

State Records Committee Meeting

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

Date: November 14, 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:

Brent Cobb

Others Present:

Kelly Pehrson
Michael Clára
Alex Goble, San Juan County
Justin Anderson, Attorney General's Office
Kim Henderson
McKenzie Hill
Bill Kesler
Judy Zimmerman
Harry Souall, Unified Police Department
Steve Onysio
Susan Mumford, Utah State Archives

Agenda:

- Four Hearings Scheduled
 - Brent Cobb v. Utah Department of Corrections
 - Kelly Pehrson v. San Juan County
 - Paul Amann v. Unified Police Department

- Michael Clára v. Unified Police Department
- Business:
 - Approval of October 10, 2019, minutes, action item
 - SRC appeals received, report
 - Cases in District Court, report
 - Other Business
 - Next meeting scheduled for December 12, 2019, 9 a.m. - 6 p.m.
 - Committee members' attendance polled for next meeting, quorum verification.

Call to Order

The State Records Committee Chair, Tom Haraldsen, called the meeting to order at 9:10 a.m.

1. Brent Cobb v. Utah Department of Corrections

Mr. Cobb was connected telephonically to the hearing. Mr. Haraldsen announced the hearing. The Committee members introduced themselves. Justin Anderson, legal counsel for the Department of Corrections, introduced himself. The Chair provided instruction 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. Cobb explained the reasons for requesting the records. He felt that he was entitled to the records since he is the victim in an assault case. He discussed his indigent status and that he is unable to pay the required fee. Mr. Cobb stated that he needs the records to assist with his legal case.

Question from Committee

The Committee discussed the reason for the appeal is due to fee issues. They discussed that Mr. Cobb is indigent and he has no funds to pay for the record fee.

Respondent's Statement

Justin Anderson, Assistant Attorney General, representing Utah Department of Corrections (UDC), stated that the fee waiver issue is whether the denial is unreasonable. Mr. Anderson reviewed Utah Code §63G-2-203, the section related to fee waivers. He discussed UDC's indigent status policy that allows indigent inmates to receive 100 pages of records free of charge each calendar year. Mr. Cobb previously received 300 pages this year free of charge. Mr. Cobb may resubmit his requests for these records after January 1, 2020, and receive a fee waiver for the records. Mr. Anderson explained that if Mr. Cobb's court case proceeds all records will be provided to him under discovery. The court is the appropriate place to request access to the records. He stated that the fee is not unreasonable. He explained that previous fee waiver appeal arguments and the same indigent status standards have been found acceptable by the Committee in the past.

Questions from Committee:

The Committee discussed the UDC indigent status standards. They discussed that UDC does not dispute that Mr. Cobb meets the indigent status outlined in their policy. UDC has provided records in excess of their policy that allows 100 pages free of charge each calendar year. They determined that approximately 50-100 pages of records would be responsive; the fee is 25 cents per page, and staff time would be required to redact some of the records.

Petitioner Closing

Mr. Cobb stated that it is only fair that he receive records he requested. The cost should not be a big issue for UDC since he is the victim in the legal case.

Respondent Closing

Mr. Anderson explained that the legal case Mr. Cobb refers to has not been decided at this time and his victim status has not been proven yet. The requested records do not primarily benefit the public. UDC's records fee is not unreasonable.

Motion by Ms. Smith-Mansfield:

Pursuant to Utah Code §63G-2-203(1), a governmental entity has the right to charge a fee for the actual costs of fulfilling the request. A Petitioner may be granted a fee waiver pursuant to Utah Code 63G-2-203(4). The Committee may review an unreasonable fee waiver denial. The Committee finds that the fee waiver denial is not unreasonable because the entity has already provided a fee waiver for 300 pages this year. Discretion is given to UDC to determine a fee waiver. Discovery is the proper avenue for obtaining records related to court cases. The governmental entity will allow the petitioner to submit new requests for these records after the first of the year.

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. Kelly Pehrson v. San Juan County

The Chair announced the hearing. The Chair provided instructions and reviewed the procedures. The Chair reminded the parties that mediation discussions are not allowed to be referenced in their testimony and asked the parties to acknowledge the restrictions on discussion of mediation. Both parties acknowledged the restrictions.

