SRC APPROVED
Date Feb 11, 2010
SLM

State Records Committee Meeting

Division of Archives, Courtyard Meeting Room
January 14, 2010
Salt Lake City, Utah

Members Present:	Chris Hansen, History Designee Lex Hemphill, Media Representative Gary Ott, Elected Official Representative Patricia Smith-Mansfield, Governor's Designee Scott Whittaker, Private Sector Records Manager, Chair
Legal Counsel:	Paul Tonks, Attorney General's Office Ed Lombard, Attorney General's Office
Executive Secretary:	Susan Mumford, Utah State Archives,
Others Attending:	Kate Black, Town of Alta Rosemary Cundiff, Archives Mark Haik, Petitioner Rich Mrazik, Attorney for Town of Alta Layne Nielson, Archives volunteer

Mr. Scott Whittaker called the meeting to order at 1:07 p.m.
Mr. Whittaker invited the parties for the hearing to come forward. Mark Haik was the petitioner. Kate Black and Rich Mrazik represented the respondent, the Town of Alta.

Opening statement, petitioner
Mr. Haik said he had requested records from the Town of Alta and had received part of the records but not all. Alta had failed to provide the records according to the intent of the law. Mr. Tolton, after appearing before this committee, had his request reviewed by District Court. The records he requested were scanned, indexed and a log was made that listed all the documents. The work was done by Orange Technologies. The scanned documents and the physical documents were returned to the Town of Alta. Two of the documents requested were missing pages. One could not be found and a claim of attorney-client privilege was claimed for the fourth. Mr. Haik said the Town of Alta should release all the documents requested.

Opening statement, respondent
Mr. Mrazik said the Government Records Access and Management Act (GRAMA) request, and the subject of the hearing was the four records that had not been released to Mr. Haik as part of his September 14, 2009 GRAMA request. Two of the records had been released just as the Town had them. If there were discrepancies they were part of the work of Orange Technologies. The analysis of road fund monies has not been located after a diligent search. The memo is a protected document as a privileged attorney-client communication under UCA 63G-2-305(18).

Testimony, petitioner
Mr. Haik said the index ordered by the court was to be released to the Town of Alta, the court, and to Mr. Tolton. The documents listed in the log existed as they were given to Orange Technologies and returned to Alta. Mr. Haik did not believe there was an error in the log produced by Orange Technologies. If the Town is in possession of the documents, they should produce them. The memo of reappointment of Dr. Kapalowski to the Board of Adjustments, the town has denied, claiming it to be a protected record pursuant to UCA 63G-2-305(16, 17, and 18. No record related solely to pending litigation, no litigation was pending and no witnesses were in need of protection. No attorney's legal theories or work product concerning litigation were involved in the memo. Mr. Haik said [Pursuant to UCA 63G-2-305 (18)] that communications between an attorney and a client agency that would be privileged, according to 78B-1-137, (primarily involving protection of witnesses) did not apply to the memo. Mr. Haik saw no reason why the memo from Paul Thompson, the town's attorney, should be protected under that statute. The Town of Alta had incorrectly evaluated the situation. All the documents listed on the index should be released. The two documents cited as lost were on the index and did exist at one time. The town's failure to find the documents is troubling.

Testimony, respondent
Mr. Mrazik said the appeal involved four documents that were part of Mr. Haik's September 14, 2009 GRAMA request. The road summary report lists two documents: a one-page document which was produced and another, a twenty-seven page document which was a mistake. The Overnight Guest Rules, a single page document, was also provided. The index listed an additional seven-page document by that title. The town could not find such a document. Any inconsistency between the Tolton privilege log and the town's records was a product of the work of Orange Legal Technologies. The town did not oversee the creation of the privilege log, but provided the documents to the company and received them again after the privilege log was made. After two diligent searches, the twenty-seven page road summary report could not be found. The memo regarding the appointment of Lee Kapalowski was clearly protected under UCA 63G-2-305(18). It was not a public record and not subject to disclosure. The section of the code referred to in 78B-1-137 explains the communication between an attorney and a governmental entity that must be met for this classification. There must be an attorney-client relationship for any advice or recommendation from the attorney to be protected. Ms. Smith-Mansfield asked if the town had contacted Orange Technologies to ask if the existence of any of the missing documents could be clarified. Ms. Black said she had not contacted the company.

