

November 12, 2018

The Honorable Jesse M. Furman
Thurgood Marshall U.S. Courthouse
United States District Court for the Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007

RE: Plaintiffs' letter-motion to designate materials for inclusion in the Administrative Record in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

As part of the Census Bureau's integrated communication campaign for the 2020 census, the Bureau's Center for Survey Measurement conducted a series of 42 focus groups in March and April 2018 as part of the Census Barriers, Attitudes, and Motivators Study. *See* Ex. 1 (Rule 30(b)(6) dep. tr. 201-03); PX-161 at 10. Twelve of these focus groups occurred before the Secretary's decision to add a citizenship question was announced, and the summaries of those focus groups are contained at PX-15. Because the information from those focus groups was before the agency at the time the decision was made, that material is properly considered part of the Administrative Record. Plaintiffs therefore move to designate those portions of PX-15 as part of the Administrative Record in this action. *See* PX-15 at 1-2, 6-8, 9-11, 18-20, 26-28, 45-48, 50, 53-54, 58).

1. The scope of the Administrative Record. The Administrative Procedure Act requires the Court to conduct "plenary review of the Secretary's decision, . . . to be based on the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *see also* 5 U.S.C. § 706 (in evaluating agency action, "the court shall review the whole record"). The "whole record" requirement is necessary to enable effective judicial review, because the § 706(2) standard requires the Court to determine, among other factors, whether the agency made a decision that "runs counter to the evidence" before it, or failed to offer a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

The "whole record" includes all of the materials before the agency at the time of the decision, not merely the subset directly reviewed by the final decisionmaker, and not merely the subset of materials that purportedly support the ultimate decision. *See Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case."); *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) ("The complete administrative record consists of all documents and materials directly or indirectly considered by the agency."); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (the administrative record includes work, recommendations, and other materials considered by subordinates).

2. *Summaries of the March 2018 CBAMS focus groups should be considered part of the Administrative Record.* The Center for Survey Measurement within the Census Bureau conducts questionnaire testing and qualitative research, including content recognition, questionnaire layout, focus groups, and related behavioral science research. Ex. 1 (Rule 30(b)(6) dep. tr. at 29-30). As part of the Census Bureau’s integrated communication campaign for the 2020 census, CSM conducted a series of 42 focus groups in the spring of 2018 through the “Census Barriers, Attitudes, and Motivators Study,” or CBAMS. *See id.* (Rule 30(b)(6) dep. tr. 201-03); PX-161 at 10. Twelve of those 42 focus groups were conducted before the Secretary’s decision to add a citizenship question to the census was announced on March 26, 2018. *Id.* (Rule 30(b)(6) dep. tr. at 203); PX-161 at 5; PX-1 at AR 1313.

The original transcripts of the CBAMS focus groups were not discoverable in this litigation because of the Title 13 prohibition on disclosing individually identifiable census information, *see* Docket No. 398 at 2; *see also* Tr. of 10/24 Hearing at 22-23, and the “audience summary reports” and “after action reports” that appear at PX-15 were produced instead. Defendants represented that these reports were based on “an approved protocol for disclosure avoidance review of summaries of qualitative research produced from activities like focus groups,” and that the summaries “are an attempt by the [Disclosure Review Board] and census to release as much data as possible.” Docket No. 398-1. In other words, by Defendants’ own representation, the summaries contained at PX-15 are the most accurate memorialization available of the substance of the CBAMS focus groups.

Defendants assert that the information from these twelve focus groups – although conducted *before* the Secretary announced his decision on March 26 – was not available to the agency until after that decision; and that this material should therefore be excluded from the Administrative Record. But Dr. Abowd testified to the exact opposite, stating on behalf of the Census Bureau that the focus group results were in fact relayed to and considered by the Census Bureau in real time: “So far, the results from the CBAMS focus groups have been directly fed back to decennial, and the new training materials are being developed and those are an input to them. So although we have to work fast, we’re not so bureaucratic that we can’t process new information when we get it.” Ex. 1 (Rule 30(b)(6) dep. tr. at 207). And the “after action reports” contained at PX-15 themselves make clear that although the focus groups were principally implemented by the Census Bureau’s contractor, Young & Rubicam, Census Bureau employees attended each focus group either in person or by remote video feed. *See, e.g.*, PX-15 at 32 (“We were also able to stream this feed to remote participants, though some Census participants were not able to access behind the firewalls of their government computers.”); *id.* at 39 (noting feedback to moderators from on-site census staff). The Census Bureau was therefore well aware of the focus group observations as they were occurring, and the information in PX-15 relating to the focus groups conducted before the Secretary’s decision is properly considered to have been before the agency at the time the decision was made.¹

¹ Even absent this evidence of real-time feedback to – and direct participation by – Census Bureau employees, the information learned by the Young & Rubicam contractors should be considered information possessed by the agency under the “consultant corollary.” *Cf. Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 10 (2001) (when an outside consultant acts analogously to an agency employee, “the records submitted by outside consultants played essentially the same part in an agency’s process of deliberation as documents prepared by agency personnel might have done”).

