

State Records Committee Meeting

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

Date: June 13, 2019

Time: 9:00 a.m. – 4:00 p.m.

Committee Members Present:

Tom Haraldsen, Chair, Media Representative
Kenneth Williams, Governor's Designee
David Fleming, Private Sector Records Manager
Patricia Smith-Mansfield, Citizen Representative
Cindi Mansell, Political Subdivision Representative
Holly Richardson, Citizen Representative
Vacant, Electronic Records and Databases Representative

Legal Counsel:

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

Executive Secretary:

Gina Proctor, Utah State Archives

Telephonic participation:

Eric Peterson
Joshua Althoff

Others Present:

Lonny Pehrson, Attorney General's Office
Bill Keshlear
Judy Zimmerman
Judy Hardy
Ben Wood, *Salt Lake Tribune*
Kendall Laws, San Juan County Attorney
Mike Lehr, representing Moab City
Austin Riter, representing Moab City
Rosemary Cundiff, State Records Ombudsman
Rebekkah Shaw, Utah State Archives

Agenda:

- Four Hearings Scheduled
 - Bill Keshlear v. San Juan County
 - Eric Peterson v. Attorney General's Office
 - Judith Zimmerman v. Attorney General's Office
 - Joshua Althoff v Moab City

- Business:
- Approval of June 13, 2019, minutes, action item
- SRC appeals received, report
- Cases in District Court, report
- Other Business
 - Review of FY 2018 Annual Report
 - Next meeting scheduled for July 11, 2019, 9 a.m. - 4 p.m.
 - Committee members' attendance polled for next meeting, quorum verification.

Call to Order

The Chair, Tom Haraldsen, called the meeting to order at 9:07 a.m.

1. Eric Peterson v. Attorney General's Office

Mr. Ericson was connected telephonically to the Committee meeting. The Chair acknowledged that Mr. Erickson and Mr. Pehrson, representing the Attorney General's Office, request a continuance for this appeal while they work toward a resolution.

Motion by Mr. Williams to continue the appeal hearing until the next State Records Committee meeting. Seconded by Mr. Fleming.

Vote: Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Mr. Williams, Mr. Fleming, Ms. Mansell, and Ms. Smith-Mansfield voting in favor of the motion.

The hearing is concluded. An order of continuance 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 Committee's decision to district court.

2. Bill Keshlear v. San Juan County

The Chair announced the hearing. The Chair provided instructions and reviewed the procedures. 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. Both parties acknowledged the restrictions.

Petitioner's Statements

Mr. Keshlear introduced himself and discussed his background in journalism and politics. He reviewed his record request in relation to a book proposal on environmental politics and communication strategies behind the creation of Bears Ears National Monument. He explained that he was interested in two recently elected San Juan County commissioners, Mr. Maryboy and Mr. Grayeyes, and their governing priorities, specifically authorship and payment for services in connection with production of resolutions introduced on February 5, 2019.

Mr. Keshlear pointed out that Utahns have a constitutional right of access concerning conduct of the public's business. He stated that there is no environmental issue in Utah more controversial than management and use of public land in San Juan County. It is directly tied to expansion of Native American sovereignty. Mr. Keshlear stated that the two commissioners have governed through resolutions written by their longtime private attorney, Steve Boos. The resolutions were approved without advice or informed consent of anyone in the county. Mr. Keshlear claimed that Mr. Boos has written, signed, and sent letters, dated March 12 and April

4, under his law firm's branded stationery to his clients and other county officials. The county did not include these letters as part of the response to the record request even though they were addressed to its clerk and administrator. Mr. Keshlear discussed the content of the letters and he described the impact Mr. Boos' legal opinions, influence, and advice could have on San Juan County. Mr. Keshlear discussed that the documents are government records and they discussed the classification of the records under Utah Code §63G-2-103(22). They were received by county officials. He also felt that possibly they were prepared under specific instructions of one or more county officials; and likely retained or owned by the two commissioners. Mr. Keshlear stated that the county might classify the records as protected pursuant to Utah Code §63G-2-305(17), attorney-client privileged.

