

OCT 13 2009

SALT LAKE COUNTY
by _____
Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

**MURRAY CITY,
Plaintiff,**

v.

**S. STEVEN MAESE, and the UTAH
STATE RECORDS COMM.,
Defendants.**

ORDER

CASE NO. 080912185

Judge Michele M. Christiansen

Pending before this Court are Defendant S. Steven Maese's Motion for Summary Judgment, Plaintiff's Cross-Motion for Summary Judgment and Mr. Maese's Motion to Strike. Mr. Maese filed his Motion for Summary Judgment on July 20, 2009; Defendant, the Utah State Records Committee, opposed the motion August 3, 2009; Plaintiff opposed the motion in a combined memorandum supporting its own Cross-Motion for Summary Judgment on August 4, 2009. Mr. Maese then filed a combined Opposition to Plaintiff's Cross-Motion and a Reply in support of his motion on August 5, 2009 and Plaintiff filed a Reply in support of its Cross-Motion on August 12, 2009. On August 7, 2009, Mr. Maese filed a Motion to Strike Plaintiff's Memorandum in Opposition, which Plaintiff opposed August 10, 2009. The Court having reviewed all relevant pleadings and documents on file in this matter, hereby rules as follows.

I. PLAINTIFF'S OPPOSITION MEMORANDUM WAS TIMELY

Plaintiff's Memorandum in Opposition and in Support of the Cross-Motion was timely under Utah Rules of Civil Procedure 6 and 7. Weekend days and the Pioneer Day Holiday are not considered in calculating the ten days Plaintiff had to file its opposition to the motion for summary judgment. Mr. Maese filed his Motion July 20, 2009, so the Memorandum in Opposition was due August 4, 2009, which was the day Plaintiff filed it. Mr. Maese's Motion to Strike is DENIED.

II. DEFENDANT MAESE'S MOTION FOR SUMMARY JUDGMENT.

On December 15, 2008, the Court granted Defendant Utah State Records Committee's Motion to Dismiss Mr. Maese's Counterclaim as untimely. The Counterclaim requested disclosure of the names of witnesses reported in the disciplinary records. Mr. Maese's motion for summary judgment again asks for full disclosure of the redacted officer and witness names. The dismissal of Mr. Maese's Counterclaim was on the merits, which prevents Mr. Maese from reasserting his requests for the witness names.

Mr. Maese's Motion for Summary Judgment to the extent it requests disclosure of the un-redacted names of the witnesses is DENIED.

Mr. Maese's Motion is GRANTED in part, as it pertains to his request for the disclosure of the officers' name, based on the following.

III. PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT.

A. An in Camera Review of the Records is Unnecessary to the Court's Determination of Whether the Records Should be Disclosed.

Plaintiff has disclosed the records of discipline that Mr. Maese requested, with the names of witnesses and the offending officers redacted. Plaintiff claims that the Utah Government Records Access and Management Act (GRAMA), specifically Utah Code Ann. § 63G-2-404, requires that the Court review the officers names to determine whether to disclose them. The Court disagrees with Plaintiff's interpretation of this statute, which states in part:

(6) The district court **may** review the disputed records. The review shall be in camera.

...

(8)(a) The court 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, controlled, or protected if the interest favoring access outweighs the interest favoring restriction of access.

Utah Code Ann. §§ 63G-2-404(6) & (8)(a) (emphasis added). Plaintiff reads the requirement in Section (8)(a) that the Court consider and weigh the pertinent interests and policies as necessitating the Court's review of the officers' names. However, the plain

language of Section (6) gives the Court the discretion to review the disputed records. *See State v. Laycock*, 2009 UT 53, ¶ 18 (citing *Savage v. Utah Youth Village*, 2004 UT 102, ¶ 18 stating “[w]hen examining a statute, we first look to its plain language.”). Thus, if the Court determines a review of the un-redacted records is necessary in its consideration of relevant interests and policies then the Court may review them. Conversely, if the Court determines it can make the required determination and balance the competing interests without reviewing the records, Utah Code Ann. § 63G-2-404(6) authorizes it to do so. Not reviewing the officers’ names does not render Utah Code Ann. § 63G-2-404 “meaningless” as Plaintiff assert. A court’s determination not to review disputed records in no way entitles a court to sidestep the balancing test GRAMA requires, it is simply discretionary as to whether reviewing the records would abet that balancing.

