

#2016-102

DAVID C. REYMANN
Attorney at Law
dreymann@parrbrown.com

November 22, 2016

VIA HAND-DELIVERY AND EMAIL

Ms. Nova Dubovik
UTAH STATE RECORDS COMMITTEE
346 South Rio Grande
Salt Lake City, Utah 84101-1106
ndubovik@utah.gov

Re: GRAMA Appeal of Denials of Records Requests Relating to Shooting of

Dear Ms. Dubovik:

We represent the ACLU of Utah (“ACLU”). Pursuant to Utah Code § 63G-2-403 of the Utah Government Records Access and Management Act (“GRAMA”) and Section 2.3.1 of Salt Lake County Countywide Policy 2040, the ACLU hereby appeals to the State Records Committee the following two decisions denying the ACLU’s requests for access to police body camera footage, surveillance camera footage, and photographs of the officer-involved shooting of a 17-year old Kenyan refugee named _____ by two Salt Lake City police officers on February 28, 2016 (the “Shooting”):

1. Decision and Order issued by the Salt Lake County GRAMA Appeals Board on October 26, 2016, a copy of which is attached hereto as Exhibit 1; and
2. Decision of Patrick Leary, Chief Administrative Office for Salt Lake City, issued on October 28, 2016, a copy of which is attached hereto as Exhibit 2.

The footage at issue apparently shows two police officers shooting a young black man who is holding a broomstick. Salt Lake County (“County”) District Attorney Sim Gill has held press interviews in which he has described the footage in detail and asserted that the footage exonerates the officers and justifies his office’s decision to instead charge with felony-equivalent crimes. Yet the County has refused to allow the public to view the same footage for itself, resulting in a lack of transparency that has prevented the public from understanding the basis for the County’s decisions. Even worse, Mr. Gill has told the Salt



Lake City Police Department (and every other police department in Salt Lake County) that if they choose to release *any* body camera footage without his approval—no matter what it shows—he will refuse to discharge the duties of his public office by prosecuting any crimes depicted in the footage.

The ultimate determination of whether records are public under GRAMA is not up to any single public official. It is governed by the statutory provisions of GRAMA and its bedrock presumption of public access. And under those provisions, the denials of the County and Salt Lake City (“City”) are improper under GRAMA and should be reversed. Neither the County nor the City has identified any GRAMA exception that allows them to properly withhold the footage. Moreover, the footage of this critical incident, now nearly a year old, is of overwhelming public importance. Public access to the footage is essential to the public’s role of reviewing the actions of law enforcement and prosecutors and holding them accountable for the manner in which they exercise the enormous powers entrusted to them.

FACTUAL BACKGROUND

On February 28, 2016, two Salt Lake City Police Department officers were at a local homeless shelter responding to a claim of petty theft. As they left the shelter, they saw what they thought was an incident warranting their attention. They ran across the street, demanded that 17-year old _____ drop the “weapon” he was holding, and then shot him four times. _____ survived, but was left paralyzed and in need of multiple, ongoing surgeries. Afterwards, the police officers said they used deadly force because they thought _____ was wielding a sword and was about to strike someone dead.

The shooting generated an immediate public reaction, resulting in wide-scale protests and demonstrations demanding, among other things, release of the footage of the shooting. As months went by, the County refused to release the footage on the basis that it was part of its “investigation”—an exception that is nowhere in GRAMA—prompting protesters to demand that Mr. Gill resign. In the wake of these demonstrations, Mr. Gill began a string of public appearances to tell his version of the Shooting and defend the actions of his office. Among other things, Mr. Gill admitted to the media that he had begun contacting police departments across Salt Lake County and informing them that if they chose to release body camera footage before Mr. Gill gave his permission—even though police departments can and must make their *own* GRAMA decisions—Mr. Gill would refuse to prosecute any crimes depicted in that footage. Mr. Gill defended this unjustifiable blanket policy by asserting that release of any such footage before he gave his approval would—apparently in every case—interfere with the “constitutional rights” of unspecified individuals.

The same day Mr. Gill held this interview, the ACLU submitted to the County and City the two GRAMA requests that are the subject of this appeal. Those requests were denied on the asserted basis that any document connected to an “investigation” is non-public, among other reasons. The County’s investigation lasted several more months, finally ending in early August. At that point, Mr. Gill held another press conference in which he publicly exonerated the officers who shot _____ concluding their actions were “justified” because deadly force was necessary to prevent an imminent deadly attack by _____. Simultaneously, Mr. Gill announced that his office had decided to charge _____ with felony-equivalent offenses and seek to try him in adult court, where _____ could face a life sentence in prison.

As justification for these related decisions, Mr. Gill described in detail what he had seen in the withheld footage, stating that review of the video records was an important part of his decision both to exonerate the officers and to charge _____ and that the footage “corroborate[d]” his account. But then, even though his investigation had concluded, Mr. Gill continued his refusal to release the footage, effectively asking the public to simply accept his version of the Shooting and trust his judgment. This time, the purported justification was that the footage “involve[d] a juvenile” and was “material evidence” in _____ prosecution—neither of which is an actual exception under GRAMA.

