

**State Records Committee Meeting**

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

Date: January 10, 2019

Time: 9:00 a.m. – 4:00 p.m.

**Committee Members Present:**

Tom Haraldsen, Chair, Media Representative  
Holly Richardson, Chair Pro Tem, Citizen Representative  
Kenneth Williams, Governor's Designee  
Patricia Smith-Mansfield, Citizen Representative  
Cindi Mansell, Political Subdivision Representative  
David Fleming, Private Sector Records Manager  
Doug Misner, History Designee

**Legal Counsel:**

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

**Executive Secretary:**

Gina Proctor, Utah State Archives

**Telephonic participation:**

Scott Gollaher, Petitioner  
Jann Farris, Morgan County Attorney

**Others Present:**

Tim Merrill, Highland City  
Cindy Quick, Highland City  
Janae Wahnschaffe, Petitioner  
Renée Wilson, Utah State Archives  
Kendra Yates, Utah State Archives  
Rosemary Cundiff, Utah State Archives  
Rebekkah Shaw, Utah State Archives

**Agenda:**

- Two Hearings Scheduled
  - Scott Gollaher v. Morgan County
  - Janae Wahnschaffe v. Highland City
- Discussion
  - Suggestions to amend Administrative Rule 35

- Approval of December 13, 2018, Minutes, action item
- Retention Schedules Approved, action item
- SRC Appeals Received, report
- Cases in District Court, report
- Other Business
  - Nomination of Committee Chair, action item
  - Nomination of Chair Pro-Tem, action item
  - Nomination of executive secretary, action item
  - Open and Public Meetings Act, training
  - Proposed Records Committees, Senate Bill 25, review
  - Approval of 2019 State Records Committee meeting dates, action item
  - Confirm a quorum for February 14, 2019, meeting
  - Next Meeting scheduled for February 14, 2019, 9 a.m. – 4 p.m.

**Call to Order: (0:00:18)**

The Chair Pro-Tem, Holly Richardson, called the meeting to order at 9:12 a.m. Ms. Richardson called for Business items for nominations of the Chair, Chair Pro-Tem, and executive secretary.

**Nomination of Chair:**

**Motion:** Ms. Smith-Mansfield made a motion to appoint Tom Haraldsen as Chair for the State Records Committee for one year. Seconded by Ms. Mansell.

Vote: Aye: 7 Nay: 0. The motion passed 7-0 with Ms. Richardson, Mr. Haraldsen, Mr. Williams, Ms. Mansell, Mr. Misner, Mr. Fleming, and Ms. Smith-Mansfield voting for the motion.

**Nomination of Chair Pro-Tem:**

**Motion:** Ms. Mansell made a motion to appoint Ms. Smith-Mansfield as Chair Pro-Tem for the State Records Committee. Seconded by Ms. Richardson.

Vote: Aye: 7 Nay: 0. The motion passed 7-0 with Ms. Richardson, Mr. Haraldsen, Mr. Williams, Ms. Mansell, Mr. Misner, Mr. Fleming, and Ms. Smith-Mansfield voting for the motion.

**Nomination of executive secretary:**

**Motion:** Mr. Williams made a motion to appoint Ms. Proctor as executive secretary for the State Records Committee. Seconded by Mr. Fleming.

Vote: Aye: 7 Nay: 0. The motion passed 7-0 with Ms. Richardson, Mr. Haraldsen, Mr. Williams, Ms. Mansell, Mr. Misner, Mr. Fleming, and Ms. Smith-Mansfield voting for the motion.

Ms. Richardson turned the remainder of the meeting over to Mr. Haraldsen, Chair **(0:10:40)**

**1. Scott Gollaher v. Morgan County (0:12:50)**

The Petitioner and Respondent were connected telephonically. The Chair announced the parties for the hearing, introduced himself, and asked the Committee members to introduce themselves. The Chair asked the petitioner and respondent to introduce themselves for the record: Scott Gollaher, Petitioner, and Jann Farris, Morgan County Attorney. The Chair explained the procedures and stated the restrictions on sharing any mediation information. He

asked the parties to acknowledge the mediation restrictions. Both parties acknowledged the restrictions.

**Petitioner (0:15:15)**

Mr. Gollaher referred the Committee to the attachments he had provided. He stated that on September 5, 2018, he had requested insurance certificates for Mr. Fajino and Mr. Uday, appellate attorneys hired by Morgan County under contract with Morgan County, and invoice billings for Mr. Uday. The invoices were for the period of the attorneys' employment up to the time of Mr. Farris' response to the GRAMA request.

Mr. Gollaher listed the attachments he had submitted to the Committee:

