

**State Records Committee Meeting**

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

Date: August 8, 2019

Time: 9:00 a.m. – 4:00 p.m.

**Committee Members Present:**

Tom Haraldsen, Chair, Media Representative  
Patricia Smith-Mansfield, Citizen Member  
Cindi Mansell, Political Subdivision Representative  
Holly Richardson, Citizen Member  
Ken Williams, State Archivist  
David Fleming, Private Sector Records Manager  
Vacant, Electronic Records and Databases Representative

**Legal Counsel:**

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

**Executive Secretary:**

Gina Proctor, Utah State Archives

**Telephonic participation:**

Rolph Kaestel  
Ozward Balfour  
Gordon Thomas  
LeRoy Wirz  
Utah News Now (Max)

**Others Present:**

Eric Peterson  
Lonny Pehrson, Attorney General's Office  
Justin Anderson, Attorney General's Office  
Amy Arnn, Utah State Tax Commission  
Jordan Thomas, Attorney General's Office  
David McKnight, Attorney General's Office  
Laron Lind, Attorney General's Office  
Chris Pieper, Attorney General's Office  
Steve Onysko  
Judith Zimmerman  
Judy Hardy  
Tom Hudachko, Utah Department of Health  
Rebekkah Shaw, Utah State Archives  
Rosemary Cundiff, State Government Records Ombudsman

**Agenda:**

- Five Hearings Scheduled
  - Eric Peterson v. Attorney General's Office
  - Rolph Kaestel v. Utah Department of Corrections
  - Ozwald Balfour v. Utah Department of Corrections
  - Gordon Thomas v. Utah Department of Corrections
  - LeRoy Wirz v. Utah State Tax Commission
  - Utah News Now v. Governor's Office on Economic Development
  - Judith Zimmerman v. Utah Department of Health
  
- Business:
- Approval of July 11, 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 September 12, 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 9:02 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 for the Attorney General's Office to review the records with the Federal Bureau of Investigation (FBI).

**Respondent Statements**

Lonny Pehrson, Utah Attorney General's Office, explained that additional time is required for the review with the FBI for legal issues on possible charges and a review of the statute of limitations. Schedules, vacations, and health issues created the delay.

**Questions from the Committee**

The Committee determined that there are approximately 90 pages in the report. One Committee member recommended that this continuance be the last one since this issue has been unnecessarily lengthy.

**Motion** by Ms. Mansell to accept the request for continuance. The Committee will hear the appeal at the next available meeting.

Seconded by Mr. Williams.

Vote: Aye: 5 Nay: 1 Abstain: 1 Motion carries 4-1-1. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Mr. Williams, voting in favor of the motion. Ms. Smith-Mansfield voting against the Motion. Mr. Fleming abstained from the vote.

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. Rolph Kaestel v. Utah Department of Corrections**

Mr. Kaestel was connected telephonically to the hearing. The Chair announced the hearing. The Chair provided instructions and reviewed the procedures. Introductions were made by Committee members and the Respondent. 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. Kaestel stated that he had a medical situation, requested his medical records from the Utah Department of Corrections (UDC), and paid the fee for them for the date range from 2008 forward. In 2017 he was diagnosed with diabetes. Some of his records indicated that he had had diabetes for 10 to 15 years prior. The records he is seeking are the set of medical records from 1999-2007.

Mr. Kaestel reviewed his financial situation including his income from his job and his expenses for commissary items. He reviewed the UDC policy FD15 Indigent Status that requires a balance less than \$9.00 for 45 consecutive days before an inmate is eligible for a fee waiver. Mr. Kaestel reviewed his lawsuits regarding his diabetes medical condition. He related his concern that UDC is abusing their discretion in denying his fee waiver request for the remainder of his medical records.

### **Questions from the Committee:**

The Committee discussed the Petitioner's legal rights being affected and obtaining the records under discovery.

### **Respondent Statements**

Justin Anderson from the Attorney General's Office represented the Department of Corrections. Mr. Anderson explained that UDC officials are willing to provide the records and have shown this by already providing the records from the present back to 2007. Because he is requesting diabetes-related diagnostics or reports, a medical professional is required to review the records. UDC currently is monitoring approximately 7,000 inmates. Pulling a medical professional away from patient care to review records from 20 years ago will take time. Removing medical staff from their duties is not something UDC would want to do lightly.