Petitioner's Statements

Mr. Pehrson explained that he had been the San Juan County Administrator for the last eight years and has had deep attachments to the county throughout his life. He stated that Kenneth Maryboy hired him eight years ago and He had a great relationship with him. Mr. Pehrson reviewed the pattern of no communication from Commissioner Maryboy prior to any of the Commission meetings. He would only receive resolutions when they were handed to him at the

meetings. No staff had seen the resolutions or worked on them or provided input for them prior to Mr. Pehrson's receiving them at the meetings. There were no emails, texts, memos, letters or other communications from the Commissioners giving him direction. Mr. Pehrson stated that he thrived when he was provided instructions for how to assist the Commissioners. Mr. Pehrson reviewed news articles, dated May 1, 2019, in which reporters quoted San Juan County Commissioners' disparaging remarks related to Mr. Pehrson's work performance. Mr. Pehrson questioned where the location of communication records cited by San Juan County Commissioners as having been sent to Mr. Pehrson with assignments, instructions for providing updates, and other work-related instructions. He explained that he did not receive a disciplinary notices for any actions of insubordination. He believes that any records related to those actions should be provided to him. Mr. Pehrson stated that there is no valid attorney-client privilege related to Mr. Boos and his argument for the requested records.

Questions from Committee

The Committee discussed Mr. Pehrson's duties overseeing the road department, economic development, senior centers, and other departments, and services for non-elected officials, such as the Commissioners.

Respondent Statements

Alex Goble, Deputy San Juan County Attorney explained that there are materials that exist and some that do not exist. The County's position regarding Mr. Boos is that he has no legitimate attorney relationship in his position with his client. There is no attorney-client privilege bearing in this case. He explained that the responsive records related to Mr. Pehrson have been provided. No other records exist. The new article would lead everyone to believe that the records do exist. San Juan County requested responsive records from Kenneth Maryboy and none were turned over. Mr. Goble stated that Commissioners Maryboy and Greyeyes are accountable for their statement to the news reporters not San Juan County. Since no records were provided to the County by the Commissioners nothing is considered to exist in the County's response. If the County does not have them then the only conclusion the County can make is that they do not exist.

Questions from Committee:

The Committee discussed whether the County looked through the Commissioners' state email account. The Committee discussed the County's process for reaching out to staff, including the Commissioners requesting them to search their own email accounts and provide any responsive records. The Committee discussed that the process for submitting record requests to the County Commissioners needs to be clarified for the public. The Committee discussed that the County considered a non-response by the Commissioners as evidence that no records existed. The Committee discussed that Mr. Pehrson's email account was searched. The Committee reviewed that the Commissioners are a separate governmental entity but there is no one to receive Commission records requests. If the County Clerk knows which County entity's records are being requested the Clerk could inform the Petitioner to submit their request to that specific County entity rather than the County in general. It is a training issue for the County Clerk and the process is muddied. The county clerk, by statute, is required to maintain the minutes of the Commission meetings. The Committee clarified with Mr. Goble

Mr. Boos relationship with the Commissioners. They clarified that any communications with Mr. Boos by the County Commissioners would be considered a record. Because the Commissioners have not turned over any records, the County interprets that to mean that no records exist.

Petitioner Closing

Mr. Pehrson stated that he would like to know which records were provided to Mr. Everitt, County Chief Administrative Officer. He explained that the records provided did not include a search of the County owned email accounts for the Commissioners. The County Clerk John David, is the records officer for the County. He should work with the individual County offices and specifically the IT department to obtain the records.

Questions from Committee

The Committee clarified that the County Administrator and Administrative Assistant provide administrative support to the Commissioners. The Committee discussed that the County Clerk stated that he made a reasonable search for responsive emails from Mr. Pehrson's email account and text messages from the Commissioner Maryboy. The Committee determined that the only email account searched was Mr. Pehrson's email account. The Committee questioned whether the HR director's records were searched. The Committee is concerned that the County is stating there are no records because no evidence was submitted that a search was completed.

Respondent Closing

Mr. Goble explained their positions that the Commissioners are responsible for searching their own email accounts and if they don't produce any records then it is a criminal matter, if records exist, and not the responsibility of the County to search their accounts. Mr. Goble requires the individuals and Commissioners to do their duty in searching and providing their own records.

Deliberation

The Public Records Management Act requires the governmental entity to manage its government accounts. The government owns the records, not the individuals. The government is responsible for management and access to records. The Committee discussed whether the Human Resource (HR) records were searched for any disciplinary actions against Mr. Pehrson and/or initiated by the Commissioners. The Committee discussed that any communications with Mr. Boos are immaterial in this case. The Committee discussed whether the County's previously submitted notices of compliance actually complied with their orders.

Motion made by Mr. Fleming:

Based on the testimony today the Committee grants the appeal. This is based on the fact that the County should have performed a more diligent search of the County email, including the Commissioners' and Human Resource director's email accounts and any other forms of communications.

Seconded by Ms. Smith-Mansfield.

Discussion on the Motion

The Committee discussed that the records could exist and have not yet been turned over. Vote: Aye: 6 Nay: 0. Motion carries 6-0. Mr. Haraldsen, Ms. Richardson, Mr. Williams, Mr. Fleming, Ms. Mansell, and Ms. Smith-Mansfield voting in favor of the motion.

