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U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

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FRIDAY, APRIL 11, 2014

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The Commission convened in Suite 1150 at 1331 Pennsylvania Avenue, Northwest, Washington, D.C. at 9:30 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ROBERTA ACHTENBERG, Commissioner\*

GAIL HERIOT, Commissioner

DAVID KLADNEY, Commissioner\*

MICHAEL YAKI, Commissioner\*

MARLENE SALLO, Staff Director

\* Present via telephone

ALSO PRESENT:

BLAKE AINSWORTH, U.S. GAO

KATHY PEYMAN, U.S. GAO

SHANNON SMITH, U.S. GAO

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STAFF PRESENT:

MARGARET BUTLER

BARBARA de LA VIEZ, Deputy Director

PAMELA DUNSTON, Chief, ASCD

ALFREDA GREENE

TINALOUISE MARTIN, Director, OM

LENORE OSTROWSKY, Acting Chief, PAU

JOHN RATCLIFFE, Chief, BFD

EILEEN RUDERT

ROREY SMITH, General Counsel, OGC

MICHELE YORKMAN, Director, IT

COMMISSIONER ASSISTANTS PRESENT:

ALEC DEULL

KENESHIA GRANT

CARISSA MULDER

JUANA SILVERIO

ALISON SOMIN

KIMBERLY TOLHURST

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

(9:30 a.m.)

CHAIRMAN CASTRO: All right. We have a  
quorum now, so I'm going to gavel this meeting to order.

Good morning, everyone. This is a  
business meeting of the U.S. Commission on Civil Rights.  
It's taking place today, April 11, 2014. The hour is  
now 9:30 exactly and we're meeting at the Commission's  
headquarters, 1331 Pennsylvania Avenue, N.W., in  
Washington, D.C.

I'm Chairman Marty Castro. The  
Commissioners who are present with me are Commissioner  
Heriot. As you can see, our other Commissioners are  
participating by phone. They are Commissioner  
Achtenberg, Commissioner Kladney and Commissioner  
Yaki. We don't believe that Commissioner Kirsanow will  
be participating today, but if he does, I'm sure he'll  
let us know when he's on the phone.

Is the court reporter present? Yes. We  
have a quorum present. Is the staff director present?

MS. SALLO: Present.

CHAIRMAN CASTRO: Okay. So the meeting  
will now come to order. The first item of course as  
always is Approval of the Agenda.

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**I. APPROVAL OF AGENDA**

CHAIRMAN CASTRO: I approve that we  
approve the agenda. Is there a second?

COMMISSIONER HERIOT: Second.

COMMISSIONER KLADNEY: Second.

CHAIRMAN CASTRO: Okay. Are there any  
amendments?

(No audible response.)

CHAIRMAN CASTRO: Hearing none, let's vote  
to approve the agenda. All in favor, say aye?

(Chorus of ayes.)

CHAIRMAN CASTRO: Any opposed?

(No audible response.)

CHAIRMAN CASTRO: Any abstentions?

(No audible response.)

CHAIRMAN CASTRO: Okay. The ayes have it,  
unanimously.

So the first item on our agenda is Program  
Planning.

**II. PROGRAM PLANNING**

**Discussion of Concept Papers and Future**

**Briefings**

CHAIRMAN CASTRO: We're going to have a  
update on various projects. And for that, I will turn

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1 it over to our staff director who will talk to us about  
2 concept papers and future briefings, etcetera.

3 MS. SALLO: Good morning.

4 CHAIRMAN CASTRO: Good morning.

5 MS. SALLO: I wanted to first address the  
6 submission of concept papers for potential briefings to  
7 be scheduled during fiscal year 2015. I wanted to  
8 advise everyone that we received a total of 22 concept  
9 papers. Those concept papers need to be reviewed by our  
10 Office of General Counsel. The concept papers will  
11 then be returned to their respective Commissioners with  
12 an indication as to whether the concept paper needs to  
13 be revised or whether the concept paper -- not revised,  
14 but tweaked or whether the concept paper is completely  
15 outside the scope of the jurisdiction. And then at that  
16 point in time we would ask for the Commissioners to make  
17 the necessary changes, if they choose to do so, and then  
18 resubmit with the hope that we can have finalization of  
19 all of the papers to be considered at the June meeting.

20 I also wanted to remind everyone that we  
21 currently have several papers in the pipeline. I know  
22 that the sex trafficking and the Arab Muslim paper --  
23 the Commissioners were kind enough already to provide  
24 us with their edits. Both papers will be submitted for

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1 legal sufficiency review with the hope that we can get  
2 that completed and returned to the Commissioners for  
3 consideration at the May meeting. If that is not  
4 possible, then we will definitely target it for the June  
5 meeting.

6 In addition, we still have three other  
7 briefing papers. That's the NVRA Section 7, the  
8 Religious Liberties paper, as well as the Vets and Civil  
9 Rights paper. I will be circulating at least one next  
10 week for review by the Commissioners, hopefully two, so  
11 that we can also put that in queue and start the process.

12 And we continue to work on the Patient  
13 Dumping paper. I believe that next week, April 14th,  
14 is the deadline for public comments for a statutory  
15 enforcement report on a hearing that occurred last  
16 month. And I will keep you updated as to where we are  
17 at with the drafting of the statutory enforcement  
18 report.

19 CHAIRMAN CASTRO: If I could just  
20 interrupt you, Madam Staff Director.

21 The Commissioners on the phone, could you  
22 mute your phone? We're getting a little bit of  
23 background noise. Thank you.

24 Go ahead.

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1 MS. SALLO: I'm sorry. So that's the  
2 concept papers.

