

SRC APPROVED
Date July 13, 2015

STATE RECORDS COMMITTEE MEETING

Location: Courtyard Meeting Room, 346 S. Rio Grande Str., SLC, UT 84101
Date: July 9, 2015
Time: 9:02 a.m. to 1:00 p.m.

Committee Members Present:

Patricia Smith-Mansfield, Chair, Governor's Designee
Marie Cornwall, Citizen Representative
Tom Haraldsen, Media Representative
Blaine Breshears, Elected Official Representative
Doug Misner, History Designee
Absent: Holly Richardson, Citizen Representative
David Fleming, *Chair Pro Tem*, Private Sector Records Manager

Legal Counsel:

Paul Tonks, Attorney General's Office
David Jones, Attorney General's Office
Nicole Alder, Paralegal, Attorney General's Office

Executive Secretary: Nova Dubovik, Utah State Archives

Telephonic Attendance:

None

Others Present:

Greg Hargis, DHRM	Cindy Smith, Petitioner
Bob Thompson, DHRM	Steve Call, Attorney
Jason Behan, Petitioner	Rosemary Cundiff, Ombudsman
Shane Topham, Attorney, Cottonwood Heights City, UT	Kendra Yates, State Archives
Catherine Taylor, DHS	Cameron Mansen, State Archives
Gray Smith, Petitioner	Rebekkah Shaw, State Archives

Agenda:

- Two Hearings Scheduled
- Approval of Retention Schedules
- Approval of June 11, 2015, Minutes
- Report on Appeals Received
- Report on Cases in District Court
- Other Business
 - Transparency Board

I. Call to Order:

The Chair, Ms. Patricia Smith-Mansfield, called the meeting to order at 9:05 a.m. Mr. David Jones filled in as legal counsel for Mr. Paul Tonks for the two hearings.

The Chair introduced the parties for the hearing: Mr. Jason Behar, Petitioner, and Mr. Bob Thompson, representing Utah Department of Human Resource Management (DHRM). The Chair explained the hearing procedures.

II. Behar vs. Department of Human Resource Management

Opening-Petitioner

Mr. Behar addressed the Committee stating he is entitled to the emails containing multiple accusations that caused him to be terminated from his job at the DHRM, Developmental Center. He argued that a person has the right to protect one's self from heinous allegations and he is seeking solid evidence as to why he was terminated.

Opening-Respondent

Mr. Thompson, Director of Labor Relations, explained that on May 1, 2015, Mr. Behar requested, "all records the state of Utah has with his name on it." A very broad GRAMA request, however DHRM provided documents that were comprised of Mr. Behar's entire personnel file. There were ten withheld documents, primarily on the basis they involved witness statements expressing concern about things that were said by Mr. Behar that caused the employer to be concerned. The records are protected under Utah Code 63G-2-302(2)(a)(b) and Utah Code 63G-2-305(25) and should not be disclosed to protect witness statements and a source who is not known outside of government. Those are DHRM's primary concerns to protect the confidentiality of the witnesses.

Testimony-Petitioner

Mr. Behar summarized the response he received from Debbie Cragun, Executive Director of DHRM, that the documents withheld contained personal recommendations and employee's statements, and if released the documents would be an unwarranted invasion of personal privacy. He would like the State to clarify how it is an unwarranted invasion of personal privacy if the witnesses willing came forward to give statements. He would also like the State to address the Director's statement "I am sure you can appreciate how difficult it would be for us to get candid information from witnesses if we were unable to promise and keep confidentiality... Utah Code 63G-2-305(10)(d)." Mr. Behar defined

candid from the Webster's Dictionary, and then commented that the word candid, according to Webster, was not used properly in the letter.

