

SRC APPROVED
Date Oct 9, 2014

State Records Committee Meeting
Division of Archives
Courtyard Meeting Room
September 11, 2014
Salt Lake City, Utah

- Members present: Lex Hemphill, Chair, Media Representative
Doug Misner, History Designee
Patricia Smith-Mansfield, Governor's Designee
David Fleming, Private Sector Records Manager
Ernest Rowley, Elected Official Representative
Marie Cornwall, Citizen Representative
- Member not present: Holly Richardson, Citizen Representative
- Legal Counsel: Paul Tonks, Attorney General's Office
- Executive Secretary: Nova Dubovik, Utah State Archives
- Attending via phone: Mr. Harshad Desai
- Others Attending: Rosemary Cundiff, Ombudsman
Yvette Donosso, Attorney General's Office
Rebekkah Shaw, Archives staff
Renée Wilson, Archives staff
Kendra Yates, Archives staff
Cameron Masen, Archives staff

Mr. Lex Hemphill opened the meeting at 9:05 a.m. Mr. Hemphill introduced Ms. Nova Dubovik as the new Executive Secretary and welcomed back Mr. Paul Tonks.

**Hearing: Harshad Desai vs. Garfield County School District
Opening-**

Ms. Rosemary Cundiff informed the State Records Committee that Yvette Donosso, the attorney representing Garfield County School District, was in a car accident and she would be delayed at least 30 minutes. Ms. Dubovik contacted Mr. Harshad Desai to notify him of the temporary postponement of the hearing, and that the Board would call him between 9:30-10:00 a.m. or as soon as the Ms. Donosso arrived. The Committee decided to continue with other business.

Approval of August 21, 2014, Minutes

Mr. Hemphill noted that last name Maesa is misspelled and should be spelled Maese. The executive secretary acknowledged the misspelling and corrected the error. Mr. Hemphill made a motion to approve the minutes of August 21, 2014. Mr. Doug Misner seconded the motion. The motion passed 5-0; Ms. Marie Cornwall was not present at August 21, 2014, meeting and abstained from voting.

Approval of Retention Schedules
Utah State General Records Retention Schedule:
None

State Agencies:

Ms. Kendra Yates presented a records series from the Department of Natural Resources (DNR), Division of Wildlife Resources and Bureau of Law Enforcement. The DNR is requesting a retention schedule to retain License Suspension Files for 65 years then destroy. The retention is based upon the administrative needs of the agency, as they enforce Utah Code § 23-19-9 (2011). Due to the fact that offenders are often repeat offenders, it is valuable to have an offender's record for the duration of their life. Previous retentions were 30 years and 5 years after revocation period expired. The justification for extending the retention to 65 years, it's helpful for the agency to have a criminal violation history to reference when new offenses occur which is a common trend among poachers. Those who poach as young adults tend to poach as older adults, too, so it is valuable to have an offender's record for the duration of their life.

The Committee questioned the legal aspect of the maintaining the separate database since there is already a criminal database available for law enforcement. Ms. Yates explained that the offender's information would be uploaded to a national data base to assist states in collaborating and notifying each other of repeat offenders. After extensive deliberation the Committee decided more discovery was needed before they could come to an agreement, and requested if Ms. Holly Betteridge, DNR Records Manager, could appear at the next SRC meeting to explain the rationale behind the extended retention schedule, and use of the national database. Ms. Yates agreed to contact Ms. Betteridge and invite her to the next meeting to explain the DNR request for an extended retention schedule. The Committee decided to table the vote pending testimony from the DNR records manager.

Ms. Yates presented the second records series from the Department of Natural Resources, Division of Parks and Recreation. These are bids for contracts with the agency to provide services at the State Parks. The Division of Parks and Recreation establishes the parameters of the contract and they collaborate with State Purchasing for contracts but they both take part in the process, and both sign the copies of the contracts, and they both are subject to GRAMA request for them. They would like to align with State Purchasing and have a five year retention schedule. A motion to approve was made by Mr. Fleming and seconded by Ms. Cornwall to approve retention schedule. A vote was unanimous, 6-0.