3 So then we also have two that are pending.  
4 We have the -- well, it's for briefing. It's not  
5 papers. I'm sorry. And so those are scheduled for  
6 July, as well as a date that needed to be set as it  
7 applied to the Stand Your Ground. So first, I want to  
8 give you an update on the Stand Your Ground, because it  
9 was left to the decision of the Chair and the Staff  
10 Director as to which date it would be. Based on the  
11 feedback that I received from the Commissioners and  
12 their availability and based on the fact that September  
13 should not be a month that we travel, because that is  
14 when I close out the fiscal year.

15 We are looking to do the Stand your Ground  
16 briefing in October. As such, next week on Monday we  
17 will be visiting some of the sites in Orlando to try to  
18 ascertain which would be the best site for us to hold  
19 the briefing. And so I will then circle back and  
20 provide that information to the Commissioners. So as  
21 it stands, it will have to be in October of this year,  
22 the briefing for Stand your Ground.

23 And then we also have the Sexual Harassment  
24 briefing that's scheduled for July. So at this point

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1 in time we've identified speakers and we are also in the  
2 process of setting up the process to receive any  
3 discovery that we need. So I wanted to provide you with  
4 that information as well.

5 CHAIRMAN CASTRO: Thank you, Madam Staff  
6 Director. I don't know if there's any questions with  
7 that. Actually, I have one.

8 I understand that, Commissioner Heriot,  
9 when we approved your initial concept for the July  
10 briefing it involved universities and now it's been  
11 expanded, to my understanding, to include K through 12  
12 in the schools. And I think that that's a little bit  
13 of a -- well, a lot of a broad expansion beyond what we  
14 had agreed upon. So what I'd like to do is kind of open  
15 that for discussion with the other Commissioners. I  
16 think it's only fair that, you know, we vote on something  
17 in terms of the substantive focus and that that not  
18 change dramatically as this appears to have done. And  
19 if in fact you do want to include -- I'll give you a  
20 chance to talk -- if you do want to include colleges and  
21 universities and K through 12 together, then I would  
22 suggest we need to re-vote on that, or vote on a separate  
23 paper on K through 12.

24 So go ahead and respond and then I'll open

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1 it up to any other Commissioners that have comments.

2 COMMISSIONER HERIOT: My understanding is  
3 it is in the transcript for the meeting, that we did in  
4 fact vote on both and that it was mentioned in the  
5 meeting, it was clear in the meeting, and that's what  
6 we voted on.

7 CHAIRMAN CASTRO: That's not my  
8 recollection. I don't know if anyone has any  
9 information on that.

10 COMMISSIONER HERIOT: Why don't we check  
11 the transcript then?

12 CHAIRMAN CASTRO: So is Alison going to go  
13 get a copy?

14 COMMISSIONER HERIOT: Yes, she's going to  
15 go try to get a copy of it.

16 CHAIRMAN CASTRO: In the interim, do we  
17 have any other Commissioners who want to address this  
18 issue?

19 COMMISSIONER KLADNEY: I do, Mr. Chairman.

20 CHAIRMAN CASTRO: Yes, go ahead,  
21 Commissioner Kladney.

22 COMMISSIONER KLADNEY: My concern is that  
23 in the blurb it talks about getting documents from DOJ  
24 and I think Department of Education OCR and it talked

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1 about misstating the law. There were concerns about  
2 misstatement of the law in the new guidance, which I  
3 think was in May of 2013, something like that. And also  
4 there were concerns about whether it would infringe upon  
5 constitutionally-protected speech of the university  
6 students, faculty and staff. There was no mention of  
7 obtaining documents from all these schools, whether K  
8 through 12 or university, and I think that's beyond the  
9 scope of the paper because it was -- these two issues,  
10 that would be the briefing and then we would do so with  
11 government enforcement people, experts on either side  
12 of the issue regarding the misstatement of the law on  
13 whether it chilled constitutional rights and scholars.  
14 I didn't foresee reams and reams of documents coming  
15 from nine universities, nor was there any mention of it  
16 in the blurb. So I would object to that type of  
17 discovery.

18 COMMISSIONER HERIOT: Blurbs never  
19 contain all of the information about what a briefing  
20 does. That's why they're called blurbs. They're  
21 usually three sentences long.

22 COMMISSIONER ACHTENBERG: Mr. Chairman?

23 CHAIRMAN CASTRO: Commissioner  
24 Achtenberg?

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1 COMMISSIONER ACHTENBERG: (No audible  
2 response.)

3 CHAIRMAN CASTRO: Commissioner  
4 Achtenberg? COMMISSIONER KLADNEY: Hello?

5 CHAIRMAN CASTRO: Sounded like you were  
6 asking to speak.

7 COMMISSIONER ACHTENBERG: Mr. Chairman?

8 CHAIRMAN CASTRO: Yes, Commissioner  
9 Achtenberg, go ahead.

10 COMMISSIONER ACHTENBERG: Hello?

11 CHAIRMAN CASTRO: Hello?

12 COMMISSIONER KLADNEY: You've got me,  
13 Roberta.

14 COMMISSIONER ACHTENBERG: Oh, okay.

15 CHAIRMAN CASTRO: Go ahead.

16 COMMISSIONER KLADNEY: This is Kladney.

17 CHAIRMAN CASTRO: We can hear you,  
18 Commissioner Achtenberg. Can you hear us?

19 COMMISSIONER ACHTENBERG: So we don't have  
20 the others?

21 COMMISSIONER KLADNEY: I don't think so.  
22 Hold on a second.

23 CHAIRMAN CASTRO: Commissioner Kladney,  
24 can you hear me?

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1 COMMISSIONER KLADNEY: (No audible  
2 response.)

