

State Records Committee Meeting

Division of Archives
Courtyard Meeting Room
October 9, 2014
Salt Lake City, Utah

SRC APPROVED
Date November 13, 2014

Members present: Lex Hemphill, Chair, Media Representative
Doug Misner, History Designee
Patricia Smith-Mansfield, Governor's Designee
David Fleming, Private Sector Records Manager
Marie Cornwall, Citizen Representative

Member not present: Ernest Rowley, Elected Official Representative

Member not present: Holly Richardson, Citizen Representative

Legal Counsel: Paul Tonks, Attorney General's Office

Executive Secretary: Nova Dubovik, Utah State Archives

Attending via phone: None

Others Attending: Dan Harrie, *Salt Lake Tribune*
Rosemary Cundiff, Ombudsman
Charity Brienz, Attorney (South Jordan, UT)
Ryan Loose, Assistant City Attorney (South Jordan, UT)
Jonathan Call, Representing Ms. Holbrook
Julie Holbrook, Petitioner
Janalee Tobias, South Jordan
Holly Betteridge, Department of Natural Resources
Doug Messerly, Department of Natural Resources
Lorianne Ouder Kirk, Archives staff
Rebekkah Shaw, Archives staff
Renée Wilson, Archives staff
Kendra Yates, Archives staff
Cameron Mansen, Archives staff

Mr. Lex Hemphill opened the meeting at 9:08 a.m. Mr. Hemphill introduced the parties; Ms. Julie Holbrook, Petitioner, and Mr. Jonathan Call acting on her behalf; Mr. Ryan Loose, Assistant City Attorney for South Jordan and Ms. Charity Brienz, Attorney for South Jordan.

Mr. Hemphill began the hearing by addressing the request made by South Jordan for a motion to dismiss Ms. Holbrook's appeal to the State Records Committee. Mr. Loose explained that in regards to the procedural issue South Jordan believes that Ms. Holbrook did not follow the statute and would like to pursue the motion to dismiss and be ruled on by the Committee.

Motion to Dismiss: South Jordan City Council vs. Julie Holbrook
Opening-Petitioner

Mr. Loose explained the 2012 statute requires that on the same day the appellant delivers an appeal to the appeals committee that it is served on the city. An obscure provision of the Utah Code § 68-3-8.5(2)(ii)(b) requires the appellant to serve the appeal on the City Recorder. Ms. Holbrook did eventually serve it on September 2, 2014, but to the City Manager. The City Manager received the appeal from Ms. Holbrook and placed it in the case file and failed to notify the attorneys the appeal had been received. This occurred during the same time the attorneys were drafting a motion to dismiss because they were unaware the City Manager had actually been served the appeal on September 2, 2014. The dispute is, if she had served it to the City Manager on the same day of her appeal to the Committee it could have easily cured the miscommunication.

Mr. Hemphill interjects that on the brief to dismiss there is a paragraph defining substantial compliance and reiterates that in Mr. Loose's definition of substantial compliance Ms. Holbrook substantially complied. Mr. Loose argues back that it is considered noncompliance in regards to the filing, but substantial compliance in which she did serve the appeal on the City on September 2, 2014. The technicality stems from the requirement that the appeal should have been served with the City Recorder, although she substantially complied.

Ms. Patricia Smith-Mansfield states it is a difficult argument in that the Records Committee is an independent hearing, furthermore scheduling is somewhat independent of the path the petitioner takes with the City. There are time requirements that must be adhered to by the executive secretary in order to schedule a hearing. The executive secretary has no way of knowing whether the appeal is served to the governmental entity on the same day it is filed with the Committee.

Opening-Respondent

Mr. Jonathan Call states that indeed Ms. Holbrook did not serve the City on the same day she filed the appeal to the Committee. It is understandable there are legal ramifications but this would force Ms. Holbrook to refile another GRAMA request to the city and go through the process again and the Committee will have to reschedule the hearing in two months. It is clear the City is not going to change its argument, and Ms. Holbrook is not going to change her argument, and in the end both parties will be in the same position in two months. In addition, in the appeals it says the petitioner is to file the appeal with the governmental entity which sent the denial. Ms. Holbrook sent the appeal to the City Manager because he is the one who sent the final denial.

