

#2015-78

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**BEFORE THE UTAH STATE RECORDS COMMITTEE**

<p>CHAD LAMBOURNE</p> <p>Petitioner,</p> <p>v.</p> <p>PROVO CITY</p> <p>Respondent.</p>	<p>PETITIONER'S STATEMENT OF FACTS AND LEGAL AUTHORITIES</p>
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**FACTS**

1. On July 7, 2015 Justin Green was arrested for DUI.
2. On July 23, 2015 charges were filed in the Provo City Justice Court by Information.
3. On July 29, 2015 I made a request for records of the Provo City Police Department pursuant to U.C.A. 63G-2-204, GRAMA. That request was for any video and/or audio from Officer Barney<sup>1</sup> relating to the arrest of Justin Green. Also requested was a copy of the DUI summons and citation, the DUI report form and the initial contact report written by Lieutenant Barney and where applicable the probable cause statement, vehicle impound form, the Intoxylizer report and search warrant. A signed, notarized release from Mr. Green, the subject of the records, accompanied that request. The request contained the following language:

It is understood that the requested records may contain information that is classified by the GRAMA statute as private and/or protected. Pursuant to U.C. A. 63G-2-202 a signed, notarized release of information from the subject of these records has been included. Please do not redact private or protected information regarding our client.

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<sup>1</sup> Unknown to Petitioner at the time was Officer Barney's rank of Lieutenant. As such, the proper title, Lieutenant Barney, will be used for this memorandum.

It is also understood that the requested records may contain private or protected information not relevant to our client. Pursuant to U.C.A. 63G-2-202 (3) we ask that you redact any such information and provide the requested record.

4. August 12, 2015 I received an email from Angela Gailbraith, Assistant Records Supervisor, with an attached letter. The letter stated that the request for the DUI report form and the incident report were being denied. There was no video or audio. The DUI Summons and Citation, the Intoxylizer printout and the impound report would be made available to me upon payment of \$15.00.

The letter contained no language regarding my right to appeal, a deadline for appeal or to whom I could appeal, as required by U.C.A. 63G-2-205 and Provo City Code (Utah)§3.13.2 (1992).

5. After learning with whom an appeal should be filed, I filed an appeal with Mayor John Curtis on August 31, 2015
6. On September 21, 2015 I received a letter dated September 16, 2015 from Wayne Parker, the Mayor's Designee, stating that the denial was affirmed.
7. This appeal is brought with regard to the denial of the DUI report form and the initial contact report written by Lieutenant Barney pursuant to U.C.A. 63G-2-403.

#### ARGUMENTS AND LEGAL AUTHORITIES

**All records are presumed to be public unless such record can be properly classified as private, controlled or protected.**

U.C.A. 63G-2-201(2) states "A record is public unless otherwise expressly provided by statute." Thus, unless the governmental agency can justify classifying a record as private or protected under one of the GRAMA sections, the record is public.

GRAMA defines an initial contact report as:

"Initial contact report" means an initial written or recorded report, however titled, prepared by peace officers engaged in public patrol or response duties describing official actions initially taken in response to either a public complaint about or the discovery of an apparent violation of law, which report may describe:

- (i) the date, time, location, and nature of the complaint, the incident, or offense;
- (ii) names of victims;
- (iii) the nature or general scope of the agency's initial actions taken in response to the incident;
- (iv) the general nature of any injuries or estimate of damages sustained in the incident;
- (v) the name, address, and other identifying information about any person arrested or charged in connection with the incident; or

- (vi) the identity of the public safety personnel, except undercover personnel, or prosecuting attorney involved in responding to the initial incident.

U.C.A. 63G-2-103(14)(a).

GRAMA then asserts an initial contact report as a public record unless it is expressly exempt from disclosure, having been restricted as private, controlled or protected. U.C.A. 63G-2-301(3)(g). Provo City attempts to classify the requested records as protected; however its argument falls short.

### **Classification of the denied records**

Provo city claims the requested records are protected pursuant to U.C.A. 63G-2-305(10)(a) and (c), and a similarly worded Provo City Code.

63G-2-305(10) states: records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records:

- (a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;

Provo City seeks to justify classifying a public record as protected claiming that there is an ongoing investigation. The investigation remains open “to help assure the privacy and safety of victims, to reduce undue influence on or tampering with witnesses or co-defendants, and to insure that all relevant information is gathered and considered so that the defendant has a fair trial.” Provo City then explains that the investigation remains open to provide for the gathering of additional information and uses the example of toxicology.

This reasoning is faulty and misleading. The DUI investigation was complete the moment Lieutenant Barney booked any evidence and completed his report. Once completed, the case was turned over to the prosecutor, and charges were filed by information in the Provo City Justice Court on July 23, 2015. While it is true that it may take weeks for the Utah State Forensic Toxicology Laboratory to complete its testing, there is no further investigation required by the police.

Even assuming arguendo, that there may be follow-up investigation needed, GRAMA makes no distinction between an ongoing and a completed investigation. This section of GRAMA only addresses a reasonable expectation of interference with an investigation. Provo City cannot reasonably show that releasing the records will interfere in any way with the investigation.

