

April 8, 2021

**State Records Committee Meeting**

Date: April 8, 2021

Time: 9:00 a.m. – 4:00 p.m.

**Committee Members Present:**

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

**Committee Members Not Present:**

Vacant, Electronic Records and Databases Representative

**Legal Counsel:**

Jacob Franklin, Assistant Attorney General  
Paul Tonks, Assistant Attorney General  
Anne Nelson, paralegal

**Executive Secretary:**

Rebekkah Shaw, Utah State Archives

**Others Present via Zoom:**

Devon Cantwell  
Jeremy Brodis, Attorney  
Chase Andrizzi  
Claire McGuire  
Kendra Yates, Department of Administrative Services  
Kelly Sparks  
Michelle Ballantyne, University of Utah  
Rebekah Bradway, University of Utah  
Robert Payne  
Shawn Wood  
Sherrie Hayashi, University of Utah  
Raphael Cordray  
Steven Onysko  
Susan Mumford  
\*\*\*\_\*\*\*-2371  
LML413DL  
Christopher Nelson  
Tyler Allred, Duchesne County

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Deborah Woods, Division of Child and Family Services  
Joshua Van Jura  
James Palmer, Department of Transportation  
Jayme Blakesley, Save Our Canyons  
Carl Fisher, Save Our Canyons  
Harry Souvall, United Police Department  
Tiffany Gilman

**Agenda:**

- Six Hearings Scheduled
  - Steven Onysko v. Department of Administrative Services (2020-133)
  - Devon Cantwell v. University of Utah (2020-100)
  - Sandra Guzman v. Division of Child and Family Services (Continuance 2020-127)
  - Raphael Cordray v. Duchesne County (2020-137)
  - Carl Fisher (Save Our Canyons) v. Department of Transportation (2021-08)
  - Tiffany Gilman v. Unified Police Department (Continuance 2020-107)
- Business:
  - Approval of March 11, 2020, SRC Minutes, action item
  - SRC appeals received and declined, notices of compliance, and related action items
  - Cases in district court, report
  - Updating administrative rules, action item
  - Committee members' attendance polled for next meeting, format and quorum verification

**Call to Order**

The Chair called the meeting to order at 9:02 am.

**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. Steven Onysko v. Department of Administrative Services (2020-133)**

The Chair announced the hearing and requested both parties to acknowledge they cannot share anything discussed in mediation with the Committee. Both parties agreed.

**Petitioner Statement**

Mr. Onysko stated the standard for informal proceedings is that a matter must be raised to a level of consciousness. He stated the Chief Administrative Officer's denial had citations to four statutes. He stated he would argue the statute of attorney-client privilege is not applicable and raise that to a level of consciousness. Mr. Onysko stated the point of his record request was

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regarding a concern about appeals combined over the objections of appellants. He reviewed his submitted exhibits.

Mr. Onysko stated he would have been okay with combined hearings if he had double the presentation time. He stated he was before the Committee in November and had two hearings, but in a later meeting, had combined hearings. He stated he objected and combining hearings is not the only issue. He stated he has not been able to get evidence subpoenas. He stated he heard the secretary is unilaterally denying hearings.

Mr. Onysko stated he asked for information on how the Committee arrived at the decision to combine hearings. He stated he is concerned about corruption to bias the appeals for governmental entities. He stated he must allege that so he can take it to court.

Mr. Onysko stated he received redacted records of comments Mr. Tonks made to the secretary and a forwarded message. He stated he is the subject of the records and should have the records unredacted. He stated the secretary sent questions to the solicitor general, Tyler Green, who wrote back that he is not the attorney to speak to. Mr. Onysko stated there should be more responsive records with correspondence with Mr. Green.

Mr. Onysko stated he is appealing the redactions and an incomplete records search. He stated the respondent failed to explain why the redactions were made.

Mr. Onysko stated the Committee cannot go back to the Chief Administrative Officer's denial because the hearing is de novo. He stated the Committee can only deliberate what is before the hearing. He stated the respondent claimed the redactions are due to attorney client privilege per 63G-2-305(17). He stated that may or may not be accurate.

Mr. Onysko reviewed court cases. He stated channeling work through a lawyer is not basis for attorney client privilege. He stated attorney client privilege can only be asserted by the client, not the attorney. He stated the Gold Standard states an attorney-client relationship does not make all correspondence protected. He stated he does not believe confidential information was in the correspondence.

Mr. Onysko stated there is a matter of public interest. He stated if attorney-client privilege is at issue, then there is not privilege. He stated if the Committee agrees with the respondent they have to look at the records and decide if 63G-2-305(17) is applicable. He stated the Department of Administrative Services classified routine administrative correspondence with a primary designation of public. He stated the department was not required to designate the records, but

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they did. He stated the respondent did not weigh public interest in knowing how the Committee decided to combine hearings without a rule.

Mr. Onysko stated he is asking the Committee to order the redactions to be reclassified as public. He stated the Committee should order the respondent to do a further search.

### **Respondent Statement**

Ms. Yates stated she is the Chief Records Officer for the state of Utah and the records officer for the Division of Archives and Records Service and the State Record Committee.

Ms. Yates stated Mr. Onysko outlined the respondent's argument already. She stated the main thing to address is that he is referring to an email entitled "rescheduling appeals" wherein Mr. Green refers to questions. She stated the questions are contained in the email thread. She stated there are no other records. She stated that she understands the response makes it sound like there are additional questions.

Ms. Yates stated the email was forwarded to Mr. Lonny Pehrson. She stated the responsive records were provided and three were originally redacted. She stated one was later provided unredacted. She stated Ms. Shaw titled the provided records as "legal correspondence", which qualifies as the client asserting attorney-client privilege.

Ms. Yates stated Mr. Tonks is counsel for the State Records Committee and Ms. Shaw is the secretary. She stated that is the role in which Ms. Shaw reached out to him. She stated all three requirements had been met.