Mr. Behar questioned why other agencies were not called to intervene if he was telling people he had been accused of molestation, and that he was a drug dealer. He explained the Developmental Center said he was not entitled to due process or drug screening per the law to clear his name. Although according to DHRM R477-14-1(7)(a) outlines an employee is subject to a drug and/or alcohol test if they meet certain criteria; it mentions reasonable suspicion. If there are multiple people coming forward claiming he was a drug dealer that is considered reasonable suspicion. Only a few days before the termination he had received a performance evaluation and was told nothing negative had been relayed to the supervisor about his behavior or work performance. If the allegations had been truthful or candid, it would have been brought up to him before he was terminated. In his opinion, according to the DHRM Rule, he had five days to respond to a termination and he was not given the opportunity to do so. If the Developmental Center thought all these issues were of concern in February why did they keep him on for another two months. He believes when people make remarks that damage one's reputation and the recipients of the remarks are not given the right to protect themselves, it is wrong.

Testimony-Respondent

Mr. Thompson provided background information on how the due process and the opportunity to respond to the termination in five days are implemented. Within the state system, there are two types of employees. First is a career service employee who has certain opportunities and rights that are afforded to them before being dismissed. That includes a notice of allegations and ability to appear in front of executive director of the department to present ones side of the story. The executive director can make a decision to terminate or take disciplinary action based on the information. At that point, the career service employee has the opportunity take it to the review office and have an evidentiary hearing in front of the administrative law judge to determine if there was just cause to terminate the employee.

A career service employee is hired in a job that is classified as career service Schedule B employment and passes a probation period. The reason Mr. Behar was not given the notice of intent to terminate, and then given the opportunity for a hearing and go to the career service review office, is that Mr. Behar was still on probation. He was in a Schedule B position but had only been in it for five-months, and the probationary period is one year. Because he had not reached the one-year mark, the law provides for agencies to terminate as if they were in the private sector-without cause or reason for termination. Mr. Behar was considered an "at-will employee."

While Mr. Behar was still on a probationary period, some witnesses came forward with written statements of events that happened in the workplace. Mr. Behar showed a pattern of disruptive behavior that caused enough concern for the directors of the Development Center to terminate his employment. The office did that without providing him cause and reason for the termination. DHRM protected the witness statements because without the

ability for employees to come forward, it could create a chilling effect in the workplace and nobody would come forward if inappropriate behavior were observed. For this reason DHRM felt that Utah Code 63G-2-305, investigations and sources unknown outside of the government, that those statements would be protected and also be appropriate to protect the confidentiality under Utah Code 63G-2-302 for those individuals that came forward and raised concerns. The witness statements that were not provided are classified private and protected and the recommendation form is classified protected.

The Committee raised questions about redacting personal information; the rights of privacy in a workplace environment; the personal decision of an employee to come forward with a complaint; and promises of confidentiality for solicited statements. The issue of whether there was an investigation, as cited by DHRM under Utah Code 63G-2-305(10)(a), when there was not an investigation performed.

Mr. Thompson commented that DHRM considered redacting but the provided statements were short and it would be easy to determine who wrote them. The question about personal privacy, he explained that it becomes personal because the employee is risking something at work by coming forward. Retaliation being one example. As for Subsection -305(10)(a) it does not necessarily complement DHRM's argument because there was only a brief investigation that took place; however, Utah Code 63G-2-305(10)(d) still applies because sources are not known outside the government agency. On the matter of confidentiality and solicited statements, at least three of the statements were unsolicited and the fourth one he is unsure of, but no promise of confidentiality was implied for the statements.

Closing-Petitioner

Mr. Behar expressed at what point does an employee either at-will or career vested do they get to protect themselves. If he were a career-vested employee, would he still be entitled to the same treatment received at this time? Would it be okay for a co-worker to make a statement without the accused to have an ability to protect themselves from unfounded information? There was no investigation to fact find only candid statements and he should be allowed to protect his own credibility and reputation.

Closing-Respondent

Mr. Thompson provided a short closing statement on the criticality for DHRM to have the leeway to protect witnesses whether it is unsolicited information or a process of a full-fledged investigation. Without it DHRM loses a great tool to keep the work environment free of discrimination and free from elements that are disruptive in the workforce. DHRM's goal is based on a principle to do everything needed to protect witnesses that come forward with workplace concerns. There is a lot of personal anxiety any time an employee comes forward to talk about another employee. DRHM is sympathetic and wants to protect them.

