

SRC APPROVED  
Date 9/9/2015

# STATE RECORDS COMMITTEE MEETING

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

Date: June 11, 2015

Time: 9:05 a.m. to 3:03 p.m.

## Committee Members Present:

Patricia Smith-Mansfield, Chair, Governor's Designee  
Marie Cornwall, Citizen Representative  
Tom Haraldsen, Media Representative  
Blaine Breshears, Elected Official Representative  
Doug Misner, History Designee  
Holly Richardson, Citizen Representative  
David Fleming, *Chair Pro Tem*, Private Sector Records Manager

## Legal Counsel:

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

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

## Telephonic Attendance:

Patrick Sullivan, Petitioner  
Karl Losee, Petitioner

## Others Present:

Gina Proctor, UDC	Parker Robertson, Citizen
Sharel Reber, Attorney, UDC	Ryan Brady, Attorney, USU
Morgan Jacobsen, <i>Deseret News</i>	Eric Warren, USU
Charles McCollum, <i>Herald Journal</i>	David Hancock, Maverik
Kevin M. Opsahl, <i>Herald Journal</i>	Brad Plowman, Maverik
Spencer Turley, UDC	Joel Campbell, Society of Professional Journalist
Jeralyn Zimmerman, UDC	Susan Munford, State Archives
Kim Burgess, <i>Herald Journal</i>	Rosemary Cundiff, Ombudsman
Peter Samore, KSL Radio	Kendra Yates, State Archives
Derek Petersen, KSL TV	Cameron Mansen, State Archives
Kyle Goon, <i>Salt Lake Tribune</i>	Rebekkah Shaw, State Archives
Catherine Taylor, DHS	
Tim Vitale, USU	

**Agenda:**

- Three Hearings Scheduled
- Approval of Retention Schedules
- Approval of May 14, 2015, Minutes
- Report on Appeals Received
- Report on Cases in District Court
- Other Business

**I. Call to Order:**

The meeting was called to order at 9:05 a.m. by the Chair, Ms. Patricia Smith-Mansfield. Mr. Doug Misner was absent for the first hearing.

The Chair introduced the parties for the hearing: Mr. Karl Losee, Petitioner, and Ms. Sharel Reber, representing Attorney for Utah Department of Corrections (UDC). The Chair explained procedures and asked the Committee members to introduce themselves to the Petitioner.

**II. Hearing: Karl Losee vs. Utah Department of Corrections (UDC)**

**Opening-Petitioner**

Mr. Losee petitioned the UDC for records regarding email communications between specified individuals that he named in each of the two GRAMA requests submitted to UDC. The first one was for email correspondences about him from 18 specific UDC staff members between March 6, 2014-January 9, 2015. These emails relate to an irreparable injury sustained from an assault. He wants the records to make sure the response to his injuries were handled properly by UDC. He claims to have been denied all records.

The second GRAMA request involved five UDC staff member emails about him between December 2009-March 31, 2010. These emails are in relation to a case that is in federal court, the Tenth Circuit Court of Appeals, *Losee vs. Gallegos*, Case No. 14-4148. The GRAMA requests are not for discovery the emails are for personal information. The governmental entity has classified them as private and protected. He feels the classification are wrong and under the GRAMA statute he is entitled to the records and would appreciate the Committee's consideration to allow access.

**Opening-Respondent**

Ms. Reber, representing UDC, addressed Mr. Losee's two GRAMA requests for emails from a variety of different UDC staff members. She remarked that Mr. Losee was provided 50 pages of responsive documents to the first GRAMA request, March 6, 2014-January 9, 2015. Within those 50 pages of responsive documents there was a name and related data to that name; medical records of another person; driver's license number; social security number; personal emails; and information relating to other person(s) that was redacted under Utah Code 63G-2-302(1)(b) and Utah Code 63G-2-302(2)(d). There was a very small portion of the 50 pages that had been redacted because they contained private information of individuals, and if provided would have been clearly an unwarranted invasion of personal privacy.

As to the second request, Mr. Losee requested all emails between December 2009-March 31, 2010 sent to or from five UDC staff members about him. UDC provided two responsive pages to that request, but within that information there was a home telephone number of a UDC staff member. That redaction was entirely proper pursuant to Utah Code 63G-2-302(1)(g) and Utah Code 63G-2-(302)(2)(d). Providing this information would have been a clearly unwarranted invasion of personal privacy. Additionally, one email in its entirety was not provided. This email contained very candid remarks by an officer, to his chain of command, detailing behavioral issues of Mr. Losee. It was classified protected pursuant Utah Code 63G-2-305(11), if disclosed could jeopardize the life and safety of an individual. In addition, pursuant to Utah 63G-2-305(13) if the record is disclosed it would jeopardize the safety and security of a correctional facility, control, and supervision of the facility.

**Testimony-Petitioner**

Mr. Losee addressed the Committee stating that under Utah Code 63G-2-201(7)(a)(b), and (c) he should be entitled to the emails as he is the subject of the records. The argument that it would jeopardize the safety and security of the institution is null because the emails are involving a housing unit that is no longer in commission. He believes Utah Code 63G-2-201(5)(b) applies to his situation, as the interest favoring access is greater than or equal to the interest of favoring restriction of access.

Mr. Losee cited Utah Code 63G-2-201(7)(a)(b)(c), Utah Code 63G-2-202(1)(a), and Utah Code 63G-2-202(7) as they pertain to his argument of being the subject of the records and entitled to the records. He also restated that the housing unit is no longer in commission and the officers listed on the GRAMA request no longer work for the department. He continued the argument by countering the UDC's stance on security and safety pursuant to Utah Code 63G-2-305(13), is not germane because the housing unit is no longer used for behavioral treatment, therefore the candid remarks made in the email would not create a security risk.

During Mr. Losee's testimony he quoted and elaborated how appeals under Utah Code 63G-2-403(10)(a)(b)(c) and Utah Code 63G-2-403(11)(c) pertain to his argument and that this is not discovery, because the case is already in the Tenth Circuit Court of Appeals. He also drew from Utah Code 63G-2-403(11) "that the public interest favoring access is equal to or greater than the interest favoring restriction of access." He strongly believes that he is entitled to the records. The Chair asked if he is disputing the redactions. Mr. Losee stated he did not object to the redactions, and that he did receive some emails with redacted information. However he wants the email that contains candid remarks about him and legally he should be able to have it.