### **Questions from the Committee**

The Committee asked Ms. Yates how she conducted her search. Ms. Yates stated she contacted Ms. Shaw specifically. She stated Mr. Onysko requested more than what is at issue. She stated she reached out to Ms. Shaw and others to ask if they had anything responsive to this. She stated Ms. Shaw was the only one with responsive records.

Ms. Yates stated the other two parts of the request were for the Chair's order that hearings be combined, and the other instances when the Committee has combined multiple appeals over objections. She stated there was no order and after speaking with multiple employees, she determined no records exist.

The Committee asked if there were communications regarding when hearings have been compelled to be combined over objections. The Committee stated other appeals had been combined and asked if Mr. Onysko is the only one to object. Ms. Yates stated that was correct.

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### **Petitioner closing statement**

Mr. Onysko stated this appeal is down to attorney client privilege. He stated he does not feel the denial was sufficient. He stated at a minimum, he should get a revised denial letter. He stated he does not believe the search was reasonable. He stated Ms. Shaw is the best secretary the Committee has had, but is only current. He stated Ms. Yates should have reached out to other sources because Ms. Shaw cannot be expected to know what went on before she arrived. Mr. Onysko stated none of the Committee members were contacted if they had correspondence.

Mr. Onysko stated attorney-client privilege requires a relationship, transfer of confidential information, and a purpose to get legal advice. He stated the court states legal advice has to do with litigation. He stated there is no attorney-client relationship between Ms. Shaw and Mr. Green. He stated the classification from the Department of Administrative Services states the records are public. He stated the resumption should be the records are public.

Mr. Onysko stated the respondent did not address public interest. He stated there is a huge concern about the way these meetings are conducted. He stated historically the Committee was renown for proper adjudication. He stated the May 2013 Saturday massacre by State Auditor John Dougall removed the best chairman the Committee has ever had. He stated it has been a fight for appellants to get subpoenas, witness, and hearings ever since. He stated the Committee is running things outside the statute. He stated he wants to hear the Committee deliberate what the court said and not their own opinions.

### **Respondent closing statement**

Ms. Yates stated she did not reach out to the Committee members because none of them were involved in the communications within the scope of the request. She stated attorney-client privilege is an important protection so that people feel they can speak to their attorneys and get counsel without it being open to the public. She stated disclosing the records would have a chilling effect on that process.

### **Deliberation**

**Motion** by Ms. Smith-Mansfield to view the records in camera. Seconded by Mr. Buchanan.

Aye: 6 Nay: 0. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams, Mr. Haraldsen, Ms. Smith-Mansfield voted in favor of the motion.

**Motion** by Ms. Smith-Mansfield to return to open session. Seconded by Ms. Dean.

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Aye: 6 Nay: 0. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams, Mr. Haraldsen, Ms. Smith-Mansfield voted in favor of the motion.

Ms. Smith-Mansfield stated this is an interesting situation because the Committee is the owner of the records. She stated the Archives provides admin support. She stated she appreciates Ms. Yates' support for the Committee. Ms. Smith-Mansfield stated this is unusual because the law does not carve out an exception for when the Committee is the governmental entity. She stated the Committee is hearing an appeal for its own records.

Ms. Smith-Mansfield stated she is surprised at the classification. She stated the owner of the records is not required to make the correspondence protected. She stated as a beacon of transparency, the Committee should always be transparent when they can be. She stated she as the entity owning the record, she sees no reason why the records should be kept classified as protected.

Ms. Smith-Mansfield stated she believes she was chair at the time. She stated the process was correct. She stated the entity went through the records and all Committee member records are delivered to the Secretary, so the Secretary has a copy and she is the record copy holder. She stated there was a phone call when they were trying to figure out the change. She stated the change in process is recent because there are so many hearings and the Committee has a time requirement. She stated the Committee is trying to get through hearings in a timely manner. She stated she had questions about the change and understood the frustration to have so many hearings that cannot be scheduled in a timely manner. She stated that was the basis of the conversation and the foundation for the change. She stated she believes there would be no other records.

Ms. Smith-Mansfield stated she is at a quandary because as a Committee member, she would have provided the records without redaction. She stated as the owner of the records she would not have relied on that because there is nothing at issue other than a procedure change. She stated she does not see anything confidential that needs to be preserved for future action. She asked how other members felt.

Ms. Dean stated she feels Ms. Shaw was seeking attorney advice. She stated she agrees with Ms. Smith-Mansfield about the transparency of this committee. She stated she believes the records were classified correctly and is looking at the weighing provision.

Mr. Williams asked if Ms. Smith-Mansfield was moving toward public interest. He stated it was not mentioned in testimony as much as he thought it would. Ms. Smith-Mansfield stated it is difficult when the majority of the presentation is not about access to the records. Mr. Williams asked if she feels the records were classified correctly. Ms. Smith-Mansfield stated the secondary designation is protected. She stated the retention schedule is approved by the Records Management Committee, but classification is not approved by committee, rather it is provided to the Archives as information. Mr. Williams stated the secondary classification of protected was followed correctly. Ms. Smith-Mansfield stated the approved retention schedule has nothing to do with classification.

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**Motion** by Ms. Smith-Mansfield to grant the appeal. The records were properly classified, but under the weighing provision, the records should be released in the public interest that the Committee be as transparent as possible. Seconded by Ms. Dean.

### **Discussion**

Ms. Dean stated there may be times when the Committee determines not to release records. She stated the classification will be reviewed each time. Ms. Smith-Mansfield stated that is a given.

Aye: 4 Nay: 2. Mr. Buchanan, Ms. Dean, Mr. Haraldsen, Ms. Smith-Mansfield voted in favor of the motion. Mr. Williams and Dr. Cornwall voted against the motion.

