

Peter Kosinski: I'd like to welcome everybody to the meeting of the State Board of Elections here on March 13<sup>th</sup>. I'm Peter Kosinski. To my right is Commissioner Kellner, to my left is Commissioner Peterson. To my far right is Commissioner Andy Spano.

We'll open our meeting as a Board of Canvassers. Today we have to consider some amended election results from the 2016 general election. Anna can you just brief the room.

Anna Svizzero: If you don't mind I'll have Brendon do it because I was out sick the last few days and he's got some notes.

Peter Kosinski: Sure, Brendon can you just brief us what this is about?

Brendon Lavelle: Three counties; Albany County, Greene County and New York City. In Albany County they had a discrepancy between the ballots that were handed out on Election Day so they corrected that first thing the morning when they found out and made those corrections but it was after the times we had to certify. Greene County was an entry error with the Presidential write-ins. They gave us those actually when we had our last meeting but it was the same day so we didn't have a chance to certify those. And then New York City had one more ballot absentee in Manhattan and then in Queens they had additional write-ins for Presidential candidate that they amended to.

Peter Kosinski: I'm presuming none of these amendments change any of the results that occurred in the 2016 election? Okay. We have to adopt this amended certification, is there a motion?

Douglas Kellner: So moved.

Gregory Peterson: Second.

Peter Kosinski: All in favor? (Chorus of ayes). Opposed? It's amended. And with that I will close the meeting of the Board of Canvassers and will open as a Board of Commissioners.

Our first order of business are minutes. We have several minutes that we have not approved over the last several months. We have October 4<sup>th</sup>, 13<sup>th</sup> and 17<sup>th</sup>. Those are those meetings we held those video meetings. Then there's December 8<sup>th</sup>, January 9<sup>th</sup>, February 22<sup>nd</sup>, and Executive Minutes of the 4<sup>th</sup>, 13<sup>th</sup> and 17<sup>th</sup> of October, the 9<sup>th</sup> of January and the 22<sup>nd</sup> of February. Are there any questions regarding any of those minutes?

Douglas Kellner: We have made substantial, there have been revisions to all of those documents and I appreciate the assistance the staff has provided for making those revisions and I'm satisfied now with the text of all of them and I move that we adopt all of these minutes.

Andy Spano: I second it.

Peter Kosinski: It's been moved and seconded that we adopt all those minutes. All in favor? (Chorus of ayes). Opposed? So those are all approved.

Next we'll move on to unit updates and our first unit is the Executive, Bob Brehm and Todd Valentine.

Todd Valentine: Most recently, we've certified the vacancies for the Special Election on the calendar in the 9<sup>th</sup> Assembly District and the 30<sup>th</sup> Senate District. That election is scheduled for May 23<sup>rd</sup>, that special election rather. We're expecting the filings, the filing are due next week for the certificates of nomination. The 9<sup>th</sup> Assembly District will be filling with us because that crosses county lines. We're still awaiting the adoption of the final State Budget. I think it is a harmless one but that didn't address any of our future needs with regards to technology though we've made that clear to the senate and assembly and the Governor's Office that its going to be problematic for us absent sufficient resources to address the spending we weren't able to get through this year because of delays in approval for the hiring and technology. So we're hopeful that they can at least re-appropriate some of the money we were unable to spend because of delays outside of our own fault.

Peter Kosinski: How much are we talking about?

Todd Valentine: There were supposed to be appropriations of 1.3 in 2 successful fiscal years according to the Division Budget. We got the first 1.3, we were able to spend a little over \$300,000 of the \$1.3 million so it's a little less than \$1 million, I think its' around \$800,000 give or take. So we'd like at least that to be re-appropriated so we have that money to spend.

Peter Kosinski: What is that going to prevent us from doing if they don't re-appropriate it?

Todd Valentine: It inhibits our ability to hire the technical resources we need to do the upgrades to the CAPAS and FIDAS system.

Peter Kosinski: So that will delay the update and implementation of the new FIDAS-CAPAS?

William Cross: Partially and it's also related to cyber security and NYSVoter as well.

Peter Kosinski: And cyber security as well. I assume they're all aware of this? Well it's going to happen in the next few weeks so I guess we'll know.

Todd Valentine: We made the case so.

Peter Kosinski: Is that all?

Todd Valentine: Yeah. Bob?

Bob Brehm: The budget will be what it is. I think all the other items that will impact on the budget that is of concern are the constitutional issues, the questions that will be on the ballots, clearly whether or not to have a constitutional convention will be this year as well as the forfeiture of certain pension benefits that had second passage this year. We had sent a notice to

the Attorney General's Office in early January on the constitutional amendment because it was clear this year and in February when the second passage happened for the pension forfeiture we sent that over to the Attorney General's Office and urged them to get us the wording for those, at least the recommended wording that you're supposed to consider before adopting the wording and we expressed some concern about the period of time it takes us after we get that wording in order to translate the questions and to make arrangements, get them published in all the newspapers. So we urged them to get it to us quickly. We do note that there's discussion about a potential for a third item that will be on the ballot. There's a lot of discussions at the capital in the form of a budget of a water bond act of some sort so we would probably have a little clarity on whether that's there by the end of the month.

Peter Kosinski: Bob what's the timing there for? When does this have to be published?

Bob Brehm: Well you have to, us the State Board, you the Commissioners have to vote prior to August 7<sup>th</sup>. We have found that if we do it on the deadline it's a little tight because we do like to get the translations in the various languages and even share them with the community and the counties to give them a little bit of time in order to give us their comments. Often they claim we receive claims long after the election or when its too late to do anything about it that the quality of our translations haven't been up to whatever they desire. So the last time we did have a couple of weeks time in that calendar to try and get some comments from people as to whether or not we've translated them correctly in a time that we could at least do something about it. The harder part I think is getting all the prices to get them published in the newspaper and on average, if we have 3 questions, it will be upwards of \$300,000 to get them published in the newspaper and usually about another 10, \$15,000 depending on translation services.

Peter Kosinski: So the AG gets us the abstract?

Bob Brehm: Well they're supposed to give us their recommendation on the form of the question and the abstract. The constitutional question is in the constitution so you don't have to go too far for that one but the abstract they have to give us the wording. On the pension forfeiture there was no language in the document that said, and it shall appear this way on the ballot. The draft version I saw in the Senate on their Bond Act for the water quality has a form of the question in it. Assuming that that gets approved at the end it will come to us. And it says, substantially as follows, because you could change a word or two but probably not more than that. So my hope is that the end of the budget if it's only 2, to try and work out a calendar with the Attorney General's Office that will at least give us extra time.

Peter Kosinski: And that will come to us for final approval correct? So that will come to this Board at some point this summer for final review. But before August 7<sup>th</sup>?

Bob Brehm: Hopefully. It's harder when it's on the deadlines. The statute is 3 months before.

Todd Valentine: No later than three months.

Peter Kosinski: Anything else? Any questions for Bob or Todd? Okay then we'll move onto the Counsels; Kim and Brian

Kim Galvin: Thank you Commissioner. The unit's been busy. We worked a long time on the legislative program that will come up later on the agenda I believe. There was 4 HAVA complaints, Help American Vote Act complaints that have been dealt with; two required hearings, two determinations on those matters have been issued and two are pending. There's approximately 9 lawsuits that are being monitored by the unit in various stages of review and discovery. We're busy watching those. The regular business of the Compliance Unit is ongoing with the reviews and various work that they do, a lot of work. We have worked together on various phone calls and issues with the local Boards of Elections on a variety of things. We have had various meetings on other things such as audits that are later on the agenda. We've all worked together with the various units trying to come to consensus on issues such as that. And we did work with Risa on one issue regarding the next round of notifications that she's making and we worked it such that we can notify our compliance auditors when and if certain committees call that they be referred back to Enforcement to try to eliminate a lot of confusion that callers have when they call. Do you have anything else Brian?

Brian Quail: I would note that 27 seminars are planned, that schedule is pretty much together.

Peter Kosinski: Those are campaign finance seminars you're talking about? When do those start?

Brian Quail: They start in May.

Peter Kosinski: 27? And are those all on site or some of those video?