**Testimony-Respondent**

Major Spencer Turley was sworn in.

Major Spencer Turley has been employed by UDC for 11.5 years, which included a variety of assignments that encompass training, security, and transportation. He currently is the assigned to the training unit. He was asked to explain how email was used, and

what kind of information was written and shared among officers about inmates. He explained officers use email as primary means of communication among supervisors and chain of command. The prison is a 24/7 operation and in order to relate concerns about inmate behavioral issues the officers need to speak candidly amongst each other. If the inmates were allowed these communications they could use it to their advantage and to retaliate against officers or other inmates. Many inmates play games and if they knew the officers caught on to their pattern of behavior then the inmates would know to modify their behavior so not to be moved or reprimanded.

He also stated that even though the housing unit is closed there are some officers still working at the institution. The email also contains the processes of how UDC does business. This information should not be released to the inmates. Allowing inmates access to the emails and the information could place a damper on officer communications if they knew inmates could receive them. It is important that officers are free to share information about contraband, assaults, who is being strong armed within the inmate community or cannot protect themselves, because all of this information if disclosed would jeopardize security of the institution.

The Chair questions if Major Turley has seen the email and he stated yes. As to the specifics of the email he would need to review it again and to identify what needed to be redacted. He did have a couple of concerns about the releasing the email and they were: institutional processes being discussed, and the officers discussing Mr. Losee's behavior observed through intelligence gathering methods.

Ms. Reber concluded that it appears Mr. Losee is okay with the redactions made, and recognizes that the private and protected information should not be released. The email in question was not provided, because as testified by Major Turley, it would impact negatively the security and management of the institution. If this information were to be released it would cause real management issues at the prison.

#### **Closing Petitioner**

Mr. Losee explained to the Committee that the officers in the prison know who he is and what he is about. It is evident in the email communication between Officer Kevin Cox and Officer Gallegos that they believe him to be someone who files lawsuits and not to be of any concern. Mr. Losee stated that he is about challenging corruption in the prison system, and knows that there are good people who work there but every once in a while there is one who is not good. He believes the candid email communication violated the prison's code of conduct that all officers shall communicate in all forms with respect to all individuals. Mr. Losee wants to use the email to show that the candid remarks violate prison policy. The court has already reviewed the email.

Mr. Losee mentioned that the emails from March 6, 2014, to January 9, 2015, were not addressed during the hearing. Mr. Losee has received some but not all of the emails from the list of individuals on the GRAMA request.

The Committee asked Mr. Losee if he believes there are other emails from prison staff members that he did not receive. Mr. Losee explains that one email would not be enough to effectively communicate back and forth between multiple individuals. He believes because he challenged the corrupt actions of Officer Gallegos and they were being covered up by other officers. He also believes that the challenge got him moved out of B-North housing unit.

**Closing-Respondent**

Ms. Reber stated that Mr. Losee was provided 50 pages of responsive emails with the private and protected information redacted. As to the second GRAMA request, two pages were provided after a thorough search. UDC provided all the emails they could find.

The issue at hand is whether the email, the department did not provide, was correctly classified as protected. Ms. Reber believes although Mr. Losee states he is not a management issue now but he could become a problem in the future if provided the email. In addition the email outlines the processes and management of inmates. There is no lack of respect in the email only candid concerns about the inmate.

**Motion:** A motion was made by Mr. Fleming to go *in camera* and seconded by Mr. Haraldsen. The motion passed 6-0.

Committee went *in camera*.

Mr. Losee was reconnected telephonically to the hearing.

**Motion:** A motion was made by Mr. Fleming to go back in session and seconded by Ms. Richardson. The motion passed 6-0.

**Deliberation:**

The Committee had a short deliberation and Mr. Fleming made a motion.

**Motion:** A motion was made by Mr. Fleming that the Committee deny access under Utah Code 63G-2-305(13) because the records were properly classified as protected. The motion was seconded by Ms. Richardson.

**Amended Motion:** Ms. Cornwall amended the original motion and added Utah Code 63G-2-305(10)(e). The Committee discusses the amendment at length going back and forth on whether or not Utah Code 63G-2-305(10)(e) is applicable to the process and procedures. The Chair is not in favor of the amendment. Mr. Fleming is in favor and amends the motion.

**Motion:** A motion was made by Mr. Fleming that the Committee deny access under Utah Code 63G-2-305(13), and could be properly classified under Utah Code 63G-2-305(10)(e). The motion was seconded by Ms. Richardson. The motion passed 5-1. There was one dissent, Ms. Smith-Mansfield.

## 5-Minute Break

The Chair introduced the parties for the hearing: Mr. Patrick Sullivan, Petitioner, and Ms. Sharel Reber, representing attorney for the Utah Department of Corrections (UDC). The Chair explained procedures and asked the Committee members introduce themselves to the Petitioner. Mr. Misner arrived for second hearing.

### III. Hearing: Patrick Sullivan vs. Utah Department of Corrections (UDC)

#### Opening-Petitioner

Mr. Sullivan explained that he will be presenting a range of records that the UDC claims do not exist or could not locate, denial of access, and denial of fee waivers. The UDC's response is that because he is incarcerated the Government Records and Access Management Act (GRAMA) statute does not apply to him as it would to a person not incarcerated. He strongly disagrees with this response by UDC. Mr. Sullivan believes the statute should apply to him even if he is incarcerated.

Mr. Sullivan explained how he sustained injuries to his arm and the subsequent medical treatments, during which time he experienced numerous problems with the care he received. The arm was not properly splinted for over four hours after he fell from the top bunk to floor. Surgery was recommended within 24 hours by the physician but the prison officials had Mr. Sullivan wait six days before having the surgery performed. He was refused pain medication before and after surgery. The UDC only administered ibuprofen. The subsequent ongoing medical issues is the reason for seeking the records and other documents that relate to the injury and follow-up care. In addition, Mr. Sullivan wants to explore the GRAMA statute and how it is not carried out by the records manager and records officer of the UDC, specifically the requirement that all inmates must prepay for all records request which is contrary to the GRAMA statute.

