

State Records Committee Meeting

Date: June 10, 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
Mark Buchanan, Private Sector Records Manager
Marie Cornwall, Citizen Representative
Tom Haraldsen, Media Representative

Committee Members Not Present:

Vacant, Electronic Records and Databases Representative
Patricia Smith-Mansfield, Citizen Representative

Legal Counsel:

Paul Tonks, Assistant Attorney General
Anne Nelson, paralegal

Executive Secretary:

Rebekkah Shaw, Utah State Archives

Others Present in person:

Mark Burns, Assistant Attorney General, UDOT
Mark Allen
Adam Beck, Attorney, Utah County
Diana Flores, Utah County
Laura Mendoza, Utah County
Katrina Cole, Utah County
ARO, Utah County
Kendra Yates
Susan Mumford
Renée Wilson

Others Present via Zoom:

Blake Hamilton, Attorney
Rosemary Cundiff
Greg Thompson, University of Utah
Leia Larsen, Tribune
Robert Sloman
Mark Guetlich, Attorney

Robert Payne, Attorney, University of Utah
Andrew Wirick, University of Utah
Michael Clara
Laura Stetson, University of Utah
Alex Vegas
Anna Marie Paseman
Stacie Simpson, University of Utah

Agenda:

- Three Hearings Scheduled
 - Thatcher v. Department of Transportation (2020-106 Continuance - report)
 - Rob Sloman v. University of Utah (2021-29)
 - Mark Allen v. Utah County (2021-25)
- Business:
 - Approval of May 13, 2021, SRC Minutes, action item
 - Updating administrative rules, action item
 - SRC appeal 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 Chair called the meeting to order at 9:02 am.

1. Thatcher v. Department of Transportation (2020-106. Continuance- report)

The Chair announced the hearing.

Petitioner Statement

Mr. Hamilton stated records were received the previous day. He requested one more continuation to hopefully resolve everything in mediation.

Respondent Statement

Mr. Burns stated all responsive records were provided. He stated an index has been created of what was not produced which may help determine what in camera review may be necessary.

Deliberation

Motion by Ms. Dean to continue the hearing until July 8th. Seconded by Mr. Haraldsen.

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

Business part 1 of 3

Motion by Ms. Dean to approve the April 29th meeting minutes. Seconded by Mr. Buchanan.

Aye: 4. Nay: 0. Abstain: 1. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams voted in favor of the motion. Mr. Haraldsen abstained because he was absent.

The Committee reviewed and discussed changes to administrative rules.

Motion by Ms. Dean to approve the proposed amendments to rules and put them through the rulemaking process. Seconded by Ms. Cornwall.

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

SRC appeal received and declined, notices of compliance, and related action items

The executive secretary reviewed appeals denied, notices of compliance received, and notices of intent received. The Committee discussed whether the Statewide Association of Public Attorneys is a governmental entity. The Committee asked Ms. Shaw to contact the State Auditor's office and report back. The secretary reviewed Mr. Steven Pace's request the Committee reconsider his appeal.

The Chair reviewed the status of the Committee's current vacant seat.

Committee sauntered for 5 minutes.

2. Robert Sloman v. University of Utah (2021-29)

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. Guetlich explained his frustrations with the respondent's response and requested the Committee ask the University for an apology. He stated one of the two requests in this appeal was made in September 2020, and there is no reason for the respondent to take so long. He stated the other request is regarding a fee of \$1,600. He stated the fee is inflated. Mr. Guetlich asked the Committee to oversee the process of and delivery of records for the first request.

Questions from the Committee

Mr. Williams asked if the fee was a prepayment. Mr. Guetlich explained all fees have been paid.

Dr. Cornwall asked for clarification regarding the respondent's denial. Mr. Guetlich stated the initial response was that there were too many records and the request should be resubmitted. He stated there was not assistance to clarify the request. Mr. Payne stated the appeal to Dr. Thompson asserted the University did not provide a date by which the records would be produced. He stated Dr. Thompson agreed and required the University to provide records by a certain date on a rolling basis. Mr. Payne stated the appeal is about the timing and the cost.

