

## U.S. COMMISSION ON CIVIL RIGHTS

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## DISCOVERY SUBCOMMITTEE

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## TELEPHONIC BUSINESS MEETING

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WEDNESDAY, JULY 18, 2018

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The Subcommittee convened via teleconference at 3:03 p.m., Michael Yaki, Chair, presiding.

PRESENT:

MICHAEL YAKI, Subcommittee Chair, Commissioner

CATHERINE E. LHAMON, Chair

DEBO P. ADEGBILE, Commissioner

DAVID KLADNEY, Commissioner

PETER KIRSANOW, Commissioner

KAREN K. NARASAKI, Commissioner

MAURO MORALES, Staff Director

MAUREEN RUDOLPH, General Counsel

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**STAFF PRESENT:**

KATHERINE CULLITON-GONZALEZ

PAMELA DUNSTON, Chief, ASCD

ALFREDA GREENE

TINALOUISE MARTIN

DAVID MUSSATT, Dir., RPCU

BRIAN WALCH

**COMMISSIONER ASSISTANTS PRESENT:**

SHERYL COZART

JASON LAGRIA

CARISSA MULDER

AMY ROYCE

RUKKU SINGLA

ALISON SOMIN

IRENA VIDULOVIC

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

(3:03 p.m.)

COMMISSIONER YAKI: Good afternoon. It is 12:03 p.m. Eastern Time. This is a meeting of the Discovery Subcommittee of the U.S. Commission on Civil Rights that was formed by resolution at the last Commission meeting.

I'm Commissioner Michael Yaki. I chair the subcommittee. Let me call the roll. Commissioner Lhamon?

CHAIR LHAMON: Present.

COMMISSIONER YAKI: Commissioner Adegbile?

COMMISSIONER ADEGBILE: Present.

COMMISSIONER YAKI: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Here.

COMMISSIONER YAKI: Commissioner Kladney?

COMMISSIONER KLADNEY: Here.

COMMISSIONER YAKI: And Commissioner Narasaki? Not present, we will see when she comes in.

Is the Staff Director present?

MR. MORALES: I am.

COMMISSIONER YAKI: And also I believe Katherine Gonzalez and Maureen Rudolph are on the phone as well. So thank you very much, all, for joining at this time.

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1 I sent earlier a proposed discovery plan.  
2 And I think, for the purposes of moving forward, the  
3 Chair sent out an edit to the proposed discovery plan.  
4 And I would direct everyone to use that version.

5 I will accept all the edits with the  
6 exceptions of the edits to striking site visits --  
7 there were site visits and subpoenas. But everything  
8 else I will accept as a family amendment to serve as  
9 the body of the plan for discussion. Are there any  
10 objections to that?

11 (No response)

12 COMMISSIONER YAKI: Seeing none, I want to  
13 open it up for discussion with regard to the proposed  
14 discovery plan that is now before you.

15 COMMISSIONER KLADNEY: Michael, Dave  
16 Kladney. Do those edits include my discussion about  
17 the Department of Defense?

18 COMMISSIONER YAKI: Commissioner Kladney  
19 was speaking. Yes, those edits do include a specific  
20 section on the possible usage of Department of Defense  
21 facilities for the potential of children and family.

22 CHAIR LHAMON: Commissioner Yaki, this is  
23 Catherine Lhamon. I appreciate the acceptance of the  
24 family amendments and just would like to talk about  
25 the idea of site visits and subpoenas as discovery

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1 tools that we might use.

2 I want to be clear that I am not opposed  
3 to either tool if, at some point, we decide if we do  
4 want to use them. But at the moment, I don't know  
5 that we would need them. And I would prefer for us to  
6 come back together.

7 (Simultaneous speaking)

8 CHAIR LHAMON: I'd prefer for us to come  
9 back together to those if we do want to use them. But  
10 if I -- I think that it's possible that use of those  
11 tools would slow down our ability to speak to this  
12 issue which I think is a really critical issue for the  
13 country and critical for our voice to be part of that  
14 record.