Mr. Kaestel has paid for the past 12 years of medical records and has an income to pay the \$12.50 fee. UDC is not being unreasonable in requiring Mr. Kaestel to take responsibility for the cost of reviewing the records. Mr. Anderson reviewed Mr. Kaestel's expenses and income. Mr. Anderson related his understanding about the lawsuit. Once a pro bono attorney was appointed the discovery process was stayed until the pro bono attorney was available. UDC recognizes Mr. Kaestel is the subject of the record. It is unclear whether the records impact his legal rights. If the medical records that he has received show that he did not have diabetes in 2010, any records prior to 2010 will not implicate the medical care he received prior to then. Earlier records may impact his legal rights in his lawsuit. UDC has discretion to waive the fee. The burden on the department is substantial. The approximately \$13.00 fee estimation by Mr. Kaestel is reasonable.

**Questions from Committee:**

The Committee discussed the need for medical staff to review the records related to undiagnosed diabetes related medical records; the difference between contract attorney copy fees and the department's GRAMA fees; UDC policy FD15 Indigent Status.

**Petitioner Closing**

Mr. Kaestel explained that there is a challenge in the lawsuit regarding the copays and costs inmates have to pay. He believes there is a conspiratorial element to the 45 days by extending the normal 30 days to the 45 days for this policy. He reviewed his income and expenses and stated that he is indigent and wants his indigence determined by a court of law. There is an egregious and serious financial problem that he experiences along with all other inmates. It is his legal position before the Committee that UDC officials are abusing their discretion if they do not waive the fee. He believes it takes a few seconds to search and print the records. It is an exhaustive search. The first 15 minutes should not be charged. It should not take more than 15 minutes to do an electronic search.

**Respondent Closing**

It would take far more than a few seconds to 15 minutes to locate these records. It is not a Google database. Mr. Kaestel's court claims are irrelevant here. This Committee is not here to decide whether anything is unconstitutional or conspiratorial. It is to determine whether it is reasonable for the department to use its discretion to ask Mr. Kaestel to pay for the time involved for the medical staff to review eight years of records.

**Deliberation**

The consideration of a fee waiver by the department is flawed. They don't use the weighing of discretion initially but only after another review is it considered. And then only considered pertaining to indigence. This is a controlled population and they do not have the same rights as outside citizens. Discretionary funding is not given to inmates as a right. His legal rights are affected but he could get these records under discovery. GRAMA states it is not discovery. The petitioner is not being denied access to the records.

**Motion** by Ms. Smith-Mansfield: It is not an unreasonable denial of a fee waiver. The governmental entity's policy regarding the \$9.00 for indigence status is long-standing and has not been found lacking by the courts.

Seconded by Mr. Fleming.

**Discussion on the Motion:** GRAMA is running parallel to the discovery process. The legal material he received is not provided free of charge. That has to do with communication with the attorney, not records. He has received a lot of records whether he paid for them or not. He is not arguing that he needs the records for his medical care. Petitioner's argument is compelling. It does start to push the boundaries of reasonableness. UDC still has the discretion and the Committee has precedence in relying on other cases. Petitioner has a right to the records. If discovery was not involved, favor would be toward the Petitioner. He understands Petitioner's frustration with waiting a lengthy time for an attorney.

**Vote:** Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Mr. Williams, Mr. Fleming 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. Ozward Balfour v. Utah Department of Corrections**

Mr. Balfour 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. Balfour requested the hearing because the department failed to release records pursuant to GRAMA. There were several exchanges between him and representatives of the department. He submitted the communications. The UDC deputy director James Hudspeth denied access to OTrack database records due to a lack of specificity of the records request. He did not feel that any further specificity could have been given, but if UDC feels that more could be given they can do that now.

#### **Respondent Statements**

Justin Anderson representing the Utah Department of Corrections (UDC). There is a large problem with this request. There are six requests and numerous requests within the one request. Mr. Anderson reviewed some of the record requests. UDC gave him his C-Notes. UDC needs to know which one he wants because he is allowed only five records per calendar year. Within a few of his requests there are more than five records. When UDC asked him to clarify, he submitted a new request for Otrack records. Otrack is a database containing various types of records and categories of records. What UDC is asking is for him to specify what he

wants instead of making six different requests with multiple requests within each request. UDC does not want to make that decision for him.