Ms. Smith-Mansfield explains this is not the court and the Records Committee is an informal body where a person does not have to hire an attorney in order to represent his or her case. There are time frames that even the governmental entities routinely miss. The end effect is that it becomes a burden on both parties, a postponement creates more administrative work and burden on the Committee. Mr. Hemphill added that at this time all parties are present and effectively are here to resolve case. Ms. Holbrook would not

have known that she was required to serve the appeal to the governmental body until her contact with the State Records Committee. The governmental entity does not provide that guidance and information when it denies an appeal.

Mr. Tonks provided guidance to the Committee by explaining what the statute specifies, and since the Committee is applying facts to the case it should make the ruling independently. The statute states under Utah Code § 63G-2-403(1)(a), the petitioner is required to appeal to the records committee by filing a notice to appeal with the executive secretary no later than 30 days after the day on which the chief administrative officer of the governmental entity grants or denies the record request in whole or in part. The decisions in the past, which have come from the State Records Committee, have been stated as jurisdictional. If filed more than 30 days the State Records Committee does not have jurisdiction to hear the case. It is very straight forward and the Records Committee has ruled on that many times before. The part they must rely on is under Utah Code § 63G-2-403(3). Mr. Tonks states he is unaware of any cases where the Records Committee has applied Utah Code § 63G-2-403(3) to a jurisdictional requirement and when it comes to jurisdiction the Records Committee is the one that determines jurisdiction and whether or not the petitioner will file with a governmental entity and whether the Committee can take jurisdiction.

Mr. Hemphill requests a motion from the Committee whether or not to accept the City's motion to dismiss. Ms. Smith-Mansfield makes a motion, that Utah Code § 63G-2-403(3)(a) is not a jurisdictional reason or issue and the Records Committee will hear and proceed with the hearing, and to deny the motion to dismiss. Ms. Cornwall seconded the motion. A vote was unanimous, 5-0.

Mr. Hemphill explained the hearing procedures to the parties.

Hearing: Julie Holbrook vs. South Jordan City Council

Opening-Petitioner

Mr. Jon Call begins with a riddle from Abraham Lincoln. "*How many legs does a dog have if you call a tail a leg?*" The answer is 4, calling a tail a leg does not make it a leg. He continues that the petitioner's argument is that the document is not going to be modified any more, everyone agrees that it is the final version of this document and that it was created by the expense of the tax payers by hiring the consultant. In addition the document is not going to be changed, and there is no harm to release the document now that an informal decision has been made not to proceed with the consultant.

Opening-Respondent

Ms. Charity Brienz explains that the City's position on this is that the draft is not a record and as counsel indicated that the draft is a finalized draft. They intend to present evidence from the auditor who prepared the draft and watermarked the document. In addition the auditor also signed an affidavit that it is indeed a draft and not yet completed and essentially it is not a record, which is the default. If the Committee does find it is a record the City has classified it as a protected record under GRAMA. The figures and data mentioned in the draft are available on the City website. The consultant was reviewing

public information from the city and was parsing out the numbers deciding if through certain adjustments the numbers were presented correctly. The draft report was provided to members of the City Council to determine whether they wanted to proceed with the final document and the auditor's services. The discussion at the council meeting was what the council was going to receive as an end product. The council decided not to go forward based on reviewing the public numbers that are available on the City website and discontinued business with the auditor. They determined the report would be too confusing and requested the report not be completed.

The City's position is that the draft document is not a record under the GRAMA definition of record and that if it is determined to be a record that it is not public. It was never made public by how it was presented, it does not contain any extra empirical data that is not available on the public website, and there is no action from the City that made it public whether by the decision of the City Manager or by reading lines of it at the City Council meeting. There was no action taken by the City, therefore it is a protected record.

Testimony-Petitioner

Mr. Call begins by stating that his client is relying on the same documents as the City and that the Committee will be making a policy decision regarding its classification. Mr. Call does not believe that the City's provision of what a temporary draft is applies to this document. Specifically because it is not a temporary draft, in the sense that at the very least it is a final draft or a draft that is completed. It is no longer being worked on and the originator is an outside hired consultant. Mr. Call focused on the statute, the personal use of an individual, it does not say the personal use of a person. The City has relied on the idea that the City can be considered a person (and he does not dispute that idea), but they do not believe the statute allows for that interpretation under Utah Code § 63G-2-103(17) where it says what a person means and it specifically says that a person is an individual or a corporation. He does believe the city could be a corporation and an individual.