Ms. Smith-Mansfield stated she wished those who voted no would have stated why before the vote. Mr. Williams stated the records officer and secretary conducted a thorough search and the conversation between the secretary and counsel is appropriately protected. Dr. Cornwall stated she does not see how releasing the record changes anything. She stated the communication does not reach a solution. She stated the question is whether the Committee can combine hearings and this record will not answer that question. Dr. Cornwall stated she is concerned about the precedent set in decisions. She stated this case could be applied in another setting in a way they do not mean.

[See page 23]

The Chair stated an order will be signed by the Chair and distributed. Either party may appeal within 30 days of the date of the order to district court.

The Committee sauntered for 2 minutes.

## **2. Devon Cantwell v. University of Utah (2020-100)**

The Chair announced the hearing and requested both parties to acknowledge they cannot share anything discussed in mediation with the Committee. Both parties agreed.

### **Petitioner Statement**

Mr. Brodis stated he is the attorney for Ms. Cantwell. He stated the University has produced the email portion of the request, so all that's at issue is the Bedera Report and the University's response to Ms. Bedera.

Mr. Brodis stated Ms. Bedera created a report and submitted it to several offices at the University and requested it be used to implement her suggested changes. He stated one of the offices she sent it to was the Equal Opportunity Office (OEO). He stated one of the challenges of the Title IX office is how to handle allegations. He stated the rights of the survivor and the accused need to be balanced. He stated Ms. Bedera is a researcher who specializes in Title IX.

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He stated she is an expert in the field. Mr. Brodis stated there are real world consequences of the policies related to Title IX and that is why Ms. Cantwell is interested.

Mr. Brodis stated the respondent suggests anything capable of copyright is not a record under GRAMA per 63G-2-103(22). He stated a recent decision from Judge Conners stated giving a person too much right, you stifle creativity in the long run. He stated that to achieve progress is to create a work with a limited ability to prevent duplication. He stated fair use needs to be flexible and an assessment of the circumstance in each case needs to be evaluated.

Mr. Brodis stated there are four factors in copyright. First is the nature of use, then the nature of the work. The amount of work used in reproduction. He stated sometimes the entire thing needs to be duplicated to make fair use. He stated the purpose makes it fair use. Last is the impact on the market.

Mr. Brodis stated the respondent claims if the requested records are records under GRAMA, they are protected per 63G-2-305(40). He stated this allows protection under education institutions for unpublished manuscripts and scholarly correspondence. He stated Ms. Bedera's report was not done in the context of academia, but advocacy. He stated Ms. Bedera told the respondent what she observed and why the University should change its policies.

Mr. Brodis stated if 63G-2-305(40) is correct, the public interest in the report outweighs the interest of it being withheld. He stated due to campus safety, there is strong interest to release this report.

Mr. Brodis asked Ms. Cantwell when UnsafeU began. Ms. Cantwell stated it was the fall of 2019 in response to what they saw as insufficient movement on Title IX issues, in particular the McClusky lawsuit. She stated they began an Instagram page and many people began submitting stories of going through the process with the OEO. She stated the mission expanded to more broadly advocate for changes to provide better support for survivors and victims.

Mr. Brodis asked what the Title IX office at the university is supposed to do. Ms. Cantwell started as an athletic compliance thing and now provides broader protections for gender and women in institutional settings. She stated one reason they are interested in Ms. Bedera's report is because of her expertise examining the legal boundaries for Title IX offices. She stated one argument Ms. Bedera makes is Title IX offices are falling short in many ways of protecting survivors. She stated Ms. Bedera advocates to improve these processes which she believes is what happened with this report.

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Mr. Brodis asked Ms. Cantwell what happens when the balance is not struck properly. Ms. Cantwell stated there is a lot of emerging research on this now. She stated one of the biggest findings is victims pay significant legal and mental challenges when the process is not followed properly. She stated often the student withdraws from the program, changes majors, or drops out of school completely.

Mr. Brodis asked Ms. Cantwell if she recognized the names of staff who received the report from Ms. Bedera. Ms. Cantwell stated she did and they are all administrators, not professors. Mr. Brodis asked what the importance is of the report and how it fits her mission to improve campus safety. Ms. Cantwell stated there are two reasons. First, some of the conversations found with former staff and students is that the university is dismissive with Title IX cases. He stated it is important to know what recommendations the university has been given. She stated they do not know what the recommendations were and whether they were appropriately implemented.

#### **Respondent Statement**

Ms. Ballantyne stated she is an attorney for the respondent. She stated a graduate student at the University of Michigan contacted the University about being a field site for her graduate research on Title IX. She stated because the respondent is a university and supports academic work, they agreed to be a field site. She stated they did not seek out the research and did not pay for it. She stated they were only a participant.

Ms. Ballantyne stated at the end, the student provided a report and powerpoint. She stated the University found several methodological and research issues with the report and communicated those to the student and her PhD supervisor. She stated to her knowledge, the student did not elect to publish either the report or powerpoint.

Ms. Ballantyne stated the respondent sought permission from the student and the university to produce the record to the requester. The student and university declined. She stated they looked to GRAMA to see if it could be provided without permission. She stated they concluded it would infringe copyright.

Ms. Ballantyne asked Ms. Hayashi to introduce herself. Ms. Hayashi stated she is the director of the OEO.

Ms. Hayashi stated they are always looking for ways to improve and serve. She stated they welcome feedback. She stated in early 2017 a colleague stated a friend was a PhD student interested in doing research in Title IX. She stated it was part of a larger project collecting data from over 300 campuses. She stated the University was one of several field sites in the study.

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She stated this was not a study on campus safety, but the student experience with the Title IX process.

Ms. Hayashi stated protecting the privacy of students was critical. She stated they were assured neither the students or university would be identified in any study or published work. She stated they did not ask for the study but agreed to participate because it was appropriate to support academic research.

