

SRC APPROVED

Date December 13, 2012
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State Records Committee Meeting

Division of Archives, Courtyard Meeting Room

October 11, 2012

Salt Lake City, Utah

Members Present: Lex Hemphill, Media Representative
Doug Misner, History Representative
David Fleming, Private Records Manager Representative
Betsy Ross, Auditor's Designee
Ernest Rowley, Elected Public Official
Patricia Smith-Mansfield, Governor's Designee

Legal Counsel: Paul Tonks, Attorney General's Office
Ed Lombard, Attorney General's Office

Executive Secretary: Susan Mumford, Utah State Archives

Others Attending: Erin Alberty, *Salt Lake Tribune*
Lisa Carricaburu, *Salt Lake Tribune*
Glen Fairclough, Archives staff
Megan Felin, Utah Transit Authority, respondent
Lynn Jenkins, citizen
Doug Larson, attorney for Granite Schools, respondent
Jeff Lawrence, petitioner
Donald Meyers, *Salt Lake Tribune*
Lorianne Ouder Kirk, Archives staff
Bill Oram, *Salt Lake Tribune*
Michael Rabisch, Utah Highway Patrol
Holly Richardson, (nominated) Citizen Representative
Gregory Stevens, attorney for petitioner Lawrence
Lana Taylor, attorney for DPS, respondent

Call to order: 9:00.

Betsy Ross, Chair of the Committee, welcomed new committee member, David Fleming, to the committee and to the meeting.

Business

The minutes of the August 9, 2012, meeting of the State Records Committee were reviewed. With the correction of the spelling of two names mentioned in the minutes,

Mr. Hemphill made a motion to approve the minutes. Mr. Misner seconded the motion. A vote was taken. Mr. Fleming, Mr. Hemphill, Mr. Misner, Ms. Ross, Mr. Rowley, and Ms. Smith-Mansfield voted to approve the minutes. The minutes for August 9, 2012, were approved. The minutes for the State Records Committee meeting of September 13, 2012, were discussed. There were corrections to the spelling of two names mentioned in the minutes. Mr. Hemphill suggested that Holly Richardson's votes be included even though she was not officially confirmed as a committee member at the time of the meeting. With those corrections, Mr. Hemphill made a motion to approve the minutes. Mr. Fleming seconded the motion. A vote was taken. Mr. Fleming, Mr. Hemphill, Mr. Misner, Miss Ross, Mr. Rowley, and Ms. Smith-Mansfield voted to approve the minutes. The minutes of September 13, 2012, were approved.

Hearing –Bill Oram, *Salt Lake Tribune* vs. Granite School District

Ms. Ross explained the procedures to the parties. Mr. Bill Oram from the *Salt Lake Tribune* introduced himself. Mr. Doug Larson represented Granite School District. Ms. Smith-Mansfield said she would recuse herself from the hearing as a parent of a Cottonwood High School student in the Granite School District.

Opening statement and testimony – petitioner

Mr. Oram said he had requested the employment investigation file for Mr. Lyman, a district employee. *The Tribune* had asked for the text messages between parties associated with the investigation as well. Mr. Oram said that the coach, Mr. Lyman, and the extent of his involvement with a female student at Cottonwood High School was relevant information and should be released. Public interest in the case warranted the release of the information. Nate Carlisle, a reporter from *The Salt Lake Tribune*, was also present. He was sworn as a witness. He said he had requested investigative files in the past and had received the records. Information was not necessarily protected just because it was part of an investigative file.

Opening statement and testimony – respondent

Mr. Larson said there were valid reasons for not turning over the files. UPAC (Utah Professional Practices Commission) for teachers in Utah had redacted information from the documents associated with the case. The Family Educational rights and Privacy Act (FERPA) was a governing law concerning the records. FERPA was an important funding vehicle for education in the state. The statute required the district to withhold private student information from release without permission from and consent of a parent or the student. By turning over documents, the district risked losing federal funding. Student records were not all classified as private. Law enforcement agencies within schools were subject to FERPA. A law enforcement unit could maintain separate records, but a copy of a law enforcement record kept by the school was an educational record and was protected under FERPA. Interviews with various students were part of the record and notes from the interviews were kept as part of the investigative files. Anecdotal stories suggested the students were persecuted by other students for participating in the investigation and contributing to the loss of a popular teacher. All but one of the students involved in the investigation