Approximately a month later, on September 2, 2016, the County released the Report of the Police Civilian Review Board (“Review Board Report”), Exhibit 3 hereto, which had been called to independently review whether the actions of the involved officers were appropriate. Like Mr. Gill’s prior press conference, the Review Board Report contains an *extensive* narrative summary of the withheld Shooting footage (further undermining the notion that there is any remaining interest in keeping the actual footage secret). Of particular significance in this matter, the Review Board’s interpretation of the footage differs in critical ways from Mr. Gill’s characterizations. Contrary to Mr. Gill’s conclusions and the assertions of the officers that they were acting to prevent an imminent deadly attack, the Review Board stated as follows: “As to the allegation that [the officers] used ‘Deadly Force’ in this incident, ***the Panel makes a finding that their actions were ‘Not Within’ policy.***” (Ex. 3, p. 16 (emphasis added).) The Review Board explained:

When viewing the recording, it can be seen that _____ is advancing upon KM, who is retreating from him. ***However, there does not seem to be much urgency on either’s part.*** In other words, _____ is advancing ***at a leisurely pace*** while KM is retreating at the same pace. At no time is KM

heard pleading to _____ to stop, nor does KM turn and run away from _____ . *This lackadaisical approach and retreat is very confusing to watch. KM can be seen backing away from _____ with his hands raised above his shoulders but the camera on [the officer] does not show the advancing _____ , nor the referred to raising of the metal object that [the officer] speaks about in his interview.*

(Ex. 3, p. 12 (emphasis added).)

The County has asserted that the Review Board was addressing a different question than Mr. Gill was based on a distinction between “policy” and “law.” But the Review Board’s conclusions raise significant questions about what the footage actually shows that underscore why public access is necessary. Nonetheless, despite the fact that both Mr. Gill and the Review Board made extensive public comment on what they believed the footage shows and came to seemingly inconsistent conclusions, the County persisted in its refusal to release the footage. The ACLU appealed the County’s and City’s identical denials through the various administrative levels and now seek relief from this Committee.

PROCEDURAL HISTORY

On May 12, 2016, the ACLU submitted GRAMA requests to the County and City seeking records relating to the Shooting, including the footage and photographs at issue in this appeal. Copies of those requests are attached hereto as Exhibit 4. On June 11, 2016, the County and City issued a joint response providing some responsive records but denying access to others, Exhibit 5 hereto. On June 21, 2016, the County and City issued a supplemental response regarding additional records the County had located, and denying access to those records, Exhibit 6 hereto.

On July 7, 2016, the ACLU appealed the County’s denials to the Salt Lake County Chief Administrative Officer for Appeals (“CAOA”), Exhibit 7 hereto; and the City’s denials to the City’s Chief Administrative Officer, Exhibit 8 hereto. The parties agreed to stay the City appeal proceedings pending the County’s more extensive appeal procedure. On July 15, 2016, the County CAO issued a one-sentence decision affirming the County’s denials, Exhibit 9 hereto.

On August 18, 2016, in light of the conclusion of Mr. Gill’s investigation, the County issued a supplemental response and produced certain additional records, but continued to deny access to others, Exhibit 10 hereto. On August 31, 2016, the ACLU appealed the County’s

various denials to the County's GRAMA Appeals Board, Exhibit 11 hereto. Upon the release of the Review Board Report, the ACLU supplemented its appeal materials with additional argument, Exhibit 12 hereto, as to why release of that report further undermined the County's position. The City subsequently intervened in the GRAMA Appeals Board proceedings joined in the County's positions.

After these various submissions and staggered releases of records by the County, the following withheld records were at issue before the GRAMA Appeals Board, and are likewise at issue here (collectively, the "Withheld Records"): (1) two videos recorded by body cameras worn by the two police officers who shot . . . (2) two surveillance videos of the area where the Shooting occurred; and (3) eleven police photographs of the area taken after the Shooting.

Salt Lake County's Countywide GRAMA Policy mandates that its Appeals Board be comprised of three people: one who is a County employee, and "two of whom *shall be members of the public*[" Countywide Policy 2040 § 2.2.1 (emphasis added). But for the Appeals Board hearing on October 18, 2016, the County selected, as its two members of the "public," *other governmental employees* from other political subdivisions—one a records manager for the Sandy City Police Department, and the other a records manager for the Central Utah Water Conservancy District. This composition was not the independent board the Policy requires.

Shortly thereafter, the Appeals Board issued a Decision and Order summarily affirming and adopting all of the arguments advanced by the County and perpetuating the denial of public access to the Withheld Records. (Ex. 1 hereto.) Two days later, the City issued its own one-sentence denial, stating that "[t]he City joins in the decision by the County Appeals Board and denies the ACLU's appeal." (Ex. 2 hereto.) This appeal followed.

LEGAL ANALYSIS

This country is in the midst of an epidemic of police-involved shootings of young black men. The rash of such incidents across the nation has led to a crisis of confidence in law enforcement, with the public in desperate need of greater transparency to ensure that the most dangerous power we bestow on police officers is being wielded responsibly and in accordance with the public trust. In many ways, this national dialogue is one of the factors that has led to the increasing use of body cameras by police officers, as the whole point of such technology is to increase transparency, allow the public to see for themselves whether law enforcement use of lethal force is truly justified, and thereby prevent destructive protests

and violence in its aftermath. When government officials, however, take it upon themselves to decide what the public is and is not entitled to see, such secrecy only worsens the crisis of public confidence and shields the actions of police officers from necessary public accountability.

