

The Salt Lake Tribune

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Nova Dubovik, executive secretary
Utah State Records Committee
346 S. Rio Grande
Salt Lake City, UT 84101

RE: Notice of appeal to the Utah State Records Committee, re Utah County records request

Dear Ms. Dubovik:

Please add a records appeal from me, representing The Salt Lake Tribune, to the agenda of the State Records Committee's next meeting. I am appealing a partial denial by Utah County sheriff's and attorney's offices and the Utah County Commission of records in the investigation of Utah County Sheriff's Deputy Edwin Randolph.

For the committee's review, I have prepared a summary of The Tribune's arguments to appeal the denial. I also have attached previous correspondence between the county and The Tribune regarding the records request and other relevant evidence.

Please refer to my contact information if you have questions.

BACKGROUND

I am appealing the denial of a request made April 16, 2016, for all records related to any internal or administrative investigation of Randolph related to allegations of witness tampering, retaliation against a witness or obstruction of justice.

The request relates to a now-dismissed charge of third-degree felony retaliation against a witness, victim, or informant filed against Randolph on Feb. 19, 2016. Police documents state that Randolph was working as guard at the Utah County Jail when an acquaintance of his, _____ was charged with the rape of _____ a student at Brigham Young University.

Prosecutors said _____ obtained _____ full police report through discovery, and Randolph took a copy of that report to BYU officials, stating that the report showed _____ had violated the university's Honor Code. _____ was forbidden from enrolling in further classes.

Prosecutors on Feb. 23 asked a judge to dismiss the case against Randolph. Utah County

Attorney Jeff Buhman told media that he had found exculpatory evidence in Randolph's statements to internal affairs investigators with the Utah County Sheriff's Office, who reviewed Randolph's professional conduct.

The Utah County Attorney's Office provided records from other administrative investigations into Randolph but denied records dealing with the witness retaliation allegation; the office found that allegations of misconduct were not sustained and classified the requested material as a private, personnel record under 63G-2-302(2)(a).

RELIEF SOUGHT

I ask the Committee instruct the county to provide the records.

ARGUMENT

I. Police internal affairs records are public, per *Lawrence v. Utah Department of Public Safety (DPS)*.

A. Lawrence expressly exempts internal affairs records from classification under 63G-2-302(2)(a), holding that "[i]nvestigative 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.'"

B. Lawrence does not distinguish between allegations that are sustained and not sustained.

1. The court overturned a State Records Committee finding that relied on analysis identical to what Utah County presents here: that records are public under 63G-2-301(3)(o) only if charges are sustained, and otherwise they are private under 63G-2-302(2)(a).

2. As noted above, Lawrence specifically identifies "alleged violations of the public trust" as a matter not covered by 63G-2-302(2)(a).

II. The record should be classified as public because it was used for criminal enforcement purposes and is not merely a personnel record.

A. GRAMA puts the burden on government agencies to prove a record is not public:

Utah Code Ann. 63G-2-201(2) A record is public unless otherwise expressly provided by statute.

B. Buhman has said that he considered Randolph's IA statement to be exculpatory evidence in a criminal matter and that it informed his decision to seek the dismissal of the witness retaliation charge.¹

C. GRAMA provides a list of exemptions for records maintained for criminal enforcement purposes in 63G-2-304(10); none appear to apply to Randolph's IA statement, and the county has presented no such argument for those exemptions. Absent any applicable exemption, records from criminal investigations are public by default.

¹ "Boss of prosecutor who criticized BYU says school supports rape victims, has not interfered," The Salt Lake Tribune, April 15, 2016 <https://shar.es/lxRjHn>

D. Left to weigh the county's claimed privacy provisions for employment records under 63G-2-302(2)(a) and the lack of protections for criminal investigative records under 63G-2-304(10), the committee should find that the requested material is a public record.

1. The Lawrence ruling specifically separates investigative records in allegations of peace officer misconduct from the provisions of 63G-2-302(2)(a), as shown above.

2. Even if 63G-2-302(2)(a) did encompass the requested records, The Legislature has declared in 63G-2-102(3)(e) its intent to "favor public access when, in the application of this act, countervailing interests are of equal weight."

III. Even if the record is classified properly as private, it should be released because the interests favoring access are greater than or equal to the interest favoring restriction of access.

A. GRAMA allows for the release of records under those conditions.

63G-2-201(5)(b): A governmental entity may disclose a record that is private under Subsection 63G-2-302(2) or protected under Section 63G-2-305 to persons other than those specified in Section 63G-2-202 or 63G-2-206 if the head of a governmental entity, or a designee, determines that:

(ii) the interests favoring access are greater than or equal to the interest favoring restriction of access.

GRAMA reiterates the ability of a chief administrative officer to weigh the interests favoring access in the appeal of a denial.

63G-2-401(6) Except as provided in Section 63G-2-406, the chief administrative officer may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private under Subsection 63G-2-302(2) or protected under Section 63G-2-305 if the interests favoring access are greater than or equal to the interests favoring restriction of access.

