

Edward A. Berkovich (6180)
Petitioner Pro Se



REC'D JAN 28 2019

IN THE STATE RECORDS COMMITTEE

STATE OF UTAH

346 South Rio Grande, Salt Lake City, Utah 84101

<p>EDWARD A. BERKOVICH,</p> <p>Appellant,</p> <p>V.</p> <p>UTAH ATTORNEY GENERAL'S OFFICE,</p> <p>Respondent.</p>	<p>APPEAL OF DENIAL OF ACCESS TO AUDIO RECORDING</p> <p>Utah Attorney General # 18-163</p>
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SUBJECT OF APPEAL

Petitioner appeals the Utah Attorney General's Office (OAG)'s denial of access to an audio recording of the purported closed portion of the Utah Prosecution Council (UPC)'s meeting held on October 21, 2015 ("the meeting").

ATTACHMENTS

Attached are: (1) copy of petitioner's initial GRAMA request; (2) copy of OAG's decision; (3) copy of chief administrative officer's decision.

WRITTEN STATEMENT OF RELIEF SOUGHT

Point 1

AGO has already classified the un-redacted *minutes* of the purported closed portion of the meeting as a public record.

1. AGO has already classified the *minutes* of the purported closed portion of the meeting as a public record. (Tyler R. Green letter to Edward A. Berkovich, dated August 15, 2017).
2. That is, un-redacted, full minutes of the purported closed portion of the meeting have been classified as a public record.
3. Thus, it follows that the *audio recording* of the purported closed portion of the meeting is also a public record.
4. I did not find legal precedent supporting the proposition that a public body may lawfully classify the *minutes* of the closed portion of a meeting as public, but classify the *audio recording* of the closed portion of the same meeting as protected. AGO is precluded from taking these inconsistent positions under the doctrine of collateral estoppel. *See, e.g., Brigham Young*

Univ. v. Tremco Consultants, Inc., 2005 UT 19, ¶ 27 (listing elements of collateral estoppel).

Point 2

No public notice of the meeting was provided.

Thus, the meeting cannot have been closed.

5. The meeting was held in violation of Utah's Open and Public Meetings Act (OPMA), which requires a public body to provide public notice of its public meetings. Utah Code § 52-4-202(1)(b).
6. Since UPC did not comply with the public notice requirement, the meeting cannot be considered to have been closed. Utah Code § 52-4-204(1)(a)(ii) states:

52-4-204 Closed meeting held upon vote of members -- Business -- Reasons for meeting recorded.

(1) A closed meeting may be held if:

(a)

(i) a quorum is present;

(ii) the meeting is an open meeting for which notice has been given under Section 52-4-202; and

(iii)

(A) two-thirds of the members of the public body present at the open meeting vote to approve closing the meeting;

(B) for a meeting that is required to be closed under Section 52-4-205, if a majority of the members of the public body present at an open meeting vote to approve closing the meeting;

Id. (emphasis added).

7. Thus, the meeting which was held, albeit in violation of OPMA, remained an open meeting for its entire duration.
8. Thus, the audio recording of the entire meeting is an audio recording of an open meeting, which makes the audio recording a public record.

Point 3

**The UPC did not sign the mandatory “sole purpose” statement,
or state any lawful reason to close the meeting.**

9. By August 15, 2017, UPC/AGO had provided me with five different versions of the minutes of the meeting (four versions attached to Lonny J. Pehrson email to Edward A. Berkovich dated July 10, 2017; one version attached to Tyler R. Green letter to Edward A. Berkovich dated August 15, 2017).
10. Not one version states a statutory basis for lawfully closing the meeting under Utah Code § 52-4-205(1) prior to UPC going into purported closed session.
11. The UPC “presiding person” did not sign a sworn sole purpose statement. Thus, the mandatory requirement to close a meeting pursuant to Utah Code §§ 52-4-205(1)(a) and 52-4-206(6) was not met.
12. UPC has acknowledged the meeting was not to discuss pending or reasonably imminent litigation (minutes of Special Utah Prosecution

Council Meeting held November 20, 2017), so that may not be claimed retrospectively as the basis for having purportedly closed the meeting under Utah Code § 52-4-205(1)(c).

13. A meeting claimed to be closed without the public body complying with public notice requirements, or meeting closure requirements, cannot be credibly claimed to have been a closed meeting. Thus, the meeting which was held, albeit in violation of OPMA, remained an open meeting for its entire duration.

14. Therefore, the audio recording of the entire meeting is an audio recording of an open meeting, which makes the audio recording a public record.

Point 4

AGO's first stated basis for redaction, Utah Code § 63G-2-305(32), assumes the record I requested is a record of a closed meeting.

15. To justify denial of access to a record under Utah Code § 63G-2-305(32) the record to which access is denied must be a record of a closed meeting ("The following records are protected if properly classified by a governmental entity:" "minutes, recordings, or reports of the *closed* portion of a meeting of a public body"). *Id.* (emphasis added).

16. As established above, the entirety of the meeting, albeit held in violation of OPMA, was an open meeting. Thus, Utah Code § 63G-2-305(32) does not apply.