3 CHAIRMAN CASTRO: Well, we're not on mute,  
4 so --

5 COMMISSIONER KLADNEY: I just messaged  
6 Kaneesha. Hopefully she'll get back to me and let me  
7 know.

8 COMMISSIONER ACHTENBERG: I thought you  
9 stated it very well. I was just going to speak up to  
10 concur.

11 COMMISSIONER KLADNEY: We can't hear him.

12 COMMISSIONER ACHTENBERG: Hello?

13 COMMISSIONER KLADNEY: Hello?

14 CHAIRMAN CASTRO: We can hear you. Can  
15 you hear us?

16 COMMISSIONER KLADNEY: Hello? Hello?

17 COMMISSIONER YAKI: That was me joining,  
18 rejoining.

19 COMMISSIONER KLADNEY: Well, we're  
20 talking to each other. Oh, you can hear us?

21 CHAIRMAN CASTRO: Yes, we can hear you.  
22 Can you hear us?

23 COMMISSIONER KLADNEY: We can't hear them.

24 CHAIRMAN CASTRO: We can hear you. You

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1 obviously cannot hear us. They still can't hear us.

2 COMMISSIONER ACHTENBERG: So I just got an  
3 email from Marty saying we can hear you.

4 COMMISSIONER KLADNEY: Right. They can  
5 hear us, but we can't hear them.

6 COMMISSIONER ACHTENBERG: Right.

7 CHAIRMAN CASTRO: So --

8 MEMBER KLADNEY: I'm going to ask them if  
9 we should call back in. Wait a minute.

10 COMMISSIONER YAKI: I just did that.

11 MEMBER KLADNEY: Oh, you got us?

12 COMMISSIONER YAKI: Yes, so it's got to be  
13 on their end.

14 MEMBER KLADNEY: Yes, they can hear us.

15 CHAIRMAN CASTRO: Now, I have a question.  
16 Do these emails have to be a part of the transcript now?

17 (Laughter.)

18 COMMISSIONER YAKI: So I can't start  
19 making colorful comments about technology.

20 COMMISSIONER ACHTENBERG: Yes, I was about  
21 to say. No joke, you guys.

22 MEMBER KLADNEY: They can hear us, so let's  
23 be quiet and try and see what they want us to do here.

24 COMMISSIONER ACHTENBERG: Okay. So they

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1 said go ahead and discuss because they can hear us.

2 CHAIRMAN CASTRO: So I just told them to go  
3 ahead and discuss their points. So let them finish.

4 COMMISSIONER ACHTENBERG: So I was going  
5 to ask for recognition from the Chair to express my  
6 concurrence with the views as expressed by Commission  
7 Kladney.

8 COMMISSIONER YAKI: And I will ask for  
9 recognition and virtually receive recognition --

10 (Laughter.)

11 COMMISSIONER YAKI: -- and join my  
12 colleagues Commissioners Achtenberg and Kladney with my  
13 understanding that the vote had been limited to the  
14 university college level and not to K through 12.

15 COMMISSIONER ACHTENBERG: And --

16 COMMISSIONER YAKI: I yield back the floor  
17 to the virtual other Commissioners.

18 CHAIRMAN CASTRO: I just texted them to let  
19 them know we're going to take the system down and reboot  
20 it.

21 COMMISSIONER ACHTENBERG: Mr. Chairman, I  
22 was just going to inquire of Commissioner Yaki whether  
23 or not is concurrence extends to the question that  
24 Commissioner Kladney expressed with regard to polling

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1 the nine university campuses, none of which was made  
2 mention of in the concept paper and seems like quite an  
3 extension beyond the government --

4 (Whereupon, at 9:43 a.m. off the record  
5 until 9:49 a.m.)

6 CHAIRMAN CASTRO: Okay. We're going to go  
7 back on the record.

8 I have been handed portions of the  
9 transcript of the meeting where we voted on this topic,  
10 and the motion as it was put forward by me. Apparently  
11 we couldn't find the transcript exactly where the issue  
12 came up, but Commissioner Heriot surmises she sent us  
13 an email indicating that she was going to add K through  
14 12 because in the motion it says, as we were replacing  
15 the ADA concept paper with this one, quote, "And in  
16 addition, comma, that we would replace the ADA Online  
17 Accessibility concept paper previously approved by the  
18 Commission as a briefing topic and replace it with a  
19 topic presented by Commissioner Heriot on sexual  
20 harassment and higher education, period. And also she  
21 amended that to add K through 12. So that is the motion.  
22 Is there a second?"

23 And it was seconded by Commissioner Yaki.  
24 And the vote occurred. Let's see, we don't have the

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1 vote here, but obviously -- yes, Commissioner Yaki voted  
2 yes; Commissioner Kladney, yes; Commissioner Heriot,  
3 yes; Commissioner Achtenberg, yes; Kirsanow, yes; the  
4 Vice-Chair, yes; myself, yes.

5 So that does address the K through 12  
6 expansion. I'm not sure if it addresses the issues that  
7 you raised, Commissioner Kladney, so -- and that is  
8 about the -- I think you were talking about subpoenas.

9 MEMBER KLADNEY: The discovery, yes.

10 CHAIRMAN CASTRO: Yes.

11 MEMBER KLADNEY: The discovery was --  
12 because this is how I felt, was it was a new guidance  
13 and we were going to look into whether it followed the  
14 current law; and it was the Harris case. And we were  
15 going to see how DOJ and the Office of Civil Rights of  
16 DOE was enforcing it by getting their documents. We  
17 weren't going to go to nine universities and nine school  
18 districts and get all their documents regarding sexual  
19 harassment or anything like that. That is not what this  
20 blurb said. That was never mentioned. And I object to  
21 any of that discovery. And I make a motion that we not  
22 conduct that discovery. We don't need discovery from  
23 DOJ and DOE Office of Civil Rights.