Resume Hearing:

Ms. Donosso arrived to the meeting, Mr. Desai was contacted by phone and the hearing began at 9:42 a.m.

Mr. Hemphill announces that Mr. Misner, a board member, needs to disclose that he serves as a representative on the Utah Division of State History and Ms. Donosso also serves on the board in the interest it maybe a possible conflict of interest. Mr. Desai,

states he is fine with Mr. Misner and Ms. Donosso serving on the same quarterly board together.

Mr. Hemphill introduced the parties; Mr. Harshad Desai, Petitioner, and Ms. Yvette Donosso representing Garfield County School District. Mr. Hemphill explained the hearing procedures.

Hearing: Harshad Desai vs. Garfield County School District

Opening- Petitioner

Mr. Desai identified himself as a resident of the Panguitch, Utah, located in Garfield County and is a U.S. citizen. Mr. Desai said he requested records explaining how Mr. Myron Cottam's, a former Garfield County School District superintendent and board member, income was \$100,000 for three years. He wanted to know Mr. Cottam's job description, and if he was a full or part-time employee or under contract while a board member. Mr. Desai continued that if Mr. Cottam is an employee, the county is in violation of Utah Code § 63G-2-301(2)(b). In addition, if Mr. Cottam is a contractor for the county earning \$100,000 for 3 year, the county is in violation of compliance Utah Code §§ 63G-2-301(3)(b)(c)(d)(e). As for the fee waiver, Mr. Desai emphasized he clearly annotated on the GRAMA request "authorized cost up to \$0.00", this required the county to request approval from him before charging for the records that cost more than \$0.00. Mr. Desai said he received the records that did not answer his GRAMA request; in addition he was charged for faxing and research fees that totaled \$54.40 for 15 pages. He is seeking the State Records Committee for a fee waiver of the \$54.40, disputing he had no intention to pay any fees for his "Right to Know."

Opening-Respondent

Ms. Donosso, provides background of the relationship of Mr. Desai and the Garfield County School District. In 2009 Mr. Desai filed a discrimination charge before the UALD (Utah Antidiscrimination & Labor Division) against Garfield County School District alleging discrimination based on religion, national origin, and ethnicity. That charge was later found to have no reasonable cause. Nevertheless, during that timeframe he submitted discovery requests and 16 GRAMA requests, which the county received and answered. The most recent records request is the only one there has been a dispute over and that has been presented to the State Records Committee; the reason being he is upset about the fee that he was charged. Ms. Donosso reads off Mr. Desai's three records request: how is it possible to be a member of the board given that he [Myron Cottam] was a prior employee of the district? What is his job description? What is he doing; and what is he producing? Ms. Donosso stated that Garfield County School District is a rural district, they do not have an HR department, or have a general counsel. Many times the employees wear different hats to get the job done. In this case, the superintendent prepared and wrote the response and gathered the information in an expedient manner and sent the documents off the next day, via facsimile. Because Ms. Donosso did not prepare the response the county did, they charged under the fee schedule. As for the fee, under statute Utah Code § 63G-2-203(4) the county did not grant Mr. Desai a fee waiver. However, they did write him a letter stating the reasons and provided a right to appeal the decision. To conclude the opening, Ms. Donosso stated that given the fact they have

answered so many GRAMA requests a nominal fee of \$54.40 seemed reasonable when they answered the others with no charge. But at the same time, the county is grateful the State Records Committee has provided them this forum so Mr. Desai can come and air his concerns especially when it does involve a board member, and to have a neutral 3rd party to review the appeal as opposed to having it be in front of the school board which is currently being reviewed.

