PARR BROWN
GEE & LOVELESS
ATTORNEYS AT LAW

DAVID C. REYMANN
Attorney at Law
dreymann@parrbrown.com

February 28, 2017

VIA HAND-DELIVERY AND EMAIL

Hon. Jacqueline M. Biskupski, Mayor
OFFICE OF THE MAYOR
SALT LAKE CITY CORPORATION
451 South State Street
Salt Lake City, Utah 84111
mayor@slcgov.com

Re: Comments on Draft Policy Regarding Release of Body Camera Footage

Dear Mayor Biskupski:

We represent the ACLU of Utah ("ACLU"). We are writing to comment on behalf of the ACLU on the Draft Policy regarding Disclosure Under GRAMA of Body-Worn Camera Recordings of Officer Involved Critical Incidents ("Draft Policy"), released by your office for public comment on January 30, 2017. The ACLU applauds Salt Lake City for taking a significant step toward greater transparency in law enforcement. We believe the Draft Policy takes seriously the City's independent obligations under GRAMA, and we support its adoption. We also offer several comments below about ways the Draft Policy can be further improved.

1. The Urgent Need for More Transparency in Law Enforcement.

This country is in the midst of an epidemic of police-involved shootings, particularly involving young black men. The rash of such incidents across the nation has led to a crisis of confidence in law enforcement, with the public in desperate need of greater transparency to ensure that the most dangerous power we bestow on police officers is being wielded responsibly and in accordance with the public trust. This lack of confidence benefits neither the public nor the police. Indeed, the ongoing national dialogue about police-involved shootings is a primary reason for the increasing use of body cameras by police officers, as the whole point of such technology is to increase transparency, allow the public to see for themselves whether law enforcement use of lethal force is truly justified, and hopefully help

prevent or ameliorate destructive protests and violence in its aftermath. When the public is denied that opportunity, confidence in law enforcement suffers and true accountability becomes difficult, if not impossible.

"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). That interest is "particularly great" when an officer is involved in a critical incident "because such shootings often lead to severe injury or death." *Long Beach Police Officers Ass'n v. City of Long Beach*, 172 Cal. Rptr. 3d 56, 74 (Cal. 2014). And notably, this need for transparency does not depend on whether the video footage shows justified or unjustified conduct by police. The public has an interest in knowing about both situations, and in ensuring that the latter is the exception rather than the rule.

Experience teaches that when government operates in secrecy, particularly with regard to urgent issues of life and death, the public inevitably assumes the worst. In those situations, even critical incidents involving police performing their jobs with integrity and courage cannot bolster public confidence in law enforcement. Mending the relationship between the public and police requires allowing the public to see the conduct of its officers, both good and bad. Otherwise, the public cannot fulfill its time-honored role of keeping government accountable to the people.

2. The City'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, 376. 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 its GRAMA obligations, *id*. ¶ 24, and to engage in "an impartial, rational balancing of competing interests." *Id*. ¶ 25. "[T]he overriding allegiance of the governmental entity must be to the goals of GRAMA and not to its preferred record classification," *id*., always conscious of the "mandate that when competing interests fight to a draw, disclosure wins." *Id*. ¶ 24.

During the 2016 General Session, with the use of body cameras increasing among law enforcement, the Utah Legislature addressed the issue of how body camera footage should be treated under GRAMA. Legislators heard from many different interest holders, including those who believe that any footage that relates in any way to an investigation or court proceeding should be kept secret and only released to the public when all of the significant decisions and proceedings are done. There was nothing preventing lawmakers from making such a judgment, and indeed, some legislatures around the country have adopted that kind of restrictive approach to body camera footage under their own records laws.