#### Opening-Respondent

Ms. Reber stated that Mr. Sullivan has brought 14 separate GRAMA appeals before the Committee. On April 9, 2015, UDC's records officer, Gina Proctor, rejected several of Mr. Sullivan's GRAMA requests that asked for fee waivers because Mr. Sullivan was not indigent. The Respondent listed each appeal and distinguished among which ones UDC is arguing or if they are moot issues.

The seven ensuing appeals are argued as moot issues by UDC:

Appeal No. 1: GRAMA request for "xray images 9-19-2014 to now." This particular request initially was for the x-ray images. At the time UDC claimed it did not receive or maintain the records and referred Mr. Sullivan to the University of Utah Medical Center (UMC). Mr. Sullivan appealed to the SRC. After which UDC obtained the records burned them to a disk and informed Mr. Sullivan that he needed to send in a money transfer slip. Mr. Sullivan appealed to the chief administrative officer (CAO) for a fee waiver. A fee waiver had not been part of the original GRAMA request. Therefore the CAO declined to address the fee waiver issue. Since that time all of the records have been provided to Mr. Sullivan. This is a moot issue.

Appeal No. 2: GRAMA request for “provider charting 9-1-2014 to now” he is requesting a fee waiver. Mr. Sullivan has now received all the provider charting covering this time period. Therefore, this is a moot issue.

Appeal No. 3: GRAMA request for “xray report 3-12-15.” Initially Mr. Sullivan was told this report did not exist, however it was located. This record has been provided to Mr. Sullivan. Therefore, this is a moot issue.

Appeal No. 5c: GRAMA request for “[i]nfirmary phone call log 9-19-14 to 9-30-14.” The Clinical Services Bureau does not keep a log of telephone calls for the infirmary. Therefore, there is no record responsive to this request, and the issue is moot.

Appeal No. 5e: GRAMA request for “[c]all logs, text messages between AP&P agent Gina Dockery and Shelley Condreaut (Assistant AG).” There were no responsive telephone logs or text messages located. Therefore, there are no records responsive to this request, and the issue is moot.

Appeal No. 5h: GRAMA request for “DOPL (Utah Division of Occupational and Professional Licensing) report.” UDC does not maintain a copy of this record. Mr. Sullivan will need to obtain it directly from the Utah Division of Public Licensing. Therefore, moot issue.

Appeal No. 5i: GRAMA request for “[a]ll prescriptions written for me.” This record has been provided to Mr. Sullivan. Therefore, this is a moot issue.

The remaining GRAMA requests are fee waivers and the Respondent explained the department’s position on non-indigent status and how it is applicable to Mr. Sullivan.

Appeal No. 4: GRAMA request for “xray images of my broken right forearm, which happened Sept. 19, 2014” and requesting a fee waiver.

Appeal No. 5a: GRAMA request for “Ortho Consult Report 9-22-14 and 10-20-14.”

Appeal No. 5b: GRAMA request for “[i]nfirmary schedule for OQ4-9/22/2014 & 10/20/14.”

Appeal No. 5d: GRAMA request for “[a]ll AP&P Detailed field notes, progress, violation reports.”

Appeal No. 5f: GRAMA request for “[a]ll electronic messages (e-mail) regarding me from Brent Keller (AP&P Agent) sent or received.”

Appeal No. 5g: GRAMA request for “[a]ll electronic messages (e-mail) regarding me from Gina Dockery (AP&P Agent) sent or received.”

Appeal No. 5j: GRAMA request for “xray report 3/12/15.”

Ms. Reber argued that Appeals 1, 2, 4, 5a, 5b, 5d, 5f, 5g, and 5i all deal with whether Mr. Sullivan is entitled to a fee waiver, which he based solely on that he is the subject of the record. GRAMA encourages public entities to provide a fee waiver where the requester is the subject of the record; however it is not required for an agency to do so. Obviously the legislature has written into the rule an amount of discretion for the governmental entity to make that determination that in all instances it is not required to provide a fee waiver. If the legislatures wanted it to happen in that manner it would have used the word "shall." Instead the legislature gave the governmental entities the discretion to determine when a fee waiver should be provided even if the requester is the subject of the record.

UDC takes this very seriously, and it has legitimate reasons, and in this particular instance UDC is denying Mr. Sullivan request for fee waivers for specific reasons. First he is incarcerated on 30 convictions. Next, the state of Utah is required to provide housing, food, clothes, and medical care for \$80.00 a day, and \$29,000 a year at the tax payer's expense. As a result of Mr. Sullivan's incarceration UDC maintains numerous records that he is the subject of. If all the inmates (6700) were allowed unfettered access to the free copies of their records, simply because they were the subject of the record, it would cost the taxpayers thousands of dollars a year. The records officers receive roughly 100 GRAMA requests from inmates each week.

Mr. Sullivan did not qualify as indigent when Mr. Haddon denied the fee waivers. In fact, at the time Mr. Sullivan had several hundred dollars in his inmate account. The UDC has reviewed his spending habits and found that Mr. Sullivan has spent hundreds of dollars in April and May on junk food and luxuries (e.g., a radio, headphones, television rental, etc.). The UDC feels it is looking out for tax payers and looking out for Mr. Sullivan's best interest in teaching Mr. Sullivan to exercise some fiscal restraint and accountability by being required to pay for any records he requests. It is the public's interest for Mr. Sullivan's fee waiver requests at issue to be denied. Therefore, UDC respectfully requests that the SRC uphold UDC's denial for these fee waivers.

**Testimony-Petitioner**

Mr. Sullivan addressed each appeal that was discussed by Ms. Reber.

Appeal No. 3 and 5i: Mr. Sullivan expressed his frustrating attempts to obtain the x-ray because originally UDC denied his request stating the record did not exist. However right before the hearing UDC was able to locate the record.

Appeal No. 5c: In regard to the infirmary phone call log. Officers routinely call the infirmary if an inmate has a medical problem. It is incomprehensible that the infirmary would not keep some kind of electronic record or a written paper record. He claims officers have told him that there is a log kept in the infirmary.

Appeal No. 5e: He knows for a fact that his probation officer, Gina Dockery and Shelley Condreaut, Assistant AG, did communicate via text message, and at one point when he was in the vehicle, she made a comment to the other agent that she needed to

text Shelley really quick. He does not believe UDC has properly searched or tried to locate the records through the phone company.

