

State Records Committee Meeting

Date: August 18, 2022

Time: 9:00 a.m. – 4:00 p.m.

Committee Members Present:

Kenneth Williams, Chair, State Archivist
Marie Cornwall, Citizen Representative
Tom Haraldsen, Media Representative
Nova Dubovik, Citizen Representative
Ed Biehler, Electronic Records and Databases Representative
Nancy Dean, Chair pro tem, Political Subdivision Representative
Mark Buchanan, Private Sector Records Manager

Legal Counsel:

Amanda Montague, Assistant Attorney General
Daniel Bokovoy, Assistant Attorney General
Scott Higley, Assistant Attorney General
Michelle Adams, paralegal

Executive Secretary:

Rebekkah Shaw, Utah State Archives

Others Present:

Aaron Davidson
Blaine Hansen, Assistant Attorney General
Patrick Sullivan
Mike Brown
Kyle Maynard, Assistant Attorney General
Wes Mangum, Counsel, Sanpete County
Patrick Tanner, counsel, Alpine School District
Lonny Pehrson, Assistant Attorney General
Joan Andrews, Salt Lake City School District
Tyler Green
Eric Peterson, Utah Investigative Journalism Project
Patrick Tanner, Alpine School District
Ethan Bercot, UIPA
Jill Flygare, UIPA
Lynne Mayer, UIPA
Ben Onofrio, Davis School District
Brady Eames
Jamie Brooks
Kent Singleton
Kraig Brinkerhoff
Tanessa Wright

Michael Clara
Rosemary Cundiff
Charles Lyons

Agenda:

- o Six Hearings Scheduled
 - o Patrick Sullivan v. Sanpete County (2022-161 Remanded case)
 - o Parents Defending Education v. Salt Lake City School District (2022-139 Continuance)
 - o Eric Peterson (Utah Investigative Journalism Project) v. Utah Inland Port Authority (2022-76)
 - o Eric Peterson (Utah Investigative Journalism Project) v. Department of Natural Resources (2021-21) and Attorney General's Office (2021-15)
 - o Mike Brown v. Davis School District (2022-69)
 - o Aaron Davidson v. Alpine School District (2022-107)
- o Business
 - o Approval of July 21, 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. Patrick Sullivan v. Sanpete County (2022-161 Remanded case)

Petitioner Statement

Mr. Sullivan explained the six different parts of his request. He stated that parts 1 and 2 were records showing evidence of the offense. He asked the Committee to find those reasonably specific. He stated the county should be able to identify what he's asking for. He stated part 3 was provided. Part 4 has no records because they were destroyed. He asked the Committee to find the records were destroyed in bad faith. He stated he does not know if the records for part 5 exist because the respondent had not stated one way or the other. He stated part 6 was answered in a separate request.

Mr. Sullivan stated the respondent will say he is at his record request limit for inmates. He stated this request was submitted before the others that were included in a previous appeal before the Committee. He stated the requests heard in January 2022 were from 2020 and this was the first request in 2021.

Mr. Sullivan explained his interpretation of Utah Code 63G-2-201(10)(a). He stated if he is limited to 5 records a year, then the code needs to be clarified.

Respondent statement:

Mr. Mangum stated the appeal is simpler than the requester is stating. He stated the Committee has already considered if Mr. Sullivan has met his record limit. He stated this appeal would have been heard in January 2022 with the others except Mr. Sullivan appealed to court first. He stated the Committee has already addressed these requests.

Mr. Mangum stated these are duplicative requests handled in prior appeals and they do not have to answer per Utah Code 63G-2-201(8)(d). He stated if the Committee finds the requester is not over his limit for the year, part 1 is duplicative of appeal #2021-83. Part 2 is litigating his criminal case. He said this request could be for one thing or many things. Part 4 was addressed in appeal #2021-55. He stated the county's email had a short retention plan which has since been changed. Part 5 was provided through discovery and through GRAMA after the hearing. Part 6 was withdrawn.

Petitioner Closing:

Mr. Sullivan stated the request was submitted before the others and he only received one record in 2021. He stated the other requests and records provided were submitted in 2020. He stated the respondent wanted this case remanded so the Committee would say he is over his limit. He stated the Committee is not bound by their prior interpretation and can change their mind.

Respondent Closing:

Mr. Mangum stated that the requester admits part 3 and 6 have been provided which makes the other requests moot. He stated those two requests were for numerous records.

Questions from the Committee:

The Committee asked Mr. Mangum if other requests had been submitted and completed since this request. Mr. Mangum stated that was correct.