Brian Quail: Those are all out in the field seminars. The Board does provide video trainings, for example the winding down seminars are typically done by video so there are video seminars that likely also occur during the year but that 27 are off-site.

Kim Galvin: And what they do on the local years is because the localities are busy this time of year, I believe that the trainers reach out to each locality and ask, "Do you need one"?

Peter Kosinski: You mean each county?

Kim Galvin: "Are you busy? What do you have up"? And if there's several together they schedule a regional one or do those independently if they're busy enough in a big enough locality.

Bob McCann: We try to hit every county at least once every 3 years and then the major ones that they do every year and they have a good rotation but then as Kim mentioned, they threw up a liaison program with the county boards. They find out when a particular county has a busy year like all their towns are up or certain things like that then they'll gear towards that.

Peter Kosinski: Any questions for the Counsels? Then we'll move on to Election Operations and Anna and Brendon.

Anna Svizzero: Thank you Commissioner. We do have a report we just didn't get it done in time for the packet so we'll pass it around in the interest of saving time and getting everybody home before this storm hits. Apart from our usual work we did have a special election called by the Governor for May 23<sup>rd</sup> to fill one Assembly seat and one Senate seat so we prepared the certification of the vacancies in the first instance and then once the special election was called, we worked with Mary Ellen Rita in Todd's office and put a calendar together for the special election and sent that out to the board...

Peter Kosinski: And that's the one that the nominating are due next week?

Anna Svizzero: Yes, Nassau and Suffolk we'll file here their nominations and the other seat is in New York City wholly contained Senate seat. We prepared our March certification which is the listing of vacancies that we anticipate in Supreme Court. Those we worked with OCA to provide those vacancies to us. And I think we have vacancies in all but 3 of the judicial districts. We sent our March certification out which includes where petitions are filed which is particularly important with the State Committee, etc. This is mostly a local year so JD delegates, etc. are listed on that chart. We continue to work with IT for the update to the CAPAS system and I don't think we have anything else. We're working with a couple of counties that are going to have major vouchers submitted for reimbursement in our shoebox program; one of them is Erie. There's about \$12 million left in that fund for I think about 20...

Peter Kosinski: Anna just for everybody do you want to just describe very briefly what the Shoebox Program is?

Anna Svizzero: Shoebox is a reimbursement program. The remaining money that county boards did not spend on voting systems once OGA, OGS decided that they weren't going to process vouchers anymore all of that money went to one fund. It was still apportioned to counties as it always was but it was given to us to manage so there was no direct payment of bills. No purchasing through that program. You have to spend county money...

Peter Kosinski: It's a reimbursement program.

Anna Svizzero: Right and then submit proof of what you bought and whether it's allowable or not to us.

Peter Kosinski: Do you know how much money we have left total in that?

Anna Svizzero: About \$12 million is left.

Peter Kosinski: Still 12.

Anna Svizzero: We were at \$19 million not all that long ago.

Peter Kosinski: So counties are still spending it.

Anna Svizzero: Yes.

Peter Kosinski: Okay good.

Anna Svizzero: I think some of them were holding out for goodies like electronic poll books and the audit system you know that kind of thing so there were a few inquiries made as to when those decisions might be at hand and when they could purchase. So we know that some county boards were holding out for those. But I think the biggest one was electronic poll books certainly in the bigger counties that have that money, that was their interest and why they were hanging on to...

Peter Kosinski: And this allocated by county?

Anna Svizzero: In the same way that the voting machine money was, same formula. Other than that, its routine business for the unit. Brendon do you have anything to add?

Peter Kosinski: Okay any questions for them. Okay thank you. We'll move on to NVRA John Conklin PIO, Tom you guys.

John Conklin: Thank you Commissioner. The public information office has been somewhat busy mostly fielding calls about campaign finance filings. That's the only thing going on right now until the special election was named. So we completed 82 FOIL requests in January and 73 in February. Tom and I have participated in the monthly ECA calls in January and February. We are working on the annual report for 2016. I sent out an e-mail to all the units requesting them to complete their versions and get them to me. I will nudge them again this week that those are due. One unit has turned in their report so far, IT. I was gonna say I was a little nervous no one mentioned it there (all laughing).

Kim Galvin: Ours is very close.

John Conklin: So as Bob mentioned we're anticipating as many as 3 ballot props this year so we're starting to gear up in the publication requirement and working with the entity that sort of makes the arrangements with all the little papers around the state that we're required to publish that information in; that can be somewhat of an arduous task, please we have to satisfy the MWBE requirements in addition to putting them in every county in the state. With regards to the website, we posted the amended certification after the January meeting for the general election results. What has been adopted today will go up later today. We posted the approved 2017 political calendar. We posted the proclamation and the political calendar for the special election on May 23<sup>rd</sup>. The public transcripts for the December, January and February meetings have been posted. The webcast for the January meeting has been posted. And we have moved a couple of things off of the home page to the publications page; the 2014 public financing pilot program report, the lever voting report that was required as a result of Chapter 273 of 2014 and the review of Interstate Exchanges report that Tom and I did are all now on the publications page.

Lastly, for NVRA, Greg and Patrick, since the January meeting, have visited Yates County, Livingston, Niagara, Wyoming and New York City for NYSVoter reviews. Do you have anything to add Tom?

Tom Connolly: The only two items I would add is we also posted the HAVA determinations the 2 that were made that was mentioned previously. And from a military and overseas voter standpoint the Federal Voting Assistance Program has recently put out 2 new versions of their federal postcard application and also the federal write-in absentee ballot that's used by military and overseas voters for review and comments on the federal register. So I know that some of the county boards have some interest in commenting on this. I know one of the ECA regions is going to be bringing up at their meeting. Obviously, I circulated this around internally, we'll probably be having comments that we will be giving back as well before they finalize the new form.

Douglas Kellner: Could you provide additional information on what we do at the State Board to review compliance with the counties in New York City with the Voter Registration Database requirements? And I'm thinking in terms of the pending lawsuits challenging New York City's registration system and how we are actually auditing and supervising the City and the Counties on these issues.

Tom Connolly: Okay well, I mean aside from the visits that John was just talking about where we go to at least every county once every 2 years, Pat and Greg go there and they reveal the documentation and the processes that the county boards are undertaking to ensure compliance with the NVRA. In addition to that, there is a monitoring kind of set of procedures that we follow here at the State Board to ensure that the county boards are doing their due diligence with regard to processing information for felons or death or duplicates. They do run reports on each county every month and for any county that seems to be lagging behind in working the information that we're providing to them, they'll usually follow it up with a formal letter just so there's documentation that there is a backlog that needs to be worked on. Hopefully that usually kind of resolves the situation, if not, we can always escalate it in the phone call or get other people involved. On top of that, with specific regard to New York City, we are generating data from New York City both with regard to audit reports that talk about voters who may have failed the audit or who have not been audited in addition to enrollment reports that we provide to the City Board for them to kind of compare with their own internal enrollments. We've completed that process as well, or at least looking at the information with other counties throughout the state just to ensure that there aren't any seemingly glitches or problems with the way the systems are communicating with one another. So that's the way we kind of just, as the Pat and Greg's visits kind of handle the more people aspect of things, we're also looking at it from a technological standpoint to make sure that the data shows that all the systems are correctly working with one another. Because obviously there are sometimes changes to the software or changes to the staff who's using the software and anyone of those things could sometimes impact the flow of information from the county boards to the State Board. So we are looking at that information on a more regular basis. We have mentioned the possibility with IT of looking at possibly some sort of software that will help us kind of keep a baseline so that we can kind of be

more mindful of any kind of hiccups or peaks and valleys that shouldn't be there to just kind of add to the tools that we have to kind of oversee cooperation with the county boards.

Douglas Kellner: You used a phrase, voters failed an audit. What did you mean by that phrase?

Tom Connolly: So, part of the way that the county systems are supposed to be designed to work with the State system is that whenever there's a new voter or change to a voter's information, that information gets sent to the State Board of Elections and then there's supposed to be an audit process where the systems again compare the information that the state system and the county system have to ensure that they're the same. If there's a failure in that audit, then there is a flag that...

Douglas Kellner: So that means that it doesn't match. The State database isn't matching the county database.