Appeal No. 5h: UDC did receive a copy of the DOPL report and they do not want to provide a copy.

Mr. Sullivan addressed the fee waiver issue. The UDC has a clear interest in declining his request for fee waivers. He argues the funds are limited and that his account balance should have nothing to do with whether a fee waiver is granted or not. He quotes Utah Code 63G-2-203 and argues the point the word “may” is permission, and that UDC does not have to grant a fee waiver, but by using language “and is encouraged to do so” the legislature intent is that for records in which someone is the subject of they should be given a copy for free. He believes the governmental entity should provide a fee waiver for records that the requester is the subject of regardless of how much is in an account.

Mr. Sullivan explains that the money in his account is for medical bills, food, toiletries, phone calls, and other necessities he has to purchase to live in prison. The junk food is for his recommended increased caloric intake by his orthopedic physician. The extra calories are to help his injury heal properly.

The issue of fee waivers and ability to appeal a records officer’s decision is brought up again. Mr. Sullivan claims that UDC has not denied fee waivers instead the request is rejected because he is not indigent status. He believes UDC should provide, as stated in Utah Code 63G-2-205, the ability to appeal the fee waiver denial. In his opinion, because they do not provide this information they do not want inmates to know their entitlements under GRAMA. In this regard UDC is not following the GRAMA statute.

He argued that UDC’s records request form does not provide a spot to mark for a fee waiver. The only way one can get a fee waiver is if the requester marks indigent, but there is nowhere to mark if one is the subject of the records as it states in Utah Code 63G-2-203. He questions Gina Proctor’s position as the records officer and her appointment to act on behalf of Deputy Director, Mike Haddon, and quotes sections from Utah Code 63G Chapter 2.

Chair questions Mr. Sullivan that he only addressed the fee waiver issue in the assistant attorney general’s statement of facts and reasons, however they also discussed that some portions of the records were protected and private. Mr. Sullivan stated he is only appealing the fee waivers.

**Testimony-Respondent**

Ms. Reber acknowledged that UDC initially could not find the x-ray report: however it was located and provided to Mr. Sullivan.

Even though Mr. Sullivan believes there should be telephone logs at the infirmary there are none, they do not exist. Ms. Reber stated she had an email from Gina Dockery, who is the supervising AP&P agent, it says she does not have any text messages that Mr.

Sullivan eluded to in the testimony. As for the DOPL records, the AP&P agent can go into the data site and look at it but UDC does not maintain, create, or own the record. It is a DOPL record.

The next issue addressed is fee waivers. Ms. Reber explained that inmates do not need money to cover expenses. The prison system provides housing, food, toiletries, and medical needs. As an inmate all of Mr. Sullivan's life necessities are met. He does not have to have any money in his inmate account and he could live fine. The issue is, he is an inmate with a whole lot of money and he is utilizing that money for what in prison are considered luxuries. If Mr. Sullivan requires a high caloric diet then he needs to go to the medical provider at the prison and request an increased caloric amount. That request and need would be provided to him at the state's cost. On the subject of fee waivers, since December 2014, Mr. Sullivan has been provided over 120 pages pursuant to a fee waiver. In some of those instances UDC thought he was impecunious, but in other instances it was merely because they waived the fees.

The Respondent addressed the notion that UDC warehouses inmates, on the contrary they are there to rehabilitate inmates, with the end focus to reintegrate them into society. Part of the rehabilitation is fiscal responsibility. As to medical if the inmate seeks outside provider care at UMC then the inmate is responsible for 10% of the amount.

As for the Department of Corrections misleading inmates on how to fill out a GRAMA request this is not the case. UDC requests the inmate to provide a blank money transfer slip and UDC determines how much to charge the inmate's account. This is how the department can cut down on administrative costs and eliminate the time consuming step of contacting the inmate for a money transfer slip to process the request. The records officer can check the database and apply a fee or not based on the inmates status.

Ms. Gina Proctor is sworn in.

Ms. Proctor has been an employee at the Utah Department of Corrections for 10 years and a records manager for 6.5 years. She stated that records are provided to inmates after careful consideration. There are eight to ten GRAMA contacts throughout the department and it is up to their discretion whether or not to provide a fee waiver. Mr. Sullivan has been provided fee waivers in the past.

Ms. Proctor continued to explain her role as the records officer working for Mr. Haddon. She researches the appeals, provides Mr. Haddon with a recommendation and reasoning whether to grant or deny an appeal. Mr. Haddon will provide direction and she drafts up a letter, he reviews, and signs or changes his mind. There are times when she does draft a letter ahead of time anticipating what his decision might be based on previous responses. Mr. Haddon is the final decision maker in the appeals process.

She explained the reason for the word "rejected" on the GRAMA form. In AC28 Policy the submission is incomplete if the inmate does not have the form signed by a case manager, who has notary privileges, to verify the inmate's signature. The money transfer

slip if not used will be shredded. The slip cannot be returned. The slips are logged in and signed off by an officer. The database system CACTUS identifies the inmate as indigent or not. The money transfer slip is required because it is part of book keeping, and it prevents going back to ask the inmate for the slip, by providing the slip it keeps the process moving and not bottle necking.

The Committee questions how an inmate can request a fee waiver. Ms. Proctor stated the inmate can write it on the form as Mr. Sullivan so noted.

Ms. Reber concludes that Mr. Sullivan is abusing the system and using his money for items that are considered luxury in the prison system. And he has continued to ask for fee waivers when he had up to \$600.00 of money in his account. If Mr. Sullivan managed his affairs correctly he could easily pay for the records request.

#### **Closing-Petitioner**

Mr. Sullivan responded to the text message issue with Gina Dockery, it is his understanding that the cell phone company keeps a log of all text messages. It does not appear that the governmental entity has gone to the phone company to obtain the messages. In his opinion the 120 pages that were provided because UDC thought he was indigent.

The GRAMA request form does not provide three different options for obtaining a fee waiver, and the policy is not readily accessible to those who are unaware that a person who is the subject of the record can ask for a fee waiver. Providing a blank money slip is similar to providing a blank check to fill ones request. This lends to a problem that when UDC provides a record that is incorrect they will not refund the requester.