15 And I am not eager, and I think none of us  
16 would be here, to see our process slowed down. And  
17 it's not clear to me, sitting here today, that we  
18 would need to use either tool to be able to amass  
19 sufficient information for us to be able to make the  
20 sort of findings and recommendations on this topic.

21 COMMISSIONER YAKI: Thank you, Madam  
22 Chair. Are there other comments on that specific  
23 issue by any of the other members?

24 COMMISSIONER KLADNEY: I would just ---  
25 sorry, folks --- I yield.

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1                   COMMISSIONER YAKI: Yes. Let me just say  
2 I appreciate what the Chair is saying. There's  
3 certainly -- the last thing, in terms of the  
4 Commission's work on this, should be anything that  
5 would delay or draw out our participation in this  
6 process.

7                   So the inclusion of those is actually not  
8 meant to have any impacts in that regard for the work  
9 of the subcommittee and for the commission. Rather,  
10 they are there in case we do need them.

11                   And given the fact that we are six members  
12 that would require eight days' notice, and collapsing  
13 all the schedules together, if we all decided or if  
14 there was a perceived need to have to use either one  
15 of those, I would rather not have to revisit it.

16                   But I can assure the Chair that the use of  
17 either one, site visit or subpoena, is not high on the  
18 priority list and is only there if it suits her  
19 purpose. If we need to, because of the exigencies or  
20 the circumstances of discovery as we see fit, this  
21 should not be done unilaterally without -- with any  
22 sort unawareness.

23                   It will only be done to have some  
24 necessity, but that necessity would have to be  
25 tempered or complicated by having to re-notice and

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1 coordinate all of our schedules for going forward with  
2 a less than full complement. If we had to, that has  
3 its own drawbacks as well.

4 So I'd just rather say that we have these  
5 tools, but the primary tools will be the use of  
6 interrogatories, questions, and move forward in that  
7 direction. So that's why I would rather have them in  
8 than out, so that all of the goals or the tactics  
9 match. I would just rather not have to revisit the  
10 situation if, indeed, the situation warrants the use  
11 of either one.

12 Commissioner Adegbile?

13 COMMISSIONER ADEGBILE: Yes. So I was  
14 just going to speak to this point, and I heard both of  
15 your comments. I guess my thought is that the way  
16 it's written now, it sort of contemplates that these  
17 things will be used. And what I'm hearing is that may  
18 not be the necessary intention.

19 But I also think that maybe it would be  
20 helpful to have a little bit more understanding, like  
21 pulling these two things apart, meaning I understand  
22 they're both investigatory tools, but perhaps the  
23 group should come to some judgement about whether or  
24 not site visits are affirmatively something that we're  
25 trying to do.

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1           Because if that's the case, it may be  
2 that, you know, we need to plan for that and maybe  
3 decide whether or not we're voting on it. The  
4 subpoenas may seem like a downstream thing that would  
5 only be necessary if there were some refusals to  
6 cooperate. And that's actually, to me, to be  
7 something that could be revisited. So that's just my  
8 quick cut at the issues having heard this discussion.

9           COMMISSIONER YAKI:       So Commissioner  
10 Adegbile, what would you propose? Would you propose  
11 that the --- well, let me just say this. Let me ask  
12 the staff director.

13           And again, I don't believe, and it's  
14 certainly not my intention nor my desire to do  
15 anything that either, A, slows down the process or, B,  
16 results in an expenditure of funds that tilts our  
17 budget in any way, shape, or form.

18           I would presume that, if we were going to  
19 do either, that there would be discussion. What I do  
20 not want is to have to come back to a formal  
21 proceeding each and every time one of these --- either  
22 one of these items need to have a broader discussion,  
23 as long as we believe that it could be or may be  
24 useful.

25           But then that would be the only time in

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1 which we'd go forward. And the little puzzle as to  
2 what concerns there may be with regard to usage of  
3 either tool but, you know, if it's the will of the  
4 subcommittee to take them out, and we'll just meet on  
5 it again if we need to, that'll be --- well, that's  
6 the will of the subcommittee.