Closing statement, petitioner
Mr. Haik said the index prepared by Orange technologies was reviewed by the Town of Alta as stated by Ms. Black. The town consented that the redacted index be released to Dr. Tolton, as ordered by the court. When the documents were returned to the Town of Alta, some records may have been refilled and some not. The documents did exist and should be found and released. He asked that the Committee review the memorandum to see if it met the standard for classification as "protected" that the town claimed.

Closing statement, respondent
Mr. Mrazik said that the town's policy was to follow the spirit and the letter of the law. The discrepancy between the log and the documents that the town has produced cannot be explained. The town produced for Mr. Haik the public records that existed according to his request. The memo from Mr. Thompson is protected by attorney-client privilege according to UCA 63G-2-305 and has not been released.

Deliberation
Ms. Smith-Mansfield made a motion that the Committee go in camera to view the memo. Mr. Hemphill seconded the motion. A vote was taken. Mr. Hansen, Mr. Hemphill, Mr. Ott, Ms. Smith-Mansfield, and Mr. Whittaker voted in favor of the motion. The motion passed and the Committee began a closed session of the meeting to view the record in question.

Closed session: 1:44 p.m. – 1:52 p.m.

Open Session
Ms. Smith-Mansfield made a motion that the Committee return to open session. Mr. Hemphill seconded the motion. A vote was taken. Mr. Hansen, Mr. Hemphill, Mr.Ott, Ms. Smith-Mansfield, and Mr. Whittaker voted in favor of the motion. The motion passed. The Committee returned to open session. Ms. Smith-Mansfield summarized the issues of the hearing. One record could not be found. Two records had discrepancies between the log and the records Alta had found and provided, and one, the memo, was a classification issue. Mr. Haik had made a good argument for the existence of the missing records, but Ms. Black had searched and had not been able to find two of the records mentioned in the log. Mr. Hemphill made a motion that the town could not provide what they could not locate. He said that if, after a diligent search, the records still could not be found within five more days, the Committee could not order them to be produced. Ms. Smith-Mansfield amended the motion to include contacting Orange Technologies to locate missing records. Ms. Smith-Mansfield seconded the motion. A vote was taken. Mr. Hansen, Mr. Hemphill, Mr. Ott, Ms. Smith-Mansfield, and Mr. Whittaker voted in favor of the motion. The motion passed. Mr. Hemphill made a motion that the record described as a memo was a "protected" document pursuant to UCA 63G-2-305(18) and should not be released. Mr. Hansen seconded the motion. Mr. Tonks read from the Southern Utah Wilderness Association case, citing the Utah Supreme Court's definition and the elements necessary for a communication to be "protected" under 63G-2-305(18). An attorney-client relationship must be established, the transfer of confidential information must be involved, and the purpose of the communication must be to obtain legal advice. A vote was taken. Mr. Hansen, Mr. Hemphill, and Mr. Ott voted for the motion. Ms. Smith-Mansfield, and Mr. Whittaker voted against the motion. The motion passed. The Town of Alta said they would send a letter to the Committee and to the petitioner after contacting Orange Technologies, and would provide the public records if found.

Approval of Minutes
Mr. Hemphill made a motion that the draft of the December 10, 2009, minutes be approved. Ms. Smith-Mansfield seconded the motion. A vote was taken. Mr. Hansen, Mr. Hemphill, Ms. Smith-Mansfield, Mr. Whittaker, and Mr. Ott voted in favor of the motion. The minutes were approved with a spelling correction.

Approval of Rules
Ms. Smith-Mansfield handed out a corrected version of the rule on approval of meeting minutes (R35-1-4). She made a motion to approve the rule. Mr. Hemphill seconded the motion. A vote was taken. Mr. Hansen, Mr. Hemphill, Mr. Ott, Ms. Smith-Mansfield, and Mr. Whittaker voted in favor of the motion. The motion passed. The amendment to Rule 35-1-4 was approved.

