

## State Records Committee Meeting

Date: May 19, 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

Nancy Dean, Chair pro tem, Political Subdivision Representative

Ed Biehler, Electronic Records and Databases Representative

### **Committee Members Online:**

Tom Haraldsen, Media Representative

### **Committee Members Absent:**

Nova Dubovik, Citizen Representative

### **Legal Counsel:**

Paul Tonks, Assistant Attorney General

Michelle Adams, Paralegal

### **Executive Secretary:**

Rebekkah Shaw, Utah State Archives

### **Others present online:**

Ian Cooperstein

Lonny

Tom Haraldsen

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Blaine Hansen

Kurt Zimmerman

Rosemary

Judith Zimmerman

Harry Souvall, UPD

### **In person:**

Mark Smedrey, Heber City

Adam Herbets, Fox 13

Harry Souvall, Unified Police  
Rebekah Bradway, University of Utah  
Brian Christensen, University of Utah  
Jim Kichas  
Fox 13 cameraman

**Agenda:**

- o Three Hearings Scheduled:
  - o Adam Herbets (FOX 13) v. Heber City Police ( 2022-45, 2022-46)
  - o Ian Cooperstein v. University of Utah (2022-35)
  - o Adam Herbets (FOX 13) v. Unified Police (2022-43)
  - o Brady Eames v. Attorney General Office (2021-132, 2022-06)

Business:

- o Approval of April 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

**Call to Order**

The Chair called the meeting to order.

**1. Adam Herbets v. Heber City Police (2022-45 & 2022-46)**

**Petitioner Statement:**

Mr. Herbets stated that he is requesting records related to a small group of officers who reported the chief of police using excessive use of force. He stated there is a public interest in cases like this. He stated that he is working on a story about the investigation.

Mr. Herbets stated one appeal is for emails. It has never been explicitly denied, but no records have been produced. He stated that the other is for a settlement agreement. He stated the public has a right to know how money is being spent.

Mr. Herbets reviewed 63G-2-305(33), 63G-2-301(3)(d), (e), and (2)(c). He also reviewed previous SRC cases and case law. He stated that he does not know what reason the respondent has for withholding the records because they have not told him. Mr. Herbets also reviewed 63G-2-801(3)(a).

Mr. Herbets asked the Committee to require Heber City to provide an estimated date of completion and require they search phones for responsive text messages. He stated there is no dispute that the records are public. He asked the Committee to consider whether the respondent should be held liable.

**Questions from the Committee:**

The Committee asked if he requested a fee waiver. Mr. Herbets stated that he did.

**Respondent statement:**

Mr. Smedrey stated that the standard for criminal action is beyond a reasonable doubt, and the Committee would have to look at intent and willful desire to hold back a record which he stated is not the case here. Mr. Smedrey stated that the request for emails is broad because it is not just for the chief, but includes other employees.

Mr. Smedrey stated the respondent never indicated that they would not make the records public. He stated an estimate was not given, but an explanation of the circumstances was provided. He stated the city has one city recorder, one IT professional, and one employee at the police department who answers record requests and they are very busy.

Mr. Smedrey stated that the email records will be provided by the 26th. He stated IT has sent the records to the police department for review and redaction. He stated they have to check each email and it will take time.

Mr. Smedrey stated that the settlement agreement is unique because it is not a result of normal action or litigation. He stated as the investigation went forward, the city spoke with the attorneys for the two employees and the settlement was entered into and a sum was paid.

Mr. Smedrey stated that the settlement involves Garrity statements and releasing it will create a chilling effect on future investigations. He stated there are ongoing investigations with POST. He stated that the story has run its course. He stated there are meeting minutes indicating the amount of the settlement and expenditures are public records. He asked the Committee to weigh all the interests.

**Questions from the Committee:**

The Committee asked how many emails are under review. Mr. Smedrey stated it is over 200 and each one will have redactions. The Committee asked for clarification about how Garrity applies to the settlement. The Committee asked if the city is overwhelmed with record requests. Mr. Smedrey stated they are and they do not have the funds to hire more people.