**Questions from the Committee:**

The Committee discussed whether the request described the records with specificity; the Respondent's description of the Otrack database, records and records series maintained within the database and its functionality.

**Petitioner Closing**

Mr. Balfour stated that in the original request there were five specific things he asked for. Ftrack from a particular date to present. Otrack from 2018 to present. Mr. Balfour has in his possession Otrack records up to 2018. What he seeks is Otrack records to bring him to the present. He understands that there are many records within a particular record. He has 42 pages from a prior record request consisting of all his Otrack records up to May 8, 2018. Mr. Balfour stated that one button will print how many of those pages have been documented in Otrack since the last time he submitted a record request. He knows what he needs. The department is refusing to give him the records he needs. Within the records he already has, there is a mention of Ftrack. He described it as a dark track. He wants to shed light on it. He stated that he inquired from personnel and was told that is where they keep all the good stuff. They are interested in keeping information from the inmates. He wants all the information. Mr. Balfour stated that he cannot be specific about information when he does not know what they have. The department can provide him with an index and he will determine what he needs. He wants it all and he wants it now. Mr. Balfour stated that GRAMA requires a release of the records unless there is a reason to deny them. The first request asked for five things that he narrowed down to three things. UDC sent the C-notes. New information is added every day. He can request the information the department maintains on mhim that they store in their various tracks. He is limited to five records per year. That is the issue. The department tells him to make multiple requests but he has run out of his five records. Right now, the request is for Ftrack and for Otrack records since May 8, 2018.

**Respondent Closing**

Just to clarify, Ftrack is just a database that UDC used before Otrack. So anything UDC would have put in Ftrack is now in Otrack. They are databases and not records. There may be records from Otrack but not Otrack. There is just not enough specificity for UDC to determine what he is requesting.

**Questions from the Committee:**

The Committee discussed the database system change from Ftrack to Otrack database.

**Respondent Closing continued**

No one has said that Ftrack doesn't exist but you have to specify which records within each system. While they are entitled to five record requests, a strict interpretation would mean that if UDC denies four requests and grants one then that would be their five-record request limit. That is not the interpretation that UDC uses. UDC may deny 20 record requests if they are requesting records that they are not entitled to. UDC would still grant future record requests. UDC grants five record requests for records that they are entitled to. UDC takes a broad

interpretation of the language for five record requests. UDC wants to provide them everything they are entitled to. The revised request is different with no overlap with the first request. Some of the documents would be found in the same database as the first request.

### **Questions from the Committee**

The Committee discussed the authority that UDC has to require inmates to use a form.

### **Deliberation**

The Committee discussed the testimony and written statements provided by the parties.

**Motion by Mr. Fleming:** Deny the appeal based on lack of specificity.

Seconded by Ms. Smith-Mansfield.

**Vote:** Aye: 5 Nay: 1. Motion carries 5-1.

Ms. Richardson, Ms. Mansell, Mr. Fleming, Mr. Williams, and Ms. Smith-Mansfield voting in favor of the motion. Mr. Haraldsen voting against 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.**

### **Gordon Thomas v. Utah Department of Corrections**

Mr. Thomas was connected telephonically. The Chair announced the hearing.

### **Petitioner Statements**

Mr. Thomas stated that he never received the Respondent's Statement of Facts. He would like to continue the appeal until he's had a chance to review it.

### **Respondent Statements**

It was mailed and the previous two petitioners received their copies.

**Motion by Ms. Richardson:** Continue the appeal until the next available hearing.

Seconded by: Ms. Mansell

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

**LeRoy Wirz v. Utah State Tax Commission**

LeRoy Wirz was connected telephonically. The Chair announced the hearing. The Committee members introduced themselves. The Respondent, Larry Lind, Assistant Attorney General, representing the Utah State Tax Commission of which the Motor Vehicle Enforcement Division is a part. The Chair provided instructions and reviewed the procedures. The Chair stated there was no mediation in this matter.

**Petitioner Statements**

Mr. Wirz reviewed the Respondent's assigned protected classification of investigation records under 63G-2-305(10). He stated that this issue was raised in the appeal response from the Respondent and not prior to the hearing. Mr. Wirz objected to its being raised so late in the appeal process.

