

**State Records Committee Meeting**

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

Date: November 10, 2016

Time: 9:00 a.m. -1:15 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

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

James Duran, Petitioner

Paul Wach, Petitioner

Richard Wilson, Roger Heller, and Richard Miller, SIPRUT Petitioners

**Others Present:**

Stuart Williams, Clearfield City Attorney

Robert Powell, Utah Department of Corrections

Nancy Dean, Clearfield Recorder

Stuart Williams, Clearfield City Attorney

Gina Proctor, Utah Department of Corrections

Jeralyn Zimmerman, Utah Department of Corrections

Matthew Anderson, Utah Department of Corrections

Laura Thompson, Assistant Attorney General

Gale Francis, Assistant Attorney General

Dolores Furniss, Utah Tax Commission

Rosemary Cundiff, Utah State Archives

Rebekkah Shaw, Utah State Archives

Kendra Yates, Utah State Archives

Rae Gifford, Utah State Archives

**Agenda:**

- Four Hearings Scheduled
- Retention Schedules, action item
- Approval of October 13, 2016, Minutes
- Report on Appeals Received
- Report on Cases in District Court
- Other Business
  - Next meeting scheduled for December 8, 2016, 9 a.m. to 4 p.m.

**1. Call to Order:**

The Chair, Ms. Patricia Smith-Mansfield, called the meeting to order at 9:05 a.m. Mr. David Fleming did not attend the first hearing.

Committee can consider is weighing public interest. The *Bryner v. Clearfield City* litigation has not been resolved, and the weighing provision cannot be a consideration.

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

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

**5-Minute Break**

Mr. Fleming arrived to the meeting.

The Committee decided to address other business while the executive secretary arranged with the federal prison to have Mr. Duran connected telephonically to the Committee.

**Motion:** Mr. Misner made a motion to go *in camera*, seconded by Mr. Lambourne. The motion passed, 5-0. Mr. Misner, Ms. Smith-Mansfield, Ms. Mansell, Ms. Richardson, and Mr. Lambourne voted yea.

**3. Approval of October 13, 2016, Minutes:**

A motion was made by Mr. Lambourne to approve the October 13, 2016, minutes. Ms. Mansell seconded the motion. The motion passed 5-0. (See the attached documents on the Utah Public Notice Website, [SRC Minutes October 13, 2016.pdf](#)). Ms. Smith-Mansfield, Mr. Misner, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea. Mr. Fleming abstained.

**Motion:** Mr. Misner made a motion to go back in session, seconded by Mr. Lambourne. The motion passed, 5-0. Mr. Misner, Ms. Smith-Mansfield, Ms. Mansell, Ms. Richardson, and Mr. Lambourne voted yea.

**4. Report on October and November Appeals:**

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

**Deliberation:** The Chair discussed the attorney-client privilege classification and common interest doctrine.

**Motion:** Ms. Richardson made a motion that the records are properly classified. Mr. Lambourne seconded the motion. The motion passed, 5-0. Ms. Smith-Mansfield, Mr. Misner, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea.

In *Roger Bryner vs. City of Clinton* and *Roger Bryner vs. City of Syracuse*: On October 13, 2016, Mr. Bryner appealed both City's decisions that records do not exist. The Committee reviewed the appeals and determined that the Petitioner did not provide sufficient evidence that a record was maintained by the governmental entities or that the governmental entities concealed or insufficiently or improperly searched for the

The Committee addressed the waiver of confidentiality. The Committee is not the respondent; therefore, the only waiver that the

record pursuant to Administrative Rule R35-2-2(2).

*In Mark Kimball vs. Utah Department of Corrections (UDC):* On October 18, 2016, Mr. Kimball appealed the access denial for a list of UDC employed staff. The Committee reviewed the appeal and determined that the Petitioner did not provide sufficient evidence that the record was maintained by the governmental entity or that the governmental entity has concealed or insufficiently or improperly searched for the record pursuant to Administrative Rule R35-2-2(2).

The executive secretary mentioned that nine potential hearings are scheduled for December. (See the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts November 10, 2016.pdf](#)).

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

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

*In Roger Bryner v. Utah Attorney General's Office (AGO):* A case was filed against the AGO, State of Utah, and Mr. Tonks. The GRAMA request was made to the AGO for email communications between Mr. Tonks and the Clearfield City Attorney. This case is the same records request that Mr. Bryner made to Clearfield City. (See *Bryner v. Clearfield City*, Committee decision 16-44).

