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UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
WASHINGTON, D.C. 20230

Robert E. Kopp, Esq.
U.S. Department of Justice
Civil Division
Director of Appellate Staff
601 D Street, NW Room 9002
Washington, D.C. 20530

Re: Margaret Carter and Susan Castillo v. United States Department of Commerce, United States District Court, District of Oregon Civ. No. 01-868-RE

Dear Mr. Kopp:

Due to the importance of the above-referenced case, the Department of Commerce and the Bureau of Census are requesting that the Department of Justice vigorously defend this case including, if necessary, seeking *en banc* review by the 9th Circuit and/or requesting a writ of certiorari from the U.S. Supreme Court. The Department of Commerce believes strongly that the release of the adjusted data is contrary to the public interest and could substantially harm the Census Bureau's deliberative process. Additionally, this case is of great importance to the Department as there is currently a split between two circuit courts of appeal on the matter: Assembly of the State of California v. Department of Commerce, 968 F.2d 916 (9th Cir. 1992) (in a similar factual scenario the Court found the adjusted data not exempt under exemption (b)(5)); and Florida House of Representatives v. United States Department of Commerce, 961 F.2d 941 (11th Cir. 1992) (in a similar factual scenario the Court found the adjusted data to be exempt under exemption (b)(5)).

The Department has withheld statistically adjusted census data under exemption (b)(5) of the Freedom of Information Act (FOIA), based on the deliberative process privilege. The information withheld was developed through a series of expert analyses and processes. While the fruits of these efforts – the "adjusted data" – are numerical, they reflect a detailed series of expert opinions and judgments regarding the nature and method of statistical sampling, certain complex demographic issues, and statistical theories of extrapolation. Generally speaking, the adjusted data generated a population total for the United States based upon the results of a sample from only a fraction of one percent of the population. Ultimately, a committee of Census Bureau experts concluded that inconsistencies with the adjusted data as compared with demographic analysis precluded a determination that the adjusted data were more reliable. Thereafter, the Census Bureau continued to evaluate and refine the statistical techniques and assumptions that had produced the adjusted data. The Secretary of Commerce, based upon the unanimous recommendation of the career experts at the Census Bureau, therefore decided not to

publish the adjusted data.

The adjusted data are predecisional because adjusted data on all levels were created in contemplation of the Secretary's decision whether to release adjusted or unadjusted data to the states as the official population tabulations pursuant to 13 U.S.C. § 141(c). Moreover, the adjusted data have other recognized indicia of predecisional documents: they were prepared by subordinates for their superiors; the preparers of the data had no final decisionmaking authority; the opinion expressed by the numbers (*i.e.*, which count was most accurate) did not reflect or explain a final agency policy or establish final agency guidelines until the Secretary made a choice of which set of data to use; they were generated pursuant to an established accuracy and coverage program (the A.C.E.) designed to enhance the accuracy of the Decennial Census; and the data do not represent any "secret law" employed by the agency. See Ashley v. U.S. Dept. of Labor, 589 F.Supp. 901, 908 (D.D.C. 1983).

Numbers may be protected to the extent that they are predecisional and deliberative, not merely fixed facts. Quarles v. Department of the Navy, 893 F.2d 390 (D.C. Cir. 1990) (construction cost estimates were derived from a complex set of judgments, and were prepared in order to assist an agency decisionmaker in arriving at his decision).¹ "As the dichotomy between opinion and fact is not clear-cut, courts generally follow a 'functional' approach in an attempt to determine 'whether production of the contested document [or section] would be 'injurious to the consultative functions of government . . .'" Providence Journal Co. v. U.S. Dept. of the Army, 981 F.2d 552, 562 (1st Cir. 1992)(citing EPA v. Mink, 410 U.S. 73, 87, 93 S.Ct. 827, 836 (1973)). Here, the Bureau of the Census and the Department both strongly believe that the public release of suspect data would impair future deliberations that precede highly sensitive decisions such as the one at issue.

In this case, two competing sets of block level data - unadjusted and adjusted - were compiled to be final products to be provided to the states. Instead of being "purely fact," all of the data are part of the decision as to which was the most accurate count of the nation's population. The two sets of data were compiled using two different methodologies, and both the methodologies and their ultimate products comprised the universe of the Secretary's options. The adjusted block level data are, in this case, the embodiment of a rejected proposal. The final numbers, how they were compiled, their reliability and accuracy, their respective effects on the population count of the nation, and the policy position of the Department regarding its commitment to count the population accurately, therefore, were inherently involved in the final judgment call of the Secretary. This determination of accuracy was itself a critical component of the deliberative process. The Secretary chose to release the unadjusted data. All the associated factors that were rejected by the Secretary comprise the deliberative process that is entitled to protection.

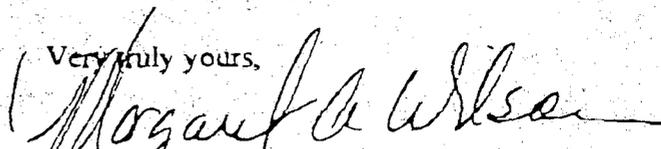
¹ Generally, purely factual material does not qualify for (b)(5) protection unless it is so inextricably intertwined with deliberative material that disclosure would reveal the agency's deliberations (Wolfe v. HHS, 839 F.2d 768, 774 (D.C. Cir. 1988)(the fact/opinion distinction should not be "mechanically applied") or unless the facts have been specifically selected from a larger group of facts and the selection itself represents agency deliberations (Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974)).

The Department believes strongly that release of the adjusted block level data is not in the public's best interest or the Census Bureau's interest. Professionals from the Census Bureau spent countless hours, over the course of more than a year, analyzing the adjusted data, and finally recommended that those data not be used because of potentially serious, unexplained statistical flaws in the process that produced them.

The decision to release the unadjusted data as the official Commerce Department numbers to be used for redistricting by the states instead of the adjusted data was the result of internal deliberative processes of the Census Bureau and the Department of Commerce. Releasing the rejected data would likely have a chilling effect on further analyses and recommendations within the Bureau and the Department, and substantially discourage frank and honest communication of information whether written or oral, concerning potential options or policies. The deliberative process is protected by exemption (b)(5) of the FOIA for this very reason. Additionally, the Bureau and Department are committed to using the most accurate information available and are concerned that the release of any potentially less reliable data is not in the public interest.

Thank you for your time and attention to this matter.

Very truly yours,



Margaret A. Wilson
Deputy General Counsel

cc: Mark Stern
Michael Rabb
Theodore W. Kassinger
William G. Barron, Jr.