Nor are these summaries excludable from the Administrative Record simply because the memorializations themselves post-date the Secretary's decision. Defendants themselves included several dozen memos in their original Administrative Record compilation that reflect post-call summaries (prepared after the Secretary's March 26 announcement) of conversations the Secretary had during his pre-announcement stakeholder outreach. *E.g.*, AR 1194, 1198-1209, 1213-1216, 1221, 1256-1261, 1274-1276. And Defendants have represented that the CBAMS focus groups summaries contained at PX-15 are an accurate characterization of the substance of the information that was before the agency regarding the CBAMS focus groups, and that the summaries were prepared based on an "approved protocol" for "summaries of qualitative research." Docket No. 398-1. That the summaries were themselves compiled only after the focus groups took place does nothing to undercut Plaintiffs' showing that the substance of the information contained in those summaries was known to and considered by the agency in March 2018.

The pages from PX-15 that consist of audience summary reports and after action reports of the twelve focus groups conducted before the Secretary's decision should therefore be included in the Administrative Record. *See* PX-15 at 1-2, 6-8 (as related to Location 1), 9-11, 18-20, 26-28 (as related to Location 1), 45-48, 50, 53-54, 58.

Respectfully submitted,

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Exhibit 1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----
4 NEW YORK IMMIGRATION COALITION, ET AL.,

5 Plaintiffs,

6 vs. Case No. 1:18-CF-05025-JMF

7 UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

8 Defendants.
9 -----

10 Washington, D.C.

11 Wednesday, August 29, 2018

12 Deposition of:

13 DR. JOHN ABOWD

14 called for oral examination by counsel for
15 Plaintiffs, pursuant to notice, at the office of
16 Arnold & Porter, 601 Massachusetts Avenue NW,
17 Washington, D.C., before KAREN LYNN JORGENSEN,
18 RPR, CSR, CCR of Capital Reporting Company,
19 beginning at 9:06 a.m., when were present on
20 behalf of the respective parties:

21 Veritext Legal Solutions

22 Mid-Atlantic Region

1250 Eye Street NW - Suite 350

Washington, D.C. 20005

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VIDEOGRAPHER: Dan Reidy

1 P R O C E E D I N G S

2 WHEREUPON,

3

4 VIDEOGRAPHER: Good morning. We're going
5 on the record at 9:06 a.m. on Wednesday August 29,
6 2018. Please note that the microphones are
7 sensitive and may pick up whispering and private
8 conversations. Please turn off all cell phones
9 and place them away from the microphones, as they
10 can interfere with the deposition audio. Audio
11 and video recording will continue to take place
12 unless all parties agree to go off the record.

13 This is Media Unit 1 of the video
14 recorded deposition of Dr. John Abowd taken by
15 counsel for the plaintiff in the matter of the
16 New York Immigration Coalition, et al., v.
17 United States Department of Commerce, et al. This
18 case is filed in the U.S. District Court of the
19 Southern District of New York. This deposition is
20 being held at the law offices of Arnold & Porter
21 located at 601 Massachusetts Avenue Northwest,
22 Washington, D.C. 20001.

1 My name is Dan Reidy from the firm
2 Veritext Legal Solutions, and I'm the
3 videographer. The court reporter is
4 Karen Jorgenson from the firm Veritext Legal
5 Solutions.

6 I am not authorized to administer an
7 oath. I am not related to any party in this
8 action, nor am I financially interested in the
9 outcome.

10 Also, counsels' appearances will be noted
11 on the stenographic record rather than orally at
12 this time.

13 Will the court reporter please swear in
14 the witness?

15 DR. JOHN ABOWD,
16 called as a witness, and having been first duly
17 sworn, was examined and testified as follows:

18 THE WITNESS: I do.

19 EXAMINATION BY MR. HO:

20 Q Dr. Abowd, before we get started, I just
21 want to confirm something on the record with your
22 counsel.

1 opinion of the Census Bureau professionals, the
2 citizenship question, even without a nativity
3 lead-in, has been adequately tested.

4 Q I believe you said that it was in May of
5 2016 --

6 A I said -- I may have said '19, but I
7 meant May of 2018. It was after the
8 Secretary -- sorry. Thank you for correcting me.
9 It was after the Secretary instructed us to add
10 the question. It was in May of this year.

11 Q Thank you for clarifying.

12 Dr. Abowd, what is the Center For Survey
13 Measurement within the Census Bureau?

14 A The Center For Survey Measurement is a
15 group of, primarily, behavioral scientists and
16 survey methodologists led by Paul Beatty who is
17 the chief.

18 Q And what does -- I'll call it CSM for
19 short -- what does CSM do?

20 A CSM does a variety of questionnaire
21 testing and qualitative research, leading content
22 recognition questionnaire layout, ISR -- Internet

1 self-response instrument design, focus groups,
2 related behavioral science research.

