

**Andy Spano:** I don't see Peter there. I see your avatar but I don't see your picture. I saw your picture before.

**Brian Quail:** Andy there's a number, depending on what you can see.

**Andy Spano:** Another one said iPad, I don't see that either. I only see him when he speaks.

**Brian Quail:** Yes.

**Andy Spano:** But I only see the avatar when he speaks.

**Brian Quail:** Right that's only because he has a separate audio line than a video line. .

**Andy Spano:** Okay fine.

**Brian Quail:** We're good to go whenever you are.

**Bob Brehm:** We're live.

**Douglas Kellner:** Well Commissioner Kosinski you're the Chair today.

**Peter Kosinski:** Okay let's start the meeting then as long as everyone's here. I'm Commissioner Kosinski. We have Douglas Kellner, Greg Peterson and Andy Spano Commissioners on the line and also staff at the Board so I'll open the meeting. Today's meeting to consider the report of the hearing officer in the Fair Campaign Code hearing that was held on Friday and I would I believe this should be done in Executive Session because of the nature of the hearing itself regarding a poll that was to be reviewed in a confidential matter by the hearing officer at the hearing. So to hear her report I would move that we go into or I would entertain a motion that we go into Executive Session but I believe we will come out of Executive Session to do any official acts.

**Bob Brehm:** Well one point of information, I'm not sure how wide your camera angle is to see that we have a guest in the room also. A representative of one of the parties in the poll, Jessica Norgrove and she had indicated to me that she would like to try and communicate a message to the 4 of you before we went into Executive Session. So at least I wanted you to know that she made that request.

**Peter Kosinski:** I'm sorry I didn't understand that Bob. She would like an opportunity to do what?

**Bob Brehm:** Speak to you for a few moments.

**Douglas Kellner:** Well I think an attorney should be able to participate in the Executive Session unless we're going to deliberate. But if we're going to receive the report and ask questions, then I think that it would be helpful to have counsel present.

**Todd Valentine:** But without both sides here, its Todd here, that would seem to be unfair both attorney's aren't here and I don't know that they were noticed that that would occur today.

**Douglas Kellner:** Did they know that the commissioners were going to meet and receive the report?

**Peter Kosinski:** Well I would give her an opportunity to be heard. I just don't, I think it's the Executive Session portion that we restrict to outside people. So if the attorney is there and would like to be heard I'm certainly willing to have her heard here at the open session regarding the hearing that was held on Friday if she would like to do that.

**Douglas Kellner:** Well I think we should start hearing the report from the hearing officer.

**Peter Kosinski:** Well how do people want to proceed? I don't have that strong of an opinion on this. I do believe Executive Session should be restricted to the Commissioners and staff.

**Douglas Kellner:** I think the procedure for a hearing and for the Commissioners to review a hearing report should be to receive the report. I haven't received any written report and then allow the attorney's to comment on the report and then if we want to go into Executive Session to deliberate then that's fine.

**Peter Kosinski:** That's fine with me. If the report, if the hearing officer wants to give us an oral presentation on the report from Friday's hearing that would be fine. We could do that now and then we could entertain the attorneys if they would like to respond and then we could go into Executive Session to deliberate if that's acceptable to the 4 Commissioners.

**Risa Sugarman:** Commissioners I believe that Mr. Walsh is delayed in court and is on his way. I think that if I'm going to give my report and the counsel are going to be permitted to make comments, I think that he should be here for that presentation. I know that he was, I believe he's delayed in court.

**Todd Valentine:** That's correct.

**Gregory Peterson:** Well how long will the delay be?

John Conklin: He just texted me and said he is on his way.

**Peter Kosinski:** Yeah but where is he?

**Todd Valentine:** Well he's coming from Schenectady.

**Douglas Kellner:** Well should we say 11:00 or?

**Peter Kosinski:** Do you want to adjourn and reconvene at 10:30 would that be appropriate here?

**Risa Sugarman:** We do have an issue for Executive Session we could do that first and then come out to the public meeting if you want to do that issue first. I made a request over the weekend for review of an enforcement matter we could do that first in executive session.

**Peter Kosinski:** Well what do the Commissioners want to do? Do they have...?

**Douglas Kellner:** That's alright with me.

**Andy Spano:** I have a time constraint at the back here of noon. Whatever speeds this up but with the proper deliberation I'm for, but at noon I'm leaving.

**Gregory Peterson:** Well let's hear Risa's request in Executive Session then come back out so the attorney's can have their input regarding the polling situation.

**Andy Spano:** That sounds reasonable.

**Bob Brehm:** So the motion to go into Executive Session.

**Peter Kosinski:** All those in favor of going into Executive Session?

**Douglas Kellner:** Executive Session to consider the subpoena request.

**Peter Kosinski:** Correct is there a second?

**Andy Spano:** Second.

**Peter Kosinski:** all in favor?

[Chorus of ayes] alright then we'll go into Executive Session. We'll give a few minutes for the room at the office to be cleared for Executive Session purposes. Let me know when that happens and we'll go into Executive Session.

**Bob Brehm:** We're on live.

**Peter Kosinski:** Okay. This meeting of the Board of Elections is to receive a report from Hearing Officer Risa Sugarman regarding a Fair Campaign code hearing that she conducted on Friday for a poll that was conducted in the 115<sup>th</sup> Assembly District by candidate Billy Jones. I would ask that Ms. Sugarman provide her report to the Board and then we would entertain comments by the two parties that are present. There are two attorneys each representing the candidate and the complainant. So Ms. Sugarman if you want to provide your report to the Board.

**Risa Sugarman:** Yes Commissioner, thank you. First, at the request of Commissioner Peterson I'd like to just indicate who is in the room, Thomas Connolly, Robert Brehm, Brian Quail and Nick Cartagena, John Conklin, Kim Galvin, Bill McCann, Todd Valentine and Brendon Lovullo are also present, myself and Carla DeMarco my associate Counsel from the Division of Election Law Enforcement. Also present are James Walsh representing the Mulverhill Campaign and Jessica Norgrove representing the Jones Campaign as well as Nick Willock W I L O C K.

