

State Records Committee Meeting

Date: October 28, 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
Ed Biehler, Electronic Records and Databases Representative

Legal Counsel:

Paul Tonks, Assistant Attorney General
Michelle Adams, paralegal

Executive Secretary:

Rebekkah Shaw, Utah State Archives

Others Present via Zoom:

Kyle Maynard, Assistant Attorney General
Gregory Ferbrache
Kelley Marsden, University of Utah
Shawn Wood, University of Utah
Jake Johnson, University of Utah
Carl Fisher
James Palmer, Assistant Attorney General

Others Present in person:

Eric Peterson
Adam Herbets, Fox 13
Lynda Viti, Assistant Attorney General
Wesley Stapley, Workforce Services
Nate McDonald, Director of Workforce Services
Jeffrey Bennion
Kendra Yates
Blake Hamilton
Darren Rosenstein
Mark Burns, Assistant Attorney General
Sergeant Cameron Roden, Utah Highway Patrol

Aaron Waite, Assistant Attorney General
Brittany Griffin, State Treasurer

Agenda:

- Seven Hearings Scheduled
 - Justin Sutherland v. Dpt Natural Resources (2021-68)
 - Eric Peterson (Utah Investigative Journalism Project) v. Dpt Workforce Services (2021-88)
 - Adam Herbets (Fox 13) v. University of Utah (2021-97)
 - TEA Group v. Dpt Transportation (Continuance 2020-105)
 - Eric Peterson (Utah Investigative Journalism Project) v. Dpt Public Safety (2021-62)
 - Carl Fisher (Save Our Canyons) v. Dpt Transportation (Continuance 2021-08)
 - Brady Eames v. State Treasurer (2021-92)
- Business:
 - Oath of Office, action item
 - Approval of September 9, 2021, SRC Minutes, action item
 - Petitioner request for civil penalties in case 2021-67, action item (order #21-45 Mark Tracy v. Emigration Improvement District)
 - SRC vacancy, report
 - Appeal scheduling limit, 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 9:08.

Committee Business part 1 of 3

Oath of Office of was administered for Mr. Bieher.

1. Justin Sutherland v. Department of Natural Resources (2021-68)

Mr. Maynard requested a motion of continuance. Both parties stated they believe the appeal can be resolved before the next scheduled meeting.

Motion by Ms. Dean to reschedule the hearing for next month. Seconded by Mr. Buchanan.

Vote: 6 Yea. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Biehler, Mr. Haraldsen, and Mr. Williams voted in favor of the motion.

2. Eric Peterson v. Department of Workforce Services (2021-88)

Petitioner's statement:

Mr. Peterson stated his appeal is regarding the housing stability services fund. He explained that the funds were meant to help people keep their homes. He stated he is trying to understand which landlords and lawyers are receiving the funds. He stated knowing the name of the landlord will not identify someone who has been evicted.

Respondent's statement:

Mr. Stapley stated Mr. McDonald worked with Mr. Peterson to identify where the money was spent. He explained the funds are usually used for legal fees to cancel eviction proceedings. He stated that under GRAMA records used to determine eligibility for social services are private. Mr. Stapley explained that knowing the landlords creates a nexus and the residents could be identified through the court record.

Committee:

Mr. Haraldsen asked how the department determines which landlords are eligible. Mr. McDonald explained.

Ms. Dean asked if Mr. Peterson could call the court and find out who has had eviction proceedings and contact the resident that way. Mr. Stapley stated having the landlord's information would make it easier to identify which residents received the funds and contact them.

Mr. Williams asked if it is an ongoing program that will have regular reporting and auditing. Mr. McDonald stated it is not an ongoing program and explained they expect auditing will occur.

Dr. Cornwall asked if they are concerned about the privacy of the landlord or just the residents. Mr. Stapley stated they are concerned about a chilling effect for the landlords, but are primarily concerned about the residents.

Petitioner Closing:

Mr. Peterson shared an experience he had contacting a resident who wanted to share their story. He explained he just wants a list of the landlords. He stated he is not asking for private information which means this is a discussion about public money being used for a public

purpose going through companies. He clarified he is not asking for addresses or dates. He stated he is trying to get a sense for what lawyers are getting funding. He stated that it is public under GRAMA.

Respondent Closing:

Mr. Stapley stated there is a public interest in making sure the funds are spent appropriately. He stated they have provided everything they can. He stated that given what they have already provided the petitioner, if they provided the names of landlords it would be simple to identify residents in the court record.

Deliberation:

The Committee discussed privacy rights under 63G-2-302(1)(a). The Committee discussed the possibility the petitioner could get the information he seeks from another entity.

Motion by Dr. Cornwall to review the records in camera. 2nd Mr. Haraldsen.