3 Q Fair to say that they are involved in
4 testing Census Bureau questionnaires?

5 A Yes.

6 Q Fair to say that they assess whether or
7 not a particular questionnaire has been tested
8 adequately?

9 A They assess survey development at all
10 stages of the survey lifecycle, including the one
11 that you referenced.

12 Q And were the professionals in CSM asked
13 their opinion as to whether there had been
14 adequate testing of the ACS citizenship question
15 to add it to the decennial enumeration
16 questionnaire?

17 A In the course of developing our technical
18 response to the Department of Justice request, the
19 first group interviewed by the technical response
20 team was a group from the Center For Survey
21 Measurement, and they were asked about the quality
22 of the citizenship question on the

1 those protocols, they would not have accounted for
2 the citizenship question, correct?

3 A That's correct.

4 Q And the same question with respect to the
5 census questionnaire assistance. To the extent
6 the testing was used to develop a projection about
7 call loads for peak operations, those projections
8 would not account for the citizenship question,
9 correct?

10 A That's correct.

11 Q In light of the Secretary's decision to
12 add the citizenship question, will the
13 Census Bureau conduct any testing on the impact of
14 that question on staffing levels?

15 MR. EHRLICH: Objection. Form.

16 THE WITNESS: It's hard to imagine what
17 kind of testing we might do, other than on a
18 relatively small scale. However, we are working
19 closely with the integrated communication
20 campaign, which the Secretary has recommended
21 increasing the budget to 500 million. They are
22 developing messaging and other tools that we fully

1 expect to use, both with the general population
2 and with specialized groups, like enumerators.

3 BY MR. TALIK:

4 Q But there has been no testing on the need
5 for -- let me rephrase that.

6 There has been no testing on whether the
7 citizenship question will require -- require the
8 Census Bureau to increase staffing levels for
9 2020?

10 A I think I've already said there hasn't
11 been in direct testing.

12 Q Sure.

13 A We have the time, from now going forward,
14 to accumulate additional information. If the only
15 testing that you mean is randomized controlled
16 trials, I don't believe there will be one of
17 those.

18 If you mean the kind of testing that
19 modern advertising firms do in developing a media
20 campaign, that's just rolling out, and there's
21 going to be a lot of that conducted between now
22 and the start of the media campaign, and we're

1 already using that forum to collect additional
2 information.

3 Q And what kinds of tests are you referring
4 to with respect to developing a media campaign?

5 A So in the development phase of that
6 contract, we conducted the Census Barriers,
7 Attitudes and Motivators Study, CBAMS, which had
8 both the survey and the focus group component.
9 The survey was -- instrument was closed before the
10 Secretary's decision, so it was not modified. But
11 the focus group's were not closed. They were in
12 process when the Secretary made his decision. So
13 we conducted 42 focus groups and 30 of them were
14 conducted after the citizenship question was added
15 to the 2020 census. And the focus group protocols
16 were modified in a manner that kept them
17 comparable to the focus group protocols from the
18 ten that were conducted before that -- to gather
19 specific information about the effects of the
20 citizenship question.

21 Q Besides the CBAMS focus groups, are there
22 other tests that the Census is already doing or

1 immediately, but I am aware of the conversations
2 that happened and the oversight that occurs with
3 those conversations. So when people propose that,
4 then their plan gets rush vetted. So I expect to
5 see modifications to the testing procedures so
6 that we can make sure that the -- the things that
7 are under our control get more testing.

8 Q But, so far, there has been no outcome of
9 that consultation in terms of a specific testing
10 plan for the citizenship question?

11 A So far, the results from the CBAMS focus
12 groups have been directly fed back to decennial,
13 and the new training materials are being developed
14 and those are an input to them.

15 So although we have to work fast, we're
16 not so bureaucratic that we can't process new
17 information when we get it. We have to have the
18 opportunity to get it. The CBAMS focus groups
19 were the opportunity -- the first opportunity to
20 get some fresh information.

21 Q Now, independent of testing, does the
22 Census Bureau intend to increase staffing levels

1 * * * * *

2 CERTIFICATE OF REPORTER

3 I, KAREN LYNN JORGENSEN, RPR, CSR, CCR the
4 officer before whom the foregoing deposition was
5 taken, do hereby certify that the witness whose
6 testimony appears in the foregoing deposition was
7 duly sworn by me; that the testimony of said
8 witness was taken by me in stenotype and
9 thereafter reduced to typewriting under my
10 direction; that the said deposition is a true
11 record of the testimony given by said witness;
12 that I am neither counsel for, related to, nor
13 employed by any of the parties to the action in
14 which this deposition was taken; and further, that
15 I am not a relative or employee of any counsel or
16 attorney employed by the parties hereto, nor
17 financially or otherwise interested in the outcome
18 of this action.



19 -----
20 KAREN LYNN JORGENSEN, RPR, CCR, CSR

21 Dated this 1st day
22 of September , 2018.