- 1) His initial request, dated September 5, 2018;
- 2) His reminder email, dated October 2, 2018, sent to Stacy Clark, Morgan County records officer;
- 3) His appeal to the chief administrative officer, dated October 12, 2018;
- 4) Email he sent to Morgan County, council members, council secretary, and Jann Farris containing, a letter, dated October 11, 2018, sent to Morgan County related to Mr. Farris' testimony at the October 11 State Records Committee hearing where Mr. Farris stated that he blocks Mr. Gollaher's emails, including copies of attachments 1, 2, and 3;
- 5) His appeal, received by the State Records Committee, for access to records that were constructively denied due to a lack of response from Morgan County chief administrative officer, Ned Mecham, received by the executive secretary on November 5, 2018;
- 6) The Notice of Hearing sent to Mr. Mecham from the SRC executive secretary, dated November 15, 2018;
- 7) Declaration of Sharon Gollaher, wife of Mr. Gollaher, stating that she sent via email and U.S. Mail to each member of the council, the council secretary, and Jann Farris, Morgan County Attorney, copies of the emails and attached documents;
- 8) Three emails, dated December 13, 2018, from Jann Farris to Scott Gollaher with subject titles, Notice to Preserve, Appeal of GRAMA Denial, and Notice;
- 9) A court filing submitted by Jann Farris regarding Richard Uday's charge of one count of Theft by deception;
- 10) GRAMA statute §63G-2-201(9), limiting the number of requests a currently convicted and incarcerated individual may submit to a governmental entity, and §63G-2-103, definition of a governmental entity;
- 11) Email communication sent to/from Mr. Gollaher and Kaye Rhodes, Morgan County records officer, with an attachment of a record request log of Mr. Gollaher's requests submitted to Morgan County between June 2012 and November 2018, compiled by Mr. Gollaher, indicating that he sent a total of six record requests to Morgan County Sheriff Office and/or to Morgan County during the 2018 calendar year.

Mr. Gollaher explained the issue that he had with Mr. Farris' claim that Morgan County did not receive the September 5, 2018, request prior to the November 2, 2018, request. He also disagreed that Morgan County and the Morgan County Sheriff's Office were the same governmental entity when they each had separate records officers responding to records

requests specific to each entity. The September 5 request was the third request to Morgan County for the 2018 calendar year and the November 2 request was the third request that he submitted to the Morgan County Sheriff's Office.

**Respondent (0:36:15)**

Mr. Farris did not have anything to add other than his written response to the committee. He maintained that the Morgan County responds to every request and that, they provide the records if they have them. The request under the committee's review is the sixth request for this calendar year from Mr. Gollaher. Inmates are permitted five requests per calendar year, not six.

**Questions from Committee (0:38:22)**

The Committee asked Mr. Farris to respond to Mr. Gollaher's argument that the Sheriff's Office is independent from Morgan County office. Mr. Farris responded that according to code, a governmental entity includes all offices within the governmental entity.

The Committee asked whether the Sheriff's Office answered record requests separately. The Committee asked if there was a records officer in the Sheriff's Office. Mr. Farris answered that Morgan County has the elected clerk/auditor, Stacy Clark. She receives all of the requests and sends them out to the appropriate office for the responsive record. The Sheriff's Office has a secretary, Kaye Rhodes, who responds to record requests.

Ms. Smith-Mansfield noted that the certified records officer listed with Archives lists different records officers in the county and the County Sheriff's office.

The Chair clarified with legal counsel regarding different entities within one governmental body. Legal counsel referred the Chair to §63G-2-201(9), which reads, notwithstanding any other provision in the chapter and subject to (9) (b), a government entity is not required to respond to or provide a record to someone that is housed in a correctional facility following a conviction. Subject to (9) (b), the code says that (9)(a) does not apply to the first five record requests submitted to the governmental entity.

Ms. Smith-Mansfield noted that a governmental entity is defined in §63G-2-103(11). Every board, department, division, and office is included in the governmental entity.

**Closing by Petitioner (0:43:20)**

Mr. Gollaher disagreed with Mr. Farris' assertion that Morgan County responds to every request and provides records if they maintain the records. Mr. Gollaher maintained that his fifth request was dated September 5, 2018, and his sixth request was dated November 2<sup>nd</sup>, 2018. It was submitted to the Morgan County Sheriff's Office, Kaye Rhodes, and not to Morgan County Clerk, Stacy Clark.

Mr. Gollaher reminded the Committee that Mr. Farris acknowledged that Morgan County has separate people to answer the requests and Kaye Rhodes asked for additional time to respond to the request, which Mr. Gollaher granted.

Mr. Gollaher asserted he is a self-appointed attorney and is not limited by five record requests per calendar year. Even if he were limited, the September 5, 2018 record request was the fifth request for the year and not the sixth.

Mr. Gollaher asked the committee to direct Mr. Farris to provide the two insurance certificates, all the billing, and the detailed billing. Not the total sum of the billings.

**Closing by Respondent (0:48:20)**

Mr. Farris stated that he submitted the attachments of the five previous email requests that were received. He said that Mr. Gollaher was trying to interpret the code but the code says that Morgan County is a political subdivision and that includes all of the offices within Morgan County. Mr. Gollaher is a current inmate which limits him to five record requests per calendar year. Beyond five requests, a governmental entity is not required to respond and Morgan County did not respond to the sixth record request. Morgan County is considering the request dated September 5, 2018, as the sixth request for the 2018 calendar year.

**Deliberation (0:53:28)**

The Committee determined the issues surrounding this matter:

- 1) This is a relatively new law to be tested. The Committee previously decided that a governmental entity is not required to respond after the fifth request unless it is from an attorney. The petitioner sent separate requests to the sheriff's office and to the county.
- 2) In the requests that Mr. Gollaher submitted, he made a distinction between requests to the sheriff's office and requests to the county, auditor, and county clerk. Morgan County lacks an ordinance which specifies how entities are determined. Political subdivisions have broad permission and flexibility in the ordinances they can make. If there is no ordinance, the law applies.
- 3) In Utah, counties are uniform in their desire to have sheriff's offices separate from county offices in receiving and processing GRAMA requests. Morgan County had two processes, one for the county and one for their Sheriff's Office. However, the Morgan County appeals all go to the same chief administrative officer: Ned Mecham.
- 4) The law does say that a response is required for the first five requests from inmates. The Department of Corrections does not make email or internet access available for inmates.
- 5) GRAMA states that the request shall include the name of the requester, their mailing address, and their phone number, if available. The Committee questioned whether a third party submitting a record request on behalf of a currently incarcerated individual be someone other than an attorney. Mr. Gollaher's email address is not a place of residence. It is used by a third party to communicate for Mr. Gollaher.