Vote: 3 Yea. 3 Nay. Mr. Buchanan, Mr. Haraldsen, Ms. Dean voted in favor of the motion. Mr. Biehler, Mr. Williams, and Dr. Cornwall voted against the motion.

Motion by Dr. Cornwall to deny the appeal because the records are properly classified under 63G-2-302(1)(a). Seconded by Mr. Biehler.

Discussion to the motion:

Mr. Haraldsen stated the petitioner's intent is solid.

Vote: 6 Yea. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Biehler, Mr. Haraldsen, and Mr. Williams voted in favor of the motion.

3. Adam Herbets (Fox 13) v. University of Utah (2021-97)

Petitioner's statement:

Mr. Herbets stated the request is related to a story about Christopher Massimine who was the director for Pioneer Theatre Company. He stated his request was for email to and from Mr. Massimine and with the vendor charged with vetting.

Mr. Herbets stated his request was reasonably specific because it is clear what he is seeking. He stated requests can be voluminous and complex and reasonably specific at the same time. He stated the respondent knows how to find the records. He stated that he clarified his request through the University record portal but that does not reset the clock.

Mr. Herbets explained why he believes technological complexities do not change the classification of the records or the specificity of the request. He also explained why he rejects the argument that providing the requested email would violate privacy rights. He stated there is still public interest in these records even though Mr. Massimine resigned. He expressed concern about transparency.

Questions from the Committee:

Mr. Haraldsen asked for clarification regarding the number of people from the vendor who may have corresponded with the University. Dr. Cornwall asked for clarification if this was one or two requests. Ms. Dean asked if there is a fee in dispute.

Respondent's statement:

Ms. Marsden stated the University is committed to transparency and works with the media often. She stated if the request were limited to the 600 employees in the College of Fine Arts, it is still not reasonably specific. She stated the University cannot perform university wide email searches. IT personnel have to pull each account, copy it to a server, search it, and then export the responsive records. She stated to search each email account would take 28,000 hours of search time. She stated their argument is not that there are technical difficulties, but that the request is not reasonably specific.

Ms. Marsden explained the University has a policy that allows employees to use their email for both business and personal use. She stated searching their email is an invasion of privacy.

Witness statement:

Mr. Woods explained reporters can reach out to him anytime and ask for records. He stated he was tasked to help Mr. Herbets limit the scope of his request. He stated he provided the requester with a list of people most likely to have the communications fitting the search terms.

Questions from the Committee:

Mr. Biehler asked how many people were on the list of employees to likely have responsive records. Mr. Woods stated there were about 15. Ms. Dean asked for clarification about which part of the request Mr. Woods was involved in.

Witness statement:

Mr. Johnson explained the search options IT has to find responsive records in email. He stated the University has about 56,000 mailboxes and it would take 28,000 hours to search them all if the scope of the request is not narrowed. He stated he would have to dedicate staff to this request because of the private nature of the records. He stated limiting the date range does not help as much as limiting the number of mailboxes to search.

Questions from the Committee:

Ms. Dean asked why Mr. Massimine's email is different from the other 15 names. Ms. Marsden stated that those people will have everything related to work business. She stated she thinks there are Fourth Amendment concerns regarding an unreasonable search of personal property. Ms. Dean asked if the University trains employees regarding the legislative intent of GRAMA. She stated they can segregate the personal correspondence from the public records. Ms. Marsden stated they have broad trainings and employees know government business records are public. She stated records do not mean personal communications unrelated to public business. She stated they have a policy that expressly permits employees to use their email account for personal use.

Mr. Buchanan asked if their policy is clear that the email account can be used for personal correspondence, but it can be searched. He stated that is the right of the employer. Ms. Marsden stated she has Fourth Amendment concerns. She stated the request has no reference to government business, it is a request for everything.

Dr. Cornwall asked if they want the requester to specify the request is related to government work. Ms. Marsden stated she would be more comfortable with that.

Mr. Biehler asked if their argument is not about the time it would take to go through Mr. Massimine's email, but a privacy concern. Ms. Marsden stated that is correct.

Mr. Haraldsen asked about the time involved to search the fifteen accounts. Ms. Marsden stated they can come up with search terms. She stated the request needs to be reasonable from inception.

Petitioner Closing:

Mr. Herbets stated the request was narrowed in September to save fees, not because the request needed specificity. He stated the University wants to handpick which correspondence the media sees. He clarified he expects the records would be segregated and redacted. He stated the request is not an invasion of personal privacy. He clarified the difference between broad and narrow requests versus specific and nonspecific requests.

Questions from the Committee:

Mr. Biehler asked if his request was for everyone in the Fine Arts department. Mr. Herbets stated 600 is more employees than he thought but the respondent cannot choose whose records they feel comfortable with Fox 13 having. Mr. Biehler asked for clarification about the narrowed request.

