

State Records Committee Meeting

Date: August 12, 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:

Patricia Smith-Mansfield, Citizen Representative

Vacant, Electronic Records and Databases Representative

Legal Counsel:

Paul Tonks, Assistant Attorney General

Executive Secretary:

Rebekkah Shaw, Utah State Archives

Others Present via Zoom:

Jessica Miller, Tribune

Mark Kittrell, Salt Lake City counsel

Sophie Kaing, Center for Biological Diversity

Wendy Park, Center for Biological Diversity

Mark Tracy

Jeremy Cook, attorney

Brady Eames

Lonny Pehrson, Assistant Attorney General

EH iphone

Brian Nalder

Chelsy

Justin Anderson

Kendra Yates

Robert Patterson, attorney

Rosemary Cundiff

Tanner Weaver

Brittany Griffin
Aaron Waite
Steven Onysko
Elliot Clark

Others Present in person:

Susan Mumford
Tessa Isacson, attorney

Agenda:

- Four Hearings Scheduled
 - Jessica Miller (Salt Lake Tribune) v. Salt Lake City (2021-79)
 - Center for Biological Diversity v. Seven County Infrastructure Coalition (SCIC) (2020-106)
 - Mark Tracy v. Emigration Improvement District (2021-67)
 - Brady Eames v. Attorney General's Office (2021-60)
- Business:
 - Approval of May 13, 2021, SRC Minutes, action item
 - Approval of July 8, 2021, SRC Minutes, action item
 - Administrative Rule updates, 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 Chair called the meeting to order at 9:13 am.

1. Jessica Miller (Salt Lake Tribune) v. Salt Lake City (2021-79)

The Chair announced the hearing.

Petitioner's statement:

Ms. Miller stated there was a police audit of Salt Lake City's K9 and the mayor reported a pattern of abuse of power was found. She stated the mayor planned to release body camera footage to the public. She stated one was not released which the District Attorney felt was criminal. Ms. Miller stated the video should have been released at the press conference with the other released footage. Footage from other police entities related to K9s have been released.

Ms. Miller stated the charges against the officer involved were filed after the press conference. She asked the Committee to release the footage using the weighing provision. She stated a dog bite may not be fatal, but it is still a violent use of force available to police.

Questions from the Committee:

Ms. Dean asked for clarification regarding the released footage from the other police entities. She asked if they were part of the cases with Salt Lake City. Ms. Miller stated the Salt Lake City attorney is investigating all K9 apprehensions for the entire jurisdiction. She stated that it includes other police departments. She stated while the investigation was still pending all the related body camera footage was released.

Respondent's statement:

Mr. Kittrell stated the attorney for the officer referenced is in attendance. He stated the sole record at issue is the body camera footage recorded at a K9 incident. He stated it is part of an active criminal investigation. He stated the record should be withheld to give the officer the right to a fair trial. Mr. Kittrell reviewed previous Committee decisions that are related.

Witness statement:

The Chair swore in the witness.

Ms. Isacson stated she has been a criminal defense lawyer for 20 years. She stated the case should make its way through the criminal justice system so judges determine what evidence is admissible. She stated it is rare for evidence to be released in a record request.

Ms. Isacson stated anytime an officer is involved in a criminal incident, like a shooting, a lawyer can see them through the process because of potential implications. She stated she is surprised police are treated differently as defendants.

Ms. Isacson stated that releasing the record to the public is problematic because the body camera footage does not tell the full story. She stated it is a distorted view of the case and it can be months before the district attorney has concluded the investigation and they can tell the whole story.

Ms. Isacson stated she represents the K9 officer who is facing felony charges. She stated a preliminary hearing is scheduled for November. She stated evidence will be introduced and this footage will become public. She asked the Committee to let the footage follow the normal process and not treat police differently than other defendants.

Questions from the Committee:

Mr. Haraldsen asked if she was hired by the department. She stated she cannot disclose that. Mr. Williams asked if the video was released to the district attorney. Mr. Kittrell stated under 63G-2-206 it is a shared record. Ms. Dean asked if a jury will be present at the preliminary hearing. Ms. Isacson stated the state needs to establish probable cause for the case to go to trial, so a jury trial is still months down the road.

Respondent Statement:

Mr. Kittrell stated there are constitutional rights at stake. He stated the city believes the record is properly classified as protected under 63G-2-305(10)(c).

Petitioner closing statement:

Ms. Miller stated the footage should have been released in September. She stated it is no different from the other videos already released. She asked the Committee to consider the weighing provision because public interest outweighs the private interest. She stated this is not a regular case because it is a police officer.

Respondent closing statement:

Mr. Kittrell stated the city acknowledges there is public interest. He stated that it does not diminish constitutional rights. He stated the protected classification is not permanent.