- 6) The Committee discussed other state and city governmental entity record request processes as they related to Morgan County's position.

The Committee determined that the basis for the denial of the request is the status of the requester as an incarcerated individual under §63G-2-201(9) and that there is no record classification issue.

**Motion** made by Ms. Smith-Mansfield (1:11:11): Pursuant to §63G-2-103(11)(a)(v) and (b) The sheriff's office is a separate entity from the county in the practice of GRAMA in the absence of an ordinance specific to Morgan County. The motion was seconded by Mr. Fleming.

Discussion on the motion: The Open Records Portal is a tool for convenience and a tool for submitting GRAMA requests to governmental entities.

Vote: Aye -5, Nay - 2. Motion carries 5-0. Mr. Haraldsen, Ms. Richardson, Ms. Smith-Mansfield, Mr. Misner and Mr. Fleming voting for the motion. Mr. Williams and Ms. Mansell voting against the motion.

Discussion regarding the five-request limit for currently incarcerated individuals and whether Morgan County should either provide the records or deny the request pursuant to §63G-2-204.

**Motion** made by Ms. Smith-Mansfield (1:15:56): The Committee determined that this matter should be continued until the next hearing to allow the governmental entity, Morgan County, to process the request according to §63G-2-204(3). The motion was seconded by Ms. Richardson.

Vote: Aye -7, Nay - 0. Motion carries 5-0. Mr. Haraldsen, Ms. Richardson, Ms. Smith-Mansfield, Mr. Misner, Mr. Williams, Ms. Mansell and Mr. Fleming voting for the motion.

The hearing concluded. (1:21:30)

An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the decision to district court.

Five-minute break (1:22:30)

Reconvene (1:22:55)

## 2. Janae Wahnschaffe v. Highland City (1:23:50)

The Chair announced the hearing. The Chair reviewed the procedures. The Chair asked the Petitioner and Respondent to introduce themselves for the record. The Chair reminded the parties that mediation discussions are not allowed to be referenced in their testimony and asked the parties to acknowledge the restrictions on discussions of mediation.

Mr. Fleming questioned whether the parties could acknowledge and stipulate in good faith that statements regarding mediation were restricted in their remarks before the committee today,

when the mediation results were contained in the documents provided to the committee by the Respondent.

Ms. Wahnschaffe stated that the situation was unique in that she provided a second appeal to the Respondent and felt that it was unavoidable for mediation results not to be mentioned. She did not have a problem with the Respondent's written statements about mediation results being presented.

Mr. Merrill stated that the mediation result and settlement made a difference, although there was no written agreement between the parties as a result of mediation.

**Petitioner (1:26:00)**

Ms. Wahnschaffe petitioned for a fee waiver for records. Her request was for Highland City emails containing six key word search terms over a four-month period. Highland City reportedly provided a fee waiver for two hours of staff time to produce 200 emails. They estimated a \$2,000 fee to provide the remaining 400 emails that would require 70.5 hours of staff time to compile and redact the records. Ms. Wahnschaffe stated that she is the subject of the records.

Ms. Wahnschaffe provided a background related to her employment and experiences as the Highland City Librarian. She related several instances of gross unethical and immoral behaviors by Mr. Nathan Crane, the current city administrator for Highland City. She described her experience and witnessing others' experiences with Mr. Crane's unethical behaviors and her filing a harassment claim under the Equal Employment Opportunity Commission. She stated that she was placed on administrative leave prior to her legal settlement with Highland City and ended her employment. Ms. Wahnschaffe believes the records benefit the public as a newspaper reporter for the *Daily Herald* wrote an article about Ms. Wahnschaffe and the library.

The Committee asked questions of the Petitioner:

Ms. Smith-Mansfield stated that for a fee waiver to be granted there are specific criteria to be met. In the written appeal Ms. Wahnschaffe stated she was the subject of the record and there was a public benefit. Ms. Smith-Mansfield asked the Petitioner to please elaborate.

Ms. Wahnschaffe explained that the records requested were personal in nature. A presentation packet was distributed at a library board meeting after her employment was terminated. The packet consisted solely of emails retrieved from her incoming and outgoing email sent to/from other professional colleagues. She'd like to know which emails were selected to be included with that packet. Everything she requested pertained directly to her and was about her.

The Committee determined that the packet was distributed to the library board and to the city council. The packet was also shared with a *Daily Herald* reporter. Ms. Wahnschaffe did not have a copy of that packet.

**Respondent (1:34:05)**

Tim Merrill, Highland City Attorney, introduced himself and Cindy Quick, City Recorder and certified records officer for Highland City. He said that the packet that was shared with the library board and the city council was a PowerPoint presentation created by the mayor. He said that it had been provided to Ms. Wahnschaffe. It was a power point that was printed with the mayor's summary. It included excerpts of certain emails. It did not include over 2000 emails. The packet was a few dozen pages.

