

PRIVACY FROM A LEGAL PERSPECTIVE

A Day of Sunshine

Utah Division of Archives and Records Service

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*The subject matter and content of this presentation may not reflect the position of the Utah Transit Authority or that of UTA's Office of General Counsel

GRAMA Recognizes a Right to Privacy

- 63G-2-102(1): In enacting this act, the Legislature recognizes **two constitutional rights**: (a) the public's right of access to information concerning the conduct of the public's business; and (b) the right of **privacy** in relation to personal data gathered by governmental entities.

So What Does the Constitution Have to Say About Privacy?

- U.S. Constitution – 4th Amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
 - Applies to the States through the 14th Amendment (and its identical to Article I, Section 14 of the Utah Constitution)

So What Does the Constitution Have to Say About Privacy?

- Requires state action – so private conduct is not regulated
- Must have a “reasonable expectation of privacy” – What “a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection ... ”
- But what you seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected See *Katz v. United States*, 389 U.S. 347 (1967).
- Bodies, clothing, personal belongings, home are generally protected.
- Not things in “plain view,” like your car’s backseat, your outdoor seating area, your curbside garbage or personal characteristics (e.g., handwriting, voice exemplars, DNA, etc.)
- “Penumbras” and “emanations” – *Griswold v. Connecticut*, 381 U.S. 479 (1965)
- “Privacy” does not appear anywhere in the Bill of Rights

Privacy in GRAMA

- 63G-2-302(2)(d): The following records are private if properly classified by a governmental entity:...(d) other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy[.]”
- 63G-2-201(14): In determining whether a record is properly classified as private under Subsection 63G-2-302(2)(d), the governmental entity, State Records Committee, local appeals board, or court shall consider and weigh: (a) any personal privacy interests, including those in images, that would be affected by disclosure of the records in question; and (b) any public interests served by disclosure.

Case Law Gives a Little Guidance

- *Deseret News Publishing Co. v. Salt Lake County*, 2008 UT 26, 182 P.3d 372
 - Public right of access and the right of individual privacy “do not enjoy an altogether harmonious relationship.”
 - BUT “[t]he provisions of GRAMA provide a rational framework for mediating the conflicts between these interest.”
 - So what is that framework?
 - First, we are “required to conduct a conscientious and neutral evaluation of the [record’s] status without regard to existing designations or classifications.”
 - Content matters; prior classifications are not determinative
 - Privacy interests are not all that matters – GRAMA “envision[s] an impartial, rational balancing of competing interests.” And a simple invasion of privacy is not enough to protect a document – the invasion of privacy must be “clearly unwarranted”
 - GRAMA “demands an expansive and searching evaluation of the interests that might make an invasion of personal privacy warranted.”

Case Law Gives a Little Guidance

- *Deseret News Publishing Co. v. Salt Lake County*, 2008 UT 26, 182 P.3d 372
- Privacy Side:
 - Would identification of witness bring them unwanted attention?
 - Would identification of witnesses cause them to hesitate to provide information in the future?
 - Is there another window into the conduct of public officials?
 - Would release injure the reputation of the subject of the report?
- Public Side:
 - Are there precautions to limit exposure of privacy issues (e.g., redaction, aliases)?
 - Are the persons identified public officials/public employees?
 - Is there another window into the conduct of public officials?

What else?

- Utah Code 76-9-401, 402 makes it a crime to (1) trespass for the purpose of eavesdropping in a private place; (2) install a surveillance device in a private place; (3) install a surveillance device to pick up things “originating in a private place which would not ordinarily be audible, visible, or comprehensible outside the private place”
 - "Private place" means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance.
 - *Jensen v. Sawyers*, 2005 **UT** 81, ¶ 50, 130 P.3d 325: "The plastic nature of privacy is not at odds with the use of an objective standard to evaluate its existence. Rather, it is a recognition that reasonable people may find a legally protectable private environment in a multiple and varied array of physical settings."

What else?

- Utah Code 45-3-3 – Private cause of action for publishing an advertisement “in which the personal identity of that individual is used in a manner which expresses or implies that the individual approves, endorses, has endorsed, or will endorse the specific subject matter of the advertisement”
 - "Personal identity" means an individual's name, title, picture, or portrait.
- There are recognized torts in Utah for (1) intrusion upon the plaintiff's seclusion or solitude or private affairs; (2) appropriation for advantage of name or likeness; (3) public disclosure of embarrassing private facts; and (4) publicity which places a party in a false light in the public eye. *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374 (Ut. Ct. App. 1997).
- And don't forget FOIA! There's a good body of case law and discussion of invasions of privacy in a variety of areas. And, of course, State Records Committee decisions!