Deliberation:

The Committee discussed government emails subject to GRAMA. The Committee discussed whether the request was reasonably specific.

Motion by Ms. Dean to grant the appeal for correspondence to and from Mr. Massimine from May 16th, 2021 thru June 15, 2021 because it is reasonably specific. The record officer has an obligation under 63G-2-308 to segregate public from non-public records. They may also use their fee schedule to address associated fees under GRAMA. Seconded by Mr. Biehler.

Vote: 6 Yea. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Biehler, Mr. Haraldsen, and Mr. Williams voted in favor of the motion.

Motion by Ms. Dean to deny the appeal for copies of all emails discussing Mr. Massimine between May 15, 2021 and the date of the request, and copies of all emails between University employees and Consultants of the Arts because it is not reasonably specific per 63G-2-201(9)(b). Because it is non specificity, it could interfere with other duties of the institution. Seconded by Dr. Cornwall.

Vote: 5 Yea. 1 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Biehler, and Mr. Williams voted in favor of the motion. Mr. Haraldsen voted against the motion.

The Committee discussed the request specific to Management Consultants of the Arts search term. Mr. Biehler stated it is too broad. Dr. Cornwall stated Mr. Herbets could use the department website to determine who would likely have discussions with the vendor and request those.

Mr. Haraldsen expressed frustration. He explained logic can help the respondent know which accounts to access. Ms. Dean explained the respondent has a responsibility to provide every responsive record. She explained her process of answering requests for email.

Motion by Mr. Biehler to deny the appeal because the request is not reasonably specific per 63G-2-204(1)(a) and 63G-2-201(9)(b). Seconded by Dr. Cornwall.

Discussion to the Motion:

Ms. Dean stated the order should include the comment that the parties should continue to work toward a resolution on specificity.

Vote: 6 Yea. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dean, Mr. Biehler, Mr. Haraldsen, and Mr. Williams voted in favor of the motion.

4. TEA Group v. Department of Transportation (Continuance 2020-105)

Petitioner's statement:

Mr. Hamilton reviewed the status of the appeal. He expressed appreciation for the Government Records Ombudsman. He stated they are down to about 200 documents withheld because they are drafts, related to an open investigation, or could reveal a confidential source. He explained there may be more responsive records that have not been produced.

Mr. Hamilton stated GRAMA does not define a draft. He reviewed 63G-2-305(22)(j) and (k). He stated emails that have been sent are not drafts. He reviewed two previous Committee orders.

Mr. Hamilton reviewed two things required for records to be withheld due to an open investigation under 63G-2-305(10)(a). He stated the respondent does not have information about the status of the related investigation. He stated the records should be redacted and provided. He stated TEA Group is no longer operating.

Respondent's statement:

Mr. Burns explained the different categories of withheld records. He stated TEA Group is a small company and it is difficult to redact and protect the source.

Questions from the Committee:

Mr. Buchanan asked if sources are outside of government. Mr. Burns says some are. Ms. Dean asked if the administrative process with TEA Group is over. Mr. Burns stated the case is waiting for this GRAMA request to be resolved first. He stated there are other pending matters.

Motion by Ms. Dean to review the records in camera and continue the hearing to November 18th. Seconded by Mr. Buchanan.

Vote: 5 Yea. 0 Nay. 1 Abstain. Dr. Cornwall, Mr. Williams, Mr. Haraldsen, Ms. Dean, Mr. Buchanan voted in favor of the motion. Mr. Biehler abstained.

5. Eric Peterson (Utah Investigative Journalism Project) v. Department of Public Safety (2021-62)

Petitioner Statement:

Mr. Peterson stated this is uncharted territory for him and he is at the mercy of the Committee. He stated he was originally trying to get basic information about the riot on January 6th. He stated a Tribune photographer was pepper sprayed at the state capitol building. He stated the initial fee was \$1,400.

Mr. Peterson stated in the records provided he could see there was a separate incident and he would like that initial contact report. He stated the respondent has misinterpreted the definition of the initial contact report. He stated there are other records he has not received.

Mr. Peterson stated he was charged for the review of records. He stated he was charged for the staff time of three people. He described how fees can be charged under GRAMA. He stated the respondent says his appeal regarding the fees is untimely. He explained it is untimely because he had been trying to resolve the appeal through mediation.

Questions from the Committee:

Ms. Dean asked for clarification about what outcome he wants from the Committee. She asked if the fee was appealed to the Chief Administrative Officer. Mr. Peterson stated he worked with the Government Records Ombudsman.