Tom Connolly: Right so that's supposed to trigger another cycle of basically the county is supposed to keep on sending an update until the audit passes correctly. As long as I note that it is failing, the county is supposed to keep on sending the information because possibly there was an error in the transmission initially that the information didn't get through the first time. So looking at one of the reasons that we're also trying to figure out the software that might help us with this is, not just people who have failed audit but people who have failed audit continuously. Because there sometimes may be an issue whether it be with special characters or issue with the software on both ends that are generating what's called a hash mark that compares, that's the way we do the audit check, is we kind of take a bunch of data elements on either side. The county board is supposed to follow the same process as we do at the State Board and based on those data elements, we generation a hash code that's supposed to be compared and they're supposed to match because they're supposed to be generated the same way on both ends. So for whatever reason if there's an issue where that hash isn't being generated correctly, which has been the case once before, that has to be fixed where like the proper software has to be put in place so that again it's calculating the information the same way. So we're just trying to I guess beef up the tools that we have at our disposal to look at the information from a more data, technological and analytic standpoint.

Bob Brehm: New York City we have been doing on a weekly basis their audit check since the issue in Brooklyn came up and that was basically through a series of phone calls where the 2 records didn't match so the audit brought them into sync and now we do that on a weekly basis. The rest of the state we did in February. From an audit point of view I think it shows that again, its one of those items that everyday a county is working on a record so if you look in the morning you might see that everybody is audited but 2 hours later they put new records in, changed a name or did something so their numbers will go up. But it's a fluctuating table in that regard but I think we have not seen any new issues of any alarm or concern other than what more could we add to the human looking that we're doing on a regular basis? I know Patrick and Greg do one other item. When, you know Lisa is usually in the agency, Lisa Shaw get a new Commissioner or Deputy Commissioner and send the notice out to everybody in the building in order to know somebody is new, they send out a welcome notice with the audit requirements and the NYSVoter

requirements to new Commissioners just to let them know that there is such a thing and here's where we keep the record. And that new Commissioners will usually follow up with them with phone calls to go over it after they've at least figured out where the other items in the office are. But they do do a welcome letter which I think is very helpful for new staff, new Commissioners.

Douglas Kellner: Are there any issues relating to the State Board that are raised in the new lawsuit brought regarding the Motor Voter Registration System?

Brian Quail: Well we have a couple of things. We have a couple of letters that have been sent and is obviously a lawsuit in relation to New York City brought by good government groups. The litigation is largely confined to issue that relate specifically to New York City. With respect to the letters that we've received, principally they're raising concerns and issues with agencies or an agency in particular, the Department of Motor Vehicles but the State Board of Elections is involved because of its responsibilities in generally overseeing the implementation of NVRA. So it would certainly be fair to say the Board of Elections is not, how it's conducting itself, not in view in those matters but in its position sort of representing the State of New York, it absolutely is.

Douglas Kellner: And some of those allegations I assume that we agree with whether they constitute technical violations or not but are there supervision issues that we should be taking with respect to the allegations in the litigation?

Brian Quail: There maybe.

Douglas Kellner: And who's looking at that?

Brian Quail: At this point, I mean from the Counsels Unit perspective, our issue has been getting into compliance and as far as the supervisory issues, I think that once we have determined how it is exactly that we got to a place where the procedures that were being employed by the agency were not ideal for lack of a better word, we would need to look at that. I think that is a very, very important thing, and I'm going to be honest with you, I don't think we have answer to that question at this point.

Douglas Kellner: Is it something that's feasible to do by our April meeting?

Brian Quail: I believe that there will be the movement on this issue by then and we would have more to say.

Peter Kosinski: Thank you. Anything else then I guess we were actually on Tom and John. Do you have anything else with your unit? Anymore questions for them? Okay then we'll move onto IT, William Cross has the floor.

William Cross: Good afternoon Commissioners. For CAPAS-FIDAS I'm happy to report in terms of resourcing which has been a major issue for us we've been finally successful in filling several of the positions we've needed for the project, tester, programmer, network specialist and

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most importantly a Project Manager just recently. We continue to work towards filling 2 additional contracted programming positions. We did some budget information for ITS for that to fill those items and we're working on that. The demonstration we provided for the conceptual design, the public reporting was last week to the Board. We appreciate the very useful feedback on that and working to incorporate your suggestions. In terms of recent progress we've continued development with the EFS module and data conversion and we've also begun Analysis of Business Rules and Use Cases for Candidate Management module. We've also worked with Compliance to make some additional refinements to the Case Management System which was put in production earlier this year. IT unit continues to work extensively with the vendors for the NYSVoter Refresh Project. Teams have completed assessments of our current network and server environments. They've identified several deficiencies based on work of a previous vendor but also overall design. We are now entering a stage of new network and infrastructure design based on those findings and to address those deficiencies they've identified. They mostly focus around fault tolerance and disaster recovery provisions to ensure up time and that data is correctly distributed and available should there be an event between us and our disaster recovery site, and also incorporating some newer aspects of cyber security that's coming to light in the past year. On cyber security, we are now working on some of the larger longer-term cyber security improvements which we could not do prior to the election. As you know we put several things into place in pretty quick fashion prior to the election but some of the longer-term things we were unable to. We've begun to work on those. I won't go into a lot of detail in public forum of some of the security aspects but I'll say like enhanced logging and system monitoring, as well as scanning systems for potential vulnerabilities are all improved or making improvements to those.

In terms of website analytics, I think looking from January and February traffic and website traffic has basically resumed normal levels since the general election. That's really all I've got.

Peter Kosinski: Any questions from the Commissioners or staff? Thank you very much. And we'll go on then to the Enforcement Unit, Risa Sugarman.

Risa Sugarman: Good afternoon Commissioners. The unit continues to work on our investigations and our inquiries. The last time we were all here together I mentioned that we were going to do an e-mail to the committees that had not filed the 3 cycle primary reports. And we had done that the day of the last meeting in January. There were 226 committees that had not filed their primary reports as of November 14, 2016. Of those 226 committees, the first filing that we got after the e-mail went out was in 13 minutes. So the committee got the e-mail and filed immediately. We got 50 committees that came into full compliance, another 50 committees are working with our investigator, Geneva Cushman to come into compliance. So they contacted us by telephone and they're working with us to come into compliance. So approximately 50% of the committees that we contacted are either in compliance or working with us to come into compliance. The letters that Kim mentioned in her report we divided the remaining 50% into two groups; the one group that we sent out a letter I believe last Thursday are committees that are missing 1 or 2 reports in addition to the primary cycle. We've already received contact from some of those committees. Those are again, not repeat offenders, they are missing maybe a periodic in addition to the primary cycle. The other 25% of the total group are

repeat offenders and we're looking at those to look at whether we're going to go forward immediately with hearing officer or to look to see whether those committees would be brought to you for referrals to District Attorneys or the Attorney General. So looking at the numbers 50% either contacted us or are in compliance I think was a good start to bringing people into compliance and then the rest working on getting the other 25% into compliance and then the others referring either for hearing officers or criminal or civil proceedings. So I think that that as a first step for process, I would consider that a good start for our process.

Peter Kosinski: Okay is that it?

Risa Sugarman: Yes.

Peter Kosinski: Any questions then?

Douglas Kellner: Well, I would just like to say for the record, I've said this over and over again that coming into compliance a year later after the nonfiling without any sanction at all I think is not adequate.

Peter Kosinski: Well these are, let me just make sure I understand the timing here. These are failures to file last August, September is that the time we're talking about?

Risa Sugarman: Right and some of them have others that some of those groups that came into compliance were just the primary 2016. The group that they're looking at now it depends what they're going to do, those 50 that we sent out it depends what they're doing. The other 25% we're looking to go to hearing officers which would entail penalties and the first 25% and then the second 25% would certainly be hearing officer or criminal penalties.

Peter Kosinski: So now do we have another cycle that happened which would be the general election cycle?

Risa Sugarman: Correct.

Peter Kosinski: Is there any activity with those...

Risa Sugarman: Well we're viewing those as well. We wanted to do one test to see how this went so this I think this was a very...

Peter Kosinski: So you're anticipating using the same process for those filers as well?

Risa Sugarman: Yes.

Peter Kosinski: Do you know how many filers or nonfilers we're talking about?

