

STATE OF UTAH  
OFFICE OF THE ATTORNEY GENERAL



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July 30, 2019

*Sent via U.S. Mail and Email*

Steven Onysko  
2286 Doc Holliday Dr.  
Park City, UT 84060  
Email: onysko5@burgoyne.com

RE: Appeal from response to GRAMA Request #19-078

Dear Mr. Onysko:

In accordance with Utah Code § 63G-2-401(9), Attorney General Sean D. Reyes has assigned me to act as the Chief Administrative Officer of the Utah Attorney General's Office (AGO) to respond to appeals under the Government Records Access and Management Act (GRAMA). Accordingly, I am responding to your above-referenced GRAMA appeal, received on July 15, 2019.

Your records request, received June 14, 2019 sought: "Incoming and outgoing 385-249-0691 call records for State of Utah cellphone assigned to any State of Utah current or former employee, including but not limited to Bridget Romano, now-former Civil Chief Deputy, for the period April 1, 2018, through June 30, 2018."

In a response dated July 12, 2019, the AGO provided you thirteen pages of records (Bates nos. UT AG 19-078 Onysko 001-013) consisting of the portions of the AGO's cell phone bills from March through June 2018 for the phone number specified in your request. Some information, including an account number and the phone numbers for all incoming and outgoing calls, was redacted as private under Utah Code § 63G-2-302(2)(d) (clearly unwarranted invasion of personal privacy) or protected under Utah Code §§ 63G-2-305(17) (attorney-client privileged).

Your appeal challenges the sufficiency of the records provided and the basis for the redactions made. Specifically, you assert that the response is incomplete because it does not include records of any calls after April 14, 2018. You also assert that redaction of the phone numbers is improper based on a decision of the State Records Committee (SRC), and that release of the numbers would not amount to a clearly unwarranted invasion of personal privacy nor violate the

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Parker

attorney-client privilege. Your appeal asks that all responsive records be provided without redaction.

I first address your assertion that the Office has not produced all responsive records. The records provided to you include all billing records for the period February 14, 2018 through July 13, 2018. This is a much broader timeframe than you requested and includes all records within the scope of your request (April through June). The lack of any call records after April 14, 2018 does not show that there are missing records. Instead, it is consistent with the fact that Ms. Romano left the office in early April 2018 and ceased using the phone shortly thereafter. Any calls made during the timeframe you specified would be reflected on the bills provided to you. Thus, I find no support for your assertion that the response was incomplete.

Because the first nine pages of records provided to you are for the period before April 1, 2018, they are outside the scope of your request and I will confine the rest of my review to pages 009-013, consisting of the bills from May through July. Page 009 is the May billing summary, which is technically not responsive because it includes no "call records." But it is included to show the completeness of the remaining records. It also bears only one redaction of an account number, which you have not specifically challenged and is redacted throughout. All call records on page 010 and the first thirteen call records on page 011 are also outside the scope of your request, so I will not address the redaction of phone numbers in those portions of the records.

Regarding the redaction of phone numbers on the remainder of page 011 (beginning with April 3, 2018) and one on page 012, I am granting your appeal and providing herewith copies of those pages without the challenged redactions. After further review, I find that release of these phone numbers would not amount to a clearly unwarranted invasion of personal privacy nor violate the attorney-client privilege. This determination is based on an individualized review of the numbers in question, not a finding that all phone records are public, as you assert.

Your contention that GRAMA requires governmental entities to release all phone records and prohibits any redaction of phone numbers does not accurately state the law. The State Record Committee decision you cite as support for this proposition is not binding precedent and was based on the specific facts of that case. And some of the language you have quoted from that opinion is clearly dicta. Utah Code § 63G-2-308 permits redaction (i.e. "segregation") of non-public information from any record, including phone records. GRAMA allows consideration of the same factors when evaluating the public/non-public nature of phone numbers as for any other information. Given the nature of the AGO's work, it is entirely possible that disclosing certain information in AGO phone records, including phone numbers, could reveal private or protected information. Thus, a thorough review is necessary before releasing AGO phone records to ensure that non-public information is not improperly released. This labor-intensive review can impose substantial administrative costs, which a requester may be required to pay under Utah Code § 63G-2-203(2)(a)(ii). I am waiving any fee for such costs here, but that conclusion is a case-specific one that must be made for each such request.