On Friday the 14<sup>th</sup> of October, at about 3:15 the proceeding took place in this room. Present at that time was Mr. Walsh, Ms. Norgrove and another attorney with Ms. Norgrove, Rebecca Moody, Kim Galvin, Bill McCann, Brian Quail, Nick Cartagena were also present and from my office, besides me Imran Dar who is my excelsior fellow and Carla DeMarco.

At the initial part of the proceeding, Ms. Norgrove provided to me and the rest of the persons in the room and I believe you were given copies of that. She provided a memorandum as well as copies of e-mails that were given back and forth during the preceding few weeks. The first thing that Ms. Norgrove did and she requested the opportunity to present her procedural objections to the proceeding that we were holding on Friday afternoon at the Commissioner's direction. In a very short nutshell she indicated that she felt that there was no basis for the hearing and that she felt that there was the proper procedural mechanism for this proceeding that we were conducted would have been under 3-104 in the regulations that were created by the Board for hearing officers under 3-104. We had several conversations during the course of that but I did allow Ms. Norgrove to place her procedural objections on the record. I did ask her to go forward with her substantive arguments in terms of the Commissioner's request and purpose for the proceedings on Friday afternoon which were her position as to what if anything should be released or how she viewed the filing of the poll as it was received on September 1<sup>st</sup>, 2016 and what if anything was her position and the campaign's position of why the full poll should not be released or deemed filed and released to the public.

During the course of that argument, she did give again some procedural arguments. She indicated that it was her position that the poll was divided into 3 parts; questions AA 1 through 23 were issues about the officers and the candidates; part 2 was questions 24 through 44 which gave more information about the candidates; and questions 207 and 208 were demographic questions. During the course of the entire presentation by Ms. Norgrove she indicated that she felt that the only way that the information or the full poll could be released by the Commissioners is if there was a violation hearing conducted under the Fair Campaign Code and the Regulations and a finding of a violation against the Jones' campaign. When she discussed the individual questions that were released and the questions that were not released it was her position that they complied with the requirements of opinion #1 of 1984. Ms. Norgrove made a very impassioned argument that she was not a poll expert and that in order to make certain decisions as to whether or not certain questions should be released, it was necessary that a poll expert should be allowed to testify and that one was not available on such short notice. I asked her several questions about the opinion #1 of 1984 and her responses to that indicated to me that in fact or she said, not indicated, she said that it was her belief and the campaign's belief that they did comply with the regulations and with opinion #1 of 1984. The specifics that we got into

in terms of the poll itself, the questions that I asked were general so that the specifics of the poll would not be made public to Mr. Walsh since he had not been provided with a copy of the poll, that was our agreement, the Commissioner's desires that the poll would be kept confidential during the course of the proceeding.

So it was a little bit of a, I don't want to say it was tortured, but it was a little difficult to ask general questions as to why certain questions were not released but we were able to do that. There were two questions that were, well let me put it this way, the questions that were released in their filing on September 1<sup>st</sup>, 2016 asked certain general questions about the office of President, Congress, State and Assembly and how would you vote or would you vote in the general election? How interested are you in the November election? And they asked the leanings towards the two Presidential candidates Hillary Clinton and Donald Trump and then asked the position question, and these are the released questions, "In the election for State Assembly the two candidate are Kevin Mulverhill running on the Republican Independence and Reform Party lines and Billy Jones running on the Democratic Working Families and Women's Equality Party lines if the elections were being held tomorrow, who would you be more inclined to vote for? Jones or Mulverhill? If not sure ask who would you be leaning towards? And the results were total Jones 47, total Mulverhill 38 and that is what was released to the press and what was in the article in the Press Republican. And it was the position of Ms. Norgrove that that was the only information that needed to be released because that is the question that was answered, that was the information that was released in the poll. When I asked specific questions as to specific questions that were omitted from the poll, for example there were 2 questions that talked about the present member of the Assembly Janet Duprey that were before the question of the opinion as to how the respondents would vote and were not released in the poll that was filed, it was the campaign's position that according to the opinion 1 of '84 preparatory does not mean prior and that they did not believe that that question was related to the opinion of the respondents when they were asked who they would vote for.

Certain of the questions numbered 11 through 21 gave names of candidates asking if they were favorable, unfavorable, if they never heard them or didn't know. And when I asked why those were not released since the candidates were mentioned as well as Ms. Duprey and Hillary Clinton and Donald Trump, their position was the same. That Preparatory does not mean prior or before and that they didn't feel that they were related or influenced or used by the respondents. And again it was very important to her, her position that she was not a poll expert that she would need a poll expert to be able to explain to me why those questions were not released.

The second part, there were other questions that were also listed before questions 3 through 8 that I did not feel were related to the questions or information that was released or that was filed in relation to the news story so I did not question her about that. I don't believe that they were in, although they ask opinions of the respondents, I don't believe that they were related to each of the two candidates. So I did not ask her about those certain questions.

The next, I asked her about questions 22 through 44 which was the second part of her, of what she described as part 2 of the poll which she sited asked for more information about each of the

candidates. And I asked her why she didn't feel that those should be released and she said, they were not preparatory and they were not related. At that point I asked her in terms of her opinion as to the section 6201.3, I'm sorry 6201.1C whether omitting those questions 22 through 44 which were positions of the individual candidates. 24 and 25 were what I would describe as pedigree of each of the candidates and then an opinion question asked about if you were voting tomorrow, again, voting tomorrow which candidate would you vote for? And then questions 25 through 44 presented positions on the individual candidates, first on Billy Jones and then on Kevin Mulverhill and then again for the third time the respondents were asked for their positions as to how they would, their positions on certain issues that may or may not be of importance to the voters in the north country and asked her if she thought that under subdivision C that was a deliberate misrepresentation of the contents or results of a poll relating to any candidate's election. Her position on that was that that clause was and should only be related to opposition candidates linking inaccurate information about a candidate poll and again that she would need an expert to help her answer that question and that the poll company, in this instance Kylie and Company, that the release of that information might impinge upon their trade secret information.

