



BRIGHAM YOUNG UNIVERSITY
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March 22, 2019

Via Email and Hand Delivery
Commissioner Jess L. Anderson
Utah Department of Public Safety
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RE: Brigham Young University's Response to the Department of Public Safety's Notice of Intent to Decertify University Police

Name of Proceeding: Notice of Intent to Decertify Brigham Young University Police
Agency File Number or Reference Number: None Provided

Dear Commissioner Anderson:

On behalf of Brigham Young University ("BYU"), this letter formally responds to your letter dated February 20, 2019, to President Kevin J Worthen, labeled a Notice of Agency Action (the "Notice"). The Notice states your intent to decertify the police force that Brigham Young University established in 1952 ("University Police") and which has been certified by the Utah Department of Public Safety for nearly forty years. The current certification criteria for a law enforcement agency of a private college or university is set forth in Utah Admin. Code R.698-4. Pursuant to Utah Code § 63G-4-204, BYU responds as follows.

I. Introduction

The continued existence and operation of University Police as a certified law enforcement agency is necessary for the safety and welfare of BYU's students and countless other members of our community. BYU is home and host to more than 33,000 students, well over 5,000 employees, and numerous visitors who come to campus for educational, religious, athletic, cultural, and other events. Campus operations are as complex and varied as those of many cities in the State. For over 40 years, without cost to tax payers, University Police has kept the campus community safe. University Police not only protects BYU's campus—on more than 600 acres, with high concentrations of people, 7 days per week, in over 300 buildings—but also provides crime prevention, detection, and other law enforcement and security services through a force of 30 full-time and 10 part-time sworn police officers. BYU's certified officers provide a level of expertise, professionalism, and protective law enforcement authority that non-certified officers (or private security) could not provide. No one has argued, or even proposed, that decertification is in the interests of safety. Rather, on the face of the Notice and as shown below, the Commissioner's unprecedented action puts at risk the comprehensive oversight of campus safety and the well-being

of BYU's students, employees, and visitors. BYU submits that the best way to keep campus safe is through the continued certification of University Police as a law enforcement agency.

II. Statement of Relief Requested and Summary of Argument

As outlined herein, the Notice asserts grounds for decertification that are factually and legally baseless. BYU requests that the Notice be withdrawn. To the extent the Notice is not withdrawn, BYU requests full discovery according to the Utah Rules of Civil Procedure as set forth in Utah Code § 63G-4-205, and a hearing on these issues as set forth in Utah Code § 63G-4-206. BYU also respectfully requests that the Commissioner designate an independent Administrative Law Judge ("ALJ") or some other neutral presiding officer to be appointed as the presiding officer for these proceedings and not conduct the hearing himself. BYU also requests that this independent ALJ hold a scheduling conference and establish a schedule for the decertification proceeding.

The Notice alleges that University Police (1) failed to conduct an investigation into alleged criminal misconduct of one of its officers, Lt. Aaron Rhoades, and failed to report findings to the Peace Officer Standards and Training division ("POST") of the Department of Public Safety ("DPS"); and (2) failed to respond to a subpoena issued in June 2018 during a POST investigation of Lt. Rhoades. As detailed herein, both grounds for decertification are incorrect.

First, in May 2016, BYU's Chief of Police, Larry Stott, personally requested that then-Commissioner of Public Safety, Keith Squires, conduct an investigation into Lt. Rhoades's conduct and audit the records of University Police generally. Commissioner Squires accepted the invitation, and he then immediately commissioned a criminal investigation into the matter by the State Bureau of Investigation ("SBI") (a separate division of DPS). SBI sought, and the court imposed, Secrecy Orders (even before BYU was aware of the investigation) that compelled Chief Stott and others to "not disclose the substance of . . . testimony or evidence, and . . . not disclose to others the existence of the investigation." In response to the concerns that Chief Stott expressed to Commissioner Squires, SBI conducted a detailed and sealed criminal investigation. In light of the ongoing criminal investigation and the Secrecy Orders, Chief Stott could not conduct anything other than a privileged investigation through BYU's lawyers, which the court authorized. At the conclusion of the SBI investigation, in which BYU fully cooperated, the Utah Office of the Attorney General ("AG") declined to bring any criminal charges. Moreover, we understand that the findings of that investigation were reported to POST. These investigations resulted in Lt. Rhoades being disciplined by BYU for departures from BYU's own internal policies, and later relinquishing his POST certification.

Second, BYU properly responded to and complied with numerous subpoenas issued by DPS, including a subpoena issued by the POST Investigations Bureau in connection with the POST investigation. BYU has produced thousands of pages of documents and made numerous witnesses available, and DPS (including SBI and POST) have had access to the documents and testimony. In responding to the specific POST subpoena of June 28, 2018, identified in the Notice, BYU properly responded with a Utah Rule of Civil Procedure 45(e)(3)(D) objection, based on the attorney-client privilege and compliance with the Secrecy Orders entered at the request of the State of Utah. DPS took no legal action to contest BYU's legally valid objection.

Further, in asserting this unprecedented agency action, DPS has acted outside the scope of its authority and has violated BYU's rights in numerous ways, as outlined herein. The statutes and regulations relied upon by the Commissioner do not give DPS the authority to decertify an entire police agency for the acts or omissions of a single officer. Also, DPS is violating BYU's right to due

process and equal protection by, among other things, unlawfully treating BYU differently from the law enforcement agencies at other universities. DPS also publicly released documents and information subject to state-court secrecy orders and the protections of the Government Records Access and Management Act ("GRAMA"), the same statute that DPS accused Lt. Rhoades of violating. DPS's attempt to decertify University Police for the repeatedly investigated, fully resolved, noncriminal conduct of one officer is not supported by the law or the facts and constitutes an abuse of discretion. By DPS's own admission, this action is unprecedented. This letter sets forth the factual history of what led to the Notice, how BYU has been forthcoming with DPS and public officials to the fullest extent required by law, and why the Notice should be withdrawn.

III. Statement of Facts

A. Overview of University Police and Relevant Policies

University Police was established in 1952 and has been a certified law enforcement agency for nearly forty years. During its entire existence, University Police has protected students, employees, and visitors without public funding, and at considerable expense to BYU. Currently, BYU employs more than forty full-time employees that make up University Police, including forty certified law enforcement officers (thirty full-time and ten part-time), as well as hundreds of part-time student employees. University Police has never received any formal or informal sanction from DPS.

As a matter of policy and practice, University Police enforces only public laws and does not enforce BYU's Honor Code, which sets forth the standards of conduct by which BYU students and employees agree to abide. By policy and practice, University Police does not enforce any university policy, unless it is within the scope of a public law.¹ University Police policy also prohibits officers from accessing or disseminating files or data from restricted criminal justice databases for non-public safety / non-law enforcement purposes.²

Independent of these restrictions, and consistent with the policies and practices of numerous colleges and universities whose campus police share information with their internal campus units,³

¹ University Police Policies & Procedures § 76, *Enforcement of University Policies*.

² University Police Policies & Procedures § 93, *Records Access, Release, and Retention*.

³ See, e.g., **University of Utah**, [Student Behavioral Misconduct Process](#) (listing "Police / Dept. of Public Safety" as a "complaint source" for student conduct issues handled by the Dean of Students' Student Affairs Office); **Utah State University**, [Student Conduct Self-Assessment](#) (noting that, at USU, "[m]ost [student] conduct issues are provided by campus police" and seeking to improve "communication and reporting" and "to establish regular meetings" between the Office of Student Conduct and Campus Police); **Utah Valley University**, [Student Rights and Responsibilities Code](#) ("Behavior that violates the Student Rights and Responsibilities Code shall be reported to Campus Police and/or the Office of Student Life."); see also, e.g., **Buffalo State (SUNY)**, [Student Conduct Process](#) ("Conduct or behavior that appears to violate the Code will result in a written report from the University Police Department, Residence Life, or any member of the Campus Community, including fellow students."); **Fairfield University**, [Student Conduct Code](#) ("Students cited and/or arrested for criminal offenses (misdemeanor or felony) will be referred to the Office of the Dean of Students."); **Marquette University**, [Student Conduct Procedures](#) ("In most cases an incident report will be filed by a Marquette University Police Department officer, another university staff member or a student. After an incident report is filed, it will be referred to a student conduct administrator."); **Northern Illinois University**, [Department of Police and Public Safety, Student Conduct](#) ("[T]he NIU Police Department has several ways to address behavior that disrupts the normal learning environment. A partnership with NIU's Student Conduct provides another mechanism to hold NIU students accountable regardless of where they are."); **Ohio State University**, [Student Conduct, Complaint](#) ("The Ohio State Police Division and the Columbus Division of Police often send reports to our [O]ffice [of Student Life] when they

University Police may respond to and share information with other BYU campus units in situations involving public safety, like a suicide threat, or enforcement of criminal laws.⁴ Further, as is true at other universities, University Police are considered “responsible employees” under Title IX, and therefore federal law requires University Police officers to report incidents of unlawful sexual misconduct to the university’s Title IX coordinator.⁵ University Police also perform critical information-sharing functions in fulfilling reporting obligations under other federal laws, including the Clery Act and the Drug Free Schools Act. Thus, in many instances, sharing information among campus police and other campus units is entirely appropriate and often required by law.