Risa Sugarman: No, I can give that to you for the next meeting though.

Peter Kosinski: Any other questions? Nope, thank you. Alright, that completes the unit reports for today so we'll move onto old business. And old business has 2 items that have been old business for several meetings. I'd like to just bring them up today and see kind of where we are and if we can make any progress.

Our first one is Documents Policy which is the policy this agency is using for treatment of documents generated by the Enforcement Unit. Just to review this, we did put an interim policy in place last, I'm going to guess somewhere around August, September, I can't remember the exact date that we did that but it was probably in the fall of last year that interim policy that this agency adopted which we're currently operating under but...

Todd Valentine: Last August.

Peter Kosinski: August, thank you. But, we are hopeful that we can put a permanent policy in place that will be a more detailed policy than the interim one which was very brief. And this is an effort to put in a final long-term policy. I have seen drafts. I have a draft in fact in front of me of something our Counsels Office put together. I know it's been shared with Risa and the Commissioners to see if there's any agreement there. I know we've had some discussions about it. I know there's been some concerns raised by Risa specifically regarding her documents and I think even the Commissioners have had some issues too. But I don't know if there's any way we can make progress here. I think the effort, as I understand it that this document tries to do is sort of a balance which is to protect the documents that need to be protected for purposes of ensuring the integrity of your process that we don't want to just put any document out there regarding an enforcement action because it may compromise the ability to actually enforce the law and we understand that. But, there's certainly, we believe times when it's appropriate to release documents and it's helpful to release documents to the public because it helps educate them. Helps them better understand how this agency views the law and enforces the law. And I think that is a very useful exercise. But so far we've not been able to actually agree upon a policy that does that. Now Risa I know you've raised issues about this and we will take those under advisement, of course, in doing this. But, I think you understand where we're coming from and I think that's agreed generally at least at the Commissioner level though I think there's some disagreement as to the level of release but I think we generally agree the concept that release should become part of the process at some level, it's a matter of how much. And Risa I think you've, can I say objected to that sort of position is that still where you're at? Is that still your position that under no circumstances would you ever think that the release of a document that's generated out of your unit would be appropriate?

Risa Sugarman: Well I do have a statement that I would read. I don't know what stage you're at, whether you're prepared to vote on the document as it is today. I have written a letter to you and my objections to the initial proposal and a memo of law that I submitted that has not been submitted to the public and I think that since the proposals and the iterations of the proposed policy have been submitted to the public, I think that I would like my letter to the Commissioners as well as my objections to the policy and my memo that I submitted to you also be submitted in public so that those who are comparing it could see what my position is as opposed to what the proposed policy submitted by Counsel and the Commissioners review would be. So, I have

copies to submit for the public and to submit to the Commissioners as a part of the minutes and the public record. But if you want my position, I would like to read my statement and then submit my letter and my memo to be part of the record.

Peter Kosinski: Can I just ask, how long is your statement?

Risa Sugarman: It's just 3 pages, it won't take long to read.

Peter Kosinski: 3 pages though okay do you want to read it or just submit it that we can read it. I mean I haven't seen this. Do you want to read it to us or just want to give it to us so we can actually read it ourselves. You're welcome to put in the public record, I have no problem with that.

Risa Sugarman: Well I'd like to read it.

Peter Kosinski: Any objections to Risa reading her public...

Risa Sugarman: Okay thank you. This process was initiated because of a leak of a confidential division document presented to the Board in Executive Session. The subsequent Inspector General's investigation and the Inspector General's determination that there was a dissemination of a confidential document to the press. The Inspector General recommended that the SBOE adopt appropriate rules, regulations, policies and procedures establishing which enforcement division materials are privileged and confidential and how such material should be handled to ensure the integrity of the Board of Elections Operations and Enforcement matters. Contrary to the Inspector General's recommendations, the policy created by the Board would implement new procedures designed to release confidential division documents rather than ensure their protection from disclosure. As a result of the Moreland Commission investigation, the Commission made up of a cross section of experienced stakeholders of the criminal justice system recommended the creation of a structurally independent Enforcement Agency which would be independent of the current Board of Elections, would be structured to promote political, independence and professionalism and would be a much stronger election law watchdog. All election law enforcement would benefit from a nonpartisan structurally independent professional enforcer whose sole purpose is safeguarding the integrity of our elections and our political system. In direct response to the Moreland Commission's preliminary report, an independent Enforcement Unit was created to restore the public's trust in New York's electoral system. In June of 2014, Election Laws 3-100 was amended to include paragraph 3-A which created the office of Chief Enforcement Counsel. Per the Election Law 3-104 was enacted creating the division of Election Law Enforcement headed by the Chief Enforcement Counsel within the SBOE. The Division has the sole authority to conduct all investigations necessary to enforce the provisions of the New York State Election Law and the Chief Enforcement Counsel has sole authority to investigate all complaints alleging violations of Article 14 of the Election Law as well as other statutes governing campaigns, elections and related proceedings. All complaints alleging the violations shall be forwarded to the Division. The Chief Enforcement Counsel serves an office for a fixed term of 5 years and may only be removed by the Governor for substantial neglect of duty, gross misconduct in office or the inability to discharge the powers

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or duties of office. Appointed by the Governor, the Chief Enforcement Counsel must be confirmed by each house of the legislature separately by a majority vote of the members elected to the House of the Legislature. The Chief Enforcement Counsel has sole authority over the personnel decisions with the Division. The clear statutory intent of the legislature was to create an independent division within the Board of Elections. The clear legislative intent in creating the division was to allow the independent investigation of complaints alleging violations of the Election Law. The Board seeks to impose its will on the division in a manner which runs contrary to the clear statutory intent. The proposal is vague and provides no definition or criteria for any action contemplated under its provisions. The Board, in an attempt to circumvent the clear statutory intent, has submitted a proposal that vests within the Board's sweeping control over the division and its documents. The proposal presents a clear danger to the integrity of the division's past and future work. Further, the proposal is contrary to the ethical obligations of investigatory agencies conducting criminal investigations, as well as the course of investigations as they proceed through the criminal justice system. Complaints received and investigated by the division are only the first step in a prosecutorial process. As an investigatory unit the division begins an investigation that is continued by either the Attorney General or appropriate District Attorney. Premature release of information will be the potential to obstruct investigations and negatively affect the fundamental fairness of the process. Under the Board's proposal, potential complainants who contemplate bringing information to the division but are concerned that their identity be kept confidential will not be assured that their identity will remain protected. Those who are subject of inquiries will be faced with the possibility of unwarranted accusations because of release of division documents. Fairness to complainants and subjects of inquiries requires that investigations remain confidential. The action of the Board in reference to the division documents would raise serious issues of fundamental fairness. The only course of action to protect the integrity of the investigations conducted by the Division is to maintain the confidentiality of all Division documents. In addition, the Chief Enforcement Counsel must be the one to decide if and when documents are released. In order to accomplish the goal of ensuring the integrity of the Division's investigations, records and reports, formal regulations are required. Additionally, the Board should develop and implement policies to enforce those regulations including specific penalties for violations. Further, it must be clear that regulations and enforcing policies be applicable to the Commissioners and entire staff of the Board of Elections. The legal arguments as to the objections to the overall proposal have been sent out in a separate memorandum. The memorandum details the ethical obligations that attach to investigations and prosecutions. These obligations require investigative agencies and prosecutors to seek justice in an unbiased nonpartisan manner and not use the information obtained for personal and political gain. They include the obligations to limit disclosure and publicity to ensure a fair trial to the accused. These ethical obligations are not limited to prosecutorial investigative agencies, i.e. the Division but extend to the conduct of the Board and the staff when action is taken with respect to Division documents. I submit the letter to the Commissioners dated July 28, 2016, the memorandum of law and the response to the proposed policy to become part of the official record of the Board. The Chief Enforcement Counsel as a nonpartisan, independent professional enforcer who routinely receives and safeguards confidential information and utilizes it for law enforcement purposes is familiar with requirements of law enforcement and the duty to safeguard the right to due process. As such, she or he is uniquely qualified to conduct, excuse me, and control the timing and appropriateness of

release of such materials. Thus materials designated as privileged and confidential by the Chief Enforcement Counsel based on her or his knowledge of the information contained therein and applicable laws and rules must be kept confidential. Moreover SBOE policy should reflect its commitment to enforcement of applicable rules and prohibit any dissemination of such material or the information contained therein without consent of the Chief Enforcement Counsel.

