

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH  
SALT LAKE DEPARTMENT

JUL 17 2018

Salt Lake County

By: \_\_\_\_\_  
Deputy Clerk

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THE SALT LAKE TRIBUNE, and its  
reporter, MATTHEW PIPER,

Petitioners,

v.

UTAH STATE RECORDS COMMITTEE,

Respondent, and

BRIGHAM YOUNG UNIVERSITY,

Intervenor.

**RULING AND ORDER ON CROSS  
MOTIONS FOR SUMMARY  
JUDGMENT**

Case No. 160904365

Judge Laura S. Scott

July 16, 2018

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Before the court are (1) Petitioners' Motion for Summary Judgment; and (2) Intervenor Brigham Young University's Motion for Summary Judgment. After hearing oral argument on the Motions on May 14, 2018, the court took the Motions under advisement.

On July 13, 2018, the court issued a Minute Entry granting Petitioners' Motion for Summary Judgment and denying Intervenor's Motion for Summary Judgment.

The court now issues its detailed Ruling and Order as follows:

**INTRODUCTION AND PROCEDURAL HISTORY**

In April 2016, Petitioners The Salt Lake Tribune and its reporter, Matthew Piper (collectively Petitioners) sent a records request to BYUPD pursuant to Utah's Government Records Access and Management Act (GRAMA). Among other documents, Petitioners requested all emails between BYUPD and six email addresses. BYU refused to provide the requested emails because "[w]ithin the scope of the aforementioned GRAMA request, Brigham Young University has no such law enforcement/public safety records related email."

Petitioners appealed BYU's denial to the Utah State Records Committee (Committee). On June 14, 2016, the Committee denied the appeal on the ground that BYUPD is not a "governmental entity" within the meaning of GRAMA and, therefore, not subject to the Committee's jurisdiction.

On July 12, 2016, Petitioners filed a Petition for Judicial Review of an Order by the Utah State Records Committee Denying Access to Records under the Government Records Access and Management Act (Petition).

On August 28, 2016, the Committee filed a Motion to Dismiss. The Committee argued that BYUPD is not a “governmental entity” because it is not part of the executive, legislative or judicial branches of the State or any political subdivision of the State. The Committee further argued that BYU, not the State, “established” BYUPD and that the Department of Public Safety’s role is limited to “certifying” BYUPD and its officers.

In response, Petitioners argued that BYUPD, “like other law enforcement agencies in Utah, is a creation of the Utah Legislature and the Utah Department of Public Safety, established to carry out the public’s business.” Thus, BYUPD “is a governmental entity within the meaning of GRAMA.” Petitioners further argued that the Motion was premature because they should be allowed to conduct discovery regarding the establishment of BYUPD, including its formation and organization and its relationship with the Department of Public Safety (DPS).

The court heard oral argument on the Motion to Dismiss on November 21, 2016. On January 20, 2017, the court issued a Ruling and Order that addressed these arguments and denied the Motion to Dismiss (2017 Ruling).

Thereafter, the parties engaged in discovery. On December 18, 2017, Petitioners and BYU filed their respective Motions for Summary Judgment. The Motions were submitted for decision on March 1, 2018 and oral argument was scheduled for May 14, 2018.

**CROSS MOTIONS FOR SUMMARY JUDGMENT**

The parties do not raise new arguments in their respective Motions for Summary Judgment. Rather, the parties expand some arguments and refine others in light of the 2017 Ruling and the material facts uncovered during discovery.

Because it previously ruled on these arguments, the court first considered whether the undisputed material facts themselves would impact the court’s analysis or change the conclusions set forth in the 2017 Ruling, which applied the motion to dismiss standard and assumed the factual allegations in the Petition were true.<sup>1</sup>

As discussed further below, the undisputed material facts are generally consistent with the Petition’s factual allegations. For example, as alleged in the Petition, the undisputed material facts show that BYUPD and its officers are certified by the State of Utah and exercise the same governmental police powers delegated to other police officers, including the power to detain, arrest, and investigate violations of Utah law. And while BYU has provided additional information regarding the history of BYUPD, the court is not persuaded this information demonstrates BYUPD is not a governmental entity as defined by GRAMA or that the court’s

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<sup>1</sup> The court agrees with BYU that the 2017 Ruling and Order is not properly included in Petitioners’ Statement of Undisputed Material Facts.

original conclusions are incorrect.

Consequently, at oral argument, the parties focused on whether the court's legal analysis and conclusions in the 2017 Ruling were incorrect based on BYU's argument that BYUPD is not one of the "listed entities" in Subsection 103(11)(a) of GRAMA. BYU also argued the court should reconsider its conclusion that BYUPD is an agency of the state or a political subdivision established by the government to carry out the public's business of policing.<sup>2</sup>

### **UNDISPUTED MATERIAL FACTS**

#### ***History of BYUPD<sup>3</sup> from 1952 to May 1979***

1. According to the "History of Brigham Young University Security/Police," which appears to have been written in 1980, BYU first organized a campus "security/police force" in 1952 as a result of several crimes that had been committed on campus. Captain Leonard Christensen, a retired Los Angeles Police Department Captain who was serving as the Chief of Campus Police at UCLA, came to BYU to head the new "security/police force."<sup>4</sup>

2. From 1952 to 1961, Captain Christensen was the only sworn peace officer. In 1961, all BYU security/police officers "were sworn in as special deputies of the Utah County Sheriff's Department and special officers of the Provo City Police Department."<sup>5</sup> BYU security/police "receive[d] cooperation from all federal and state law enforcement agencies...."<sup>6</sup>

3. In 1974, Robert W. Kelshaw was appointed Chief.<sup>7</sup>

4. By the late 1970s, BYU security/police had grown to 24 or 25 officers, all of whom were employees of BYU and deputized with the Utah County Sheriff's Office and sworn as special officers for Provo City Police. These officers were listed in official Utah Peace Officer Standards and Training (POST) records as being certified.<sup>8</sup>

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<sup>2</sup> To the extent it has it, the court declines to exercise its discretion to apply the law of the case doctrine. Although the court disagrees with BYU's assertion that the "legal and factual issues differ from those previously addressed," it nevertheless considered all of BYU's arguments on the merits. After doing so, the court is not persuaded the 2017 Ruling is incorrect.

<sup>3</sup> In its Motion, BYU takes exception to the use of "BYUPD" by Petitioners and presumably the court. As Petitioners point out, BYUPD refers to itself as the "Brigham Young University Police Department," which is fairly reduced to the acronym BYUPD. For example, in several letters, Chief Kelshaw referred to the department as BYU Police Department or Brigham Young University Police Department. BYU's student newspaper refers to BYUPD and BYU's official website also uses the acronym BYUPD. Regardless, the court would use "University Police" as requested by BYU but for its desire to be consistent with the 2017 Ruling, which used BYUPD.

<sup>4</sup> See History of Brigham Young University Security/Police.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Letter dated June 17, 1980, from Chief Kelshaw to Joe Borich.

5. In 1972, BYU sent a letter to the Provo City Attorney regarding “BYU students and former students who are charged with criminal offenses.” In explaining the role of BYU officers, President Dallin H. Oaks stated they “function in dual capacities [with] responsibilities to [BYU] and to the public law enforcement agencies.” President Oaks further stated that when an officer signs a criminal complaint against a student, “*he does so in furtherance of his responsibility to the public and to the off-campus law enforcement agencies by which he has been deputized.* In that function, he does not represent BYU.”<sup>9</sup>

6. On January 13, 1977, Chief Kelshaw wrote a letter to Raymond Childs regarding forwarding certain criminal justice information to the Dean of Students and seeking his advice. In the letter, Chief Kelshaw states that although the officers are employees of BYU, they are “sworn peace officers by Provo City and by the Utah County Sheriffs [sic] Department and all are certified under Utah Peace Officers Standards and Training. *By virtue of this fact, we have access to criminal justice information specifically police reports, arrest reports, statements, etc. which would probably not be made available to private citizens.*”<sup>10</sup>

7. In February 1978, BYU security/police executed a Non-Disclosure Agreement, which permitted it to access certain criminal history record information.<sup>11</sup>

8. In March 1978, BYU security/police sought and apparently received permission from the Department of Public Safety (DPS) to use red and blue lights and sirens on emergency vehicles owned by BYU.<sup>12</sup> At that time, Utah law prohibited the use of these lights on any vehicle except law enforcement vehicles of public agencies.<sup>13</sup>

9. In April 1978, Chief Kelshaw sent a letter to the Utah Bureau of Criminal Investigation (BCI) confirming its agreement to “recognize our department and furnish us with full privileges to criminal justice information that can be furnished by you.”<sup>14</sup>

10. In September 1978, the Federal Communications Commission issued an Official Notice of Violation to BYU. In the Notice, the radio service or class of station being used by BYU security/police is identified as “public safety local government.”<sup>15</sup>

11. In a March 2, 1979 letter to Joann Couch, (who upon information and belief worked for a government agency), Chief Kelshaw asserted BYUPD was “accepted as an agency that you will be able to release information to in the future” and stated as follows:

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<sup>9</sup> See Letter dated April 18, 1972 from Dallin H. Oaks to Glen J. Ellis (emphasis added).

<sup>10</sup> See Letter dated January 13, 1977 from Chief Kelshaw to Raymond Childs (emphasis added).

<sup>11</sup> See Non-Disclosure Agreement between DPS and BYUPD executed on February 27, 1978.

<sup>12</sup> See Letter dated March 31, 1978 from Chief Kelshaw to Commissioner Larry Lunnen.

<sup>13</sup> See Department of Public Safety Memorandum dated November 27, 1978.

<sup>14</sup> See Letter dated April 19, 1978 from Chief Kelshaw to Del Mortensen.

<sup>15</sup> See Official Notice of Violation dated September 21, 1978.

Since the inception of this department, it has been recognized as a constituted police agency with full arrest powers . . . Because we are recognized as a police agency in Utah Valley, all sworn officers, which number 24, are authorized to serve subpoenas, summonses, and arrest warrants.

The department also has a fully constituted investigation division [which] investigates matters not only on campus but off campus when the investigation concerns personnel or property belonging to the University.

*At this time, we derive our authority as sworn deputies with the Utah County Sheriff and as sworn Provo City Police officers under Provo Police jurisdiction. Within a matter of a short time, we are receiving legislative authority from the State of Utah, which will place us as a department in the Category I police officer status . . . [which] means that Brigham Young University Police Department will have all of the authority, rights, and powers of any State or local police department within the State of Utah.*<sup>16</sup>

12. On March 20, 1979, the Provo City Attorney notified Chief Kelshaw that based upon Utah Code Ann. § 25-5-15, which provided that “[n]o officer of the United States, or of the State of Utah . . . shall receive any per diem when testifying in a criminal proceeding unless the officer is required to testify at a time other than during his or her normal working hours,” the court “will pay a witness fee . . . to any officer . . . who is asked to testify while off duty.”<sup>17</sup>

13. On April 25, 1979, Chief Kelshaw sought advice from the Provo City Attorney regarding whether BYUPD “should pursue maintaining our Provo City police authority along with being sworn with the State of Utah by Judge Crockett on 8 May 1979.”<sup>18</sup>

14. Prior to May 1979, the Utah Bureau of Identification paid for and installed a computer terminal at BYU security/police.