The Utah Legislature understood the importance of transparency and public access last session when it crafted an extremely narrow exception under GRAMA for body camera footage. Lawmakers explicitly exempted from the “private” designation any footage, like that at issue here, showing an officer-involved shooting or commission of a crime. The Legislature has likewise not enacted an exception under GRAMA for records that merely “relate” to an investigation or constitute “material evidence” in a court proceeding. Yet those are the reasons the County has refused to allow transparency here, and its unjustified rationale is so broad that it threatens to undo GRAMA’s presumption of openness anytime records relate to officer-involved shootings—precisely when the need for public access is at its apex.

The County apparently has a policy preference that nothing connected to its investigations or subsequent prosecutorial decisions should be released to the public until after the fact. But that policy preference not to be held accountable while the County is discharging its official duties is not the law. Under GRAMA, the Withheld Records are public, subject to no legitimate exception, and should be released.

The County’s and City’s Obligations Under GRAMA

The foundation of GRAMA is the presumption of public access to government records. “A record is public unless otherwise expressly provided by statute.” Utah Code § 63G-2-201(2). In enacting GRAMA, the Legislature declared its intent to “promote the public’s right of easy and reasonable access to unrestricted public records;” to “specify those conditions under which the public interest in allowing restrictions on access to records may outweigh the public’s interest in access;” and to “prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter...” Utah Code § 63G-2-102(3); *see also Deseret News Publ’g Co. v. Salt Lake Cnty.*, 2008 UT 26, ¶ 13, 182 P.3d 372, 376. The Utah Supreme Court has long “recognize[d] that it is the policy of this state that public records be kept open for public inspection in order to prevent secrecy in public affairs.” *KUTV Inc. v. Utah State Bd. of Educ.*, 689 P.2d 1357, 1361 (Utah 1984). And the Court has specifically instructed governmental entities not to engage in “adversarial combat over record requests.” *Deseret News*, 2008 UT 26, ¶ 25. Instead, an entity is “required to conduct a conscientious and neutral evaluation” of every GRAMA request, *id.* ¶ 24, and to engage in “an impartial, rational balancing of competing interests.”

Id. ¶ 25. “[T]he overriding allegiance of the governmental entity must be to the goals of GRAMA and not to its preferred record classification,” *id.*, always conscious of the “mandate that when competing interests fight to a draw, disclosure wins.” *Id.* ¶ 24.

The public interest in open government and accountability for public officials is perhaps nowhere more urgent than in the conduct, and potential misconduct, of the public’s peace officers. “Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers.” *Comm’n on Peace Officer Standards and Training v. Superior Court*, 64 Cal. Rptr. 3d 661, 674 (Cal. 2007) (citation omitted). That interest is “particularly great” when, as here, an officer is involved in shooting a civilian “because such shootings often lead to severe injury or death.” *Long Beach Police Officers Ass’n v. City of Long Beach*, 172 Cal. Rptr. 3d 56, 74 (Cal. 2014).

The recent spate of officer-involved shootings underscores the critical importance of fostering both accountability for police officers and public understanding of their conduct. Those goals are ill-served by withholding of records based on conclusory, categorical justifications contrary to both the letter and spirit of GRAMA.

The 2016 Body Camera Amendments to GRAMA

With the increasing use of body cameras by Utah police officers, the Utah Legislature extensively considered during the 2016 session whether and how to classify body camera footage under GRAMA. Legislators heard from many different interest holders, including those, like the County, who believe that any footage that relates in any way to an investigation or court proceeding should be kept secret, and only released to the public when all of the significant decisions and proceedings are done. There was nothing preventing lawmakers from making such a judgment, and indeed, some legislatures around the country have adopted that kind of restrictive approach to body camera footage under their own open records laws.

But the Utah Legislature chose a different path. It passed an exceedingly narrow provision allowing body camera footage to be classified as “private” *only* when it is taken inside a home or residence. Utah Code § 63G-2-302(2)(g) (2016). And even when the footage is taken inside a home or residence, such footage is not classified as “private” if it falls within certain statutory exceptions:

- (2) The following records are private if properly classified by a governmental entity:

(g) audio and video recordings created by a body-worn camera, as defined in Section 77-7a-103, that record sound or images inside a home or residence except for recordings that:

- (i) depict the commission of an alleged crime;
- (ii) record any encounter between a law enforcement officer and a person that results in death or bodily injury, or includes an instance when an officer fires a weapon;
- (iii) record any encounter that is the subject of a complaint or a legal proceeding against a law enforcement officer or law enforcement agency;
- (iv) contain an officer involved critical incident as defined in Section 76-2-408(1)(d); or
- (v) have been requested for reclassification as a public record by a subject or authorized agent of a subject featured in the recording.

Id. These exceptions to private status—nearly all of which apply to the footage here—are powerful evidence of what the Legislature intended with regard to the public’s right to know.

Of course, if the footage falls within some other exception under GRAMA, it could be classified as non-public on that basis. But this Committee’s interpretation of those more vaguely worded exceptions is guided by what the Legislature said when it *specifically* addressed records like these. And if the County’s view of the law were correct—that any record related to an investigation or court proceeding is necessarily off-limits to the public—nearly all body camera recordings that depict “an alleged crime” or an “encounter ... that results in death or bodily injury” or “is the subject of a complaint or a legal proceeding” would be non-public under GRAMA. That outcome is the exact opposite of what the Legislature intended.

Denial of Access to the Withheld Records is Improper

Unable to rely on the only actual provision in GRAMA that addresses body camera footage, the County has asserted various arguments that have shifted with nearly every denial letter. Although the County’s initial refusal to release the records simply because they “related” to its investigation was unquestionably wrong under GRAMA, the County successfully ran out the clock on that issue by concluding its investigation while these proceedings dragged on. At this point, the County is left with two arguments as to why the Withheld Records are non-public as “protected”: (1) the assertion that release of the records

“reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings,” Utah Code § 63G-2-305(10)(b); and (2) the assertion that release of the records “would create a danger of depriving a person of a right to a fair trial or impartial hearing,” *id.* § 63G-2-305(10)(c).

