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Attorneys for Intervenor Brigham Young University

IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

THE SALT LAKE TRIBUNE and its
reporter, MATTHEW PIPER,

Petitioners,

vs.

The UTAH STATE RECORDS
COMMITTEE.

Respondent, and

BRIGHAM YOUNG UNIVERSITY,

Intervenor.

**AFFIDAVIT OF
RACHEL GIFFORD**

Case No. 160904365

Judge Laura Scott

BYU 00978
01197

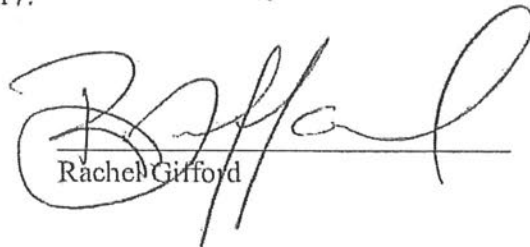
I, Rachel Gifford, being first duly sworn, hereby state as follows:

1. I am an adult over twenty-one (21) years of age.
2. The matters stated herein are true and correct and are within my personal knowledge and, if called to testify as a witness, I could and would testify competently thereto.
3. I used to be a records analyst with the Utah Division of Archives and Records Service ("UDARS"), and I have been employed by UDARS for approximately 2 years.
4. I previously was responsible for assisting public colleges and universities with their records management and providing access to GRAMA certification and training. I have knowledge, background, and experience in that area.
5. Brigham Young University ("BYU") is a private university and therefore UDARS has taken the position that neither BYU nor any of its departments, including the University Police, is a governmental entity subject to GRAMA.
6. BYU is not listed in our Open Records Portal (or in any other database that we maintain) as a state agency (or other governmental entity) to which a GRAMA request may be submitted, and we do not intend to add or list BYU as a governmental entity subject to GRAMA.
7. In August 2016, Lieutenant Aaron Rhoades, a police officer employed by BYU, contacted UDARS to inquire about possibility of him taking the GRAMA certification exam.
8. We informed Lt. Rhoades that UDARS hierarchy committee had determined that, as a private organization, BYU would not be added to our database as it was not a governmental entity.

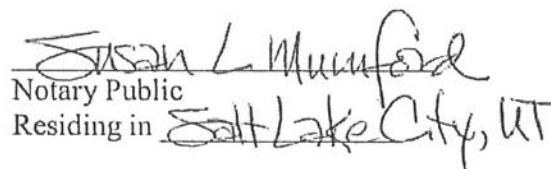
9. While anyone may voluntarily take the GRAMA certification exam, only those employed by a governmental entity may become GRAMA certified on behalf of a governmental entity.

10. Although we allowed Lt. Rhoades to take the GRAMA certification exam, we did not require him to do so; nor have we required any BYU employee to take the certification exam.

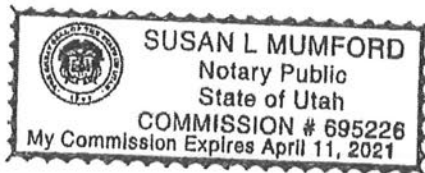
DATED this 31 day of July, 2017.


Rachel Gifford

Subscribed and sworn to before me this 31st day of July, 2017.

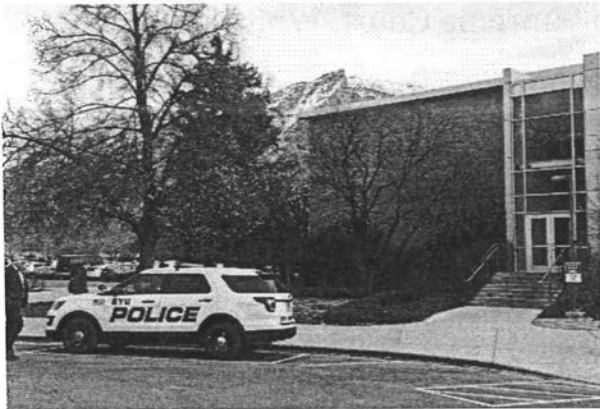

Notary Public
Residing in Salt Lake City, UT

My Commission Expires: April 11, 2021



The Salt Lake Tribune

With BYU police explicitly covered by open-records laws, Salt Lake Tribune seeks documents about Honor Code investigations



(Rick Egan | Tribune file photo) The police station at Brigham Young University in February 2019.