Peter Kosinski: So you want to put that in the record for today's meeting?

Risa Sugarman: Yes.

Peter Kosinski: Are there any questions regarding the statement or...

Douglas Kellner: Well I have a comment that I seriously disagree with Ms. Sugarman's interpretation of the statutory history behind the formation of the Division of Enforcement within the Board of Elections. The legislature did not make that office structurally independent and indeed it does not use the word independent in the statute at all. Instead 3-104 subdivision 1-A explicitly provides that it is a division of the Board of Elections and 3-104 subdivision 8 explicitly provides that the State Board of Elections, that's the four Commissioners may promulgate rules and regulations consistent with law to effectuate the provisions of this section governing the operation of the Enforcement Counsel. So Ms. Sugarman, since she has been appointed has done everything possible to asset her independence and to try to separate her unit from the Board of Elections instead of integrating it as part of a functioning unit within the Board of Elections. And in the process has abandoned all of the, or almost all of the routine enforcement activities that had been done by the Board of Elections prior to Ms. Sugarman's appointment. And she is correct that she cannot be removed by the Commissioners, she can only be removed for nonperformance of her duties by the Governor. So she really does have the discretion to do virtually anything she wants to do. But the process has been that the routine efforts of Campaign Finance Enforcement have been essentially abandoned so that the process that was in place for finding people who did not file on a regular basis has been essentially dropped. That there have been only about a dozen proceedings brought against nonfilers while under the old policy more than 2,000 proceedings would have been brought. Then under the old system we had a process where complaints were reviewed by Counsel. I was very critical of that process because of the long delays by Counsel in reviewing those reports that often we'd get them 2 or 3 years after they'd been filed, but Ms. Sugarman has decided not to provide any reviews to the Commissioners at all with respect to the complaints that she's received which has again created a significant structure change because in reviewing those complaints often on small issues regarding conduct of inspectors, regarding fine points of campaign literature we were able to develop guidelines that could be shared with the entire election community so that election practitioners candidates had the benefit of our advice. That function has been entirely abandoned. For me, as an Election Commissioner, I am guided by four key principles of election administration. That election administration should be uniformed, it needs to be accurate, it needs to be verifiable and it needs to be transparent. And the enforcement process to me is a key component of election administration and that means that it needs to be uniformed, it needs to be verifiable and transparent so that we know that enforcement decisions are not being made on an arbitrary basis and they be transparent so that everybody understands what the rules of the road

are. I am very disappointed that Ms. Sugarman does not adhere to those principles. I'm not going to remain silent when she talks about the need for election law enforcement in a star chamber process where no one knows what the principles are that determine who should be selected for enforcement out of the thousands of candidates for enforcement. Now turning to our confidentiality policy...

Risa Sugarman: Commissioner, can I just say one thing...

Douglas Kellner: I think I'm speaking now.

Risa Sugarman: I just want to add one comment as to the complaints about the process of elections. When I get a complaint in terms of the election commissioners or complaints in terms of what you mentioned are about election. What I view are not within my purview, I refer them to Mr. Brehm and Mr. Valentine. So, I would say that the complaints that are made that are not within, what I would consider the Division's jurisdiction are actually sent to the Board so that they could deal with issues that are more within the jurisdiction of the....

Douglas Kellner: Right, but you're still receiving somewhere between 150 and 200 complaints a year.

Risa Sugarman: Approximately

Douglas Kellner: And how many have you reported on to the Commissioners?

Risa Sugarman: Well, I don't feel it's within my preview to report to you on those issues. And I believe that...

Douglas Kellner: That's my point.

Risa Sugarman: I understand that.

Douglas Kellner: the statute says that you're a division within the Board of Elections.

Risa Sugarman: That is solely responsible for the investigations of civil and criminal litigations.

Douglas Kellner: Yes, but you're supposed to report when a complaint is closed. We don't get those reports. And we never learn about the substance of the complaints in order to determine what the policies are. So it's not necessarily uniform or verifiable. And it certainly not transparent. Which is no way to administer elections in my view.

Peter Kosinski: Just as an off shoot...

Douglas Kellner: And I still will talk about the documents.

Peter Kosinski: Yeah, we'll get on the documents

Gregory Peterson: I just want to say as Commissioner Kellner was speaking, I jotted a quick note down during your presentation Risa and the thing that came to my mind and I think one thing you said Commissioner Kellner is that it is not a star-chamber procedure. And that's what it certainly sounds like as you read your statement. It's not a grand jury. Grand jury, yes, things are secret and are supposed to be kept secret, it remains there and frankly there are certainly sanctions on anybody that releases that kind of information. This is not a grand jury proceeding. This is the Board of Elections. We are here to make sure we facilitate the voter's rights. We are here to facilitate transparency so that those that file, the public can read and understand those things. There are certainly again sanctions for not doing those things and it seems to me that by separating yourself so strongly and by setting yourself off like it was a grand jury situation which it is not, frankly as far as I'm concerned, I've run for office before, I understand the vagaries of the political situation. You know, running for office is difficult and raising money is difficult and again all of that has to be transparent. All of that has to be part of the process and the public has a definite right to vote. And there are certainly punishments for those who transgress. But you are and have been as Commissioner Kellner has said part of this organization statutorily, and what you're reading frankly, I just don't agree with at all. Somewhere along the line certainly transparency should prevail. Somewhere along the line you say yes these things have happened, we want the public to understand. We don't want to interfere with what you are doing as far as your investigatory process is concerned but that is important. And certainly, certainly there should be secrecy as far as that is concerned so you are able to do your job. However, somewhere along the line the public does have the right to know. In a grand jury proceeding the public does not have a right to know. But if there is a trial along the line somewhere which is exposed to the entire public and to the jury generally. So, what I see as far as I'm concerned, the attorneys are working very hard, diligent on both sides of the isles here. We try to come up with a policy that hopefully handles some of the things that you are worried about and yet as Commissioner Kellner and the rest of us have thought, it certainly has to be a certain amount of transparency as well. And I think the document we have come up with covers it pretty darn close. And frankly from what you've read today, I'd almost say I'm ready to vote for it now just so you understand completely where we stand as the Board. If you're throwing down the gauntlet you know fine, I have no problem picking it up and doing what we have to do. And it's this board that sets the policy and if that's the case then you know what, the four of us have to agree to a policy and vote on it and be done with it.

Andy Spano: so are we back to the policy now? I would like to hear Doug's comment.

Peter Kosinski: we will. I just want to finish this thought. I think, Risa we have had this discussion before, this isn't new and your position isn't new. I do think there is a fundamental difference between what we see our role as and what you see your role as and I don't think we are ever going to get past that. I think maybe Commissioner Peterson's suggestion might be the best that we might just have to vote on something to get it out there officially as to what our position is. But I don't think there is any secret what our position is generally and I know Commissioner Kellner has some differences maybe from the rest of us but I think generally we feel our obligation here isn't merely to enforce the law but to educate the public, educate candidates, to educate treasurers as to what the law is so they are able to follow the law

accurately. And I think your office could serve that purpose but not if it's totally shut down, never to be seen, no one can ever see anything you ever do. There is just this absolute shroud over everything that is going on. I don't think that's productive. I don't think that is useful and I don't think that furthers the obligation of this Board which in large part is to educate. And I don't frankly Risa understand why you're so reluctant to even accept that as a principle at all because you seem to have no interest at all in that side of our obligation, although from a commissioner standpoint we see that as a primary goal and role that we have and I really don't understand why you are so absolutely resistant to even consider that as any part of this. I might add as well that despite your portrayal of your unit as being separate, which it is to some degree, statutorily as Commissioner Kellner pointed out there is language in there that you are part of this. You have to come to us for certain tasks that you undertake with subpoena's and referrals so there clearly was a design to make sure that this Board oversees certain aspects of what you do so to portray it that the statute was put in place to make you totally independent, never to be seen by this agency first of all is belied by you sitting here today and secondly it is belied by the language in the statute that requires you to come to this Board for certain activities you want to undertake. And to deny us our role in that, to say you can't fulfill your obligation to educate the public to make sure they know what they are doing, be prophylactic, to prevent these people from violating the law instead of just prosecuting them after they do so. I just don't understand why you're so unable, resistant, unwilling to even consider that as part of what goes on in your agency or in your unit so I see that nothing's changed. I got that and I think the Board's going to have to decide what they're going to have to do but I think you've laid out your position. It's pretty clear to us, it's clear to me at least, after all these months that we've been discussing this.

