

Date Sept. 9, 2010

## State Records Committee Meeting

Division of Archives, Courtyard Meeting Room

August 12, 2010

Salt Lake City, Utah

Members Present: Scott Daniels, Citizen Representative  
Chris Hansen, State History Designee  
Lex Hemphill, Media Representative  
Betsy Ross, Auditor's Designee  
Scott Whittaker, Private Sector Records Manager, Chair

Member Excused: Patricia Smith-Mansfield, Governor's Designee  
Gary Ott, Elected Official Representative

Legal Counsel: Paul Tonks, Attorney General's Office  
Ed Lombard, Attorney General's Office  
Tori Ballif, Attorney General's Office, Intern

Executive Secretary: Susan Mumford, Utah State Archives

Attending via telephone: Barbara Lewis

Others Attending: Rosemary Cundiff, Archives staff  
Glen Fairclough, Archives staff  
Maren Jeppsen, Archives staff  
Debbie Kurzban, Attorney for Human Services  
Blake Nakamura, Petitioner  
Paul Nielson, Salt Lake City, Attorney for respondent  
Mindy Spring, Archives staff  
Lana Taylor, Attorney, Department of Public Safety  
Sue Taylor, Division of Child and Family Services

### **Mr. Scott Whittaker called the meeting to order at 9: 35 a.m.**

Mr. Whittaker, Chair of the Committee, called the meeting to order. Mr. Whittaker welcomed those present. The first agenda item had been postponed. The hearing: Shawn and Barbara Lewis vs. Human Services, was next on the agenda. Barbara Lewis was contacted in Chicago by telephone. Mr. Whittaker explained the procedures for the hearing.

### **First Hearing – Shawn & Barbara Lewis vs. Utah Department of Human Services**

#### **Opening statement, petitioner**

Ms. Barbara Lewis explained that she was the grandmother of the girl about whom the information had been requested. She and her son Shawn Lewis, the biological father, had lost contact and wanted to know the girl's condition and location. Barbara and Shawn had both requested the information from the State of Utah. She said her son was ill and would not participate in the hearing.

**Opening statement, respondent**

Ms. Debbie Kurzban and Ms. Sue Taylor represented the Department of Human Services. Ms. Kurzban asked if the two GRAMA requests were combined into one for the purposes of the hearing. [Ms. Lewis responded that she was willing to be the petitioner for both requests as she and Shawn had sent separate requests for the same records.] Ms. Kurzban said that there was no dispute about the records. The records requested were concerning Shawn Lewis' biological daughter. However, since Mr. Lewis' parental rights were terminated in 2002, the records were not available to him without a power of attorney or a notarized release from the girl's legal guardians or adoptive parents in accordance with Utah law. The privacy rights of the adopted child and that of her adoptive parents were at stake.

**Testimony, petitioner**

Ms. Lewis said her son had not been notified that his parental rights had been terminated. Contact with Human Services had not produced any results.

**Testimony, respondent**

Ms. Kurzban said she was not prepared to respond to the process of the termination of Mr. Lewis' rights as a parent. The records requested were service plans, progress reports, and adoption files. The records were properly classified as both private and controlled pursuant to GRAMA. The appellants believed they were entitled to the records because of their blood relationship to the girl. Because of the court order terminating parental rights, Ms. Sue Taylor, the GRAMA officer, had correctly denied access to the records. Ms. Kurzban handed the Committee an unredacted copy of the court order terminating Mr. Lewis' parental rights.

**Closing, petitioner**

Ms. Lewis said she had been told to complete forms sent to them by the Department of Human Services in order to make a GRAMA request. She had not been told they would not have access to the records. She said they had not received the order terminating Shawn's rights.

