

State Records Committee Meeting

Date: March 17, 2022

Time: 9:00 a.m. – 4:00 p.m.

Committee Members Present:

Kenneth Williams, Chair, State Archivist
Marie Cornwall, Citizen Representative
Mark Buchanan, Private Sector Records Manager
Tom Haraldsen, Media Representative
Nova Dubovik, Citizen Representative

Committee Members Absent:

Nancy Dean, Chair pro tem, Political Subdivision 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 in person:

Jennifer Orten
Chad Shattuck, attorney
Sophia Anderson
Ryan Lambert, Salt Lake County, Attorney
Megan Hillyard, Salt Lake County
Teena Horlacher
Dave Burton
Tracy Lars
Katie Ratzlaff
Susan Mumford

Others Present via Zoom:

J. Quesenberry, Assistant Attorney General, USBE
Benjamin Rasmussen, USBE
Jonathan Bejarano
Aaron Pacini
Paul Van Komen, Attorney, Jordan School District

Anthony Godfrey, Jordan School District

Agenda:

- o Four Hearings Scheduled:
 - o Jennifer Orten v. Salt Lake County (2022-02 Continuance)
 - o Jennifer Orten v. Board of Education (2022-03)
 - o Jonathan Bejarano v. Board of Education (2021-120 Continuance)
 - o Aaron Pacini v. Jordan School District (2021-138)

- o Business:
 - o Approval of February 2022, SRC Minutes, action item
 - o SRC appeals received and declined, notices of compliance, and related action items
 - o Cases in district court, report
 - o Committee members' attendance polled for next meeting, format and quorum verification
 - o Legislative update report

Call to Order

The Chair called the meeting to order.

Business Part 1 of 2

Approval of February 17, 2022, SRC Minutes, action item:

Motion by Mr. Haraldsen to approve the February 17, 2022, minutes. Seconded by Mr. Buchanan.

Vote: 5 Aye. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dubovik, Mr. Haraldsen, Mr. Williams voting in favor of the motion.

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

Ms. Shaw reviewed appeals received, declined, and withdrawn.

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

The Committee set the next meeting for April 21, 2022.

1. Jennifer Orten v. Salt Lake County (2022-02)

Petitioner Statement:

Mr. Shattuck stated the appeal is for a fee waiver and was timely filed with the Committee. He stated the respondent charged the requester more than another person who made the same

request. He reviewed the fees and stated they were illegal. He stated the Chief Administrative Officer of Appeals (CAOA) reviewed the fees and agreed they were too high.

The appeal is in six parts. Mr. Shattuck stated the last request fee was reduced from \$9,488.99 to \$1,663.00. Mrs. Orten is the only subject of the record and there were almost 700 responsive emails. He stated request five and six had a fee of \$273.00 reduced to \$95.00 by the CAO.

Mr. Shattuck stated it is unreasonable to deny access to email about the requester. He stated governmental entities are encouraged not to charge a fee to the subject of the record. He stated there is public interest because Mrs. Orten is part of the Utah Freedom Coalition, has a strong social media following, and will be interviewed related to this case. He stated the requester should not be charged because the expense and emotional toll is unreasonable. He opposed the respondent's policy to only accept appeals in person.

Respondent statement:

Mr. Lambert shared a powerpoint. He stated the Committee does not have jurisdiction over request 1, 2 and 4. He stated request 1 and 2 were filed late. He stated the petitioner never appealed request 4 to the Clerk's office so there was nothing for the CAO to review on appeal. The only matter on appeal is the February 3rd final decision. He reviewed the timeline. He stated there are over 1,700 emails that would be responsive. 2 minutes per email, equates to almost 80 hours of employee time. Taking an employee out of doing a normal job for 2 weeks to work solely on this. Accept prepayment of half.

Mr. Lambert stated that the requester had not met the burden to show that the denial of the fee waiver was unreasonable. He stated the emails have not been reviewed for classification yet because they are not required to until the fee is paid. He stated the petitioner agreed that \$23.76 was a reasonable hourly rate. He stated the total fee is an estimate and there may be reimbursement when the request is fulfilled.

Questions from the Committee:

The Committee asked for clarification about how the cost went down on the second review. Mr. Lambert stated it was part of the appeals process. The Committee asked for clarification about the lowest paid employee capable of responding to the request.

Petitioner closing:

Mr. Shattuck stated Mrs. Orten contacted the State Auditor and the Attorney General's Office about the matter. He stated the cost was lowered after a letter from the Auditor. He stated fees for electronic records should not cost this much. He stated the fees were an obstruction and inconsistent with what had been charged to other requesters.

Witness Statement:

The Chair swore in the witness.

Ms. Anderson described her experience when she requested election records from Salt Lake County. She stated that she was also overcharged.

Questions from the Committee:

The Committee asked clarifying questions if the process she followed was the same as Mrs. Orten's request.