7 I'd rather not. I'd rather say that we  
8 would use common sense and courtesy and have consensus  
9 if we had to proceed in either direction. And I  
10 believe --- I wanted to tell the staff director, if  
11 there were a site visit involved, whether we would  
12 have to go to the entire Commission for the budget  
13 authority for that anyway.

14 MR. MORALES: This is Staff Director Mauro  
15 Morales. I don't believe we need to go. If you  
16 wanted it, the general consensus was to do a site  
17 visit. I don't believe we need to go to a full  
18 committee -- commissioner vote on that, given that the  
19 subcommittee was authorized to take some investigatory  
20 discovery steps on behalf of the Commission.

21 I would say if that being the decision of  
22 the subcommittee to do a site visit, and/or subpoenas,  
23 there is and could be a significant cost to that,  
24 depending where the site visit is, the timing of it  
25 all, and all the rest of that. So I would ask

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1 commissioners to keep that in mind.

2 You know, one way, you know, and I don't  
3 want to cause any heartburn here, but one way to  
4 change would maybe be to add something to that  
5 sentence along the lines of, "May include but not  
6 limited to site visits, interviews, subpoenas,  
7 interrogatories."

8 And then if we do decide to go forward in  
9 expenditure of funds, then perhaps the subcommittee,  
10 you know, could make a decision on that and review  
11 whether or not a site visit is, in fact, necessary.

12 CHAIR LHAMON: This is Catherine Lhamon.  
13 I am unclear, A, what the downside is to coming back  
14 and meeting if we want to authorize it and, B, what  
15 the distinction is between including it as a  
16 possibility and saying that we'll come back to vote on  
17 it. Because either way, we have to schedule the  
18 meeting.

19 And for myself I have, as I mentioned,  
20 very substantial worry about delay and also about the  
21 costs. But the potential for needing to enforce a  
22 subpoena, the wait or the length of time that can be  
23 involved in doing that, and also the diversion of  
24 staff resources that would be involved in doing that,  
25 the way some productivity of other reports that have

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1 intended, and also the advisory committee reports that  
2 the advisory committee were intended to see out of it,  
3 I think there would be substantial downsides to go.

4 I just would want to come back and discuss  
5 utility of the device and the need for it, if it  
6 proves doubtful that we're going to use it.

7 COMMISSIONER YAKI: Commissioner Lhamon,  
8 again, I appreciate what you're saying. I think on  
9 the site visits, absolutely I would think about it.  
10 We would need to come back to the committee.

11 And I think anything involving that kind  
12 of expenditure of funds is something that we do. And  
13 I would agree to amending the plan to require that a  
14 site visit be approved by --- a specific site visit be  
15 approved by the subcommittee.

16 As to the subpoena, you know, I think that  
17 we just disagree on this. Because the whole point of  
18 a subpoena is that we've reached a point where we need  
19 to move forward with that if necessary. And by  
20 putting a process in that requires us to have to re-  
21 notice, come back, and discuss this, defeats the fact  
22 of utility of the subpoena. And I would note that the  
23 initial authorizing resolution of the Commission  
24 exclusively noted and authorized the use of subpoenas.

25 So again, I am not saying we will, I'm not

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1 saying we want to. I am saying that, if we need to  
2 take the serious and sober step of issuing a subpoena,  
3 it would be something that we would have to discuss  
4 with the general counsel, and with the staff director,  
5 and with you as the Chair. It's your signature on the  
6 subpoena. That would have to be done beforehand.

7 I really just have an issue with tying our  
8 hands procedurally if we need --- if there's an  
9 exigent need to revoke. And maybe, you know, if we  
10 can't resolve that, you know, we can't resolve that.  
11 And I'd like to hear what any of the commissioners  
12 might have to say, Commissioner Kladney, or  
13 Commissioner Kirsanow?

14 COMMISSIONER NARASAKI: Mike, this is  
15 Commissioner Narasaki. I just want to let everyone  
16 know I've actually been on for the past ten minutes.  
17 So, sorry.