Provo City goes to great lengths to discuss the GRAMA statutes lack of protection of victims, witnesses, that releasing the initial contact report may make it more difficult to get witnesses and victims to cooperate. This argument is also misleading and faulty. Victims and Witnesses are protected by other sections of the Utah Code. (See e.g., U.C.A. 76-5-102, U.C.A. 76-5-106, U.C.A. 76-5-106.5, U.C.A. 76-5-107 & U.C.A. 76-8-508 et al.) GRAMA does not contemplate

protecting witnesses and victims because there is no need. GRAMA in fact specifically lists “names of victims” in the definition of initial contact report, a public record.

Provo city next argues that releasing the initial contact report may make it more difficult to seat an impartial jury.

U.C.A. 63G-2-305(10)

(c) would create a danger of depriving a person of a right to a fair trial or impartial hearing.

What Provo City fails to show is how releasing the requested records may make impaneling an impartial jury difficult. Provo City has approximately 87,407 people over the age of 18<sup>2</sup>. Even if the requested records were published in the Daily Herald, finding 4 persons who had never heard of Mr. Green or the arrest would not be difficult.

The records that Provo City seeks to protect are in fact public records. The statutes cited to protect the records are not applicable.

### **Discovery**

In the affirmation of the denial Provo City also discusses criminal discovery and the Utah Rules of Criminal Procedure stating: “It appears that the requested documents are available to Mr. Lambourne or Mr. Green through the discovery process.” U.C.A. 63G-2-207 addresses this issue very clearly. “Subpoenas and other methods of discovery under the state or federal statutes or rules of civil, criminal, administrative, or legislative procedure are not written requests under Section 63G-2-204, ... Unless a court or administrative law judge imposes limitations in a restrictive order, this section does not limit the right to obtain records through the procedures set forth in this chapter.”

### **Access to protected records**

Provo City’s citation of U.C.A. 63G-2-202(4) is moot. The records requested are properly classified public, not protected. A release from the City, the County Attorney and the co-defendant is not necessary. The release was provided so Provo Police did not redact the private information regarding Mr. Green. Should the requested records contain information about anyone other than Mr. Green, GRAMA addresses how such a situation is to be handled:

[I]f a governmental entity receives a request for access to a record that contains both information that the requester is entitled to inspect and information that the requester is not entitled to inspect under this chapter, and, if the information the requester is entitled to inspect is intelligible, the governmental entity shall allow access to information in the record that the requester is entitled to inspect under this chapter; and may deny access to information in the record if the information is exempt from disclosure to the requester. ...

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<sup>2</sup> United States Census Bureau website, <http://quickfacts.census.gov/qfd/states/49/4962470.html>, last accessed October 12, 2015.

U.C.A. 63G-2-308.

In the case of a DUI report form and the initial contact report written by Lieutenant Barney denying the protected information is accomplished by simply redacting that information.

#### **Relevant case law**

Provo City claims neither of the cited cases is relevant to this case. Both cases are, in fact, directly on point.

As this committee is aware from the documents provided in *Jessica Phillips v. West Jordan City Police*, the initial denial of that GRAMA request was because "At this time, the case is still active." In *Phillips*, charges were filed in the West Jordan City Justice Court on October 15, 2013. The GRAMA request was made November 11, 2013. As far as the West Jordan Police Department was concerned the case was in fact no longer active. It had been turned over to the prosecutor. That case is applicable to the instant case for the same reason. The Provo City Police Department has finished the DUI investigation and turned the case over to the prosecutor who subsequently filed charges. The situation is identical. With regard to Mr. Green's case there is nothing more for the Provo Police Department to investigate. Simply saying the investigation is ongoing doesn't make it so.

The *Phillips* case also makes a distinction between criminal discovery and records requested pursuant to GRAMA. Even though the requested records may be available through the discovery process, access to public records may not be denied under GRAMA.

In the *Vanocur* case the Utah Highway Patrol also classified the records of a DUI arrest as protected. Provo City claims this case differs because the Utah Highway Patrol's case was classified as protected and they didn't know if the records would be used in any future investigation. Provo City claims Mr. Green's case is not closed, that there may be further investigation. However, aside from the disingenuous rhetoric regarding the safety of potential victims and witnesses, waiting for the toxicology lab's results (which will not change anything the Provo Police Department does, regardless of the results) discovery and mugshot websites, Provo City cannot show that any follow-up or further investigation will take place in this case.

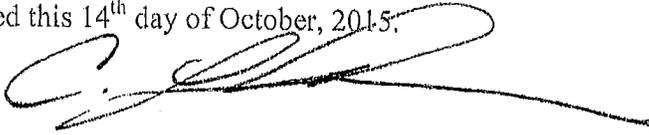
In *Vanocur* the UHP argued that the records should be classified as protected under U.C.A. 63G-2-305(9), since renumbered to U.C.A. 63G-2-305(10). Provo City now makes the same arguments regarding the classification of the requested records and a fair trial for Mr. Green. The committee found then that the UHP's arguments regarding classified as protected, or that releasing the records (of a public servant whose arrest garnered a great deal of public attention) would create a danger of depriving the defendant of a fair trial unpersuasive.

#### **Conclusion**

Provo City has misclassified the requested records as protected, and can provide no convincing reason for doing so. This committee has ruled on cases identical to this case and found the requested records in this case to be public and subject to disclosure under GRAMA. There is no

reason for the Committee to deviate from its prior rulings. The Committee should order Provo City to release the records in question.

Dated this 14<sup>th</sup> day of October, 2015:

A handwritten signature in black ink, appearing to read 'C. Lambourne', with a long horizontal flourish extending to the right.

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