

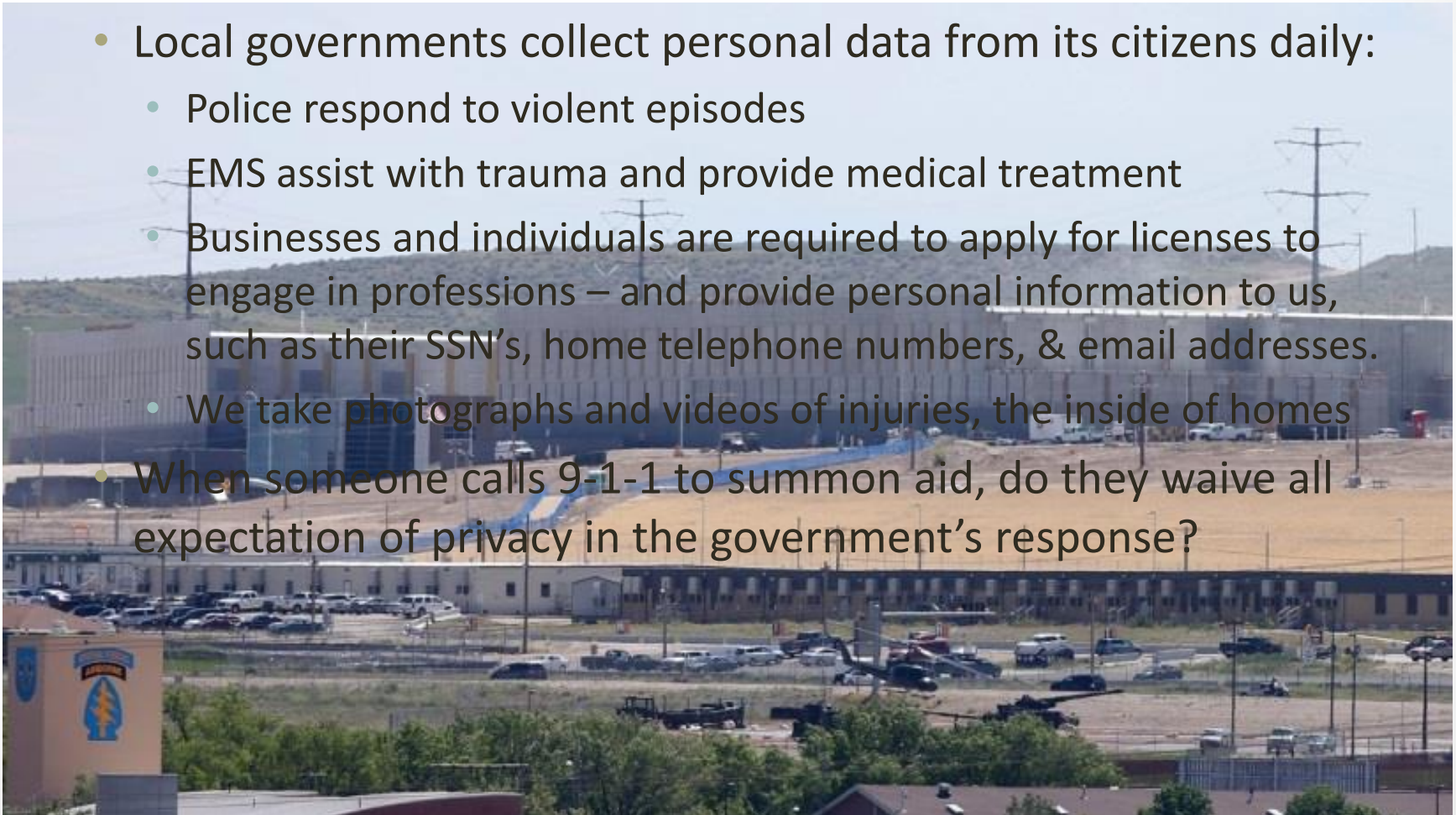
GRAMA & Privacy

Protecting our Citizens while
Complying with Law

Government Civil Practice Conference – October 17, 2013

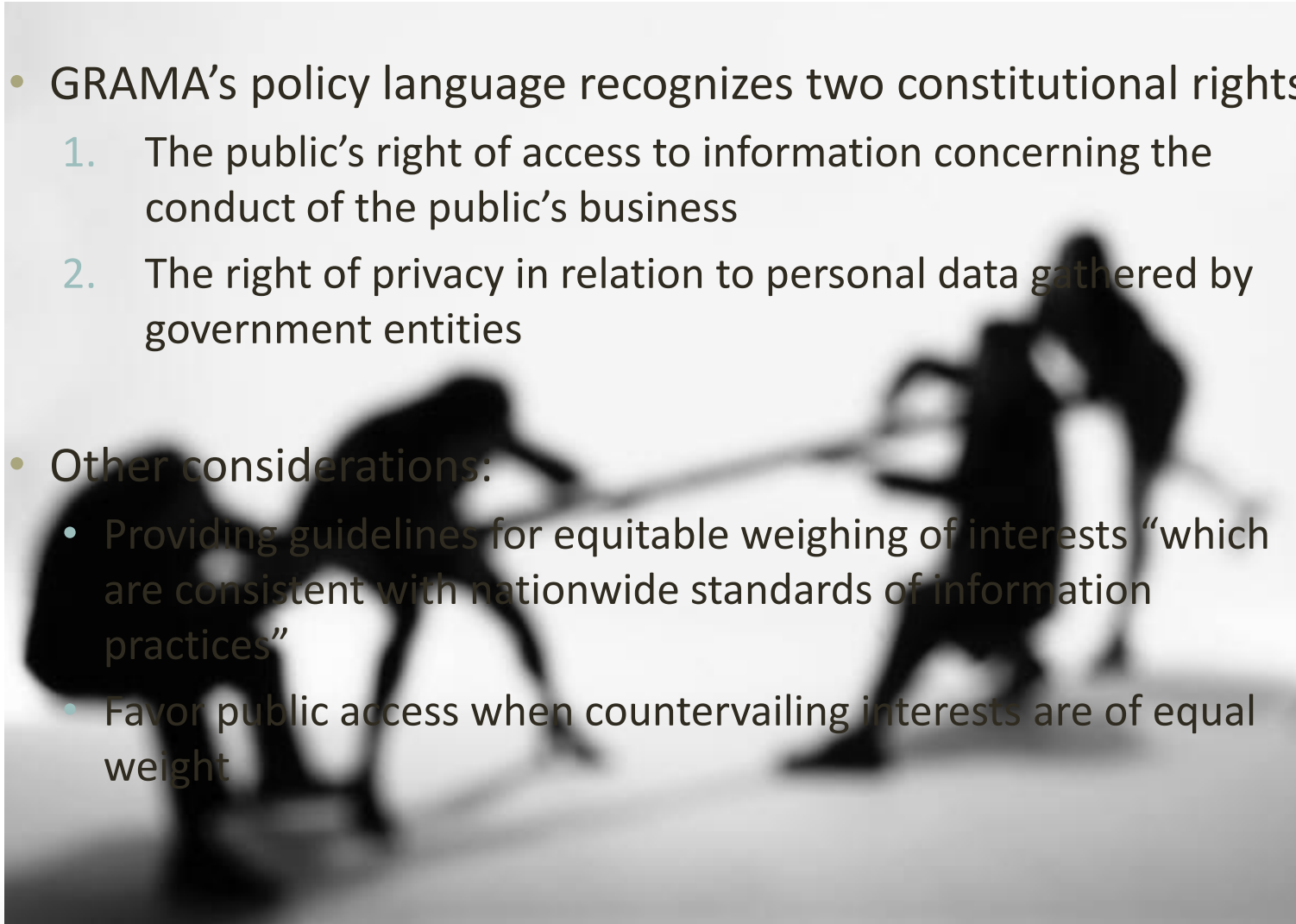
Information Gathering

- Local governments collect personal data from its citizens daily:
 - Police respond to violent episodes
 - EMS assist with trauma and provide medical treatment
 - Businesses and individuals are required to apply for licenses to engage in professions – and provide personal information to us, such as their SSN's, home telephone numbers, & email addresses.
 - We take photographs and videos of injuries, the inside of homes
- When someone calls 9-1-1 to summon aid, do they waive all expectation of privacy in the government's response?