He argued that Ms. Proctor receives the appeals and provides research, recommendations, notes and drafts letters for the chief administrative officer. The statute does not state the records officer should do those specific tasks. He continued to argue her role is not in compliance with the statute.

#### **Closing-Respondent**

Ms. Rebel counter argued all Mr. Sullivan's points. The fact is Gina Dockery does not have the responsive text messages and that UDC does provide inmates fee waivers for records they are the subject of, and these are provided regularly. In order to prevent bottleneaking the records request and appeals system it is UDC policy to submit a blank money transfer slip. Depending on the inmates indigent status a fee waiver will be granted or denied. To provide all inmates a fee waiver for records they are the subject of would cost the state thousands of dollars in tax payer dollars. Mr. Sullivan will not be denied the medical records. He will either pay for them or if he no longer has money, and becomes impecunious, they will be given to him free of charge. The Utah Department of Corrections is in the business of rehabilitating offenders and fiscal responsibility is paramount.

Ms. Cornwall asked which appeals were fee waivers. Ms. Rebel listed Appeal No. 1, 2, 4, 5a, 5b, 5d, 5g, and 5i. In regards to Appeal No. 5d and 5f they contain protected and private information but Mr. Sullivan is not contesting the redactions.

The Committee questions the Respondent as to why the infirmary does not maintain telephone logs and if they are maintained on the patients' chart. Another question arose as to what records the phone company does maintain. The Respondent answered only the long distant calls. The Chair asked if an inmate wants to inspect a record how would that be requested on the GRAMA form. The Respondent answered the case manager would be involved in arranging for the inmate to inspect their records upon request.

**Deliberation:**

Mr. Fleming stated that Mr. Sullivan has interpreted the legislature's intent as someone who is the subject of a record it should be provided for free. That is not the case, and if it were so the law would read as such. Mr. Fleming believes the UDC has acted properly on this matter. On another note, the law is not intended to be administrative procedures it is intended to be a statute and all statutes are complied with based on procedures that are defined by the agency. Mr. Fleming completely disagrees with Mr. Sullivan's implications of the legislature's intent and the interpretation of the statute.

**Motion:** A motion was made by Mr. Fleming that the denial of the fee waiver by the Utah Department of Corrections is upheld. The motion was seconded by Mr. Breshears. The motion passed 6-1. There was one dissent, Mr. Haraldsen.

The Chair takes the floor and expresses that fees in GRAMA are problematic. Corrections has developed a form to help expedite the matter on the types of request they frequently receive. The most frequent request is that of someone who is indigent and wants the fee waived. Although the form does not provide for inspecting a record it does provide a copy. There is a policy in place for an inmate to receive up to 100 free copies a year. The Chair elaborates that UDC might consider expanding the form to address those items, but it is not required. The petitioner has the right to inspect the record but it is not entirely sure if that is happening based on the evidence today; however the petitioner certainly has the right to inspect. The Chair supports the motion.

The Committee decides to group 5c and 5e together and rule separately on 5h, because the first group the records do not exist, as for the latter the agency does not maintain.

**Motion:** A motion was made by Mr. Breshears that based on the evidence presented to the Committee, they are convinced the governmental entity does not have records responsive to the request specific to 5c & 5e. The motion is seconded by Mr. Misner. The motion passed 7-0.

**Motion:** A motion was made by Ms. Cornwall that the governmental entity does not maintain the record of 5h, DOPL report. The motion was seconded by Mr. Fleming. The motion passed 7-0.

**20-Minute Lunch Break.**

**IV. Approval of May 14, 2015, Minutes:**

Ms. Smith-Mansfield submitted editorial corrections that were updated on the document prior to the meeting. A motion was made by Ms. Richardson to approve the May 14, 2015, minutes and seconded by Mr. Fleming. The motion passed 6-0. One abstention, Ms. Cornwall (see the attached documents on the Utah Public Notice Website, [SRC Minutes May 14, 2015.pdf](#)).

**V. Report on May and June Appeals:**

The executive secretary briefed the following incomplete, denied, and pending appeals:

-The following appeals will not be heard because the petitioners did not provide the completed paperwork to process the appeals: **Ben Winokur vs. Utah Tax Commission, John Rice vs. UDC, and Bodee Flynn vs. Department of Workforce Services**. It is noted that Mr. Bodee Flynn's appeal, although incomplete, was resolved through mediation.

- **P. R. Robert Augason vs. University of Utah hearing**: The Committee readdressed and discussed this case at length and determined that the petitioner withdrew the appeal and it cannot be reinstated by the Committee. It is outside their jurisdiction. In addition the petitioner withdrew the appeal based on the outcome of mediation and that mediation cannot be brought forth for the Committee to hear. The hearing was cancelled.

-**Thomas Dudley Beck vs. Bluff Water Works Special Service District**: Mr. Beck sent a Letter of Noncompliance to the SRC stating that BWWSSD did not provide the records in the format requested. BWWSSD did file letter of compliance and provided records as ordered by the SRC. Mr. Beck was notified to seek court options. Mr. Tonks further explained the reasoning behind the decision not to allow Mr. Beck to address the Committee on this matter, essentially the SRC has no jurisdiction.

-The following appeals are still pending review: **Jamis Johnson vs. UDC, Nate Carlisle, The Salt Lake Tribune vs. Washington County Attorney's Office, Jason Behar vs. DHRM, Gray Smith vs. Cottonwood Heights City, and lastly Michael Clára vs. SLC School District**.

At this time there are seven potential hearings scheduled for July 9, 2015, and two tentatively scheduled for August (see the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts June 11, 2015.pdf](#)).

The Chair introduced the parties for the hearing: Mr. Charles McCollum, Petitioner, and Mr. Ryan Brady, representing attorney for the Utah State University (USU). The Chair has the Committee members introduce themselves and explained the procedures.

**VI. Hearing: Kevin Opsahl, *The Herald Journal* vs. Utah State University (USU)**

**Opening-Petitioner**

Mr. Charles McCollum, *The Herald Journal* editor, presented opening statement. The appeal is about USU's denial to disclose the details of a contract with Maverik, the corporate convenient store and gas chain, to rename the USU stadium that use to be called Romney Stadium. The new stadium will be named Maverik Stadium for an unknown contractual period of time. The journal asked for the contract and USU denied access.