The Court finds that reviewing the officers’ names is unnecessary to determine if their names should be disclosed to Mr. Maese. The officer’s individual names mean nothing to the Court nor would it be appropriate for the Court to employ any outside knowledge of the officer’s names to determine whether disclosure would be appropriate. Moreover, Plaintiff has not indicated why all or even one of the officers’ names should be relevant to the Court’s decision. The Court must evaluate the competing interests and public policies regarding disclosure, and whether Plaintiff properly classified the records,

based on their content, not based on the officer's names or who the officers are.

The Court also finds that the officers' names are irrelevant to its determination that disclosure of the names does not constitute a clearly unwarranted invasion of personal privacy. The privacy interests in disciplinary reports are not particular to individual officers. The Court sees no reason why the officers' names would or could be relevant to its determination as to whether to disclose them to Mr. Maese. Plaintiff's request that the Court hold an in camera review of the un-redacted names is DENIED.

B. Plaintiff has not Met its Burden to Show it Properly Classified the Disputed Records as Protected or as Private.

When Plaintiff received Mr. Maese's request, GRAMA required it to conduct a "conscientious and neutral assessment" of his request, "taking into account the entire scope of GRAMA, including its expressions of legislative intent, its presumptions favoring access, and its mandate that when competing interests fight to a draw, disclosure wins." *Deseret News Publ. Co. v. Salt Lake County*, 2008 UT 26, ¶ 24. GRAMA prevents a government entity from presuming "that a requested record has been properly classified and then proceed[ing] to canvass GRAMA for statutory language that confirms its designation." *Id.* In the case of records of discipline, however, GRAMA provides specific classifications and exceptions to their designation as public, private or protected. Specifically, GRAMA designates as public "records that would disclose information

relating to formal charges or disciplinary actions against a past or present governmental entity employee if: (i) the disciplinary action has been completed and all time periods for administrative appeal have expired; and (ii) the charges on which the disciplinary action was based were sustained.” Utah Code Ann. § 63G-2-301(3)(o). There are exceptions to this designation, and where “a record is expressly exempt from disclosure, access may be restricted.” *Id.* at 301(3). Utah Code Ann. § 63G-2-305 provides exceptions:

The following records are protected if properly classified by a governmental entity:

...
(9) [R]ecords created or maintained for . . . discipline purposes if release of the records:

- (a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;
- (b) reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings;
- (c) would create a danger of depriving a person of a right to a fair trial or impartial hearing;
- (d) reasonably could be expected to disclose the identity of a source who is not generally known outside of government and, in the case of a record compiled in the course of an investigation, disclose information furnished by a source not generally known outside of government if disclosure would compromise the source; or
- (e) reasonably could be expected to disclose investigative or audit techniques, procedures, policies, or orders not generally known

outside of government if disclosure would interfere with enforcement or audit efforts.

...
(25) records, other than personnel evaluations, that contain a personal recommendation concerning an individual if disclosure would constitute a clearly unwarranted invasion of personal privacy, or disclosure is not in the public interest.

Utah Code Ann. §§ 63G-2-305(9)(a) - (e) & 63G-2-305(25). Plaintiff also claims it properly classified the records as “private” under Utah Code Ann. § 63G-2-302(2)(d).

By asserting that these statutes justify its classification of the records as protected and as private, Plaintiff must show it performed a conscientious and neutral assessment of the records and that 1) it properly classified the records as protected or private; 2) the records contain a personal recommendation and 3) disclosure would constitute a clearly unwarranted invasion of personal privacy or that disclosure is not in the public interest.

i. *Plaintiff did not Properly Classify the Records as Protected Under Utah Code Ann. § 63G-2-305(9).*

The primary problem with Plaintiff’s classification of these records as protected is that it has disclosed the records themselves with only the names redacted. While this might signify the privacy interests of the individual officers are particularly important, it undermines any argument that the actual content of the records is private. In fact, disclosure of the content of the reports eliminates the need for the Court to consider

whether §§ 63G-2-305(9)(a), (b) or (e), as those factors pertain to the content of the reports and not to the rights of the particular individuals.¹ Utah Code Ann. § 63G-2-305(9)(d) is also not at issue as the officers' are not sources of information in these reports and the Court has ruled that the witnesses' names cannot be disclosed.

