

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,
501 School Street, S.W., Suite 700
Washington, DC 20024

Plaintiff,

V.

DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Defendant.

Case No. 1:10-cv-00851 (RBW)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Department of Justice, by and through undersigned counsel, hereby moves pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 7(h) for summary judgment in this Freedom of Information Act action (“FOIA”). The grounds for Defendant’s motion are set forth in the attached memorandum of points and authorities, the Declaration of Vanessa Brinkmann, the Declaration of Nelson Hermilla, the Declaration of Jacqueline Coleman Snead, and Defendant’s Statement of Material Facts Not In Genuine Dispute. For the reasons explained in the attached memorandum, Defendant respectfully requests that the Court uphold under FOIA both the Department’s search for records responsive to Plaintiff’s request for records related to the Department’s decision to dismiss three defendants in *United States v. New Black Panther Party for Self-Defense*, Case No. 09-65 (E.D. Pa.), and the Department’s withholding of responsive records pursuant to exemptions (b)(5) and (b)(7).

Date: November 2, 2010

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INTRODUCTION

Plaintiff Judicial Watch seeks to use the Freedom of Information Act (“FOIA”) to invade a privileged area in civil discovery – the internal decisionmaking that preceded the Civil Rights Division’s decision to dismiss the claims against three defendants in *United States v. New Black Panther Party for Self-Defense*, Civil Action No. 2:09-cv-0065. Plaintiff’s apparent disagreement with that decision is not a basis to deny the Department the protection the law affords that attorney work product and deliberations. Indeed, on some level, Plaintiff recognizes as much because it has abandoned its challenge to the Department’s withholding of draft pleadings. Nevertheless Plaintiff persists in challenging the Department’s withholding of other classic attorney work product – specifically, internal communications about legal strategy, updates to and discussions among senior management on the status of those communications, written legal analyses, and documents describing such information. FOIA exemption (b)(5), however, provides absolute protection to such information. The Department’s continued withholding of that information thus should be upheld.

Although not necessary to the disposition here, certain of the withheld materials – documents prepared for the ongoing investigation by the Office of Professional Responsibility (“OPR”) into allegations that the Department’s handling of the *New Black Panther Party* case was politically influenced – are additionally protected from disclosure by exemption (b)(7). The disclosure of such material reasonably could interfere with OPR’s investigation and invade the privacy of witnesses therein identified, and thus its withholding is proper under FOIA. Whether the Court reaches that issue or not, the Department is entitled to judgment in its favor as Plaintiff’s challenges here are without merit.

STATEMENT OF FACTS

On May 15, 2009, the government filed a Notice of Voluntary Dismissal as to three defendants and a Motion for Default Judgment as to a fourth defendant in *United States v. New Black Panther Party for Self-Defense*, Case No. 2:09-cv-0065 (E.D. Pa. 2009) (hereinafter “the *New Black Panther Party* case”), an action filed by the Civil Rights Division pursuant to Section 11(b) of the Voting Rights Act. The district court granted the government’s motion and enjoined Defendant Minister King Samir Shabazz from displaying a weapon within 100 feet of any open polling location on any election day in Philadelphia, Pennsylvania and from otherwise violating 42 U.S.C. § 1973i(b). Thereafter, on May 29, 2009, Judicial Watch (hereinafter “Plaintiff”) submitted a Freedom of Information Act (“FOIA”) request to the Department of Justice (“Department”) seeking to probe the decisionmaking process culminating in the government’s filing of that motion. *See* Defendant’s Statement of Material Facts Not in Genuine Dispute (“Def. SOMF”) ¶ 1, filed herewith; *see also* Declaration of Vanessa R. Brinkmann (“Brinkmann Decl.”) ¶ 3 & Ex. A; Declaration of Nelson D. Hermilla (“Hermilla Decl.”) ¶ 3 & Ex. A. Specifically, Plaintiff requested the following categories of information:

1. Any and all records pertaining to the lawsuit under the Voting Rights Act against the New Black Panther Party for Self Defense and three of its members . . . (records include but are not limited to, memos, correspondence, affidavits, interviews, records concerning default judgment, excluding court filings).
2. Any and all records pertaining to the decision to end the civil complaint against the New Black Panther Party for Self Defense and three of its members (records include but are not limited to, memos, correspondence, affidavits, interviews, records concerning default judgment, excluding court filings).
3. Any correspondence between the Justice Department and the New Black Panther Party for Self Defense, to include defendants X, Y, & Z and/or any

attorney(s) representing the defendants.

4. Any third-party communications concerning the New Black Panther Party for Self Defense, to include defendants X, Y, & Z and/or any attorney(s) representing the defendants.

Brinkmann Decl. Ex. A. The Department acknowledged receipt of the request and advised Plaintiff that its FOIA request had been referred to the component most likely to have records, namely, the Civil Right Division, which prosecuted the *New Black Panther Party* case. *See* Complaint for Declaratory and Injunctive Relief (“Compl.”) ¶ 6. By letter dated July 15, 2009, that Division informed Plaintiff that there likely would be delay in processing its FOIA request because of the large number of FOIA requests received by the Division. *See* Hermilla Decl. ¶ 5 & Ex. B.

During the processing of Plaintiff’s FOIA request, the Civil Right Division forwarded a copy to the Department’s Office of Information Policy (“OIP”) for processing and direct response to Plaintiff. *See* Brinkmann Decl. ¶ 4. The request was received in that office on January 4, 2010. *See* Brinkmann Decl. ¶ 4. By letter dated January 15, 2010, Plaintiff was advised that the Department had received multiple FOIA requests concerning the *New Black Panther Party* case and that to facilitate responding the Department had interpreted the scope of all such requests as “limited to records concerning the Department’s decision to seek a dismissal of defendants” in that case. *See* Brinkmann Decl. ¶ 5. Although Plaintiff initially disagreed with that interpretation, Plaintiff ultimately consented to the Department’s narrowing. *See* Compl. ¶ 8. Searches for responsive paper and electronic records within that scope were conducted in the Civil Rights Division, the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the Office of Public Affairs, the Office of

Legislative Affairs, the Office of Legal Policy, and the Office of Intergovernmental and Public Liaison. *See* Def. SOMF ¶¶ 3-6; Brinkmann Decl. ¶¶ 7-27; Hermilla Decl. ¶¶ 5-9.

The results of those searches were communicated to Plaintiff over several letters. By letter dated January 15, 2010, OIP notified Plaintiff of the completion of the searches in the Office of the Associate Attorney General and the official records repository for the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General and advised Plaintiff that the responsive documents located were being withheld in full pursuant to exemption (b)(5). *See* Brinkmann Decl. ¶ 5 & Ex. B. Less than two weeks later, OIP sent a further interim response advising that the searches in the Offices of Public Affairs and Legal Policy yielded no responsive documents. *See* Brinkmann Decl. ¶ 29 & Ex. C. By letter dated February 9, 2010, the Civil Rights Division produced to Plaintiff the non-exempt, responsive records yielded by its search and advised Plaintiff that other responsive documents were being withheld pursuant to exemptions (b)(5) and (b)(7). *See* Hermilla Decl. Ex. C. By letter dated March 26, 2010, OIP advised Plaintiff that no responsive records were located in the searches conducted in the Office of Legislative Affairs and the Office of Intergovernmental and Public Liaison. *See* Brinkmann Decl. ¶ 30 & Ex. D.

Plaintiff, by letter of that same date, appealed the interim response of the Civil Rights Division and clarified that an apparently misdirected letter dated January 29, 2010 appealed OIP's January 15, 2010 response. *See* Brinkmann Decl. ¶ 35 & Ex. G. While those appeals were pending and the processing of Plaintiff's FOIA request remained ongoing, Plaintiff filed the instant action pursuant to 5 U.S.C. § 552 alleging that the Department is unlawfully withholding

documents responsive to Plaintiff's FOIA request.¹ The Department continued processing Plaintiff's request. On July 8, 2010, OIP provided its final response to Plaintiff, advising that the searches in OAG and ODAG were complete, that thirteen documents were being withheld pursuant to exemption (b)(5), and that documents had been referred by CRT. *See Brinkmann Decl.* ¶ 31 & Ex. E. On August 19, 2010, OIP provided Plaintiff with a final determination on the records that had been referred to OIP by CRT and advised that those records were being withheld pursuant to exemptions (b)(5) and (b)(6). *See Brinkmann Decl.* ¶ 33 & Ex. F.

Pursuant to the Court's Order of July 27, 2010 and in an effort to narrow the issues in dispute, the Department produced to Plaintiff a detailed, draft *Vaughn* index identifying and justifying the withholding of 122 documents responsive to Plaintiff's FOIA request. *See Def. SOMF* ¶ 8. The Department's early provision of a draft *Vaughn*, however, failed to effect any significant narrowing of the issues. By email dated September 27, 2010, Plaintiff raised the following concerns with the Department's withholdings:

First, the U.S. Commission on Civil Rights posted an Email from Dana [sic] Flynn to Steven Rosenbaum, dated May 13, 2009 and entitled "New Black Panther Party FW: Comments on the proposed default judgment filings in NBPP." It does not appear as though this document is listed on the *Vaughn* index and it has not been produced to Judicial Watch. . . . Judicial Watch therefore continues to have concerns that DOJ has not performed an adequate search and has not produced all responsive records.

Second, based on that Email, Judicial Watch believes that many of the Emails listed on the *Vaughn* index also contain a list of individuals Cced. None of the entries on the *Vaughn* index include to whom the Emails were CC-ed. Judicial Watch asserts this is important information as it pertains to whether the Emails were in fact inter- or intra- agency communications.

¹ Plaintiff's appeals were closed administratively after it initiated these legal proceedings. *See Brinkmann Decl.* ¶ 37 & Ex. I.

Third, with respect to the documents falling within the numbered range 2-85, Judicial Watch asserts that DOJ has not adequately satisfied the standard to withhold the documents. DOJ has not shown that disclosure of the records would have a chilling effect on the staff.

Fourth, it is unclear how the documents dated May 15, 2010 [sic] or after are predecisional or deliberative.

Fifth, Judicial Watch believes that DOJ has not adequately satisfied its burden with respect to documents 86 through 99. It is unclear what pending investigation exists, the status of that investigation, and how the release of the records could reasonably be expected to interfere with the enforcement proceedings.

Sixth, with respect to documents numbered 100-122, DOJ has completely failed to satisfy its burden. The descriptions of the documents do not even address whether the documents are predecisional or deliberative or would have a chilling effect on the decision making process if released. . . .

Seventh, Judicial Watch asserts that DOJ has not sought to segregate all non-exempt information.

Def. SOMF ¶ 9; *see also* Declaration of Jacqueline Coleman Snead (“Snead Decl.”) Ex. A (Email from Michael Bekesha to Jacqueline Coleman Snead (Sept. 27, 2010)).

Although Plaintiff abandoned its challenges to withholdings pursuant to exemption (b)(6) and withholdings of draft pleadings, those concessions only removed individual emails within or attachments to email chains otherwise still in contention.² However, thirty-three documents, identified on the draft *Vaughn* as entirely subsumed in email chains listed elsewhere, are not in issue by virtue of the redundancy of separately challenging those documents.³ In the course of

² The following withholdings, either (b)(6) assertions or draft pleadings – are no longer in contention: Document Nos. 4d-f, 17a-b, 19c, 20c, 26c-e, 28c-e, 40d, 59d-f, 67c-i, 68b, 69b-e, 71a, 77d-g, and 80b-e.

³ The following documents are fully subsumed email chains that are not separately challenged: Document Nos. 1, 3, 8, 9, 10, 11, 15, 16, 18, 21, 29, 31, 33, 38, 41, 43, 45, 46, 48, 51, 53, 54, 56, 58, 61, 62, 66, 72, 73, 75, 76, 119, and 120. *See* Snead Decl. Ex. A (omitting

preparing this filing, the Department decided to make discretionary releases of certain withholdings and determined that non-exempt information could be segregated from one document.⁴ Consequently, seventy-five documents, in whole or in part, remain in contention.⁵ *See generally* Brinkmann Decl. Ex. J; Hermilla Decl. Ex. D. The Department now moves the Court to uphold these withholdings pursuant to exemptions (b)(5) and (b)(7) and to enter judgment in the Department's favor.

ARGUMENT

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Thus, while FOIA generally requires agency disclosure, Congress recognized "that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused." *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 621 (1982); *see* 5 U.S.C. § 552(b). Although these exemptions should be "narrowly construed," *Abramson*, 456 U.S. at 630, they

these documents from the list of Plaintiff's challenges).

⁴ These documents, specifically Document Nos. 19a-b, 77a-c, 78a, 79a-c, 85e-f, 100a, 101a, 103a, 106a-b, 108a-b, 109a-b, 115, 118a, and 122a, were provided to Plaintiff's counsel by letter dated November 2, 2010 and thus are no longer in contention.

⁵ Specifically, Plaintiff challenges the following documents identified on the Department's draft *Vaughn* index: Document Nos. 2a, 4a-c, 5a, 6a, 7a, 12a-b, 13a, 14a, 17c-f, 20a-b, 22a, 23a, 24a-c, 25a, 26a-b, 27a, 28a-b, 30a-h, 32a-b, 34a-b, 35a, 36a, 37a-c, 39a-f, 40a-c, 42a, 44a, 47a-e, 49a-c, 50a-d, 52a, 55a-f, 57a, 59a-c, 60a-c, 63a-c, 64a, 65a-c, 67a-b, 68a, 69a, 70a, 74a-c, 80a, 81a, 82a, 83a-d, 84a-c, 85a-d, 86-99, 101b, 102, 103b-d, 104a-b, 105a-c, 106c, 107a, 110-114, 116, 117a-d, and 121. *See also* Snead Decl. Ex. A.

should be given “meaningful reach and application,” *John Doe*, 493 U.S. at 152. Affording the exemptions invoked here such reach and application compels that the Court uphold the challenged withholdings pursuant to exemptions (b)(5) and (b)(7) and that summary judgment be granted to the Department.

An agency is entitled to summary judgment when it demonstrates that “it has fully discharged its obligations under FOIA.” *NYC Apparel FZE v. United States Customs & Border Protection*, 484 F. Supp. 2d 77, 86 (D.D.C. 2007) (internal quotations omitted). In making that determination, “the Court must first answer whether the agency made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Moayedi v. United States Customs & Border Protection*, 510 F. Supp. 2d 73, 78 (D.D.C. 2007) (internal quotations omitted). Then, “the Court must determine whether any responsive information that the agency has withheld falls within one of the FOIA’s exemptions.” *Id.* Both the adequacy of the agency’s search and the proper invocation of FOIA’s exemptions can be demonstrated through agency declarations; “the agency may submit non-conclusory affidavits or declarations that explain, in reasonable detail, the scope and method of the agency’s search as well as any justifications for non-disclosure.” *Id.*

“The Court may award summary judgment based *solely* upon the information provided in affidavits or declarations when the[y] . . . describe ‘the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.’” *Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d 17, 21 (2007) (emphasis added). Unless the declarations are “deficient, the court need not conduct

further inquiry into their veracity.” *Ferranti v. Bureau of Alcohol, Tobacco & Firearms*, 177 F. Supp. 2d 41, 45 (D.D.C. 2001); *see also Sonds v. Huff*, 391 F. Supp. 2d 152, 157 (D.D.C. 2005). Rather, “[s]uch affidavits or declarations are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims.” *Kidder*, 517 F. Supp. 2d at 21-22. Thus, where, as here, “the agency’s search was adequate, and the asserted FOIA exemptions are justified,” “summary judgment in favor of the defending agency” is warranted. *Moayedi*, 510 F. Supp. 2d at 79.

I. THE DEPARTMENT CONDUCTED A REASONABLE SEARCH FOR RECORDS RESPONSIVE TO PLAINTIFF’S FOIA REQUEST.

In an apparent effort to ground its challenge to the Department’s search in something other than speculation, Plaintiff contends that the alleged absence of a particular document from the Department’s draft *Vaughn* index and the document production to Plaintiff evidences an inadequate search. Specifically, Plaintiff complains that the Department’s search apparently did not yield the May 13, 2009 email from Diana Flynn to Steven Rosenbaum that the U.S. Commission on Civil Rights obtained through unauthorized means and then posted on its website.⁶ *See* Snead Decl. Ex. A (“It does not appear as though this document is listed on the *Vaughn* index and it has not been produced to Judicial Watch.”). Such an argument clearly is intended to elicit the very information that FOIA authorizes the government to withhold. The Department, however, need not confirm or deny the inclusion of that email in the withholdings to demonstrate that Plaintiff’s challenge to the Department’s search is baseless.

⁶ The documents that the Department has provided to the U.S. Commission on Civil Rights in connection with its inquiry related to the *New Black Panther Party* case all bear in the bottom right-hand corner the Bates stamp “DOJ” followed by a unique six-digit number. The referenced posted email, however, does not have such a Bates stamp.

FOIA does not require that an agency's search be perfect. As this Court previously has recognized, an agency's search "need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the [] specific request." *Wiesner v. Federal Bureau of Investigation*, 577 F. Supp. 2d 450, 454 (D.D.C. 2008); *Moayedi*, 510 F. Supp. 2d at 81 (noting that "it is not necessary that the search be perfect, but only reasonable"). Thus, the agency is only required "to make a good faith effort to conduct a search for the requested records, using methods which can reasonably be expected to produce the information requested." *Gaylor v. Department of Justice*, 496 F. Supp. 2d 110, 115 (D.D.C. 2007). An agency "fulfills" that obligation "if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Moayedi*, 510 F. Supp. 2d at 79. "Because the agency is the possessor of the records and is responsible for conducting the search, the Court may rely on [a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched." *Gaylor*, 496 F. Supp. 2d at 115 (internal quotations omitted). If, as here, the agency makes that showing, "the burden shifts to [plaintiff] to rebut [the agency's] evidence by a showing that the search was not conducted in good faith." *Id.* That showing clearly is not made by a plaintiff's suspicion that a particular document was not yielded by the agency's search. *Gaylor*, 496 F. Supp. 2d at 115; *see also Wiesner*, 577 F. Supp. 2d at 455 (noting that agency affidavits "cannot be rebutted by purely speculative claims about the existence and discoverability of other documents"). Since that is all the "evidence" Plaintiff here could proffer, the Court should uphold the Department's search.

As detailed in the Hermilla and Brinkmann Declarations, the Department conducted a search reasonably designed to identify all records related to the Civil Rights Division's decision to dismiss the claims against three defendants in the *New Black Panther Party* case. *See* Hermilla Decl. ¶¶ 5-9; Brinkmann Decl. ¶¶ 7-27. Plaintiff's request for such records was referred to the Department component that prosecuted the case – the Civil Rights Division. *See* Hermilla Decl. ¶4. The Division in turn “collect[ed] all paper and electronic records from specific Civil Rights Division employees who had worked on the case or created records related to the matter.” Hermilla Decl. ¶ 6. This collection effort spanned the Civil Rights Division's Office of the Assistant Attorney General and that Division's Administrative Management, Appellate, Criminal, Housing and Civil Enforcement, and Voting Sections. *See* Hermilla Decl. ¶ 6. The records yielded by that effort were reviewed for responsiveness to Plaintiff's original request – subsequently narrowed by agreement of Plaintiff as seeking only records related to “the Department's decision to seek a dismissal of defendants in *United States v. New Black Panther Party for Self-Defense, et al.*” *See* Compl. ¶ 8. Following that narrowing of the scope of Plaintiff's request, the Civil Rights Division FOIA/Privacy Act Branch staff conducted a second review of the materials previously collected for “responsive[ness] to the narrowed request.” Hermilla Decl. ¶ 9. The materials since had been inventoried and coded by date, content, and office and therefore staff “searched the detailed inventory” for relevant subject matters. *See id.* Following that second review, the Civil Rights Division deemed its search completed. *See* Hermilla Decl. ¶ 9.

A parallel search effort for responsive records was conducted in the Department's senior management offices by the Office of Information Policy ("OIP"), which processed Plaintiff's request "on behalf of the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), Legal Policy (OLP), Legislative Affairs (OLA), Intergovernmental and Public Liaison (OIPL), and Public Affairs (PAO)." Brinkmann Decl. ¶ 4; *see also id.* ¶¶ 7-27. As with the search conducted in the Civil Rights Division, searches on behalf of the senior management offices encompassed hardcopy and electronic records. *See id.* By memorandum dated January 7, 2010, OIP advised the seven senior management offices of Plaintiff's request and the need to conduct a search of paper and electronic files; each office in turn conducted its own records search and provided any "potentially responsive material" to OIP for further review.⁷ *See* Brinkmann Decl. ¶¶ 9, 12-13, 18, 20, 22. Separately, OIP conducted a "key word search" of "the electronic database of the Departmental Executive Secretariat, which is the official records repository of OAG, ODAG and OASG," (Brinkmann Decl. ¶ 5), "using the following terms: 'New Black Panther,' 'Black Panther and Philadelphia,' 'Black Panther and Congress,' and 'Black Panther,'" (Brinkmann Decl. ¶ 27). OIP also conducted searches of the computer files of officials in OAG and ODAG using the search terms "New Black Panther Party," "NBPP," "New Black Panther," and "NBP." Brinkmann Decl. ¶¶ 10, 14. To capture the paper files of former officials, OIP searched "records indices, which list file folder titles maintained by these individuals, arranged according to subject"; any potentially responsive files were retrieved from retired records storage facilities. Brinkmann Decl. ¶ 15. All records yielded

⁷ Four offices, OLA, PAO, OLP, and OIPL, did not locate records responsive to Plaintiff's request. *See* Brinkmann Decl. ¶¶ 24, 26, 29, 30.

by these various searches were reviewed for responsiveness to Plaintiff's request. *See* Brinkmann Decl. ¶ 7.

While those searches alone were sufficient to satisfy the Department's obligations under FOIA, OIP went further and reviewed for responsiveness to Plaintiff's FOIA request records collected in response to other requests received by the Department concerning the *New Black Panther Party* case, including a much *broad*er request from the U.S. Commission on Civil Rights ("USCCR"). *See* Brinkmann Decl. ¶ 6 n.3 (explaining that in response to a request from the USCCR, "OIP conducted a search for all records regarding the NBPP litigation" and, although "not specifically collected for plaintiff's FOIA request, [those records] w[ere] nevertheless reviewed for responsiveness to plaintiff's request to ensure that all relevant records were located"); *id.* ¶ 27 n.7 (explaining that the results of an August 28, 2009 "search of the Executive Secretariat's IQ database in response to a separate FOIA request on the same general topic, but limited to records of OASG" were "reviewed for responsiveness to plaintiff's FOIA request"). FOIA clearly does not require a more comprehensive search than Plaintiff's request received. The Department accordingly is entitled to judgment in its favor on Plaintiff's challenge to that search.

II. THE DEPARTMENT PROPERLY WITHHELD DOCUMENTS PURSUANT TO FOIA EXEMPTION (B)(5).

Plaintiff's request for documents related to the dismissal decision in the *New Black Panther Party* case necessarily implicates exemption (b)(5). That exemption shields from disclosure "inter-agency or intra-agency memorandums or letters which would not be available

by law to a party . . . in litigation with the agency.”⁸ 5 U.S.C. § 552(b)(5). Courts have construed exemption (b)(5) as encompassing “documents normally privileged in the civil discovery context.” *Heggestad v. United States Department of Justice*, 182 F. Supp. 2d 1, 6 (D.D.C. 2000); *see also Dow Jones & Co. v. Department of Justice*, 917 F.2d 571, 573 (D.C. Cir. 1990) (construing exemption (b)(5) as “encompass[ing] the protections traditionally afforded certain documents pursuant to evidentiary privileges in the civil discovery context” (internal quotations omitted)). Thus, documents protected by the attorney work product doctrine and the deliberative process privilege clearly are within the scope of this exemption. *See CREW v. National Archives & Records Admin.*, ___ F. Supp. 2d ___, 2010 WL 2265036, at *1 (D.D.C., June 7, 2010) (noting that exemption (b)(5) “has been construed to exempt those documents . . . normally privileged . . . [and including among] those privileges . . . the deliberative process privilege . . . and [] the attorney work-product privilege” (internal quotations omitted)); *see also Heggestad*, 182 F. Supp. 2d at 6. Since the Department has invoked exemption (b)(5) as to information within both privileges, those assertions are proper and should be upheld.

A. The Department Properly Withheld Attorney Work Product Related to the New Black Panther Party Case Pursuant to Exemption (b)(5).

By virtue of Plaintiff’s objective of probing the decisionmaking in the *New Black Panther Party* case, the withholdings in issue are squarely within the attorney work product doctrine. This doctrine “shields materials ‘prepared in anticipation of litigation . . . by or for [a] party or by or for that . . . party’s representative,’” (*Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607,

⁸ All of the documents in issue “are emails between, or notes and briefing materials created by, officials in OAG, ODAG, OASG, and [the Civil Rights Division] and accordingly are inter- or intra- agency communications internal to the Department of Justice.” Brinkmann Decl. ¶ 39.

620 (D.C. Cir. 1997)), and thus “provides . . . a ‘zone of privacy’ within which to think, plan, weigh facts and evidence, candidly evaluate a [] case, and prepare legal theories.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980); *see also CREW*, 2010 WL 2265036, at *2 (same). Such protection is afforded by law because “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion.” *Judicial Watch, Inc. v. Department of Justice*, 432 F.3d. 366, 369-70 (D.C. Cir. 2005).

The “proper preparation” of a case “demands that [t]he [lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.” *Id.* Such “work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly . . . termed . . . the ‘work product of the lawyer.’” *Id.* “Were such materials open . . . on mere demand,” as Plaintiff here urges, “[t]he effect on the legal profession would be demoralizing” and “the cause of justice would be poorly served.” *Id.* Accordingly, in this Circuit and, “as the Supreme Court has made clear, the [work-product] doctrine should be interpreted broadly and held largely inviolate.” *Id.* at 369.

Thus, under FOIA, any record “prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under exemption 5.”⁹ *Tax Analysts*, 117 F.3d at 620. The phrase “in anticipation of

⁹ Factual materials prepared in anticipation of litigation also are properly withheld under FOIA, (*Miller v. Department of Justice*, 562 F. Supp. 2d 82, 112 (D.D.C. 2008)), since “[a]n important part of what is protected by the privilege for attorney work-product is the attorney’s consideration and weighing of the facts,” (*Mervin v. Federal Trade Comm’n*, 591 F.2d 821, 826 (D.C. Cir. 1978)).

litigation” “means any time after initiation of the proceeding.” *Gutman v. Department of Justice*, 238 F. Supp. 2d 284, 294 (D.D.C. 2003). Significantly, here, “[t]he privilege applies to past litigation as well.” *Id.* Given these parameters, the Department’s withholdings here are well within the attorney work product doctrine and thus should be upheld. *See* Brinkmann Decl. ¶ 40 (describing withheld attorney work product as “documents [that] were created and/or exchanged in connection with the Department’s handling of the NBPP litigation”); Hermilla Decl. ¶ 15 (explaining that “[t]he materials for which the attorney work product privilege is being asserted were generated as a result of the investigations of violations of the statutes within the enforcement responsibility of the Voting Section in reasonable anticipation of litigation”).

As evident from the Brinkmann and Hermilla Declarations, the Department has asserted this doctrine as to records that themselves are attorney work product in the *New Black Panther Party* case as well as records that describe or summarize that work product. *See* Hermilla Decl. ¶¶ 11-16; Brinkmann Decl. ¶¶ 54-60. The majority of these records are classic attorney work product consisting of “email messages forwarding and transferring [] draft memoranda and draft pleadings” that “contain analyses, discussions, questions, suggestions, revisions,” “requests for additional legal research, requests for supporting evidence for various legal claims, and discussions [about] alternate proposals for claims of relief.”¹⁰ Hermilla Decl. ¶ 4. Some of the withheld records contain “extensive discussions regarding the merits, legal strategies, and factual evidence in the draft pleadings and draft memoranda.” *Id.*; *see also* Brinkmann Decl. ¶ 55

¹⁰ The documents in this category include Document Nos. 2a, 4a-c, 5a, 6a, 7a, 12a-b, 13a, 14a, 17a-f, 20a-b, 22a, 23a, 24a-c, 25a, 26a-b, 27a, 28a-b, 30a-h, 32a-b, 34a-b, 35a, 36a, 39a-f, 40a-c, 42a, 47a-e, 49a-c, 50a-d, 52a, 55a-f, 57a, 59a-c, 60a-c, 63a-c, 64a, 65a-c, 67a-b, 68a, 69a, 70a, 81a, 82a, 101b, 102, 103b-d, 104a-b, 105a-c, 106c, 107a, and 121.

