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July 7, 2016

VIA HAND-DELIVERY

Chief Administrative Officer for GRAMA Appeals
Salt Lake County
2001 South State Street, N2200
Salt Lake City, Utah 84190

Re: GRAMA Appeal of Denials of Records Requests Relating to Shooting of Abdi Mohamed

Dear Sir or Madam:

We represent the ACLU of Utah ("ACLU") with respect to the matters that follow.

Pursuant to the Utah Government Records Access and Management Act, Utah Code § 63G-2-101, *et seq.*, Salt Lake County ordinance 2.82.100, and Salt Lake County Policy 2040 § 2.1.3, this letter constitutes the ACLU's notice of appeal of the GRAMA denials issued by Salt Lake County ("County") on June 11, 2016 ("June 11 Denial") and June 21, 2016 ("June 21 Denial") (collectively, the "Denials"). As set forth in the Denials, the County has agreed to waive the initial administrative appeal to the County's GRAMA designee.

Background

On February 28th, 2016, a Salt Lake City Police Department officer-involved incident (the "Incident") resulted in the shooting of Abdi Mohamed, a 17-year old Kenyan refugee, placing him in critical condition. Abdi's health continues to be impacted from the shooting, leaving him paralyzed and undergoing ongoing surgeries. Abdi has been public about his experience of that day. However, records collected by police from that day, most notably the police video camera footage and area surveillance footage, have remained solely in the hands of the police and the Salt Lake County prosecutor's office.

Across the country and likewise in Utah, important societal questions about law enforcement's use of force are being raised. Particularly in circumstances that involve potentially deadly police force against a young, black male who is part of an immigrant

community, we are mindful of the historic and systemic disproportionality of police violence. We are mindful of the need for transparency in the search for progress. Community members, policy experts, and social activists have contacted the ACLU expressing a desire to have the information for themselves that is now exclusively in the hands of the City and the County. The release, or withholding, of police body-camera footage has far-reaching implications as to how this tool of transparency will be wielded.

In light of the continuing and heightened public interest surrounding this shooting, on May 12, 2016, the ACLU submitted a GRAMA request to the County for certain records relating to the Incident. A copy of the request is submitted herewith. On June 11 and 21, 2016, the County issued the Denials. The Denials detailed certain records the County had agreed to produce and described others for which the County refused. Among the records the County refused to produce are: footage from two body cameras worn by police, presumably the officers involved in the shooting of Mr. Mohamed (the "**Body Camera Footage**"); two surveillance videos of the area showing the shooting of Mr. Mohamed (the "**Surveillance Footage**"); 68 photographs depicting the scene and aftermath of the shooting (the "**Photographs**"); and all after-incident reports relating to the Incident (the "**After-Incident Reports**") (all collectively, the "**Withheld Records**"). The County withheld all of these records based on the assertion that their release "could be expected to interfere with our investigation and might deprive an individual (whether the juvenile, an officer, or someone else) of the right to a fair trial." [June 11 Denial p.3.]

The County also redacted certain information from two other records: an initial contact report (No. 0078-83) and a CAD Call log (No. 0002-76) (the "**Redacted Records**"). These redactions obscure the names of the two officers involved in the shooting, as well as various other names that appear to be witnesses and arrestees. The County justified its redaction of this information based on the same "investigation" and "fair trial" argument stated above, and on the assertion release would constitute a "clearly unwarranted invasion of personal privacy" under Utah Code § 63G-2-302(2)(d).

The ACLU hereby appeals the denial of access to the Withheld Records and the redactions in the Redacted Documents of the names of the involved officers, witnesses, and arrestees. This appeal is timely under Salt Lake County Policy 2040 § 2.1.3.

The County'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 it has specifically instructed governmental entities not to engage in "adversarial combat over record requests." *Deseret News*, 2008 UT 26, ¶ 25. Rather, an entity is "required to conduct a conscientious and neutral evaluation" of every GRAMA request, *id.* ¶ 24, and 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.

The public interest in open government and accountability for public officials is perhaps nowhere more urgent than in the conduct, and potential misconduct, of the public's peace officers. "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, as here, an officer is involved in shooting a civilian "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).

