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(est. 1984)

The Dyer Law Group

REC'D SEP 28 2018

September 28, 2018

HAND DELIVERED

Gina Proctor
State Records Committee Executive Secretary
Utah State Archives and Records Service
346 South Rio Grande Street
Salt Lake City, Utah 84101

RE: Appeal of Utah Department of Public Safety's Denial of Officer Swen Heimberg's Appeal of Peace Officer Standards and Training's Denial/Response to Officer Swen Heimberg's GRAMA Requests dated June 20, 2018, regarding the Matter of the Peace Officer Certification of Swen Heimberg

Dear Ms. Dubovik,

This office represents Officer Swen Heimberg ("Officer Heimberg") in the above-referenced matter. By this letter and through his counsel, Mr. Heimberg hereby appeals the Department of Public Safety's ("DPS") and Lt. James Higgs ("Lt. Higgs") response/denial of Officer Heimberg's Appeal of Utah Peace Standards Training's ("POST") response/denial of Officer Heimberg's Government Records Access Management Act ("GRAMA") Request dated June 20, 2018 (the "GRAMA Request") under Utah Code Ann. §63G-2-403(2013). Officer Heimberg's appeal is timely because he is bringing his appeal within 30 days of DPS's/Lt. Higgs' August 30, 2018, response/objection/denial of his GRAMA Requests. For the purposes of this appeal, Officer Heimberg's mailing address is c/o Dyer Law Group, The Langton House, 648 East 100 South, Salt Lake City, UT 84102 and his phone number is c/o Dyer Law Group: (801) 363-5000.

Statement of Facts

POST has alleged that Officer Heimberg unlawfully accessed Bureau of Criminal Identification ("BCI") records for a non-law enforcement purpose. South Salt Lake Police Department ("SSLPD") conducted an internal investigation into Officer Heimberg's accessing of BCI records. Thereafter, on February 21, 2013, POST opened an administrative investigation into SSLPD's allegations that Officer Heimberg had improperly accessed BCI records. POST's investigative file indicates that POST reviewed SSLPD's internal affairs investigation file as part of its investigation. As part of its investigation, POST reviewed Officer Heimberg's radio logs, Spillman chat logs, dispatch tapes and internal affairs interviews. POST also conducted phone interviews with persons whose BCI records Officer Heimberg was alleged to have accessed.

On April 30, 2014, POST sent a letter to Officer Heimberg notifying him that POST was recommending that his peace officer certification be suspended for a period for 18 months. On the same day, POST Director J. Scott Stephenson issued a Notice of Agency Action stating that POST was seeking to take administrative action against

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Officer Heimberg's peace officer certification. Director Stephenson thereafter issued an Amended Notice of Agency Action on June 2, 2014. The Amended Notice of Agency Action is attached hereto as Exhibit A. On June 27, 2014, Officer Heimberg's counsel sent an email requesting an extension of time to respond to the Amended Notice of Agency Action due to the Fourth of July holiday. On July 1, 2014, Marcus R. Yockey, Special Assistant Attorney General for the Utah Department of Public Safety, sent an email to Officer Heimberg's counsel confirming an extension of time for Officer Heimberg to file a response to the Amended Notice of Agency Action. On July 7, 2014, Officer Heimberg's counsel timely filed his Response to Amended Notice of Agency Action. Officer Heimberg's Response to the Amended Notice of Agency Action is attached hereto as Exhibit B.

POST's process for suspension or revocation of an officer's peace officer certification is governed by the Utah Administrative Code that provides for "limited discovery" but which "does not extend to interrogatories, requests for admissions, request for production of documents, request for the inspection of items or depositions." *See*, Utah Admin. Code R728-409-13(A). The administrative code further provides that "disclosure of all discovery materials is subject to the provisions of [GRAMA]." *See*, Utah Admin. Code R728-409-13(C).

