

November 12, 2020

State Records Committee Meeting

Date: November 12, 2020

Time: 9:00 a.m. – 4:00 p.m.

Committee Members Present:

Kenneth Williams, State Archivist
Mark Buchanan, Private Sector Records Manager
Patricia Smith-Mansfield, Chair, Citizen Representative
Marie Cornwall, Citizen Representative
Nancy Dean, Political Subdivision Representative

Committee Members Not Present:

Tom Haraldsen, Media Representative
Vacant, Electronic Records and Databases Representative

Legal Counsel:

Paul Tonk, Assistant Attorney General
Nicole Adler, paralegal

Executive Secretary:

Rebekkah Shaw, Utah State Archives

Telephonic participation:

Unknown attendee

Others Present via Google Hangout:

J. Robert Latham
Laura Thompson, Assistant Attorney General
Karen Hill, Dpt. Human Services
Steven Onysko
Kelly Sparks
Miyako Uehara
Alexander Cramer, Park Record
Helen Strachen, Summit County
Rosemary Cundiff, Archives
Greta Wilson
Bethany Rodgers
Chike Ogbuehi, Division of Purchasing
Dan Harrie
Brook McCarrick, Assistant Attorney General
Kirt Slaugh, State Treasurer
Kendra Yates, Archives

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David Damschen, State Treasurer
Brady Eames
Lonny Pehrson, Assistant Attorney General
Hoang Nguyen
Allen Rollo, State Treasurer
Sam Stecklow

Agenda:

- Six Appeals Scheduled
 - Robert Latham v. Department of Human Services
 - Alexander Cramer (Park Record) v. Summit County
 - Brady Eames v. State Treasurer
 - Steven Onysko v. Attorney General Office
 - Sam Stecklow v. Division of Purchasing
 - Center for Biological Diversity v. Seven County Infrastructure Coalition

- Business:
 - Committee vacancy role change, action item
 - Approval of October 8, 2020, SRC Minutes, action item
 - SRC appeals received and declined, notices of compliance, and related action items
 - Cases in district court, report
 - Committee members' attendance polled for next meeting, format and quorum verification

Call to Order

The State Records Committee Chair, Patricia Smith-Mansfield, called the meeting to order at 9:07 a.m.

Business part 1 of 2

The Chair read a letter stating the meeting will be held electronically and telephonically without an anchor location pursuant to Utah Code 52-4-207(4). The public may monitor the meeting and any public wishing to comment in the meeting can submit their request to the Executive Secretary. The letter is active for 30 days.

1. Robert Latham v. Department of Human Services

The Chair announced the hearing and provided instructions and reviewed the procedures.

Petitioner's statement:

Mr. Latham stated he would ask the Committee to keep in mind this may be the first application of 78A-6-317(5)(a) before this Committee. He stated he has a background in journalism and has communicated with journalists who are interested in this story.

Mr. Latham stated colleagues suggested to him the accusations made in the requested reports are in reference to him. He stated there is public interest in this case if the quality case review process is being misused. He stated as a parental defender, he has been invited to these QCR

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reviews, but they are not mandatory. Mr. Latham stated these records are not audits and the respondent's website never refers to the process as an audit. He stated privacy has been weaponized in GRAMA and people who are supposed to benefit from the classification are being prevented from accessing records.

Question from Committee:

The Committee asked for clarification that he is not specifically named but believes he is the individual referenced. Mr. Latham stated he has a suspicion it refers to him based on the commonality in the information and the region referenced. He stated there is a small group of attorneys who would fit and the consensus is that it is in reference to him.

Respondent's statement:

Ms. Thompson stated that the division oversees the QCR process. She stated there are no defense attorneys named in the records. She stated the statute referenced is applicable to juvenile court proceedings and not GRAMA appeals. She stated there are over avenues for the petitioner to access records related to child welfare proceedings. Ms. Thompson stated the interview notes requested have no direct case references.

Ms. Thompson stated the QCR process is an audit, which has been upheld by the Committee before. She explained the QCR is to create systemic improvement in the child welfare process. The records are notes taken by QCR reviewers of everyone interviewed in the process, including private citizens, government employees, and attorneys. She stated the connection to Mr. Latham does not exist. She stated the petitioner admits he is not sure if the records reference him. She stated providing these records would create a chilling effect to others who were promised confidentiality.