Mr. Merrill said that the city believes that Ms. Wahnschaffe is not entitled to a fee waiver because this is a private matter. In the original record request to the city, Ms. Wahnschaffe said that she was the subject of the record. She did not explain how the request primarily benefits the public.

Mr. Merrill related that he reviewed the committee's previous decisions related to fee waivers. He found a case, Michael Clara v. Salt Lake School District case number 16-06, in which the Committee had decided that discretion for granting a fee waiver was left to the governmental entity providing the record. There is no reason that the record request would benefit the public rather than a person. She requested the documents from the city to determine whether there were disparaging remarks made about her performance as an employee. She agreed to withdraw her request in mediation as part of a settlement.

The Committee discussed the Respondent's statements.

The Committee determined that they had not previously addressed the issue of settlements. Correspondence is classified as discussions, phone calls, emails, etc. There is nothing in GRAMA or the Utah Uniform Mediation Act that authorizes binding settlements. The mediation result issue was raised at the beginning of the hearing. The Petitioner did not have an objection to introducing the settlement resulting from mediation. A Committee member explained that if the mediation were to reach an agreement to release protected records, the Committee would have no authority to release protected records.

Mr. Tonks provided some clarification on written agreements, oral agreements, and settlement negotiations which should not be disclosed. That is part of the Utah Uniform Mediation Act. Mr. Tonks said that the actual agreement could be shared but the negotiations could not. Mr. Tonks defined the role of the SRC. The authority of the Committee is limited because it is statutory. It does not operate as a court. When it involves mediation, even if the parties agree, the Committee does not have authority to enforce a mediated agreement. Mr. Tonks said that a fee waiver could not be granted by the SRC on records the city had already provided for free.

The Committee reviewed the city's arguments regarding whether the records benefit the public.

Mr. Merrill said the intent of the Petitioner's request was personal in nature. She wanted to see how her reputation was being affected. From the city's perspective, it was more than just personal because she asked for a much more expansive range of records, including the words "library" and "director" extended the request to over 2,000 records.



The Committee discussed that information had been provided to the *Daily Herald*. The fact of providing records to a news media seemed to reinforce the idea that there is a public benefit and that the city is charging Ms. Wahnschaffe for work that the city already had done. Mr. Merrill stated that the reporter, Carissa Neely, had made a GRAMA request. The city denied the request but offered to waive two hours of staff time. This same fee waiver initially was offered to Ms. Wahnschaffe. Ms. Neely obtained two hours of records for free. She did not pay for any additional records. She ultimately did write an article about the library. The issues revolving the separation of Ms. Wahnschaffe from the city did not play a big part in that article.

The Committee determined that the records provided to Ms. Wahnschaffe were greater in number than those provided to the *Daily Herald* reporter because some records were already compiled and redacted. The Committee reviewed the fee waiver estimate and calculation of Ms. Quick, Highland City records officer

**Closing by Petitioner (1:49:50)**

Ms. Wahnschaffe said she was told by a library board member in attendance at the meeting that the distributed packet actually was a compilation of emails and not a PowerPoint presentation. She was told by a recipient of the packet that those emails were contained in the packet. She stated that this person was too nervous to give it her but she did tell Ms. Wahnschaffe that the entire packet is composed of emails from Ms. Wahnschaffe's Highland City email account. She stated that it is of public interest due to the money that Highland City has paid out as severances to female employees over the past two years.

The Committee determined that Ms. Wahnschaffe had received the PowerPoint but that it was not a record she had requested. The PowerPoint did contain some emails. The PowerPoint was not the same packet that was given to the library board.

The Committee reviewed Ms. Wahnschaffe's understanding that the *Daily Herald* was contacted by Highland City to mitigate any negative feedback they might receive when the public learned of Ms. Wahnschaffe's departure from the city's employment.

**Closing by Respondent (1:54:45)**

Mr. Merrill addressed the concerns and claims regarding the city manager. He wanted the committee to know that the city took the concerns seriously and had hired an independent investigative firm who did a thorough investigation and interviewed everyone involved. The claims were found to be unsubstantiated.

Questions for the Respondent.

The Committee determined that Ms. Quick decided she would be the most qualified or trained staff member to do the search for records and make any necessary redactions. Her hourly wage is \$27.88/hour.

**Deliberation (1:56:00)**

The Committee determined that the large number of emails suggested that some threads of multiple emails were being counted individually. When a key word search term is used, a lot of the resulting emails are duplicates and have no pertinence. The voluminous number of emails amounted to more than 16 emails per day, including Saturday and Sunday. The city could not come up with that number of emails without including every thread and every response. They did a search and got a result. The search engine returned a number of results that basically was counting the same email multiple times. The city could not charge twice for the same record. They had done the calculation of 74 hours and the only thing the city could do is subtract duplicates from the final product and provide a refund. The Committee discussed that the hours in the estimate may be extreme and unreasonable and asking for a \$2,000 check up front may be unreasonable. The Committee discussed that it had not been proven to be an unreasonable denial as long as the governmental entity is not charging for duplicative emails. The Committee determined that they did not have the authority to change the fee. The majority of the Committee members and legal counsel could not recall a time when the Committee granted a partial fee waiver.

Some Committee members were bothered by the city reaching out to the newspaper as opposed to the newspaper reaching out to the city for a story about the library. That indicates evidence of a public interest. Some felt there was a public interest in the request and that there was enough evidence to prove a public interest. The problems of the library are of public interest.

