

State Records Committee Meeting

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

Date: July 11, 2019

Time: 9:00 a.m. – 4:00 p.m.

Committee Members Present:

Tom Haraldsen, Chair, Media Representative
Patricia Smith-Mansfield, Citizen Representative
Cindi Mansell, Political Subdivision Representative
Holly Richardson, Citizen Representative
Rebekkah Shaw, State Archivist Designee

David Fleming, Private Sector Records Manager-Absent
Vacant, Electronic Records and Databases Representative

Legal Counsel:

Debbie Kurzban, Assistant Attorney General, Attorney General's Office
Nicole Alder, Paralegal, Attorney General's Office

Executive Secretary:

Gina Proctor, Utah State Archives

Telephonic participation:

Tony Alexander Hamilton
Michael Bacon
Seven Wilson
Roger Baker, Tooele City Attorney
Ryan Wood, attorney for Lehi City

Others Present:

Eric Peterson
Lonny Pehrson, Attorney General's Office
Elias Faraclas
Justin Anderson, Attorney General's Office
Rosemary Cundiff, State Government Records Ombudsman

Agenda:

- Five Hearings Scheduled
 - Eric Peterson v. Attorney General's Office
 - Tony Alexander Hamilton v. Utah Department of Corrections
 - Michael Bacon v. Utah Department of Corrections
 - Seven Wilson v. Tooele City
 - Elias Faraclas v. Lehi City

- Business:
- Approval of June 13, 2019, minutes, action item
- SRC appeals received, report
- Cases in District Court, report
- Other Business
 - Review of FY 2019 Annual Report
 - Next meeting scheduled for August 8, 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 9:12 a.m.

1. Eric Peterson v. Attorney General's Office

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

Eric Peterson, Utah Investigative Journalism Project introduced himself. He requested a continuance.

Respondent Statements

Lonny Pehrson, Utah Attorney General's Office, explained that the review was delayed and additional time is required for the screening of state charges. A comprehensive review with the investigators and the experts at the office is necessary.

Questions from the Committee:

The Committee clarified whether the email issue is resolved. Mr. Pehrson stated it was. August's agenda will indicate that the investigative report will be reviewed.

Ms. Smith-Mansfield asked questions about the statute of limitations for public corruption charges. The review is just for the investigative report. Statute of limitations is a complex issue and not straightforward merely looking at dates.

Motion by Ms. Smith-Mansfield to accept the request for continuance for one month on the issue of the investigation report to provide an opportunity of review of the records by AG office and we have the classifications and issues before us next time that is specific to what is outstanding.

Seconded by Ms. Mansell.

Vote: Aye: 5 Nay: 0. Motion carries 5-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Ms. Shaw, 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.

Five-minute break.

Reconvene.

2. Tony Alexander Hamilton v. Utah Department of Corrections

Mr. Hamilton was connected telephonically to the hearing. The Chair announced the hearing. The Chair provided instructions and reviewed the procedures. Introductions were made. 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. Hamilton stated that in November 2018 he began the record request process and then had eye surgery which interrupted the timeliness of his appeal. He submitted a duplicate request in order to obtain the record. Mr. Hamilton referred to two court decisions allowing the Constitutional rights of inmates to access the courts and use of law libraries or legal assistance that is adequate, effective and meaningful. The facilities are supposed to have adequate legal research services. Mr. Hamilton stated that the contract attorneys will not assist him in preparation of this. The old contract for legal services that was effective from April 1, 2013 to March 31, 2015, uses the word "inmate" numerous times. Mr. Hamilton stated that the term "inmate" is a specific reference to him and the other 7000 inmates in the state of Utah.

Questions from the Committee:

Ms. Shaw: When you put in your request last year did you know you were having eye surgery at the end of the month?

Mr. Hamilton stated that he had eye surgery the week before Thanksgiving and a week later for the other eye.

How far in advance did you know that you were having eye surgery?

Mr. Hamilton stated he had about a week notice.

