

**State Records Committee Meeting**

Location: Courtyard Meeting Room, 346 S. Rio Grande Str., SLC, UT 84101

Date: October 13, 2016

Time: 9:05 a.m. -1:35 p.m.

**Committee Members Present:**

Patricia Smith-Mansfield, Chair, Governor's Designee

Chad Lambourne, Citizen Representative

Tom Haraldsen, Media Representative

Cindi Mansell, Political Subdivision Representative

Doug Misner, History Designee

Holly Richardson, Citizen Representative

**Absent:** David Fleming, *Chair Pro Tem*, Private Sector Records Manager

**Legal Counsel:**

Paul Tonks, Attorney General's Office

David Jones, Attorney General's Office

**Executive Secretary:** Nova Dubovik, Utah State Archives

**Telephonic Attendance:**

Roger Bryner, Petitioner

**Others Present:**

Stuart Miller, Clearfield City Attorney

Nancy Dean, Clearfield Recorder

Keith Johansen, Wasatch County School District

Joan Andrews, Wasatch County School District Attorney

Cynthia Love, Wasatch Taxpayers Association Attorney

Alex Stuckey, *Salt Lake Tribune*

Jeffrey J. Hunt, Wasatch Taxpayers Association

Simone Rudas, Attorney General's Office

Mariah Noble, *Salt Lake Tribune*

Kevin Opsahl, *Herald Journal*

Mica McKinney, Utah State University Attorney

Tim Vitral[sic], Utah State University

Amanda Dero, Utah State University

Rachel Piper, *Salt Lake Tribune*

Tracy Taylor, Wasatch Taxpayers Association

Merry Duggin, Wasatch Taxpayers Association

Geoff Landward, USHE[sic]

Morris Haggerty, Utah State University Attorney

Rosemary Cundiff, Utah State Archives

Rebekkah Shaw, Utah State Archives

Kendra Yates, Utah State Archives

**Agenda:**

- Five Hearings Scheduled
- Retention Schedules, action item
- Approval of September 8, 2016, Minutes
- Report on Appeals Received
- Report on Cases in District Court
- Other Business
  - Next meeting scheduled for November 10, 2016, 9 a.m. to 4 p.m.

**1. Call to Order:**

Ms. Holly Richardson was connected telephonically for the meeting.

The Chair, Ms. Patricia Smith-Mansfield, called the meeting to order at 9:05 a.m. and she welcomed a new member, Mr. Chad Lambourne, Citizen Representative. Mr. Lambourne is a retired police officer and currently works as a paralegal for Schatz, Anderson & Associates in Salt Lake City, UT. The Chair also introduced Mr. David Jones, Assistant Attorney General, who will provide legal counsel to the Committee for the first hearing. Ms. Richardson arrived to the meeting at 9:15 a.m.

**2. Roger Bryner vs. Clearfield City Continuance**

The Chair introduced the parties for the next hearing: Mr. Roger Bryner, Petitioner, and Mr. Stuart Williams, representing attorney for Clearfield City. The Chair explained procedures and asked Committee, the Petitioner, and Respondent to introduce themselves for the record.

**Petitioner's Opening Statement**

Mr. Bryner began by stating that in the event the Committee does not waive any privilege he requests an *in camera* review of the records. He continued that the Committee should keep in mind that the attorney-client privilege applies only to legal advice. Any communication that is not legal advice pertaining to a joint legal interest, where an agreement for joint defenses does not exist, is not privileged. The second issue, Mr. Bryner stated, is whether a record exists that shows the Committee agreed to a joint defense with the City of Clearfield. In his

opinion if the agreement does not exist, then the attorney-client privilege does not exist and the records he seeks should be public. He is not concerned with the redactions that do not pertain to attorney-client privilege.

**Respondent's Opening Statement**

Mr. Williams stated the City's position is outlined in the statement of facts submitted to the Committee and Petitioner. The City has no objection to the *in camera* review of the records and has provided copies for the Committee's review.