This leaves only Utah Code Ann. § 63G-2-305(9)(c) for the Court to consider; whether disclosure “would create a danger of depriving a person of a right to a fair trial or impartial hearing.” The Court has no evidence disclosure of the names would affect these officers' rights to fair trials or impartial hearings. Nor is it clear how such rights could be affected by disclosing the names associated with Mr. Maese's request for “[a]ll records of sustained discipline of Murray City Police Officers, for which all time periods for administrative appeal have expired, for the last 5 years.” Mr. Maese requested records of final disciplinary actions and Plaintiff agrees the officers' right to administrative appeal expired for the records it disclosed. The discipline has concluded. Plaintiff has not shown any reason why these rights would or could be affected by disclosure of the names

¹ Plaintiff's only attempt to address the statutory exceptions is the claim that the reports are protected because they “address internal investigations and discipline, Murray City investigative techniques, and personnel evaluations concerning individuals employed by Murray City.” Pl.'s Mem. Opp. Summ. J. 7-8. Even if the Court found it necessary to consider factors (a), (b) or (e), Plaintiff's disclosure of the reports of “internal investigations . . . investigative techniques” belies plaintiff's claim that the information itself should be protected. The names of officers have no bearing on the investigations or techniques.

and disclosure of the names is not prevented by this statute and Plaintiff has not properly classified them as protected.

ii. *Plaintiff did not Properly Classify the Records as Protected Under Utah Code Ann. §63G-2-305(25), nor as Private Under Utah Code Ann. § 63G-2-302(2)(d).*

Utah Code Ann. §§ 63G-2-305(25) and 63G-2-302(2)(d) both allow government entities to classify records as private or protected, under different circumstances, if disclosure would constitute a clearly unwarranted invasion of personal privacy.

Utah Code Ann. § 63G-2-305(9)(d)

To protect records from disclosure under this statute, they must be “records, other than personnel evaluations, that contain a personal recommendation concerning an individual if disclosure would constitute a clearly unwarranted invasion of personal privacy, or disclosure is not in the public interest.” Utah Code Ann. § 63G-2-305(25). Mr. Maese disputes the relevance of this statute to these records and argues because they do not contain personal recommendations it does not apply. Plaintiff counters that because “the documents constitute investigations into allegations of misconduct, findings, recommendations, and imposition of punishment” they meet this exception.

The Court agrees that the disciplinary records cannot be construed as personal

recommendations. The letters detail the infractions each officer committed, the hearing process each officer has been through, the consequences of the actions, and each letter gives the officer notice that disciplinary actions are cumulative and that the letters will become part of the officers' files. There is no recommendation or positive connotation in the letters. In stark contrast to a personal recommendation, which is something one seeks for praise, not punishment. A "recommendation" is: "[t]he act of recommending; [s]omething that recommends, especially a favorable statement concerning character or qualifications; [s]omething, such as a course of action, that is recommended." *The American Heritage Dictionary of the American Language* (4th ed. 2009). To evaluate someone is "[t]o ascertain or fix the value or worth of; [or t]o examine and judge carefully; appraise." *Id.*

Plaintiff faults Mr. Maese for not citing law or statute to support his claim, but neither "personal recommendation" nor "personnel evaluation" is defined in the Utah Code, Utah case law has not addressed the meaning of the words in the GRAMA context, nor are the terms ambiguous. The records informing officers of disciplinary action cannot be construed as personal recommendations and the exception provided in Utah Code Ann. § 63G-2-305(9)(d) is inapplicable to these records.