University Police also has a longstanding policy of voluntarily responding to public records requests, similar to GRAMA, even though BYU is not currently subject to public records laws.⁶ BYU has regularly provided public law enforcement records in response to records requests from media outlets and others. Nonetheless, as is consistent with the practice at other universities, and in following the standards set forth in GRAMA, BYU denies records requests that seek disclosure of private or protected records, such as attorney-client privileged records and other internal communications among university officials on non-law enforcement related matters.

B. Conduct at Issue and BYU’s Request for an Investigation

In the spring of 2016, University Police Chief Larry Stott learned of allegations that one of his officers, Lt. Aaron Rhoades, had accessed and disclosed to BYU’s Honor Code Office information from a shared law enforcement database, known as Spillman, which is accessible by participating law enforcement agencies in Utah County. Chief Stott approached his colleague, Utah County Sheriff Jim Tracy, about conducting an outside inquiry or investigation into these allegations. However, Sheriff Tracy declined, as one of his deputies had been accused of similar misconduct.⁷ Nonetheless, Sheriff Tracy recommended that Chief Stott contact DPS Commissioner Keith Squires to conduct an appropriate audit or investigation.

On or around May 25, 2016, Chief Stott convened a meeting on BYU’s campus, which was attended by Chief Stott, Commissioner Squires, Sheriff Tracy, Provo Police Chief John King, BYU Lt.

encounter students whose conduct may have violated the law, the Code [of Student Conduct,] or both.”); **Richmond University**, [Student Conduct Council Hearing Procedures](#) (“In the process of conducting an investigation or assessing whether a formal charge is warranted, the Conduct Officer or the Vice President for Student Development, at his or her sole discretion, may seek the advice and counsel of . . . University Police . . .”); **University of Texas, Austin**, [Conduct Processes and Procedures](#) (“Student Conduct and Academic Integrity routinely receives reports (referrals) of alleged violations of university rules from campus offices (e.g., University of Texas Police Department . . .”).

⁴ University Police Policies & Procedures § 93, *supra* note 2.

⁵ Office for Civil Rights, US Dep’t of Educ., Revised Sexual Harassment Guidance, 66 Fed. Reg. 5512 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁶ University Police Policies & Procedures § 76, *supra* note 1. With BYU’s full support, the Utah Legislature recently passed SB 197 that will officially subject University Police to GRAMA and also provide government immunity to University Police’s officers. See <https://le.utah.gov/~2019/bills/static/SB0197.html>. SB 197 awaits the Governor’s signature.

⁷ Utah County Sheriff’s officer, Edwin Randolph, was alleged to have been involved in the very same information transaction that was at issue with Lt. Rhoades. In fact, if called to testify at the hearing in this matter, BYU Honor Code personnel are expected to testify that it was actually Randolph who first contacted the BYU Honor Code Office about the specific matter, and that Randolph, within three days of his initial contact, provided the BYU Honor Code Office with the complete Provo Police report at issue. Lt. Rhoades was alleged to have verified over the phone the existence and details of the report. Just like Lt. Rhoades, Randolph retired and relinquished his POST certification.

Chris Autry, and two investigators from SBI. During the meeting, Chief Stott specifically discussed the allegations about Lt. Rhoades and requested that DPS conduct an audit—or more appropriately, an investigation—into any alleged improper access or dissemination by University Police of information from law enforcement records in Spillman or in other restricted criminal databases. At the time, Chief Stott did not believe that the alleged access and dissemination by Lt. Rhoades rose to the level of criminal misconduct. Subsequently, Chief Stott learned that SBI had initiated a criminal investigation into the conduct reported by him in the meeting with Commissioner Squires.

C. Secrecy Orders and Subpoenas

Beginning in July 2016, Secrecy Orders were entered at the request of the State of Utah in connection with the criminal investigation into the alleged misconduct of Lt. Rhoades. Those Secrecy Orders, entered at the request of the State of Utah, remain in place. Among other things, the Secrecy Orders prohibit disclosure of any testimony or evidence in connection with the relevant criminal investigation. By statute, the purpose of secrecy orders is to prevent disclosure of “information that, if disclosed, would pose: (i) a substantial risk of harm to a person’s safety; (ii) a clearly unwarranted invasion of or harm to a person’s reputation or privacy; or (iii) a serious impediment to the investigation.” Utah Code § 77-22-2(7)(c).

In conjunction with the Secrecy Orders, pursuant to the same Utah statute and as authorized by a court, the AG’s office also served subpoenas commanding BYU and certain BYU employees to provide testimony and evidence in aid of the criminal investigation. The first of these subpoenas is dated July 7, 2016. BYU itself received two subpoenas duces tecum, the first of which is dated August 25, 2016, and which commanded BYU to produce various documents. During the investigation, separate subpoenas were served on ten different current or former BYU employees, including Chief Stott. Each of the subpoenas contains the following statement in bold lettering:

The Court has ordered that the [subpoena] be held in secret, that you not disclose to others that you have received a subpoena, that you not disclose to others the substance of your testimony or evidence, and that you not disclose to others the existence of the investigation. Nothing in the secrecy order infringes upon the attorney-client relationship between you and your attorney, or any other legally recognized relationship. If you violate the secrecy order, a copy of which is attached, you may be held in contempt of court.

The Secrecy Orders and the subpoenas served on BYU, Chief Stott, and others prohibited any disclosure of testimony or evidence relevant to the investigation, including but not limited to various documents gathered and used in connection with the investigation. Thus, even if BYU or Chief Stott wanted to interview witnesses, gather documents, or conduct their own investigation, the Secrecy Orders and the subpoenas legally prevented them from doing so unless authorized by the court.⁸

⁸ At BYU’s request, and as stipulated to by the AG’s office, BYU was recently authorized to disclose the existence of the investigation, the Secrecy Orders, the subpoenas, and the substance of certain other limited documents and information previously restricted under the Secrecy Orders. This disclosure is necessary to afford BYU its due process rights to defend itself against DPS’s decertification effort against University Police and to respond to information publicly released by DPS. This letter is carefully tailored to comply with the existing Secrecy Orders.

D. SBI's Criminal Investigation of Lt. Rhoades

According to a protected report that DPS recently released ("POST Investigative Report"),⁹ SBI began its investigation of Lt. Rhoades on May 25, 2016, the same day that Chief Stott requested an investigation into alleged improper access and dissemination of criminal justice information. On June 30, 2016, in-house counsel for BYU received a call from the AG's office providing notice of a "highly sensitive" investigation related to the Honor Code and Title IX. The AG's office did not reveal the target of the investigation or the alleged violations, and, when BYU first received subpoenas and the corresponding Secrecy Orders, it suspected that the criminal investigation involved the conduct of Lt. Rhoades, but it did not know for certain. To protect BYU's rights and to obtain legal advice in connection with the investigation, BYU retained outside counsel, and Lt. Rhoades retained separate counsel.

SBI's criminal investigation lasted almost two years. During that period, BYU fully cooperated with the investigation, making numerous witnesses available for interviews and producing thousands of pages of documents. As part of the investigation, the AG's office alleged that Lt. Rhoades had violated a criminal provision of GRAMA that makes it a Class B misdemeanor for a "person who has lawful access to any private, controlled, or protected record under [GRAMA]" to "*intentionally* disclose[], provide[] a copy of, or improperly use[] a private, controlled, or protected record *knowing* that the disclosure or use is prohibited by [GRAMA]." Utah Code § 63G-2-801(1)(a) (emphasis added) (hereafter "GRAMA Criminal Statute"). Neither the AG's office nor SBI ever indicated that any other criminal violation was part of the investigation, and BYU understood that the SBI investigation covered all possible criminal violations arising from Lt. Rhoades's alleged improper access to and use of criminal justice databases.

In response to the criminal investigation, BYU and Lt. Rhoades asserted that he could not have violated the GRAMA Criminal Statute because the AG's office, the Utah Division of Archives and Records Service ("UDARS"), and the State Records Committee ("SRC") had all taken the position that GRAMA does not apply to BYU. For example, in connection with separate litigation (not covered by any secrecy orders), Rachel Gifford, a records analyst for UDARS, signed an affidavit stating that, because BYU "is a private university[,] . . . UDARS has taken the position that neither BYU nor any of its departments, including University Police, is a governmental entity subject to GRAMA."¹⁰ Because all of the relevant state agencies had said that GRAMA did not apply to BYU or University Police, Lt. Rhoades could not have acted "knowing" that his disclosure or use was prohibited by GRAMA.

On April 7, 2017, counsel for BYU wrote a letter to AG attorneys pointing out that the AG's office was simultaneously taking the position that GRAMA did not apply to BYU while considering filing criminal charges against an employee of BYU for violation of the GRAMA Criminal Statute.¹¹ Counsel for BYU also pointed out in that letter, among other things, that (1) the GRAMA Criminal Statute required intentional disclosure or improper use and knowledge that the behavior was

⁹ Sgt. Jeremy Barnes, POST Investigations Bureau, Investigative Report, Case No. 18-065 (Dec. 10, 2018) (labeled PROTECTED DOCUMENT – DO NOT DUPLICATE OR DISSEMINATE), https://dpsnews.utah.gov/wp-content/uploads/sites/37/2019/02/POST-Investigation_Redacted.pdf (published by DPS on Feb. 26, 2018).

¹⁰ July 31, 2017 Affidavit of Rachel Giffords.