Mr. Williams addressed the issue of the parties entering into a joint defense and stated that Mr. Bryner is mistaken, in regard to the law and it is not necessary to enter a joint defense for something to be privileged. There is a rule of common interest that articulates the City's position whether a joint defense agreement is required. Mr. Bryner is specifically appealing redacted emails that include Mr. Williams and Mr. Paul Tonks, Committee's legal counsel, and the other assistant city attorney's communications. The City maintains those emails remain privileged.

**Testimony Petitioner**

Mr. Bryner stated he is not disputing attorney-client privilege if the City's correspondence is with its city attorney. However, if it is not legal advice but communications between Mr. Tonks and the city attorney, those are prohibited, and the Committee can unilaterally order them disclosed. He asked the Committee to waive the attorney-client privilege on the emails. He requested a copy of the attorney joint defense agreement and

the IP fax addresses from the City's fax machine.

**Testimony Respondent**

Mr. Williams continued that Mr. Bryner is not disputing or questioning the internal communications between the City and its counsel, but instead looking to acquire emails between Mr. Tonks and himself disclosed. There is a common interest rule for multiple parties who are in cases of litigations. There are commonalities in some of the issues of litigation that created the common interest. Mr. Williams concluded that there is no copy of any written joint defense agreement between the City and the Committee's attorneys.

The Chair asked about the IP address for the fax machine. Mr. Williams responded that there is a specific IP for the fax copy machine that is responsive to Mr. Bryner's request.

**Petitioner's Closing Remarks**

Mr. Bryner agrees that work product is a subset of attorney-client privilege and it could exist. If the attorneys are sending back and forth drafts that they are working on together those are privileged. If the City is sending them to Mr. Tonks, they are privileged only as far as the Committee and City share a common interest and joint defense agreement either verbally or orally. The Committee has the option of waiving the privilege and ordering the redacted emails to be disclosed.

**Respondents Closing Remarks**

Mr. Williams provided no closing remarks.

**Deliberation:** The Chair asked Mr. Jones, Committee's legal counsel, about the common interest rule. Mr. Jones responded that, in this situation, the parties are involved in litigation, both have their own legal counsel, and those legal counsels can communicate between one another about issues. The attorney can communicate with the other party without notifying the Committee. The Committee would be able to contact its attorney, find out exactly what those communications that took place were about, and those would clearly be

attorney-client privilege. He continued that there is no written defense agreement in this case and it is not required.

The Committee decided to go *in camera*, however, due to the voluminous records to be reviewed, the hearing is continued until November 10, 2016.

**Motion:** Mr. Haraldsen made a motion to go *in camera* and continue the appeal until the following month. Mr. Misner seconded the motion. The motion passed, 6-0. Ms. Smith-Mansfield, Mr. Misner, Mr. Haraldsen, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea

**5-Minute Break**

**3. James J. Duran vs. Department of Human Services, Division of Child and Family Services**

The executive secretary stated that the Department of Human Services wants to be representative by its attorney, Ms. Laura Thompson. The Chair announced that because the attorney for the governmental entity had an unforeseen family emergency, the hearing therefore should be continued. The Chair stated that in Utah Code § 63G-2-403(8) the parties shall be given an opportunity to provide testimony.

(The Chair introduced the standard attorney, Mr. Paul Tonks, who will provide legal counsel to the Committee for the remainder of the meeting).

The Committee discussed procedural and jurisdictional issues and whether the Petitioner could be reached to agree to the continuance. Ms. Sheila Page, Assistant Attorney General, on behalf of Ms. Laura Thompson, the attorney for the Department of Human Services, addressed the Committee. She stated that Ms. Thompson is in the ER dealing with a potentially end-of-life situation with a family member that occurred overnight. Ms. Page explained the legal issues for the case are simple but that she knows nothing more about the case to

represent the client. The client would be disadvantaged by the fact the department does not have an attorney prepared to argue the legal issues before the Committee. The Department of Human Services requested that the matter be continued.

**Motion:** Ms. Richardson made a motion to continue the hearing because of unforeseen medical issue with the governmental entity's attorney. Mr. Haraldsen seconded the motion. The motion passed, 5-1. Mr. Misner, Mr. Haraldsen, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea. Ms. Smith-Mansfield voted nay.