Respondent statement:

Ms. Viti requested the appeal be dismissed. She stated the request was resolved in mediation. She stated the additional records he seeks are a separate request that has not been appealed to yet. She stated they need permission from the prosecutor to release those and provided them. She stated the Committee has no jurisdiction because it has not been appealed yet. She stated the fee was not appealed so the Committee cannot consider it. Ms. Viti reviewed the Committee's order #10-11. She stated there is nothing else to address.

Questions from the Committee:

Mr. Haraldsen asked how the fee was calculated. Ms. Viti stated she cannot address that because it is not before the Committee. Mr. Peterson stated he understood that issues resulting from the compromise could be addressed before the Committee. He stated it is worth knowing if how they determined the fee is valid. The Committee asked for clarification what is before the Committee.

Motion by Mr. Williams to deny the appeal. Seconded by Dr. Cornwall.

Discussion to the motion:

Mr. Haraldsen stated he felt this should go to district court. Ms. Dean stated things could have been done differently by the respondent to work with the petitioner.

Vote: 6 Yea. 0 Nay. Mr. Biehler, Dr. Cornwall, Mr. Williams, Mr. Haraldsen, Ms. Dean, Mr. Buchanan voted in favor of the motion.

6. Carl Fisher (Save Our Canyons) v. Department of Transportation (Continuance 2021-08)

Petitioner Statement:

Mr. Fisher reviewed the status of the appeal. He stated there are questions related to the attachments to emails and they are not sure they got them all. He stated Mr. Palmer agreed to help them correlate those.

Respondent Statement:

Mr. Palmer stated they have provided all the responsive records include emails and attachments. He stated they consider the appeal resolved.

Questions from the Committee:

Dr. Cornwall asked the petitioner to clarify what they are looking for. Mr. Fisher stated they want something to help correlate the attachments to the email threads. Ms. Dean reviewed 63G-2-201(8)(b). Mr. Haraldsen asked Mr. Palmer if he would be willing to create a guide so the requester can match them up. Mr. Palmer stated they created a file that connects the emails to the attachments but it is a PDF and he believes the petitioner wanted a different format. Mr. Fisher stated the respondent already suggested they would provide that but it has not been received.

Motion by Ms. Dean to consider the appeal resolved with an order that Mr. Palmer supply the email and attachments in PDF, and a table of contents as discussed and then file a notice of compliance with the Committee. Seconded by Mr. Haraldsen.

Vote: 6 Yea. 0 Nay. Mr. Biehler, Dr. Cornwall, Mr. Williams, Mr. Haraldsen, Ms. Dean, Mr. Buchanan voted in favor of the motion.

Business part 2 of 3

Motion by Ms. Dean to approve the September 9th minutes. Seconded by Mr. Haraldsen.

Vote: 6 Yea. 0 Nay. Mr. Biehler, Dr. Cornwall, Mr. Williams, Mr. Haraldsen, Ms. Dean, Mr. Buchanan voted in favor of the motion.

SRC Vacancy Report

Mr. Williams updated the Committee on the status of the citizen member vacancy.

7. Brady Eames v. State Treasurer (2021-92)

Petitioner Statement:

Mr. Eames stated that benefit to the public is not defined under GRAMA. He stated public funds deposited in the Public Treasurer Investment Fund are public and he should not be charged a fee. He stated the Treasurer should make an administrative rule for fees. He stated these records should be available online.

Respondent Statement:

Mr. Waite stated the fee is reasonable and complies with the law. He reviewed 63G-2-203(1) and (4). He explained why the fee was not waived. Mr. Waite explained summary data is available on the website.

Questions from the Committee:

Mr. Haraldsen asked if the records are available for inspection in the office. Mr. Waite said they are not, but they are online. Mr. Haraldsen asked for clarification on how the fee was determined.

Petitioner Closing:

Mr. Eames stated the information online is not specific to entities. He stated other entities have provided these records without charge.

Respondent Closing:

Mr. Waite stated the reports are available online. He stated the fee was reasonable.

Deliberation:

Motion by Mr. Biehler to deny the appeal as it was not an unreasonable denial of a fee waiver per 63G-2-203(1). Seconded by Mr. Haraldsen.

Vote: 6 Yea. 0 Nay. Mr. Biehler, Dr. Cornwall, Mr. Williams, Mr. Haraldsen, Ms. Dean, Mr. Buchanan voted in favor of the motion.

Business part 3 of 3

Petitioner request for civil penalties in case 2021-67, action item (order #21-45 Mark Tracy v. Emigration Improvement District)

No motion was made.

Cases in District Court, report

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

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

Ms. Shaw reviewed appeals with the Committee.

Appeal scheduling limit, action item

The Committee determined meetings should have five or six hearings is the most that should be heard in a meeting.

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

Motion to Adjourn

The Chair adjourned the October 28, 2021, State Records Committee meeting.

This is a true and correct copy of the October 28, 2021, SRC meeting minutes, which was approved on November 18, 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