(describing this category of material as including “front-line legal analysis and discussions thereof” and “the internal discussions and feedback of senior management offices, as [Civil Rights Division] attorneys select[ed] and present[ed] particular aspects of the case for these supervisory-level officials”). While Plaintiff apparently recognizes that the draft pleadings and draft memoranda are privileged and thus is not challenging their withholding, Plaintiff inexplicably challenges the withholding of Department attorneys’ discussions of those drafts. Just like the drafts, these discussions including those among counsel “who were analyzing the merits and legal issues and proposing various options for relief” clearly are also protected as attorney work product. Hermilla Decl. ¶ 10.

The Department additionally has withheld as attorney work product records, including some post-dating the filing of the notice of dismissal in the *New Black Panther* case, “inasmuch as they were created in connection with or describe events occurring during the course of the [New Black Panther Party] litigation.” Brinkmann Decl. ¶ 54. Some of these documents consist of “real-time updates on litigation developments” to supervisory-level officials.¹¹ Brinkmann Decl. ¶ 55 (explaining that “[t]hroughout these documents, litigating attorneys provide analyses and recommendations to, and solicit input from, one another and then communicate these developments to managerial officials within the Department in the course of ongoing litigation”). Other documents summarize from the perspective of the particular author, the development of the litigation strategy up through the voluntary dismissal of the claims against three defendants.¹²

¹¹ The documents in this category include Document Nos. 13a, 14a, 36a, 44a, 49a-c, 55a-f, 57a, 67a-b, 81a, 101b, 103b-d, 104a-b, 105a-c, and 106c.

¹² The documents in this category include Document Nos. 86-99, and 116.

See Brinkmann Decl. ¶ 47 (describing Document No. 116 “as a summary of events surrounding the NBPP litigation which was written by an attorney in the OASG”); Hermilla Decl. ¶ 27F(3) (describing Document Nos. 86-99 as containing descriptions of “discussions among officials on litigation strategy and various litigation options and assessments of outcomes in the *United States v. New Black Panther Party for Self-Defense, et al.* enforcement action,” “summaries of internal conversations with colleagues and with supervisors reviewing merits, legal strategies, and various options for the scope of proposed relief,” and “summaries from the law enforcement investigation including witness statements, research and other measures taken to determine the events around the voting intimidation incident on Election Day, November 2008, in Philadelphia, Pennsylvania”).

Still other documents withheld pursuant to the attorney work product doctrine contain a “rehash[ing of the] . . . decisionmaking processes which unfolded during the course of the litigation,” (Brinkmann Decl. ¶ 51), as part of decisionmaking in the aftermath of the *New Black Panther Party* dismissals concerning “how to respond to inquiries regarding [the] litigation, such as inquiries from Congress, the press, or others.”¹³ Brinkmann Decl. ¶ 58. In all of these forms, their disclosure “would severely hamper the adversary process as attorneys working on litigation would no longer feel free to discuss a case in this fashion or to write down important thoughts on the case for fear that the information might be publicly disclosed.” Brinkmann Decl. ¶ 56; *see also* Hermilla Decl. ¶ 27A(5). FOIA, however, protects against such hampering, by authorizing the Department, as here, to invoke exemption (b)(5) as to materials that would reveal attorney

¹³ The documents in this category include Document Nos. 83a-d, 84a-c, 85a-d, 110, 111, and 117a-d.

work product. The Court accordingly should uphold that invocation.

B. The Department Properly Invoked Exemption (b)(5) as to Deliberative and Predecisional Communications Related to the *New Black Panther Party* Case.

All of the challenged withholdings are separately protected from disclosure by the deliberative process privilege. That privilege is “predicated on the recognition that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.” *Dow Jones & Co.*, 917 F.2d at 573 (internal quotations omitted); *see also Department of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001) (“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news . . .”). This privilege “serves to assure agency employees that they can provide a decisionmaker with their uninhibited opinion without fear of public scrutiny, to prevent premature disclosure of proposed policies, and to protect against public confusion through the disclosure of [a] document advocating or discussing reasons for policy decisions that were ultimately not adopted.” *Kidd v. Department of Justice*, 362 F. Supp. 2d 291, 295-96 (D.D.C. 2005) (internal citations omitted); *see also National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (“the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions”).

To come within this privilege, the information must be predecisional and deliberative. *See Gutman*, 238 F. Supp. 2d at 292-93; *Heggstad*, 182 F. Supp. 2d at 7; *Hamilton Sec. Group, Inc. v. Department of Hous. & Urban Dev.*, 106 F. Supp. 2d 23, 31-32 (D.D.C. 2000); *Judicial Watch, Inc. v. Department of Commerce*, 90 F. Supp. 2d 9, 14 (D.D.C. 2000). The predecisional

requirement is satisfied if the information is “antecedent to the adoption of an agency policy.”

Gutman, 238 F. Supp. 2d at 292. An agency, however, “need not identify a specific final agency decision;” it is sufficient for the agency to “establish what deliberative process [wa]s involved” and the role played by the withheld information “in the course of that process.” *Heggstad*, 182 F. Supp. 2d at 7 (internal quotations omitted). The deliberative element includes information that is “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Gutman*, 238 F. Supp. 2d at 293 (internal quotations omitted). “Deliberative communications are those reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Kidd*, 362 F. Supp. 2d at 295 (internal citations omitted). In addition to such communications, exemption (b)(5) “protects . . . all communications which, if revealed, would expose to public view the deliberative process of an agency.” *Russell v. Department of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). Courts should afford “considerable deference” to an agency’s “judgment as to what constitute[d] . . . ‘part of the agency give-and-take – of the deliberative process – by which [an agency] decision itself [wa]s made.’” *Chemical Mfrs. Ass’n v. Consumer Prod. Safety Comm’n*, 600 F. Supp. 114, 118 (D.D.C. 1984). Such deference is owed here to the Department’s determination that the information withheld here was part of such a process.

1. The Withheld Communications Leading up to the Department's May 15, 2009 Filing in the *New Black Panther Party* Case Are Protected by the Deliberative Process Privilege.

Most of the documents still in contention reflect the decisionmaking process preceding the Civil Rights Division's decision to dismiss the claims against three defendants in the *New Black Panther Party* case. "[T]he process leading to a decision to initiate, or to forego, prosecution is squarely within the scope of th[e deliberative process] privilege." *Senate of Commonwealth of P.R. v. Department of Justice*, 823 F.2d 574, 585 n.38 (D.C. Cir. 1987). Indeed, exemption (b)(5) "is tailor-made for the situation in which [a prosecutor's office is] assessing the evidence it [is] compiling. To expose this process to public scrutiny would unnecessarily inhibit the prosecutor in the exercise of his traditionally broad discretion to assess the case and decide whether or not to file charges." *Id.*; *see also Fund for Constitutional Gov't v. National Archives & Records Serv.*, 485 F. Supp. 1, 13 (D.D.C. 1978) (same). Thus, courts consistently have held that the types of records withheld here satisfy the requirements for proper invocation of the privilege.¹⁴ *See, e.g., Miller v. Department of Justice*, 562 F. Supp. 2d 82, 113 (D.D.C. 2008) (concluding that discussions between FBI officials and other law-enforcement and prosecutory officials related to "options and potential consequences before taking action . . . [are] protected from disclosure by the deliberative process privilege and . . . properly withheld under Exemption 5"); *Fund for Constitutional Gov't*, 485 F. Supp. at 13-14 (concluding that the "disclosure of information generated during a prosecutor's assessment of particular cases would

¹⁴ As demonstrated in the previous section, this category of documents is also properly withheld as attorney work product. *See Heggstad*, 182 F. Supp. 2d at 7 ("Documents covered by the deliberative process privilege are often also protected by the attorney work-product privilege."). Thus, the Court need not reach the alternative argument that the Department properly withheld this category pursuant to the deliberative process privilege.

be extremely detrimental to the prosecutor's free exercise of discretion" and "[a]s such . . . exemption 5 justifies the[ir] non-disclosure"); *Dipietro v. Executive Office for U.S. Attorneys*, 357 F. Supp. 2d 177, 184 (D.D.C. 2004) (concluding that "information . . . reflect[ing] communications among government personnel regarding litigation issues, alternatives, and strategies pertaining to [a] prosecution" were properly withheld under exemption (b)(5)); *Jackson v. United States Attorneys Office*, 293 F. Supp. 2d 34, 40 (D.D.C. 2003) (concluding that to disclose pages containing the deliberative process of a U.S. Attorney's office's consideration of possible criminal actions "would reveal pre-decisional communications among government personnel (i.e., discussions of various litigation issues, alternatives, and strategies), which would jeopardize the candid and comprehensive considerations essential for efficient and effective agency decision-making"); *Heggstad*, 182 F. Supp. 2d at 10-11 (concluding that "all documents prepared by the agency with regard to this prosecution prior to the final decision . . . to authorize the prosecution . . . would be considered predecisional and allowing release of these memoranda would violate the intent of the deliberative process privilege").

Indeed, Plaintiff itself does not seriously dispute that the communications preceding the Civil Rights Division's dismissal decision were predecisional and deliberative. Rather, Plaintiff seeks to impose on the Department the additional burden of demonstrating a chilling effect from disclosure of those communication. *See* Snead Declaration Ex. A (describing basis for challenge to "documents falling within the numbered range 2-85" as the Department's failure to "show[] that disclosure of the records would have a chilling effect on the staff"). Since that clearly is not

the law in this Circuit,¹⁵ the Court should uphold the Department's withholding of the deliberative records preceding the May 15, 2009 filing.¹⁶

The process by which that filing “evolve[d] into a final document[] [wa]s itself a deliberative process.” Hermilla Decl. ¶ 17A(3). That process is reflected in “‘discussions’ . . . memorialized on-line” that consist of “emails forwarding drafts back and forth between attorneys and to supervisors for review, with questions on legal research, factual issues, . . . and extensive detailed responses.” Hermilla Decl. ¶¶ 27A(2), (5). Such “communications comprise the essence of the exchange among government officials who were analyzing the merits and legal issues and proposing various options for relief.” Hermilla Decl. ¶ 27A(6). Throughout the process, the Civil Rights Division attorneys “brief[ed] supervisory offices on the progress of the case, and litigators and supervisory attorneys exchange[d] feedback as [that Division] . . . and senior Department officials consider[ed] different options.”¹⁷ Brinkmann Decl. ¶ 45; *see also* Hermilla Decl. ¶ 27A(6). The compelled “[d]isclosure of such emails would severely hamper the efficient day-to-day working of the Department as individuals would no longer feel free to

¹⁵ *See CREW*, 2010 WL 2265036, at *2 (noting two requirements of information exempt under the deliberative process: “it is both ‘predecisional’ and ‘deliberative’”); *see also Heggstad*, 182 F. Supp. 2d at 7 (noting that “[f]or a document to be covered by the deliberative process privilege, *two requirements* must be satisfied” (emphasis added)). The Department, in any event, satisfies the third requirement that Plaintiff seeks to impose here. *See* Hermilla Decl. ¶¶ 12, 27A(5), (7); Brinkmann Decl. ¶ 46.

¹⁶ The documents in this category include Document Nos. 2a, 4a-c, 5a, 6a, 7a, 12a-b, 13a, 14a, 17a-f, 20a-b, 22a, 23a, 24a-c, 25a, 26a-b, 27a, 28a-b, 30a-h, 32a-b, 34a-b, 35a, 36a, 39a-f, 40a-c, 42a, 47a-e, 49a-c, 52a, 55a-f, 57a, 59a-c, 60a-c, 63a-c, 64a, 65a-c, 67a-b, 68a, 69a, 81a, 101b, and 103b-d.

¹⁷ The documents in this category include Document Nos. 13a, 14a, 36a, 44a, 49a-c, 55a-f, 57a, 67a-b, 81a, 101b, 103b-d, 104a-b, 105a-c, and 106c.

discuss their ideas and advise on the content of documents in email messages.” Hermilla Decl. ¶ 27A(5). Department employees moreover “w[ould] be much more circumspect in their discussions with each other and in providing all pertinent information and viewpoints to senior officials in a timely manner.” Brinkmann Decl. ¶ 46. Such circumspection “would seriously impair the Department’s ability to foster the forthright, internal discussions necessary for efficient and proper decisionmaking.” Brinkmann Decl. ¶ 46. The Department thus properly invoked exemption (b)(5) as to the deliberations preceding the dismissal decision reflected in the May 15, 2009 court filings in the *New Black Panther Party* case.¹⁸

2. The Department Properly Withheld Documents Reporting, Memorializing, or Describing the Deliberations Within the Civil Rights Division Related to the Dismissals in the *New Black Panther Party* Case.

The withheld documents, including some post-dating May 15, 2009, that report or describe the privileged discussions within the Civil Rights Division are clearly exempt under (b)(5). *See* Brinkmann Decl. ¶¶ 43-45; Hermilla Decl. ¶¶ 27A, 27D. While Plaintiff dismisses such documents as non-privileged “status reports,” (*see* Snead Decl. Ex. A), the D.C. Circuit has recognized that “[i]t would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only ‘report’ what those recommendations and opinions are.” *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977); *see also Wolfe v. Department of Health & Human Servs.*, 839 F.2d 768, 775 (D.C. Cir. 1988) (“[t]hat the information requested does not fully reveal the reasoning of the recommendation but merely

¹⁸ Consistent with its obligation under FOIA, the Department provided copies of those filings to Plaintiff. *See* Hermilla Decl. ¶ 27A(3) & Ex. C.

memorializes” it does not “strip[] it of protection”). Thus, exemption (b)(5) protects the reports up the chain of command of the deliberations within the Civil Rights Division while they were ongoing¹⁹ as well as records created subsequent to the dismissal decision that describe those deliberations.²⁰ See Brinkmann Decl. ¶ 44 (describing certain of these withheld records as “e-mails from individual Department components, and the attachments thereto, . . . forwarded or shared among and across multiple offices within the Department, including the senior officials who oversee agency operations, to brief these officials on significant matters which arise during the day-to-day activities within the individual offices”); Brinkmann Decl. ¶ 47 (describing Document No. 116 “as a summary of events surrounding the NBPP litigation which was written by an attorney in the OASG”); Hermilla Decl. ¶ 27F (describing Document Nos. 86-99 as containing descriptions of “discussions among officials on litigation strategy and various litigation options and assessments of outcomes in the *United States v. New Black Panther Party for Self-Defense, et al.* enforcement action,” “summaries of internal conversations with colleagues and with supervisors reviewing merits, legal strategies, and various options for the scope of proposed relief,” and “summaries from the law enforcement investigation including witness statements, research and other measures taken to determine the events around the voting intimidation incident on Election Day, November 2008, in Philadelphia, Pennsylvania”); Hermilla Decl. ¶ 27B (describing Document No. 37 as an email forwarding for consideration “draft language for an internal report to the Front Office management” concerning a

¹⁹ The documents in this category include Document Nos. 13a, 14a, 36a, 44a, 49a-c, 55a-f, 57a, 67a-b, 81a, 101b, 103b-d, 104a-b, 105a-c, and 106c.

²⁰ The documents in this category include Document Nos. 86-99 and 116.

contemplated course of action in the *New Black Panther Party* case). The Court accordingly should uphold the Department's withholding of such records.

3. The Deliberative Process Privilege Protects the Decisionmaking Process Related to the Department's Response to Inquiries About the Dismissals in the *New Black Panther Party* Case.

Notwithstanding Plaintiff's claims to the contrary, (*see* Snead Decl. Ex. A), the Department properly invoked exemption (b)(5) as to post-May 15, 2009 records that were part of the Department's development of its response to congressional and other inquiries about the dismissals in the *New Black Panther Party* case. Courts have rejected the "generalized argument" that this exemption does not apply to "suggested responses to inquiries from Capitol Hill" where the response concerns a "decision [that] had already been made" – here, the decision to dismiss the claims against three defendants in the *New Black Panther Party* case. *See Sierra Club v. United States Dept. of Interior*, 384 F. Supp. 2d 1, 19 (D.D.C. 2004). Such proposed responses and the discussions related thereto "represent the building blocks of policymaking, proposed recommendations by agency employees for how the agency might respond to inquiries on a[n] . . . issue, and [a]re part of the careful consideration of proposals central to th[at] deliberative process." *Id.* Indeed, "[r]ecommendations on how best to deal with a particular issue are themselves the *essence* of the deliberative process" and "clear[ly] . . . fall within the deliberative process privilege." *Id.* (internal quotations omitted). Thus, the Department properly withheld talking points, draft language for congressional letters, and discussions that were part of the decisionmaking related to the Department's response to inquiries about the dismissals in the *New Black Panther Party* case.

a. The Department Properly Withheld Briefing Papers Created to Prepare Department Officials with Upcoming Congressional Appearances.

The briefing papers withheld by the Department clearly satisfy the requirements for invocation of exemption (b)(5). This Court previously has recognized that briefing papers are deliberative where “they reflect a discourse that occurred during [a] decision-making process.” *ACLU v. Department of Homeland Sec.*, ___ F. Supp. 2d ___, 2010 WL 3718944, at *14 (D.D.C., Sept. 20, 2010); *see also Williams v. Department of Justice*, 556 F. Supp. 63, 65 (D.D.C. 1982) (concluding that “briefing papers prepared for the Attorney General prior to an appearance before a congressional committee” were “clearly deliberative”). Such records also are predecisional because their “creation . . . itself suggests that a public statement was anticipated at the time of its creation.” *ACLU*, 2010 WL 3718944, at *14; *see also Judicial Watch v. Department of Commerce*, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) (concluding that talking points “prepared . . . for consideration of [agency] decision-makers” “were properly withheld”). The briefing papers withheld here share these characteristics and thus were properly withheld.²¹

As explained in the Brinkmann Declaration, these briefing papers were “prepared by staff within the senior management offices of the Department to assist senior leadership in addressing various legal and policy points about the [*New Black Panther Party*] litigation.” Brinkmann Decl. ¶ 50. These staff “attempt to succinctly summarize particular events that occurred in an individual office, identify[] important issues, and provide key background information in a concise, summary format for ease of understanding and presentation.” *Id.* That process necessarily involves the author’s selection of facts and issues that he or she “deem[s] most

²¹ The documents included in this category are Document Nos. 80a, 110, and 111.

appropriate for briefing senior officials.” *Id.* In that respect, the talking points represent that individual’s personal opinion and accordingly “do[es] not embody final agency action.”²²

Brinkmann Decl. ¶ 52. Rather, “the Department leadership . . . ultimately decide[s] how to represent the interests of the Department as a whole.” *Id.* The materials created by staff that are preparatory to such decisions are clearly part of a deliberative process and therefore properly were withheld from Plaintiff.²³

b. The Department Properly Withheld Deliberative Discussions During Its Development of an Official Response to Inquiries About the Dismissal in the *New Black Panther Party* Case.

The Department properly withheld several documents containing discussions that were part of the Department’s development of its response to public inquiries about the dismissals in the *New Black Panther Party* case. The suggested responses reflected therein are “privileged under Exemption 5 because they constitute recommendations from staff as to how agency officials might handle [a particular] congressional inquir[y]” and “clearly were subject to review and revision by the final sender.” *Sierra Club*, 384 F. Supp. 2d at 19-20. As such, each recommendation “represent[s] only a personal opinion – one of numerous inputs in the evolution of an agency’s final position.” *Judicial Watch v. Clinton*, 880 F. Supp. 1, 12, 13 (D.D.C. 1995). Because the release of such material “would inappropriately reveal many editorial judgments

²² This point is illustrated by Document No. 80a, which while not a briefing paper, provides the author’s opinion as to information that should be included in briefing papers for a then-upcoming congressional hearing. Thus the rationale that justifies withholding briefing papers applies as well to this document.

²³ For the reasons explained in Part II.B.2, *supra*, these documents are also protected to the extent they summarize litigation deliberations in the *New Black Panther Party* case. See Brinkmann Decl. ¶ 52 (explaining that litigation deliberations are incorporated in the talking points).

made by the agency during the review process,” FOIA exempts the material from disclosure. *Id.* at 13 (concluding that “a proposed response to a congressional inquiry” “represents the personal opinion of the author, not yet adopted as the final position of the agency, [and] thus exempt from FOIA disclosure”). The Department thus properly invoked exemption (b)(5) as to the discussions reflected in Document Nos. 83, 84, 85, and 117. As explained in the Hermilla and Brinkmann Declarations, these records reflect internal “‘back and forth’ discussions” about the appropriate response to congressional and media inquiries concerning the *New Black Panther Party* case and themselves contain “discussions and comments concerning factual and legal analysis [from] th[at] litigation.” *See* Hermilla Decl. ¶ 27E; Brinkmann Decl. ¶ 52. Their withholding thus is justified under FOIA.

4. The Department Properly Withheld Attorney Notes Taken During Meetings at Which the *New Black Panther Party* Case Was Discussed.

The Department properly invoked exemption (b)(5) as to the notes of an attorney from a senior management office during meetings with the Department components overseen by her office.²⁴ *See Judicial Watch of Fla. v. Department of Justice*, 102 F. Supp. 2d 6, 14 (D.D.C. 2000). “A document is . . . deliberative when it is ‘actually related to the process by which policies are formulated and decisions are made.’” *Id.* Notes taken at a meeting formulating such decisions clearly are “actually related” to that process. *See id.* (concluding that “[n]otes taken by the Attorney General *at a meeting regarding the campaign-finance task force itself* certainly are actually related to the process by which she reached her decision not to appoint an independent counsel on campaign finances” (emphasis in original; internal quotations omitted)). The notes

²⁴ The documents in this category include Document Nos. 112-114.

reflect the notetaker's "distillation of issues" that she considered important at the time of the meeting and "wished to memorialize for later reference" and thus "could reveal how [she] prioritized different facts and considerations." *Id.* As such, meeting notes are precisely the type of record that exemption (b)(5) was "intended to shelter." *Id.* at 14-15 (concluding that "compelled public disclosure of . . . personal notes would have . . . a chilling effect on free deliberation"); *see also Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974) (cautioning that in "some cases selection of facts or summaries may reflect a deliberative process which exemption 5 was intended to shelter").

The Department, accordingly, properly withheld the personal notes of an attorney in attendance at meetings with representatives of Department components supervised by her office. These notes "reveal both the content of deliberative briefings given during meetings with the Department's senior offices, as well as the thought processes and mental impressions of senior management staff who are being informed about a topic." Brinkmann Decl. ¶ 48; *see also* Brinkmann Decl. ¶ 40 (describing these records as "notes created by attorneys in the Department's senior management offices detailing their discussions on and thoughts about the [*New Black Panther Party*] litigation"). The notes subsequently become part of the notetaker's evaluative process which the staff in senior management offices should "feel completely free to undergo . . . without fear that their views on developing and giving – or choosing not to give – feedback to subordinates would be publicly revealed." Brinkmann Decl. ¶ 48. FOIA thus contemplates the withholding of such records, and the Department appropriately did so here.

III. THE DEPARTMENT PROPERLY WITHHELD DOCUMENTS PURSUANT TO FOIA EXEMPTION (B)(7)(A).

The Court should uphold the Department's invocation of exemption (b)(7)(A) as to fourteen memoranda prepared at the request of the Office of Professional Responsibility ("OPR") in connection with its ongoing investigation into allegations that the Civil Rights Division's handling of the *New Black Panther Party* case was influenced by political considerations.²⁵ Exemption (b)(7)(A) shields from disclosure "records or information compiled for law enforcement purposes . . . to the extent that the production of such records or information could . . . interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A); *see also Boyd v. Criminal Div. of Dept. of Justice*, 475 F.3d 381, 386 (D.C. Cir. 2007). Thus, to fall within this exemption, a record must satisfy two criteria: "first, it must be 'compiled for law enforcement purposes,' and second, its release must 'interfere with enforcement proceedings.'" *Edmonds v. Federal Bureau of Investigation*, 272 F. Supp. 2d 35, 54 (D.D.C. 2003). Both criteria are satisfied by the fourteen documents withheld pursuant to exemption (b)(7)(A) (hereinafter "OPR Memoranda").²⁶

A. The OPR Memoranda Were Compiled for Law Enforcement Purposes.

The OPR investigation for which the OPR Memoranda were prepared constitutes a law-enforcement proceeding. "In assessing whether records are compiled for law enforcement purposes, this circuit has long emphasized that the focus is on how and under what circumstances the requested files were compiled" and "whether the files sought relate to anything that can fairly

²⁵ The Court need not reach the issue of the propriety of the Department's invocation of exemption (b)(7)(A) if the withholding of the OPR Memoranda is upheld under exemption (b)(5).

²⁶ These documents are identified as Document Nos. 86-99 on the Index of CRT Withholdings Challenged by Judicial Watch. *See* Hermilla Decl. Ex. D.

be characterized as an enforcement proceeding.” *Jefferson v. Department of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (internal citations omitted). OPR “inquir[ies] into specific wrongdoing” have been so characterized. *Heller v. United States Marshals Serv.*, 655 F. Supp. 1088, 1090 (D.D.C. 1987); *Kimberlin v. Department of Justice*, 139 F.3d 944, 947 (D.C. Cir. 1998); *see also Jefferson*, 284 F.3d at 177. Thus, courts have held that files created in connection with such inquiries clearly were compiled for law enforcement purposes. *See Kimberlin*, 139 F.3d at 947 (concluding that “OPR investigation . . . in response to and focused upon a specific, potentially illegal release of information by a particular, identified official” was a law enforcement investigation and the files related thereto were “compiled for law enforcement purposes”); *Heller*, 655 F. Supp. at 1090 (concluding that documents in issue “clearly [we]re ‘investigatory records compiled for law enforcement purposes,’ since they represent[ed] part of an inquiry into specific wrongdoing by specific Marshals and jurors”); *see also Jefferson*, 284 F.3d at 177 (regarding as compiled for such purposes “files in connection with investigations that focus directly on specific alleged illegal acts which could result in civil or criminal sanctions”). The OPR Memoranda likewise should be so regarded.

Pursuant to its authority under 28 C.F.R. § 0.39a(1), OPR is conducting an investigation into “allegations that the Department’s actions, including the voluntary dismissal of its complaint against three of the four defendants in *United States v. New Black Panther Party for Self Defense, et al.* were influenced by political considerations.” Hermilla Decl. ¶ 27F(2) (internal quotations omitted). As part of that investigation, by “October 23, 2008 memorandum to the Civil Rights Division,” OPR “request[ed] summaries of attorney activities from Civil Rights Division personnel involved in the enforcement of the Voting Rights Act in *United States v. New*

Black Panther Party for Self-Defense, et al.” Hermilla Decl. ¶¶ 17, 27F(1). Those summaries – the OPR Memoranda – thus satisfy the threshold “compiled for law enforcement purposes” requirement for invocation of exemption (b)(7)(A).

B. The Release of the OPR Memoranda Reasonably Could Interfere With OPR’s Pending Investigation.

The OPR Memoranda constitute a category of evidentiary materials that plainly satisfies exemption (b)(7)(A)’s interference requirement. An agency “need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document.” *Kidder*, 517 F. Supp. 2d at 28; *see also Edmonds*, 272 F. Supp. 2d at 54 (same). “The categories relied upon, however, must be ‘functional’ – ‘allowing the court to trace a rational link between the nature of the document and the alleged likely interference.’” *Id.*; *see also Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986) (same). Courts have traced such a link between third-party statements and similar evidentiary materials and interference in the form of “revealing the nature and scope of the investigation[,],” “stifl[ing] cooperation,” and “imped[ing] the success of the investigation[.]” *Edmonds*, 272 F. Supp. 2d at 55; *see also Kidder*, 517 F. Supp. 2d at 28.

As explained in the Hermilla Declaration, such interference reasonably could attend the disclosure of the OPR Memoranda’s first-hand accounts of the Civil Rights Division’s decisionmaking in the *New Black Panther Party* case. Specifically, their disclosure “could discourage the continued cooperation of the witnesses as well as of other knowledgeable individuals” and thereby “impair [OPR’s] . . . ability to complete its investigation.” Hermilla Decl. ¶¶ 20, 21. Department employees likely “w[ould] be much more circumspect in their

responses to [OPR]” which could “seriously impair [its] . . . ability to foster the forthright, internal discussions necessary . . . to reach a final resolution.” Hermilla Decl. ¶ 27F(3). Since the records withheld pursuant to exemption (b)(7)(A) thus satisfy both requirements for its invocation, the Court should uphold those withholdings.