**Motion made by Mr. Fleming (2:08:20)**

Mr. Fleming said that if the Committee found that the fee estimate was unreasonable, that it meant that the fee waiver denial is being used to deny access. Pursuant to §63G-2-203(6), the Petitioner has provided evidence that the fee waiver denial was unreasonable and also provided evidence of a public interest. Therefore, the fee waiver should be granted. The motion was seconded by Ms. Richardson.

**Discussion:**

The Committee discussed that there was a public interest and it was not necessary to go *in camera* to review records to determine whether a fee waiver was unreasonable. The reason that there were many hits on the search was that the city used the unsophisticated search engine that comes with the email platform. Text messages were requested also. A list of items in the original request indicated nine pages of texts. The petitioner received three pages. Granting a partial fee waiver would involve the Committee in the business of how the city calculates fees. Committee could determine only if the denial of the fee waiver was reasonable or unreasonable. The fee waiver should either be granted or not granted.

Mr. Tonks said that the review by the Committee was *de novo*. A fee waiver denial is either reasonable or unreasonable. There is a Supreme Court ruling on this. It has always been unreasonable or reasonable.

Vote: Yea: 7; Nay: 0. Motion carries 7-0. Mr. Haraldsen, Ms. Richardson, Mr. Williams, Ms. Smith-Mansfield, Ms. Mansell, Mr. Misner and Mr. Fleming voting for the motion.

The hearing concludes. **(2:17:00)**

An Order will be issued within seven business days. Both parties will receive a copy and will have 30 days to appeal to district court.

Five-minute break **(2:17:25)**

Reconvene **(2:17:55)**

### **BUSINESS (2:18:00)**

#### **Discussion**

The committee discussed proposed suggestions for Administrative Rule 35.

Mr. Williams: What I'd like to get is feedback on suggestions to the Rule. It would be easier for us at Archives to get the rules through and approved. Could you send me your feedback in writing through email so we can share it amongst ourselves? Send the email to Ken and he will compile them and send them to counsel and the committee and executive secretary. Tricia you had brought up some suggestions in the past when you were the director of archives and the chair.

Mr. Fleming: I don't think we should address this the way we normally address reviewing orders where we have an open email forum. I think Ken should receive the emails, consolidate the feedback and we don't have to scroll through the emails to find what each member said. Give us a summary so it is all in logical order and all together. So we can say we either agree, don't agree with all of the feedback or agree with part of the feedback.

Ms. Smith Mansfield: Archives needs to provide a broad spectrum of what it would like. For example, GRAMA provides that the executive secretary may decline a hearing, as in the case that something has previously been heard. That is the only situation pursuant to the Administrative Rule. There are all these other things that a hearing isn't scheduled for but it doesn't fall into the declined, such as, jurisdictional question. Don't have a record issue. There is a general complaints issue that are prone to seem to be scheduled, if that is the new process. The Archives has the right to determine how they would like to see it is run and how the executive secretary does the job. The Chair or the Committee should also determine it. In the absence of the Committee making the decision then...before, the discussion was all those things was a hearing cannot be scheduled because there is all these things that had to be in place before a hearing could be scheduled. If it is not there then the executive secretary has the authority to not schedule them and it is not considered a declining of a hearing. More of those come to the Chair now. I think that should be part of it because that is one of the reasons that a lot more conversations happened with the Chair because more cases get complicated so do they...Chair you would have more to say too what instances do you want the Chair and the Committee involved and which ones would be under the discretion of the executive secretary.

Ms. Proctor: I send an email to the Chair and Ken and ask if we need legal counsel's input on it. These are the questions and concerns I have about this appeal. And then I am advised by Ken as to whether I can reach out to legal counsel or not. If the appeal is approved for scheduling a

hearing then I send out a Notice of Hearing. That is how it has happened and I think it works well.

Mr. Williams: Archives needs to define the procedural steps that Archives is in charge of.

Ms. Smith-Mansfield: Those steps are not defined in the administrative rule and if that is the way it is to work then they need to be defined in administrative rule.

Ms. Proctor: So, are these the Archives rules or the SRC rules?

Mr. Williams: SRC rules that Archives provides administrative support.

Ms. Smith-Mansfield: Administrative support was much broader before. Now, a lot more has been given to the Chair to provide administrative support. If that is the case, then those should be defined in the Administrative Rules.

Ms. Proctor: I don't understand how the Chair has been providing administrative support. He's made the decisions on appeals being denied or not.

Mr. Fleming: I don't feel like I've provided administrative support. I feel like I have been asked a question that requires a decision according to the statute on the Chair's part and Gina has done her best. We have spent hours looking at the code trying to figure out whether or not this decision is my decision or someone else's decision. And when the Chair looks at the code I don't see anybody with authority to make the decisions on denials other than the Chair.

Ms. Smith-Mansfield: What I am saying is the denial of the hearing in the code is only in one instance. If we are going to make more denials then they should be put in the rule.

Gina: The denials that have been denied are because of different issues but the denial still comes from the Chair.