B. The Tribune disputes that the requested record is properly classified as private. See sections I and II above.

C. The interests favoring access are greater than or equal to the interest favoring restriction of access.

1. The county has not demonstrated a substantial interest in restricting access to this record.

a. The county has not identified any negative consequence to its release.

b. An overwhelming amount of detail already is public in the investigation into Deputy Randolph. Extensive police records have been released and widely reported in the media.²

The county must show that any interest in withholding this record is unique to this record; broader interests favoring restriction likely have been weakened or made moot by the exposure

² "Newly released records: Deputy wanted BYU Honor Code Office to investigate alleged rape victim" The Salt Lake Tribune, May 17, 2016 <https://shar.es/1xRqi7>

this case already has received.

2. The interests favoring access are strong.

a. The public has a strong interest in internal affairs findings in misconduct allegations.

i. As noted in Lawrence, “the response of the ... investigators reflected in the investigative records primarily pertain to the performance of their official duties.”

ii. Performance of such duties is a matter of public interest. The court holds in Lawrence: “[T]he public’s right to know the response of public officials charged with the responsibility of investigating alleged constitutional violations substantially exceeds any individual interests of those public officials or the interest of a Trooper charged with the responsibility [of] protecting the safety and rights of the State’s citizens. ... The records will reveal whether public officials properly discharged their public responsibility to investigate and address allegations that law enforcement personnel violated a citizen’s constitutional rights.”

iii. Again, the Lawrence ruling does not differentiate between sustained allegations and unsustained allegations in assigning public interest.

b. Following the arguments presented above, the public has an equal, if not stronger, interest in an elected prosecutor’s rationale in deciding not to pursue previously-filed criminal charges against a law enforcement officer.

i. The close working relationship between prosecutors and law enforcement creates a heightened public interest in prosecutorial decisions in criminal allegations involving peace officers. University of Utah law professor and former federal Judge Paul Cassell writes in The Washington Post:

“While it is not necessarily an inherent conflict of interest for a local prosecuting attorney to conduct an investigation into allegations of misconduct by police agencies that he works with regularly, it can create the perception of bias. ... A district attorney’s office that is one day calling a police officer to the stand as a critical witness may have a difficult time the next day investigating the same officer and charging him with a crime. ... [T]he public tends to wonder about whether prosecutors ... have been fair and thorough in developing charges against officers from local police agencies”³

Cassell quotes Brian Beutler, who in The New Republic describes a “legal flaw” in which “local prosecutors investigate the officers on whom they rely for evidence, cooperation, and political endorsements”⁴

The Tribune is not arguing a particular likelihood of bias in the case of Deputy Randolph but merely that the unique relationship between a prosecutor and a law enforcement agency creates a special public interest in transparency.

ii. A county attorney’s duty to defend the county in civil matters creates a heightened

³ “Who prosecutes the police? Perceptions of bias in police misconduct investigations and a possible remedy” The Washington Post, Dec. 5, 2014 <http://wpo.st/NNf22>

⁴ “The NYC Cop Who Strangled Eric Garner to Death Is Free Thanks to a Legal Flaw. Here’s How Voters Can Fix It” New Republic, Dec. 3, 2014 <http://bit.ly/2dJWsgL>

public interest in a county attorney's findings in criminal allegations involving deputy conduct.

There is potential tension when a criminal prosecution of a county employee could affect the county's liability in a civil action. This potential conflict was acknowledged locally in 2002, when the Salt Lake County District Attorney referred to Weber County prosecutors a criminal investigation into a sheriff's deputy in a fatal car wreck because the Salt Lake County D.A. would defend the deputy in a civil action.⁵

That potential tension has prompted policy action elsewhere. In the Los Angeles City Attorney's office, attorneys in the civil division are forbidden from trying to affect criminal prosecutions because "conflicts of interest and appearances of conflict can unnecessarily prejudice the judicial process," according to a memo that identifies as an example "cases involving the prosecution of an officer, employee or agent of the city for an act committed in the course and scope of official duty"⁶

In Iowa, potential charges against county employees always are referred to outside prosecutors because "there is an inherent conflict for a county attorney to prosecute a county employee," Sioux County Attorney Melissa O'Rourke said.⁷

In Illinois, the state bar association has advised prosecutors not to handle charges of patient abuse in county-operated care facilities while also representing the facility in a civil suit.⁸

To be clear, the Tribune is not arguing the legal professional ethics or appropriateness of county attorneys handling the prosecution of county employees, but rather that the dual roles of county attorneys have been understood to potentially create tension. The public has an interest in ensuring that tension is not a factor in the decision of whether to prosecute a county sheriff's deputy.

iii. The public interest is further elevated in the case of Deputy Randolph because this case raises unique questions as to whether peace officers and civilians are held to an equal standard of lawful conduct.

Utah County charged two people with witness retaliation against Randolph, a peace officer, and the civilian whom she accused of rape. While Buhman has said exculpatory information in Randolph's IA investigation prompted him to drop the case against Randolph,⁹ prosecutors continued to pursue an identical charge against

In a preliminary hearing Feb. 24 — after the dismissal of Randolph's charges — prosecutors presented against the same evidence that Provo police had prepared for the charges against Randolph, including a recorded police interview in which Randolph describes his actions, as well as testimony from the Provo detective who conducted the investigation.