Mr. Call continues to expand on the temporary draft provision, if it is considered a temporary draft it was given to more than one individual and based on the original argument it was distributed among a variety of individuals and this is a policy decision the Committee will have to make whether or not that would somehow affect the idea of it being a temporary draft.

The next item Mr. Call presents is whether or not it is a draft. The Committee has made decisions in the past that draft records of a document, that were eventually completed, cannot be disclosed quoting Case No. 09-12 William Justesen vs. Millard County. The Committee needs to make a decision because this document will never be worked on again, it is essentially a finalized form of the draft. The final issue and provision he focuses on is Utah Code § 63G-2-301(3)(k). The Petitioner believes some sort of decision was made because the record was discussed in an open meeting. Mr. Call refers the Committee to the City Minutes on pages 8 and 9 where the Council discusses the Mulligans Golf and Games audit. In closing he restates the Petitioner's argument is that the document was discussed in public and therefore should be available for the public to review.

Testimony-Respondent

Ms. Brienz responded that the Committee is familiar with GRAMA and it is known that not every document is a record. The City's position is that temporary drafts are similar materials prepared by a consultant for personal use of another individual. She states those drafts are not a record and that is stated directly in GRAMA. Ms. Brienz refers to Mr. Call's testimony where he mentioned the personal use idea, even quoting the definition of the person, however under GRAMA the definition of a person includes a corporation and includes a body.

Ms. Brienz continues the testimony by arguing their two other points in the case. Ms. Holbrook's initial request was denied and then she appealed to the City Manager and it was denied again because the temporary draft is not a record and is protected. The distribution of the draft is not disputed however GRAMA specifically allows drafts to be circulated and presented to staff and decision makers and still remain nonpublic per Utah Code § 63G-2-301(3)(j). She restated that although multiple people looked at the document this does not constitute it being a public record.

Ms. Brienz referenced Case No. 09-12 William Justesen vs. Millard County. In that decision the Committee indicated the records prepared prior to a final version were in fact temporary drafts and that were not subject to disclosure. The discussion among the council was whether or not to retain or whether or not to create a final draft. What was forwarded to the City from the auditor was an example of what the final form could look like. It was never completed and the City decided not to go with auditor services.

Mr. Hemphill questions if the document was ever relied on to make the decision not to use the auditor's service. Mr. Loose responded that the Council's decision not to use the document was based on the auditor's confusing oral presentation at the meeting not from the document. Mr. Hemphill continued that if the document confused the Council then it did influence whether to hire the auditor or not. It therefore had some influence on the decision to hire the auditor. Mr. Loose responded that the auditor's discussion with the Council was confusing not the document and that is what influenced the Council to vote not to employ his services.

Closing-Petitioner

Mr. Call restated that the most important point to focus on is government transparency and in no realm is it more important than in the finance aspect. The draft is essentially done, it will not be modified unless the City decides to reengage and hire an auditor; more specifically, the City made a decision to hire an auditor to review the financial information and analyze it's accounting procedures which included evaluating the way the employees approached the numbers, after which now the City believes it does not have to disclose the information and allow the public to review the process. Even if the draft in question was a form, the Council relied on the form to determine they did not like the document and ultimately based its decision on that document. The tax payers should get the benefit of the auditor's work placing all the numbers in a relevant format that is easy to read. Let the tax payers get the benefit of what the tax money is being spent on.

Closing-Respondent

Mr. Loose responded that this is really a question that when a public body gets involved in a very active policy discussion, and they are trying to accommodate residents and promote different opinions, they ask staff. This is part of the preliminary portion of hiring a consultant and gathering information to write a draft. And when a body decides to move away from that direction and go in a different direction there will be documents left hanging out there that are drafts. Unless it is extremely limited, it will be overly burdensome to the governmental entity to allow someone at every stage of the draft to make a request. Secondly, from a policy standpoint, when it is a final document that is when the public gets the benefit. Furthermore, the numbers in the draft are available on the City website and the City does not have to provide further information.

A motion was made by Mr. Fleming to go *in camera* session and seconded by Mr. Misner. A vote was unanimous, 5-0.

In camera at 10:20 a.m.

SRC reviewing the document *in camera*

A motion was made by Mr. Fleming to move back into session and seconded by Ms. Smith-Mansfield. A vote was unanimous, 5-0.