Ms. Hayashi stated the students were easy to identify and a breach in confidentiality created a concern of students being re-traumatized. She stated there were factual inaccuracies so the conclusions were based on faulty information. She stated the research did not involve policies, case files, or other documentation. She stated it relied on interviews which can be based on perception rather than the facts. Ms. Hayashi stated in her opinion the report is work by a student who approached the University to be a field site. She stated they shared feedback with the faculty advisor and hoped to provide a conversation for the student and her professor to discuss. She stated the work was not solicited, requested, or procured. She stated due to the significant flaws in the report, the OEO did not rely on the report or any of its recommendations.

Ms. Ballantyne stated the legal issue hinges on copyright law. She stated the creator owns the copyright. She stated both sides agree it is not a record if the copyright laws restrict that access. She stated the question for the Committee is whether this is a fair use under copyright.

Ms. Ballantyne stated there are four balancing factors. First is the purpose of the use. She stated the key factor is whether the use is transformative. She stated the point of copyright is to encourage creativity. She stated there is no request to create something new because the use is the same purpose Ms. Bedera created it for.

Ms. Ballantyne stated the second is the nature of the work. She stated this case has unpublished documents and the Supreme Court stated unpublished work weighs heavily against fair use. She stated these records have not been distributed to the public. Ms. Ballantyne stated third is the amount of the work used. She stated the request is for the full report, not limited portions. She stated the last point is the effect and use of market value. She stated there is a market for scholarly publications. She stated the student has the right to publish her work. She stated the petitioner can go to Ms. Bedera and get it because the respondent is not the only holder of the record.

Ms. Ballantyne stated they do not believe these are records, but if they were, they would be properly classified protected as unpublished manuscripts and scholarly correspondence. She

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stated the records are scholarly work. She stated the interest in protection outweighs public access. She asked the Committee to uphold the determinations that the records are not records under GRAMA.

### **Questions from Committee**

The Committee asked if the student failed to provide permission or if she declined. Ms. Ballyntine stated she declined. The Committee asked if the University is the repository for the record. Ms. Ballyntine stated the University has been given the records but they do not own the records. She stated copyright protects a bundle of rights including copying or displaying a creator's work. She stated both are infringed unless it is fair use.

### **Petitioner for closing statement**

Mr. Brodis stated UnsafeU would use the report to check if the assertions of Ms. Bedera are accurate. He stated if this is considered unpublished then everything sent to a legislator can be prohibited from release because it is protected by copyright. He stated if the work was used to change policies it should be released.

Mr. Brodis stated copyright does not allow inquiry behind closed doors. He stated the University took it upon themselves to criticize Ms. Bedera's work when it was given to them to make policy changes. He stated Ms. Bedera was told she cannot publish the work without permission from the University so he is not surprised she did not sign the release. He stated the absence of the copyright holder at the hearing is telling.

### **Question from Committee**

The Committee asked Mr. Brodis if he has read any of Ms. Bedera's published works. Mr. Brodis hasn't. Ms. Cantwell stated she has read some of her scholarly work and publications in magazines. The Committee asked Ms. Cantwell if she has had personal discussions with Ms. Bedera. Ms. Cantwell stated that she has.

The Committee asked if she can relate what the conversations were about. Mr. Brodis stated the respondent has shifted the burden to the requester to show they have tried to get the requested records in other ways. Dr. Cornwall stated that she is a retired professor of 20 years and has done research on sexual abuse. She stated she has taught gender issues and would like to know what Ms. Cantwell learned by talking to Ms. Bedera.

Ms. Cantwell stated she is a graduate student and just finished masters defense and going into a PhD program. She stated she is familiar with ethics approval and ethical protocols. She stated she is not aware of Ms. Bedera's protocol but her understanding is that the subject of the

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studies can choose to share information with who they would like. She stated the respondent could release the records to others who ask for it.

Ms. Cantwell stated it is a scary position to be in when an institution with a large legal team makes accusations about the validity of research. She stated she would not release them if she were the graduate student because she wouldn't want to put her academic career at risk, especially if the work criticizes an institution about how they have handled an issue of power. She stated the academic setting makes this more complicated. She stated her understanding is that the report was provided as policy recommendations.

Dr. Cornwall stated she is concerned about the women interviewed for the study. Mr. Brodis stated the entire report was denied so they have not discussed redactions. He stated they would be happy to talk about redactions to protect the privacy of individuals but it has not been raised yet.

#### **Respondent Closing statement**

Ms. Ballantyne stated the report had fundamental misunderstandings of the law and the university does not believe she was an expert. She stated her methodology needed to be communicated back to her and her advisor. Ms. Ballantyne stated the University was promised no students would be identified, but it was clear in the report that any student who read it could be subject to retraumatization. She stated if the report were released all of it those would need to be redacted.

Ms. Ballantyne stated the key legal argument is that it is not a record under GRAMA. She stated no one disputes it is copyrighted. She stated Ms. Bedera has a right to control whether the work is published. She stated they are not arguing that anything unpublished is not a record. She stated this is about a graduate student's research and it is not a record.

#### **Deliberation**

Dr. Cornwall stated she feels for the student having her first research experience. She stated it appears Ms. Bedera has begun to publish in the last two years and everything is comparative. Dr. Cornwall stated releasing this would be devastating to the academic experience when poor research is used.

Ms. Smith-Mansfield stated professors own their own research and it is not the university's record. Dr. Cornwall stated that is correct. She stated getting internal review approval to do research depends greatly upon what you say about the protection you will provide your subjects. She stated this report being released could ruin her career.

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Ms. Smith-Mansfield stated the petitioner is saying even if the record is copyrighted, it falls under fair use. Dr. Cornwall stated it does not belong to the respondent, but to the researcher. She stated the respondent does not have a contract with the researcher. She stated it would be different if this report was requested and procured.