**4. *Alex Stuckey, Salt Lake Tribune vs. Cedar City Police Department***

The Chair introduced the Petitioner. The executive secretary called and telephonically connected Chief Darin Adams, representing Cedar City Police Department. Chief Adams stated that he was approximately 40 minutes from arrival. The Chair made the decision to move to other business.

**5. Other business:**

**Approval of September 8, 2016, Minutes:**

A motion was made by Ms. Richardson to approve the September 8, 2016, minutes. Ms. Mansell seconded the motion. The motion passed 6-0. (See the attached documents on the Utah Public Notice Website, [SRC Minutes September 8, 2016.pdf](#)). Ms. Smith-Mansfield, Mr. Misner, Mr. Haraldsen, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea.

**6. Retention Schedules:**

**Utah State Agencies Retention Schedule:**

Ms. Kendra Yates presented four retention schedules.

Attorney General's Office. Criminal Department. Commercial Enforcement Division. 28922 Commerce legal case files. Retain 15 years after case is closed.

28923 Corporations legal case files. Retain 15 years after case is closed.

Attorney General's Office. Civil Department. State Agency Counsel Division. 28798 Legal counsel records for the Department of Human Services. Retain 10 years after final action.

**Motion:** A motion was made by Mr. Misner, and seconded by Ms. Richardson, to approve all proposed retention schedules. The motion passed, 6-0. Ms. Smith-Mansfield, Mr. Misner, Mr. Haraldsen, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea.

Department of Natural Resources. Division of Oil, Gas, and Mining. Oil and Gas Conservation. 8620 Inspection and enforcement seismic exploration records. Retain 10 years.

**Motion:** A motion was made by Mr. Misner, and seconded by Mr. Lambourne. The motion passed, 6-0. Ms. Smith-Mansfield, Mr. Misner, Mr. Haraldsen, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea.

**7. Report on September and October Appeals:**

The executive secretary briefed the Committee on the following declined hearing.

*In Robert Baker vs. Utah Department of Corrections:* On September 22, 2016, Mr. Baker requested a motion of reconsideration. A courtesy response was sent to Mr. Baker explaining there is no method for the Committee to reconsider a decision.

*In Helen Redd vs. Utah Attorney General's Office:* Ms. Redd appealed to the Attorney General's Office for production of records. The Committee Chair and Mr. Fleming reviewed the appeal and determined that there was not sufficient evidence provided in the statement of facts, reasons, and legal authority to support the appeal, that the records were maintained by the governmental entity, or that the governmental entity concealed, or not sufficiently or improperly searched for the record pursuant to Administrative Rule R35-2-2(2). The State Records Committee upheld the governmental entity's claim of

extraordinary circumstances at a hearing on September 8, 2016, *Redd v. Attorney General's Office*, Case No. 16-37. In this appeal, the governmental entity has not denied records in whole or part.

The executive secretary sought the Committee's decision to grant or decline a hearing in *Alex Stuckey, Salt Lake Tribune vs. North Park Police Department*. Ms. Stuckey is appealing an access denial to police records. The Committee declined to hear the appeal due to it being untimely filed to the executive secretary under Utah Code § 63G-2-403(1)(a).

**Motion:** Mr. Misner made a motion to decline the hearing, seconded by Ms. Mansell. The motion passed, 6-0. Ms. Smith-Mansfield, Mr. Misner, Mr. Haraldsen, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea.

The executive secretary mentioned that ten potential hearings are scheduled for November and two for December. (See the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts October 13, 2016.pdf](#)).

#### **8. Report on Cases in District Court:**

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

In *Salt Lake Tribune vs. Utah State Records Committee*: This case is moving forward and copies of the briefs are posted for the Committee to review. The Committee's position is a matter of law that the Brigham Young University police department is not considered a public entity that is subject to GRAMA. The court will make that final determination. If the court determines that there is any question of fact then the Committee steps back and Brigham Young University argues its case. (See the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts October 13, 2016.pdf](#)).

#### **9. *Alex Stuckey, Salt Lake Tribune vs. Cedar City Police Department***

The executive secretary called and telephonically connected Chief Darin Adams, representing Cedar City Police Department. Chief Adams stated that he was five minutes from arrival. The Chair made the decision to move forward with the hearing.