17. Therefore, the audio recording of the meeting is a recording of an open meeting, which makes the audio recording a public record.

Point 5

AGO's second stated basis for redaction, Utah Code § 52-4-206(5), assumes the record I requested is a record of a closed meeting.

18. To justify denial of access to a record under Utah Code § 52-4-206(5), the record to which access is denied must be a record of a closed meeting ("A recording, transcript, report, and written minutes of a *closed* meeting are protected records under Title 63G, Chapter 2, Government Records Access and Management Act"). *Id.* (emphasis added).

19. As established above, the entirety of the meeting, albeit held in violation of OPMA, was an open meeting. Thus, Utah Code § 52-4-206(5) does not apply.

20. Therefore, the audio recording of the meeting is a recording of an open meeting, which makes the audio recording a public record.

Rebuttal to anticipated AGO responses

21. AGO may argue the statutory remedy for a closed meeting violation is to commence a suit challenging the final action taken in an illegally closed

meeting within 90 days. Utah Code § 52-4-302. However, while I expressly do not waive any right(s) to later challenge the final action taken on a separate legal basis, for the specific purpose of this GRAMA appeal, I am not challenging the final action taken. Instead, I am pointing out that the meeting cannot be credibly claimed to have been closed, so it remained an open meeting for its entire duration. Thus, the entirety of the audio recording is a public record.

22. AGO may try and argue the meeting was a *de facto* closed meeting, but *Kearns-Tribune's* requirement that OPMA exceptions be "strictly construed" precludes years-after-the-fact *de facto v. de jure* arguments. *Kearns-Tribune Corp. v. Salt Lake County Comm'n.*, 2001 UT 55, ¶ 15. UPC was required to strictly comply with OPMA's closed-meeting exceptions on October 21, 2015, it did not. Thus, thus the meeting was an open meeting for its entire duration.

Point 6

Appellant requests SRC use its weighing authority

under Utah Code § 63G-2-403(11)(b) and order disclosure of the record.

23. The public interest favoring access is (1) transparency, and (2) holding public bodies accountable under their own statutes: that is, when a public body does not comply with its public notice requirement to hold a public

meeting, and does not comply with the signed “sole purpose” statement requirement to claim to close that same meeting, or provide any lawful reason to close the meeting, the public body should not be permitted to withhold the record of its deliberations from the public, or at least, from the subject of the meeting. If SRC wants to limit appellant’s use of the record, Utah Code § 63G-2-403(11)(c) provides for that.

24. I expressly waive my privacy interests in the audio recording of the purported closed portion of the meeting.

25. UPC Director Robert J. Church (“Church”) expressed ostensible concern about possible retaliation and other repercussions if the identities were revealed of who said what and who voted how in the meeting. He expressed that ostensible concern under oath to SRC on or about April 13, 2017 (<https://www.utah.gov/pmn/files/292609.mp3> @ 3:27:53) (last accessed August 26, 2018). I let pass the implied suggestion in his statement about possible retaliation, knowing time would show his lack of prescience about that, as illustrated by the absence of any such circumstance, even though the identities of who voted how and what they said has been known for the last 17 months or so.

26. Thus, unless UPC prefers not to “take their actions openly [and] conduct their deliberations openly[,]” Utah Code § 52-4-102(2), contrary to public

policy, and assuming OPMA applies to UPC, there is no reason for SRC not to order disclosure of the record.

DATED this January 26, 2019.

/s/ Edward A. Berkovich

(appellant requests notices and documents be sent by email only to
[REDACTED])

APPENDIX "A" EXPLANATORY NOTE

BEGINS ON NEXT PAGE

APPENDIX A

(explanatory note)

When I first requested the audio recording in December 2016, OAG's first response stated "there are no audio recordings" (OAG records counsel Lonny J. Pehrson (Pehrson) letter to Edward A. Berkovich, January 17, 2017). Though the minutes of the meeting contained two references to a recording of the meeting, Pehrson stated one reference was "boilerplate[,]'" and he did not address the other one. *Id.*

I appealed to CAO, whereupon UPC Director Church (Church) explained he had set up the UPC recording equipment and tried to record the meeting, and after I requested the recording, he looked for the SD card, and though he did not find the SD card, he suggested operator or equipment error as the explanation for there being no recording. (Robert J. Church letter to Parker Douglas, dated March 7, 2017).

On or about December 14, 2017, about a year after my first request for the audio recording, while before the State Records Committee on a separate matter, OAG provided me information that the recording referred to by Pehrson and Church in the correspondence above was an intended "backup copy" (Church email to UPC board members, October 21, 2015 at 9:34 a.m.) ("the email"), and there was a second recording of the meeting, made using

freeconferencecall.com, which turns out to be the intended primary recording.

Church states he had “forgotten about” the reference to the freeconferencecall.com audio recording in the email he sent. (Church memo to Pehrson, November 6, 2018). Also, “the last time Mr. Berkovich requested a copy [of the recording in December 2016], there was nothing on my computer to provide. It never occurred to me to look on my account at freeconferencecall.com as I did not remember making a recording.” *Id.* The freeconferencecall.com audio recording is the subject of this appeal. **[end of Appendix A, explanatory note].**