Deliberation:

The Committee addressed whether the requester had met his limit. The Committee discussed whether the limit is meant to be for records or record series.

Motion by Ms. Dean that despite having ruled in January that the petitioner met his five record limit, and given the unique circumstances of the case being remanded, the Committee finds it appropriate to rule on all six parts. In part 1 a reasonable search was done and the request is duplicative. In part 2 the request was overly broad and also duplicative. In part 3 the records were provided. In part 4 a reasonable search was done and there were no responsive records, and the request is duplicative. In part 5 a reasonable search was done and no responsive records were found and it is duplicative. Part six the rescinded does not have the records and the request should be submitted to the entity that holds the records. Seconded by Dr. Cornwall.

Discussion to the motion:

Mr. Biehler recommended the Committee not address the parts of the request if the decision is that he met his limit. He stated he does not think it is a special circumstance. Ms. Dubovik agreed.

Vote: No 4. Yea 3. Mr. Buchanan, Mr. Biehler, Ms. Dean, and Ms. Dubovik voted against the motion. Dr. Cornwall and Mr. Williams voted for the motion.

Motion by Ms. Dean to deny the appeal because the requester met his five requests for 2021 and the Committee will not review any more of his requests from 2021. Seconded by Mr. Biehler.

Vote: No 6. Yea 1. Mr. Buchanan, Dr. Cornwall, Mr. Biehler, Ms. Dean, and Ms. Dubovik voted for the motion. Mr. Williams voted against the motion.

2. Parents Defending Education v. Salt Lake City School District (2022-139 Continuance)

Petitioner statement:

Mr. Green stated that he received a lot of records that morning and he needs to check with his client to see if they are satisfied. He requested a continuance to October 2022.

Respondent Statement:

Ms. Andrews stated they hope to resolve everything. She stated the records were challenging to classify and there were a few reasons to protect some records including drafts, settlement negotiations, and personnel matters.

Motion by Mr. Haraldsen to continue the appeal to October 2022 in hopes the appeal will be resolved. Seconded by Ms. Dubovik.

Vote: Yea 5. Nay 0. Abstain 2. Mr. Haraldsen, Ms. Dubovik, Dr. Cornwall, Mr. Williams, and Mr. Biehler voted in favor of the motion. Ms. Dean and Mr. Buchanan abstained because they were not in attendance at the last hearing.

3. Eric Peterson (Utah Investigative Journalism Project) v. Utah Inland Port Authority (2022-76)

Petitioner Statement:

Mr. Peterson stated he is interested in information provided by consultants to the Port Authority. He stated the unvarnished first report could show how it informed what happened since and what made it to the final public report. He stated the process can be useful for the public to understand.

Mr. Peterson stated he was told it is a draft, but if a consultant is paid for it then it should be a finished product. He stated this paper was commissioned as part of a project finalized in the summer of 2021. He stated he is trying to get a narrative and how the information was presented and other information can be redacted as needed.

Respondent Statement:

Mr. Bercot stated that the Port Authority signed an agreement with the consultant and part of that was to assess market demand and competitiveness. The paper was to be provided as a PowerPoint of the assessment they were working on. He stated this was never provided to the board and was never understood to be a final version because it was created to prepare for a later final presentation. He stated the executive team checked it for errors before the final presentation was made to the board. The public version was presented in a public session.

Mr. Bercot stated that the draft is protected under Utah Code 63G-2-305(22). He stated there are no exceptions listed in Utah Code 63G-2-301(3). He stated the public interest does not outweigh the interest in protecting the record. He stated the legislature expressly stated the Port Authority's duty is to the statewide public purpose of maximum benefit for the state inland port by taking advantage of trade, exporting Utah products worldwide, and increasing foreign investment in Utah. He stated the Port Authority competes with other inland ports which weigh heavily on the side of nondisclosure for the record. He stated that the record has preliminary information about trade lanes, markets, and potential competitors. He stated the protected classification of the record is for the protected purpose of making sure the inland port succeeds.

Witness statement:

The Chair swore in the witness.

Ms. Flygare stated only she and the director saw the record before the final was presented.

Mr. Peterson asked if there was another invoice made for the final product. Ms. Flygare stated there was.

Questions from the Committee:

Mr. Haraldsen asked how much time there was between the draft and the final product. Mr. Bercot stated it was about six months. Ms. Flygare stated there were parts of the draft used in the final but additional work was done including financial analysis. Mr. Haraldsen asked if the final was now public. Ms. Flygare stated it was on their website. Mr. Haraldsen asked Mr. Peterson if he had seen the posted report. Mr. Peterson stated that he had.