¹¹ April 7, 2017 Letter from Rodney Snow to Gregory Ferbrache and Russell Smith.

unlawful; (2) many of the communications at issue contained only publicly available information; (3) the records at issue had not been designated as private or protected under GRAMA; (4) violation of an internal policy is different from a knowing violation of a criminal statute. Thus, BYU explained, Lt. Rhoades's actions could not have risen to the level of criminal misconduct.

Ultimately, SBI screened criminal charges with the AG's office, which declined to prosecute Lt. Rhoades. In a letter to Lt. Ryan Van Fleet of SBI, dated March 7, 2018, Craig Barlow, Criminal Deputy Attorney in the Justice Division of the AG's office, wrote that "[a] select panel of experienced Justice Division prosecutors independently assessed the [SBI] investigator's case," and that "each agreed independently and collaboratively that this case lacks a reasonable likelihood of conviction."¹² Thus, prosecutors declined to take the case. BYU reasonably relied on these statements in connection with its communications with DPS and in its own internal investigation.

E. BYU's Internal Investigation and Discipline of Lt. Rhoades

Originally, the prohibitions in the Secrecy Orders and subpoenas precluded BYU from participating in or conducting its own investigation into the alleged misconduct of Lt. Rhoades. To help respond to and participate in the criminal investigation of Lt. Rhoades, BYU retained outside counsel, Rod Snow. Initially, Mr. Snow approached attorneys in the AG's office, seeking a clarification or stipulation to allow BYU to internally investigate the facts, so that Mr. Snow could advise BYU. In the fall of 2016, attorneys from the AG's office refused to stipulate that Mr. Snow, on BYU's behalf, could conduct an internal, even a privileged, investigation. Faced with this dilemma, Mr. Snow approached the court that had entered the secrecy orders and asked for guidance. In November 2016, the court entered an amended secrecy order allowing Snow to interview witnesses and discuss findings with the BYU Office of the General Counsel ("OGC").

Consistent with the court's authorization, and without waiving the attorney-client privilege, BYU was then able to conduct a parallel, internal, and privileged investigation into Lt. Rhoades's alleged misconduct. As part of that investigation, thousands of pages of documents were reviewed and numerous witnesses were interviewed, including Chief Stott, Lt. Rhoades, and various other BYU employees. BYU's outside counsel also was allowed to sit in on interviews of witnesses in SBI's criminal investigation.

The criminal investigation concluded without any finding that Lt. Rhoades's actions violated the law. Nonetheless, because Lt. Rhoades's conduct violated University Police policy, and by agreement with the AG's office, BYU disciplined Lt. Rhoades by removing his access to criminal justice databases and prohibiting him from having any involvement in Honor Code matters.¹³ This action was consistent with the expressed desire of the AG's office to impose such discipline, which the AG's office represented to BYU as sufficient to resolve the matter.¹⁴ BYU also made other changes within University Police in an effort to prevent improper access to and dissemination of private information from law enforcement records.

¹² March 7, 2018 Letter from Craig Barlow to Lt. Ryan Van Fleet, attached as **Exhibit 1**.

¹³ See various January 2018 letters documenting BYU's discipline of Lt. Rhoades.

¹⁴ See draft settlement agreement between BYU and the State of Utah.

F. POST Investigation of Lt. Rhoades

Despite the conclusion of the criminal investigation in early 2018 and the lack of any criminal misconduct that could be prosecuted, DPS referred the matter to POST for further investigation and possible decertification of Lt. Rhoades. According to the POST Investigative Report released by DPS, SBI contacted POST on or about April 18, 2018, roughly one month after the AG's office had declined to prosecute, and informed POST that "SBI had completed a criminal investigation regarding Lt. Rhoades's unlawful use of Spillman *and* UCJIS records."¹⁵ The term UCJIS refers to the Utah Criminal Justice Information System, which is maintained by the Bureau of Criminal Identification ("BCI"), which is part of the Criminal Investigations and Technical Services Division ("CITSD"), which is a division of DPS.¹⁶ The Post Investigative Report also reveals that POST was aware that the SBI investigator had screened criminal charges with prosecutors, who "declined to file charges."¹⁷ Still, as outlined below, POST pursued its own investigation into alleged criminal misconduct of Lt. Rhoades and BYU's response to such misconduct. POST's investigation was therefore the second DPS investigation into Lt. Rhoades's alleged misconduct.

According to the POST Investigative Report, the focus of the POST investigation was an alleged criminal violation of Utah Code § 53-10-108(12)(a), which makes it "a Class B misdemeanor for a person to *knowingly* or *intentionally* access, use, disclose, or disseminate a record created, maintained, or to which access is granted by [CITSD] or any information contained in a record created, maintained, or to which access is granted by the [CITSD] for a purpose prohibited or not permitted by statute, rule, regulation, or policy of a governmental entity" (hereafter the "BCI Criminal Statute"). Because UCJIS is a records database administered by BCI,¹⁸ which is part of CITSD,¹⁹ presumably the focus of the POST investigation was Lt. Rhoades's access to and use of UCJIS. Thus, although the SBI investigation examined alleged misconduct related to *both* Spillman *and* UCJIS (and presumably any possible criminal violations resulting therefrom), the focus of the POST investigation appears to have been alleged misconduct related only to UCJIS.

On June 4, 2018, POST investigator Camille Zabriskie sent Chief Stott a GRAMA request asking that BYU provide "all records regarding the internal administrative and criminal investigations involving [Lt. Rhoades]."²⁰ In a written response, Stephen Craig, in-house counsel for BYU, reminded Ms. Zabriskie that multiple state agencies had taken the position that BYU is not subject to GRAMA.²¹ Mr. Craig also indicated that "University Police is anxious to cooperate in any appropriate action or investigation initiated by POST" and that "[t]here may be appropriate avenues outside of GRAMA for gathering information."²² Then, on June 26, 2018, Ms. Zabriskie issued a subpoena duces tecum to "Brigham Young University Police Department, Attn: Chief Larry Stott," commanding production of

¹⁵ POST Investigative Report, *supra* note 9 (emphasis added).

¹⁶ Utah Code § 53-10-103 (creating CITSD as a division of DPS); *id.* § 53-10-201 (creating BCI as part of CITSD).

¹⁷ POST Investigative Report, *supra* note 9.

¹⁸ *See* Utah Admin. Code R.722-900-4 (outlining rules by which BCI grants access to UCJIS).

¹⁹ *See supra* note 14.

²⁰ June 4, 2018 GRAMA Request for Records from Camille Zabriskie to Chief Larry Stott.

²¹ June 20, 2018 Letter from Stephen Craig to Camille Zabriskie.

²² *Id.*

“all information regarding the background and history on the internal administrative investigations involving: Aaron Rhoades as requested by [POST].”

Shortly after BYU received the POST subpoena, on June 29, 2018, and unbeknownst to BYU, “POST received a copy of the SBI investigation for review.”²³ Thus, on information and belief, POST had full access to all of the same investigation materials that SBI had during its investigation, including notes or transcripts of witness interviews and thousands of pages of documents already provided by BYU.

On July 6, 2018, BYU's outside counsel, James Jardine, sent a letter to AG attorney Lynda Viti, in which BYU objected to the POST subpoena, on grounds that that the subpoena would require BYU to disclose privileged or other protected information, in violation of Rule 45(e)(3)(D) of the Utah Rules of Civil Procedure.²⁴ Complying with POST's subpoena would have required BYU not only to waive the attorney-client privilege related to BYU's privileged internal investigation, but also to violate the Secrecy Orders that had been entered at the request of the State of Utah.²⁵

Disregarding BYU's objections, Ms. Viti raised a different issue. In an email on July 31, 2018, Ms. Viti sought confirmation that “BYU did not conduct an investigation into its own police officer, Aaron Rhoades, for misuse of BCI information or any other violations relating to improperly accessing or sharing BCI information.”²⁶ In an email response on August 1, 2018, Mr. Jardine reiterated that “the only internal administrative investigation relating to the subject of the POST investigation was done in connection with responding to the criminal investigation undertaken by the [AG's] office and was done by and under the supervision of counsel.”²⁷ As outlined above, BYU's counsel had conducted an internal, parallel, privileged investigation into the conduct at issue. Thus, “all but a very few documents that would be responsive to the subpoena are subject to the attorney-client privilege.”²⁸ Also, without directly referencing the existence of the Secrecy Orders (the very existence of which were subject to secrecy constraints), Mr. Jardine emphasized the fact that “restrictions relating to the [AG's] office criminal investigation prevent BYU from producing responsive documents that are not subject to the attorney-client privilege” and that BYU “would be glad” to work with the different divisions of the AG's office “to take the necessary steps for [POST] to receive those documents.”²⁹

In an email reply on August 3, 2018, Ms. Viti acknowledged that she was aware of a secrecy order, but stated that POST would like to move forward with its investigation and that she would be filing a motion to compel BYU to produce the requested documents.³⁰ Mr. Jardine responded, agreeing that a motion to compel would be the appropriate way for Ms. Viti to proceed, and he

²³ POST Investigative Report, *supra* note 9.

²⁴ July 6, 2018 Letter from James Jardine to Lynda Viti.

²⁵ Pursuant to statute, the Secrecy Orders did not prevent SBI or the AG's attorneys from “disclosing information obtained [in the criminal investigation] for the purpose of furthering any official government investigation.” Utah Code § 77-22-2(6)(c). Thus, POST easily could have obtained (and apparently already had obtained) the entire investigation file from SBI.