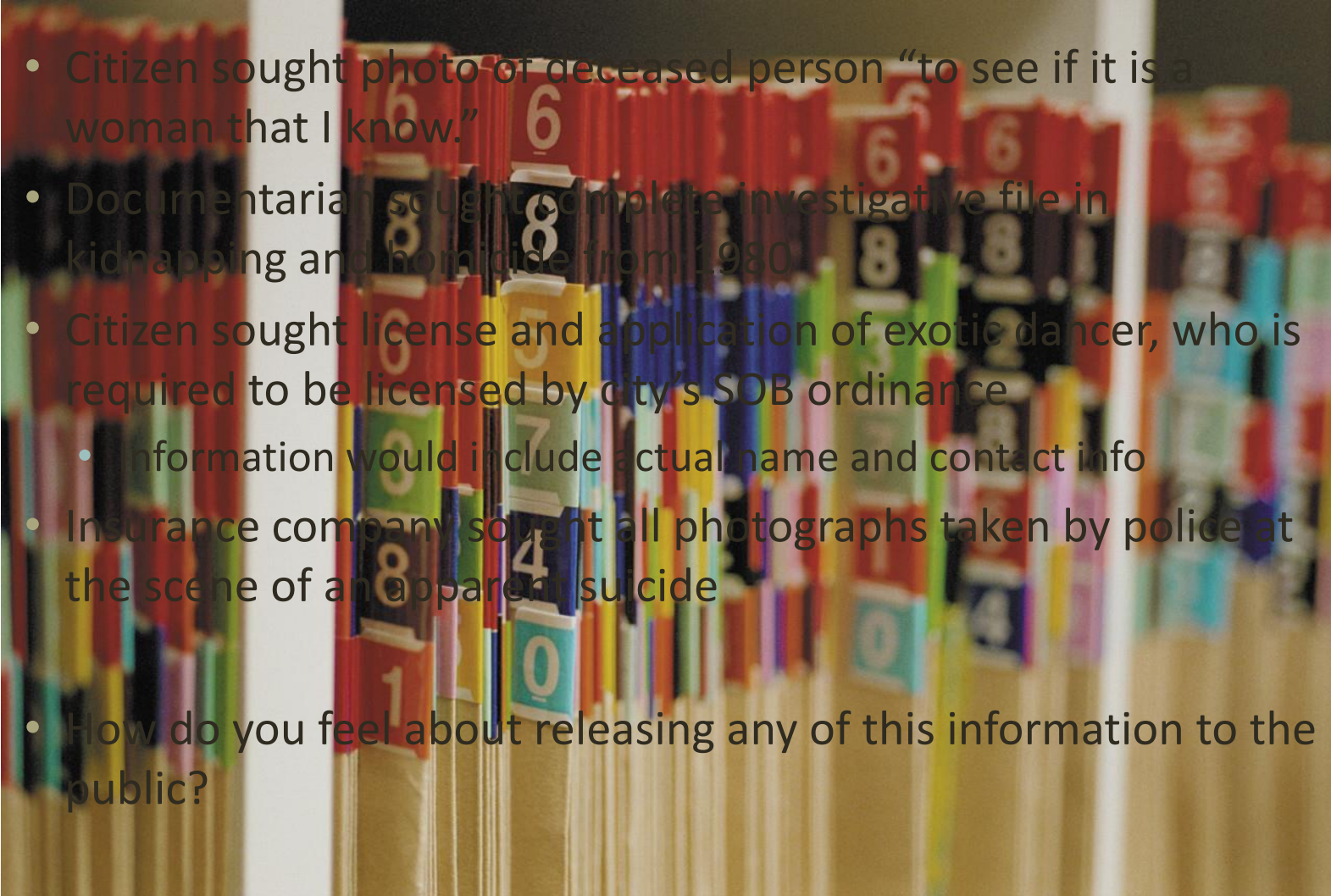


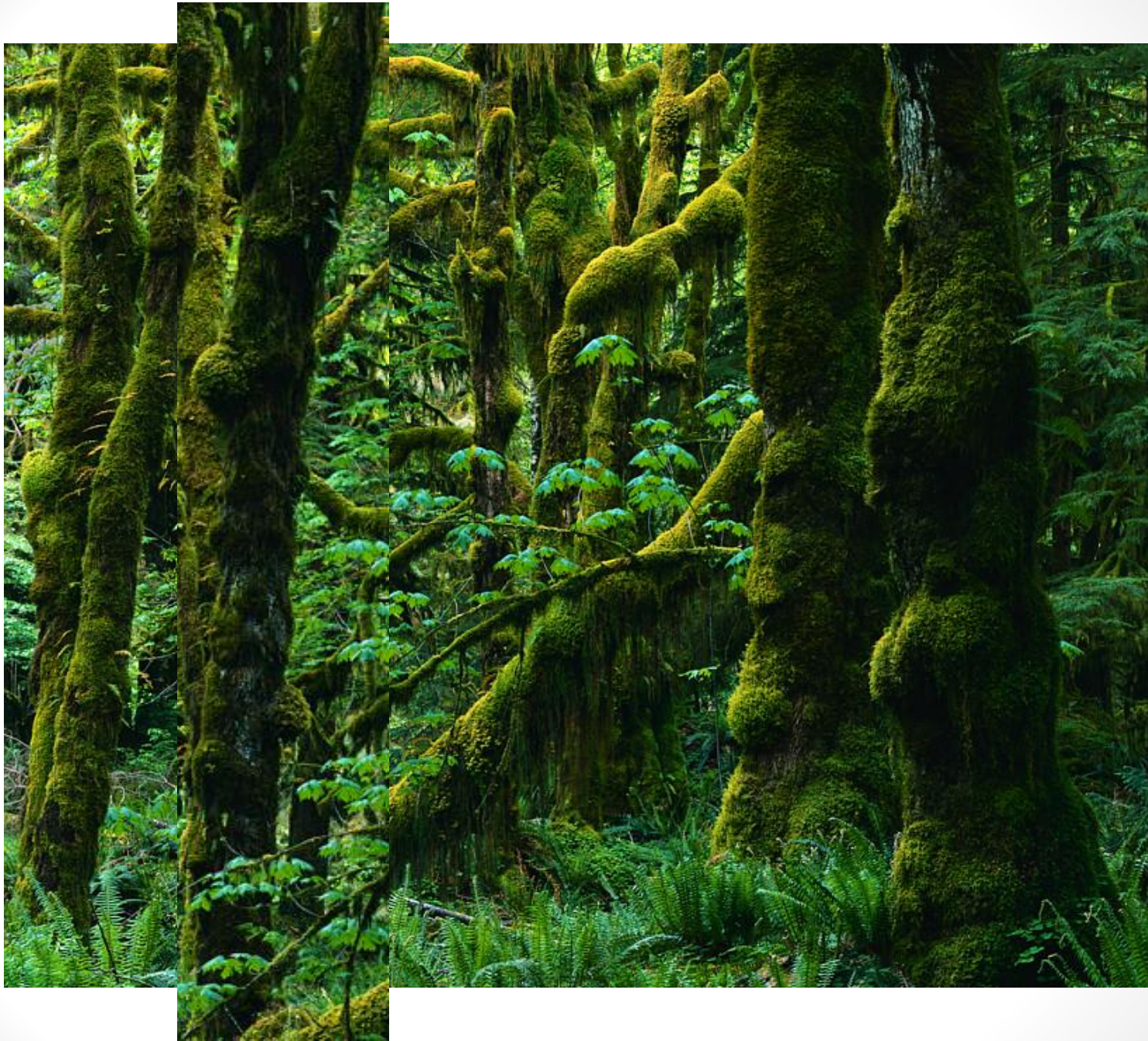
Competing Interests

- GRAMA's policy language recognizes two constitutional rights:
 1. The public's right of access to information concerning the conduct of the public's business
 2. The right of privacy in relation to personal data gathered by government entities
- Other considerations:
 - Providing guidelines for equitable weighing of interests "which are consistent with nationwide standards of information practices"
 - Favor public access when countervailing interests are of equal weight



Example: Records Requests in SSL

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- Citizen sought photo of deceased person “to see if it is a woman that I know.”
