

BuzzFeed

VIA E-MAIL

August 10, 2015

Nova Dubovik
Utah State Records Committee
346 Rio Grande
Salt Lake City, UT 84101-1106

RE: McDaniel GRAMA Request for Utah Execution Protocol

Dear Ms. Dubovik:

I write on behalf of BuzzFeed News and its reporter, Christopher McDaniel. On May 1, 2015, Mr. McDaniel requested records pertaining to the execution of Ronnie Lee Gardner (“the Request”) under the Utah Government Records Access and Management Act, § 63G-2-101 *et seq* (“GRAMA”). That Request was nominally granted in part and denied in part by the Utah Department of Corrections (“UDC”) on May 28, 2015. On June 25, 2015, BuzzFeed appealed this determination, and on July 9, 2015, the UDC denied that appeal, providing little explanation as to why the stated exemptions applied.

We respectfully ask that this Commission overturn the July 9, 2015 UDC decision, recognizing both the extraordinary public interest in disclosure and the inapplicability of the cited exemptions. No other state known to the Requester withholds the type of information sought here.

Background

There have only been three firing squad executions in the modern era — all of them in Utah. The state banned the practice in 2004, although it was not retroactive, allowing Ronnie Lee Gardner to choose a firing squad over a lethal injection. Gardner’s 2010 execution was the last time a man has faced a firing squad in the United States, but that could change soon.

In 2015, the Utah legislature elected to resurrect the firing squad as an option if the Department of Corrections can’t obtain lethal injection drugs — a very possible

outcome as drug suppliers are working to keep their products out of the hands of death penalty states. Recognizing this importance, a number of states make their execution policies available online, including Montana¹, Oklahoma², Nebraska³, Texas⁴, Missouri⁵, and North Carolina⁶. In Utah, this public interest is at its zenith: After the legislature elected to resurrect the possibility of a firing squad earlier this year, these records became even more vital to the public interest. These documents would be used to inform the public of its past, giving them the information they need in order to make an informed decision about how the state should act in the future.

That is precisely why Mr. McDaniel filed his request – though he is not the only one. MuckRock, a news site dedicated to analyzing and sharing government documents, also filed a request and subsequent appeal for similar execution policy material in Utah.⁷ The public interest in the requested material is undeniable, and yet UDC has failed to explain why the execution policy cannot be disclosed here.

Mr. McDaniel's Request

Given this history and significant public interest, on May 1, 2015, Mr. McDaniel submitted the Request seeking

1. The execution protocol followed in the execution of Ronnie Lee Gardner;
2. Records referring to clothing worn by Gardner during the execution;
3. Records referring to the firearms and ammunition utilized during the execution;
4. Records referring to any restraints used during the execution;
5. Records referring to the structure the restraints were attached to during the execution.

A copy of the Request is attached to this letter as Exhibit A. The May 28, 2015 response to that Request, attached here as Exhibit B (“the Response”), claimed to disclose records responsive to parts (3), (4), and (5), and invoked no exemption to prohibit disclosure. In its appeal (“the Appeal,” attached here as Exhibit C) dated June 25, 2015, BuzzFeed argued that those limited records were not responsive to the Request. In turn, the response to our appeal (or the “Final Response,” attached here as Exhibit D) stated that “the Department’s thorough search yielded only the records that were previously provided to you. There were no other responsive records located.” This seems implausible to BuzzFeed News, and we ask for a declaration detailing the extent of the search.

¹ <http://cor.mt.gov/content/Resources/Reports/ETManual.pdf>

² <http://www.ok.gov/doc/documents/op040301.pdf>

² <http://www.ok.gov/doc/documents/op040301.pdf>

³ http://www.sos.ne.gov/rules-and-regs/regsearch/Rules/Correctional_Services_Dept_of/Title-69_Execution_Protocol/Chapter-11.pdf

⁴ http://s3.amazonaws.com/static.texastribune.org/media/documents/TDCJ_Execution_Protocol_07-09-2012_Final.pdf

⁵ <https://www.documentcloud.org/documents/2195860-mo-protocol.html>

⁶ <https://www.ncdps.gov/div/AC/Protocol.pdf>

⁷ A record of the request, denial, appeal, and final denial are available at <https://www.muckrock.com/foi/utah-234/firing-squad-policies-18185/>

As for part (1), the Response identified that the UDC Execution Policy as a responsive record. While numerous states volunteer their execution policies online, here the DOC invoked two statutes to prohibit disclosure, Utah Code Ann. (“U.C.A”) § 63G-2-106 and U.C.A. §§ 63G-2-305(11) & (13). Despite arguing in the Appeal that these statutes do not appear to apply to the Execution Policy, BuzzFeed received a Final Response devoid of any substantive explanation. BuzzFeed now submits these arguments for the Committee’s review.