Respondent Statements

Kendall Laws, San Juan County Attorney, introduced himself. Mr. Laws stated that the County had complied as fully as they could with this record request. The county clerk reached out to all possible organizations and departments in the county and asked whether they had any documents or correspondence that might be responsive to the request. He received none other than the past resolutions, which were provided to Mr. Keshlear. Mr. Laws related the process that the county implemented to locate any other responsive records. They provided an addendum to the appellate decision with additional records. The county determined that there likely are other records that do exist although the county does not have possession or maintain those records.

Questions from Committee:

The Committee determined that the county has a problem in its records management. There is no mechanism other than cooperation of the individuals to provide the county with the records. All records belong to the state. The county reached out for correspondence. The only record that was located was the resolution that already had been passed in an open meeting. The Committee determined that the additional existing communications are records. The Committee determined that the private attorney provided his services pro bono. The County Attorney would be the person to receive legal bills and Mr. Laws has not received any bills for Mr. Boos' legal services.

Petitioner Closing

Mr. Keshlear stated that it is clear that the pro bono services were probably restricted to the creation of the initial series of resolutions. The relationship between Mr. Boos and the two commissioners goes back to when they were both officials of the Navajo Nation in various capacities. Mr. Boos was legislative counsel as part of the Navajo Nation and his current client mix includes institutional clients related to Native American governments and various entities. His firm was part of the lawsuit under appeal that redistricted San Juan County. The law firm already has been paid for its services but the county may have to pay \$2-\$3 million connected to a federal lawsuit. There was another lawsuit to kick Mr. Maryboy and Mr. Grayeyes off the ballot. That litigation was not pro bono. The litigants that lost are in the process of raising funds to pay for that lawsuit.

Mr. Keshlear surmised that if San Juan County successfully pursues the legal strategy that there are no exceptions to attorney-client privilege that exist under GRAMA, then GRAMA would not have any value. An elected official would be able to route all policy considerations through a

team of personal attorneys and then successfully claim attorney-client privilege. He wondered whether commissioners and their legal team are removing an important tool such as GRAMA so that citizens cannot access records and hold their elected representatives accountable. Mr. Keshlear speculated that records officers, which worked at the pleasure of their bosses, had little incentive to press their bosses to comply with record requests, especially those that reveal embarrassments or illegal activity. Mr. Keshlear stated that there is reason to believe the new commissioners, under the direction of their private attorney, would fail to comply with any committee order to release documents related to the development of policy that surfaced almost immediately after they took control.

Respondent Closing

Mr. Laws summarized the county's argument that San Juan County would like to always be compliant with GRAMA. The county believes in transparency. The county will comply with the direction the Committee orders.

Questions from Committee

The Committee determined that there are three commissioners for San Juan County. Each commissioner represents one district. San Juan County recently was reorganized by a federal judge. A redistricting lawsuit is on appeal and argued last October and the opinion of 10th Circuit has not yet been provided. All three commissioners of the county utilize the county attorney by statute.

The Committee is clear that the county turned over the responsive records that they located and to which they had access. The county has not been able to determine whether the documents prepared by the outside attorney are subject to the request. The county tried to access the records and was told that they are classified as protected attorney-client privilege. The county has not been given the records in order to review them or to determine whether that classification is appropriate.

Deliberation

There is a difficult situation for the county in that the authority of the State Records Committee is limited in enforcing an order. The county would be left to enforce the Committee's order. All correspondence, emails, and drafts of resolutions that are provided to a governmental entity are records.

Motion made by Ms. Smith-Mansfield: The Committee grants the appeal.

- 1) These are records pursuant to Utah Code §63G-2-103(22), prepared, owned, received, or retained by a governmental entity or political subdivision.
- 2) The records may contain attorney-client privileged communication classified as protected pursuant to Utah Code §63G-2-305(17). They also may establish information that goes to a public meeting and may be classified as public pursuant to Utah Code §63G-2-301(3)(h), as correspondence by and with a governmental entity in which the governmental entity determines or states an opinion upon the rights of the state, a political subdivision, the public, or any person. Therefore it is the governmental entity that determines the classification. Even if the record is private and is correspondence with commissioners, as government employees, it is the governmental entity's privilege to classify the record. The privilege belongs to the client. The client is San Juan County.