**Respondent Statements**

Larry Lind, Assistant Attorney General, addressed Mr. Wirz's objection to the citation. Mr. Lind narrowed the classification under §63G-2-305, so it isn't a new argument. The Motor Vehicle Enforcement Division is concerned about these types of requests. The reporting officers are law enforcement officers. They do investigations and civil enforcement. Criminal prosecution is done by the County Attorney. The reports have investigative techniques, identify officers, and disclose sensitive information. In this case, there is nothing in the investigative report that contains that type of risk. The Motor Vehicle Enforcement Division is concerned that releasing this investigation report could set a precedent for future requests and other investigative reports. In this case, it doesn't matter. It is very short.

**Questions from the Committee**

The Committee discussed the Respondent's concern that releasing the record may set a precedent for future requests.

**Petitioner Closing**

Mr. Wirz stated that he understood their concerns with releasing other reports. He provided assurance that he would not announce to the world that he got one. Mr. Wirz does not think that all reports should be carte blanche. It should be on a case by case basis and they can decline to release parts of the reports. The report that he requested is not a problem. He'd like to receive the report since there are no concerns with the one he requested.

**Respondent Closing**

Most of what was in the file was Mr. Wirz's complaint form and two additional pages that he had not received yet.

**Questions from the Committee**

The Committee discussed whether the report would disclose investigative techniques or identify investigative officers.

**Deliberation**

This issue already was decided by the court in *Deseret News vs. Salt Lake County*. The Respondent is worried about the designation of the investigative reports as a whole. It is the

responsibility of the governmental entity to review the individual report, apart from the larger concern, and determine whether the singular record is the same classification. The entity already has determined that this report does not contain that type of information.

**Motion** made by Ms. Smith-Mansfield: Provide the report to the Petitioner as a public record pursuant to §63G-2-201(1). It does not interfere with the classification of any other investigative records. Each request must be considered individually according to *Deseret News* vs. Salt Lake County.

Seconded by Mr. Fleming.

**Vote:** Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Mr. Williams, Mr. Fleming, 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.

### **Utah News Now v. Governor's Office of Economic Development (GOED)**

Utah News Now was connected telephonically to the hearing. The Chair announced the hearing. Introductions of Committee members and Respondent, Chris Pieper, Assistant Attorney General's Office representing GOED, 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**

Utah News Now, Max, pointed out that the number used by the Committee for today's call is the same number that Mr. Pieper claims is not a real number. The Respondent's response claims that the number on the form was not a real number. It is one of the reasons claimed for not responding to his request. Max stated that his reason for being here today is because of a bruised ego of a bureaucrat who does not follow the GRAMA law. GOED did not claim records are not public.

The Freedom of Information Act (FOIA) for record requests says that requests can be made in the name of an individual. State record requests are the same in Utah.

1) A Utah state senator said that businesses are people too. So far, there is no claim that the records are not public, just a legal definition of person or a natural person. Max stated that he did not receive any of the information in the Respondent's statement during the time that his request was considered by GOED.

As far as timeliness, GOED was in discussion back and forth. They never made a response about public records. They said if he provided the name of a natural person they could respond. He asked for the reason they required that. They sent him to the statute where corporations and persons are defined.

2) Max asked several times for the name of the CAO. They did not answer his questions. He asked Val Hale, GOED executive director, and received no response. They had a part in preventing him from sending the appeal. It was not denied since there was just discussion over the definition.

3) Max specified the exact person. Mr. Josh Romney was on the board and other organizations. If there was an issue of too many documents he would have narrowed the request.

Max stated that a trick the GOED uses is to make it into something that it is not and call it unreasonable. They may try to throw in personal records even though that is not what he was asking for and has no interest in. He wants things uniquely created by this person and not spam.

4) The response was not legally sufficient. The definition of person is provided in federal law, state law, and by a senator on the campaign trail.

5) The phone number is valid. The Committee called him at that number  
An overzealous bureaucrat decided to create this mess. No legal basis to deny this request.

### Questions from the Committee

The Committee discussed the definition of a person under Utah Code §63G-2-103(17).

### Respondent Statements

Mr. Pieper stated that the GOED is dealing with multiple tiers. GOED is not refusing records. It has not got to the point where they can search for the records. This requires a threshold of naming a legal entity so he can get the records. He has 36 requests pending at this time and we can assist him with the SRC direction and advice.