²⁶ July 31, 2018 Email from Lynda Viti to James Jardine.

²⁷ August 1, 2018 Email from James Jardine to Lynda Viti.

²⁸ *Id.*

²⁹ *Id.*

³⁰ August 3, 2018 Email from Lynda Viti to James Jardine.

invited Ms. Viti to collaborate with the AG attorneys from the criminal matter and welcomed the opportunity to seek guidance from the court that issued the Secrecy Orders.³¹ Neither Ms. Viti nor any other AG attorney ever filed a motion to compel. (Under Utah Rule of Civil Procedure 45(e)(5), such a motion is required in order to compel an objecting party to comply with a subpoena.) Instead, Ms. Viti sent another email on August 16, 2018, inquiring whether “an investigation also [was] conducted by the BYU PD chief (or a designee) when he was made aware of an allegation that Aaron Rhoades had improperly accessed BCI information.”³²

In a final email to Lynda Viti on August 28, 2018, Mr. Jardine explained that (1) no criminal conduct occurred that would have required such an investigation; (2) Chief Stott did request that the DPS Commissioner conduct an investigation into Rhoades's conduct and an investigation was in fact conducted; and (3) BYU conducted an internal, privileged investigation led by counsel. Ms. Viti never responded to Mr. Jardine's email and never pursued appropriate legal process to compel BYU to respond further to the subpoena. However, prior to the Notice of decertification issued by Commissioner Anderson, BYU produced the limited set of non-privileged documents, which related to the internal discipline of Lt. Rhoades.³³

While the POST investigation was pending, Lt. Rhoades decided to retire from BYU. He entered into a retirement agreement with BYU on August 31, 2018.³⁴ Rhoades's final day of employment with BYU was on September 30, 2018. On October 9, 2018, interim Chief of University Police Chris Autry and BYU Deputy General Counsel Steve Sandberg met with Scott Stephenson (POST Director), Kelly Sparks (POST Deputy Director), Alex Garcia (POST Bureau Chief), and Ms. Viti (AG attorney) to request guidance on the internal structure of University Police. The discussion included the status of the POST investigation. During the meeting, Mr. Sandberg tried to explain, without violating the Secrecy Orders, that Chief Stott was prevented from doing an investigation, which tied BYU's hands with respect to the POST subpoena. During the conversation, Mr. Sparks also commented to Chief Autry that POST “had never disciplined a chief for not initiating an investigation,” and Mr. Garcia appeared to nod in agreement. Also, when asked what would happen if Lt. Rhoades relinquished his certification, Mr. Stephenson said the POST investigation would be “over” and “done” and that POST would have no reason to pursue the issue further because Rhoades would not have any way to represent POST or the profession. BYU communicated these comments to counsel for Lt. Rhoades after the meeting.

Also, on October 9, 2018, the Salt Lake Tribune reported that, in response to questions about the resolution of the investigation, Ric Cantrell, the AG's chief of staff, declared that “changes were made within [University Police] in connection with the records-sharing issue,” and that “[w]e are satisfied that the structure that allowed this to happen *has been remedied*.”³⁵

On October 17, 2018, Chief Autry confirmed with Mr. Garcia that Chief Stott had not personally initiated his own internal affairs investigation into Lt. Rhoades. That information was

³¹ August 6, 2018 Email from James Jardine to Lynda Viti.

³² August 16, 2018 Email from Lynda Viti to James Jardine.

³³ February 12, 2019 Letter from James Jardine to Lynda Viti.

³⁴ August 31, 2018 Retirement Agreement between Aaron Rhoades and BYU.

³⁵ Jessica Miller, *Utah Lawmaker Says BYU Police Should Be as Transparent as Other Departments, Will Push Legislation* (Oct. 9, 2018) (emphasis added), <https://www.sltrib.com/news/2018/10/09/utah-senator-says-byu/>.

consistent with BYU's explanation that (1) Chief Stott requested that DPS investigate these issues, which led to two separate investigations from DPS; (2) Chief Stott was prohibited by the Secrecy Orders and the subpoenas from conducting his own personal internal affairs investigation; and (3) upon court authorization, counsel for BYU conducted an internal, privileged investigation into Rhoades's conduct.

On October 25, 2018, Rhoades voluntarily relinquished his POST certification.³⁶ The POST investigation formally concluded on November 15, 2018, when POST accepted Rhoades's relinquishment of his certification.³⁷ After two lengthy DPS investigations, and after various remedial measures had been implemented, and after the AG's office considered the issues to be "remedied," BYU believed that the conduct at issue had been resolved to POST's satisfaction.

G. BYU's Support for Transparency and Applying GRAMA to University Police

As the SBI investigation drew to a close, AG attorneys and other government officials requested BYU's collaboration in proposing legislation to amend GRAMA to apply to University Police. As described below, even before that request, BYU was already working on this amendment to GRAMA. Therefore, contrary to some media reports, BYU has not "changed" its position on whether University Police should be subject to GRAMA as a matter of policy. However, the plain language of the current version of GRAMA, and the position taken by UDARS, the SRC and the AG's office, establish that University Police is not subject to GRAMA. Once again, University Police's longstanding policy is to follow GRAMA principles in responding to public records requests, and it has provided numerous law enforcement records in response to requests from the media and others.

Throughout this process, BYU representatives met with numerous government officials to discuss amending GRAMA itself and/or DPS rules to make University Police subject to GRAMA. The recent passage of SB 197 was the result of cooperative efforts among BYU, legislators, the AG's office, and media outlets.³⁸ In June 2017, attorneys from BYU OGC met with representatives from the Governor's staff to discuss possible legislation to make University Police subject to GRAMA. On October 4, 2017, Mr. Sandberg sent an email to AG attorneys in both the civil and criminal divisions, expressing BYU's desire not to take any action that impedes the criminal investigation of Lt. Rhoades and pursue an effort to clarify, via administrative rule or statute, that BYU will produce law enforcement records.³⁹

In early 2018, Mr. Sandberg met with AG's office representatives and attorneys to discuss the process for a bill that would amend GRAMA and the Governmental Immunity Act of Utah to cover University Police, and which would also make conforming changes to the Public Safety Code. BYU attorneys then began meeting with AG attorneys assigned to DPS to create a draft bill that could be supported by BYU, DPS, and the AG's office. BYU's attorneys told the AG attorneys

³⁶ October 25, 2018 Relinquishment of POST Certification from Aaron Rhoades.

³⁷ November 15, 2018 Acceptance of Relinquishment of POST Certification.

³⁸ Moreover, BYU's position in litigation with the Salt Lake Tribune and others on these issues is a valid legal response to efforts to obtain private, internal records of BYU, which are unrelated to law enforcement. The Salt Lake Tribune and others have downplayed the fact that University Police provided numerous law enforcement records in response to requests for public records requests.

³⁹ October 4, 2017 Email from Steve Sandberg to Mark Burns, and copying Mike Orme, Spencer Austin, Gregory Ferbrache, Russell Smith, Jim Jardine, Rodney Snow, and Sam Alba.

representing DPS that BYU would support the addition of GRAMA compliance to the listed certification requirements in DPS administrative rules.⁴⁰ Additionally, or in the alternative, BYU would support DPS's and the AG's efforts to have the legislature pass a bill that would apply GRAMA to University Police, to be effective at a future date. As expressed by BYU university counsel Heather Gunnarson and by Chief Autry at legislative public hearings in February 2019 in the Utah Senate and in March 2019 in the Utah House of Representatives, BYU believes in and supports transparency and accountability for University Police.

H. Communications Leading to the Notice of Intent to Decertify

Notwithstanding years of BYU's cooperation and collaboration with DPS and the AG's office, Jess Anderson, Utah's new Commissioner of Public Safety, initiated the extraordinary action of seeking to decertify BYU's entire police force. On January 3, 2019, Commissioner Anderson, met with BYU's now formally appointed police chief, Chris Autry, at DPS headquarters. During that meeting, Commissioner Anderson delivered to Chief Autry a decertification warning letter, dated December 19, 2018 ("Warning Letter").⁴¹ Before accepting the letter, Chief Autry asked if the parties could work out any issues that had arisen. Commissioner Anderson responded, "We are way beyond dialogue now," and handed Chief Autry the letter.

In the Warning Letter, Commissioner Anderson demanded that BYU "permit and facilitate DPS access to all records, personnel and electronic data deemed necessary by DPS to conduct an investigation of BYU PD to assess: (a) [BCI/UCJIS] access and use by BYU personnel and compliance with [the BCI Criminal Statute]; (b) The powers, authority, and limitations of the Chief of BYU PD and BYU PD officers; and (c) The command structure of the BYU PD." The Warning Letter further demanded that BYU comply with all POST subpoenas and that Commissioner Anderson expected BYU to comply with GRAMA, despite BYU's pending appeal on whether BYU was subject to GRAMA at all. The Warning Letter gave University Police until February 22, 2019, to comply with these conditions or face decertification.