15. Prior to May 1979, BYU security/police received correspondence that the DPS sent to local law enforcement agencies in Utah County.

16. Prior to May 1979, BYU security/police participated in associations and gatherings of chiefs of police and police forces.

17. Prior to May 1979, BYU security/police coordinated with other police departments on radio frequencies.

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<sup>16</sup> See Letter dated March 2, 1979 from Chief Kelshaw to Ms. Joann Couch (emphasis added).

<sup>17</sup> See Letter dated March 20, 1979 from Glen J. Ellis to Chief Kelshaw.

<sup>18</sup> See Letter dated April 25, 1979 from Chief Kelshaw to Dee Bradford.

***The Enactment of House Bill 80***

18. In 1979, the Utah legislature amended Chapter 181, Public Schools, § 53-45-5<sup>19</sup> as follows:

Members of the police or security departments of any [~~state institution of higher education~~] college or university shall be appointed by the governing board of such institution and when so appointed shall be peace officers and shall also have all of the powers possessed by policemen in cities and by sheriffs, including, but not limited to, the power to make arrests on view or on warrant of violation of state statutes and city or county ordinances [~~; providing, however, that such powers may be exercised only in cities and counties in which such institution, its branches or properties are located and only in connection with acts occurring on the property of such institution or when required for the protection of its interests, property, students or employees; and otherwise within such counties when specifically requested by the state or local law enforcement officials having jurisdiction~~].  
Members of the police or security department of any [~~state institution of higher education~~] college or university shall also have the power to enforce all rules and regulations promulgated by the governing board of such institution.

19. This statute continues to be found in the statutes governing state institutions of higher education. It currently resides in Title 53B, State System of Higher Education, Chapter 1, Enforcement of Regulations at Institutions<sup>20</sup> at § 53B-3-105, Appointment of police or security personnel – Powers in substantially the same form:

- (1) Members of the police or security department of any college or university are appointed by the board.<sup>21</sup>
- (2) Upon appointment, they are peace officers and have all the powers possessed by policemen in cities and by sheriffs, including the power to make arrests on view or on warrant of violation of state statutes and city or county ordinances.
- (3) Members of the police or security department of any college or university also have the power to enforce all rules and regulations promulgated by the board as related to

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<sup>19</sup> According to the bill’s preamble, this amendment “clarif[ied] the powers of certain peace officers; designating two categories of peace officers; providing for their jurisdiction, powers and training; and maintaining present retirement status for peace officers.” See 1979 Utah Laws 933.

<sup>20</sup> The stated purpose of this chapter is “to confirm and clarify the power vested in the board [of regents] to pass rules and regulations governing the parking and traffic on campuses and related facilities and to enforce the rules and regulations by all appropriate methods.” Utah Code Ann. § 53B-3-101.

<sup>21</sup> The “board” refers to the Utah Board of Regents. Utah Code Ann. § 53B-1-101.5(1).

the institutions.

20. This is the only statutory authority cited by BYU as permitting BYUPD and its officers to operate as a police department and exercise plenary police power. No BYUPD officer has been deputized or sworn as special officers since May 8, 1979.

***BYU's Statements Regarding House Bill 80***

21. According to the History, “[i]n May 1979, as a result of legislation, the department [BYUPD] was officially recognized as a separate entity and jurisdiction and all officers were given peace officer status.” At that point, BYUPD had “all of the authority, rights, and powers of any State or local police department in the State of Utah.”<sup>22</sup>

22. On May 2, 1979, Chief Kelshaw notified DPS Commissioner Larry Lunnen that “[p]ursuant to the provisions of House Bill 80 . . . Utah 77-10-6, Brigham Young University advises you that it has established a law enforcement agency at Brigham Young University . . . which will exercise its powers under House Bill 80 on and after 8 May 1979.”

23. Chief Kelshaw further stated that “each officer of this department has satisfactorily met the training requirements as stated in UCA 77-10-6 paragraph 1(b)” and BYU was “prepared to reimburse POST for all future costs incurred for each officer requiring POST basic training.”

24. On May 8, 1979, Chief Justice J. Allan Crockett swore in 23 Category I peace officers employed by BYUPD.<sup>23</sup>

25. In 1979, BYUPD sought input from Del Mortenson of BCI regarding BYUPD’s “general directive regarding releasing information and privacy of records.”

26. In a November 1980 letter, Chief Kelshaw stated that BYU “officially submitted a request [to the Utah Legislature] that private colleges and universities be permitted to establish their own law enforcement agencies with full police powers. Fortunately that request was included and passed in the existing statute.”<sup>24</sup>

27. In a letter dated February 16, 1982, President Jeffrey R. Holland “formally endorse[d]” former BYU President Oaks’ statement regarding the dual capacity of BYUPD officers, *i.e.*, that if a BYUPD officer “signs a criminal complaint against [a] student, *he does so in furtherance of his responsibility to the public and to the off-campus law enforcement agencies by which he has been deputized [or commissioned].* In that function, he does not represent BYU.”<sup>25</sup>

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<sup>22</sup> See History of Brigham Young University Security/Police.

<sup>23</sup> See Declaration of Arnold L. Lemmon.

<sup>24</sup> See Letter dated November 18, 1980 from Chief Kelshaw to Kevin S. Hirsch.

<sup>25</sup> See Letter dated February 16, 1982 from Jeffrey R. Holland to Noall T. Wootton, Utah County Attorney, which attached the April 1972 letter from President Oaks.

28. In July 1983, the Utah State Crime Laboratory informed BYUPD that it would provide state crime laboratory and Utah State Health Laboratory services “at no charge to law enforcement agencies.”<sup>26</sup>

29. On August 14, 1987, DPS notified BYUPD that because the definition of peace officer includes a “police officer employed by any college or university,” there would be no costs incurred by BYU for the training expenses of BYUPD officers to attend basic training.<sup>27</sup>

### ***BYUPD’s Certification and Status as a Law Enforcement Agency***

30. After May 1979, BYUPD applied for certification by DPS and received that certification.

31. BYUPD’s certification by the State of Utah is memorialized in letters between BYUPD officials and officials from DPS. It appears from those letters that the BYUPD Chief typically wrote to the DPS Commissioner certifying that BYUPD meets the standards necessary for certification as a law enforcement agency under Utah law, and that DPS generally responded by re-certifying that BYUPD is a law enforcement agency under Utah Law.

32. For example, on February 2, 2001, Chief Stott sent a letter to the DPS Commissioner requesting that he “certify the BYU Police Department as a Law Enforcement Agency. According to Utah State Law, *private Universities receive their police authority through the Commissioner of Public Safety.*” Chief Stott further states that BYUPD “currently meets and will continue to meet the standards and requirements necessary to be eligible for certification as a law enforcement agency.”<sup>28</sup>

33. On April 10, 2001, the DPS Commissioner sent a letter to Chief Stott stating “I certify Brigham Young University Police Department as a Law Enforcement agency, according to Utah State Law 53-13-103.”<sup>29</sup>

34. Similar, if not identical letters, were sent by Chief Stott and the DPS Commissioner in 2006.”<sup>30</sup>

35. According to BYUPD’s University Police Authority and Jurisdiction Policy (Policy), BYUPD enforces municipal and state laws and may enforce those laws outside of its jurisdiction under certain circumstances.

36. BYUPD’s website states that it is a “state certified police department.”

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<sup>26</sup> See Memo to “Law Enforcement Agency” re “Transfer of Drug Identification Services Provided by the Utah State Health Laboratory to the Utah State Crime Lab” attached as Petitioners’ Exhibit S.

<sup>27</sup> See Letter dated August 14, 1987 from Clyde M. Palmer to Chief Kelshaw.

<sup>28</sup> See Letter dated February 2, 2001 from Chief Stott to Commissioner Robert Flowers (emphasis added).

<sup>29</sup> See Letter dated April 10, 2001 from Robert Flowers to Chief Stott.

<sup>30</sup> See Letter dated December 18, 2006 from Scott T. Duncan to Chief Stott.



37. In its 2015 Annual Campus Security Report, BYUPD states it “maintains a state-certified police department” and its officers “have the same law enforcement powers as officers from other Utah police agencies, including the authority to make arrests.” It states BYUPD “works closely with local municipal, county, state, and federal law enforcement agencies.” It further states its officers “receive ongoing training under regulatory guidelines established by the Utah Department of Public Safety” and that it “maintains a state-certified 911 center.”<sup>31</sup>

38. BYUPD’s state-certified 911 center continues to receive reports from the public concerning on and off-campus issues.<sup>32</sup>

39. BYUPD continues to use red and blue lights on its patrol cars.<sup>33</sup>

40. BYUPD is able to access certain databases and records otherwise only available to governmental entities, including motor vehicle records.<sup>34</sup> This is reflected in the Utah Valley Law Enforcement Shared Data System Policies (Data System Policies), which applies to BYUPD as well as other Utah County law enforcement agencies and governs BYUPD’s access to what is commonly known as the Spillman database. According to the Data Systems Policies, BYUPD is the only participant not associated with a city or county government.<sup>35</sup>

41. BYUPD has entered into an Agency User Agreement with the DPS, BCI, and Utah Criminal Justice Information System (UCJIS). Throughout the Agreement, BYUPD is referred to as the “agency.” By executing the Agreement, BYUPD agreed (among other things) that dissemination of UCJIS information is governed by Utah Code § 53-10-108 and that UCJIS information may be “disseminated to criminal justice agencies for criminal justice purposes and criminal justice employment.” BYUPD agrees to be audited by BCI and/or the FBI at least every three years. BYUPD’s Terminal Agency Coordinator is required to attend mandatory training and is required to assure compliance with Utah and FBI policies and regulations. According to the Agreement, BYUPD has access to NCIC ENT, NCIC INQ, III, NLETS, UCH, and Local.<sup>36</sup>

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<sup>31</sup> See Brigham Young University Annual Security Report – 2015.

<sup>32</sup> See Petitioners’ Exhibit O.

<sup>33</sup> According to Utah Code Ann. §41-6a-1616, only an authorized emergency vehicle, a school bus, or a simulated emergency vehicle may display a red or blue light that is visible from directly in front of the center of the vehicle. Utah Admin. Code R698-7-3 provides that a private police vehicle may be designated as an emergency vehicle if, among other requirements, “the vehicle is used on a part time basis to assist a governmental entity in responding to emergencies” or “the owner of the vehicle receives written authorization to operate the vehicle as an emergency vehicle from the sheriff, chief of police, or fire chief of the governmental agency that the vehicle is authorized to assist.”

<sup>34</sup> Utah Admin. Code R708-32-4, Uninsured Motorist Identification Database, provides that “insurance information will be provided only to authorized personnel of . . . federal, state and local governmental agencies who have their access through the Utah Criminal Justice Information System to Driver License and Motor Vehicle Division’s computer information for law enforcement purposes.”