*In Roger Bryner v. City of Clearfield:* The Second District Court Judge has scheduled a Show Cause hearing for November 18, 2016, regarding the court's motion to find Mr. Bryner a vexatious litigant. (See the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts November 10, 2016.pdf](#)).

#### **10-Minute Break**

#### **6. Retention Schedules:**

##### **Utah State Agencies Retention Schedule:**

Ms. Rae Gifford presented two retention schedules.

Department of Human Services. Division of Aging and Adult Services. 17234 Annual program monitoring records. Retain 5 years.

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

Department of Natural Resources. Division of Forestry, Fire, and State Lands. 25745 Operator notifications of intent to conduct forest practices. 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. Lambourne, Mr. Fleming, Ms. Richardson, and Ms. Mansell voted yea.

The Chair went on to other business while waiting for Mr. Duran to be telephonically connected to the Committee.

#### **7. Other Business:**

-December 8, 2016, is the date of the next scheduled meeting. The Chair queried whether a quorum will be present for the next meeting; all members intend to be present.

-The executive secretary announced the 2017 Committee schedule will be posted on the Google Docs for the members to review.

-The Chair discussed potentially new legislation affecting GRAMA in 2017.

#### **7. James J. Duran vs. Department of Human Services, Division of Child and Family Services, Continuance**

The Chair introduced the parties for the next hearing: Mr. James Duran, Petitioner, and Ms. Laura Thompson, Assistant Attorney General for Utah Department of Human Services, Juvenile Justice Services. The Chair explained procedures and asked Committee, the Petitioner, and Respondent to introduce themselves for the record.

The Chair announced that there are two parts to the hearing. The first being the records denial and second that the appeal was untimely filed to the chief administrative officer. The first issue addressed is the untimeliness of the appeal.

**Respondent:** Ms. Thompson addressed and provided the Committee the reason for disputing the untimeliness of Mr. Duran's appeal. The denial letter was stamped January 27, 2016, and it clearly stated Mr. Duran had 30 days to appeal the decision to the chief administrative officer. Mr. Duran indicated that he received that letter on February 20, 2016, and subsequently, appealed two months later to the chief administrative officer on April 20, 2016. Mr. Duran did not meet the deadline that clearly was written in his denial letter. He claims excusable neglect; however, there is no provision in GRAMA that allows the Committee to facilitate the request. This appeal is clearly outside the provisions of the law.

**Petitioner:** Mr. Duran explained why he missed the 30-day window to appeal the decision to the chief administrative officer and used the excusable neglect policy as a defense. He told the Committee that there was a prison transfer and all his belongings, including legal material, were in storage and he did not have means to retrieve the documents needed to file the appeal. After two months, the caseworker provided him the material needed to make the appeal. Additionally, he argued, the denial letter was not received until February 20, 2016.

**Deliberation:** The Committee discussed that the excusable neglect policy is in the federal rules and applies to the courts not the Utah State Records Committee. Based on the timeline and information provided by the Petitioner, the Committee is convinced there was enough time to file an appeal to the chief administrative officer. The Chair recommended the Petitioner resubmit a GRAMA request to the governmental entity and start the process over.

**Motion:** Mr. Fleming made a motion to uphold that the appeal is denied for untimeliness by the governmental entity. Mr. Lambourne seconded the motion. The motion passed, 6-0. Ms. Smith-Mansfield, Mr. Misner, Mr. Lambourne, Mr. Fleming, Ms. Richardson, and Ms. Mansell voted yea.

#### **8. *Paul Wach vs. Utah Department of Corrections***

The Chair introduced the parties for the next hearing: Mr. Paul Wach, Petitioner, and Mr. Matthew Anderson, Assistant Attorney General for the Utah Department of Corrections. The Chair explained procedures and asked the Committee, Petitioner, and Respondent to introduce themselves for the record.

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

Mr. Wach stated that use of the "Cautions" to lengthen his incarceration is unfair, that he has the right to know who was responsible for the accusations, and who entered the information in the inmate database.

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

Mr. Anderson explained that the records that Mr. Wach is requesting are called cautions. The Department has an offender management database, which assists officers in the day-to-day housing management of inmates. In addition to housing management, the cautions list contains certain safety and health issues that are pertinent to the overall safety of the institution. It is a quick management tool that Corrections has classified protected under Utah Code § 63G-2-305(11) and (13). Corrections asked the Committee to uphold its decision to not disclose the record to the inmate.