**Motion** by Dr. Cornwall moved to deny the appeal per 63G-2-103(22)(b)(4) that copyrighted materials are not records under GRAMA. Seconded by Ms. Smith-Mansfield.

#### **Discussion to the motion**

Mr. Williams stated he's confused. He stated 63G-2-305(40) lists specific works not public, but research is called out specifically. He stated it does not say research records are not records under GRAMA. Dr. Cornwall asked if the citation means her lectures are government records.

Ms. Smith-Mansfield stated the respondent argued it is not a record, but if it were considered a record by the Committee, 63G-2-305(40) would apply. She stated professors' work would be protected, but in practice they are generally not provided to university archives. She stated they keep the ownership of the research they have.

Ms. Smith-Mansfield asked if anyone disagrees with the motion. Mr. Williams stated he is in support of the motion. Mr. Buchanan stated he is in favor of the motion. Dr. Cornwall stated she is taking the word of the respondent that the report was bad. She stated she has never seen a masters level report that was not bad. She stated that is the nature of the masters research.

Aye: 6 Nay: 0. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams, Mr. Haraldsen, Ms. Smith-Mansfield voted in favor of the motion.

The Chair stated an order will be signed by the Chair and distributed. Either party may appeal within 30 days of the date of the order to district court.

The Committee sauntered for 4 minutes.

### **3. Sandra Guzman v. Division of Child and Family Services (2020-127)**

Chair announced the hearing. The petitioner was not in attendance.

#### **Respondent Statement**

Ms. Wood stated it was their understanding that there were three records before the Committee. She stated one was a case file from 2020. She stated this was denied because of an open investigation and protected under 63G-2-305(10) and 62A-4a-412(3). She stated the 2014 case file was unsupported and the petitioner was not the perpetrator pursuant to 63G-2-202(10). The third was Children's Justice Center (CJC) interviews, which are not records per 77-37-4. Ms. Wood stated the CJC files are moot because the petitioner's counsel got a copy from the Fourth District Court.

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Ms. Woods stated prior to the last hearing the investigation was terminated and charges were dismissed. She stated they could make those records available. She stated the parties were supposed to meet with Ms. Cundiff but she never heard from any party. She stated she did not have address information for the petitioner and would need that before sending a protected record.

### **Questions from Committee**

The Committee asked if she had contact information from the initial GRAMA request. Ms. Wood stated she did, but months had passed and she does not want to assume the address is still correct.

The Committee asked Ms. Wood if the 2014 case was unsubstantiated but the 2020 case could be provided. Ms. Wood stated that was correct. She stated she believes the 2014 denial should stand.

### **Deliberation**

Ms. Dean thanked the entity for going back to review what could be released.

**Motion** by Ms. Dean to grant the appeal in part and deny the appeal in part. The 2014 case cannot be released per 63G-2-202(10) and the CJC interviews are not records per 63G-2-103(22)(b)(x)(5). The 2020 case file should be provided because the charges are no longer pending. Seconded by Mr. Haraldsen.

### **Discussion to the Motion**

Ms. Wood asked for clarification on 77-37-4 is incorrect. 77-37-4 governs access to the CJC interviews. She asked if the Committee can find the initial denial was appropriate.

Ms. Smith Mansfield stated "no longer pending" indicates it was pending. Ms. Dean stated the Committee does not know about any redactions. Ms. Wood stated the 2020 report only had informant information redacted per 62A-4a-412(3).

Aye: 6 Nay: 0. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams, Mr. Haraldsen, Ms. Smith-Mansfield voted in favor of the motion.

The Chair stated an order will be signed by the Chair and distributed. Either party may appeal within 30 days of the date of the order to district court.

### **4. Raphael Cordray v. Duchesne County (2020-137)**

The Chair announced the hearing and requested both parties to acknowledge they cannot share anything discussed in mediation with the Committee. Both parties agreed.

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### **Petitioner Statement**

Ms. Cordray thanked the Committee for hearing the appeal. She stated she has learned a lot from listening to and reading the Committee's rulings. She stated she is appealing the County's refusal to give reasonable consideration to waive the fee of her December 2, 2020 request.

Ms. Cordray stated her request is crucial to the public's ability to understand the impact of the Uintah Basin Railway on Duchesne County and Utah. She stated she got a response the day after her request asking for a payment of \$83.50 for paper copies. She stated she asked for a fee waiver and electronic copies. She stated the fee was adjusted to \$61 for electronic copies. She stated she paid the fee in protest so she could get the records. Ms. Cordray stated payment does not make her request for a fee waiver moot because she paid in protest and she would like the fee refunded.

Ms. Cordray stated governmental entities cannot routinely deny fee waiver requests, but must consider the merits of the request. She stated the public impact by the railway shows the release of these records is in the public interest. She stated GRAMA allows records to be furnished without charge when the public interest is served.

Ms. Cordray stated the county argued she does not belong to a news agency, but GRAMA does not require she belong to a news agency. She stated she has a webpage and public blog at tarsandsresist.org where she writes about fossil fuel development and tar sands and strip mining. She stated her newsletter has 500 subscribers and the Facebook page has 4,000 followers. She stated she shares information about the Seven County Infrastructure Coalition and Uintah Basin Railway among other things. She stated she is not paid for these activities and her fee waiver is merited.

Ms. Cordray stated the respondent did not offer a reason to deny the fee waiver request. She stated the county demanded \$10 per electronic copy and \$50 for staff time exceeds the lowest paid employee. She stated the first 15 minutes were not discounted. She stated she believes \$0.10 per electronic page is unreasonable. She stated she should be able to inspect the records for free, especially during a pandemic.

### **Respondent Statement**

Mr. Allred stated the appeal is for a refund. He stated nothing in this is free because either the requester pays for it or the taxpayer. He stated Ms. Cordray needs to prove the fee was unreasonable. He stated he does not believe \$61 is worth arguing.