I. The Requested Execution Protocol Does Not Constitute a “Security Measure” Under GRAMA

The GRAMA, by its own terms, explicitly recognizes two balancing constitutional rights: both the “the public's right of access to information concerning the conduct of the public's business” and “right of privacy in relation to *personal* data gathered by governmental entities.” *See* § 63G-2-101. While certain restrictions on access are permissible “for the public good,” *id.*, the statute is oriented towards transparency and disclosure. Confidentiality is permissible “only as provided in this chapter,” not broadly, so as to “prevent abuse of confidentiality by governmental entities.” *Id.*

Despite this presumption of openness, the DOC invokes U.C.A. § 63G-2-106 (“Records of Security Measures”) to prevent disclosure. “Security measures” is not defined in the Act itself, *see* U.C.A. § 63G-2-103 (“Definitions”), nor is there significant precedent interpreting this section. The plain language of the statute, however, indicates that it protects mundane security information, the likes of which would allow intruders unwarranted access to protected facilities:

U.C.A. § 63G-2-106. The records of a governmental entity or political subdivision regarding security measures designed for the protection of persons or property, public or private, are not subject to this chapter. These records include

- (1) Security plans;
- (2) Security codes and combinations, and passwords;
- (3) Passes and keys;
- (4) Security procedures; and
- (5) Building and public works designs, to the extent that the records or information relate to the ongoing security measures of a public entity.

This section of GRAMA has been described as designed to “ensure the secrecy of government records regarding security against terrorist attacks,” or other threats to critical infrastructure. *Recent Legislative Developments*, 2003 Utah L. Rev. 778, 779 (2003). The DOC simply does not explain how the Execution Policy fits into that type of exemption. An Execution Policy bears little resemblance to a security plan, or a pass and key. This limited exemption should not be stretched beyond its plain meaning.

II. Disclosure of the Execution Policy Would Not Jeopardize the Life, Safety, or Security As Protected by Statute

The other section invoked to prevent disclosure concerns those records whose publication would

U.C.A. § 63G-2-305(11): ... *would jeopardize the life or safety of an individual*;

U.C.A. § 63G-2-305(13): ... *would jeopardize the security or safety of a correctional facility, or records relating to incarceration, treatment, probation, or parole, that would interfere with the control and supervision of an offender's incarceration, treatment, probation, or parole.*

As with the earlier cited statute, there is scant applicable precedent that exists to interpret these exemptions – but they do not, on their face, appear to apply to an execution protocol designed for a particular form of execution used only a handful of times previously. Mr. Gardner’s “life or safety” could not possibly be a concern here, and should there be any participants in his execution that are named in the records, their identities should properly be redacted to protect their safety. Nor does the DOC explain how an execution protocol, the likes of which is openly disclosed online in a number of states, would affect the “control and supervision” of other offenders, or jeopardize or safety of a correctional facility. Should the Utah execution protocol differ dramatically from those available in other states, and indeed disclose information properly subject to these exemptions, that limited portion should also be redacted. Despite two opportunities to do so, DOC has provided no reason why it cannot disclose at least some portion of the protocol.

To be clear, the Request does not seek to endanger any individuals, facilities, or interfere with the control of existing inmates. All the Request seeks is non-identifying details on the last execution by firing squad, made notable and newsworthy because of the surprising possibility of that method being used again. In six other states – none of which invoke “life or safety” or “security” reasons for secrecy – this information would be volunteered to the public. So too should be the case in Utah. There can be no greater public interest than understanding the specificities of an execution method banned over a decade ago and now again made permissible.

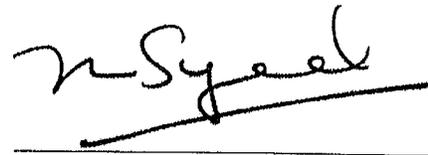
III. Redaction Will Protect Any Properly Withheld Portions of the Requested Records

As referenced above, BuzzFeed News in its appeal requested that DOC protect any properly exempted and sensitive material in the Execution Policy through redaction. The DOC Response entirely failed to address this possibility, though GRAMA imposes a duty on the agency to divide a record into public and nonpublic parts, and redact the latter. *See* § 63-2-307; *see also Deseret News Pub. Co. v. Salt Lake Cnty.*, 182 P.3d 372, 377 (2008); *KUTV Inc. v. Utah State Bd. of Educ.*, 689 P.2d 1357, 1362 (1984) (Utah Supreme Court holding that a state agency had a duty to segregate public from nonpublic

information in a requested record). We ask that the Committee consider this option as appropriate, if needed.

Respectfully, and for the reasons explained above, we ask that the requested records be disclosed to BuzzFeed News and to the public. We welcome the opportunity to appear in front of the Commission to further explain our position. Please feel free to contact me with any questions at your convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read "N Syed", written over a horizontal line.

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