

State Records Committee Meeting

Date: March 16, 2023

Time: 9:00 a.m. – 4:00 p.m.

Committee Members Present:

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

Legal Counsel:

Brian Swan, Assistant Attorney General
Michelle Adams, Paralegal

Executive Secretary:

Rebekkah Shaw, Utah State Archives

Others Present Online or In Person:

Valerie Jacobson, Archives
Rosemary Cundiff, Archives
Amber Lindsey
Judith Zimmerman
Ronald Mortensen
Patrick Conklin
Kristen Chevrier
Paul Amann
Lonny Pehrson, Attorney, Attorney General Office
Mohamed Abdullahi, Attorney, Logan City
Blaine Thomas, Attorney, Dept. of Health & Human Services
Tim McConnehey
Terra Rosslund, University of Utah
Ian Cooperstein
Rebekah Bradway, Attorney, University of Utah
Austin Weenig, University of Utah
Eric Stott, Dept. of Health & Human Services

Robert Statterfield
Dianna Sanchez, Dept. of Health & Human Services
Christopher Pieper, State Treasurer Office
Teresa Harris, Logan City

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Daniel Burton, Attorney General Office
Natasha Naylor
Amanda Slater
Bri Murphy
Blaine Hansen, Attorney General Office
Wendy McConneley
Steven Onysko
Todd Jenson
Craig Carlston
Spage

Agenda:

- o Five Hearings Scheduled
 - o Judith Zimmerman v. Department of Health & Human Services (2022-235)
 - o Tim McConnehey v. Jordan School District (2022-220)
 - o Paul Amann v. Attorney General Office (2022-215, 2022-216)
 - o Ian Cooperstein v. University of Utah (2022-225)
 - o Brady Eames v. Logan City (2022-190)

- o Business
 - o Approval of February 2023 SRC Minutes, action item
 - o Order 23-07 action item
 - o Legislative session update, report
 - o Cases in district court, report
 - o SRC appeals received and declined, notices of compliance, and related action items
 - o Committee members' attendance polled for next meeting, format and quorum verification

Call to Order

The Chair called the meeting to order.

1. Judith Zimmerman v. Department of Health & Human Services (DHHS) (2022-235)

Petitioner Statement:

Dr. Zimmerman stated she objects to the Attorney General's Office participating as counsel to the Committee and counsel to the respondent. She stated there are other conflicts of interest because the Attorney General's Office represents the University of Utah in her ongoing court case.

Dr. Zimmerman stated she has not received any records responsive to her request. The complaints requested involve the data the department controls. She stated the respondent argues the records are not subject to GRAMA because they fall under Utah Code 63G-2-106. She stated that "security measure" is not defined. She stated the security procedures have previously been provided to parents, IHC, schools, and volunteers.

Dr. Zimmerman stated she is concerned about scientific misconduct and provided examples. She stated the Committee could reclassify the records if they fall under Utah Code 63G-2-301 due to the public interest. She stated if there are records to support or negate the allegations, the public deserves to know.

Dr. Zimmerman asked if the data can be trusted if DHHS doesn't not correct errors because the CDC says it is not significant. She stated her request is in the public interest and important for the safety and security of those whose information is used

Respondent statement:

Mr. Thomas objected to the exhibits petitioner provided to the Committee because he has not had time to review them. He also objected to any allegations of misconduct by the department, stating that it is not in the Committee's jurisdiction.

Mr. Thomas stated any responsive records are defined as security records and not subject to GRAMA. He stated if they were subject to GRAMA, they would be private records. He stated the complaints requested were submitted by the requester. He stated she asked the department to take security measures to investigate conduct of employees and take disciplinary actions. He stated the request is not entitled to any rights under GRAMA including a response or appeal because the records are not governed by GRAMA. He stated her arguments support this. Mr. Thomas stated that the Committee does not have the authority to release records that are not subject to GRAMA.

Mr. Thomas stated even if the records were not security measures, they are private under Utah Code 63G-2-302(2)(d) and Utah Code 63G-2-301(3)(o) for the misconduct records. He stated Dr. Zimmerman has not shown that she is the subject of the records. He stated entities should be able to scrutinize employees without public embarrassment or shame unless proven guilty and disciplinary action is sustained.

Questions from the Committee:

The Committee asked if the respondent is arguing records related to employee misconduct around scientific research fall under security. Mr. Thomas stated an employee misconduct is a security risk and looking into it would involve security.