Significantly, nowhere in the Warning Letter did Commissioner Anderson assert or otherwise reference that Chief Stott, Chief Autry, or anyone at BYU failed to conduct an internal investigation into the behavior of any University Police officer. Nor did the Warning Letter refer to the prior POST investigation of Aaron Rhoades or to any particular subpoena to which BYU had allegedly failed to properly respond.⁴² Nonetheless, DPS appeared to be using the threat of decertification in order to conduct a *third*, even more expansive, inquiry into alleged misconduct related to access and dissemination of records by Lt. Rhoades.

On January 7, 2019, Chief Autry responded to the Warning Letter by sending Commissioner Anderson a letter addressing the demands. In that letter, Chief Autry reminded Commissioner Anderson that Chief Stott had invited DPS to conduct an investigation and that there had already been an "entirely separate process" looking into these issues. Chief Autry also indicated that he was "pleased to facilitate access to all records, personnel and electronic data [that POST] investigators deem necessary to conduct an investigation to assess" the three areas outlined in the Warning Letter.

⁴⁰ Utah Admin. Code R.698-4-4.

⁴¹ December 19, 2018 Letter from Commissioner Jess Anderson to Chief Chris Autry (not delivered until January 3, 2019).

⁴² *Id.*

Chief Autry further commented that, while the State of Utah had never taken the position that University Police was subject to GRAMA, BYU had been working with DPS lawyers and the legislature to amend GRAMA (or DPS rules) so that GRAMA was applicable to University Police going forward, and that Chief Autry welcomed such a change and committed to follow GRAMA. Finally, Chief Autry invited collaboration between DPS and University Police on processing GRAMA requests, the structure of University Police, and protocols for record handling.⁴³

On January 30, 2019, Chief Autry called Commissioner Anderson, who expressed concern that Chief Autry's response on January 7, 2019, had not adequately addressed the issue raised in the Warning Letter about compliance with POST subpoenas. Chief Autry verbally apologized and reiterated that BYU would comply with subpoenas, and Commissioner Anderson told Chief Autry what he needed to write back to properly respond. On February 4, 2019, Chief Autry sent a follow-up letter to Commissioner Anderson and reiterated that University Police would take "all necessary steps" to be in compliance with POST subpoenas and POST investigations, unless BYU were prevented from doing so by a court order.⁴⁴ That same day, the court that had entered the Secrecy Orders authorized—for the first time—disclosure of their existence, and Chief Autry was able to inform Commissioner Anderson that the Secrecy Orders had prevented BYU from producing documents in response to the prior POST subpoena. BYU also produced a handful of documents that were not attorney-client privileged and that were not subject to the Secrecy Orders. Finally, Chief Autry expressed his desire for "a mutually open and trusted relationship of cooperation, understanding, and assistance," and invited Commissioner Anderson to reach out if he had "any concerns related to University Police or [its] compliance with any POST requirements or DPS rules."

After sending the second letter reiterating and emphasizing BYU's cooperation with DPS, Chief Autry again did not hear back from the Commissioner or DPS. On February 8, 2019, Chief Autry sent a text message to Commissioner Anderson, stating: "Hey just making sure that you got the letter and that [i]t is acceptable. Feb. 22 is coming quick." Again, Chief Autry heard nothing back. On February 12, 2019, Chief Autry followed up again, this time by email, once again committing to provide any other documents, information, or other assistance necessary, and asking the Commissioner to let Chief Autry know if the Commissioner believed University Police had not fully complied with the demands in his Warning Letter. Finally, Commissioner Anderson sent an email response, stating that he had received Chief Autry's letters, that the Commissioner was "giving them proper consideration," that "there [was] nothing more that [he was] in need of," and that his "decision will be forthcoming."

At 9:30 p.m. on February 20, 2019, two days before the deadline given in the Warning Letter, Commissioner Anderson texted Chief Autry to let him know that he had sent a letter to BYU President Kevin Worthen and noted that, "it is not good for you." BYU did not receive the Notice—dated February 20, 2019—until February 25, 2019. On February 26, 2019, just as various media outlets were reporting the Notice, DPS publicly announced its intent to decertify University Police and publicly released Commissioner Anderson's Warning Letter and the Notice. DPS did not release Chief Autry's response letters promising cooperation. DPS did, however, release various other documents, including

⁴³ January 7, 2019 Letter from Chief Chris Autry to Commissioner Jess Anderson, attached as **Exhibit 2**. This letter incorrectly references September 1, 2016 as the original meeting date between Chief Stott and Commissioner Squires. That meeting actually occurred on or around May 25, 2016.

⁴⁴ February 4, 2019 Letter from Chief Chris Autry to Commissioner Jess Anderson, attached as **Exhibit 3**.

the POST Investigative Report of the POST investigation, which redacted some information, but disclosed various nonpublic details of both the SBI criminal investigation and the POST investigation.

IV. Statement Summarizing the Reasons the Notice Is Invalid and Must Be Withdrawn

The Commissioner seeks to decertify University Police pursuant to Utah Admin. Code R.698-4-5(1). Specifically, the Commissioner alleges a “failure to meet the certification criteria set forth in [Utah Admin. Code R.698-4-4],” and points to the requirement that University Police officers “shall be subject to all of the requirements of Title 53, Chapter 6, part 2.” Specifically, the Commissioner alleges that University Police (1) failed to conduct an investigation into allegations of misconduct by Lt. Rhoades and to report to POST allegations found to true; and (2) failed to respond to the June 28, 2018, subpoena issued by POST. Respectfully, neither of these alleged grounds for decertification have any basis in law or fact, and the Notice should be withdrawn.

A. BYU Did Not Fail to Conduct an Investigation or to Report Misconduct.

As the first ground for decertification, the Notice cites Utah Code § 53-6-211(6), which requires that “[a] chief, sheriff, or administrative officer of a law enforcement agency who is made aware of an allegation against a peace officer employed by that agency that involves conduct in violation of Subsection (1) shall investigate the allegation and report to [POST] if the allegation is found to be true.” To BYU’s knowledge, the only allegation of misconduct listed in Subsection (1) against an officer of University Police was the alleged criminal misconduct of Lt. Rhoades in violation of Subsection (1)(d) of the same statute, which prohibits a certified peace officer from “engag[ing] in conduct which is a state or federal criminal offense, but not including a traffic offense that is a class C misdemeanor or infraction.” Utah Code § 53-6-211(1)(d). As outlined below, University Police did not fail to conduct an investigation or fail to report allegations found to be true to POST.

1. *BYU asked for and DPS investigated alleged criminal misconduct.*

Upon becoming aware of the allegations, Chief Stott affirmatively sought out and asked DPS Commissioner Squires to conduct an investigation. Based on the facts at issue, Chief Stott appropriately sought the assistance of the highest ranking law enforcement officer in the State of Utah to conduct, lead, or direct that investigation.

According to DPS’s own records, Commissioner Squires accepted Chief Stott’s invitation, albeit not as an administrative audit but as a criminal investigation, and directed that SBI—the state’s preeminent law enforcement investigative unit—conduct an investigation. SBI’s stated objective is to “conduct professional investigations” that are “complete, thorough, detailed and factually based” and “that meet the highest standards of our profession.”⁴⁵ The very day that Chief Stott made the request for an investigation is the day that SBI initiated a criminal investigation into Lt. Rhoades. SBI’s investigation lasted nearly two years. During that period, BYU and its employees fully cooperated and assisted with the investigation by complying with a dozen subpoenas, providing thousands of pages of documents, facilitating access to numerous witnesses, and sitting for interviews. Thus, Chief Stott’s request for an investigation, and DPS’s resulting thorough investigation, fulfilled the statutory requirement to investigate allegations of criminal misconduct.

⁴⁵ Utah State Bureau of Investigation, *SBI Objectives*, <https://sbi.utah.gov/>.

2. *There were no findings of criminal misconduct to report to POST.*

Although the Notice also accuses University Police of failing to report criminal misconduct to POST, the statute requires such reporting *only* “if the allegation is found to be true.” Importantly, the result of the thorough investigation by SBI and subsequent analysis by the AG’s office was a uniform finding from multiple experienced prosecutors that Lt. Rhoades had not engaged in any prosecutable criminal misconduct related to his access or dissemination of information from Spillman or UCJIS. Based on the independent investigation of SBI and conclusions of the AG’s office, there was no criminal misconduct that University Police was required to report to POST. University Police had no duty to report to POST allegations that ultimately were found *not* to be true.

3. *The findings of the SBI investigation were reported to POST.*

Even if SBI investigation had found that allegations of criminal misconduct were true (SBI made no such finding), the POST Investigative Report released by DPS clearly indicates that “POST received a copy of the SBI investigation for review.”⁴⁶ As a result, there was no failure to report findings to POST when Chief Stott requested an investigation. SBI conducted that investigation, and the findings of that investigation were reported directly to POST. Thus, University Police did not fail to fulfill a statutory obligation to report truthful findings to POST.

4. *Chief Stott was not required to personally conduct the investigation.*

Nothing in the statute required Chief Stott to personally conduct or lead the investigation. The AG attorney representing POST acknowledged as much by asking whether “the BYU PD chief (or a designee)” conducted an investigation.⁴⁷ Here, it is clear that Chief Stott asked Commissioner Squires to conduct an investigation, and that such an investigation was in fact conducted.

5. *The Secrecy Orders prevented Chief Stott from investigating the allegations.*

Even if Chief Stott were personally required to conduct an investigation (he was not), he was legally prevented from doing so because of the Secrecy Orders and the subpoenas that were served on BYU, Chief Stott, and other BYU employees. DPS and its AG attorneys sought and implemented those Secrecy Orders and subpoenas, which specifically prohibited BYU, Chief Stott, and other BYU employees from speaking to others about the substance of the SBI investigation, including testimony or evidence related to the investigation.