**Closing, respondent**

Ms. Kurzban said that although she was sympathetic, the appeal must be denied as neither Shawn nor Barbara Lewis is the subject of the records requested. Shawn Lewis is not the parent of the minor who is the subject of the record and does not have a notarized release or power of attorney to permit access to the records. Human Services requests that the Committee respect the privacy rights of the child and her legal guardians. [Ms. Ross asked if Ms. Kurzban could provide a redacted copy of the order or the case number of the order terminating parental rights to Mr. Lewis.] Ms. Kurzban conferred with Ms. Taylor. She said that if the petitioner were to complete a GRAMA request for the court and the case number, it could be released.

**Deliberation**

Mr. Daniels said that according to the law, the department had no discretion in giving access to the requested records. He made a motion to affirm the decision of the department. Mr. Hemphill seconded the motion. Ms. Ross said Human Services would provide the name of the court and the case number if Shawn Lewis requested it. A vote was taken. Mr. Daniels, Mr.

Hansen, Mr. Hemphill, Ms. Ross, and Mr. Whittaker voted for the motion. The motion passed unanimously. Mr. Whittaker said that an order would be sent to the parties within five days. He thanked the parties for their participation.

### **Second Hearing – Blake Nakamura vs. Salt Lake City Corporation**

The parties for the hearing introduced themselves. Blake Nakamura said he represented the Rail Management Group doing business as the Rail Events Center. Paul Nielson introduced himself as the attorney for Salt Lake City Corporation.

#### **Opening – petitioner**

Mr. Nakamura said the Rail Events Center was a new forty-four thousand square foot, open source events center located at 235 North, 500 West, in Salt Lake City. He said that the center hosted trade shows, non-profits, fund raisers, and concerts. The request for records arose as a result of the center receiving citations for violating the Salt Lake City noise ordinance. Salt Lake City itself and other businesses often violated the same noise ordinance at the Gallivan Center, the Twilight Concert Series, or various private bars. Mr. Nakamura had requested and partially received e-mails between Salt Lake Valley Health Department and Salt Lake City among other communications. Some that were denied him or were heavily redacted were communications between parties outside the city. He felt the records had been improperly classified as protected. They were not the deliberations of an attorney or strictly between an attorney and a client. He requested that the unredacted copies be released on the basis that they had been improperly classified and denied.

#### **Opening – respondent**

Mr. Nielson said that many of the issues raised by the Salt Lake City Appeals Board centered on Mr. Nakamura's ability to acquire exculpatory evidence through a GRAMA request. The city's reason for withholding the documents was that they contain attorney-client communications. Salt Lake Valley Health does noise enforcement for the city. The common interest extension provides that if federal, county, state, or city agencies work together, and have an expectation that communications among their legal counsel will be kept confidential, the attorney-client privilege does apply. Mr. Nielson agreed that not all communications between an attorney and a client are considered privileged. The e-mails in question contained requests for advice, attorney opinions, and included e-mails to James Bennett and Diane Keay. These were individuals employed by Valley Health to enforce noise ordinances. Releasing the records would not respect the common interest extension of attorney client privilege.

#### **Testimony – petitioner**

GRAMA requests had been filed with both Salt Lake County and Salt Lake City for records. A lot of documents were received from the county but not so many from the city. When the two sets of records were compared, the redactions and withheld communications became evident. The Rail Events Center management contended that even though a common interest may exist, a relationship of attorney-client must be established for the communications to be protected. No such relationship exists between Salt Lake Valley Health and Salt Lake City Attorney's Office. The permit issued by Salt Lake City to the Rail Events Center allows musical events. There could be a conflict of interest in prosecuting the Rail Events Center

under the city's own noise ordinance if it regularly violates the ordinance. Therefore the e-mails requested do not qualify for the attorney client privilege and may be precluded from the extension by an opposing relationship between Salt Lake City and Salt Lake Valley Health. Mr. Nakamura said that after the noise citation, alterations had been made to the building to mitigate the noise.

**Testimony – respondent**

Mr. Nielson said that a relationship did exist between the Salt Lake City and Salt Lake Valley Health. City ordinances specifically name Valley Health as the city's enforcement agent for the noise ordinance. He said the city was engaged in a joint effort to enforce the noise ordinance. The City Prosecutor's Office is in regular communication with Valley Health to enforce the violations and the citations issued. After hours responses to noise violations would be made by the police rather than Valley Health.