24 CHAIRMAN CASTRO: Is there a second to that

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1 motion?

2 COMMISSIONER ACHTENBERG: Second.

3 CHAIRMAN CASTRO: Discussion?

4 Commissioner Heriot?

5 COMMISSIONER HERIOT: Let's see, how can I  
6 put this?

7 MEMBER KLADNEY: Can she turn her mic on,  
8 please?

9 CHAIRMAN CASTRO: Yes, you need to put your  
10 mic on.

11 COMMISSIONER HERIOT: Sorry. I'm trying  
12 to think of a polite way to put this. We tried to come  
13 up with a bipartisan set of issues that we would address.  
14 And the Chairman told Commissioner Kirsanow and I that  
15 we would be able to pick a topic. And the idea was that  
16 we would cooperate in your topics and in return you would  
17 let us have a topic as the minority. The  
18 first thing that happened to unravel this deal was that  
19 Commissioner Kladney objected somehow, somewhere to  
20 something and had to undo the entire deal. Instead of  
21 the topic that we had selected for the majority, he  
22 wanted a different topic and we had to unravel that deal,  
23 recreate the deal. And this is basically an unraveling  
24 of a deal after you've gotten the votes. I object to

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1 this greatly.

2 We had two people come in from the GAO  
3 yesterday and talk to me, and they're here today. And  
4 I mistakenly told them that the Commission had been  
5 doing reasonably well in cooperating on topics. I  
6 hereby withdraw that statement. I find this to be  
7 outrageous that after we have worked on this thing --  
8 and let's face it, ladies and gentlemen, we have not  
9 turned out as many reports as we should. But now we're  
10 unraveling the deal and that's going to make it that much  
11 more difficult to turn out good reports. I am outraged.

12 MEMBER KLADNEY: May I speak, Mr.  
13 Chairman?

14 CHAIRMAN CASTRO: Go ahead, Commissioner  
15 Kladney.

16 MEMBER KLADNEY: In regards to the  
17 changing of topics, it was not my idea, nor did I put  
18 the idea forward of switching topics, Commission  
19 Heriot. What occurred was the Office of General  
20 Counsel scratched the topic that we had, our topic, my  
21 topic that I put forward, and we had to come up with  
22 another one. They said that there was no -- it wasn't  
23 the federal question in the topic that we put forth. We  
24 didn't say that you had to put forth a different topic.

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1 You did that of your own discretion. That was not  
2 anything that was done at the Commission level with the  
3 Commissioners or with the staff. So I want the record  
4 to reflect that. It was the Office of General Counsel  
5 that required our side to obtain a new topic, which we  
6 did. You at your own discretion decided to change the  
7 topic and put forward this subject in this blurb in this  
8 form.

9 CHAIRMAN CASTRO: Commissioner Heriot?

10 COMMISSIONER HERIOT: Okay. Number one,  
11 the idea is a deal if we select topics as a package. The  
12 original idea was that the conservatives would select  
13 a topic that they could agree to from the list that the  
14 majority had submitted and vice versa. And so it went  
15 from we had picked the topic from your list that we  
16 thought was the best and you guys had picked a topic from  
17 our list that you thought was the best. When you  
18 switched to a topic that you liked better -- and let me  
19 add the OGC does not tell you which topics are with our  
20 jurisdiction and which are not. The staff works for the  
21 Commission. You do not work for the staff. So, no, I  
22 believe that topic was within our jurisdiction and you  
23 obviously though so, too, since you voted for it. So  
24 that was an unraveled deal.

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1                   Let me add that when the current  
2                   Commissioners came on board two years ago, we scratched  
3                   several topics that were in the pipeline where reports  
4                   were being already prepared. That's why we don't have  
5                   as many reports as we should have, I believe. You know,  
6                   we're just putting ourselves in a position now where  
7                   we're going to create a report that is doing no good  
8                   whatsoever. It is something that we voted on. The  
9                   blurb was never intended to be a list of all the  
10                  discovery options. If you had wanted to vote on the  
11                  discovery, then you could have done that, but it's  
12                  months, months, months later now. To now go back and  
13                  say we need to start again is just silly.

14                  CHAIRMAN CASTRO: Commissioner Heriot --

15                  MEMBER KLADNEY: I would ask the --

16                  COMMISSIONER YAKI: Mr. Castro?

17                  CHAIRMAN CASTRO: Commissioner Kladney,  
18                  let me just insert here a second.

19                  We're not changing your topic. I mean, I  
20                  think you've proven to us that there's an expansion here  
21                  to K through 12, so that's the topic. We're not  
22                  changing the topic. The issue I guess is the scope of  
23                  the discovery. I'm going to have Commission Yaki and  
24                  then I'll send it back to you, Commission Heriot.

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1 Commissioner Yaki, go ahead.

2 COMMISSIONER YAKI: Yes, I am not going to  
3 try and respond to everything that Commissioner Heriot  
4 said, but I will say that as the current, with the  
5 exception of Commissioner Kirsanow, who's not present,  
6 most-senior member of the Commission, there are some  
7 things that she did raise that I need to respond to.

