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 KLASKEY, Commissioner

PETER KIRSANOW, Commissioner

KAREN K. NARASAKI, Commissioner

MAURO MORALES, Staff Director

MAUREEN RUDOLPH, General Counsel
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
AGENDA

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

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

(No response)

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

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

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

CHAIR LHAMON: Commissioner Yaki, this is Catherine Lhamon. I appreciate the acceptance of the family amendments and just would like to talk about the idea of site visits and subpoenas as discovery
tools that we might use.

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

(Simultaneous speaking)

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

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

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

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

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

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

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

It will only be done to have some necessity, but that necessity would have to be tempered or complicated by having to re-notice and
coordinate all of our schedules for going forward with a less than full complement. If we had to, that has its own drawbacks as well.

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

Commissioner Adegbile?

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

But I also think that maybe it would be helpful to have a little bit more understanding, like pulling these two things apart, meaning I understand they're both investigatory tools, but perhaps the group should come to some judgement about whether or not site visits are affirmatively something that we're trying to do.
Because if that's the case, it may be that, you know, we need to plan for that and maybe decide whether or not we're voting on it. The subpoenas may seem like a downstream thing that would only be necessary if there were some refusals to cooperate. And that's actually, to me, to be something that could be revisited. So that's just my quick cut at the issues having heard this discussion.

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

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

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

But then that would be the only time in
which we'd go forward. And the little puzzle as to what concerns there may be with regard to usage of either tool but, you know, if it's the will of the subcommittee to take them out, and we'll just meet on it again if we need to, that'll be --- well, that's the will of the subcommittee.

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

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

I would say if that being the decision of the subcommittee to do a site visit, and/or subpoenas, there is and could be a significant cost to that, depending where the site visit is, the timing of it all, and all the rest of that. So I would ask
commissioners to keep that in mind.

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

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

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

    And for myself I have, as I mentioned, very substantial worry about delay and also about the costs. But the potential for needing to enforce a subpoena, the wait or the length of time that can be involved in doing that, and also the diversion of staff resources that would be involved in doing that, the way some productivity of other reports that have
intended, and also the advisory committee reports that
the advisory committee were intended to see out of it,
I think there would be substantial downsides to go.

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

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

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

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

So again, I am not saying we will, I'm not
saying we want to. I am saying that, if we need to take the serious and sober step of issuing a subpoena, it would be something that we would have to discuss with the general counsel, and with the staff director, and with you as the Chair. It's your signature on the subpoena. That would have to be done beforehand.

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

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

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

COMMISSIONER Kladney: I have something. Commissioner Kladney here. First of all, on the site visit, I am glad that you conceded that point. Because I think I am the only one on the subcommittee
that actually went on the last site visit. And I know that it was ---

(Audio interference)

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

COMMISSIONER KLADNEY: I know.

(Off the record comments)

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

(Audio interference)

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

- (Audio interference)

COURT REPORTER: I'm sorry, this is the court reporter. Until that background sound from the airport goes by, I won't be able to do a transcript. I just want everyone to know that.
COMMISSIONER YAKI: I heard. Let me restate this. And Commissioner Kladney, you can correct me. One, you would like it to be amended to include the use of a subpoena duces tecum in addition to subpoenas, number one. Number two, you also believe that it should be left to a subsequent discussion if we're going to authorize the actual issuance of either one of those two. Would that be correct?

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

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

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

CHAIR LHAMON: Chair Yaki, I'm sorry, this is Catherine Lhamon. One suggestion might be just to go ahead and notice a meeting for when the interrogatory and document request window closes so that we could move immediately to another alternative
if it became necessary. And we wouldn't lose the gap in time.

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

(No response)

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

COMMISSIONER NARASAKI: I actually would -- sorry.

COMMISSIONER YAKI: Yes.

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

COMMISSIONER YAKI: Yes.

COMMISSIONER NARASAKI: Or whoever is necessary?

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

COMMISSIONER NARASAKI: And this is a military base.
COMMISSIONER YAKI: Yes. And the Department of Defense and military bases are now included as a part of the discovery plan.

COMMISSIONER NARASAKI: Great, okay. Thank you.

COMMISSIONER YAKI: Okay. So ---

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

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

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

CHAIR LHAMON: Thank you.

COMMISSIONER YAKI: So with that ---

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

COMMISSIONER YAKI: Yes?

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

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

COMMISSIONER NARASAKI: Okay.

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

COMMISSIONER KLABNEY: I think we should take a vote. I think there should be a vote.

(Simultaneous speaking)

COMMISSIONER YAKI: Calls for a roll call
vote?

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

COMMISSIONER YAKI: On what?

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

COMMISSIONER YAKI: Is there a second?

CHAIR LHAMON: Second.

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

(No response)

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

CHAIR LHAMON: Aye.

COMMISSIONER YAKI: Commissioner Lhamon, aye. Commissioner Kladney?

COMMISSIONER Kladney: Yes.

COMMISSIONER YAKI: Kladney, aye.

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

COMMISSIONER YAKI: Kirsanow, aye.
Commissioner Narasaki?

COMMISSIONER NARASAKI: Aye.

COMMISSIONER YAKI: Commissioner Narasaki, aye. Commissioner Adegbile?

COMMISSIONER ADEGBILE: Aye.

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

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