IV. THE DEPARTMENT PROPERLY WITHHELD DOCUMENTS PURSUANT TO FOIA EXEMPTION (B)(7)(C).

Incorporated into the records discussed in Part III, *supra*, as well as in Document Nos. 28 and 60²⁷ is information additionally exempt from disclosure pursuant to exemption (b)(7)(C). That exemption “authorizes the government to withhold ‘records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.’” *Boyd*, 475 F.3d at 386; 5 U.S.C. § 552(b)(7)(C). In evaluating the propriety of such withholdings, “the court must balance the privacy interests involved against the public interest in disclosure.” *Safecard Servs., Inc. v. Securities & Exch. Comm’n*, 926 F.2d 1197, 1205 (D.C. Cir. 1991). Courts, however, have construed exemption (b)(7)(C) as “afford[ing] broad[] privacy rights to suspects, witnesses, and investigators.” *Id.* Such broad protection “recognize[s]

²⁷ As with exemption (b)(7)(A), “a court in applying exemption 7(C) must first determine whether the documents in question are ‘investigatory records compiled for law enforcement purposes.’” *Heller*, 655 F. Supp. at 1090. That fact already has been established as to the OPR Memoranda. *See* Pt. III.A, *supra*. Document Nos. 28 and 60 also clearly satisfy that requirement as they summarize or attach witness statements compiled for the prosecution *United States v. New Black Panther Party for Self-Defense*. As explained in the Hermilla Declaration, the Civil Rights Division’s investigation of the *New Black Panther Party* case “occurred pursuant to Section 11(b) of the Voting Rights Act of 1965, as amended,” and therefore those statements “satisfy the threshold requirement of Exemption 7 as investigatory records compiled for law enforcement purposes.” Hermilla Decl. ¶ 25; *see also* Hermilla Decl. ¶ 27C(2) (noting that “[t]he Civil Rights Division initially compiled the witness summaries for law enforcement purposes”).

that simply mentioning a person's name in a law enforcement file can stigmatize that person, even if he is not the subject of the investigation.” *Heller*, 655 F. Supp. at 1091; *see also Edmonds*, 272 F. Supp. 2d at 52 (noting that the D.C. Circuit “has ‘admonished repeatedly’ that witnesses, informants, and investigating agents have a ‘substantial interest in seeing that their participation remains secret’ and that ‘[t]hird parties discussed in investigatory files may have a similarly strong interest in nondisclosure’”). In light of that substantial privacy interest, courts have regarded “the public interest in disclosure of [such information a]s not just less substantial, [bu]t [] insubstantial.” *Safecard*, 926 F.2d at 1205; *see also Taylor v. Department of Justice*, 268 F. Supp. 2d 34, 37 (D.D.C. 2003). Thus, under exemption (b)(7)(C)'s balancing test, the balance tips decidedly against disclosure of the witnesses' identities withheld here from the OPR Memoranda and two emails “forwarding or summarizing evidence of several witness statements” obtained in the *New Black Panther Party* case. Hermilla Decl. ¶ 27C(2).

After a review of these records, the Civil Rights Division “determined that there was no public interest cognizable under the FOIA in the disclosure of individual names” of witnesses to the events on Election Day, or the witnesses or subjects of the pending OPR investigation. *See Hermilla Decl. ¶ 26*. In contrast, the privacy interests implicated are substantial. *See id.* (explaining that “[t]he disclosure of this information about individuals could result in unwarranted public attention, embarrassment, and might subject these individuals to harassment or reprisals, especially given the high degree of sensitivity related to the underlying voter intimidation issue”); *Hermilla Decl. ¶ 27C(4)* (explaining that “since an OPR investigation carries an implied stigma of potential wrongdoing . . . the association of particular DOJ employees with [such] an investigation . . . could subject the individuals to embarrassment or

harassment”). Thus, “there was nothing to balance against the strong privacy interest these individuals have in protection of their identities,” but, even if there had been, “given the strength of these privacy interests . . . [they] outweighed any possible public interest in disclosure of this sensitive information.” Hermilla Decl. ¶ 26. Accordingly, the Department’s withholding of those identities here is justified.

V. THE DEPARTMENT SATISFIED FOIA’S SEGREGABILITY REQUIREMENT.

The Department’s withholding of the challenged documents in their entirety complies with FOIA’s segregability requirement. Although FOIA “requires that ‘[a]ny reasonably segregable portion of a record [] be provided to any person requesting such record after deletion of the portions which are exempt,’” the D.C. “Circuit has long recognized [] that documents may be withheld in their entirety when nonexempt portions ‘are inextricably intertwined with exempt portions,’” *Juarez v. Department of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008), or where “the document is fully protected as work product,” *Judicial Watch*, 432 F.3d at 371. The latter is clearly implicated here. The work product doctrine, which the Department properly has invoked as to all of the withheld documents, “simply does not distinguish between factual and deliberative material.” *Id.* “[F]actual material is itself privileged when it appears within documents that are attorney work product.” *Id.* (noting that “[a]ny part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine”). Segregability therefore is not required as to such documents. *Id.*; *see also CREW*, 2010 WL 2265036, at *2 (“If a document is fully protected as work product, then segregability is not required.”). Thus, the Department’s in-full withholdings should be upheld here. *See* Part II.A, *supra* (demonstrating that the challenged documents

constitute attorney work product related to the *New Black Panther Party* case); *see also* Brinkmann Decl. ¶ 59; Hermilla Decl. ¶ 27A(10).

That result alternatively follows from a traditional segregability inquiry – necessary only if the Court determines that the attorney work product affords incomplete protection of any challenged document – where “[a] court may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated.” *Juarez*, 518 F.3d at 61. The Brinkmann and Hermilla Declarations submitted herewith together make that showing. OIP “carefully reviewed each of the documents to determine whether any information could be segregated for release.” Brinkmann Decl. ¶ 60. Although OIP determined that none contained “reasonably segregable, nonexempt information,” where possible OIP has disclosed “certain factual ‘envelope’ information” to Plaintiff. *Id.* Likewise, during his review of the Civil Rights Division’s withholdings, Mr. Hermilla “carefully reviewed the responsive draft pleadings, draft memoranda, transferring email messages, and responsive email messages, and . . . determined that the records and communications contain no reasonably segregable, non-exempt information.” Hermilla Decl. ¶ 16. However, “[t]o the extent that certain factual ‘envelope’ information could be disclosed to Plaintiff, such information [ha]s [been] provided.” *Id.* In this regard, FOIA does not require more of the Department.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court grant this motion and enter judgment in favor of the Department.

Date: November 2, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on, November 2, 2010, a true and correct copy of the foregoing Department of Justice's Motion for Summary Judgment was electronically filed through the U.S. District Court for the District of Columbia Electronic Document Filing System (ECF) and that the document is available for viewing on that system.

s/ Jacqueline Coleman Snead
JACQUELINE COLEMAN SNEAD

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,
501 School Street, S.W., Suite 700
Washington, DC 20024

Plaintiff,

V.

Case No. 1:10-cv-00851 (RBW)

DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Defendant.

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Rule 7.1(h), Defendant Department of Justice submits this statement of material facts as to which there is no genuine issue.

1. By letter dated May 29, 2009, Plaintiff Judicial Watch, Inc., submitted a Freedom of Information Act (“FOIA”) request to the Department of Justice (“Department”) FOIA/Privacy Act Mail Referral Unit seeking four categories of records pertaining to *United States v. New Black Panther Party for Self-Defense*, Civ. No. 2:09-cv-0065 (E.D. Pa.) (hereinafter “*New Black Panther Party* case”). Declaration of Nelson D. Hermilla (“Hermilla Decl.”) ¶ 3; Declaration of Vanessa R. Brinkmann (“Brinkmann Decl.”) ¶ 3 & Ex. A.

2. Plaintiff accepted the Department’s interpretation of the scope of Plaintiff’s FOIA request as limited to records concerning the Department’s decision to seek a dismissal of defendants in the *New Black Panther Party* case. *See* Complaint for Declaratory and Injunctive Relief (“Compl.”) ¶ 8.

3. Plaintiff's FOIA request was referred for processing by the Civil Rights Division, which prosecuted the *New Black Panther Party* case, which in turn referred the request to the Office of Information Policy ("OIP"), which processed the request on behalf of the Offices of the Attorney General ("OAG"), Deputy Attorney General ("ODAG"), Associate Attorney General ("OASG"), Legal Policy ("OLP"), Legislative Affairs ("OLA"), Intergovernmental and Public Liaison ("OIPL"), and Public Affairs ("OPA"). Hermilla Decl. ¶ 4; Brinkmann Decl. ¶ 4.

4. The Civil Rights Division collected all potentially responsive paper and electronic records from the Civil Rights Division employees who had worked on the *New Black Panther Party* case or had created records related to that case. *See* Hermilla Decl. ¶ 6. The results of that collection effort were reviewed for responsiveness to Plaintiff's original FOIA request and a second time for responsiveness to Plaintiff's request as narrowed by the Department's interpretation. *See* Hermilla Decl. ¶¶ 6, 9.

5. OAG, ODAG, OASG, OLP, OLA, OIPL, and OPA conducted electronic and paper searches for records responsive to Plaintiff's FOIA request. *See* Brinkmann Decl. ¶¶ 6-31. OIP separately conducted electronic searches of the computer files of officials in OAG and ODAG using the search terms "New Black Panther Party," "NBPP," "New Black Panther," and "NBP" and reviewed indices arranged by subject of the paper files of former ODAG officials. *See* Brinkmann Decl. ¶¶ 10, 14, 15. OIP also conducted an electronic search of the Departmental Executive Secretariat, which is the official records repository for OAG, ODAG, OASG, and also maintains some OLA records, using the following search terms: "New Black Panther," "Black Panther and Philadelphia," "Black Panther and Congress," and "Black Panther." *See* Brinkmann Decl. ¶ 7. The results of these searches were reviewed for responsive to Plaintiff's FOIA request.

See Brinkmann Decl. ¶ 7.

6. OIP also reviewed search results for other requests it had processed related to the *New Black Panther Party* case, including a much broader non-FOIA request from the United States Commission on Civil Rights, for responsiveness to Plaintiff's request. See Brinkmann Decl. nn. 3 & 7.

7. By letter dated February 9, 2010, the Civil Rights Division produced all responsive, non-exempt information yielded by its search to Plaintiff. See Hermilla Decl. ¶ 8.

8. On September 15, 2010, pursuant to court order, the Department provided Plaintiff's counsel with a draft *Vaughn* index identifying and justifying the responsive records yielded by the Department's search that are being withheld pursuant to FOIA exemptions. See Declaration of Jacqueline Coleman Snead ("Snead Decl.") ¶ 2; see also generally Brinkmann Decl.; Hermilla Decl.

9. By email dated September 27, 2010, Plaintiff, pursuant to court order, identified the withholdings Plaintiff challenges. See Snead Decl. ¶ 3 & Ex. A. Plaintiff challenges none of the Department's withholdings under 5 U.S.C. § 552 (b)(6) or the Department's withholding of draft pleadings. See Snead Decl. Ex. A.

10. The records the Department withholds pursuant to exemption (b)(5) are internal communications or memoranda related to the *New Black Panther Party* case that reflect attorney work product from that case, predecisional and deliberative communications, or both. See Brinkmann Decl. ¶¶ 39, 40; Hermilla Decl. ¶¶ 11-16.

11. The records the Department withholds pursuant to exemption (b)(7)(A) are memoranda prepared at the request of the Office of Professional Responsibility ("OPR") in

connection with its ongoing investigation into whether the Department's handling of the *New Black Panther Party* case was influenced by political considerations. *See* Hermilla Decl. ¶ 27F. The disclosure of these memoranda would impair OPR's ability to foster forthright, internal discussions necessary for efficient and proper decisionmaking and the final resolution of its investigation, would have a chilling effect on staff who in the future would be reluctant to express their opinions, and would hamper OPR's investigative role in reviewing allegations of misconduct. *See* Hermilla Decl. ¶ 27F(3).

12. The records the Department withholds pursuant to exemption (b)(7)(C) were compiled in connection with either OPR's ongoing investigation (described in para. 11, *supra*) or the Civil Rights Division's prosecution of the *New Black Panther Party* case. These records identify witnesses, whose privacy interest in the nondisclosure of their connection with those investigations is not outweighed by any possible public interest in that information. *See* Hermilla Decl. ¶ 26.

13. The Department reviewed the responsive records withheld from Plaintiff to determine whether any non-exempt information could be segregated from those withholdings. *See* Brinkmann Decl. ¶ 60; Hermilla Decl. ¶ 28. With the exemption of Document No. 85f (which has now been disclosed to Plaintiff), the Department determined that no such information could be segregated and that the continued withholdings are exempt in their entirety. *See* Brinkmann Decl. ¶ 60; Hermilla Decl. ¶ 28.

Date: November 2, 2010

Respectfully submitted,

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Counsel for the Department of Justice

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE, ET AL.

Defendant.

Civil Action No. 1:10-cv-00851

DECLARATION OF NELSON D. HERMILLA

I, Nelson D. Hermilla, declare the following to be true and correct:

1. I am the Chief of the Freedom of Information/Privacy Act Branch of the Civil Rights Division of the United States Department of Justice in Washington, D.C. My duties include supervision of the Freedom of Information/Privacy Act (FOI/PA) Branch of the Civil Rights Division which is responsible for the processing of all records access requests pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act (PA) 5 U.S.C. § 552a, which are received by the Division. I am responsible for processing the documents responsive to Plaintiff's May 29, 2009 FOIA request (received by the Civil Rights Division July 14, 2009) that is the subject of this FOIA action.

2. The statements herein are made on the basis of knowledge acquired through the performance of my official duties.

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ADMINISTRATIVE PROCESSING OF PLAINTIFF'S FOIA REQUEST

3. By letter dated May 29, 2009, Plaintiff directed a FOIA request to the Department of Justice "FOIA/PA Referral Unit" of the Justice Management Division. The FOIA request sought access to:

1) Any and all records pertaining to the lawsuit under the Voting Rights Act against the New Black Panther Party for Self Defense and three of its members (Malik Zulu Shabazz, Minister King Samir Shabazz, Jerry Jackson) (. . . includ[ing] . . . memos, correspondence, affidavits, interviews, and records concerning default judgment, excluding court filings).

2) Any and all records pertaining to the decision to end the civil complaint against the New Black Panther Party for Self Defense and three of its members (. . . includ[ing]. . . memos, correspondence, affidavits, interviews, and records concerning default, excluding court filings).

3) Any correspondence between the Justice Department and the New Black Panther Party for Self Defense, to defendants X, Y & Z and/or any attorney(s) representing the defendants.

4) Any third-party communications concerning the New Black Panther Party for Self Defense, to include defendants X, Y & Z and/or any attorney(s) representing the defendants.

(A copy of Plaintiff's request is attached as Exhibit A.)

4. On June 5, 2009, the Justice Management Division's (JMD) Referral Unit received Plaintiff's request because Plaintiff addressed its request to "the FOIA/PA Mail Referral Unit, Department of Justice." On June 18, 2009, JMD's Referral Unit sent the Plaintiff's request to the Executive Office for United States Attorneys (EOUSA), by mistake. On July 8, 2009, the EOUSA discovered the mistake and determined that the request should be forwarded to the Civil Rights Division. On July 14, 2009, the Civil Rights Division received a copy of Plaintiff's request sent from both Justice Management Division and EOUSA. Because the regulations governing FOIA

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requests state that, "When a component receives a request for a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from disclosure under the FOIA . . .," the Civil Rights Division forwarded documents it discovered which originated outside of the Division to the agencies and Department components where they originated. 28 C.F.R. § 16.4 (c). On December 30, 2009, the Division forwarded documents to the Federal Bureau of Investigation, and on January 14, 2010, to the Department's Office of Information and Privacy and to the United States Commission on Civil Rights. Thereafter, each of those components or agencies processed the records for a direct response to Plaintiff.

5. The Civil Rights Division sent Plaintiff two letters responding to its request. The first response, dated July 15, 2009, acknowledged the receipt of Plaintiff's request and informed Plaintiff that because of the large number of FOIA requests received by the Civil Rights Division there would be a delay in responding to Plaintiff's request. (A copy of this response is attached as Exhibit B.) On this same date, the Civil Rights Division began a search within the Division to locate any documents that would be responsive to Plaintiff's request and referred a copy of Plaintiff's FOIA request to the Division's Voting Section. On December 24, 2009, the FOI/PA Branch also contacted the Division's Appellate Section to search for responsive records. The FOI/PA Branch also found that the Criminal Section of the Division had responsive records and collected the related documents from the Criminal Section. The FOI/PA Branch also contacted the Housing and Civil Enforcement Section and obtained its responsive records. Throughout the processing, the Office of the Assistant Attorney General also conducted a complete search for any responsive records.

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6. The Civil Rights Division's search to locate all records related to *United States v. New Black Panther Party for Self-Defense, et al.*, Civ. No. 2:09-cv-0065 (E.D. Pa.) consisted of the combined search efforts of the Civil Rights Division's Office of the Assistant Attorney General; Administrative Management; and Appellate, Criminal, Housing and Civil Enforcement, and Voting Sections to collect all paper and electronic records from specific Civil Rights Division employees who had worked on the case or created records related to the matter. The Division conducted manual file searches and electronic searches for all of the same individuals seeking to locate all records within the pertinent time frame that encompassed the initiation of the Civil Rights Division's review of the New Black Panther Party activities in the November 2008 election. After collecting all related records, the Civil Rights Division reviewed all electronic and paper records for responsiveness.

7. On December 4, 2009, the Voting Section had completed a thorough search and review of the responsive records and forwarded its detailed listing and documents to the FOI/PA Branch. On December 29, 2009, the Criminal Section completed a thorough search and review and forwarded its records to the FOI/PA Branch. On January 4, 2010, the Appellate Section completed a thorough search and review of its responsive records and forwarded them to the FOI/PA Branch. Electronic searches by the Office of the Assistant Attorney General and the Administrative Management Section continued beyond the time that the Division responded to the Plaintiff in continuing to supplement the inventory in response to other records requests.

8. By letter dated February 9, 2010, the Civil Rights Division responded to Plaintiff's request informing Plaintiff that the Civil Rights Division had determined that access to the records

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should be denied on the basis of FOIA Exemptions (b)(7)(A), (b)(5), and (b)(7)(C). Further, Defendant processed and disclosed 92 pages in full to the Plaintiff in the Division's response dated February 9, 2010. A copy of the Civil Rights Division's February 9, 2010 response is attached as Exhibit C (without enclosures).

9. On May 24, 2010, the plaintiff filed its suit and narrowed its access request to only those records related to: "the Department's decision to seek a dismissal of defendants in *United States v. New Black Panther Party for Self-Defense, et al.*" Since the Civil Rights Division had created a thorough inventory by date and office that identified all records related to the case, the FOI/PA Branch staff searched the detailed inventory for the issues responsive to the narrowed request. After reviewing the records that had been created within the relevant time frame, the Civil Rights Division determined the search to be complete.

10. A copy of a *Vaughn* listing containing a detailed description of withheld documents is attached to this declaration as Exhibit D. Since some records are similar to one another, the FOI/PA Branch has categorized them into six distinct groups. The *Vaughn* listing describes the responsive documents contained in each group, including such information as the date and general content of the material, and identifies the applicable privileges which protect each group from full or partial disclosure under Exemption 5 and Exemption 7 of the FOIA. Exemption 5 applies to all of the documents in the six groups of documents, and other Exemptions also apply to some of the documents. The groups have been subdivided into categories that identify the particular nature of the group. The six groups are briefly identified here and are more fully discussed below:

- a. Group 1 consists of several draft documents and revisions with forwarding emails reflecting the predecisional back and forth discussions containing analyses of the law and

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facts, questions, suggestions, legal strategies, and proposals for claims of relief, etc.

b. Group 2 consists of one email requesting draft language for a CRT Front Office report regarding the New Black Panther Party litigation.

c. Group 3 consists of several documents containing personal privacy information which should be protected under 7(C) and documents in this group are also included in both Group 1 and Group 6;

d. Group 4 consists of one email forwarding court filings and providing comments on the case for further deliberation and also shows details and facts related to the nomination process within the Department of Justice.

e. Group 5 consists of three emails with the Office of Public Affairs discussing the appropriate response to media inquiries on the New Black Panther Party litigation and provides additional comments and characterization of the case.

f. Group 6 consists of memoranda from Civil Rights Division employees compiled in response to the Office of Professional Responsibility's ongoing investigation of allegations regarding the Division's actions related to its New Black Panther Party litigation and whether there may have been decisions influenced by political considerations for dismissal of three defendants.

EXEMPTIONS

EXEMPTION 5

11. Exemption 5 exempts from mandatory release "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption has been applied here to materials protected by the deliberative process privilege and the attorney work product privilege.

12. The materials for which the deliberative process privilege is being asserted consist of documents reflecting many preliminary and developing recommendations and discussions over an extended period of time regarding the application of strategies, guidelines, First Amendment

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constitutional issues, and the scope and type of prospective relief. These discussions constituted a necessary part of the attorneys' investigation in order to develop alternative strategies and properly present evidence. Disclosure of these discussions would inhibit the Department attorneys' future ability, in cases yet to be developed, to have candid, internal discussions which are necessary for the efficient and proper decision-making in the Department of Justice. Disclosure of attorney work product and other documents related either to the government's discussion of its actions or the government's case could reveal the direction, focus and scope of the inquiries; the evidence developed to date and the reliance placed by the government on that evidence; the government's strategies; and the strengths and weaknesses of the government's case. Revealing such information could provide targets and subjects with undue insight into the development of the government's case, how it determines the most effective enforcement of particular statutes, and could enable subjects to devise strategies to counter prosecutive efforts, and background information upon which attorneys could evaluate initial inquiries, allegations, investigations, and cases.

13. The description following in paragraph 27 will provide a detailed explanation of what deliberative process is involved and the particular role of each group of documents in that process and the nature of the author's decision-making authority, and the relative positions in the agency's personnel structure occupied by the document's authors and recipients.

14. The documents withheld under the deliberative process privilege are primarily from lower-ranking personnel to either their peers or to supervisors. Each document for which this privilege is claimed is predecisional in nature and formed a part of the Division's deliberative discussions in the Civil Rights Division's enforcement actions in *United States v. New Black Panther*

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Party for Self-Defense, et al.

15. The materials for which the attorney work product privilege is being asserted were generated as a result of the investigations of violations of the statutes within the enforcement responsibility of the Voting Section in reasonable anticipation of litigation. This compilation of investigatory records has indeed resulted in an injunction against one defendant for violating the Voting Rights Act. The documents for which the Exemption 5 attorney work product claim has been utilized include the Civil Rights Division attorneys' private thoughts, tactics, strategy, factual and legal analyses, and appraisals of the sufficiency of the available evidence, and the evidentiary value of particular witness' statements. Such materials are clearly the type of work product privileged from discovery by an adversary in such litigation so as not to discourage its creation. There are no documents for which this Exemption has been claimed that have been created outside the context of a reasonable anticipation of the motion to be filed in the case. The description that follows in paragraph 27 provides an explanation of the context of the creation of each document at the time it was drafted and the circumstances that constituted the substantial and reasonable expectation of litigation.

16. Exemption 5 attorney work product protects these records in the entirety; therefore, there is no possibility of segregable portions of material that may be released to Plaintiff. During the Civil Rights Division review of the documents in Groups 1-6, I have carefully reviewed the responsive draft pleadings, draft memoranda, transferring email messages, and responsive email messages, and I have determined that the records and communications contain no reasonably segregable, non-exempt information. To the extent that certain factual "envelope" information could be disclosed to

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Plaintiff, such information is provided in the attached *Vaughn* index. Inasmuch as all the documents at issue are protected by the work product privilege, none of the information is appropriate for release.

EXEMPTION 7(A)

17. FOIA Exemption 7(A) permits the withholding of records or information, compiled for law enforcement purposes, where the production of such records or information could reasonably be expected to interfere with enforcement proceedings. The Civil Rights Division has withheld all electronic and paper records drafted in response to the Office of Professional Responsibility's October 23, 2008 memorandum to the Civil Rights Division requesting summaries of attorney activities from Civil Rights Division personnel involved in the enforcement of the Voting Rights Act in *United States v. New Black Panther Party for Self-Defense, et al.* As described below, these materials include paper and electronic records detailing the roles of various Civil Rights Division personnel related to the Department's enforcement action, more specifically, the decision to seek a dismissal of defendants in *United States v. New Black Panther Party for Self-Defense, et al.* Disclosure of the records could reasonably be expected to interfere with the Office of Professional Responsibility's ongoing law enforcement proceeding.

18. The records being withheld under Exemption 7(A) are Civil Rights Division records compiled in conjunction with the Office of Professional Responsibility's ongoing investigation. Any portion of these memoranda, if disclosed, could reasonably be expected to interfere with the Office of Professional Responsibility's ongoing law enforcement proceeding, and the records are therefore exempt in their entirety from access pursuant to 5 U.S.C. § 552(b)(7)(A). The expected

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harm to or interference with this enforcement proceeding is discussed in greater detail in paragraph 27 of this declaration (See "F. Group 6 Documents").

19. The Office of Professional Responsibility determined that disclosure of the information contained in Group 6 as described in paragraph 27 could reasonably be expected to result in interference with or harm to its ongoing law enforcement proceeding. The Office of Professional Responsibility's determination regarding Exemption 7(A) applies to Group 6 only and excludes Groups 1 - 5.

20. Disclosing documents relating to employee witnesses in the Office of Professional Responsibility's ongoing inquiry could discourage the continued cooperation of the witnesses as well as of other knowledgeable individuals.

21. Finally, disclosure of the Office of Professional Responsibility's gathering of facts as contained within Group 6 could impair the Office of Professional Responsibility's ability to complete its investigation.

22. The Civil Rights Division has made every effort to provide clear and full descriptions of the categories of records being withheld pursuant to Exemption 7(A) and to identify the harm to or interference with the ongoing proceeding that could reasonably be expected to occur from release of the information contained in such records. However, any attempt to further describe the records above in greater detail would lead to disclosure of the very information sought to be protected.

23. Although the Civil Rights Division, at the present time, is withholding these documents pursuant to Exemption 7(A), most, if not all of the documents falling within the various described categories, if individually processed, would also be exempt in whole or in part under other provisions

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of the FOIA, including 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(7)(C);

24. There are records entirely apart from the records related to the Office of Professional Responsibility investigation that pertain to matters within the Civil Rights Division that do not interfere with the Office of Professional Responsibility's current, ongoing, law enforcement proceeding but that nonetheless pertain to sensitive internal deliberations, express candid opinions and contain attorney work product. I describe these separate records below in additional detail as records that are exempt pursuant to 5 U.S.C. § 552 (b)(5) and 5 U.S.C.

§ 552(b)(7)(C) in the Index of Documents.

EXEMPTION 7(C)

25. This provision exempts from mandatory release information contained in investigatory records compiled for law enforcement purposes, the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. Records of Department of Justice, Civil Rights Division investigations, in this case, related to enforcement of *United States v. New Black Panther Party for Self-Defense, et al.* satisfy the threshold requirement of Exemption 7 as investigatory records compiled for law enforcement purposes. Records of Department of Justice, Civil Rights Division investigations, in this case, related to enforcement of *United States v. New Black Panther Party for Self-Defense, et al.* were created pursuant to Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973, 1973i(b) (2000) and therefore satisfy the threshold requirement of Exemption 7 as investigatory records compiled for law enforcement purposes. The Court jurisdiction for the enforcement occurred pursuant to 28 U.S.C. § 1345 and 42 U.S.C. §§ 1973j(f) and the Attorney General of the United States had standing to bring the

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enforcement action pursuant to 42 U.S.C. § 1973(j)(d).

26. Of particular concern is personal information concerning individuals involved as subjects of the investigations as well as witnesses. The disclosure of the personal information to third parties could reasonably be expected to constitute an unwarranted invasion of personal privacy. The disclosure of this information about individuals could result in unwarranted public attention, embarrassment, and might subject these individuals to harassment or reprisals, especially given the high degree of sensitivity related to the underlying voter intimidation issue. After careful review of the records containing information about individuals, the Civil Rights Division determined that there was no public interest cognizable under the FOIA in the disclosure of individual names. As a result, there was nothing to balance against the strong privacy interest these individuals have in protection of their identities. Moreover, given the strength of these privacy interests, the Division also determined that those substantial privacy interests outweighed any possible public interest in disclosure of this sensitive information. Since the Civil Rights Division has no means of controlling the use made of information released pursuant to the FOIA request, the disclosure of this information could constitute an irreparable invasion of these individuals' privacy rights as well as a risk of harassment that could result in physical harm.

