

State Records Committee Meeting

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

Date: March 14, 2019

Time: 9:00 a.m. – 4:00 p.m.

Committee Members Present:

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

Legal Counsel:

Paul Tonks, Assistant Attorney General, Attorney General's Office

Executive Secretary:

Gina Proctor, Utah State Archives

Telephonic participation:

None

Others Present:

Jillian Norton, Salt Lake City School District
Florence Miller, Salt Lake City School District
Stewart Gollan, representing Mr. Fierro
Anthony Fierro
Lonny Pehrson, Attorney General's Office
Nate Sumbot, Governor's Office
Chad Bennion
Rebekkah Shaw, Utah State Archives
Renée Wilson, Utah State Archives
Kendra Yates, Utah State Archives

Agenda:

- Three Hearings Scheduled
 - Chad Bennion v. Attorney General's Office
 - Chad Bennion v. Governor's Office
 - Anthony Fierro v. Salt Lake City School District
- Business:
- Discussion
- Approval of March 14, 2019, minutes, action item

- SRC appeals received, report
- Cases in District Court, report
- Retention schedules approved, action item
- Other Business
 - Confirm a quorum for the next meeting
 - Next meeting scheduled for May 9, 2019, 9 a.m. - 4 p.m.

Call to Order (0:00:20)

The Chair, Tom Haraldsen, called the meeting to order at 9:01 a.m. The Chair introduced himself and noted the Committee members' names are in front of each of them on the table. The Chair explained the procedures and stated the restrictions on sharing any mediation information. He asked the parties to acknowledge the mediation restrictions. Chad Bennion, Petitioner, and Lonny Pehrson for the Attorney General's Office acknowledged the restrictions.

1. Chad Bennion v. Utah Attorney General's Office 0:01:22)

The Petitioner entered an objection related to the attorney for the State Records Committee. As an attorney with the Attorney General's Office (AGO) the Petitioner objected to Mr. Tonks hearing matters dealing with records of the Attorney General's Office. He said he believed there is an inherent conflict of interest especially when the Attorney General's Office determines salaries, positions, promotions and so forth. The Chair acknowledged the objection.

Petitioner Statements (0:02:35)

Mr. Bennion reviewed the history of his initial record request for all costs and expenses for litigation of Senate Bill 54, which was passed in 2014. This issue relates to the process of how candidates are selected for primary elections to be put on a ballot. After SB 54 passed there was litigation about the process. When Mr. Bennion made the request, he anticipated receiving a number of documents. In the first response, there were eight records totaling less than \$6,000 for transcription. He knew there had been settlements in the process of litigation. He appealed to the Chief Administrative Officer because he knew that the Constitution Party received \$45,000 in a court ordered amount for legal fees. That record was produced by the AGO.

Mr. Bennion argued that for a media-dominated issue, the AGO had produced less than \$100,000 in records of receipts that demonstrated the cost to the state for the legislation, statute, and litigation. Mr. Bennion said that he knew this cost was a financial stress which was noted in the newspapers and that the amounts on the other side are closer to 1 million dollars. Mr. Bennion referred to the Rules of Professional Conduct, Chapter 13. These rules govern all attorneys in the state. There are no exemptions. However, there are provisions for attorneys that represent government agencies. Mr. Bennion read the section related to fees. Mr. Bennion stated that the Governor's Office is the Attorney General's client. There should be records between the two offices related to the cost of litigation. This is not about legal arguments that are privileged communications. The request is about fees and taxpayer dollars that were used to defend a piece of legislation for the state of Utah. There should be a higher transparency for such funds to be tracked. Furthermore, the AGO routinely represents the Governor and the state of Utah even though the Governor has his own counsel and deputy counsel. A memorandum or copy of the lawyer's customary fee arrangements should be

provided that states the general nature of the legal services to be provided, the base rate, or the total amount of the fee and to what extent the client is responsible for costs, expenses, or disbursements in the course of the representation. Mr. Bennion stated that he had not received records for the attorney fees, legal assistance, the Solicitor General's time and cost to argue the matter, nor for any other staff that were at other appeals nor for the original court hearings.

Mr. Bennion asserted that there seemed to be some resistance in providing the information. He is certain that Mr. Pehrson is going to argue that they did not track those costs. If they did not track those costs, he would like to know why. They are required to provide, under the Rules of Professional Conduct, minimally, a memorandum to the client.