Neither argument is supported by the language of GRAMA, the actual facts regarding delinquency proceedings, or the clear intent of the Legislature regarding the public interest in footage showing officer-involved shootings.

1. **Release of the Footage Would Not “Interfere” With Any Enforcement Proceedings.**

The County’s first justification for withholding the subject records is that release of those records would somehow “interfere” with the juvenile delinquency proceedings against The Appeals Board’s Decision and Order provides little explanation of this assertion beyond the single, conclusory contention that release of the records “could reasonably be expect [*sic*] to taint the testimony of potential witnesses.” (Ex. 1, ¶ 5.) That perfunctory, unsupported, and unexplained justification is inadequate under GRAMA.

GRAMA contains no blanket exemption for all records that relate to or are part of an ongoing prosecution. It allows such records to be withheld only where release of the records would “interfere with” a specific enforcement proceeding. Utah Code § 63G-2-305(10)(b). The burden is squarely on the County to prove that the Withheld Records fall within the claimed exception. *Deseret News*, 2008 UT 26, ¶ 53.

To discharge that burden, the County “must make a ... specific showing of why disclosure ... could reasonably be expected to interfere with enforcement proceedings.” *Miller v. U.S. Dep’t of Agric.*, 13 F.3d 260, 263 (8th Cir. 1993) (interpreting the analogous provision under federal Freedom of Information Act). Such a showing cannot be of the “boilerplate, conclusory variety.” *Id.* Nor can it be of “[s]uch a speculative and farfetched concern” that it would essentially “justify [the] withholding of virtually *any* document by *any* government agency” relating to a proceeding. *Lion Raisins v. U.S. Dep’t of Agric.*, 354 F.3d 1072, 1085 (9th Cir. 2004), *overruled on other grounds by Animal Legal Def. Fund v. U.S. F.D.A.*, 836 F.3d 987 (9th Cir. 2016). Rather, the County must prove that “release poses a concrete risk of harm to the agency in the ... action. A concrete risk, by definition, must be something more than a hypothetical or speculative concern.” *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ken. 2013) (interpreting analogous provision under Kentucky open records law).

Courts have uniformly rejected invocation of the “law enforcement” exception based on conclusory, speculative assertions without particularized supporting facts, including in the context of police videos. *See, e.g., Does v. King Cnty.* 366 P.3d 936, 945 (Wash. Ct. App. 2015) (ordering release of security surveillance footage of shooting and rejecting conclusory assertion of interference with witnesses or law enforcement, holding that proponents of secrecy “were obligated ‘to come forward with specific evidence of chilled witnesses or other evidence of impeded law enforcement.’” (citation omitted)); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (exception “require[s] specific information about the impact of the disclosures” on an enforcement proceeding); *id.* (“[I]t is not sufficient for an agency merely to state that disclosure would” interfere with a proceeding; “it must rather demonstrate *how* disclosure” would do so); *Grasso v. I.R.S.*, 785 F.2d 70, 77 (3d Cir. 1986) (“[T]he government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding.” (citation omitted)); *Estate of Fortunato v. I.R.S.*, No. 06-6011 (AET), 2007 WL 4838567, at *4 (D.N.J. Nov. 30, 2007) (a “categorical indication of anticipated consequences of disclosure is clearly inadequate.” (quoting *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987))); *North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (government must prove release of records would “interfere in a palpable, particular way”).

Conclusory speculation, however, is all the County has offered here. The Appeals Board’s decision does not even attempt to explain how release of the footage of the Shooting will “taint” witness testimony. The decision does not identify any actual witnesses, it does not describe what their expected testimony will be, it does not substantiate how the Withheld Records relate to that testimony, and it does not, in any form or fashion, explain how that testimony could possibly be “tainted” by seeing evidence that more accurately depicts what happened that evening than the multiple, public characterizations of the footage that have already been disseminated by Mr. Gill and others.

Moreover, if the County’s argument were the law, this limited exception would apply to every single case that had evidence and witnesses. Any prosecutor could claim he or she was exempt from GRAMA’s disclosure obligations simply because some unidentified witness might, at some time in the future, change his or her testimony based on seeing that evidence. If that type of speculation were sufficient to invoke the “interference” exception, there would be a categorical exclusion for all “material evidence” in a criminal prosecution. That view of the law is unsupported by the actual language of GRAMA. “[M]erely because a piece of paper has wended its way into an investigatory dossier created in anticipation of enforcement action, and agency ... cannot automatically disdain to disclose it.”

Pine, No. C.A. 96-6274, 1998 WL 356904, at *11 (R.I. June 24, 1998) (citation omitted). To find otherwise would create a “blanket exemption for police files” that “would turn on its head [the] basic presumption of openness.” *City of Ft. Thomas*, 406 S.W.3d at 850. See also *Penn. State Police v. Grove*, No. 1646 C.D.2014, 2015 WL 5670686, at *5 (Pa. Commw. Ct. Sept. 28, 2015) (ordering release of police dashcam video and holding that “[t]he mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under” open records laws (citation omitted) (alteration in original)).