### **Question from Committee**

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The Committee asked if the electronic version had 10 cents per copy and staff time? Mr. Allred stated he guessed so. He stated their fees are established by ordinance.

The Committee asked what the ten cents cost covers. Mr. Allred stated they printed everything. He stated it was established by ordinance so he is not ready to argue the cost to scan paper. The Committee asked if the cost to scan would be staff time. He stated he supposed it would be. The Committee stated it appeared to be a double charge. Mr. Allred stated there was no charge for scan time. He stated two people pulled the records from the computer. The Committee asked if the fee included scanning time. Mr. Allred stated it did not, it was for retrieval.

The Committee asked if the lowest paid of the two people was \$25 an hour. Mr. Allred stated it is a two person department. He stated they averaged their time and charged \$25 an hour. He stated they both spent more than an hour. He stated it is not well itemized because that takes too much time.

#### **Petitioner Closing**

Ms. Cordray said the respondent never considered waiving the fee. She stated she never received a letter denying the fee. She stated the respondent did not address the merits of her fee waiver request. Ms. Cordray stated she has a right to know the reason the fee waiver was denied. She stated producing electronic records, printing them, then scanning them back in does not make sense. Ms. Cordray stated the records benefit the public and she used them to further public knowledge of the matter.

#### **Respondent Closing**

Mr. Allred stated the statute allowed for reasonable costs to be paid. He stated there should not be a refund issue.

#### **Deliberation**

Mr. Haraldsen wondered if the Committee has authority to require a refund. Ms. Smith-Mansfield stated it has been done before, but no one has ever argued that it cannot be refunded. She stated there is a provision to charge an estimate and entities are expected to refund what isn't expended.

Dr. Cornwall stated it hinges on whether the community benefited from the information. Mr. Williams stated the public interest was addressed in the petitioner's testimony.

Ms. Dean stated the entity established fees by ordinance and has done what is required to set the fees. Ms. Smith-Mansfield stated the Committee generally does not rule if it was a reasonable fee if it is by ordinance. Dr. Cornwall stated entities are encouraged to waive fees if it benefits the public. Ms. Dean stated it is suggested and she is not convinced they were unreasonable.

Mr. Haraldsen stated the Railway is a big deal and many people know about it. He stated there is strong precedent the public wants to know what is going on with the Railway. Ms. Smith-Mansfield stated GRAMA defines who is acting in the public interest. Dr. Cornwall asked Mr. Haraldsen if there are local newspapers in Duchesne County. Mr. Haraldsen stated there are

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a couple. He stated he is supportive of people with strong Facebook groups and blogs because their right to get information is just as valid as the media. He stated that he thinks the fee is a little absorptive. Dr. Cornwall stated if she were running a small newsletter, \$61 would be important.

**Motion** by Dr. Cornwall to grant the appeal due to public interest as it was an unreasonable denial of a fee waiver per 63G-2-203(6)(a). Seconded by Ms. Smith-Mansfield.

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

**Motion** by Dr. Cornwall to deny the appeal as it was not an unreasonable denial of a fee waiver. Ms. Dean seconds.

Aye: 4 Nay: 2. Mr. Buchanan, Ms. Smith-Mansfield, Ms. Dean, and Mr. Williams voted in favor of the motion. Dr. Cornwall and Mr. Haraldsen voted against the motion.

The Chair stated an order will be signed by the Chair and distributed. Either party may appeal within 30 days of the date of the order to district court.

The Committee sauntered a 30 minute lunch break.

##### **5. Carl Fisher (Save Our Canyons) v. Department of Transportation (2021-08)**

The Chair announced the hearing and requested both parties to acknowledge they cannot share anything discussed in mediation with the Committee. Both parties agreed.

##### **Petitioner Statement**

Mr. Fisher shared his screen.

Mr. Fisher stated he is the executive director for Save Our Canyons, a non-profit organization. He stated their mission is to protect the wildness and beauty of the Wasatch Front. He stated that one critical objective is to protect the water resources.

Mr. Fisher stated the respondent was required to perform a Environment Impact Study (EIS) for the Little Cottonwood Project. He stated that normally a federal agency would do the EIS, but the respondent sought to do it on its own. He stated there was a Memorandum of Understanding between the Federal Highway Administration and the Utah Department of Transportation. He stated there is a requirement for the public to be allowed to participate.

Mr. Fisher stated there are critical points for public engagement. He stated the respondent received their request on November 10th and received no response. He stated they appealed to the Committee on January 7th but the time to be involved in the EIS had passed. He stated five

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months have passed before records were provided. He stated there are substantial redactions and 95 pages withheld according to the Bates numbering. Mr. Fisher stated there is no explanation for the denial or redactions. He stated the delay in receiving the records harmed their participation in the process. He requested the Committee review all the responsive records not already fully provided and determine if they should have access to the records.

### **Respondent Statement**

Mr. Palmer stated he came to agree to provide the petitioner whatever they want. He stated he would gladly provide any explanations they need for redactions. He stated it was never the respondent's intention to deny the records. He stated the delay was his fault. Mr. Palmer stated 5,000 pages had been provided. He stated anything the petitioner wants done to remedy the situation, he can agree to.

### **Question from Committee**

The Committee asked if the respondent is agreeable to providing the records unredacted. Mr. Palmer stated some reactions are private email addresses and phone numbers. He stated he can provide those materials to the Committee to review. He stated there are also redacted drafts. The Committee asked if he would provide a citation for all of the redactions. Mr. Palmer stated he would need to prepare that.

### **Petitioner closing**

Mr. Fisher stated he appreciated Mr. Palmer's engagement, but the delay happened before he was involved. He stated they received 5,000 pages on April 4th. He stated he has no issue with the private redactions, but redactions unlawfully held. He stated the respondent has demonstrated they cannot be trusted to make lawful redactions. Mr. Fisher stated he would be making another request for the same records to bring everything to the current date.