Motion by Patricia Smith-Mansfield:

The Committee is persuaded that San Juan County has not established a rule or policy for records requests. The Commission is its own governmental entity. On its website under the request area it says that the San Juan County is committed to transparency and will respond to government records access requests. Pursuant to Utah Code §63G-2-204(8) the office shall promptly forward the request to the appropriate office. In the absence of rule or policy, San Juan County is the appropriate entity for the public to submit Government Records Access and Management Act requests for the Commission.

Seconded by Ms. Mansell

Mr. Fleming withdraws his earlier motion.

Motion made by Ms. Smith-Mansfield:

Pursuant to Utah Code §63G-2-204(8), in the absence of policy, in this case, San Juan County is the appropriate entity to receive the request. The Committee grants the appeal. The Committee is persuaded that the County should perform an independent search, conducted by the IT department, of the County, Commissioners, and Human Resource Director's email accounts and of any other forms of communications in the county's control.

Seconded by Mr. Fleming.

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

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

Five-minute break.

Reconvene.

3. Paul Amann v. Unified Police Department of Greater Salt Lake

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 discussion of mediation. Both parties acknowledged the restrictions.

Petitioner Statements

Paul Amann explained that he and Mr. Souvall spent additional time together mediating today and they both request that the briefs, and notices of compliance and non-compliance be withdrawn. They ask that the appeal hearing be rescheduled for December 12, 2019, to allow them to resolve any further records issues.

With respect to the records that have not yet been provided, Mr. Souvall has undertaken efforts to gather records referenced in his withdrawn brief. These included DNA testing reports, pictures of his office, personal property/evidence, affidavits and e-warrants, and a thumb drive, which was Mr. Amann's personal property. These were provided to Mr. Souvall. All will be returned to Mr. Amann. They resolved the issues related to a "packet" and an actual report that was generated. The packet is asked to be withdrawn, based on what Mr. Souvall has deemed to be information to be redacted and will be red-boxed and issued with a "protective order" to not be further released by Mr. Amann. Mr. Amann stated that he is a whistleblower and has received retaliation for it. In Mr. Amann's view, there was a case report made and information provided to UPD. Recordings of interviews have been agreed to be provided to Mr. Amann. Mr. Amann understands Mr. Souvall's legitimate concern that there will not be liability on the part of UPD for releasing records to him that are not under a protective order.

Respondent Statements

Harry Souvall, representing UPD, stated that Mr. Amann has presented compelling interest that he should be provided some of the redacted information. UPD feels that the redactions are appropriate but Mr. Amann's compelling interest should be honored. However, these redacted parts should be preserved at a later date, in terms of whether they are classified as public or appropriately redacted. UPD is willing to provide the red-box redactions under a protective order. Mr. Amann is the subject of the record and should have access to the information. As far as the other records are concerned, UPD has more work to do on those. The lack of a centralized recordkeeping system at UPD has hampered the efforts to locate all responsive records. Mr. Souvall supports the stipulation to continue the appeal.

Motion by Mr. Fleming: The appeal should be continued to the next Committee hearing date. 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.

4. Michael Clára - Unified Police Department of Greater Salt Lake

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.

Questions from Committee

The Committee discussed whether a representative from Salt Lake County Jail is present. Mr. Souvall stated they are not. Mr. Souvall is present for this hearing due to Mr. Clára's request to UPD. Mr. Souvall does not represent Salt Lake County. The Committee reviewed the current appeal.

Petitioner Statements

Mr. Clára explained that on the agenda, Michael Clára v. UPD is related to a video. That appeal was resolved during mediation. It was during mediation that Mr. Clára learned that Salt Lake County Jail is not part of UPD. His record request regarding Yassine Ibrahim's arrest needed to be submitted to the Salt Lake County Sheriff's Office, which is separate from UPD. Mr. Clára explained his involvement with Mr. Ibrahim in their community, Poplar Grove. He assisted Mr. Ibrahim in requesting the arrest records on July 19, 2019, at the Salt Lake County Jail, in person. Their website said that the appeal is to be submitted to Jon Fassett with UPD. Mr. Clára filed an appeal for the records on August 27, 2019, via certified mail to Jon Fassett. Mr. Clára then filed with the State Records Committee. He contacted the Salt Lake County Sheriff's Office, on October 24, 2019, with Lt. Berrett. She said they had not received it and he would need to submit his request on the Salt Lake County Sheriff's Office record request forms. Mr. Clára described his additional email correspondence with Lt. Berrett and the instructions he received from her. Mr. Clára explained that he is not required to submit another request when he submitted his request via certified mail and again on October 24, 2019, via email. Mr. Clára recited, Utah Code §63G-2-204(8), if a request for access is submitted to an office of a governmental entity other than that specified by rule in accordance with Subsection (3), the office shall promptly forward the request to the appropriate office. Mr. Clára described his issue is that UPD did receive his request and he'd like Mr. Souvall to answer the question of whether UPD forwarded it to the appropriate office. Even if UPD did not forward it to the correct office in the same office building, they have the request now. Mr. Clára provided the medical records notarized release for the private records under the Health Insurance Portability and Accountability Act (HIPAA).

