U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUN 0 6 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cummings:

We write regarding the Committee on Oversight and Reform's (Committee) June 3, 2019 letter to the Department of Justice (Department) stating that the Committee intends to schedule a vote on a resolution to hold the Attorney General in contempt of Congress based on the Department's response to Committee requests for documents and testimony regarding the reinstatement of a citizenship question on the 2020 United States Census. The Committee's action is premature and we are disappointed by the Committee's mischaracterization of the Department's continued and ongoing efforts to accommodate the Committee's oversight interests.

Since receiving the Committee's February 12, 2019 document request, and the April 2, 2019 subpoena that followed, the Department has sought to identify and to produce responsive documents and information to the Committee. Specifically, the Department has made eight submissions to the Committee in its ongoing, rolling document production totaling more than 17,000 pages (productions on February 25, 2019, March 15, 2019, March 29, 2019, April 11, 2019, April 16, 2019, April 26, 2019, May 10, 2019, and May 24, 2019). The Department has also identified tens of thousands more responsive pages that it is in the process of producing. At the same time, the Department has made two senior officials available for transcribed interviews by Committee staff. Last week, on May 30, 2019, Gene Hamilton, Counselor to the Attorney General, spent several hours answering all of the Committee's questions regarding the reinstatement of the citizenship question on the 2020 Census. Prior to that, John Gore, Principal Deputy Assistant Attorney General for the Civil Rights Division, voluntarily testified before the Committee on May 18, 2018 and appeared for a lengthy transcribed interview on March 7, 2019.

Despite the Department's significant and ongoing efforts to accommodate the Committee's requests, your June 3 letter alleges lack of compliance by the Attorney General based on (1) the Committee's dissatisfaction with the Department's ongoing document production; and (2) the Attorney General's instruction that Mr. Gore not appear before the Committee for a third time, for a deposition, unless the Committee allows him to be accompanied by Department counsel.

Let us address first the Attorney General's instruction concerning Mr. Gore's appearance. The Committee's oversight inquiries relate to Executive Branch decision-making. As we

previously explained in our April 9, 2019 letter, the Executive Branch must be able to protect privileged information and to provide appropriate supervision to employees in connection with congressional communications regarding such matters. The Committee's exclusion of agency counsel from a compelled deposition of a Department official on these topics therefore would unconstitutionally infringe upon the prerogatives of the Executive Branch. As we indicated then, and as we reiterate now, the Department is willing to make Mr. Gore available for the requested deposition (or another transcribed interview) if the Committee permits agency counsel to accompany Mr. Gore.

With respect to the Department's ongoing document production, the Department has been working diligently and in good faith to make documents available, and it plans to continue its review and production in an effort to accommodate the Committee's requests. However, your June 3 letter indicates the Committee will consider postposing its contempt vote *only* if the Department immediately produces certain documents. These specific documents—a memorandum from a Commerce Department attorney to Mr. Gore and all drafts of a Department letter to the Census Bureau—are protected from disclosure by the attorney-client privilege, deliberative process privilege, and/or the attorney work product doctrine. Indeed, a federal court has already held the memorandum and note from a Commerce Department attorney to Mr. Gore and drafts of the Department's letter to the Census Bureau to be protected by such privileges.[1] Accordingly, the Committee's insistence that the Department immediately turn over these documents, in the face of a judicial order protecting them from disclosure, is improper. However, the Department intends to continue its substantial production of documents consistent with Executive Branch confidentiality interests.

As to both of these issues, the Department remains willing to continue working with the Committee to find a resolution that would balance Congress's "legitimate need for information that will help it legislate"[2] and the Department's "legitimate, constitutionally recognized need to keep certain information confidential."[3] One challenge, of course, has been the Committee's desire to conduct oversight of the Commerce Department's decision to reinstate the citizenship question on the 2020 Census while the matter is being actively litigated, rather than waiting a short period of time until the matter is resolved. Nonetheless, as discussed, the Department will continue to produce documents to the Committee as appropriate.

Given the ongoing accommodation efforts by the Department, we believe that a vote on contempt would be entirely premature. We hope that the Committee will not take such an abrupt

---

[1] The deliberative drafts of the letter from the Department to the Census Bureau were found to be appropriately withheld based on the deliberative process privilege. Order, Docket No. 369 at 5, *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (Oct 5, 2018) ("the Court concludes that the drafts of the 'Gary Letter' . . . are protected by the deliberative process privilege and, given DOJ's subordinate role in Secretary Ross's decision to add the citizenship question, need not be disclosed"). The memorandum and note provided by a Commerce Department attorney to Mr. Gore were found to be appropriately withheld on attorney-client privilege grounds. *See* Min. Order, Docket No. 361, *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (Sept. 30, 2018) ("The Court upholds Defendants' invocation of the attorney-client privilege with respect to the remaining disputed documents, substantially for the reasons stated in Defendants' opposition").

[2] *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 157 (1989).

[3] *Id.* at 157-58.

measure to terminate the accommodation process, but will instead work in good faith to respect the legitimate prerogatives of each of our co-equal branches.

Very truly yours,

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Jim Jordan
Ranking Member