Motion: A motion was made by Mr. Fleming to go *in camera* and seconded by Mr. Misner. The motion passed 6-0.

Committee went *in camera*.

Motion: A motion was made by Mr. Fleming to back in session and seconded by Mr. Breshears. The motion passed 6-0.

The Committee discussed at length with the Petitioner why he had not been drug tested and asked the Respondent to clarify the procedures for identifying someone who should be tested. The question of disclosing the records and unwarranted invasion of personal privacy was raised and debated among the members.

Motion: A motion was made by Mr. Fleming that the governmental entity properly classified the records under Utah Code 63G-2-305(10)(d). The motion was seconded by Ms. Cornwall. The motion did not pass 3-3. Dissenting members, Ms. Smith-Mansfield, Mr. Misner, and Mr. Haraldsen.

Further discussion about disclosing or not disclosing the records continued and eventually the Committee decided to go back *in camera*.

Motion: A motion was made by Mr. Fleming to go *in camera* and seconded by Mr. Misner. The motion passed 6-0.

Committee went *in camera*.

Motion: A motion was made by Mr. Fleming to go back in session and seconded by Mr. Breshears. The motion passed 6-0.

The Committee decided to bates stamp the documents and rule on two separate motions.

Motion: A motion was made by Mr. Fleming to release bates stamped documents 1, 2, 4, 5, 6, 7, 8, and 9 that all information that is specific to Utah Code 63G-2-305(10)(d) that could reasonably identify the source which includes personal identifying information, and any particular time event that associated with the event be redacted. Mr. Misner seconded the motion. Motion passed 6-0.

Motion: A motion was made by Mr. Breshears that bates stamped document 3 is properly classified protected under Utah Code 63G-2-305(10)(d). Ms. Cornwall seconded the motion. Motion passed 6-0.

5-Minute Break

For the next case, the Chair asked Mr. Haraldsen to disclose that he used to be the editor of the *Cottonwood Holladay Journal*, and that his wife is a current Planning Department staff member for Cottonwood Heights City. The Petitioners objected to Mr. Haraldsen association with Cottonwood Heights City. Mr. Haraldsen recused himself.

The Chair explained the hearing procedures then addressed the Committee's Counsel.

The Chair questioned Mr. Jones, records committee legal counsel, about the Petitioner's statement of facts and argument regarding civil rules, discovery, and attorney client privileges. In the statement of facts, the Petitioners brought forth the rules of evidence and it is unclear how the Committee should address it as related to GRAMA. Mr. Jones commented that rules of evidence apply in a court proceedings and this is not a court proceedings. Rules of evidence deal with statutory authority and there is nothing in the GRAMA statute concerning the rules of evidence. The Chair asked the Petitioner to address where the provisions in GRAMA are specific to the rules of evidence to help the Committee understand the Petitioner's argument.

Mr. Steven Call, representing attorney for the Petitioners, commented the law of privilege, in the state of Utah, was codified in the Utah Rules of Evidence and it defines the scope of attorney client privileges. The GRAMA statute specifically refers to that privilege and does not give any other sort of definition or scope of the privileges that exist under Utah law. Mr. Jones countered that under GRAMA there is attorney client privileges and work product records are protected; the rule of evidence does not apply to this proceeding. The attorneys debated the Utah law and if it is applicable to the hearing. The chair interrupted the argument, and stated the hearing is an administrative proceeding not a court proceeding, and requested the Petitioner to begin the opening statement.

III. Gray Smith vs. Cottonwood Heights City, Utah

Opening-Petitioner

Mr. Call, representing attorney for the Petitioners, Mr. and Ms. Smith, explained the Smiths are trying to protect their home in Cottonwood Heights, located just below Wasatch Boulevard. The home is situated adjacent to a 45-acre parcel of land that is being developed in to a high-density housing community; known as the Giverny project. The problem arose when the developer requested to move the new subdivision entrance on to the Smith's right away instead of using the 45-acre historical entrance, and the Planning Commission approved it.