 - Documentarian sought complete investigative file in kidnapping and homicide from 1980
 - Citizen sought license and application of exotic dancer, who is required to be licensed by city’s SOB ordinance
 - Information would include actual name and contact info
 - Insurance company sought all photographs taken by police at the scene of an apparent suicide
 - How do you feel about releasing any of this information to the public?



Privacy

- Among the numerous records which are specifically classified as “private” under GRAMA, there is this catch-all:

“records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy”

- There are numerous State Records Committee Decisions which address this subsection.
 - A list of identified decisions and their general outcome is included in your materials
 - Records committee decisions are light on legal analysis
- There is one appellate case in Utah to address this issue.

Federal Counterpart

- The Freedom of Information Act (FOIA) provides a similar avenue for the public to access federal records.
- It excludes private data from disclosure under two specific exemptions:
 - §552(b)(6): “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”
 - §552(b)(7)(C): “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy”
- Which is more similar to Utah’s provision?



State Records Committee

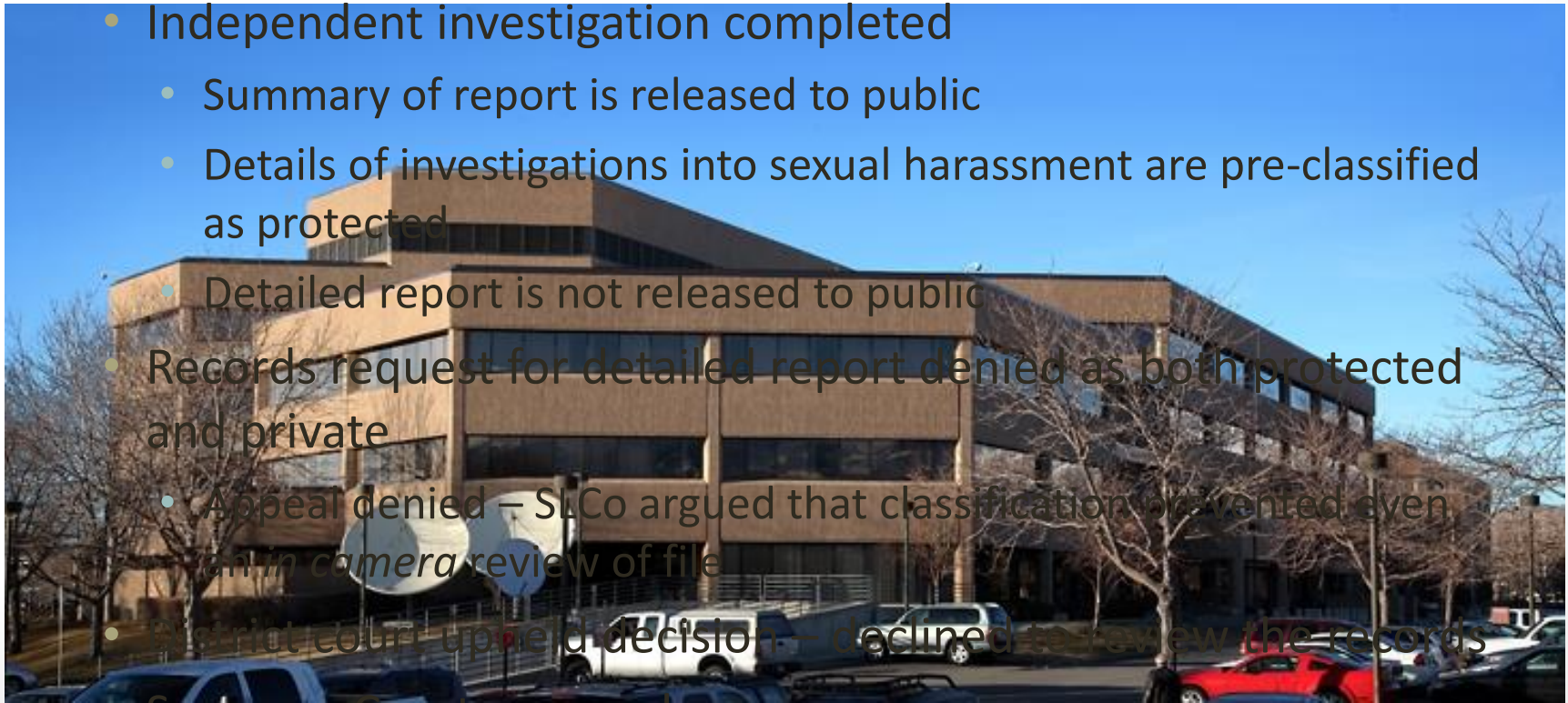
- At least thirty decisions have addressed subsection 302(2)(d)
 - Eleven denied the appeal entirely
 - Eight upheld the appeal entirely
 - Eleven partially upheld the appeal