And then as to the demographics, I asked her whether she thought that that was not in keeping with the opinion #1 of 1984 which states that in answer to question, the 6<sup>th</sup> questions the information required under C of section 6201.2 sets forth the total number of person's polled, the geographic and any special characteristics of the population. Information under subdivision G once again asks for the same total as in C but requires a breakdown of how the people who make up the total responded to the poll questions. And I asked her why the demographics response in addition to whether or not the respondents were democrats or republicans and then male and female which were the two questions that they did file with their original filing, why the other information was not disclosed. And again, she opined that it was necessary to have an expert explain why those didn't fit under the description under question #6, and that since they were asked after question #23 which was the initial opinion question as to how the respondents would vote, they were not related to the question #23 that was submitted.

This morning I would say that I ask that at the end of, before getting to Mr. Walsh's position, before the proceeding ended I asked Ms. Norgrove if the Commissioners were inclined to release the poll would there be any questions that you would consent to be released in addition to those that were initially filed? And at the time I might not have articulated it but I did this morning when Ms. Norgrove came in again to speak with me that this would not in any way be an admission or an acknowledgement that they did not comply with or believe that they complied with the filing as they, that they understood it on September 1<sup>st</sup>, 2016. And we had a conversation about the poll and although we still disagree, Ms. Norgrove did indicate that there were 5 additional questions or actually at least 5 additional questions that she felt that could be released. Again, without admitting any violation however she made the proviso that this would end the proceedings here and that no further hearing be conducted after Election Day whether or not a violation has occurred under the Fair Campaign Code.

Mr. Walsh also made certain positions on the record. He stated that he believed that the filing of the entire poll when it was received by me on October 5<sup>th</sup>, 2016 made that poll a public document under the Election Law and that since he was not provided with the entire poll and his

---

client was, his client's due process rights were violated because he was not adequately able to represent him. I agree that it was difficult for him to participate in the proceeding because he did not have a copy of the poll but I don't believe that it negatively affected him to the extent that there was a due process violation. I haven't now that's what happened at the hearing. I haven't changed my position. I do believe that the entire poll should be released but there are, and I must say that this is not in my opinion a push poll, there was no indication in any of the questions that were asked except perhaps one at the end that there was any attempt by the company or the persons that did the polling questions to sway the respondents one way or another. There are a number of questions that were before the first question as to the opinions of as to how they would vote. Those would be questions number 3 through 8 that did not relate to the candidates themselves. So, I think that if anything, those questions number 3 through 8 could be redacted but I do believe that the questions as to Janet Duprey, I believe that the list of candidates or persons including Donald Trump, Billy Jones, Kevin Mulverhill, Hillary Clinton and Janet Duprey as to total favorable, unfavorable, very favorable, never heard of, don't know, should be released. There are other candidates and public officials that are listed. I don't think those have to be released so numbers 11, 14, and 18 through 22 could be omitted. And the reason that I would include Donald Trump and Hillary Clinton is because they included a number 22 that asked their opinions about how they would vote in the Presidential election if it were held the day after the poll. The position of Ms. Norgrove on that issue was they shouldn't be penalized for giving more information and that the only information that needed to be released is what was released in the press which was the question 23, "How would people vote between Jones and Mulverhill"? I believe that 24 through 44 are related under the Opinion #1 of 1984 even though they were asked afterwards and the fact that there were 2 more opinion questions asked once after 24 and 25 and one after the information provided in questions 27 through 44 and again, an opinion was asked are related to the findings of the opinions of the respondents in the initial question. I don't believe the Opinion mean related mean before or after or preparatory or prior I believe that the Opinion is clear that it means related to or influenced. And I believe the questions number 24 through 44 were related to and influenced the respondents in their opinions as to who they would vote for. Now this morning, Ms. Norgrove in response to my questions about those stated that they were research information and therefore they should not be divulged to give information as to what research or what questions were asked of these respondents in order to prepare for a campaign. And I do believe that all the demographics should be revealed because I think that that too is related to what the poll was about and I believe, as I stated the other day, that under subdivision C the filing of this was a deliberate misrepresentation of the contents and results of the poll. And that's my report, I'm sorry.

**Douglas Kellner:** I didn't hear a conclusion at the end of the report. Precisely what is it that you're recommending? Precisely.

**Risa Sugarman:** I would recommend that questions 9, 10, in addition to what's been released before, questions 9, 10, 12, 13, 15, 16, and 17, 24 through 43 and 201 through 207. Now in addition to what was released before 201 through 206 be released.

**Bob Brehm:** 206 o 207?

**Risa Sugarman:** Well 207 and 8 were already released. So the questions that were not released before I would recommend again that questions 9, 10, 12, 13, 15, 16, and 17, 24 through 43 and 201 through 206 be released.

**Gregory Peterson:** I didn't hear that, be what?

**Risa Sugarman:** Be released.

**Gregory Peterson:** Released, sorry thank you.

**Douglas Kellner:** Alright and questions 24 through 40 I'm sorry.

**Risa Sugarman:** 3

**Douglas Kellner:** 44, oh 43 are all hypothetical questions asked after the question that was published and relate to hypothetical conduct is that correct?

**Risa Sugarman:** 24 and 25 give the background and what I would call pedigree of each of the candidates.

**Douglas Kellner:** So how could those questions have affected the answer to 23?

**Risa Sugarman:** Well because the 26 is again a question, "Now that you've heard more information, let me ask you again".