But the Utah Legislature chose a different path. It passed an exceedingly narrow provision allowing body camera footage to be classified as "private" *only* when it is taken inside a home or residence. Utah Code § 63G-2-302(2)(g) (2016). And even when the footage is taken inside a home or residence, such footage is not classified as "private" if it falls within certain statutory exceptions:

> (2) The following records are private if properly classified by a governmental entity:…
>
> (g) audio and video recordings created by a body-worn camera, as defined in Section 77-7a-103, that record sound or images inside a home or residence except for recordings that:
>
> (i) depict the commission of an alleged crime;
>
> (ii) record any encounter between a law enforcement officer and a person that results in death or bodily injury, or includes an instance when an officer fires a weapon;
>
> (iii) record any encounter that is the subject of a complaint or a legal proceeding against a law enforcement officer or law enforcement agency;
>
> (iv) contain an officer involved critical incident as defined in Section 76-2-408(1)(d); or

> (v) have been requested for reclassification as a public record by a subject or authorized agent of a subject featured in the recording.

Id. These exceptions to private status—most of which apply to the footage addressed by the Draft Policy—are powerful evidence of what the Legislature intended with regard to the public's right to know and the importance of transparency for critical incident videos.

This provision, of course, does not mandate that all such videos must be made public. If the videos legitimately fall within some other provision of GRAMA, they could be classified as non-public for some other reason. But in discharging its obligations under GRAMA and interpreting those more general GRAMA exceptions, the City can properly assume that by not enacting the broader body camera exceptions urged by those who favor secrecy, the Legislature intended for withholding of critical incident videos to be the rare exception, not the rule.

That principle was recently underscored in litigation in which both the City and Salt Lake County were involved. After nearly a year of fighting on behalf of the ACLU to obtain the body camera footage of the officer-involved shooting of Abdi Mohamed, we argued an appeal to the Utah State Records Committee, which unanimously reversed Salt Lake County's unjustified refusal to release that video evidence and held the videos were public records under GRAMA. *See ACLU v. Salt Lake County District Attorney*, No. 17-02 (Utah State Records Comm., Jan. 24, 2017).

3. <u>The Draft Policy Furthers Governmental Transparency.</u>

The Draft Policy is well conceived and a significant step towards the goals of open government and repairing the relationship between the public and police.

The Draft Policy properly allows for input from other agencies who may have an interest in the video at issue, but it takes the City's independent obligations under GRAMA seriously by requiring that an agency seeking to withhold a record explain the basis for the request in writing. In our experience, requiring a reasoned statement, rather than simply a statement that parrots the statutory language of GRAMA, will help reduce baseless denials.

The Draft Policy also provides for ongoing reassessment of any decision to withhold videos on 30-day intervals. This is consistent with the law requiring an agency to take into account changed circumstances, rather than resting permanently on an initial classification.

See Deseret News, 2008 UT 26, ¶ 24 ("If a governmental entity becomes aware that circumstances that contributed to the denial of a record request have changed during the appeal, or before another request is received for the same record, the legislative intent and statutory structure of GRAMA requires the entity to reassess the classification of the record and, if appropriate, alter its classification as permitted by section [63G-2-307].").

Finally, the Draft Policy provides for mandatory release of a withheld video after 180 calendar days, regardless of the pendency of any investigation or legal proceeding. This provision is not at odds with the City's obligations under GRAMA; it is fully consistent with them. Even if a record is initially properly classified as non-public, the agency has an ongoing obligation to reassess changed circumstances and to release such records if and when the public interest outweighs or is equal to the interests favoring secrecy. *See* Utah Code § 63G-2-401(6); *Deseret News*, 2008 UT 26, ¶ 24. The Draft Policy's mandatory release provision is a recognition that after half a year, if not well before, the manifest public interest in these types of records will come to outweigh whatever residual interests are served by continuing secrecy.

We have read with some disappointment critical comments about the Draft Policy made by Salt Lake County's District Attorney. We think those comments widely miss the mark.

First, the suggestion that the City has no right to make decisions regarding the release of body cameras, and that Your Honor "should be focusing on being the mayor and not the district attorney or a public prosecutor,"[1] displays a profound misunderstanding of how GRAMA works. The City is subject to GRAMA and not only can, but *must*, make its own independent decisions regarding whether to release its records. The District Attorney does not have veto power over those decisions simply because he is a prosecutor. The City should be applauded for taking its own GRAMA obligations seriously, not criticized because the District Attorney disagrees.