##### **Testimony Petitioner**

Mr. Wach disputed Corrections' argument that the cautions record is used for the safety of the institution and management of inmates. He believed that one of the cautions contains an inflammatory statement about some accusations and defamation, and it has been used to lengthen his incarceration. Mr. Wach does not believe that the statement has

anything to do with how Corrections manages safety and housing. He wants to know who is responsible for the accusations, and who is responsible for the database entries. He explained that his current six-to-12 month matrix for a parole violation has been lengthened to 13 years before a re-hearing based on the accusations in the cautions.

#### **Testimony Respondent**

Deputy Warden Robert Powell was sworn in. He briefly described how the cautions are used to evaluate and manage individual risks that an inmate possess to other inmates, self, or the institution as a whole. It is an immediate snapshot of a greater body of the criminal information. The entries are restricted to lieutenants and above or an equal rank at the Adult Probation and Parole. Furthermore, cautions should not be available to the public, staff, and the public. There is information that would present a safety issue to the institution and to individual members of society if they were to be released.

Mr. Fleming asked whether the information on the cautions is included in the file provided to the Board. Mr. Anderson explained that a copy of the file presented to the Board is also provided to the inmate. This is called the "blue packet." The cautions are not provided to the Board, however the information in the cautions is gleaned from the inmate's criminal record which the Board has access to and uses to determine the inmates case.

Mr. Wach did not have questions for the witness.

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

Mr. Wach stated that he is supposed to be provided a copy of all the material presented to the Board prior to the hearing. He feels that not all the information that the Board received was provided to him in the "blue packet."

#### **Respondents Closing Remarks**

Mr. Anderson expressed that Corrections staff may have been speculating why the Board ruled to increase Mr. Wach's prison sentence,

but the UDC staff has no access to the Board's internal decisions. Mr. Wach's criminal history is well documented in the media and he is consistently in and out of prison for parole violations. The UDC respectfully requested that the Committee uphold UDC's classification of the cautions entries at issue in this matter as protected.

**Deliberation:** The Committee decided to review the record.

**Motion:** Mr. Fleming made a motion to go *in camera*, seconded by Ms. Mansell. The motion passed, 5-1. Mr. Misner, Ms. Smith-Mansfield, Ms. Mansell, Ms. Richardson, and Mr. Fleming voted yea. Mr. Lambourne voted nay.

**Motion:** Mr. Misner made a motion to go back in session, seconded by Ms. Richardson. The motion passed, 5-0. Mr. Misner, Ms. Smith-Mansfield, Ms. Mansell, Ms. Richardson, and Mr. Lambourne voted yea. Mr. Fleming abstained.

**Motion:** Mr. Fleming made a motion that the records are properly classified and uphold the denial under Utah Code § 63G-2-305(11) and (13) and the motion was seconded by Ms. Richardson. The motion passed, 5-1. Mr. Fleming, Mr. Misner, Ms. Richardson, Mr. Lambourne, and Ms. Mansell voted yea. Ms. Smith-Mansfield voted nay.

#### **5-Minutes Break**

#### **9. Richard Wilson, SIPRUT vs. Utah Tax Commission**

The Chair introduced the parties for the next hearing: Mr. Richard Wilson, Petitioner, and Mr. Gale Francis, Assistant Attorney General for the Utah Tax Commission. The Chair explained procedures and asked Committee, the Petitioner, and Respondent to introduce themselves for the record.

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

Mr. Richard Wilson explained that the law firm represents clients in a class action lawsuit against Intuit and TurboTax. It is

alleged that Intuit lacked internet security that allowed fraudulent federal and state tax returns to be filed. During the law firm's investigation, it was learned that the Utah State Tax Commission had made some public statements regarding the fraudulent tax returns. Mr. Wilson is seeking information through GRAMA from the Utah Tax Commission that sheds light on the scheme of fraud that forms the basis of the Commission's complaint in the California Federal Court. Mr. Wilson explained that he is not seeking individual tax returns only information about the fraudulent returns.

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

Mr. Francis explained that no responsive records exist and through the testimony of Ms. Dolores Furniss, Disclosure Officer, it will be clearer as to what was used to respond to the fraudulent tax filing issues. There is no written or created records in the possession of the Tax Commission. Concerning communications among or between the Tax Commission, IRS, Santa Barbara Tax Products Group LLC, Intuit, or the TurboTax subsidiary of Intuit, all communications were performed telephonically or in person. The Utah State Tax Commission has met its obligations under GRAMA.