- The Records Committee is citing to its previous decisions as precedent (See e.g., 2013-02)
 - We should be looking for similar facts in previous decisions
- The Committee seems to respond well to the practice of redacting personal information from documents, rather than denying the request due to the record containing personal information
- Your experience?



Deseret News v. Salt Lake Cnty.

- Allegation of sexual harassment by supervisor at County Recorder Office
- Independent investigation completed
 - Summary of report is released to public
 - Details of investigations into sexual harassment are pre-classified as protected
 - Detailed report is not released to public
- Records request for detailed report denied as both protected and private
 - Appeal denied – SLCo argued that classification prevented even *in camera* review of file
- District court upheld decision – declined to review the records
- Supreme Court reversed




Deseret News v. Salt Lake Cnty.

Main lessons from *Deseret News*:

- Advance classification of record series does not end inquiry
- Government must examine the particular document sought and weigh the privacy interests being invaded against the public interests in disclosure
- Privacy must be invaded in a “clearly unwarranted” manner to be protected
- Public officials have little to no expectation of privacy related to actions taken in their official capacities



Request for private document

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- 63G-2-201(5)(b) provides two other ways for the government to release private records designated under -302(2):
 - (i) there is no interest in restricting access to the record
 - OR
 - (ii) the interests favoring access are greater than or equal to the interest favoring restriction of access.
 - This section allows release to “persons”
 - This does not automatically mean that it is now designated “public” – will depend upon the circumstances
 - Restrictions against dissemination?
 - Enforceable?
 - Experiences?

Potential Strategies

- Argue that the requestor's identity or purpose is irrelevant
 - Emphasize that once a document is released, it is "public"
 - Support in *United States v. FLRA* and *Reporters Comm.*:
"[W]hether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest.'"
 - Experiences?
- Request input from subject of the record
 - Effective in *Favish* – affidavit from surviving relatives
 - Effective in *Gallup v. Bd. Of Pardons* (Records Committee Case 2011-13)
 - Less effective in *SL Trib v. Bd. of Pardons* (Records Committee Case 2010-22)
 - Experiences?
- Use common law or statutes otherwise establishing a right to privacy to establish the strength of the privacy interest
 - Experiences?

Discussion