8 First, while I gladly accede to  
9 Commissioner Heriot's correctness in what topic was  
10 that we voted for, there is nowhere in that topic and  
11 nowhere in any topic that we have done that completely --  
12 unless it was specifically mentioned and specifically  
13 discussed and specifically voted on, as we did, for  
14 example, in the Stand Your Ground investigation  
15 discussion, mention of how we would conduct specific  
16 discovery. And that is not usually -- that is not up  
17 to the discretion of staff to do. This is not just  
18 directly in discovery. This is specific directed and  
19 specific university discovery. And I would  
20 just like to remind -- not remind, but to educate the  
21 members of the audience who might be hearing this  
22 slightly -- a history of what the Commission may or may  
23 not have done, that this is not something that is usual  
24 or normal. And if it is the desire of Commissioner

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1 Heriot to direct discovery at these particular  
2 universities, then that is something that, yes, the  
3 Commission can decide on, but the Commission should at  
4 least vote on, which we have not been given the  
5 opportunity to do.

6 Upon looking at the list of the  
7 universities, I am somewhat -- I don't want to say  
8 suspicious. I would just simply say that we have in the  
9 past had a situation where we became entangled with the  
10 privacy and confidentiality issues with universities in  
11 the past and to the point where a Commissioner had to  
12 be told by the General Counsel to give up that data after  
13 we had completed the report because it violated the  
14 confidentiality provisions; which took months and  
15 months and months, by the way, to negotiate with these  
16 universities.

17 So when you go in this manner, when you  
18 target specific universities and you're targeting  
19 potentially confidential data that they may possess, I  
20 can tell you firsthand that that alone, if I recall  
21 correctly from that one briefing that we had, required  
22 months of negotiation and discussion with these  
23 universities, which means that the likelihood of  
24 anything happening in July is unlikely and unrealistic

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1 to begin with.

2 Secondly, as I said before, that was a  
3 product of specific discussion and both by the  
4 Commission as to those specific universities in that  
5 particular case -- and in this opportunity we were not  
6 given that opportunity, nor given the opportunity to  
7 contact or interview universities to see whether they  
8 were even predisposed to even negotiating with us in any  
9 timely manner or not, not that anything that would  
10 involve them would require their permission.  
11 Obviously that's not the case, but certainly would go  
12 a long way towards ascertaining what kind of a fight we  
13 may or may not have with regard to discovery on these  
14 kinds of issues.

15 So, you know, with that being said, I would  
16 strongly object to any discovery in any particular  
17 university mandated by any Commissioner as a part of a  
18 report. And as to what a deal is or not, you know, as  
19 frequently the lone Commissioner in the minority on this  
20 Commission for a period of five to six years, the notion  
21 that I would have complete carte blanche over any topic  
22 that may have been a part of any deal with the full  
23 majority, which I was in the minority, is something that  
24 would have happened only my dreams. Every topic that

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1 I tried to get through, every topic that I tried to  
2 compose, every topic that I did manage to get through  
3 was controlled solely, completely and totally by the  
4 staff director in attempts by me to do anything  
5 otherwise were met with resistance and outright  
6 hostility by both staff and by the other Commissioners.

7 So I would say that in this instance we've  
8 been more than fair. We've been more than open. We are  
9 just simply stating that in this particular instance,  
10 as in any other instance that we might have, that the  
11 issue of how this would be conducted, how this would be  
12 put together is at the discretion of the staff. And if  
13 the Commissioner has specific concerns or ideas or  
14 direction in which he or she wants it to go, they can  
15 bring that up specifically to the Commission and the  
16 Commission will specifically vote and thereby direct  
17 staff in order to conduct it.

18 In this case we have not done that with  
19 these nine universities proposed by Commissioner Heriot  
20 and I think that therefore is out of order.

21 CHAIRMAN CASTRO: Okay. So, Commissioner  
22 Heriot will speak next and then the staff director.

23 COMMISSIONER HERIOT: Okay. Coming from  
24 Commissioner Yaki the notion that discovery is bad a

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1 thing, Commissioner Yaki, the one thing that we have  
2 agreed on consistently in the past --

3 COMMISSIONER YAKI: Wait, wait, wait.

4 We --

5 CHAIRMAN CASTRO: Commissioner Yaki,  
6 please let her finish.

7 COMMISSIONER YAKI: No, no, no.  
8 Seriously, what do you mean discovery is a bad thing?  
9 Go through the entire transcript of what I just said,  
10 Commissioner Heriot. I never said anything of the  
11 sort. I didn't say discovery is a bad thing. I said  
12 this particular discovery, this particular narrowing  
13 and specifying of certain universities is not something  
14 we discussed on. It's not something that we voted on  
15 and it is and has in the past been the subject of  
16 extensive negotiation and time-consuming negotiations  
17 between the Commission and universities.

18 CHAIRMAN CASTRO: Okay. Commissioner  
19 Heriot, please continue.

20 COMMISSIONER HERIOT: Again, the one thing  
21 that Commissioner Yaki and I have agreed on consistently  
22 in the past is that having briefings that don't produce  
23 actual data are not good, that we really ought to be  
24 doing exactly what then majority leader Lyndon Baines

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1 Johnson said that the Commission was for, and that is  
2 to go out and find facts.

3 We have not been good at that. We have  
4 frequently brought professional talking heads to talk  
5 to us. They have said the same things they've said in  
6 the articles that they have written. What we really  
7 need to do is spend more time finding actual facts.  
8 There is no confidential material that we're talking  
9 about here. These are policies and presentations we're  
10 asking these universities to produce. And it seems to  
11 me a pretty easy thing. This is not time-consuming.  
12 This is something that can be done relatively quickly  
13 and I think it is useful.