Appeals received
Ms. Mumford reported that three appeals had been received and two were scheduled to be heard March 11, 2010.

Cases in District Court
Mr. Tonks reported on cases in district court. (See attached list for the progress of cases in district court.)

Adjournment
Mr. Whittaker thanked the Committee members for their attendance, and the meeting was adjourned by acclamation.

Next meeting scheduled for February 11, 2010, 9:30 a.m.

R35-1-4. Committee Minutes.

(1) **Purpose**. Utah Code Section 52-4-203 requires any public body to establish and implement procedures for the public body's approval of the written minutes of each meeting. This rule establishes procedures for the State Records Committee to approve the written minutes of each meeting.

(2) **Authority**. This rule is enacted under the authority of Utah Code Sections 52-4-203, 63G-3-201, and 78A-12-101 *et seq.*

~~(1)~~ (3) All meetings of the Committee shall be recorded. The recording of the open meeting shall be made available to the public within 3 business days. Access to the audio recordings shall be provided by the Executive Secretary at the Utah State Archives, Research Center.

~~(2)~~ (4) Approved written minutes shall be the official record of the meetings and appeal hearings and shall be maintained by the Executive Secretary. ~~A copy of the approved minutes shall be made available for public access at the Utah State Archives.~~

(a) Written minutes shall be read by members prior to the next scheduled meeting, including electronic meetings.

(b) Written minutes from meetings will be made available no later than one week prior to the date of the next regularly scheduled Committee meeting.

(c) When minutes are complete but waiting official approval, they are a public record and must be marked as "Draft."

(d) At the next meeting, at the direction of the chair, minutes shall be amended and/or approved with individual votes recorded in the minutes. The minutes will be then marked as "Approved."

(e) When the minutes are "Approved" they will be so noted in the printed and online versions. A copy of the approved minutes shall be made available for public access at the Utah State Archives.

January 2010 Records Committee Case Updates

District Court Cases

Attorney General Office v. McKitrick, 3rd Judicial District, Salt Lake County, Case No. 090917108, Judge Dever. Filed October 13, 2009.

Current Disposition: Complaint filed by AG's office. Answer filed on behalf of State Records Committee. McKitrick and the Salt Lake Tribune have filed answers.

Salt Lake City v. Johnson, 3rd Judicial District, Salt Lake County, Case No. 090915921, Judge Denise Lindberg. Filed September 24, 2009.

Current Disposition: January 12, 2010 the trial court filed a default certificate against Mr. Johnson in favor of Salt Lake City. Salt Lake City will probably draft a judgment entry reversing State Records decision.

Douglas Carter v. Utah Dept. Of Corrections, 3rd Judicial District, Salt Lake County, Case No. 080916813, Judge Denise Lindberg. Filed August 14, 2008.

Current Disposition: Settlement agreement has been signed by the parties. Court filed an order approving of the joint settlement agreement and dismissal of the case January 11, 2010.

Utah Dept. of Corrections v. Clanton, 3rd Judicial District, Salt Lake County, Case No. 080909757, Judge Lindberg. Filed June 13, 2008.

Current Disposition: Oral argument was held on January 7, 2010. Court found that issue involving State Records Committee raised by Corrections was moot (review by trial court is *de novo*). Court is now reviewing records *in camera* to determine if they should be released to Ms. Clanton.

Utah Appellate Court Cases

Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, Utah Supreme Court, Case No. 20060813-CA. District Court Case No. 050909118.

Current Disposition: Settlement reached with SUWA and appellate case has been dismissed.

Murray City v. Maese, 3rd Judicial District, Salt Lake County, Case No. 080912185, Judge Christiansen. Filed July 11, 2008. Court of Appeals Case No. 20090958 CA.

Current Disposition: Court of Appeals is considering motion by Murray City to dismiss Maese's appeal based upon issues that are moot (Murray City has already provided the records). Murray City has filed a Civ.R. 60(B) motion with the trial court.