He outlined specific points about the appeal and reasoning behind the petition. First *The Herald Journal* is trying to fight for the principle, that government records such as this be kept open. The journal does not want to see future contracts between USU and other companies be closed based on the decision made by the Committee today. It would set a very bad precedence. Reviewing USU's statement of facts and reasons to the Committee it cited a State Records Committee ruling, *Morgan Fife vs. City of Orem*, Case No. 13-14, this demonstrates the Committee's decisions carry a lot of weight. It would be very dangerous if Maverik was allowed to close this contract based on the argument that marketing strategies and advertising dollars should be kept secret. There are two places in GRAMA that mentions contracts entered in by government entity are public records in accordance to Utah Code 63G-2-301(3)(d), and expenditures of funds by the governmental entity pursuant to Utah Code 63G-2-301(3)(e). The Maverik contract falls under both statutes. The journal finds those portions of the GRAMA statute to be the heart and soul of the ideal of government transparency. It provides the public the ability to see what kind of financial deals the government is involved in. It also provides a critical check on corruption and the "good ole boy" system.

If a business wants confidentiality in a contract then it should not do business with the government. Maverik argues disclosures could give competitors an unfair advantage. If the request is granted what would prevent all companies to do business with a public agency from expecting the same consideration. Ruling today in Maverik's favor could pave the way for carte blanche secrecy. According to GRAMA there is a provision where businesses can file a claim of confidentiality and that claim should not make it automatically so without checks and balances.

Maverik made a couple of arguments that the contract ruling made in the *Fife vs Orem* was about bids and request for proposals. The Committee ruled that because of the confidentiality it should be honored, but that case pertains to a bid for proposals not a contract. Mr. McCollum referenced Utah Codes 63G-2-301(3)(d) and Utah Code 63G-2-301(3)(e) which pertain to contracts not bids.

He concluded by mentioning the renaming of Boise State University stadium. The Bronco Stadium was renamed Albertsons Stadium and the contract was not originally released to the public when requested by the press. The athletic department refused to release the contract until the Boise State President stepped in and ordered the department to disclose the contract. Mr. McCollum hopes the Committee will do the same thing and rule in favor of releasing the contract.

Cripe, C. (2014, June 17). Boise State will get \$9 million from Albertsons naming-rights deal. Idaho Statesman. [On-line]. Available: <http://www.idahostatesman.com/2014/06/17/3239497/tickets-for-boise-state-football.html>

### **Opening-Respondent**

Mr. Brady, associate general counsel for Utah State University, stated USU has an abiding interest in disclosing documents to the public. USU discloses documents all the time, and the statute does provide that all documents are otherwise designated public, although in this case the statute requirements designate the contract as a protected document. The statement of facts submitted by USU outlines two primary legal provisions that are most germane to this particular issue. The first is in the contract. When it was signed by Maverik it made a claim of business confidentiality, and provided a concise statement in supporting that claim. USU recognized that to be in compliance with Utah Code 63G-2-309 it had to designate the contract as protected under Utah Code 63G-2-305(2). The claim of business confidentiality may be justified if in fact the document in question contains commercial information that reasonably could be expected to result in a competition injury to that claimant. USU wants to be in compliance with GRAMA, and if the contract is disclosed it would be a violation of the statute.

### **Testimony-Petitioner**

Mr. Joel Campbell was sworn in.

Mr. Campbell, an Associate Professor at Brigham Young University, former reporter and actively involved with GRAMA legislation since its inception, appeared in front of the Committee on behalf of *The Herald Journal*.

He explained the three provisions mentioned for the claim of business confidentiality and the context of those claims. First, referring to Utah Code 63G-2-309(1)(a)(i)(A) and (B), he summarized the statute discussing that “any person who provides to a governmental entity a record that the person believes should be protected under Subsection 63G-2-305(1) or (2) or both Subsections...shall provide with the record a written claim of business confidentiality.” The business claim of confidentiality referred to is questionable. Does it mean the entire record is off limit or only information inside of the record would be harmful to the business operation? Mr. Campbell believes the confidentiality information can be segregated out from other information that maybe of interest to the public. The public ought to know the basic of the contract and there is a way to protect the business confidentiality.

Second provision mentioned is Utah Code 63G-2-305. He discussed trade secrets and provided background as to what he believes the intent of that portion of statute refers to. The legislature’s intent involved donations to the government including institutions of higher learning. At the time of drafting the law institutions wanted to grant anonymity to the some of the donors, but the basics of the contract pursuant to Utah Code 63G-2-305(37)(b) would still be disclosed. However Maverik is the opposite, it is very public

about their name and wants the name to be used in conjunction of a public institution, but does not want the terms disclosed.

Mr. Campbell provided an example of when the business confidentiality clause was appropriately used in terms of higher education. From the discussion early on in the GRAMA process the University of Utah approached legislature requesting that their medical research (e.g. genome project, DNA research, medical research) not be requested through GRAMA to plunder their scientific research. Therefore they wanted technology transfer, copy right, trade mark, and intellectual property protected. Those who were activist for openness agreed it should be protected. That is the reason higher education created business confidentiality in the first place, to protect the research of a scientist at the University of Utah. Mr. Campbell does not see the comparison between Maverik claims of propriety food and genome research at the university.

Mr. Campbell continued that he reviewed the Board of Trustees minutes and the Maverik partnership is not on the agenda, and there is no evidence that it was discussed in an open meeting. There is also concern on whether the Open Meetings Act and procurement laws in the state were followed. Were the proper channels used and was there a legislation appropriation process, and lastly will this be an ongoing budget item. There are other processes that are supposed to be checked for stadiums and buildings and there is no evidence that those were properly followed. Mr. Campbell stated the records are misclassified and is the wrong use of the business confidentiality claim. There is an ability to simply rule that there is overwhelming public interest that outweighs the business protection.

#### **Testimony-Respondent**

Mr. Brady requests that the Committee ask him questions instead of providing testimony.