Mr. Bennion stated he has been an administrative representative and a paralegal for different attorneys and law firms where he was required to document the billing, what it was for, which case, and provide the billing to the client. He feels that he should have received these type of records about fees in response to his request.

Committee Questions (0:15:02)

The Committee clarified that Mr. Bennion is not an attorney and is representing himself today and that some documents already were provided to Mr. Bennion.

Respondent Statements (0:18:25)

Mr. Pehrson stated that Mr. Bennion did a good job of pointing out what the fundamental misunderstanding is with regard to his record request. Mr. Bennion has brought requests to the AGO before and has been frustrated with the types of financial records that are available from the AGO. A fundamental issue is that Mr. Bennion views the AGO as a typical law firm who bills clients by the hour or tracks hours. This is not applicable to the AGO. The AGO is statutorily required to defend the constitutionality of statutes passed by the Legislature. In that function they are not acting necessarily as an attorney, for a client, in the typical sense. Instead, in the AGO is a division known as the Constitutional Defense and Special Litigation Section. Their job is to handle lawsuits in regard to the constitutionality of statutes. They did not track their hours individually by case, by attorney, or by an issue. They did the work that was necessary to defend the statute. When the request was received for records showing costs of the AGO in defending SB 54 the AGO conducted a proper search and found that the only records that existed were records of out-of-pocket costs for depositions, transcripts, settlement payments, etc. Before the request was filed, the AGO was not on the Internal Service Fund (ISF) billing situation that they have implemented since then. They were not tracking hours by individual attorney or by the case number or by what they were working on.

Another fundamental misunderstanding was Mr. Bennion's assertion that the Rules of Professional Conduct somehow required the AGO to provide a memorandum to someone when they defend a statute. Mr. Bennion provided no case law, no Bar opinion, nothing more than his own opinion of his reading of the Rules of Professional Conduct to show that the AGO has to provide that sort of memorandum. He is correct in that there is no specific exception in the Rules, but that is because the AGO's office is not a typical law firm. It has never been the practice of the AGO to treat cases like this as representing a client, whether it be the Governor or the Lt. Governor.

Mr. Pehrson stated that, under Administrative Rule 35-2-2, the Petitioner has the burden of proving that there are additional records that the governmental agency has not provided. He

has the burden to provide sufficient evidence showing that records existed at one time, that the governmental entity has concealed the records, or that they have insufficiently or improperly searched for the records. The Petitioner has not met this burden. He presented speculation about what should exist and what could exist, but he has not presented any evidence, as required by the rule, that there are additional records. Mr. Pehrson felt that he had provided adequate explanation for why that is so. Mr. Bennion's arguments are based on false assumptions about how the office functions, its recordkeeping and accounting systems, as well as the Office's role in defending statutes. Mr. Pehrson felt it is important to specifically look at the subject of the request. Mr. Pehrson agreed that this is a huge issue. It has been in the media for years and there have been multiple lawsuits. The request that he presented to the AGO was for specific records that are focused primarily on billing and costs. The last item in his request was for requests to confer or request for consultation. It wasn't clear what exactly that was. But, the focus of the request is about billing amounts and cost records.

Mr. Pehrson explained that it is possible that the AGO has provided only records showing \$50,000 of expenses when the other party claimed that they have possibly spent millions because the AGO did not track the expenses in that manner. We aren't saying more was not spent. Obviously, more was spent. It simply was not tracked and, therefore, there are no records.

Mr. Pehrson made a note about the weighing provision because Mr. Bennion does raise this in his brief. The State Records Committee should not get into weighing of the public interest. He does not think Mr. Bennion had met the threshold to reach that yet because they are still talking about whether he has met his burden under the Administrative Rule of presenting evidence that the AGO withheld records. Mr. Pehrson urged the Committee not to get into the weighing provision.

Questions:

The Committee clarified that Mr. Pehrson was quoting Administrative Rule R35-2-2. That Rule is in the section of declining a hearing and it is the authority of the Chair to determine whether to have a hearing scheduled.

Mr. Pehrson stated that he filed a motion in this case asking that the hearing not be scheduled for this very reason because it was not met. No action was taken.