Testimony-Petitioner

Mr. Desai responded by reiterating that Mr. Cottam was the Garfield County School District superintendent in 2004, Mr. Desai is uncertain if Mr. Cottam retired or resigned after being the superintendent, but he did go on to work for the Department of Education then came back and became a board member of the Garfield County School District and was making \$100,000 annual income for three years. Mr. Desai states it is his right to know if Mr. Cottam was a contractor or an employee, either way under Utah Code § 63G-2-301 he has the right to know Mr. Cottam's title and/or if he is a contractor.

Mr. Hemphill interjects to clarify the testimony that Mr. Desai is claiming Mr. Cottam is a board member with a three year contract making \$100,000 a year with the school district, and the school district says Mr. Cottam is not under contract. Mr. Hemphill asks where Mr. Desai obtained the evidence that indeed Mr. Cottam has a contract with the school district for \$100,000 annual income. Mr. Desai responded that the evidence is located somewhere in the papers sent to the SRC, and if indeed Mr. Cottam is not making \$100,000 a year as a full employee, part-time employee or as a contractor then the county could have responded and made that distinction that Mr. Desai had the wrong information. Mr. Hemphill asks again for clarification as to where the evidence is located that Mr. Desai is using to make the claim about the \$100,000 annual income for 3 years. Mr. Desai responded that it is on a letter but he does not have it in front of him at this moment. He continued that if the school district told him that indeed Mr. Cottam was not under contract with the county while serving as a board member the issue at hand could have ended, he would have accepted he had the wrong information. Mr. Hemphill asked if the county could attest that indeed Mr. Cottam was not under contract while serving on the board would that end the situation, Mr. Desai said the issue has gone in a different direction because he did not receive the information he requested. He knows the authority of the board and that is not what his GRAMA request was for. He wanted to know what Mr. Cottam was doing for the school district, if he was under contract, because being on the board at the same time is a conflict of interest.

Mr. Hemphill asks Mr. Desai to address the fee waiver, which is what the appeal hearing is for in front of the State Records Committee. Mr. Desai restated the authority of the board member is public record and he could have gone in and looked at it but that is not what he requested. As of today, he still does not know if Mr. Cottam was a full time employee, part-time employee or a contractor for the Garfield County School District board or if he was under contract for 3 years making \$100,000 annually. In addition to, on the GRAMA request he authorized \$0.00 fees for any report from Garfield County School District.

Respondents Testimony

Ms. Donosso explains the current Garfield County School District superintendent is Ben Dalton not Mr. Cottam, Mr. Cottam is a former superintendent of the Garfield County School District back in 2004-2007, and then briefly come back and serve as an interim superintendent for 6 months until Ben Dalton was hired. During the 6 months Mr. Cottam's contract was for \$50,000 and was not a board member, which would have been a conflict of interest. She continued that it is possible when he was under contract in 2004, as a full time superintendent, his annual earnings were around \$90,000-\$100,000.

Mr. Hemphill asked for clarification that indeed during the time Mr. Cottam was a superintendent and a board member that he was not under any other contract. Ms. Donosso responded that this is correct. She continued the opening by listing Mr. Desai's requests, along with the records the school district sent to answer his GRAMA request. The records included the responsibilities, powers, and duties of board members; the policies, eligibility and qualification of board members; as well as, the Code of Ethics, elections, and reappointment of board members. In addition she disputed Mr. Desai statement, "that you need to figure out what my request is", in GRAMA it specifically has provisions that requires the requester to be specific with their GRAMA request, and it cannot be vague. Ms. Donosso feels the Garfield County School District has been more than accommodating with Mr. Desai's requests and have made every attempt to answer and not deny based on vagueness, although they have denied some of his request due to vagueness. In this case Ben Dalton did not contact Mr. Desai to clarify the GRAMA request.