Mr. Tonks: Basically, we have two ways to make a denial. One is from the statute, for the executive secretary can decline to schedule a hearing if the series, classified as private, controlled, or protected by the same governmental entity and has already been heard by the committee. That does not include public records. The executive secretary takes a look at the appeal. The other way to deny a hearing is in our Administrative Rule, the Committee cannot order a governmental entity to disclose records that they do not have. That where we get to the exception where the executive secretary goes to the Chair and according to Administrative Rule the Chair can determine if there is sufficient evidence that the governmental entity should have the records. Those are the only two options for denying a hearing.

Mr. Fleming: We have talked about both denials and scheduling appeals. I think the statute also requires a hearing be scheduled within a certain amount of time.

Ms. Smith-Mansfield: It has to have all of these requirements before it can be scheduled and that is where the gray area is.

Mr. Tonks: The appeal shall contain a, b, c, and d. When you start questioning what if it doesn't have it, who do we talk to, based on that? Most Petitioners are non-lawyers. If you have a Petitioner that does not have a copy of a previous decision what do we have to review?

Ms. Proctor: Administrative Rules says that I have to send them a Notice and let them know which documents are missing about their appeal.

Ms. Smith-Mansfield: Is that a rule?

Ms. Proctor: It is an Administrative Rule that is why I do it.

Mr. Fleming: What happened last time with a complaint by Mr. Eames about the fee?

Ms. Proctor: Yes, I talked that over with David, the Chair, and asked if evidence existed for this to be a fee waiver issue. And he reminded me of legal counsel advice that “when in doubt schedule a hearing.”

Ms. Smith-Mansfield: That is an instance of...there wasn't a request for a fee waiver. So, he was just complaining about the fee and they hadn't approved the fee.

Mr. Fleming: So what is the issue?

Ms. Smith-Mansfield: I think somehow we need to provide the exec sec...see the exec sec has quite a bit of power in the instance of all the steps, somehow, maybe not, it does talk to the Chair in one way or another. But in what instance does the executive secretary have the authority to establish that it is a proper appeal before the SRC.

Mr. Fleming: I think that there is definitely a need for clarification. I am not arguing that the Chair should retain all of the power and the executive secretary should retain all of the power that they currently have under the statute. I think it is unreasonable for a volunteer Chair to have all of that responsibility. It is a lot of work and that is what I talked about at the last meeting. But, I think we are bound by the statute regardless whether we think it is reasonable or not. And I think the executive secretary is charged with following that statute to the best of their ability.

Ms. Proctor: Based on legal counsel advice of when in doubt schedule a hearing and what does “evidence” mean when the governmental entity says they don't have any records but the Committee has said, we think you should or we want to hear this and vet it for ourselves.

Mr. Fleming: It is always a judgement call.

Ms. Proctor: So, if you are saying that that appeal should not have been scheduled then it's like a Catch-22. If I deny it then Paul has to argue it in court or if I schedule it and...

Mr. Fleming: I don't know that we are necessarily talking about whether appeals should be scheduled.

Ms. Smith-Mansfield: I was saying that the one wasn't an appeal for a fee waiver because those words were not used. I think you are saying that those issues should be talked over with the Chair.

Mr. Fleming: Which Eames case?

Ms. Smith-Mansfield: Eames was talking about the cost being too high and they didn't approve their fees until August in their ordinances which was after his request and therefore he just wasn't going to pay up. He didn't ask the governmental entity for a fee waiver.

Chair: I agree. But he was still appealing access to the records.

Ms. Smith-Mansfield: It was stated on the agenda as a fee waiver. Our discussion was that there was nothing in there for a fee waiver.

Mr. Fleming: But, we (Gina and I) had that discussion.

Ms. Smith-Mansfield: What I was trying to do is find a way to ease the burden of the Chair in those instances and you are jumping on all over it so forget it.

Mr. Fleming: I am not jumping all over it. I am just trying to make sure that we have the facts straight here. And that if we are going to ask the executive secretary to follow the law, and that is our primary directive, we have to let her do that to the best of her ability and when she looks at the law and it says the Chair has the authority to do whatever and she comes to the Chair and asks me and says I think the law says you need to look at this and by law I mean GRAMA and the Rules.

Mr. Tonks: The Administrative Rule is 35-2-2, same series, in order to find a request for a hearing according to 403(4) the exec sec shall consult with Committee Chair and at least one member of the Committee as to what to do.

Mr. Fleming: Right, and that is the way we do it.

Mr. Tonks: Then 2) is where it says the Committee Chair shall determine whether the Petitioner has brought sufficient evidence, the committee chair determines that sufficient evidence was provided, that there is no record exists, then the Chair shall direct the executive secretary to schedule a hearing.

Ms. Proctor: And that is what we have been doing.

Mr. Tonks: That is where you have those two different things 1) requires the Chair and one other member for same series, same records, same government entity. 2) in cases of access denial because the records do not exist that is just the Chair makes a determination by himself that sufficient evidence has or has not been presented to schedule or not schedule a hearing.

Mr. Fleming: So I think what I suggested at last Committee meeting is we need someone whose job it is to be Chair of this committee because then that Chair could be more to act under the law. As far as spending a lot of time talking over the past six months with Gina I feel that we did the best we could to follow the spirit of the law and the Administrative Rule, and with my experience of the guidance of legal counsel over the years, which is, when in doubt schedule a hearing.

