

State Records Committee Meeting

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

Date: October 10, 2019

Time: 9:00 a.m. – 4:00 p.m.

Committee Members Present:

Tom Haraldsen, Chair, Media Representative
Kenneth Williams, State Archivist
David Fleming, Private Sector Records Manager
Cindi Mansell, Political Subdivision Representative
Holly Richardson, Citizen Representative
Patricia Smith-Mansfield, Citizen Representative
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:

Daniel McMann

Others Present:

David C. Jones, Attorney General's Office
McKhelyn Jones, UVU Review
Eric Peterson, Utah Investigative Journalism Project
Justin Anderson, Attorney General's Office
Michael Robinson
Christine Nelson, UVU PD
Christian Vegor Pedersen, UVU
Wendy Downs, Sandy City
Steven Osborn, Sandy City
Rebekkah Shaw, Utah State Archives
Rosemary Cundiff, State Records Ombudsman

Agenda:

- Three Hearings Scheduled
 - Daniel McMann v. Utah Department of Corrections
 - McKhelyn Jones (UVU Review) Eric Peterson (Utah Investigative Journalism Project) v. Utah Valley University
 - Michael Robinson v. Sandy City

- Business:
- Approval of September 12, 2019, minutes, action item
- SRC appeals received, report
- Cases in District Court, report
- Other Business
 - Next meeting scheduled for November 14, 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 9:06 a.m.

1. Daniel McMann v. Utah Department of Corrections

Mr. McMann was connected telephonically to the hearing. Mr. Haraldsen announced the hearing. The Committee members introduced themselves. The Chair provided instructions and reviewed the procedures. The Chair reminded the parties that mediation discussions are not allowed to be referenced in their testimony and asked the parties to acknowledge the restrictions on discussions of mediation. Both parties acknowledged the restrictions.

Petitioner's Statements

Mr. McMann reviewed his appeal for a police report and assault charges related to a specific person and that person's plea agreement. He stated that he is the subject of the record and his legal rights are impacted. He needed the records to present as evidence in a claim. He reviewed his financial statement, limited income, and financial obligations. He did not have sufficient funds to pay the fees for the requested records.

Question from Committee

The Committee discussed and explained discovery processes to Mr. McMann.

Respondent Statements

Justin Anderson, Assistant Attorney General, representing Utah Department of Corrections (UDC). Mr. Anderson stated that the fee waiver issue is whether the denial is reasonable. He explained that the court will determine whether Mr. McMann's legal rights are implicated. Mr. Anderson reviewed the indigent status criteria for UDC and the federal Bureau of Prisons (BOP) standards. He reviewed Mr. McMann's income, gift monies, expenditures and sales purchases. Mr. Anderson reviewed the estimated 2 ½ hours required for staff to prepare the responsive records and the .25 per page fee. He stated that the fee is not unreasonable. He explained that previous fee waiver appeals and the same indigent status standards have been found acceptable in the past.

Questions from Committee:

The Committee discussed the BOP indigent status standards.

Petitioner Closing

Mr. McMann explained his cost of living expenses for items such as clothing, hygiene, food, and medical fees. He explained that he had payments for restitution as well. He explained that he does not have the ability to pay the fees for the cost of the records.

Respondent Closing

Mr. Anderson explained that some necessary items are provided without charge to inmates that meet the indigent status. Additional costs for food is discretionary and are typically snacks. Mr. Anderson explained that budgeting and saving money for the record fees may be necessary for requesters. The requested records do not primarily benefit the public. Mr. McMann's legal rights were not implicated by the information in the record. Mr. McMann has not shown that his is indigent. UDC's fee is not unreasonable.

Questions from Committee

The Committee reviewed Mr. McMann's financial statements and gift money. The Committee discussed that Mr. McMann is not indigent and could afford the \$50.00 deposit for the 50-60 pages at the cost of .25 per page.

Deliberation

The Committee discussed discovery as an option for the Petitioner.

Motion by Ms. Smith-Mansfield: Based on the testimony today, written documentation, and previous decisions, the Committee is not persuaded that the Petitioner fulfills the requirements set forth in Utah Code §63G-2-203(4). The Committee finds that the fee waiver denial is not unreasonable and that discretion is given to UDC to determine a fee waiver.

Seconded by Ms. Mansell.

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

The hearing is concluded. An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the Committee's decision to district court.

2. McKhelyn Jones (UVU Review) and Eric Peterson (Utah Investigative Journalism Project and Utah Society of Professional Journalists) v. Utah Valley University

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.

David Jones, Assistant Attorney General, representing Utah Valley University, explained a procedural issue with Eric Peterson present as an interested party. He stated that interested parties can appeal access issues but not fee issues. Mr. Peterson is not out any money.

Paul Tonks, Assistant Attorney General, representing the State Records Committee reviewed the relevant statutes related to interested parties, legal interest, interested person and intervener: Utah Code §63G-2-400.5(3) & (6); §63G-2-402(3); §63G-2-403(6) & (8).

Motion by Mr. Williams: It is the Committee's discretion to allow Mr. Peterson as an interested person pursuant to Utah Code §63G-2-403(8).

