

State Records Committee Meeting

Date: May 18, 2023

Time: 9:00 a.m. – 4:00 p.m.

Committee Members Present In Person:

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

Jim Kichas, State Archivist Designee

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

Michelle Lombardi, Assistant Attorney General, Tax Commission

Patrick Tanner, Attorney, Uintah School District

Aubry Johnson

Jason Johnson

S. Mark Barnes, Attorney

Gregory Ferbrache, Attorney

Kathryn Bleazard, Tax Commission

Andrew Day, Attorney

Nick Bender

Annie Knox, KSL

Lonny Pehrson, Assistant Attorney General, Attorney General Office

Danielle Allison

Aaron Waite

Scott Pruyt

Rock Woodford

Monika Griff

Laron Lind
Blaine Hansen
Kiersten Vandervelde
Jann Farris
Daniel Burton
Justin Anderson
Terra Rosslund

Agenda:

- o Four Hearings
 - o Nicholas Bender (for Johnson) v. Uintah School District (2023-01)
 - o Annie Knox (KSL) v. Attorney General Office (2023-08)
 - o Gregory Ferbrache v. Tax Commission
 - o Pete Sorensen v. Salt Lake City Police (2022-62)

- o Business
 - o Approval of April 2023 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 pro tem called the meeting to order.

1. Nicholas Bender (for Johnson) v. Uintah School District (2023-01)

Petitioner Statement:

Mr. Day, counsel for Aubrey and Jason Johnson, stated that they seek factual information related to their child's injury that occurred during recess. They also seek factual information regarding other incidents in other playgrounds of the district.

Mr. Day stated the respondent's argument discounts the petitioner's interest in the records. He stated the respondent is not required to classify the record protected under Utah Code 63G-2-305(18) and (24). He stated the request includes the student injury report, staff statements, reports from the Division of Risk Management, and correspondence between staff and the Division. He stated that the protected classification is improper.

Mr. Day asked the Committee to review the records in camera and review several questions. He stated if the record relates to more than the subject of the records, then it is a public safety record which is done regularly in the normal course of business. Mr. Day also made an argument for the public interest outweighing the classification.

Witness statement:

The Chair pro tem swore in the witness, Mrs. Johnson.

Mrs. Johnson described the incident. She stated she was shocked the respondent would not provide the injury report and inspection report about the condition of the playground. She stated staff made her feel out of line for asking for the record.

Mrs. Johnson stated the student injury report could provide critical information. She stated it is against the public interest for a parent to not have access to records about their children.

The Chair pro tem swore in the witness, Mr. Johnson.

Mr. Johnson stated that they are looking for answers and do not want other parents to go through what they have. He stated they know the records exist and they need to understand what happened. He stated the district has not adequately explained why the records cannot be disclosed. He asked the Committee to order the records be released.

Questions from the Committee:

The Committee asked if there is any litigation going on currently. The petitioner stated there is not. The Committee asked if any records have been received. Mr. Day stated they have received records except what he listed. The Committee asked if anything provided had been redacted. Mr. Day stated there were no redactions.

Respondent statement:

Mr. Tanner stated the district regrets what happened and recognizes the burden on the family. He stated the appeal is not about the petitioner's need to get information to care for their child because they are aware of what injuries occurred. He stated they will not get new information from the records.

Mr. Tanner stated the appeal is about litigation. He stated the petitioner has already stated they will file a claim. He stated this appeal should be at the court to get access to the records as GRAMA requires classification. Mr. Tanner stated the argument that factual information cannot be protected is not under GRAMA but could relate to litigation. Mr. Tanner stated the parents

have seen the report but they want a copy for litigation. He stated it would provide an unfair advantage to the petitioner if they knew the process of the insurer.

