

SRC APPROVED
Date Dec. 10, 2015

STATE RECORDS COMMITTEE MEETING

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

Date: November 12, 2015

Time 9:05 a.m. to 2:15 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

Telephonic: 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:

Holly Richardson, Member

Scott Gollaher, Petitioner

Others Present:

James Hudspeth, Utah Department of Corrections

Kurt Bailey, Petitioner

Stephen Bailey, Petitioner's father

David Church, Attorney, Provo City Housing Authority

Nestor Gallo, Petitioner

Matt Anderson, Utah Department of Corrections

Gina Proctor, Utah Department of Corrections

Rebekkah Shaw, Utah State Archives

Jeremy Runia, Provo City Housing Authority

John Rice, Petitioner

Rosemary Cundiff, Utah Government Records Ombudsman

Agenda:

- Four Hearings Scheduled
- Retention Schedules, action item
- Approval of October 8, 2015, Minutes
- Report on Appeals Received
- Report on Cases in District Court
- Other Business
 - Next meeting scheduled for December 10, 2015, 9 a.m. to 4 p.m.
 - Review 2016 State Records Committee meeting dates

I. Call to Order:

Ms. Holly Richardson was not connected telephonically for the first hearing [absent].

The Chair, Ms. Patricia Smith-Mansfield, called the meeting to order at 9:05 a.m. and introduced the parties for the first hearing: Mr. Scott Gollaher, Petitioner, and not in attendance Morgan County Attorney's Office. The Chair explained procedures and asked the Committee members to introduce themselves to the Petitioner.

The Chair explained that the governmental entity was absent but had sent a statement explaining it does not possess any records responsive to Mr. Gollaher's request. Mr. Gollaher was allowed to provide evidence that the Morgan County Attorney's Office did indeed possess the responsive records.

II. Scott Gollaher vs. Morgan County Attorney's Office.

Opening and Testimony: Petitioner

Mr. Gollaher explained he is seeking a governmental record that identifies who and when five colored photographs were sent to Morgan County Attorney's Office. He requested the record because Morgan County mentioned the five colored photographs at an earlier hearing in March 2015 (*Scott Gollaher v. Morgan County Attorney's Officer*, Case No. 15-08), after which the photographs were emailed to Mr. Gollaher.

The photographs that Morgan County provided to Mr. Gollaher were part of a search warrant that Salt Lake City executed; Morgan County did not participate. Mr. Gollaher is seeking the receipt that identified the source of who sent the photographs to Morgan County and when they were sent. In addition to the five photographs, he is also seeking the receipt and origin of the Children's Justice Center DVD that was provided to him by Morgan County in 2013.

The issue of a record sharing agreement was raised by the petitioner and that Morgan County should have a records sharing agreement with Weber County pursuant to Utah Code § 63G-2-206(6). He explained when evidence transfer is accomplished the receiving office must agree to the classification of the records and, in the case of the photographs, they were classified protected. The Children's Justice Center records are exempt pursuant to Utah Code § 63G-2-103(22)(b)(xv). He believed that because of the

classification an exempt status of the records there should be a record sharing agreement between the agencies, and thus a receipt should be provided to him detailing the transfer. The agencies must have a record of who sent and received the protected government records. It is a reasonable assumption that receipts for the records would exist and the agency that provided them to the Morgan County Attorney would be obligated to tell the County how to properly handle the material under GRAMA prior to releasing them.

Closing-Petitioner

Mr. Gollaher closed by stating that Mr. Jann Farris, Morgan County Attorney, has proceeded with a case that has resulted in a three-year incarceration. Mr. Gollaher wants truth, justice, and the Committee to order the Morgan County Attorney's Office to produce the two receipts responsive to his GRAMA request.

Deliberation:

The Committee members request clarification on the record sharing statute, Utah Code § 63G-2-206(6). Mr. Tonks addressed the Committee and explained the provisions behind the record sharing statute. The Chair added that at times law enforcement develops a general agreement not a specific agreement for each shared records. To have specific agreements per record would bog down the administrative system. A discussion continued on evidence transfer-how records are tracked between agencies. The Committee also commented that it would have been in the best interest of the governmental entity to participate in the hearing. Many questions could have been answered if a representative had appeared for the hearing to explain the County's procedures. Mr. Tonks interjected that the Committee must be persuaded by the information provided today. In this setting, the Committee relies on the evidence presented by the petitioner and governmental entity.