Respondent Statements

Justin Anderson from the Attorney General's Office representing the Department of Corrections. He admits that he previously made the request and it was denied in 2018. This is a duplicate request and can be denied. Mr. Anderson stated that the Committee may determine that the eye surgery is a reasonable reason to accept the duplicate request however, the record does not mention Mr. Hamilton specifically. It references inmates generally. The term specifically is important. GRAMA is not the correct statute to use to resolve his conflicts with Mr. Angeloffer. The department has grievance policies, processes and other ways to assist Mr. Hamilton to get the help that he needs for access to the courts and resolve the issues he has. The statutes are clear and he submits with that.

Questions from Committee:

The Committee determined that the attorneys are contracted to handle the inmate cases, prepare court filings, screen for frivolous claims, provide legal research and make copies. The contracted attorneys are not required to handle the frivolous claims. There are three contract attorneys to assist all 8,000 to 8,500 inmates.

Petitioner Closing

Mr. Hamilton explained that he doesn't receive lengthy notice for the surgery so that he cannot contact anyone on the outside. By the time he got his appeal paperwork submitted his appeal was rejected as untimely. He began the second process on April 10. He would like to look at the current contract for his own satisfaction. The contract attorneys are supposed to assist him in the preparation of the legal paperwork.

Questions from the Committee:

The Committee determined that Mr. Hamilton received assistance from Mr. Freestone while he was housed at Draper site and received assistance from Mr. Angelhoffer while housed at the Central Utah Correctional Facility (CUCF).

Respondent Closing

Mr. Anderson reiterated that the contract does not reference Mr. Hamilton specifically. This is a duplicate request.

Deliberation

The two citations that the agency brings forward: 1) § 63G-2-201(8)(d), a government entity is not required to fulfill a person's record request if it unreasonably duplicates a previous request. The Committee should consider whether this was an unreasonable duplicate request.

2) § 63G-2-201(10)(b)(i) requires that a requested record contain a specific reference to the individual inmate. It also allows for the first five requests submitted by an inmate during a calendar year that specifically references the individual. This has to be a record that names them.

The Committee determined that the first appeal was untimely. The requested record is not a record in which he is specifically referenced. It is a reasonable denial.

Motion by Ms. Smith-Mansfield: The Committee denies the appeal due to Utah Code §63G-2-201(10)(b)(i). The record does not specifically reference the individual.

Seconded by Ms. Shaw.

Vote: Aye: 5 Nay: 0. Motion carries 5-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Ms. Shaw, 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. Michael Bacon v. Utah Department of Corrections

Mr. Bacon was connected telephonically to the hearing. The Chair announced the hearing. Introductions of Committee members and Respondent were made. 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. Bacon stated that the policies for urinalysis (UA) testing done by the Department of Corrections using his UA sample makes him party to the record. He feels that a second UA testing by an outside lab should be allowed for inmates since he can be charged criminally. He stated he should be eligible to receive the records related to the calibration of the UA machine.

Questions from the Committee:

Ms. Smith-Mansfield: Do you want to have your sample retested? Are you involved in an administrative or litigation with UDC?

No, not at this time. His intent is to bring the matter to court because the UDC charges \$150 for having a dirty UA for symboxin and they wouldn't allow him to send it to an outside lab.

Respondent Statements

Mr. Anderson stated that the policies he references do not reference him. He does have access to his UA test results but not to the records regarding the machines. This is interesting in that the policy that allows inmates to send out UA testing to an outside lab does not exist for inmates. They do exist for offenders on parole, probation, and halfway houses but not to currently incarcerated individuals.

Questions from the Committee:

The Committee clarified that the policy is for parolees and not for the currently incarcerated inmates. The policy that allows for independent UA testing is not available to inmates but if he were a parolee he would have that policy available to him.

How often is it calibrated?

It is calibrated daily.

Does UDC have other kinds of requests of dirty UA?

Yes, but often when inmates have dirty UA they dispute them for a variety of reasons.

As far as criminal charges are concerned, being disciplined in prison the evidence standard for inmates is lower than parolees or individuals on the street. Mr. Anderson did not believe Mr. Bacon is correct that criminal charges can come solely from the dirty UA.

Are you familiar with the fine schedule?

