

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE
CONFERENCE OF THE NAACP, et al.,

Plaintiffs,

v.

PATRICK LLOYD MCCRORY, in his
official capacity as the Governor of North
Carolina, et al.,

Defendants.

**JOINT STATUS REPORT
REGARDING OUTSTANDING
DISCOVERY AND PRODUCTION
ISSUES**

Civil Action No. 1:13-CV-658

LEAGUE OF WOMEN VOTERS OF
NORTH CAROLINA, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et
al.,

Defendants.

Civil Action No. 1:13-CV-660

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA, *et*
al.,

Defendants.

Civil Action No. 13-cv-861

JOINT STATUS REPORT REGARDING OUTSTANDING DISCOVERY AND PRODUCTION ISSUES

Pursuant to this Court's order of December 5, 2014, (ECF No. 203, 13-cv-861), the parties submit this joint status report regarding outstanding discovery and production issues.

1. North Carolina Division of Motor Vehicles Data for Expert Analysis¹

Plaintiffs' position: The United States has not been able to proceed with its database matching analysis of voter registration records against the North Carolina Division of Motor Vehicles (DMV) database to determine the number of voters who do not possess DMV-issued photo identification because it has not received all the necessary data fields.

On July 2, 2014, the United States served a request for current DMV data. On August 4, 2014, Defendants produced some data from the DMW database. The July 2 request specifically asked for the content of fields in the DMV database that could be used to determine whether an individual currently possesses a driver license or non-operator ID, including fields "reflecting whether the driver license or identification card has expired, been suspended, or confiscated;"² however, the data received in August did

¹ Although the United States has raised these issues for the past few weeks, and summarized its position on these issues for the parties in an email on Monday, December 8, and shared its draft at 9:10 a.m. Tuesday morning, Defendants did not provide responses for this joint summary until 3:39 p.m. on Tuesday, December 9. The deadline for filing set by the court was 5 p.m. that day.

² See Request No. 1 of United States' Third Set of Requests for Production of Documents: "The contents of all fields contained within the State Automated Driver

not appear to contain this information.

On September 19, 2014, the United States sent an inquiry to Defendants regarding DMV data fields reflecting driver license expiration dates and physical surrender of driver licenses. The United States did not receive a reply from Defendants and followed up on its inquiry on September 29 and October 6. Finally, on October 10, Defendants replied and informed the United States that the data produced in August did not include these specific data fields.

Following a meet and confer on October 16, and several follow-up emails and phone calls from the United States, on November 17, Defendants produced data fields reflecting driver license expiration dates. However, to date, Defendants have not produced DMV data fields reflecting the physical surrender of driver licenses.

The United States requests that the outstanding DMV data be produced before or

License System (SADLS), as they exist as of July 15, 2014, that could be used to match individuals against the State Election Information Management System (SEIMS) to determine voter eligibility, or to determine whether an individual currently possesses any form of identification named in Section 163-166.13(e) of the North Carolina General Statutes. This request includes the content of all fields reflecting the full name, address (including city, state, county, and ZIP code, and any alternative addresses), date of birth, Social Security number, race, ethnicity, sex, driver license or personal identification card number, and disability status of all driver license and personal identification card holders, as well as the content of fields reflecting whether the driver license or identification card has expired, been suspended, or confiscated, and whether the license or identification holder is deceased. This file should contain at least the same fields, field names, and types of data as contained in the file named “dmv_dl_list_20140127 - HIGHLY CONFIDENTIAL.txt” produced by Defendants on January 31, 2014. The data columns should be in the same order as they appeared in this file.”

on December 12, 2014.

Defendants' position: Defendants disagree that “the United States has not been able to proceed with its database matching analysis” or that defendants have been less than diligent in attempting to respond to the massive and repetitive discovery requests served by the United States and plaintiffs. While the United States has often posed the other responsibilities of federal agencies as a justification for expediting discovery by defendants, it does not acknowledge that the State Board of Elections (“SBE”) and the DMV also have many other responsibilities and staff that may be more limited than the resources available to the United States.