Motion: A motion was made by Mr. Fleming to deny the appeal. The Committee is not persuaded the governmental entity is in possession of the record based on the evidence presented. Ms. Cornwall seconded the motion. The motion passed, 5-0.

It should be noted that the Respondent's failure to appear before the Committee to answer questions from the Committee made this determination very difficult and the Respondent is encouraged to appear before the Committee in the future.

5-Minute Break

Ms. Holly Richardson, Committee member, was telephonically connected to the meeting at 9:50 a.m.

The Chair introduced the parties for the next hearing: Mr. Kurt Bailey, Petitioner, and not in attendance Perry City Police Department. The Chair explained procedures and asked the Committee members to introduce themselves to the Petitioner.

III. Kurt Bailey vs. Perry City Police Department

The Chair addressed the Order to Dismiss submitted by Perry City Police Department and the fact no one was able to represent the city at the hearing. The city claimed all records were provided and the dash camera video does not exist. The Petitioner was asked if the city had been responsive to the GRAMA request. The Petitioner stated that he did not receive the dash camera video. The Chair provided the Petitioner an opportunity to provide evidence to the fact that the dash camera video does exist.

Mr. Kurt Bailey explained that two denial notices received from the city suggest that a dash camera video did exist at one time. He referenced the chief administrative officer's response dated August 24, 2015; it suggested the dash camera video did exist along with other video used during his citation. He provided the Committee with a timeline and copies of the governmental entity's responses to his GRAMA request.

The Chair swore in Mr. Steven Bailey.

Mr. Kurt Bailey stated that he did not receive the dash camera video that was used for a citation given on July 18, 2015, #P10329319. He submitted four different requests and received only the Officer Report for the incident 15-P000817, and the body camera recording. On July 20, 2015, a GRAMA request was submitted for all video. The city denied the request, stated that the video is evidence and could not be released. A second GRAMA request was submitted on July 27, 2015, again requesting "[a]ll video and recording including but not limited to dash camera, body camera, and any other video taken during the citation." He was provided a denial letter and was told to file a motion of discovery with Box Elder Justice Court since this was an ongoing investigation.

The Committee discussed evidence the Petitioner presented regarding the dash camera video. The point of the motion to dismiss is that there is nothing to argue because the city does not have the dash camera record. Due to the absence of the city's defense, Mr. Fleming made a motion to deny dismissal.

Motion: A motion was made by Mr. Fleming to deny the Motion to Dismiss. Ms. Cornwall seconded the motion. The motion passed, 5-1. One dissent, Ms. Smith-Mansfield.

It is explained to the Petitioner that the hearing is about records access not the untimeliness of the governmental response to the GRAMA request.

Kurt Bailey vs. Perry City Police Department

Opening and Testimony: Petitioner

Mr. Bailey submitted two GRAMA requests to Perry City Police Department in case it had not received the first one, or it did not understand the first request. Perry City Police Department responded to the second GRAMA request and stated it would provide the dash camera video. Perry City provided responsive records for the second request through the prosecutor. The material did not contain the dash camera video. A subsequent letter stated the police department does not possess the dash cam video. The

statute mentions that the governmental entity may not destroy or give up custody of any record to which access was denied (Utah Code § 63G-2-205(3)). Mr. Bailey believed the dash cam video has been destroyed. His evidence is based on the city response that it would provide the video and later responding that it did not have it.

The Committee questioned the Petitioner on the specifics of the incident-whether the police vehicle approached from behind him and if a dash cam was noticeable inside the vehicle. Mr. Bailey stated the police vehicle pulled up from behind. At the time, he did not notice a dash camera and does not know if the city uses them or has a policy pertaining to dash cam use. Mr. Bailey was pulled over while riding a motorcycle and remembers the body camera being on.

The Chair asked when the incident took place. The Petitioner responded it took place on July 18, 2015. The first request for all video was filed on July 20, 2015, two days after the incident. On July 27, 2015, six business days later, he specifically requested the body camera and dash camera video.

Deliberation:

The Committee commented that dash camera video usually is on a loop and recorded over after 3-6 months based on a general retention schedule. However, in this case the Petitioner submitted a GRAMA request two days after the incident. It is possible that Perry City did not take dash cam video but the Respondent is not available to answer this question.

The Committee discussed the dash camera video, retention schedules, and city policy. The city website and Archives website was searched for copies of the municipality's ordinance. There was no retention schedule reported to the Archives for dash cameras, and nothing in the municipal code referencing policies and procedures on how to maintain the video. This raised a question as to what happen to the video.