### **Question from Committee**

The Committee asked if he is saying he questions the redactions as inappropriate. Mr. Fisher stated he is.

### **Respondent closing**

Mr. Palmer apologized for the delay. He stated he would take full responsibility because he does not want it to reflect badly on his client agency. He stated he would make sure the petitioner gets what they want.

### **Deliberation**

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**Motion** by Ms. Smith-Mansfield to review records in camera and continue the hearing. Seconded by Ms. Dean.

**Discussion to the motion**

Ms. Smith-Mansfield stated reviewing the records may forestall issues with the next request because the respondent would have the Committee's opinion on appropriate redactions. Ms. Dean stated she would want to know what was withheld with citations. Mr. Williams and Ms. Smith-Mansfield agreed.

Dr. Cornwall stated she is not convinced it is efficient for the Committee to be involved yet because the respondent has more records to provide, and petitioner needs more time to review the records he received on April 4th. She stated the parties could report next month on their progress and narrow the records the Committee needs to review. Ms. Smith-Mansfield stated that would be a new motion.

Ms. Dean stated the petitioner has already waited a long time to get this far. She stated the Committee could give guidance so the process can go smoother. Dr. Cornwall stated requiring a citation matrix from the respondent for in camera review would slow the process for the next request.

Ms. Smith-Mansfield stated the reason for her motion is the petitioner has been waiting a long time and the redactions would be appealed regardless. Ms. Dean stated they could encourage the Government Records Ombudsman to help the process.

Dr. Cornwall stated they do not have any sense of how big this project is and she would encourage the parties to provide what they can to the Committee to reduce the volume of records to review.

Aye: 6 Nay: 0. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams, Mr. Haraldsen, Ms. Smith-Mansfield voted in favor of the motion.

The Chair stated an order will be signed by the Chair and distributed. Either party may appeal within 30 days of the date of the order to district court.

**6. Tiffany Gilman v. Unified Police Department (Cont. 2020-107)**

The Chair announced the hearing.

**Deliberation**

**Motion** by Ms. Dean to go into closed session. Seconded by Mr. Haraldsen.

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Aye: 6 Nay: 0. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams, Mr. Haraldsen, Ms. Smith-Mansfield voted in favor of the motion.

Mr. Buchanan left the meeting.

**Motion** by Ms. Dean to return to open session. Seconded by Ms. Smith-Mansfield.

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

**Motion** by Ms. Dean to grant the appeal and order the records be released because after reviewing the records in camera, the Committee is not convinced it is an open investigation being worked actively. Redactions may be made per 63G-2-305(10)(d) to protect sources not known outside the government. Seconded by Ms. Smith-Mansfield.

**Discussion to the motion**

Ms. Dean stated some redactions would be appropriate. She stated the entity did not use the right classification. And instead of using 63G-2-305(10)(a), it should be (10)(d). Ms. Smith-Mansfield stated the entity was overbroad with redactions.

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

Ms. Smith-Mansfield stated this is specific to sources not known outside government and the victim is known. Dr. Cornwall stated that changes the motion. Ms. Smith-Mansfield said the victim is not a source and maybe they should revisit the motion. Dr. Cornwall stated it changes the vote for her.

Ms. Dean stated the victim's name is known and redacting it is overbroad. Dr. Cornwall stated there are unsubstantiated statements made and she was a minor at the time. She stated she feels protective of her as much as the other minors named.

Mr. Tonks stated the Committee can revisit motions to change the previous one. Ms. Smith-Mansfield stated Dr. Cornwall's new motion should include 63G-2-302(2)(d) that releasing the victim's name is a clearly unwarranted invasion of personal privacy.

Mr. Souvall stated the name of missing minors is often released and they do not consider the victim's name to be private. Dr. Cornwall stated she is concerned about what is said about her, her friends, and her family. Mr. Tonks stated they could redact the actions but not the victim's name.

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**Motion** by Dr. Cornwall that any information about the victim who was a minor be redacted under 63G-2-302(2)(d) in addition to names not known outside of government under 63G-2-305(10)(d).

It was not seconded.

Ms. Smith-Mansfield stated if that motion passed, nothing new would be released. Dr. Cornwall stated she agrees there is too much redacted. Ms. Smith-Mansfield stated the story is commonly known. Dr. Cornwall stated she cannot support a motion because unsubstantiated information is given about the victim.

**Motion** by Ms. Smith-Mansfield to revoke on the original motion. Mr. Haraldsen seconded.

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

**Motion** restated by Ms. Dean to grant the appeal and order the records be released because after reviewing the records in camera, the Committee is not convinced it is an open investigation being worked actively. Redactions may be made per 63G-2-305(10)(d) to protect sources not known outside the government. Seconded by Mr. Haraldsen.

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

Mr. Souvall asked if the information provided by sources is being redacted. He asked if the Committee would look at page 18. He stated the statement of the Vice Principal should not be released to the public because it is hurtful to the family and does not belong in the public domain. Dr. Cornwall stated a feminist would have a lot to work with in these records because the victim is blamed. Ms. Smith-Mansfield stated that is why it should be released. She stated it is all unsubstantiated, but shows how people were thinking. She stated there is a much higher bar of privacy if it is to extend to family members.

Chair asked if the petitioner would like to comment.

Ms. Gilman stated it is important to talk about the fact for many of these victims they were blamed one way or another. She stated she would be writing with a feminist perspective. She stated the police did the best they could, but had a biased lens of the time period. She stated part of the story will be that it is unsubstantiated.

Dr. Cornwall asked the petitioner to do no more harm to Nancy Wilcox. Ms. Gilman stated the victims are the emphasis of the work because not enough has been written about them. She stated they deserve to be known more than the person who killed them.