By Erin Alberty

Published: May 15

Updated: May 15, 2019

Utah news agencies have renewed their requests for information from Brigham Young University's campus police, now that legislation confirms that the police department is subject to the state's public records laws.

SB197 went into effect on Tuesday, specifying that a private university's police department is considered a governmental entity. That means the police department at BYU, which is owned by The Church of Jesus Christ of Latter-day Saints, must respond to public records requests as any other law enforcement agency would.

The Salt Lake Tribune and KUTV-Channel 2 separately filed requests on Tuesday.

"The Tribune has asked for these records from BYUPD before and this is the kind of transparency citizens can and should expect from all law enforcement agencies in the state," said Tribune editor Jennifer Napier-Pearce.

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The Tribune reiterated its request for correspondence between the police department and the Honor Code Office, first made by a reporter in 2016 amid reports that BYU was disciplining students who reported sex crimes if they were found to have violated the Honor Code when they were assaulted. The Honor Code bans alcohol and coffee, premarital sex and “homosexual behavior,” and imposes a dress code and regulates visitation between male and female students.

That 2016 request is now pending before the Utah Supreme Court. While a district judge ruled in favor of The Tribune, BYU argues its police were exempt from public records laws because BYU is a private university, and not a governmental entity. SB197 isn’t retroactive, so it doesn’t resolve that lawsuit.

But The Tribune renewed its request as the legislation went into effect on Tuesday, noting Utah’s public records laws cover any records that are “prepared, owned, received, or retained” by a governmental entity.

“I believe [records of police correspondence with Honor Code officials] are currently being retained by BYUPD, an entity subject to GRAMA,” Tribune reporter Jessica Miller wrote in the request.

BYU officials said the police department “will apply the GRAMA statute to each request as it comes in.”

“As a matter of policy, our police have routinely provided public law enforcement records upon request and will continue to do so,” wrote BYU spokesman Todd Hollingshead. “University police, like other law enforcement agencies, will not provide items that are not public records under GRAMA.”

KUTV requested recordings of a police interview with Joseph L. Bishop, a former head of the church’s Provo Missionary Training Center, who was accused of sexual misconduct against a missionary in 1984. The woman in 2017 told BYU police officers

that Bishop had sexually assaulted her in a small room in the MTC; according to a BYU police report, Bishop admitted to officers that he took a woman into a small room at the MTC and asked to see her breasts.

KUTV and others first requested the recording in 2018; an appeal is pending.

Tuesday's request also is based on the law's requirement that any record "retained" by a governmental entity is subject to public records laws, said KUTV News Director Mike Garber.

BYUPD is fighting a separate battle to remain in existence. State officials have said they intend to decertify BYU's police force for multiple violations — and in letters to the school specifically noted the department's failure to follow public records laws.

The department also didn't conduct an internal investigation into misuse of protected police records and failed to respond to subpoenas when state regulators were investigating a BYU officer for misconduct, state officials have said.

After a two-year investigation, state authorities said they believed a BYU police lieutenant was taking information from other departments' private records and passing it to university officials, including Honor Code enforcers.

That finding is consistent with internal BYU records The Tribune obtained in 2016, showing that an Honor Code worker in one case asked former BYU Lt. Aaron Rhoades for information on a woman who had reported a rape to Provo police. Rhoades used a shared digital storage system to review the Provo police case documents and then shared with Honor Code enforcers intimate details from the woman's sex assault medical exam records.