Question from Committee:

The Committee asked if there is a difference between the review and the reports. Ms. Thompson stated the reports were made public, but the petitioner is asking for the interview notes. She stated the request is essentially for the same thing. She stated the request was for source material but they do not call it source material. The closest thing they have is the interview notes. She stated the reports are public on their website.

Respondent's statement:

Ms. Thompson stated Mr. Latham referenced two to three statements referencing an attorney and the source material for those would be in the interview notes. She stated the first part of the QCR process is to review child welfare records. The second part is to interview stakeholders. She stated this is the part the petitioner is asking about.

Question from Committee:

The Committee asked what the participants are told about confidentiality when they're interviewed. Ms. Thompson said she does not know if there is a script, but they are told their comments will be kept in confidence. She stated they may be told the product is protected or otherwise confidential under GRAMA.

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Petitioner closing:

Mr. Latham stated calling it an audit does not protect the source material. He stated a court does not make a distinction between a professional and private journalist. He stated posting information to a blog is sufficient under the first amendment. He stated he would take these records to state legislators who are trying to improve the juvenile justice system, non-profit organizations who are interested in a fair process, and government oversight bodies. He stated members of the media have an interest in this. Mr. Latham stated there is no court guidance on this. He stated a parent or attorney is entitled to these records if not completely, then with little redactions.

Question from the Committee:

The Committee asked the respondent to address the records being protected under 63G-2-305(10) in their closing statement. Also if the records could be redacted and protect the sources.

Respondent closing:

Ms. Thompson stated audits are a recognized exception under GRAMA. She stated anyone could defeat the classification by saying they are going to publish the records and then public interest in seeing everything published would swallow the rule.

Ms. Thompson stated she did not know if there would be anything intelligible left after redacting the records. She stated the majority of interview notes have nothing to do with the request. She stated the notes are summaries and you might not even be able to tell who made the statements.

Deliberation:

Motion by Cornwall the records are appropriately denied based on 63G-2-305(10)(b)(d) and (305)(12). Seconded by Mr. Williams.

Discussion to the motion

Ms. Smith-Mansfield stated she believes the records are properly classified under 63G-2-305(10), but feels including 305(10)(b) and 305(12) goes too far.

Aye: 4 Nay: 1. Mr. Buchanan, Ms. Cornwall, Ms. Dean, Mr. Williams voted in favor of the motion. Ms. Smith-Mansfield voted against the motion.

The hearing 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.

The Committee sauntered for two minutes.

2. Alexander Cramer v. Summit County (Continuance)

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The Chair announced the hearing and provided instructions and reviewed the procedures. The Chair stated the records were reviewed in camera and asked if the Committee would like to go in camera to discuss the in camera records.

Motion by Mr. Williams to go in camera. Seconded by Ms. Dean.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Dean, Mr. Williams, Ms. Smith-Mansfield voted in favor of the motion.

Motion by Mr. Williams to return to open session. Seconded by Ms. Dean.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Dean, Mr. Williams, Ms. Smith-Mansfield voted in favor of the motion.

Deliberation:

The committee appreciates the entity providing so much information. There is a lot of public interest in what is happening.

Motion by Mr. Williams to grant the appeal because after reviewing the records in camera, the public interest outweighs the protected classifications for protection of a governmental program and attorney-client privilege. However, employee spotlight information of a private nature should be redacted. Seconded by Ms. Dean.

Discussion to the motion

The Committee expressed appreciation for the entity providing so much information. Ms. Smith-Mansfield stated there were also drafts in the records.

Aye: 3 Nay: 0. Abstain: 2. Ms. Smith-Mansfield, Ms. Dean, and Mr. Williams voted in favor of the motion. Ms. Cornwall and Mr. Buchanan abstained.

The hearing 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.

3. Brady Eames v. State Treasurer

The Chair announced the hearing and provided instructions and reviewed the procedures.

Petitioner's statement:

Mr. Eames addressed appeal 2020-83 first. He stated the State Auditor issued a finding and recommendation pertaining to the State Treasurer in November 2005. He stated he believes

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since that date the Treasurer would be requesting quarterly reports from financial institutions to ensure public funds from state and local entities do not get mixed up.