Utah Code Ann. § 63G-2-302(2)(d)

Records may also be properly classified as private if they are “records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy.”² Utah Code Ann. § 63G-2-302(2)(d). This statute is less restrictive and clearly encompasses data such as police officers’ names. The Court does not defer to Plaintiff’s classification of these records simply because they contain data. After balancing the relevant privacy interests against the public interests warranting disclosure, the Court finds that disclosure of the officers’ names will not constitute a clearly unwarranted invasion of personal privacy.

GRAMA's private and protected classification of records that ‘constitute[] a clearly unwarranted invasion of personal privacy’ does not sanction denying access to a record merely because it invades personal privacy. To qualify for nonpublic classification a record must not only invade personal privacy, it must do so in a ‘clearly unwarranted’ manner.

Deseret News, 2008 UT 26, ¶ 30 (citing a former version of the statute Utah Code Ann. § 63-2-302(2)(d); and *United States Dep't of State v. Ray*, 502 U.S. 164, 177 (1991)).

The invasion of privacy is not unwarranted because the officers were disciplined

² The Utah Supreme Court has found that this statute is “a puzzling and circular condition to impose on a record, the proper classification of which depends upon whether its disclosure constitutes a clearly unwarranted invasion of personal privacy. . . . While this statutory language remains an enigma to us, we are satisfied that it does not give us cause to defer to the County's primary classification of the . . . record.” *Deseret News*, 2008 UT 26, ¶ 29 n. 5.

because of his or her misconduct as a police officer. City police officers are public and government officials held to particular standards of conduct and given official duties. Officers can be sanctioned for noncompliance with their official duties or standards of conduct. It is in the public interest to know when a police officer has abused or violated those duties. Even where two officers were off duty, they were disciplined for involving a police vehicle in their misconduct and for conduct unbecoming of a police officer. Another officer was disciplined for damaging police equipment; another for sleeping on duty and others were disciplined for using profane language while on duty or at official events. Disclosure of the names associated with the discipline reports will clarify which officers committed which infractions in the performance of their official duties.

Additionally, the privacy interest a police officer has in the disclosure of her or his name is far less than the privacy interest an officer has in a birth date, a home address or a social security number, which GRAMA protects and which could allow someone to find criminal records, commit identity fraud or otherwise infringe on the officer's privacy beyond learning about official discipline. *See e.g. Utah Code Ann. § 63G-2-302(1)(f)* (classifying as private "employment records concerning a current or former employee of, or applicant for employment with, a governmental entity that would disclose that individual's home address, home telephone number, Social Security number, insurance

coverage, marital status, or payroll deductions”); *and see Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 302 (Ariz. 1998) (finding “a person, including a public school teacher, has a privacy interest in his or her birth date.”). Unlike this sensitive information, police officers’ names are broadcast to the public on a badge on the officers’ chests. As officials who interact with the public daily, the officers’ names are essential to their duties. It would be contrived to now prevent the disclosure of their names, particularly when disclosure is associated with their official duties. Plaintiffs have not established that disclosure would cause more than minor embarrassment about past events. Embarrassment does not constitute a clearly unwarranted invasion of these officers’ privacy nor is it justification to prevent disclosure of their names. *See Deseret News*, 2008 UT 26, ¶ 40. The officers’ embarrassment can be limited by controlling the disclosure of these names and Mr. Maese’s use of them.

In conclusion, after weighing and balancing the competing interests at stake in the disclosure of these officers’ names, the Court finds that because of the officers’ public roles and duties and because Plaintiff has not properly classified the names of the officers as protected or as private, that the names are public and Mr. Maese has a right to them as a matter of law. Plaintiff’s Cross-Motion for Summary Judgment is DENIED.


C. The Court Orders Disclosure of the Names of the Police Officers to Defendant S. Steven Maese and Orders Defendant S. Steven Maese to Limit His Use of the Names of the Officers.

The Court orders plaintiff to disclose the names of the officers to Mr. Maese in full. The Court orders Mr. Maese to limit his use of the records and names by not publishing them nor disclosing them any further.

This is the final Order of the Court.

DATED this 14 day of October, 2009.

BY THE COURT:


Michele M. Christiansen
DISTRICT JUDGE