Even more troubling, however, is the County’s implicit assumption that the public has no meaningful role to play in the functioning of the criminal process, and that public access to potential evidence almost necessarily “interferes with” those proceedings. To the contrary, both the United States Supreme Court and the Utah Supreme Court have recognized for decades that public access “enhances the quality and safeguards the integrity of the fact-finding process,” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982), ensures basic fairness and the appearance of fairness in the proceedings, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (“*Press-Enterprise II*”), fosters public confidence in the judicial process and acceptance of its results, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 507-08 (1984) (“*Press-Enterprise I*”), acts as a necessary check on the judiciary, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980), and allows the public to participate in government. *Id.* at 587-88 (Brennan, J., concurring); see also *Waller v. Georgia*, 467 U.S. 39 (1984); *State v. Archuleta*, 857 P.2d 234, 238 (Utah 1993); *Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515, 521 (Utah 1984); *Soc’y of Prof’l Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987).

The County’s view that criminal prosecutions must necessarily take place in the dark, with no public access to the evidence at issue or records relating to the prosecutor’s discharge of a public office until after trial, is directly contrary to decades of precedent, is unsupported by any language in GRAMA, and should be rejected by this Committee.

2. Release of the Footage Would Not Create a Danger of Depriving Right to a Fair Trial.

The County’s other argument fares no better. The Appeals Board’s Decision and Order simply asserts, in conclusory fashion with little explanation, that release of the Withheld Records “would create a danger of depriving _____ of a right to a fair trial.” (Ex. 1, ¶ 3.) Other paragraphs of the Decision and Order repeat this same phrase but do not explain how the County actually believes _____ cannot receive a fair trial if the footage is released. (*Id.* ¶¶ 4-7.) The ACLU and this Committee are therefore left to assume that the

County believes the footage is incriminating because it shows alleged criminal conduct by or otherwise impeaches his credibility, and that potential jurors who may see the footage on the news before trial will be irredeemably tainted as a result.

The “fair trial” exception in GRAMA parallels the same test governing the right of access to court proceedings and records. In that context, there is a wealth of guidance and authority on what the exception means and how truly narrow and rare are the circumstances when release of records actually impairs a defendant’s fair trial rights. One thing that is perfectly clear is that speculative, conclusory assertions about fair trial rights are never sufficient to justify withholding otherwise public records. Rather, “[i]t is only upon the showing of some *specific circumstance* that gives rise to *significant probability* of prejudice to the proceeding that the courts are inclined to close the courtroom and seal the records.” *People v. DeBeer*, 774 N.Y.S.2d 314, 315 (N.Y. Co. Ct. 2004) (emphasis added). “The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]. The burden [is] on the moving party to show that an open hearing would jeopardize the defendant’s right to a fair trial.” *In re Times-World Corp.*, 488 S.E.2d 677, 682 (Va. Ct. App. 1997) (citation omitted).

All criminal prosecutions involve information that is unflattering, prejudicial, and sometimes inflammatory. Hypothetical prejudice alone has never been sufficient under the First Amendment or the common law to deny the public access to court records. If the law were otherwise, no negative information about a criminal defendant would ever be released. As the court explained in *State v. Kozma*, in which a criminal defendant’s confession was unsealed:

[E]ven massive pretrial publicity about a case is not enough to show a serious and imminent threat to the administration of justice or to the denial of fair trial rights. The fact that the Statement has been determined to be inadmissible does not alter that conclusion. Even where pretrial publicity includes publication of inadmissible evidence or confessions, a defendant can still receive a fair trial.

No. 92-15914 CF10E, 1994 WL 397438, at *2 (Fla. Cir. Ct. Feb. 4, 1994) (citations omitted). Numerous other courts have agreed. *See DeBeer*, 774 N.Y.S.2d at 316 (finding that defendant not entitled to have sealed a confession contained in document filed with court); *U.S. ex rel. Callahan v. U.S. Oncology, Inc.*, No. 7:00-CV-00350, 2005 WL 3334296, at *3 (W.D. Va. Dec. 7, 2005) (finding that “defendants ha[d] not overcome the presumption in favor of public access” by providing “general claims of prejudice”); *State v. Cianci*, 496 A.2d 139, 145 (R.I.

1985) (finding that “blanket statement of potential prejudice was not sufficient to demonstrate compelling reasons for ordering the sealing of discovery documents”).

The mere fact that the footage at issue may, in the County’s opinion, be incriminating is not enough to establish a danger that [redacted] will be unable to receive a fair trial. And that alone is enough to reverse the County’s denial. But the County’s argument in this specific context also fails for at least six additional reasons.

First, [redacted] has been charged as a juvenile. His proceedings will be held before a juvenile court judge in juvenile court. There are no juries in juvenile delinquency proceedings. And while the County has asked the court to certify [redacted] as an adult so it can try him in adult court, whether that will happen or not at this point is pure speculation. So the County’s argument would have to be that the *juvenile court judge*, having seen the released footage prior to trial, would be unable to set aside her own bias and could not afford a fair hearing. That argument is not compelling.