Mr. Eames stated there is no retention schedule for the quarterly reports from financial institutions so he assumes they are never disposed of. He stated unless he is informed the reports were never received, he must assume they have been received since 2005 and are public records which should never be disposed of.

Question from Committee:

The Committee asked the petitioner to address the fee waiver. Mr. Eames stated the fee waiver pertains to the reports from the Treasurer to the State Money Management Council from 2010-2015. He stated they should be provided without a fee because the reports from 2016 and later were already provided without charge.

Respondent's statement:

Ms. McCall stated she cannot speak to a 2005 audit report. She stated the request was for any and all quarterly reports from any financial institution with respect to any internal and external investments. She stated all funds are invested in the same pool regardless if they are internal or external entities. She stated it is not possible to get him the information he is requesting.

Ms. McCall stated the respondent does not know what the petitioner means by quarterly reports. Bank statements are not maintained by the Treasurer. She stated the request is not reasonably specific. She stated there are many records which could be interpreted as responsive. She stated there is information updated quarterly available on the Treasurer's website.

Witness statement:

The Chair swore in the witness.

Mr. Rollo stated he is looking at the recommendation letter dated Nov 2005. He stated it is related to the PTIF accounts held by corporate trust companies at that time. He stated internal entities are state agencies and local governments are external. Mr. Rollo stated the underlying activity cannot be determined from the aggregate data.

Respondent statement:

Ms. McCall stated the petitioner asked for all deposits and investment reports for 2010-2019. She stated Mr. Slaugh provided the DNI reports for 2016 - 2019. The petitioner was informed the other six years were stored off site and would be provided for a fee for the time and work required to produce those. She stated GRAMA allows entities to assess fees to cover the cost of producing the records. Ms. McCall stated the petitioner is not the subject of the record and the public benefit provided is too nebulous to justify a fee waiver. She stated the previous four years would indicate if the Treasurer is complying with the law.

Question from Committee:

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The Committee asked if the two requests are related. Treasurer Damschen stated one request was for any and all bank statements and the other was for the DNI reports. He stated the DNI reports can be provided but the PTIF request should be resubmitted to every entity who has an investment in the pool. Treasurer Damschen stated no responsive records exist for the request for 'any and all deposits and investment reports'. He stated transactions are made in omnibus transactions or one big investment.

The Committee asked if he is saying the transactions are difficult to follow. Treasurer Damschen stated they are accounted for to the penny. He stated entities receive a monthly statement telling them what they are investing.

The Committee asked if the second request regarding colleges and universities would be found online. Treasurer Damschen said yes. He stated there are about 3,000 accounts and requesters should get this information from the local entity.

Petitioner closing:

Mr. Eames stated records received by an entity are records according to GRAMA. He stated the bank statements he requested are public records. He stated the pool is an overwhelming amount of money in control of the Treasurer and anything in the PTIF should be open to public inspection.

Respondent closing:

Ms. McCall stated much of the PTIF information is published on the website. She stated there are no records responsive to his request, and they do not understand what specifically he wants. She stated the appeal should be denied and the petitioner should submit a more specific request.

Deliberation:

Motion by Ms. Cornwall to deny the appeal because the request is not reasonably specific and the petitioner needs to go to the appropriate entities for specific data. Seconded by Mr. Williams.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams, and Ms. Dean in favor of the motion.

Motion by Ms. Cornwall that it is not an unreasonable denial of a fee waiver. Seconded by Mr. Williams.

Discussion to the motion

Ms. Dean stated the Committee heard a similar case, but the records were required by statute to be in the office. Ms. Smith-Mansfield stated records being in the office can also refer to records in the entity's custody but stored off site. She stated the record still must be available for inspection in the office. Ms. Smith-Mansfield stated there is a balance in what cost may be

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assessed for fulfilling a record request. She stated lots of entities charge for searching for records and the Committee balances whether they believe the fee is a denial of access.

Aye: 3 Nay: 2. Mr. Buchanan, Ms. Cornwall, Mr. Williams voted in favor of the motion. Ms. Dean and Ms. Smith-Mansfield voted against the motion.

The hearing 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.