Mr. Tonks: Always keep in mind that you have that extra step that is beyond that, every single time we meet the executive secretary basically says these are the hearings we have declined and here are the reasons. According to the Administrative Rule, if any committee member has requested a discussion to reconsider a decision, they may after a majority vote, choose to reverse the decision about not holding a hearing. Still in a sense, the committee still has the ability to reverse any of these decisions to decline to hold a hearing. They will be recorded here and you will have the ability to reverse the decision based upon majority vote, based upon Administrative Rule. So it isn't always the Chair or the executive secretary hung out to dry.

Mr. Fleming: I have also said in certain instances in my experience I don't think that this is something that just two people on the Committee had to make a decision on for the whole Committee.

Mr. Tonks: Always look through your materials as they are coming through. The reason we provide it to you so you can see which were declined and here is the reason why. If you want to get more information then, just talk to Gina and ask her. When you get to that portion of reporting we can have a vote and a discussion.

Ms. Proctor: Those denied appeals are on the shared drive under the "Denied" folder.

Ms. Smith-Mansfield: The only thing I was trying to say is in response to what you were saying last time, were there instances that they were more process ones. That we could give to the executive authority with her knowledge base to be able to parse out that is not declining, they are unable to schedule because the case is not there. That is really the jist of the only thing I was trying to say.

Mr. Fleming: Ok, that's cool. But, that is why I brought up the time issue. Your answer to that was it has to be a complete appeal. She has the authority to determine if the appeal is complete.

Ms. Smith-Mansfield: An incomplete appeal is not declining in the strictest sense because she can't schedule it.

Mr. Fleming: I agree. But, I think that is not necessarily has been absolutely clear, to me or to Gina in the past.

Ms. Smith-Mansfield: That is why I thought some sense of an Administrative Rule if...but I did want a sense of whether that was what the committee would want or not.

Ms. Proctor: I'm wondering if we can have an Administrative Rule that says, much like if the committee members feel that they would like to have a hearing for an appeal that had been denied, can we say, if the committee feels that an appeal hearing is not warranted that they can rescind a notice of hearing that was scheduled. Does that have to be a statute?

Mr. Fleming: That's a sticky wicket.

Mr. Tonks: We are very limited when we can decline. But, to actually decline and then say we accept one...(trailed off).

Ms. Smith-Mansfield: Is that different from decline to incomplete?

Ms. Proctor: Incomplete or no case made.

Ms. Smith-Mansfield: But we accept, yes. This is not properly before the Committee.

Ms. Alder, Paralegal: Because the information is incomplete.

Mr. Tonks: That would be interesting. The problem is when would you do it? All the parties are here, we could say we have a motion and I don't think we should hold this.

Ms. Proctor: I wasn't thinking while everyone is here. We are scheduled out to April, do you want to take a look at any one of them and review it?

Mr. Tonks: But, they act as a Committee.

Ms. Proctor: And review it during the business portion here and say, Hey, I've looked at the material and I don't think this one warrants a hearing. Let's take a vote on whether it meets the criteria. Is there a statute that could be allowed for that?

Mr. Fleming: I get where you are going with that and I don't like the idea. I have been on this committee for six years and I am just now getting to where I think I would be qualified to say that. I think Committee members are qualified to vote after deliberation by virtue of being on the Committee but that is pretty much it until you have really studied the law like the Chair is forced to, like the executive secretary and the ombudsman and the State Archivist are bound to because it is their job.

Mr. Haraldsen, Chair: Having said that, let's take a look at the one you and I talked about this week regarding Eric Peterson. We denied that, primarily we denied it is because the reason we ruled on it last time has not changed. We are still bound by that ongoing investigation thing.

Ms. Proctor: Right, and the CAO provided a statement in his response that they received a declaration from the FBI that their investigation is still ongoing.

Mr. Haraldsen: I would have loved to hear it because I personally would like to see that issue. But, my point being that seemed to me that it would be redundant to have someone come before us when I cannot see that we could make any difference in our decision because of what we were bound with a year ago.

Ms. Proctor: Exactly. Everything stayed the same. Just like with Clára v. UTA. That decision was already made as well and that appeal was denied as well because it was the same documents, same classification, same reason, everything was the same.

Ms. Smith-Mansfield: But was it really still an ongoing investigation?

Ms. Proctor: In Clára's it wasn't an investigation that was ongoing. It was that the Committee had already determined that the records that they did deny originally were still the same records that he wanted this time. They were originally classified as attorney work product not an investigation.

Ms. Smith-Mansfield: But, Eric Peterson appeal was for records about an ongoing investigation?

Mr. Haraldsen: That is what we were told.

Ms. Smith-Mansfield: But to the AG Office, everything is always ongoing.

Ms. Proctor: That isn't what it was. Tyler Green went through and said that they went through and obtained a declaration from the FBI that the investigation is still ongoing. But, in Clára's the investigation was over but his appeal wasn't about investigation. The Committee heard that one and ordered some records produced but there was one segment of records that the Committee denied and classified it as attorney work product. And those are the records that Clára wanted. He received everything else. It was just the one section of records that the Committee did not provide.

Mr. Haraldsen: I agree with what you are saying that they can use it as a stop gap and they can throw that term out there and just kick that can down the road but the point is, before, that stopped us from being able to make a decision so my feeling was that there wasn't any point in hearing it again when they were still using that ongoing investigation.

Ms. Proctor: Right and it wasn't the Attorney General's Office, it was the FBI (investigation).

Ms. Smith-Mansfield: We haven't always believed the Attorney General's Office.