- 1) Legal name
- 2) Valid address
- 3) Phone number which is not an issue at this appeal hearing.
- 4) Not timely, the CAO. GOED is trying to help him and GOED is a public entity. An email address for Val Hale is required. It is not used as a barrier to Max coming here and seeking a legal remedy.
- 5) The statute requires reasonable specificity.

First, a requester must provide a name. The statute requires it. These are threshold requirements. It is not sufficient for someone to claim to be a legal entity somewhere. Reasons: It is ironic if employing the sunshine law to claim anonymity. Legal accountability uses no pseudonyms. Accurate record keeping employs names.

An agency can give better customer service and communicate freely. Mr. Pieper offered for Max to call him on his direct office number, but he has not done this.

Safety and security require a requester to give his name. If there were a protective order in place it would allow the GOED to respond, if security measures are taken care of.

Legal reasons make a difference in determining a fee waiver. Certain classifications of records are determined by the identity of the person.

The Committee should reject his request to trust him. There has to be someone for service of process to be verified. This is what GOED asked for. Things went silent for four months; 1,523 days. Regarding timeliness, an appeal must be made within 30 days. Max exceeded this time frame. GOED wanted to help him and allowed the appeal and moved it forward.

The request was not reasonably specific. This is broader. Including but not limited to every category under the sun.

Secondly, justice requires that if the requestor wants his own records, he should have them. Max isn't asking for his own records, but someone else's records.

Finally, GOED tried to assist every step of the way. The lack of reasonable specificity is huge. If Max wants a good faith search GOED must ask each of the over 100 employees to do the search, dig in boxes, including archived boxes. The point is, if he wants a good faith search, GOED would have to figure out what he wants. The statute requires specificity.

### **Question from the Committee**

The Committee discussed the specificity of the request and determined that Max seeks the uniquely created records by Josh Romney in his official capacity with GOED. They discussed the specificity of the mailing address provided.

### **Petitioner Closing**

Max claimed that Mr. Pieper just lied on this stuff. He claimed that he never was told the CAO's name. No one on the website is designated as the CAO. If the records had to be mailed he could and would receive them. Max has agents in that building that could accept the mailing. Mr. Pieper never brought up the fact that the company name is not good enough. He said, §63G-2-103(17), that statement meant a natural person. Now, he says that a company was not good enough despite it being opposite to what he says now.

The original request was a boiler plate thing and if he would have asked Max to narrow it he would have narrowed it. Mr. Pieper is trying to mislead the Committee. Max is talking about uniquely created documents. Mr. Pieper never asked Max to narrow the request. Mr. Pieper acted like the request was valid even within the 30 days that he appealed it.

Max thought that once an honest lawyer got involved they would determine that a natural person was a legal person. A legal person encompasses the entire legal definition. Any federal agency would have accepted his request. Mr. Pieper is trying to retaliate against the Petitioner. They have a good ol' boys club without any government transparency. This goes against what the public records act is about.

### **Questions from the Committee**

The Committee discussed whether the name of the Chief Administrative Officer had been provided to the Petitioner.

### **Respondent Closing**

Mr. Pieper said that Max's identity did matter. An affidavit from Amy Edwards is there. Not knowing a name was one of the first things that Ms. Edwards explained. Natural person is not a term that Mr. Pieper used. The five pages of emails is the first time he communicated with Mr. Pieper. The Committee has a complete record of all his explanations to Max. At every turn GOED told him that they were willing to assist him. Mr. Pieper gave Max his direct phone number in order to assist Max. It is important to hold to the basic threshold requirements of the law.

**Questions from the Committee**

The Committee discussed the person and role of the records officer when the request was received by GOED; the date range that Mr. Romney worked with GOED.

**Deliberation:**

The Committee discussed the testimony and written statements by the parties. They discussed concerns about validity of the business and definition of a person.

**Motion** by Ms. Smith-Mansfield: Based on today's testimony, the Petitioner clarified the request and it is now reasonably specific; records that were uniquely created by Josh Romney during his official capacity with the governmental entity; and the Committee finds that the appeal is timely filed before the Committee.

**Seconded** by Mr. Fleming.

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

**Deliberation** regarding procedurally a person.

**Motion** by Ms. Richardson: The Petitioner has not provided sufficient evidence before the Committee that he meets the legal standard for the legal definition of a person under 63G-2-103(17) to comply with 63G-2-204(1). Therefore the Committee denies the appeal.