<sup>35</sup> See Utah Valley Law Enforcement Shared Data System Policies.<sup>35</sup>

<sup>36</sup> See Agency User Agreement, dated May 18, 2017.

42. UCJIS is a single point of access used by criminal justice agencies or other government entities to access various electronic criminal databases including drivers' license, motor vehicle records, criminal history, National Crime Information Center database, district court information, gang and terrorist files, warrant, and corrections data to assist police officers and departments in their law enforcement activities.<sup>37,38</sup>

43. BYUPD receives services from the Criminal Investigation and Technical Services Division, which was created by the State of Utah to support and maintain law enforcement agencies' access to criminal records, to provide criminalistics laboratory services, provide investigative assistance to law enforcement and other government agencies, and collect and provide intelligence information to criminal justice agencies.<sup>39</sup>

44. BYUPD participates in the Utah County Law Enforcement Officer Involved Incident Protocol, which is included on BYUPD's website. A "Protocol Member Agency" is identified as "[a]ny law enforcement agency, state or local, which function in Utah County and which have committed to participation in this protocol."<sup>40</sup>

45. BYUPD's "Law Enforcement Code of Ethics," which BYUPD officers must follow, provides that BYUPD officers "recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of police service."<sup>41</sup>

46. BYU has received funds and/or grants made available to law enforcement agencies but not the general public or other private institutions. For example:

a. In October 2016, BYUPD requested funds from the State of Utah for DUI enforcement equipment, which was granted in or around April 2017. Pursuant to this grant, the State of Utah provided BYUPD with \$5,000 on April 27, 2017. In the grant application, BYUPD is listed as the "department or agency." BYUPD represents there are 30 "sworn personnel . . . whose primary responsibilities include impaired driving enforcement." The application states that "[l]aw enforcement agencies that receive equipment [should] [m]ake sure appropriate records are maintained in an effort to comply with state and local audits should they occur." It further states that signing the application

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<sup>37</sup> Although BYU is correct that non-criminal justice agencies may obtain information from a criminal history record or warrant of arrest information from division files, the purpose for obtaining the information "must be authorized by statute, executive order, court rule, court order, or local ordinance." Utah Code Ann. § 53-10-108. BYU has offered no evidence that it obtains such information as a non-criminal justice agency.

<sup>38</sup> See also Utah Code Ann. § 41-1a-116(1)(a), which provides that all motor vehicle and title registration records are classified as "protected" under GRAMA and access to them is governed by § 63G-2-202. Absent a court order, they may be shared with "another governmental entity [or] a political subdivision . . . if the requesting entity (b) enforces, litigates, or investigates civil, criminal, or administrative law, and the record is necessary to a proceeding or investigation." § 63G-2-206(1)(b).

<sup>39</sup> See Utah State Crime Laboratory Memorandum dated July 1983; see also Utah Code Ann. § 53-10-104.

<sup>40</sup> See Utah County Law Enforcement Officer Involved Incident Protocol (emphasis added).

<sup>41</sup> See Petitioners' Exhibit Q.

“signifies that your agency is in compliance with Utah Code 77-7-102 through 107 regarding [in-car] camera agency policy requirements.”<sup>42</sup>

b. In 2017, BYUPD received an “EMS & Preparedness Grant” from the State of Utah in the amount of \$2,700. This funding came from the State of Utah’s “Public Safety Restricted Account.” The funds are earmarked to (among other things) “purchase equipment for law enforcement agencies of the state and its political subdivisions to assist them in enforcing alcohol or drug related driving laws . . . .”<sup>43</sup>

47. In March of 1982, a BYUPD officer “was assigned to work full-time narcotics with Ed Spann from [Utah Narcotics and Liquor Law Enforcement].” Based on this assignment, BYUPD Chief Kelshaw requested the loan of a vehicle from the State of Utah for use while the BYUPD officer was working undercover.<sup>44</sup>

48. In 1983, BYUPD Chief Kelshaw wrote to the Utah State Law Enforcement Service Division and requested an undercover driver’s license for a BYUPD officer who was doing undercover work.<sup>45</sup>

49. On June 2, 1983, Chief Kelshaw wrote to Eugene Findley of the Utah State Department of Finance and requested that ownership of a forfeited 1964 Ford Thunderbird, which BYUPD had previously seized, be transferred to BYUPD for use in undercover work pursuant to Utah Code § 58-37-13(8). At the time, the statute allowed forfeited property to be transferred to “*any state agency, bureau, county, or municipality*, which demonstrates a need for specific property . . . .” (emphasis added). In his letter, Chief Kelshaw stated “[t]his agency [BYUPD] consistently has need for undercover vehicles which appear inconspicuous to the ordinary person . . . .”<sup>46</sup>

50. On June 8, 1983, the State of Utah Department of Administrative Services granted BYUPD’s request for use of the forfeited Thunderbird.

51. On June 15, 1983, in an almost identical letter, Chief Kelshaw wrote to Mr. Findlay and requested that ownership of a forfeited 1975 Plymouth Duster, which BYUPD had previously seized, be transferred to BYUPD for use in undercover work pursuant to Utah Code § 58-37-13(8).

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<sup>42</sup> The statutory reference is presumably Utah Code Ann. §§ 77-7a-102 through 107, which relate to law enforcement use of body-worn cameras. Utah Code Ann. §§ 77-7-1 *et seq.* relate to arrest. Subsection 77-7a-103(2) defines “law enforcement agency” as “any public agency having general police power and charged with making arrests in connection with enforcement of the criminal statutes and ordinances of this state or any political subdivision.”

<sup>43</sup> See Petitioners’ Exhibit SS and TT. See also Utah Code Ann. § 53-1-117 and Utah Admin. Code R14-550-1

<sup>44</sup> See Letter dated March 26, 1982 from Chief Kelshaw to Jim Gillespy, Utah Narcotics and Liquor Law Enforcement.

<sup>45</sup> See Letter dated October 10, 1983 from Chief Kelshaw to Robert E. Robbins, Law Enforcement Services Division.

<sup>46</sup> See Letter dated June 15, 1983 from Chief Kelshaw to Eugene Findlay, Utah Department of Finance.

52. BYUPD requested and/or received advice or feedback from the Utah County Attorney and other State of Utah officials on law enforcement matters. For example:

- a. In 1977, Utah County Attorney Noall Wootton sought clarification for BYUPD from the Utah State Attorney General, asking whether the Utah County Sheriff had authority to deputize security departments “such as the Brigham Young University Security . . . so as to grant them peace officer status throughout the County?” The State Attorney General confirmed that the Utah County Sheriff had such authority if state officer training requirements were satisfied. Mr. Wootton, in turn, shared this opinion with BYUPD.
- b. Also in 1977, J. Wesley Sherwood Assistant Chief of BYUPD wrote to U.S. Attorney Ramon Childs to obtain advice on utilizing criminal justice information in disciplinary actions against BYU students. He wrote: Recently because of many changes involving the privacy of individuals especially the enactment of the Federal Privacy Act, a question has arisen that probably is quite unique to our department.<sup>47</sup> As you may be aware, our officers are employees of Brigham Young University, a private institution. However, our regular officers are sworn peace officers by Provo City and by the Utah County Sheriffs [sic] Department and all are certified under Utah Peace Officer Standards and Training. By virtue of this fact, we have access to criminal justice information specifically, police reports, arrest reports, statements, etc. which would probably not be made available to private citizens. We have in select instances in the past forwarded some of this information to the Dean of Students for disciplinary actions against a student. We are now concerned that under the new regulations this may be a violation since we are sharing the information with someone outside the “criminal justice agencies.” Your views on this matter would certainly be appreciated. If you need further clarification or information, I would be most happy to furnish it to you.
- c. In March 1979, Provo City Attorney Richard Bradford advised BYUPD Chief Kelshaw regarding the issue of witness fees for testifying officers. In support of his position, Mr. Bradford cited Utah Code § 25-5-15, which provided that: “[n]o officer of the United States, or the State of Utah, or any county, incorporated city or town within the State of Utah, shall receive any per diem when testifying in a criminal proceeding unless the officer is required to testify at a time other than during his or her normal working hours.
- d. In April 1979, Chief Kelshaw wrote to Mr. Bradford for advice regarding the effect of House Bill No. 80 on BYUPD’s police authority as derived from Provo City. Chief Kelshaw wrote: “Enclosed is a copy of House Bill No. 80,

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<sup>47</sup> Mr. Sherwood addresses the letter to “Raymond Childs.” However, Raymond Childs is not listed in the Utah Bar directory and U.S. Attorney Ramon Childs appears to have had an office at 350 South Main (the address to which the letter was sent).

which takes effect 8 May 1979. Would you please peruse it and give me your opinion as to whether or not we should pursue maintaining our Provo City police authority along with being sworn with the State of Utah by Judge Crockett on 8 May 1979.”

- e. In November 1979, Chief Kelshaw sent “the second draft of our departmental general directive regarding releasing record information and privacy of records . . . Please feel free to make any changes or comments that may be pertinent, and return same to me as soon as possible.”<sup>48</sup>
- f. In August 1981, Dan Clark (BYUPD Investigation Sergeant) requested information from the Utah County Attorney’s Office concerning the final dispositions of several individuals charged in district court, who apparently also had BYUPD case numbers.
- g. In June of 1983, BYUPD Chief Kelshaw again wrote to Noall T. Wootton, Utah County Attorney, for advice about BYUPD’s policy concerning providing the Miranda Warning in police situations.
- h. BYUPD Chief Kelshaw also sought advice from Provo City Attorneys Glen Ellis and James Brady concerning enforcement of drinking and driving laws and uninsured motorist laws on private BYU property. Both governmental attorneys responded and provided their opinions to Chief Kelshaw.<sup>49</sup>

53. BYUPD employs approximately two dozen POST-certified police officers and several POST-certified dispatchers.

54. BYUPD is subject to the same POST reporting and training requirements as other POST-certified police departments in the State of Utah.

55. The DPS Commissioner has the power to revoke or deny the certification of BYUPD “for failure to meet the certification criteria set forth in” Utah Admin. R698-4-4. Through its certification authority, DPS has the authority to prescribe rules and regulations governing the operations of a law enforcement agency of a private college or university, including the geographical limits of its authority, the contents of its policy and procedure manual, reporting requirements, and accreditation status by the U.S. Department of Education.<sup>49</sup>

56. The POST Council may similarly suspend or terminate the certification of any peace officer pursuant to Utah Code Ann. § 53-6-211.

### ***BYUPD’s Alleged “Dual Capacity”***

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<sup>48</sup> See Letter dated November 14, 1979 from Chief Kelshaw to Del Mortensen, BCI.

<sup>49</sup> See Utah Admin. R698-4-4.