18 COMMISSIONER YAKI: So will the court  
19 reporter please note that Commissioner Narasaki has  
20 been present for the last ten minutes? So does anyone  
21 --

22 COMMISSIONER KLADNEY: I have something.  
23 Commissioner Kladney here. First of all, on the site  
24 visit, I am glad that you conceded that point.  
25 Because I think I am the only one on the subcommittee

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1 that actually went on the last site visit. And I know  
2 that it was ---

3 (Audio interference)

4 COMMISSIONER YAKI: I'm sorry, I can't  
5 hear you. There's some airport noise in the  
6 background.

7 COMMISSIONER KLADNEY: I know.

8 (Off the record comments)

9 COMMISSIONER KLADNEY: So I'm glad you  
10 conceded that point. As far as the subpoenas go,  
11 first of all, it's a subpoena. I would think you  
12 would also want subpoena duces tecum. However, I  
13 believe that you should not authorize them to blanket  
14 ---

15 (Audio interference)

16 COMMISSIONER KLADNEY: -- is important.  
17 We should come back as a committee and vote on that  
18 specifically as to where they should go and what  
19 should be used. That's my opinion, because I think --  
20 -

21 (Audio interference)

22 COURT REPORTER: I'm sorry, this is the  
23 court reporter. Until that background sound from the  
24 airport goes by, I won't be able to do a transcript.  
25 I just want everyone to know that.

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1                   COMMISSIONER YAKI:    I heard.    Let me  
2   restate this.    And Commissioner Kladney, you can  
3   correct me.    One, you would like it to be amended to  
4   include the use of a subpoena duces tecum in addition  
5   to subpoenas, number one.    Number two, you also  
6   believe that it should be left to a subsequent  
7   discussion if we're going to authorize the actual  
8   issuance of either one of those two.    Would that be  
9   correct?

10                   COMMISSIONER KLADNEY:   That's correct.  
11   Because I believe that individually we all have to  
12   make a decision as to whether we want to use that  
13   power.    And we have to come together as a committee,  
14   the majority of the committee, to do so.

15                   And I would be in favor of not only  
16   allowing as subpoenas once there is a committee  
17   meeting and approval of the use of it.    Otherwise, I  
18   can't vote for the proposition the way it stands.

19                   COMMISSIONER YAKI:    Okay.    Well, in that  
20   case ---

21                   CHAIR LHAMON:    Chair Yaki, I'm sorry, this  
22   is Catherine Lhamon.    One suggestion might be just to  
23   go ahead and notice a meeting for when the  
24   interrogatory and document request window closes so  
25   that we could move immediately to another alternative

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1 if it became necessary. And we wouldn't lose the gap  
2 in time.

3 COMMISSIONER YAKI: That's right. I will  
4 agree, if there's no objection to requiring that site  
5 visits, subpoenas, or subpoenas duces tecum shall be  
6 required to be approved by the committee at a  
7 subsequent meeting. And aside from that, are there  
8 any other changes to the discovery plan that people  
9 would like to see?

10 (No response)

11 COMMISSIONER YAKI: Hearing none, I'd like  
12 to ---

13 COMMISSIONER NARASAKI: I actually would -  
14 -- sorry.

15 COMMISSIONER YAKI: Yes.

16 COMMISSIONER NARASAKI: Sorry, this is  
17 Commissioner Narasaki. Did we include the Department  
18 of Defense?

19 COMMISSIONER YAKI: Yes.

20 COMMISSIONER NARASAKI: Or whoever is  
21 necessary?

22 COMMISSIONER YAKI: Yes. The Department  
23 of Defense is ---

24 COMMISSIONER NARASAKI: And this is a  
25 military base.

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1 COMMISSIONER YAKI: Yes. And the  
2 Department of Defense and military bases are now  
3 included as a part of the discovery plan.