The Committee questioned as to where did the university or Maverik get the idea to use private money to build a stadium, and are there other universities doing this? The Respondent stated this is a trend for universities to partner with commercial companies to build facilities and make institutional improvements. Private money has been used to build universities in a variety of ways over time. That is why universities dedicate so much time and effort to what is generally termed advancement of the university. Most universities have a vice president of advancement who goes out and tries to raise funds to improve the campus and school programs. In this case, this is not a donation it is category of a business expense by Maverik and the university approached it as a business transaction. To comply with the statute the contract was classified as a protected record.

GRAMA is not just about disclosure of records it's also about the protection of records the proper designation, not all records are public. Utah State University has not made the claim of confidentiality: Maverik has made the claim of business confidentiality. Mr. Brady requests that General Counsel for Maverik be brought into the conversation so the Committee can ask questions as to why Maverik requested the document to be classified protected and how reasonable is their business confidentiality claim.

David Hancock, General Counsel for Maverik Inc., was sworn in.

The Chair, before questioning the General Counsel, asked Mr. Brady about Utah Code 63G-2-305(2) what the university is citing as a reason for protected record. There are three parts to Subsection 2 and the governmental entity must meet all three conditions.

The Chair reads the subsections and questions Mr. Brady whether the governmental entity weighed the interest, and did the university weigh not just the claim of business confidentiality, but also the public interest? Mr. Brady responded that the university weighed the public's interest on a variety of different levels. There is definitely public curiosity as to how the university is conducting business, making improvements, and what financial contracts they have entered into. Maverik is only one piece of the financial business that the university entered in to build a stadium. These financial partnerships are very instrumental in moving forward and meeting the mission of the university. The public by extension will benefit with a business environment, and it is necessary for the university to enter in to commercial contracts in order to survive.

Another question is asked of the Respondent about the competitive bids. Mr. Fleming poses a question about the university citing the *Morgan Fife vs. City of Orem* case, which is about competitive bids not about contracts. He is curious if there was a competitive bid process. How the claim of confidentiality is related to the contract the same as the claim of confidentiality in competitive bid process? Mr. Brady responded he does not identify with a clear distinction between the records. The claim of business confidentiality may be made on any type of record. In this particular case Maverik made the claim within the record itself. The distinction for USU is not critical on the claim of confidentiality, and there was a reasonable balance of Maverik's interest, public interest, and USU came to the determination to classify the document as a protected record.

Ms. Cornwall questions the argument that university benefits a great deal from the contract and that is in the public interest. If the university benefits and Cache county residents will enjoy the extra benefits why does Maverik not want to take credit for that?

Mr. Hancock response to Ms. Cornwall's question is that Maverik is in a high competitive advertising environment. If the advertising dollars and expenditures were known to the public, particularly to those people who buy advertising from, it can be used as leverage against Maverik and advertising negotiations. It will affect Maverik's ability to compete in the market.

Mr. Brad Plowman was sworn in.

Mr. Plowman, Marketing Representative for Maverik, addressed the Committee's questions. On the question of sponsorships, the last 13 years all three of the big schools University of Utah, Utah State University, and BYU used private entities to negotiate all of their contracts on behalf of the marketing and advertising inside their stadiums. The trend is towards naming rights for sponsorships in advertising.

The question of unfair competitive advantages was addressed by Mr. Plowman. If the advertising information becomes public there is no longer any competitive advantage over future deals on behalf of Maverik. The Chair retorts that the economic environment changes, and the amount of what the contract was for at the time is no longer relevant because the economy is different. The discussion between the Committee and Respondent continues over whether there is a competitive advantage or disadvantage if the contract details are provided to the public. Mr. Brady comments on Maverik's testimony and their perspective on market place and whether or not the claim is reasonable; weighing the public interest against Maverik's. The Chair comments that usually business confidentiality claim is only for a portion of the contract but Maverik is making the claim for the entire contract.

### **Closing-Petitioner**

Mr. McCollum comments that there could be all kinds of provisions in the contract besides just the dollar figures, which would be of public interest. Involving the E-Center, *The Salt Lake Tribune* submitted a GRAMA request and found that all gas purchases were to be made at Maverik. He questions if that is part of the contract with USU? What sweetened the deal for Maverik, it could be virtually anything. That is why there is a high public interest to view the contract. When Maverik says that advertising confidentiality is important to these advertising negotiations, it shouldn't matter.

The main agreement is if one can simply claim confidentiality per the GRAMA law, one can override the section of the law that covers contracts by government to entities are open to the public. If anyone can claim business confidentiality then the GRAMA law is severely flawed.

Mr. Campbell comments on procurement that there was a news release about the contract that the priority food products and Maverik concessions would be given a place at the stadium. If the entity gives a sole source procurement to one there must be a justification for that action, and he wonders if that was ever done. He concludes the closing comments by thanking the Committee.

### **Closing-Respondent**

Mr. Brady hopes the Committee will not be distracted by procurement. The bottom line is the university is not expending funds. This hearing is simply about claiming business confidentiality and challenging the protected designation. The university has carefully gone through the records and if they were to disclose any information it would be in noncompliance with the law. They do not want to subject the university to legal reprisals. They want to be in compliance with the law and he asked the Committee to uphold the Utah State University's decision to deny access.

Mr. Fleming clarifies his inquiry on procurement. In essence the members were trying to get to the idea of whether or not there would be an unfair competitive advantage over Maverik. Why is it fair that only one commercial entity had the chance to do the deal? Was it possible other entities had the opportunity to do the deal it is an unknown because the Respondent could not answer the question. It is about competition not procurement.

Mr. Brady comments that the argument is about the designation of the protected record, not whether or not there was proper procurement or competition. Mr. Fleming restated that a contract with a public entity is a public record. The public has the right to know what kind of deal is made with a commercial business. That particular part of the code does not state that it's only procurement contracts. The Respondent comments that it is the first thing that is cited in his testimony that contracts are public unless otherwise designated. In this case the record has been otherwise designated per the code.

**Motion:** A motion was made by Mr. Fleming to go *in camera*. The motion was seconded by Ms. Cornwall. The motion passed 7-0.

Committee went *in camera*.

**Motion:** A motion was made by Ms. Cornwall to go *back in session*. The motion was seconded by Mr. Misner. The motion passed 7-0.