The Chair introduced the parties for the next hearing: Ms. Alex Stuckey, Petitioner, and Chief Darin Adams, representing the Cedar City Police Department. The Chair explained procedures and asked the Committee, Petitioner, and Respondent to introduce themselves for the record.

#### **Petitioner's Opening Statement**

Ms. Stuckey stated the *Tribune* requested the initial contact report after the alleged victim contacted the paper and told her story about the experience she went through going through the Southern Utah University Title IX process of reporting a rape. The victim stated that she had tried to contact the police after the initial report was made in 2015, but eventually gave up when the department was not responsive. The *Tribune* requested the police report from the University's police department. The police department denied the request and classified the record under Utah Code § 63G-2-302(2)(d). The *Tribune's* position is that the police department's argument for not releasing the name is invalid, that there was no investigation accomplished, and the suspect's name is known.

Chief Adams arrived to the meeting.

#### **Respondent's Opening Statement**

Chief Adams provided the background history about the initial handling of the case by his predecessor, Chief Robert Allison, who recently retired. It was not until shortly after the previous chief of police's retirement that the report was discovered. The victim was contacted and she declined to proceed with an official investigation. The suspect's name was not released to the *Tribune* because there had been no investigation and there is no active investigation at this time.

**Testimony Petitioner**

Ms. Stuckey explained that the police department redacted the suspect's name and stated that it was an unwarranted invasion of personal privacy because no charges or investigation were ever initiated. She continued that other police departments usually redact only the victim's name not the name of the alleged suspect. The police department's argument is not valid. Lastly, Ms. Stuckey read a letter to the Committee written by the victim.

**Testimony Respondent**

Chief Adams stated that the only denial that occurred was the redaction of the suspect's name on the initial contact report, of which Ms. Stuckey has a copy. The officer who took the report asked the victim if she wanted to pursue a criminal investigation, to which the victim responded that she was not sure. At the conclusion of the encounter the officer noted in the report that the victim did not want to pursue charges. In light of the circumstances, releasing the suspect's name would be a clear invasion of personal privacy.

The Chair stated that the department is relying on a clearly unwarranted invasion of personal privacy under Utah Code § 63G-2-302(2)(d) for redacting the suspect's name. In the governmental entity's statement of facts, which is a public document, it states that the only denial that occurred was the redaction of the suspect's name, who is identified by name in the report. She continued that the governmental entity has already released the information as public, and how can that be a further invasion of personal privacy if the name is tied to the report.

Chief Adams responded that Ms. Stuckey already had the name but that she wanted it included in the report. The Chair interjected that the name is stated in the report and the only redaction is identified and directly tied to the report in the governmental entity's statement of facts. Chief Adams responded that the *Tribune* had the name and redacting from the report is based on principle more than anything else.

**Petitioner's Closing Remarks**

Ms. Stuckey closed with the remark that redacting the suspect's name on the report is not valid. The victim never had an opportunity to press charges because the police department did not follow up on the allegations that a crime was committed, because the report had been sent to the records office.

**Respondents Closing Remarks**

Chief Adams stated that law enforcement attempts to safeguard both parties in cases. The suspect's name was not released because there was no official investigation and currently there is no active investigation.

**Deliberation:** The Committee discussed that it is a public record. There is no investigation and the name has already been tied to the report through the governmental entity's statement-of-facts public document.

**Motion:** Mr. Lambourne made a motion that the record is public under Utah Code § 63G-2-301(3)(g) and that releasing it is not an unwarranted invasion of personal privacy under Utah Code § 63G-2-302(2)(d). Mr. Misner seconded the motion. The motion passed, 5-1. Ms. Smith-Mansfield, Mr. Misner, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea. Mr. Haraldsen voted nay.

The Chair expressed the reason why the record is ruled public. If the governmental entity claims clearly unwarranted invasion of personal privacy as its reason for nondisclosure it cannot in another document counter that by releasing the name because that would be a clearly unwarranted invasion of personal privacy. If the governmental entity claims that classification then the suspect's name certainly should not have been tied together in a public record.

**5-Minute Break**

**10. Alex Stuckey, Salt Lake Tribune vs. Utah State University**

The Chair introduced the parties for the next hearing: Ms. Alex Stuckey, Petitioner, and Ms. Mica McKinney, representing Utah State University. The Chair explained procedures and asked the Petitioner and Respondent to introduce themselves for the record.