4. Eames v. State Treasurer

The Chair announced the hearing and asked for brevity.

Petitioner's statement:

Mr. Eames stated appeal 2020-84 pertains to the same PTIF. He stated the State Auditor found issues with accountability with respect to money that comes from state agencies and local entities. He stated there is confusion regarding funds being mixed up with local government money. He stated he is requesting records related to clearing up the issues found by the Auditor.

Respondent's statement:

Ms. McCall stated Mr. Eames requested any and all financial institution records pertaining to the transfer of citizen tax money to the PTIF. She stated the deposits from education institutions come from various sources including tuition, donations, government grants, and legislative appropriations. She stated they are not segregated by source and the office cannot identify which funds are from tax money. Ms. McCall stated there are no records responsive to the request and the appeal should be denied.

Question from Committee:

The Committee asked Mr. Eames if he followed up with their suggestion that he contact various universities. Mr. Eames stated he has done that in different requests but he does not believe it pertains to this audit. He stated this is a different audit. Mr. Eames stated over 207 million dollars was misclassified by the higher education entities.

Petitioner closing:

Mr. Eames stated that was his closing statement.

Respondent closing:

Ms. McCall stated they tried to address his questions and the petitioner made no reference in his request to any other audit report. She stated problems with a 10-15 year old audit report have been addressed. She stated there are no records responsive to the request because they cannot identify citizen tax money from other deposits.

Deliberation:

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Motion by Mr. Williams to deny the appeal because the entity has no records responsive to the request. The agency did refer the requester to the appropriate source at the entity level. Seconded by Ms. Cornwall.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams, and Ms. Dean in favor of the motion.

The hearing 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.

The Committee sauntered for 15 minutes.

5. Steven Onysko v. Attorney General Office

The Chair announced the hearing for appeal 2020-01 and provided instructions and reviewed the procedures. The Chair noted the petitioner submitted a request for a motion to disqualify the assistant attorney general to be addressed first with any new information.

Petitioner's statement:

Mr. Onysko stated there is a terrible conflict of interest for the respondent to advise the Committee while their colleagues are in an adversarial position. He stated Ms. Romano was Mr. Tonks' former supervisor.

Respondent's statement:

Mr. Pehrson stated this motion has been raised numerous times and nothing has changed.

The motion to disqualify the assistant attorney general fails.

Petitioner's statement:

Mr. Onysko stated he is entitled to object for things to be adjudicated by future fact finders. He stated this also applies to deliberation. He stated he had been denied subpoenas for witnesses who he intended to ask if the Chair communicated with the attorney before the hearing.

Question from the Committee:

The Chair asked Mr. Onysko to address his records access denial. Mr. Onysko asked if the respondent brought the records. The Chair stated the Committee will determine if they will view the records in camera.

Petitioner's statement:

Mr. Onysko stated he has a right to investigate corruption. He stated this is the point of GRAMA. He stated he is seeking access to records falsely asserted to be attorney work product. He stated the records were prepared for a State Records Committee proceeding which is not litigation or judicial.

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Mr. Onysko stated the phone number was redacted per Utah Code 63G-2-305(10)(d) which he called the snitch subsection. He stated the records prove the respondent is investigating the former civil deputy for misconduct. He stated screenshots of text messages are not a copy of the record.

Mr. Onysko stated the Committee cannot discuss anything not addressed in the hearing during deliberation including the specificity of the request because the Committee is not qualified to judge if a record officer understands the record request.

Mr. Onysko stated attorney work product cannot be used to hide facts. He stated it can only hide opinions or legal advice. He stated the Committee should order the respondent to provide the records because they are public facts that cannot be hidden.

Respondent's statement:

Mr. Pehrson stated there are two requests and two appeals but one is really a subset of the other. He stated 2020-01 is the broader request. He stated there are two pages responsive to one item in the request for communications with Ms. Romano regarding inquiries of the phone, laptop, and keycards. He stated they were identified as work product because they were created in preparation for a GRAMA appeal regarding a prior request Mr. Onysko filed.

Mr. Pehrson stated the records were prepared in anticipation of litigation or an administrative proceeding. He stated the Committee is a quasi-judicial body. Mr. Pehrson stated this is a moot point because it is also in anticipation of a judicial appeal which remains pending.