**Douglas Kellner:** But 26 wasn't published right?

**Risa Sugarman:** Correct.

**Douglas Kellner:** So how is it related as opposed to just something that deals with campaign strategy?

**Risa Sugarman:** It's related in that after getting more information about the candidate the respondent's response as to their positions as to the candidates drastically changes.

**Andy Spano:** And was that number released?

**Risa Sugarman:** No.

**Douglas Kellner:** And that was after the question that was released?

**Risa Sugarman:** That's correct but as I said Commissioners, I think that the filing of this poll the way it was done was a misrepresentation of the poll. As I said to you before, on Thursday, I think that this section 6201.1C has two separate clauses; one is the first clause is a deliberate

misrepresentation of the contents of results of a poll relating to any candidate's election and I think by releasing only the first part of that poll and the questions that were released, it was, since and the reason that I say this is since the respondents were asked two additional times after more information was given about the candidates and about their positions, that's what made the filing the way it was misrepresentation. And I think that...

**Andy Spano:** I still don't understand. I'm trying to look objective. What was released (cutting in and out).

**Risa Sugarman:** I'm sorry we can't hear you Commissioner.

**Andy Spano:** Okay, what was released, can you hear me now?

**Risa Sugarman:** Yes.

**Andy Spano:** What was released were the tally numbers of the head to head is that correct?

**Risa Sugarman:** Yes, the first request, the first opinion.

**Andy Spano:** Yeah, but was released to the press though was the tally numbers?

**Risa Sugarman:** Correct.

**Andy Spano:** Based on that line on that particular question.

**Risa Sugarman:** Yes.

**Andy Spano:** Now once you get past those numbers what relevance do the rest of the questions have to those numbers?

**Risa Sugarman:** Because additional information was provided to the respondents and those numbers radically changed after the respondents got additional information which, in my opinion, makes the filing a deliberate misrepresentation. I understand, that's why I say to you the section subdivision C has two clauses; one is talking about the release to the press and what has to be filed, but the initial clause the initial sentence talks about misrepresenting the results of the poll when you file it with the Board. That's my position.

**Andy Spano:** I understand, thank you.

**Peter Kosinski:** Are there other questions of Risa?

**Douglas Kellner:** Yes, in terms of the procedure I read the notice that was sent out to the candidates and the notice does not seem to be consistent with what the Commissioner's resolution was on Thursday. Maybe this is just something that we should take up with the

Commissioners. But am I correct that you informed the candidates, you informed the attorney's that the hearing was not pursuant to 3106 and was not pursuant to our regulation under 3106?

**Risa Sugarman:** I did. And I would just like to indicate that you said Commissioner that they were hypothetical questions, question 35 I'm sorry 24 through 44...

**Douglas Kellner:** Well I haven't seen the questions so I asked.

**Risa Sugarman:** I understand that but they weren't hypothetical questions, they were specific questions as to positions of each of the candidates. So they might have been research questions but they weren't hypothetical, they were specific to the positions of each of the candidates.

**Peter Kosinski:** Okay. So if I understand it Risa, you're recommending the release of 1, 2, 3, 4, 5, 6, 7 and I've got another 5 that's 12 and I've got another 19 I believe that's 31 additional question results of what you're recommending be released pursuant to your hearing?

**Risa Sugarman:** Well I haven't counted them but.

**Peter Kosinski:** Okay but I'm just counting them here 9, 7, 12, 13, 15, 16, 17, 24 through 43 and 201 through 206 are the ones I have enumerated as your recommendation for additional release.

**Risa Sugarman:** That's correct.

**Peter Kosinski:** Okay. So are there any questions for Risa? If not I'm going to give the attorney's present an opportunity to be heard. I would like to limit this, I know you had an opportunity on Friday to be heard in front of the hearing officer but I know you requested some time in front of the Commissioners. I think that from what I heard Risa gave a pretty comprehensive report explaining what happened at Friday's hearing. If you disagree, you can let us know, but I'd like to limit our discussion then to Risa's recommendation and those specific questions that she has recommended for release and whether either party has an issue regarding the potential release of any or all of those questions. So in that regard, I would entertain I think the attorney for the respondent, Jones is Jessica Norgrove, is that you? And if you'd like to be heard we'll give you a few minutes to be heard on Risa's recommendation.

**Jessica Norgrove:** Yes Commissioner, Jessica Norgrove, I'm here on behalf of the Jones' Campaign. Thank you very much for allowing me to be heard by all the Commissioners. We did appear on Friday and at the informal proceedings to discuss as was noticed Mr. Walsh's request for a copy of the poll. My understanding and I did ask, you've already received my papers about our general procedural objections.

**Peter Kosinski:** We have your papers that you filed as part of the hearing so I don't think we need to go through those in any detail. If there's anything additional you'd like to offer that's what we would like to hear.

