

SRC
Date *June 9, 2016*

State Records Committee Meeting

Location: Courtyard Meeting Room, 346 S. Rio Grande Str., SLC, UT 84101
Date: May 12, 2016
Time: 9:00 a.m. to 12:08 p.m.

Committee Members Present:

Patricia Smith-Mansfield, Chair, Governor's Designee
Marie Cornwall, Citizen Representative
Tom Haraldsen, Media Representative
Cindi Mansell, Political Subdivision Representative
Doug Misner, History Designee
Holly Richardson, Citizen Representative
David Fleming, *Chair Pro Tem*, Private Sector Records Manager

Legal Counsel:

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

Executive Secretary: Nova Dubovik, Utah State Archives

Telephonic Attendance:

Fred Finlinson, Washington County Water Conservancy District
Holly Richardson, Committee member

Others Present:

Judy Fahys, KUER 90.1
Catherine Brabson, Attorney, Salt Lake City Corporation
Heidi Voordeckers, Davis County
Nick Schou, Utah Rivers Council
Zack Frankel, Utah Rivers Council
Nina Cleere, Davis County
Jennifer Cundiff, Public
Angela Elmore, Attorney
Noemi Cruz, Public
Kendra Yates, Utah State Archives
Mary Sieweine, Utah State Archives
Blaine Ferguson, Assistant Attorney General
Rosemary Cundiff, Utah State Archives
Dan Harrie, *Salt Lake Tribune*
Nate Carlisle, *Salt Lake Tribune*
Daniel H. Burton, Attorney General's Office
Ashley Shelter, Attorney General's Office
Illegible name, Public

Agenda:

- Three Hearings Scheduled
- Retention Schedules, action item
- Approval of April 14, 2016, Minutes
- Report on Appeals Received
- Report on Cases in District Court
- Other Business
 - Next meeting scheduled for June 09, 2016, 9 a.m. to 4 p.m.
 - Utah Transparency Advisory Board Position

I. Call to Order:

Ms. Richardson was telephonically connected to the Committee meeting.

The Chair, Ms. Patricia Smith-Mansfield, called the meeting to order at 9:00 a.m. and introduced the parties for the first hearing: Mr. Zachary Frankel and Nick Schou, Petitioners, and Mr. Fred Finlinson, representing the Washington County Water Conservancy District (WCWCD). The Chair explained procedures and asked the Committee members to introduce themselves to the parties. The hearing is a Continuance from April 14, 2016; the Committee reviewed the contract provided by WCWCD prior to the May 12, 2016, meeting.

**II. *Utah Rivers Council vs. Washington County Water Conservancy District (WCWCD):*
Continuance**

Deliberation:

The Committee discussed at length the terms of the contract regarding the deliverables for the repayment plan. It was determined that WCWCD hired the consultant to produce a product that the agency paid for and owns. The definition of a record includes the phrase "that is prepared, owned, received, or retained by a governmental entity or political subdivision" (Utah Code § 63G-2-103(22)(a)). A governmental entity cannot use a third-party vendor as an excuse to claim that it does not have the records. During the course of the contract, a working draft of the repayment plan was presented and viewed by a number of people in public meetings.

Motion: Mr. Fleming made a motion that the record is considered a governmental record under Utah Code § 63G-2-103(22)(a) and there is no provision showing that it should not be a public record; therefore, it is a public record under Utah Code § 63G-2-201(2). Ms. Cornwall seconded as so amended. The motion passed, 7-0.

The Chair introduced the parties for the next hearing: Ms. Angela Elmore, on behalf of Trenton Mellen, Petitioner, and Ms. Catherine Brabson, representing Salt Lake City Corporation. The Chair explained procedures and asked the Petitioner and Respondent to introduce themselves for the record.

Ms. Mansell (Salt Lake City Recorder) recused herself from the proceedings.

**III. *Angela H. Elmore, on behalf of Trenton Mellen v. Salt Lake City Corporation:*
Petitioner's Opening Statement**

Ms. Elmore explained that the issues raised today concern the collection process of the requested records. She would like the City to provide on record what the process was for collecting the requested records and whether all the records were compiled based on that process. She further explained that a number of classifications are assigned to the records and it is the City's burden to meet those classifications. Ms. Elmore cited *Schroeder v. Utah Attorney General's Office*, 358 P.