Under Utah Code § 63G-2-402, you have the right to immediately appeal this decision by appealing to the State Records Committee pursuant to Utah Code § 63G-2-403, or by filing a petition for judicial review in district court pursuant to Utah Code § 63G-2-404. Any appeal

*State v. Bruun*, 2019 UT App 77 - Utah: Court of Appeals  
May 9, 2019

[6] "Dicta normally comes in two varieties: obiter dicta and judicial dicta." *Ortega v. Ridgewood Estates LLC*, 2016 UT App 131, ¶ 14 n.4, 379 P.3d 18 (quotation simplified). Although "[b]oth terms refer to judicial statements that are unnecessary to the resolution of the case," obiter dicta is nonbinding whereas "lower courts are obliged to follow any judicial dicta that may be announced by the higher court." *Id.* (quotation simplified). "Obiter dicta refers to a remark or expression of opinion that a court uttered as an aside," and includes "statement[s] made by a court for use in argument, illustration, analogy or suggestion." *Id.* (quotation simplified). Judicial dicta, on the other hand, encompasses "statement[s] deliberately made for the guidance of the bench and bar upon a point of statutory construction not theretofore considered" by the higher court. *Id.* (quotation simplified).

## One Hundred Years of Utah Case Law

*In re Young's Estate*, 33 Utah 382, 385, 94 P. 731, 732 (Utah 1908). [March 5, 1908].

387 The [attorney-client] privilege belongs to the client and he may waive it or enforce it as to him may seem proper." (*In re Young's Estate*, 33 Utah 382, 385, 94 P. 731, 732 (Utah 1908)).

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*Southern Utah Wilderness Alliance v. Automated Geographic Reference Center*, 200 P. 3d 643 (2008) 2008 UT 88. [December 23, 2008]

"¶33 ... Thus to rely on the attorney-client privilege, a party must establish: (1) an attorney-client relationship, (2) the transfer of confidential information, and (3) the purpose of the transfer was to obtain legal advice."

# Washington Examiner

Thursday, December 05, 2019

## Republicans angry and concerned about Schiff release of phone records

by Byron York | December 04, 2019 11:42 PM

House Intelligence Committee Chairman Adam Schiff's decision to publish the phone records of the president's personal attorneys, a journalist, a fellow lawmaker, a National Security Council aide, and others has sent a chill among Republicans concerned about the reach of a powerful chairman determined to root out the communications of people with connections to the Trump-Ukraine affair. Rep. Devin Nunes, ranking Republican on the committee, whose phone records were included among those released, called the move a "gross abuse of power."

The Intelligence Committee Democrats' Trump-Ukraine impeachment investigation report, released publicly Tuesday, included records of some phone calls by presidential lawyers Rudy Giuliani and Jay Sekulow, Nunes, journalist John Solomon, Fox News host Sean Hannity, indicted Giuliani associate Lev Parnas, National Security Council aide and former Nunes staffer Kash Patel, lawyer Victoria Toensing, and unidentified people at the White House and Office of Management and Budget.

The published records consisted only of the two parties on each call, plus the date and duration of the call. No content from any call was released.

Schiff subpoenaed AT&T and Verizon for the information. Sources involved in the matter have only minimal information of exactly what Schiff did, but they believe the chairman subpoenaed a total of five phone numbers — it is not clear who each number was associated with — from which the published information was taken.

It is also not clear how much phone record information Schiff received from AT&T and Verizon that was not included in the report.