14 As to whether or not we voted on this, I  
15 actually expected that this would have been put on the  
16 agenda. I was asked to produce a more complete concept  
17 paper. I did that. I expected it to be on the agenda.  
18 It never made it onto the agenda. I don't set the  
19 agenda. But after something has been lying around as  
20 many months as this, suddenly to be told that despite  
21 months and months of planning, you know, this is just  
22 off the agenda, after I voted in favor of projects that  
23 the majority wanted, to now be ambushed this way I think  
24 is completely inappropriate. CHAIRMAN CASTRO:

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1 Madam Staff Director?

2 MS. SALLO: I just want to put on the record  
3 that the General Counsel will be providing an opinion  
4 as to whether any concept paper is beyond the scope or  
5 not even meeting the scope of what we are required to  
6 do. That is the General Counsel's job, and that is what  
7 we will be doing.

8 CHAIRMAN CASTRO: And --

9 MEMBER KLADNEY: Mr. Chairman?

10 CHAIRMAN CASTRO: Commissioner Kladney?

11 MEMBER KLADNEY: I would ask the staff  
12 director to correct the record as far as Commissioner  
13 Heriot's comments go about the statutory report and  
14 whether in fact OGC directed that that be the statutory  
15 report, the one about prisons and sentencing.

16 MS. SALLO: That is correct, Commissioner  
17 Kladney. The General Counsel did meet with  
18 Commissioner Kladney and a special assistant to advise  
19 them that the report as written did not meet the  
20 requirements of our statute, and therefore we were not  
21 able to use that as a topic because it was beyond the  
22 scope of our mission.

23 CHAIRMAN CASTRO: And in fact that's why  
24 we're --

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1                   MEMBER KLADNEY:   And also we never asked  
2                   Commissioner Heriot or any other Commissioner to change  
3                   the other topic, did we?   Did the staff do that?

4                   COMMISSIONER HERIOT:   That was not my  
5                   argument.   The point was that we had been asked to pick  
6                   from that list that the majority had the topic that we  
7                   were happiest with.   And the majority picked from our  
8                   list the topic they were happiest with.   And so for you  
9                   then to be able to pick a different topic meant that we  
10                  should be able to pick the topic we wanted most as well.

11                  MEMBER KLADNEY:   Commissioner Heriot, we  
12                  did not choose to pick a different topic.   We did not  
13                  try to do that at all.

14                  COMMISSIONER HERIOT:   That's not what I've  
15                  heard.

16                  MEMBER KLADNEY:   We were barred from using  
17                  our topic.   I would have preferred to have done that  
18                  topic, but I was told it did not fit the jurisdictional  
19                  parameters of the statutory report.

20                  COMMISSIONER HERIOT:   So we got another  
21                  Nevada topic.

22                  MEMBER KLADNEY:   That did not require you  
23                  to go about choosing another topic.

24                  CHAIRMAN CASTRO:   Okay.

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1                   MEMBER KLADNEY:   You did that in your own  
2                   discretion.

3                   COMMISSIONER HERIOT:   I don't think you  
4                   understand what I'm saying.

5                   CHAIRMAN CASTRO:   All right.   Okay.  
6                   Here's what we're going to do:   I think, you know, we've  
7                   addressed the substantive matters here.   We have the  
8                   process that we're now instituting where we are actually  
9                   having the OGC review our concept papers beforehand, not  
10                  afterwards so we don't end up in this problem again.

11                  You do have your topic.   It was voted on.  
12                  It's very clear.   You made the case that it is higher  
13                  ed and K through 12.   We are not taking that topic away  
14                  from you.   The only concern is the scope of the  
15                  discovery.   And so with a motion pending on that  
16                  specific issue, not removing your topic, but dealing  
17                  with the discovery issue, your topic remains in place.  
18                  You've obviously shown that, you know, we were in error,  
19                  that I was in error on my understanding of the expansion  
20                  of it.

21                  And so now we will call the question on  
22                  Commissioner Kladney's motion.

23                  Could you restate the motion,  
24                  Commissioner, just so that we're really clear?

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1                   MEMBER KLADNEY: The motion is to limit the  
2                   discovery on this paper to what is stated in the blurb.  
3                   That would be obtaining documents from DOJ and DOE, the  
4                   Office of Civil Rights, that there be no discovery to  
5                   school districts or universities.

6                   CHAIRMAN CASTRO: And that motion has been  
7                   seconded. I'm going to take a roll call vote on that.

8                   Commissioner Heriot, how do you vote?

9                   COMMISSIONER HERIOT: This is a first of  
10                  many no votes.

11                  CHAIRMAN CASTRO: Commissioner Kladney,  
12                  how do you vote?

13                  MEMBER KLADNEY: Yes.

14                  CHAIRMAN CASTRO: Commissioner  
15                  Achtenberg, how do you vote?

16                  COMMISSIONER ACHTENBERG: Yes.

17                  CHAIRMAN CASTRO: Commissioner Yaki, how  
18                  do you vote?

19                  COMMISSIONER YAKI: Yes, but after this  
20                  vote I'm going to offer a possible substitute amendment.

21                  CHAIRMAN CASTRO: Okay. And then I also  
22                  vote yes. So the motion passes.

23                  Now, Commissioner Yaki, you have a  
24                  substitute motion?

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1                   COMMISSIONER YAKI:  Yes, I would say that  
2           I do agree with Commissioner Heriot on her  
3           characterization of my position that too often this  
4           Commission has not been engaged in the past; I'm talking  
5           about when I was in the minority, in getting real data  
6           for its reports, whether they were a briefing or whether  
7           they were statutory.  I understand her point of view and  
8           I would simply say that the briefings, as I've often  
9           stated, are often a way of getting the full flavor, full  
10          facts, the full range of issues and discussions.  And  
11          one of my concerns with where this particular briefing  
12          was headed was that I did not unfortunately any logic  
13          as to the selection of those particular universities and  
14          how they related to this particular topic in specific.