Ms. Smith-Mansfield clarified that it is the Chair's discretion to decide whether the Petitioner's argument is sufficient enough to proceed with the hearing. The Petitioner did put forth an argument. It are no grounds to strike a hearing once it is accepted by the Chair and set for a hearing.

Ms. Smith-Mansfield clarified that the cited rule is specific to declining a hearing before a hearing is scheduled.

Mr. Pehrson stated the Committee can decide what the proper burden should be in this instance but that his argument is that the same burden should rest on the Petitioner at the hearing that would apply in a motion to deny a hearing.

The Chair asked what ISF billing is.

Mr. Pehrson stated it is Internal Service Fund, where the AGO has gone to a situation where they track hours for each individual matter. Attorneys now bill client-agencies, other governmental agencies, and that provides a more transparent billing. The new procedures have been rolled out over the past year. This request was filed in January 2018. The vast majority of this litigation had been completed last year. In fact, the US Supreme Court just denied *certiorari* on this so the matter is completely resolved as of last month. The ISF was being implemented in the middle of last year.

The Chair asked whether anything more has happened since the billing system was implemented. Have there been any additional costs related to this case for anything that has been added since it was adopted as a policy?

Mr. Pehrson answered that he would assume that there have been additional expenses for SB 54 litigation.

The Chair stated that he was curious to know how ISF billing came about.

Mr. Pehrson explained that the legislature required it. An audit was done on the office and the recommendations of the audit department to the legislature were that they be transitioned to that type of accounting.

Ms. Smith-Mansfield clarified that governmental agencies did pay for legal services before.

Mr. Pehrson said there were some cases, for instance, with Highways and Utilities Division. He said that he was not familiar with all of the cases but it was more on an ad hoc basis and now this is an office wide approach. He is not sure how it would apply to our Constitutional Defense staff because they are statutorily required to defend the statutes and are not defending the Governor's office or a client.

Mr. Fleming clarified that since the ISF system was implemented were there records in that system. He reminded Mr. Pehrson that his answer not refer to the time prior to the request. Mr. Pehrson explained the request was filed in January of 2018. Since then the case has been to the 10th Circuit and then to the US Supreme Court on a *certiorari* petition which recently was denied. But the vast majority of the legal work had been completed before then. Once the case was settled by the AGO there was the \$45,000 settlement to close one of the cases and then the other case proceeded through all of the appeals.

Mr. Fleming asked whether there were records in the ISF that were responsive to this request Mr. Pehrson answered that there was not. This matter was already an appeal to the Committee before the ISF was implemented.

Ms. Smith-Mansfield clarified that this request was submitted to the AGO in January 2018, before the ISF.

Mr. Pehrson reviewed the AGO initial response in which eight pages were provided. Those were the depositions and transcripts and some travel costs. When they did the second search for his appeal to the Chief Administrative Officer (CAO), they realized they overlooked the settlement check. There was no attempt to hide anything, it was completely public and in the news. They realized that they had not provided the check so they did provide it at the time of the CAO appeal decision. It was the only other record the CAO determined that might be

responsive to this request. Since then, in anticipation of this appeal, the AGO completed another search. AGO record custodians assured Mr. Pehrson that there are no other records responsive to this request.

Petitioner Closing (0:33:00):

Mr. Bennion stated that if it wasn't necessary to track the billing why was the ISF implemented? He said that the AGO has not cited any statute or policy nor has he cited case law for how the Rules of Professional Conduct do not apply to the AGO. Mr. Bennion referenced Exhibit B, the bill from Thackery and Company for Utah Republican Party v. Herbert. The Governor was being sued. There should be documents. The Governor is the client. If the AGO have statutory provisions then they have funds that are being used. There should be some records related to that. Mr. Bennion expressed his opinion that administrative proceedings are more of an attempt to make them legal proceedings, which they were not designed to be. Administrative proceedings were designed to get to the truth of the matter and weigh things by the preponderance of testimonial evidence or documentary evidence and citation to be able to make a determination. This is not a legal proceeding. That would come next if an appeal goes beyond this [Committee]. He reiterated that the Governor's office was the client. He stated that this matter with the Rules of Professional Conduct provides provisions where attorneys are to provide the client, in this case Governor Herbert, with what the costs would be.