Seconded by Ms. Mansell.

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

Petitioner's Statements

McKhelyn Jones stated that Utah Valley University Police Department's (UVU PD) practice had been to provide a summary of initial contact reports (ICR) without a fee up until the end of 2016 and the beginning of 2017. The information in the summary contained who received the call, incident location, responding officer's name, disposition, unit name, time reported, time dispatched, time completed, and a narrative describing the responding officer's initial findings. The practice was then changed to provide no access to the initial contact report (ICR) without a \$10.00 fee. The format of the ICR only contained: the nature of the incident, date/time reported, date/time occurred, general location and disposition.

Ms. Jones explained that the UVU Review has paid \$210.00 in a previous request for 21 ICRs, totaling five pages. With assistance from Scott Trotter, UVU's senior director of public relations, the \$10.00 fee per ICR was reduced to \$5.00 per ICR for the current record request. The current request is for eight ICRs. Ms. Jones received seven ICRs with a reduced fee of \$5.00 per report, totaling a fee of \$35.00. One incident was an open and active investigation and was not provided. These ICRs are five pages each.

Ms. Jones explained that the funds could be better spent on student journalism instruction and training. There is a need for students to be aware of crime on campus and hold the police accountable in reporting. Precautions can be taken by students when they are aware of criminal activity and the areas where crimes occur. Ms. Jones discussed the estimated three and a half hours of staff time that the UVU PD claimed it would take to provide the records and asserted that the actual time is minimal.

Questions from Committee

The Committee discussed that inspecting the record without cost is not allowed since 2017. Scott Trotter, UVU Public Relations, assisted in the fee reduction for each report and not the cost per page.

Petitioner Statements continued

Eric Peterson, Utah Investigative Journalism Project and Utah Professional Journalists, reviewed the procedure and cost for requesting the records. He stated that the \$5.00 per ICR cost is reasonable instead of the previously charged \$10.00 per ICR. He referenced *Salt Lake City Corporation v. Jordan River Restoration Network*, Utah Supreme Court 2018 UT 62, determined that a governmental entity can charge a reasonable fee. In that case the record request was not routine and was cumbersome. The UVU Review long-standing requests for ICRs are routine. Mr. Peterson reviewed the Spillman database process capabilities using search criteria v. UVU PD declaration.

Respondent Statements

David Jones, Assistant Attorney General, explained that the issue is whether the current fee charged for the seven ICRs is reasonable. He explained that with the approval of UVU Administrators the fee for the current request was reduced from \$10.00 per report to \$5.00 per report and that the \$35.00 fee is reasonable. The fee was already paid by UVU Review and the

records were provided. Then they appealed to the Chief Administrative Officer and then to the State Records Committee.

Mr. Jones provided a document, Initial Contact Report Creation Steps created by Christine Nelson, UVU PD. She described her job duties and explained the multitasking required to fill a record request. She explained that the previous process required her to create a new record, the summary report. Now, she creates a pdf file from the Spillman database and makes the redactions electronically. Ms. Nelson reviewed the Spillman system and discussed the steps required to create the pdf file while completing her other duties during the same three and one-half hour period to produce each of the seven ICRs.

Mr. Jones explained that the reduced fee is reasonable because the inspection of a public record does not apply to records only accessible electronically when part of the electronic record cannot be easily segregated or redacted. The Petitioner paid the fee and the records were provided. The request was not denied.

Questions from Committee:

The Committee discussed that \$5.00 is a reasonable fee that was agreed upon by UVU Review and UVU PD. Then UVU Review appealed their agreement. The Committee discussed that prior to 2017, the previous Chief's process was for UVU Review to receive a summary free of charge instead of actual ICRs. The current Chief requires that a pdf be created from the Spillman database for the ICR, information be redacted, and a fee be assessed.

Petitioner Closing

McKhelyn Jones explained that UVU PD does not allow inspection of the Spillman database. She felt that the three and one-half hours described to fill the request was not appropriate since Christine Nelson was completing other duties during the time that she was gathering the ICRs from the Spillman database. She explained that \$5.00 per report is expensive to a student. The students need to know about crime on campus so they can take precautions and protect themselves. Ms. Jones stated that it is her job to report on campus crime.

Respondent Closing

David Jones explained that without interruptions it would take approximately one and one-half hours to follow the steps outlined to provide the records. There is no testimony that anyone else could process the request more quickly. Christine Nelson is the lowest paid employee capable of processing the request and her wage is approximately \$20.00 per hour. It is a reasonable fee of \$35.00 for seven ICRs. Mr. Jones agrees that the records are valuable for the public's safety. The fee is not mandatory but is discretionary for UVU PD to charge. The fee is reasonable and is not prohibitive to UVU Review's budget to pay for the copies.

Questions from Committee

The Committee discussed whether ICRs are requested and provided to others routinely. They discussed whether the fee is billed and paid via department to department.