The recent spate of officer-involved shootings around the country, and the often violent aftermath that follows, underscores the critical importance of fostering both accountability for police officers and public understanding of their conduct. Those goals are ill-served by withholding of records based on conclusory, categorical justifications contrary to both the letter and spirit of GRAMA.

The County's Denial of Access to the Withheld Records is Improper

The County has asserted that the Withheld Records, consisting of the Body Camera Footage, the Surveillance Footage, the Photographs, and the After-Incident Reports are all "protected" records under GRAMA. This assertion relies on a section of GRAMA that allows certain types of records "created or maintained for civil, criminal, or administrative enforcement purposes" to be withheld only if release of the records "(a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;... [or] would create a danger of depriving a person of a right to a fair trial or impartial hearing[.]" Utah Code § 63G-2-305(10). The County's overbroad interpretation of these two narrow exceptions is improper and should be reversed.

1. Interference With An Ongoing Investigation.

GRAMA contains no blanket exemption for all records that relate to or are part of an ongoing investigation. It allows such records to be withheld only where release of the records would somehow "interfere with" a specific investigation. *Id.* The Utah Supreme Court has narrowly interpreted this investigation exception, requiring a withholding entity to show how release would interfere with a specific, ongoing investigation, not some hypothetical future event. *Deseret News*, 2008 UT 26, ¶ 45.

The burden is squarely on the County to explain and prove how release of the Withheld Records would actually interfere with an ongoing investigation. *Deseret News*, 2008 UT 26, ¶ 53. To discharge that burden, the County "must make a ... specific showing of why disclosure ... could reasonably be expected to interfere with enforcement proceedings." *Miller v. U.S. Dept. of Agriculture*, 13 F.3d 260, 263 (8th Cir. 1993) (interpreting a substantively identical provision under federal Freedom of Information Act). Such a showing cannot be of the "boilerplate, conclusory variety." *Id.* Nor can it be of "[s]uch a speculative and farfetched concern" that it would essentially "justify [the] withholding of virtually any document" relating to an investigation. *Lion Raisins v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1085 (9th Cir. 2004).

The County's Denials do not contain any sufficient explanation or proof of such specific interference. The County's only argument is that the County has not yet finished interviewing witnesses, and release of the Withheld Records—which apparently *accurately* depict the events of that night—would somehow "potentially taint evidence or witness testimony." [June 11 Denial p. 3.] The County does not further explain this assertion, nor does it make any sense. Records that accurately document the events of that night, even if they were seen by the unidentified "witnesses" referenced by the County, would do nothing but corroborate reliable witness accounts. Nor does the County explain why it has still not finished its witness interviews, more than four months after the fact, or even state that it knows who these unidentified witnesses are.

The County's position also proves too much. The hypothetical concern about potential witnesses seeing released records would apply to every ongoing investigation involving witnesses. If that fact alone were enough to qualify for GRAMA's investigation exception, no investigation records would ever be released while the investigation was ongoing. That would have the effect of putting off limits any document relating to an ongoing investigation, directly contrary to the limited scope of GRAMA's statutory text.

It would also be directly contrary to the path the Utah Legislature chose this past session. During debates on amendments to GRAMA to address body camera footage, various interest-holders tried to convince the Legislature to put all body camera footage off limits to the public, or at least body camera footage that was the subject of an ongoing investigation. The Legislature chose a different path, choosing to classify as non-public *only* body camera footage taken inside a home or residence that does *not* depict a critical incident or similar event. Utah Code § 63G-2-302(2)(g) (2016). All other body camera footage is presumptively public under GRAMA unless it fits within some other express exception. This legislation is powerful evidence that the Legislature intended body camera footage depicting officer-involved shootings to be public, even if that footage is taken inside a private home.

The County's position would effectively write those limitations out of the law and put all body camera footage relating to an ongoing investigation off limits to the public. That result would eviscerate the public accountability purposes that body cameras are supposed to serve and would be directly contrary to GRAMA. The County's position should accordingly be reversed.

2. Deprivation of the Right to a Fair Trial.

The County's only other argument fares no better. In conclusory fashion, without any explanation, the County simply asserts that release of the Withheld Records would somehow deprive someone—the County does not say whom—of the right to a fair trial, if someone is actually charged with a crime in connection with the Incident, and if those charges ever result in a trial at some unspecified time in the future.