**Closing – petitioner**

Mr. Nakamura said there was no evidence other than the assertion of counsel that an attorney client relationship existed between the city and Valley Health.

**Closing – respondent**

Mr. Nielson said that money did change hands as the county does not provide services for free for the city. He was unaware of an actual contract. The county would not provide services for the city without a charge. Even if the city contracted with a private entity for enforcement services, Mr. Nielson said he felt the attorney client privilege would apply.

**Deliberation**

Mr. Daniels made a motion that the Committee review the documents in camera. Mr. Hemphill seconded the motion. A vote was taken. Mr. Daniels, Mr. Hansen, Mr. Hemphill, Ms. Ross, and Mr. Whittaker voted for the motion. The motion passed. The Committee went into closed session.

**Closed Session 10:50 a.m. – 11:12 a.m.**

**Deliberation**

Mr. Hemphill made a motion to return to open session. Mr. Hansen seconded the motion. Mr. Daniels, Mr. Hansen, Mr. Hemphill, Ms. Ross, and Mr. Whittaker voted for the motion. The motion passed. The Committee continued their deliberation in open session. Mr. Hemphill asked if all the names of individuals to whom e-mails were copied were employees of the city. Mr. Nielson said that all except the two who were employees of Valley Health were employees of the city. Mr. Hemphill made a motion that pursuant to UCA 63G-2-305(17) and (18), the request be denied. Ms. Ross seconded the motion. A vote was taken. Mr. Daniels, Mr. Hansen, Mr. Hemphill, and Ms. Ross voted for the motion. Mr. Whittaker voted against the motion. The motion passed. Mr. Whittaker thanked the parties for their attendance and said that an order would be sent within five days.

### **Approval of July 8, 2010 SRC minutes**

Mr. Hemphill made a motion to approve the minutes of July 8, 2010. Ms. Ross seconded the motion. Mr. Daniels, Mr. Hansen, Mr. Hemphill, Ms. Ross, and Mr. Whittaker voted for the motion. The motion passed. The minutes of July 8, 2010 were approved.

### **Approval of retention schedules.**

There were no retention schedules to approve.

### **Cases in District Court**

Mr. Tonks presented the cases in district court to the Committee with updates. See attached list.

### **Appeals received**

Ms. Mumford distributed a list of appeals to the State Records Committee that had been made during the month. Seven requests for hearings had been received. See attached list.

### **Tribune vs. UTA**

Dan Harrie had asked the Committee to consider whether they would hear the Cathy McKittrick/Tribune appeal for records from UTA if that entity were to again revise its records ordinance to allow appeals to go to the State Records Committee before going to district court. He had hoped not to have to begin the process of requesting records again. The Committee discussed the timeline of events and referred to Mr. Tonks for advice. Mr. Tonks said that according to UCA 63G-2-403 and 404; the Committee had to respond to the appeal under the ordinance in place at the time of the completed appeal. The appeal to the State Records Committee came in its completed form when the revised ordinance excluding the State Records Committee was in place. The Committee would not have the jurisdiction to hear a belated appeal and would be precluded from doing so under the provisions of Utah Code.

### **Other Business**

The Committee discussed ways of avoiding postponements of hearings in the future. Mr. Hemphill suggested that the quorum of five might be changed to a majority of four. Ms. Ross said it would have to be a change in statute presented to the legislature. Ms. Mumford said one of the assets of the Committee was the wide representation of viewpoints. Mr. Whittaker said he would be absent next month. Ms. Smith-Mansfield will be available next month and perhaps a new member of the Committee. Teleconferencing could be an option if a quorum is not available to come to the building. It was suggested that the issue be put on the agenda for September.

### **Adjournment**

Mr. Hemphill made a motion to adjourn. The meeting was adjourned by acclamation.