The Committee asked Mr. Lambert to explain the process of lowering the fees. Mr. Lambert stated that he objected to the witness testimony. He stated the fees are lowered in the same process as looking at record access appeals.

Respondent closing:

Mr. Lambert stated he had not heard the requester went to the State Auditor and the Attorney General's Office. He stated that there was no outside influence in the CAO's decision. He stated 63G-2-701 gives political subdivisions authority to establish GRAMA policies. He stated that they can do anything outside what is limited in that statute.

Questions from the Committee:

The Committee asked where requests 1, 2, and 4 are in the process. Mr. Lambert stated that he thought it was in the clerk's office and may be looked at again on appeal.

Public Comment:

The Chair allowed public comments for two minutes each.

Deliberation:

Motion by Dr. Cornwall to dismiss request 1 and 2 because the appeal is untimely to the CAO according to the respondent's procedures. And dismiss request 4 because it is not ripe before the Committee per Utah Code 63G-2-701. Seconded by Mr. Buchanan.

Vote: 5 Aye. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dubovik, Mr. Haraldsen, Mr. Williams, voting in favor of the motion.

Motion by Ms. Dubovik to grant the appeal for request 3, 5, and 6 because the records primarily benefit the public. Seconded by Mr. Buchanan.

Vote: 3 Aye. 2 Nay. Mr. Williams and Dr. Cornwall voted against the motion. Ms. Dubovik, Mr. Haraldsen, and Mr. Buchanan voted in favor of the motion.

2. Jennifer Orten v. Board of Education (2022-03)

Petitioner Statement:

Mrs. Orten stated her request was for all records sent by the superintendent or ACCESS committee members about a topic he raised in an open meeting. She stated she received a lot of records, but many were withheld. She stated that she did not receive email sent to the board

themselves. She stated she had no proof the record officer asked the board members to search for responsive records. She stated she wants to make sure the records were properly withheld.

Questions from the Committee:

The Committee asked what she thought was missing. Mrs. Orten stated she is missing an email from the record officer to the school board staff. She stated she does not believe they are attorney-client privilege.

The Committee asked if she was requesting the board search for responsive records on private devices. Mrs. Orten stated she asked for email and texts specific to their job. She stated that it appears they are using a private phone for work because one email stated a board member was grateful the entity no longer paid for their phone.

Respondent statement:

Mr. Rasmussen stated that his communications with the board fall under attorney-client privilege. Mr. Quesenberry stated that her two record requests were less than a week apart and cover voluminous records. He stated there are 15 people on the board and 400 employees. He referred to the request as a fishing expedition.

Mr. Quesenberry stated the requester is asking for private communications. He stated that state employees have private lives but may talk to family and friends about work. He stated those emails could fall under the request but are private. He stated that nothing in statute provides a mechanism to provide private text messages. He reviewed the definition of a record and stated these messages are not subject to GRAMA.

Petitioner closing:

Mrs. Orten stated she has a question about the record officer's role because he is a lawyer, and the appointed record officer. She asked if everything he sends is subject to attorney client privilege.

Respondent closing:

Mr. Quesenberry stated that. Mr. Rasmussen is an attorney and his legal services are paid for by the board, so his correspondence is protected.

Petitioner Closing:

The petitioner stated the request was for a week time span and very specific. She stated that she would waive the review of the denied emails because her questions had been answered in the hearing. She stated that she thought the matter should be brought to the Committee's attention. She stated she was more interested in the process and she does not need the records.

Public Comment:

The Chair allowed public comment for two minutes each.

Deliberation:

The Committee discussed the use of private devices for public business.

Motion by Mr. Haraldsen to dismiss the appeal as the petitioner has withdrawn the case. Seconded by Ms. Dubovik.

Vote: 5 Aye. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dubovik, Mr. Haraldsen, Mr. Williams, voting in favor of the motion.

3. Jonathan Bejarano v. Board of Education (2021-120 Continuance)

Deliberation:

Motion by Dr. Cornwall to go in camera to review the records. Seconded by Ms. Dubovik.

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

Document 1 was a draft word document, 2 is a PDF attachment, and 3 is a PDF audit.

Motion by Ms. Dubovik to grant the appeal for 1 and redact the names on the “to” and “from” per 63G-2-302(n)(i). Deny the appeal for 2 because it is a draft per 63G-2-305(22). The email should be provided, but not the draft. Grant the appeal for the 2 and 3 email and redact the “to and from” per 63G-2-302(n)(i) and release the attachment of 3 because it is public. Seconded by Mr. Haraldsen.

Discussion to the motion:

Ms. Dubovik stated she has concerns about personal devices being used for public business and something needs to be done. The issue comes before the Committee often.

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

4. Aaron Pacini v. Jordan School District (2021-138)

Petitioner Statement:

Mr. Pacini’s request is in six parts. He stated no initial decision was made regarding his request for a fee waiver. He stated there is public interest if there has been tampering with the school election. He stated that the statute encourages the respondent to waive the fee. He stated the records are electronic and should not take long to search and provide. Mr. Pacini reviewed the

events around the election. He stated he is not requesting the ballots. He stated the candidates should have the same access to the records that teachers have.

