


Appeal to Utah State Records Committee, 2020-94

Hearing Presentation, Feb. 11, 2021

PRESENTED BY ROB LATHAM



Did the Washington County Attorney's
Office improperly deny a **subject**
access to records?

Withheld records

There are 263 emails to/from Angela and 35 emails to/from Eric that are classified as private pursuant to Utah Code Section 63G-2-302(2)(d) and/or protected pursuant to Sections 63G-2-305(6), (10), (17), (18) and (22) and therefore, your request for these records is denied.



Dean Cox, Commissioner | Victor Iverson, Commission, Chair | Gil Almquist, Commissioner

September 24, 2020

Withheld records

and any other communications you may have received between Eric Clarke and Nicholle Felshaw and/or Eric Clarke and members of the Indigent Defense Committee.

1. Any and all records — including electronic data such as emails, text or social media messages,¹ and audio recordings — collected, generated, maintained, prepared, owned, received, or retained on or after June 20, 2018 by Angela Adams, Brock Belnap, Eric Clarke, and/or Victor Iverson that reference or are about me (hereinafter “the undersigned”) and not records that are clearly not in reference to me.

See Utah Code § 17-18a-802(2)(a) (county “attorney ... does not represent a county commission, **county agency**, **county board**, county council, county officer, or **county employee**”); see also *Salt Lake County Comm’n v. Salt Lake County Atty.*, 1999 UT 73, 985 P.2d 899 (Utah 1999), ¶ 34 (holding “County Attorney only has an attorney-client relationship with the County, and not with the Commission and its individual Commissioners”).

Waiver of privilege

**Eric Clarke,
WashCo Atty**



**Curtis Jensen
Jenny Jones
*Tim Martin***

**WashCo Indigent
Defense *Committee***

Waiver of privilege

**Eric Clarke,
WashCo Atty**

**9/30/2019
email**



**Curtis Jensen
Jenny Jones
*Tim Martin***

+

**Nicholle Felshaw
WashCo Commissioners
Douglas Terry**

American Bar Association Criminal Justice Section Standards

Standard 4-1.2

The Function of Defense Counsel

(e) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, counsel should stimulate and support efforts for remedial action....

a governmental entity ... **shall**, upon request, disclose a **private** record to:
... the **subject** of the record;

--Utah Code § 63G-2-202 (1)(a)(i)

“GRAMA permits a governmental entity to divide a record into its public and nonpublic parts by redacting nonpublic content.”

-- *Deseret News v. Salt Lake County*,
2008 UT 26, ¶ 16

No deference to non-public classification

“It would be incompatible with a governmental entity’s responsibilities under GRAMA to apply to a record request a review methodology which presumes that a requested record has been properly classified and then proceed to canvass GRAMA for statutory language that confirms its designation.”

– *Deseret News v. Salt Lake County*, 2008 UT 26, ¶ 24

Notwithstanding any other provision in this chapter, if a governmental entity receives a request for access to a record that contains both information that the requester is entitled to inspect and information that the requester is not entitled to inspect under this chapter, and, if the information the requester is entitled to inspect is intelligible, the governmental entity:

- (1) shall, except as provided in Subsection 63G-2-201(1)(b)(iii), allow access to information in the record that the requester is entitled to inspect under this chapter; and
- (2) may deny access to information in the record if the information is exempt from disclosure to the requester, issuing a notice of denial as provided in Section 63G-2-205.

--Utah Code § 63G-2-308

If a governmental entity receives a request for access to a record that contains **both** information that the requester is entitled to inspect and information that the requester is not entitled to inspect under this chapter, and, if the information the requester is entitled to inspect is intelligible, the governmental entity:

- (1) shall ... allow access to information in the record that the requester is entitled to inspect under this chapter;

--Utah Code § 63G-2-308

If a governmental entity receives a request for access to a record that contains **both** information that the requester is entitled to inspect and information that the requester is not entitled to inspect under this chapter, and, if the information the requester is entitled to inspect is intelligible, the governmental entity:

- (1) **shall** ... allow access to information in the record that the requester is entitled to inspect under this chapter;

--Utah Code § 63G-2-308

Washington County says the Indigent Defense Commission's core principles weren't violated because the County didn't violate the IDC's core principles.

Appellant also claims that the records will help determine if Washington County violated the "core principles" for indigent defense systems. Washington County did not violate the core principles and there is no indication of such a violation by the records.

Washington County says

is communicating with opposing parties, probation, witnesses, victims or interoffice staff to perform her responsibilities in the prosecution of her cases. Appellant is no longer listed as an attorney on the case, so the information is private as to the defendant of the case. These are classified as private and/or protected pursuant to Utah Code Sections 62C-2-202(2)(d) and 62C-

Rule 1.9. Duties to Former Clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(b)(1) whose interests are materially adverse to that person; and

(b)(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(c)(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(c)(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.9. Duties to Former Clients.

...

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(c)(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.



Standard 4-1.3 Continuing Duties of Defense Counsel

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Standard 4-1.3 Continuing Duties of Defense Counsel



Some duties of defense counsel run throughout the period of representation, and even beyond. Defense counsel should consider the impact of these duties at all stages of a criminal representation and on all decisions and actions that arise in the course of performing the defense function. These duties include:

- (a) a duty of confidentiality regarding information relevant to the client's representation which duty continues after the representation ends;
- (b) a duty of loyalty toward the client;
- (c) a duty of candor toward the court and others, tempered by the duties of confidentiality and loyalty;

(a) a duty of confidentiality regarding information relevant to the client's representation which duty continues after the representation ends;

IDC MINIMUM PRINCIPLES FOR EFFECTIVE REPRESENTATION

In accordance with the Federal and State Constitutions, state law, and the mandates of the United States and Utah Supreme Court, the IDC has developed and adopted the following guiding principles for the assessment and oversight of indigent defense systems with the state.