Deliberation

Ms. Smith-Mansfield began the deliberation by stating she has seen an inconsistency between GRAMA and the Open and Public Meetings Act. The Open and Public Meetings Act requires that within 3 business days, after approving written minutes, that they be made available at the public body's primary office to include any public materials distributed at the meetings. However it does not define public materials. It is unclear if this draft was the information the Council looked at or if it was relied on to make a decision of the content other than to decide to continue with the report or not.

Mr. Tonks adds clarification that information relied on by a public body in a public meeting may not necessarily be public information.

Ms. Smith-Mansfield continues that the Open and Public Meetings Act does not explicitly state that if it is handed out it is public, however if it is being discussed in an open and public meeting how can one consider it not public. The question whether the content was discussed, and this is an unknown, other than to determine whether to continue with the audit or not. She states it is hard to imagine after reading it that they did not do something within their offices with the information about their own internal procedures and make changes. City officials have testified they did not and the Committee has to take their word.

Mr. Fleming states he has a hard time believing the decision to engage the auditor would not be influenced by that anyone who saw the content of the draft, however he is

convinced that the decision whether not to engage the auditor to complete the report was the decision that was made. And he is convinced that the release of the document would be a release of a draft document and not one in final form. Mr. Fleming ends the argument with the conclusion that draft document is appropriately classified as protected.

Ms. Cornwall addressed the statement by the petitioner as to what is the “harm in releasing the draft?” and she explains the harm is setting a precedent of what is a draft document. She is in agreement with Mr. Fleming it is a draft document. She continues that the reason she would say it is a draft is that all points are arguable on the document, and the auditor himself is saying it is a draft. Mr. Fleming agrees that the auditor is saying this is not a document that should be used for any policy-making decision.

Mr. Hemphill reads Utah Code § 63G-2-301(3)(k) to the Committee members.

Ms. Cornwall makes a motion that the document is properly classified as protected under Utah Code § 63G-2-305(22) and was never relied upon by the governmental entity in carrying out action or policy decisions requiring it to be made public under Utah Code § 63G-2-301(2)(j). Mr. Misner seconded the motion. The motion passed 4-1, with Mr. Hemphill dissenting.

Approval of Retention Schedules

Utah State General Records Retention Schedule:

None

State Agencies:

Ms. Kendra Yates introduces Mr. Doug Messerly (Investigation Supervisor, Division of Wildlife) and Ms. Holly Betteridge (Records Officer, Wildlife Law Enforcement).

Ms. Yates summarizes and readdresses the Committee’s concerns pertaining to the License Suspension Files series 4420 (see SRC Minutes September 11, 2014, p. 2). The Department of Natural Resources (DNR) is requesting a retention schedule to retain License Suspension Files for 65 years then destroy. The retention is based on the administrative needs of the agency, as they enforce Utah Code § 23-19-9 (2011). Due to the fact that offenders are often repeat offenders, it is valuable to have an offender’s record for the duration of their life. Previous retentions were 30 years and 5 years after revocation period expired. The justification for extending the retention to 65 years, is helpful for the agency to have a criminal violation history to reference when new offenses occur, which is a common trend among poachers. Those who poach as young adults tend to poach as older adults, too, so it is valuable to have an offender’s record for the duration of that person’s life.

Ms. Smith-Mansfield addresses the concern of the retention schedule being changed numerous times over the years. She explains that the agreed on retention schedule should be thoughtful so as not change it again in 5-10 years. The problem with 65 years is that it is a very long time to maintain a record. The concern is that it will be difficult to maintain

the database as systems change, ability to migrate data, and sustainability. If these areas are not addressed in the retention schedule they will be changed again in the future.

Mr. Messerly addressed the Committee's concern to the 45-year retention schedule. The suspension statute provides that a person can be suspended for a maximum of 7 years for a conviction of a felony and that the penalty can also be doubled in the case that that person was previously on suspension when the act was committed, or if the person killed, what is defined by the statute a trophy animal. In one criminal episode a person can be suspended for 14 years for poaching a trophy bull or elk or poaching an over-limit production if previously had been on suspension. The DNR has cases where people routinely have multiple criminal episodes and the statute provides as long as those criminal episodes are separate that the suspension periods will be consecutive. Many times it begins with one criminal episode then DNR often discovers a person has a pattern of behavior that would lead to multiple convictions. As long as those multiple convictions are distinct criminal episodes the suspensions will be consecutive but ordered in one hearing. This is one created record.