Mr. Bennion stated that there has to be records in excess of \$2 million dollars that the AGO has spent. He said that Mr. Pehrson provided no statute or rule and offered nothing as to why the AGO may be exempt from the Rules of Professional Conduct.

Respondent Closing (0:37:25)

Mr. Pehrson stated that Mr. Bennion's focus is on the Rules of Professional Conduct. If he feels the AGO is somehow violating those rules the appropriate course of action is to go to the Bar and seek a ruling from them that the AGO is not following the rules as required or find an opinion from the Bar. The AGO has operated in this manner forever as far as he knows and it has never been raised as an issue. He does not see how it can be an ongoing violation of the Rules of Professional Conduct. If it is, then this body is not the proper place to raise that question. He does not feel that this Committee is tasked with interpreting the Rules of Professional Conduct particularly as they apply to the AGO. That seemed to be Mr. Bennion's sole argument for why there must be records or there should be records that don't exist. Mr. Pehrson stated that he did not think that the Petitioner had met the burden of proof that the office had concealed or withheld or that the Office has not properly searched. They had searched at least three times. Senior people in the Office that handled the case had searched for cost and billing records. The AGO did not dispute that more was spent. It is simply that there are no records of the additional expenditures. For that reason he would ask the Committee to deny Mr. Bennion's appeal.

Questions (39:05)

Mr. Fleming clarified that Mr. Pehrson acknowledges that more money was spent and what he meant is internal resources were applied.

Mr. Pehrson stated that Mr. Fleming is correct. Not out of pocket.

Deliberation (39:25)

Motion by Ms. Smith-Mansfield: The appeal be denied based upon the evidence presented by the Attorney General's Office that no records exist that have not already been provided that are responsive to Mr. Bennion's record request.

Seconded by Mr. Fleming.

Vote (46:40): Aye: 6 Nay: 1. Motion carries 6-1. Mr. Haraldsen, Mr. Hartley, Ms. Mansell, Mr. Williams, Mr. Fleming, and Ms. Smith-Mansfield voting in favor of the motion. Ms. Richardson voted against the motion.

The hearing is concluded (47:05). 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.

2. Chad Bennion v. Governor's Office (47:22)

The Chair announced the hearing. Mr. Bennion and Nate Sumbot, Deputy General Counsel to the Governor, asked for a five-minute break to speak together to resolve some things. The Chair announced that the Committee will take a five-minute break. (48:06)

Reconvene (48:23)

Mr. Bennion stated that they have resolved this matter and there is no need to have a hearing. The appeal was withdrawn.

3. Anthony Fierro v. Salt Lake City School District (0:49:25)

The Chair announced the hearing.

Stewart Golan, representing the Petitioner, Mr. Fierro, stated that he was retained last evening to represent Mr. Fierro and has not submitted a brief. He has contacted the Respondent and he believes they have reached a resolution. Although, it will take some time to work through the resolution he requested a continuance for the appeal to be heard at the next Committee meeting.

Florence Miller, representing Salt Lake City School District, stated that they have reached the terms of the resolution and is confident it will have a positive result.

Deliberation (51:00):

The Committee encourages people to work together and get a resolution and if they have made a good faith effort and can resolve the appeal, then the Committee should continue it.

Motion made by Ms. Smith-Mansfield: Move to continue the appeal until the next Committee meeting in May.

Seconded by Mr. Fleming.

Vote (0:52:05): Aye: 7 Nay: 0. Motion carries 7-0. Mr. Haraldsen, Mr. Hartley, Ms. Mansell, Ms. Richardson, Mr. Williams, Mr. Fleming, and Ms. Smith-Mansfield voting in favor of the motion.

The hearing is concluded (0:52:28). 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 (52:35). Reconvene (52:50)

BUSINESS (53:05)

Discussion

Motion to Approve March 14, 2019, Minutes

The motion was made by Mr. Williams. Seconded by Mr. Hartley.

Vote: Aye -4, Nay – 0 with 3 Abstentions. Motion carries 4-0. Mr. Haraldsen, Ms. Smith-Mansfield, Mr. Fleming, Mr. Williams voting for the motion. Mr. Hartley, Ms. Richardson and Ms. Mansell abstained.