The Tribune also obtained limited data in 2016 that showed police searched for and accessed at least 6,500 reports from that digital records-sharing system in 18 months — a number that officers from other departments said seemed unusually high. The number of searches by BYU police declined after the state began investigating the department.

Other information from the state's two-year investigation into BYU police has not been made public because a Utah judge has placed a secrecy order on the findings.

Prosecutors declined to charge Rhoades, who retired from the police department in 2018 and gave up his police certification.

In addition to emails The Tribune first requested in 2016 between BYU's police department and the Honor Code and Title IX offices, Miller also has specifically requested email correspondence between Rhoades and anyone employed at the Honor Code Office from 2011 to 2018.

BYU has appealed the decertification of its police department, which is set to take effect Sept. 1.



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(GRAMA)” filed by Petitioners, the Salt Lake Tribune and its reporter, Matthew Piper, (“Petitioners”), on July 12, 2016 pursuant to Utah R. Civ. P. 12(b)(6), “failure to state a claim upon which relief can be granted.” A memorandum supporting this motion has been attached providing further reasoning concerning the granting of this motion. Additionally, a proposed court order has also been attached.

DATED this 25th day of August 2016.

SEAN D. REYES
Utah Attorney General

/s/ Paul H. Tonks
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Salt Lake City, Utah 84114-1160
Telephone: (801) 538-9501

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August 2016, I emailed and transmitted a true and correct copy of the foregoing **MOTION TO DISMISS** to be electronically filed with the clerk of the above court, using the Utah Trial Court/ECF System, which sent notification of such filing to the following:

Michael Patrick O'Brien
Mark D. Tolman
JONES WALDO HOLBROOK & McDONOUGH PC
170 South Main Street, Suite 1500
Salt Lake City, UT 84114
*Attorneys for the Petitioners,
The Salt Lake Tribune and Matthew Piper*

/s/ Paul H. Tonks

PAUL H. TONKS

Petitioners, the Salt Lake Tribune and its reporter, Matthew Piper, (“Petitioners”), on July 12, 2016, and files this Memorandum in Support of its Motion.

I. UNDISPUTED RELEVANT FACTS¹

1. Brigham Young University (“BYU”) is a private institution, certified by the Commissioner of the Utah Department of Public Safety (“Public Safety”) to maintain a police department (“Department”), employing individuals who also are certified as Utah Peace Officers (“POST Certified”). Petitioners’ Complaint Exhibit B; Exhibit E pg. 18.
2. Officers employed by the Department are included within the definition of “law enforcement officers” under Utah Code § 53-13-103. Petitioners’ Complaint ¶12.
3. Petitioners made a request for records for law enforcement/public safety records from the Department pursuant to Utah Code § 63G-2-203 of the Government Records Access and Management Act (“GRAMA”).
4. In an e-mail dated June 9, 2016, the Department denied Petitioners’ request for records, stating that it had “no such law enforcement/public safety records related email.” Petitioners Exhibit A.
5. Petitioners filed an appeal with the Committee on or about June 13, 2016. Complaint ¶5.
6. On or about June 14, 2016, the Committee denied Petitioners’ appeal based upon lack of jurisdiction over the Department because it is not a “governmental entity” as defined in

¹ If the Court relies upon any undisputed relevant facts that are construed to be outside of the initial pleadings, are not disputed by Petitioners, and/or are not established by statute, the Committee requests that the present Motion to Dismiss be converted into a Motion for Summary Judgment and disposed of as provided in Utah R. Civ.P. 56, as allowed by Utah R. Civ.P. 12(b).

Utah Code § 63G-2-103(11)(a)(v) and (b)(i). Complaint ¶¶6&7, Petitioners' Exhibit C, pg.