- 3) In that the Committee has ordered disclosure under Utah Code §63G-2-801(3)(c), a public employee who intentionally refuses to release a record, the disclosure of which the employee knows is required by a final unappealed order from a government entity, the State Records Committee, or a court is guilty of a class B misdemeanor.

Seconded by Mr. Fleming.

Vote: Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Mr. Williams, Mr. Fleming, Ms. Mansell, and Ms. Smith-Mansfield voting in favor of the motion.

The hearing is concluded. 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 of the State Records Committee to district court.

Five-minute break. Reconvene.

3. Judith Zimmerman v. Attorney General's Office (AGO)

The Chair announced the hearing. The Chair provided instructions and reviewed the procedures. 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. Both parties acknowledged the restrictions.

Petitioner Statements

Dr. Judith Zimmerman introduced herself and reviewed her professional background and employment. She discussed her federal retaliation lawsuit and the claims made against her and its outcome. There is an ongoing lawsuit in state court. Dr. Zimmerman reviewed her record request and the reasons for her appeal. Her request was for any and all documentation of disciplinary action taken against AGO attorneys Jeffrey Robinson, Yvette Donosso, Steven Densley, and Kathleen Liuzzi. The AGO response included two pages of disciplinary records related to Ms. Donosso but they did not locate any disciplinary records related to the other three attorneys. Dr. Zimmerman discussed her efforts to obtain additional records based on her belief that the information she was provided indicated other records did exist. She was provided with an additional four pages of responsive records. She discussed the redactions made to the records provided and the classification of those redactions. Dr. Zimmerman related her communications with Tyler Green, Solicitor General, in obtaining other additional records related to an email communication between Mr. Densley's supervisor and her own private attorney. Dr. Zimmerman requests that the Committee order the AGO to complete another due diligence search and provide any other public responsive records.

Respondent Statements

Lonny Pehrson introduced himself and stated that he represented the Attorney General's Office. Mr. Pehrson discussed the record request and the facts surrounding locating and providing the responsive records as well as follow-up communications with Dr. Zimmerman, and further production of records. He noted that this is the first time Dr. Zimmerman had raised concerns about redactions. Mr. Pehrson stated that the AGO has performed several searches but Dr. Zimmerman had not met the burden of proof that the SRC Administrative Rules require showing that the AGO has not completed due diligence in their search. Mr. Pehrson discussed the few redactions and the AGO efforts to make sure they did not release

any protected information classified as attorney-client privilege in the court case names. Mr. Pehrson had readied the unredacted version of the eight pages provided with the three words that were redacted if the Committee would like to review them *in camera*. Mr. Pehrson addressed the email related to Mr. Densley. That email was from Mr. Densley's supervisor to Dr. Zimmerman's attorney noting that Mr. Densley had been counseled about the situation and the supervisor would personally monitor him. This is not discipline. That is why the email is not part of the responsive records for the record request. Mr. Densley was verbally counselled and personally monitored by his supervisor. Those things do not necessarily generate any records. A notice of intent to discipline for Ms. Denosso was provided in a subsequent release of records because it was not located in any personnel file. It was located elsewhere after the response was issued. Once the record was located the AGO provided it. There are redactions in that document and they are prepared unredacted for the Committee's review. The additional records, which were the basis of the original dispute, were eight pages the AGO identified that were not regarding formal discipline. That is why we found them non-responsive to this request. The records of employees are classified as private with an exception. The exception is for records of formal charges and disciplinary actions after all time for appeals has expired, and the charges on which the discipline action were taken are sustained are classified as public, according to GRAMA. The extension of a new employee's initial probationary period is not a disciplinary action. This is a process to help a new employees succeed prior to completing the probationary period. All employees have a probationary period prior to obtaining a career service status. A performance improvement plan (PIP) is also not a formal disciplinary action. Ms. Denosso had a PIP and the AGO provided that record because ultimately it did result in a disciplinary action.

Petitioner Closing

Dr. Zimmerman explained that she did not bring up an issue of redaction previously because she received the latest redacted disciplinary records of Ms. Denosso only in the past week. The history of trying to get records from the AGO has been problematic. In her federal case, documents were withheld until the last day of her trial. They had to redo discovery. She did not have faith that the AGO had searched diligently.