Questions from Committee

The Committee determined that Mr. Clára submitted his appeal to the State Records Committee prior to knowing that the Salt Lake County Sheriff's Office maintained the jail records.

Respondent Statements

UPD was formed in 2010. The UPD is housed in same building as the Salt Lake County Sheriff's Office. The Sheriff is the chief executive officer (CEO) of UPD and retains County obligations over the jail and Public Safety Bureau. Sheriff Rosie Rivera has dual roles but these are separate entities. It is the responsibility of one governmental entity to forward requests to a separate governmental entity. Mr. Souvall explained the separateness of the entities and explained that they only share some space in the same building. Mr. Souvall admits that this request fell through the cracks. Mr. Clára has done nothing to resolve the appeal with the County because he doesn't believe he has to. UPD is not the custodian of the records. Mr. Souvall is not the attorney for the County and can only explain that UPD cannot release these records.

Questions from Committee

The Committee determined that UPD did not respond at all to Mr. Clára. They are required to give notice to the Petitioner whether they maintain the records. UPD did not respond at all.

Mr. Souvall is not clear whether UPD received the request. He did not check to see whether UPD received the request prior to the hearing. The Committee clarified the mailing address and to whom the notice of hearing was addressed.

Petitioner Closing

Mr. Clára explained that he did refile the request with the Salt Lake County Jail via email. Mr. Clára researched the Utah State Archives website and located the name of the records officer for the Sheriff's department and submitted it to that person via email. Mr. Clára stated that he also sent the request via certified mail. He asks that the appeal hearing be rescheduled and require the governmental entity to appear and asked the Committee to issue a subpoena for them to appear.

Respondent Closing

Mr. Souvall had nothing more to add.

Discussion

The Committee clarified that they do not believe that Salt Lake County Sheriff's Office responded to the request appropriately.

The Petitioner appealed appropriately due to no response from UPD. Utah Code §63G-2-204(4) requires them to respond. The Salt Lake County Sheriff's Office became aware at some point that they did have a copy of the request. The Committee explained that they do not need Mr. Clára to resubmit his request on a new form. The Committee should hear this appeal in December with the Salt Lake County Sheriff's Office. The Committee should have noticed this earlier and notified the Chair of the discrepancy.

Motion by Mr. Fleming: Continue the appeal hearing to the December meeting with the Salt Lake County Sheriff's Office present.

Seconded by: Ms. Smith-Mansfield.

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

BUSINESS

Ms. Mansfield resumed discussion on orders regarding fees, Utah Code §63G-2-203(1). The reason to bring it up again is to clarify that in previous orders Utah Code §63G-2-203(2)(a) relates to compiling records, (b) relates to an hourly charge, specific to when compiling in a different format, which regularly is cited instead of §63G-2-203(1), which relates to a governmental entity may charge a fee for actual administrative costs.

Motion to Approve October 10, 2019, Minutes

The motion to approve the minutes was made by Mr. Williams.

Seconded by Mr. Fleming.

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

Report on Appeals received, report

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

Brady Eames v. Office of State Auditor: Requesting an expedited hearing for access to individual final operating and capital budget adopted by Utah Local Government's Trust Board of each of six proprietary funds.

William Sherratt v. Board of Pardons and Parole: Requesting access to the number of parole dates issued contingent upon completion of rehabilitative programs, Co Ques, HOPE, or SOTP.

The Committee determined that this agenda item be worked on future agendas as appeals received and denied, notices of compliance, and related action items.

Discussion on Notices of Compliance issues. The Chair will sign a letter to the Governor that the State Records Committee may take action on failure to submit a notice of compliance in Zimmerman v. Department of Health. Legal counsel will draft the letter.

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

Other Business:

Discussion regarding number of appeals scheduled per meeting.

The Committee determined that the executive secretary will schedule 15 appeal hearings each month.

Discussion of Administrative Rules.

The Committee suggested amendments to specific rules.

The next meeting is scheduled for December 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 Mr. Fleming. Seconded by: Ms. Richardson.

The Chair adjourned the November 12, 2019, State Records Committee meeting at 1:12 p.m.

This is a true and correct copy of the November 14, 2019, SRC meeting minutes, which was approved on December 12, 2019. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>.

x *Gina Proctor*
Executive Secretary

APPROVED