**Discussion:**

The Committee discussed the legal definition of a person and articles of incorporation, evidence that the business exists, public records, preserving the whole record-requesting process for any action taken to court.

**Motion Seconded** by Ms. Smith-Mansfield.

**Vote:** Aye: 3 Nay: 3 Motion does not carry 3-3. Mr. Haraldsen, Ms. Richardson, and Mr. Williams voting in favor of the motion. Ms. Mansell, Mr. Fleming, and Ms. Smith-Mansfield voting against the motion.

**Motion** by Ms. Smith-Mansfield: According to the Petitioner's testimony that they are a legitimate person as defined under §63G-2-103(17) and therefore they can make a request under 204(1) and inspect or have copies under 201(1) and the Committee grants the appeal.

**Seconded** by Ms. Mansell.

**Vote:** Aye: 2 Nay: 4. Motion does not carry, 2-4. Ms. Mansell and Ms. Richardson voting in favor of the motion. Mr. Fleming, Ms. Smith-Mansfield, Mr. Haraldsen, and Mr. Williams voting against the motion.

**Motion** by Ms. Smith-Mansfield: The Petitioner has not provided sufficient evidence before the Committee that he meets the legal standard for the legal definition of a person under 63G-2-103(17) to comply with 63G-2-204(1). Therefore the Committee denies the appeal.

**Seconded** by Ms. Richardson.

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

### **Break for Lunch**

### **Reconvene**

#### **Judith Zimmerman v. Utah Department of Health**

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**

Judy Zimmerman and April Hollingsworth. The Petitioner thanked the Committee for the opportunity to speak before them. Her request is for records relating to the sharing of thousands of identifiable, highly sensitive children's health and education records by this agency. The public has the right to know how vulnerable children's most personal information is being shared without their consent and knowledge. Some records have been provided by Tom Hudachko, Utah Department of Health (UDOH) GRAMA Coordinator, and Dr. Joseph Miner, Executive Director of UDOH. Ms. Zimmerman stated that she seeks clarification on at least three UDOH records already known to exist or other records that should exist in this situation.

From 2002-2013, as a government employee, she authored and was the lead principal investigator on multiple multimillion dollar federal grant awards for Centers for Disease Control and Prevention (CDC). CDC funded sites to collect highly sensitive and identifiable children's health and education information under the Public Health Disease Surveillance Authority of UDOH. It was done without consent. If education data was collected, it was done with the approval of the state office of education and local school districts. The grant was named Utah Registry of Autism and Developmental Disabilities otherwise known as URADD. CDC had strict guidelines on data security and data privacy that UDOH administrators acknowledged and signed agreements in order to be in compliance with federal privacy laws related to public health surveillance activities conducted without consent. (The Agreement is Exhibit A).

URADD data was maintained on a restrictive-use government server with access granted on a need-to-know basis and only with approval of the lead principal investigator, which was Ms. Zimmerman, and the project coordinator, Amy Henderson. Of importance was that in 2009 the Utah State Office of Education rescinded the authority of the UDOH to collect education data

for this CDC grant citing concerns related to federal school privacy laws, known as the Family Educational Rights and Privacy Act (FERPA). (See exhibit B).

In 2012, Ms. Zimmerman reported privacy concerns and sought assistance from multiple government agency administrators including most of those health department employees named in this record request. The reason she asked for help was that she had reason to believe that three University of Utah researchers had copied identifiable URADD health and education data off of the secure restricted-use server without her knowledge, approval, and without multiple data source approvals, and in violation of signed security agreements and contracts. Despite going to great lengths to seek help from these health officials, no one helped her resolve the many concerns reported. No one from the Health Department assisted her in locating or confirming if, indeed, the data had been copied.

Following the report of her concerns about these violations, her employment was terminated after working in state government for 37 years and just after passing a rigorous retention, promotion, and tenure review. A federal jury recently determined that the government retaliated against her in violation of the Utah Public Employee Protection Act for reporting the research misconduct. Not until the federal trial was she able to confirm that a massive amount of identifiable and sensitive children's family, health, and education data were copied as she suspected in violation of signed contracts and security agreements.