Incidentally, in past submissions explaining its denials, the County has ascribed significant weight to the fact that [redacted] is being prosecuted as a juvenile, arguing that [redacted] proceedings are “presumptively non-public.” (*See, e.g., Ex. 10*, pp. 1, 4.) The supposedly “non-public” nature of [redacted] proceedings was almost the entire justification for the County’s position that this case is different than the decades of constitutional precedent rejecting the County’s unsupported assertions of prejudice. But the County’s assertion is wrong as a matter of law. [redacted] is over fourteen years old and has been charged with offenses that would be felonies were he in adult court. Since 1993, when the laws governing access to juvenile court proceedings were amended by the Utah legislature in a special session, the presumption in such cases has been the opposite—proceedings are presumptively *open* absent compelling reasons otherwise. *See Utah Code § 78A-6-114(1)(c)(i)*. This change to the law was enacted specifically so “that everybody can see what happens in [juvenile] courts” in those more serious cases, and “so that people can witness and gain a correct understanding of these proceedings.” House Floor Debate, Day 2, 1993 Utah Second Special Legislative Session (Oct. 2, 1993) (statement of Rep. Raymond W. Short). As a result, the fact that [redacted] is being prosecuted in juvenile court weighs *in favor* of the release of the Withheld Records, not against it.

Second, even if [redacted] does eventually get certified to adult court, any argument that he could not receive a fair trial there is nothing more than speculation. No one knows when such a trial may occur, if it occurs at all—most prosecutions are resolved by plea. If a trial ever occurs, it will be a significant amount of time from now, a fact that cuts in favor of

release because potential jurors are quite unlikely to remember specifics of any information disclosed now. *See, e.g., Kozma*, 1994 WL 397438, at *2 (“A significant number of the public does not retain what is disseminated by the media[.]”); *DeBeer*, 774 N.Y.S.2d at 314 (“[T]here will be a significant period of time between access to the defendant’s statement and a trial on this matter.”). Moreover, any jury will be drawn from Salt Lake County, not some small jurisdiction with a limited pool of potential jurors. The notion that the County will be unable to find twelve jurors in all of Salt Lake County that either have not seen the footage or cannot set aside any preconceived notions about the case defies reason. *See also, e.g., State v. Bishop*, 753 P.2d 439, 459 (Utah 1988) (“Defendant also claims that potential jurors had read a prejudicial news article which appeared in the paper the morning of jury selection. However, only six [out of 84 total] panel members reported that they had read part or all of the article or seen the headlines thereof.”).

Third, the County’s purported concerns about [redacted] fair trial rights are ironic given that it is the County that is prosecuting [redacted] and it is the County who has insisted that it “will almost certainly seek to admit the [Withheld] Records at trial.” (Ex. 10, p. 4.) It is worth wondering, if the County truly believed the Withheld Records are so fundamentally prejudicial to [redacted] receiving a fair trial, why it intends to make them a centerpiece of its case. But beyond that, the fact that the evidence will likely be introduced at trial cuts *against* the County’s position, because it means the jury will see the evidence anyway. *See Utah Dep’t of Pub. Safety v. State Records Comm.*, 2010 WL 2487352 (Utah 3d Dist. Ct. 2010) (ordering release of dash cam video and DUI report and rejecting GRAMA “fair trial” exception because “a jury will likely see all of this evidence regardless of whether it is released to the media in advance of trial”). There is, therefore, no risk of “tainting” the jury pool.

In this regard, the County has previously argued that [redacted] might seek to have the Withheld Records excluded at trial. That argument is also speculation, and the County cannot offer any cogent explanation for how video of an alleged crime being committed would be inadmissible at a trial of that crime. Moreover, the public’s right to access records under GRAMA does not depend on what the trial judge rules about admissibility. It is an independent, statutory right. *See North*, 881 F.2d at 1100 (rejecting argument that trial judge may rule on admissibility as grounds for refusing to release documents, explaining that “[t]he fact that Judge Gesell wished to defer full discovery relating to the *Kastigar* motion until after trial does not, standing alone, prove that disclosure before then can reasonably be expected to interfere with the enforcement proceeding”).

But the County's argument is also wrong because pretrial exclusion and suppression hearings are held in the open all the time, and courts routinely allow access to the motion papers describing or attaching the evidence at issue. If the law were otherwise, and the mere speculative possibility that evidence might be excluded were enough to raise a fair trial argument, no pretrial evidentiary proceedings would ever be open to the public. That is the opposite of the governing law. See *Waller v. Georgia*, 467 U.S. 39 (1984) (applying First Amendment open courts analysis to pretrial suppression hearing); *Assoc. Press v. United States Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (First Amendment right of access to pretrial suppression papers); *Kozma*, 1994 WL 397438 (allowing public access to defendant's videotaped statement that contained "potentially damaging admissions" even though it would be inadmissible at trial); *BP Products N. Am., Inc. v. Houston Chronicle Publ'g Co.*, 263 S.W.3d 31 (Tex. Ct. App. 2006) (granting public access to unfiled witness statements exchanged in discovery); *State v. Grecco*, 455 A.2d 485, 486-87 (N.J. Super. Ct. App. Div. 1982) (granting public access to tape recordings played during pretrial hearings even though "they had not yet been admitted into evidence"); *Florida Freedom Newspaper, Inc. v. Florida*, No. 03-2065-CA-K, 2004 WL 1669663 (Fla. Cir. Ct. Mar. 2, 2004) (granting newspaper access to search warrants, affidavits supporting search warrants, and materials seized pursuant to search warrant); *DeBeer*, 774 N.Y.S.2d at 315 ("A court may not close a [suppression] hearing on a possibility that there might be tainted, nonpublic evidence that might impair the selection of an impartial jury—which could very likely be said of every suppression hearing in every highly publicized case.").

