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February 12, 2019

VIA U.S. MAIL AND EMAIL

Ms. Gina Proctor
UTAH STATE RECORDS COMMITTEE
346 South Rio Grande
Salt Lake City, Utah 84101-1106
gproctor@utah.gov

Re: *Appeal of Denial of GRAMA Request for Records Relating to Shooting of
Lauren McCluskey*

Dear Ms. Proctor:

I am a reporter for KSL-TV (“KSL”). Pursuant to Utah Code § 63G-2-403 of the Utah Government Records Access and Management Act (“GRAMA”), KSL hereby appeals to the State Records Committee the denial by the University of Utah (the “University”) of KSL’s requests for access to “police documents related to case number 18-1861” (the “Records”).

FACTUAL BACKGROUND¹

Lauren McCluskey, a star student-athlete at the University, first met Melvin Rowland on September 2, 2018. They began a relationship soon after. Over time, he visited her often at her residence hall on the University campus and built friendships with her other friends and students in the hall.

On October 9, 2018, McCluskey learned Rowland’s true identity, including his actual age and his status as a registered sex offender. In order to confront him with the information, she invited him to her dorm, where he admitted his sex-offender status but denied his age. She told him that she wanted to end the relationship. He spent the night in her dorm. The next day, he borrowed her car to run errands. Shortly thereafter, McCluskey’s mother contacted the University’s campus dispatch to request a security escort to help her daughter retrieve her car from Rowland. When campus police contacted McCluskey, she initially declined the assistance, stating she believed Rowland would soon leave the car at her dorm and felt comfortable with that arrangement. A dispatcher told McCluskey that security officers would

¹ The University has provided its own timeline on these events, which has been summarized in this Factual Background section. *Available at* <https://unews.utah.edu/timeline-of-events-in-lauren-mccluskey-case/>.

be near the building just in case and asked McCluskey to call if the situation changed. At 5:00 p.m., McCluskey called dispatch and stated that Rowland had left her car in the parking lot of Rice-Eccles Stadium and that she needed a ride to pick it up, so security officers gave McCluskey a ride to pick up her car.

On October 12, 2018, McCluskey contacted University police to report her receipt of suspicious text messages that she believed were from friends of Rowland. The text messages claimed that Rowland was dead and that it was McCluskey's fault. However, McCluskey soon confirmed on social media that the claims were not true. When the reporting officer asked McCluskey if she felt in danger or threatened, she said that she did not but did think Rowland's friends may be trying to lure her somewhere. The officer told her to not go anywhere that made her uncomfortable and to call back if there was any further contact.

On October 13, 2018, McCluskey once again contacted University police to report new text messages that she believed were from Rowland and/or his friends. The messages demanded money in exchange for not posting compromising photographs of McCluskey on the internet. Per the demands, McCluskey sent \$1,000 to a third-party account with the hope that the photographs would remain private. The police took the report, pulled Rowland's criminal history, and assigned the case to a detective for possible sexual extortion charges.

On October 19, 2018, the police began a formal investigation of the sexual extortion charges. A detective contacted McCluskey to gather additional information, to identify all suspects possibly involved, and to seek an arrest warrant for Rowland and/or his acquaintances.

For several days thereafter, the University's security video showed Rowland at various location on campus.

On October 22, 2018, McCluskey emailed University policy to report receiving additional text messages from a "spoofed" number that claimed to be Deputy Chief Rick McLennon and that requested that she travel to the police station. The University police now believe this text was sent by Rowland with the intent of luring McCluskey out of her dorm. Waiting for McCluskey to leave her room, Rowland spent that afternoon with some of McCluskey's friends in the residence hall. At 8:20 p.m., Rowland confronted McCluskey in the parking lot outside her residence hall while she was speaking with her mother on her cellphone. During the altercation, McCluskey dropped her cellphone and belongings. Rowland dragged McCluskey to a different spot in the parking lot, where he forced her into the backseat of a car and shot her multiple times. At 8:23 p.m., McCluskey's father called

dispatch and stated his belief that his daughter was in trouble, relayed what her mother heard on the phone, and requested that officers respond immediately. At 8:32 p.m., police arrived at the parking lot, located McCluskey's belongings, and began searching her dorm, the surrounding area, and the parking lot. But at 8:38 p.m., Rowland was picked up by an acquaintance and left campus. At 9:55 p.m., over an hour and a half after Rowland first began his attack on McCluskey, police located McCluskey's body and sent a secure-in-place alert campus wide. Over the next few hours, police continued to send alerts, lifted the secure-in-place order, identified the suspect as Rowland, located Rowland, and chased Rowland into the Trinity A.M.E. Church, where he shot and killed himself.