II. LEGAL ARGUMENT

Pursuant to Utah R. Civ.P. 12(b)(6), a district court may dismiss a complaint based upon a plaintiff's "failure to state a claim upon which relief can be granted." A Civ.P. 12(b)(6) motion to dismiss admits the facts alleged in the complaint, but challenges the plaintiff's right to relief based on those facts. *Mitchell v. Recontrust Co.*, 2016 UT App 88, ¶16 373 P.3d 189. A district court should grant a motion to dismiss when assuming the truth of the allegations in the complaint and drawing all reasonable inferences therefrom in the light most favorable to the plaintiff, it is clear that the plaintiff is not entitled to relief. *Id.*, following *Hudgens v. Prosper, Inc.*, 2010 UT 68, ¶ 14, 243 P.3d 1275. In evaluating a motion to dismiss, the district court may "consider documents that are referred to in the complaint and [are] central to the plaintiff's claim" and may also "take judicial notice of public records." *Mitchell*, following *BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 6, 322 P.3d 1172.

A review of Petitioners' Complaint shows that their requested relief is that: (1) The Committee's decision denying Petitioners' appeal should be reversed and; (2) Petitioners should be given access to the Departments' records. Complaint ¶27. Petitioners claim that their right to an appeal of the Committee's decision is through Utah Code § 63G-2-404. Complaint ¶4 & 9. However, the central problem with Petitioners' Complaint and the requested relief is that as a matter of law, BYU and the Department are not governmental entities and the Committee did not have jurisdiction over the Petitioners' appeal.

GRAMA states that every person has the right to inspect a “public record” free of charge, and the right to take a copy of a public record during normal working hours subject to Utah Code §§ 63G-2-203 & -204. Utah Code § 63G-2-201(1). A person may make a request for a record from a “governmental entity” pursuant to Utah Code § 63G-2-204. If a person is denied access to a record, the requester may appeal the access denial to the chief administrative officer of the governmental entity. Utah Code § 63G-2-401(1)(a). If the chief administrative officer of the governmental entity affirms the denial of a record request, the requester may appeal the decision to the Committee or petition for judicial review in district court. Utah Code § 63G-2-402(1). If an appeal is filed with the Committee, the Committee shall grant the relief sought in whole or in part, or uphold the governmental entity’s access denial in whole or in part. Utah Code § 63G-2-403(11)(a). A person may petition for judicial review an order or decision of the Committee pursuant to Utah Code § 63G-2-404(1).

In order for Petitioners to have access to records possessed by the Department pursuant to the provisions of GRAMA, either BYU or the Department must be found to be a “governmental entity” as defined in GRAMA. GRAMA defines a “Governmental Entity” in Utah Code § 63G-2-103(11) as:

1. An executive department agency of the state, the offices of the governor, lieutenant governor, state auditor, attorney general, and state treasurer, the Board of Pardons and Parole, the Board of Examiners, the National Guard, the Career Service Review Office, the State Board of Education, the State Board of Regents, and the State Archives.
2. The Office of the Legislative Auditor General, Office of the Legislative Fiscal

Analyst, Office of Legislative Research and General Counsel, the Legislature, and legislative committees, except any political party, group, caucus, or rules or sifting committee of the Legislature;

3. Courts, the Judicial Council, the Office of the Court Administrator, and similar administrative units in the judicial branch;
4. Any state-funded institution of higher education or public education;
5. Any political subdivision of the state; or
6. Every office, agency, board, bureau, committee, department, advisory board, or commission of an entity listed in Utah Code § 63G-2-103(11)(a) that is funded or established by the government to carry out the public's business.

It is undisputed that neither BYU nor the Department are part of the executive, legislative or judicial branches of the State of Utah. It is also undisputed that BYU and the Department are not political subdivisions of the State of Utah. Similarly, there is no dispute that BYU is a private institution and is not a state-funded institution of higher education. The only potential definition of a governmental entity under GRAMA that could include BYU or the Department is the one relied upon by Petitioner: A department "funded or established by the government to carry out the public's business." Petitioners' Complaint ¶24 following Utah Code § 63G-2-103(11)(b)(i).