Risa Sugarman: I would just also include the statute gives me the sole authority of the hiring of my personnel. I also have a totally separate budget from the rest of the Board. So that is indicia of the separateness.

Peter Kosinski: Fair enough. We can get onto the...

Andy Spano: I have a comment after I hear.

Peter Kosinski: So now we'll move onto the proposed rule or regulation or whatever, policy that the Board would enact for dealing with these.

Douglas Kellner: I have 2 issues with respect to the policy. One is that specifically we should, the default rule should be disclosure of criminal referrals. That by the time they have been investigated and developed for review by the Commissioners that information ought to be publicly disclosed so that the public has an understanding of what referrals we've been making and to put pressure on the District Attorneys in some ways to actually follow up on them because the public understands that a formal referral was made on particular cases.

Peter Kosinski: So at what point do you think that should be disclosed?

Douglas Kellner: So my suggestion is that the text on the second page read, "A request for criminal referral shall not be disclosed until 30 days after the referral unless the Commissioners

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determine that disclosure of said materials may impede any ongoing law enforcement investigation, in which case the referral shall not be disclosed”. So it’s switched and it basically would say to the DA, look we’re going to make the referral public unless you tell us that it would impede your investigation to refer it at this time. And with the understanding to the DA is that, “Well if you need 6 months, we’ll hold off for 6 months. If you need a year we’ll hold off for a year”. But, if nothing happens, then we will disclose the referral. And the reason I say that is because it was an issue with the Moreland Commission where we had made I think it was more than 1800 referrals for prosecution to District Attorneys which I think 6 had been followed up by District Attorneys. And the District Attorneys would say, “Oh the referrals weren’t adequately developed”. Well most of them were pretty routine just failure to file. So the system that we have now is that there are only a handful of criminal referrals that have actually been made but many of them still have not been followed up. The referrals that were made a year and a half ago, 2 years ago still there has been either no prosecution or no feedback saying one way or the other. And again, they keep it secret, in some ways the secrecy is to show that there’s no their there, that it’s a lot of smoke and noise behind the curtain where there’s really nothing going on. And instead of just admitting that nothing is going on, they use the cloak of secrecy to avoid scrutiny and accountability. So that’s one thing to change that rule.

The second thing that I think we should address is how complaints that go to the Enforcement Unit are reviewed and summarized so that the election community and the public know what the policies are and can evaluate that the way complaints are being handled is done in a uniform and verifiable manner.

Peter Kosinski: I’m not sure what you mean by that. How would that be done?

Douglas Kellner: Like we used to do or doing summaries without identifying complainants but simply doing a two-sentence squib that defines what the complaint was and what the response was. And that we would require that as policy of the Commissioners that that kind of report be done whether it be done every 6 months or every year, I’d be flexible on that but that there be a report to show what it takes to have a complaint processes and to show what the opinion of the Board of Elections is with respect to the kinds of technical issues that we used to rule on on a routine basis. Is a video where a police officer appears in uniform that’s used for a campaign a violation of the law? Well we spelled out in detail just what the rule was because of the complaint that came in. And we didn’t refer the complaint to prosecution but it created a basis for a detailed rule that was helpful to the election community. And I could site a dozen examples of things like that. That process again has been completely shut down since the new Enforcement Unit went into place.

Peter Kosinski: Let me ask about the referral thing then. I mean as this is written as I understand it, if a referral is made to a prosecutor that under this proposal we could release, we could approve release of that with 3 votes of the Commissioner and the approval of the agency to which it was referred? You’d change that? The way this reads right now is if a referral is made we could release it if we got 3 Commissioners to agree and we got the District Attorney or Attorney General depending on who the referred to agency is to agree then we could release?

Douglas Kellner: I'm reversing it that the default provision would be that it gets released unless the Commissioners determine not to release it.

Peter Kosinski: And what about the District Attorney or Attorney General's Office?

Douglas Kellner: Well it would be on consultation with them presumably.

Gregory Peterson: The only problem I have is generally along those lines is that I would hate to see in a political scrap one opponent making a report and so forth and then we wind up playing his or her game releasing something and its for political purposes rather than actually that somebody made a violation that we want to pursue.

Andy Spano: That's a good point. I mean the DA's are elected, they are elected by a party. That could play with that. Not that I've ever known a DA to do it. I want to make that clear. My DA's that might be listening.

Peter Kosinski: Well listen, I think we're very sensitive to the issues related to release. I don't think we are blindly just suggesting release. I think we understand that there are enforcement issues, there are political issues, and there are several components of this that we have to consider as we decide how to proceed with this thing. So I don't think, and I think your letter sort of implies that we're not trustworthy, that we're not able to make a decision in a reasonable way to come to a conclusion that would be reasonable that would not certainly be intended to interfere with any enforcement action but would be designed to further the public good frankly. So I certainly don't agree with the letter or the tone of the letter at least or the implication of the letter that any discretion that this Board might be able to undertake, which I think is what this policy anticipates is it would give us discretion that when we think the opportunity is appropriate, we would release. I don't think it anticipates release of everything by any means. But I think the idea that this Board can't make reasonable decisions when release is appropriate and when its not, I think really is insulting to this Board frankly and I think is not warranted based upon our activity. So I don't accept that as a premise as to how we should proceed. I think this Board does have the ability to make those decisions but I think we do have several considerations we're undertaking when we make that decision. And one of them is certainly the ability of the Enforcement Unit to go forward and do their job appropriately. So that's not ignored, its just not, I'm not going to say it's the only thing, I think that its just one thing but there are other things as well. Well I'm not sure we're ready to vote today.

Gregory Peterson: I think we're close.

Peter Kosinski: I think we are too and...

Andy Spano: Look, we have very different opinions in terms of my colleague here Commissioner Kellner and the Counsel, but what we do have right here is a very thorough discussion, a process that the public knows because we're doing this all in public and no one for certain knows whether either position is correct here but we know we went through a process

that was extensive, that involved a lot of thinking, etc. and we should be voting on this today. We shouldn't be putting it off any longer.

Peter Kosinski: So you're making a motion is that what you're doing?

Andy Spano: I make a motion.

Gregory Peterson: You're making a motion...

Peter Kosinski: To adopt this as written?

Gregory Peterson: As it is written and agreed to by our Counsel?

Andy Spano: As it is written.

Peter Kosinski: I'm not sure I'm ready. I would like to see maybe the language that Commissioner Kellner is...

Gregory Peterson: Wait a minute, if it's as is, it is before Commissioner Kellner's suggestions.

Peter Kosinski: No, no, no but I know I want to consider at least what he's saying maybe before I vote although I'm not sure I agree with it.

Gregory Peterson: Well I was thinking was perhaps we should vote on this and very seriously discuss Commissioner Kellner's amendments or suggestions which we could incorporate the next time we were here. That way we have a procedure. That procedure can be amended next time around to adjust for whatever we feel is appropriate and that's it, we're done. And I think it's important to get this out. Frankly I would second it.

Kim Galvin: Well for what it's worth, I understand what his proposed changes would be and I think I could draft them pretty easily for you to review. I don't have an opinion as to whether or not the, I mean I think the draft is the draft and I don't think we're going to get any farther based upon Ms. Sugarman's statements or your statements in developing this draft any further. I think it is what it is and here it is and we can't move it any farther.

Andy Spano: That was my point.

Peter Kosinski: Yeah, no, I'm not disagreeing with that, I guess I'm just I would like to consider those changes.

Kim Galvin: I think Commissioner Kellner's point is that if you ever call up a DA and ask if you can release something their gut instinct for whatever reason legitimate or illegitimate is going to be no. So he's reversing the presumption and giving them a certain amount of days in which to object and that would have to accompany any referral.