**Jessica Norgrove:** Yes, and I won't go into those but I just would like to mention about Friday's hearing. I specifically asked if it was a hearing pursuant to the Fair Campaign Code and I was told that no, it was not. And that there was no substantive discussion of the merits of whether there was a violation and it was purely to decide whether or not to release a copy to Mr. Walsh. So my further objections would be that we don't believe there's procedurally any basis to do that because it was produced to Ms. Sugarman's office on the pretense that it would be kept confidential and my understanding is that its not, her position has been that its not part of the Board's record to be released under FOIL. But notwithstanding our objections to that and to the inability to prepare for a substantive discussion of the merits of the poll on Friday because we were informed that it was not supposed to be a substantive discussion of the merits. We did proceed to discuss these somewhat and I was very limited in what I could present because again in order to do that we would really require a full hearing on the merits. But, I will just briefly discuss the merits of the poll itself and why we released what we did. In the paper there was a mention of the question of how the respondents would have voted right now and that question came out of the first part of the poll and the poll is comprised, as Ms. Sugarman indicated of 3 heats, the first heat is, "What would you do today" very quick questions without providing any information to the respondents about any of the candidates that they were asked about. And it was an unbiased view of the voter's opinion without any attempt to influence them. That was questions 1 through 23. Again the question that was released in the Press Republican came from question number 23 and that was how they would vote if they were to vote for either Jones or Mulverhill. Other questions that were discussed in the article were the question, they did cite to the respondents being male or female and what party they were enrolled in, Democrat, Republican or Independent, and so the campaign when they filed the information they attempted to file any information that was published. And again this was an unauthorized disclosure to the Press Republican but as soon as the campaign found out that there had been a leak of information about the poll, they attempted to investigate and they immediately complied with the requirements of the Fair Campaign Code and filed their filing. In the course of their investigation they had found out that there was additional information that was leaked that was not published in the Press and therefore they also filed additional questions that had not been published in the Press Republican with the presidential campaign. So that was the reason that the Presidential questions were also filed in the interest of being fully with their due diligence. And so they filed question #23 as well. So the reason they had filed questions 207 and 208 were the demographics that had been released in the article.

Going back just briefly to the poll itself, as I said the first heat was the unbiased view; the second heat is 24 through 44 and those questions provide additional information to the respondents and then they ask, "Now that you know that how would you respond"? So they are in a sense hypothetical questions. They are more of a I would say biased question but they also relate to information that could be used internally by a campaign and again they could be used by my client's opposing candidate which is understandably why Mr. Walsh wants a copy of the poll. But we do not believe those are in any way related to the question that was released which was #23. And the third heat, again, was just demographics about the respondents but those were not released in the article questions 201 through 206 were not released in the article. Questions 207 and 208 were the male/female and the party enrollment of the respondents and those we did file. And again, just to wrap up, I know we're under a time constraint. As far as the issue of releasing

the poll itself, it's really our belief that in order to release any further information, either the campaign would amend their filing under the Fair Campaign Code or we would have a full hearing on the merits. But it really is our belief that the document was provided voluntarily to Ms. Sugarman's office under the guise that it would be kept confidential during her investigation and my understanding is that her investigation is still ongoing at this point since there has been no hearing under the Fair Campaign Code. And that's all.

**Andy Spano:** I think only you and Ms. Sugarman have seen the poll. The Commissioners have not seen the poll. So it has been kept confidential.

**Jennifer Norgrove:** I understand that yeah. Thank you.

**Risa Sugarman:** Commissioners I would just like to indicate that we had this discussion in terms of the production of the poll and Ms. Norgrove mentioned that she felt that the only reason we had the poll was because it was released voluntarily by the campaign, however I did mention that the Commissioners had voted at the last meeting not at Thursday's meeting, but the last meeting to authorize Counsel's Office to authorize a subpoena which she said they might have moved to quash and that we were prepared and had already drawn up a motion to compel. So that the poll I believe we would have been successful in our motion to compel to have the poll produced. So I do thank the campaign for avoiding the necessity to go to litigation but there were other venues for us to pursue that we would have gone forward to obtain a full copy of the poll.

**Jennifer Norgrove:** Could I just say one more thing? We met, I met with Ms. Sugarman she graciously allowed me to meet with her this morning to discuss a couple of the questions. And in the interest of transparency and obviously we have very, we had made many objections procedurally which is why we were reluctant to turn over the poll in the first place. There was really no framework for how it would be treated and we really did want to cooperate with the Board and we were not looking to be obstructionist in any way which is why we eventually did turn over the poll to Ms. Sugarman. But, again, I offered this morning to her in the interest of transparency and to resolve the distraction that this has now become that we would, we could amend our filing to add a couple more questions that are related to the Assembly district itself but that to resolve the matter. This has become a distraction to the Board and to the Campaigns and without any admission of any fault or any finding of any violation or any further proceedings.

**Peter Kosinski:** Okay thank you and I appreciate that. We also have I believe Jim Walsh in the room from the Mulverhill Campaign.

**Jim Walsh:** Thank you Commissioner. I just want to make sure, there are one or two things I wanted to make sure that were clear in the Commissioner's mind that the reason why we have pursued this is because we want to ensure that the Election Law is filed. We want to ensure that everybody complies with the rules and regulations of the Election Law. So the reason for filing our complaint was based there and wasn't based in anything nefarious. I would start that I filed the FOIL on October 6<sup>th</sup> as soon as I found out that the full poll was filed. It would be my belief