The reason given by Petitioners to claim that the Department should be considered a "governmental entity" subject to GRAMA is the fact that officers for the Department "are granted the authority by Utah Code Ann. § 53-13-103(3) to exercise the authority delegated to them by the State of Utah to pursue offenders outside of their geographic area" and the

Department “holds itself out to the public as a state-certified police department.” Petitioners’ Complaint ¶¶13 & 14. This authority is based upon Public Safety’s statutory authority to certify BYU and allow it to establish the Department and hire “POST Certified” officers. Complaint ¶ 16. However, the fact that Public Safety certifies the Department or that the Department employs POST certified officers to provide security on the BYU campus, does not automatically convert BYU or the Department into a “governmental entity” subject to GRAMA.

Additionally, a careful reading of the POST Certification statute within the Public Safety Code shows that the Legislature did not intend to create “governmental entities” of any college or universities employing POST certified law enforcement officers. A “Law enforcement officer” includes “members of a law enforcement agency **established by a private college or university** provided that the college or university has been certified by the commissioner of public safety according to rules of the Department of Public Safety.” Utah Code § 53-13-103(1)(b)(xii) (emphasis added). Public Safety’s role is limited to “certifying” the law enforcement agency, while it is the private college or university, not the State of Utah, that “establishes” the law enforcement agency.

A comparison between GRAMA’s definition of a governmental entity in Utah Code § 63G-2-103(11) and the POST Certification statute shows this important distinction. GRAMA requires the entity to be “established by the government” in order to be considered a governmental entity pursuant to Utah Code § 63G-2-103(11)(b)(i). The POST Certification statute instead requires that “law enforcement officers” of a private college or university, must be

members of a law enforcement agency “established” by the college or university, and not the government. See, Utah Code § 53-13-103(1)(b)(xii). Therefore, as a matter of law, even assuming the facts as applied by Petitioners in their Complaint, Petitioners cannot establish the Department to be a governmental entity under GRAMA because even though the Department drives is law enforcement authority pursuant to Utah Code § 53-13-103(1)(b)(xii), it was still established by BYU, a private entity. Or as stated by Petitioners in their appeal to the Committee:

BYU is a private institution, but its police department was created with the blessings of the state Commissioner of Public Safety, and its officers are certified as Utah Peace Officers by the state Peace Officer Standards training. Its law enforcement powers to make arrest to use force, to access protected records, etc., derive from statutory authority. [Exhibit B, pg. 1]

The simple fact that the Department derives its law enforcement powers from the State does not automatically convert it into a “governmental entity” subject to GRAMA.

Petitioners also rely upon *Mallory v. Brigham Young Univ.*, 2014 UT 27, 332 P.3d 922, for their claim that the Department is a governmental entity. Petitioners claim that BYU has argued that the Department’s “employees, such as traffic cadets, are subject to Utah governmental immunity because of, among other things, their relationship with and supervision by a [Department] peace officer, and because they carry out governmental functions.” Complaint ¶22. The Committee is not privy to all arguments made by BYU in Utah courts, but a review of *Mallory* shows that this was not BYU’s argument for that case.

In *Mallory*, a BYU traffic cadet was directing traffic under the supervision of a Department peace officer. *Mallory*, ¶3. A Provo City ordinance allows a university's non-peace officer employees to direct traffic on public streets while under the supervision of a peace officer employed by the same university to aid in the orderly movement of traffic related to public gatherings in excess of 5,000 people. *Id.* It is apparent from the language of the Provo City ordinance that the sole purpose of the ordinance was to have it apply to traffic control on public streets related to large public gatherings. The Plaintiff in *Mallory* drove his motorcycle from LaVell Edwards Stadium (private property owned by BYU), onto University Avenue (a public Provo City street), colliding with another vehicle, suffering serious bodily injury and incurred economic damages as a result of the collision. *Id.*

BYU argued that Utah's Governmental Immunity Act's definition of "employee" should include "all authorized agents of a governmental entity except those that are independent contractors." *Mallory*, ¶10. The Utah Supreme Court analyzed the BYU traffic cadet's relationship with Provo City as a "master-servant relationship." The court found that Provo City was the "master" in that it had the legal right to control the BYU traffic cadet through the Provo City ordinance which also granted the Provo City chief of police "full power, at any time, to suspend any subordinate, officer, or employee, person, or agents." *Id.*, ¶22 (quotations excluded). The court held that the "relationship between Provo City and the BYU Defendants, acting pursuant to the Provo City ordinance, exhibits the hallmarks of a master-servant relationship." *Id.* ¶23.