Report on Appeals Received (54:30)

The executive secretary reviewed the status of appeals received. She reviewed the appeals under review and denied appeals.

2019-27 Denied Clara v SLC, there are no records responsive to the request.

2019-32 Sullivan v. UDC, appeal for two incident case records in which one case was a duplicate appeal to the Committee.

Ms. Smith-Mansfield requested to discuss Mr. Sullivan's denial. She feels that since the Petitioner submitted a new request and the governmental entity did not deny the request initially or on appeal to the CAO as a duplicate request, then the SRC should treat it as a new appeal before the Committee¹.

Motion made by Ms. Smith-Mansfield to schedule the appeal. Seconded by Mr. Fleming.

Vote: Aye: 7 Nay: 0. Motion carries 7-0. Mr. Haraldsen, Mr. Hartley, Ms. Richardson, Ms. Mansell, Mr. Williams, Mr. Fleming, and Ms. Smith-Mansfield voting in favor of the motion.

Report on Cases in District Court (1:10:55) Paul Tonks, Assistant Attorney General, provided updates on the current appeal cases under judicial review.

Retention Schedules (1:27:23): presented by Renée Wilson.

Series #01710 Department of Environmental Quality, Division of Air Quality; Suspended air particulate matter filter sheets.

The Committee determined that they do not have authority to approve schedules for objects. Utah Code §63A-12-103(10), to establish retention schedules, a governmental entity should submit them to the State Archives for objects of evidentiary or historical value. These objects are filters. The Committee has authority to approve retention schedules for records as defined in Utah Code §63G-2-103(22), pursuant to Utah Code §63G-2-604. The State Archives has authority to schedule these objects.

¹Administrative Rule R35-2-2, If a Committee has requested a discussion to reconsider the decision to decline a hearing, the Committee may, after discussion and by a majority vote, choose to reverse the decision and hold a hearing. Any discussion of reconsideration shall be limited to those Committee members then present, and shall be based only on two questions: whether the records being requested were covered by a previous order of the Committee, and/or whether the petitioner has, or is likely to, put forth a public interest claim. Neither the petitioner nor the agency whose records are requested shall be heard at this time. If the Committee votes to hold a hearing, the executive secretary shall schedule it on the agenda of the next regularly scheduled Committee meeting.

Motion made by Ms. Smith-Mansfield to deny approval for this schedule. Seconded by Mr. Fleming.

Vote (1:42:32) Aye: 7 Nay: 0. Motion carries 7-0. Mr. Haraldsen, Mr. Hartley, Ms. Richardson, Ms. Mansell, Mr. Williams, Mr. Fleming, and Ms. Smith-Mansfield voting in favor of the motion.

Series #80697 Department of Agriculture and Food. Division of Plant Industry; Nursery inspection certificates and licenses.

Motion made by Mr. Fleming to approve this schedule. Seconded by Mr. Williams.

Vote (1:44:15) Aye: 7 Nay: 0. Motion carries 7-0. Mr. Haraldsen, Mr. Hartley, Ms. Richardson, Ms. Mansell, Mr. Williams, Mr. Fleming, and Ms. Smith-Mansfield voting in favor of the motion.

Series #80649 Department of Agriculture and Food. Division of Plant Industry; Official seed inspection and laboratory report files.

Motion made by Mr. Fleming to approve this schedule. Seconded by Ms. Smith-Mansfield.

Vote (1:45:10): Aye: 7 Nay: 0. Motion carries 7-0. Mr. Haraldsen, Mr. Hartley, Ms. Richardson, Ms. Mansell, Mr. Williams, Mr. Fleming, and Ms. Smith-Mansfield voting in favor of the motion.

Other Business (1:45:57):


The next meeting is scheduled for May 9, 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 at least five Committee members will be present.

The Committee discussed the new laws, the date that new laws go into effect, the Records Management Committee, and suggested administrative rule change to be on the next meeting agenda for review.

Motion to Adjourn by Ms. Smith Mansfield (1:54:15). Seconded by Ms. Mansell.

The Chair adjourned the April 11, 2019, State Records Committee meeting at 11:05 a.m.

This is a true and correct copy of the April 11, 2019, SRC meeting minutes, which were approved on April 11, 2019. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>

X. 
Executive Secretary