Question from Committee:

The Committee asked if the records were created in the process of responding to a Chief Administrative Officer appeal. Mr. Pehrson stated it was.

Respondent's statement:

Mr. Pehrson stated the records were not created in the ordinary course of business, but in anticipation of litigation. He stated the records can reveal the legal impressions of an attorney concerning anticipated legal proceedings. He stated facts can still be a work product because they can disclose an attorney's case.

Mr. Pehrson stated the public expects appeals to be properly handled, therefore it is not expected that every communication is public record. He stated the petitioner has a grudge against Ms. Romano. He stated there is no public interest in this case.

Mr. Pehrson stated the phone number was redacted because it is a personal cell number. He stated releasing this would be a clear invasion of personal privacy. He stated they do not have the ability to segregate private text messages from not private texts. He stated they provided screenshots which was a reasonable method of accommodating the request. He stated screenshots do not indicate there are missing records.

Petitioner closing:

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Mr. Onysko stated he wants the personal cell phone number because Ms. Romano made a police report in the morning and he is suspicious she made a phone call on the allegedly stolen cell phone. He stated this case is about work product. He stated the work product is not judicial or quasi-judicial proceedings.

Mr. Onysko stated he feels his right to due process has been violated because he was denied witnesses and confirmation the records would be available for the Committee to review in camera. He stated he is raising these issues so future fact finders will know he raised them.

Respondent closing:

Mr. Pehrson stated it would make no sense to say all communication between an attorney and an executive made in preparation for an appeal that will go before the Committee would be public. He stated there is no question the records at issue were prepared in relation to an appeal that is now pending or was filed before the district court. He urged the Committee to find that work product applies to these emails.

Deliberation:

Motion by Ms. Dean to go in camera to review the records. Seconded by Ms. Cornwall.

Aye: 5 Nay: 0. Ms. Smith-Mansfield, Mr. Buchanan, Ms. Cornwall, Mr. Haraldsen voted in favor of the motion.

Motion by Ms. Dean to go back into open session. Seconded by Mr. Williams.

Aye: 5 Nay: 0. Ms. Smith-Mansfield, Mr. Buchanan, Ms. Cornwall, Mr. Haraldsen voted in favor of the motion.

Motion by Ms. Dean to release the two email records as public. Seconded by Mr. Buchanan.

Aye: 5 Nay: 0. Ms. Smith-Mansfield, Mr. Buchanan, Ms. Cornwall, Mr. Haraldsen voted in favor of the motion.

Discussion to the Motion

Ms. Smith-Mansfield clarified for the respondent that these are not protected under 63G-2-305(18).

The hearing 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.

6. Steven Onysko v. Attorney General Office

The Chair announced the hearing for appeal 2019-144 and stated brevity would be appreciated.

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Petitioner's statement:

Mr. Onysko stated this case is similar to the previous one. He stated he hoped the Committee brought records. He stated he felt he should not have been denied subpoena of witnesses. He stated the purpose of his request is to know about possible corruption. Mr. Onysko stated the laptop was lost for two months. He stated the laptop had sensitive case material including a case he was involved in and was trying to obtain through discovery.

Mr. Onysko stated it is indisputable some of the records he received are partial threads of emails. He stated that proves other records exist. He stated there are only two possible explanations. One is that it was an accident and the other involves action from multiple employees. He stated he was not able to take his laptop or cell phone when he left state service.

Mr. Onysko stated there is no proof the number is a personal cell phone number. He stated he wants to know if Ms. Romano made a call from an allegedly stolen cell phone. He stated the text messages start with 'OK' which can be inferred to be an answer to something. He stated it is not fathomable that a text dialogue starts with 'OK'. He stated he wants to know what Ms. Romano is replying to. Mr. Onysko stated he has proved more records exist and should be released. He stated it is unknown who Ms. Romano is texting.

Mr. Onysko stated a phone number is not data on an individual and has not been considered private by the Committee. He stated it is not an unwarranted invasion of privacy. He stated the key is whether the invasion of privacy is warranted or not. He stated citizens have a right to know about public theft. He stated public officials need to be held accountable. He asked the Committee to review the record in camera and let him know if the phone number is a state number or not.