To the layman, it seems worrisome that the committee would publish phone records of the president's lawyers — are there attorney-client issues involved? — plus a journalist — are there First Amendment issues involved? — and a member of Congress. But among insiders and experts, the concern is not that Schiff broke the law — it appears he acted legally — but that the committee majority used its authority to walk up to the edge of propriety in a politically charged investigation.

In a text exchange, I asked one Republican lawmaker with knowledge of the situation whether Schiff's move raised any attorney-client issues:

Not legally. They used their subpoena authority. The decision to publish certain records is out of bounds as clearly political retribution, but it's not illegal as far as I can determine.

By email, I asked Berkeley law professor John Yoo, a noted legal scholar who once worked for the George W. Bush administration, whether anyone's rights might have been affected. He downplayed the possibility of an attorney-client privilege violation but suggested Schiff's action might have violated other rights. This is his response:

*There is certainly a constitutional privacy issue here, but I don't think an attorney-client privilege issue. The attorney-client privilege covers the substance of the communication, but it doesn't protect the fact that a communication took place.*

*For example, when one party to a lawsuit has to hand over documents to the other party, it can redact the content of the document if it is attorney-client privileged or withhold the document itself, but not the fact of the document's existence (there is usually a log created that sets out the from, to, date information, etc.).*

*That is a separate question from whether Giuliani and Nunes had any constitutional rights violated by the House when it obtained these records. I am surprised that Giuliani and the White House did not think this would come up and sue their telecom providers to prevent them from obeying any demands from the House for their calling records.*

Among those directly involved, the feelings were more intense. In a text exchange Wednesday, I asked Giuliani whether he believed Schiff's actions touched on attorney-client privilege. His response:

*Schiff, Pelosi, Nadler have trashed the U.S. Constitution and are enabled by a pathetic fawning press. They have proceeded without respect for attorney-client privilege, including threats of contempt and imprisonment. They have violated every conceivable due process right...counsel confrontation, cross-examination, compulsory process. They have conducted secret hearings leaking selectively and deceptively. This Pelosi Congress will be remembered for wholesale trashing of the U.S. Constitution to satisfy the politically-driven irrational hatred of a president who challenges their fantasies that they are intellectually and morally superior to the rest of us.*

Nunes' phone records were a topic of much discussion Tuesday when the report revealed he had several conversations with Giuliani and two with Parmas. On Wednesday, Nunes released a statement:

*The Democrats' impeachment charade is failing, and desperate people do desperate things. So Schiff suddenly published phone records of myself, current and former Republican staff members, and a journalist whose reporting he doesn't like. It's a gross abuse of power for a*

*congressman to go after his political opponents, staffers, and reporters in this way, but it's characteristic of the way Schiff has run this entire show. He's going to need a long rehabilitation period when this is over.*

Finally, the publication of John Solomon's records raised still other issues, this time about freedom of the press. In the excitement over the Democratic report, there was little or no discussion about the problems that might arise from the House Intelligence Committee publishing a journalist's phone records. But in the past, at least when President Trump was not involved, similar issues have been a concern of press advocates. The Reporters Committee for Freedom of the Press *First Amendment Handbook* contains the following passage:

*Courts ... have begun to recognize that subpoenas issued to non-media entities that hold a reporter's telephone records, credit card transactions or similar material may threaten editorial autonomy, and the courts may apply the reporter's privilege if the records are being subpoenaed in order to discover a reporter's confidential sources.*

Searching media coverage Tuesday and Wednesday, there was little or no discussion on whether Schiff's disclosure touched on Solomon's First Amendment rights. Solomon is the target of much criticism in mainstream reporting, but he is a journalist who should enjoy the same protections as others in his profession.

Such concerns, as well as concerns about publishing the records of others, were nowhere to be found in the initial media discussion of the Democratic report. Perhaps that will change when the full content of the report sinks in. Or perhaps publication of the phone records will be no more than a footnote in the bitter fight over the Trump impeachment.