Deliberation:

Motion by Ms. Dean to deny the appeal as the records are properly classified under 63G--305(10)(b & c). Seconded by Dr. Cornwall.

Discussion to the motion:

Mr. Haraldson stated this is a big issue right now. He stated police dog attacks have been a problem for a long time. Dr. Cornwall stated she understood but these records would eventually be released. Mr. Haraldsen stated he is not convinced releasing this record would poison the jury pool. Dr. Cornwall stated it would be unknowable if the footage would bias the jury.

Vote: 4 Yea. 1 Nay. Mr. Williams, Ms. Dean, Mr. Buchanan, Dr. Cornwall, voted in favor of the motion. Mr. Haraldsen voted against the motion.

2. Center for Biological Diversity v. Seven County Infrastructure Coalition (SCIC) (202-106)

The Chair introduced the hearing.

Petitioner's statement:

Ms. Kaineg stated the requested records are related to the construction and commercialization of the Uintah Basin railroad. She stated GRAMA is strongly in favor of public disclosure and SCIC needs to prove the records cannot be disclosed and their explanation is insufficient. She stated release of the records would not interfere with transactions or contracts.

Ms. Kaineg stated the records can be disclosed due to public interest. She stated significant public funds are intended for the project. She stated it is in the public interest to understand

what impact the railway will have. She stated there is a lot of data already available so these records should also be released.

Respondent's statement:

Mr. Patterson described the need for the railway and the respondent's involvement. He stated there are three records at issue. One is a schedule of tasks and subtasks to complete as required by the national environmental protection act. One is a breakdown of potential benefits from the railway. The last one is a draft analysis of scenarios showing potential revenue streams that could result.

Mr. Patterson stated the respondent is willing to provide the first two, but the analysis is protected under 63G-2-305(3) and releasing the record could result in speculation. He stated the railway will have a substantial impact on the commodities market. He stated the final decision of approval for the basin is expected in the next few months.

Questions from the Committee:

Dr. Cornwall asked for clarification about how the record would affect commodity markets. Mr. Patterson stated it would lead to speculation in mineral leases. He stated once the railway is started the concern dissipates because people will speculate as it is built.

Dr. Cornwall asked if the record is raw data. Mr. Patterson stated it is done by consultants for SCIC. Dr. Cornwall asked if they paid an outside company for this analysis. Mr. Patterson stated they did.

Ms. Dean asked for clarification on how the record would impact mineral rights. Mr. Patterson explained how releasing the commercial and financial information could disrupt the economy of the Uintah Basin.

Petitioner closing statement:

Ms. Kaineg stated there is public interest in these records because the project is using public funds. She stated the oil study has already been released with a timeline of commodities on rail by year. She stated the withheld record should be no different.

Respondent closing statement:

Mr. Patterson stated the record has sensitive information that could impact the economy until a final decision is made regarding the railway. He stated the record should be protected until then.

Questions from the Committee:

Dr. Cornwall asked if there would be future public input on the railway. Mr. Patterson stated they are currently waiting on a federal process. He stated there is a significant public notice and

comment period. He clarified that construction will be years long and there will be several public meetings along the way.

Ms. Dean asked Mr. Patterson if this record becomes public eventually, what is the difference in competition today versus months from now. Mr. Patterson stated that when the federal transportation board decision is released SCIC will know if the railway is going forward or not. He stated at that point there would be no reason to avoid speculation because it will happen anyway.

Deliberation:

Motion by Mr. Haraldsen to go in camera to review the records. Seconded by Dr. Cornwall.

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

The Committee discussed the protected classification. Ms. Dean stated she appreciated that SCIC offered to release the first two records. Mr. Haraldsen stated he is uncomfortable with relying on the assumption that the record will be released eventually.

Motion by Dr. Cornwall to deny the appeal for the 5.1 draft analysis per 63G-2-305(3) with the understanding that 1.34 and 3.2 will be released. Seconded by Mr. Buchanan.

Discussion to the motion:

The Committee clarified that the respondent already agreed to release 1.34 and 3.2.

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

3. Mark Tracy v. Emigration Improvement District (2021-67)

The Chair introduced the hearing.

Petitioner's statement:

Mr. Tracy explained why he is seeking the records. He stated he asked for fire flow test results. He stated he is asking for public records. He explained this was requested a year ago. He asked the Committee to review the exhibits he submitted.

Respondent's statement:

Mr. Cook stated everything the respondent said was inaccurate. He stated the request was not properly submitted to the respondent. He reviewed Judge Kouris' decision in a related case. He stated the judge's decision is binding on the Committee.