Mr. Pacini stated that he received some names and screenshots. He stated that he doesn't know if he has received the full record. He stated he is also seeking records about the number of students in each class at, above, or below benchmark.

Questions from the Committee:

The Committee asked what he is still missing that was requested. Mr. Pacini stated he has not received anything for request 1, 4, and 5. He is satisfied with the response for request 2. He stated he would like the email sought in request 3. He stated 4 and 5 are the fee waiver issue. He stated that he received summary benchmark information in request 6 but he would like to have full production.

Respondent statement:

Mr. Van Komen stated FERPA supersedes GRAMA and that is usually the lens they use when answering requests. He stated they are not required to create a record to answer a request. He stated request 6 is for Dibels which they do not have so they tried to provide something similar. He stated that providing class level information would allow someone to identify specific students.

Mr. Van Komen stated that the requester's concerns are personal because he was not elected in the first vote. He stated there is only one election result even though there were two votes. He explained there were procedural inaccuracies so the first vote is not the election result. He stated that the records do apply to the requester, but they have a responsibility to the taxpayer and declined the fee waiver request.

Mr. Van Komen stated that the third request was for the names of each member including parents and teachers, dates of service, and the end of their current term. He stated the community council elections are governed by statute. He stated it is called an election, but does not fall under the general election code, but Utah Code 53G-7-1202. He stated that the school elections are closed. The results are made public on request.

Mr. Van Komen stated that FERPA protects student information and a parent of a student is also personal information. He reviewed what is considered directory information. He stated that the principal enters names on the school land trust website but the school does not keep their own record of the results.

Witness Statement:

Superintendent Godfrey stated that they only charged for the time to review email. He stated that there is more involved than providing the results from search terms. He stated that there is no information for the period requested but they provided what they could.

Questions from the Committee:

The Committee asked if they had a policy for assessing fees. Mr. Godfrey stated they do not have a formal policy because they try to be flexible. He stated they calculate the hourly rate of the people involved.

The Committee asked why the first election was invalidated. Mr. Godfrey stated there were more openings than originally communicated and some procedures were not followed.

Mr. Van Komen stated that the district had tried to be forthcoming and honor privacy rights.

Petitioner closing:

Mr. Pacini stated that the first election results were responsive at the time of his request. He stated that he is a subject of the records. He stated that FERPA does not apply to this request. He stated they did not tell him they did not use Dibels. He stated there is no way to identify the students directly or indirectly.

Mr. Pacini stated if information was submitted to SITLA, then that communication would be responsive to the request. He stated that he wants to know how many ballots were cast.

Respondent closing:

Mr. Van Komen stated that no records exist of providing the information to SITLA because it goes into their website. He stated that they provided what they could to the petitioner. Mr. Godfrey stated that they are asking a fee for the most in depth portion of the request.

Question from the Committee:

The Committee asked if the election goes to the school board. Mr. Godfrey stated that it does not.

Deliberation:

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

Vote: 5 Aye. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dubovik, Mr. Haraldsen, Mr. Williams voting in favor of the motion.

Motion by Mr. Haraldsen to deny the appeal for request 1 per 63G-2-302(2)(d) as a clearly unwarranted invasion of personal privacy & 63G-2-305(22). Seconded by Ms. Dubovik.

Vote: 5 Aye. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dubovik, Mr. Haraldsen, Mr. Williams voting in favor of the motion.

Motion by Mr. Williams to deny request 3 for the names of members and dates of services because the record has already been provided. Seconded by Dr. Cornwall.

Vote: 5 Aye. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dubovik, Mr. Haraldsen, Mr. Williams voting in favor of the motion.

Motion by Dr. Cornwall to deny the appeal for request 4 and 5 for a fee waiver. Seconded by Mr. Williams.

Discussion to the motion:

Dr. Cornwall stated that the public interest is not clear. Mr. Buchanan stated it is difficult to determine when it is in the public interest or not.

Vote: 5 Aye. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dubovik, Mr. Haraldsen, Mr. Williams voting in favor of the motion.

Motion by Mr. Haraldsen to deny the appeal for request 6 because the record does not exist. Seconded by Mr. Buchanan.

Vote: 5 Aye. 0 Nay. Mr. Buchanan, Dr. Cornwall, Ms. Dubovik, Mr. Haraldsen, Mr. Williams voting in favor of the motion.

Business Part 2 of 2

Cases in district court, report:

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

Legislative Update

The Chair and Ms. Shaw reviewed bills from the legislative session.

Motion to Adjourn

The Chair adjourned the March 17, 2022, State Records Committee meeting.

This is a true and correct copy of the March 17, 2022, SRC meeting minutes, which was approved on April 21, 2022. 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