Respondent's statement:

Mr. Pehrson stated this request was for all records regarding the handling of Ms. Romano's access cards. He stated a few text messages were found in preparation of the Chief Administrative Officer appeal. He stated an email exchange and one email thread was found. He stated the text messages were from Ms. Romano's personal cell phone because her work phone was stolen. He stated the provided records show the phone number has been redacted.

Mr. Pehrson stated the petitioner has not met the burden to show additional records exist. He stated not every text message is responsive because a text thread can go on forever. He stated she started a conversation with OK, and it was not a response to a previous message. He stated the Committee can review the records in camera and determine that if they would like. He stated the petitioner is asking them to create a record.

Mr. Pehrson stated he would not rehash his previous argument. He stated the Committee previously held personal mobile phone numbers are properly classified as private. He stated he has no problem with the Committee reviewing the records to confirm the phone number is not the stolen phone number. He stated it is not a justification for producing non-responsive text messages. Mr. Pehrson stated the petitioner seems to want them to image the phone. He

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stated screenshots do not indicate more records exist. He stated the petitioner has the burden to prove more records exist and that has not been met.

Petitioner closing:

Mr. Onysko stated there is no foundation in fact for the respondent's testimony. He stated providing him access to a record is not creating a record. He stated he is not interested in Ms. Romano's personal cell phone number. He asked the Committee to view the record in camera to determine if the call was made from the stolen phone. He stated these are public records. He stated calling a public entity makes the number public and it is not an unwarranted invasion of privacy.

Respondent closing:

Mr. Pehrson stated there are exceptions to the right to inspect a public record. One exception is for records which cannot be inspected are records which are only accessible by a computer or electronic device and public records cannot be readily segregated from non-public records. He stated all relevant information has been provided. He stated the petitioner is asking them to create a record. He stated the two people in the conversation have already been identified for the petitioner. He stated there is no indication additional records exist. He asked the Committee to deny the appeal.

Deliberation:

Motion by Ms. Dean to view the records in camera. Seconded by Mr. Buchanan.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams, Ms. Dean voted in favor of the motion.

Motion by Mr. Williams to return to open session. Seconded by Ms. Cornwall.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams, Ms. Dean voted in favor of the motion.

Motion by Mr. Williams to deny the appeal as all responsive records have been provided with redactions appropriate to the classifications provided. Seconded by Ms. Dean.

Discussion to the motion

Ms. Smith-Mansfield stated the phone number is not a government issued phone number.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams, Ms. Dean voted in favor of the motion.

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The hearing 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.

The Committee sauntered for two minutes.

7. Stecklow v. Division of Purchasing

The Chair announced the hearing and provided instructions and reviewed the procedures.

Petitioner's statement:

Mr. Stecklow stated he is an independent journalist. He stated this appeal is seeking two things: First the release of applications for pharmacy licenses withheld because the contracts have not been finalized. Second he asked the Committee to review the redactions made by the companies asking for confidentiality. He stated those redactions should be for trade secrets that would harm the competitive process. He stated one application was released with most text redacted including the name of the CEO. Mr. Stecklow stated there must be more information that is not a trade secret which was redacted and not reviewed by the Chief Administrative Officer.

Mr. Stecklow stated all licensees have been announced and awarded. He stated the state has control over every aspect of this process so there is a false competitiveness. He stated he believed the classification was incorrect, but if the Committee agreed, he asked that the records be released due to public interest. He stated there is public interest in knowing who is behind the companies applying for and receiving licenses in Utah.

Respondent's statement:

Mr. Ogbuehi stated there are two questions in this appeal. First is whether the Division of Purchasing should provide protected records prior to contracts being signed. The second is if material marked confidential by the record owners should be provided to the public after an unredacted copy has been provided.

Mr. Ogbuehi stated disclosure would put the Division of Purchasing in a situation where there is impairment to government procurement proceedings. He stated after the contracts have been signed they can release them. He stated at the time of the request only two were signed even though they had been awarded. He stated since then a third has been signed and that has been released. Mr. Ogbuehi stated the division has no reason to withhold the records after they have gone through the process but they ask the petitioner to exercise patience. He stated as soon as the contracts are signed they will be provided.