---

that when the legislature enacted the office of the Chief Enforcement Counsel they did so under the existing provisions of the Election Law. They had the ability to put in a different place but in 3100.3A is the Establishment of the Board of Elections Office Special Counsel. The Board of Elections under 3100 is where your authority is to be formed. Additionally, as we look through in the Board of Elections, there's no carve out that provides for the confidentiality of specific information in the Office of the Chief Enforcement Counsel. Specifically I would bring the attention of the Board to section 3212, The Board of Elections Organization Proceeding Reports and Records and under subparagraph 3, all records of the Board, the papers, the books filed in the office are public records, period, end of story. So the records held are public records at the Board of Elections. I understand that the Enforcement Counsel may differ with me with respect to what's confidential and what's not. The legislature has not allowed for anything to be held separate and confidential in its creation of this and the legislature has recently created it if that's something that would like to go forward, I would suggest its within the powers of the Board to formulate a legislative agenda and to put that in front of the legislature. But now we don't have that. We don't have a carve out for investigatory matters that that's a public document number 1. Number 2 I would say that this Board voted to issue a subpoena and did vote to issue a subpoena and I would affirmatively state that this is information that was covered by that vote for the subpoena. When we look at what the regulation and this regulation is still intact, its still fully intact despite the reliance upon the Opinion 1 of 1984 it's the release of the exact wording of the questions asked and the sequence of such questions. It doesn't say relevant questions. It doesn't say subsequent questions. It doesn't say anything other than the exact wording of the questions asked. That's what the rule says. If the Board would like to change that rule, the Board has that ability but right now the rules and regs say the poll will be filed with the Board. That's what the regulation says. It doesn't say field with the Chief Enforcement Counsel with the provision that we're not going to let you release it to anyone else and I don't believe anybody has the authority to put that type of caveat onto a filing with this Board. I would say that there's also default here that I filed on, if I'm not mistaken September 13<sup>th</sup> my complaint. The 14<sup>th</sup> is when it was received by the Board, going 10 days from the 14<sup>th</sup> is September 24<sup>th</sup>. I do not have an answer and therefore there is a default if we get to the merits and I know we're not at the merits yet. When I go to my due process concern which is we've heard an awful lot of conversation and in fact it was part of the respondent's case in chief that they started breaking out questions AA through 23, 24 through 44 and 201 to 208. Those are just numbers in the air for me I'm kind of grabbing at smoke because I can't grab a hold of that and understand. I do understand some of the background issues with respect to polling but the fact that that was used in its case and chief to try to represent itself, due process requires that that information be released to me so that I may be able to adequately represent my client. Without that ability to represent my client again what are we left with? That's a public document as far as I'm aware and concerned and I would like to go through and put up a zealous defense or enforce my position but we're not there yet. And I won't waste anymore of your time but I would affirmatively say is that our position is we want the public release of the poll because that's what you have required in your regulations. We're asking you to enforce your regulations. It's not me asking for it so I can come back and design a mail plan. That we've dragged this thing on I think we first started dealing with this September and we're now here with 2 weeks left until the election or maybe 3. This is meant for the enforcement of the law and the request that everyone be held to the same standard. If I'm not mistaken there was a very zealous advocacy with

respect to a previous poll that was in fact filed in full and it was in fact filed in full 2 years ago because that is what was demanded publicly by the Enforcement Counsel. So I'm asking you to enforce your rules. I'm not asking for the Board to give a leg up to us. We're not the ones that released this publicly. We're not the ones that allowed somebody to go out and talk to a reporter about it but since that's happened, we want the rules followed and the law followed and that's what we've asked you to do sir, thank you for your time.

**Peter Kosinski:** Okay. Any questions for Mr. Walsh? Okay having everyone been heard is there any discussion amongst the Commissioners regarding the report by Risa Sugarman in this matter?

**Douglas Kellner:** I have a few comments on it. First of all, this is procedurally completely mucked up and once again, I would ask that my colleagues of the Commissioners spell out what the procedure is going forward and what they think the procedure has been so far. Certainly, what happened on Friday is not consistent with what we voted on Thursday. I kept asking what is the procedure. Commissioner Kosinski kept telling me that we were going to follow the procedures set forth in 3106 and set forth in the regulation in 6201.3 and that's what you said and then for whatever reason, Ms. Sugarman goes and does a completely different operation and I just don't understand it. So that's my first point.

My second point is, are we setting a uniform policy that we are going to follow for every similarly situated case going forward? And the e-mail that I got from Counsel over the weekend suggests that what you want to do is make this a one-time situation and that this is not going to be precedent for anything in the future. I know that on the relatively few situations where I have asked for emergency meetings in order to enforce Board regulations and Board resolutions particularly 4 years ago when we were dealing with a Commissioner who was trying to stop college students from registering to vote, the commissioner said, "*No, we're not going to meet again. You're going to have to wait*". But on this, this is drop everything we're going to try to get this done beforehand and what's happened to our policy of holding off on things until after the elections because we don't get involved in investigatory matters immediately before the election? And then finally on the merits, I'm completely unpersuaded that the campaign has not done exactly what was required under our Opinion 84.1.

**Peter Kosinski:** Okay well I will respond to your assertions regarding the hearing on Friday. It appears to me that the Board has a regulation on the books that's been there for 30 some years regarding the conduct of their Campaign Code hearings which are to be conducted by the Enforcement Counsel of the Board which Risa Sugarman currently is. That hearing process is laid out that if the Board so deems is necessary they can order a hearing which is what we did on Thursday. The hearing was conducted on Friday which I think is fully compliant.

**Douglas Kellner:** Excuse me Commissioner do you realize that Risa says that she did not conduct a hearing pursuant to that regulation?

**Peter Kosinski:** Well regardless...

**Douglas Kellner:** And the notice says it was done pursuant to not the statute that you just cited and which I believe is what you had told us on Thursday was the basis for the hearing, the notice said its conducted pursuant to 3102 not 3106.

**Peter Kosinski:** I think that's form over substance. I think the regulation calls for a hearing to be conducted by the hearing officer which was done on Friday. I think both parties were present at the hearing and given an opportunity to be heard which I think is perfectly acceptable under due process. I think they were given adequate hearing and frankly this has been going on since early September and I know there's been numerous correspondence between the Enforcement Counsel and the parties involved giving them ample opportunity to be heard in those situations as well. So I think the argument that due process has not been followed is a specious argument. I think there's been adequate due process, in fact even more due process that is normally anticipated under our regulation. So I'm not concerned about that. I think our role here is to ensure that the law is followed. The law is that if a poll was released to the public that the public has a right to know what the poll was. Has a right to know what the questions were that were asked. Has a right to know information regarding that poll so the polls aren't misused in the conduct of elections. That I believe is the goal of the state law and of our regulations. And I believe that's what we should be concerned with today. I mean the reason for us conducting this is that clearly a poll that's conducted in the context of an election the results should be known prior to the election because if it's not known until after the election really it becomes moot. So that's the reason that we needed to move this along as quickly as we could in order to have a resolution to this matter today. So I believe that's well within our purview. I think that in fact furthers the interest of the Election Law, furthers the interest of the public's right to know whether they're getting accurate information as it relates to what campaigns are releasing to the public. So in that context I think what we've done here today fully complies with our regulations and the spirit of the law as well as the letter of the law. So I am not at all troubled, in fact, I congratulate Risa Sugarman for going forward as she has to do what she's done in giving everybody an opportunity to be heard. So that said, I think we have in front of us what Ms. Sugarman has reported to us her recommendations regarding the release of additional questions in this particular poll and if other Commissioners have comments, I'm certainly willing to entertain them or a motion is appropriate.