The request by the United States did not specifically request driver’s license expiration dates in its July 2, 2014, request for production. Nonetheless, defendants did produce a July DMV database that contained the same fields as were used by the SBE to produce its April 2013 matching analysis. The United States had not complained about deficiencies in the prior production by defendants. There are hundreds of fields in the DMV database preserving information dating back numerous years.

Without regard to the foregoing, defendants advised plaintiffs last week that the SBE manager of IT, Marc Burris, was out of the office for a week. Mr. Burris has prepared all prior encrypted hard drives provided to the plaintiffs that include DMV databases and election databases from the SBE SEIMS database. Prior matching reports by all sides were done using an encrypted hard drive that contained both databases. Defendants advised the United States that they would consult with Mr. Burris and DMV officials this week to determine when an encrypted hard drive could be completed with

both the DMV database and the SEIMS data base. They also advised the United States that they would consult with Mr. Burris this week and determine if he was able to prepare an encrypted hard drive containing only the DMV data base.

An encrypted hard drive with DMV data only will be available to be produced no later than Friday, December 12, 2014. Regarding the “physical surrender” data, the SADLS database includes a table that contains within it a field related to the surrender of licenses to the DMV. This field typically contains within it information collected when a customer has surrendered an out-of-state license to the DMV in the course of obtaining a new identification issuance from the NC DMV. Accordingly, there is a related field that contains information regarding the state of the license that was surrendered.

Hypothetically, this field could contain information related to the surrender of the NC identification. However, there is no field in SADLS containing information exclusively showing customers who have surrendered NC issued identification to the NC DMV.

With regard to SBE SEIMS data, election results from the November 2014 election are now available for 98 counties. Two counties have not finalized their results in SEIMS and the SBE is continuing to work with those counties to assist them in finalizing the data. An encrypted hard drive with updated SEIMS data for all counties that have then finalized the data for the November 2014 election will be available to be produced no later than Friday, December 12, 2014. An encrypted hard drive with updated SEIMS data for all 100 counties can be available to be produced after further consultation with the two counties that have not yet finalized their data.

2. Supplemental Productions from the State Board of Elections, the Department of Transportation, and the North Carolina Governor's Office

Plaintiffs' position: Pursuant to Fed. R. Civ. P. 26, the parties are under a continuing obligation to supplement responses to discovery requests with relevant documents and electronically stored information (ESI). The last set of documents and ESI produced by Defendants was received by Plaintiffs on June 10, 2014. These documents were collected from custodians in January and February 2014. There are responsive documents and communications that were created and transmitted after January and February 2014 that Defendants have not produced (*e.g.*, documents and ESI regarding the November 2014 general election and the ongoing implementation of the voter photo identification provision).

On November 19, 2014, by e-mail correspondence, Plaintiffs noted that Defendants have an obligation to supplement productions from the State Board of Elections, Department of Transportation, and the Governor's Office. During a meet and confer on December 4, 2014, Defendants indicated that they had not discussed whether they would provide Plaintiffs supplemental productions, did not agree to do so, and did not confirm a date certain by which they will complete supplemental production.

Plaintiffs request that Defendants complete supplemental productions from the State Board of Elections, the Department of Transportation, and the Governor's Office before or on December 18, 2014.

Defendants' position: The discovery requests cited by the United States state that defendants were obligated to produce documents through the date of the discovery requests, not through and including the trial of this action or any future date. Defendants do not agree that these requests created the amorphous obligation to continually update responses that plaintiffs and the United States now assert. Defendants can only speculate about the time parameters covered by the United States ill-defined duty to supplement.

Defendants' first notice of the position of the United States regarding the supplementation of prior discovery requests was received on November 19, 2014. It is impossible for the defendants to conduct a search of possible custodians pursuant to old search terms that may no longer have relevance and produce these documents on or before December 12, 2014, less than 30 days after defendants received notice of the position of the United States regarding supplementation. Moreover, it is not clear what substantive issues the United States would have defendants "supplement." Any supplementation related to the intent of the legislature or communications by legislators would be futile as such post-enactment communications bear no possible relevance to the intent of the legislature at the time of enactment the challenged law.