transferred out of Cottonwood High. Multiple interviews had been conducted to obtain truthful testimony. It was true that some of the privacy rights of public employees are forfeit. Under the government Records Access and Management Act (GRAMA), the district reasonably expected UCA 63G-2-305 to protect information that would interfere with an investigation. Although the investigation was over, it was still a clearly unwarranted invasion of privacy to release certain records. *The Tribune* had requested interview notes and text messages. Students had not offered information willingly in the interviews. There were portions of the records that could be disclosed. The school district had invited *The Tribune* to sit down and discuss the documents. Initially that had not happened. Then the parties met with the government records ombudsman. Student statements feed on drama and are not always the truth. There was the possibility of distortion. Redacting names of students would not make their identities impossible to verify. Phone records belong to students. Five students had transferred out of Cottonwood as a result of the incident. Without exception the students involved had expressed fear of harassment. Mr. Hemphill read from UCA 63G-2-301. He said the disciplinary action was completed and all time for appeals had been completed. Mr. Larson said the teacher had resigned rather than be disciplined. There was therefore no finding of facts or a report. Mr. Larson said the privacy interests of the students outweighed the need to release the records. The initial police report had been provided to the *Tribune*.

Petitioner – closing

Mr. Oram said the licensing division of UPAC had an ongoing investigation. Misbehavior by a public employee was of great interest to the public. The requested records were not private. If the records were released, *The Tribune* would not use the names of students in its reporting. The story was ongoing. The extent of the involvement of a teacher with a student was of public concern. The teacher and the students had gained some level of separation by leaving the school. The “chilling effect” for future investigations was not sufficient reason for the denial of the records. Under FERPA, the requested text and phone messages and the law enforcement interviews were not educational records. Mr. Oram said he had not seen the statements by students. The requested records were about a public employee not students. He said the requested logs and text messages did not qualify as educational records.

Respondent – close

Mr. Larson said that while there was a need to maintain transparency in government records, the protection of kids was the more important objective. 60FR 3467 provided that records of criminal conduct were part of a student’s cumulative file. The Department of Education had provided the standard for protection of student records. Mr. Larson said *The Tribune* was engaged in a fishing expedition. There were no reasons to believe in a cover up or that the school district was withholding information. When the investigation ended with a termination, the investigation itself ended. There had been no attempt by *The Tribune* to obtain the consent of parents or students to obtain the records. Mr. Oram had no right to access private student records. All the employee records that were public had been released.

Deliberation

Mr. Hemphill made a motion to go *in camera*. Mr. Rowley seconded the motion. A vote was taken. Mr. Fleming, Mr. Hemphill, Mr. Misner, Ms. Ross, and Mr. Rowley voted for the motion. The motion passed and the committee went *in camera*.

10:40 – 11:18 closed session

Mr. Fleming made a motion to return to open session. Mr. Rowley seconded the motion. A vote was taken. Mr. Fleming, Mr. Hemphill, Mr. Misner, Ms. Ross, and Mr. Rowley, voted to return to open session. The committee returned to open session.

Deliberation – continued

Mr. Rowley said he had not read the news stories. He said access to records was the only way to determine the behavior of public employees. He asked what information had already been published about the teacher. Mr. Hemphill said articles about Mr. Lyman had reported inappropriate contact with a female student. The teacher had resigned. His career as a coach was over. The extent of misconduct was still not known. Mr. Rowley made a motion that the text messages as currently redacted be released. Mr. Fleming seconded the motion. A vote was taken. Mr. Fleming, Mr. Hemphill, Mr. Misner, Ms. Ross, and Mr. Rowley voted in the affirmative. The motion to release the text messages passed unanimously. Mr. Hemphill made a motion that pursuant to UCA 63G-2-201(2), records of witness statements were public records and should be released. Ms. Ross seconded the motion. Mr. Fleming mentioned the clearly unwarranted invasion of personal privacy addressed in the *Deseret News* case and said he was not convinced that public interest warranted the release of the records. A vote was taken. Mr. Hemphill voted in favor of release of the statements. Ms. Ross, Mr. Rowley, Mr. Misner, and Mr. Fleming, voted against the motion. Mr. Rowley made a motion that documents 1, 8, 9, and 10 should not be released but that the remainder should be released. Mr. Fleming seconded the motion. A vote was taken. Mr. Rowley and Mr. Fleming voted for the motion. Ms. Ross, Mr. Misner, and Mr. Hemphill voted against the motion. The motion failed. Mr. Hemphill made a motion that all the witness statements be released with the exception of #1. Ms. Ross seconded the motion. A vote was taken. Mr. Hemphill, Mr. Fleming, and Mr. Misner voted in favor of the motion. Ms. Ross and Mr. Rowley voted against the motion. The motion passed. Ms. Ross told the parties that an order would be sent within seven days. She thanked them for their attendance.