The Committee asked who has the settlement agreement. Mr. Smedrey stated the requester has seen the agreement.

**Petitioner Closing:**

Mr. Herbets stated the respondent agreed to provide the correspondence records by May 26th. He stated the estimate did not come up before the hearing. He stated it is the burden of the respondent to show how releasing the record would damage an ongoing investigation. He stated the request was not for anything involving Garrity statements.

Mr. Herbets stated that the story is not about anyone's guilt, but how the investigation was conducted.

**Respondent Closing:**

Mr. Smedry stated that the settlement anticipated there might be litigation but it is not the result of litigation. He stated that POST is investigating and there will be a hearing. He stated there is a timing to when transparency occurs and if there is a hearing with POST that is the transparency.

**Deliberation:**

**Motion** by Ms. Dean to go in camera to review the settlement agreement. Seconded by Dr. Cornwall.

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

**Motion** by Ms. Dean to continue the hearing for appeal 2022-45 to June 16, 2022 to give the petitioner a chance to review the records, with a strong recommendation to the city to meet the date they agreed to. Seconded by Mr. Buchanan.

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

**Motion** by Ms. Dean to release the settlement but redact names per 63G-2-305(10)(d). Seconded by Dr. Cornwall.

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

**2. Ian Cooperstein v. University of Utah (2022-35)**

**Petitioner statement:**

Mr. Cooperstein stated that he is a former employee of the University and a whistleblower. He stated that he had filed a series of complaints that were wrongly shared with the respondent's general counsel before his position was eliminated. He stated that he has paid fees for records but has not received all of the records.

Mr. Cooperstein stated that the respondent has not done an adequate search. He stated that he has received incomplete records, much of which he already had from previous requests. He stated that some of the missing records are emails about his activity with the auditor that would have been printed.

Mr. Cooperstein stated that there was a three-way phone call between his former supervisor, human resources, and counsel. He stated that he wanted any emails related to the call. He

stated that releasing the records is in the public interest because the Title IX office serves 60,000 people.

**Respondent statement:**

Mr. Christensen stated the allegations from the requester are serious and a majority of his testimony is not relevant to the current appeal. He stated that the requester has submitted over 200 requests and the respondent is working with the requester to organize and prioritize the requests. He stated that 35 of the requests are done so far.

Mr. Christensen stated that this appeal is specific to communications between human resources and the campus recreation department pertaining to an open OEOE complaint from June 17th to July 17th. He stated nothing in the request mentioned a report of internal audits.

Mr. Christensen stated that all the records they could find were provided with two exceptions: a witness statement and the cell phone number of an employee. He stated that communications between counsel and human resources are privileged. He stated it is unclear if the requester is challenging the redactions. He stated there are no records of discussions about phone calls.

**Questions from the Committee:**

Ms. Dean asked what the respondent did to search for the records. Ms. Bradway explained how they searched email for current and former employee mailboxes.

**Petitioner closing:**

Mr. Cooperstein stated the other pending requests are not relevant. He stated he does not want personal cell phone numbers. He stated that a conference call happening with no correspondence about it is not believable. He stated he wants the record setting up the conference call and information passed between the parties.

Mr. Cooperstein stated the respondent takes two years to answer most requests. He stated of the 35 requests fulfilled in the last two years, he only has about 25 pages. He stated the records should be reviewed because there is public interest in how the respondent handles whistleblower complaints. He stated there should be more responsive records.

**Respondent closing:**

Mr. Christensen stated that he does not know the basis for the allegation of non-legal disclosure of a complaint. He stated that other communications are not subject to this request. He stated that a reasonable search was done.

**Deliberation:**

**Motion** by Ms. Dean to deny the appeal because the respondent has done a thorough search and the records are classified correctly under 63G-2-305(17). Seconded by Mr. Buchanan.

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

The Committee sauntered for 30 minutes.

**3. Adam Herbets (Fox 13) v. Unified Police Department (2022-43)**

Mr. Herbets asked the Committee not to consider the respondent's statement of facts because it was submitted after the deadline. The Chair asked if he had a chance to review it and he stated that he had.