Respondent Closing

Mr. Pehrson stated that the eight pages of redacted documents released last week contained three redacted words. He did not believe that was what prompted the current issue regarding the redactions. It could have been raised and should have been raised previously. Mr. Pehrson is not involved in any court case related to discovery in Dr. Zimmerman's litigation. He stated that the AGO's office has searched several times and provided records that are related to discipline despite not being formal discipline records.

Questions from the Committee

The Committee determined the three redactions identify court cases that the named AGO attorneys handled. The Committee determined that the Notice of Intent contained redactions but were not previously appealed or challenged by Dr. Zimmerman. The Committee determined that they would like to review these redacted documents *in camera*.

Motion by Mr. Fleming to go *in camera*. Seconded by Ms. Mansell

Vote: Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Mr. Williams, Mr. Fleming, Ms. Mansell, and Ms. Smith-Mansfield voting in favor of the motion.

Motion to reconvene by Mr. Fleming. Seconded by Ms. Mansell

Vote: Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Mr. Williams, Mr. Fleming, Ms. Mansell, and Ms. Smith-Mansfield voting in favor of the motion.

The Chair noted that the SRC is reconvened.

The Committee clarified with Mr. Pehrson that the redaction of Oct. 5 is redacted under Utah Code § 63G-2-305(17) (18) including the one that has an initial. Mr. Pehrson stated that the redaction was made because it was removed previously and stricken from the Notice of Intent. The initials are those of the supervising attorney who drafted it noting it was not warranted for discipline.

Motion by Ms. Smith-Mansfield: The redactions are appropriately classified as protected pursuant to Utah Code §63G-2-305(17) (18) and not public pursuant to Utah Code § 63G-2-301(3) (h) and access is denied. Seconded by Mr. Fleming.

Vote: Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Mr. Williams, Mr. Fleming, Ms. Mansell and Ms. Smith-Mansfield voting in favor of the motion.

Motion by Ms. Smith-Mansfield: The Committee is convinced that the governmental entity has provided all responsive records due to the entity's due diligence searches related to disciplinary actions for the named attorneys. The appeal is denied as to ordering the AGO to perform additional searches for responsive records. Seconded by Ms. Mansell.

Vote: Aye: 5 Nay: 1. Motion carries 5-1. Ms. Richardson voting against the Motion. Mr. Haraldsen, Mr. Williams, Mr. Fleming, Ms. Mansell, and Ms. Smith-Mansfield voting in favor of the motion.

Motion by Ms. Smith-Mansfield: The appeal is denied as to the Performance Improvement Plan and the email related to verbal counselling. These are not disciplinary records. These are not disciplinary records according to DHRM Rule R477-11-1. These are considered employee records classified as private under Utah Code §63G-2-302(2) (a) and are not classified as public records under Utah Code §63G-2-301(3) (o) because they are not formal charges or disciplinary actions against a past or present governmental entity employee. Seconded by Mr. Fleming.

Vote: Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Mr. Williams, Mr. Fleming, Ms. Mansell, and Ms. Smith-Mansfield voting in favor of the motion.

The hearing is concluded. 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 of the State Records Committee to district court.

Five-minute break.

Reconvene.

Joshua Althoff v. Moab City

The Chair announced the hearing. Mr. Althoff was connected to the meeting via telephone. Committee members introduced themselves. The Chair provided instructions and reviewed the procedures. 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. Both parties acknowledged the restrictions.

Petitioner Statements

Mr. Althoff explained his record request was for access to the audio recording of his polygraph test and that he should have access to it. The city just found out that they do not have a copy of the audio portion of the test. He stated that if Moab City paid for the services then they should have a copy of it or request a copy from the provider and release a copy to him. He stated that Moab City denied access because his vital signs were monitored while he was taking the polygraph test and they classified it as private. Mr. Althoff stated that the privacy interest is his own medical record of his heart rate. The polygrapher told him one thing during the test and the written summary of the polygraph indicates something different than what he was told during the polygraph test.

Questions from the Committee

The Committee determined that an outside provider, Intermountain Polygraph, conducted the polygraph test.