Respondent Statement

Mr. Payne stated the petitioner sought records of the University PIVOT Center. He stated the request was problematic and asked Mr. Wirick to explain.

Mr. Wirick was sworn in by the Chair.

Witness Statement

Mr. Wirick stated he is the Vice President for research at the University. He stated a major component in research is not just discovery, but delivery. He stated the PIVOT Center handles a lot of confidential information. He stated record requests cost time to carefully review and redact information. He stated the request was broad which made it difficult to do in a timely manner. Mr. Wirick stated the records will be released.

Respondent Statement

Mr. Payne stated they have to carefully search the records and review them carefully to make sure they are responsive and redacted properly. He stated the petitioner understands how cumbersome it is because his company created the database PIVOT has used to manage documents. He stated a three-year time span and search terms like "data", "analytics", and "metrics" are too broad.

Mr. Payne explained the University has a GRAMA request backlog and could not start his request immediately, but they informed the petitioner and gave a response time estimate. He stated the request was denied because the search terms were too broad. He stated the petitioner divided the request into 21 different requests with shorter time periods. Mr. Payne stated the first request covered two and a half months and pulled 17,000 pages of emails and attachments. He explained their process of reviewing the records.

Mr. Payne stated their fee estimate for the search and review was short and they charged another \$400. He stated GRAMA entitles the respondent to charge reasonable costs for the work. He requested the Committee to deny the appeal.

Petitioner Statement

Mr. Guetlich stated "data" is not a search term in the request. He stated all the petitioner is interested in are records related to the repayment of the management information system. He stated that is a narrow topic that should not be producing thousands of responsive records.

Question from the Committee

Dr. Cornwall asked for clarification about which request was being addressed. Mr. Guetlich

clarified which request was appealed. He stated the respondent wants them to provide the queries to use to produce records and that is not required. Mr. Sloman stated the word “data” appears in a previous, concluded request. He stated the search terms were specific and narrow. He stated he is not looking for proprietary information. He stated his search terms were guided by communications from a PIVOT employee.

Dr. Cornwall asked if the request is for all the search terms or any of the search terms. Mr. Sloman stated the people do not tend to write “analytics” in email and they are not search for proprietary information.

Respondent Statement

Mr. Payne stated the search terms were in 20 requests and the first produced 17,000 pages but only 243 were responsive to the request. He stated the second request produced 37,000 pages. He explained narrowing the search terms would help. Mr. Payne stated GRAMA entitles them to recover the costs of fulfilling the request.

Questions from the Committee

Ms. Dean asked if they are searching the entire email database for those search terms, or just the individuals identified in the request. Mr. Payne stated that they are only searching the individual email addresses.

Dr. Cornwall asked if there are a lot of duplicates. Mr. Payne stated there are, but they still have to review them. Dr. Cornwall asked how much narrower the search would be once “analytics” was removed from the search terms. Mr. Payne stated it may be significant.

Deliberation

Motion by Mr. Haraldsen to continue to the next available hearing to provide more time for the respondent to clarify the request and search parameters. The parties are encouraged to work with the ombudsman. Seconded by Dr. Cornwall.

Discussion to the motion

Mr. Haraldsen recommended the parties work together to expedite the process.

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

Business part 2 of 3

Cases in District Court

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

The Committee sauntered until 12:15

3. Mark Allen v. Utah County (2021-25)

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. Allen stated his appeal outlines how Utah is behind the times. He stated text messages are records and elected officials keep records in their pocket and away from the public. He stated his request is for correspondence Commissioner Lee had with a constituent that the respondent cannot produce. He stated personal records should not be mixed with government records.

Mr. Allen reviewed his request for text messages regarding Bridal Veil Falls. He stated the respondent asked Mr. Lee if he had responsive records. He requested the Chair ask for an audit. He reviewed a Committee order from 2016. He stated there is a bigger issue than Mr. Lee communicating with a personal device. He stated the public has a right to know how many government records have not been classified properly because they are on personal devices. Mr. Allen asked the Committee to keep a broad scope on this appeal and not allow the argument to be narrowed.