### **Deliberation**

The Committee discussed the citation the governmental entity has provided that the records are protected under commercial information or non-individual financial information obtained from a person if a person includes a corporation under Utah Code 63G-2-305(2)(a)(b)(c); Utah Code 63G-2-309 that includes the claim of confidentiality; Utah Code 63G-2-305(1)(a)(b)(ii) and Subsection (2); entity can make a claim under Utah Code 63G-2-201(5)(b) or Utah Code 63G-2-401(6). In that situation a governmental entity to whom the record was made may not disclose the record and be protected under the provision listed under Subsection 63G-2-309(1)(b)(i). The Chair comments that those are the specific statutes the governmental entity is claiming.

Counsel includes the following statutes Utah Code 63G-2-301(3)(d); Utah Code 63G-2-302; Utah Code 63G-2-304; and Utah Code 63G-2-305.

The discussion centers on whether or not there is public interest, and if the public would benefit by releasing the record to the community. Releasing the record could also harm the university deal with Maverik. A counter view was offered that the certain portions of the contract could be redacted and provided. Another opinion is offered that a university should be free of corporate involvement, and there is public interest to have the discussion on what is given away to engage with commercial contracts.

**Motion:** A motion is made by Mr. Breshears to deny the record and that governmental entity has properly classified the record protected under Utah Code 63G-2-305(2). The motion is seconded by Mr. Fleming. The motion does not pass 1-6. Mr. Breshears voted for the motion.

**Motion does not pass.**

The Committee discussed legislative intent is not enough to grant a way to duck GRAMA because the entity invokes confidentiality. Otherwise, everyone would be doing it and the GRAMA statute would be worthless as a law. If all it takes is for a business to say they

are not subject to GRAMA if one clause is added in the contract, then why is there GRAMA? The confidentiality argument is often made and it's hard to claim a future injury. Most contracts do not have the entire contract under the business confidentiality claim.

The Committee continues to examine thoughts and opinions about bids versus contracts; commercial and public interest; funding with or without public dollars; and negative impact to the university if released. Mr. Misner commented that when discussing universities and big money one can never go wrong being as open as possible. If the process is transparent to the public it decreases the risk and scrutiny.

After the failed motion the Committee redirected focus and considered redacting commercial interest portions of the contract, and providing the rest of the contract. Others objected and would not vote for specific terms of the contract. One suggestion was to allow the parties work together and try to come to terms as to what is considered commercial interest. This was rejected by Counsel. Counsel stated the Committee's job is to say public or not public. The Committee has to be specific in their ruling.

**Motion:** A motion is made by Mr. Haraldsen to honor the appeal. The Committee finds the contract is a public record based on Utah Code 63G-2-301(3)(d). The motion is seconded by Mr. Fleming. The motion does not pass, 2-4. There was one abstention, Ms. Richardson.

**Motion does not pass.**

The Committee decides in order to make a decision on which parts are public and protected they must go back *in camera* to review the contract.

**Motion:** A motion was made by Mr. Fleming to go *in camera* and seconded by Mr. Misner. The motion passed 7-0.

The Committee went *in camera*.

**Motion:** A motion was made by Ms. Cornwall to go back in session and seconded Ms. Richardson. The motion passed 7-0.

**Motion:** A motion was made Ms. Richardson upon further *in camera* review the contract be made public under Utah Code 63G-2-301(3)(d), and section Utah Code 63G-2-305(2) does not apply. The motion was seconded by Ms. Cornwall. The motion passed 6-1. One dissent, Mr. Breshears.

The Committee discussed the intent of the law is to clearly favor public disclosure and to have a weighing provision, and if there is a question it always goes to public interest. The people of the state have significant interest in what happens with their universities that are funded generally by tax payer dollars. It is a government contract and it is meant to be public.

Ms. Cornwall left the meeting at 3p.m.

**VII. Approval of Retention Schedules:**

**State Agencies: None**

**Utah State General Records Retention Schedule:**

Ms. Rebekkah Shaw presented six series for Law Enforcement.

Administrative Records

(Item 1-74) Legal Counsel Records (Admin)

(Item 1-75) Formal Opinion Records (Admin)

(Item 1-76) Agency History Records (Admin)

**Motion-**A motion was made by Mr. Fleming and seconded by Mr. Breshears to approve the proposed retention schedule. A vote was unanimous, 6-0.

Human Resource Records

(Item 11-61) Staff Acquisition Records

**Motion-**A motion was made by Mr. Fleming and seconded by Ms. Richardson to approve the proposed retention schedule. A vote was unanimous, 6-0.

Purchasing Records

(Item 13-17) Request for Proposal Records

**Motion-**A motion was made by Mr. Fleming and seconded by Mr. Haraldsen to approve the proposed retention schedule. A vote was unanimous, 6-0.

Property Records

(Item 14-5) Right of Way Records

**Motion-**A motion was made by Mr. Fleming and seconded by Mr. Breshears to approve the proposed retention schedule. A vote was unanimous, 6-0.

**VIII. Report on Cases in District Court:**

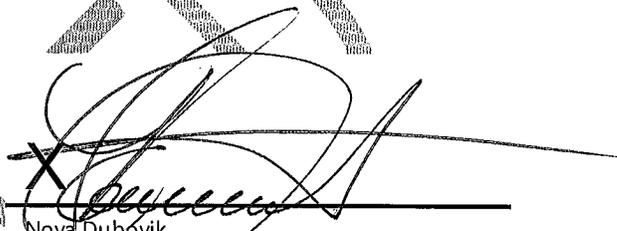
Mr. Tonks briefed to the committee members on the *Utah Dept. of Human Resources v. Paul Amann* is sealed because of the subject matter. The Committee's interest is limited and to just monitor the case. The *Daniel Rivera Jr. v. Utah Dept. of Human Services, Division of Child and Family* a motion to dismiss the case will be prepared by either DHS or counsel for Committee. According to the statute the petitioner is supposed to serve all the parties within 120 days and that has not been accomplished (see the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts June 11, 2015.pdf](#)).

**IX. Other Business:**

The next meeting is scheduled for July 9, 2015. The executive secretary queried if there will be a quorum present for the next meeting. Ms. Richardson will be absent on July 9, 2015.

The June 11, 2015, State Records Committee meeting adjourned at 3:03 p.m.

**This is a true and correct copy of the June 11, 2015, SRC meeting minutes, which were approved on July 9, 2015. 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

APPROVED