Mr. Fleming: Isn't this the one where that Peterson (trailed off)

Ms. Proctor: It is the same as the case where no records exist. It isn't always believed just because the governmental entity states that. In last month's hearing with Brady Eames, that was the case with Salt Lake City and also the Utah Local Government Trust (ULGT), they both claimed that they provided all the records but yet the Committee doesn't always believe the governmental entity when they state that until they have the hearing before them. So, we have the hearing.

Mr. Fleming: When in doubt (schedule a hearing).

Ms. Proctor: So, the fee question was associated with one of those appeals, was it moot, the Committee determined it was but the other factor in scheduling that hearing was that they said they provided all of the records. But, who believes them? We have to hold a hearing and question it.

Mr. Fleming: Can I suggest that we have had enough discussion on this today and we need to propose rules. Ken, you are going to give us a set of rules that show the proposed changes, right?

Mr. Williams: You are going to weigh in, and I will compile them.

Mr. Fleming: Have you not gathered some suggestions so far?

Mr. Williams: We haven't.

Mr. Fleming: Could we start from the suggestions that have already been made. I don't want to start over. I think that you and your staff are the experts on the Administrative Rules and if you think something should happen I would rather start from the point where you think things should happen rather than from scratch. And just let the Committee give you feedback. I'd rather look at your suggestions as part of the initial review.



Mr. Williams: I think that is what Tricia was saying. We are tasked with providing administrative support.

Mr. Fleming: Right.

Mr. Williams: We are happy to put something together.

Ms. Smith-Mansfield: My suggestion is that you take a look at the rule for the executive secretary and she is not a voting member. She is not a member of the Committee. But she does have quite a bit of authority as established by law. And so you know... (trailed off).

**Approval December 13, 2018, Minutes (2:47:52)**

The executive secretary reported that the minutes are not yet completed. There is one appeal hearing where the minutes are not complete. There is still one page left to edit. The December 13, 2018 minutes will be approved at the February 14, 2019 meeting.

**Approval of Retention Schedules, action item (2:48:43)**

Ms. Renée Wilson discussed the following Retention Schedules.

Department of Commerce Division of Public Utilities

29709 Energy utility company research records

29722 Telecommunications utility company research records

29723 Water utility company research records

Motion to approve series 29709, 29722, and 29723 was made by Mr. Williams.

Seconded by Mr. Misner.

Vote: Aye: 5 Nay: 2 the motion carried, 5-2. Mr. Fleming, Ms. Richardson, Mr. Williams, Mr. Haraldsen, and Mr. Misner voting for the motion. Ms. Mansell and Ms. Smith-Mansfield voting against the motion.

**Report on Appeals Received (3:00:00):**

The executive secretary explained the Excel log that will be created for reviewing the appeals. The executive secretary reviewed the status of appeals received, scheduled, declined, and postponed. The executive secretary reviewed the denied appeals:

In *Eric Peterson v. Attorney General's Office*, Appeal Req. #2018-108, the Committee heard this same matter involving the same records with the same governmental entity in January 2018 Decision and Order #18-03. The chief administrative officer provided sufficient evidence that the FBI's investigative case was open and ongoing and the appeal therefore was denied.

In *Clara v. Utah Transit Authority*, Appeal Req. #2018-101, the Committee heard this same matter involving the same records with the same governmental entity in September 2016 Decision and Order #16-33. The Committee reviewed the same records *in camera* and upheld the protected classification for attorney work product that the UTA determined originally.

**Report on Cases in District Court (3:18:55):**

Paul Tonks, Assistant Attorney General, provided updates on the current appeal cases under judicial review.

**Other Business (3:33:30):**

Annual Open and Public Meetings Act Training:

Mr. Tonks and Ms. Alder provided the annual Open and Public Meetings Act Training.

Discussion of GRAMA Bills – 2019 Legislative session **(4:07:52):**

The Committee members discussed the 2019 legislative session regarding Senate Bill 25 Records Committees. They understood the bill to create a separate records management committee to hear retention schedule matters and it will meet quarterly. This will alleviate the State Records Committee from hearing the retention schedule matters.

Approval of 2019 Committee Meeting dates, action item **(4:16:22)**

Motion to approve the 2019 Committee meeting dates to be held on the second Thursday of each month was made by Ms. Smith-Mansfield.

Seconded by Mr. Fleming

Ms. Richardson noted that she will not be present at the March 14, 2019 meetings.

Mr. Williams noted that there is a possibility that he will not be present at the March 14, 2019 meeting.

Mr. Fleming noted that he will not be present at the July 11, 2019, meeting.

Ms. Alder noted that she likely will not be present for the April 11 and May 9 meeting.

Vote: Aye: 6 Nay: 0 the motion carried, 6-0. Mr. Fleming, Mr. Williams, Ms. Smith-Mansfield, Mr. Haraldsen, Mr. Misner, and Ms. Mansell voting for the motion. Ms. Richardson is absent.

**(4:18:45)** The next meeting is scheduled for February 14, 2019, from 9:00 a.m. to 4:00 p.m. The Chair queried whether a quorum will be present for the next meeting and determined that a quorum will be present.

**(4:20:20)** Motion to Adjourn by Ms. Cindi Mansell. Seconded by Mr. Williams.

Chair: The January 10, 2019, State Records Committee meeting adjourned at 4:35 p.m.

**(6:06:40)**

**This is a true and correct copy of the December 13, 2018, SRC meeting minutes, which were approved on January 10, 2019. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>**

X



Executive Secretary