Mr. Tanner stated the classification was proper because Utah Code 63G-2-305(18) includes the insurer, employee, and agents of the entity. He stated it is broader than litigation, but “in anticipation of” it. He stated the risk management report was created by the insurer in anticipation of litigation. He stated the student injury report was required in anticipation of litigation. The staff member statements were prepared by an employee or agent in anticipation of litigation. He stated email correspondence was created in the course of arranging discussions with the petitioner to respond to the claim. Mr. Tanner stated Utah Code 63G-2-305(24) applies to the risk management report and employee statements. He stated these two citations indicate a public policy interest for governmental entities to defend themselves in court.

Questions from the Committee:

The Committee asked for clarification about the purpose and use of the student injury report. Mr. Tanner explained how he understood it. The Committee asked about the criteria for a student injury report to be created. Mr. Tanner stated he understood this one was created in response to the student requiring hospitalization.

Petitioner Closing Statement:

Mr. Day reviewed the Utah Wilderness court case. He stated that for a record to be protected under Utah Code 63G-2-305(18) it must be created primarily for litigation. He stated the student injury report is created in the normal course of business. He stated they have not received any correspondence between staff about the incident.

Mr. Bender stated that Ms. Johnson has not seen the student injury report. He stated it is in the public interest to allow parents to get this information from the school their child attends. He reviewed the legislative intent.

Questions from the Committee:

The Committee asked if the responsive records are voluminous. Mr. Bender stated they are only addressing what the respondent identified.

Respondent Closing Statement:

Mr. Tanner stated the plain language of the statute cannot be superseded. He stated the statute was changed since the Utah Wilderness case so it is not based on the attorney work product alone. He stated being factual does not take the records out of the classification. He stated the

petitioner wants the records for litigation.

Deliberation:

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

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

Motion by Ms. Dubovik that #3, the risk management report, is properly classified under Utah Code 63G-2-351(18) and (24). Weighing the public interest, it does not outweigh the classification. Seconded by Mr. Buchanan.

Discussion to the motion:

Mr. Buchanan asked that they vote on the other records first. Ms. Dubovik withdrew the motion.

Motion by Mr. Buchanan that #1, the student injury report, is properly classified under Utah Code 63G-2-305(18) and (24). Under the weighing provision, it should be released due to the public interest with redactions of student names except the child of the petitioner. Seconded by Ms. Peterson.

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

Mr. Biehler stated he agrees the record is properly classified and he would have voted nay except the parents have already seen the record.

Motion by Dr. Cornwall that #2, statements from staff, is properly classified under Utah Code 63G-2-305(18) and (24). Under the weighing provision, they should be released due to the public interest. Seconded by Mr. Peterson.

Discussion to the motion:

Dr. Cornwall and Ms. Dubovik stated they vote yes because the student injury report will be released.

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

Motion by Mr. Biehler to deny #4, email correspondence with the Division of Risk Management, as properly classified under Utah Code 63G-2-305(18) and (24). Under the weighing provision, the public interest does not outweigh the classification.

Vote: Yea: 6. Nay 1. Dr. Cornwall, Mr. Biehler, Mr. Kichas, Ms. Dubovik, Mr. Buchanan, Ms. Dean voted in favor of the motion. Ms. Peterson voted against the motion.

Ms. Peterson stated the record is properly classified, but the public interest outweighs the classification so she votes no.

Motion by Ms. Dubovik that #3, the risk management report, is properly classified under Utah Code 63G-2-351(18) and (24). Weighing the public interest, it does not outweigh the classification. Seconded by Dr. Cornwall.

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

Ms. Peterson stated the record is properly classified, but the public interest outweighs the classification so she votes no. Mr. Buchanan stated there is a strong public interest to protect the investigation, but the public interest outweighs it so he votes no.

2. Annie Knox (KSL) v. Attorney General Office (2023-08)

Petitioner Statement:

Ms. Knox stated she is an investigative producer for KSL. She said the appeal is about whether the public has a right to know what elected officials are up to. She stated the request is for a couple of months of the Attorney General's schedule. She stated the respondent told her he only has a personal calendar, but staff can edit it.

Ms. Knox stated the calendar is used to make appointments and nothing in the law prevents its release because it is used for work. She stated the role of Attorney General has immense responsibility and power so the schedule should be public. She stated personal appointments and events can be redacted, though they would ideally like to see everything.