The Committee asked if the totality of the records fall under security measures in Utah Code 63G-2-106. Mr. Thomas stated they do.

Dr. Dean stated that if the investigation is complete and disciplinary action was sustained, then those records are public. She stated she can understand portions not being public but the whole thing falling under Utah Code 63G-2-106 seems a stretch.

Mr. Thomas stated the investigations would be protected under Utah Code 63G-2-305(10) . He stated if the records involve security measures, then they are not subject to GRAMA.

The Committee asked if there was disciplinary action. Mr. Thomas stated his understanding is that even stating whether the investigation occurred would be releasing information not subject to GRAMA so he cannot answer.

Petitioner Closing Statement:

Dr. Zimmerman stated her request involved specific employees. She stated this is not a security measure.

Respondent Closing Statement:

Mr. Thomas stated the request asked for an investigation into a potential breach of data including private information. He stated these records are not subject to GRAMA, and if they were, they are private. He stated the requester has not demonstrated the public interest outweighs the private records about employees.

Public Comment:

Dr. Mortensen stated he is a retired humanitarian. He stated he is concerned about how much data governmental entities gather about citizens. He stated it is in his own security interest to

know what is collected and who his data is shared with. He stated there is public interest in knowing how the state responds when security protocols are violated.

Ms. Chevrier stated she is concerned about the lack of transparency in this case. She stated that large pools of data encourage large data breaches. She stated personal information breached can ruin lives, careers, and tear families apart. She stated a payer database was shared with the University of Utah for research purposes but where the data has gone from there is unknown. She stated DHHS has a history of serious data breaches and mishandled data. She stated the public has a right to know where their data is going.

Deliberation:

Motion by Ms. Dean to review the records in camera. Seconded by Ms. Dubovik.

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

Motion by Dr. Cornwall to continue the hearing. Seconded by Ms. Dean

Discussion to the motion

Dr. Cornwall stated the decision of what falls under Utah Code 63G-2-106 is an important one. The respondent was also given new information today and needs a chance to make his arguments in response.

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

The Committee sauntered.

2. Tim McConnehey v. Jordan School District (2022-220)

Petitioner statement:

Mr. McConnehey stated he submitted the request in September 2022. The denial stated the respondent does not maintain the email address because Mr. Robinson uses a Gmail account, so there were no responsive records. He stated his appeal to the Chief Administrative Officer was unanswered.

Mr. McConnehey stated another request sent October 2022 was partially fulfilled. He received seven emails, and two text messages for a two year time span. He stated he knows there are more responsive records because Mr. Robinson has commented on financial issues in public meetings. He was informed that Mr. Robinson frequently deletes his messages, but provided all he could find. He stated his wife sent Mr. Robinson a message in July that should have come up in their search for responsive records.

Mr. McConnehey asked why government records are in a personal Gmail account. He stated the Gmail address is posted to the District's website, so that account is how the public contacts him. He stated the respondent should be responsible for the retention of those records. He stated Mr. Robinson has been on the board for six years and has previously been trained on district policies. He asked the Committee to grant his appeal.

Respondent statement:

Mr. Van Komen stated there is a statutory difference between employee and elected official. He stated GRAMA is for records maintained by the entity. He reviewed the definition of an elected official, and the definition of a record. He stated if a record is not maintained by the respondent, it is not subject to GRAMA. He stated GRAMA does not enforce the respondent to require an elected official to do something outside of GRAMA.

Mr. Van Komen reviewed the definition of a governmental entity, individual, and human being. He stated elected officials are not included in Utah Code 63G-2-103(21) or (22)(a). Mr. Van Komen reviewed what is defined as not a record including materials legally owned by an individual in their private capacity. He stated that is what is happening here because the personal email is not prepared, owned, or received by the governmental entity. He said there is confusion about Utah Code 63G-2-103(22)(b)(i)(A). He stated records are stored on the district email server. He stated talking about something in a public meeting doesn't make the private email government records.

Mr. Van Komen stated the District is required to post an email address for each board member. He stated that does not make the email public record. He stated the remedy is the ballot box, not GRAMA. He reviewed the difference between a public employee and an elected official.

Mr. Van Komen stated the respondent has no responsive records. He stated the district can ask Mr. Robinson to check his email for responsive records, but cannot require it. He stated the GRAMA request was not denied because there were no records to provide. He stated they responded in good faith.