3d 1075 (Utah 2015), to provide support for her argument that properly withheld documents may be required to be released if the interests in favor of disclosure outweigh those against. She argued that the governmental interest in this case is less than in the public interest. Ms. Elmore requests that the Committee follow the *Schroeder* ruling and release the records even if the classifications are upheld because it is in the public's interest.

Respondent's Opening Statement

Ms. Brabson stated that the Salt Lake City Attorney's Office was involved with Ms. Elmore's GRAMA request. Ms. Brabson went on to explain that she will be presenting some of the evidence that was attached in the Statement of Facts, Legal Authority, and Reasons provided to the Committee. It sets forth litigation including the actual litigation including Mr. Mellon, and the threatened litigation by Mrs. Mellen (Petitioner's mother). The City's classifications of the records are protected for litigation, work products, and attorney-client privileged material. Ms. Brabson was granted prior permission from the Committee Chair to bring a representative sample of the voluminous email chains for *in camera* review.

Testimony Petitioner

Ms. Elmore is concerned about the method used by the City for collecting correspondence from the City employees. She explained that a GRAMA request to City Prosecutor's Office was filed and Ms. Padma Veeru-Collings, Chief Prosecutor, asked the employees to each search, gather, and provide their own emails to Ms. Veeru Collings. Ms. Veeru-Collings reviewed and released the non-restricted information. Ms. Elmore feels this was inappropriate and wants assurance from the City that this process did not occur for her client's records request. The reason Ms. Elmore questions the process is because certain email communication chains were missing from the material provided by the City. Ms. Elmore has significant concern over how the representative sampling of *in camera* records were chosen. Case in point, an email chain from Ms. Veeru-Collings is missing a portion of the previously forwarded email. There is no record in the chain showing how the original email was forwarded to Ms. Veeru-Collings.

Ms. Elmore argued that the City classified the emails protected or private because the emails relate to anticipated litigation or litigation. It is unreasonable to interpret Utah Code § 63G-2-305(18) to protect this type of litigation. If this is the interpretation then every GRAMA request to the City Prosecutor's Office, whose only responsibilities are litigation or anticipating litigation, would be denied. She continued that if the classification is upheld, the public interest in the disclosure of the documents heavily outweighs the restrictions. She summarized and interpreted *Schroeder v. Utah Attorney General's Office*, 358 P. 3d 1075 (Utah 2015). Ms. Elmore further explained that pursuant to the Supreme Court ruling that properly withheld documents may be required to be release if the interests in favor of the disclosure outweigh those against disclosure. In addition, the City has dismissed Mr. Mellen's Class B Misdemeanor case and has not disclosed any interest in ever pursuing the case further. Therefore, any interest the City has in protecting its correspondence is minimal and cannot overcome the overwhelming public interest. She asked the Committee to consider requesting the entire documents, not just the sampling, to review *in camera*.

Testimony Respondent

Ms. Brabson explained the City's process for collecting the records and reviewing them for classification purposes. The attorney's office acquired e-discovery software a few years ago. The City uses it to search and retrieve City emails for litigations and GRAMA requests. A trained paralegal accesses the City's servers and performs searches on all the employee email that is sent and received based on the search criteria. This process was used to retrieve, sort, review, and classify Ms. Elmore's records request.

Ms. Brabson addressed her decision on which email chains were brought for the representative sample. She personally picked communications between prosecuting attorneys that were at the heart of the issue, to include the emails that were of concern to Ms. Elmore. Ms. Brabson explained how the emails for the *in camera* review were broken up into three categories and tabbed under Utah Code § 63G-2-305(18), (17) and (25).

Ms. Brabson argued that *Schroeder v. Utah Attorney General's Office* is very different from the current case in front of the Committee. Stating that the work product in the *Schroeder* case was informational, a summary, and the court ruling did not address the issue of internal prosecutor work products.

Petitioner's Closing Remarks

Ms. Elmore asked the Committee to review the emails classified attorney client issue and verify they are properly classified. If there were anything that can be released that favors public interest versus government interest she would like those provided. Ms. Elmore argued that *Schroeder* case is specific to the case in front of the Committee and asked the Committee to follow the ruling when reviewing the records *in camera*. She requested again that the Committee consider requesting all relevant documents, not just the sampling, to review *in camera*.