Those type of speculative, hypothetical assertions about fair trial rights are never sufficient to justify withholding otherwise public records. Rather, "[i]t is only upon the showing of some *specific circumstance* that gives rise to significant probability of prejudice to the proceeding that the courts are inclined to close the courtroom and seal the records." *People v. DeBeer,* 774 N.Y.S.2d 314, 315 (N.Y. Cty. Ct. 2004) (emphasis added). Here, there have been no criminal charges filed and there may never be; there is no trial set, and one may never occur; and even if both of those come to pass, there will be a significant amount of time between release of the records and the selection of any jury, making it highly unlikely that those records will have any impact on the jury pool.

Furthermore, the County does not assert that the Withheld Records will be inadmissible in some hypothetical future trial. Indeed, if there is a trial based on events captured in footage or photographs, those documents are likely to be central to the trial and shown to the jury. For that reason as well, the fair trial exception does not apply. *See Utah Dep't of Pub. Safety v. State Records Comm.*, 2010 WL 2487352 (Utah 3d Dist. Ct. 2010) (ordering release of dash cam video and DUI report and rejecting "fair trial" exception because "a jury will likely see all of this evidence regardless of whether it is released to the media in advance of trial").

Finally, even if the County had made the requisite showing of interference with a specific person's specific trial, and even if the Withheld Records were unlikely to be used at that trial, Utah courts have repeatedly rejected denial of public access as a means of assuring a fair and impartial jury. In cases far more high-profile than this one, Utah courts have employed a wide variety of less-restrictive tools to ensure that a defendant receives a fair trial despite negative pretrial publicity, including but not limited to "use of an enlarged venire, thorough and searching voir dire, and a detailed jury questionnaire." *State v. Allgier*, 2011 UT 47, ¶ 19, 258 P.3d 589 (internal quotations omitted). As the Utah Supreme Court has explained:

> [E]nlarging the venire is recognized as a potential way to alleviate[ ] the problems in a particular case associated with selecting a fair and impartial jury. In addition, voir dire has long been recognized as an effective method of rooting out [potential juror] bias, especially when conducted in a careful and thorough[ ] manner. Finally, "jury questionnaires" provide a reasonable method for "identify[ing] the extent of exposure prospective jurors may have had to news coverage about this case and assist[ing] counsel in ferreting out people with fixed opinions."

Id. ¶ 20 (internal quotations and citations omitted). "These reasonable alternatives to [denying access] would provide sufficient protection to [the defendant's] right to a fair trial in this case

regardless of whether the respective interests otherwise weighed in favor of or against [denying access]." *Id.*

For all of these reasons, the County's blanket classification of all of the Withheld Records as "protected" is improper and should be reversed.

The County's Redactions are Improper

With respect to the Redacted Records, the County has redacted what appear to be the names of the two officers involved in the shooting, the names of one or more arrestees, and the names of certain witnesses. (The County has redacted other personally identifying information such as addresses, telephone numbers, and the like, that the ACLU does not challenge on appeal.) The County's apparent justification for these redactions is the same cursory reference to interference with an ongoing investigation, fair trial rights, and an unexplained citation to GRAMA's residual privacy exception, Utah Code 63G-2-302(2)(d).

For all of the reasons explained above, the County's reliance on the investigation and fair trial exceptions is improper. Releasing the names of the involved officers, others arrested that night, and witnesses will do nothing to interfere with the County's investigation nor jeopardize anyone's fair trial rights. Indeed, all of those identities would be public information if any trial were to occur.

Furthermore, if the County really means to argue that these identities are private under GRAMA—something its "protected" classification does not encompass—that argument is equally unfounded. With respect to the police officers, they are public employees discharging their official duties. "[A] public official ... has no right of privacy as to the manner in which he conducts himself in office." *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975). The Utah Supreme Court expressly held in *Deseret News* that GRAMA's residual privacy exception does not apply to facts regarding a public official's conduct in discharging his office because such invasions, even if they concern sensitive matter, are not "unwarranted," as GRAMA requires. *Deseret News*, 2008 UT 26, ¶¶ 39-40.