Hearing Erin Alberty vs. Public Safety

Ms. Ross explained the procedures for the hearing to the parties. She asked them to introduce themselves.

Opening – petitioner

Erin Alberty, *The Salt Lake Tribune*, introduced herself. She said she had requested records in February, 2012, of a trooper involved shooting. The trooper's name was Ed Bentley. The shooting occurred in 2006. The subject of the shooting was John Borno. The Department of Public Safety found the shooting to be unjustified. Trooper Bentley was fired and later charged in criminal court. The charge was dropped by the Carbon County prosecutor. Requests for all but three of the records originally requested had been satisfied. The internal affairs report, the shooting review board report, and the recording of the interview conducted with Trooper Bentley were the remaining records. The Department of Public Safety (DPS) argued that the records were protected under 63G-2-305(17). The section dealt with records prepared for litigation. The request came before the specific statute cited was on the books. Every shooting is reviewed as a matter of protocol, whether or not the review is likely to result in further action. Ms. Alberty said the department equated a termination to an administrative proceeding. Disciplinary records are public pursuant to UCA 63G-2-301(3)(o). A video of the interview with the trooper was requested. The merit of releasing information about police use of force was clear. Records that could reveal unjustified use of force and withholding information about it are of public interest. In the SRC order number 06-05, *The Salt Lake Tribune* vs. Salt Lake City, complaints of police conduct, once substantiated, were found by the State Records Committee to be public. There is great public interest in an officer-involved shooting. The records should be released.

Opening statement – respondent

Ms. Lana Taylor introduced herself. She represented the Department of Public Safety and the Highway Patrol. Michael Rabisch, Utah Highway Patrol, was also present. The initial records request was for internal affairs (IA) records. A box of records related to the request was located. After sorting through the box, public records were released to *The Tribune*. Dash cam videos, policies and procedures, an incident report prepared by the troopers who initially responded to the scene and two records – a letter of intent to terminate and a termination letter – were released. Two separate interview videos and a third video, which is a recording of the shooting review board, were the remaining records that were denied. Miss Alberty was referred to the Carbon County Sheriff's Office to obtain any of their records. On the same day of the shooting, the internal affairs division began an investigation. The Department of Public Safety's position was that the denied records are protected under UCA 63G-2-305(17).

Testimony – petitioner

Ms. Alberty said she had requested records that are like those maintained when any shooting incident occurs. DPS said the records requested were not maintained in the normal course of business. The records were no different than records made in any shooting. The idea of the records in this particular case being denied because of the facts involved was not clear. The original denial was made based on the argument that the release would interfere with an investigation. The case had been closed for years. Nate Carlisle, a reporter with *The Tribune*, was sworn as a witness for the

petitioner. He said internal affairs investigators are sworn peace officers. The officers are not a unique branch separate from law enforcement. He said DPS had done due diligence but had not come to the proper conclusion about the records. Mr. Hemphill asked what the public interest was in a case concluded in the past. Ms. Alberty said she was looking at a five-year period of time and officer-involved shootings. She said seventy-seven cases of officer-involved shootings had been reviewed and only two had been found to be unjustified. The trooper statement and video were not clear. It was not clear how DPS had reached its conclusion in this case. She said she was investigating how a police agency regulated officers. She was interested in the use of force and what determined the difference between a justified and an unjustified shooting.