Respondent Statements

Austin Riter and Mike Lehr representing Moab City were introduced. Mr. Althoff is appealing the denial of access to the audio recording of the polygraph examination in Moab City's Internal Affairs investigation file. There are three audio files in the investigation file and the city manager, under the impression that they had that record in the investigation file, denied access to it. While preparing for this hearing it was found that no audio of the polygraph interview was maintained by the city. A third-party private vendor conducted the polygraph test in 2016.

Questions from the Committee

The Committee determined that Utah County Sheriff's Office conducted the investigation and contacted Intermountain Polygraph to conduct the polygraph examination. The results were provided to Moab City. Moab City did not contact Utah County Sheriff's Office or the private vendor to obtain a copy of the audio recording. Mr. Althoff received a written summary of the polygraph examination.

The Sheriff's Office answers record requests independently of the city. Moab City denied the request based on privacy interests of other individuals' names that were assumed to be on the audio and were redacted from the written summary.

Petitioner Closing

Mr. Althoff explained that he previously had reached out to Utah County Sheriff's Office for access to the audio recording of the polygraph interview. The Utah County Attorney told him that Utah County did not keep copies of audio recordings, and they turned all of their investigation records over to Moab City. Mr. Althoff explained the disputed information contained between the written summary and the polygraph interview that he participated in

with Intermountain Polygraph. Mr. Althoff described the hardships he has experienced because of this situation.

Questions from the Committee

The Committee determined that the record is an audio/video recording.

Respondent Closing

Moab City does not have a copy of the record to produce.

Deliberation

The Committee discussed that Moab City has not requested a copy of the audio recording from Intermountain Polygraph. Moab City maintains that GRAMA proposes no obligation upon a governmental entity to obtain it and there is an institutional interest not to do that.

The audio recording is a private record created by a third party based on a contract. Having a third party involved in creating records does not absolve the government entity from obtaining or maintaining that record. There is a contractual relationship between Moab City, the Utah County Sheriff's Office, and Intermountain Polygraph. The protected classification under Utah Code §63G-2-305(10) is not appropriate. Certain questions in the polygraph interview were related to other individuals besides Mr. Althoff. Redactions would be necessary in order to provide the record. Mr. Althoff already knows the names of these individuals' but the re-release of the record is a concern. Technology has advanced to the point where redactions for audio and video are possible.

Motion by Ms. Smith-Mansfield: Granted in part and denied in part for redactions. This is a governmental entity's record. Moab City should request the record and provide it to Mr. Althoff. If the record has been destroyed then documentation of the destruction is required. This is a private record under Utah Code 63G-2-302-(1)(b), records containing data on individuals describing medical history, diagnosis, condition, treatment, evaluation, or similar medical data; with redactions for other individuals' private information under Utah Code 63G-2-302(2)(d), other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy. Seconded by Ms. Mansell.

Vote: Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Mr. Williams, Mr. Fleming, Ms. Mansell, and Ms. Smith-Mansfield voting in favor of the motion.

The hearing is concluded. 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 of the State Records Committee to district court.

BUSINESS

Motion to Approve May 9, 2019, Minutes

The motion was made by Ms. Mansell. Seconded by Mr. Fleming.

Vote: Aye - 5, Nay – 0, Abstained – 1. Motion carries 5-0. Mr. Haraldsen, Ms. Smith-Mansfield, Mr. Fleming, Ms. Mansell, and Mr. Williams voting for the motion. Ms. Richardson abstained.

Report on Appeals Received

The executive secretary reviewed the status of appeals received. Ms. Proctor reported the declined appeals:

Michah Ferry v. Utah Dept. of Corrections: declined due to timeliness issue.

Steven Rossi v. Bureau of Criminal Identification: declined to timeliness issue.

Brent Myron Cobb v. Utah Dept. of Corrections: declined due to timeliness issue.

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

Review of the FY 2018 Annual Report

Other Business:

The next meeting is scheduled for July 11, 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. Mr. Fleming will be absent.

Motion to Adjourn by Mr. Fleming. Seconded by Ms. Mansell.

The Chair adjourned the June 13, 2019, State Records Committee meeting at 12:15 p.m.

This is a true and correct copy of the June 13, 2019, SRC meeting minutes, which was approved on July 11, 2019. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>

X 
Executive Secretary