Mr. Ogbuehi stated the division can go back for solicitation before contracts have been signed and having all of the information public already would put vendors who have already submitted proposals at a disadvantage. He stated the law is clear in 63G-2-309 that businesses can request records they provide with their proposals be protected with business confidentiality. He stated the Administrative Code for the division puts the burden on the owners of the record at the time of submission. He stated access in this case was properly restricted.

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Question from Committee:

The Committee asked how names can be protected as a trade secret or could result in competitive injury under 63G-2-309. Mr. Ogbuehi stated the division allows vendors to claim what they want to be protected and when they have questions they go back to the vendor. He stated if the petitioner is wondering about anything specific he can let them know.

The Committee asked if it is typical for names to be redacted. Mr. Ogbuehi stated names are usually open, so if the petitioner wants the names of the CEOs, they can get those. He stated the request involves a lot of records. He stated it could be narrowed down and they could probably review that and get it for him.

The Committee asked if they have ever not accepted a bid because there were too many redactions requested. Mr. Ogbuehi stated not to his knowledge. He stated usually they are asking for redactions after submission.

The Committee asked if he is suggesting the petitioner go through what he has received and request a specific section to be redacted and the respondent will go to the company and ask about releasing it. Mr. Ogbuehi stated that was correct.

The Committee asked if there are contracts still to be awarded. Mr. Ogbuehi said there are not, but not all of the awarded contracts have been signed. The Committee asked if the records would be provided as soon as they are signed. Mr. Ogbuehi stated they would be public as soon as they are signed.

Petitioner Closing:

Mr. Stecklow stated the CEO name was just an example of something that might not be properly redacted. He stated the respondent should be ensuring redactions coming from vendors meet the standard of the law. He stated there is no impairment to the procurement proceeding to have all the information public.

Respondent Closing:

Mr. Ogbuehi stated he already answered how releasing the records before the contract is signed can impair the solicitation process. He stated allowing the division to operate until the contracts are signed protects the sanctity of the procurement. He stated not having the records public allows people to focus on the process and not be distracted because the information may be released. He stated the division has properly released the documents.

Deliberation:

Motion by Mr. Buchanan to continue the hearing to view the records in camera. Seconded by Ms. Dean.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams, Ms. Dean voted in favor of the motion.

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The hearing 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.

8. Center for Biological Diversity v. Seven County Infrastructure Coalition

The Chair announced the hearing and provided instructions and reviewed the procedures.

Petitioner's statement:

Ms. Park stated the Center is trying to determine how the Coalition is spending millions of dollars in grant funds awarded by the Community Impact Board to build an oil railway in the Uintah Basin. She stated the withheld records are reimbursements for railway related expenses.

Ms. Park stated the respondent improperly redacted information from the records they thought were not responsive to the request. She stated redactions were also made based on attorney-client privilege and attorney work product. She stated the Center disputes these, but even if the classification applies, the records should be released due to public interest.

Ms. Park stated that nothing in GRAMA allows redactions for nonresponsive content. She stated the respondent would provide it if requested separately but it should already be included. She stated that the contents would help provide context and the redactions can skew public understanding of the records. She stated rather than redacting the information, the respondent could have provided clarification about what was related to the railway.

Ms. Park stated attorney client privilege does not apply to reimbursements because they are created in the normal course of business. She stated these were not classified as protected when they were shared with the Community Impact Board.

Ms. Park stated she found boilerplate language in the grant contracts which state the records are public and may be disclosed under GRAMA, and that the grantee agrees contracts and invoices are public records.

Ms. Park stated an article in the Salt Lake Tribune discusses a dispute the Community Impact Board and the Coalition had over disclosure of billing records. She stated the Board overruled the Coalition and provided the records to the Tribune. She stated the Committee should overrule the claim of attorney-client privilege.

Ms. Park stated that attorney work product does not apply because the reimbursements were not created in preparation for or in anticipation of litigation or an administrative proceeding. She stated these are created in the ordinary course of business.

Ms. Park stated public interest outweighs the Coalition's interest to protect the records. She stated reimbursements would reveal how funds from the grant were spent. She stated the public deserves to know how funds intended to benefit their community are spent. She stated

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the public has a strong interest in knowing funds are used for their intended purpose. She requested the Committee order the records to be released without redactions.