**Andy Spano:** Let me say a word. Again I listened carefully. I don't care about all these minor details of what it says here and what it says there. I'm concerned about the election and two candidates. And I looked at everything from the perspective of the candidate. And at this time of the year. Obviously one candidate wants to hold polls so they can see if it's helpful in their campaign. That's not an objectionable point because it was information on the poll that was released. On the other hand, the other candidate does not want to release the entire poll for the same reasons. And we adjudicated the situation by pushing through what we did over the weekend. Take it faster and get this done. I had one problem with the question after the question that gave the tally and that appeared in the newspaper. I don't see any relevance at all to answer the questions after that whether they changed the tally or what, the question was, what the situation at this moment is and that's all you get even when it's a private poll in the newspaper. You get the situation at that poll, it's a snapshot and that's what you got. What

created the snapshot are the questions before that question nothing after that. That's my problem here.

**Risa Sugarman:** Commissioner the only thing that I would say to that is the snapshot was asked two more times when additional information was provided. I mean it's the snapshot.

**Andy Spano:** It wasn't in the paper. It wasn't in the newspapers.

**Risa Sugarman:** That's correct but...

**Andy Spano:** It wasn't in the public domain.

**Risa Sugarman:** But what was in the newspaper...

**Andy Spano:** We're arguing about what was in the public domain and where did that come from? Where are the questions for that? And the questions for that snapshot are prior to that question. You want to release everything prior to that question as with the rules as requested, but that question is where it stops.

**Risa Sugarman:** But the information that was released to the press was incorrect and misleading.

**Andy Spano:** If we go down that route we're going to take every, we might just as well change our regs and say, "*If anything comes out on the polls, release the whole polls*" period.

**Risa Sugarman:** I would agree with that. That's why I don't agree with #1 of 84.

**Andy Spano:** I think that's a better way to go. Not now. You don't change the rules in midstream.

**Peter Kosinski:** As I understand it under Ms. Sugarman's report she's basing her recommendation on the Fair Campaign Code portion which is subdivision C regarding the deliberate misrepresentation of the contents or results of a poll relating to any candidate selection. Risa is that correct? Is that the basis?

**Risa Sugarman:** Yes.

**Peter Kosinski:** Okay so that it's not the portion of that of that rule or that opinion that we put out in 84 regarding release of certain questions that are released in a public way, this goes to a different portion of the Fair Campaign Code as I understand.

**Andy Spano:** But the questions that...

**Douglas Kellner:** Where does it say that the Board has authority to order the release of the whole poll as opposed to imposing a fine for not complying?

**Peter Kosinski:** Well I think that we have power to force the release of a poll when a poll is not properly released after a public release of it. What's triggered all this is the public release of information regarding this poll. That's what triggered this whole compliance.

**Andy Spano:** Maybe I have this all wrong. Just explain if I give you a snapshot number the question I asked is "*Where are you right now if you had to choose a candidate*"? That's real. And then I go into the hypotheticals. I've been through hundreds of polls believe me. I offer one hypothetical oh you found out he has blonde hair and you don't like blonde hair, dadadadadada and then he comes out losing the race what the hell has that got to do with what you released and what's that got to do with defrauding the public? What has that got to do with it? Those are questions you ask for strategy. They haven't occurred yet.

**Gregory Peterson:** I understand what you're saying...

**Andy Spano:** This is important because this issue affects every candidate on every side of the isle in every free campaign it's not a minor issue. One to me its not a minor issue and we ought to have a polling expert sitting right here talking to her.

**Gregory Peterson:** Commissioner I don't disagree with you on that because I've sat through many polls myself as well and it is important obviously that this take place prior to an election. We've lost a lot of time on this thing already and what's fair is fair and that's what the Campaign Code is all about. If, as you said, if let's say for the sake of argument there's one question that says, "*Who would you vote for today X vs. Y*" that's one part of it. If thereafter the questions are, "*If I told you that X is a bank robber, was convicted and spent time in jail, would that change your opinion*" and it goes down and the result of that changed question comes up then I'd say, "Look that's wrong". If that's just asked and it's not public and it doesn't come out and it doesn't affect the numbers that were originally released, I think you're right and I agree with you.

**Peter Kosinski:** Well how would the Commissioners like to proceed?

**Andy Spano:** Well I would like to make a motion that we release all the questions in the poll prior to question 23.

**Douglas Kellner:** Commissioner you realize that's more than what Ms. Sugarman recommended. Ms. Sugarman recommended some questions prior to 23 and then questions 24 to 43.

**Andy Spano:** But Mr. Walsh reminded us that in our opinion, was it our opinion Mr. Walsh?

**Jim Walsh:** I was pointing to your regulations Mr. Commissioner that your regulations say each question, every question and the sequence of order, it doesn't say, it doesn't carve out anything is what I was referring to as your regulation.

**Andy Spano:** Yeah, I am talking about the sequence of order up to select questions. That's why I recommended that.

**Jim Walsh:** But Commissioner one of the things that we've got 207 and 208 as well.

**Andy Spano:** I don't want to know about them, talk to the other guys. So where are you going with this, Doug where are we going with this?

**Douglas Kellner:** I think procedurally this is totally inappropriate the way this has happened so I'm going to vote against any disclosure.