57. BYUPD “provides general law enforcement protection to the campus community by enforcing federal, state, and local laws and regulations, under its certification by the Commissioner of Public Safety.”<sup>50</sup>

58. BYUPD also provides crime prevention programs, security services, special event security services, parking services, and Clery Act compliance.<sup>51</sup>

59. Like BYUPD, other law enforcement agencies provide crime prevention and community programs. For example, the Unified Police Department claims to provide the following non-law enforcement services to the communities it serves: (1) The Autism Safety Roster; (2) Bicycle Licensing; (3) Canyon Alerts; (4) Child Seat Inspections; (5) Graffiti Removal; (6) Park Information; (7) Prescription Drug Drop Box; (8) Tattoo Removal; and (9) Towing Information.<sup>52</sup>

60. BYUPD is primarily funded by Brigham Young University. BYUPD’s budget is subject to approval by the Board of BYU. BYUPD employees receive salaries and benefits from BYU. BYUPD is a division of the Department of Student Life within BYU. BYUPD’s Chief reports to BYU’s Vice President for Student Life.

61. On occasion, BYUPD “may receive a federal or state grant for equipment, such as radar equipment, but such grants amount to less than 1% of [BYUPD’s] budget in any given year.”<sup>52</sup>

62. DPS does not list BYUPD on any DPS organization chart or representation of DPS administrative units, which include the POST Division, the Law Enforcement Services Division, and the BCI.

63. DPS does not list any other county or local police departments on any DPS organization chart or representation of DPS administrative units.

64. The DPS Commissioner does not receive any daily, weekly, or monthly reports from BYUPD.

65. The DPS Commissioner does not receive any daily, weekly, or monthly reports from any county or local law enforcement agency.

66. The DPS Commissioner does not have any regularly scheduled meetings or communications, for reporting purposes or otherwise, with the chief or with any other officer of BYUPD.

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<sup>50</sup> In an article in the Daily Universe posted on June 23, 2010, Lt. Lemmon is quoted as stating that “[i]n the early 1970s, the legislature passed a bill that private colleges and universities could have a police department, *but they had to be chartered underneath the commissioner of public safety in the state of Utah.*” See “BYUPD requires tough training” posted June 23, 2010 on the UWire by the Daily Universe (emphasis added).

<sup>51</sup> See Declaration of Arnold L. Lemmon

<sup>52</sup> See Declaration of Chief Larry Stott.

67. The DPS Commissioner does have any regularly scheduled meetings or communications, for reporting purposes or otherwise, with the chief or with any other officer of any other county or local law enforcement agency.

68. DPS has *no* role or involvement in any of the following:

- a. The organizational structure of BYUPD;
- b. Employment decisions regarding BYUPD officers or other personnel;
- c. BYUPD leadership structure or reporting lines;
- d. The day-to-day operations of BYUPD;
- e. Prioritization of BYUPD's law enforcement services;
- f. Decisions regarding additional security and other services offered to the campus community;
- g. Paying salaries and benefits of BYUPD officers and personnel; or
- h. BYUPD's budget and expenditures for equipment and supplies.

69. DPS does not have any role or involvement in: (a) determining the organizational structure of county or local law enforcement; (b) employment decisions regarding county or local law enforcement agencies' officers or other personnel; (c) leadership structure or reporting lines of county or local law enforcement agencies; (d) the day-to-day operations of county or local law enforcement agencies; (e) prioritization of county or local law enforcement agencies' law enforcement services provided within their jurisdictions; (f) decisions regarding additional security and other services county or local law enforcement agencies offer within their jurisdictions; (g) paying the salaries and benefits of county or local law enforcement agencies' officers and personnel; or (h) county or local law enforcement agencies' budgets and making decisions about expenditures for equipment and supplies.

70. DPS considers BYUPD to be a "law enforcement agency" under Utah Code § 53-1-102(1)(c) and a "criminal justice agency" under Utah Code § 53-10-102(9).

### ***BYU's Records Access, Release, and Retention Policies and Procedures***

71. BYU's Records Access, Release, and Retention Policies and Procedures state that BYUPD "will comply with Utah's Government Records Access and Management Act (GRAMA) and the Division of Archives and Records Service's Municipal Schedule 21, Public Safety Records" and "Utah Code 53-10-1-108, Restrictions on access, use, and contents of division records – Penalty for misuse of records." They further state that BYUPD "will comply with all federal and state laws pertaining to the protection, retention, and release of law enforcement records." They define "Public Records" as "any record that is not private, controlled, protected, or exempt" and state that BYUPD "allows inspection of a 'public' record free of charge, and will provide a copy of the public record, subject to a reasonable fee, during normal working hours."<sup>53</sup>

72. According to BYU, BYUPD “voluntarily” releases certain records using the “structure and processes outlined in [GRAMA].”<sup>54</sup> BYUPD’s practice has been to release law enforcement records upon request because it considers it an important public service element of a law enforcement agency. However, BYUPD’s position is that it is not required to disclose any law enforcement records, even those defined as public records under GRAMA, and its decision to do so is entirely voluntary.<sup>55</sup>

73. Neither BYU nor BYUPD is listed on the Utah Division of Archives and Records’ (UDARS) Open Records Portal, or in any other database maintained by UDARS.

74. For purposes of responding to government records requests, DPS does not respond on behalf of BYUPD.

75. DPS does not respond on behalf of any other county or local law enforcement agency (such as the Murray City Police Department or Draper Police Department, for example).

## **RULING AND ORDER**

As a preliminary matter, the court will not repeat in its entirety the discussion of the police function, GRAMA, Utah’s Archives and Records Services and Information Practices Act (Records Act) and Public and Private Writing Act (Writings Act), statutory construction principles, *Mallory v. BYU*, and the Utah Governmental Immunity Act set forth in the 2017 Ruling.<sup>56</sup> Rather, the court incorporates by reference the 2017 Ruling and it should be included and considered along with this Ruling and Order in the event of an appeal.

### **I. The Executive Branch and the Police Function**

As the U.S. Supreme Court has explained in various cases, “the police function” is one of the most “basic functions of government” because it “fulfills a most fundamental obligation of government to its constituency,”<sup>57</sup> which “is to provide for the security of the individual and his property.”<sup>58</sup> Police play a critical role in the administration of justice. And as the Utah Supreme

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<sup>53</sup> See University Police, Policies and Procedures, Records Access, Release, and Retention (June 30, 2016). According to Rachel Gifford’s Affidavit, Lieutenant Aaron Rhoades of BYUPD took the GRAMA certification examination in late 2016. According to Ms. Gifford, “only those employed by a governmental entity may become GRAMA certified on behalf of a governmental entity” although anyone may “voluntarily take the GRAMA certification examination.” See Gifford Affidavit at ¶¶ 8 - 10.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> The court also continues to find persuasive the Ohio Supreme Court’s decision in *Schiffbauer v. Banaszak*, 33 N.E.3d 52 (Ohio 2015). With respect to *ESPN, Inc. v. University of Notre Dame Police Department*, 62 N.E.3d 1192 (2016), the court notes the Indiana legislature subsequently amended its open records law to specifically include a private university police department within the definition of “public agency.”

<sup>57</sup> *Foley v. Connelie*, 435 U.S. 291, 297-98 (1978)(stating “the police function” is one of the most basic functions of government and “fulfills a most fundamental obligation of government to its constituency”).



Court observed in a different context, “if administering justice to those who violate the penal code is not a governmental function, we do not know what is.”<sup>59</sup>

Article V, Section 1, of the Utah Constitution provides that “the powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.”

The execution and enforcement of the laws is primarily under the purview of the executive department.<sup>60</sup> Specifically, the Constitution provides that the executive department is charged with the duty to “see that the laws are faithfully executed.”<sup>61</sup> Although the Constitution does not, by any express grant, vest the police power in the executive department, “it must be exercised by the department to which it naturally belongs.”<sup>62</sup>

## II. GRAMA

The Utah legislature enacted GRAMA to advance the cause of governmental transparency and accountability.<sup>63</sup> In doing so, the legislature recognized 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.<sup>64</sup> The legislature intended to “favor public access when, in the application of this act, countervailing interests are of equal weight.”<sup>65</sup>

GRAMA governs any “record . . . that is prepared, owned, received, or retained by a governmental entity or political subdivision.”<sup>66</sup> And “every person has the right to inspect a public record free of charge.”<sup>67</sup> Although GRAMA contains a lengthy list of records that are presumptively public, it specifically states that this list “is not exhaustive and should not be used

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<sup>58</sup> *U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Div.*, 407 U.S. 297, 312 (1972)(quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966)(White, J., dissenting)).

<sup>59</sup> *Scott v. Utah County*, 2015 UT 64, ¶¶ 60-66 (In analyzing whether application of the UGIA to prison work release program violated the open courts clause of the Utah Constitution, the Utah Supreme Court, applying the *Standiford* test, held that such a program was a “core governmental activity.”).

<sup>60</sup> *Alpine Homes, Inc. v. City of West Jordan*, 2017 UT 45, ¶ 40.

<sup>61</sup> *Id.* at ¶ 48 (quoting Utah Const. art. VII, § 5); see also *Suarez v. Grand County*, 2012 UT 72, ¶ 19 (legislative power gives rise to new law, while executive power implements a law already in existence); *Carter v. Lehi City*, 2012 UT 2, ¶ 34 (“executive power . . . encompasses prosecutorial or administrative acts aimed at applying the law to particular individuals or groups based on individual facts and circumstances”).

<sup>62</sup> *Cf. In re Integration & Governance of Utah St. Bar*, 632 P.2d 845, 847 (Utah 1981).

<sup>63</sup> *Deseret News Pub. Co. v. Salt Lake County*, 2008 UT 26, ¶ 13.

<sup>64</sup> Utah Code Ann. § 63G-2-102(1).

<sup>65</sup> *Id.* at 102(3)(e).

<sup>66</sup> *Id.* at 103(22).

<sup>67</sup> *Id.* at 201(1)-(2).

to limit access to records.”<sup>68</sup> To the contrary, a “record is public unless otherwise expressly provided by statute.”<sup>69</sup>

Relevant to the Cross Motions and under Subsection 103(11) of GRAMA, a “governmental entity” means “executive department agencies of the state,” the Legislature and certain legislative offices, the courts and certain judicial units, state-funded educational institutions, or political subdivisions of the state. BYU refers to these as the “Listed Entities.”<sup>70</sup>

It also means “every office, agency, board, bureau, committee, department, advisory board, or commission of [a Listed Entity] that is funded or established by the government to carry out the public’s business.” BYU refers to these as the “Sub-Entities.”<sup>71</sup>

GRAMA’s explicit identification of certain records of “law enforcement agencies” and “peace officers” as “public records” is also relevant to the Cross Motions. These records include “initial contact reports” and “chronological logs.”<sup>72</sup> “Chronological logs” means the regular and customary summary records of law enforcement agencies and other public safety agencies that show: (a) the time and general nature of police, fire, and paramedic calls made to the agency; and (b) any arrests or jail bookings made by the agency.<sup>73</sup> “Initial contact report” means an “initial written or recorded report, however titled, prepared by peace officers engaged in public patrol or response duties describing official actions initially taken in response to either a public complaint about or the discovery of an apparent violation of law . . .”<sup>74</sup> Finally, GRAMA defines an “at-risk government employee” as a current or former peace officer.<sup>75</sup>

### III. Statutory Analysis

“When interpreting a statute, it is axiomatic that this court’s primary goal ‘is to give effect to the legislature’s intent in light of the purpose that the statute was meant to achieve.’”<sup>76</sup> “The best evidence of the legislature’s intent is ‘the plain language of the statute itself.’”<sup>77</sup> In interpreting a statutory provision, the court assumes, absent evidence to the contrary, “that the legislature used each term advisedly according to its ordinary and usually accepted meaning.”<sup>78</sup>

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<sup>68</sup> *Id.* at 301(4).