#### **Petitioner's Opening Statement**

Ms. Stuckey explained that the *Tribune* began reporting on the Torrey Green story when it received police reports naming him as a suspect in separate sexual assault allegations. The *Tribune* requested emails and all correspondence mentioning Torrey Green from 2009 to present between one and more of the staff from the University. The *Tribune* was provided reports from the police department but not from the University. The emails are the only way to know whether the University discussed the allegations on campus and, if it did, then those communications are in the public interest and should be released.

#### **Respondent's Opening Statement**

Ms. McKinney stated that the issue before the Committee is narrow. While the *Tribune* discussed allegations related to sexual assault, the records that are responsive do not include any information regarding the allegations. The records contain academic progress and injury reports. She asserted the records fall under the Family Educational Rights and Privacy Act (FERPA). Therefore, the records cannot be released under GRAMA without the student's permission.

#### **Testimony Petitioner**

Ms. Stuckey stated that the *Tribune* is not interested in student records it is seeking only correspondence in which the various allegations were discussed. Under Title IX of the Civil Rights Act of 1964, the school has an obligation to investigate and resolve sexual assault complaints. It is known that three of the students went to the university, which means that it is possible that correspondence about the assaults does exist. Nevertheless, there is a FERPA exemption for disclosing disciplinary results for all crimes of violence, Ms. Stuckey explained, which includes sexual

assault. This exception allows campus communities to make informed decisions about safety and accountability (FERPA 34 CFR 99.31(14)(i)). Lastly, Ms. Stuckey stated that the emails are the only window into understanding what actions were taken by the University and it is in the public interest to release the records.

#### **Testimony Respondent**

Ms. McKinney provided background and outlined the University's position on the records in terms of GRAMA and FERPA. The records being sought are nonpublic records under Utah Code § 63G-2-201. In fact, the federal government restricts the ability for the University to release the records. The federal statute is enforced and protects any document that relates directly to the student and is maintained by the institution. She summarized *Bryner v. Canyon School District* (2015) UT. App. 131. Case No. 20130566-CA as evidence to support her case. The records clearly are maintained by the school and therefore the school is unable to release the records because they fall under FERPA.

Ms. McKinney discussed the public interest aspect and commented that federal and state law restricts access. The records community does not have the authority or the ability to override that based on public interest. There is a legal obligation grounded in FERPA and an ethical obligation to make sure the processes and the confidentiality is maintained.

Ms. Richardson added that under the Cleary Act in § 485(f) of the HEA (20 U.S.C. § 1092(f)), all postsecondary institutions participating in the student financial aid programs under Title IV of the HEA must make a variety of disclosures related to campus safety to students, families, and employees. She provided the Committee and Respondent the citation for the document she read: (See <http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf>)

Ms. McKinney counter argued that the records could not be released under FERPA. Mr. Morris Haggerty, Assistant Attorney General with Utah State University, stated that FERPA applies to all schools and the schools cannot release education records directly related and maintained by the school. On the broader level, the federally mandated statute directly prohibits records that pertain to students to be released. There is a list of exceptions, disciplinary exceptions, although they are narrowly drawn.

The Chair added that the definition of educational records includes more than just the academic; records it includes all parts of information about the student.

**Petitioner's Closing Remarks**

Ms. Stuckey concluded that the Tribune does not want student records; it is seeking emails that discuss the sexual assault allegations. The issue is about the University's federally mandated responsibility with the Title IX complaints that should have been filed and investigated. The disclosure of the emails will be the only way for the *Tribune* to determine if the federally mandated rules were followed.

**Respondent's Closing Remarks**

Ms. McKinney concluded that there is a public interest in the records; however, the responsive records do not relate to the sexual assault allegations. The records relate to the student's academic career at Utah State University, fall under FERPA, and, therefore, are not releasable.

**Deliberation:** The Committee discussed at length about FERPA and GRAMA. Mr. Tonks explained the *Bryner v. Canyon School District* court ruling and how it is applicable to the case before the Committee. The Chair pointed out that Utah Code § 63G-2-107(2) is a recent addition to the statute as of 2016, which addresses FERPA.

