

State Records Committee Meeting

Date: June 16, 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

Tom Haraldsen, Media Representative

Committee Members Online:

Nova Dubovik, Citizen Representative

Legal Counsel:

Paul Tonks, Assistant Attorney General

Michelle Adams, Paralegal

Executive Secretary:

Rebekkah Shaw, Utah State Archives

Others present online:

“907”

“Jb”

“CN”, University of Utah

Brittany Thorley, Utah County Attorney Office

FOX 13 News

George

Rebecca Walsh

Steven Onysko

Teresa Prior

Mark Smedley, Heber City

Shawn Wood

Rosemary Cundiff, Utah Archives

Courtney Tanner, Tribune

Terri J.

Terra Rosslund, University of Utah

In person:

Adam Herbets, Fox 13
Rebecca Bradway, University of Utah
Adam Beck, Utah County
Laura Mendoza, Utah County

Agenda:

- o Three hearing scheduled:
 - o Adam Herbets (FOX 13) v. Heber City Police (2022-45 Continuance)
 - o Adam Herbets (FOX 13) v. Utah County (2022-49)
 - o Courtney Tanner (Tribune) v. University of Utah (2022-103)

Business:

- o Approval of May 2022, SRC Minutes, action item
- o Approval of June 2, 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 Continuance)**Petitioner Statement:**

Mr. Herbets stated that Heber City gave an estimate of the fee at the last hearing. He stated since then the scope of the request was narrowed to 33 emails. He stated that he received an invoice, but the price is for work he never requested.

Mr. Herbets stated that he was given a spreadsheet of over 3,000 emails that they thought were responsive. When he reviewed it he found only 600 were responsive. He stated that he never wanted a spreadsheet. He stated that the request was for what should have been a small number of emails of an employee on administrative leave. He stated that since 600 is about 18% of the responsive emails, he would be willing to pay 18% of the quoted fee. He stated that there should be minimal redactions so he is not sure why the records have been delayed. He recommended the Committee look at criminal charges per 63G-2-801(3)(a).

Respondent statement:

Mr. Smedley stated that the person who handles the redactions is out of the office so they do not know what date they could provide the records. He stated that the city has been very responsive and they have always intended to provide the records. He stated that they have one IT person who does not just work for the police department.

Mr. Smedley stated that the initial request was for an index and compilation of emails. He stated there was no charge for the index. He stated Mr. Herbets narrowed the request down to 425 emails and the IT director explained the time and charge and they narrowed it down further. The cost was around \$800 and there were 33 emails that the requester wanted a physical copy of. The fee was reduced to \$467 for the IT work. Mr. Smedley stated that the requester said he needed authorisation to pay the fee and he never heard back.

Mr. Smedley stated that they are ready to deliver the records. He stated that they have borne most of the cost, but there should be a fee. He stated that they have provided records and have not intentionally withheld anything. He stated that the criminal sanctions have never been used.

Questions from the Committee:

The Committee asked for clarification about the fee. Mr. Smedley stated the cost for the compilation of 2,000 emails down to 435 which the requester wanted to look at. The Committee asked if the charge was only for the IT professional. Mr. Smedley stated that the city pays that fee for the time spent on a project for an individual department. He stated that all other work time and costs were waived.

The Committee asked if redactions have been made. Mr. Smedley stated that they have not been done for the 33 emails. He stated the fee should be paid first and the requester understood that. The Committee asked if they would need to wait for the employee to return from leave before they could do redactions. Mr. Smedley stated that was correct. The Committee asked if the recorder could do it. Mr. Smedley stated that the recorder could not. He stated they could find someone else to do it, but they have never done redactions before so it would be easier to wait for the administrator to return. He stated only one person has the required training.

Petitioner Closing:

Mr. Herbets stated the respondent cannot give themselves more work and charge for it. He stated an employee being out of the office is not a valid extraordinary circumstance under GRAMA. He stated he had asked many times for a citation to justify the delay.

Respondent Closing:

Mr. Smedley stated the city is not intentionally creating work. He stated that Heber City is the fastest growing community and gets requests done as fast as they can. He stated the initial request was broad.

Deliberation:

The Committee expressed frustration with the delay. Mr. Williams stated it was the Committee's understanding from the last continuance that the requester was going to get the records and review the redactions. The Committee discussed whether to waive the fee.

Motion by Dr. Cornwall to grant the fee waiver because releasing the records is in the public interest and continue the hearing to July 21st to allow the requester time to look at the redactions.. Seconded by Mr. Haraldsen.

Vote: 6 Yea. 0 Nay. 1 Abstain. Ms. Dean, Dr. Cornwall, Mr. Williams, Mr. Haraldsen, Mr. Buchanan, Mr. Biehler voted in favor of the motion. Ms. Dubovik abstained.

2. Adam Herbets (FOX 13) v. Utah County (2022-49)

Petitioner statement:

Mr. Herbets stated the story he is working on is about the conduct of the Utah County Attorney's Office. He explained there is public interest due to how Mr. Leavitt prosecutes cases regarding people he has a relationship with. He stated there is inconsistency despite perceived or actual conflict of interest.