Questions from the Committee:

The Committee asked why the other six board members have a district email account. Mr. Van Komen stated a district email account is provided when asked. The Committee asked if Mr. Robinson is using the Gmail account for public business, should those be subject to GRAMA. Mr. Van Komen stated GRAMA does not extend to anything done under public business to be a record. He stated that may be good policy, but it is an over extension of the definition.

The Committee asked if the request was made to the school board rather than the district, would it be treated differently. Mr. Van Komen stated the board is a body politic. Mr. Robinson is not.

The Committee stated the school board is subject to the Open Public Meetings Act (OPMA). With few exceptions, the meetings are open because public business needs to be done in the open. The Committee stated the legislative intent of GRAMA includes the public's right to access records about public business and asked why GRAMA would be different from OPMA. Mr. Van Komen stated OPMA is separate from GRAMA as it does not deal with the records of individuals or elected officials.

The Committee stated they do not see officials exempt from disclosing records of public business. Mr. Van Komen stated if the governmental entity creates or maintains the records, then the records are not exempt.

The Committee asked if the board members are over the budget of the district. Mr. Van Komen stated that they are collectively, not individually. He stated a lot of information is available about the budget and elected officials can take a position that is not adopted. He stated underlying information about the budget is provided, but communications of a board member is not maintained by the respondent.

Requester Closing Statement:

Mr. McConnehey stated Mr. Robinson is held to a different standard from the rest of the board. He referenced order #18-39 regarding work-related messages. He stated the Committee said they should be considered records and disclosed if it's about the public's business.

Respondent Closing Statement:

Mr. Van Komen stated nothing is withheld. He stated the district does not have control over what Mr. Robinson receives in his personal email account. He stated there is no requirement for elected officials to use an email account from the governmental entity. He stated GRAMA does not require the district to force Mr. Robinson to use a Jordan School District email account. He

stated GRAMA recognizes a difference from elected officials and governmental entities. The entity is subject to GRAMA.

Questions from the Committee:

The Committee asked if the district's position is that the emails are not records under GRAMA but as a courtesy to the petitioner, they asked Mr. Robinson anyway. When Mr. Robinson provided what he had, it was sent to the petitioner. Mr. Van Komen stated that is correct.

Deliberation:

The Committee discussed the legislative intent of GRAMA and public business.

Ms. Dean stated her opinion that if an elected official is conducting entity business, the records are owned by the entity. Dr. Cornwall, Mr. Williams, and Ms. Dubovik agreed that the Gmail address is on the website and the emails about public business should be kept. Dr. Cornwall stated that personal correspondence would not fall under GRAMA.

Ms. Peterson stated it is common across government for a governmental entity to give the option to have a work email account. If not, the entity does not bind the person to record retention. Ms. Dubovik stated she sees it as a workaround to avoid transparency. Ms. Petersen stated GRAMA was established before electronic communications. Dr. Cornwall stated a record is defined regardless of format.

Motion by Dr. Cornwall to grant the appeal. The respondent needs to do another search. Email related to the public's business should be retained according to district policy and provided under Utah Code 63G-2-102(1)(a). Seconded by Ms. Dean.

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

3. Paul Amann v. Attorney General Office (2022-215, 2022-216)

Petitioner statement:

Mr. Amann stated he has a standing objection to the Committee's counsel being from the Attorney General's Office. He stated that appeal 2022-215 is for transcripts, which he has received from the respondent's counsel. That appeal is resolved.

Appeal 2022-216.

Mr. Amann reviewed an ongoing court case and an order from Judge Skanchy. He stated the

respondent is hostile toward him and refuses to provide him records. He stated that the records he seeks are explicitly public under Utah Code 63G-2-301(3)(o) because they involve formal charges and disciplinary actions.

Mr. Amann stated the respondent did not ask the record holders for records. He stated there is an ongoing problem of the respondent being unable to find records or keep records appropriately. He stated he is asking for records that involve completed investigations. He stated he had received disciplinary records previously without cost. He stated KSL had made a similar request and the respondent could forward to him what they sent to KSL.

Mr. Amann stated the respondent is avoiding the request by asking for money. He stated the request should not take hours to fulfill. He stated the fees are unreasonable because the records are public. He stated his request is not unreasonable.