Respondent statement:

Mr. Pehrson stated that the statute says a daily calendar used for personal use is not a record. He stated the Attorney General does not have a weekly calendar for the date range of the request. Mr. Reyes only uses a daily calendar so there are no records responsive to the request.

Mr. Pehrson stated that the Outlook calendar is used for all engagements, personal and work. It is for his personal use to be in the right place at the right time. He stated it is not meant to document his official activities, which is done on the website and social media accounts. He stated that keeping multiple calendars is inconvenient which is why GRAMA has this exemption. He stated the statute includes calendars that staff may edit because it says "or for the personal use of an individual for whom the originator is working". He stated few in the office may access it, and others may view it to know where he is.

Mr. Pehrson stated it is not practical for officials to have a separate work and personal calendar. He stated it would encourage officials to use less secure, non-government systems. He stated disclosing the calendar could jeopardize safety by revealing travel locations and family information. Even though the request is for a past calendar, it can show patterns.

Questions from the Committee:

The Committee asked if team calendars would have been provided. Mr. Pehrson stated those would not fall under this exemption. They are records and would have been reviewed for classification. The Committee asked if Mr. Reyes had a calendar just for work, would it be a record. Mr. Pehrson stated it would.

The Committee asked if the information could be segregated. Mr. Pehrson stated it is not a record so there is no obligation to segregate it.

The Committee asked if the calendar is purely for Mr. Reyes personal use and not for staff use. Mr. Pehrson stated the statute does not state the calendar needs to be purely for personal use. Staff can see the calendar to view Mr. Reyes' availability. The Committee asked if staff use it for work. Mr. Pehrson stated it is still for Mr. Reyes personal use even if people use it for work. They need to know when he has personal appointments to know when he is free. It has personal and official meetings.

Petitioner Closing Statement:

Ms. Knox stated staff can modify the calendar. If they use it to plan and conduct the business of the office, it is not a personal calendar. She stated KSL is not searching for specifics about Mr. Reyes family life. People know when he's likely to be at the office and what he's up to on social media. She stated that taxpayers have a right to the record.

Question from the Committee:

The Committee asked for clarification that the request is for a past calendar, not future appointments. Ms. Knox stated the request is for a past calendar from November to August.

Respondent Closing Statement:

Mr. Pehrson stated the public's right to know is not at issue. If the public feels the Attorney General is not transparent, they can vote him out. He stated providing the calendar would hamper officials' effectiveness and require them to maintain multiple calendars. He stated the calendar being maintained on a system at work does not mean it is not a personal calendar. Mr. Pehrson stated that the Attorney General should not be treated differently than other government employees because of the position.

Deliberation:

The Committee discussed whether the calendar at issue is a record.

Ms. Peterson stated she was unconvinced that maintaining multiple calendars would be a burden because elected officials already do that by having two phones or multiple email accounts.

Ms. Dean expressed concern about risk involved by disclosing a pattern of meeting locations.

Motion by Ms. Peterson to grant the appeal. The calendar does not fit the definition under Utah Code 63G-2-103(25)(b)(ix). Non-work items may be redacted. Seconded by Ms. Dubovik.

Discussion to the motion:

Mr. Biehler stated he would be in favor of significant redactions. Ms. Peterson did want redactions added to the motion. Mr. Biehler suggested the addresses of work appointments. Mr. Buchanan suggested the respondent be tasked with classifying the record if the motion passes.

Ms. Dubovik stated the public can see where Mr. Reyes goes on the website and any patterns could be learned already. She stated releasing the record is in the public interest. Mr. Biehler expressed concerns about the record establishing patterns and posing a safety risk if addresses were not redacted. Ms. Dean agreed.

Vote: Yea: 5. Nay: 2. Dr. Cornwall, Mr. Kichas, Ms. Dubovik, Mr. Buchanan, Ms. Petersen voted in favor of the motion. Ms. Dean and Mr. Biehler voted against the motion. The Committee sauntered.