15                   I do believe that -- simply that if in the  
16          discretion of the staff it would be useful to obtain any  
17          policies and procedures from any particular, from any  
18          randomly selected or easily accessible school districts  
19          or universities in their discretion in order to augment  
20          and fully flesh out the topic, I would say that would  
21          be appropriate, but I would leave that in the discretion  
22          of the staff for the purposes of managing the briefing.  
23          Because if we all really think about it, this could be  
24          a very long briefing if we were to attempt to go quite

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1 as far afield as it already is right now with regard to  
2 the addition of the K through 12. So in that instance,  
3 I would simply say I would direct the staff to in their  
4 discretion and if needed in order to make this briefing  
5 more well-rounded, if in their discretion they seek to  
6 find some sample or representative policies from in each  
7 school district or university in their discretion, I  
8 would not object to that.

9 CHAIRMAN CASTRO: So is that --

10 COMMISSIONER ACHTENBERG: Is that a  
11 motion?

12 CHAIRMAN CASTRO: -- a motion,  
13 Commissioner?

14 (Laughter.)

15 COMMISSIONER YAKI: Yes.

16 CHAIRMAN CASTRO: Okay. Is there a  
17 second?

18 COMMISSIONER ACHTENBERG: Second.

19 CHAIRMAN CASTRO: Any additional  
20 discussion, or any discussion?

21 COMMISSIONER ACHTENBERG: Mr. Chairman, I  
22 think that sounds imminently reasonable and quite  
23 salutatory, which I think is a very good idea under the  
24 circumstances. So I want to thank Commissioner Yaki

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1 for contributing such a Solomon-like addition to the  
2 prior motion.

3 CHAIRMAN CASTRO: Okay.

4 MEMBER KLADNEY: And if I may add --

5 CHAIRMAN CASTRO: Yes, Commissioner  
6 Kladney.

7 MEMBER KLADNEY: -- some clarification,  
8 Commissioner Yaki? Is that the staff director makes  
9 these decisions? I mean, there has to be one person,  
10 right, not just the staff?

11 COMMISSIONER YAKI: Well, I mean, all  
12 these are ultimately at the discretion of the staff  
13 director working with the staff, so yes, it's going to  
14 be the judgment of the -- and ultimately it's the  
15 judgment of the staff director who is ultimately  
16 responsible for making an arranged brief.

17 MEMBER KLADNEY: Then I can concur.

18 CHAIRMAN CASTRO: Any other questions,  
19 comments?

20 (No audible response.)

21 CHAIRMAN CASTRO: Hearing no, we'll vote  
22 on that motion.

23 Commissioner Heriot, how do you vote?

24 COMMISSIONER HERIOT: No.

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1 CHAIRMAN CASTRO: Commissioner Kladney,  
2 how do you vote?

3 MEMBER KLADNEY: Yes.

4 CHAIRMAN CASTRO: Commissioner Yaki, how  
5 do you vote?

6 COMMISSIONER YAKI: Aye.

7 CHAIRMAN CASTRO: Commissioner  
8 Achtenberg, how do you vote?

9 COMMISSIONER ACHTENBERG: Aye.

10 CHAIRMAN CASTRO: And I vote yes. It  
11 passes 4 to 1.

12 Okay. We now move onto Management and  
13 Operations, and I'll turn it over to the staff director  
14 to give us her monthly report.

15 MEMBER KLADNEY: Mr. Chairman?

16 CHAIRMAN CASTRO: Yes?

17 MEMBER KLADNEY: I'd like to make one  
18 comment.

19 CHAIRMAN CASTRO: Okay.

20 MEMBER KLADNEY: Someone said that this  
21 concept paper has been around for months. We just  
22 received it in my office this month, just like two weeks  
23 ago. So I just want to put that for the record. I don't  
24 know why it wasn't distributed widely before that, but

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1 that is when we received it. Thank you.

2 CHAIRMAN CASTRO: Okay. We're moving on  
3 now to Management and Operations. Madam Staff  
4 Director?

5 **III. MANAGEMENT AND OPERATIONS**

6 MS. SALLO: Yes, sir. I wanted to advise  
7 everyone that unfortunately for the Commission Eileen  
8 Rudert will be retiring after 29 years with the  
9 Commission. So I wanted to let everyone know that she  
10 will be greatly missed. I've truly enjoyed working  
11 with her in the almost three years that I've been here  
12 and it's a great loss for the Commission. So I just  
13 wanted to let everyone know that and to thank her for  
14 all of her years of commitment to us.

15 CHAIRMAN CASTRO: Congratulations,  
16 Eileen. You'll definitely be missed. So thanks for  
17 all the work you've done and the support you've given  
18 to the Commission over your career, and especially in  
19 the three years I've been Chairman. I appreciate that.  
20 You'll be missed.

21 MS. SALLO: And her last day with us --

22 CHAIRMAN CASTRO: Commissioner Yaki, go  
23 ahead.

24 COMMISSIONER YAKI: Yes, and I would say,

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1 Eileen, as long as I've been on the Commission you've  
2 been a great resource and a great public servant. And  
3 thank you for your service to this Commission and to this  
4 country and I wish you all the best in your next  
5 endeavor.

6 CHAIRMAN CASTRO: You were going to say,  
7 Madam Staff Director?

8 MS. SALLO: I was going to say her last day  
9 with us is April 30th.

10 CHAIRMAN CASTRO: Okay. Thank you.

11 MS. SALLO: I also wanted to advise the  
12 Commissioners that we've now completed the alignment of  
13 our strategic plan with our performance appraisal  
14 system. And so we will be now meeting. The managers  
15 will be meeting individually with the employees to  
16 ensure that we go over the revised performance appraisal  
17 plans. And those will hopefully go into effect across  
18 the Commission for July 1st of this year.