Motion: A motion was made by Mr. Fleming that a lack of representation by the governmental entity prohibited the Committee to ask why the dash camera video does not exist. Archives legal counsel did not approve the phrasing of the motion and Mr. Fleming withdrew the motion.

Motion: A motion was made by Mr. Fleming that the governmental entity produce the video based on evidence presented, and reference the general retention schedule which suggests that it should have the dash camera video. The Committee is not persuaded the record does not exist. Mr. Misner seconded the motion. The motion passed, 6-0.

The Chair commented that if the governmental entity had appeared at the hearing it could have answered the question raised and provided further information on Perry City policies and procedures.

Closing statement by Petitioner:

Mr. Bailey commented that the main reason he appeared is because of the roadblocks encountered with Perry City. He hopes that by standing up to Perry City Police Department other records requesters will have an easier time in accessing records from the department.

Ms. Holly Richardson disconnected at 10:30 a.m.

The Chair introduced the parties for the hearing: Mr. Nestor Gallo, Petitioner, and Mr. David Church, attorney representing Provo City Housing Authority. The Chair explained the hearing procedures.

IV. Nestor Gallo vs. Provo City Housing Authority (PCHA)

Opening-Petitioner

Mr. Gallo is a civil engineer and a resident of Provo, Utah. Over the last few years, he has had some serious concerns about how PCHA handles housing inspections and its procedures and policies. His family no is longer part of the PCHA program but he is representing the other 900 families who still are part of the Section 8 voucher and those who have disabilities. He understands the program and has the ability, energy, and time to come to the board and seek service.

The main reason for the four appeals is that the responses by the governmental entity were not consistent. He feels the responses were not detailed enough and not what he requested. He feels the PCHA has not been consistent with its answers and hopes today the disputes will be resolved by receiving the final answer from Mr. Jeremy Runia, Executive Director of PCHA.

Opening-Respondent

Mr. Church, attorney representing PCHA, stated attempts were made to comply with the records requests. The PCHA declined to create new records and refused to provide access to one records series that is classified protected. The Provo City Housing Authority is not a branch of Provo City; it is an independent governmental entity, even though it has the name Provo City Housing Authority. It was created under state law in the 1970s. The housing authority received three GRAMA requests and four subsequent appeals. Mr. Church read off each one and provided the PCHA's response.

Appeal #1: Mr. Gallo requested the specific amount of the Executive Director's gross compensation before and after the PCHA action on December 17, 2014.

This information was provided to Mr. Gallo. When Mr. Gallo appealed to the Committee he added "staff report and/or the type of public fund account from which the funds were going to be withdrawn" and written documentation of who initiated the recommendation to the raise the pay.

Appeal #2: Mr. Gallo requested copies of the bid schedule including unit prices, quantity take offs, and change orders for a construction project known as Saint Francis Apartment Project.

The Provo City Housing Authority does have copies of some of these records but they are the property of the limited liability company and the investor. The representatives of the investor have requested that they be classified protected.

Appeal #3: Mr. Gallo requested a copy of the policy or code in place prior to February 2014 governing the inspection of a certain house in Provo City. The request specifically addressed where in the policy or code net playpen is mentioned.

The section of the policy was copied and provided to Mr. Gallo. The PCHA code stated the location of the playpen was in violation because it was blocking a window. This made it a code violation. The governmental entity has responded three times to this request.

Appeal #4: Mr. Gallo is requesting a copy of a financial analysis done to justify a benefit reduction undertaken by PCHA in 2013.

Mr. Gallo was provided the minutes from the board meeting when this matter was considered and approved as well as the board packet that all members of the PCHA board received on this item. He was also provided additional documentation to justify the adjustment of the budget at the time. There are no more responsive records for this request.

The PCHA's position is that it has responded and specifically provided Mr. Gallo's records request. Now, through the appeal process, Mr. Gallo is asking for PCHA to create additional documents that say, "we don't have something" or "we did not do something."

The Saint Francis Project documents are the main issue and were denied as classified protected. The reason behind not providing the documents is that this is not a PCHA project. Saint Francis Housing Partners, LLC, is a private investor for building low income housing. A private developer and a private investor that build low-income housing and receive tax credits for accomplishing the project. After a project is built, PCHA is given a 1 percent ownership in which it is the manager of the complex for 50 years under the housing authority. There are a limited number of these tax credits for low income housing to be built and there is a very competitive vetting process.