The Petitioners appealed the Planning Commission's approval for the Giverny project to the Board of Adjustment. In addition, to the right away approval, the Petitioners brought allegations that the Planning Commission had *ex parte* communications with proponents and opponents of Giverny before the Planning Commission voted to approve the project, and that those *ex parte* communications improperly influenced certain Planning Commission members to vote in favor of Giverny. Mr. Topham, City attorney, did an investigation to validate the *ex parte* allegations. The Petitioners requested the City to disclose the results of the investigation. The City provided records of detailed inquires and investigations of the alleged improper communications of Giverny appeal with the

exception of two email strings. The Petitioner argued that the City waived any attorney-client privilege by intentionally disclosing portions of its attorney-client communication. Per the Utah law the City cannot cherry pick which records are provided-it is all or none. The Petitioners are requesting that the Committee order the City to release all attorney client privileged emails that relate to Mr. Topham's investigation on improper *ex parte* communications.

Opening-Respondent

Mr. Topham, representing attorney for Cottonwood Heights City, explained the issue before the Committee is 26 emails involving the city staff members, Planning Commission members, and city attorneys.

The legislative intent of GRAMA is to promote public's right to access records and discourage government from abuse in confidentiality of the records. GRAMA accomplishes that by requiring a balancing test between the public's right to know and the governments need to retain confidentiality of some records. The attorney client privilege in the attorney work product is fundamental to the system. He summarized the attorney client privileges is under Utah Code 63G-2-305(17)(18) and (23). The City believes that even though there is attorney client privileges, under Utah Code 63G-2-201(5)(b), each record must have the balancing test and determine if there is public interest and if the records should be disclosed.

Mr. Smith's GRAMA request was made in the context of the appeal to the Cottonwood Heights Board of Adjustment concerning a land rights deal based on the Planning Commission's decision.

Testimony-Petitioner

Mr. Call comments on Mr. Topham's suggestion that this is about a balancing test of records protected under Utah Code 63G-2-305(17)(18) attorney client privileges. The Utah Court of Appeals the Supreme Court stated that when there is disclosure of attorney client privileges information to a subject matter, if that disclosure is made intentionally, then all privileges as of that matter is weighed. He quotes *State v. Johnson*, 2008 UT App 5, 178 P.3d 915 and *Terry v. Bacon*, 269 P.3d 188 (2011), that in order maintain privileges under no circumstances may any of the information be selected and disclosed. If a party intentionally released the records, it cannot pick-and-choose what is disclosed. It is all or none.

In this case, there are 11 emails classified attorney client privileged communications between Mr. Topham and various employees of the city. The emails were used in front of the Board of Adjustment by way of summary, and they all dealt with *ex parte* communications about the development's historical entrance. The 11 emails were then disclosed to the Smiths. Since the City disclosed the emails, it has waived its right to apply the attorney client privilege to the remaining documents sought by Smiths related to the alleged improper *ex parte* communications. By intentionally disclosing numerous attorney client privileged communication to the Smiths, concerning the factual investigation made by the City, they are no longer subject to attorney client privilege.

The Chair interjects and comments that the Petitioner is arguing that since the Respondent disclosed some of the attorney client privileged records that now all the records should be disclosed under Rule 510. She argued that Rule 510 pertains to court proceedings not open records. Mr. Call asserted rules of evidence can apply outside litigation and used in almost any context; one does not have to be in litigation for the waiver to occur. He continued that the matter was in litigation at the time the Petitioners appealed to the Board of Adjustment. In conclusion, he requested that the remaining emails be disclosed.

Testimony-Respondent

Mr. Topham comments on the land use appeal to the City's Board of Adjustment. Mr. Smith asserted that certain members of the Planning Commission had *ex parte* improper communications with the developer and others that took place outside the City meeting. When the allegations were made the City and attorneys took them seriously. He investigated the allegations principally through email correspondence with the eight Planning Commission members and the responses were briefed to the Board of Adjustment. Although most of the investigations were conducted by email, some were done by telephone and that action does not recreate a record under GRAMA. However, the investigation emails were protected records under GRAMA because they involved communication between him, as the representing attorney, and the City's Planning Commissioners.