**Andy Spano:** There's no resolution on the floor.

**Peter Kosinski:** Commissioner Spano didn't you make a motion?

**Andy Spano:** I withdraw my motion.

**Peter Kosinski:** You withdraw it okay.

**Andy Spano:** Anyone want to suggest a resolution?

**Peter Kosinski:** We have a recommendation from Ms. Sugarman. I think we need to move that.

**Andy Spano:** I have to vote against that regulation if that's on the floor.

**Peter Kosinski:** Well it's not on the floor, no one's moved it.

**Douglas Kellner:** Well so there's no motion.

**Peter Kosinski:** There's no motion today?

**Andy Spano:** What does that mean? I know it means no motion but what does it mean in terms of things.

**Peter Kosinski:** Well it means that nothing will happen today if there's no motion by the Board to act upon. Well I'll make a motion. I will move that we adopt Ms. Sugarman's report and her recommendation. Is there a second to that?

**Gregory Peterson:** Excuse me does that mean the release of the entire poll?

**Peter Kosinski:** Well, no, it's the release of the questions that Ms. Sugarman is recommended being released and I have those listed as 9, 10, 12, 13, 15, 16, 17, 24 through 43 and 201 through 206. Those specific questions are the ones as I understand it she is recommending be released in addition to what's already been released.

**Douglas Kellner:** So Commissioner Peterson to point out that includes the questions following the question that was published.

**Andy Spano:** And I made my recommendation that we do everything before. (cutting out)

**Douglas Kellner:** Commissioner Spano you're breaking up and we can't hear you.

**Andy Spano:** I said that's why I made the recommendation that we give every question up until that question up to 23.

**Peter Kosinski:** So are you making that motion again Commissioner Spano?

**Andy Spano:** You have a motion on the floor are you gonna take it off?

**Peter Kosinski:** Well I don't hear a second so I don't think I need to take it off.

**Andy Spano:** That we release every question up to 23. That's my motion.

**Peter Kosinski:** So you're moving so we have a second motion on the floor, all questions up to 23, is there a second to the motion.

**Gregory Peterson:** And that leads up to the point where the numbers that were issued and that's what was made public is that correct? Ms. Sugarman is that correct?

**Risa Sugarman:** Yes, I'm sorry.

**Peter Kosinski:** The release related to question 23 is that correct?

**Risa Sugarman:** Yes.

**Peter Kosinski:** Yes, Commissioner Peterson, yes.

**Gregory Peterson:** Okay.

**Peter Kosinski:** Are you seconding Commissioner Spano's motion?

**Gregory Peterson:** I'll second that motion.

**Peter Kosinski:** Okay so now we have a motion on the floor to...

**Douglas Kellner:** Let me just ask a procedural question. Are we ordering the candidate to follow that or are we saying that Enforcement Counsel can release the document, release that portion of the document that she obtained as investigator and with the promise of confidentiality?

**Peter Kosinski:** Commissioner Spano it's your motion.

**Andy Spano:** I think we ought to ask the campaign to release it tomorrow.

**Douglas Kellner:** And if they don't?

**Peter Kosinski:** The requirement I believe is to file with the Board. I think the requirement isn't the release per se it's to file with the Board prior to the public having access. That's the requirement under the law.

**Andy Spano:** My feeling is you want to do this in a way that's consistent. We told the campaign its confidential that's why they gave it to us so we're not going to release it unless they give us some note saying you can release it off that. If that's not the case we can run it tomorrow and if we don't get it tomorrow then we will release.

**Douglas Kellner:** Commissioner Spano did I hear you say that if we don't get it from the campaign, if the campaign does not file it that we will release the document that we received that the investigator received with the promise...

**Andy Spano:** No, we're only going to release those questions.

**Douglas Kellner:** You see what I'm trying to get now I want a uniform policy and I want the precedence to be clear so that what we are saying now is that when the Chief Enforcement Counsel gains a document that is confidential in the course of an investigation the Commissioners have the right to vote to make public the document that the Chief Enforcement Counsel received confidentially. I just want to establish the precedence.

**Peter Kosinski:** Well Commissioner I think that's a whole different issue. I think Commissioner let me just go back a second. This particular hearing is in the context of a civil proceeding that has been brought and confidentiality was something that the Board asked for when we asked that the Enforcement Counsel seek this document from this particular party. So this is a big of a different matter than the normal conduct of a investigation by the Enforcement Counsel, this is a matter that is being considered in the context of a Fair Campaign Code Hearing so I do agree with you that set precedence for Fair Campaign Code hearing process.

**Andy Spano:** Yeah, could we vote on this and then we'll have a discussion on that?

**Peter Kosinski:** Yeah I think we should. I know Commissioner Spano has time. So we have a motion on the floor that orders the release or the filing and the public release of questions 1 through 23 of this particular poll. I have a motion and a second. All in favor?

[3 ayes] opposed? Nay. Okay that's 3 to 1 reporting. Are there any other motions to be entertained in this matter? My motion had no second so there's no other motion that I'm hearing on the floor. And I believe that will end the matter unless another Commissioner has any other comments regarding the matter before us today. Okay. My understanding is that the campaign was ordered to file the report with us by tomorrow those questions, if they do not then the

Enforcement Counsel is authorized to go ahead and make that official filing with our Board on their behalf of those specific questions 1 through 23.

**Andy Spano:** Can we just agree to have still a very serious discussion on the points brought up by Commissioner Kellner because we really have to straighten this out and have a process in place.

**Peter Kosinski:** I agree. I agree we will do that certainly we should do that and can do that in the future.

**Andy Spano:** I think in the near future.

**Gregory Peterson:** I agree with you.

**Peter Kosinski:** Alright I would entertain a motion to adjourn.

**Gregory Peterson:** Moving to adjourn.

**Andy Spano:** Second.

**Peter Kosinski:** And second and all in favor?

[4 ayes]. Okay. So we are adjourned and we will meet at the calling of our November meeting I believe scheduled meeting is November 15<sup>th</sup>.