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INDEX OF DOCUMENTS

27. Itemization of the documents withheld in whole or in part are identified in the six categories below:

A. Group 1 Documents

[Documents Nos. 2, 4, 5, 6, 7, 12, 13, 14, 17, 20, 22, 23, 24, 25, 26, 27, 28, 30, 32, 34, 35, 36, 39, 40, 42, 44, 47, 49, 50, 52, 55, 57, 59, 60, 63, 64, 65, 67, 68, 69, 70, 74, 81, and 82.]

(1) The deliberative process is intended to protect the decision making processes of government agencies from public scrutiny in order to enhance the quality of agency decisions.

(2) A significant part of the deliberative process within the Department of Justice involves the creation of draft documents which are then reviewed, edited, and modified before they become final. The draft documents in Group 1 consist of unsigned, both dated and undated draft memoranda, and draft pleadings including multiple draft versions for several documents. The documents also consist of transmittal emails with followup questions and analysis, and emails forwarding drafts back and forth between attorneys and to supervisors for review, with questions on legal research, factual issues, request for the Civil Rights Division's Appellate Section's legal research and its views, and extensive detailed responses. By their nature as drafts, these documents are predecisional, preliminary versions of what will later become a final document.

(3) Clearly, the process by which a draft evolves into a final document is itself a deliberative process. As a result, there is no reasonably segregable, non-exempt information that can be disclosed from the drafts. However, once the draft versions protected in Group 1 became final, the Civil Rights Division disclosed the final documents to the Plaintiff in the Division's response dated

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February 9, 2010.

(4) In addition to the draft documents, e-mail messages forwarding and transferring the draft memoranda and draft pleadings contain analyses, discussions, questions, suggestions, revisions, and recommendations. The draft documents also consist of emails with extensive discussions regarding the merits, legal strategies, and factual evidence in the draft pleadings and draft memoranda. These e-mail messages forwarding and transferring the draft memoranda and draft pleadings contain analyses, discussions, questions, requests for additional legal research, requests for supporting evidence for various legal claims, and discussions on alternate proposals for claims of relief.

(5) All of the documents, the drafts and the discussions reflecting the drafting process, constitute part of the exchange of ideas and suggestions that accompanies all decision-making and reflect preliminary assessments by attorneys and supervisors about issues where they were asked to make recommendations and provide advice. Agency officials routinely email each other, share language, give suggestions, and respond to recommendations and propose details of language as they draft documents or respond to inquiries. Email operates as a way for individual Department of Justice employees to communicate with each other about current matters without having to leave their offices. These "discussions," which get memorialized on-line, are part of the exchange of ideas and suggestions that accompanies all decision-making and typically reflect attorneys' preliminary assessments about issues on which they may be asked to make recommendations. Indeed, the online discussions most resemble conversations between attorneys which are part of the give and take of agency deliberations. Disclosure of such emails would severely hamper the efficient day-to-day working of the Department as individuals would no longer feel free to discuss their ideas and advise

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on the content of documents in email messages. If email messages such as these are routinely released to the public, such disclosure will chill on-line discussions among Department attorneys. The consequent reluctance to communicate openly will seriously impair the Department's ability to foster the forthright, internal discussions necessary for efficient and proper decision making. Disclosure of such preliminary assessments and opinions would clearly make officials much less likely to comment on drafts. Agency decision making is at its best when employees are able to focus on the substance of their views and not on whether their views may at some point be made publicly available.

(6) The internal, predecisional back-and-forth discussion among agency officials is an essential part of the creation of agency policy leading up to making final agency decisions. Here the draft documents, internal agency email discussion, and similar communications comprise the essence of the exchange among government officials who were analyzing the merits and legal issues and proposing various options for relief. Throughout the process, attorneys request advice, agency officials engage themselves in an active analysis, and then propose recommended alternatives.

(7) Authors of some of the emails, including the Civil Rights Division's Appellate Section attorneys who made an assessment of the *United States v. New Black Panther Party for Self-Defense, et al.* enforcement action separate from the Voting Section's enforcement analysis, intended to make appropriate officials aware of all the legal and policy implications pertaining to the legal strategies, merits, constitutional issues, and proposed relief so that a thorough discussion of the issues could occur. For a federal agency to fulfill its statutory mandate, agency attorneys must consider every aspect of a given issue so that agency officials can make fully informed decisions. If a line attorney

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is aware that his or her policy analysis or proposed recommendations may be released to the public, he or she will not engage himself or herself in the needed candid interaction of ideas. That line attorney will likely be more concerned with the public perception of the document he or she is drafting than with providing the necessary information to the decision maker. The consequent inhibition would be extremely detrimental to the Division's deliberative process.

(8) All of the documents that have been withheld pursuant to the deliberative process privilege are intrinsically a part of the deliberative processes of the Division and the Department. In the course of drafting these documents, attorneys and supervisors communicate with each other, seeking information, providing advice, and offering suggestions. The documents at issue consist of just such communications. These documents are part of the exchange of ideas and suggestions that accompanies all decision-making and typically reflect attorney's preliminary assessments about the issue on which they have been asked to make recommendations.

(9) These documents are also properly withheld under attorney work product privilege as they include the Civil Rights Division attorneys' private thoughts, tactics, strategy, factual and legal analyses, and appraisals of the sufficiency of the available evidence or the capacity of particular witnesses. The discussion by the attorneys contains candid thoughts concerning the development of evidence, an analysis of the evidence's strengths and usefulness as well as appropriate presentation. This memorialization of thoughts in reasonable anticipation of future prosecutions constitutes attorney work product. Such materials are clearly the type of work product privileged from discovery by an adversary in such litigation so as not to discourage its creation. Attorney work product exempts these records from access in the entirety. No segregation of portions of the records

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is possible without causing harm to the Division's prosecutorial interests. There are no documents for which this Exemption has been claimed that have been created outside the context of a reasonable anticipation of the likelihood of litigation.

(10) Here the internal agency email discussions and questions about the merits, strategies, and proposals for relief reflected in draft documents, and similar communications are part of the exchange among government officials who were analyzing the merits and legal issues and proposing various options for relief. Throughout the process, attorneys request advice and agency officials engage in active analysis, then propose alternative resolutions. Exemption 5 attorney work product protects these records in the entirety; therefore, there is no possibility of segregable portions of material that may be released to Plaintiff. To the extent that certain factual "envelope" information could be disclosed to Plaintiff, such information is provided in the attached *Vaughn* index. Inasmuch as all the documents at issue are protected by the work product privilege, none of the information is appropriate for release. I have carefully reviewed the responsive draft pleadings, draft memoranda, transferring email messages, and responsive email messages, and I have determined that the records and communications contain no reasonably segregable, non-exempt information.

B.

Group 2 Document

[Document No. 37]

(1) This is an email from a CRT Front Office administrative assistant requesting a line attorney or a Deputy Chief in the Voting Section to provide draft language for an internal report to the Front Office management regarding the *United States v. New Black Panther Party for Self-Defense, et al.* enforcement action. This email exchange initially identified the appropriate person

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to respond and then requested that individual to submit proposed draft language regarding the *United States v. New Black Panther Party for Self-Defense, et al.* enforcement action.

(2) This draft memorandum is a predecisional, preliminary version of a document. It was necessary to review the draft for later revision and incorporation into a report. The ultimate goal was to prepare an internal report for final review by the CRT Front Office which would subsequently be forwarded to the Office of the Attorney General as a summary of pending matters and cases in the Civil Rights Division.

C. Group 3 Documents

[Document Nos. 28 and 60, also listed in Group 1; and Document Nos. 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98 and 99, also listed in Group 6]

(1) The Civil Rights Division determined that these documents, containing personal privacy information about witnesses, are exempt from access and are therefore protected under Exemption 7(C). This provision exempts from mandatory release information contained in investigatory records compiled for law enforcement purposes, the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. Records of Department of Justice, Civil Rights Division investigations, in this case, related to enforcement of *United States v. New Black Panther Party for Self-Defense, et al.* were created pursuant to Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973, 1973i(b) (2000) and therefore satisfy the threshold requirement of Exemption 7 as investigatory records compiled for law enforcement purposes as described in paragraph 25 above. The Civil Rights Division's explanation of the basis for its determination regarding these records is described in paragraph 26 above.

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(2) The Civil Rights Division determined that documents consisting of two emails forwarding or summarizing evidence of several witness statements regarding the events that occurred on the November 2008 Election Day in Philadelphia, PA are exempt from access pursuant to Exemption 7(C). In one of these emails, the Section Chief responded to his supervising Acting Deputy Assistant Attorney General (ADAAG) for additional information on supporting evidence and the Section Chief responded with a summary of several different witness statements, identified by their individual names. The Civil Rights Division initially compiled the witness summaries for law enforcement purposes. The Section Chief summarized their statements in response to the supervisor's inquiry in his email for further explanation about the supporting evidence. In the second email, the ADAAG forwarded formal witness statements to the Appellate Chief for a review and assessment of the evidence. Some of the witnesses' formal written statements were compiled as part of the law enforcement investigation but never filed with the court.

(3) In addition to privacy concerns, the two emails described above are also predecisional and contain deliberative information. These documents also contain attorney discussion, opinions and analyses of the underlying facts and law.

(4) There are also fourteen memoranda by Civil Rights Division employees which contain their responses to the Office of Professional Responsibility inquiry related to the employees. The Division employees are the subjects of the Office of Professional Responsibility's investigation. These fourteen memoranda are described under Group 6 and are withheld under Exemption 7(A) as Civil Rights Division records compiled in conjunction with the Office of Professional Responsibility's ongoing investigation. The Office of Professional Responsibility is conducting its

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investigation in accordance with its authority under Department regulation 28 C.F.R. § 0.39a(1). Therefore, the Office of Professional Responsibility's investigation satisfies the threshold requirement of Exemption 7 as investigatory records compiled for law enforcement purposes. In addition to 7(A), the names of CRT authors who the Office of Professional Responsibility required to respond to its investigation in a memoranda are also protected under Exemption 7(C) since an Office of Professional Responsibility investigation carries an implied stigma of potential wrongdoing regarding each employee whose actions are being reviewed. Regardless of the final results of the Office of Professional Responsibility investigation, the mere existence of such an inquiry and the association of particular DOJ employees with an investigation, if publicly divulged, could subject the individuals to embarrassment or harassment. The Civil Rights Division's explanation of the basis for its determination regarding these records is described in paragraph 26 above:

(5) The Civil Rights Division employees' memoranda contain their analysis of the law and facts of *United States v. New Black Panther Party for Self-Defense, et al.* After careful review of the records containing information about individuals, the Civil Rights Division determined that there was no public interest in the disclosure of individual names; therefore, the very strong privacy interests of the individuals prevailed against the lack of a determinable public interest requiring protection of the sensitive information. Based on the rationale set forth in paragraph 26 above, the Division must protect the privacy of individual citizens who provided statements about the events that happened with the New Black Panther Party in Philadelphia, Pennsylvania, at the November 2008 election. The Civil Rights Division compiled the witness summaries for law enforcement purposes and some of the employees summarized their statements in providing an analysis of the law

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and facts in the responsive memoranda for the Office of Professional Responsibility investigation.

(6) If individual names or their statements should be released to the public, then such disclosure would chill witnesses from coming forward and assisting with the Division's development of matters and cases. This, in turn, would interfere with enforcement of the civil rights laws and the Civil Right Division's mission since disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.

D.

Group 4 Document

[Document No. 80]

(1) One email advising supervisor that the Division had filed final versions of pleadings with the court forwarding copies of documents. The document advises of a final order in the *United States v. New Black Panther Party for Self-Defense, et al.* enforcement action and the nature of relief. The email shows details and facts related to the Department process, the nature of the case and the facts related to distribution. Components continue to brief management and senior officials regarding actions taken in the case. Exemption 5 attorney work product protects these records in the entirety; therefore, there is no possibility of segregable portions of material that may be released to Plaintiff.

(2) In addition to being withheld under the attorney work product privilege, this email is also withheld under the deliberative process privilege since it shows details and facts related to the nomination process in the Department and also contains attorney discussion, opinions, and comments on the nature of the case and the facts related to distribution.

(3) I carefully reviewed the document and determined that there was no reasonably segregable, non-exempt information that could be disclosed. To the extent that certain factual

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"envelope" information could be disclosed to Plaintiff, such information is provided in the attached *Vaughn* index. Inasmuch as the document at issue is protected by the work product privilege, none of the information is appropriate for release. The Civil Rights Division disclosed copies of the pleadings in final to Plaintiff in Defendant's response dated February 9, 2010.

E. Group 5 Documents

[Document Nos. 83, 84 and 85]

(1) These documents consist of three emails between CRT Front Office and the Office of Public Affairs (OPA) with internal discussions on the appropriate response to media inquiries concerning the New Black Panther Party litigation. These documents reflect "back and forth" discussions and comments concerning factual and legal analysis of the litigation of aspects of the *United States v. New Black Panther Party for Self-Defense, et al.* enforcement action with the objective of preparing an accurate public statement. The documents contain a discussion of the extent to which the Department may release information concerning internal deliberations.

F. Group 6 Documents

[Document Nos. 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98 and 99]

(1) The Civil Rights Division has withheld all electronic and paper records drafted in response to the Office of Professional Responsibility's October 23, 2008 memorandum to the Civil Rights Division. The Office of Professional Responsibility is conducting its investigation in accordance with its authority under Department regulation 28 C.F.R. § 0.39a(1). Therefore, the Office of Professional Responsibility's investigation satisfies the threshold requirement of Exemption 7 as investigatory records compiled for law enforcement purposes. The records being

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withheld are summaries of attorney activities from Civil Rights Division personnel involved in the enforcement of *United States v. New Black Panther Party for Self-Defense, et al.*

(2) The records being withheld under Exemption 7(A) are Civil Rights Division records compiled in conjunction with the Office of Professional Responsibility's ongoing investigation into allegations that the Department's actions, including the voluntary dismissal of its claims against three of the four defendants in *United States v. New Black Panther Party for Self-Defense, et al.*, were influenced by political considerations. These records consist of memoranda from individual attorneys to the Office of Professional Responsibility regarding decisions made, the rationales for such decisions, and the extent and degree of individual attorney activity related to the *United States v. New Black Panther Party for Self-Defense, et al.* These materials include paper and electronic records detailing the roles of various Civil Rights Division personnel related to the Department's enforcement action, more specifically, the decision to seek a dismissal of defendants in *United States v. New Black Panther Party for Self-Defense, et al.* Any portion of these memoranda, if disclosed, could reasonably be expected to interfere with the Office of Professional Responsibility's current law enforcement proceeding and the records are therefore exempt in their entirety from access pursuant to 5 U.S.C. § 552(b)(7)(A). Individuals' responses to the pending Office of Professional Responsibility investigation includes authors' thoughts and personal recollections on litigation developments and characterizations of actions and discussions with colleagues and supervisors in the *United States v. New Black Panther Party for Self-Defense, et al.* enforcement action.

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(3) In each of these documents, the authors describe discussions among officials on litigation strategy and various litigation options and assessments of outcomes in the *United States v. New Black Panther Party for Self-Defense, et al.* enforcement action. In addition, there are summaries of internal conversations with colleagues and with supervisors reviewing merits, legal strategies, and various options for scope of proposed relief. These documents also include summaries from the law enforcement investigation including witnesses statements, research and other measures taken to determine the events around the voting intimidation incident on Election Day, November 2008, in Philadelphia, Pennsylvania. These documents include candid assessments of the evidence, opinions, and analyses of the draft documents, case law, facts, First Amendment constitutional issues, and various types and scope of relief. Disclosure of these records would reveal deliberations within the Division including detailed discussions between Voting Section management and the CRT Front Office, between Voting Section line attorneys and their supervisors, between the CRT Front Office and Office of the Associate Attorney General, and within the Division including the CRT Appellate Section. Disclosure of the memoranda would severely hamper the efficient day-to-day working of the Office of Professional Responsibility and its ability to investigate allegations of misconduct. If memoranda such as these are routinely released to the public, Department employees will be much more circumspect in their responses to the Office of Professional Responsibility. This will seriously impair the Office of Professional Responsibility's ability to foster the forthright, internal discussions necessary for efficient and proper decision making, and to reach a final resolution. Disclosure of these documents would have a chilling effect on staff who would in the future be reluctant to express their opinions to the detriment of the government's decision making process. Disclosure would also

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hamper the Office of Professional Responsibility's investigative role in reviewing allegations of misconduct. Further, as discussed above, these 14 memoranda are also exempt from access via Exemption 5, as materials protected by the deliberative process privilege and the attorney work product privilege.

(4) In addition to Exemption 7(A), the names of CRT authors who the Office of Professional Responsibility required to respond to its investigation in memoranda are also covered under Group 3 and are protected under Exemption 7(C) since an Office of Professional Responsibility investigation carries an implied stigma of potential wrongdoing regarding each employee whose actions are being reviewed.

(5) The FOI/PA Branch consulted extensively with the Division sections and offices having responsive records concerning the review and categorization of these records for purposes of asserting Exemption 7(A).

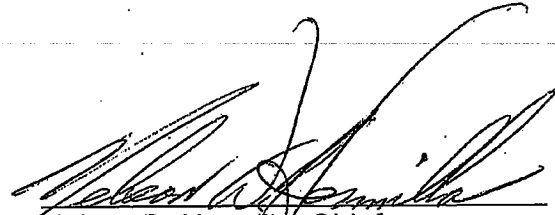
28. I have carefully reviewed the responsive documents and determined that Groups 1 - 6 contain no reasonably segregable, non-exempt information; therefore, for all six groups of documents, no segregation was possible. To the extent that certain factual "envelope" information could be disclosed to Plaintiff, such information is provided in the attached *Vaughn* index.

- 26 -

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:

November 1, 2010



Nelson D. Hermilla, Chief
FOI/PA Branch
Civil Rights Division
U. S. Department of Justice
Washington, DC 20530

Declaration of Nelson D. Hermilla

Exhibit A



U.S. Department of Justice

Executive Office for United States Attorneys
Freedom of Information/Privacy Act Staff
600 E Street, N.W., Room 7300
Washington, D.C. 20530
202-616-6757 Fax 202-616-6478

JUL 8 2009

To: Civil Rights Div.

Requester: Jenny Small

Requester Number: 09-2384

Subject of Request: New Black Panther Party

Dear FOIA/PA Contact Person:

The enclosed Freedom of Information Act/Privacy Act request was received by this office. The paragraphs checked below apply:

1. ☒ As your office may have records responsive to this request, we are referring it to you for a direct response to the requester.
2. ☐ While processing this request, we located the enclosed records which originated in your office. These records were found in the U.S. Attorney's Office files and may or may not be responsive to the request. We are referring _____ page(s) of material and a copy of the request to you for a direct response to the requester.
3. ☐ This office is also providing _____ page(s) of documents under a cover page titled "Background Information". The attached records are provided to your agency to assist in processing your records. These are not part of the referred records and should be kept as administrative records in this referral.

A copy of our final determination letter is also enclosed for your reference. Please note we have charged the requester \$ _____ for search/duplication costs incurred in the processing of this request.

We have notified the requester of this referral.

If you have any questions about this matter, please contact the FOIA/PA processor named below.

Sincerely,

William G. Stewart II
Assistant Director

Name: _____

Phone: _____

Enclosure(s)



Judicial Watch

Because no one is above the law!

FOIA
RECEIVED
2009 JUN 19 PM 4
DEPT OF JUSTICE/EO
FOIA/PRIVACY STAFF

29 May 2009

VIA CERTIFIED MAIL & FACSIMILE

FOIA/PA Mail Referral Unit
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001
(301) 583-7354
(301) 341-0772 fax
Article Number: (7009 0080 0002 2431 1797)

CIVIL RIGHTS DIVISION

JUL 14 2009 J.E.

Received by CRD
FOI/PA Branch

Re: Freedom of Information Act Request

Dear Sir/Madam:

Pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Judicial Watch, Inc. hereby requests that the Department of Justice produce any and all agency records concerning the following subjects within twenty (20) business days:

1. Any and all records pertaining to the lawsuit under the Voting Rights Act against the New Black Panther Party for Self Defense and three of its members {Malik Zulu Shabazz, Minister King Samir Shabazz, Jerry Jackson} (records include, but are not limited to, memos, correspondence, affidavits, interviews, and records concerning default judgment, excluding court filings).
2. Any and all records pertaining to the decision to end the civil complaint against the New Black Panther Party for Self Defense and three of its members (records include, but are not limited to, memos, correspondence, affidavits, interviews, records concerning default judgment, excluding court filings).¹
3. Any correspondence between the Justice Department and the New Black Panther Party for Self Defense, to include defendants X, Y & Z and/or any attorney(s) representing the defendants.

¹ Department of Justice's Press Release is attached for reference.

Department of Justice
Freedom of Information Act Request
29 May 2009
Page 2 of 5

4. Any third-party communications concerning the New Black Panther Party for Self Defense, to include defendants X, Y & Z and/or any attorney(s) representing the defendants.

Time Frame: November 2008 - Present

We call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA... The presumption of disclosure should be applied to all decisions involving FOIA.²

President Obama adds that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails." Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

For purpose of this request, the term "record" shall mean: (1) any written, printed, or typed material of any kind, including without limitation all correspondence, memoranda, notes, messages, letters, cards, telegrams, teletypes, facsimiles, papers, forms, records, telephone messages, diaries, schedules, calendars, chronological data, minutes, books, reports, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; (2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail or e-mail, meaning any electronically transmitted text or graphic communication created upon and transmitted or received by any computer or other electronic device, and all materials stored on compact disk, computer disk, diskette, hard drive, server, or tape; (3) any audio, aural, visual, or video records, recordings, or representations of any kind, including without limitation all cassette tapes, compact disks, digital video disks, microfiche, microfilm, motion pictures, pictures, photographs, or videotapes; (4) any graphic materials and data compilations

² President Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act," January 21, 2009; <http://www.whitehouse.gov/the_press_office/FreedomofInformationAct>

Department of Justice
Freedom of Information Act Request
29 May 2009
Page 3 of 5

from which information can be obtained; (5) any materials using other means of preserving thought or expression; and (6) any tangible things from which data or information can be obtained, processed, recorded, or transcribed. The term "record" also shall mean any drafts, alterations, amendments, changes, or modifications of or to any of the foregoing.

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii).

Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. In accordance with the statutory designation for a media group, Judicial Watch gathers information of potential interest, uses its editorial skills to create a distinct work, and distributes it to the public. Judicial Watch gathers information using Freedom of Information Act requests, state open records law requests, government contacts, interviews, Internet based research, book based research, and community tips. Judicial Watch distributes its distinct work using its editorial skills in its monthly newsletter *The Verdict*, its weekly e-mail publication *Weekly Update*, its blog *Corruption Chronicles*, and special reports. *The Verdict* maintains a subscription of over 120,000 and Judicial Watch's website has logged over 500,000 page views just between January 2009 and April 2009 with 2,000 unique visitors per day. *Weekly Update* reaches 25,000 people per week.

The statute also notes that government may consider an organization's past publication record. When considering Judicial Watch's past publication record, its previous media status is also relevant. Judicial Watch has been recognized as a member of the media in past FOIA litigation; See *Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006). Furthermore, Judicial Watch has consistently been recognized as a member of the news media in other FOIA requests. Within the last 6 months, Judicial Watch was designated as media by the Department of State on 27 March 2009 (200901038), Department of Homeland Security on 20 November 2008 (DHS/OS/PRIV 09-49), Federal Housing Finance Agency on 8 December 2008 (FOIA 2009-31), and Department of the Treasury on 6 January 2009 (2008-12-019).

In addition to meeting and exceeding the statutory requirements as a media organization, Judicial Watch's mission and peer recognition further qualify it for the media category. The Pew Research Center's Project for Excellence in Journalism provides that "the central purpose of journalism is to provide citizens with accurate and reliable information they need to function in a free society.... serving as watchdog and offering voice to the voiceless."¹ Judicial Watch's mission is consistent with this definition ("promotes transparency, accountability and integrity in government, politics

Department of Justice
Freedom of Information Act Request
29 May 2009
Page 4 of 5

and the law.") Furthermore, *The Hill* has recognized Judicial Watch as one of the top watchdog organizations in the country.³ In addition to the *Hill's* recognition, Judicial Watch has also been awarded press credentials and membership in journalism organizations.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to promote transparency, accountability and integrity in government, politics and the law. Its loyalty is to the truth and to the public. It uses litigation to access the truth and its publications to inform the public.

The particular records requested herein are sought as part of Judicial Watch's efforts to report the Department of Justice's decision to terminate a civil complaint against a group that engaged in voter intimidation. The *Washington Times* broke the story using court records, but it is still unclear as to why the Department of Justice cancelled the lawsuit. The publicly known facts indicate that the New Black Panther Party harassed and intimidated voters in violation of the Voting Rights Act. It is further known that the defendants failed to defend themselves and so the Department of Justice was guaranteed a victory. Furthermore, it is alleged that the career attorneys wanted to proceed in the case, but the political appointees overruled them. What political calculations and benefits would result in not pursuing justice? The documents clearly pertain to government activities as it is the duty of the Department of Justice to uphold and enforce complaints pursuant to the Voting Rights Act. Disclosure will clearly contribute to understanding why the Department of Justice has failed to fulfill its duties and activities. Disclosure will appeal to the general public who want to ensure the sanctity of the voting process. Significance will derive from presenting new facts about the lawsuit including the correspondence and decisions surrounding the termination of the civil complaint. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as an article in one of its publications.

³ <http://thehill.com/business-lobby/lobby-league-31-watchdogs-2005-02-16.html>

Department of Justice
Freedom of Information Act Request
29 May 2009
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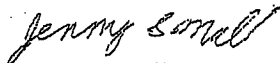
In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under the OPEN Government Act of 2007, Section 6(b).

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

In an effort to facilitate record production within the statutory time limit, Judicial Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5181 or jsmall@judicialwatch.org. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,



Jenny Small
Judicial Watch, Inc.
Researcher

ⁱ "Principles of Journalism" Pew Research Center's Project for Excellence in Journalism.
<<http://www.journalism.org/resources/principles>>.



Department of Justice

FOR IMMEDIATE RELEASE
Wednesday, January 7, 2009
WWW.USDOJ.GOV

CRT
(202) 514-2007
TDD (202) 514-1888

Justice Department Seeks Injunction Against New Black Panther Party

Lawsuit Seeks to Prohibit Voter Intimidation in Future Elections

WASHINGTON - The Justice Department today filed a lawsuit under the Voting Rights Act against the New Black Panther Party for Self-Defense and three of its members alleging that the defendants intimidated voters and those aiding them during the Nov. 4, 2008, general election.

The complaint, filed in the United States District Court in Philadelphia, alleges that, during the election, Minister King Samir Shabazz and Jerry Jackson were deployed at the entrance to a Philadelphia polling location wearing the uniform of the New Black Panther Party for Self-Defense, and that Samir Shabazz repeatedly brandished a police-style baton weapon.

"Intimidation outside of a polling place is contrary to the democratic process," said Acting Assistant Attorney General Grace Chung Becker. "The Voting Rights Act of 1965 was passed to protect the fundamental right to vote and the Department takes allegations of voter intimidation seriously."

According to the complaint, party Chairman Malik Zulu Shabazz confirmed that the placement of Samir Shabazz and Jackson in Philadelphia was part of a nationwide effort to deploy New Black Panther Party members at polling locations on Election Day. The complaint alleges a violation of Section 11(b) of the Voting Rights Act of 1965, which prohibits intimidation, coercion or threats against "any person for voting or attempting to vote." The Department seeks an injunction preventing any future deployment of, or display of weapons by, New Black Panther Party members at the entrance to polling locations.

The New Black Panther Party for Self-Defense, which claims active chapters nationwide, is distinct from the Black Panther Party founded by Bobby Seale in the 1960s.

The Civil Rights Division enforces the Voting Rights Act of 1965. To file complaints about discriminatory voting practices, including acts of harassment or intimidation, voters may call the Voting Section of the Civil Rights Division at 1-800-253-3931. More information about the Voting Rights Act and other federal voting laws is available on the Department of Justice's web site at www.usdoj.gov/crt/voting/index.htm.