They are fined but Mr. Anderson is not familiar with the schedule.

Petitioner Closing

Regarding the policy related to UA testing for halfway house residents they are still inmates of the department so it should be the same policy regardless of housing status. Mr. Bacon said that he was indeed charged \$150 for the dirty UA. He asked to see the calibration of the machine. The UDC refused his request. Mr. Anderson hasn't provided the Committee any proof of anything he said.

Respondent Closing

Mr. Anderson stated that there are different policies for incarcerated inmates vs. parolees and half-way house residents. Both may be referenced as inmates but because of the different situations it is a different scenario. Adult Probation & Parole (AP&P) has its own policies due to different rights as to the supervision status and the different restriction in housing between the parolees and inmates. The policy does not reference him specifically. He does have access to the policy in the inmate reference library manual.

Policy doesn't differentiate between the types of inmates. There are two separate policies. AP&P has their policies for how the officers act and provide the supervision for those on parole. The prison has policies for how the officers act, how the prison is operated and how the inmates are governed.

Questions from the Committee:

For the policy regarding inmates at halfway houses, is there a term used in referencing the inmates?

The policy would likely use the term "offender" rather than "inmate."

Why do parolees have the option to retest the UA by an outside lab?

The parolee would have access to the second UA test and have access to the policy itself. The policy is public. Policies are available to inmates that affect their daily life but not to policies that have information related to security and operations. The policies do not reference an individual person.

Deliberation

The requested policy is not a prison policy. This record would be public but because it is not in the reference library since he is not a parolee. He has access to the policies that do impact him as a currently incarcerated individual.

The Committee determined to uphold the UDC decision because this policy does not reference him specifically. There is a concern with the whole system of UA testing procedures in general.

Motion by Ms. Shaw: The Committee denies the appeal subject to Utah Code §63G-2-201(10)(b)(i). The record does not specifically mention the individual. The Committee upholds the governmental entity's decision.

Seconded by Ms. Mansell

Vote: Aye: 5 Nay: 0. Motion carries 5-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Ms. Shaw, 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.

Seven Wilson v. Tooele City

Mr. Wilson and Mr. Baker were connected telephonically. The Chair announced the hearing. The Committee members introduced themselves. Roger Baker, Tooele City Attorney, introduced himself. 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. Wilson stated that he was requesting records related to his DNA oral swab testing that he believed was unlawfully obtained. He felt that there was an attempt to discredit him. He requests access to affidavits and search warrants related to him and regarding the death of Ms. Evelynne Derricott.

Respondent Statements

Roger Baker, Tooele City Attorney is representing Ms. Debbie Winn, Tooele City Mayor. Mr. Baker stated that initially Mr. Wilson asked for the entire investigation report into the murder of Evelynne Derricott. Later, he limited his request to only the investigation records that pertained directly to him. There was some communication with the records officer and the appeal officer and the scope of the request was narrowed. Mr. Baker reviewed all of the records in the possession of the police department for this investigation. It took hours to comb through them. There were only six pages that he located within the police department related to Mr. Wilson's request about himself and these were provided to him. Mr. Baker stated that he has no knowledge of a search warrant related to Mr. Wilson's DNA oral swab test. There were minor redactions to one page, which were related to other individuals that were interviewed. This case has not gone to trial yet.

Petitioner Closing

Mr. Wilson stated that he needs the records to go through a civil matter against Tooele City Police Department. He is a pro se litigant and is representing himself.

Questions from the Committee

The Committee determined that Mr. Wilson was not requesting records that did not exist. The records that he did request specifically regarding himself were provided. Mr. Wilson stated that he understood that the case had not yet gone to trial and the Committee likely would not release any records not directly related to him. Mr. Wilson was satisfied with the records that were provided to him as the only records that exist directly related to him.

Respondent Closing

Mr. Baker explained, with regard to an affidavit or search warrant that he had no indication from the police department or the investigation file that an affidavit or search warrant for a cheek swab for Mr. Wilson's DNA sample existed.

Motion by Ms. Smith-Mansfield: All records specific to and referencing Mr. Wilson have been provided by the governmental entity and the appeal is satisfied. No further action is necessary. Seconded by Ms. Richardson.