Testimony-Petitioner

Mr. Gallo provided handouts to the Committee and addressed each appeal separately. (See the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts November 12, 2015.pdf](#)).

Appeal #1: Mr. Gallo was not concerned about the amount of the gross compensation of the executive director but from where does funding revenue originate. Mr. Gallo's

contention is that the increase of compensation was not included on a staff report and the audio file segment was missing. He wants to know if the increase in compensation is going to affect the benefits allocated to low income families and people with disabilities.

Appeal #2: Mr. Gallo wants to become more informed about the Saint Francis Project. He is seeking the bid schedule, unit prices, and change orders. Mr. Gallo believed these documents are public records and should be provided. He is not asking for anything that is private or confidential regarding the Saint Francis Project, LLC.

Appeal #3: Mr. Gallo is requesting the specific code or guideline that addressed a net playpen as a public safety concern. He argued that if the playpen violation is a public safety issue significant enough to suspend the benefits to a low income family, then the public is entitled to know why and how to prepare for such inspections.

Appeal #4: Mr. Gallo does not feel this request was sufficiently answered. He wants to know if there is a financial study to justify the recommendation to reduce the Public Housing Assistance benefits to low income families and people with disabilities.

Ms. Cornwall asked whether the bid schedule for the Saint Francis Project is a public record and if that is the only record he has not received. Mr. Gallo responded that when a contractor provides a bid schedule and change order it is public information, and that he has not received the record. He wants the opportunity to address the city council and point out discrepancies in the bids-one being that the foundation of the project is 13,000 cubic feet. Mr. Gallo stated that considering the location of the foundation and what he can see that there is no way 13,000 cubic feet of concrete were poured for the foundation.

Testimony-Respondent

The Chair swore in Jeremy Runia, Executive Director of PCHA.

Mr. Church addressed the four appeals and explained to the Committee and Mr. Gallo that all records were provided except for the Saint Francis Project record.

Appeal #1: This appeal should be denied because PCHA does not have any records that have not already been provided to Mr. Gallo. The reason for the break in documentation and audio file is that the Board went *in camera* to discuss Mr. Runia's pay raise. That is a protected record and will not be provided to Mr. Gallo. PCHA is not obligated to create records just to comply with his request.

Appeal #3: The code does not refer specifically to the net playpen, however Mr. Gallo has been provided with the code that the playpen is a tripping hazard. The home not only failed on the inside it failed on the outside-there were multiple failures. The housing authority does not own the Section 8 units. Private citizens own these units and the housing authority's only role is to manage them and assist people in partial payment of rent. The housing authority goes out on an annual basis and inspects the units to ensure there are no code violations.

Appeal #4: PCHA has provided the same financial records to Mr. Gallo that was presented to the Board, and will not create a document with an analysis report because one is not available.

Appeal #2: Mr. Church turns the testimony time over to Mr. Runia to continue commentary on the Saint Francis Project.

Mr. Runia explained that the Saint Francis Housing development is a private endeavor. Two parties came together to develop low income housing. This is a national program. This development has an investor who is buying tax credits. The Utah Housing Corporation is the tax credit agency for the state of Utah and it allocates the tax credits. This is a highly competitive endeavor and multiple contractors and developers apply annually to win the bid. The PCHA has entered into a partnership with an investor. Where there are change orders Mr. Runia discusses them in general terms at the Board meetings. This keeps the Board informed because the units eventually will be turned over to PCHA to manage the property. Mr. Runia counters Mr. Gallo's statement that the foundation is 13,000 cubic feet of concrete. He states that it is only 1300 cubic feet of fill.

The Chair asked about the protective classification of the records pursuant to Utah Code § 63G-2-305(2)(a) and (b). The issue with classifying the records under this statute is that there must be a claim of confidentiality filed during the time the contract is provided to the governmental entity. Mr. Church offered that no claim of confidentiality was provided at the time the contractor provided the records to the PCHA. Mr. Church stated that is the weakness in PCHA's position. All they have is a telephone conversation with Utah Housing Corporation counsel telling them the record is not public.