Peter Kosinski: But it also changes our process here that it wouldn't take a vote of the Board to do it, it would be presumed to go out that's a different way of...

Kim Galvin: I didn't understand it that way. I just thought it reversed the presumption and then it would come back to the Board and still require 3 to release.

Douglas Kellner: Correct.

Peter Kosinski: Oh it would take...

Douglas Kellner: No, no it would require 3 to stop.

Peter Kosinski: That's a big difference to me.

Douglas Kellner: That may be what you want to tweak.

Peter Kosinski: I would want to consider that but I would have to consider it because that would take the affirmative vote of this Board away from that process.

Andy Spano: But I think the suggestion that has been made to pass this today and work on an amendment later on so we have something that everyone can follow at this particular point. We did a very similar thing when we had the interim.

Peter Kosinski: We did, we did that's true. That's true I just don't like...

Andy Spano: This is a lot better than what we have.

Peter Kosinski: Fair enough I just am not crazy about passing something that we call permanent with the anticipation we're going to amend it.

Andy Spano: Are you in favor of what Doug said?

Peter Kosinski: Not necessarily but I'd like to see it before I would approve it, I'd like to see it maybe in the language. But I guess, well I'd have to see it to be sure. That's all. You still get a motion on the floor and he seconded it. Is there any more discussion as far as...

Douglas Kellner: Well I move that we amend the policy on page 2 subdivision 2 so that it would read "Request for criminal referral shall not be disclosed until 30 days after the referral unless the Commissioners determine that disclosure of said materials may impede any ongoing law enforcement investigation in which case the referral shall not be disclosed". And I do have it in writing.

Peter Kosinski: Does that have a second or do you want to wait to see it? Even though there is a motion on the floor...

Andy Spano: I'm going to second it.

Douglas Kellner: A motion to amend.

Peter Kosinski: A motion to amend the first motion. We'll have to vote on the first amendment before we vote on. (Everyone talking to each other)

Kim Galvin: Do you want a 5-minute break?

Peter Kosinski: Yeah can we just take a minute cause I need to understand what Robert's Rules are. So can somebody just check that out?

Kim Galvin: No they don't apply to us that was just a bad joke.

Peter Kosinski: I still would like to know how to handle 2 motions like that.

Kim Galvin: You rule on the first motion the amendment and then ...

Peter Kosinski: We're going to take a break. Okay we're going to reconvene. We have on the floor a motion, we actually have 2 motions; we'll take them in this order, the first motion is to amend the proposed regulations or the proposed policy I should say with the language that Commissioner Kellner articulated prior to the break. That motion was made by Commissioner Kellner, seconded by Commissioner Spano to make that amendment. Is there any discussion that motion? And I would ask for a vote, all those in favor? (Aye) those opposed? (Aye) okay so that does not carry. There is now a motion on the floor to adopt the policy as presented and that motion was made by Commissioner Spano and seconded by Commissioner Peterson. Is there any discussion on that motion? Then I would call the question on that and is there, all those in favor say aye. (Aye) those opposed? And that carries.

Douglas Kellner: Could I just have a minute to explain my vote?

Peter Kosinski: Sure.

Douglas Kellner: That obviously I'm not happy with the policy because it does not provide for the level of transparency and accountability that I would like but I still think this policy is better than the interim policy and therefore I voted for it with those reservations.

Peter Kosinski: Okay. Just, I would make note that this policy then would apply to the agency wide, this is something the Commissioners are adopting for the entire agency, Commissioners and staff included going forward. So this would in essence replace then that interim policy that the Board adopted back in August.

Gregory Peterson: But would not affect the cases that Risa is going to present to us.

Peter Kosinski: No, I think today's meeting we will use the interim policy because you submitted those to us under that policy. We'll treat those under that policy but going forward now we will use the new policy. Okay so that takes care of that old business. On to the next old business which is the automated audits. Just to remind everybody this is the implementation of that new statute that was passed actually I believe in '15 which allows for the county boards of elections to use automated systems to do their 3% audits that they're required to do by law. And I note Commissioner Kellner has had a proposal and I don't know that I have it in writing that he had put forward for really limited hand counts as part of this new and how the process would work. We've had some give and take I know at the staff level on this policy. I have some concerns which I know I've raised.

Douglas Kellner: Based on the staff discussions that had been reported to me, we're still very far apart and I don't think that...

Peter Kosinski: Okay I don't think we're very far apart. I just want to maybe say what my general principles are in this area that I would like to accomplish. I would like to, I think we should make this available to our counties because I think it could be very useful to them and efficient and a better way to do their audits than they're currently doing. I think it's important if we can though to make it as maybe least expensive. I am reluctant to force the counties into buying brand new systems to do this if we can avoid it and I know we may not be able to and I know there's some concern about using current systems but I think that if, our goal should be try to craft the process that would allow the counties to use current hardware that they have rather than having to buy new hardware because that's going to be a very expensive proposition, especially for our smaller counties to try to go out and buy new systems just to accomplish this goal. So that was my hope was that there was a way we could do that. I'm not sure its doable but.

Andy Spano: I think Bob mentioned something to me when I was discussing this with him and I'd like him to put it on the table.

Bob Brehm: There are certain, the statute itself when they amended it is the systems have to be independent and the reg tries to deal with that. So I mean all the counties have a precinct-based scanner that counts the ballot on Election Day. So, for audit purposes they would need something other than that system to audit it. If they purchased anything else that was automated...

Peter Kosinski: Well Bob let me stop you right there. Let me just start there then. So I have a precinct based system, I also have a poll site base system. So I'm trying to audit my poll site base system. I'm not auditing my central count.

Douglas Kellner: Peter we even need to go back further a step in the analysis which is that a fundamental provision of the 2005 voting system statute that was put in place was to create a voter verifiable paper audit trail. That was a fundamental provision that whether scanning was used or whether some kind of electronic device was used to cast the vote, the law provided that it had to have a voter verifiable paper audit trail. And what that means is that there would be some

paper record that the voter would see that could subsequently be used to verify that the ballot was cast in the manner that the voter actually voted. And it was directed at what we call black box voting where you go in to an electronic machine, you'd cast your vote, it would create an electronic record but the voter had no way of noting whether the electronic record that was created was actually the way the voter cast the vote. So that opens the possibility for hacking of the voting system. Of course, having a voter verifiable paper audit trail is meaningless if you don't actually audit it and so New York has the provision for the 3% random audit. Why 3%? It was just a number pulled out of the air. Some states only do 1%. At the time New York's Audit Statute was state of the art cited throughout the country as a model for verifiable voting system, and for a proper audit system. But since that time we've gained experience. We have learned that there are tools that may be even better than hand counting for the audit because manual counts themselves involve human error when you're dealing with so many ballots. But a key principle of the Automated Tools Statute which I believe I was the first person to actually draft the text that the legislature finally adopted, but obviously it's a collective process when legislation is adopted, was to require software independence. The Statute itself uses the word independence but it was based on the concept of software independence that was proposed to be part of the National Voluntary Voting System Guideline Amendments that they were calling 2.0 that was being debated around 2008 to 2010. Those Voluntary Voting system Guideline Amendments are still being talked about today. There has been no consensus on those amendments. But software independence was the key if you're going to introduce an automated tool to assist in the audit process. If you don't have software independence, you have a bootstrap problem of using the same, you don't have an effective audit because you have the same system that could be compromised doing the audit as the system you're trying to audit. In effect if you have banking internal controls, if you're having the teller do the audit of the cash in the teller's till it doesn't work because its not independent and therefore if something is wrong with the initial count, its not necessarily going to come up in the audit because its not independent. So that's the problem with this definition that was added in here is that it abandons the principle of software independence for using the automated tool. So that's the problem. And then the other problem is that if you don't have at least some manual check component which doesn't need to be very large in order to be effective, it can be a very small number of ballots to be an effective audit, you have the problem of again not being assured that the auditing system, that the automated tool used to do the audit is itself functioning the way its supposed to function. So those are the principles behind the draft that I have. And as I say, I'm very flexible on what the number of the manual count is but the definition that basically guts out software independence...

Kim Galvin: May I ask a question?