**Motion:** Mr. Lambourne made a motion that the records are subject to FERPA under Utah Code § 63G-2-107(2), and, therefore, not

subject to disclosure under Utah Code § 63G-2-201(3)(b), and Utah Code § 63G-2-201(6)(a). Mr. Misner seconded the motion. The motion passed, 4-2. Ms. Smith-Mansfield, Mr. Misner, Mr. Lambourne, and Ms. Mansell voted yea. Mr. Haraldsen and Ms. Richardson voted nay.

**11. Tracy Taylor vs. Wasatch County School District**

The Chair introduced the parties for the next hearing: Ms. Cynthia Love, representing Ms. Tracy Taylor, the Petitioner, and Ms. Joan Andrews, representing Wasatch County School District. The Chair explained procedures and asked the Petitioner and Respondent to introduce themselves for the record.

**Petitioner's Opening Statement**

Ms. Taylor stated that the Wasatch County School ("District") Superintendent was promoted in June to the Utah State School Board. The District began the hiring process of replacing the previous superintendent in early May. At that time, the District had a meeting with the Utah School Boards Association (USBA). By June the District had chosen a new superintendent. The process of hiring the new superintendent had not been disclosed to the public, which is contrary to the procedures of other school boards which release that information to the public.

Ms. Love continued that the District conducted a closed process in hiring the new superintendent which is a problem because the superintendent is of public interest to parents and taxpayers. The District not only engaged in a closed process--it formed a secret citizen committee and that none of the names of the members have been released. The committee was formed to vet the applicants and the entire process was accomplished in secrecy. Ms. Love stated that the records her client seeks are expressly public, albeit the District has restricted access and classified the records as private. Even if the records are private, the District had an obligation to invoke the weighing provision.



There is a public interest in the selection process and the records should be ordered released.

#### **Respondent's Opening Statement**

Ms. Andrews stated that the District understands the argument that the public would have liked to witness a more open process; however, nothing in GRAMA requires such. The District made a decision based on the express language of GRAMA and its own GRAMA policy, and looked at the interests that were involved in regards to selecting the new superintendent. There was no legitimate basis on which to supersede the candidate's privacy interest for the sake of public disclosure. The decision maker was the USBA and only the USBA can hire the superintendent. The District made the decision that applicants have a right to privacy ensures and that in the future quality applicants will apply and not be inhibited.

#### **Testimony Petitioner**

Ms. Love argued that the statutory provisions the District has relied on are in error. She summarized Utah Code § 63G-2-301(1)(g) and argued that the private information on the applications can be redacted. The Petitioner is more concerned about the qualifications such as education and job history of the applicants. The other GRAMA provisions are similarly misapplied such as Utah Code §§ 63G-2-302(2)(a), -301(2)(b), and -301(4). These sections need to be read together not separately, as the Respondent has done to argue nondisclosure of the records. Lastly, the District is relying on Subsection 63G-2-302(2)(d), stating that it is a clearly unwarranted invasion of personal privacy to release the applications. Ms. Love argued that the information that is in an application is not the type of information that would be personally embarrassing. Someone who is applying for a high-level position needs to be aware that there will be public scrutiny.

Ms. Love continued that even if the Respondent is correct about the statutory argument, that the documents are private under GRAMA, the District was obligated to

go through the balancing test and determine whether, in this particular instance, the documents should nevertheless be released. The public has the right to be part of the process to elect public officials.

#### **Testimony Respondent**

Ms. Andrews stated that there are two distinct issues. The issue of the applicants for the superintendent position and the citizen committee members.

Ms. Andrews explained that the selection of the new superintendent was an open process. There was a school board meeting on May 5, 2016, that Ms. Taylor and others from the public attended. The District extensively discussed the process and how the search for hiring a new superintendent would be handled. She further explained that when Ms. Taylor appealed to the chief administrative officer the District produced additional documentation regarding the process in terms of the Utah School Boards Association (USBA) manual. The manual contains information about the applications and the hiring timeline, which is public.