Notwithstanding the above concerns, non-privileged documents related to efforts to implement S.L. 2013-381 will be made available on the SBE FTP website on or before December 15, 2014. Defendants are also willing to conduct a search of custodian email accounts but cannot do so until the parties have agreed upon updated search terms and custodians. SBE can conduct an updated search using the prior search terms and custodians and provide that data to counsel for defendants for further privilege review on

or before December 15, 2014.

3. Production of Legislative Documents Pursuant to the Court's November 20, 2014 Order

Plaintiffs' position: The Court's November 20, 2014 order regarding the production of legislative documents directed Defendants to: (1) produce communications between legislators and third parties; and (2) prepare and produce a privilege log reflecting communications between legislators and outside counsel prior to the commencement of this litigation on August 12, 2013, that Defendants are withholding on the basis of privilege.

Upon receipt on the Court's order on November 20, Plaintiffs requested to meet and confer with Defendants to discuss a schedule for production of legislative documents. Defendants declined to meet and confer before December 4. During a meet and confer call on December 4, Defendants indicated simply that they are preparing to produce communications between legislators and agencies (but no other third parties) and a privilege log reflecting communications between legislators and outside counsel prior to the commencement of this litigation.

On December 8, 2014, Defendants produced a privilege log reflecting communications between legislators and outside counsel prior to the commencement of this litigation. The plaintiffs are currently reviewing that document. Also on December 8, Defendants filed a partial objection to the magistrate judge's order, regarding communications between constituents and legislators. Defendants indicated that while they "will produce communications between legislators and state agencies . . . are not

filing objections to this part of the Magistrate Judge's order," they nevertheless purport not to waive "their right to argue in any future appeal that legislative privilege applies to communications between legislators and state agencies involving information-gathering related to the challenged legislation." ECF No. 204, 13-cv-861.

Plaintiffs request that Defendants produce all third party communications with legislators as outlined in the November 20 order (excluding those currently subject to the State's partial objection) before or on December 15, 2014.

Defendants' position: Defendants' position is stated in their Objections to the Magistrate Judge's Order filed yesterday, December 8, 2014. As stated in those Objections, defendants have already produced the requested privilege log. In addition, defendants can produce the agency communications on or before December 15, 2014.

4. Department of Transportation 30(b)(6) Deposition

Plaintiffs' position: On November 19, 2014, Plaintiffs notified Defendants by email correspondence that they wanted to schedule a 30(b)(6) deposition of the North Carolina Department of Transportation (DOT). A subpoena and notice for the DOT 30(b)(6) deposition were served on February 20, 2014, but the deposition was postponed by agreement of the parties. In their correspondence, Plaintiffs requested that Defendants identify specific witnesses they plan to designate for each topic listed in the DOT 30(b)(6) deposition notice. Further, Plaintiffs proposed a series of dates in December to schedule the deposition and requested that Defendants confirm a date for the deposition.

Defendants did not respond to Plaintiffs' request regarding the DOT 30(b)(6) deposition, and declined to meet and confer about this and other discovery issues before

December 4. During the December 4, 2014, meet and confer, Defendants stated they could not identify witnesses for the 30(b)(6) deposition and were still in the process of confirming dates to schedule the deposition.

Plaintiffs request that Defendants immediately identify individuals they plan to identify as 30(b)(6) witnesses for the DOT and confirm a date for the deposition (during the week of December 15-19) before or on December 10, 2014.

Defendants' position: Defendants disagree with the insinuation that defendants have refused to meet or confer on any topic in this case. Under the position of the United States, a party fails to meet and confer when it is unable to meet the schedule proposed by the United States, often during holidays, and without regard to the availability of defendants' counsel or parties counsel need to consult before a response can be given.

Defendants can now designate the following witnesses to testify in response to the 30(b)(6) deposition notice issued by the United States for DMV: Randy Dishong, Barbara Webb, and David Ulmer. Defendants will be able to confirm availability of these witnesses on or before December 10, 2014.

5. Additional Requests for Production of Documents and Interrogatories

On December 8, 2014, both the United States and private plaintiffs served additional requests for discovery and interrogatories on Defendants.

Dated: December 9, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on December 9, 2014, I electronically filed the foregoing **Joint Status Report Regarding Outstanding Discovery and Production Issues**, using the CM/ECF system in case numbers 1:13- cv-658, 1:13- cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

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