<sup>69</sup> Utah Code Ann. § 63G-2-201(2).

<sup>70</sup> Utah Code Ann. § 63G-2-103(11)(a).

<sup>71</sup> Utah Code Ann. § 63G-2-103(11)(b).

<sup>72</sup> Utah Code Ann. § 63G-2-301(3).

<sup>73</sup> Utah Code Ann. § 63G-2-103(2).

<sup>74</sup> Utah Code Ann. § 63G-2-103.

<sup>75</sup> Utah Code Ann. § 63G-2-103.

<sup>76</sup> *Monarrez v. UDOT*, 2016 UT 10, ¶ 11 (citing *Biddle v. Wash. Terrace City*, 1999 UT 110, ¶ 14); see *Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, ¶ 14.

<sup>77</sup> *Monarrez*, 2016 UT 10, ¶ 11 (citing *State v. Miller*, 2008 UT 61, ¶ 18).

<sup>78</sup> *Marion Energy*, 2011 UT 50, ¶ 14.

Moreover, the court must ensure that individual words or sections are “construed in connection with every other part or section so as to produce a harmonious whole.”<sup>79</sup> Thus, the plain meaning of a statutory term should not be interpreted in isolation. Rather, its meaning must be determined given the relevant context of the statute.<sup>80</sup> In other words, “we must also examine the purpose of the statute . . . and its relation to other statutes.”<sup>81</sup> Finally, each provision of the Utah Code “shall be construed with a view to effect the objects of the provision and to promote justice.”<sup>82</sup>

Only when the meaning of a statute cannot be discerned from its language alone may the court resort to “legislative history and other accepted sources” to inform its statutory analysis.<sup>83</sup> If the “statutory language is ambiguous – in that its terms remain susceptible to two or more reasonable interpretations after [the court has] conducted a plain language analysis – [it] will generally resort to other modes of statutory construction.”<sup>84</sup> Otherwise, if the legislature’s intent can be ascertained from the statutory terms alone, no other interpretive tools are needed.<sup>85</sup>

As the court has previously stated, this is a challenging case of first impression. Although BYU has strong arguments, the court ultimately is not persuaded by them as discussed below.<sup>86</sup>

#### **IV. When Acting as a Law Enforcement Agency, BYUPD is a Governmental Entity Under Subsection 103(11)(a) of GRAMA.**

In its Motion for Summary Judgment, BYU more fully develops its argument that BYUPD is not subject to GRAMA because it is not one of the entities or sub-entities listed in Utah Code Ann. § 63G-2-103(11).

BYU first argues BYUPD is not a “Listed Entity” because it is a “privately created, funded, managed, and operated police department within a private university” and there is no “requisite connection” between BYUPD and DPS or any other Listed Entity.<sup>87</sup> The court is not convinced.

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<sup>79</sup> *Ivory Homes, Ltd. v. Utah State Tax Com’n*, 2011 UT 54, ¶ 21 (internal quotations omitted); *see also Anderson v. Bell*, 2010 UT 47, ¶ 9 (stating that “the purpose of the statute has an influence on the plain meaning of the statute”)(internal quotations omitted).

<sup>80</sup> *Monarrez* at ¶ 11 (citing *Olsen v. Eagle Mountain City*, 2011 UT 10, ¶ 12)(noting that the “we read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters”)(internal quotations omitted).

<sup>81</sup> *Salt Lake City Corp. v. Haik*, 2014 UT App 193, ¶ 12.

<sup>82</sup> Utah Code Ann. § 68-3-2(3).

<sup>83</sup> *Haik v. Sandy City*, 2014 UT App 193, ¶ 15.

<sup>84</sup> *Id.*

<sup>85</sup> *Bagley v. Bagley*, 2016 UT 48, ¶ 10.

<sup>86</sup> Petitioners have the burden of showing that BYUPD is a governmental entity under GRAMA. By focusing on BYU’s arguments, the court is not shifting the burden to BYU to show it is not a governmental entity. The court is simply recognizing that it previously concluded BYUPD is a governmental entity and BYU is attempting to persuade the court that this conclusion is incorrect.

<sup>87</sup> *See* BYU’s Memo. at 17.

In determining whether BYUPD fits within GRAMA's definition of a governmental entity, the first critical question is "what is BYUPD"? The answer to that question may not be seriously disputed. BYUPD is a "law enforcement agency" as defined in Utah Code Ann. § 53-1-102. It is also a "criminal justice agency" as defined in Utah Code Ann. § 53-10-102.

Prior to May 1979, it was a "security/police department" that employed officers who were deputized with the Utah County Sheriff's Office and sworn as special officers for Provo City Police. It was only through their status with Utah County and/or Provo City that BYU's "security/police department" and its officers were able to exercise any police powers or access any of the governmental databases, records, or support services needed to effectively exercise those powers.

After May 1979, and solely by virtue of the Utah legislature's enactment of HB 80 and DPS's continued regulation and certification, BYUPD is able to exercise plenary police power directly and access government databases, records, support services, equipment, and funding in its own right. Importantly, DPS considers BYUPD to be a "law enforcement agency" under Utah Code § 53-1-102(1)(c).<sup>88</sup>

The Utah Public Safety Code provides the relevant definition of law enforcement agency. A "law enforcement agency" means "an entity of the federal government, a state, or a political subdivision of a state, including a state institution of higher education, that exists primarily to prevent and detect crime and enforce criminal laws, statutes, and ordinances."<sup>89</sup>

Applying the plain language of this definition, any law enforcement agency, regardless of whether it is formed or funded by a private university, is considered an entity of the state or a political subdivision if it "exists primarily to prevent and detect crime" and "enforce criminal laws." Thus, even if the "vast majority" of BYUPD's "law enforcement activities are to investigate crime on BYU campus" and even if BYUPD also provides other services such as crime prevention programs, it is still a law enforcement agency because it exists primarily to prevent and detect crime and enforce criminal laws, statutes, and ordinances.<sup>90,91</sup> As Petitioners point out in their memoranda, BYUPD can hire people, buy uniforms, provide security at events, and operate patrol cars without blue or red lights, but it cannot be a police department or exercise police power without being a law enforcement agency.<sup>92</sup> This conclusion is buttressed by the

<sup>88</sup> See SOF ¶ 71.

<sup>89</sup> Utah Code Ann. § 53-1-102(c).

<sup>90</sup> See also *State v. Green*, 2005 UT 9, ¶ 52 ("law enforcement agency" is "one whose primary duty is to prevent and detect crime, and which has general police power and is charged with making arrests in connection with the criminal statutes and ordinances of the State of Utah or any political subdivision thereof."); *State v. Bradshaw*, 541 P.2d 800, 802 (Utah 1975) (Henriod, C.J., concurring) (general population perceives law enforcement as individuals who wear a "blue, brass-buttoned suit, ornamented with a silver star over [their] heart.")

<sup>91</sup> Nor has BYUPD been classified separately from law enforcement agencies. Cf. *State v. Green* at ¶ 51 (DCFS is not a law enforcement agency because it has been classified separately from law enforcement agencies).

<sup>92</sup> It is also a criminal justice agency, which is defined as a "government agency or subdivision of a government agency that administers criminal justice under a statute, executive order, or local ordinance and that allocates greater than 50% of its annual budget to the administration of criminal justice." See Utah Code Ann. § 53-1-102(8).

definition of “law enforcement officer,” which means “a sworn and certified peace officer who is an employee of a law enforcement agency that is part of or administered by the state or any of its political subdivisions . . .” and includes “members of a law enforcement agency established by a private college or university.”<sup>93,94</sup>

Notwithstanding the clear and unambiguous definition of law enforcement agency, BYU makes several arguments regarding its applicability to BYUPD and its relevance to GRAMA.

BYU first argues the court should ignore the Public Safety Code definition of law enforcement agency because this definition is limited to “[a]s used in this title.”<sup>95</sup> But BYU has not offered an appropriate alternative definition that would make it a “purely private” police department not subject to GRAMA. Indeed, the varying definitions of law enforcement agencies in the Utah Code all have one thing in common: defining a law enforcement agency as a government agency.<sup>96</sup> Nor has BYU adequately explained why the court should not utilize the rule of construction that statutory provisions should be interpreted in harmony with other statutes in the same or related chapters.<sup>97</sup>

BYU also argues this definition is not relevant because GRAMA’s definition of “governmental entity” does not specifically include a “law enforcement agency” or “criminal justice agency” as those terms are used in the Public Safety Code. However, with a few exceptions not pertinent here, GRAMA does not list governmental entities by name or by reference to their governing statutes. Thus, BYU’s somewhat circular approach to interpreting “governmental entity” doesn’t work in most instances. For example, if we want to know whether the Heber Valley Historic Railroad Authority (HVHRA) is subject to GRAMA, we can’t simply read GRAMA’s definition of a governmental entity and find out. We must first go to the statute authorizing HVHRA, which states it is an “independent state agency and body politic and corporate.” We must then go to the Independent Entities Act for the definition of “independent state agency,” which means “an entity created by the state, but . . . independent of the governor’s direct supervisory control.” And if neither statute addresses whether HVHRA is or is not exempt from GRAMA, we must then determine whether HVHRA, an entity created by the state but not under the direct supervision of the governor, is a governmental entity under GRAMA.<sup>98</sup>

Similarly, because BYUPD is a police department governed by the Public Safety Code,<sup>99</sup> this is the most logical place to look for an appropriate definition. In addition, GRAMA

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<sup>93</sup> Utah Code Ann. § 53-13-103(1)(b)(xii).

<sup>94</sup> Utah Code Ann. § 53-13-103(1)(a)

<sup>95</sup> Utah Code Ann. §53-1-102(1).

<sup>96</sup> See, e.g., Utah Code Ann. §§ 53-5c-102(4); 77-7a-103(2); 77-7-27(1)(a), and 51-9-411.

<sup>97</sup> *State v. Carreno*, 2006 UT 59, ¶ 11 (quoting *Bd. of Educ. v. Sandy City Corp.*, 2004 UT 37, ¶ 9).

<sup>98</sup> Utah Code Ann. § 63E-1-102(5). Notwithstanding being defined as a “state agency” as opposed to an “executive department agency” and notwithstanding GRAMA’s definition of governmental entity, an independent state agency is subject to GRAMA. See Utah Code Ann. § 63H-4-108 (GRAMA not included on list of exempt statutes).