The Executive Secretary clarified that Mr. Eames v. The Attorney General was on the agenda posted to the Public Notice Website, but was withdrawn.

3. Gregory Ferbrache v. Utah Tax Commission (2021-102)

Petitioner Statement:

Mr. Ferbrache stated the request turned out to be voluminous. He stated citizens cannot tolerate government investigations denying access to records that may vindicate the accused. He stated they were directed to use GRAMA for exculpatory evidence. He stated that the prosecutor declined to file criminal charges so there must be evidence in support of his client's innocence.

Mr. Ferbrache stated there is a public interest that the government cannot hide behind process to prevail against a citizen. He stated his client has an interest in obtaining the records and the public has an interest in due process.

Mr. Ferbrache stated the parties have been cooperating and a lot of records have been provided. He stated that the records are heavily redacted and it is hard to know what the classification is and if the statute cited applies. He stated they are trying to get the statements relied on for the criminal and civil investigation.

Mr. Ferbrache asked the Committee to review all the records and not only the sample that was provided by the respondent. He stated each witness will be different. He stated they are asking for due process.

Respondent statement:

Ms. Lombardi stated over 800 pages were released. She stated these were provided without charge. If any further production is required they would like to charge the actual cost to provide the records. She stated nothing gives the respondent the authority to disclose records protected by other statutes.

Ms. Lombardi stated this is a sales tax case. She stated third party information was not provided to the requester. She reviewed the secrecy order from court and nothing subject to it was provided, but the case number was provided if the petitioner decides to seek to have that

overturned. Ms. Lombardi reviewed the log provided to the Committee and the related citations justifying the redactions.

Questions from the Committee:

The Committee asked how the administrative law judge fits in the appeal. Ms. Lombardi stated the appeal unit of the Tax Commission has administrative law judges for taxpayer appeals. Those decisions can be appealed to the court.

Petitioner Closing Statement:

Mr. Ferbrache stated there must be exculpatory evidence in the records. He stated they are only asking for the witness statements and the Committee does not need to decide what is exculpatory. He stated his client has a right to defend themselves and they need the records to do it.

Respondent Closing Statement:

Ms. Lombardi stated she is not involved in the civil or criminal case. She stated no criminal charges were filed, but the civil investigation is separate. She stated that this is not in the public interest, but the petitioner's interest to have the records. She stated if the Committee requires records to be produced, they ask to be able to charge the fees provided under GRAMA.

Deliberation:

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

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

Motion by Dr. Cornwall to deny the appeal. The records were properly classified as indicated in the log. Redactions were also properly classified. The public interest does not outweigh the classification under the weighing provision. Seconded by Ms. Dubovik.

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

4. Pete Sorensen v. Salt Lake City Police (2022-62)

Ms. Shaw informed the Committee that the parties asked to postpone to June. The respondent is hoping to provide all the records by Friday.

Motion by Mr. Biehler to postpone the appeal to the next available meeting. Seconded by Mr. Buchanan.

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

Business:

Approval of April SRC Minutes, action item

Motion by Mr. Buchanan to approve the April minutes. Seconded by Ms. Dubovik.

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

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

Ms. Shaw updated the Committee on appeal 2022-197. She has not heard from the petitioner, and attempts to contact him at a previous address have failed.

Motion by Dr. Cornwall to cancel appeal 2022-197. Seconded by Mr. Biehler.

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

The Executive Secretary reviewed the following appeals that were denied.

2023-47	Keaton Yeates v. Dept. of Corrections	Requesting access to transportation records for his case. Denied because sufficient evidence was not provided that records exist.
2023-46	Loren Lambert v. Labor Commission	Requesting access to the first name name and address of an officer mentioned on an incident report. Denied because the appeal is untimely.

Cases in district court, report

Mr. Swan updated the Committee on cases in district court.

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

A quorum was confirmed for May 25th and June 15th, 2023.

This is a true and correct copy of the May 2023, SRC meeting minutes, which was approved on June 15, 2023. An audio recording of this meeting is available on the Utah Public Notice Website.

X /e/ Rebekkah Shaw

APPROVED