The right to the effective assistance of counsel can be summed up as having effective representation at all critical stages of: a criminal prosecution, juvenile delinquency proceedings, and where statutorily mandated under Utah Code § 78A-6-1111, in Abuse, Neglect, and Dependency Proceedings. Effective assistance is the right of the accused to require the prosecuting authority's case to survive the crucible of meaningful adversarial testing, without interference, or fear of retaliation. The following principles adopted by the IDC are intended to help a System ensure effective assistance in all appointed cases in the state.

These principles are not intended as criteria for the judicial evaluation of alleged misconduct of defense counsel, or to determine the validity of a conviction, or to create substantive or procedural rights that may accrue to the accused, convicted persons, or counsel. Failure to adhere to such standards and guidelines does not, in and of itself, constitute ineffective assistance of counsel, and this paragraph must not be construed to overrule, expand or extend, whether directly or by analogy, the prevailing case law for making a determination regarding ineffective assistance of counsel.

1. **Regionalization**: Under state law, counties and municipalities are encouraged to enter into interlocal cooperation agreements for the provision of legal defense services. Utah Code § 77-32-306(4). IDC grant monies for critical needs and matching grants are contingent on a plan for regionalization.
2. **Independence**: Indigent defense service providers shall have independent judgment without fear of retaliation.
3. **Interference**: Neither the state, nor any local government, may interfere with an indigent defense service provider's access to clients and the service provider must be free to defend the client based on the service provider's own independent judgment.

Proceedings. Effective assistance is the right of the accused to require the prosecuting authority's case to survive the crucible of meaningful adversarial testing, without interference, or fear of retaliation. The

2. Independence: Indigent defense service providers shall have independent judgment without fear of retaliation.

Brock R. Belnap #6179
Washington County Attorney
Eric Clarke #13177
Deputy Washington County Attorney
33 North 100 West, Suite 200
St. George, Utah 84770
Eric.Clarke@washco.utah.gov
Telephone: (435) 634-5723
Attorneys for the Washington County

THE FIFTH DISTRICT JUVENILE COURT

IV. CONCLUSION

Washington County is gravely concerned with the potential precedent of having staff and appointed indigent defense committee members subpoenaed to testify in cases involving a contract public defender has had a complaint investigated by the committee. With the large

and Jenny Jones on or around August 2, 2019. Ms. Felshaw is the Washington County Administrator. Ms. Jones is a licensed attorney and one of three members of the Washington County Indigent Defense Committee. The subpoenas require Ms. Felshaw and Ms. Jones to appear for a three day hearing and to provide again documents made available the subpoenaing party. Neither individual has any knowledge of this case nor the individuals involved and they

What if the complaints are coming from the prosecuting authorities?

Proceedings. Effective assistance is the right of the accused to require the prosecuting authority's case to survive the crucible of meaningful adversarial testing, without interference, or fear of retaliation. The

“to utilize the [work product] privilege,
[t]he party seeking to assert the ...
work product privilege ... has the
burden of establishing that [such] is
applicable.”

--*SUWA v. AGRC*, 2008 UT 88, ¶ 29
(cleaned up)

“[T]o 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.”

--*SUWA v. AGRC*, 2008 UT 88, ¶ 33

“However, ‘channeling work through a lawyer’ does not by itself create a basis for attorney client privilege.”

–*SUWA v. AGRC*, 2008 UT 88, ¶ 35
(citations omitted)

the State Records Committee may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private, controlled, or protected if the public interest favoring access is greater than or equal to the interest favoring restriction of access.

Utah Code § 63G-2-403(11) (emphasis added).

How Democracies Die

78 HOW DEMOCRACIES DIE

To better understand how elected autocrats subtly undermine institutions, it's helpful to imagine a soccer game. To consolidate power, would-be authoritarians must capture the referees, sideline at least some of the other side's star players, and rewrite the rules of the game to lock in their advantage, in effect tilting the playing field against their opponents.

Disclosure is in the public interest.



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NEWS / U.S.

Public defenders' firings protested amid bail reform push

By The Associated Press | Posted - Mar. 5, 2020 at 2:47 p.m.



NORRISTOWN, Pa. (AP) — The firing of two county public defenders in the Philadelphia suburbs is drawing a growing backlash, coming after their office filed a court brief that said systemic failures in cash bail practices are rife in Pennsylvania.

A crowd of more than 100 protesters held a rally on the Montgomery County courthouse steps Thursday before giving hours of public comment at the regular meeting of the county's board of commissioners.

Here are the 4 inspectors general ousted by the Trump administration

Lawmakers have called for a full explanation into the administration's firings.

By Michelle Stoddart

May 19, 2020, 4:36 PM • 4 min read



Questions grow after firing of State Department watchdog

Top Republicans say they want answers. ABC News' Alex Presha reports.

The Trump administration has ousted watchdogs at multiple federal agencies over the past six weeks.

The moves have brought criticism from top Democratic lawmakers -- and some Republicans. Last week, lawmakers on both sides of the aisle called for a full explanation into the administration's firings.

Disclosure is in the public interest.



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Thanks!

Contact:

Rob Latham

3143 South 840 East, #420

St. George, Utah 84790

rob@roblatham.pro

www.roblatham.pro