Vote: Aye: 5 Nay: 0. Motion carries 5-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Ms. Shaw, 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.

Reconvened.

Elias Faraclas v. Lehi City

Mr. Ryan Wood, Lehi City Attorney, was connected telephonically. The Chair announced the hearing. The Committee members introduced themselves. Mr. Wood introduced himself. 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. Faraclas stated that his appeal covers some record requests that were not fulfilled entirely. He listed three sections that he would discuss:

First point is that there is one record that is a public record and needs to be released.

Second point is about processes. Mutilation and bad faith. What is appropriate?

Third point, a record that could be classified as public or protected.

First point: The public record is related to the area planned amendment. An email printout showed records that were not included but since have been provided. Lehi City classified two documents as drafts. The classification was given after the record was posted for the area planned amendment. All discussion postdates the City discussing, approving, and posting it. The City cannot have a draft after the public process is done.

Second point: Mr. Faraclas described his perspective on mutilation of records. He thought that Lehi City intentionally damaged the records so that they did not fulfill their original purpose. The city stipulated that they changed the format of their second response so he wouldn't have access to the attachments. Mr. Faraclas stated that is what this appeal is about. Only one thing is a draft, the development agreement. The City has since turned these documents over to me. Mr. Faraclas stated the City destroyed the record by changing the format.

Questions from the Committee

The Committee interjected a question to the second point. Reformatting from one format, such as paper, to electronic is allowed if all information is preserved and intact. The fact that they reformatted does not make it mutilation or destruction.

Petitioner Statements continued

Second Point continued: In terms of process the City acted in bad faith. It is supposed to be an easy way for citizen to gain records. There were several months between requesting records and the appeal to the State Records Committee which prompted the City to provide some records. Mr. Faraclas expressed his frustration with Lehi City not thoroughly answering his request during the timeline in accessing the records from the City.

The request was for communication, emails, texts, messages, and documents. Some of the records were provided after the Committee scheduled a hearing. Lehi City responded with an email query. Mr. Faraclas felt that he should be able to submit a request and the City should turn over the records.

Third point: Mr. Faraclas stated that the City said they had two documents that they did not turn over. The City has a draft for the comments on the area planned amendment. It cannot be a draft once the City has signed it and posted it. The comments on the development agreement should be public and not a protected draft. Mr. Faraclas requested the Committee to classify the development agreement that is a protected draft as public. According to §63G-2-305 (22), drafts are protected unless classified as public. The public has a greater interest in this record than the City has in keeping it protected.

Respondent Statements

Mr. Wood thanks the Committee for allowing him to appear by phone. He will proceed in the same order as the Petitioner.

First Point: the development agreement vs. the area planned amendment. When the council approved the development agreement it was conditionally approved with instruction to staff to make some changes to it according to the comments made at the meeting. Updating the area planned amendment required it to be in line and consistent with the development agreement. So both documents were classified as drafts. Most of the emails contained attachments of these two draft documents. If the Petitioner is saying that he does not have the final copy of the agreement then Mr. Wood can provide that to him. But both documents are drafts as the attorney for the developer and Mr. Wood went back and forth in finalizing the documents.

Second Point:

The first email batch included a link that he could click on and see the attachments. The emails and the attachments were determined to be public. The second batch of emails did not include a link because the attachments were determined to be protected. Those emails were communications between the developer's attorney and Mr. Wood. There were 101 pages of emails that were under review. Mr. Faraclas provided the State Records Committee with a table that identified the specific emails that he had concerns about. Lehi City reviewed that table and then was able to provide those specific documents. It did take five months to fulfill the request. Mr. Wood acknowledged the City could have done a better job at reviewing the

voluminous number of records for the one-year worth of records related to this important issue for the City.

Third Point:

Mr. Wood explained that the drafts are classified as protected pursuant to §63G-2-305(22). He stated that the petitioner already was provided the original draft submitted to the council for their approval and the final executed and recorded document. His concern is that when attorneys exchange redlined communications within the documents comments are made. Those comments should be protected. The interest is balanced since the public already has the first and final version of the document.