On December 19, 2018, a three-member panel comprised of veteran law enforcers and assigned to investigate the University's handling of the case publicly reported on their investigation.² John T. Nielsen, who headed the panel, said, "Whether or not we can say with certainty that her death could have been prevented in this particular situation, we just simply cannot do that. All we can say is we hope we have systems in place in the future that will lessen the probability of this kind of a thing happening." But he continued, "We determined that the University of Utah Public Safety is understaffed, not only with respect for the need for more patrol officers, but other officers and detectives trained in the investigation of domestic and interpersonal violence." And then the University's President, Ruth Watkins, said, "This report does not offer us a reason to believe this tragedy could have been prevented. But instead, the report tells us how we can improve." Yet Mr. Nielsen contradicted President Watkins in saying, "None of the officers involved sought to discover if Rowland was under the supervision of the Division of Adult Probation and Parole, notwithstanding the fact that a criminal history check was conducted and that Lauren suspected that Rowland and his friends were behind the extortion attempts. . . . All I can tell you is that the information that could have been available with respect to [Melvin Rowland's] offender status, at least should have been reported to the parole agent. What the parole agent [would do] beyond that, we don't know." In short, the information provided to the public at this point was woefully incomplete, conclusory, and contradictory.

On February 12, 2019, the same day as what would have been McCluskey's 22nd birthday, President Watkins and others delivered another presentation to the University's board of trustees regarding the case.³ Notwithstanding her prior comments that there was no

² Available at <https://www.deseretnews.com/article/900047256/officials-release-details-of-independent-investigation-into-lauren-mccluskey-case.html>.

³ Available at <https://www.deseretnews.com/article/900055449/university-of-utah-enacting-changes-after-student-killing-but-no-firings-president-says-lauren-mccluskey.html>.

“reason to believe this tragedy could have been prevented,” President Watkins stated, “I’ve had many, private, difficult conversations about this situation about corrective actions and about our expectations moving forward. The actions that we have taken have been guided by my best judgment and by what I believe will ultimately make this a safer campus moving forward, as safe a campus as we can ensure. . . . I do not believe it serves the ultimate mission of enhancing campus safety to fire anyone who acted in good faith and is capable and deeply committed to doing better. At the same time, I fully expect accountability and compliance with these actions moving forward.” A variety of other concerns, recommendations, and changes for “the shortcomings identified” were mentioned.

Noticeably absent from both the December 19 report and February 12 presentation was any indication of any ongoing investigation of any kind.

At some point during the February 12 presentation, the University’s Department of Public Safety Chief Dale Brophy remarked, “I can’t imagine how difficult it is for her parents. I understand their frustration, I understand their anger. I can’t even imagine how hard it is and how difficult it is for them.” But the information provided to both McCluskey’s parents and the public at large on this important issue has been limited at best. The public also has an interest in the safety of our campuses and has been denied the opportunity to review the Records in order to further protect our community, administrators, students, parents, and children.

PROCEDURAL HISTORY

1. On December 20, 2018, KSL submitted a GRAMA request to the University seeking records relating to the shooting. A copy of KSL’s initial request is attached hereto as Exhibit A.
2. On January 3, 2019, the University issued a response denying access to records. A copy of the University’s response is attached hereto as Exhibit A.
3. On January 9, 2019, KSL appealed the University’s denial to the University’s Records Officer. A copy of KSL’s appeal is attached hereto as Exhibit B.
4. On January 25, 2019, the University issued another response to KSL’s appeal that identified certain responsive documents that were publicly available online but denied access to others. A copy of the University’s response is attached hereto as Exhibit C (the “Denial”).

5. This appeal now follows.

LEGAL ANALYSIS

There is an epidemic of violence on campuses and in surrounding communities across the nation. This rash of violent incidents has resulted in a crisis of confidence both in law enforcement and administrators in higher education. The public has an incredible interest in and a desperate need for greater information and transparency to ensure that our campus communities are being sufficiently protected in accordance with the public trust and confidence we all—from teachers and their students to parents and their children—place in these important institutions.

Under GRAMA, the Records are public, subject to no legitimate exception, and should be released.

The University'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. 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 and to engage in “an impartial, rational balancing of competing interests.” *Id.* ¶¶ 24-25. “[T]he overriding allegiance of the governmental entity must be to the goals of GRAMA and not to its preferred record classification,” always conscious of the “mandate that when competing interests fight to a draw, *disclosure wins.*” *Id.* ¶ 24 (emphasis added).

The public interest in open government and accountability for public officials is perhaps nowhere more urgent than in the context at issue here: the intersection of conduct and potential misconduct by the public's peace officers and higher education administrators charged with the enormous responsibility of protecting our students and children. "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).

The recent spate of campus shootings underscores the critical importance of fostering both the accountability for police officers and administrators and the 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. Indeed, if there were truly nothing that could have been done to prevent the loss of Ms. McCluskey's life, then the Records should support that and earn back the public's trust. But if there was something that could have been done, the public must be allowed to access the Records and to provide feedback on the processes and other measures that might help save other lives.

The Denial Is Improper

The University has claimed that the Records "continue to be part of an ongoing criminal investigation" and withheld the Records based on an unsubstantiated assertion that "disclosure of [the Records] could reasonably be expected to interfere with the investigation, see Utah Code § 63G-2-305(10)(a)." [Denial 1.]