A 4th District judge threw out the charge against after defense attorney

⁵ "Teen's Family Seeks Justice" The Salt Lake Tribune, Nov. 10, 2002

⁶ Prosecutorial Ethics, Los Angeles City Attorney Rocky Delgadillo, California League of Cities, May 2004 <http://bit.ly/2deQiFy>

⁷ Criminal charges not likely against former Sioux County chief deputy" The LeMars Daily Sentinel, Oct. 13, 2006 <http://bit.ly/2dxrz0m>

⁸ "Opinions involving state's attorneys" The Public Servant <http://bit.ly/2dKmyQt>

⁹ "Prosecutor says rape case is threatened by BYU Honor Code investigation," The Salt Lake Tribune, April 15, 2016 <https://shar.es/1xRstwy>

argued that prosecutors had no evidence of intent to harm the witness. During the preliminary hearing, that defense attorney, Gregory Stewart, noted:

“There’s plenty of evidence that others, namely Edwin Randolph [and other acquaintances of] caused harm, but all of the evidence before the court today is that they did it without knowledge, permission, at his request, or anything else. ... If the state wants to prosecute these others, they’re free to do so. It seems like they’d gone down that path, and for whatever reasons — political or otherwise — they’ve chosen not to do that to Mr. Randolph today.”

These events raise questions of critical public interest as to why Randolph’s IA statement informed the decision to drop the charges against him, but not those against his civilian co-defendant.

Prosecutors apparently found that the exculpatory information provided by Randolph was strong enough to overwhelm the evidence gathered in the criminal investigation, but there is no indication that the exculpatory information was shared with before the prosecutors presented the same evidence against him in court. The U.S. Supreme Court has ruled that defendants have a constitutional right to exculpatory evidence that prosecutors uncover (*Brady v. Maryland*). In connection to the public interest in ensuring criminal laws are applied equally, the public also has an interest in ensuring that the information exonerated Randolph only, and that exculpatory evidence was not withheld from his co-defendant.

c. Information in the public record raises questions as to the consistency and completeness of accounts offered thus far as to official findings on Randolph’s conduct. The public has an interest in ensuring that elected officials fully and accurately represent facts relevant to the discharge of their duties.

The Tribune first reported on the charge against Randolph on April 14. Later that day, Randolph’s attorney released a statement that Randolph “never intended that BYU take Honor Code action against the female victim. Rather, he intended that BYU investigate male students, particularly male athletes, who may have victimized women or otherwise violated BYU standards regarding sexual conduct.”¹⁰

In an interview shortly after that, Sheriff Tracy offered a different explanation: that Randolph took the police reports to BYU in an effort to help female athletes.¹¹

Both of those explanations appear to contradict not only each other, but also information from police and prosecutors involved in the witness retaliation case. In a recorded police interview, Randolph repeatedly and consistently stated that his intent was to prompt an investigation into Barney, and that he did not believe her allegations against . Two other witnesses confirmed Randolph’s motive, according to police records.¹²

Prosecutors also wrote in a court memo that own defense attorney in the rape case said Randolph “had taken [police report] to the BYU Honor Code office so that they could start an internal investigation into the alleged rape victim’s status as a BYU student.”¹³

¹⁰ See Footnote 1.

¹¹ “Sheriff says employee who shared rape report with BYU was trying to prevent sex assaults,” *The Salt Lake Tribune*, April 19, 2016 <https://shar.es/lxRsVG>

¹² See Footnote 2.

¹³ See “Memo in Opposition to Motion to Quash”

The Tribune acknowledges that Randolph's IA statement may reconcile these apparent contradictions. But given the inconsistencies that now exist in the public record, the public has a strong interest in evaluating that for themselves. If the IA statement simply counters Randolph's own previous statements and other evidence, the public should have the opportunity to evaluate whether that statement was appropriately given more weight and whether it is truly exculpatory.

d. Both Tracy and Randolph's defense attorney have said more information would benefit public understanding of the case. Tracy in May told The Tribune he was frustrated the information in the IA report can't be released.¹⁴ In April, Randolph's defense attorney, Jeremy Jones, told The Tribune: "The hope is that some of this stuff is going to become more clear as the rest of this story develops in its own right. I get that it's a little bit cryptic."¹⁵

CONCLUSION

Lawrence provides specific instruction that restrictions on personnel records do not apply to an investigative report of this nature. Even if it didn't, disclosure is in the public interest. Public trust requires an understanding of how misconduct allegations against law enforcement are investigated. Public trust requires a clear explanation for a prosecutor's sudden reversal in the decision to charge a law enforcement officer with a felony, particularly while using identical evidence to pursue a case against a civilian.

The parties involved with this case have said it would all make sense if only they could release this record. Fortunately, the legislature created GRAMA's weighing provision to allow this.

Thank you for your consideration.

Sincerely,

Nate Carlisle

6 ATTACHEMENTS

CC: Larry Ellertson, Utah County Board of Commissioners
Jeff Buhman, Utah County Attorney
Jim Tracy, Utah County Sheriff

¹⁴ See Footnote 2.

¹⁵ See Footnote 1.