Mr. Gallo was provided an opportunity to ask the witness, Mr. Runia, a question. He inquired about records he received on another project, the Ekin Project. Mr. Runia answered that the Ekin Project was federally funded and therefore a public record. The Chair asked Mr. Tonks about a recent court case that is specific to confidentiality and relevant to this case. Mr. Tonks offered it was *Morgan Fife v. Orem City*, Civil No. 140400007, and that he would find the decision. It was a court appeal in response to a Committee decision, *Morgan Fife vs. Orem City*, Case No. 13-14.

Closing-Petitioner

Mr. Gallo expressed his appreciation to the Committee and for the ability to listen to the information provided by the Respondent. The information provided by Mr. Runia today is all new and would have been informative if provided in his earlier responses. The Saint Francis Project bid information is what he is seeking. He is willing to sign a confidentiality agreement that he would not disclose it to anyone. He hopes to receive the records, and thanks the Committee.

Closing-Respondent

Mr. Church summarized the four appeals and stated the governmental entity has been responsive for all except for the Saint Francis Project. The Saint Francis Project is

classified as protected based on phone inquiries, and the fact it is a privately funded project. Mr. Church challenges the Committee to keep it private because it outweighs the public interest. Mr. Gallo is using the record for personal usage not for public good. He suggested the Committee thoroughly vet the law and consider the position of the Utah Housing Authority, counsel, and the private entity which provided the records and maintain the classification as protected.

Deliberation:

The Committee has no interest in reviewing the disputed records *in camera*. The Committee moved into deliberation and discussed at great length whether the contract should be considered protected under Utah Code § 63G-2-305(2)(a) and (b). The Chair added that the recent 2014 District Court case ruling is on point, *Morgan Fife v. Orem City*, Case No. 140400007. Mr. Tonks summarized the judges interpretation of Utah Code § 63G-2-305(1) or (2), which are the confidentiality provisions. The problem the judge found, because there were four different contracts with claims of confidentiality, three of the four contracts were properly classified as protected records because at the time the contracts were submitted, a claim of confidentiality was filed. However, one of the entities did not provide a claim of confidentiality and did not until the city contacted the entity after the GRAMA request was filed. The entity then responded and said it wanted to keep the contract confidential. The judge ruled that the verb “shall,” which is operative in the section quoted, that an action is required or mandatory. Essentially, because entity did not provide the claim of confidentiality with the records it did not cloak itself with legislative privilege. No appeal was filed.

Ms. Cornwall argued there is a difference in the two cases because those bids were requested by the city of Orem to provide a service for the city of Orem. In this circumstance, the private developer is submitting the bids and PCHA has nothing to do with the bidding process. Another member suggested that PCHA might not have the authority to release the documents because it owns only 1 percent of the project. Committee members held a lively debate on whether PCHA should release the record; PCHA retains it and is a governmental entity being used as conduit for the private developer to gain tax credits for building low income housing. The private developer actually is involved in a governmental project. It would have been prudent for the governmental entity, at the time the records were provided, to request a business confidentiality claim from the developer. The court was very specific in its ruling, and if PCHA is going to rely on Utah Code § 63G-2-305(2)(a) and (b) then -305(c) also needs to be there. Mr. Tonks interjected and quoted the definition of a record, pursuant to Utah Code § 63G-2-103(22)(a)(i). A few members conclude the record was received and retained by the governmental entity without a statement of confidentiality. The Chair explained PCHA is a public entity whether acting as an agency for the developer or not. The Maverik appeal was introduced as a similar but different case, *Kevin Opsahl, The Herald Journal v. Utah State University*, Case No. 15-20, in that Maverik was a private business which gave Utah State University money to put its name on the stadium. The Committee ruled Maverik could not claim business confidentiality on the entire contract and ordered the contract released.

Motion: A motion was made by Mr. Fleming to order the Provo City Housing Authority to release the records based on the fact that, by definition, as described in Utah Code § 63G-2-103(22)(a)(i), it was received and retained by the public entity and was not originally defined as a protected record with no confidentiality claim filed at the time the record was received under. Utah Code § 63G-2-305(2). Mr. Misner seconded the motion. The vote passed, 3-2. Two dissents, Ms. Cornwall and Mr. Haraldsen.

Motion: A motion was made by Mr. Fleming to deny appeals #1, #3, and #4 because the petitioner has acknowledged the governmental entity has satisfactorily answered the requests during the hearing. Mr. Haraldsen seconded the motion. The vote passed, 5-0.

15-Minute Break for Lunch

The Chair introduced the parties for the final hearing: John Rice, Petitioner, and Mr. Matthew Anderson, attorney representing Utah Department of Corrections (UDC). The Chair explained the hearing procedures.