Officer Heimberg has previously appealed POST's denial of two (2) other GRAMA Requests which requested POST/DPS produce substantially the same kinds of documents/materials as was requested in the GRAMA Request at issue here. On March 2, 2015, DPS denied Officer Heimberg's appeal of the denial of his two (2) previous GRAMA Requests, from which Officer Heimberg appealed to the Utah State Records Committee (the "Records Committee") on April 1, 2015. On May 14, 2015, the Records Committee heard oral argument on Officer Heimberg's appeal of DPS' denial and, on May 26, 2015, the Records Committee issued its Decision and Order denying Officer Heimberg's appeal of DPS' denial of his two (2) GRAMA Requests. On June 12, 2015, Officer Heimberg requested that Administrative Law Judge Catten issue a subpoena duces tecum to POST for the documents DPS denied production of incident to Officer Heimberg's two (2) GRAMA Requests. POST filed an objection to the proposed subpoena on June 15, 2015, asserting that Officer Heimberg is only "entitled to a copy of the materials contained in the division's investigative file that the division intends to use in the adjudicative proceedings." On June 29, 2015, ALJ Catten issued the Order on Request for Subpoena Duces Tecum denying Officer Heimberg's request for issuance of the subpoena requested by Officer Heimberg.

Officer Heimberg timely filed a Complaint/Petition for Review of a Decision and Order of the State Records Committee and Declaratory/Injunctive Relief on June 24, 2015, and timely filed his Amended Complaint, Petition for Review of Decision and Order of the State Records Committee and Declaratory/Injunctive Relief on October 21, 2015. Subsequent thereto, the parties reached an agreement for the production of the documents requested by Officer Heimberg, which was memorialized in a Protective Order and Order Resolving Disclosure of Records signed by the Honorable Matthew Bates, Third Judicial District Court Judge, on March 3, 2017 in Case No. 150904273 (the "Order Resolving Disclosure"). *See* Exhibit C. After entry of the Order Resolving Disclosure, DPS permitted Officer Heimberg's counsel to review the requested documents without redactions and under an Attorney's Eyes Only Designation ("AEO"), thereafter produced the unredacted documents under an AEO designation on or about June 14, 2017 and then, nearly a year later, produced



redacted copies of the requested files in **May of 2018**.

Due to the delay in the production of documents incident to the Order Resolving Disclosure, POST has adjudicated and disciplined/sanctioned other similarly situated peace officers who were accused of violating the same statute as Officer Heimberg. Accordingly, on June 20, 2018, Officer Heimberg's counsel submitted a GRAMA Request to Sergeant Brad Macfarlane ("Sgt. Macfarlane"). Officer Heimberg's GRAMA Request is attached hereto as Exhibit D. DPS/POST granted in part and denied in part the GRAMA Request and requested additional time to provide all of the requested documents on June 28, 2018. See Exhibit E. POST's June 28, 2018, letter stated that, "the decision to release the records involves legal issues that require POST to seek legal counsel for the analysis of statutes, rules, regulations, and case law pursuant to Section 63G-2-204(5)(f)." *Id.* On July 19, 2018, Julie Gomez sent an email to Officer Heimberg's counsel with a letter granting in part and denying in part the June 20th GRAMA Request and provided additional documents responsive to the June 20th GRAMA Request ("POST's Response"). See Exhibit F. Although POST's Response provided Officer Heimberg with some responsive documents (i.e., Notice(s) of Council Meetings, Notice(s) of Hearings, POST Council Disciplinary Guidelines, Recommendations to the POST Council, etc.), POST denied the June 20th GRAMA Request as to records in the POST investigative files on the grounds that "such records have been classified as 'protected pursuant to Sections 63G-2-305(10)(d) and (e); 'private' pursuant to Section 63G-2-302; or are exempt from GRAMA request pursuant to Section 63G-2-201(6)." *Id.*

On August 16, 2018, Mr. Heimberg timely appealed POST's Response/denial of Mr. Heimberg's GRAMA Request. Officer Heimberg's August 16, 2018, appeal (excluding exhibits) is attached hereto as Exhibit G. Inasmuch as POST requested additional time to respond to the GRAMA Request and produced responsive documents on July 19, 2018, Officer Heimberg's appeal of the denial was timely filed within thirty (30) days of POST's Response and is therefore timely. On August 30, 2018, Lt. Higgs sent a letter to Officer Heimberg's counsel reaffirming that POST had classified the requested investigative files as "protected" and/or "private pursuant to GRAMA and therefore denied the production of the investigative files. Lt. Higgs' August 30, 2018, letter is attached hereto as Exhibit H.