Fourth, any interest in secrecy of the Withheld Records, even if it were legitimate, has been radically reduced by the fact that copious second-hand information about the content of the video has been made public, both by Mr. Gill's public statements and by the narrative account in the Civilian Review Board Report. For obvious reasons, the Utah Supreme Court has specifically instructed that when second-hand information revealing the contents of withheld records under GRAMA reaches the public domain, "any significant interests that would be protected by requiring the [records] to remain sealed are now greatly diminished." *State v. Allgier*, 258 P.3d 589, 593 (Utah 2011) (rejecting the same "fair trial" argument asserted by the County here).

Fifth, it is notable who has not objected to the release of the Withheld Records—himself. In its Decision and Order, the County Appeals Board got this issue exactly backwards, asserting that "the fact that the Juvenile or his attorney have not had an opportunity to comment on this GRAMA Request, [*sic*] weighs against disclosure of the Contested Records." (Ex. 1, ¶ 15.) But if he were concerned about his own fair trial rights being impacted, could have done what the Salt Lake City Police Department did—

intervene in the County appeals proceedings. *See* Countywide Police 2040 § 2.1.6.3. Indeed, [redacted] has that right before this Committee too. *See* Utah Code § 63G-2-403(6)(a). Instead, [redacted] has been quite open about the events of that night, speaking about his shooting to the press and never seeking to intervene in these proceedings. In that light, the County's attempt to vicariously assert the fair trial rights of a person whom they are prosecuting, and against whom they intend to introduce the very evidence they say will make a fair trial impossible, is not compelling.

Sixth, even if [redacted] were not being prosecuted in juvenile court, and even if his proceedings in adult court were certain to go to trial, and even if that trial were imminent, and even if the Withheld Records were not likely to be introduced in that trial, and even if information about the footage had not already reached the public domain, and even if [redacted] himself were the one asserting that his right to a fair trial was in danger—*none* of which are actually the case—there are multiple, less-restrictive alternatives to denying public access that will allow a court to seat a fair and impartial jury despite publicity regarding the case. Those alternatives include the time-tested judicial tools of voir dire, juror questionnaires, an enlarged jury venire, peremptory challenges, admonitions to the jury, continuance, and change of venue.

In cases far more high-profile than this one, Utah courts have employed these various tools to ensure that a defendant receives a fair trial despite negative pretrial publicity. *See Allgier*, 2011 UT 47, ¶ 19. As the Utah Supreme Court explained:

[E]nlarging the venire is recognized as a potential way to alleviate[] the problems in a particular case associated with selecting a fair and impartial jury. In addition, voir dire has long been recognized as an effective method of rooting out [potential juror] bias, especially when conducted in a careful and thorough[] manner. Finally, “jury questionnaires” provide a reasonable method for “identify[ing] the extent of exposure prospective jurors may have had to news coverage about this case and assist[ing] counsel in ferreting out people with fixed opinions.”

Id. ¶ 20 (internal quotations and citations omitted). “These reasonable alternatives to [denying access] would provide sufficient protection to [the defendant’s] right to a fair trial in this case regardless of whether the respective interests otherwise weighed in favor of or against [denying access].” *Id.*

Time and again, Utah courts have rejected the argument relied upon by the County here that any exposure to incriminating pretrial publicity will either automatically disqualify potential jurors or make seating an unbiased jury impossible.¹ Illustrative of this principle is the following explanation from the *Lafferty* case—also a far more high-profile matter than this one:

[Pretrial] publicity may lead jurors to form opinions about the defendant's guilt... but that does not necessarily disqualify the jurors. "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court."

State v. Lafferty, 749 P.2d 1239, 1250-51 (Utah 1988) (quoting *Murphy v. Florida*, 421 U.S. 794, 800 (1975)).

Lafferty is not an outlying opinion. Courts across the country have repeatedly endorsed voir dire as effective at ensuring a fair and impartial jury and rejected the notion that jurors are "nothing more than malleable and mindless creations of pretrial publicity." *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 330 (4th Cir. 1991). As the Fourth Circuit explained:

¹ See, e.g., *State v. Pierre*, 572 P.2d 1338, 1350 (Utah 1977) (rejecting pretrial publicity claim and noting "voir dire was neither simple nor perfunctory" but rather was "a serious and comprehensive examination of the potential jurors to determine if any could remember or had contact, directly or indirectly, with the facts or publicity surrounding the case that would in any way suggest a likelihood of prejudice"); *State v. Bishop*, 753 P.2d 439, 459 (Utah 1988), *overruled on other grounds by State v. Menzies*, 889 P.2d 393 (Utah 1994) (effective voir dire eliminated alleged risk from prejudicial article published on day of jury selection); *State v. Lafferty*, 749 P.2d 1239, 1251 (Utah 1988) ("It is true that some of the jurors expressed an opinion that Lafferty was guilty; however, after the trial judge had questioned them carefully, each unequivocally stated that he or she would set aside preconceived notions, accord Lafferty a presumption of innocence, and decide the case on the evidence presented at trial."); *State v. Cayer*, 814 P.2d 604, 610 (Utah Ct. App. 1991) (defendant failed to show prejudice where "exhaustive voir dire was conducted and . . . defendant passed the jury for cause"); *State v. Olsen*, 869 P.2d 1004, 1008 (Utah Ct. App. 1994), *abrogated on other grounds by State v. Doport*, 935 P.2d 484 (Utah 1997) ("The careful voir dire conducted by the judge, followed by Olsen's passing the jury for cause, was sufficient to insure that Olsen received a fair trial."); *State v. Aase*, 762 P.2d 1113, 1116 (Utah Ct. App. 1988) (same).