V. John Rice vs. Utah Department of Corrections (UDC):

Opening-Petitioner

Mr. Rice explained the appeal is to access statements made by his former employer to the UDC during an employment background investigation. The former employer did not uphold its promise to respond neutral to his employment background checks. During the application phase with UDC Mr. Rice did make the staff aware that allegations were made by the previous employer which were false.

Opening-Respondent

Mr. Anderson explained the responsive document being sought is called a Confidential Background Investigation Report. The law enforcement bureau at the Department of Corrections maintains the document. It is a background investigation by the department for screening potential applicants for various positions in the department. Corrections classify these records as protected and private. The private classification is based on the fact that before the background investigation begins the applicant signs an authorization as part of the application process. The authorization provides protection to statements that were provided and evidence obtained, and notifies the applicant that the information will not be made available. In fact, when law enforcement goes out to discuss the applicant with the references it ensures the person that the information gathered will be kept confidential. The LEB (Law Enforcement Background) investigator provided the references, who are to be interviewed, a copy of the authorization letter signed by the applicant. This provides the reference the ability to speak candidly about the applicant. To release the record would be an unwarranted invasion of personal privacy pursuant to Utah Code § 63G-2-302(2)(d). UDC respectfully requests that the Committee uphold UDC's denial of the requested records.

Testimony-Petitioner

Mr. Rice agreed with UDC that he did sign the authorization document. The only portion of UDC's argument that he does not agree with is the allegations that were made by his

former employer as to why he left the previous company. He was terminated on false grounds of harassment and discrimination toward female employees. His former employer told him an investigation had taken place and that women filed all the complaints; however, there was no documentation to be found to confirm the allegations. Mr. Rice was offered a severance package in exchange for leaving quietly. The former employer also agreed to respond neutral to any employment background checks.

Mr. Rice recently applied for various law enforcement positions and believed was denied a position due to his former employer's remarks on the background check. He made it past the interview panel, which mainly focused on his previous employer's statements. Mr. Rice told the panel he did nothing wrong and subsequently was afforded the final interview with the warden. However, the warden focused on the statements made by the former employer. At the end of the interview, the warden told Mr. Rice he did not know if he could be trusted. Mr. Rice continually has tried to defend himself to the point of taking a polygraph test, which he passed. He wants to know what his previous employer said so his name can be cleared.

Mr. Rice reiterates that he agreed with UDC's position that he does not have the right to the record he seeks, but he wants to clear his name. Without those records he cannot confront the former employer and try to rectify the problem. Corrections' Human Resource Department provided guidance on how to approach the previous employer and place a request to have the derogatory statement(s) retracted.

The Chair asked if the previous employer was private or government. Mr. Rice responded that the previous employer was private and he had there for eight years.

Testimony-Respondent

The Chair swore in James Hudspeth, Bureau Chief for law enforcement, who has been in this position for two and one-half years.

Mr. Anderson asked Chief Hudspeth about his work background and what he did as an investigator. Chief Hudspeth established the program for law enforcement's current background investigation process for new hires. This is a very rigorous background check because the department does not want to recruit anyone who would compromise the safety of the public and public trust. The recruitment entails a physical fitness assessment, NPOST examination, release of information, and LESI (Law Enforcement Services, Inc.) questionnaire.

When an investigator performs a background check, the person being interviewed is provided a copy of the applicant's signed authorization document which states that any information provided will remain confidential. All applicants are expected to sign the nondisclosure of confidential information provided to the investigator. In addition, there is assurance to those being interviewed that what they say will not be disclosed to the applicant. This provides candid interaction and the investigator gains valuable knowledge about the applicant.

The Committee inquired whether Chief Hudspeth was familiar with Mr. Rice's background check. He confirmed he was and that there were five pages to the document. The next question asked to counsel was how an employer has an individual right to privacy. Mr. Anderson replied that when the investigator speaks to the employee it is as an individual not someone representing or speaking on behalf of the entity. The Chair countered that the person is representing the company and is not speaking on his/her own behalf. Counsel replied that they are speaking of individuals at the company it is their privacy interest as individuals at stake.

Another question posed to the Respondent was whether the investigator interviewed individuals that Mr. Rice identified. The Respondent responded it would have been those individuals or the individuals the company provided.