Reasons for Appeal and Legal Authority

A. The Order Resolving Disclosure requires POST to produce the investigative files requested in the June 20th GRAMA Request to Officer Heimberg.

Officer Heimberg respectfully submits that POST's refusal to produce the investigative files is contrary to the Order Resolving Disclosure, which provides in relevant part defined "records" to mean "any POST investigative files since 2010 in which (1) there were sustained allegation of unauthorized UCJIS access by a peace officer and (2) final adjudication by POST Council." See Exhibit C at p. 1. The Order Resolving Disclosure further provides that Officer Heimberg's "interests in accessing the records, subject to the conditions stated in this order, are greater than the interests favoring restriction of access." *Id.* at ¶4. (Emphasis supplied). The Order Resolving Disclosure further provides a means for redacting the requested records to protect any privacy interests set forth in the pertinent GRAMA sections, including permitting



POST to designate documents as AEO and preventing disclosure of any information “driver license history or criminal history of a person other than the officer that was the subject of the investigation” as well as any information “that would reveal the identity of witnesses or reveal any information regarding a witness’ personal matter, such as details of marital, financial, or medical issues.” *Id.* at ¶¶3& 6.

Officer Heimberg respectfully submits that the Order Resolving Disclosure is applicable to the documents requested in the June 20th GRAMA Request and further addresses the issues identified in the POST Response inasmuch as POST/DPS can redact and/or mark pertinent private/protected documents as AEO.¹ Accordingly, Officer Heimberg respectfully submits that the Order Resolving Disclosure vitiates any argument/objection by POST/DPS that the records are not subject to disclosure. Accordingly, Officer Heimberg respectfully requests that the Committee reverse the POST Response denying portions of the June 20th GRAMA Request and order the records requested be produced to Officer Heimberg’s counsel.

B. POST has improperly denied production of the entirety of the investigative files regarding similarly situated peace officers against whom POST has imposed sanctions.

POST’s Response denied access to the investigative files of other peace officers who were alleged to have violated U.C.A. §53-6-211(1)(d) on the grounds that the records were private, protected, or otherwise exempt from disclosure under GRAMA. As has been previously asserted by Officer Heimberg, investigative records are not records that qualify as private or protected under GRAMA. The Supreme Court of Utah has addressed this matter in *Deseret News Publishing Company v. Salt Lake County*, wherein the Supreme Court of Utah held that,

“We conclude that government records are presumptively public under GRAMA, and thus, the County bears the burden of proving that it properly classified the investigative report as nonpublic. We hold that the County did not properly classify the investigative report as a private record under section 63-2-302(2)(d) because the public interest in the record's release outweighs the potential personal privacy intrusion suffered. We further hold that the County did not properly classify the investigative report as a protected record under section 63-2-304(9), an exception that should properly extend only to reasonably expected investigations rather than hypothetical ones. Finally, we find legitimate public interest in releasing the report.” *Deseret News Publishing Company v. Salt Lake County*, 2008 UT 8, ¶53 (Emphasis supplied).