Deliberation

Pursuant to Utah Code § 63G-2-201(1) 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. ICRs are universally used throughout law enforcement agencies. Utah Code §63G-2-203(13), a

governmental entity cannot use the format to hinder access. The Petitioner cannot be punished for the governmental entity's lack of an efficient process. The steps involved are simple but other duties and an inefficient process make it cumbersome. The Committee is persuaded that the effort of multiple parties at UVU to grant a fee reduction allowed for a reasonable fee agreement. Whether fees are waived is at the discretion of the governmental entity. Committee members are not pleased that the UVU PD blames their system for the cumbersome process. The Committee discussed record sharing between offices of the same governmental entity. The Committee discussed the fee as unreasonable given the public safety interests.

Motion made by Ms. Smith-Mansfield: Based upon testimony today the Committee is persuaded that the fee is unreasonable. The Committee finds that the governmental entity shall provide the Initial Contact Reports for inspection free of charge, after being segregated from any non-public records under Utah Code § 63G-2-308. Initial Contact Reports are normally public pursuant to Utah Code §63G-2-301(3)(g). A person has the right to inspect a public record and take a copy under §63G-2-201(1)(a). Pursuant to §63G-2-203(5)(b) a governmental entity cannot use the format to hinder the rights to inspect a record.

Seconded by Ms. Richardson.

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

The hearing is concluded. An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the decision of the State Records Committee to district court.

Five-minute break.

Reconvene.

3. Michael Robinson v. Sandy City

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

Michael Robinson explained that he was assaulted by a person and reported the incident to the police. He stated that nothing resulted from his reporting. However, a detective filed a proper report and interviewed witnesses. A recording of the incident was captured from a camera on the southwest corner of the courthouse building, showing that the perpetrator rushed at him four separate times. He stated that the detective only interviewed family members of the perpetrator. The prosecutor dismissed the charges stating the attacker was not the primary aggressor, implying that Mr. Robinson was responsible.

Mr. Robinson requested all records regarding the investigation, charges, and the dismissal of the criminal case in which he was one of the victims.

Respondent Statements

Steven Osborn, representing Sandy City. Mr. Osborn stated that the issue is about the records. He explained that statute allows the governmental entity to classify attorney-client privileged communications and attorney work product as protected under Utah Code §63G-2-305(17) and (18). Mr. Osborn stated that the alleged perpetrator is Mr. Robinson's step-daughter. She alleges that she was the victim of abuse by Mr. Robinson. Mr. Osborn relates the type of records that are at issue; emails between Sgt. Blanko and the prosecutor, which are attorney-client privilege, and emails between the prosecutor and his paralegal, which are about case management and are classified as attorney work product and privileged communications. Mr. Osborn explained that the prosecutor is not required to explain his decision to dismiss the charges. Mr. Robinson thinks he has a right to access the records. The emails do not explain the reason for the decision to dismiss the charges. Mr. Osborn asked the Committee to deny the appeal.

Question from Committee

The Committee discussed that there are three to four pages of emails that were denied.

Petitioner Closing

Mr. Robinson felt that he was not represented fairly. He saw the witness statements. He explained that something happened in order for the charges to be dropped. He believes that new evidence exists that persuaded the prosecutor to drop the charges. He reviewed the events of the day of the attack.

Respondent Closing

Mr. Osborn explained that there is no indication that other evidence exists. He reviewed the file and said that there was nothing in the file that showed new evidence. The prosecutor has the discretion to make decisions. The attorney-client privileged communications and attorney work product records are appropriately classified as protected.

Questions from the Committee

The Committee discussed that the initial response explained that there were a few emails that were located and classified as protected. The records were described to Mr. Robinson.

Motion by Ms. Smith-Mansfield: The email communications are properly classified as attorney-client privileged communications and attorney work product pursuant to Utah Code §63G-2-305(17) and (18).

Seconded by Mr. Fleming.

Discussion

The record request suggests that the Petitioner is seeking the attorney thought processes for determining the dismissal of charges, which is attorney work product. *Utah Legal Clinic v. Salt Lake City Corp.*, 2019 UT App 58.

A public interest is not brought forward. This is a private interest. The Petitioner is not happy with the prosecutor's decision and reason to dismiss the charges. GRAMA does not protect the Petitioner's right to face his accuser. It just protects the right to access public records.

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

The hearing is concluded. An order will be issued within seven business days and both parties will receive a copy of the order. Each party has 30 days to appeal the decision of the State Records Committee to district court.

BUSINESS

Motion to Approve September 12, 2019, Minutes

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

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

Report on Appeals Received

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

Michael Clara v. Alpine School District: Requesting access to Employment Contract of Alpine School District superintendent and Business Administrator. No records exist.

Richard Danley Jr. v. Davis County Commission: Requesting access to all records regarding the dogs owned by a specific individual located at a specific address. Not timely to the Chief Administrative Officer.

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 November 14, 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: Mr. Fleming.

The Chair adjourned the October 10, 2019, State Records Committee meeting at 12:49 p.m.

This is a true and correct copy of the October 10, 2019, SRC meeting minutes, which was approved on November 14, 2019. An audio recording of this meeting is not available on the Utah Public Notice Website at <https://archives.utah.gov> due to technical difficulties.

X *Gina Proctor*
Executive Secretary