#### **Testimony Petitioner**

Mr. Wilson addressed the Committee outlining the nine specific documents requested. He argued that Ms. Furniss did not respond appropriately according to Utah Code § 63G-2-205(2)(a). She had stated that there was no written communications and that tax returns were private and could only be released through shared records agreement. In the denial letter she failed to provide a description of the denied documents under Utah Code § 63G-2-205(2)(b). The only provision noted in the denial letter was that the documents were private under Utah Code § 63G-2-302. In the chief administrative officer's response the classification included not only private but it also refer to Title 59-1-403, however, those provisions apply to tax returns. Mr. Wilson argued that in the

GRAMA request it was clearly stated he was not seeking tax returns.

In further testimony, Mr. Wilson outlined the central reason for the appeal in that the Tax Commission did not respond to the GRAMA request according to the provisions under Utah Code § 63G-2-205(2)(a) and (b). Mr. Wilson concluded that the public interest outweighs favoring nondisclosure of the records.

#### **Testimony Respondent**

Ms. Furniss was sworn in. She provided a detailed outline of the events and actions the office took in January 2015 in response to the suspected fraudulent income tax return. It began when a taxpayer received a quiz letter from the Tax Commission in the mail. The taxpayer was concerned because he had not yet filed an income tax return. Through further investigation, it became clear that the fraudulent return had been filed electronically. A few days later, another taxpayer called and stated that the taxpayer's TurboTax account had been hacked and by the end of the day, it was discovered that five more tax returns were potentially fraudulent. All the returns had the same characteristics in that the annual income was changed and the monies were to be sent to a prepaid debit card. TurboTax had submitted all the returns and it appeared at that time its Cloud server had been compromised. However, that was never confirmed during the extent of the investigation and speaking with Intuit and TurboTax.

Immediate action was taken by the Governor's Office to suspend all tax refunds until the fraud was isolated. Ms. Furniss also explained the process of working with FAST Enterprises (located in Denver), the programmers of the Utah Tax Commission's internal computer system known as "GENTAX," to find all the tax returns with specific characteristics that had been identified as having been manipulated. This issue required a quick response limiting all communications to the IRS, Federation of Tax Administrators and Suspicious Filer Group,

Tax Commission, Intuit, and TurboTax by phone, conference call, or in person. Information that was submitted to FAST Enterprises to analyze the returns was compiled from the tax returns, which are classified pursuant to the following provisions: Utah Code § 63G-2-302(2)(c)(d)(e), Utah Code § 63G-2-305(10) and (15), Utah Code § 59-1-403, and Utah Administrative Code R861-112-3.

Mr. Francis asked Ms. Furniss whether an exhaustive search was accomplished for any responsive records. Ms. Furniss restated that no records were created during the event and no written investigation document was created.

Mr. Heller asked the witness whether her files and emails were searched for responsive records and clarified that all communications had been accomplished telephonically or in person. He also asked what information was compiled for FAST Enterprises. Ms. Furniss explained that the data compilation included names, Social Security numbers, home addresses, and bank account information. Mr. Heller asked whether the data fields could be redacted. Ms. Furniss stated no, the fields on the records could not be redacted.

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

Mr. Wilson asked the Committee whether it could direct the Utah State Tax Commission to produce the data compilation and partially produce the records with the private information redacted. Furthermore, he challenged the classification of private in the interest favoring access, than the interest favoring the denial of access. In his opinion, the consumer protection outweighs the potential minimal aspects for marking the records private and not disclosing the records.

#### **Respondents Closing Remarks**

Mr. Francis explained that to redact the information would require the Tax Commission to pay a programmer to isolate the fields that Mr. Wilson is requesting and to

redact certain non-disclosable information. The law does not require a governmental entity to create a record and doing so would be burdensome. The Tax Commission acted appropriately within the small window of time to identify the problem and acted quickly to resolve the fraudulent tax returns. The testimony is evidence that no records exist and the governmental entity should not have to create records.

Mr. Lambourne asked whether the data field information sent to FAST Enterprises is the same that is on a tax return form. Ms. Furniss answered yes, it is the same information, and that it mirrors the tax form. The Committee determined that if the Petitioner got a tax return, he would have the fields on the record that he is seeking.

#### **Deliberation:**

**Motion:** Mr. Fleming made a motion that all records that could exist in the tax database are properly classified under Utah Code § 63G-2-302(2)(c), (d), and (e) and Utah Code § 63G-2-305(15), and that any other communications-type records related to the specific event do not exist. Mr. Misner seconded the motion. The motion passed, 6-0. Ms. Smith-Mansfield, Mr. Misner, Mr. Fleming, Mr. Lambourne, Ms. Richardson, and Ms. Mansell voted yea.

12. The November 10, 2016, State Records Committee meeting adjourned at 1:35 p.m.

**This is a true and correct copy of the November 10, 2016, SRC meeting minutes, which were approved on December 8, 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>.**