Mr. Souvall stated that both parties agreed to extend the deadline for the hearing because the hearing was moved up. He stated that he was teaching a class so it was an accommodation because the date was changed. Mr. Herbets stated that he was satisfied with that reasoning.

**Petitioner statement:**

Mr. Herbets stated that the appeal was initially about two body camera videos, but now it is just one. He stated the video depicts a juvenile in a crime. He stated the respondent had cited 63G-2-305(10)(c) which references a fair trial, and (65) which addresses footage inside a hospital.

Mr. Herbets stated these records are public outside of those statutes. He reviewed the definition of an initial contact report under 63G-2-301(3)(g). He stated that body camera and surveillance video are part of the initial contact report. He reviewed some related district court cases and previous committee decisions. Mr. Herbets stated that redactions can be made to protect the juvenile. He stated that the statute does not address the difficulty of segregation.

Mr. Herbets discussed the public interest in the case. He stated that the facility had been cited by the Department of Health for failure to provide a safe environment. He stated that employees were threatened with being fired if they reported to the police.

**Respondent statement:**

Mr. Souvall stated that the request is for a video in a medical facility. He stated there are a lot of statutes involved. He stated the staff saying they would be fired is related to the video they are releasing. He stated that the withheld record shows officers walking into a mental health care facility. He stated that there is a whiteboard with names, health monitors, and staff talking about medical conditions. He stated that trying to redact all of the protected information would be especially difficult and make the video useless.

Mr. Souvall stated that there are four videos with the juvenile present. He stated that he understood the public interest. He stated that juveniles should not have to deal with people knowing they were in a behavior facility.

**Petitioner closing:**

Mr. Herbets stated that the policy of officers is to turn off their cameras unless there is a crime taking place, so he questioned why the cameras were on at all. He stated that nothing in the statute states the public portion is less public because it is difficult to redact. He stated that he is asking for the public portion of the video to be released.

**Respondent closing:**

Mr. Souvall stated that the public portions of the video take place outside of the facility. He stated that they could not find anything about staff saying they would be fired in the recording. He stated they could not find that in the video and if they did they would have isolated it and released it.

Mr. Souvall stated they have put four hours into the request and have not done a full audio review. He stated that if they need to do all the work, they should be compensated for the time.

**Questions from the Committee:**

The Committee asked if there is a fee. Mr. Herbets stated that he had not been quoted a fee, but he did ask for a fee waiver. Mr. Souvall stated it would be about \$80. Mr. Herbets stated that he had no problem with that quote.

**Deliberation:**

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

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

**Motion** by Dr. Cornwall to continue the hearing to June 2nd to give the Committee time to review the records. Seconded by Mr. Buchanan.

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

**4. Brady Eames v. Attorney General Office (2021-132 & 2022-06)**

Mr. Eames did not attend the hearing.

**Respondent statement:**

Mr. Pehrson stated that appeal 2021-132 is a frivolous case. He stated that the request is for records under series 6410. He stated that no records exist and the existence of a retention schedule does not mean that there are records. He stated that the requester has made no showing that records do exist. He stated that upon review of the series description, if there were records, the records would fall under 63G-2-305(10), (18), and (23).

Mr. Pehrson stated that appeal 2022-06 is for conflict screens for the Archuleta case. He stated the records would be classified protected under 63G-2-305(10) and (18). He asked the Committee to deny both appeals.

**Deliberation:**

**Motion** by Ms. Dean to deny appeal 2021-132 and 2022-60 because the records were classified correctly under 63G-2-305(10)(b)(c), (18), and (23). Seconded by Mr. Biehler.

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

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

Ms. Shaw reviewed appeals received and declined.

**Cases in district court, report**

Mr. Tonks reviewed cases in the district court.

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

A quorum was confirmed for June 2nd.

**Motion to Adjourn**

The Chair adjourned the May 19, 2022, State Records Committee meeting.

**This is a true and correct copy of the May 19, 2022, SRC meeting minutes, which was approved on June 16, 2022. An audio recording of this meeting is available on the Utah Public Notice Website at <https://archives.utah.gov>.**

**X           /e/ Rebekkah Shaw\_\_\_\_\_**