Testimony – respondent

Ms. Taylor said that when a shooting occurred an administrative review was opened. The more severe the incident the more likely it was to have three investigations. Local law enforcement investigated; there was an administrative review; and IA (Internal Affairs Division) all investigated. The IA could compel testimony that could not be used in criminal proceedings. The investigative work product contained discussions and impressions. The administrative review report is not released to the subject of the record. The report is reviewed for disciplinary action and is not released. Major Rabisch was sworn as a witness. He said he was assistant superintendent of the Highway Patrol. Internal reviews were always conducted internally. They have always been perceived to be protected. The report may contain information gathered from employees or citizens. It may contain confidential information which has been given in confidence. In that setting, the subject may be compelled to provide information the subject would not normally be required to provide. Release of the information could have a chilling effect on future interviewees providing information. The employee that is the subject of the investigation does not have access to the information gathered. *The Tribune* must show that release of records to the public has greater worth than protection of those records. If there is a compelling interest in release, the DPS asked that names be redacted or that *The Tribune* be subject to a protective order to not release or disseminate the names of witnesses. Ms. Taylor said the protected classification of the records was appropriate.

Closing – petitioner

Mr. Carlisle said Officer Rabisch had said the investigative records were always protected. The heightened public interest in the case should be weighed in the balance. Mr. Carlisle said the fact that the trooper was also Mayor of Green River at the time of the shooting elevated public interest. *The Tribune* would prefer redactions rather than a restriction of dissemination through a protective order. DPS wanted to consider the termination record as public, but all the reasons for the termination were considered protected records. Mr. Carlisle said that made no sense. The investigation was triggered by the shooting. The trooper testified that in every shooting there is an investigation. The records of the investigation with all the reasoning, mental impressions, and intentions should be released. The witnesses, except an accomplice,

were all police officers whose names are public records. There is public interest in the whole investigation and in the resulting decision.

Closing – respondent

Ms. Taylor said DPS and DHRM both used the investigative records to initiate action. Separate departments dealt with different issues and kept different records. When the matter turned into an administrative proceeding, the records were prepared in anticipation of a disciplinary action and those were provided. DPS sorted through the records to select the records that were public and had provided them. The remaining records were protected pursuant to UCA 63G-2-305(17). They were records prepared for or by an attorney, consultant, surety, indemnitor, insurer, employee, or agent of a governmental entity for, or in anticipation of litigation or a judicial, quasi-judicial, or administrative proceeding. Preferable to releasing the records in their entirety would be the redaction for the protection of witnesses. Ms. Taylor said she had identified comments, evaluations, and mental impressions in the denied records. She said she had not marked or highlighted the records. She said the protected classification of the records was appropriate.

Deliberation

Mr. Rowley said that mental impressions did not have a place in the discussion. The committee's consideration was in the preponderance of evidence mentioned in UCA 63G-2-406 necessary to release records in the public interest. This was difficult without seeing the records. Ms. Smith-Mansfield said the investigation into the incident was closed and disciplinary action had occurred. She said the records would normally be public except to the extent that investigative material might be protected under UCA 63G-2-305(9)(d). Mr. Hemphill made a motion. Pursuant to 63G-2-301(3)(o), the records of the investigation were public and should be released. Ms. Ross seconded the motion. A vote was taken. Mr. Hemphill and Mr. Misner voted in favor of the motion. Ms. Smith-Mansfield, Ms. Ross, Mr. Rowley, and Mr. Fleming voted against the motion. The motion failed. Mr. Rowley made a motion that the records were properly classified under UCA 63G-2-305(17). Mr. Fleming seconded the motion. A vote was taken. Mr. Rowley and Mr. Fleming voted in favor of the motion. Ms. Smith-Mansfield, Ms. Ross, Mr. Misner, and Mr. Hemphill voted against the motion. Mr. Rowley made a motion that the committee review the records *in camera*. Mr. Misner seconded the motion. A vote was taken. Mr. Hemphill and Ms. Smith-Mansfield voted against the motion. Ms. Ross, Mr. Rowley, Mr. Fleming, and Mr. Misner voted in favor of the motion. The committee went *in camera* to view the records.