Had Chief Stott commenced his own investigation and begun conducting his own interviews and asking witnesses questions about documents supplied to the AG’s office, the AG’s office could have, and likely would have, sought a contempt order against Chief Stott for violating the Secrecy Orders and the command language of the subpoenas. In other words, neither the State nor the court would have tolerated such interference with a pending criminal investigation or violation of the Secrecy Orders. Only upon proper authorization from the court would any internal inquiry have been permitted, and that is exactly what BYU did in conducting its own internal, privileged investigation after receiving court approval.

⁴⁶ POST Investigative Report, supra note 9.

⁴⁷ August 16, 2018 Email from Lynda Viti to James Jardine.

6. *Once authorized, BYU conducted its own internal, privileged investigation.*

Although each of the subpoenas stated that “[n]othing in the secrecy order infringes upon the attorney-client relationship between you and your attorney,” it was unclear whether BYU had the ability to conduct even a privileged investigation into the alleged misconduct of Lt. Rhoades. In fact, when BYU asked the AG’s office to be able to do so, the AG’s office rejected that proposal and refused to stipulate that counsel for BYU could interview witnesses in the investigation. For that reason, BYU was forced to seek guidance from the court that issued the Secrecy Orders. Ultimately, the court authorized BYU’s outside counsel to conduct interviews of witnesses and to share that information with BYU’s OGC. This was the only investigation that BYU was legally authorized to conduct.

As outlined above, with the court’s permission, BYU was able to conduct an internal, privileged investigation into the alleged misconduct of Lt. Rhoades. BYU’s internal investigation was parallel to the SBI investigation, but BYU’s investigation was conducted independently, by and under the direction of counsel. Without waiving the attorney-client privilege, BYU is willing to disclose the fact that, in coordination with Chief Stott and BYU’s OGC, counsel for BYU did conduct an investigation during which counsel reviewed thousands of pages of documents and interviewed numerous witnesses, including Chief Stott, Lt. Rhoades, and various other BYU employees. While in agreement with the AG office’s conclusion that Lt. Rhoades had not engaged in criminal misconduct, Lt. Rhoades was ultimately disciplined by BYU, as agreed upon by the AG’s office, and he retired shortly thereafter.

BYU did not fail to conduct an internal investigation, and University Police had no duty to report to POST allegations of criminal misconduct that were not true.

B. BYU Did Not Fail to Respond to a Subpoena Issued by POST.

As the second ground for decertification, the Notice alleges that University Police failed to comply with a POST subpoena issued on June 28, 2018. The Notice cites Utah Code § 53-6-210, which authorizes POST to issue subpoenas in connection with its investigations and makes it a Class B misdemeanor to “willfully disobey[]” subpoenas issued by POST. As outlined below, University Police did not fail to respond to the subpoena and instead properly complied with the Secrecy Orders and asserted objections based on the attorney-client privilege under the Utah Rules of Civil Procedure. If POST disagreed with BYU’s response, it could have filed a motion to compel BYU to comply with the subpoena. Despite BYU’s invitation to do so, POST never filed a motion to compel. And even though Ms. Viti said in August 2018 she would move to compel BYU to comply with the subpoena, POST never moved to compel BYU to comply with its subpoena.

BYU did respond to the POST subpoena. The Notice characterizes BYU’s response to the subpoena as a failure to respond, and it asserts that this constitutes a ground to decertify University Police. This ground for decertification is without factual or legal basis.

1. *BYU fully responded to subpoenas issued by counsel for DPS.*

The Notice’s allegation that University Police failed to respond to a POST subpoena is factually wrong for two separate reasons. First, BYU properly responded to the subpoena, objecting under Utah Rule of Civil Procedure 45(e)(3)(D). An objection to a subpoena is a legally valid response to a subpoena. Under the law, if POST disagreed with that objection, it had the procedural right to file a motion to compel. POST did not do so, leaving the objection legally proper and

controlling. Second, irrespective of the legal grounds, BYU had already provided thousands of pages of documents in response to two subpoenas duces tecum issued by attorneys for DPS. BYU also made various witnesses available in response to ten other subpoenas issued by attorneys for DPS. BYU's responses to subpoenas issued in the SBI investigation included documents directly relevant to the investigation into Lt. Rhoades's alleged misconduct and therefore arguably would have been responsive to the POST subpoenas. The POST Investigative Report reveals that POST received a copy of the SBI investigation from SBI, and therefore POST investigators presumably received a copy of all of documents to which SBI investigators had access.

2. *DPS cannot force BYU to violate the Secrecy Orders.*

Because the Secrecy Orders prohibited BYU from disclosing documents or testimony in connection with the criminal investigation, POST cannot force BYU to disclose the same documents or testimony for purposes of the POST investigation. BYU was careful not to do anything that would have violated the Secrecy Orders or that would have put BYU at risk of being held in contempt of court. Although various facts of the investigation were leaked to the media, they were not leaked by BYU. DPS had already directed SBI to investigate the matter, and that SBI investigation imposed Secrecy Orders on BYU. By issuing an overlapping subpoena in a subsequent POST investigation, DPS put BYU in the untenable position of being unable to provide documents responsive to the overlapping subpoena without violating the Secrecy Orders that the State of Utah had requested in the SBI investigation. An executive branch agency does not have the authority to force BYU to violate a judicial order.

Importantly, both the Secrecy Orders and the statute governing them specifically state that a secrecy order "does not prevent attorneys from the state or members of their staff from disclosing information obtained [in the criminal investigation] for the purpose of furthering any official government investigation." Utah Code § 77-22-2(6)(c). Thus, while BYU was prevented from giving POST documents relevant to the criminal investigation, the law specifically authorized both SBI and the AG's office to disclose the documents in connection with any official government investigation, like the POST investigation. In fact, BYU's counsel encouraged this sharing by AG attorneys and, to the extent not already authorized by law, BYU's counsel cooperated with the AG's office in submitting a motion to modify the Secrecy Orders to allow the AG's office itself to share these documents.⁴⁸ Thus, BYU's actions were cooperative, appropriate, and lawful.

3. *DPS cannot force BYU to waive the attorney-client privilege.*

DPS is improperly attempting to decertify University Police because BYU has asserted the attorney-client privilege. That privilege remains one of the bedrock principles of America's legal system. *Upjohn Company v. United States*, 449 U.S. 383, 389 (1981). The Supreme Court has ruled that this privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." *Id.*

⁴⁸ Notably, by the time the AG's office filed the unopposed motion to allow AG attorneys for SBI to share documents from the criminal investigation with POST, SBI apparently had already provided the documents to POST. Specifically, POST reports that it had already received SBI's investigation file on June 29, 2018. The AG's office filed its unopposed motion on September 28, 2018, seeking to modify the Secrecy Orders to allow the AG's office to share investigative information with POST.

The Utah Rules of Civil Procedure specifically authorize a subpoenaed party to assert this privilege in response to a subpoena requesting privileged documents. Utah R. Civ. P. 45(e)(3)(D).

When it became clear that POST sought not only documents regarding Lt. Rhoades's alleged misconduct, but also documents evidencing BYU's internal, privileged investigation into that alleged misconduct, BYU properly objected on grounds that the latter set of documents were protected by the attorney-client privilege. Upon receiving BYU's objection, the POST attorneys had the procedural right to file a motion to compel under the rules. Utah R. Civ. P. 45(e)(5). POST never so moved, and therefore POST waived the ability to compel production. Having waived the legal right to compel production, the Notice now takes the extreme position that it can decertify an entire police force because of BYU's legally proper refusal to waive the attorney-client privilege. While BYU is willing to disclose non-privileged information related to its investigation, BYU cannot be forced to waive the attorney-client privilege.

Importantly, Utah Code § 53-6-211(6) requires only that an investigation occur upon becoming aware of criminal misconduct. The same statute does not mandate any specific level or type of investigation; nor does this statute authorize or require a review of the scope or quality of such an investigation, especially when an internal investigation is privileged. POST and its attorneys are well aware of the fact that BYU conducted an internal, privileged investigation. POST does not have the right or authority to force a waiver of the attorney-client privilege, and an order of decertification cannot and should not be based on this improper ground.

4. *BYU provided non-privileged documents responsive to the subpoena.*

The Notice also fails to acknowledge that BYU did provide non-privileged documents that were responsive to the POST subpoena. Specifically, BYU provided documents related to the internal discipline of Lt. Rhoades, as well as the letter declining to prosecute Rhoades. The Notice also failed to acknowledge BYU's repeated willingness to cooperate and work with POST in providing any other non-privileged documents that were not subject to the Secrecy Orders. Rather than accept those offers, and work together in good faith with University Police, the Commissioner took the unprecedented action of seeking decertification of all of University Police.

V. DPS's Efforts to Decertify University Police Overstep DPS's Authority and Violate BYU's Rights.

In addition to BYU's substantive response to the grounds for decertification, BYU objects to the decertification action on various other grounds. If the Commissioner chooses not to withdraw the Notice, and if the hearing results in a decision to decertify University Police, BYU plans to appeal that decision. BYU will also reserve the right to pursue legal action against DPS for violations of BYU's rights and other unlawful actions by DPS. These violations and unlawful activities are summarized, in part, below.