The GRAMA request, Ms. Andrews explained, is specifically for the applications that were submitted by the candidates. She continued that it is a very well established principle of statutory construction that one does not try to harmonize the statute and give intent. When interpreting statutory language the words that were omitted are presumed to be purposeful omissions. This comes into play when looking at the relationship of Utah Code § 63G-2-301(2)(b) and Utah Code § 63G-2-302(2)(a). Ms. Andrews read of the statute and compared each Subsection. She pointed out that there is no mention of applicant in Subsection 63G-2-301(2)(b); however, when one reads Subsection 63G-2-302(2)(a) the language includes "applicant."

The Chair challenged the notion of purposeful omission. By pointing out that at the end of the public records section in GRAMA it ends with "this section is not exhaustive and should not be used to limit access to records"

pursuant to Utah Code § 63G-2-301(4). In the Chair's opinion, the governmental entity cannot argue that because something is not included it does not mean that it is not a public record. The governmental entity cannot deny access if it is statutorily expressed in those classifications. Ms. Andrews begged to differ because if the legislature really felt that job applications were presumptively public why would they not be included in Subsection 63G-2-301(2)(b).

The following Committee decisions were discussed as being relevant to the current case in front of the Committee: *Utah Headliners Chapter, Society of Professional Journalists vs. Utah State Board of Regents*, Case No. 97-02; *Paul Amman vs. Utah Attorney General's Office*, Case No. 15-28; and, lastly, *Cody Black v. Lehi City Police Department*, Case No. 16-15.

Ms. Andrews explained how the citizen committee was formed. The five members of the Wasatch County School District Board each recommended five people that would make good candidates for the citizen committee. The Utah School Boards Association (USBA) sent out twenty-five invitations and nineteen volunteers accepted to be on the committee. The citizen committee reviewed applications and provided recommendations to the USBA. The USBA made the final decision as to who would be interviewed and hired.

Ms. Andrews argued that if the names of the citizen committee were to be public, fewer citizens would be willing to accept this civic duty because of scrutiny from the public. Releasing the names of the citizen committee would be a clearly unwarranted invasion of personal privacy under Utah Code § 63G-2-302(2)(d).

The Chair asked if there are records that exist with the names of the citizen committee members. Ms. Andrews stated there is no single list; however, Mr. Haggerty mentioned that there is a sign-in list as the members

came in to perform the application review and provide recommendations. The Utah School Boards Association handled the applications and the process of contacting the selected citizen committee candidates, which is a separate governmental entity from the Wasatch County School District Board of Education.

#### **Petitioner's Closing Remarks**

The Chair asked the Petitioner if she had a list of other school boards which released the information she is seeking from the Wasatch County School District. Ms. Love listed the Utah State Board of Education and the Utah College of Applied Technology as two agencies that announced their four finalists and the names of the search committee members involved in the hiring process. Ms. Love concluded that high-level positions are subject to public scrutiny and the privacy weighing interest and the balancing test may be different in those positions than for regular applicants.

#### **Respondents Closing Remarks**

Ms. Andrews stated that two of the District's finalists wished to keep their applications private from their current employer unless they actually were selected to be hired. At which point they would be happy to engage in the final reference check process. It is not just a nebulous releasing the applications, it is an actual concern of the applicants. The Committee should weigh the privacy the applicants sought when they applied for the position. Reasonable people can disagree with the amount of openness the school board might want to have in respect to the hiring process. There is ample reason that the applications of those applicants ought not to be disclosed. The Respondent does not agree that the entire pool of applicants should be disclosed due to privacy. Releasing the finalist would not be outside the realm since there is proof that other districts have done so but two applicants specifically did not want to be disclosed and would be very concerned about the release.

**Deliberation:** The Chair stated that there are a number of issues before the Committee. The responsive records brought by the Respondent were voluminous. There are four requests for records and to use the weighing provision. If the Committee used the weighing provision members must review the records. The Chair stated that if the governmental entity properly classified the records as private under Utah Code § 63G-2-302(2)(a), she would consider using the weighing provision to see if they should be made public because of the high profile position.