Closed session 2:05 – 2:35

Deliberation – continued

Ms. Smith-Mansfield made a motion to return to open session. Mr. Hemphill seconded the motion. A vote was taken. Mr. Hemphill, Mr. Fleming, Mr. Misner, Ms. Ross, Mr. Rowley and Ms. Smith-Mansfield voted in favor of the motion. The

committee returned to open session. Ms. Smith-Mansfield made a motion that the records are investigative records but as they did not qualify for any of the protections under UCA 63G-2-305(9) and the investigation and disciplinary action that resulted are completed, the records are public. Mr. Hemphill seconded the motion. Ms. Smith-Mansfield amended the motion to include that under UCA 63G-2-305(9)(d) information that could disclose the identity of a source could be redacted. Mr. Hemphill withdrew his second. Mr. Fleming seconded the amended order. Ms. Smith-Mansfield limited her motion to the written reports and withdrew the amendment about redaction of information that would reveal sources. Ms. Smith-Mansfield withdrew her entire motion. Mr. Hemphill made a motion that the written records were public under UCA 63G-2-301(3)(o) and should be released. Mr. Misner seconded the motion. A vote was taken. Mr. Misner, Ms. Ross, Mr. Hemphill, and Mr. Fleming voted for the motion. Ms. Smith-Mansfield, Mr. Rowley, voted against the motion. The motion passed. Ms. Smith-Mansfield made a motion that the videos were protected under 305(9)(d) and should not be released. Mr. Fleming seconded the motion. A vote was taken. Mr. Hemphill voted against the motion. Mr. Fleming, Mr. Misner, Ms. Ross, Ms. Smith-Mansfield, and Mr. Rowley voted in favor of the motion. The motion passed. Ms. Ross said an order would be sent to the parties within seven business days. She thanked the parties for their attendance.

Hearing Jeffrey Lawrence vs. Department of Public Safety.

Opening statement – petitioner

Mr. Greg Stevens spoke in behalf of his client, Mr. Jeffrey Lawrence. He appealed the denial of an investigative report into Mr. Lawrence's complaint against a Utah Highway Patrol trooper. He alleged that the trooper had violated his client's constitutional rights and committed perjury in a statement against him before a judge. The release of the records clearly was in the public interest pursuant to UCA 63G-2-201(2). The records were not created in anticipation of litigation. They were not an investigative record. They were not protected, controlled, or private and should be made public.

Opening statement – respondent

Ms. Taylor, representing the Department of Public Safety, said that the records being sought were a complaint that had been filed by Mr. Lawrence. The Highway Patrol had investigated the complaint. As a result, no disciplinary action was taken against the trooper. There was neither a written reprimand, suspension without pay, demotion or dismissal. The statute says sustained action—none of disciplinary action occurred and UCA 63G-2-301(3)(o) is not applicable.

Testimony – petitioner

Mr. Stevens said that the statute relied upon by DPS was not applicable in the case. UCA 63G-2-301(4) states that the list of public records is not an exhaustive list and should not be used to limit access to records. In UCA 63G-2-201(2), the statute states that documents are presumed to be public unless private, protected, or controlled. There is no ongoing investigation that would qualify the record for protection under

63G-2-305(9). Mr. Lawrence filed an internal affairs complaint and it was investigated as a matter of course. If there were names of witnesses who were not public employees, they could possibly be redacted. The name of the trooper and the internal affairs investigators would be public. The internal affairs report and any supporting documentation or interviews had been requested. Mr. Lawrence had already received the record of his arrest.

Testimony – respondent

Ms. Taylor said the complaint Mr. Lawrence had filed was classified as private. The complaint could be released to him. The policy and procedure information could be released. Concerning investigative reports, government employees have an expectation of privacy in unfounded or unsubstantiated complaints. No disciplinary action was taken. An administrative review was conducted. No disciplinary action was taken. The record was private. The petitioner had not shown that there was public interest favoring access. A lawsuit was filed by Mr. Lawrence; discovery took place and now litigation was no longer pending. The records related to the review of an officer who is still employed. The records would be part of a yearly performance review which is clearly a private record. Release of performance reviews of public employees would make it difficult to do a job, especially in a small community. The burden was on Mr. Lawrence to show how release of the records was of public interest. The government does not disseminate records of a current employee. Ms. Taylor said the records were private pursuant to UCA 63G-2-302(2)(a). If the private records – part of a personnel file – were to be released, they should be accompanied by a protective order. Officer Michael Rabisch, who had testified earlier, said that although there had been no disciplinary action taken as a result of the grievance, a personnel file could still contain other sensitive information.