Mr. Herbets stated there are two separate requests. One is to the Attorney's Office, the other is to the Sheriff's office. He stated the Attorney's Office handles the appeals for both. He stated the Sheriff's office wants the records to be released and there is a battle between the two offices. He stated that there is no ongoing investigation in this case. He stated his request was for the full case file but he was sent the initial contact report minutes before the hearing.

Mr. Herbets stated that the respondent would argue that releasing the record would prejudice the case but the argument is invalid because there is no ongoing case. He reviewed examples of related case law. He stated the other argument for attorney client privilege also does not apply because the case is in the Salt Lake County District Attorney's office and they do not rely on screening decisions which fall under his request because they make their own determinations. Mr. Herbets stated the public deserves an answer for the lack of consistency.

Questions from the Committee:

The Committee asked what falls under the screening documents he's requesting. Mr. Beck stated a meeting conversation is recorded. Mr. Haraldsen asked the requester if he was seeking the records from Salt Lake County. Mr. Herbets stated that he made the request in February from Utah County and learned a week ago that Salt Lake County was on the case.

Respondent statement:

Mr. Beck stated the request is dated February 2nd and the incident related to the request had just happened. He stated that the attorney over those cases stated there was an ongoing investigation. He stated that the Chief Administrative Officer upheld the denial because the case was active. Mr. Beck stated that a few months later they followed up and learned Utah County was no longer handling the case. He stated that they contacted Salt Lake County and the decision was the same.

Mr. Beck stated responsive records include a screening video which is made when a case moves from law enforcement to the attorney's office to determine charges. He stated that it is a

conference call in which the attorneys are sharing impressions and falls under attorney work product in 63G-2-305(18). Mr. Beck stated that the records could also fall under 63G-2-305(10)(a),(b), and (c) because it is an ongoing criminal proceeding.

Mr. Beck read from a declaration from Salt Lake County asking the Committee to uphold the denial. He asked the Committee to uphold the denial and stated that the records could be reviewed for disclosure again at the end of criminal proceedings.

Questions from the Committee:

The Committee asked if the investigation by the county attorney is separate from the sheriff. Mr. Beck explained the difference between an ongoing proceeding and an investigation. The Committee asked when the case will go to trial. Mr. Beck stated it had not appeared in court yet because this case is still in early stages. He stated that new information is always coming in.

Ms. Mendoza explained the life cycle of investigation case files. She stated the classification of the records can change over the course of that time and they rely on the prosecutor's input because it is hard to know what is exculpatory.

The Committee asked why they record screening meetings. Mr. Beck stated it was so they could go back to it and review the strong and weak points of the case.

Petitioner closing:

Mr. Herbets stated that Salt Lake County has its own case and their own screening. He stated that the screening video has nothing to do with Salt Lake County's case, but if it is being used then there would be even more public interest. He stated that the attorneys' opinions on the case would have no bearing on Salt Lake County's case.

Mr. Herbets reviewed the public interest in the case. He stated that Attorney Leavitt won't sit with him and explain so the records are the only way for him to get an answer. He stated that the burden is on the respondent to show that releasing the records will affect a trial.

Questions from the Committee:

The Committee asked if Mr. Leavitt was part of the screening. Mr. Beck stated he is not, but he is aware it is happening.

Respondent closing:

Mr. Beck stated that the story is about County Attorney Leavitt and the case file is not related to him. He stated that the subject of the record could be deprived of his right to a fair trial and GRAMA allowed the information to be protected. He stated that the classification will be re-evaluated again as the case resolves.

Deliberation:

The Committee discussed the public interest in the screening versus the right to a fair trial.

Motion by Ms. Dubovik to go in camera to review the records and continue to July 21st.
Seconded by Ms. Dean.

Vote: 5 Yea. 2 Nay. Ms. Dubovik, Ms. Dean, Mr. Haraldsen, Mr. Buchanan, Mr. Biehler voted in favor of the motion. Mr. Williams and Dr. Cornwall voted against the motion.

Due to the pending election and public interest, the motion was amended to review the records during lunch and reconvene at 1:30. Seconded by Ms. Dean.

Vote: 7 Yea. 0 Nay. Mr. Williams, Dr. Cornwall, Ms. Dubovik, Ms. Dean, Mr. Haraldsen, Mr. Buchanan, Mr. Biehler voted in favor of the motion.

3. Courtney Tanner (Salt Lake Tribune) v. University of Utah (2022-103)

Petitioner statement:

Ms. Tanner described an incident involving a student who was murdered. She stated the request is for reports showing if the student and her boyfriend contacted police for help. She reviewed the definition of an initial contact report.

Ms. Tanner stated that the University's argument is that the district attorney asked them not to release them. She stated the district attorney cannot allow exemptions to GRAMA. She stated Salt Lake City released records of an incident of domestic violence and the initial contact report for the murder. She stated her intention is to see how the University handled a case after the McClusky case. She stated that the respondent has not explained how releasing the records will interfere with the trial.