Ms. Mansell offered the opinion that this case is a public transparency fail. She reflected upon her own agency and how the Mayor created the homeless site selection committees, which are making huge decisions that affect all of the residences and none of the committee names are private nor do the members expect them to be private. There should not be an expectation as to privacy. Ms. Mansell asked whether the citizen committee position is considered at-risk as outlined under Utah Code § 63G-2-303. The Chair stated no, they are not.

The Committee and legal counsel discussed at length whether the legislature purposefully or mistakenly omitted "applicant for employment" from Utah Code § 63G-2-301(2)(b), as it is listed under Utah Code § 63G-2-302(2)(a) being private if properly classified by a governmental entity. The Committee addressed each category individually and motioned accordingly.

1.) Request for all applications including the top four candidates:

**Motion:** Mr. Lambourne made a motion that all applications are public pursuant to Utah Code § 63G-2-301(2)(b), except to the extent they may contain private information pursuant to Utah Code § 63G-302(1)(g), to include the letters of recommendation under Utah Code § 63G-302(2)(a). Ms. Richardson seconded. The motion passed, 5-1. Mr. Misner, Mr. Lambourne, Ms. Mansell, Mr. Haraldsen, and

Ms. Richardson voted yea. Ms. Smith-Mansfield voted nay.

The Chair voted against the motion because she believed the records should have been released under the weighing provision.

2.) Request for the citizen committee review names:

**Motion:** Ms. Mansell made a motion that the nineteen citizen committee review names are public. Mr. Lambourne seconded the motion. The motion passed, 6-0. Mr. Misner, Mr. Lambourne, Ms. Mansell, Mr. Haraldsen, Ms. Richardson, and Ms. Smith-Mansfield voted yea.

3.) Request for the hiring process:

**Motion:** Mr. Misner made a motion that the governmental entity appropriately responded to the request. Mr. Lambourne seconded the motion. The motion passed, 6-0. Mr. Misner, Mr. Lambourne, Ms. Mansell, Mr. Haraldsen, Ms. Richardson, and Ms. Smith-Mansfield voted yea.

4.) Ms. Andrew clarified that the Utah School Boards Association (USBA) handled the search process. The citizen committee names were selected by the Wasatch County School District Board members and were submitted to the USBA which managed the process. The request was for the "process followed for selection- job description of selection committee."

**Motion:** Mr. Misner made a motion that the governmental entity does not maintain the record and is not required to create a record. Mr. Haraldsen seconded the motion. The motion passed, 6-0. Mr. Misner, Mr. Lambourne, Ms. Mansell, Mr. Haraldsen, Ms. Richardson, and Ms. Smith-Mansfield voted yea.

5.) Request for who was interviewed, second interview [sic] who visited the school district.

**Motion:** Mr. Misner made a motion to the extent that if the governmental entity has responsive records those records are public and should be disclosed, and, if they do not exist, the governmental entity is not required

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to create a record. Ms. Richardson seconded the motion. The motion failed to pass, 2-4. Mr. Misner and Ms. Richardson voted yea. Mr. Lambourne, Ms. Mansell, Mr. Haraldsen, and Ms. Smith-Mansfield voted nay.

The Committee discussed the motion as to who was interviewed but would not include the rankings or evaluations. The motion failed, nonetheless the members decided to revisit the motion.

**Motion:** Ms. Mansell made a motion to the extent that if the governmental entity has responsive records those records are public and should be disclosed, and, if they do not exist, the governmental entity is not required to create a record. Mr. Lambourne seconded the motion. The motion passed, 4-2. Mr. Misner, Ms. Richardson, Mr. Lambourne, and Ms. Mansell voted yea. Mr. Haraldsen and Ms. Smith-Mansfield voted nay.

**12. Other Business:**

The Chair ordered the executive secretary to schedule the two continuances to be first on the agenda for November 10, 2016, and to reschedule the last two appeals in November to the December agenda. There are ten


appeals currently scheduled for November, not including the two continuances, which is too many for the Committee to hear in one day.

-November 10, 2016, is the date of the next scheduled meeting.

The executive secretary queried whether a quorum will be present for the next meeting; Mr. Haraldsen will be absent from the November meeting.

The October 13, 2016, State Records Committee meeting adjourned at 1:35 p.m.

**This is a true and correct copy of the October 13, 2016, SRC meeting minutes, which were approved on November 10, 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