With respect to the identities of others arrested that night or witnesses to the Incident - which occurred in a public place - there is likewise no cognizable privacy interest in those facts. A person has "no reasonable expectation of privacy" when he or she is recorded or photographed "in a public or semi-public place." *Cox v. Hatch*, 761 P.2d 556, 564, 563 (Utah 1988). And when such persons are either witnesses to or victims of a crime, the legitimate public interest in knowing their identities vastly outweighs any minimal privacy concern:

> There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest.... Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed[.]

Restatement (Second) of Torts § 652D cmt. f (1977).

The County is only allowed to redact information from otherwise public documents when that information is legitimately non-public under GRAMA. Utah Code § 63G-2-308. Because the redaction of the identities of the involved officers, arrestees, and witnesses fall within none of GRAMA's exceptions to disclosure, those redactions are improper and should be reversed.

The Withheld Records and the Redacted Records Should Be Released Because the Public Interest Outweighs the Interests in Secrecy

As detailed above, and for many different reasons that go beyond just the events in this community, the legitimate public interest in the records at issue is significant. The entire purpose of body camera and other footage of police encounters is to foster public trust in law enforcement and ensure accountability for misconduct. That purpose is not served by giving law enforcement the power to decide what footage to release and when to release it. Indeed, such actions have the opposite effect on both public trust and police accountability.

Weighed against this substantial public interest in disclosure are *de minimus*, hypothetical concerns about unexplained interference in an investigation and non-existent privacy rights of people photographed and recorded in a public place.

Consequently, even if the Withheld Records and the Redacted Records are properly classified as non-public under GRAMA, the ACLU requests that they be released under Utah Code § 63G-2-401(6) because "the interests favoring access are greater than or equal to the interests favoring restriction of access." *Id.*

Furthermore, even if the County had properly determined that some portions of the Withheld Records are properly classified as non-public, it defies reason to argue that the entirety of all of those records is non-public. At a minimum, therefore, the ACLU requests that all public portions of the Withheld Records be released consistent with the County's duties of segregation under Utah Code § 63G-2-308.

Conclusion

For all of these reasons, the County's refusal to release the Withheld Records and its improper redaction of identities in the Redacted Records should be reversed.

Sincerely,

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Salt Lake County District Attorney
2001 South State Street S3-600
Salt Lake City, Utah 84190

Via certified mail and hand delivery

May 12, 2016

Re: Public Records Request / Records regarding shooting of Abdi Mohamed, February 27, 2016

To Whom It May Concern:

This letter is a request under Utah Code § 63G-2-204(3)(b) by the American Civil Liberties Union of Utah ("ACLU of Utah"). This request seeks records regarding the February 27, 2016 police encounter with Abdi Mohamed in the approximate area of 250 South Rio Grande St. (440 West) (the "Incident").

Records Requested

Please provide copies of the following created, updated, or edited, records from February 27, 2016, to the present regarding the Incident:

1. Chronological logs, complaint logs or service calls
2. Initial contact reports
3. After-incident reports
4. Photographs
5. Body camera footage
6. Other video footage of the Incident and area, including but not limited to dash-cam and/or surveillance video
7. All other public records concerning the Incident

Because this request is on a matter of public concern and because it is made on behalf of a non-profit organization, we request a fee waiver. *See* Utah Code § 63G-2-203(4). If, however, such a waiver is denied, we will reimburse you for the reasonable cost of copying. Please inform us in advance if the cost will be greater than fifty dollars ($50). Please send us documents in electronic form if at all possible.

The ACLU of Utah is seeking this information for the benefit of the public, including, in particular, for the dissemination of information relevant to the Incident and

accountability for the officers and other individuals involved. Accordingly, the ACLU of Utah requests an expedited five-day response to this request. *See* Utah Code § 63G-2-204(3)(b). If any or part of this request is denied, please send a letter listing the specific exemptions upon which you rely for each denial. *See* Utah Code § 63G-2-205(2).

Thank you for your prompt attention to this matter. Please furnish all applicable records to ACLU of Utah, 355 North 300 West, Salt Lake City, UT 84103. If you have questions, please contact us.

Sincerely,

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