19 We are also preparing for our audit that you  
20 know happens annually. So we will be in the process of  
21 trying to find an auditor who can come in and start the  
22 process. And as we you know, we are working with GAO  
23 for the next I guess 60-some-odd days. So I am the  
24 contact person and I will be providing them with any all

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1 documents or information that they require. And that  
2 is all, sir.

3 CHAIRMAN CASTRO: Yes, Madam Staff  
4 Director, you have in the past done what I think is a  
5 great job of periodically -- not at every meeting, but  
6 periodically reporting to us on where we stand in terms  
7 of hitting the goals of your strategic plan. Maybe for  
8 the next month's meetings, because I think it's been at  
9 least a month --

10 MS. SALLO: I did it last month.

11 CHAIRMAN CASTRO: Yes.

12 MS. SALLO: So I do it every other month.

13 CHAIRMAN CASTRO: So if we can do it every  
14 other month?

15 MS. SALLO: Yes.

16 CHAIRMAN CASTRO: I think that's really  
17 helpful to keep us on task as to what we need to do.

18 MS. SALLO: Yes.

19 CHAIRMAN CASTRO: So thank you. Any other  
20 questions for the staff director?

21 (No audible response.)

22 CHAIRMAN CASTRO: Hearing none, we will  
23 then move on to State Advisory Committee Appointments.

24 **IV. STATE ADVISORY COMMITTEE (SAC) APPOINTMENTS**

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1                   CHAIRMAN CASTRO: Today's agenda gives us  
2 one, and that is for Idaho. So I am now going to make  
3 a motion that the Commission appoint the following  
4 individuals to the Idaho State Advisory Committee based  
5 upon the recommendation of our staff director:  
6 James Annest, Richard A. Cummings, Louise E. Dixey,  
7 Maurice O. Ellsworth, Dina M. Flores-Brewer, Margie A.  
8 Gonzalez, Marshall E. Mend, Gladys B. Montoya, Stephen  
9 C. Smith, Carmen A. Suarez, Rudolph Wilson and Scott  
10 Yenor. Pursuant to this motion the Commission appoints  
11 Marshall E. Mend as chair of the Idaho State Advisory  
12 Committee.

13                   These members will serve as uncompensated  
14 government employees. Under this motion the  
15 Commission authorizes the staff director to execute the  
16 appropriate paperwork for the appointments. Is there  
17 a second?

18                   (No audible response.)

19                   CHAIRMAN CASTRO: Do I have a second on the  
20 motion?

21                   COMMISSIONER HERIOT: Second.

22                   CHAIRMAN CASTRO: Thank you. Any  
23 discussion? Any questions?

24                   (No audible response.)

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1 CHAIRMAN CASTRO: Hearing none, I'll take  
2 a vote.

3 Commissioner Heriot, how do you vote?

4 COMMISSIONER HERIOT: Yes.

5 CHAIRMAN CASTRO: Commissioner  
6 Achtenberg, how do you vote?

7 COMMISSIONER ACHTENBERG: (No audible  
8 response.)

9 MS. SALLO: Did we lose them?

10 CHAIRMAN CASTRO: Have we lost them?  
11 Commissioner Kladney?

12 MEMBER KLADNEY: (No audible response.)

13 CHAIRMAN CASTRO: Commissioner Yaki?

14 COMMISSIONER YAKI: (No audible  
15 response.)

16 CHAIRMAN CASTRO: All right. Well, we're  
17 going to put it on hold until we get the Commissioners  
18 back.

19 (Whereupon, at 10:19 a.m. off the record  
20 until 10:26 a.m.)

21 CHAIRMAN CASTRO: Okay. We're back on.

22 COMMISSIONER ACHTENBERG: We're all on.

23 CHAIRMAN CASTRO: Can you hear us?

24 MEMBER KLADNEY: Yes.

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1 COMMISSIONER ACHTENBERG: Yes.

2 CHAIRMAN CASTRO: We'll move quickly  
3 before we lose connection again. So we had made a  
4 motion and it was seconded. Did you hear the motion on  
5 the Idaho State Advisory Committee?

6 COMMISSIONER YAKI: Yes, we all voted.

7 COMMISSIONER ACHTENBERG: We did.

8 CHAIRMAN CASTRO: Okay. All right. So  
9 now we're going to take a vote.

10 Commissioner Heriot, how do you vote?

11 COMMISSIONER HERIOT: Yes.

12 CHAIRMAN CASTRO: Commissioner  
13 Achtenberg, how do you vote?

14 COMMISSIONER ACHTENBERG: Yes.

15 CHAIRMAN CASTRO: Commissioner Kladney,  
16 how do you vote?

17 MEMBER KLADNEY: Yes.

18 CHAIRMAN CASTRO: Commissioner Yaki, how  
19 do you vote?

20 COMMISSIONER YAKI: Aye.

21 CHAIRMAN CASTRO: I vote yes. The Idaho  
22 Committee passes unanimously. Thank you.

23 **V. ADJOURN BRIEFING**

24 I now move to adjourn. Is there a second?

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1 COMMISSIONER ACHTENBERG: Second.

2 CHAIRMAN CASTRO: All those in favor, say  
3 aye?

4 (Chorus of ayes.)

5 CHAIRMAN CASTRO: All right. Thank you,  
6 everyone. It is now adjourning at 10:26 a.m. Eastern  
7 Time.

8 (Whereupon, the meeting was adjourned at  
9 10:26 p.m.)

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