**Next meeting scheduled for September 9, 2010, at 9:30 a.m.**

## August, 2010 Appeals to SRC

1. **Robert LaSalle vs. Corrections.** A request for a hearing. I telephoned Corrections. They said they were sending a response to his request. I mailed Mr. LaSalle a letter telling him of their response and informing him that if it was not satisfactory, he could continue the appeal.
2. **Cathy McKittrick, SL Tribune vs. UTA.** Originally she had not yet appealed to the UTA Board of Trustees. Then by the time she had done so, UTA revised ordinance. The appeal was denied for lack of jurisdiction. Dan Harrie asked to have issue put on August agenda to resume if ordinance changed in the future.
3. **Rodney Ham vs. Human Services.** Mr. Ham appealed the lack of response from Human Services. Mailed documents to complete his appeal minus original GRAMA request. He said it had been a request for a quote of the cost of providing the requested documents. The responses say his request is a duplicate of prior requests and HS not required to respond.
4. **Damon Crist vs. Corrections.** Mr. Crist requesting copies of 3 "cautions." He was told the requests were not on proper Corrections GRAMA request forms. His letter to SRC was the only document received. I wrote letter asking him for the responses from Corrections in order to complete the appeal.
5. **Mike Weaver vs. Corrections.** Mr. Weaver sent an incomplete request (no copy of original request) for psychological records. He said in his appeal he had received some of the requested records. I will need a copy of original request.
6. **Blake Nakamura vs. SLC Corporation.** Hearing scheduled for August 12. Mr. Nakamura is appealing the partial denial of records regarding the Rail Events Center and noise complaints made to the city.

## August 2010 Records Committee Case Updates

### District Court Cases

**Attorney General Office v. Peterson**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 100911772, Judge Reese. Filed July 1, 2010.

**Current Disposition:** Answer filed for Committee on July 22, 2010. Eric Peterson filed his answer on July 26, 2010.

**Salt Lake City v. Jordan River Restoration Network**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 100910873, Judge Iwasaki. Filed June 18, 2010.

**Current Disposition:** Answer filed for Committee on June 28, 2010. Jordan River filed its answer on July 27, 2010 after getting leave of court to file out of time. Jordan River has requested a Temporary Restraining Order against Salt Lake City related to the records in this case. Hearing for TRO is scheduled for August 11, 2010.

**Maxfield v. Lieutenant Governor**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 100907599, Judge Iwasaki. Filed April 28, 2010.

**Current Disposition:** Answer filed for Committee on May 17, 2010. Motion for Partial Summary Judgment filed by Lieutenant Governor concerning jurisdiction of Court and Committee to hear fee issues. On June 9, 2010, filed Memorandum Contra on issue of whether Court and Committee can here disputes concerning whether a fee waiver was unreasonable. Lieutenant Governor agreed with argument in reply memorandum filed on June 16, 2010. Still waiting for decision.

**Moulton v. State Records Committee**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 100901662, Judge Hansen. Filed February 1, 2010.

**Current Disposition:** Appeal filed of a decision by the Department of Human Services to not release a record. No appeal was filed with the State Records Committee, so Motion to Dismiss the complaint against the Committee (and the Governor) was filed on March 25, 2010. Motion to dismiss granted by the Court on June 24, 2010.

**Attorney General Office v. McKittrick**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 090917108, Judge Dever. Filed October 13, 2009.

**Current Disposition:** Hearing held on July 7, 2010 on issue whether counsel for the Salt Lake Tribune could have access to the letter. Court held that matter should be briefed and argued on August 17, 2010. A new trial date will also be scheduled at that time.

### Utah Appellate Court Cases

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

**Current Disposition:** Maese has filed his appellate brief, alleging that his counterclaim was timely filed and that the Committee lacks standing to participate in judicial review of its decision and the Court should not have considered the Committee's Motion to Dismiss. The relief requested by Maese is to have the Court of Appeals "prohibit the Committee from filing future pleadings and motions in GRAMA appeals." The AG's office filed an appellee brief opposing Maese, arguing that the issue is moot since he has already received the disputed records.