Respondent's statement:

Mr. Patterson stated 1,600 pages have been provided. He stated they are not trying to obfuscate the records, but make clear what is responsive. He stated they did not want to confuse the issue. He stated they are public and can release them. He stated they were trying to be clear what is responsive.

Mr. Patterson stated the Coalition disclosure of the records to the Community Impact Board included a letter requesting the records be kept confidential. He stated the Committee has been consistent that attorney invoices are largely public but certain data elements are not public. He stated names and the subject matter of services rendered can be redacted. He stated this has been done in line with the Committee's prior decisions.

Mr. Patterson the contract submitted does state contracts are public, but that they are subject to GRAMA. He stated there are data elements which can be redacted according to GRAMA. He stated they are not trying to withhold the invoices entirely. He stated GRAMA is clear that a governmental entity may not provide a record as a shared record. He stated sharing the records does not alter the classification of the records.

Mr. Patterson stated these are not only generated for reimbursement but for their client, the Coalition, who transfers those to the Board. He stated the attorney-client interest is also a substantial public interest so attorneys can do their work effectively.

Petitioner closing:

Ms. Parks stated there is no reason to redact information to clarify what was responsive. She stated there is no legal provision to release records in this manner. She stated as an attorney she would not rely on the boilerplate language to protect confidential information. She stated GRAMA requires the originating entity provide the classification to the entity receiving a shared record. She stated there is a heightened interest in how the Community Impact Board funds are used because they are supposed to be used in the public interest.

Respondent closing:

Mr. Patterson stated all GRAMA requires is that recipients be informed of the classification of shared records. He stated invoices are public records, but there is a protected data element. He stated the Coalition has followed the guidance of the Committee and has in fact redacted less than the Committee has previously ruled could be redacted. He asked the Committee to deny the appeal.

Deliberation:

Motion by Mr. Williams to review the records in camera. Seconded by Ms. Dean.

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Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams, Ms. Dean voted in favor of the motion.

Motion by Ms. Dean to return to open session. Seconded by Mr. Buchanan.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams, Ms. Dean voted in favor of the motion.

Motion by Mr. Williams to deny the appeal and the redactions are properly classified. Seconded by Ms. Dean.

Discussion to the motion

Ms. Smith-Mansfield stated there are two previous orders regarding what can be redacted. She stated redacting the non-responsive contents serves as a statement that the content is non responsive. She stated a distinction needs to be made to see what applies to a particular project.

Aye: 5 Nay: 0. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams, Ms. Dean voted in favor of the motion.

The hearing 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.

Business part 2 of 2

Due to the lateness of the day, the Chair recommended skipping the review of district court cases.

Motion by Mr. Williams to approve the October minutes. Seconded by Mr. Buchanan.

Aye: 4 Nay: 0. Abstain: 1. Mr. Buchanan, Ms. Cornwall, Ms. Smith-Mansfield, Mr. Williams voted in favor of the motion. Ms. Dean abstained.

Appeals received, declined, notices of compliance, and related action items

The secretary reviewed two appeals in which the respondent asked for a motion to reconsider the denial. The motion to reconsider the denial was not taken by the Committee.

Committee vacancy role change, action item

Mr. Williams stated the Committee is looking for someone with experience in electronic databases and it has been vacant for 18 months. He stated the Committee has been close to not having a quorum before and asked for suggestions for how the description of the position can be updated so it would be easier to fill.

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The Committee discussed having a county representative, another media representative, and previous roles that have existed on the Committee. Ms. Cornwall stated a county role being someone who deals with records would make sense. Ms. Smith-Mansfield stated having someone with experience in electronic records would still be a good idea. Mr. Williams stated he would take the Committee's ideas to stakeholders and follow up.

Committee members' attendance polled for next meeting, format and quorum verification.

The Chair verified a quorum will be present at the December 10th meeting.

Motion to Adjourn

The Chair adjourned the November 12, 2020, State Records Committee meeting at 2:39 p.m.

This is a true and correct copy of the November 12, 2020, SRC meeting minutes, which was approved on December 10, 2020. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>.

X /e/ Rebekkah Shaw
Executive Secretary

Approved