Her interest today is focused on obtaining records maintained by the Health Department related to this sharing of data. On May 30, 2019, she submitted a record request to UDOH which stated, "Please submit all correspondence and emails with UDOH employees, including, but not limited to, Barry Nangle, Harper Randall, Marc Babitz, Nan Streeter, Richard Harward, Iona Traen and/or David Patton with University of Utah faculty William McMahan, Deborah Bilder, and/or Amanda Bakian." The date range of requested records: 1/1/2012-12/31/2014. Bilder, Bakian, and McMahan were the three University of Utah researchers she reported for concerns related to research misconduct.

Ms. Zimmerman has a concern with the Attorney General's Office statement in response to the appeal hearing. They state the reason for not providing an email was, "According to DTS, the email string Ms. Zimmerman seeks was located on the GroupWise System UDOH used prior to their transition to Gmail. The transition to Gmail occurred in November 2012 and former employee files were not transferred."

Ms. Zimmerman explained her confusion by this statement of fact made by the AGO related to the employment status of the employees named in her record request. She asserts that it is incorrect and misleading. She explained that all Health Department employees specifically named in this record request were employed by UDOH in November 2012. In addition, all UDOH employees named in this record request worked months and years past this date at the UDOH and all had critical administrative duties for which records should have been transferred and retained. Dr. Babitz was copied as he is the current deputy director of the health Department.

Ms. Zimmerman's attorney, April Hollingsworth, stated that about this time last year they went to trial for this whistleblower claim against the University of Utah (U of U). Approximately five years of litigation lead up to that. The U of U produced about 12,000 documents. In all of the depositions related to the 2012 contract (Exhibit C), no one had ever, until the trial, indicated that this was the basis for giving the doctors, Bilder, Bakian, and McMahon, the authority to share data, which they acknowledged they did share. Ms. Zimmerman had never had cause until the trial of this case to take a second look at that contract. They saw things on the document that did not make sense, including the names that are on the document. For the DOH it is signed only by Barry Nangle. Other documents that Ms. Zimmerman had show that Sherry Watkins and Harper Randall were always involved in the data sharing agreement. We didn't have time to get to the bottom of this document. It is not known whether it may be fraudulent. It is unknown whether these Doctors went around the system that they were supposed to follow. The original document should exist. The copy they possessed was produced by the University. There should be drafts of the contract agreement. There should be emails about the negotiations of the process because there always are with data sharing agreements. Ms. Zimmerman had requested these documents but they were not produced then or with this GRAMA request. This contract is shrouded in mystery. Trial Exhibit D came up. That document was clearly responsive to the discovery request to the University and never has been produced even though Dr. Bilder was copied on the email and was in charge of document production. That document clearly was withheld. It only came up at trial because there was some testimony about this email. We took a recess and the judge ordered the witness to send that email to us. That is how we became aware of it, despite the University's obligation to produce it. Now we suspect there are other communications about that email and that email specifically in UDOH records. We did not receive it in response to Ms. Zimmerman's record request. Our concern is that it should at least be in the archived emails of Harper Randall because she was the reason that UDOH/ATO response statement does not ring true. Harper Randall remained an employee of UDOH well beyond November 2012. These are important documents for Ms. Zimmerman in discovering what went on with the negotiations, or the lack thereof, with the 2012 contract that is Exhibit C. Exhibit D provides some information but it appears that Harper Randall was out of the loop. There should be at least the document from UDOH and perhaps other emails. If in truth they don't exist, our question is why don't they exist and who got rid of them? We hope they do exist on some server somewhere but it is clear that the reasons given by the UDOH for why they do not exist do not ring true. Harper Randall's extended tenure went well beyond November 2012 when the system was transferred over.

### **Questions from the Committee**

The Committee discussed the email thread from Harper Randall, the Exhibits submitted, and the data sharing agreement and its retention that the University of Utah provided to the Petitioner during litigation.

### **Respondent Statements**

David McKnight for UDOH. Jordan Thomas is a law clerk and is prepared to represent the UDOH position. Ms. Thomas reviewed the timeline of the record request submitted by Ms. Zimmerman. Under §63G-2-204, a respondent has 10 days to produce a record or it will be

treated as a denial. If there are extraordinary circumstances and the Respondent performed a search resulting a voluminous production, the review of them took a long time.