Respondent statement:

Mr. Pehrson stated a fee waiver is all that is before the Committee. He stated the request mentioned a few individuals but was not limited to those. He stated the fee waiver was denied because the petitioner did not show how the request benefits the public. He stated it is for the petitioner's ongoing litigation against the respondent. He stated there are also a large number of requests from the petitioner. Many fee waivers have been provided. He stated it is appropriate for the respondent to consider the impact fulfilling the request has on the Human Resource Office, which is small.

Mr. Pehrson stated the appeal to the Chief Administrative Officer did not provide the public interest in granting the fee waiver, but objected to the estimated time to gather the records. He stated they invited the petitioner to narrow the request to the named individuals or the time span of 8 years. He stated the request would require research. He stated if the request is for records that were provided to KSL for a more specific request, they can do that without cost.

Mr. Pehrson stated GRAMA does not provide a weighing analysis for the Committee in determining whether to grant a fee waiver. He stated it is not required of the entity or the Committee. He asked the Committee to uphold the denial.

Questions from the Committee:

The Committee asked how many employees are in the Attorney General's Office. Mr. Pehrson stated there are a few hundred. The Committee asked if there is a system that tracks all disciplinary records and the result of any actions. Mr. Pehrson stated he is not aware of one. He stated they would be in each personnel file. He stated once they identify the file, they would need to pull it and only provide records that are public, which also requires a review.

Petitioner Closing:

Mr. Amann stated the respondent should have provided records previously given to the media for free. He stated they did not refer him to any records available online. He stated he is a whistleblower working to expose corruption. He stated the cost of poor records management should not be passed to him. He stated that he narrowed the search already by naming three people.

Questions from the Committee:

The Committee asked if he is willing to limit his request to the named employees. The request said any and all disciplinary records “including, but not limited to” the named mentioned. Mr. Amann stated that they should provide the three while they search for the rest. He stated they should provide what is already available. He stated he does not know the names of everyone who has been disciplined.

The Committee asked Mr. Pehrson if any of the names mentioned were included in the previous requests from the media. Mr. Pehrson stated they routinely get requests for records provided to KSL and they go to the previous response and provide the records. He stated if the request is what was released to the media, they can do that, but that was not the request. He stated the request is for the entire office. He stated GRAMA requires the records be identified with reasonable specificity. He stated the petitioner is moving the goalposts. He stated if the request is limited to the individuals named, they can get an updated estimate. He stated governmental entities cannot reinterpret a record request.

Deliberation:

The Chair stated appeal 2022-215 was withdrawn.

Motion by Ms. Dean to deny appeal 2022-216 because the entity may charge a fee under Utah Code 63G-2-203. The entity did assess the reasonableness of a fee waiver and is allowed to ask for it in advance if it is over \$50. Seconded by Mr. Buchanan.

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

4. Ian Cooperstein v. University of Utah (2022-225)**Petitioner Statement:**

Mr. Cooperstein stated he is seeking records about a job posting. He reviewed the University's policy regarding job postings. He stated the job posting he's looking for meets the requirements in the policy to have been posted for several days. He stated nothing has been provided in response to his request, but he has been charged for the search. He stated he wants to know why the records do not exist.

Mr. Cooperstein stated the charge is \$50 for less than 10 minutes of work and no records. He stated he is being overcharged for a search that was not done properly. He stated he provided keywords and only two departments would need to be searched.

Respondent Statement:

Ms. Bradway stated a number of statements and assumptions were made based on false statements. He stated there are only two issues before the committee. The request for the job posting and the fee. She stated there are no records responsive to the request. She stated everything advertised during the time frame requested was searched and nothing has the job titles requested.

Ms. Bradway stated GRAMA allows entities to charge a fee for search time and retrieval. She stated typically they can find postings with little time and cost, but when they could not find it, they spent more time and resources searching. She stated the petitioner was provided all the costs associated with the request. She stated some were waived. She stated the fee is based in statute and asked the Committee to uphold the denial.

Questions from the Committee:

The Committee asked if the fee was the actual cost of providing a record under Utah Code 63G-2-203(1)(a) and (2)(a). Ms. Bradway stated Utah Code 63G-2-203(2)(a)(i) starts with staff time. She stated that she does not read Utah Code 63G-2-203 as restricting fees only when records are provided.

The Committee asked if their policy means there should be a record. Ms. Bradway stated there are exceptions when the job is posted internally. She stated they searched thoroughly and did not find any responsive records. She stated she does not believe the policy was violated.