Ms. Tanner explained why the public interest outweighed the interest in withholding the record. She stated that there is public interest in how the respondent handled the case. She stated she is not against reasonable redactions. She reviewed entities who previously have provided initial contact reports during an active investigation.

Respondent statement:

Ms. Bradway stated that the request is for a specific police report with the names of these two students. She stated they only found one related to the death of the student and the prosecution. She stated the district attorney asked them not to release it until the case is complete under 63G-2-305(10)(a), (b), and (c).

Ms. Bradway stated the full police report and initial contact report are protected because releasing it can interfere with investigations, enforcement proceedings, and deprive a right to a fair hearing. She stated that the list under 63G-2-301 is not exhaustive. She stated that the district attorney's office asked them not to release the record. She stated that they complied with instructions from the prosecutor's office and will re-evaluate the classification when the case is closed. She asked the Committee to uphold the denial.

Questions from the Committee:

The Committee asked what the status was of the case. Ms. Bradway stated it is still early.

Petitioner closing:

Ms. Tanner stated that the respondent has not addressed how releasing the record will harm a fair trial. She stated that is a big part of the law and the district attorney cannot provide exceptions. She stated she is not against redactions.

Respondent closing:

Ms. Bradway stated the district attorney is not creating an exception. The exemption is in 63G-2-305(10)(a, b, and c). She stated that 63G-2-301 explicitly states that records can be exempt under other citations. She stated it is an active murder investigation and they rely on the district attorney to determine how the records will impact the proceedings.

Questions from the Committee:

The Committee asked if the records can be redacted. Ms. Bradway stated that the district attorney's instructions were not to release it at all.

Deliberation:

Motion by Ms. Dean to go in camera to review the incident report. Seconded by Mr. Williams.

Vote: 7 Yea. 0 Nay. Mr. Williams, Dr. Cornwall, Ms. Dubovik, Ms. Dean, Mr. Haraldsen, Mr. Buchanan, Mr. Biehler voted in favor of the motion.

Ms. Dean stated that the legislative intent for initial contact reports is that they are public.

Motion by Ms. Dean to grant the appeal and release the report per 63G-2-301(g) with proper redactions under 63G-2-302(2)(d). Any applicable fees should be paid. Seconded by Mr. Buchanan.

Dr. Cornwall stated she wanted it on the record that part of the issue was whether or not to take the request of the district attorney as sufficient to override GRAMA. She stated that they were concerned if they did not review the record and consider it on their own, they would be giving up that responsibility. She stated this decision does not mean they would not take the district attorney's opinion into account. Dr. Cornwall stated that it is clear to her that they need to go in camera and verify requests from district attorneys.

Vote: 7 Yea. 0 Nay. Mr. Williams, Dr. Cornwall, Ms. Dubovik, Ms. Dean, Mr. Haraldsen, Mr. Buchanan, Mr. Biehler voted in favor of the motion.

Motion by Mr. Haraldsen to go to lunch. Seconded by Ms. Dean.

Vote: 7 Yea. 0 Nay. Ms. Dean, Dr. Cornwall, Mr. Williams, Mr. Haraldsen, Mr. Buchanan, Mr. Biehler, Ms. Dubovik voted in favor of the motion.

The Committee reviewed the records in camera for appeal 2022-49 during lunch.

Business

Approval of May 2022, SRC Minutes, action item

Motion to approve the May minutes seconded by Mr. Williams.

Vote: 6 Yea. 0 Nay. 1 Abstain. Ms. Dean, Dr. Cornwall, Mr. Williams, Mr. Haraldsen, Mr. Buchanan, Mr. Biehler voted in favor of the motion. Ms. Dubovik abstained.

Approval of June 2, 2022, SRC Minutes, action item

Motion to approve the June 2nd minutes seconded by Mr. Buchanan.

Vote: 7 Yea. 0 Nay. 1 Abstain. Ms. Dean, Dr. Cornwall, Mr. Williams, Mr. Haraldsen, Mr. Biehler, Ms. Dubovik 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 received and declined.

Adam Herbets (FOX 13) v. Utah County (2022-49)

Deliberation:

Motion by Dr. Cornwall to deny the appeal because after reviewing the records in camera, the Committee finds the records are properly classified. Seconded by Mr. Buchanan.

7-0

Vote: 7 Yea. 0 Nay. Ms. Dean, Dr. Cornwall, Mr. Williams, Mr. Buchanan, Mr. Haraldsen, Mr. Biehler, Ms. Dubovik voted in favor of the motion.

Ms. Dean stated that the record classification should be reviewed again as the case moves forward. Mr. Haraldsen stated the record is specific to the defendant and the Committee needs to protect his rights.

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

A quorum was confirmed for the July 21st meeting.

Motion to Adjourn

The Chair adjourned the June 16th, 2022, State Records Committee meeting.

This is a true and correct copy of the June 16, 2022, SRC meeting minutes, which was approved on July 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