Mr. Messerly explains the duplicity of keeping records with the Bureau of Criminal Identification database. BCI keeps records of criminal convictions and arrests. The process by which a person's wildlife license privileges are suspended is administrative and it is separate and distinct from the criminal process so the records that are created as a result of that process are not obtained by BCI. An order of a suspension is a record that is created by the Division of Wildlife Enforcement by the hearing officer, and not maintained anywhere else outside with the Wildlife Enforcement records.

In addition the state of Utah is a member of what is called the Interstate Wildlife Violator Compact (IWVC). The purpose of the database is so that states can make each other aware of who is on suspension. It is a centralized database and if there is a change to the status the change is made instantly. Most states use the database for licensing to ensure that the person is eligible to purchase a license. Forty-three states are part of the central database system. All the information is kept on file and has been kept on file with the centralized database, and Utah has been involved since 1996.

Mr. Fleming questions how diligent are the states keeping the information current on the persons? Mr. Messerly states that when a person is entered in the system the scope and time period is entered at that time beginning and ending date. It automatically changes the status when it reaches the ending date.

Ms. Betteridge offers background. She has worked for the DNR for over 33 years and in that period they have had a number of changes in systems. In the old electronic file system, which was hosted by the Department of Public Safety, documents could not be attached and with FATPOT they can now attach documents. The changes in the law and practices have evolved and the need to have the information available in the past was the same but the practicality of it was not sustainable. Now with the new systems it is entirely possible to maintain a database that can capture longer history.

Mr. Fleming requested clarification that the DNR is going to apply in an automated way the 65-year retention along with the ability for a person to go in and suspend that retention when applicable. The Committee requests an amendment to the retention schedule to read “65 years or until revocation period has expired or whichever is greater.”

A motion to approve with the amendment was made by Mr. Fleming and seconded by Ms. Smith-Mansfield to approve the proposed retention schedule. A vote was unanimous, 5-0.

5 Minute Break

Approval of September 11, 2014, Minutes

Mr. Hemphill and Ms. Cornwall noted misspelled words. The decision was to approve the minutes based on the corrections being made prior to posting. The executive secretary acknowledged the misspellings and corrected the errors. Mr. Fleming made a motion to approve the minutes of September 11, 2014. Mr. Doug Misner seconded the motion. The motion passed 5-0.

Report on September/October Appeals and November 13, 2014, Appeals.

The executive secretary reported that the Alex Schmidt, Save Our Canyons vs. Utah Parks and Recreation and Roger Bryner vs. Salt Lake City Police Department both scheduled for October, have been canceled and resolved by both parties. At this time there are four hearings scheduled for November (See the attached documents on the Utah Public Notice website, [SRC Meeting Handouts October 9, 2014. pdf](#)).

Cases in District Court

Mr. Tonks briefed committee members about the cases in District Court. (See the attached documents on the Public Notice website, [SRC Meeting Handouts October 9, 2014.pdf](#)).

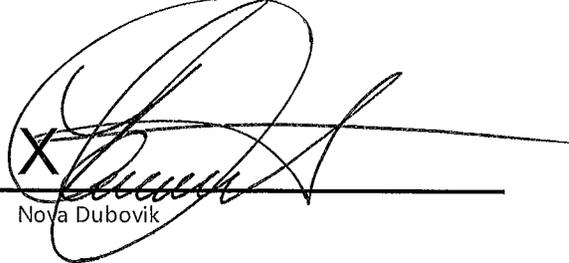
Other Business

The next meeting is scheduled for November 13, 2014. The executive secretary queried which members would be present for the next meeting. At this time it is an unknown. The Senate is to nominate one or two new members on October 15, 2014. One of the nominees is to replace Mr. Hemphill, Chair, for this is his last session. Mr. Rowley has already stated he will not be available for the November 13, 2014, meeting.

Committee members wish Mr. Hemphill all the best and offer a big Thank You for seven years of volunteer service on the State Records Committee. He will be greatly missed.

The October 9, 2014, State Records Committee meeting adjourned at 11:50 p.m.

This is a true and correct copy of the October 9, 2014, SRC meeting minutes, which were approved on November 13, 2014. An audio recording of this meeting is available on the Utah Public Notice Website at <http://www.archives.state.ut.us/public-notice.html>.



X
Nova Dubovik

SRC Executive Secretary