At the outset, such perfunctory and unsubstantiated assertions—devoid of any facts or analysis—do not and cannot satisfy the University's burden to deny access to the presumptively public Records. *See Deseret News Publ'g Co.*, 2008 UT 26, ¶ 53, 182 P.3d 372 (noting that where "government records are presumptively public under GRAMA, . . . the [government entity] bears the burden of proving that it properly classified the [record at issue] as non-public"). Courts have repeatedly rejected parties' attempts to deny public access to records based on such conclusory, unsupported grounds. *See, e.g., Utah Dep't of Pub. Safety v. State Records Comm.*, No. 100904439, 2010 Extra LEXIS 6, at *10-11 (Utah 3d Dist. June 17, 2010) (holding that a prosecutor's affidavit testimony that public release of the DUI Report Form and dash-cam video at issue "could impair [his] ability to impanel an impartial jury" was "little more than his legal conclusion, to which the Court g[ave] no weight" and was "not supported by either facts or analysis"); *Donovan v. F.B.I.*, 579 F. Supp. 1111, 1121 (D.C.N.Y. 1983) ("[T]he FBI's generic categorization in and of itself fails to demonstrate how

release of documents would interfere with the trial.”); *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) (determining that the “defendants ha[d] not overcome the presumption in favor of public access” by reciting “general claims of prejudice”); *State v. Cianci*, 496 A.2d 139, 145 (R.I. 1985) (noting that a “blanket statement of potential prejudice was not sufficient to demonstrate compelling reasons for ordering the sealing of discovery documents”).

As these courts have explained, a *specific* showing of interference with investigations is necessary to withhold records from the public. *See, e.g., Putnam v. U.S. Dep’t of Justice*, 873 F. Supp. 705, 714 (D. D.C. 1995) (“The government must demonstrate specifically how each document or category of documents, if disclosed, would interfere with the investigation.” (internal quotations omitted)); *Evening News Ass’n v. City of Troy*, 339 N.W.2d 421, 497 (Mich. 1983) (“[T]he government must show . . . how the particular kinds of records would interfere with a pending enforcement investigation . . . by more than conclusory statements.” (emphasis omitted)); *Kidder v. F.B.I.*, 517 F. Supp. 2d 17, 28 (D. D.C. 2007) (“Defendant must show, by more than [a] conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding[.]”) (internal quotations omitted) (first alteration in original)); *People v. DeBeer*, 774 N.Y.S.2d 314, 315 (N.Y. Co. Ct. 2004) (“It 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 . . . seal the records.”).

So to satisfy its burden, the University “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 University 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 this law-enforcement exception based on conclusory, speculative assertions without particularized supporting facts. *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, as “it 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”).

If the law were otherwise, government entities could always deny legitimate GRAMA requests merely by parroting language from any of the “protected” record provisions (or other exemptions from disclosure)—as the University has attempted here. If that were sufficient, the public’s presumptive right of access under GRAMA would be meaningless.⁴

And yet the University has offered only conclusory speculation and unsubstantiated assertions. Such assertions cannot support the Denial. The known facts directly contradict the University’s position. As confirmed by a cursory review of the facts set forth above, there are no such ongoing investigations. Both the victim and the perpetrator are deceased, so there can be no ongoing criminal investigation because there is no one who could be prosecuted. Moreover, the shooting occurred months ago on October 22, 2018, and since that time, an independent review was conducted regarding the efforts of University police leading up to the shooting and a press conference during which the University’s purportedly conclusive findings were shared. On December, 19, 2018, University President Ruth Watkins told the media and the public that the independent report did “not offer us a reason to believe this tragedy could have been prevented.” On February 12, 2019, the University’s presentation to its board of trustees mentioned a number of “shortcomings” and recommendations to address

⁴ Notably, because the Final Audit Report has been completed, it goes without saying that there can be no valid grounds for alleging that its release reasonably could be expected to interfere with an ongoing audit. See Utah Code Ann. § 63G-2-305(9)(b).

them but failed to identify any ongoing investigation. Regardless, for purposes of this appeal, either these public statements should not have been made or the investigation is closed—or both—and either way, the Records should be released to the public.

Even if there is an ongoing investigation, there also has already been a substantial amount of publicity regarding the events culminated in the shooting death of Ms. McCluskey. Such publicity necessarily includes without limitation the numerous and widely published news articles and reports regarding the incident and the University's responsive efforts and public statements. Given the extent and context of this publicity, including the University's own conduct and comments, it is highly doubtful that the release of the Records could have any material—or even incremental—impact on any investigation.

And finally, even if this Committee were to assume that the Records were properly classified 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.⁵ The Records relate directly to a highly publicized incident that has had ripple effects throughout the entire community. As this Committee is undoubtedly aware, there is substantial public interest in these Records, in preventing violence at our education institutions, and in protecting and providing for the safety and security of our students and children.

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 Records relate directly to issues of critical public importance. Accountability is not served by merely demanding the public 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 University's refusal to release the Records is contrary to the text and governing principles of GRAMA and should be reversed.

⁵ At a minimum, if there are legitimately non-public portions of the Records, those should be redacted or segregated so that as much as possible can be released. *See, e.g.*, Utah Code § 63G-2-308.

UTAH STATE RECORDS COMMITTEE
February 12, 2019
Page 10

Sincerely,


KSL-TV