Ms. Donosso then addressed the fee waiver that under the law the county is entitled to set a fee schedule, and it is very reasonable considering the time spent researching and answering the records request. Per the fee schedule Mr. Desai was charged the following fees: 14 Copies/Duplication @ .10 per page, \$1.40; 14 pages faxed @ \$2.00 per page, \$28.00; and \$25.00 for one hour of research. Mr. Hemphill queried, why did the school district fax the documents instead of mailing them to Mr. Desai? Ms. Donosso responded that Mr. Desai faxes the GRAMA requests to the school district, even though he has been asked to send them to the attorney's office. This particular request was sent to the school district during the same timeframe that Ms. Donosso was preparing to leave out of the country the next day, and she was unable to handle the request and instead guided the school district with how to respond to Mr. Desai's request. Ms. Donosso emphasized out of the 16 request filed by Mr. Desai this is the only she has not handled, and when she does respond it is by postage mail. This request, due to the circumstances, has been the only one prepared by the school district and to ensure that Mr. Desai received the requested records, and out of precaution it was sent via fax.

Ms. Smith-Mansfield queried why the school district did not follow up on the fact that Mr. Desai did not want to pay anything for his request. In fact the school district sent him the materials before receiving the fee, and why didn't the school district contact him to notify of the associated fee? Ms. Donosso responded that per the law they are not required to contact him about the fees associated with the records request. They did send a letter giving him the right to appeal the fee, Mr. Desai sent a fee waiver appeal back,

they reviewed it and decided it did not meet the requirements of Utah Code § 63G-2-203(4).

Ms. Smith-Mansfield asked, what is the fee scheduled base upon, specifically the \$25.00 per hour research fee, is it based on the lowest employee salary with or without benefits? Ms. Donosso responded, it just includes the salary not benefits.

Ms. Donosso also mentions that Mr. Desai is a *pro-se* litigant, and explains why Ben Dalton took the extra time to write the follow-up letter and explained the fee schedule; this letter was part of the package sent to Mr. Desai. She concludes the opening by reiterating that the school district provided everything Mr. Desai requested in an expedient and very responsive manner.

Closing-Petitioner

Mr. Desai stated he agreed with the attorney general but in the last 5 years there has been a lot of difficulty approaching the Garfield County School District office, when he has visited the office in the past no one has been at the front desk or the recorder is not there. These are the difficulties the State Records Committee has to take into consideration. He continued to explain that if he has eight GRAMA requests in the last two years that is his right, and in the bigger picture, people are not as interested in these issues or wanting to know anything and do not exercise their rights, as he does. Lastly, the issue of the fee structure he feels the county could have done more work with him and he feels that he is communicating but the school district is not reciprocating the communication, they are running away. The bottom line the State Records Committee needs to find out if Mr. Cottam was a board member at the same time he was a full or part-time employee or under contract making \$100,000 annually for three years. Furthermore, the fee structure is problematic, the Committee needs to evaluate the fee structure because he did not ask for the documents, and if it is in compliance of Utah Code § 63G-2-203(3).

Closing-Respondent

Ms. Donosso responded that the district feels they have fully complied with Utah Code § 63G-2-203(3), under the statute a governmental entity may charge a reasonable fee to cover staff time, they have provided a record and feel it has been reasonable. The governmental entity did charge Mr. Desai for the staff's time compiling, summarizing, and organizing the material. The staff had to retrieve it and coordinate the response via fax, and it was reasonable they would return the response via fax as that is how the GRAMA was received. She continued they feel the fees reflect the work that had been done by the county to prepare the response, in addition to using her expertise as guidance. She explained Garfield County is a rural community with limited resources. And reiterates that Utah Code § 63G-2-203(4) Mr. Desai does not qualify for any fee waiver, the request was about Mr. Cottam, not about Mr. Desai. Therefore he does not qualify for a fee waiver. They did allow him all of the appeal rights and they feel they have been very transparent and as fair as possible. The fee waiver denial should be upheld.

Mr. Hemphill asked if there are any questions, Mr. Rowley requests clarification if Mr. Cottam is a current member of the board, if he has been through the public process, and is

he currently an employee or contractor of the school district. Ms. Donosso responded with yes, he is a current member of the board and went through the public process to be a member. As to if he is currently an employee or under contract the answer is no. Ms. Donosso further answered the question by offering that Mr. Cottam was the full time superintendent, from 2004-2007, under contract, and again during a 6 month period when he was interim for the school district as they searched for a new superintendent; however he was not under contract during the period he served on the school board.