Mr. Rice was asked if he had any questions for the witness. He commented that when UDC contacted his former employer to provide a response to his employment history, UDC had called the 1-800 number and the call was transferred to his former employer on duty hours. He asked how UDC can differentiate between private statements of an individual when asked for an employment background check. Chief Hudspeth responded that the employer is providing an opinion on what type of employee the person was and if they reported to work on time and were reliable. The background check is not verifying employment it is seeking personal information about the potential applicant.

Closing-Petitioner

Mr. Rice restated that he wants the opportunity to clear his name.

Closing-Respondent

Mr. Anderson reiterated that the record is private and protected. The record is private because investigators are contacting individuals, people who work with the former employer, and there are privacy concerns although speaking on behalf of the employer. As Chief Hudspeth testified that concerns are raised by the representative of the employers when contacted to find out about an applicant's background. So much so that they, in fact, provide them a copy of the authorization that the applicant signs not only authorizing the employer to provide information but also clarifying that under no uncertain terms the applicant will not get a copy of the LEB. It is extremely important to LEB because they need to make a good assessment about whether the person is going to make a good employee in the institution. If the information on the background checks out that the person was never formally charged, but it comes out that criminal activity or questionable activity took place, LEB needs to know that information. UDC respectfully requests that the Committee uphold UDC's denial for the requested records in this matter.

The Chair interjects to inquire on which statute UDC is using-is it Utah Code § 63G-2-305(25)? No, Mr. Anderson replied, it is Utah Code § 63G-2-305(11) and (13).

Mr. Rice was provided a minute to finish his closing statement. He expressed to the Committee how the investigator could confirm if what the former employer stated about the applicant is true. How can applicants protect themselves from wrongful statements if

they are unaware of what is said. Mr. Hudspeth is provided an opportunity to respond. He explained that during the interview process the interviewer could discreetly bring up points, made by those people interviewed, and get a sense if what was said about the applicant is true based on the answers given.

Deliberation:

Motion: A motion was made by Mr. Fleming and seconded by Ms. Cornwall to go *in camera*. The motion passed, 5-0.

Motion: A motion was made by Mr. Fleming and seconded by Ms. Cornwall to back in session. The motion passed, 5-0.

Mr. Fleming asked if all respondents, who were interviewed as part of the background check, were provided a copy of the signed authorization letter and assured confidentiality. Chief Hudspeth responded that is so if they requested it but he could not say that everybody who was interviewed received it.

Ms. Cornwall clarified with UDC that it is not claiming Utah Code § 63G-2-305(10), only Utah Code § 63G-2-305(11) and (13). The Chair followed with another question about whether the authorization letter was provided to the employer in this case. Chief Hudspeth stated he could not deny or confirm whether the investigator provided a copy because there is nothing noted in the investigation report.

The Committee discussed at length how Utah Code § 63G-2-302(2)(d) does and does not pertain to the case in regard to the employer. In this case, it is not about anyone's personal privacy or issues when the person is speaking on behalf of the company. The Committee suggested redacting the name of the individual and leaving what was stated because that is what the petitioner is seeking.

Motion: A motion was made by Mr. Fleming to order the governmental entity to release only the information from the background check that is attributed to the appellant's former employer and representatives with the names and personal information redacted. In this instance the record is not a protected record under Utah Code § 63G-2-305(11) and (13). Mr. Haraldsen seconded the motion. The motion passed, 4-1. One dissent, Mr. Misner.

The Committee discussed how Utah Code § 63G-2-305(11) and (13) really did not pertain to this particular record. All agreed it was not relevant to the record but could have a chilling effect and that is a valid argument, except that in this case it does not pertain as argued by the Committee. The Committee feels that Subsection 63G-2-302(2)(d) represents the records and amends the motion to add the record is not protected under Utah Code § 63G-2-305(11) and (13).

VI. Approval of Retention Schedules:

The Retention Schedules were not posted on Google Docs with sufficient time for the Committee members to review prior to the meeting; therefore, the Committee will address them at the next scheduled meeting.

VII. Approval of October 8, 2015, Minutes:

A motion was made by Ms. Cornwall to approve the October 8, 2015, minutes. Mr. Misner seconded the motion. The motion passed 4-0. One member abstained, Mr. Fleming. (See the attached documents on the Utah Public Notice Website, [SRC Minutes October 8, 2015.pdf](#)).