Petitioner Closing:

Mr. Peterson stated that he understood the need to stay competitive. He stated that the public is in the dark and the request was meant to give a sense of the process including how the Port Authority used what they got and presented it to the public.

Mr. Peterson stated GRAMA is unclear on the status of drafts and when they are finalized. He stated this was invoiced. He asked the Committee to review the record. He stated he needed the Committee to see if it could be redacted and released.

Respondent closing:

Mr. Bercot described a Utah Supreme Court Case that illustrated the weight of legislative pronouncement when doing a balancing test. He stated Utah Code 63G-2-301(3)(k) suggests

drafts are still drafts even if they are never finalized. He stated this record is a step in the process for a final presentation. It is a preliminary version of the findings.

Question from the Committee:

Mr. Haraldsen asked if the unfair advantage is to the contractor or to the Port Authority. Mr. Bercot stated it would be the Port Authority that is competing with other port authorities. Mr. Biehler asked why they paid for a draft and not a final report. Mr. Bercot stated that paying for it does not mean it cannot be a draft. He stated as an attorney he often is asked to make a draft of something that is not finalized until later. He stated the Port Authority agreed to pay for the work to make the draft and then the work to revise it to create a final version.

Dr. Cornwall asked Ms. Flygare if she met with the researcher and discussed the data and analysis. Ms. Flygare stated the discussion was about next steps to look at the Port Authority's competitiveness, market lanes, and what additional information is needed. She stated there were specific milestones to be met, and this draft was one. Dr. Cornwall asked if the contract was public. Ms. Flygare stated it is.

Ms. Dean asked if the market analysis was shared with the board. Ms. Flygare stated the final report was shared with the board which included market analysis, trade lanes, and competitiveness.

Deliberation:

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

Vote: No 0. Yea 7. Mr. Buchanan, Dr. Cornwall, Mr. Biehler, Ms. Dean, Mr. Williams, and Ms. Dubovik voted for the motion.

Dr. Cornwall stated the record is part of the process to get to the final report and she is not convinced there is public interest in it because you cannot interpret the process from it.

Motion by Ms. Dubovik to deny the appeal because the records are properly classified under Utah Code 63G-2-305(22). After reviewing the records in camera, the public interest does not outweigh the classification. Seconded by Mr. Buchanan.

Vote: No 0. Yea 7. Mr. Buchanan, Dr. Cornwall, Mr. Biehler, Ms. Dean, Mr. Williams, and Ms. Dubovik voted for the motion.

Business Part 1 of 2:

Motion by Mr. Haraldsen to approve the July minutes. Seconded by Ms. Dubovik.

Vote: No 0. Yea 5. Abstain 2. r. Cornwall, Mr. Biehler, Mr. Williams, and Ms. Dubovik voted for the motion. Mr. Buchanan and Ms. Dean abstained.

4. Eric Peterson (Utah Investigative Journalism Project) v. Department of Natural Resources (2021-21) and Attorney General's Office (2021-15)

Petitioner statement:

Mr. Peterson stated that the Attorney General's Office investigated a hunt from 2018. He stated one investigation into the organizer of the hunt is open and he cannot get the records. He stated he found out later it was a hunt for Donald Trump Jr.. He stated the investigation was reopened because of his request. He stated when he requested all the records related to the investigation as it was reopened.

Mr. Peterson stated that the investigation was given to Davis County in 2021. He stated the respondent investigated from June 2021 to May 2022 and felony charges were filed for Mr. Lemon at the end of the statute of limitations. He stated the Davis County attorney stated their case is ongoing. Mr. Peterson stated the charge has been made and no actual investigating is happening now that the case is proceeding. He stated releasing the records will not impact the case. Mr. Peterson stated he is interested in the Attorney General Office investigation that went for 9 months before it was given to Davis County to do their own investigation.

Mr. Peterson stated that the Department of Natural Resources may argue there isn't evidence of public interest but there are politics involved. He stated the Trump family is one of intense public interest. He stated Sean Reyes campaigned for Trump and his office decided to investigate this for a year before it was sent to Davis County. He stated the public wants to know what was going on in the initial investigation.