Second, the District Attorney's comments, like his arguments throughout the Mohamed appeal, are based on the view that no records should ever be released while an investigation or criminal proceeding are pending. But GRAMA contains no such sweeping exception. It allows records to be withheld only if their release would "interfere" with an investigation, a rare circumstance that is narrowly construed and never satisfied by rank

[1] http://www.deseretnews.com/article/865672198/Mayor-proposes-order-for-releasing-police-body-camera-videos.html

conjecture. Utah Code § 63G-2-305(10)(a); *see also Deseret News*, 2008 UT 26, ¶ 53; *Miller v. U.S. Dep't of Agric.*, 13 F.3d 260, 263 (8th Cir. 1993); *Does v. King Cnty.* 366 P.3d 936, 945 (Wash. Ct. App. 2015). As police officers know well, release of records like body camera videos more often serves the goals of the investigation than the other way around.

Furthermore, as for the District Attorney's assertion that release of body camera footage would necessarily deprive every future criminal defendant of the right to a fair trial, that argument was correctly rejected by the State Records Committee in its order requiring the release of the Mohamed footage. Setting aside the speculative nature of any attempt to predict what a future trial might look like, and the fact that such videos are almost certainly going to be seen by the jury anyway, Utah courts routinely reject closure as a means to preserve fair trial rights because courts have a litany of tools to seat a fair and unbiased jury, even in the face of massive pretrial publicity. *See, e.g.*, *State v. Allgier*, 2011 UT 47, ¶¶ 18-20, 258 P.3d 589.

The District Attorney may have a policy preference that the public not be able to scrutinize his office's investigations and prosecutions until they are finished and all the relevant decisions have been made. But that policy preference is not the law. And the City's Draft Policy is far more consistent with GRAMA than the criticisms levied by the District Attorney.

4. <u>Suggested Improvements.</u>

Although we fully support adoption of the Draft Policy, we offer several suggestions that we believe will improve it:

- The scope of the Draft Policy is limited to Officer Involved Critical Incidents ("OICIs"), which are defined in Section 1.3. Certainly, when an OICI occurs and is captured on body camera footage, there is a strong public interest in the footage. But there are other situations where there is also a strong public interest. Those situations include some of the scenarios specified in Utah Code § 63G-2-302(2)(g), such as where the video depicts the commission of an alleged crime, records an encounter between law enforcement and a person that results in bodily injury (but not death), and/or depicts an encounter that is the subject of a complaint or legal proceeding against the officer or agency. In particular, we believe subparagraphs (ii), (iii), and (iv) should be expanded to include bodily injury, as well as death; and that provisions should be added including depictions of crimes and incidents that lead to complaints.

Furthermore, any discharge of a firearm by a police officer raises public concerns, even if no one is injured or killed. We believe subsection (i) could be broadened to include those situations.

- Section 2.3 requires an agency making a claim regarding closure to do so within "a reasonable time." This is a good requirement, but the Section should also specify that "a reasonable time" is in no event later than the City's statutory deadline to respond to GRAMA requests—10 days for standard requests, and 5 days for requests in the public interest. *See* Utah Code § 63G-2-204(3).

- Finally, Section 2.3 provides 30-day intervals to re-evaluate the decision to withhold videos from the public. We believe that in many cases a shorter period of time will be appropriate, particularly with fast-moving situations. At a minimum, we think the Section should provide that the City has the discretion to shorten this period of time under appropriate circumstances, both for its own internal review intervals and for the periods of extension requested by other agencies.

5. Conclusion.

Again, we commend the City for taking a significant step towards greater transparency in law enforcement and appreciate the opportunity to comment on the Draft Policy. Please let us know if we can be of help in your next steps.

Sincerely,

/s/ David C. Reymann
PARR BROWN GEE & LOVELESS, P.C.
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
(801) 532-7840

/s/ Leah Farrell
ACLU OF UTAH, INC.
355 North 300 West
Salt Lake City, Utah 84103
(801) 521-9862

cc (via email): Mark Kittrell