VIII. Report on October and November Appeals:

The executive secretary briefed committee members on the following appeals:

- **Patrick Sullivan vs. Department of Technology Services:** Mr. Sullivan appealed access denial to Utah Insurance Department emails stored at the Department of Technology Services (DTS). The Chair and Committee member, Ms. Richardson, reviewed the request and declined a hearing pursuant to R35-2-2(2) and R895-1-4(3).
- **Cindy St. Clair, KUTV SLC vs. Spring City, UT:** KUTV is appealing a fee waiver denial for records received from the city. Missing chief administrative officer's response. Missing required material to process. Incomplete appeal.
- **Matthew Johnson vs. Utah Department of Corrections:** Mr. Johnson is appealing access denial to his incident and Discipline Report." Missing required material to process. Incomplete appeal.
- **Roger Bryner vs. Utah Department of Health, Utah Public Health Laboratory, Forensic Toxicology Program:** Mr. Bryner is appealing access denial to copyrighted material. Missing required material to process. Incomplete appeal.
- **Patrick Sullivan vs. Department of Corrections:** Appeal recently received and pending review.
- **Patrick Sullivan vs. Utah Department of Human Resource Management:** Appeal recently received and pending review.
- **Patrick Sullivan vs. Department of Corrections:** Parties are in mediation and the November hearing was rescheduled for December 10, 2015.
- **Patrick Sullivan vs. Insurance Department, Fraud Division:** Parties are in mediation and the November hearing was rescheduled for December 10, 2015.
- **Roger Bryner vs. Davis County:** Withdrawn, dispute resolved through mediation.
- **Chris McDaniel, BuzzFeed Inc., vs. Department of Corrections:** Parties are in mediation and the November hearing was rescheduled for December 10, 2015.
- **Tammy Halvorson, Diamond Parking Services, LLC vs. Utah State Tax Commission:** Parties are in mediation and the November hearing was rescheduled for December 10, 2015.
- **Ramon A. Somoza vs. Utah County Attorney's Office:** Mr. Somoza is appealing the partial access denial of full disclosure of the communication between Utah County Prosecution, Ron T. Edwards (crime scene investigator), and the Utah County Public Defenders Association. The appeal is untimely by eight days.

The executive secretary acting on counsel's advice contacted Utah County Attorney's Office inquiring if the Committee took jurisdiction would the County agree. The County opposed and stated the appeal was filed untimely to the Committee. The executive secretary recommended to the Chair and one other Committee member that the appeal be declined due to untimeliness. The Committee member, Mr. Fleming, requested the appeal be discussed at the meeting. The Committee members discussed the time frame in which the petitioner received the Commission's decision and if it gave him enough time to respond. There is no evidence to prove the petitioner received the September 24, 2015, decision on October 12, 2015, as he claims, providing him only 13 days to file an appeal with the Committee. The Committee discussed the notice of appeal and made the decision to decline a hearing, pursuant to Subsection 63G-2-403(1)(a).

At this time, there are ten potential hearings scheduled for December 10, 2015, and two scheduled in January 2016. (See the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts November 12, 2015.pdf](#)).

IX. Report on Cases in District Court:

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

Amann v. Utah Department of Human Resources, Case No. 150904275, is in 3rd District Court. This case has the potential of being combined with the other GRAMA appeal on file in court, *Utah Department of Human Resources v. Paul Amann*, Case No. 150901160.

Utah Attorney General v. Salt Lake Tribune, Case No. 150904266, the Committee's answer has been filed by Mr. Tonks and the Motion to Intervene filed unopposed by Sheriff Cameron Noel.

Salt Lake City v. Jordan River Restoration Network, Case No. 100910873, this will be a two-day trial in December on the issue of fee waiver. (See the attached documents on the Utah Public Notice Website, [SRC Meeting Handouts November 12, 2015.pdf](#)).

X. Other Business:

-December 10, 2015, is the next scheduled meeting.

-Review 2016 State Records Committee meeting dates:

The Chair asked the members to review the proposed schedule so that it can be approved in December 2015.

-The Chair mentioned that the Utah League of Cities and Town's nominee, Cindi Mansell, is up for Senate confirmation on December 18, 2015. Members can listen to the live feed if they choose.

The executive secretary queried whether there will be a quorum present for the next meeting; Ms. Richardson may be able to participate physically at the December meeting.

SRC Minutes November 12, 2015

The November 12, 2015, State Records Committee meeting adjourned at 2:15 p.m.

This is a true and correct copy of the November 12, 2015, SRC meeting minutes, which were approved on December 10, 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