###

09-014

Declaration of Nelson D. Hermilla

Exhibit B



U.S. Department of Justice
Civil Rights Division

Freedom of Information/Privacy Acts Branch - NALC
950 Pennsylvania Avenue, NW
Washington, DC-20530

NDH:CRD:SC

JUL 15 2009

Ms. Jenny Small
Judicial Watch
501 School Street, S.W., Suite 725
Washington, DC 20024

FOI/PA No.: 09-00392-F Date Received: 7/14/09

Subject of Request: Information pertaining to the lawsuit against the New Black Panther Party for Self-Defense and three of its members

Dear Requester:

This is to inform you that your request for records from the files of the Civil Rights Division was received by the Division's Freedom of Information/Privacy Acts (FOI/PA) Branch on the date indicated above. Your request has been assigned the FOI/PA number shown above. Please refer to this number in any future correspondence concerning this request. In connection with review of your FOI/PA request, the following paragraph(s) are applicable:

In searching its file for records responsive to your request,

located records that originated with the Civil Rights Division. These records were referred to the Civil Rights Division as the originating component for review and release determination. Upon completion of our review, the releasable document(s) will be sent directly to you.

XX As a result of the large number of Freedom of Information and Privacy Acts requests received by the Civil Rights Division, some delay may be encountered in processing your request. In an attempt to treat each requester fairly, we have adopted a policy of processing requests in the approximate order of receipt. Please be assured that your request is being handled as equitably as possible. We appreciate your patience and will provide you with a response at the earliest possible date.


Please note that the Civil Rights Division utilizes multi-track processing in which processing ranges from faster tracks for requests (seeking access to documents already processed for prior requests) to much slower tracks for complex requests involving voluminous amounts of responsive documents or extensive consultation. At your option, you may wish to call the number below and limit the scope of your request to enable your request to be handled in the most expeditious manner available to fulfill your interests.

Since your letter did not include authorization or a certification of identity, we will close your file for now. We will re-open your request on receipt of the required authorization forms. The Privacy Act, and the Department of Justice Privacy Act regulation, 28 C.F.R. §16.41, require each person requesting records indexed or maintained under his or her name or another person's name, to furnish the Department with proof of identity/consent to disclosure. Please complete the enclosed form and return it directly to the Freedom of Information/Privacy Acts Branch, Civil Rights Division, US Department of Justice, Washington, DC 20530.

Should you wish to appeal the identification/consent requirement, you may do so by writing, within sixty days, to the Director, Office of Information and Privacy, United States Department of Justice, 1425 New York Avenue, N.W. Building, Suite 11050, Washington, DC 20530. The envelope should be marked "FOI/PA Appeal." Following review by the Department, judicial review of the decision of the Attorney General is available in the United States District Court in the judicial district in which you reside, in which you have your principal place of business, or in the District of Columbia.

If you have any further questions, contact this office by calling (202)-514-4210.

Sincerely,


Nelson D. Hermilla, Chief
Freedom of Information/Privacy Acts Branch
Civil Rights Division

Declaration of Nelson D. Hermilla

Exhibit C



U.S. Department of Justice
Civil Rights Division

Freedom of Information/Privacy Acts Branch - NALC
950 Pennsylvania Avenue, NW
Washington, DC 20530

FOIA No. 09-00392-F

FEB 09 2010

Jenny Small, Researcher
Judicial Watch
501 School Street, S.W., Suite 725
Washington, D. C. 20024

Dear Ms. Small:

This is in further response to your May 29, 2009 Freedom of Information Act request seeking access to "...any and all records pertaining to the lawsuit ... against the New Black Panther Party for Self Defense ... any and all records pertaining to the decision to end the civil complaint. ... any correspondence between the Justice Department and the New Black Panther Party for Self Defense ... or any attorney(s) representing the defendants ... any third-party communications concerning [same]."

After an extensive search for records within the Criminal and Voting Sections, we have located numerous responsive records. Please note that this office is responsible for Civil Rights Division records only. To the extent that you may wish to seek access to records generated by any other component of the United States Department of Justice, you may wish to send a FOIA request directly to that component. This office is referring your request to the Office of Information Policy for further processing regarding any records originating in the Attorney General's Office.

As you are aware, the Civil Rights Division, Voting Section is currently involved in an open law enforcement action in the *U. S. v. New Black Panther Party for Self-Defense, et al.*, Civ. No. 2:09-cv-00065-SD, (E.D. Pa.).

This enforcement action is:

- (1) pending, and
- (2) disclosure of the records related thereto could reasonably be expected to interfere with this pending enforcement action;

therefore, I have determined that access to the majority of the records related to this pending action should be denied pursuant to 5 U.S.C. § 552(b)(7)(A). I have also determined that many of the records that are exempt from access pursuant to 5 U.S.C. § 552(b)(7)(A) should also be denied pursuant to:

1. 5 U.S.C. § 552(b)(5) since the records consist of predecisional deliberative material and attorney work product;

-2-

2. 5 U.S.C. § 552(b)(7)(C) since disclosure of portions of the records could reasonably be expected to constitute an unwarranted invasion of personal privacy;
3. 5 U.S.C. § 552(b)(7)(D) since disclosure of portions of the records could reasonably be expected to disclose the identity of confidential sources and confidential information;
4. 5 U.S.C. § 552(b)(7)(F) since disclosure of some portions of records could reasonably be expected to endanger the life or physical safety of individuals.

Enclosed are the only records that are immediately available. These records are available because the documents are either already part of the public domain or because the content of the records, if disclosed, would not interfere with the Civil Rights Division's currently pending matters and are as follows:

1. Copies of pleadings and filings related to *United States v. New Black Panther Party for Self-Defense*, E.D. Pa. Civ. No. 2:09-cv-00065-SD.
2. Copies of email and correspondence from the court related to *United States v. New Black Panther Party for Self-Defense*.
3. Letters to the Defendants from the Department of Justice
4. Letter to the Department of Justice from a Member of Congress and the Civil Rights Division's response.

The records responsive to your request contain additional public records such as news articles. These records are not included since we have assumed that you may already have access to the media accounts of this matter. Should you wish to obtain copies of any further public type records, please do not hesitate to contact this office by calling 202-514-4210.

In searching for records responsive to your request, this office located records that originated with other components and other federal agencies. In accordance with Department of Justice regulations, 28 C.F.R. § 16.1, *et seq.*, this office has referred your request and copies of the records to the appropriate offices from which you may expect an additional response. Further inquiry regarding these referrals should be directed to the following individuals:

Carmen Mallon, Chief of Staff
Office of Information Policy
United States Department of Justice
1425 New York Ave., N.W., Suite 11050
Washington, D. C. 20530-0001

-3-

David M. Hardy
Records/Information Dissemination
Records Management Division
Federal Bureau of Investigation
107 Marcel Drive
Winchester, VA 20534

Emma Monroig, FOIA Officer
United States Commission on Civil Rights
624 Ninth Street, N.W., Rm. 621
Washington, D. C. 20425

Should you wish to appeal my decision with respect to your request, you may do so by writing, within sixty days, to: Director, Office of Information Policy (OIP), United States Department of Justice, 1425 New York Avenue, Suite 11050, N.W., Washington, D.C. 20530. The envelope should be marked "FOI/PA Appeal." The Appeal must be received by OIP within 60 days of the date of this letter. Following review by the Department, judicial review of the decision of the Attorney General is available in the United States District Court in the judicial district in which you reside, in which you have your principal place of business, or in the District of Columbia.

I hope this information has been of some assistance to you in this matter.

Sincerely,

Nelson D. Hermilla, Chief
Freedom of Information/Privacy Acts Branch
Civil Rights Division

Declaration of Nelson D. Hermilla

Exhibit D

Judicial Watch v. Department of Justice
Civ. Action No. 10-851

Index of CRT Withholdings Challenged by Judicial Watch

Grp. No.	Doc. No.		Document Type	Author/From	To	Date	Exemption	Description of Withheld Information
1	2	a	Email chain	Steve Rosenbaum*	Chris Coates*	4/29/09	(b)(5)	Supervising Acting DAAG’s review and email response to the draft filings for the continuing NBPP litigation and his request for additional supporting video evidence from the Section Chief. The supporting video evidence relates to specific defendants and the Acting DAAG wants to make a candid assessment of the quality of the evidence prior to making recommendations on merits, legal strategies, and proposed relief.
1	4	a	Email chain	Steve Rosenbaum*	Loretta King*	4/29/09	(b)(5)	Supervising Acting DAAG’s detailed email response to his supervising Acting AAG with his analysis of the proposed draft filings for continuing NBPP litigation discussing the merits, legal strategies, legal issues, and proposed relief. Acting DAAG makes a candid assessment of legal research and has substantive questions on the case law and breadth of proposed relief and drafted in anticipation of the May 1 filing date for the motion and memorandum for entry of a default judgment. This document also contains attorney discussion, opinions, and analyses of the draft documents and case law and drafted in anticipation of filing the motion and memorandum for entry of default judgment due on May 1 st .
		b		Steve Rosenbaum*	Chris Coates*	4/29/09		
		c		Chris Coates*	Steve Rosenbaum*	4/28/09		
1	5	a	Email Chain	Loretta King*	Steve Rosenbaum*	4/29/09	(b)(5)	Supervising Acting AAG emails with questions to discuss with the Acting DAAG after her review of the proposed draft filings in continuing NBPP litigation discussing the merits, legal strategies, legal issues, and proposed relief.
1	6	a	Email Chain	Chris Coates*	Steve Rosenbaum* Christian Adams* Spencer Fisher*	4/29/09	(b)(5)	Section Chief emails to the supervising Acting DAAG requesting prompt discussion to respond to the Acting DAAG’s detailed questions and analysis of the proposed draft filings for continuing NBPP litigation on the merits, legal strategies and issues, constitutional issues, and proposed relief.
1	7	a	Email Chain	Chris Coates*	Steve Rosenbaum*	4/29/09	(b)(5)	Section Chief emails to supervising Acting DAAG that VOT Section is working on responses to the supervisor’s detailed analysis and questions regarding the draft filings for pending NBPP litigation on the merits, legal strategies, legal issues, constitutional issues, and proposed relief. This includes a discussion of First Amendment issues and breadth of underlying statutory enforcement authority between the Voting Section management and supervisors in CRT Front Office.

Judicial Watch v. Department of Justice
Civ. Action No. 10-851

Index of CRT Withholdings Challenged by Judicial Watch

Grp. No.	Doc. No.		Document Type	Author/From	To	Date	Exemption	Description of Withheld Information
1	12	a	Email Chain	Steve Rosenbaum*	Chris Coates*	4/30/09	(b)(5)	Supervising Acting DAAG emails response to Section Chief with his frank assessment of the case law and opinion that additional research must be conducted to support the proposed legal strategies and theories. The Section Chief responds with summaries of several different cases regarding different legal points previously raised. This document contains deliberations between the CRT Front Office and Voting Section Management.
		b		Chris Coates*	Steve Rosenbaum*	4/30/09		
1	13	a	Email	Steve Rosenbaum*	Sam Hirsch*	4/30/09		Email from Acting DAAG to DASG with responsibility for CRT forwarding the Acting DAAG's detailed response and analysis of the proposed draft filings in continuing NBPP litigation discussing the merits, legal strategies, and legal issues including constitutional issues. The documents were drafted in anticipation of filing the motion and memorandum for entry of default judgment due on May 1 st . Acting DAAG makes a candid assessment of legal research and has substantive questions on the case law and breadth of proposed relief.
1	14	a	Email	Steve Rosenbaum*	Sam Hirsch*	4/30/09	(b)(5)	Email from Acting DAAG to DASG with responsibility for CRT forwarding the Acting DAAG's detailed response and analysis of the proposed draft filings in continuing NBPP litigation discussing the merits, legal strategies, and legal issues including constitutional issues. Acting DAAG makes a candid assessment of legal research and has substantive questions on the case law and breadth of proposed relief.

Judicial Watch v. Department of Justice
Civ. Action No. 10-851

Index of CRT Withholdings Challenged by Judicial Watch

Grp. No.	Doc. No.		Document Type	Author/From	To	Date	Exemption	Description of Withheld Information
1	17	c		Sam Hirsch*	Steve Rosenbaum*	4/30/09	(b)(5)	DASG requested the Acting DAAG's personal contact information to discuss the proposed draft documents for NBPP litigation. Emails between Acting DAAG and supervising DASG with responsibility for CRT discussing draft documents and legal strategy and merits of NBPP litigation and providing his analyses and opinion of the development of different approaches under consideration.
		d		Sam Hirsch*	Steve Rosenbaum*	4/30/09		
		e		Steve Rosenbaum*	Sam Hirsch*	4/30/09		
		f		Sam Hirsch*	Steve Rosenbaum*	4/30/09		
1	20	a	Email Chain	Chris Coates*	Loretta King* Steve Rosenbaum*	5/4/09	(b)(5)	Emails from Voting Section Chief and Deputy to their supervisors in CRT Front Office Management with candid statements about an earlier meeting discussing specific factual matters and to clarify issues in the draft memorandum of law for the NBPP litigation. The email also provided additional information to correct alleged inaccuracies.
		b		Robert Popper*	Chris Coates*	5/4/09		
1	22	a	Email Chain	Steve Rosenbaum*	Diana Flynn*	5/7/09	(b)(5)	Acting DAAG forwarding draft Memorandum on Proposed Injunction Order for Appellate Section's review, legal assessment and recommendations on the merits, legal strategies, and potential course of actions proposed by VOT Section in the pending NBPP litigation. The memorandum discusses the quality of evidence as related to each defendant as well as the breadth of statutory authority for enforcement and the expansive relief that is sought. This document is predecisional, deliberative containing analyses and discussion exchanged between the VOT Section Management and attorneys, to their supervising Acting DAAG in the Office of the Acting AAG.

Judicial Watch v. Department of Justice
Civ. Action No. 10-851

Index of CRT Withholdings Challenged by Judicial Watch

Grp. No.	Doc. No.		Document Type	Author/From	To	Date	Exemption	Description of Withheld Information
1	23	a	Email	Steve Rosenbaum*	Diana Flynn*	5/7/09	(b)(5)	Acting DAAG forwarding additional documents for CRT Appellate Section's review, including the Acting DAAG's analyses and opinion of the development of different approaches under consideration in NBPP litigation. Email contains the Acting DAAG's candid assessment of legal research with substantive questions on the case law and breadth of proposed relief. This document is predecisional and contains deliberations between the CRT Front Office and the request for Appellate Section's internal legal opinions and recommendations on the merits, legal strategies, constitutional issues, and potential course of actions proposed by VOT Section in the pending NBPP litigation for documents to be finalized for filing on May 15th.
1	24	a	Email Chain	Steve Rosenbaum*	Diana Flynn*	5/7/09	(b)(5)	Acting DAAG forwarding additional documents for CRT Appellate Section's review, including the Acting DAAG's analyses and opinion of the development of different approaches under consideration in NBPP litigation and VOT Section's responses. The Acting DAAG makes a candid assessment of legal research and has substantive questions on the case law and breadth of proposed relief. This document is predecisional and contains deliberations between the CRT Front Office and VOT Section. The Acting DAAG requests Appellate Section's internal legal opinions and recommendations on the merits, legal strategies, constitutional issues, potential course of actions proposed by VOT Section in the pending NBPP litigation, and a summary of relevant case law.
		b		Steve Rosenbaum*	Chris Coates*	4/30/09		
		c		Chris Coates*	Steve Rosenbaum*	4/29/09		
1	25	a	Email	Steve Rosenbaum*	Diana Flynn*	5/7/09	(b)(5)	The Acting DAAG forwarding additional documents for CRT Appellate Section's review, including the Acting DAAG's analyses and opinion of the development of different approaches under consideration in NBPP litigation and VOT Section's analysis and detailed responses to the Acting DAAG's questions on the merits, including an assessment of the case law and various legal strategies and options available. There is also a discussion of relevant First Amendment issues and necessary scope of proposed relief.

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1	26	a	Email Chain	Steve Rosenbaum*	Diana Flynn*	5/7/09	(b)(5)	The Acting DAAG forwarding revised draft pleadings from VOT Section for CRT Appellate Section's review, legal opinions, and recommendations on proposed changes to the legal strategies, merits, constitutional issues, and proposed relief. These changes include a narrowly tailored scope of relief against particular defendants and various types of requested relief. Further, the revisions include a discussion of legal research regarding a limited injunction and First Amendment issues.
		b		Chris Coates*	Loretta King*	5/1/09		
1	27	a	Email	Steve Rosenbaum*	Diana Flynn*	5/7/09	(b)(5)	The Acting DAAG forwarding additional legal research from VOT Section for CRT Appellate Section's review and recommendations including the development of different approaches, potential course of actions, and scope of relief under consideration in NBPP litigation.
1 and 3	28	a	Email Chain	Steve Rosenbaum*	Diana Flynn*	5/7/09	(b)(5) and (b)(7)(C)	The Acting DAAG forwarding witness statements and information on video evidence for CRT Appellate Section's review and recommendations as supporting evidence in NBPP litigation. This document is predecisional and contains deliberations between the CRT Front Office and the request for Appellate Section's legal opinions and recommendations on the merits, legal strategies, constitutional issues, and potential course of actions proposed by VOT Section in the pending NBPP litigation and anticipated filing on May 15th.
		b		Robert Popper*	Chris Coates* Steve Rosenbaum*	4/30/09		

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1	30	a	Email Chain	Steve Rosenbaum*	Loretta King*	5/7/09	(b)(5)	Acting DAAG’s email to the supervising Acting AAG’s responding to her questions on merits and clarification of facts based on his analysis of evidence and time line. He has additional questions about the supporting evidence and possible discrepancies. This document is predecisional, deliberative containing analyses and discussions between the Acting AAG and the Acting DAAG in CRT Front Office. It also contains analyses and discussions among the Voting Section staff, and also between the Voting Section staff and IT staff on access and viewing supporting factual evidence. The supporting video evidence relates to specific defendants.
		b		Loretta King*	Steve Rosenbaum*	5/7/09		
		c		Steve Rosenbaum*	Loretta King*	5/7/09		
		d		IT Staff	Christian Adams* Spencer Fisher* Robert Popper* IT Staff Chris Coates* Steve Rosenbaum*	5/7/09		
		e		Spencer Fisher*	IT Staff	5/7/09		
		f		Robert Popper*	Christian Adams* Spencer Fisher*	5/7/09		

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		g		Steve Rosenbaum*	Robert Popper*	5/7/09		
		h		Robert Popper*	Chris Coates* Steve Rosenbaum*	4/30/09		
1	32	a	Email Chain	Steve Rosenbaum*	Loretta King*	5/7/09	(b)(5)	The Acting DAAG emails to supervising Acting AAG forwarding his inquiry to VOT Section Chief discussing the evidence and time line, requesting clarification of facts, and asking questions on the merits and underlying evidence and requesting additional information. This document is predecisional, deliberative containing analyses and discussions between VOT Section management and the supervising Acting AAG and acting DAAG in CRT Front Office.
		b		Steve Rosenbaum*	Chris Coates*	5/7/09		
1	34	a	Email Chain	Steve Rosenbaum*	Chris Coates*	5/8/09	(b)(5)	Supervising Acting DAAG to VOT Section Chief requesting further research on legal issues and clarification of facts and timeline and suggesting other avenues of research.
		b		Chris Coates*	Steve Rosenbaum*	5/8/09		
1	35	a	Email	Chris Coates*	Steve Rosenbaum*	5/8/09	(b)(5)	Section Chief to Supervising Acting DAAG that VOT Section will conduct additional research on legal issues and clarify factual issues regarding NBPP statements, analysis of evidence and clarification of time line.
1	36	a	Email	Steve Rosenbaum*	Sam Hirsch*	5/8/09	(b)(5)	Acting DAAG forwarding to DASG with responsibility for CRT the draft remedial memorandum which discusses the quality of evidence as related to each defendant as well as the breadth of statutory authority for enforcement and the expansive relief that is sought. The DASG was also

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								given notice that CRT Appellate Section’s analysis and opinion of draft documents and legal strategy was requested.
1	39	a	Email Chain	Steve Rosenbaum*	Diana Flynn*	5/11/09	(b)(5)	Acting DAAG forwarding additional information on NBPP evidence, timeline, and clarification of factual evidence for CRT Appellate Section’s review, under consideration in NBPP litigation. The CRT Front Office requested Appellate Section’s opinions and recommendations on the merits, legal strategies, constitutional issues, and potential course of actions proposed by VOT Section in the pending NBPP litigation.
		b		Chris Coates*	Steve Rosenbaum*	5/11/09		
		c		Steve Rosenbaum*	Chris Coates*	5/8/09		
		d		Chris Coates*	Steve Rosenbaum*	5/8/09		
		e		Steve Rosenbaum*	Chris Coates*	5/7/09		
		f		Chris Coates*	Loretta King*	5/6/09		
1	40	a	Email Chain w/ attachments	Steve Rosenbaum*	Marie McElderry*	5/11/09	(b)(5)	Supervising Acting DAAG’s response to CRT Appellate Section attorney and resent copies of proposed draft documents for Appellate Section’s review and legal advice. This is a request for Appellate Section’s internal legal opinions and recommendations on the merits, legal strategies, constitutional issues, and potential course of actions proposed by VOT Section in the pending NBPP litigation.
		b		Chris Coates*	Loretta King*	5/6/09		

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		c	Draft Memorandum	Chris Coates* Robert Popper* Christian Adams* Spencer Fisher*	Loretta King*	5/6/09		Email attachment has the draft memorandum on proposed injunctive relief.
1	42	a	Email	Steve Rosenbaum*	Loretta King*	5/11/09	(b)(5)	Acting DAAG to supervising Acting AAG summarizing his analyses and various discussions with VOT Section on legal issues and merits and expressing his frank statements about the quality of evidence and representations of facts and case law. This document contains predecisional, deliberations between CRT Front Office senior management.
1	44	a	Email	Steve Rosenbaum*	Sam Hirsch*	5/11/09	(b)(5)	Acting DAAG to DASG with responsibility for CRT with additional information and research for his review including NBPP statements and posting on web sites and timeline evidence.
1	47	a	Email Chain	Marie McElderry*	Steve Rosenbaum*	5/11/09	(b)(5)	CRT Appellate Section attorney to supervising Acting DAAG with candid statement of her opinion about the proposed relief and scope with detailed discussions on the merits, legal strategies and remedies. This document is predecisional and contains deliberations between CRT Front Office and Appellate Section.
		b		Steve Rosenbaum*	Marie McElderry*	5/11/09		
		c		Marie McElderry*	Steve Rosenbaum*	5/11/09		
		d		Steve Rosenbaum*	Marie McElderry*	5/11/09		
		e		Marie McElderry*	Steve Rosenbaum*	5/11/09		

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1	49	a	Email Chain	Steve Rosenbaum*	Sam Hirsch*	5/11/09	(b)(5)	Acting DAAG forwarding to DASG with responsibility for CRT with summary of his analyses and various discussions with VOT Section on legal issues and merits and expressing his frank statements about the quality of evidence and representations of facts and case law. This document is predecisional and contains deliberations between CRT Front Office and VOT Section management.
		b		Steve Rosenbaum*	Loretta King*	5/11/09		
		c		Chris Coates*	Steve Rosenbaum*	5/11/09		
1	50	a	Email Chain	Steve Rosenbaum*	Sam Hirsch*	5/12/09	(b)(5)	Acting DAAG to DASG with responsibility for CRT with requested follow-up information and confirmation that additional actions would be conducted in the investigation and identifying that actions would be taken by another Section Chief as requested.
		b		Sam Hirsch*	Steve Rosenbaum*	5/11/09		
		c		Steve Rosenbaum*	Sam Hirsch*	5/11/09		
		d		Sam Hirsch*	Steve Rosenbaum*	5/11/09		
1	52	a	Email	Steve Rosenbaum*	Loretta King*	5/13/09	(b)(5)	Acting DAAG to supervising Acting AAG forwarding emails from CRT Appellate Section Chief and CRT Appellate attorney with their detailed legal analyses including the application of constitutional provisions and judicial precedent to strategies and relief under consideration in the ongoing NBPP litigation, as well as an assessment of the strength of potential legal arguments, and presenting different possible scenarios in the litigation.

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1	55	a	Email Chain	Steve Rosenbaum*	Loretta King*	5/13/09	(b)(5)	Acting DAAG advising his supervising Acting AAG of DASG’s request for a memorandum by the Acting DAAG reviewing various options, legal strategies, and different proposals of relief as related to each separate defendant. Acting DAAG forwarding emails from Appellate Section Chief’s and Appellate Attorney’s with their detailed legal analyses including the application of constitutional provisions and judicial precedent to strategies and relief under consideration in the ongoing NBPP litigation, as well as an assessment of the strength of potential legal arguments, and presenting different possible scenarios in the litigation.
		b		Steve Rosenbaum*	Sam Hirsch*	5/13/09		
		c		Sam Hirsch*	Steve Rosenbaum*	5/13/09		
		d		Steve Rosenbaum*	Sam Hirsch*	5/13/09		
		e		Diana Flynn*	Steve Rosenbaum*	5/13/09		
		f		Marie McElderry*	Diana Flynn*	5/12/09		
1	57	a	Email	Steve Rosenbaum*	Sam Hirsch*	5/14/09	(b)(5)	Acting DAAG to DASG with responsibility for CRT forwarding revised proposed draft documents for review and analysis of the draft filings for pending NBPP litigation on the merits, legal strategies, legal issues, constitutional issues, and proposed relief. The proposed filings discuss the quality of evidence as related to each defendant, the statutory authority for enforcement, consideration of First Amendment issues, and proposed scope of relief against the defendants.

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1	59	a	Email Chain	Steve Rosenbaum*	Diana Flynn*	5/14/09	(b)(5)	Acting DAAG forwarding revised proposed draft documents to CRT Appellate Section requesting advice and opinions on the merits, legal strategies, legal issues, constitutional issues, and proposed relief for pending NBPP litigation. The proposed filings discuss the quality of evidence as related to each defendant, the statutory authority for enforcement, consideration of First Amendment issues, and the proposed scope of relief against the defendants.
		b		Steve Rosenbaum*	Loretta King*	5/14/09		
		c		Chris Coates*	Steve Rosenbaum*	5/14/09		
1 and 3	60	a	Email Chain	Chris Coates*	Steve Rosenbaum*	5/15/09	(b)(5) and (b)(7)(C)	VOT Section Chief's and Deputy's response to their supervising Acting DAAG for additional information on merit and legal strategies and supporting evidence. This document summarizes several different witness statements and analyzes the evidence. This document is predecisional and contains deliberations between the VOT Section Chief and his supervising Acting AAG.
		b		Robert Popper*	Chris Coates*	5/15/09		
		c		Steve Rosenbaum*	Chris Coates*	5/15/09		
1	63	a	Email Chain	Steve Rosenbaum*	Diana Flynn*	5/15/09	(b)(5)	Acting DAAG to CRT Appellate Section discussing the most recent proposal for the draft pleadings, legal strategies, and scope of the proposed relief type. This document is predecisional and contains deliberations between CRT Front Office and Appellate Section. Acting DAAG forwarding emails from Appellate Section Chief's and Appellate Attorney's with their detailed legal analyses including the application of constitutional provisions and judicial precedent to strategies and relief under consideration in the ongoing NBPP litigation, as well as an assessment of the strength of potential legal arguments, and different possible scenarios in the litigation.
		b		Diana Flynn*	Steve Rosenbaum*	5/15/09		
		c		Marie McElderry*	Diana Flynn*	5/15/09		
1	64	a	Email	Steve Rosenbaum*	Chris Coates*	5/15/09	(b)(5)	Acting DAAG's response to VOT Section Chief on parameters and scope of relief in the draft motion. This document is predecisional and contains deliberations between the VOT Section Chief and his supervising Acting AAG.