Mr. Misner requested clarification on, if after Mr. Desai sent his fax the superintendent or any of his staff had any communication with Mr. Desai's as to how to send the response. Ms. Donosso responded no, because they were in litigation for two different cases, one in 2009 and the case he currently brought against the school district in 2012 which has been denied but is in the Court of Appeals. This suit is specific to the position that Ben Dalton holds. That is why Mr. Desai has been instructed to send all his GRAMA requests and communication to the attorney general's office. Nonetheless, Mr. Desai continues to send all his faxes to Ben Dalton instead of to the Attorney General's Office.

Mr. Hemphill asked if the normal route of communication with Mr. Desai is through the mail, and Ms. Donosso stated, yes.

Deliberation

Ms. Smith-Mansfield responded by stating, that in review of the information it is responsive to the requesters request and does not qualify for the fee waiver under the conditions of GRAMA. It is true the governmental entity is not required to notify the petitioner, however they should not charge duplicate fees and a fax is free. She continues that it looks as though the county doubled on fees and it is difficult to image the lowest paid staff makes \$25.00 per hour. Mr. Fleming argues is it the lowest paid employee or the lowest paid employee qualified to respond to the request.

Ms. Cornwall interjects that someone had to write the letter and interpretation, she continues that Mr. Desai should read Utah Code § 63G-2-103(22) which defines what is a record and be very clear with the records request. Mr. Rowley reiterates that it comes down to the fee, is it appropriate, and he believes the lowest paid employee would not understand or have training on GRAMA and know what to provide as a response.

Mr. Hemphill states it is obvious that Mr. Desai makes a lot of GRAMA requests, however the Committee is dealing with just one, not a continuum of cases; or the sense that charging \$54.40, given all the times they have responded to him is reasonable is not pertinent in the judgment to this case. He continues he would not give Mr. Desai a fee waiver, he feels the governmental entity had the right to charge for copying of the records, although he would attempt to restructure the fee that they have charged. It is not Mr. Desai fault that Ms. Donosso was leaving and the school district responded instead and faxed the records instead of by postage, the usual response. He does not believe faxing the response for \$28.00 is reasonable, nor is the \$25.00 research fee appropriate. Ms. Cornwall agreed that the \$28.00 charge for faxing was unreasonable. She did not

have a problem with the \$25.00 research fee, because the school district researched to ensure there was no contract and never had been one.

Ms. Cornwall made a motion that the Committee agree to a fee, but the fee to be reduced to \$26.40. Motion seconded by Mr. Fleming, Mr. Rowley is not in favor, he states they have a fee schedule and policy and are entitled to charge a fee. Ms. Cornwall backed out of her motion.

Mr. Fleming discussed the issue about government entities not having a fee schedule, e.g., Maese case spurred Tooele to create a fee schedule. Ms. Smith-Mansfield reads the Utah Code § 63G-2-203 (2)(c) and states the governmental entities must adhere to specific requirements in GRAMA, so they are subject to Utah Code §§ 63G-2-201(1)(3) and Utah Code § 63G-2-202, 205, and 206 but where they have the greatest flexibility is in Utah Code § 63G-2-203 for fees. And where GRAMA states they can charge certain items local governments can establish local ordinances and policies with more flexibility. There is question to the flexibility because they should keep to the spirit of the actual cost of what it costs. However GRAMA does allow provisions and the governmental entity does have a published fee schedule under Utah Code § 63G-2-203(3)(c). She refers the Committee to Utah Code § 63G-2-701 (1)(d). Mr. Tonks adds that the Committee's authority is the Utah Code § 63G-2-203(6), and quotes the code. Ms. Smith-Mansfield adds where the SRC has authority is when there is an illegal fee, but she argues this is not believed to be the issue in this circumstance. In this instance the governmental entity has a fee schedule and they are adhering to it.