<sup>99</sup> See *State v. Green*, at ¶ 49, fn. 5 (“Utah Code sections 53-1-101 to -304 is the Public Safety code governing the administration of police agencies.”).

implicitly references definitions from the Public Safety Code when it refers to law enforcement agencies and peace officers in definitions of certain public records. BYU itself references definitions from the Public Safety Code in its argument that BYUPD was not “established by the government to carry out the public’s business.”<sup>100</sup> And BYUPD officers are included in GRAMA’s definition of “at-risk government employees” because they are peace officers.<sup>101</sup>

BYU further argues a “law enforcement agency established by a private college or university” is somehow distinct from a law enforcement agency. But the Public Safety Code does not draw this distinction in any way meaningful to this analysis. The only difference between a law enforcement agency and a law enforcement agency established by a private college or university is the latter subcategory is subject to *additional* state regulation.

BYU lastly argues that regardless of the definition of law enforcement agency, GRAMA’s definition of a governmental entity does not include “an entity of the state” unless the entity is specifically identified as being part of the executive, legislative, or judicial branches or a political subdivision. In other words, just because BYUPD is an entity of the government, it is not a governmental entity. The import of BYU’s argument is there are free-floating “state entities” completely unattached or unrelated to the legislative, executive, or judicial branches of government. BYU does not provide legal authority for this argument and it has not identified any such entity in its briefing, much less one engaging in a core government function such as policing. But more importantly, this argument appears to be inconsistent with the Utah Constitution.

Article V, Section 1, of the Utah Constitution provides “the powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial . . .” The executive department is charged with the duty to “see that the laws are faithfully executed.”<sup>102</sup> Thus, the execution and enforcement of the laws are primarily under the purview of the executive department.<sup>103</sup> The court is hard-pressed to understand how BYUPD can be an “entity of the state” for purposes of enforcing the laws and yet not be part of the executive department for purposes of GRAMA. Given this constitutional statement of the executive department’s duty and authority, and in the absence of legal authority to support BYU’s argument, the court rejects it.<sup>104</sup>

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<sup>100</sup> Given that BYUPD’s *access* to certain records is directly tied to its classification as a law enforcement agency under the Public Safety Code, there is a certain parallelism in concluding that BYUPD’s obligation to *disclose* certain records is also directly tied to its classification as a law enforcement agency under the Public Safety Code.

<sup>101</sup> Utah Code Ann. § 63G-2-303(1)(a)(i).

<sup>102</sup> *Id.* at ¶ 48 (quoting Utah Const. art. VII, § 5).

<sup>103</sup> *Alpine Homes, Inc. v. City of West Jordan*, 2017 UT 45, ¶ 40.

<sup>104</sup> The Utah Constitution also supports the alternative conclusion that BYUPD, when acting as a law enforcement agency, may be considered a political subdivision of the State of Utah. Article XI, Section 8, provides that the legislature “may by statute provide for *the establishment of political subdivisions of the State, or other governmental entities*, in addition to counties, cities, towns, school districts, and special service districts, to provide services and facilities as provided by statute. *Those other political subdivisions of the State or other governmental entities may exercise those powers and perform those functions that are provided by statute.*” (emphasis added). And as BYUPD correctly points out, county and local law enforcement agencies are agencies of political subdivisions.

For all these reasons, the court concludes that BYUPD is an executive department agency of the state and, therefore, a governmental entity under Subsection 103(11) of GRAMA.

V. **Alternatively, BYUPD, as a Law Enforcement Agency, is a Governmental Entity under Subsection 103(11)(b) of GRAMA**

Alternatively, BYUPD, as a law enforcement agency, is a governmental entity under Subsection 103(11)(b). As set forth below, the court concludes BYUPD is a governmental entity for purposes of GRAMA because it is an agency of the state or a political subdivision established by the government to carry out the public's business of policing.<sup>105</sup>

BYU does not appear to dispute that BYUPD is "carry[ing] out the public's business." Accordingly, BYU's arguments focus on whether it is a "sub-entity" and, if so, whether it is "funded or established by the government."

BYU argues BYUPD cannot be considered a Sub-Entity because DPS does not list BYUPD on its organizational charts and DPS has no role or involvement in BYUPD's organization structure, leadership, reporting lines, employment decisions, salaries, benefits, expenditures, budget, equipment, supplies, uniforms, day-to-day operations, prioritization of law enforcement activities, or any non-law enforcement activities.<sup>106</sup> As Petitioners point out, BYUPD does not necessarily need to be "within the administrative structure" of, or "have organizational lines" to, a Listed Entity. Rather, it must be of a Listed Entity, meaning connected, derived, relating to, associated with, etc.<sup>107</sup>

For the same reasons set forth in IV above, the court concludes that BYU's Sub-Entity argument is foreclosed by its classification as a law enforcement agency. Accordingly, if it is not considered an "executive department agenc[y] of the state" or a "political subdivision," it must be considered an agency, board, bureau or department of an executive department agency (or an agency of a political subdivision) in order to be a law enforcement agency exercising the plenary police powers granted to the executive department by the Utah Constitution.

Petitioners do not forcefully argue BYUPD is funded by the government. BYU does receive some funds from the government, primarily or exclusively in the form of grants for equipment and payment or waiver of certain POST costs. But it is undisputed such funds amount to less than 1% of BYUPD's budget in any given year. Indeed, BYUPD's ability to obtain such

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<sup>105</sup> The parties' arguments regarding *Mallory v. BYU*, 2014 UT 27, are addressed in the 2017 Ruling. As explained therein, the court acknowledges that GRAMA and the Utah Governmental Immunity Act (UGIA) have slightly different definitions and serve different purposes. Thus, the Utah Supreme Court's holding in *Mallory* that a BYU traffic cadet was an employee under the UGIA is not determinative of the issue in this case. However, the court continues to believe the conclusion that BYUPD is a governmental entity under GRAMA is *consistent* with the holding in *Mallory* and BYU's arguments made in support of its claim of governmental immunity for its traffic cadets, who are employees of BYUPD.

<sup>106</sup> See BYU Memo. at 17.

<sup>107</sup> See Merriam-Webster, <https://merriam-webster.com/dictionary/of/>; Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/of/>; and Dictionary.com, <https://www.dictionary.com/browse/of/>.

grants and waivers is more appropriately considered in connection with its status as a Listed Entity or Sub-Entity.

Thus, as before, the resolution of this issue turns on whether BYUPD is “established by” the government to carry out the public’s business.

As a preliminary matter, BYU argues that BYUPD was “established” by BYU in 1952. The court respectfully disagrees. Whatever BYU “established” in 1952 and regardless of what it was called, BYU’s “security/police” was not a police department or law enforcement agency or any other entity with police powers because BYU could not create or establish one by itself. Indeed, its legal existence as a law enforcement agency entirely depends on what the court has called its enabling statute (HB 80 now § 53B-3-105) and DPS certification.<sup>108</sup>

BYU further argues the term “established by” “unambiguously requires creation or formation, as demonstrated by the term’s ordinary meaning and confirmed by the Utah Supreme Court’s interpretation of the phrase in *Barker*, as well as the Legislature’s reference to a ‘law enforcement agency established by a private college or university’ in the Public Safety Code. As stated in the 2017 Ruling and set forth below, the term “established” is ambiguous. The court also disagrees that the holding in *Barker* and the definition of law enforcement officer in the Public Safety Code conclusively demonstrate “established” means “directly created” for purposes of GRAMA.

**A. The Public Safety Code’s Definition of Law Enforcement Officer**

BYU relies heavily on the Public Safety Code when arguing BYUPD was not established by the government. Specifically, BYU argues the Public Safety Code “makes clear” it was not established by the government because it defines a “law enforcement officer” as including “members of a law enforcement agency *established* by a private college or university.”<sup>109</sup> The court is not persuaded.

Under the Public Safety Code a “law enforcement officer” means “a sworn and certified peace officer who is an employee of a law enforcement agency that is part of or administered by the state or any of its political subdivisions, and whose primary and principal duties consist of the prevention and detection of crime and the enforcement of criminal statutes or ordinances of this state or any of its political subdivisions.”<sup>110</sup> “‘Law enforcement officer’ includes . . . (iv) *any* police officer employed by *any* college or university”. . . [and] (xii) “*members* of a law enforcement agency established by a private college or university provided that the college or university has been certified by the commissioner of public safety according to the rules of the Department of Public Safety.”<sup>111</sup>

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<sup>108</sup> Certainly its existence as a practical matter depends on BYU and its continued funding of BYUPD. There is nothing that prevents BYU from deciding to go back to having a security department with security officers instead of a law enforcement agency with peace officers.

<sup>109</sup> Utah Code Ann. § 53-13-103(1)(b)(xii) (emphasis added).

<sup>110</sup> Utah Code Ann. § 53-13-103(1)(a).

<sup>111</sup> Utah Code Ann. § 53-13-103(1)(b)(emphasis added).



The court is not convinced “established” in this context is the same as “established” in GRAMA. The “members” definition is included within the broader “means” definition of law enforcement officer. Thus, it is not clear that “established by” in (1)(b)(xii) replaces or modifies the “employee of a law enforcement agency that is part of or administered by the state or any of its political subdivisions” language of (1)(a). Also, it is not clear whether “members” means “police officer” or whether it refers to a different type of employee of a college or university’s law enforcement agency, *e.g.*, a traffic cadet. Although the context may suggest they are the same, the definition of law enforcement officer already includes “any police officer employed by any college or university” in (1)(b)(iv).<sup>112</sup> So even if the definition is relevant, it is not determinative.

### **B. The Meaning of the Word “Established”**

The parties’ arguments regarding the meaning of the word “established” are not fundamentally different from the arguments made in connection with the Motion to Dismiss. BYU continues to ask the court to construe “established” narrowly as “to bring into existence” or “to institute [something] permanently by exactment or agreement”<sup>113</sup> or “to make something start to exist or start to happen” or “to start an organization or company.”<sup>114</sup> Using this definition, the State of Utah must have actually created or organized BYUPD in order for it to be considered a governmental entity under GRAMA. Petitioners continue to ask the court to construe “establish” broadly as “to cause to be recognized and accepted” or “to found, to create, to regulate” or “to found, recognize, confirm or admit.”<sup>115</sup> Using this definition, BYUPD would be considered a governmental entity because it is only allowed to exist because of the statute and it is subject to substantial and ongoing regulation and certification by DPS.

As explained in the 2017 Ruling, the court begins its analysis by looking to the “ordinary and accepted meaning” of the term “established,” which the Legislature did not define in GRAMA. “A starting point for assessing ordinary meaning is the dictionary . . . because [it] attests to a range of senses that a given term has been given over time.”<sup>116</sup>

The dictionaries have numerous and varied definitions of “established” that potentially apply, some of which support BYU’s position (*e.g.*, to build, create, found, form) and some of which support Petitioners’ position (*e.g.*, to authorize, endow, certify, conform, legislate, validate). While “established” may be limited to only those entities actually formed by the State,

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<sup>112</sup> In the 1985 version of the definition of peace officer, which was found in § 77-1a-1, there was a period after (a) and (b) read as follows: “any police force established by a private college or university shall, prior to exercising its police power, apply to the commissioner of public safety and be certified by the commissioner under the rules of the Department of Public Safety.”