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1	65	a	Email Chain	Steve Rosenbaum*	Chris Coates* Loretta King*	5/15/09	(b)(5)	Acting DAAG's response to VOT Section Chief discussing legal effect of procedural rules and scope of relief in the draft motion. This document is predecisional and contains deliberations between the VOT Section Chief and his supervising Acting AAG.
		b		Steve Rosenbaum*	Chris Coates* Loretta King*	5/15/09		
		c		Chris Coates*	Steve Rosenbaum* Loretta King*	5/15/09		
1	67	a	Email Chain	Steve Rosenbaum*	Sam Hirsch*	5/15/09	(b)(5)	Acting DAAG forwarded to DASG with responsibility for CRT the proposed pleadings drafted in anticipation for filing the motion and memorandum for default on May 15 th . The proposed filings discuss the dismissal of claims against three defendants, the statutory authority for enforcement, First Amendment issues, and proposed scope of relief against the remaining defendant.
		b		Chris Coates*	Loretta King* Steve Rosenbaum*	5/15/09		
1	68	a	Email	Steve Rosenbaum*	Loretta King* Sam Hirsch*	5/15/09	(b)(5)	Acting DAAG's analysis and revisions to the proposed draft order for entry of default judgment to his supervising Acting AAG and DASG. This document is predecisional and contains deliberations between the Acting DAAG and his supervisors in CRT Front Office and DASG and drafted in anticipation of filing on May 15th.
1	69	a	Email	Steve Rosenbaum*	Loretta King* Sam Hirsch*	5/15/09	(b)(5)	Acting DAAG's analysis and revisions to the proposed notice of dismissal and motion and memorandum for entry of default judgment to his supervising Acting AAG and DASG. This document is predecisional and contains deliberations between the Acting DAAG and his supervisors in CRT Office of the Acting AAG and DASG. This document also contains attorney discussion, opinions, and analyses of the draft documents and case law and is exempt under attorney work product privilege and drafted in anticipation of filing on May 15th.

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1	70	a	Email	Steve Rosenbaum*	Chris Coates*	5/15/09	(b)(5)	Acting DAAG's further analysis, review and revisions to several draft documents and forwarding to VOT Section for review on substantive issues, to proof, and finalize in anticipation of the May 15 th filing with the court.
1	74	a	Email Chain	Steve Rosenbaum*	Chris Coates* Robert Popper*	5/15/09	(b)(5)	Acting DAAG's response to VOT Section Chief and VOT Deputy Chief containing revised legal strategy and omitting witness statements in anticipation of the May 15 th filing with the court.
		b		Robert Popper*	Steve Rosenbaum* Chris Coates*	5/15/09		
		c		Steve Rosenbaum*	Chris Coates*	5/15/09		
1	81	a	Email Chain	Chris Coates*	Chris Herren*	5/15/09	(b)(5)	VOT Section Chief to VOT Deputy Chief describing the supervising Acting AAG's and the Acting DAAG's most recent proposals on legal strategy and scope of relief regarding particular defendants in the NBPP case.
1	82	a	Email Chain	Steve Rosenbaum*	Loretta King*	5/22/09	(b)(5)	Acting DAAG to supervising Acting AAG forwarding copies of Acting DAAG's comments and candid concerns on merit, legal strategies, and scope of relief in VOT Section's proposed pleadings in April.

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2	37	a	Email Chain	Robert Popper*	Kathy Anderson	5/11/09	(b)(5)	This document is from CRT Office of the Acting AAG staff to the Voting Section requesting draft language about filing the proposed motion for default judgment in NBPP litigation for an internal report.
		b		John Russ	Kathy Anderson Robert Popper*	5/11/09		
		c		Kathy Anderson	John Russ*	5/11/09		
3 (and 1)	28	a	Email Chain	Steve Rosenbaum*	Diana Flynn*	5/7/09	(b)(5) and (b)(7)(C)	Acting DAAG forwarding witness statements and information on video evidence for CRT Appellate Section’s review for consideration as supporting evidence in NBPP litigation. This document is predecisional and contains deliberations between the CRT Front Office and the request for Appellate Section’s internal legal opinions and recommendations on the merits, legal strategies, constitutional issues, and potential course of actions proposed by VOT Section in the pending NBPP litigation.
		b		Robert Popper*	Chris Coates* Steve Rosenbaum*	4/30/09		
3 (and 1)	60	a	Email Chain	Chris Coates*	Steve Rosenbaum*	5/15/09	(b)(5) and (b)(7)(C)	Section Chief’s response to his supervising Acting DAAG for additional information on merit and supporting evidence and summarizing several different witness statements in which witnesses are identified by name.
		b		Robert Popper*	Chris Coates*	5/15/09		
		c		Steve Rosenbaum*	Chris Coates*	5/15/09		

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4	80	a	Email	Steve Rosenbaum*	Helaine Greenfeld* Andrew Kline*	5/18/09	(b)(5)	Acting DAAG advised his supervisor that final versions of pleadings were filed with court and provided copies of documents. The document advises of a final order in the NBPP litigation and discusses nature of the relief. This document is deliberative since it shows details and facts related to the Department process and also contains attorney discussion, opinions, and comments and facts related to distribution. The email provides additional comment and characterization of the nature of the case and the relief sought. The email also shows details and facts related to the nomination process in the Department.
5	83	a	Email Chain	Steve Rosenbaum*	Sam Hirsch* Alejandro Miyar	5/28/09	(b)(5)	Acting DAAG's comments to DASG with responsibility for CRT and comments to OPA on publicity about NBPP litigation and legal analysis of default judgments and inaccuracies of the stated facts in the NBPP case. The email provides additional comments and characterization of the case.
		b		Steve Rosenbaum*	Sam Hirsch* Alejandro Miyar	5/28/09		
		c		Sam Hirsch*	Alejandro Miyar Steve Rosenbaum*	5/28/09		
		d		Alejandro Miyar	Steve Rosenbaum* Sam Hirsch*	5/28/09		

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5	84	a	Email Chain	Steve Rosenbaum*	Alejandro Miyar Sam Hirsch*	5/28/09	(b)(5)	Acting DAAG's comments to DASG with responsibility for CRT and to OPA that internal deliberative discussions are protected and legal analysis of facts and law in the NBPP case. The email provides additional comments and characterization of the case.
		b		Alejandro Miyar	Sam Hirsch* Steve Rosenbaum*	5/28/09		
		c		Sam Hirsch*	Steve Rosenbaum* Alejandro Miyar	5/28/09		
5	85	a	Email Chain	Steve Rosenbaum*	Tracy Schmalder Sam Hirsch* Alejandro Miyar	5/28/09	(b)(5)	Acting DAAG's comments to DASG with responsibility for CRT and to OPA on reasons for dismissal of defendants in NBPP litigation and legal analysis of dismissals and legal obligations of DOJ. The email provides additional comments and characterization of the case.
		b		Tracy Schmalder	Alejandro Miyar Sam Hirsch* Steve Rosenbaum*	5/28/09		

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		c		Alejandro Miyar	Tracy Schmalder Sam Hirsch* Steve Rosenbaum*	5/28/09		
		d		Tracy Schmalder	Alejandro Miyar	5/28/09		
6 (and 3)	86		Memorandum	CRT Employee	Mary Patrice Brown*	9/25/09	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	87		Memorandum	CRT Employee	Mary Patrice Brown*	10/7/09	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	88		Memorandum	CRT Employee	Mary Patrice Brown*	10/2/09	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	89		Memorandum	CRT Employee	Mary Patrice Brown*	10/8/09	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.

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6 (and 3)	90		Draft Memorandum	CRT Employee	Mary Patrice Brown*	undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	91		Draft Memorandum	CRT Employee	Mary Patrice Brown*	undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	92		Draft Memorandum	CRT Employee	Mary Patrice Brown*	undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	93		Draft Memorandum	CRT Employee	Mary Patrice Brown*	undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.

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6 (and 3)	94		Memorandum	CRT Employee	Mary Patrice Brown*	undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	95		Draft Memorandum	CRT Employee	Mary Patrice Brown*	Undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	96		Draft Memorandum	CRT Employee	Mary Patrice Brown*	Undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	97		Draft Memorandum	CRT Employee	Mary Patrice Brown*	Undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual's Response to pending OPR investigation which includes author's thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.

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Grp. No.	Doc. No.		Document Type	Author/From	To	Date	Exemption	Description of Withheld Information
6 (and 3)	98		Draft Memorandum	CRT Employee	Mary Patrice Brown*	Undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual’s Response to pending OPR investigation which includes author’s thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.
6 (and 3)	99		Draft Memorandum	CRT Employee	Mary Patrice Brown*	Undated	(b)(5), (b)(7)(A), and (b)(7) (C)	Individual’s Response to pending OPR investigation which includes author’s thoughts on litigation developments and characterizations of actions and discussions with colleagues in the NBPP litigation. Author describes discussions among officials on litigation strategy and various litigation options and assessments of outcomes.

Judicial Watch v. Department of Justice
Civ. Action No. 10-851

Index of CRT Withholdings Challenged by Judicial Watch

List of Acronyms:

DASG - Deputy Associate Attorney General	AAAG - Acting Assistant Attorney General of Civil Rights Division
OPA - Office of Public Affairs	ADAAG - Acting Deputy Assistant Attorney General of Civil Rights Division
OPR - Office of Professional Responsibility	Appellate - Appellate Section of Civil Rights Division
CRT - Civil Rights Division	NBPP - New Black Panther party
VOT - Voting Section of Civil Rights Division	
AWP - Attorney Work Product Privilege	
DPP - Deliberative Process Privilege	

CRT AAG/Front Office

Loretta King, Acting Assistant Attorney General (former)
Steve Rosenbaum, Acting Deputy Assistant Attorney General (former)
Kathy Anderson, Special Assistant to Acting Assistant Attorney General

Appellate Section

Diana Flynn, Chief of Appellate Section
Marie McElderry, Senior Appellate Attorney (now retired)

Voting Section

Chris Coates, Chief (former)
Rebecca Wertz, Principal Deputy
Robert Popper, Deputy Chief
Chris Herren, Deputy Chief
J. Christian Adams, Trial Attorney (now resigned)
Spencer Fisher, Trial Attorney
John Russ, Trial Attorney

Criminal Section

Andrew Kline, Special Litigation Counsel

Office of Public Affairs

Tracy Schmalzer
Alejandro Mijar

Office of Professional Responsibility

Mary Patrice Brown, Counsel

Office of Associate Attorney General

Helaine Greenfeld, Deputy Associate Attorney General
Sam Hirsch, Deputy Associate Attorney General

Note: Attorneys listed in the index are designated with an asterisk at the end of their names.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 10-00851 (RBW)

DECLARATION OF VANESSA R. BRINKMANN

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1) I am the Counsel to the Initial Request (IR) Staff of the Office of Information Policy (OIP), United States Department of Justice. In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from seven senior leadership offices of the Department of Justice, specifically the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy, Legislative Affairs, Intergovernmental and Public Liaison, and Public Affairs. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within the Department of Justice, as well as with other Executive Branch agencies.

2) I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

Plaintiff's Initial FOIA Request

3) By letter dated May 29, 2009, Jenny Small, on behalf of plaintiff Judicial Watch, Inc., submitted a FOIA request addressed to the Department of Justice, Justice Management Division, FOIA/Privacy Act Mail Referral Unit, for records pertaining to: (1) "the lawsuit under the Voting Rights Act against the New Black Panther Party for Self Defense and three of its members {Malik Zulu Shabazz, Minister King Samir Shabazz, Jerry Jackson}," (2) "the decision to end the civil complaint against the New Black Panther Party for Self Defense and three of its members," (3) "[a]ny correspondence between the Justice Department and the New Black Panther Party for Self Defense," and (4) "[a]ny third-party communications concerning the New Black Panther Party for Self Defense." The time period specified was November 2008 through the present. This letter was ultimately referred to the Department's Civil Rights Division (CRT), and was received by CRT July 14, 2009. (A copy of plaintiff's May 29, 2009 letter is attached hereto as Exhibit A.)

4) Upon discussion with OIP, CRT referred plaintiff's FOIA request to OIP. OIP received plaintiff's FOIA request by e-mail on January 4, 2010, and initiated processing of plaintiff's FOIA request on behalf of the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), Legal Policy (OLP), Legislative Affairs (OLA), Intergovernmental and Public Liaison (OIPL), and Public Affairs (PAO).

5) By letter dated January 15, 2010, OIP acknowledged receipt of plaintiff's FOIA request on behalf of OAG, ODAG, OASG, OLP, OLA, OIPL, and PAO. In addition, OIP advised plaintiff that the Department was in receipt of multiple FOIA requests and, in an effort to

facilitate OIP's response to plaintiff's request, OIP had interpreted the scope to be limited to "records concerning the Department's decision to seek a dismissal of defendants in *U.S. v. New Black Panther Party for Self Defense*" [hereinafter "NBPP litigation"].¹ Additionally, this January 15, 2010 letter advised plaintiff that OIP had completed its record searches in OASG and in the electronic database of the Departmental Executive Secretariat, which is the official records repository for OAG, ODAG and OASG, and which also maintains some OLA records, and that sixty-nine responsive documents, totaling 135 pages, were located. OIP advised plaintiff that all of this material was being withheld in full pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552 (b)(5), which pertains to certain inter- and intra-agency communications protected by the deliberative process and attorney work-product privileges.² Finally, OIP advised plaintiff that searches were continuing in OAG, ODAG, OLP, OLA, OIPL and PAO. (A copy OIP's January 15, 2010 letter to plaintiff is attached hereto as Exhibit B.)

Explanation of Records Searches

6) OIP conducted searches in OAG, ODAG, OASG, OLP, OLA, OIPL, and PAO for records responsive to plaintiff's FOIA request.³ As described in detail below, these searches

¹ Plaintiff has stated that it does not challenge OIP's interpretation of the scope of plaintiff's request. See Compl. ¶ 8, filed May 24, 2010.

² In OIP's January 15, 2010 letter to plaintiff, the total number of pages being withheld on behalf of OASG was stated as 135. This page count was subsequently determined to be in error and plaintiff was advised of the correct number of pages, 115, in OIP's July 8, 2010 letter, discussed below.

³ By memoranda dated January 8, 2010, supplementary records searches were initiated in OAG, ODAG, OASG, OLP, OLA, OIPL, and PAO, in connection with a separate non-FOIA records request from the United States Commission on Civil Rights (USCCR). The scope of this separate non-FOIA search was significantly broader than that of the FOIA requests (including plaintiff's FOIA request) received by OIP. Because OIP received both the non-FOIA USCCR records request and the FOIA requests within a few days of each other, in addition to the FOIA searches specifically addressed in this declaration, OIP conducted a search for all records

consisted of a comprehensive review of the paper and electronic files of both current and relevant departed employees in those Offices, as well as a search of the Departmental Executive Secretariat. With respect to searches conducted in individual Offices, OIP initiates such searches by sending a memorandum to each Office which notifies the Office of the receipt of the request and the need to conduct a search. The general practice for all of these Offices is, upon receipt of a search memorandum, to notify each individual staff member in that Office of the receipt of OIP's memorandum requesting that a search be conducted, and each staff member's files, both paper and electronic, are then searched as necessary for records responsive to the request. In some instances, the Offices will request that staff members from OIP assist in the search. A search of an official's computer files usually includes a search of the e-mail systems of that official, and can include a hard drive search if the official indicates that one is called for.

7) The particulars of OIP's searches in OAG, ODAG, OASG, OLP, OLA, OIPL and PAO are laid out below. Once the below-described searches were completed in each Office, all material was reviewed for responsiveness to plaintiff's FOIA request. After careful review, it was found that a total of 188 pages of documents located during the search were responsive to plaintiff's FOIA request. OIP provided plaintiff with rolling determinations on this responsive material.

Search of the Office of the Attorney General

8) By memorandum dated January 7, 2010, a search was initiated in OAG for records

regarding the NBPP litigation and reviewed all of the search results for responsiveness to the pertinent requests. Because of the broad search conducted for the separate non-FOIA request, OIP was able to review voluminous amounts of material on the subject of the Department's NBPP litigation. All of this material, while not specifically collected for plaintiff's FOIA request, was nevertheless reviewed for responsiveness to plaintiff's request to ensure that all relevant records were located.

responsive to plaintiff's FOIA request.

9) Pursuant to a telephone conversation on February 2, 2010, and subsequently by formal memorandum dated February 18, 2010, OIP was advised by OAG that its initial records searches were complete. OAG also provided potentially responsive hard copy "paper" material to OIP. In addition, OAG asked that OIP search the computers of three OAG officials for responsive material.

10) Pursuant to OAG's request, on February 2, 2010, OIP conducted a search of three OAG officials' computers files. The terms used to complete this search were: "New Black Panther Party," "NBPP," "New Black Panther," and "NBP." All material located in the search was later reviewed for responsiveness to plaintiff's request.

Search of the Office of the Deputy Attorney General

11) By memorandum dated January 7, 2010, a search was initiated in ODAG for records responsive to plaintiff's FOIA request.

12) On February 2, 2010, OIP was advised by ODAG that its initial records searches were partially complete, that two current and one former ODAG official had potentially responsive material, and asked that OIP remotely search the electronic files of these three officials. In addition, hard copy "paper" material was provided to OIP to review for responsiveness, from the two current ODAG officials.

13) By memorandum dated February 17, 2010, OIP was advised by ODAG that its initial records searches were complete, and asked that OIP search the electronic files of another current ODAG official and two additional former ODAG officials for responsive material. In addition, ODAG provided OIP with potentially responsive material from four more current ODAG officials.

14) In sum, ODAG asked that OIP conduct remote searches of computer files for a total of six current and former ODAG officials. In order to initiate remote searches of the indicated ODAG officials' records, OIP FOIA Specialists conducted a search of each official's e-mails in the Enterprise Vault (EV Vault), starting February 4, 2010, and finishing on June 11, 2010. The EV Vault maintains e-mails of former employees in the senior leadership offices of the Department, as well as e-mails of current employees who request a remote search. OIP used the following terms to conduct these e-mail searches: "New Black Panther Party," "NBPP," "New Black Panther," and "NBP." All material located in the e-mail searches was reviewed for responsiveness to plaintiff's FOIA request.

15) Next, in order to search the paper files of the three former ODAG officials, the FOIA Specialist assigned to plaintiff's FOIA request conducted a search of former ODAG employees' records indices, which list file folder titles maintained by these individuals, arranged according to subject. Any subject file titles of the former officials that appeared to contain potentially responsive records would then need to be retrieved from retired records storage facilities. Upon review of the three former officials' indices, the OIP FOIA Specialist assigned to plaintiff's FOIA request identified three potentially responsive subject files that needed to be reviewed. All of the relevant files were retrieved from the retired records storage facility between June 1, 2010 and June 15, 2010. Upon review of the files by the OIP FOIA Specialist, two of the files were determined to contain material that was duplicative of records already located in the course of the search. The last file contained potentially responsive material and was copied for further review.

16) Finally, on June 30, 2010, ODAG requested that OIP conduct a search of the paper files of one additional current ODAG official. Upon my review of the identified files on July 2, 2010, the records therein were determined to be outside the scope of plaintiff's FOIA request.

Search of the Office of the Associate Attorney General

17) At the time OIP received plaintiff's FOIA request, OIP was already in receipt of a request for similar records of the OASG. Pursuant to this previous request, by memorandum dated August 28, 2009 a records search had been initiated in OASG for records encompassed by plaintiff's FOIA request. Accordingly, OIP decided that it would review the search results received in connection with this prior request for responsiveness to plaintiff's FOIA request.

18) In addition, on December 4, 2009, OIP was advised by OASG that its records searches in response to plaintiff's request were complete, and provided potentially responsive material from three OASG officials to OIP.⁴ This material was subsequently reviewed for responsiveness to plaintiff's FOIA request.

Search of the Office of Legal Policy

19) By memorandum dated January 7, 2010, a search was initiated in OLP for records responsive to plaintiff's FOIA request.

20) By memorandum dated January 13, 2010, OIP was advised by OLP that its records search was fully complete. OLP provided potentially responsive material to OIP for further review.

Search of the Office of Intergovernmental and Public Liaison

21) By memorandum dated January 7, 2010, a search was initiated in OIPL for records responsive to plaintiff's FOIA request.

22) By memorandum dated January 29, 2010, OIP was advised by OIPL that its records

⁴ In addition, pursuant to OIP's broader search on the NBPP litigation, as discussed in n.3 above, OIP initiated a second search of OASG by memorandum dated January 8, 2010. This second search was completed on February 16, 2010, and potentially responsive material from seven officials was provided to OIP. However, none of this supplemental material was determined to be responsive to plaintiff's FOIA request.

search was fully complete. OIPL provided potentially responsive material to OIP for further review.

Search of the Office of Legislative Affairs

23) By memorandum dated January 7, 2010, a search was initiated in OLA for records responsive to plaintiff's FOIA request.

24) Between January 12, 2010 and January 28, 2010, officials from OLA and OIP engaged in several discussions on the parameters of records searches for plaintiff's FOIA request. Pursuant to these discussions, on January 28, 2010, OLA advised OIP that, inasmuch as OLA had not participated in the NBPP litigation decisions, OLA did not maintain any material responsive to plaintiff's FOIA request.⁵

Search of the Office of Public Affairs

25) By memorandum dated January 7, 2010, a search was initiated in PAO for records responsive to plaintiff's FOIA request.

26) On January 12, 2010, PAO officials contacted OIP to discuss the parameters of records searches for plaintiff's FOIA request. Pursuant to these discussions, by memorandum dated January 12, 2010, OIP was advised by PAO that its records searches for plaintiff's FOIA

⁵ In addition, on February 25, 2010, OIP was advised by the Office of Legislative Affairs that its records searches in response to the separate non-FOIA request from the USCCR were complete and asked that OIP search the electronic files of four current officials. Hard copy material was also provided by OLA for OIP's review. Between March 1, 2010 and March 5, 2010, OIP conducted searches of the files of these four individuals. The terms used to complete these searches were: "New Black Panther Party," "NBPP," "New Black Panther," and "NBP." All material located in the OLA searches were printed off to review for responsiveness to plaintiff's FOIA request. All of this material was determined to be not responsive to plaintiff's FOIA request.

request were complete, and that no responsive material was located.⁶

Search of the Departmental Executive Secretariat

27) On January 29, 2010, OIP conducted a search in the electronic database of the Departmental Executive Secretariat, for records responsive to plaintiff's FOIA request. As noted above, the Departmental Executive Secretariat is the official records repository for OAG, ODAG and OASG, and also maintains some OLA records. The Departmental Executive Secretariat uses a central database to control and track certain incoming and outgoing correspondence for the Department's senior management offices. This Intranet Quorum (IQ) database maintains records from January 1, 2001 through the present. Records received by the designated senior management offices are entered into IQ by trained Executive Secretariat analysts. The data elements entered into the system include such items as the date of the document, the date of receipt, the sender, the recipient, as well as a detailed description of the subject of the record. In addition, entries are made that, among other things, reflect what action is to be taken on the records, which component has responsibility for that action, and when that action should be completed. Key word searches of the electronic database may then be conducted by utilizing a single search parameter or combinations of search parameters. Search parameters may include the subject, organization, date, name, or other key words. The FOIA Specialist assigned to plaintiff's request conducted a key word search of the Executive Secretariat's IQ database using the following terms: "New Black Panther," "Black Panther and Philadelphia," "Black Panther and

⁶ In addition, on February 4, 2010, OIP was advised by the Office of Public Affairs that its records searches for the USSCR document request were complete, and material from eleven current officials was provided to OIP. This material was reviewed by OIP for responsiveness to plaintiff's FOIA request. All of this material was determined to be not responsive to plaintiff's FOIA request.

Congress,” and “Black Panther.”⁷ All material located in the search was printed to review for responsiveness for plaintiff’s FOIA request.

OIP’s Responses to Plaintiff’s FOIA Request

28) As noted previously, by letter dated January 15, 2010, OIP advised plaintiff that sixty-nine documents, totaling 135 pages, were being withheld in full pursuant to Exemption 5 of the FOIA.⁸ This letter constituted OIP’s final response on behalf of OASG. (OIP’s letter dated January 15, 2010 to plaintiff is attached as Exhibit B.)

29) By letter dated January 26, 2010, OIP advised plaintiff that searches were complete, and no responsive records were located, in PAO and OLP. OIP further advised that it was continuing to process plaintiff’s FOIA request on behalf of OAG, ODAG, OLA, and OIPL. (A copy of OIP’s January 26, 2010 letter to plaintiff is attached hereto as Exhibit C.)

30) By letter dated March 26, 2010, OIP advised plaintiff that searches were complete, and no responsive records were located, in OLA and OIPL. OIP further advised that it was continuing to process plaintiff’s FOIA request on behalf of OAG and ODAG. (A copy of OIP’s March 26, 2010 letter to plaintiff is attached hereto as Exhibit D.)

31) By letter dated July 8, 2010, OIP provided a final response to plaintiff. At that time, OIP advised plaintiff that OAG and ODAG searches were complete, and that thirteen documents,

⁷ On August 28, 2009, OIP conducted a search of the Executive Secretariat’s IQ database in response to a separate FOIA request on the same general topic, but limited to records of OASG. The terms used to complete this search were: “Thomas J. Perrelli and New Black Panther Party,” “Perrelli and New Black Panther Party,” “Associate Attorney General and New Black Panther Party,” “Perrelli and Voter,” “Perrelli and Philadelphia,” “Associate Attorney General and Philadelphia,” “Associate Attorney General and Voter,” and “Thomas J. Perrelli.” The results of this search were also subsequently reviewed for responsiveness to plaintiff’s FOIA request and none of the material was determined to be responsive.

⁸ As explained above, the corrected page count is 115 pages withheld in full.

totaling forty pages, were being withheld in full pursuant to the deliberative process and attorney work-product privileges of Exemption 5 of the FOIA. OIP also advised plaintiff that the remaining responsive pages located in OAG and ODAG had been referred to CRT for processing and direct response to plaintiff. (A copy of OIP's July 8, 2010 letter to plaintiff is attached hereto as Exhibit E.)

32) Subsequent to OIP's final response and in preparation of this declaration, OIP identified additional information in twenty-two pages, which could be released as a matter of discretion. These documents had previously been withheld in full pursuant to Exemption 5 of the FOIA; however, OIP subsequently determined that portions of them were appropriate for release to plaintiff as a matter of agency discretion.

Referral of Material from the Civil Rights Division

33) By e-mail dated July 28, 2010, CRT referred fifteen pages of responsive documents to OIP for processing and direct response to plaintiff. OIP processed this material on behalf of OASG.

34) By letter dated August 19, 2010, OIP provided plaintiff with a final determination on the material referred by CRT, and advised plaintiff that these documents were being withheld in full pursuant to the deliberative process and attorney work-product privileges of Exemption 5 of the FOIA, as well as Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of a third party.⁹ Additionally, OIP advised plaintiff that some of the pages referred by CRT were duplicative of material already processed in response to plaintiff's initial FOIA

⁹ Because OIP's protection of information pursuant to Exemption 6 is not being challenged by plaintiff, this declaration will not address OIP's assertion of Exemption 6.

request which was previously handled by OIP. (A copy of OIP's August 19, 2010 letter to plaintiff is attached hereto as Exhibit F.)

Plaintiff's Administrative Appeal to OIP

35) By letter dated March 26, 2010, and received on April 8, 2010, plaintiff submitted an administrative appeal to OIP regarding the IR Staff's January 15, 2010 response to plaintiff, in which records were withheld on behalf of OASG.¹⁰ (A copy of plaintiff's March 26, 2010 administrative appeal letter is attached hereto as Exhibit G.)

36) By letter dated April 13, 2010, OIP's Administrative Appeals Staff acknowledged receipt of plaintiff's administrative appeal.¹¹ (A copy of OIP's April 13, 2010 letter is attached hereto as Exhibit H.)

37) By letter dated June 4, 2010, OIP's Administrative Appeals Staff responded to plaintiff's administrative appeal, advising plaintiff that its appeal had been closed administratively because plaintiff had initiated litigation regarding the actions subject to its appeal. (A copy of OIP's June 4, 2010 letter is attached hereto as Exhibit I.)

Explanation of Withheld Material

FOIA Exemption 5

38) Attached to this declaration is a Vaughn Index containing a detailed description of the forty-eight pages of withheld documents being challenged by plaintiff. Because certain

¹⁰ Plaintiff's March 26, 2010 letter resubmitted and corrected a previous letter that was sent to OIP on January 29, 2010, which listed the wrong FOIA tracking number for the underlying IR Staff request being challenged by plaintiff. (A copy of plaintiff's January 26, 2010 letter is included in Exhibit H.)

¹¹ OIP's Administrative Appeals Staff is distinct from the IR Staff and is responsible for adjudicating administrative appeals from any adverse determinations made by a Department of Justice component in response to a FOIA request.

records are similar to one another, we have categorized them into three distinct groups. The Vaughn Index describes the responsive documents at issue, including such information as the date, author/recipient, subject and the general content of the material, provides the number of pages for each document, and identifies the privileges -- deliberative process, as well as attorney work-product -- which protect each group from disclosure under Exemption 5 of the FOIA. E-mail messages have been counted and processed as individual documents and duplicative material processed only once. (OIP's Vaughn index is attached hereto as Exhibit J.)