Respondent's Closing Remarks

Ms. Brabson points out to the Committee that even though the Petitioner vehemently disagrees with how the case was handled by the SLC prosecutor's office, the District Court did find there was probable cause in the case. She summarized and interpreted the *Schroeder* case disputing the Petitioner's assertion that it pertained to the current case in front of the Committee. Ms. Brabson commented that *Schroeder* is an outlier and cannot be used to get every work product information from the opposing attorneys.

Deliberation

Motion: Mr. Fleming made a motion to go *in camera*, Mr. Haraldsen seconded it, and the motion passed, 6-0.

Motion: Mr. Fleming made a motion to go back in session, Mr. Misner seconded it, and the motion passed, 6-0.

Deliberation:

Mr. Tonks summarized the *Schroeder v. Utah Attorney General's Office* and the *Southern Utah Wilderness Alliance v. Utah Division of Oil, Gas and Mining (SUWA)* cases. Mr. Tonks quoted Utah Code § 63G-2-305(17) and Utah Code § 63G-2-305(18). He continued to interpret the court rulings for the Committee--the courts have said that attorney client privilege basically protects the records of communication between a governmental entity and the attorney representing, retained, or employed by the governmental entity if the communications would be privileged under statute or court rule. The purpose of the statute is to promote free communication between the attorney and the client (governmental entity) that is specific to litigation. If it were a social communication about meeting for lunch then it would be outside the attorney-client privilege.

Mr. Tonks addressed the definition of attorney work product by explaining that the SUWA case relied on the *Gold Standard, Inc., v. American Barrick Resources Corporation 801 P.2d 909 (Utah 1990)* case. The court in the *Gold Standard* ruling characterized attorney work product as "three essential requirements for materials to be protected by the work product doctrine under rule 26(b)(3): (1) the material must consist of documents or tangible things [that are otherwise discoverable], (2) prepared for anticipation of litigation or for trial, (3) by or for another party or by

or for that party's representative (See https://scholar.google.com/scholar_case?case=5348342160176295142&q=Gold+Standard&hl=en&as_sdt=6,45). The inquiry focused on the primary motivating purpose behind the creation of the document.

In the SUWA case, there were documents prepared by the automated geographic reference center that were used in litigation. The agency attempted not to disclose the documents under GRAMA because they had been used in litigation and were thought to be protected. The court ruled that the mere use of documents in litigation does not render them exempt from GRAMA. There is also a two-tier approach for an attorney work product. In SUWA, it was discussed that work prepared in anticipation of litigation by an attorney, or its agent, is the first tier. The second tier is the conclusion, opinions, or legal theories of an attorney, or representative of the party, concerning the litigation. The second tier receives the highest protection and is discoverable only upon showing a rare and exceptional circumstance.

Counsel explained that in the *Schroeder* case when the GRAMA request was submitted for information the investigation was concluded. Some records were found to be attorney-client privileged, and others, such as bank records and Post-it notes, were found to be items produced by the bank not the attorneys. The court found that with the investigation completed that some of the items could be released. The court did not release any real attorney work product or mental impressions of the attorney on those records.

The Committee and Counsel discussed whether correspondence amongst attorneys in an office would be defined as an attorney work product. Furthermore, correspondence between attorney and client, as defined in statute, is attorney-client privileged communication. Ms. Smith-Mansfield and Mr. Haraldsen stated they would like to see all the records so they could be properly reviewed.

Motion: Mr. Haraldsen made a motion for a continuance to review all the records. Mr. Misner seconded the motion. The motion passed, 6-0.

The Continuance will be scheduled for July 14, 2016.

**IV. *Nate Carlisle, Salt Lake Tribune vs. Attorney General's Office:*
Continuance**

The Chair introduced the parties for the next hearing: Mr. Nate Carlisle, *Salt Lake Tribune*, Petitioner, and Mr. Blaine Ferguson, representing the Attorney General's Office. The Committee discussed at length how to rule on the multiple records. Mr. Fleming announced that he missed reviewing the *in camera* records for the appeal and therefore would recuse himself from the case. The Committee decided to rule on the entire group of records as one category.

Motion: Ms. Mansell made a motion that all records are properly protected under Utah Code § 63G-2-305(a-c), except for the policy manuals which are public under Utah Code § 63G-2-301(3)(a). Mr. Misner seconded the motion. The motion passed, 4-2. Ms. Smith-Mansfield and Mr. Haraldsen provided the dissenting votes. Mr. Fleming abstained.