The Utah Department of Public Safety should be well aware of Officer Heimberg’s interest in and to the requested records – it was DPS’ attorney who drafted the Order Resolving Disclosure, which explicitly provides that Officer Heimberg’s “interest in accessing the records...are greater than the



1. Officer Heimberg anticipates seeking additional/alternative relief from the District Court in Case No. 150904273 but is bringing this appeal to preserve his rights to access to the requested documents.

interests favoring restriction of access.”² Officer Heimberg’s interest in this case is his right to full and fair due process in these POST proceedings, which includes Officer Heimberg’s right to present evidence to POST that any sanctions being sought against Officer Heimberg’s POST certification are inconsistent with previously meted out sanctions for other, similarly situated peace officers who received only letters of caution. This is not only required as part of Officer Heimberg’s due process rights, but by POST’s own policies, which require POST Council to “facilitate fairness and consistency” in meting out discipline/sanctions. Additionally, any potential privacy issues can easily be addressed by redaction of private/protected information, which POST has already done for POST investigative files that were previously disclosed.

C. POST has previously redacted investigative files and cannot therefore reasonably assert that production of the requested investigative files is not possible.

As set forth hereinabove, POST has previously produced the investigative files of other similarly situated peace officers under an AEO designation and has redacted personal identifying information and/or other information which may be private or protected under GRAMA. Thus, Officer Heimberg respectfully submits that any issue as to police officer privacy can be addressed by redaction of non-public information. Redaction has been supported by the Supreme Court of Utah, to-wit: “To facilitate classification, GRAMA permits a governmental entity to divide a record into its public and nonpublic parts by redacting nonpublic content.” *See Deseret News* at ¶16. However, only nonpublic information can be redacted under GRAMA as pointed out by the Court in *Deseret News*, “unless the invasion of privacy is clearly unwarranted, the public interest in disclosure must prevail.” *Id.* at FN6. Additionally, any privacy concerns that POST may have are ameliorated by the Order Resolving Disclosure inasmuch as the documents produced by POST are prohibited from being disclosed or used in any other proceedings. *See* Order Resolving Disclosure, Exhibit C, at ¶5.

Conclusion and Relief Sought

Officer Heimberg respectfully requests that the State Records Committee reverse DPS’s/POST’s denial of Officer Heimberg’s GRAMA Request and order the production of the requested documents sought in the GRAMA Request. Inasmuch as the documents requested by Officer Heimberg are investigative files regarding alleged

2. Officer Heimberg further notes that DPS has also had this issue addressed in the case of *Lawrence v. Utah Department of Public Safety and Utah State Records Committee*, Case No. 120907748, in which the Honorable Judge L.A. Dever issued a Ruling on June 7, 2013, holding that investigative records that are the subject of a GRAMA request should be disclosed and that investigative records “are not records concerning performance evaluations or personal status information that qualified under the Code as private.” Thereafter, Judge Dever entered a judgment against the Utah Department of Public Safety holding that “investigative records...are presumptively public under Section 63G-2-201(2) and shall remain public and subject to disclosure...” Judge Dever continued, “Investigative records addressing alleged violations of the public trust fall outside of this Section because they are not the same kind, class, character or nature as the specifically enumerated categories of sensitive personal information identified as “performance evaluations and personal status information such as race, religion, or disabilities.”” Judge Dever subsequently awarded the Mr. Lawrence \$9,360.00 in attorney’s fees and costs incident to pursuing the appeal of this Department’s denial of his GRAMA request.



violations of the same statute that Officer Heimberg is alleged to have violated, Officer Heimberg submits that production of the responsive documents is necessary for a full hearing in the proceedings before POST and that Officer Heimberg will be unconstitutionally deprived of a full and fair due process hearing if his GRAMA Requests are denied. As with the documents produced incident to the Order Resolving Disclosure, Officer Heimberg has no objection, and in fact would encourage, the documents/materials ordered by the Records Committee to be produced be appropriately designated as "Confidential" or "AEO."

If Officer Heimberg's appeal to the State Records Committee is not summarily granted, counsel requests oral argument be had before the State Records Committee.

Thank you for your consideration.

Very truly yours,



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Benjamin R. Dyer, Esq.
Attorneys for Officer Heimberg

Enclosures

CC: Swen Heimberg (w/attachments)
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