39) Exemption 5 of the FOIA protects certain inter- and intra- agency communications protected by the deliberative process and attorney work-product privileges. All of the withheld records being challenged by plaintiff, which were located in OAG, ODAG, and OASG, as well as the material referred by CRT and processed on behalf of OASG, were created and exchanged entirely within the Department of Justice. All of the documents at issue are e-mails between, or notes and briefing materials created by, officials in OAG, ODAG, OASG and CRT and accordingly are inter- and intra- agency communications internal to the Department of Justice.

40) All of the records at issue are protected under Exemption 5 of the FOIA. All the documents are protected by the attorney work-product privilege in their entireties and also contain information protected under the deliberative process privilege. The withheld records fall into three overall, but inter-related groups: (1) e-mail discussions through which senior management offices are kept informed on CRT's handling of the ongoing NBPP litigation, including discussions about CRT's draft filings and litigation decisions (i.e., Group 1 of the attached Vaughn Index); (2) notes created by attorneys in the Department's senior management offices detailing their discussions on and thoughts about the NBPP litigation (i.e., Group 2 of the attached Vaughn Index); and (3) briefing and preparatory materials created to assist senior

leadership officials in deciding how to respond to inquiries on the NBPP litigation (i.e., Group 3 of the attached Vaughn Index). All of these documents are predecisional and were created and/or exchanged in connection with the Department's handling of the NBPP litigation and reflect the many levels of decisionmaking inherent to Department operations. In addition, all of the documents in Groups 1-3 of the attached Vaughn Index were created by, or at the direction of, attorneys regarding the Department's litigation activities. Therefore, OIP determined that the documents at issue were protected in full by Exemption 5 of the FOIA under the attorney work-product privilege, and were also protected in part by the deliberative process privilege.

Deliberative Process Privilege

41) As mentioned above, all of the three groups of records contain information protected by the deliberative process privilege, which is intended to protect the decisionmaking processes of government agencies from public scrutiny in order to enhance the quality of agency decisions.

42) A significant part of the decisionmaking processes within the Department of Justice involves the exchange of e-mail messages pertaining to the preparation of court documents, ongoing litigation strategy, and regular communications with management officials. The documents contained in Group 1 of the attached Vaughn Index consist of just such communications. The e-mails in Group 1 consist of back and forth discussions, forwards, and spinoff discussions, in which CRT attorneys loop in supervisory officials, who then respond with any thoughts or guidance, or engage in discussion amongst themselves.¹² Disclosure of such e-mails would severely hamper the efficient day-to-day workings of the Department, as individuals would no longer feel free to candidly present their views on component operations, or to discuss

¹² The documents included in Group 1 are: 101b, 102, 103b, 103c, 103d, 104a, 104b, 105a, 105b, 105c, 106c, 107a, 121.

their ideas and advice on these activities in e-mail messages.

43) The documents in Group 1 are part of the exchange of ideas and suggestions that accompanies all decisionmaking and reflect preliminary assessments by Department officials about issues in which they have been asked to make recommendations and provide advice. Department employees routinely e-mail each other, sharing interpretations, opinions and language, giving and responding to suggestions, and providing input as they develop litigation positions, brief senior officials, and draft documents or respond to inquiries. E-mail operates as a way for individual Department of Justice employees to communicate with each other about current matters and to key in a wide range of Department stakeholders without having to leave their offices. These "discussions," which get memorialized online, are part of the exchange of ideas and suggestions that accompanies all decisionmaking and typically reflect staff members' very preliminary assessments about issues on which they have not yet decided, or on which they may be asked to make recommendations. Indeed, such online discussions most resemble conversations between staff members which are part of the give and take of agency deliberations.

44) Additionally, it is common for e-mails from individual Department components, and the attachments thereto, to be routinely forwarded or shared among and across multiple offices within the Department, including the senior officials who oversee agency operations, to brief these officials on significant matters which arise during the day-to-day activities within the individual offices.

45) All of the documents in Group 1 of the attached Vaughn Index are prime examples of how exchanges between a litigating component and the senior management offices allow for a more fulsome decisionmaking process. For instance, these documents contain CRT's legal analysis, internal discussion, reports, briefings, and ultimate determination regarding a proposed

filing in the NBPP case. And yet the process does not end there; even after a general litigation course is decided upon, various other tactical decisions must be made as that course is executed. Alternative options on how to execute that decision are discussed, draft filings are reviewed and edited, advice is given, comments are taken. Throughout the process, CRT briefs supervisory offices on the progress of the case, and litigators and supervisory attorneys exchange feedback as the component and senior Department officials consider different options.

46) If communications such as those in Group 1 are routinely released to the public, Department employees will be much more circumspect in their discussions with each other and in providing all pertinent information and viewpoints to senior officials in a timely manner. This lack of candor would seriously impair the Department's ability to foster the forthright, internal discussions necessary for efficient and proper decisionmaking. Certainly disclosure of such preliminary assessments and opinions would make officials commenting on litigation much more circumspect in providing their views. Agency decisionmaking is at its best when employees are able to focus on the substance of their views and not on whether their views may at some point be made publicly available.

47) Another aspect of the decisionmaking process consists of attorneys from the Department's senior management offices taking notes of discussions and meetings with the Department components they oversee, summarizing those notes for later reference, and memorializing events for their own use or for that of others. For instance, the documents included in Group 2 of the attached Vaughn Index consist of the handwritten notes of an ODAG attorney, taken during weekly meetings with CRT, as well as a summary of events surrounding the NBPP litigation which was written by an attorney in OASG.¹³

¹³ The documents included in Group 2 are: 112, 113, 114, and 116.

48) The documents in Group 2 reveal both the content of deliberative briefings given during meetings with the Department's senior offices, as well as the thought processes and mental impressions of senior management staff who are being informed about a topic. It is common practice for Department components to meet with and brief senior offices on their internal operations, in a setting where thoughts and ideas are shared freely, and feedback is exchanged. Meanwhile, attorneys of these senior offices often take notes during regular meetings with representatives of Department components that their offices oversee. In this case, ODAG and OASG attorneys have created notes based on regular communications from and about CRT - a component which is supervised by these senior offices and directly by the Associate Attorney General. Moreover, these attorneys frequently later summarize these notes by putting them in a different format, often adding details and annotations regarding context and including their own impressions, assessments and evaluations of what is or is not significant in a discussion. This process allows staff of the managerial offices to evaluate a situation for later reference or to create a record of the facts and key points while they are still fresh. It is crucial that components feel free to offer a candid take on what is happening within their offices, and equally important that staff in senior management offices feel completely free to undergo their own evaluative process without fear that their views on developing and giving -- or choosing not to give -- feedback to subordinates would be publicly revealed.

49) The final, overall category of withheld documents, included in Group 3 of the attached Vaughn Index, reflects yet another part of the deliberative decisionmaking process -- the creation of briefing papers and preparatory materials -- to aid in briefing senior officials and preparing them to answer inquiries that may arise from outside sources.¹⁴

¹⁴ The documents included in Group 3 are: 110, 111, 117a, 117b, 117c, and 117d.

50) All of the documents in Group 3 were prepared by staff within the senior management offices of the Department to assist senior leadership officials in addressing various legal and policy points about the NBPP litigation. The drafters of these briefing papers and e-mails attempt to succinctly summarize particular events that occurred in an individual office, identifying important issues, and provide key background information in a concise, summary format for ease of understanding and presentation. In doing so, the authors distill pertinent information underlying events as they attempt to anticipate questions that senior Department leadership, including the Attorney General and Associate Attorney General, may encounter about the issues at hand, to ensure that they are prepared to respond to those questions. Throughout this process, the authors necessarily review the universe of facts and possible issues arising on the topic, and then select those facts and issues that they deem most appropriate for briefing senior officials.

51) The documents in Group 3 were created to brief senior leadership as part of the deliberative process of preparing responses to Congressional and media inquiries regarding decisions made in the NBPP litigation. In order to meaningfully assess these decisions and prepare a response to the inquiries, the authors of these documents rehash the litigation process as they peel back to core decisionmaking processes which unfolded during the course of litigation. The fact that these litigation deliberations are incorporated into a document after-the-fact does not diminish the harm attendant in their release: it is the information itself, not simply the recording of it, that goes to the heart of the Department's litigation decisionmaking.

52) The Department's most senior officials rely heavily on the creation of such briefing materials so that they can be fully informed on the substance of the many legal issues being worked on in the Department everyday in individual offices. These senior officials are then

prepared to decide how best to respond to inquiries on the Department's activities. The documents in Group 3 -- including the briefing papers and e-mails discussing how to respond to Congress on an inquiry involving the NBPP litigation -- are preliminary and do not embody final agency action. The employees preparing such materials must feel free to create the most thorough and candid documents possible so that the Department leadership are well-informed as they ultimately decide how to represent the interests of the Department as a whole.

53) All of the documents that have been withheld pursuant to the deliberative process privilege are intrinsically a part of the decisionmaking processes of the Department. In the course of making litigation decisions and communicating with officials as developments unfold, attorneys and staff communicate with each other, seeking information, providing advice, and offering suggestions. The documents at issue consist of just such communications.

Attorney Work-Product Privilege

54) In addition to being protected by the deliberative process privilege, the documents in Groups 1-3 of the attached Vaughn Index are also protected by the attorney work-product privilege, inasmuch as they were created in connection with or describe events occurring during the course of the NBPP litigation. All of the documents reflect the Department's internal actions as they unfolded during the course of litigation, and discussion about those actions. Finally, all of the protected documents were created by attorneys, or under the direction of attorneys.

55) The documents withheld in Groups 1-3 consist of a variety of materials pertaining to the Department's actions in the NBPP litigation -- front-line legal analysis and discussions thereof, real-time updates on litigation developments, e-mails about court filings, briefings by and communications with the office responsible for the litigation, notes and summaries stemming from such communications, and briefing papers and preparatory materials for senior leadership

with respect to the litigation. Throughout these documents, litigating attorneys provide analyses and recommendations to, and solicit input from, one another and then communicate these developments to managerial officials within the Department in the course of ongoing litigation. As such, the documents in Groups 1-3 reveal the decisionmaking process, strategies and opinions of litigators and officials within CRT on the NBPP litigation. The withheld documents reveal not only the work of attorneys "on the ground," but also the internal discussions and feedback of senior management offices, as CRT attorneys select and present particular aspects of the case for these supervisory-level officials.

56) In the documents in Group 1, attorneys within the litigating office share and discuss the facts of the litigation as they relate to the relevant legal provisions and give opinions on available courses of action in the litigation. Disclosure of these documents would reveal the legal strategies, interpretations of law, and analysis critical to the Department's handling of a case. Such disclosure would severely hamper the adversary process as attorneys working on litigation would no longer feel free to discuss a case in this fashion or to write down important thoughts on the case for fear that the information might be publicly disclosed.

57) In addition, as with the documents in Groups 2 and 3, senior officials must feel free to receive and act upon litigation updates as they see fit -- weighing in on developments as necessary, or deciding not to do so when appropriate. In order to make the calls required of them, these senior officials must be assured that they are given a candid picture of a given case.

58) Even as litigation develops, documents are filed, and cases are closed, Department attorneys may need to revisit any number of the myriad of litigation decisions underlying a particular case. For instance, as is reflected in document 107a in the attached Vaughn Index, even after filing, components continue to brief the management offices regarding actions recently

taken in a case and on the anticipated results of such actions and, naturally, these matters are discussed among attorneys in the senior management offices. Department attorneys must still feel free to provide the reasons or strategy behind a litigation decision as they explain what was done and as they and their supervisors consider how additional proceedings would be affected; moreover, as with document 116, senior management office attorneys must still be able to candidly summarize, rehash, and document the discussions and analyses that went into litigating a given case. Finally, senior officials often must deliberate over how to respond to inquiries regarding litigation, such as inquiries from Congress, the press, or others -- a process which, as with the documents in Group 3, frequently involves a reexamination not only of what was done in the case, but why. Certainly Department attorneys must feel free to develop litigation strategy in the midst of prosecuting a case -- yet, even after a litigation decision is made, or a case closed, attorneys must be free to explain the basis for their litigation strategies.

59) As discussed in detail above, disclosure of the documents in Groups 1-3 of the attached Vaughn Index would reveal Department attorneys' internal interpretation of the law and analysis of legal strategy as they litigate on behalf of the Department. Such disclosure would severely hamper the adversary process as attorneys would no longer feel free to discuss litigation in this fashion or to memorialize important thoughts on potential litigation strategies for fear that the information might be disclosed to their adversaries.

60) During OIP's review of the information withheld in Groups 1-3, we carefully reviewed each of the documents to determine whether any information could be segregated for release. However, all of the remaining documents at issue are protected in their entireties by the attorney work-product privilege. As such, the disclosure of these documents, and the facts selected for and contained within them, would reveal individual assessments of what was deemed

significant in the course of the litigation, what strategies and options were being considered, when and by who. They are exempt in full and so contain no reasonably segregable, nonexempt information. To the extent that certain factual "envelope" information could be disclosed to plaintiff, such information is provided in the attached Vaughn Index.

I declare under penalty of perjury that the foregoing is true and correct.


Vanessa R. Brinkmann

Executed this 2nd day of November 2010.

EXHIBIT A

AG/2010-R0317
DAG/2010-R0318
ASG/2010-R0319
OIP/2010-R0320
OLA/2010-R0322
PAO/2010-R0323
JBG



Judicial Watch

Because no one is above the law!

FOIA
RECEIVED
2009 JUN 19 PM 4
DEPT OF JUSTICE/EG.
FOIA/PRIVACY STAF.

RECEIVED

JAN 04 2010

29 May 2009

VIA CERTIFIED MAIL & FACSIMILE

FOIA/PA Mail Referral Unit
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001
(301) 583-7354
(301) 341-0772 fax
Article Number: (7009 0080 0002 2431 1797)

Office of Information Policy

CIVIL RIGHTS DIVISION

JUL 14 2009 A.M.

Received by CRD
FOI/PA Branch

Re: Freedom of Information Act Request

Dear Sir/Madam:

Pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Judicial Watch, Inc. hereby requests that the Department of Justice produce any and all agency records concerning the following subjects within twenty (20) business days:

1. Any and all records pertaining to the lawsuit under the Voting Rights Act against the New Black Panther Party for Self Defense and three of its members {Malik Zulu Shabazz, Minister King Samir Shabazz, Jerry Jackson} (records include, but are not limited to, memos, correspondence, affidavits, interviews, and records concerning default judgment, excluding court filings).
2. Any and all records pertaining to the decision to end the civil complaint against the New Black Panther Party for Self Defense and three of its members (records include, but are not limited to, memos, correspondence, affidavits, interviews, records concerning default judgment, excluding court filings).¹
3. Any correspondence between the Justice Department and the New Black Panther Party for Self Defense, to include defendants X, Y & Z and/or any attorney(s) representing the defendants.

¹ Department of Justice's Press Release is attached for reference.

Department of Justice
Freedom of Information Act Request
29 May 2009
Page 2 of 5

4. Any third-party communications concerning the New Black Panther Party for Self Defense, to include defendants X, Y & Z and/or any attorney(s) representing the defendants.

Time Frame: November 2008 - Present

We call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA... The presumption of disclosure should be applied to all decisions involving FOIA.²

President Obama adds that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails." Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

For purpose of this request, the term "record" shall mean: (1) any written, printed, or typed material of any kind, including without limitation all correspondence, memoranda, notes, messages, letters, cards, telegrams, teletypes, facsimiles, papers, forms, records, telephone messages, diaries, schedules, calendars, chronological data, minutes, books, reports, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; (2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail or e-mail, meaning any electronically transmitted text or graphic communication created upon and transmitted or received by any computer or other electronic device, and all materials stored on compact disk, computer disk, diskette, hard drive, server, or tape; (3) any audio, aural, visual, or video records, recordings, or representations of any kind, including without limitation all cassette tapes, compact disks, digital video disks, microfiche, microfilm, motion pictures, pictures, photographs, or videotapes; (4) any graphic materials and data compilations

² President Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act," January 21, 2009; <http://www.whitehouse.gov/the_press_office/FreedomofInformationAct>

Department of Justice
Freedom of Information Act Request
29 May 2009
Page 3 of 5

from which information can be obtained; (5) any materials using other means of preserving thought or expression; and (6) any tangible things from which data or information can be obtained, processed, recorded, or transcribed. The term "record" also shall mean any drafts, alterations, amendments, changes, or modifications of or to any of the foregoing.

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii).

Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. In accordance with the statutory designation for a media group, Judicial Watch gathers information of potential interest, uses its editorial skills to create a distinct work, and distributes it to the public. Judicial Watch gathers information using Freedom of Information Act requests, state open records law requests, government contacts, interviews, Internet based research, book based research, and community tips. Judicial Watch distributes its distinct work using its editorial skills in its monthly newsletter *The Verdict*, its weekly e-mail publication *Weekly Update*, its blog *Corruption Chronicles*, and special reports. *The Verdict* maintains a subscription of over 120,000 and Judicial Watch's website has logged over 500,000 page views just between January 2009 and April 2009 with 2,000 unique visitors per day. *Weekly Update* reaches 25,000 people per week.

The statute also notes that government may consider an organization's past publication record. When considering Judicial Watch's past publication record, its previous media status is also relevant. Judicial Watch has been recognized as a member of the media in past FOIA litigation; See *Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006). Furthermore, Judicial Watch has consistently been recognized as a member of the news media in other FOIA requests. Within the last 6 months, Judicial Watch was designated as media by the Department of State on 27 March 2009 (200901038), Department of Homeland Security on 20 November 2008 (DHS/OS/PRIV 09-49), Federal Housing Finance Agency on 8 December 2008 (FOIA 2009-31), and Department of the Treasury on 6 January 2009 (2008-12-019).

In addition to meeting and exceeding the statutory requirements as a media organization, Judicial Watch's mission and peer recognition further qualify it for the media category. The Pew Research Center's Project for Excellence in Journalism provides that "the central purpose of journalism is to provide citizens with accurate and reliable information they need to function in a free society.... serving as watchdog and offering voice to the voiceless." Judicial Watch's mission is consistent with this definition ("promotes transparency, accountability and integrity in government, politics

Department of Justice
Freedom of Information Act Request
29 May 2009
Page 4 of 5

and the law.") Furthermore, *The Hill* has recognized Judicial Watch as one of the top watchdog organizations in the country.³ In addition to the *Hill's* recognition, Judicial Watch has also been awarded press credentials and membership in journalism organizations.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to promote transparency, accountability and integrity in government, politics and the law. Its loyalty is to the truth and to the public. It uses litigation to access the truth and its publications to inform the public.

The particular records requested herein are sought as part of Judicial Watch's efforts to report the Department of Justice's decision to terminate a civil complaint against a group that engaged in voter intimidation. The *Washington Times* broke the story using court records, but it is still unclear as to why the Department of Justice cancelled the lawsuit. The publicly known facts indicate that the New Black Panther Party harassed and intimidated voters in violation of the Voting Rights Act. It is further known that the defendants failed to defend themselves and so the Department of Justice was guaranteed a victory. Furthermore, it is alleged that the career attorneys wanted to proceed in the case, but the political appointees overruled them. What political calculations and benefits would result in not pursuing justice? The documents clearly pertain to government activities as it is the duty of the Department of Justice to uphold and enforce complaints pursuant to the Voting Rights Act. Disclosure will clearly contribute to understanding why the Department of Justice has failed to fulfill its duties and activities. Disclosure will appeal to the general public who want to ensure the sanctity of the voting process. Significance will derive from presenting new facts about the lawsuit including the correspondence and decisions surrounding the termination of the civil complaint. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as an article in one of its publications.

³ <http://thehill.com/business--lobby/lobby-league-31-watchdogs-2005-02-16.html>

Department of Justice
Freedom of Information Act Request
29 May 2009
Page 5 of 5

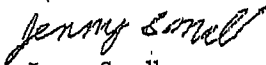
In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under the OPEN Government Act of 2007, Section 6(b).

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

In an effort to facilitate record production within the statutory time limit, Judicial Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5181 or jsmall@judicialwatch.org. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,



Jenny Small
Judicial Watch, Inc.
Researcher

¹ "Principles of Journalism" Pew Research Center's Project for Excellence in Journalism.
<<http://www.journalism.org/resources/principles>>.

#09-014: Justice Department Seeks Injunction Against New Black Pan...

<http://www.usdoj.gov/opa/pr/2009/January/09-crt-014.html>



Department of Justice

FOR IMMEDIATE RELEASE
Wednesday, January 7, 2009
WWW.USDOJ.GOV

CRT
(202) 514-2007
TDD (202) 514-1888

Justice Department Seeks Injunction Against New Black Panther Party

Lawsuit Seeks to Prohibit Voter Intimidation In Future Elections

WASHINGTON - The Justice Department today filed a lawsuit under the Voting Rights Act against the New Black Panther Party for Self-Defense and three of its members alleging that the defendants intimidated voters and those aiding them during the Nov. 4, 2008, general election.

The complaint, filed in the United States District Court in Philadelphia, alleges that, during the election, Minister King Samir Shabazz and Jerry Jackson were deployed at the entrance to a Philadelphia polling location wearing the uniform of the New Black Panther Party for Self-Defense, and that Samir Shabazz repeatedly brandished a police-style baton weapon.

"Intimidation outside of a polling place is contrary to the democratic process," said Acting Assistant Attorney General Grace Chung Becker. "The Voting Rights Act of 1965 was passed to protect the fundamental right to vote and the Department takes allegations of voter intimidation seriously."

According to the complaint, party Chairman Malik Zulu Shabazz confirmed that the placement of Samir Shabazz and Jackson in Philadelphia was part of a nationwide effort to deploy New Black Panther Party members at polling locations on Election Day. The complaint alleges a violation of Section 11(b) of the Voting Rights Act of 1965, which prohibits intimidation, coercion or threats against "any person for voting or attempting to vote." The Department seeks an injunction preventing any future deployment of, or display of weapons by, New Black Panther Party members at the entrance to polling locations.

The New Black Panther Party for Self-Defense, which claims active chapters nationwide, is distinct from the Black Panther Party founded by Bobby Seale in the 1960s.

The Civil Rights Division enforces the Voting Rights Act of 1965. To file complaints about discriminatory voting practices, including acts of harassment or intimidation, voters may call the Voting Section of the Civil Rights Division at 1-800-253-3931. More information about the Voting Rights Act and other federal voting laws is available on the Department of Justice's web site at www.usdoj.gov/crt/voting/index.htm.

###

09-014

EXHIBIT B



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

JAN 15 2010

Ms. Jenny Small
Researcher
Judicial Watch
501 School Street, SW
Suite 725
Washington, DC 20024

Re: AG/10-R0317
DAG/10-R0318
ASG/10-R0319
OIPL/10-R0320
OLP/10-R0321
OLA/10-R0322
PAO/10-R0323
CLM:VRB:JBG

Dear Ms. Small:

While processing your Freedom of Information Act (FOIA) request for records concerning *U.S. v. New Black Panther Party for Self-Defense, et al.*, the Department of Justice's Civil Rights Division forwarded your request to this Office for processing and direct response to you. For your information, your request was received in this Office on January 4, 2010. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Public Affairs, Legislative Affairs, Legal Policy and Intergovernmental and Public Liaison.

For your information, the Department of Justice is in receipt of multiple FOIA requests concerning *U.S. v. New Black Panther Party for Self-Defense*, and we have interpreted the scope of all of these requests to be limited to records concerning the Department's decision to seek a dismissal of defendants in *U.S. v. New Black Panther Party for Self-Defense*. This interpretation is intended to facilitate our response to you; moreover, these requests are being processed on an expedited basis. If you are not satisfied with our interpretation of the scope of your request, however, you may contact us at (202) 514-3642 or at the below address to discuss your request. If we do not hear otherwise from you, we will assume that you are satisfied with the scope as defined above.

Please be advised that we have completed our records searches in the Office of the Associate Attorney General, as well as the electronic database of the Departmental Executive Secretariat, which is the official records repository for the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General, and sixty-nine documents, totaling one hundred thirty-five pages, were located that are responsive to your request. I have determined that all of this material should be withheld in full pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 522(b)(5), which pertains to certain communications protected by privilege, in this instance the deliberative process privilege and the attorney work-product privilege. For your information, the withheld material includes e-mails between officials in the Civil Rights Division and the Office of the Associate Attorney General regarding litigation strategy, drafts of court filings, and briefing materials related to the subject of your request.

-2-

We are continuing our records searches in the Offices of the Attorney General, Deputy Attorney General, Public Affairs, Legislative Affairs, Legal Policy and Intergovernmental and Public Liaison, and will respond to you again once those records searches are completed and any disclosure determinations are made.

We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request. In your letter you agreed to pay fees up to \$350 in the event that a fee waiver is not granted.

If you are not satisfied with my action on behalf of the Office of the Associate Attorney General, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-001. Your appeal must be received within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in dark ink, appearing to read "Carmen L. Mallon", with a long horizontal flourish extending to the right.

Carmen L. Mallon
Chief of Staff

EXHIBIT C



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

Ms. Jenny Small
Researcher
Judicial Watch
501 School Street, SW
Suite 725
Washington, DC 20024

Re: AG/10-R0317
DAG/10-R0318
OIPL/10-R0320
OLP/10-R0321
OLA/10-R0322
PAO/10-R0323
CLM:VRB:JBG

JAN 26 2010

Dear Ms. Small:

This is an interim response to your Freedom of Information Act (FOIA) request for records concerning *U.S. v. New Black Panther Party for Self-Defense, et al.*, which was received in this Office on January 4, 2010. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, Public Affairs, Legislative Affairs, Legal Policy and Intergovernmental and Public Liaison.

Please be advised that searches were conducted in the Offices of Public Affairs and Legal Policy, and no records responsive to your request were located. We are continuing our records searches in the Offices of the Attorney General, Deputy Attorney General, Legislative Affairs, and Intergovernmental and Public Liaison, and will respond to you again once those records searches are completed and any disclosure determinations are made.

If you are not satisfied with my action on behalf of the Offices of Public Affairs and Legal Policy, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-001. Your appeal must be received within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read "Carmen L. Mallon".

Carmen L. Mallon
Chief of Staff

EXHIBIT D



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

Ms. Jenny Small
Researcher
Judicial Watch
501 School Street, SW
Suite 725
Washington, DC 20024

Re: AG/10-R0317
DAG/10-R0318
OIPL/10-R0320
OLA/10-R0322
CLM:VRB:JBG

MAR 26 2010

Dear Ms. Small:

This is an interim response to your Freedom of Information Act (FOIA) request for records concerning *U.S. v. New Black Panther Party for Self-Defense, et al.*, which was received in this Office on January 4, 2010. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, Public Affairs, Legislative Affairs, Legal Policy and Intergovernmental and Public Liaison.

Please be advised that searches were conducted in the Offices of Legislative Affairs and Intergovernmental and Public Liaison, and no records responsive to your request were located. We are continuing to process your request on behalf of the Offices of the Attorney General and Deputy Attorney General. We will respond to you again once our processing is completed and any disclosure determinations are made.

If you are not satisfied with my action on behalf of the Offices of Legislative Affairs and Intergovernmental and Public Liaison, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-001. Your appeal must be received within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read "Carmen L. Mallon", with a long horizontal line extending to the right.

Carmen L. Mallon
Chief of Staff

EXHIBIT E



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

Ms. Jenny Small
Researcher
Judicial Watch
501 School Street, SW
Suite 725
Washington, DC 20024

JUL 1 8 2010

Re: AG/10-R0317
DAG/10-R0318
VRB:JBG

Dear Ms. Small:

This is a final response to your Freedom of Information Act (FOIA) request for records concerning *U.S. v. New Black Panther Party for Self-Defense, et al.*, which was received in this Office on January 4, 2010. This response is made on behalf of the Offices of the Attorney General and Deputy Attorney General.

Please be advised that we have completed our records searches in the Offices of the Attorney General and Deputy Attorney General, and documents were located that are responsive to your request.

I have determined that thirteen documents, totaling forty pages, should be withheld in full pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), which pertains to certain information protected by privilege, in this instance the deliberative process privilege and the attorney work-product privilege. For your information, the withheld material includes e-mails between officials in the Civil Rights Division and the Office of the Deputy Attorney General, handwritten meeting notes, and other discussion of litigation matters related to the subject of your request.

