

Gina Proctor:

Hello you can consider this my official appeal to the State Records Committee of a denial of records from a request filed on Feb. 20, 2019.

In that request I sought the following items:

My original request dated Feb. 20, 2019 sought:

- “1.The final and completed Utah Attorney General's Office 2012 UTA Investigation report. The same document that the office would eventually turn over to the FBI looking into allegations of impropriety and insider dealings involving former UTA board members including Terry Diehl and Greg Hughes.
2. E-mail correspondence to and from former AG Mark Shurtleff in calendar year 2012 regarding the above investigation and report.”

The Attorney General’s Office has denied the request saying that the records are protected under 63G-2-305(10) that are to be protected so as not to interfere with an ongoing FBI investigation, which the FBI has confirmed to the AG’s office and previously in an affidavit to the State Records Committee prior to a 2018 hearing on a similar request.

The AG’s office has considered this a duplicative request and contends that they have weighed the interests as per GRAMA’s balancing test and found that the interest of disclosure does not outweigh the interests of secrecy.

As to Item 2 of this recent request the AG’s office says that such correspondence if produced could “reasonably be expected to interfere with that investigation”—in reference to the same FBI investigation.

I make my appeal based on GRAMA’s balancing test and based on the fact that the AG’s office is too involved in the matter to make an objective determination of balance.

I also make this appeal based on the fact that while it is true I have requested the document from item 1 of this request in two previous records disputes—the fact of the matter **is that to this day, no independent review of the documents has been made by the State Records Committee and therefore no independent weighing of GRAMA’s balancing test has been undertaken.**

I’ll focus on this point first. In the first appeal made to the SRC at this point, something happened that was a first for me in the past decade or so of taking appeals to the board—the SRC declined to review the documents in camera.

Had I known that was even a remote possibility that the SRC would not review records in camera I would have taken the time in my testimony phase of the hearing to stress how important the committee’s in-camera review is to requestors.

I would have talked to them about how when I teach responsible GRAMA techniques to student journalists I talk about how valuable the SRC is by virtue of the fact that they are an independent set of eyes that can review records with their only focus being on how disclosure does or does not align with

state laws, transparency and the greater good—and unlike the records holder, they are not invested in keeping records buried that might embarrass them if they are released.

Had I known it was possible the records would not be reviewed in camera I also would have stressed how very vital that independent review is in particular to citizens and organizations such as my nonprofit that lack deep pockets. For example, in the past when I worked at the Salt Lake City Weekly the SRC reviewed records that the AG's Office swore would jeopardize ongoing investigations if they were released. The SRC at that time reviewed the records and found that was not quite true, that some records were right to classified as private and protected but that some weren't. When the AG's office fought appealed the SRC's decision it was up to our small newsroom to decide if we should take it to court. **Knowing that the SRC had independently reviewed the records and determined some should be considered public gave us encouragement to know that it was worth the legal bills to press the matter in court.** We spent the money and eventually obtained records of employees at the office discussing candidly how the office couldn't look into charges against Jeremy Johnson, citing the fact that he was a friend and major campaign donor to former Attorney General Mark Shurtleff.

If the SRC does not review records in camera, and denies a request, the requestor has no idea whatsoever if they are to have a fighting chance in pursuing the records in court.

In early 2018 when the SRC denied my request without reviewing the records, the consensus was essentially that they did not want to interfere with the FBI's ongoing investigation. I was willing to stomach the fact that the records had not been reviewed by deciding that I would give the matter another year for the FBI to resolve their investigation and then to file again.

I fully anticipated presenting to the SRC all the reasons why it's vital for requesters to have disputed records be reviewed in camera at my next hearing. Then something else virtually unprecedented happened—my entire hearing was denied.

The only reason I can fathom that such a hearing would be denied was for the fact that the new SRC secretary was not present for the original 2018 SRC hearing on this matter, and therefore was not there to see that, in fact, the records in question were never reviewed in camera. As such the entire hearing was denied based solely on the previous determination.

However, not only is that determination unfair based on the facts stated above about how the committee was not able to actually weigh the balancing test because they never looked at the records, but its also invalid because the current secretary failed to consider the impact of the passage of time.

Again the previous SRC hearing on the matter expressed grave concerns about the FBI's investigation into the matter but expressed a desire to give the agency time to resolve the investigation. The further passage of time has revealed not only that they have not resolved the matter but that they have moved even further past the statute of limitations that would actually allow them to bring charges on issues raised in the document I've requested.

Keep in mind while that UTA report was concluded in 2012 it referenced events going back as far as 2007—that's now more than a decade old.

It's also worth noting that the AG's office has yet to address this matter of the statute of limitations, instead they have just blithely referred to the FBI's insistence that it will interfere with an ongoing investigation.

As to item 2, communications to and from former Attorney General Mark Shurtleff regarding this report, in the most recent denial from Solicitor General Tyler Green dated March 29, he only argued that it was "reasonable" to expect disclosure of these very old communications would interfere with the FBI's investigation.

But in the previous appeal to the SRC, the FBI filed an affidavit to confirm specifically that release of the report from Item 1 would interfere with the investigation. As far as we know the FBI has no interest in these emails to and from Shurtleff. If they do feel they are vital to their investigation they ought to be able to file an affidavit that would confirm this.

This is why its vital that the SRC consider this hearing, especially in regards to the records requested in Item 2 as well as Item 1—no independent eyes have looked to see if these emails are something the public has a right to know about or not, just like the investigative report. As to the matter of the balancing test. Its my contention that the issue is still one of great interest to Utahns. It gets at the fundamental fairness of our institutions. For years UTA has been dogged by corruption allegations and scathing reports of conflicts of interest and insider dealings, and yet still has avoided any serious repercussions. Greg Hughes, a pivotal figure in the report is still a prominent figure in Utah politics and a likely candidate for governor in 2020.

Remember that these are not federal records even though the FBI would like them not to be released, these are state generated records and it is entirely appropriate and necessary that the committee look at them to make a determination. I understand full well the vital role the SRC serves and how precious the time commitments of each committee member are, that's why if agreed upon at the hearing I would certainly have no objection to the committee deciding to a continuance of the matter and setting the documents aside at archives so that each committee member could review them before the next month's meeting. That was the procedure often adopted with the SRC in the past when it came to reviewing documents.

It is timely and appropriate for the SRC to consider this matter again and weight the arguments again, and for the first time review the documents in question.

Thank you for your consideration

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