Respondent Statement

Mr. Beck stated the question is not whether text messages are subject to GRAMA. He stated the question is whether these records are responsive to the request. He explained the timeline of the request. He stated they reached out to individuals asking if they have responsive records. He stated they went back to the Commissioners several times asking to provide anything responsive to the request and they said they do not possess or maintain any responsive records.

Mr. Beck reviewed a Committee case from 2019 when a San Juan county commissioner was seen texting during the meeting and a request was made for those text messages. He stated the Committee found it reasonable to believe there were texts. He stated there is not evidence in this case that Mr. Lee sent any texts to Mr. Richard Losee. He stated it is reasonable to believe there are no responsive records. Mr. Beck stated the respondent has done their due diligence to respond to the request.

Questions from the Committee

Mr. Williams asked if the respondent has a policy or guidance on phone usage or text messages. Mr. Beck stated he is not sure what policy is in place. He stated Mr. Lee does not have multiple phones. He stated the County will frequently educate employees that text messages can be subject to GRAMA even if it is on a private device.

Ms. Dean asked if commissioners are told how to maintain government records on a private device. Mr. Beck stated he was unsure. He stated many entities use cell phones and it is difficult to access private devices.

Dr. Cornwall asked if individuals could provide their phone for the respondent to download. Mr. Beck stated that has not been their practice. Dr. Cornwall asked if previous requests with records on personal devices have been provided. Mr. Beck stated this the second request he is

aware of for cell phone records. He stated the previous request had records provided. Ms. Mendoza explained the process of answering record requests. She stated they have never had a problem of someone not wanting to provide records.

Mr. Haraldsen asked if they asked Mr. Lee about his phone. Ms. Mendoza stated they check county records first. Mr. Beck stated they reached out to Mr. Lee's office and his policy advisor and the answer was the same every time. Mr. Haraldsen asked if other commissioners have phones provided by the county. Ms. Mendoza stated they all have private devices.

Petitioner Statement

Mr. Allen stated Ms. Mendoza has been ethical in doing her job. He stated he is asking for an audit by Mr. Dougal. He stated this is a landmark case. He stated security is an issue. Mr. Allen asked what would happen if a personal device with government records fell into the wrong hands. He stated a government device could be provided to the next official to maintain continuity.

Mr. Allen asked the Committee not focus on one email or text. He stated the scope includes copies of all incoming and outgoing correspondence regarding Bridal Veil Falls. He stated the record officer cannot classify records she cannot see. Mr. Allen stated Mr. Lee was the Chief Administrative Officer for the appeal, which is a process problem.

Respondent Statement

Mr. Beck stated the petitioner is asking legislative questions. He stated this appeal is about a specific records request. He stated Mr. Allen has sent many requests and this is the one petitioner chose to appeal. He stated there is no proof there were ever text messages between Mr. Lee and Mr. Losee. He asked the Committee to deny the appeal because there are no records responsive to the request.

Deliberation

The Committee discussed their role and authority under GRAMA.

Motion by Ms. Dean to deny the appeal on the basis the respondent does not possess or maintain the record. Seconded by Dr. Cornwall.

Discussion to the Motion

Mr. Haraldsen stated he does not feel they have a choice. He stated the road block is not with the respondent but employees who may believe they do not have records. Ms. Dean stated public business done on a private device is a record that needs to be maintained by the entity.

Mr. Haraldsen and Dr. Cornwall agreed. Dr. Cornwall stated elected officials must understand if they are conducting business on a personal phone that they need to provide access to those records as part of being in public service. Ms. Dean included appointed officials. Mr. Haraldsen reviewed HB 477. Ms. Dean clarified that the Committee believes this is an issue everywhere. Aye: 5 Nay: 0. Mr. Haraldsen, Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Williams voted in favor of the motion.

Business part 3 of 3

Mr. Williams mentioned the possibility of changing the role of the current vacancy. The Chair asked that an action item for this be added to the next meeting.

Format and quorum verification

Ms. Smith-Mansfield stated she would not make the next meeting.

Motion to Adjourn

The Chair adjourned the June 10, 2021, State Records Committee meeting at 12:39pm.

This is a true and correct copy of the June 10, 2021, SRC meeting minutes, which was approved on July 8, 2021. 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