Because the remaining documents pertain to matters under the purview of the Civil Rights Division, we have referred them to that component for processing and direct response to you. The Civil Rights Division will respond directly to you.

Finally, pursuant to our letter to you dated January 15, 2010, we advised you that sixty-nine documents, totaling one hundred and thirty-five pages, were being withheld on behalf of the Office of the Associate Attorney General, pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Please be advised that upon further review of the material, it actually consists of only one hundred and fifteen pages. This discrepancy was due to an error in counting e-mail messages within the same e-mail subject.

Although I am aware that your request is the subject of ongoing litigation and that appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "V. Brinkmann", with a long horizontal flourish extending to the right.

Vanessa R. Brinkmann
Counsel, Initial Request Staff

EXHIBIT F



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

Ms. Jenny Small
Researcher
Judicial Watch
425 3rd Street, SW
Suite 800
Washington, DC 20024

AUG 19 2010

Re: ASG/10-R1166
VRB:JBG

Dear Ms. Small:

While processing your Freedom of Information Act (FOIA) request for records concerning *U.S. v. New Black Panther Party for Self-Defense, et al.*, the Department of Justice's Civil Rights Division referred fifteen pages to this Office for processing and direct response to you on behalf of the Office of the Associate Attorney General. For your information, these documents were received in this Office on July 28, 2010.

I have determined that all of the referred material should be withheld in full pursuant to Exemptions 5 and 6 of the FOIA, 5 U.S.C. § 552(b)(5), (b)(6). Exemption 5 pertains to certain information protected by privilege, in this instance the deliberative process privilege and the attorney work-product privilege. Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of a third party. For your information, the withheld material consists of e-mails between officials in the Civil Rights Division and the Office of the Associate Attorney General, pertaining to litigation matters related to the subject of your request, as well as a cell phone number. Please be advised that some of the individual e-mails contained within the referred e-mail chains are duplicates of material that was previously processed in response to your initial request to this Office.

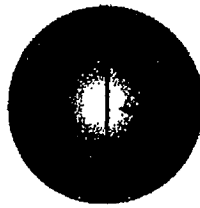
Although I am aware that your request is the subject of ongoing litigation and that appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal.

Sincerely,

A handwritten signature in black ink, appearing to read "V. R. Brinkmann", with a long horizontal flourish extending to the right.

Vanessa R. Brinkmann
Counsel, Initial Request Staff

EXHIBIT G



Judicial Watch

Because no one is above the law!

26 March 2010

VIA US Certified Mail

United States Department of Justice
Office of Information Policy
Attn: Director, Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-001
Article Number: (7009 1680 0000 3345 3443)

RECEIVED

APR 08 2010

Office of Information Policy

all 7
CDT
FOIA
(7)(A)
2010-1575 AG
2010-1576 DAG
2010-1577A SG
2010-1578O PL
2010-1579D LP
2010-15800 LA
2010-1581PA0

Re: FREEDOM OF INFORMATION ACT APPEAL: Clarification

Request ID: OIP unknown number (referencing 09-2384 EO, Ag/10-R0317, DAG/10-R0318, OIPL/10-R0320, OLP/10-R0321, OLA/10-R0322, PAO/10-R0323, CLM:VRM:JBG, 09-00392 Civil Rights Division)

Dear Sir/ Madam:

On 29 January 2010, Judicial Watch appealed the 15 January 2010 Office of Information Policy response letter and interpretation of its 29 May 2009 request. On 4 March 2010, Judicial Watch received an appeal acknowledgement for the Civil Rights Division. The request ID may have led to confusion. Judicial Watch would like to take this opportunity to clarify that the 29 January 2010 letter was in fact appealing the Office of Information Policy letter dated 15 January 2010. I have attached the 15 January 2010 response letter and 29 January 2010 appeal letter for reference.

★ Under separate cover, Judicial Watch will appeal the 9 February 2010 Civil Rights Division response.

Please do not hesitate to contact me should you have any question at jsmall@judicialwatch.org or 202-646-5181.

Sincerely,

Jenny Small
Judicial Watch



**Judicial
Watch™**
*Because no one
is above the law!*

29 January 2010

VIA US CERTIFIED MAIL

United States Department of Justice
Office of the Associate Attorney General
Attn: Director, Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-001
Article Number: (7009 1680 0000 3345 3467)

Re: FREEDOM OF INFORMATION ACT APPEAL

Request ID: 09-00392-F

Dear Sir/Madam:

On 29 May 2009, Judicial Watch requested four items pertaining to the New Black Panther Party for Self Defense. On 15 January 2010, The Department of Justice (DOJ) responded (on the behalf of several components) to Judicial Watch's request with "we have interpreted the scope of all of these requests to be limited to records concerning the Department's decision to seek a dismissal of defendants in *U.S. v. New Black Panther Party for Self-Defense*." Further in response, Carmen L. Mallon, Chief of Staff, wrote "I have determined that all of this material should be withheld in full pursuant to Exemption 5 of the FOIA" (135 pages of records). Judicial Watch respectfully appeals the Department of Justice's response.¹

First, the Department of Justice's interpretation of the request ignores Judicial Watch's actual request and excludes solicited items such as documents, witness statements, and/or other evidence obtained by DOJ regarding the case. Item 1 of the request specifically addresses such excluded items:

"Any and all records pertaining to the lawsuit under the Voting Rights Act against the New Black Panther Party for Self Defense and three of its members (Malik Zulu Shabazz, Minister King Shamir Shabazz, Jerry Jackson) (records include, but are not limited to, memos, correspondence affidavits, interviews, and records concerning default judgment, excluding court filings)."

¹ Judicial Watch also received a letter dated January 26, 2010 referencing the *U.S. v. New Black Panther Party for Self Defense, et al.* The letter notes that it is an interim response for a request received January 4, 2010. It appears that this letter is an interim response for the offices that the January 15, 2010 letter addressed as still pending. From these two letters, it appears that the search is still pending partially in several components and that these DOJ components may also be applying the erroneous DOJ interpretation as described in the January 15, 2010 letter. Judicial Watch extends its objections to these components' responses as well.

Department of Justice
FOIA Appeal
29 January 2010
Page 2 of 2

Furthermore, media reports and the Civil Rights Commission have informed the public that at least some materials exist. A declaration by Bartle Bull (dated April 7, 2009) is available on Michelle Malkin's website.

Second, the Department of Justice's interpretation of the request also may have excluded third party communications, which Judicial Watch asked for under item 4.

"Any third-party communications concerning the New Black Panther Party for Self Defense, to include defendants X, Y, & Z and/or any attorney(s) representing the defendants."

Please note: Judicial Watch discussed the reference "X,Y,Z" with FOIA officer, Nelson Hermilla, and was advised that such identification did not obscure the request and would help avoid any privacy concerns. Judicial Watch, however, would like to formally clarify that item 4 should read:

"Any third-party communications concerning the New Black Panther Party for Self Defense, to include defendants Malik Zulu Shabazz, Minister King Shamir Shabazz, Jerry Jackson and/or any attorney(s) representing the defendants."

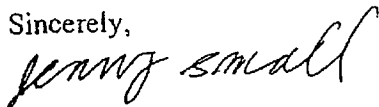
Judicial Watch believes responsive records do likely exist given media reporting that Kristin Clarke of the NAACP Legal Defense Fund asked DOJ to drop the case; Judicial Watch asks for such items to be searched pursuant to its request made under the FOIA.

Finally, pursuant to 5 U.S.C. § 552 (b) **any reasonably segregable portion of a responsive record must be provided.** In the Department of Justice's guidance concerning disclosure, it refers to *Army Times Pub Co. v. Department of the Air Force* and the finding that "the defendant agency 'has the burden of demonstrating that no reasonably segregable information exists within the documents withheld.'" Such burden has not been met in this case.

Judicial Watch did not consent to a limiting of its request and asks for a search and segregable release of all responsive items by all components.

Please do not hesitate to contact me should you have any questions at jsmall@judicialwatch.org or 202-646-5181.

Sincerely,



Jenny Small
Judicial Watch, Inc.



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

JAN 15 2010

Ms. Jenny Small
Researcher
Judicial Watch
501 School Street, SW
Suite 725
Washington, DC 20024

Re: AG/10-R0317
DAG/10-R0318
ASG/10-R0319
OIPL/10-R0320
OLP/10-R0321
OLA/10-R0322
PAO/10-R0323
CLM:VRB:JBG

Dear Ms. Small:

While processing your Freedom of Information Act (FOIA) request for records concerning *U.S. v. New Black Panther Party for Self-Defense, et al.*, the Department of Justice's Civil Rights Division forwarded your request to this Office for processing and direct response to you. For your information, your request was received in this Office on January 4, 2010. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Public Affairs, Legislative Affairs, Legal Policy and Intergovernmental and Public Liaison.

For your information, the Department of Justice is in receipt of multiple FOIA requests concerning *U.S. v. New Black Panther Party for Self-Defense*, and we have interpreted the scope of all of these requests to be limited to records concerning the Department's decision to seek a dismissal of defendants in *U.S. v. New Black Panther Party for Self-Defense*. This interpretation is intended to facilitate our response to you; moreover, these requests are being processed on an expedited basis. If you are not satisfied with our interpretation of the scope of your request, however, you may contact us at (202) 514-3642 or at the below address to discuss your request. If we do not hear otherwise from you, we will assume that you are satisfied with the scope as defined above.

Please be advised that we have completed our records searches in the Office of the Associate Attorney General, as well as the electronic database of the Departmental Executive Secretariat, which is the official records repository for the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General, and sixty-nine documents, totaling one hundred thirty-five pages, were located that are responsive to your request. I have determined that all of this material should be withheld in full pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 522(b)(5), which pertains to certain communications protected by privilege, in this instance the deliberative process privilege and the attorney work-product privilege. For your information, the withheld material includes e-mails between officials in the Civil Rights Division and the Office of the Associate Attorney General regarding litigation strategy, drafts of court filings, and briefing materials related to the subject of your request.


-2-

We are continuing our records searches in the Offices of the Attorney General, Deputy Attorney General, Public Affairs, Legislative Affairs, Legal Policy and Intergovernmental and Public Liaison, and will respond to you again once those records searches are completed and any disclosure determinations are made.

We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request. In your letter you agreed to pay fees up to \$350 in the event that a fee waiver is not granted.

If you are not satisfied with my action on behalf of the Office of the Associate Attorney General, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-001. Your appeal must be received within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in dark ink, appearing to read "Carmen L. Mallon", with a long horizontal flourish extending to the right.

Carmen L. Mallon
Chief of Staff

EXHIBIT H



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

APR 13 2010

Ms. Jenny Small
Judicial Watch
Suite 725
501 School Street, SW
Washington, DC 20024

Dear Ms. Small:

This is to advise you that your administrative appeals from the action of the Initial Request Staff of the Office of Information Policy, acting on behalf of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Intergovernmental and Public Liaison, Legal Policy, Legal Affairs, and Public Affairs, were received by this Office on April 8, 2010.

The Administrative Appeals Staff of the Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeals have been assigned the following numbers:

<u>Appeal No.</u>	<u>Request No.</u>
2010-1575	AG/10-R0317
2010-1576	DAG/10-R0318
2010-1577	ASG/10-R0319
2010-1578	OIPL/10-R0320
2010-1579	OLP/10-R0321
2010-1580	OLA/10-R0322
2010-1581	PAO/10-R0323

Please mention these numbers in any future correspondence to this Office regarding these matters.

We will notify you of the decision on your appeals as soon as we can. If you have any questions about the status of your appeals you may contact me at the number above.

Sincerely,

Priscilla Jones
Supervisory Administrative Specialist

FILE COPY

EXHIBIT I



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

JUN 04 2010

Ms. Jenny Small
Judicial Watch
Suite 800
425 Third Street, SW
Washington, DC 20024

Re: Appeal Nos. 2010-1575, 2010-1576,
2010-1577, 2010-1578, 2010-1579,
2010-1580, 2010-1581
Request Nos. AG/10/R0317,
DAG/10-R0318, ASG/10-R0319,
OIPL/10-R0320, OLP/10-R0321,
OLA/10-R0322, PAO/10-R0323
CAS:KWC

Dear Ms. Small:

You appealed from the actions of the Initial Request Staff (IR Staff) of the Office of Information Policy acting on behalf of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Intergovernmental and Public Liaison, Legal Policy, Legislative Affairs, and Public Affairs on your requests for access to records pertaining to U.S. v. New York Black Panther Party for Self Defense, Case No. 09-0065 (E.D.Pa. 2009).

I have been informed that you filed a lawsuit pertaining to the actions of the above-referenced offices in the United States District Court for the District of Columbia. Inasmuch as these matters are now before the Court, I am closing your appeal files in this Office in accordance with 28 C.F.R. § 16.9(a)(3) (2009).

Sincerely,

A handwritten signature in dark ink, appearing to read "Janice Galli McLeod", written over a horizontal line.

Janice Galli McLeod
Associate Director

WC

EXHIBIT J

Judicial Watch v. Department of Justice
Civ. Action No. 10-851

U.S. District Court
District of Columbia

Index of OIP Withholdings

Acronyms:

OAG – Office of the Attorney General

CRT – Civil Rights Division

DAG – Deputy Attorney General

ODAG – Office of the Deputy Attorney General

OLA – Office of Legislative Affairs

ASG – Associate Attorney General

OASG – Office of the Associate Attorney General

AG – Attorney General

NBPP – New Black Panther Party

Description of the forty-eight pages of records withheld by OIP on behalf of the OAG, ODAG, and OASG, which are being challenged by plaintiff.

Group	Document #		Document Type	Author/From	To	Subject/Title	Date	Exemption	Pages	Description of Withheld Information
Grp. 1	101	b	Email	Steven Rosenbaum	Sam Hirsch	New Black Panther Party Update	4/30/09	(b)(5)	1	E-mail from attorney at CRT to OASG briefing on the current status of litigation and providing his opinion on the development of different approaches under consideration.
	102		E-mail	Tom Perrelli	Sam Hirsch	Where are we on the Black Panther Party Case?	5/14/09	(b)(5)	1	E-mail asking for update on the NBPP litigation between officials in OASG, and noting ODAG's current thoughts on logistics in the case.
	103	b	E-mail chain	Steven Rosenbaum	Sam Hirsch	FW: New Black Panther Party -- your questions	5/15/09	(b)(5)	3	E-mails forwarding and presenting legal analysis from CRT Appellate Section attorneys on questions presented from the CRT Front Office; specifically, the attorneys provide their legal assessments and recommendations on a potential course of action in the NBPP case. The Appellate Section's analysis is forwarded to OASG.
		c		Diana Flynn	Steven Rosenbaum cc: Marie McElderry	New Black Panther party - - your questions	5/15/09			
		d		Marie McElderry	Diana Flynn	Questions from the Front Office	5/15/09			

Group	Document #		Document Type	Author/From	To	Subject/Title	Date	Exemption	Pages	Description of Withheld Information
	104	a	E-mail chain	Sam Hirsch	Tom Perrelli	RE: Black Panthers?	5/14/09	(b)(5)	1	E-mails between attorneys in OASG regarding the current status of the NBPP litigation and an update on the status of deliberations in CRT regarding legal strategies under consideration in that Office.
		b		Tom Perrelli	Sam Hirsch	Black Panthers?	5/14/09			
	105	a	E-mail chain	Sam Hirsch	Tom Perrelli	NBPP	5/15/09	(b)(5)	1	E-mail discussion between attorneys in OASG and CRT, then within OASG, regarding current status of the NBPP litigation and, specifically, CRT's development of a position with respect to potential actions under consideration in the case.
		b		Sam Hirsch	Tom Perrelli	FW: Timing	5/15/09			
		c		Sam Hirsch	Loretta King, Steven Rosenbaum	Timing	5/15/09			
	106	c	E-mail	Sam Hirsch	Tom Perrelli	NBPP	5/15/09	(b)(5)	1	E-mail between OASG attorneys regarding edits to court papers in the NBPP litigation and commenting on the status of the case.
	107	a	E-mail	Sam Hirsch	Donald Verrilli, Aaron Lewis, Tom Perrelli	Fw: New Black Panther	5/16/09	(b)(5)	1	E-mail from OASG to OAG, ODAG and OASG officials forwarding court papers filed in the NBPP litigation, as well as e-mails briefing recipients on the nature of the relief sought therein. E-mail provides additional comment and characterization of relief sought.
	121		E-mail	Sam Hirsch	Steven Rosenbaum	NBPP	5/15/09	(b)(5)	1	E-mail from an OASG attorney to a CRT attorney presenting OASG's view on a course of action under consideration in the case, and discussing timeline of the litigation as well as possible options regarding deadlines.

Grp. 2	112		Handwritten Attorney Meeting Notes	Daphna Renan	N/A	CRT Weekly mtg	4/30/09	(b)(5)	1	<p>Handwritten notes taken at a "CRT Weekly Meeting" in which a variety of pending CRT matters are discussed. Author's notes reflect a discussion of the NBPP case and raises a question about the nature of the lawsuit.</p> <p>*Only a limited portion of these notes relate to the subject of plaintiff's FOIA request.</p>
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Group	Document #		Document Type	Author/From	To	Subject/Title	Date	Exemption	Pages	Description of Withheld Information
	113		Handwritten Attorney Meeting Notes	Daphna Renan	N/A	CRT weekly mtg	5/09	(b)(5)	1	Handwritten notes taken at a “CRT Weekly Meeting” in which a variety of pending CRT matters are discussed. Author’s notes reflect a discussion of a development in the NBPP litigation. *Only a limited portion of these notes relate to the subject of plaintiff’s FOIA request.
	114		Handwritten Attorney Meeting Notes	Daphna Renan	N/A	CRT Weekly Mtg.	5/14/09	(b)(5)	2	Handwritten notes taken at a “CRT Weekly Meeting” in which a variety of pending CRT matters are discussed. Author’s notes reflect a discussion of a potential court filing in the NBPP litigation and the ASG’s thoughts on that filing. *Although 2 pages in length, only a limited portion of these notes relate to the subject of plaintiff’s FOIA request.
	116		Chronology	Sam Hirsch	Uncertain, but was forwarded to OAG, ODAG and PAO	Chronology re New Black Panther Party case:	5/09	(b)(5)	27	Detailed “chronology” of the Department’s involvement in the NBPP litigation as presented from the author’s perspective. Includes the author’s characterization of actions and discussions with and among Department colleagues since the inception of the lawsuit, but focusing primarily on the time period of 4/29/09-5/21/09. This document contains an unvarnished presentation of author’s thoughts on litigation decisions, actions, strategies, and recommendations as they developed, as well as ruminations and retrospective analyses on the variety of decisionmaking processes in CRT, OASG, ODAG and OAG with respect to the NBPP litigation. Author describes and paraphrases discussion among officials regarding litigation strategy, potential courses of action and the viability of different litigation options as well as assessments of potential outcomes, in addition to providing his own insight into all aspects of his involvement in the litigation.

Group	Document #		Document Type	Author/From	To	Subject/Title	Date	Exemption	Pages	Description of Withheld Information
Grp. 3	110		Briefing Paper	Karen Stevens, CRT	N/A	New Black Panther Party: VRA Litigation	Undated	(b)(5)	2	Briefing paper, including talking points, for the AG regarding the Department’s handling of the NBPP litigation and the decision to drop charges against three defendants. This briefing paper identifies selected aspects of the Department’s handling of the NBPP litigation, and serves to brief the AG on how he may prepare for potential inquiries during upcoming Hill testimony.
	111		Briefing Paper		N/A	Black Panthers	Undated	(b)(5)	2	Briefing paper, including talking points, for the ASG regarding the Department’s handling of the NBPP litigation and the decision to drop charges against three defendants. This briefing paper identifies potential issues and various aspects of the Department’s handling of the NBPP litigation, and serves to brief the ASG on how he may prepare for inquiries.
	117	a	E-mail chain	Charlotte Burrows	Gary Grindler	RE: Letter to House Judic- - New Black Panther party	1/20/10	(b)(5)	3	Forward of an e-mail with the subject “New Black Panther Party: Response to Lamar Smith” by an ODAG attorney, who then presents a detailed analysis to the DAG on certain points of CRT’s decisionmaking process in the NBPP litigation. The ODAG attorney provides CRT’s explanations on its handling of the litigation and opines on how most appropriately to present certain aspects of the case in a draft letter to Congress.
		b		Gary Grindler	Charlotte Burrows	RE: Letter to House Judic- - New Black Panther party	1/20/10			
		c		Charlotte Burrows	Gary Grindler	RE: Letter to House Judic- - New Black Panther party	1/20/10			
		d		Steven Rosenbaum	Judy Appelbaum, Nancy Scott-Finan, Sam Hirsch, Charlotte Burrows, Daphna Renan. cc: Loretta King	New Black Panther Party: Response to Lamar Smith	6/23/09			

Identification of Key Department of Justice Officials

OAG

Aaron Lewis

ODAG

Gary Grindler, Acting Deputy Attorney General
Charlotte Burrows, Associate Deputy Attorney General
Daphna Renan, Counsel
Kathryn Ruemmler, Donald Verrilli, David Margolis

OASG

Tom Perrelli, Associate Attorney General
Sam Hirsch, Deputy Associate Attorney General

OLA

Judy Appelbaum, Nancy Scott-Finan

CRT

Loretta King, Acting Assistant Attorney General (former)
Steve Rosenbaum, Acting Deputy Assistant Attorney General (former)

Diana Flynn, Chief of Appellate Section
Marie McElderry, Senior Appellate Attorney (now retired)
Karen Stevens, Counsel to the Assistant Attorney General (former)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,
501 School Street, S.W., Suite 700
Washington, DC 20024

Plaintiff,

v.

DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Defendant.

Case No. 1:10-cv-00851 (RBW)

DECLARATION OF JACQUELINE COLEMAN SNEAD

I, Jacqueline Coleman Snead, declare as follows:

1. I am a Senior Counsel in the Federal Programs Branch, Civil Division, United States Department of Justice, and a member in good standing with the District of Columbia Bar. I am one of the attorneys representing the Department of Justice in the above-captioned matter. I have personal knowledge of the facts stated in this declaration. I make this declaration in support of Defendant's Motion for Summary Judgment.

2. Pursuant to the Court's Order of July 28, 2010, I produced to Plaintiff's counsel, Michael Bekesha, on September 15, 2010, a draft *Vaughn* index of the documents responsive to Plaintiff's Freedom of Information Act ("FOIA") request for "records concerning the Department's decision to seek a dismissal of defendants in *United States v. New Black Panther Party for Self-Defense*" that have been withheld by the Department pursuant to FOIA exemptions.

3. By email dated September 27, 2010, Mr. Bekesha identified the following challenges to the Department's withholdings:

First, the U.S. Commission on Civil Rights posted an Email from Dana [sic] Flynn to Steven Rosenbaum, dated May 13, 2009 and entitled "New Black Panther Party FW: Comments on the proposed default judgment filings in NBPP." It does not appear as though this document is listed on the *Vaughn* index and it has not been produced to Judicial Watch. . . . Judicial Watch therefore continues to have concerns that DOJ has not performed an adequate search and has not produced all responsive records.

Second, based on that Email, Judicial Watch believes that many of the Emails listed on the *Vaughn* index also contain a list of individuals Cced. None of the entries on the *Vaughn* index include to whom the Emails were CC-ed. Judicial Watch asserts this is important information as it pertains to whether the Emails were in fact inter- or intra- agency communications.

Third, with respect to the documents falling within the numbered range 2-85, Judicial Watch asserts that DOJ has not adequately satisfied the standard to withhold the documents. DOJ has not shown that disclosure of the records would have a chilling effect on the staff.

Fourth, it is unclear how the documents dated May 15, 2010 [sic] or after are predecisional or deliberative.

Fifth, Judicial Watch believes that DOJ has not adequately satisfied its burden with respect to documents 86 through 99. It is unclear what pending investigation exists, the status of that investigation, and how the release of the records could reasonably be expected to interfere with the enforcement proceedings.

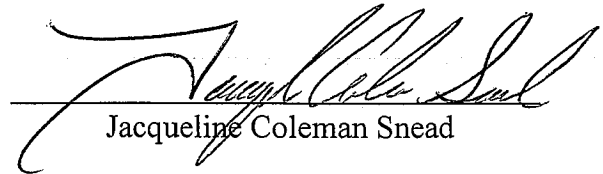
Sixth, with respect to documents numbered 100-122, DOJ has completely failed to satisfy its burden. The descriptions of the documents do not even address whether the documents are predecisional or deliberative or would have a chilling effect on the decision making process if released. . . .

Seventh, Judicial Watch asserts that DOJ has not sought to segregate all non-exempt information.

Email from Michael Bekesha to Jacqueline Coleman Snead (Sept. 27, 2010). Attached hereto as Exhibit A is a true and correct copy of Mr. Bekesha's September 27, 2010 email.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 2, 2010 in Washington, D.C.



Jacqueline Coleman Snead

Exhibit A

Snead, Jacqueline Coleman (CIV)

From:
Sent:
To:
Subject:

Michael Bekesha [REDACTED]
 Monday, September 27, 2010 3:20 PM
 Snead, Jacqueline Coleman (CIV)
 RE: Judicial Watch v. DOJ

(b)(6)

Jacqui:

Judicial Watch challenges the withholdings of the documents listed below. Judicial Watch challenges both the Exemption 5 and Exemption 7 claims, but it does not challenge the withholdings pursuant to Exemption 6. The following are Judicial Watch's concerns about the documents as they are withheld in their entirety.

First, the U.S. Commission on Civil Rights posted an Email from Dana Flynn to Steven Rosenbaum, dated May 13, 2009 and entitled "New Black Panther Party FW: Comments on the proposed default judgment filings in NBPP." It does not appear as though this document is listed on the *Vaughn* index and it has not been produced to Judicial Watch. From what I can tell, the "subject/title" and "No. of Pages" does not match any entry on the *Vaughn* index. Judicial Watch therefore continues to have concerns that DOJ has not performed an adequate search and has not produced all responsive records.

Second, based on that Email, Judicial Watch believes that many of the Emails listed on the *Vaughn* index also contain a list of individuals CCed. None of the entries on the *Vaughn* index include to whom the Emails were CC-ed. Judicial Watch asserts this is important information as it pertains to whether the Emails were in fact inter- or intra- agency communications.

Third, with respect to the documents falling within the numbered range 2-85, Judicial Watch asserts that DOJ has not adequately satisfied the standard to withhold the documents. DOJ has not shown that disclosure of the records would have a chilling effect on the staff.

Fourth, it is unclear how the documents dated May 15, 2010 or after are predecisional or deliberative.

Fifth, Judicial Watch believes that DOJ has not adequately satisfied its burden with respect to documents 86 through 99. It is unclear what pending investigation exists, the status of that investigation, and how the release of the records could reasonably be expected to interfere with the enforcement proceedings.

Sixth, with respect to documents numbered 100-122, DOJ has completely failed to satisfy its burden. The descriptions of the documents do not even address whether the documents are predecisional or deliberative or would have a chilling effect on the decision making process if released. Also, the descriptions state that the documents are simply "a status update on the litigation."

Seventh, Judicial Watch asserts that DOJ has not sought to segregate all non-exempt information. It is difficult to believe that every word on every page of each document falls under a claim of exemption.

To summarize, Judicial Watch is concerned that DOJ has not performed a reasonable search and additional records responsive to its request have not been produced. Judicial Watch does not believe that DOJ has adequately satisfied its burden on withholding documents and believes that DOJ has failed to show that all information falls under a claim of exemption and cannot be segregated.

Once you have had a chance to review, please let me know and we can discuss how we should proceed.
 Thanks.

Document Number
2 a
4 a-c
5 a
6 a
7 a

12 a-b
13 a
14 a
17 a-f
19 a-b
20 a-b
22 a
23 a
24 a-c
25 a
26 a-b
27 a
28 a-b
30 a-h
32 a-b
34 a-b
35 a
36 a
37 a c
39 a-f
40 a-c
42 a
44 a
47 a-e
49 a-c
50 a-d
52 a
55 a-f
57 a
59 a-c
60 a-c
63 a-c
64 a
65 a-c
67 a-b
68 a
69 a
70 a
71 a
74 a-c
77 a c
78 a
79 a-c
80 a
81 a
82 a
83 a-d
84 a-c
85 a-f

86-99
100a
101 a-b
102
103 a-d
104 a-b
105 a-c
106 a-c
107 a
108 a-b
109 a-b
110-116
117 a-d
118 a
121
122 a

mb

(b)(6)