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The Committee sauntered 2 minutes.

## **Business part 2 of 2**

### **Approval for March 11, 2021 minutes**

Dr. Cornwall suggested an edit on page 9. Mr. Pender said it was changed when they got a records request. She stated he was arguing from the beginning that they didn't change the status, it was always closed. Ms. Shaw stated the status changed on the website when the request was received. Dr Cornwall suggested they add "on the website".

Chair asked to read it back.

"Committee asked for dates or evidence of when the case went from solved to unsolved. Mr. Pender said the status of the case was not changed, but the status of the website was changed. He stated he was not working on the website and the person who posted the case to the website was not working in cold cases full time."

**Motion** by Ms. Dean to approve the minutes as amended. Seconded by Dr. Cornwall.

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

### **Updating Administrative Rules**

Mr. Tonks stated he and Ms. Nelson were tasked with updating rules related to the department name change.

**Motion** by Ms. Smith-Mansfield to authorize legal counsel to make necessary changes to existing rules. Seconded by Ms. Dean.

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

Ms. Shaw suggested a rule update to clarify records provided electronically for in camera review are not returned to the entity, but are destroyed. Ms. Smith-Mansfield stated the Committee can suggest the attorney work on some language for a vote and they could vote at the next meeting.

Ms. Smith-Mansfield stated the Committee is seeing petitioners' appeals based on issues that are not about records access. She stated a clarification in rule could provide guidance to petitioners to help them understand the difference. Ms. Williams stated this change would be easier on the Chair. Ms. Smith-Mansfield stated the change would help because often they hear issues the Committee cannot do anything about. She stated anything about procedure and process is not in their jurisdiction.

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Dr. Cornwall asked what happens when those appeals are received. Ms. Smith-Mansfield stated they hear them because there is an access issue, but it would help to limit the appeal to the access issue.

**SRC appeals received and declined, notices of compliance, and related action items**

Ms. Shaw reviewed appeals withdrawn. Five appeals were denied.

**Cases in district court, report**

Mr. Tonks requested a motion to go into closed session per 52-4-205(1)(c) for a strategy session to discuss pending or imminent litigation. He stated he had a few things he would like to cover with the Committee in closed session.

**Motion** by Ms. Smith-Mansfield to go into closed session. Seconded by Ms. Dean.

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

Mr. Buchanan returned to the meeting.

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

Aye: 6 Nay: 0. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams, Mr. Haraldsen, Ms. Smith-Mansfield voted in favor of the motion.

**Cases in district court, report**

Mr. Tonks reviewed the status of cases in district court.

Dr. Cornwall stated she had been bothered by the Onysko case and wondered if they could revisit it. She stated this was done on the last hearing so she was hoping they could revisit the first hearing.

**Motion** by Dr. Cornwall to reconsider the motion in the Onysko v. DAS (2020-133) case. Seconded by Ms. Smith-Mansfield.

**Discussion to the motion**

Dr. Cornwall stated she does not believe the Committee should make a decision about their own records. She stated she worries that they are trying to be too transparent and may end up setting precedent around attorney-client privilege. She stated she thinks they should go back and encourage Mr. Onysko to appeal to the District Court. She asked Mr. Tonks if they have ever heard an appeal for their own records request. Mr. Tonks stated no.

Dr. Cornwall stated denying the appeal would facilitate the appeal going forward to district court. Ms. Smith-Mansfield stated she supports the motion to reconsider. She stated the vote was taken before anyone explained their reasoning for voting against the motion.

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Aye: 6 Nay: 0. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams, Mr. Haraldsen, Ms. Smith-Mansfield voted in favor of the motion.

**Motion** by Dr. Cornwall to deny the appeal because the Committee isn't independent enough to review an appeal about its own records. Seconded by Ms. Smith-Mansfield.

**Discussion to the motion**

Dr. Cornwall stated that would like to encourage the petitioner to let the district court instruct both them and the Committee. She stated if the petitioner is worried about corruption, reviewing your own behavior provides opportunity for corruption.

Ms. Smith-Mansfield stated the Committee should be transparent but she wonders if she can separate that from the entity's reasoning for attorney-client privilege. Ms. Dean stated she is a record officer, but her attorney has asked her on occasion which hat she is wearing, the entity or the Committee. She stated it is hard to do sometimes so she can see what Dr. Cornwall is saying.

Ms. Smith-Mansfield stated it comes down to the perception of fairness if they rule on their own records. Mr. Williams stated they all wear multiple hats. He stated he likes the motion as the Committee needs guidance. He stated the Committee is impartial with people from various professions and roles. Ms. Smith-Mansfield stated attorney-client privilege has always been difficult for her. She stated she would always err on the side of releasing the record. She stated she agreed the perception of voting on their own records is not a good one, so she doesn't know how to vote. Dr. Cornwall stated not knowing how to vote is another reason to send it to district court. Mr. Buchanan stated it was awkward to review this appeal and he supports the motion.

Aye: 5 Nay: 1. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams, Mr. Haraldsen, voted in favor of the motion. Ms. Smith-Mansfield voted against the motion.

Ms. Smith-Mansfield stated she agrees with the motion but voting nay because GRAMA has not provided another avenue and put the Committee in this position. Ms. Dean stated GRAMA provides for people to appeal to district court or the Committee. Ms. Smith-Mansfield stated that is the petitioner's decision, not the Committee's.

**Format and quorum verification**

The Committee would have a quorum on April 29th.

**Motion to Adjourn**

The Chair adjourned the April 8, 2021, State Records Committee meeting at 4:32 p.m.

**This is a true and correct copy of the April 8, 2021, SRC meeting minutes, which was approved on April 29, 2021. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>.**

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X /e/ Rebekkah Shaw  
Executive Secretary

APPROVED