The conduct at issue in *Mallory* was only “Ms. Robinson’s actions as a traffic cadet.” *Mallory*, ¶1, n.1. The Provo City ordinance, and consequently the applicable government immunity in *Mallory*, applied only to the non-peace officer student traffic cadet, and did not apply to the entire Department or BYU. *Id.* ¶3. The holding of *Mallory* relied solely upon the master-servant relationship created by the narrowly tailored Provo City ordinance allowing properly supervised non-peace officer student traffic cadets to aid in the orderly movement of traffic on public streets related to public gatherings in excess of 5,000 people.

It should also be noted that the majority of the court in *Mallory* referenced an argument of the dissenting opinion because of its applicability to the present case:

The dissent wonders whether today’s holding would potentially extend immunity from civil suit to “private security guards” and “private highway contractors’ flagpersons” by virtue of the statutory restrictions placed upon them. It would not. At most, our decision simply recognizes the possibility that statutorily regulated individuals, *if* performing governmental function, *may* be “Employees” as defined in the Governmental Immunity Act, *if* they act pursuant to a statute or ordinance that asserts control over the manner in which they perform that governmental function...[T]he dissent’s implication that our holding will automatically extend governmental *immunity* to a extensive array of private actors is misplaced. [*Mallory*, ¶27, references excluded]

The dissent in *Mallory* uses the exact same reasoning used by Petitioners in the present case and the majority opinion in *Mallory* makes it clear the absurdity of such a proposition. *Mallory* stands for the basic proposition that statutory language, not broad assertions of governmental authority or governmental function, should control. The majority in *Mallory* even

chides the dissent for trying to blur the lines between two separate statutory contexts: Governmental Immunity and Workers' Compensation.

Laws applied to governmental entities (GRAMA/ Governmental Immunity Act), do not apply to individuals or entities (BYU or the Department/ private security guards, private highway contractors), simply because they are "performing governmental functions." Otherwise, the statutory umbrella that was meant to apply only to governmental entities, would become so large that any person, entity, business, corporation, or organization doing any action considered to be a "governmental function" would be included underneath that umbrella. The majority opinion in *Mallory* is consistent with the holding that a private entity performing governmental functions on behalf of a governmental entity does not by itself convert that private entity into a governmental entity. The power to create a governmental entity must be an "explicit" grant of authority from the State of Utah or its subdivisions, and cannot be an "implicit" creation based upon the private entity performing actions similar to governmental functions.

III. CONCLUSION

As a matter of law, Brigham Young University and the Department cannot be considered governmental entities. Petitioners have not presented, nor can they present, any facts that would convert said entities into governmental entities. GRAMA only applies to governmental entities, and therefore, since the State Records Committee can only review appeals of denials of access to records of governmental entities, the Committee properly denied Petitioners' appeal. Accordingly, the Motion to Dismiss should be granted because Petitioners cannot state a claim

upon which relief can be granted and their Complaint should be dismissed pursuant to Utah R. Civ.P. 12(b)(6).

DATED this 25th day of August, 2016.

SEAN D. REYES
Utah Attorney General

/s/ Paul H. Tonks

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2016, I mailed, U.S. postage prepaid, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**, to the following:

Michael Patrick O'Brien
Mark D. Tolman
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The Salt Lake Tribune and Matthew Piper*

/s/ Paul H. Tonks
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