Questions from the Committee

The Committee clarified that the comments are from attorneys, staff, or council members within the redlined changes and comments.

The Committee stated that it was difficult to identify which records were being referenced due to Lehi City not providing a reference to the classifications of the attachments.

Mr. Wood explained the attachments he was referencing and which ones were drafts and classified as protected.

The Committee clarified that the SRC executive secretary was provided the documents that were not released.

Petitioner Closing

With respect to the City's responsibility to the records. The City admitted that they changed the format and indicated they assumed that they sent everything. Mr. Faraclas stated the City has the responsibility to provide him a table and identify the records they withheld.

The most important thing is the comments on the area planned amendment. It was passed with conditions to align with the development agreements. He read the motion from the Lehi City Council meeting that gave instructions that the development agreement is to be amended to be compliant with the area planned amendment. The motion did not state to change the area planned amendment to comply with the development agreement.

Questions from the Committee

The Committee clarified that Mr. Faraclas was seeking all attachments in the emails.

Respondent Closing

Mr. Wood explained that whether the City complied with the city council meeting motion is not before the committee today. The documents still are considered drafts.

Deliberation: The governmental entity has an obligation to provide the records or provide a classification to the denied records. The governmental entity did not fulfill the duty to provide a thorough answer to the Petitioner. The Committee determined to go *in camera* to review the records.

Motion to go *in camera* by Ms. Smith-Mansfield. Seconded by Ms. Mansell

Vote: Aye: 5 Nay: 0. Motion carries 5-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Ms. Shaw, and Ms. Smith-Mansfield voting in favor of the motion.

Motion to reconvene by Ms. Richardson. Seconded by Ms. Mansell

Vote: Aye: 5 Nay: 0. Motion carries 5-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Ms. Shaw, and Ms. Smith-Mansfield voting in favor of the motion.

The Chair noted that the SRC is reconvened.

Deliberation: On page 10 of the Petitioner's written statement to the State Records Committee (SRC) he requested the release of drafts of the development agreement and asks the Committee to order the release of the comments on the area planned amendments. The Committee did not find that the Respondent made a strong enough case to classify the records as drafts.

Motion by Ms. Smith-Mansfield: The Committee is not persuaded that all of the records are properly classified as drafts pursuant to §63G-2-305(22) considering the method in which they provided them to the State Records Committee's review, although some of the records are properly classified as drafts. Under the weighing provision, the Committee finds there is sufficient evidence for the Committee to order the release of the records in the public interest pursuant to §63G-2-403(11)(b).

Seconded by Ms. Mansell.

Vote: Aye: 5 Nay: 0. Motion carries 5-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Ms. Shaw, 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 June 13, 2019, Minutes

The motion was made by Ms. Mansell. Seconded by Ms. Richardson.

Vote: Aye - 4, Nay – 0, Abstained – 1. Motion carries 4-0. Mr. Haraldsen, Ms. Smith-Mansfield, Ms. Mansell, and Ms. Smith-Mansell voting for the motion. Ms. Shaw abstained.

Report on Appeals Received

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

Brady Eames v. Logan City: declined to schedule an expedited hearing and he withdrew his appeal.

Patrick Sullivan v. Utah Dept. of Corrections: declined due to previously heard record series with the same governmental entity and the records are exempt from GRAMA.

Report on Cases in District Court: Nicole Alder, paralegal for Attorney General's Office, provided updates on the current appeal cases under judicial review.

Other Business:

The next meeting is scheduled for August 8, 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.

Motion to Adjourn by Ms. Richardson. Seconded by Ms. Mansell.

Vote: Aye: 5. Nay:0. Motion carries 5-0. Mr. Haraldsen, Ms. Smith-Mansfield, Ms. Mansell, and Ms. Smith-Mansell voting for the motion. Ms. Shaw abstained.

The Chair adjourned the July 11, 2019, State Records Committee meeting at 12:04 p.m.

This is a true and correct copy of the July 11, 2019, SRC meeting minutes, which was approved on August 8, 2019. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>

X *Gina Proctor*
Executive Secretary