<sup>113</sup> *Establish*, MERRIAM-WEBSTER’S DICTIONARY, [www.merriam-webster.com/dictionary/establish](http://www.merriam-webster.com/dictionary/establish) (last visited Jan. 19, 2017).

<sup>114</sup> *Establish*, MACMILLAN DICTIONARY, [www.macmillandictionary.com/us/dictionary/american/establish](http://www.macmillandictionary.com/us/dictionary/american/establish) (last visited Jan. 19, 2017).

<sup>115</sup> *Establish*, BLACK’S LAW DICTIONARY, <http://thelawdictionary.org/establish/> (last visited Jan. 19, 2017).

<sup>116</sup> *Hi-Country Prop. Rights Grp. v. Emmer*, 2013 UT 33, ¶ 19.

it is also possible that it refers to agencies such as BYUPD that are allowed to perform governmental functions pursuant to a specific statutory grant of authority subject to extensive control and oversight by the State. Thus, the dictionary itself cannot resolve the contest of the meanings of “established” put forward by the parties.

Consequently, as in the 2017 Ruling, the court resolves the ambiguity by analyzing the structure and context of GRAMA and any “related [statutes],”<sup>117</sup> including the Public Safety Code and § 53B-3-105. After carefully considering BYU’s additional arguments regarding the meaning of established, the court reaches the same conclusion it reached in the 2017 Ruling. In doing so, the court is not conflating “authorized” with “established.” After all, “authorize” is a synonym for “establish.” The court is selecting a definition that more appropriately fits in the broader context of GRAMA and serves its purposes.<sup>118</sup>

### **1. HB 80 Statutorily Established BYUPD as a Law Enforcement Agency**

The court previously referred to HB 80, which is now § 53B-3-105, as BYUPD’s enabling statute because it is the statute by which the legislature granted it police authority and BYUPD depends solely on this statute for its legitimacy as a police department that directly exercises police power. The court also recognized, and BYU does not dispute, that this authority can be taken away at any time by the legislature or DPS. Because this statute is the origin and continued source of BYUPD’s police power, it “established” BYUPD as a law enforcement agency.

However, BYU correctly points out that HB 80 addressed individuals who were or could be included under the new designations of Category I, Category II, and federal peace officers. Thus, BYU argues, HB 80 “specifically anticipated” that private colleges and universities would “establish their own police forces” when their “governing boards” appointed their police officers. At first blush, this argument has some appeal. The problem with relying on this language is that HB 80 amended Chapter 181, Public Schools. And thereafter it continued to be found in the statutes governing state institutions of higher education. It currently resides in Title 53B, State System of Higher Education, Chapter 1, Enforcement of Regulations at Institutions. Importantly, the “board” referred to in the current statute is the Utah Board of Regents.

BYU acknowledges this when it argues HB 80 should not be characterized as its “enabling act” and Title 53B cannot be read as establishing police forces at private colleges or universities because it only regulates the “state system of higher education.” Perhaps the court does not fully understand BYU’s argument on this point but the only statutory authority for BYUPD has always been found in the statutes governing the state system of higher education.

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<sup>117</sup> *Monarrez*, 2016 UT 10, ¶ 11; *see also* Utah Code Ann. § 68-3-11 (“Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such other as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.”). Neither party argues that “established” has a peculiar meaning.

<sup>118</sup> *See Summit Operating, LLC v. Utah State Tax Com’n*, 2012 UT 91, ¶ 15 (noting that although the tax exemption statute was arguably ambiguous when read in isolation, “the context of the statute and its prior versions” clarified the ambiguity).

And HB 80 did not amend § 53-4-4, which stated the “governing board of each state institution of higher education may establish and maintain police or security departments for the purposes of enforcing the regulations of such institutions and the laws of the state of Utah.” In its current form it states “the board,” meaning the Utah Board of Regents,” “may establish and maintain police or security departments for the purpose of enforcing the regulations of each institution of higher education and the laws of the state.”<sup>119</sup> More fundamentally, BYU’s argument ignores the simple fact that state colleges and universities may establish and maintain police departments without certification from DPS. Private colleges and universities may not.

Finally, BYU’s argument is inconsistent with how BYUPD viewed HB 80 at the time it was enacted. As Chief Kelshaw explained in a letter sent a few months prior to it taking effect, HB 80 was “legislative authority from the State of Utah, which will place us as a department in the Category I police officer status . . . [which] means that Brigham Young University Police Department will have all of the authority, rights, and powers of any State or local police department within the State of Utah.”<sup>120</sup>

## 2. The State, Through DPS, Exclusively Regulates BYUPD

The State of Utah, through the POST Division, exclusively regulates BYUPD. It not only has the power to certify or not certify BYUPD as a law enforcement agency, it has the authority to draft rules and regulations governing BYUPD as well as discipline its officers.<sup>121</sup> It also has the authority to investigate crimes on BYU campus even if BYUPD does not request its assistance.

<sup>122</sup>

Although BYU “readily acknowledges that it has always had to rely on some kind of delegation of power or authority from the State of Utah in order to be a law enforcement agency” it insists that BYUPD is a “private police force” which has merely received, through a certification process (and previously through delegation), the authority to engage in certain public functions, *i.e.*, law enforcement. Thus, BYU maintains, the origin and continued source of its police power is irrelevant in determining whether BYUPD is a governmental entity. Rather, the court should look solely at who buys the uniforms and pays the salaries and maintains the vehicles. Again, the court disagrees. It is this act of certification – this explicit delegation of the executive department’s police power – that “establishes” BYUPD *as a police force*. Indeed, BYU has cited no Utah authority for the proposition that it could establish a “police force,” private or otherwise, without this express delegation of authority. BYU’s role is more properly described as sponsorship, the word used by DPS in the regulations governing BYUPD.

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<sup>119</sup> See Utah Code Ann. §§ 53-10-102 and 108.

<sup>120</sup> See SOF ¶ 11.

<sup>121</sup> In Utah Admin. R698, DPS uses the phrase “members of a law enforcement agency of a private college or university,” not “established by.” It also characterizes a private college or university as “sponsoring” the law enforcement agency.

<sup>122</sup> Under Utah Code Ann. §53-1-105, at the governor’s direction, the DPS Commissioner “shall assign [Criminal Investigations and Technical Services Division] employees to investigate any crime within this state for the purpose of identifying, apprehending, and convicting the perpetrator or perpetrators of that crime even if the commissioner has not received a request from a law enforcement agency.”

### 3. Even if the Court Adopts “Created” as the Definition of Established, It Still Applies to BYUPD.

The court’s conclusion does not change even if it adopts “created” as the definition of “established” as advocated by BYU. The word “create” also means: to cause to happen or come into being, as something unique that would not naturally evolve or that is not made by ordinary processes; to make by investing with new office, or rank; designate; invest with a new form; constitute; appoint; to be the cause or occasion of; giving rise to; to bring about; arrange, as by intention or design.<sup>123</sup>

### 4. *State ex rel. Shields v. Barker*, 167 P. 262 (Utah 1917)

BYU also argues the term “established by” “unambiguously requires creation or formation, as demonstrated by the term’s ordinary meaning and confirmed by the Utah Supreme Court’s interpretation of the phrase in *Barker*. In *Barker*, the Utah Supreme Court was interpreting the phrase “established by law.” The *Barker* Court noted “[t]o be established by law means just what it says, namely, by a law duly passed by the lawmaking power of this state.” The Court then turned to the critical definition of “law.” It did not discuss the meaning of “established.” Consequently, the court does not find *Barker* to be particularly instructive to the issue at hand. Indeed, the real lesson of *Barker* as applied to this case may be that if the Utah legislature cannot delegate its own express power to create courts to a political subdivision, it certainly cannot delegate executive power – the police power – to a private institution unless the Utah Constitution specifically permits it to do so.

### 5. Other Arguments of the Parties

The court will briefly touch on a few other arguments raised by the parties in connection with the Cross Motions.

Petitioners direct the court to the Establishment Clause to support their position. To the extent these concepts intersect at all, the court notes that the case law interpreting the Establishment Clause is consistent with the court’s conclusion that BYUPD was “established by the government” for purposes of GRAMA.

BYU criticizes Petitioners for not specifically identifying who established BYUPD. But GRAMA’s definition does not require Petitioners or the court to do so because the definition states “established by *the government*” generally, not a Sub-Entity specifically. In making this determination, the court considered the critical roles that Utah County, Provo City, the Utah legislature, and the executive department played in establishing BYUPD as a law enforcement agency in the State of Utah.

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<sup>123</sup> See Merriam-Webster, <https://merriam-webster.com/dictionary/create>; Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/create>; and Dictionary.com, <https://www.dictionary.com/browse/create>; Black’s Law Dictionary, <https://thelawdictionary.org/create/>.

Petitioners argue that if the legislature had intended to exclude a “private” police department from GRAMA notwithstanding the Public Safety Code’s definition of law enforcement agency, it could have simply excluded it as it did with the Utah Educational Savings Plan created in Section 53B-8a-103. Similarly, Petitioners argue that because the legislature defined law enforcement agency after enacting GRAMA, the legislature could have easily crafted a definition of law enforcement agency that gave BYUPD exactly what it wants, *i.e.*, authority and access but no transparency and accountability. Because these arguments cut both ways, the court did not find them particularly compelling.

Finally, the court observes without criticism that BYU’s arguments are technical arguments only. Nowhere in BYU’s briefs does it seriously suggest that the Utah legislature could not simply amend GRAMA to specifically include BYUPD (or any other law enforcement agency sponsored by a private college or university) in the definition of a governmental entity or amend the Public Safety Code to specifically state that all law enforcement agencies are subject to GRAMA.

## **6. Petitioners’ Definition Better Fits the Context and Purpose of GRAMA**

“When uncertainty exists as to the interpretation and application of a statute, it is appropriate to look to its purpose in light of its background and history, and also to the effect it will have in practical application.”<sup>124</sup>

In exercising the state’s sovereign police power, BYUPD is functionally equivalent to every other police department in Utah, all of which are subject to GRAMA. BYUPD and other police departments meet the same certification requirements, perform the same functions, and serve the same purposes. There is no apparent limitation on BYUPD’s ability to exercise plenary police authority. Excluding BYUPD from the definition of a governmental entity for purposes of GRAMA creates internal inconsistencies that are not easily or logically resolvable. And even if the Public Safety Code definitions arguably conflict, the court is not persuaded that exempting BYUPD, a law enforcement agency for all other purposes, from GRAMA is a compelling or defensible way to reconcile them, particularly when there are significant and legitimate public interests favoring an interpretation that does not exempt only one police department in the State from GRAMA. To the contrary, when there is a transfer of a core governmental function to a private actor such as BYUPD, public access and accountability should follow.