Douglas Kellner: needs to be drafted so that it provides for independence otherwise you have the same system auditing.

Kim Galvin: May I ask a question and I don't mean to be problematic with this question, I'm just trying to get my head around it. Let's say I'm a vendor and I develop, can you imagine that, but I developed a precinct base system and absentee system and they have different software. They run on different software.

Douglas Kellner: Are they independent software?

Kim Galvin: They are.

Douglas Kellner: Well that's the key. If they're independent that works.

Kim Galvin: Do I make them dependent because I am the same vendor with control over both?

Douglas Kellner: Not necessarily. And the same is true but you have to, and that's why you need the manual component to make sure that the auditing system is in fact dependent and accurate.

Kim Galvin: Well if I came up with software for my scanners and software that was different for an absentee system...

Douglas Kellner: Yeah, but I'm not aware that that's the case of any vendor and why they would do it.

Anna Svizzero: It would defeat the purpose of the economy of scale in building the election one time.

Kim Galvin: I'm just asking if it's possible.

Douglas Kellner: It's possible

Kim Galvin: For one vendor to meet the criterion vs. exclusion of all vendors from doing both.

Douglas Kellner: It's possible but don't kid yourself...

Kim Galvin: No, that was just my question.

Douglas Kellner: But that's not how a vendor would work as Anna says. The election management system for the central scanner would be the same election management system as for the precinct system and if you have the same election management system then there's no software independence.

Kim Galvin: Okay.

Brian Quail: The language that's in the first attempt at a compromised draft is that the device or other similar product which is developed without access to proprietary election management software/hardware and is based upon separate software that is program separate and apart. So there's 2 components actually being separate and apart, and that the software that is in the audit tools developed by folks that don't have access to the proprietary election management software/hardware.

Kim Galvin: Which necessarily would exclude the same vendor?

Brian Quail: Not necessarily but would be very...

Kim Galvin: Something totally different.

Douglas Kellner: Practically it would because there's no vendor who would use a different election, separate election management system.

Kim Galvin: Okay.

Brian Quail: Theoretically if they siloed their development of both products it would be possible.

Kim Galvin: Right just clarity on that particular point I think would be helpful for all of us that are trying to, okay thank you.

Peter Kosinski: Okay well thank you. I think we can get an agreement on this by the way. I don't think we're that far apart. I think we just need to hammer it down. I don't disagree with the general concepts I guess as you articulate them as far as keeping this a system that you can rely on. I'm not looking here to create a system that is not really doing a true audit because it's not really an audit, it's just repeating something that's already happened, and I get that. So I get you don't want to do that. So I'm certainly interested in trying to find a way to get that. Again, my concerns have been that we don't want to create a system nobody's going to use because its too expensive because I've got to go out and buy a new system if we don't have to that's all. Because I realize the counties have limited budgets and to say you have to buy a whole new system...

Andy Spano: You have no problem with an automated system and a manual system?

Peter Kosinski: I don't like it but I see the reasoning behind it and I understand that I don't we're ever going to get away from that.

Andy Spano: So the cost aspect of this is...

Peter Kosinski: Cost is a big issue to me and...

Andy Spano: So let's work on that.

Peter Kosinski: Trying to find a way to make it affordable to our counties and still do what we want it to do would be my goal but I don't know who can get there.

Douglas Kellner: I know I'm taking this one step further but...

Gregory Peterson: It's the oh-oh moment!

Douglas Kellner: But the state of the art today in election administration is the risk limiting audit as opposed to 3% or 1% audit. And of course that would require a statutory change.

Peter Kosinski: Which is maybe something we should look at.

Douglas Kellner: But it would be a lot less expensive if we went to a risk limiting audit system because you would no longer need a 3% audit, you would be auditing in almost all cases far fewer ballots. But in very close elections it would escalate to a much larger audit.

Peter Kosinski: Which as you know is a whole other issue that I wanted to talk about.

Douglas Kellner: Well I understand but that's the point of the risk limiting audit as opposed to...

Peter Kosinski: And I don't have a problem with that if that's what the State of New York decides to do and we can have a statutory change I'm fine with that I just think that's not where we are right now.

Douglas Kellner: I don't think that statutory change is likely to happen without the 4 of us recommending it.

Peter Kosinski: And I think if we want to look at that we should because I think maybe that is ultimately the way to go to change the way we do audits in this state to make it a better system but in the interim this is what we have. What we have right now is a 3% audit. That's our current statutory scheme and we have to work within that. But I do think if we think there's a better way to do it we should approach the legislature to adopt a different system. I don't know that they're going to object I think if we can make the case that it's a better auditing system than we currently have. So that's something else we should look at while we're into this. Alright so I'm hopeful maybe by the next meeting we can reach some kind of consensus and try to get this off the dime. Okay. That's that. And then we'll go on to new business. So we have a set of regulations that have been out for some time, I know we put them out for comment a couple of months ago, these are the Independent Expenditure regulations. These were adopted to conform to the new Independent Expenditure statute that was passed by the legislature last year and it's been up for public comment. Have there been any public comments on the regulations as proposed? No? So if there's...

Douglas Kellner: I move the adoption of the regulations.

Peter Kosinski: I have a motion is there a second? I have a second to adopt. All those in favor (Chorus of ayes) opposed? So those are adopted. And the next is the legislative packet that was given to us by Counsel's Office, I see we have a total of 22 and possibly another one if we can get an agreement on this auditing process maybe we'll even have another one. Are there questions on the packet as provided to us by the staff? Any questions? Is there anybody that would like to move that we adopt these as the Board's legislative proposal?

Gregory Peterson: Move we adopt it.

Peter Kosinski: Moved by Commissioner Peterson, seconded by Commissioner Spano.

Douglas Kellner: And I would just like to comment on 17-16 which is alternative poll site organization I strongly endorse the statutory proposal which we have been recommending that county boards implement administratively without statutory authority although there are a couple of people who have argued that the statute is required. That the election law provision for the election district as the unit of election administration is anachronistic. That our election districts were set with the size of approximately 1000 voters, the limit now is a little higher than that because the level voting machine could only handle 1000 votes, and the entire structure of the statute with poll site administration is based on election districts with election inspectors appointed to the election district. And what we have learned with the introduction of the scanning devices which can handle many thousands of ballots, is that it is more efficient to administer the whole poll site as a unit and that we still want there to be bipartisan inspectors in charge of the poll site which is provided for in our proposal here but there's no need to duplicate the title of inspector for each election district, instead have these 4 inspectors in charge of the whole poll site and then everybody else at the poll site is assigned their duties accordingly and that gives much more flexibility to the boards to operate much greater efficiency and I believe that that's already legal to do it that way under the current statutory scheme simply by saying that the inspectors for each election district at a poll site are the same and my understanding is some counties have already implemented that. But, this would confirm it by legislation and I think that it's an excellent proposal and I hope that the legislature gives it priority attention.

Peter Kosinski: Any other comments on the package. Do we have a motion? Is there a motion on the floor? Alright, all those in favor? (Chorus of ayes) opposed? Alright that will be our packet. That is everything I have on the agenda for today prior to going into Executive Sessions. Is there any other business to come before the Board in public session? The next meet we should talk about that. It is currently March 13<sup>th</sup>. So I think we're looking at April, anybody have any issues?

Douglas Kellner: Between Commissioner Spano and me we suggest the 24<sup>th</sup> or the 25<sup>th</sup>.

Peter Kosinski: Are those days...

Gregory Peterson: That's fine with me yeah.

Peter Kosinski: Do you have a preference 24<sup>th</sup>, 25<sup>th</sup>?

Douglas Kellner: 24<sup>th</sup> is Monday, 25<sup>th</sup> is Tuesday.

Kim Galvin: Tuesday.

Peter Kosinski: Okay let's go with the 25<sup>th</sup> of April. Okay so that will be the next Board meeting. Alright so with that said is there a motion to adjourn and go into Executive Session?

Douglas Kellner: To discuss enforcement matters. So moved.

Gregory Peterson: Second.

Peter Kosinski: I got a second. All in favor? (Chorus of ayes). Opposed? I just make mention we don't anticipate coming back into public session after this so for those who are here I don't think we'll go back in. Okay thank you.