A. DPS Is Acting Beyond the Scope of Its Authority and Jurisdiction.

The Commissioner's Notice relies on the position that University Police somehow fails to fulfill the certification requirement that University Police "*officers* shall be subject to all of the requirements of Title 53, Chapter 6, part 2 [i.e., the Peace Officer Training and Certification Act (the 'Certification Act')]." Utah Admin. Code R.698-4-4(4) (emphasis added). Although this regulation requires that officers of University Police be "subject to" the Certification Act in order for University Police to be certified, *nothing* in the Certification Act or the regulation authorizes DPS to decertify

an entire police agency for a single officer's failure to comply with the POST certification requirements. University Police officers are subject to the POST certification requirements, and neither DPS nor BYU has ever suggested that they are not. In fact, DPS sought decertification of the individual officer whose conduct is at issue in this case, and that officer relinquished his POST certification. That fact alone demonstrates that University Police officers are "subject to" the Certification Act. Therefore, University Police fulfills this certification requirement.

To the extent DPS is arguing that Chief Stott's alleged failure to investigate Lt. Rhoades is a separate basis for decertification, that argument fails for the same reasons. As outlined above, Chief Stott did request an investigation, and multiple investigations were conducted, including by DPS and BYU. DPS has never sought to decertify Chief Stott, presumably because he did nothing to violate the POST certification requirements. But even if Chief Stott had failed to investigate Lt. Rhoades's conduct (he did not), that failure would not authorize DPS to decertify all of University Police. The failure of an individual officer to comply individual POST certification obligations may result *only* in individual sanctions, *not* decertification of (or any other sanction against) an entire police agency.

Despite the fact that former Chief Stott and former Lt. Rhoades are no longer employed by BYU (and are retired), DPS is now attempting to use their prior alleged acts or omissions—which the AG's office acknowledged had "been remedied"—to punish those who had nothing to do with the alleged misconduct in this case. DPS has not identified or even alleged any systemic, unresolved problem with University Police that requires decertification of all of University Police. Under a plain reading of the POST Act, University Police fulfills the certification criterion at issue because all remaining officers at University Police are subject to the POST certification requirements, and DPS has never identified any current officer who is in violation of those requirements.

Thus, DPS's actions in attempting to decertify an entire police force for the acts or omissions of individual *retired* officers go far beyond the authority granted by statute or regulation. In essence, DPS's is acting *ultra vires*—i.e., beyond the scope of its legal authority to regulate law enforcement officers and law enforcement agencies. By attempting to apply certification criteria for a law enforcement agency that do not exist, DPS ignores the rule of law and the requirements of the rulemaking process. If the Commissioner wants to create new rules or criteria authorizing DPS to decertify an entire police force because of a single officer's failure to comply with POST certification requirements, then the Commissioner must go through the proper rulemaking process. Merely declaring an intent to decertify University Police based on the acts or omissions of individual officers does not give the Commissioner the authority to do so.

BYU acknowledges the important role that DPS plays in regulating the activities of law enforcement agencies and law enforcement officers. However, in this case, DPS is acting beyond the scope statutory authority and jurisdiction, and the Notice must be dismissed.

B. DPS's Actions Are in Violation of BYU's Rights.

The Notice to decertify University Police violates BYU's rights in several ways. First, DPS is violating BYU's constitutional right to due process under the Fourteenth Amendment of the US Constitution and Section 7 of the Utah Constitution by unlawfully depriving BYU of a liberty interest in its public reputation and a property interest in the certification of University Police. This decertification process is an attempt by the Commissioner to subject BYU and its employees to multiple redundant agency actions regarding the same alleged misconduct, to force BYU to waive the attorney-client privilege, and to serve conflicting roles as both accuser and adjudicator.

BYU fully recognizes that the State of Utah controls the scope and application of its police power. The legislature has authorized a private university to establish and operate a certified law enforcement agency. BYU further acknowledges that the legislature has conditioned BYU's operation of a law enforcement agency on certification by DPS. Nonetheless, University Police's certification cannot be revoked without the due process of law, including the process described in DPS's own administrative rules. The inconsistent positions of DPS and the many procedural irregularities leading up to the decertification Notice establish, or at least cast serious doubt, that the Commissioner has extended (or will extend) appropriate due process and other legal protections to BYU in reaching a decision to decertify. Therefore, the Commissioner should not decide this case.

The Commissioner's role in this process also raises significant due process concerns. Instead of appointing a neutral decision-maker, the Commissioner (who is and will be a material witness in this case) has compromised BYU's rights by assuming the roles of both accuser and adjudicator. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (holding that "unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case"). The Commissioner assumed the role of accuser by charging BYU with failure to conduct an investigation or to comply with a subpoena. According to the Notice, the Commissioner intends to assume the role of the adjudicator who will decide whether to decertify BYU's entire police force. In this case, the Commissioner's dual role is improper, and the Commissioner should recuse himself.

Even if the Commissioner harbors no actual bias toward BYU, the question is not "whether a [factfinder] harbors an actual subjective bias, but instead whether, as an objective matter, 'the average [factfinder] in his position is 'likely' to be neutral, or whether there is an unconstitutional potential for bias.'" *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262 (2009)). In this case, it is clear that there is an "impermissible risk of actual bias," because the Commissioner has assumed the role of "both accuser and adjudicator." *Id.* That alone is a violation of due process. For these reasons, BYU formally requests appointment of a neutral ALJ to hear and decide this matter.

Further, the fact that DPS conducted two investigations (one by SBI and another by POST) without achieving the results that DPS sought (i.e., a criminal conviction, or a decertification decision against a single officer) does not entitle DPS to a third investigation through an administrative proceeding seeking to decertify an entire police force. Because SBI's lengthy criminal investigation resulted in a finding of no prosecutable misconduct, and POST's subsequent investigation did not reveal any additional facts that would establish criminal misconduct, DPS cannot now decertify University Police for allegedly failing to investigate and report the same alleged criminal misconduct. For that reason, the decertification effort is unfair, and DPS is and should be collaterally estopped from recycling the same underlying unsupported allegations of criminal misconduct to try to achieve a different result. BYU reasonably relied on the results of the DPS investigations—including the decision not to prosecute Lt. Rhoades, the agreed upon discipline of Lt. Rhoades, and statement from the AG's office that these issues had "*been remedied*"—to conclude that these issues had in fact been resolved. This reversal of position and attempt to decertify University Police suggests the misuse of an administrative proceeding to accomplish an ulterior purpose.

C. DPS May Have Violated GRAMA and the Secrecy Orders.

DPS itself appears to have engaged in the same type of unlawful behavior that it accused Lt. Rhoades of committing. Specifically, on February 26, 2019, DPS publicly released records

designated as PROTECTED, which disclose various details of not only the POST investigation but also the prior SBI criminal investigation.⁴⁹ The release of this document may have violated the same GRAMA Criminal Statute that DPS previously accused Lt. Rhoades of violating and is currently accusing University Police of failing to investigate. DPS's improper actions combined with its allegations against BYU may demonstrate bias and unclean hands in this case.

DPS may also have violated the Secrecy Orders by knowingly disclosing information that was subject to the Secrecy Orders. Throughout this process, BYU has carefully observed its obligation to comply with the Secrecy Orders (entered at the request of DPS and its AG attorneys), as well as the command language of the subpoenas. Meanwhile, through no fault of BYU, information regarding the criminal investigation has been leaked to the media in direct violation of the Secrecy Orders. These leaks not only infringe on the privacy rights and reputations of targets and witnesses in the investigations, they are also unfairly prejudicial to BYU in this proceeding.

Although BYU does not know the full potential extent of DPS violations of the Secrecy Orders, DPS's release of the POST Investigative Report is an instructive example of such a violation.⁵⁰ DPS attempted to redact certain portions of this document (apparently recognizing some duty not to disclose protected information from the SBI investigation), but DPS still released significant information that was the subject of the Secrecy Orders. This includes, for example, Lt. Rhoades's identity, the scope of the SBI investigation, the dates of Lt. Rhoades's alleged criminal misconduct, and the factual findings of the investigation. At the time DPS released this report on February 26, 2019, the Secrecy Orders prohibited disclosure of this information. The AG's office acknowledged that BYU was put in a situation in which BYU needed to defend against allegations that had been made public, and stipulated to the court that BYU could make additional, limited disclosures to defend itself.

Under the Subpoena Powers Act (Title 77, Ch. 22 of the Utah Code), secrecy orders are meant to protect not only the integrity of the investigation but also the privacy and reputation of accused individuals and witnesses. "[T]he [Subpoena Powers] Act contemplates" that "the names of subpoenaed persons or targets [will] not [be] publicized," particularly because "[s]uch information has great potential for damaging the reputations of innocent persons." *In re Criminal Investigation*, 754 P.2d 633, 652, 655 (Utah 1988); *see also KUTV, Inc. v. Conder*, 635 P.2d 412, 413 (Utah 1981) ("The stated purposes of the secrecy provisions of the Act are to protect the innocent . . ."). By publicly disclosing protected information subject to the Secrecy Orders, DPS has not only potentially violated court orders but has unfairly prejudiced and harmed BYU, Lt. Rhoades, and possibly other individuals. DPS's use of the Secrecy Orders as a weapon to gather inculpatory evidence in secret and then prevent BYU from defending itself with rebuttal evidence is an unconstitutional application of the Subpoena Powers Act. While BYU reserves the right to address violations of the Secrecy Orders with the court that issued them, such violations establish further grounds for DPS to withdraw the Notice.