Petitioner Closing:

Mr. Cooperstein asked that the fee be waived because no records were provided. He stated the request was filed in 2020 and he received a letter of extension suggesting they were doing a detailed search. He stated if some fees were waived then the fee was going to be over \$50, which he stated was absurd. He explained his understanding of the promotion he had and how

it relates to the job posting. He stated he can accept the records do not exist but he would like to know why.

Respondent Closing:

Ms. Bradway stated a thorough search was done. She stated there are no records to provide and asked the Committee to deny the appeal.

Questions from the Committee:

The Committee asked how much time was spent on the search. Ms. Bradway said an hour and forty minutes. Three staff members worked on it, but the charge time was not the full hour and forty minutes.

Deliberation:

Ms. Dean stated she is convinced a reasonable search was done so the only issue is the fee.

The Committee discussed whether a fee can be charged for a search when no records are provided. Ms. Dubovik stated she has never seen a charge only for the search. Dr. Cornwall noted the cost after some being waived is just under \$50.

The Committee discussed the actual cost of providing records. Ms. Petersen stated GRAMA is conflicted so it is up to the Committee.

Motion by Ms. Dean to deny a portion of the appeal. The entity did a reasonable search and there are no records to provide. Seconded by Mr. Biehler.

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

Motion by Dr. Cornwall to grant the fee waiver based on the unique circumstances of the appeal. Seconded by Ms. Petersen.

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

4. Brady Eames v. Logan City (2022-190)

The petitioner did not attend the hearing. Ms. Shaw read a message from him that he was

pumping water from his flooded basement, and a message from the respondent that they just received a new request from the petitioner.

Respondent Statement:

Mr. Abdullahi stated the appeal is the same case as in December 2022. He stated the amount is a little different, but the request is the same. He stated the records were prepared for the hearing so they provided them to the petitioner. He stated the petitioner is required to pay the pending fee before he receives any more records.

Questions from the Committee:

The Committee asked if there were any reactions. Mr. Abdullahi stated there were not. The Committee asked how the fee was calculated. Mr. Abdullahi stated three people compiled the records and the fee is for 3.5 hours at \$15.00 an hour. He stated three people worked on the request and they charged the lowest hourly rate.

Deliberation:

Motion by Ms. Dean to deny the appeal for a fee waiver under Utah Code 63G-2-203. The city may charge fees for providing records and the fee is reasonable. Seconded by Dr. Cornwall.

Discussion to the motion:

Dr. Cornwall stated there is a real cost for the respondents to attend the meeting from Logan and these requests are repeatedly submitted with small changes. She stated the Committee should be aware of the hidden costs to providing records. Ms. Dubovik stated the petitioner received the records and has still not paid the fee.

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

Mr. Abdullahi stated an appeal in June will be for the same thing. Dr. Cornwall stated the Committee should address that in their Rules.

Mr. Williams left the meeting. Ms. Dean chaired the meeting.

Business:

Approval of February SRC Minutes, action item

Motion by Ms. Petersen to approve the February minutes. Seconded by Ms. Dubovik.

Vote: Yea: 5. Nay 0. Abstain 1. Mr. Biehler, Ms. Dubovik, Mr. Buchanan, Ms. Petersen, Ms. Dean voted in favor of the motion. Dr. Cornwall abstains.

Mr. Williams returned.

Legislative Update:

The Executive Secretary reviewed SB 231 and HB 343. She stated the Committee is required to create rules to implement the changes in SB 231. The Committee discussed legislative changes.

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

The Executive Secretary reviewed the following appeals that were denied and withdrawn. She stated Rosemary Cundiff, the Government Records Ombudsman is retiring.

2023-23	Steven Allen v. Dept of Corrections	Requesting access to a warden variance from 1993. The appeal was missing the request and denials, which were sent to me by the record officer. Denied because sufficient evidence was not provided that the responsive record exists.
2023-21	Eric Peterson (UIJP) v. Utah Inland Port Authority	Requesting access to records related to benefits provided to a board member. Denied because sufficient evidence was not provided that responsive records exist.
2023-16	Brady Eames v. Millard County	Requesting access to reports from a 1989 murder investigation. Denied because the records had previously been provided and decision 21-04 states "the Committee is convinced that Millard County has provided access to all public records responsive to Mr. Eames' records request."

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

A quorum was confirmed for April 20, 2023.

This is a true and correct copy of the March 2023, SRC meeting minutes, which was approved on April 20, 2023. An audio recording of this meeting is available on the Utah Public Notice Website.

X /e/ Rebekkah Shaw