Respondent statement:

Mr. Maynard stated the Department of Natural Resources feels the 2018 investigation report should be protected under Utah Code 63G-2-305(10). He stated the preliminary hearing is scheduled for October 2022. He stated that Mr. Lemon has been charged but having Trump named in this story creates extrajudicial misstatements. He stated Trump does not elicit nuanced opinions. He stated others involved in the case are not known until the trial and releasing these records could impact public opinion in the case which would make it harder to get an unbiased jury in Carbon County. He stated Mr. Lemon has a right to a fair trial.

Mr. Pehrson stated the original request to the Attorney General Office was for their investigative report. He stated the reports of witnesses contacted, interviews, narratives, and evidence received. He stated all of those are part of the investigation report.

Mr. Pehrson stated that charges were filed by Davis County after they conducted an additional follow up investigation. He stated the core of the investigation was done by the Attorney General's Office, which are the records at issue. He stated the records are integral to the prosecution. He stated the records are protected under Utah Code 63G-2-305(10) because releasing the records would deprive the right to a fair trial, reveal sources not known outside of government, and would reveal investigative techniques. He stated there is nothing besides the

name Trump that is of public interest. He stated the records are not about Mr. Trump. He stated the public interest is not urgent and the records will eventually be released.

Petitioner closing:

Mr. Peterson stated investigation techniques and confidential sources could be redacted. He stated he wanted the narrative and did not need the protected details. He stated Mr. Trump was part of an event to inaugurate the organization created by Mr. Lemon.

Mr. Peterson stated there is no guarantee that he would get the records after the trial is over. He stated that the politics around Mr. Trump is urgent. He stated he is seeking the records to see how the investigation was handled. He asked why the investigation was closed in 2018 and then opened after he submitted his request. He stated how the investigation was handled is not central to the case.

Respondent closing:

Mr. Pehrson stated redaction is not feasible for these records. He stated the report is 170 pages with a lot of references to informants and techniques that cannot be easily redacted. He stated there is no convenient summary to provide without disclosing protected information. He stated Mr. Trump is a small part of the case.

Mr. Maynard stated the 2018 investigative report is a narrative of facts and potential witnesses. He stated disclosure would impede the case and make it harder to provide a fair trial.

Mr. Pehrson stated the decision to refer it to Davis County was to avoid any appearance of impropriety due to Mr. Reyes political association and it was screened by a neutral prosecutor.

Deliberation:

Motion by Ms. Dean to go in camera to review the records. Seconded by Mr. Haraldsen.

Vote: No 3. Yea 4. Mr. Haraldsen, Ms. Dean, Mr. Buchanan, Ms. Dubovik voted for the motion. Mr. Bieher, Mr. Williams, and Dr. Cornwall voted against the motion.

Motion by Ms. Dean to deny appeals 2021-21 and 2021-15 because after reviewing the records, the Committee finds they are properly classified under Utah Code 63G-2-305(10). Seconded by Dr. Cornwall.

Vote: No 0. Yea 7. Mr. Williams, Dr. Cornwall, Mr. Biehler, Mr. Haraldsen, Ms. Dean, Mr. Buchanan, Ms. Dubovik voted for the motion.

5. Mike Brown v. Davis School District (2022-69)

Petitioner Statement:

Mr. Brown stated the records he is seeking are about him and the fee typically should be waived. He stated someone else made a similar request and were not charged as much. He

stated the response from the entity said they did not know if all the records would include his name, but that is what the request was for. He stated some records he is seeking include the respondent's counsel so there may be a conflict of interest.

Mr. Brown stated their use of the word "may" in code means the respondent can choose and do not have to charge if they do not want to. He reviewed the definition of "may" in common law and the dictionary definition. He stated in statute they are encouraged to waive the fee when the requester is the subject of the request. He stated the Utah Constitution mentions his right to gather evidence and the accused person should not be compelled to pay fees to secure rights. Mr. Brown asked that the fee be waived because he is the subject of the record, and because the word "may" does not mean they can choose to have the fee.

Respondent statement:

Mr. Onofrio stated the requester is not the subject of every record requested. He stated they have the discretion to charge a fee and it is reasonable to charge a fee in these circumstances. He stated not every "Mike Brown" mentioned in their records could be him because it is a common name, a color, and there is an employee named Mike Brown at the district.

Mr. Onofrio stated reversing the respondents decision to charge a fee changes "may" to "must" in the code. He stated they aim to compensate taxpayer time and the fee is reasonable. He stated they gathered phones, got text messages, reformatted and compiled the results, and saved them as PDFs. He stated emails were less difficult but still took time. He stated the law has not kept up with the change in technology and record creation. He stated government agencies spend more time answering requests and need to make back some of the cost by charging fees. He asked the Committee to balance access to the records with respect of taxpayer funds.