D. DPS Is Unlawfully Treating University Police Differently from Other Agencies.

The sharing of private information from law enforcement records for a purpose unrelated to law enforcement or public safety is a violation of University Police policy. Nonetheless, as is the case at any other college or university with a police force on campus, enforcement of public laws by campus

⁴⁹ POST Investigative Report, *supra* note 9.

⁵⁰ POST Investigative Report, *supra* note 9.

police necessarily results in interaction and sharing of information with other campus units, such as Title IX personnel, deans of students, student conduct personnel, housing personnel, and more. On information and belief, these practices are common at schools such as the University of Utah, Utah State University, Utah Valley University, and numerous other institutions across the country.⁵¹

DPS has not investigated or sought decertification of the police forces of other institutions for accessing law enforcement information and sharing it with other campus units. It is critical for campus police to be able to share information within the campus community to maintain public safety and to protect students, employees, and visitors. Doing so is entirely appropriate, especially in light of recent events involving campus safety. DPS's effort to stop BYU from doing the same thing that goes on every day at Utah's public universities is arbitrary and capricious.

Discovery in this case is likely to show that DPS has not engaged in any decertification actions against individuals or agencies that allegedly have engaged in the same kinds of acts or omissions that have been alleged against University Police. Thus, on information and belief, DPS has denied BYU equal protection of the laws under the Fourteenth Amendment to the US Constitution and Section 24 of the Utah Constitution by applying the Utah Public Safety Act differently to University Police than to other law enforcement agencies. The evidence may also demonstrate that improper animus played a role in DPS's Notice to decertify University Police.⁵²

VI. Conclusion

BYU and University Police fully support transparency and accountability for University Police in the same way that other law enforcement agencies are required to be transparent and accountable. However, decertification of an entire law enforcement agency is an extreme and unprecedented action, and the grounds that DPS has asserted for decertification are without merit. Accordingly, BYU respectfully asks that the Commissioner withdraw the decertification Notice immediately and allow BYU to continue its longstanding ability to protect its students, employees, and visitors with a publicly certified police force.

BYU's strong preference has been and continues to be to work collaboratively with DPS. However, BYU is prepared to defend itself in this proceeding and related proceedings, including conducting discovery, asserting relevant claims and defenses, and seeking available remedies for violations of BYU's rights. Ultimately, the best way to keep BYU's students, employees, and visitors safe is to preserve the ability of University Police to operate as a certified law enforcement agency, and BYU will do what is necessary to protect our community.

⁵¹ See *supra* note 3.

⁵² BYU reserves the right to assert any other applicable defenses that BYU discovers or that arise in connection with this case, including without limitation any other defenses under the First and Fourteenth Amendments to the US Constitution and any related rights afforded to BYU under the Utah Constitution. BYU also requests appropriate relief, including injunctive relief and damages, from any harm caused by DPS's unlawful acts and violations of BYU's rights.

Respectfully submitted,



Steven M. Sandberg, General Counsel
Brigham Young University



James S. Jardine
Ray Quinney & Nebeker P.C.

Exhibit 1

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



SEAN D. REYES
ATTORNEY GENERAL

Spencer E. Austin
Chief Criminal Deputy

Ric Cantrell
Chief of Staff

Tyler R. Green
Solicitor General

BRIDGET K. ROMANO
Chief Civil Deputy

March 7, 2018

Lt. Ryan Van Fleet
State Bureau of Investigation
5500 W. Amelia Earhart Drive, Suite #100
Salt Lake City, Utah 84116

Re: Complaint against Lt. Aaron Rhoades

Dear Lt. Van Fleet:

I am formally responding to your request to consider prosecution in the matter of Lt. Aaron Rhoades of Brigham Young University Police Department.

The Department of Public Safety, State Bureau of Investigation initiated an investigation. Upon completion of the investigation, the matter was presented to the Utah Attorney General's Justice Division to consider prosecution. The applicable standard for a prosecutor to apply in reviewing evidence gathered in an investigation is whether the evidence is sufficient for a reasonable likelihood of conviction at trial.

A select panel of experienced Justice Division prosecutors independently assessed the investigator's case, including investigative reports, documents, and witness interviews. After each prosecutor on the panel had the opportunity to review the investigation, each agreed independently and collaboratively that this case lacks a reasonable likelihood of conviction. Based on the aforementioned, the Justice Division within the Utah Attorney General's Office is declining any further action at this time.

Sincerely,

CRAIG L. BARLOW, Criminal Deputy
Justice Division

cc: Sean Reyes, Utah Attorney General
Spencer Austin, Criminal Chief Deputy

bcc: Michael Orme, BYU Office of General Counsel

Exhibit 2

UNIVERSITY POLICE
BRIGHAM YOUNG UNIVERSITY
2120 JKB
PROVO, UTAH 84602-6201
(801) 422-2222 / FAX: (801) 378-0935



January 7, 2019

Commissioner Jess Anderson
Utah Department of Public Safety
4501 South 2700 West, Box 141775
Salt Lake City, Utah 84114-1775

Dear Commissioner Anderson,

I appreciated you taking two hours out of your busy schedule to meet with me on January 3, 2019. I was surprised when you handed me the letter dated three weeks earlier on December 19, 2018 requesting to investigate our use of criminal history records and databases, under your authority as commissioner of DPS. It had been over two years since a commissioner of the Department of Public Safety was willing to meet in person with the chief of University Police to talk about these important issues. Your requests are exactly what Chief Stott asked for when he and I met with former Commissioner Squires on September 1, 2016 to ask the DPS to audit our department. It is my understanding that a different government organization began an entirely separate process that directly affected these issues. I'm excited to finally receive guidance directly from the DPS to assess our practices.

Your letter is the first time a state official with police powers and authority has said he expects University Police to comply with GRAMA. The specific direction we have received from the Utah Division of Archives and Records Service is that we were not subject to GRAMA. I have learned that our lawyers have spoken with DPS lawyers and explained that University Police welcomes an additional requirement under the rule you cited in your letter requiring us to comply with GRAMA. The issue of whether a law enforcement agency established by a private college or university should be subject to GRAMA is also actively being reviewed by the state legislature. University Police has been working with DPS lawyers and with legislators to change the law so GRAMA does apply to University Police in the future since we have state law enforcement authority, even though we are not a governmental entity.

On behalf of the Brigham Young University Police Department, I am pleased to facilitate access to all records, personnel and electronic data your investigators deem necessary to conduct an investigation to assess:

1. Utah BCI and UCJIS access and use by BYU personnel and compliance with Utah Code provisions about access and use of criminal history and data;
2. The powers, authority, and limitations of the Chief of University Police and University Police officers; and
3. The command structure of University Police.

I'm supportive of DPS making a rule, or the legislature changing the statute, so that University Police is subject to GRAMA. University Police doesn't get the funding or retirement benefits that government police entities do, but we take seriously our police chain of command through you, and we will follow your expectation that University Police comply with GRAMA.

I look forward to meeting together soon to collaborate with you, a member of the Attorney General's office, the governor's general counsel, POST, and BYU representatives to best facilitate how to complete the actions as you have requested and proceed toward the option we discussed about having DPS process GRAMA requests that University Police receives.

As we move ahead and consult your employees in the structuring of our department and setting up new protocols for records handling, we look forward to fostering a reciprocally open and trusted relationship of cooperation and assistance. Thank you for working to help University Police develop into the best department possible.

Respectfully,

Chris Autry
BYU Police Chief

Cc: Lt. Steven Messick
BYU Vice President Jan Scharman

Exhibit 3



UNIVERSITY POLICE
BRIGHAM YOUNG UNIVERSITY
2120 JKB
PROVO, UTAH 84602-6201
(801) 422-2222 / FAX: (801) 378-0935

February 4, 2019

Commissioner Jess Anderson
Utah Department of Public Safety
4501 South 2700 West, Box 141775
Salt Lake City, Utah 84114-1775

Dear Commissioner Anderson,

I wanted to follow up on the letter I sent you on January 7, 2019. As Chief of University Police, I take seriously our duties and obligations as officers, especially the requirements about certification under POST and the rules established by DPS.

I apologize that I didn't respond to your second point in my earlier letter. University Police will take all necessary steps to be in compliance with all subpoenas about any future allegations of misconduct by University Police officers issued by any POST investigation by POST Investigations or a POST ALJ under the Utah Code, unless we are prevented from doing so by court order. We will also comply with any ALJ rulings and the results of any POST councils.

We are unable to respond to subpoenas issued in connection with the prior investigation into the conduct of one of our former officers because, beginning in July 2016, Secrecy Orders have been entered at the request of the State of Utah in a case that governs the subject matter of your request for records. These Secrecy Orders entered at the request of the State of Utah remain in place.

Thank you again for patiently working with us through these issues and for your commitment to developing a mutually open and trusted relationship of cooperation, understanding, and assistance. If you have any concerns related to University Police or our compliance with any POST requirements or DPS rules, please reach out to me.

Respectfully,

Chris Autry
University Police Chief

Cc: Lt. Steven Messick
BYU Vice President Jan Scharman