Question from the Committee:

Mr. Williams asked how the requested records are managed. Mr. Cook stated he did not know because the request was made improperly. He stated the records are public but the request was not made properly so they did not need to classify the records.

Ms. Dean stated the request cc'd other individuals. She asked if the respondent believes cc'ing someone means they are also being asked to provide the record. Mr. Cook stated Judge Kouris said how to make the request.

Mr. Williams asked if the records should be accessed through discovery. Mr. Cook stated the case was dismissed.

Dr. Cornwall asked where the Simplifi is included in the request. Mr. Cook stated she is cc'd.

Petitioner closing statement:

Mr. Tracy stated the request was made to the record officer. He stated it was ludicrous to not respond because of who is cc'd. He stated the respondent required fees awarded to a third party be paid before answering the request. He stated that is not a reason to deny a record request.

Respondent closing statement:

Mr. Cook stated the petitioner made the same argument before Judge Kouris. He stated the petitioner ignored the judge's order and made the request improperly.

Deliberation:

Ms. Dean asked for clarification from counsel regarding the weight the Committee should give the judge's order. She expressed frustration that the Committee is caught in the middle. The Committee reviewed the request and discussed the difference between "to" and "cc".

The Committee reviewed Judge Kouris' decision. Ms. Dean asked Mr. Cook if the fees are for pending record request payments or court fees. Mr. Cook stated they are attorney fees. He stated there are no fees owed to the Emigration Improvement District (EID). He stated EID was not named in the case.

Motion by Ms. Dean that the request was made to the entity and the records are public. The request was improperly denied due to fees owed to private individuals. Any fees associated with

producing the records prior to releasing the records should be paid per 63G-2-203. Seconded by Dr. Cornwall.

Discussion to the motion:

Mr. Williams stated he believes the request was made improperly and goes contrary to the court order.

Vote: 4 Yea. 1 Nay. Ms. Dean, Dr. Cornwall, Mr. Buchanan, Mr. Haraldsen voted in favor of the motion. Mr. Williams voted against the motion.

4. Brady Eames v. Attorney General's Office (2021-60)

The Chair announced the hearing.

Petitioner's statement:

Mr. Eames expressed his confusion regarding the relationship between the Utah Prosecution Council (UPC) and the Attorney General's Office (AGO). He explained the importance of the records as they relate to Senate Bill 8, stated the responsive records are stored at the State Records Center. He reviewed the retention of the requested records. Mr. Eames stated he has a right to freely inspect the meeting records.

Respondent's statement:

Mr. Pehrson stated that they did not find any responsive records related to the twenty year old legislation. He stated they provided an 88 page summary of legislative changes from that year even though it was not directly responsive to the request.

Mr. Pehrson stated if any other responsive records exist it would require a labor intensive search through records stored at the State Records Center. He stated they estimated five hours at \$20/hour to do the work. He stated the petitioner is not the subject of the records and his legal rights are not implicated. He asked the Committee to uphold the fee waiver denial.

Petitioner closing statement:

Mr. Eames stated he listed seven different reasons why the fee waiver should be granted. He stated the UPC is a separate entity from the AGO and they should have different fee rules for their records.

Mr. Eames stated the fee waiver should be granted because the records should be available in their office. He stated the respondent should retrieve the boxes and he can review them himself.

Respondent closing statement:

Mr. Pehrson stated the UPC is a training body within the AGO which means they share the same retention schedules. He stated the records are old and stored off site. He explained staff would have to go through the boxes to retrieve any responsive records. He stated this request is not in the public interest so the petitioner should bear the cost.

Deliberation:

Motion by Mr. Williams to deny the request for a fee waiver because the entity properly considered the factors in the statute 63G-2-203(6 & 7). Seconded by Mr. Haraldsen.

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

Business

Motion by Ms. Dean to approve the May 13, 2021 minutes as written. Seconded by Mr. Williams.

Vote: 4 Yea. 0 Nay. 1 Abstain. Mr. Williams, Ms. Dean, Mr. Buchanan, Mr. Haraldsen voted in favor of the motion. Dr. Cornwall abstained.

Motion by Mr. Haraldsen to approve the July 8 meeting minutes. Seconded by Mr. Williams.

Vote: 4 Yea. 0 Nay. 1 Abstain. Mr. Williams, Ms. Dean, Dr. Cornwall, Mr. Haraldsen voted in favor of the motion. Mr. Buchanan abstained.

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

Ms. Shaw reviewed appeals with the Committee.

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

The Committee confirmed a quorum would be present for the September 9th meeting.

Cases in District Court, report

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

Motion to Adjourn

The Chair adjourned the August 12, 2021, State Records Committee meeting.

This is a true and correct copy of the August 12, 2021, SRC meeting minutes, which was approved on September 9, 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

APPROVED