Specific documents were not found in the search completed by Department of Technical Services (DTS). Seventy-five documents were provided that were relevant to her request but not the ones she specifically wanted. Dr. Hudachko asked her to withdraw her appeal since they did fulfill her request, even though she did not receive what she wanted. On June 25, 2019, Dr. Hudachko requested another DTS search to attempt to locate the specific documents. On June 26, 2019, DTS informed Dr. Hudachko that their second search did not result in locating the specific documents Ms. Zimmerman wanted. Our investigation determined a few possibilities, the search involved a series of email chains between UDOH employees and University of Utah (U of U) employees nearly a decade ago. The email systems were changed and these emails were not transferred over. Inboxes were deleted before the transfer of systems. Another search would be necessary. If we had the records, we would be happy to give them to her but as of now we are unable to get them. She has the documents so UDOH does not feel she is being denied the records. If she wants to authenticate the emails with UDOH we can work with her on that. It does not appear from the searches that we have the documents she wants.

#### **Questions from the Committee**

The Committee discussed the search that UDOH made for the responsive records. The Committee discussed the importance of the contract and that UDOH did not locate it.

#### **Petitioner Closing**

Attorney thinks that there is a good chance that the contract does not exist. Or was it deleted? Did it never exist? Was something else changed? This is a significant issue because the contract that does not exist with UDOH records was used as the basis for these three University of Utah doctors and researchers for accessing and copying identifiable data that should have been protected. If that contract does not exist, prior to making that determination, we want everything searched for Barry Nangle's emails, Microsoft Word documents, a draft that may have been changed. The search is necessary before we accept the UDOH determination that they do not have this very significant contract.

Exhibit D, an email chain, references a going-around Harper Randall, who should have been involved in the contract. As the Committee pointed out, this should have gone through State Purchasing. If the ultimate determination is that these documents do not exist, we want to have a more thorough explanation and examination of why they do not exist. Were they never on the UDOH server or were they deleted? We want to know that. The explanation or reason does not ring true because Harper Randall was with the UDOH before and after the transfer to Gmail system, according to UDOH.

#### **Questions from the Committee**

The Committee clarified the Exhibits and the Respondent's search for the requested records.

**Witness for Respondent sworn in.** Tom Hudachko, Director of Communications for UDOH.

#### **Questions from the Committee**

The Committee discussed Mr. Hudachko's search for the records in the email accounts. They discussed the process UDOH goes through when making a contract, signatures and enacting the contract.

### **Respondent Closing**

In closing, the department made two separate searches for the request for the agreement. Neither search produced the documents she wanted. We don't have it. I think the department would be willing to do another search.

### **Questions from Committee**

The Committee discussed the date the data-sharing agreement ended and the transfer of GroupWise to Gmail system.

### **Deliberation:**

When the State transferred from the GroupWise email system to the Gmail system, each individual had to tell DTS if they had archived emails that needed to be transferred along with the current emails. Even if someone did ask for archived emails to be transferred over, DTS did not transfer them.

### **Questions from the Committee**

The Committee discussed whether DTS was asked to search the Google Vault. They discussed the negligence of UDOH in maintaining the emails and the agreement or contract.

**Motion** by Ms. Smith-Mansfield: The Committee is not persuaded that the governmental entity did a thorough search. The Committee requires the governmental entity to thoroughly search, specifically the files outside of the Gmail environment, and do a search of the Google Vault, and produce any additional relevant information, classified as public, to the Petitioner.

Seconded by Ms. Mansell.

**Vote:** Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Ms. Mansell, Mr. Williams, Mr. Fleming, 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.

Resume.

### **BUSINESS**

#### **Motion to Approve July 11, 2019, Minutes**

The motion was made by Ms. Smith-Mansfield. Seconded by Mr. Williams.

### **Discussion**

The Committee asked that the Question and Answer section of the Minutes have only a general summary. The Committee members also asked to have a general summary of the discussions.

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

**Report on Appeals Received**

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

Ozward Balfour v. Utah Department of Corrections: Requesting all education records be amended and annotated with an affidavit provided for that purpose. Declined because the SRC does not have authority to require a record be amended.

**FY 2019 Annual Report** needs to be put on the September agenda as an action needed.

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

**Other Business:**

The next meeting is scheduled for September 12, 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. Smith-Mansfield. Seconded by Mr. Williams.

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

The Chair adjourned the August 8, 2019, State Records Committee meeting at 2:47 p.m.

**This is a true and correct copy of the August 8, 2019, SRC meeting minutes, which was approved on September 12, 2019. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>**

x *Gina Proctor*  
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**Executive Secretary**