Ms. Cornwall reiterates that the SRC is not in the business to determine and evaluate the local governments' fee schedule and withdraws her motion. Mr. Hemphill refers to a case concerning the Democratic Party wanted to see the new redistricting records the legislature and was charged \$15,000 for a box of records. It was ruled an excessive fee and the entity relented by giving the box to the party. It was an excessive fee and a fee intended to deny access to the records. There are times when fees are posed to effectively deny access to records. Ms. Cornwall stated that in that case it was not pre-established fee and therefore not relevant to this case. Mr. Hemphill argued that question was, can the SRC weigh in on whether a fee is appropriate or not. There is a theory that a fee could be an inhibitor to deny access to records.

The SRC continues to deliberate. Mr. Hemphill continues that Mr. Desai should pay something but not classify it as a fee waiver but he may be entitled to a fee reduction. There is a fee schedule for faxing but in this instance it is an anomaly because they normally communicate with Mr. Desai by postage mail and this time they faxed him, why should he pay for that? Ms. Cornwall restates it is in the fee schedule to charge for the facsimile. The Committee members go back and forth on sending the records request via fax or postage mail, and that the governmental entity could have sent the documents via postage mail. Ms. Smith-Mansfield noted that the governmental entity did indeed have the choice to mail the documents but they chose to fax them instead. Mr. Hemphill argues then the governmental entity can choose the more expensive way to convey a record. And

in this particular case it seems as though there is a bit of a makeup of funds for previous record requests made by Mr. Desai.

Mr. Rowley restates that the normal method of communicating with Mr. Desai has been by mail not by fax and they should have communicated to him that there would be a charge, where in the past he has not had a charge before rather than surprise him with it. A reduction in this case might be the reasonable action based on the fact in the past he has received communication by postage mail.

A motion was made by Mr. Fleming (based on the original motion) that the fee waiver is denied but that the fee is to be adjusted to \$26.40 reprieved from \$54.40. Mr. Misner seconded the motion.

The Committee clarifies the decision that it is a reduction in fee based upon Mr. Desai receiving it in a format he did not ask for.

The motion passed 4-2, with Ms. Smith-Mansfield and Mr. Rowley dissenting.

Mr. Hemphill explained that Mr. Tonks will produce an order within 7 business days and he thanked the parties involved.

Administrative Rules

Ms. Smith-Mansfield said the amendments to the Administrative Rules have been approved through the public process and will be published at the next publication update.

Report on August/September Appeals and October 9, 2014, Appeals.

The executive secretary reported that the Lindsey Whitehurst, *Salt Lake Tribune* vs. University of Utah hearing, scheduled for October, has been canceled and resolved by both parties. At this time there are three hearings scheduled for October (See the attached documents on the Public Notice website, [SRC Meeting Handouts September 11, 2014.pdf](#)).

Cases in District Court

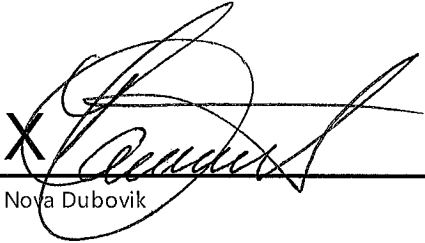
Mr. Tonks briefed the cases in District Court. (See the attached documents on the Public Notice website, [SRC Meeting Handouts September 11, 2014.pdf](#)).

Other Business

Next meeting is scheduled for October 9, 2014. The executive secretary verified there will be a quorum present for the next meeting.

The September 11, 2014 State Records Committee meeting adjourned at 11:30 a.m.

This is a true and correct copy of the September 11, 2014, SRC meeting minutes, which were approved on October 9, 2014. An audio recording of this meeting is available on the Utah Public Notice Website at <http://www.archives.state.ut.us/public-notice.html>.



X *[Handwritten Signature]*
Nova Dubovik

SRC Executive Secretary