The emails were bundled into two separate groups. The fact finding investigation emails between the Planning Commission and City Attorney, are one bundle and classified protected. The second bundle of protected records involve two separate email strings containing nine emails between him, two other land use attorney's representing the city, and two city planning staff members. The latter bundles of emails, in the City's opinion, consist entirely of litigation strategy discussions, and Mr. Smith's allegations. When the City received Mr. Smith's GRAMA request, the city classified the two bundles as protected records, but then City performed the balancing test, which resulted in the disclosure on everything about the investigation with the Planning Commissioner; despite the claim of attorney client privileges. There were seventeen emails disclosed that dealt with the fact finding investigation, and out of those the City only withheld nine litigation strategy emails. The City believed it properly complied with GRAMA by analyzing the protected records and balancing the respected rights of the public's interest. In conclusion he requested Mr. Smith's appeal be denied.

Closing-Petitioner

Mr. Call expressed the important aspect is the emails that were not disclosed. The Petitioners cannot make a determination if there are communications from one of the Commissioners because they were never disclosed. Yet, Counsel in support of his position is asserting to the Committee that there is no such communication. The only way to figure it out at this stage is to go *in camera*, review the documents, and make a determination. That is why the Utah Courts ruled that a decision needed to be made in the beginning to release either all attorney client privileged communications or none.

The information cannot be cherry picked. He emphasized that the disclosures were made intentional and the balancing test weighs in favor of the government entity disclosing all the privileged information-only the subject is disclosed. This way tribunal, judges, boards, and petitioners all have the same ability to look and judge what is relevant and what is not. This issue is very important to the Smiths. It is in the Petitioner's opinion, that if not for the *ex parte* communications the Commission would have voted differently.

Closing-Respondent

Mr. Topham asserts the City followed the applicable land use law in approving the development, the hearing, and investigation concerning *ex parte* allegations, and lastly the Board of Adjustment decision supporting the Planning Commission's decision. He believed that a balancing test is required by GRAMA that the City appropriately complied with the law. The City is required to disclose things that support public interest and withhold things where the public interest is better served by keeping it confidential. The city records officer and city manager went through the emails records and all made the same determination of releasing certain ones to Mr. Smith that did not pertain to litigation strategy.

Deliberation:

Motion: A motion was made by Mr. Fleming to go *in camera* and seconded by Mr. Misner. The motion passed 3-2. Two members dissented, Ms. Smith-Mansfield and Mr. Breshears.

Committee went *in camera*.

Motion: A motion was made by Ms. Cornwall to go back in session and seconded by Mr. Fleming. The motion passed 5-0.

The Chair commented that the issue in front of the Committee is twofold. One being the attorney-client privilege and record classification; the secondary is the use of the weighing provision; as to whether or not the records that had not been provided should be provided under the weighing provision. She reminded the Committee the weighing provision of records is under the attorney-client privileges Utah Code 63G-2-305(17) and (18). Mr. Fleming stated that the Committee is there to make a decision on whether or not the weighing provision was properly executed as required by GRAMA. The rules of evidence are Utah law, but he does not think it is up to the Committee to interpret the rules of evidence that is for the court to decide. There is a compelling argument whether or not the City waived its right to privilege but the Committee is not going to decide if that is the argument that wins.

Motion: A motion was made by Mr. Fleming to uphold City's decision to not release the records because they were properly classified under Utah Code 63G-2-305(17) and (18). Ms. Cornwall seconded the motion. The motion passed 5-0.

Mr. Tonks returned and Mr. Jones left the proceedings after the motion passed.

IV. Approval of Retention Schedules:

State Agencies: None

Utah State General Records Retention Schedule:

Ms. Rebekkah Shaw presented two series for Human Resource Records Schedule 11.

(Item 11-64) Grievance records

(Item 11-66) Complaint investigation files

Motion-A motion was made by Mr. Fleming and seconded by Mr. Breshears to approve the proposed retention schedule. A vote was unanimous, 6-0.

Payroll Records Schedule 10.

(Item 10-29) Timekeeping records

(Item 10-30) Payroll processing records

(Item 10-31) Payroll post processing records

(Item 10-32) Employee wage history records

Motion-A motion was made by Mr. Fleming and seconded by Mr. Breshears to approve the proposed retention schedule. A vote was unanimous, 6-0.