Closing – petitioner

Mr. Stevens said his client was asking for an internal affairs report not a personnel record. He said the record was not a clearly unwarranted invasion of personal privacy. The request was for an internal investigation report. Mr. Lawrence maintained that the Highway Patrol trooper had lied in an affidavit to a judge. Names of any individuals not known would be the only necessary redactions. It clearly was in the public interest to know how an alleged violation is handled in the Department of Public Safety. A public employee engaged in the performance of duties did not have an expectation of privacy and the records would not be a clearly unwarranted invasion of personal privacy. An officer has the responsibility of enforcing the safety and the constitutional rights of citizens. Investigation into an alleged violation of those duties is of public interest.

Closing – respondent

Ms. Taylor said that records relating to public employees and their performance reviews and evaluations are private. They are properly classified as private. The records still could be released if the committee finds that the petitioner has met the burden of public interest.

Deliberation

Mr. Hemphill said that since the records had not resulted in disciplinary action pursuant to 63G-2-302(2)(a), the records were private and therefore should not be released. Ms. Ross seconded the motion. A vote was taken. Mr. Hemphill, Mr. Fleming, Mr. Misner, and Mr. Rowley voted for the motion. Ms. Smith-Mansfield and Ms. Ross voted against the motion. The motion passed four to two. Ms. Ross said the parties would receive the order within seven business days. She thanked the parties for their attendance.

SRC Appeals received

See attached report.

District Court updates

No updates to report.

Adjournment 3:23 p.m.

Next meeting November 15, 2012.

STATE RECORDS COMMITTEE
October 11, 2012
State Archives Building, Courtyard Meeting Room
346 S. Rio Grande (450 West)
Salt Lake City

AGENDA
Call to Order 9:00 a.m.

Hearing: Bill Oram, *Salt Lake Tribune* vs. Granite School District

Hearing: Erin Alberty, *Salt Lake Tribune* vs. Department of Public Safety

Break

Hearing: Jeffrey Lawrence vs. Department of Public Safety

Other Business

- 1. Approval of August 9, 2012 SRC Minutes, action item**
- 2. approval of September 13, 2012 SRC Minutes, action item**
- 3. SRC appeals received**
- 4. Cases in District Court**
- 5. Other Business**

ADJOURNMENT

Next meeting scheduled for Thursday, November 15, 2012, at 9:00 a.m.

**SRC Appeals Received
October 2012**

1. **Julie Stecklein, *Tribune* vs. UTA. Rescheduled for November.**
Request for crime database information.
2. **Michael Luesse vs. UDC. Scheduled for November** Request for C-notes, 100 page limits for fee waivers for indigent inmates.
1. **Cimaron Neugebauer, *Tribune* vs. Career Service Review Board. Scheduled for November.** Discipline of a DPS Officer.
2. **Mark Tolman, KSL TV vs. Wasatch County. Scheduled for November.** Records of Gregory Nathan Peterson's arrest.
3. **Steven Sanchez vs. Tax Commission.**
4. **Reginald Williams vs. State Travel Office.**
5. **Paul Kimball vs. Courts**
6. **Jeff MccCollin vs. Division of Water Rights.**
7. **Moses Shepherd vs. UDC**
8. **Robert Milliner vs. UDC**
9. **Corey Vonberg vs. AG's Office**
10. **Danny Ward vs. Human Services**
11. **Calvin Moore vs. UDC**
12. **Don Stryker vs. U. of Utah**
13. **Sandra Senn vs. Public Safety**
14. **David Cook vs. UDC**
15. **Mark Kimball vs. UDC**
16. **Robert Baker vs. UDC**
17. **Gordon Thomas vs. Ct. of Appeals**

18. Steven Sanchez vs. Tax Commission

19. Reginald Williams vs. Administrative Services Travel Office

20. Melvin Eugene Smith vs. UDC

21. Jeff McCollin vs. Division of Water Rights

22. Corey Vonberg vs. Attorney General's Office