4 COMMISSIONER NARASAKI: Great, okay.  
5 Thank you.

6 COMMISSIONER YAKI: Okay. So ---

7 CHAIR LHAMON: Commissioner Yaki, sorry,  
8 just one other small thing. This is Catherine Lhamon  
9 again. This is very minor, but in the text you  
10 mention the OCRE director by name. But her name is  
11 actually Katherine Culliton-Gonzalez, not Kathleen.  
12 And Catherine to Katherine, I just wanted to make sure  
13 we got that correct.

14 COMMISSIONER YAKI: Okay. I will have  
15 that corrected in the final as it goes out. So as  
16 amended, are there any objections to the discovery  
17 plan?

18 CHAIR LHAMON: So I'm sorry, Commissioner  
19 Yaki, I just want to make sure I understand the  
20 amendments. It's the text that my personal assistant  
21 circulated earlier today including the deletion of  
22 site visits and subpoenas but adding a sentence saying  
23 that if the subcommittee were to seek to use site  
24 visits, subpoenas, or subpoenas duces tecum, then the  
25 committee would reconvene to approve them?

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1 COMMISSIONER YAKI: Yes.

2 CHAIR LHAMON: Thank you.

3 COMMISSIONER YAKI: So with that ---

4 COMMISSIONER NARASAKI: This is  
5 Commissioner Narasaki. I'm a little bit confused.

6 COMMISSIONER YAKI: Yes?

7 COMMISSIONER NARASAKI: Why would we  
8 delete the subpoenas and site visits? I thought we  
9 were just adding language to say those things would be  
10 subject to a meeting to approve them, not that they  
11 were coming out of the list of what we would actually  
12 be doing.

13 COMMISSIONER YAKI: We're not deleting. I  
14 accepted our changes and accepted deletions of those  
15 two. And then we're adding a sentence saying that the  
16 issuance of the subpoenas, and subpoenas duces tecum,  
17 or site visits shall require the authorization of the  
18 subcommittee at a subsequent meeting.

19 COMMISSIONER NARASAKI: Okay.

20 COMMISSIONER YAKI: Okay? With that, are  
21 there any objections? Going once, going twice ---

22 COMMISSIONER KLADNEY: I think we should  
23 take a vote. I think there should be a vote.

24 (Simultaneous speaking)

25 COMMISSIONER YAKI: Calls for a roll call

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1 vote?

2 CHAIR LHAMON: Just a second. I think we  
3 need to have a motion and a second.

4 COMMISSIONER YAKI: On what?

5 COMMISSIONER NARASAKI: I move that we  
6 adopt the proposed memo on discovery with the amending  
7 sentence as discussed to delete subpoenas and site  
8 visits but add the sentence stating that subpoenas,  
9 subpoenas duces tecum, and on-site visits will require  
10 a meeting and vote of the committee, subcommittee.

11 COMMISSIONER YAKI: Is there a second?

12 CHAIR LHAMON: Second.

13 COMMISSIONER YAKI: Okay. The motion is  
14 seconded. Any discussion on the motion?

15 (No response)

16 COMMISSIONER YAKI: Seeing none, call the  
17 roll on the motion. Commissioner Lhamon?

18 CHAIR LHAMON: Aye.

19 COMMISSIONER YAKI: Commissioner Lhamon,  
20 aye. Commissioner Kladney?

21 COMMISSIONER KLADNEY: Yes.

22 COMMISSIONER YAKI: Kladney, aye.  
23 Commissioner Kirsanow?

24 COMMISSIONER KIRSANOW: Yes.

25 COMMISSIONER YAKI: Kirsanow, aye.

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1 Commissioner Narasaki?

2 COMMISSIONER NARASAKI: Aye.

3 COMMISSIONER YAKI: Commissioner Narasaki,  
4 aye. Commissioner Adegbile?

5 COMMISSIONER ADEGBILE: Aye.

6 COMMISSIONER YAKI: Aye. There are six  
7 ayes, no nays. The motion is approved. That  
8 concludes the meeting of the subcommittee. Thank you  
9 all very much. If there's nothing else, the meeting  
10 is adjourned.

11 (Whereupon, the above-entitled matter went  
12 off the record at 3:28 p.m.)

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