V. Approval of June 11, 2015, Minutes:

Ms. Smith-Mansfield and Mr. Fleming submitted editorial corrections that were updated on the document prior to the meeting. A motion was made by Mr. Fleming to approve the June 11, 2015, minutes, and Mr. Misner seconded it. The motion passed 6-0 (see the attached documents on the Utah Public Notice Website, [SRC Minutes June 11, 2015.pdf](#)).

VI. Report on June and July Appeals:

The executive secretary briefed the following withdrawal, denial, and postponements:

-Patrick Sullivan vs. UDC: The petitioner withdrew the appeal for a refund of \$2.50.

-John Rice vs. UDC: The notice of appeal to the State Records Committee was untimely.

-Nate Carlisle vs. Washington County Attorney Office: The appeal was resolved and withdrawn.

The following three hearings were postponed until August 13, 2015, because they are in mediation: **Isaac Lemus vs. DHS**, **Corydon Day vs. UDC**, and both **Patrick Sullivan vs. University** hearings.

At this time there are seven potential hearings scheduled for August 13, 2015 (see the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts July 9, 2015.pdf](#)).

VII. Report on Cases in District Court:

Mr. Tonks briefed to the committee members on the *Paul Amann v. Utah Dept. of Human Resource Management and State Records Committee* is a new appeal in third District Court. The SRC will be filing an answer on July 16, 2015. The court case is related to the SRC's May decision that denied Mr. Amann records access. The parties are being encouraged to consolidate the two cases that are in court (Case No. 150904275 & 150901160).

Two other cases that are being followed, *Utah Attorney General's Office v. Salt Lake Tribune*, in this one the Respondents have not been served with a Summons. In the *Daniel Rivera Jr. v. Utah Dept. of Human Services, Division of Child and Family* the motion to dismiss the case has been submitted, but the Petitioner has requested an extension because he did not service the parties.

Mr. Tonks elaborated on the details of the *Utah Dept. of Human Resource Management v. Paul Amann* court case that he attended in the morning. The original purpose of the hearing was for the Department of Commerce and the Attorney General's Office attempt at intervention. The original case was *Paul Amann vs DHRM* and the other two agencies came as interested parties, however they did not file an appeal instead they tried to come through the civil rules of procedures to intervene as a party. However civil rules actually states in order to intervene the parties have to prove their interests are not being represented. The judge asked the question and of course, the agencies were denied because the attorney, Mark Blums, is representing their interests from the Department of Human Resource Management (see the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts July 9, 2015.pdf](#)).

VIII. Other Business:

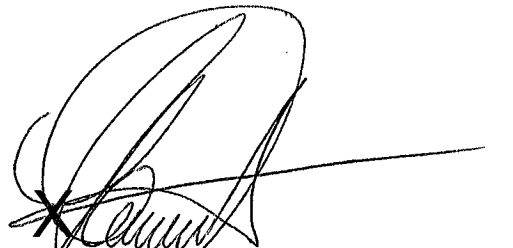
Transparency Board:

Chair explained the Utah Transparency Advisory Board is part of the Department of Finance it regulates and provides direction for the Open Record Portal that is managed by the Utah State Archives. There is an open position that needs to be filled by a Committee member who will represent and provide public input. Ms. Cornwall and Mr. Haraldsen showed interest and intend to apply for the position on the Governor's Boards and Commissions webpage <http://www.utah.gov/governor/boards/>

The next meeting is scheduled for August 13, 2015. The executive secretary queried if there will be a quorum present for the next meeting. Ms. Smith-Mansfield will not be in attendance for the August 13, 2015, during the first half of the meeting.

The July 9, 2015, State Records Committee meeting adjourned at 1:00 p.m.

This is a true and correct copy of the July 9, 2015, SRC meeting minutes, which were approved on August 13, 2015. An audio recording of this meeting is available on the Utah Public Notice Website at <http://www.archives.state.ut.us/public-notice.html>.



Nova Dubovik
Executive Secretary

APPROVED