Petitioner closing:

Mr. Brown stated Mr. Onofrio should recuse himself. He stated GRAMA is not old. He stated the statute is clear that records about you should be provided without a fee. He asked the Committee to waive the fee.

Mr. Onofrio stated the records with his name are already excluded under GRAMA and have no bearing on the Committee's decision.

Questions from the Committee:

The Committee asked why the fee is \$55/hour. Mr. Onofrio stated that is the hourly wage for their I.T.. He stated that he asked if anyone else could do it but they have few qualified tech workers. The Committee asked for clarification about the hourly rate.

The Committee asked for clarification from Mr. Brown about how much the fee was for the other person he referenced. Mr. Brown stated his request is the same but for a different time period. He stated his friend paid \$180 and his fee is \$700. Mr. Onofrio stated they do not have a central server to search text messages and that part of the request was a big cost. He stated if the

requests did not include text messages, it would be cheaper. Mr. Brown stated both requests were for email and text messages.

Deliberation:

Motion by Ms. Dean to deny the appeal. Given the testimony from the respondent about the expertise required to retrieve the records, the fee is reasonable. Seconded by Dr. Cornwall.

Discussion to the motion:

Dr. Cornwall stated the Committee can only uphold or deny the fee waiver because the Legislature has not given the Committee the ability to change the cost.

Vote: No 0. Yea 7. Mr. Williams, Dr. Cornwall, Mr. Biehler, Mr. Haraldsen, Ms. Dean, Mr. Buchanan, Ms. Dubovik voted for the motion.

6. Aaron Davidson v. Alpine School District (2022-107)

Petitioner Statement:

Mr. Davidson explained an incident at an Alpine School District board meeting when they were addressing face masks. He stated the records he is requesting are about the respondent wanting to press charges. He stated their policy requires every decision needs to be made as a body with a vote taken. He stated either they voted in a closed meeting or did not record it in open meeting. He stated his request is meant to find out which.

Mr. Davidson stated the Utah Constitution says he should not be compelled to pay for these records he needs to defend himself. He referenced common law, the rules of construction, and two definitions of “may”. He stated that fees should always be waived for the subject of the records. He stated what is “reasonable” is never defined. He asked the Committee to waive the fee so he can get information to justify the charges against him.

Respondent statement:

Mr. Tanner stated the only issue before the Committee is the fee waiver. He stated the request is for communications from various people that refer to Mr. Davidson or Ms. Lindsay. He stated they worked with the requester to narrow the requests and some records were provided. He stated the projected cost was \$150 and the fee waiver was denied. Since the requester did not pay the fee they had not retrieved the records and reviewed them for classification. He stated they have not reviewed the records to see how many are about Mr. Davidson.

Mr. Tanner stated the requester’s argument is that “may” means “shall” which ignores the commonly used meaning of the word. He stated legal dictionaries do not override the plain language of the statute. He stated the Utah Constitution reference is not applicable here because a criminal case has nothing to do with GRAMA requests. He stated there is no constitutional violation in denying the fee.

Petitioner closing:

Mr. Davidson stated the school board broke the law. He stated he is only asking for records related to him. He stated the information could be influential in his case.

Respondent closing:

Mr. Tanner stated GRAMA is mostly concerned with what can be restricted and everything else is public. He stated nothing has been denied yet because the fee has not been paid. He stated they estimated the work involved to determine the fee and will refund the difference.

Deliberation:

Motion by Dr. Cornwall to deny the appeal because based on the testimony provided the respondent has made a good faith effort to analyze the request. Seconded by Ms. Dean.

Discussion to the motion:

Ms. Dean stated the Legislature has not given the Committee the ability to reduce the fee which makes things difficult sometimes.

Vote: No 0. Yea 7. Mr. Williams, Dr. Cornwall, Mr. Biehler, Mr. Haraldsen, Ms. Dean, Mr. Buchanan, Ms. Dubovik voted for the motion.

Business Part 2 of 2

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

Ms. Shaw reviewed appeals with the Committee.

Cases in district court, report

Ms. Adams reviewed the status of cases in district court.

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

A quorum was confirmed for the September 15, 2022 meeting.

This is a true and correct copy of the August 18, 2022, SRC meeting minutes, which was approved on September 15, 2022. An audio recording of this meeting is available on the Utah Public Notice Website.

X /e/ Rebekkah Shaw