The reason that fair trials can coexist with media coverage is because there are ways to minimize prejudice to defendants without withholding information from public view. With respect to the potential prejudice of pretrial publicity, ... [v]oir dire is of course the preferred safeguard against this particular threat to fair trial rights ... [and] can serve in almost all cases as a reliable protection against juror bias however induced.

Id. at 329 (internal quotation marks omitted; alterations and second ellipsis in original); *see also, e.g., Press-Enterprise II*, 478 U.S. at 15 (“Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.”); *United States v. Martin*, 746 F.2d 964, 973 (3d Cir. 1984) (“Testing by *voir dire* remains a preferred and effective means of determining a juror’s impartiality and assuring the accused a fair trial.” (internal quotation marks omitted)); *State v. Schaefer*, 599 A.2d 337, 345 (Vt. 1991) (“As a basic principle, *voir dire* is the normal and preferred method of combating any effects of pretrial publicity.”).

In its Decision and Order, the Appeals Board sweeps all of this authority away with the following conclusory sentence: “While the Board recognizes that there may be efforts a court can take to potentially cure a release of the Contested Records in depriving the Juvenile of a fair trial; [*sic*] that is not the question under GRAMA. Records are protected if their release would create a danger of depriving a person of a fair trial[.]” (Ex. 1, ¶ 7.) According to the Board, then, *any* risk that pretrial publicity will endanger a fair trial—no matter how remote or substantiated it is—satisfies the fair trial exception under GRAMA because there is some residual “danger” of impacting the trial. The Board cites no authority for this remarkable conclusion, and the ACLU is aware of none. If the exception worked that way, no information about a criminal prosecution would ever be released. That exception would gut the presumption of access under GRAMA. The County is required to make a specific showing of an actual, substantiated, credible danger that the court will be unable to seat a fair and impartial jury despite all of the other tools at its disposal that allow the public’s right of access and a defendant’s Sixth Amendment rights to coexist. The County has not credibly attempted to make that showing here, much less satisfied the standard.

“Pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 554 (1976). Despite the existence of many high-profile prosecutions in this state (e.g., the Lafferty Brothers, Ronnie Lee Gardner, the Ogden Hi-Fi killers, Martin MacNeill, Ralph Menzies, Gary Bishop, Brian David Mitchell), a Utah appeals court has never reversed a guilty verdict as a result of pretrial publicity. *See KUTV, Inc. v. Conder*, 668 P.2d 513, 518 (Utah 1983). That demonstrates the

exceptionally high showing that must be made before the public's right of access is sacrificed in the name of the Sixth Amendment. The County has simply failed to make that showing here.

For all of these reasons, the County's attempt to rely on fair trial rights as a basis for concealing the Withheld Records is improper and should be reversed.

The Withheld Records Should Be Released Because the Public Interest Outweighs the Interests in Secrecy

In the alternative, even if this Committee were to assume that the County had properly classified any of the Withheld Records as "protected" (which it has not), this Committee should still order their release under Utah Code § 63G-2-403(11)(b) because the public interest in accessing these records overwhelmingly outweighs the hypothetical, speculative, and minimal interests in secrecy.²

At a time when police shootings of young black men have reached near epidemic proportions, the public's need to ensure accountability by law enforcement is at its apex. That role cannot be fulfilled if the public is simply asked to trust law enforcement based on secret records that only police and prosecutors are allowed to see. If the Withheld Records truly exonerate the involved officers, as Mr. Gill has publicly argued, their release will only increase trust in law enforcement and validate Mr. Gill's decisions. If those records vary from Mr. Gill's account or do not support his decisions, as the report of the Civilian Review Board suggests, their release goes directly to the discharge of Mr. Gill's official duties and are critical to ensuring prosecutorial accountability. Either way, the situation will be invariably worse if the records remain secret, and the growing crisis of confidence in law enforcement will suffer as a result.

Weighed against these interests are conclusory and speculative assertions by the County that release of the footage might, at some point in the future, have some unidentified impact on right to a fair trial—if he is certified to adult court and if his case ever proceeds to trial. And it is no solution to say the public should simply wait until after trial, whenever that might be. Holding public officials accountable requires the public to be involved while critical decisions are being made, not merely being informed after the fact that everything was proper. That is, again, the whole point of body camera footage: to increase

² At a minimum, if there are legitimately non-public portions of the footage, those should be segregated and the rest of the footage released. See Utah Code § 63G-2-308. crime was not getting shot by the police. Footage of his shooting has no legitimate connection to the County's fair trial argument.

transparency for law enforcement at a time when public access can be meaningful. The County has managed to prevent the public from fulfilling that critical function for nearly a year. This Committee should rectify the County's erroneous denials and order the records released.

CONCLUSION

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. The Withheld Records relate directly to issues of critical public importance, including the proper use of deadly force and Mr. Gill's discharge of his public duties. Government accountability is not served by simply telling the public to trust that public officials have made good decisions. The public is entitled to see the facts for themselves and make their own independent judgments. The County's refusal to release the Withheld Records is contrary to the text and governing principles of GRAMA and should be reversed.

Sincerely,

/s/ David C. Reymann

PARR BROWN GEE & LOVELESS, P.C.
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
(801) 532-7840

/s/ Leah Farrell

ACLU OF UTAH, INC.
355 North 300 West
Salt Lake City, Utah 84103
(801) 521-9862

cc (via email): Darcy M. Goddard (County)
Mark Kittrell (City)