Accordingly, whether it is by virtue of BYUPD’s performance of a quintessential governmental function given to the executive department or the explicit statutory authorization or DPS’s regulation and certification or the functional delegation of Provo City’s statutory obligation to provide police services within its municipal boundaries or all of these together, the court alternatively concludes BYUPD is a governmental entity for purposes of GRAMA because it is an agency of the state or a political subdivision established by the government to carry out the public’s business of policing.

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<sup>124</sup> *Stanton Transp. Co. v. Davis*, 341 P.2d 207, 209 (Utah 1959) (“When uncertainty exists as to the interpretation and application of a statute, it is appropriate to look to its purpose in light of its background and history, and also to the effect it will have in practical application.”).

## VI. Barnard v. Utah State Bar

BYU relies heavily on the Utah Supreme Court's decision in *Barnard v. Utah State Bar* and argues it is "dispositive." In the court's view, *Barnard* is neither applicable nor persuasive because it involves a repealed statute with different definitions and is otherwise distinguishable.

In *Barnard*, the Utah Supreme Court addressed the "narrow" question of whether the Utah State Bar was a "state agency" within the scope of the meaning of that term as used in the Records Act and the Writings Act.<sup>125</sup> The Records Act defined "public records" as records "retained by any state public office . . . or in connection with the transaction of public business by the public offices, agencies, and institutions of the state . . ." The Records Act further defined "public offices" as "the offices of any . . . other agency of the state or any of its political subdivisions." A "state agency" was defined as a "department, division, board, bureau, commission, council, institution, authority, or other unit, however designated, of the state."<sup>126</sup>

Before 1931, the Bar existed as a private organization of attorneys. Membership was voluntary, and admission and discipline were regulated directly by the legislature and the courts, not the Bar. In 1931, the legislature "gave official recognition" to the Bar and required every person practicing law in the State of Utah to pay a license fee and be a member of the Bar. The Bar "was given power to recommend the admission of applicants and the discipline of lawyers to the Supreme Court for binding action."<sup>127</sup>

In its decision, the Court first explained it has the inherent and explicit power and authority to regulate the practice of law, including the admission to practice law and the conduct and discipline of persons admitted to practice law.<sup>128</sup> In reaching its conclusion the Bar was not a "state agency" for purposes of the Records Act and the Writings Act, the Court looked to "the nature, purpose, and functions of the Bar" and noted "the mere fact that an organization is created or officially recognized by statute does not make it a state agency."<sup>129</sup> Because the Bar "does not exist to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession," it was not a "state agency." Specifically, the Bar merely "assists" the Court by "administering qualifying exams and investigating the moral fitness of applicants to practice law" and recommending "proposed disciplinary actions . . . for those whom the Bar has found to have violated the Code of Professional Conduct." The Bar has no final decision-making authority and simply "aids" the Court "by rendering advisory services."<sup>130</sup> After already concluding the Bar was not a "state agency," the Court then noted the Bar "has a number of attributes of nongovernmental organizations" and "conducts a number of activities not related to its

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<sup>125</sup> *Barnard, supra*, 804 P.2d 526, 527.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 528 (emphasis added).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 529.

<sup>130</sup> *Id.*

regulatory functions in the admission and discipline of attorneys.”<sup>131</sup>

As BYU acknowledges, *Barnard* dealt with the Records Act and the Writings Act, not GRAMA. But more critically, the Bar only assists the Court in the Court’s exercise of its power to regulate the practice of law. In contrast, BYUPD is not rendering advisory services or simply assisting other law enforcement agencies. BYUPD is exercising police power directly. Nor is BYU entirely correct when it states that BYUPD is “self-governed” or “not funded by the state.” DPS has authority over BYUPD’s certification. And BYUPD receives state funds and, perhaps more importantly, state services that are not available to “purely private” security companies. Additionally, GRAMA replaced the “public office” definition with “governmental entity,” which “also means” every office, agency, or department “funded or established by the government to carry out the public’s business.”<sup>132</sup> By employing the alternative of “funded *or* established by the government,” the legislature clearly intended to include entities other than traditional state agencies or those funded by taxpayer dollars.<sup>133</sup> The legislature also did not use a more specific phrase such as “operated by” or “created by” or “organized by.”<sup>134</sup> Finally, given GRAMA’s broad definition of governmental entity, it arguably includes the Bar.

## **VII. Interpreting “Governmental Entity” to Include BYUPD Is Consistent with GRAMA and BYU Has Not Shown Countervailing Interests of Equal Weight**

The court also rejects BYU’s argument that construing “governmental entity” to include BYUPD is somehow inconsistent with the interests and purposes of GRAMA.

GRAMA was enacted “to advance the cause of governmental transparency and accountability.”<sup>135</sup> Accordingly, the legislature intended to “favor public access when, in the application of this act, countervailing interests are of equal weight.”<sup>136</sup> BYUPD, when acting as a law enforcement agency, is engaging in one of the most fundamental functions of government: the enforcement of criminal laws, which includes substantial power over the State’s citizens as necessary for that enforcement. Indeed, “the police power . . . is an attribute of sovereignty and is inherent in and belongs to the state, and that the power may be exercised by a municipality or other governmental body or board only as the power may have been expressly delegated thereto by the state . . . .”<sup>137,138</sup> Further, when BYUPD is exercising the state’s police power, BYUPD

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<sup>131</sup> *Id.* at 530.

<sup>132</sup> *See* Utah Code Ann. § 63G-2-103(11)(b)(i)(emphasis added).

<sup>133</sup> *See* Utah Code Ann. § 63G-2-103(11)(b)(i)(emphasis added).

<sup>134</sup> *See Turner v. Staker & Parson Companies*, 2012 UT 30, ¶ 12, 284 P.3d 600 (noting that the court must “look first to the plain language of the statute and ‘presume that the legislature used word advisedly and read each term according to its ordinary and accepted meaning’”)

<sup>135</sup> *Deseret News*, 2008 UT 26, ¶ 13.

<sup>136</sup> Utah Code Ann. § 63G-2-102(3)(e).

<sup>137</sup> *Bohn v. Salt Lake City*, 8 P.2d 591, 603 (1932).

<sup>138</sup> Presumably, BYUPD officers would be considered “state actors” for purposes of the Fourteenth Amendment and their conduct “state action” for purposes of the Fourth Amendment.

creates records specifically identified in GRAMA as being “public records.” And BYUPD is functionally equivalent to every other police department in Utah, all of which are subject to GRAMA.<sup>139</sup>

BYU nevertheless argues the “stated purpose of GRAMA is to allow access to certain government records held by governmental entities – not to allow access to private records of private institutions such as BYU, or internal departments of private institutions, such as [BYUPD].” This argument misses the mark. BYUPD is performing a core *government* function and, in doing so, creates records that are considered *public* records under GRAMA. GRAMA explicitly recognizes the public’s *constitutional right* to access information concerning the conduct of the public’s business. The constitutionally recognized “right to privacy” is not a right of privacy belonging to the entity conducting the public’s business. Rather, it is an individual’s right of privacy with respect to “personal data” gathered by governmental entities.<sup>140</sup>

BYU’s interpretation of “governmental entity” as it applies to BYUPD also contravenes the express purpose of GRAMA because it would effectively shield one police department from transparency and accountability merely because it is “sponsored” by a private university. Like all other peace officers, BYUPD officers may arrest, detain, pursue, imprison, frisk, interrogate, investigate, search, use red and blue lights, and even use deadly force against individuals, regardless of whether they are employees or students of BYU and regardless of whether the alleged conduct occurred on and off campus. BYU has not provided the court with a compelling reason or an overarching principle explaining why the records it creates in connection with these law enforcement activities should be private while the exact same records created by the Utah County Sheriff are presumptively public. Or why the disclosure of a record regarding an individual detained or arrested on a Provo City street should depend on whether the arresting officer happens to work for BYUPD or Provo City Police. BYU just insists it should be so because it is “private institution.” Importantly, BYU’s voluntarily, and entirely discretionary, disclosure of certain records does not equal transparency and accountability.

In summary, the court agrees with Petitioners that a determination that BYUPD, when acting as a law enforcement agency, is subject to GRAMA is entirely consistent with and furthers the purposes and intent of GRAMA. Indeed, there are significant and legitimate public interests favoring an interpretation that does not exempt only one police department in Utah from GRAMA.<sup>141</sup>

### **VIII. BYUPD May Engage in Non-Law Enforcement Activities**

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<sup>139</sup> Given its arguments in *Mallory*, there is no reason to believe that BYU would not take the position that BYUPD enjoys the benefit of governmental immunity when acting as a law enforcement agency or when its officers are acting as law enforcement officers. Indeed, nowhere in the briefs does BYU disavow governmental immunity for BYUPD or its officers.

<sup>140</sup> See Utah Code Ann. § 63G-2-102(1).

<sup>141</sup> *Stanton Transp. Co. v. Davis*, 341 P.2d 207, 209 (Utah 1959) (“When uncertainty exists as to the interpretation and application of a statute, it is appropriate to look to its purpose in light of its background and history, and also to the effect it will have in practical application.”).



In ruling that BYUPD is a governmental entity subject to GRAMA when acting as a law enforcement agency and/or its officers are acting as law enforcement officers, the court is not foreclosing the possibility that BYUPD also engages in activities that may be considered “non-law enforcement” or that its officers have, as former President Oaks described it, “dual capacities.” If, for example, BYUPD’s provision of “crime prevention programs” does not depend in any way on its status as a law enforcement agency or its officers’ status as peace officers or require access to any law enforcement databases or result in any law enforcement agency action, then BYUPD may have an argument it is not a governmental entity when acting solely in that non-law enforcement capacity and, therefore, any record relating solely to such non-law enforcement activity is not subject to GRAMA. This issue is reserved for another day.

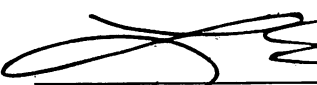
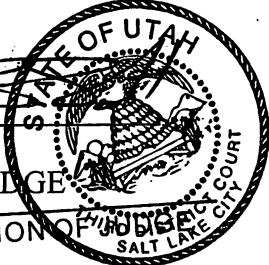
**CONCLUSION**

The court recognizes that BYU has strong arguments worthy of appellate consideration. But for the reasons set forth above, the court concludes that when BYUPD is acting as a law enforcement agency and/or its officers are acting as law enforcement officers, it is a governmental entity subject to GRAMA.

Accordingly, the court GRANTS Petitioners’ Motion for Summary Judgment and DENIES Intervenor’s Motion for Summary Judgment.

SO ORDERED this 17<sup>th</sup> day of July 2018.

BY THE COURT:

  
LAURA S. SCOTT  
DISTRICT COURT JUDGE  
By SAC  
STAMP USED AT DIRECTION OF JUDGE  


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160904365 by the method and on the date specified.

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07/17/2018

/s/ EMILY AGUILAR-CUESTA

Date: \_\_\_\_\_

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Deputy Court Clerk