Ms. Smith-Mansfield and Mr. Haraldsen dissented because they found some of the records to be public.

V. Approval of April 14, 2016, Minutes:

A motion was made by Ms. Cornwall to approve the April 14, 2016, minutes. Mr. Misner seconded the motion. The motion passed 7-0. (See the attached documents on the Utah Public Notice Website, [SRC Minutes April 14, 2016.pdf](#)).

VI. Retention Schedule:

Utah State General Records Retention Schedule: Ms. Kendra Yates presented seven records series. The Committee decided to table the series until the new policy has been written and published to explain the new retention schedule processes.

Financial Records

- (Item 7-61) Accounts Payable Records.
- (Item 7-60) Accounts Receivable Records.
- (Item 7-63) Annual Financial Budget.
- (Item 7-62) Budget Records.
- (Item 7-58) Grant and Other Financial Assistance Records.
- (Item 7-59) Grant Final Reports.
- (Item 7-64) Trust Financial Records.

State Agencies: Ms. Yates presented one schedule.
Lieutenant Governor.
28818 Statewide voter registration records. ~~Retain 25 years after superseded.~~

Motion: A motion was made by Mr. Haraldsen, and seconded by Ms. Mansell, to approve the proposed retention schedule. The motion passed, 7-0.

State Agencies: Ms. Rae Gifford presented three schedules.
Department of Commerce. Property Rights Ombudsman.
26443 Dispute resolutions records. Retain 10 years after final action.

Motion: A motion was made by Mr. Fleming, and seconded by Ms. Cornwall, to approve the proposed retention schedule. The motion passed, 7-0.

Board of Education
28860 Carson Smith scholarship records. Retain 3 years after expiration of scholarship.

Motion: A motion was made by Mr. Fleming, and seconded by Mr. Misner, to approve the proposed retention schedule. The motion passed, 7-0.

Department of Veterans and Military Affairs.
19958 Military discharge records. Retain 15 years.

Motion: A motion was made by Mr. Haraldsen, and seconded by Mr. Fleming, to approve the proposed retention schedule. The motion passed, 7-0.

VII. Report on Cases in District Court:

Mr. Tonks briefed Committee members on the following district court cases:

There are two *Roger Bryner* cases versus City of Clearfield. The latest is: *Roger Bryner v. City of Clearfield*, Case No. 160700423, Second District Court, filed on April 27, 2016. The answer from the Committee will be filed shortly in District Court. The case involves a records request for documents related to the appointment of Clearfield Justice Court Judges. A

Notice of Compliance was filed by the City of Clearfield, but an appeal was still filed by Mr. Bryner.

Jordanelle Special Service District v. Utah State Auditor, Case No. 160901401, is in Third District Court. A Motion to Dismiss was filed with the Court on May 11, 2016.

Roger Bryner v. City of Clearfield is in Second District Court. On May 9, 2016, the case was remanded to the Committee for further proceedings regarding whether Mr. Bryner should have access to records responsive to his records request. The new Committee hearing date will be scheduled on June 9, 2016.

(See the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts May 12, 2016.pdf](#)).

VIII. Report on March and April Appeals:

There were no denials to brief the Committee members. The executive secretary mentioned that seven potential hearings are scheduled for June 09, 2016, and July 14, 2016, respectfully. (See the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts May 12, 2016.pdf](#)).

IX. Other Business:

-June 09, 2016, is the next scheduled meeting.

-Utah Transparency Advisory Board position

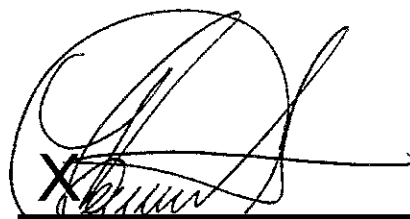
Ms. Richardson expressed interest in replacing Ms. Cornwall as the Committee representative on the Utah Transparency Advisory Board.

Motion: Mr. Fleming made a motion, and seconded by Mr. Haraldsen, to approve Ms. Richardson as the Committee nominee. The motion passed, 7-0.

The executive secretary queried whether a quorum will be present for the next meeting; Mr. Misner will be absent June 9, 2016, and Ms. Cornwall's last attendance will be July 14, 2016.

The May 12, 2016, State Records Committee meeting adjourned at 12:08 p.m.

This is a true and correct copy of the May 12, 2016, SRC meeting minutes, which were approved on June 09, 2016. 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