



Effective Dispute Resolution Strategies by Government Records Ombudsman, Rosemary Cundiff

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The Utah State Legislature created the government records ombudsman position during the 2012 General Legislative Session. They authorized the records ombudsman to act as a resource to the public in making records requests and in filing appeals associated with records requests, and also to assist government employees in responding to records requests or dealing with related appeals. The records ombudsman may mediate disputes between requesters and responders. Effectively, the creation of this position was intended facilitate easier access to records, to improve transparency and compliance with the law, and to *help resolve disputes over records issues*.

The records ombudsman's responsibilities are defined in Utah Code 63A-12-111:

63A-12-111. Government records ombudsman.

- (1) (a) The director of the division shall appoint a government records ombudsman.
- (b) The government records ombudsman may not be a member of the records committee.
- (2) The government records ombudsman shall:
 - (a) be familiar with the provisions of Title 63G, Chapter 2, Government Records Access and Management Act;
 - (b) serve as a resource for a person who is making or responding to a records request or filing an appeal relating to a records request;
 - (c) upon request, attempt to mediate disputes between requestors and responders; and
 - (d) on an annual basis, report to the Government Operations Interim Committee on the work performed by the government records ombudsman during the previous year.
- (3) The government records ombudsman may not testify, or be compelled to testify, before the records committee, another administrative body, or a court regarding a matter that the government records ombudsman provided services in relation to under this section.

The law outlines four basic responsibilities for the records ombudsman:

1. **Understand GRAMA.** The Government Records Access and Management Act (GRAMA) is nuanced and subject to frequent change. The records ombudsman is familiar with the law, and with previous State Records Committee and court decisions that have interpreted it. The records ombudsman page on the Archives website includes links to GRAMA and other records laws as well as local government records ordinances and policies.
2. **Assist requesters and responders with records requests and appeals.** The ombudsman primarily provides assistance through consultation. She can be reached at (801) 531-3858 or rcundiff@utah.gov.
3. **Mediate disputes between requesters and responders.** As a neutral party, the ombudsman is an advocate for following the law. The ombudsman may not be compelled to testify about any issue in which the ombudsman was involved. The ombudsman does not discuss any issues related to mediation with members of the State Records Committee.
4. **Provide a report of work performed.** The annual [records ombudsman's report](#) is posted on line.

Dispute resolution strategies

After a little more than one year on the job, the records ombudsman has provided some observations about mediation and dispute resolution strategies. They are:

1. **Ask for help.** The ombudsman can help mitigate disputes by answering questions about the law and the records request process, by helping to find answers to questions about the nature and existence of records, by facilitating communication between parties, and by extending an invitation to the other party to participate in mediation.
2. **Treat others with consideration and respect.** Emotions such as anger and indifference make clear thinking difficult. A requester who sees only corruption in government and is annoyed by bureaucracy will have difficulty understanding and following the processes outlined in GRAMA for requesting records. Government employees who are frustrated by the work of filling GRAMA requests or are suspicious of a requester's intentions will likewise have difficulty complying with the requirements of providing access. Responders must remember that "*Everyone* has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours...." (Utah Code 63G-2-201(1)(2013)).
3. **Follow the law and pay attention to the details.** GRAMA is filled with detail. It outlines procedures for making a request and requirements for government response along with time limits. Each governmental entity is responsible to classify its own records according to the classification requirements that are described in GRAMA and other laws. For any requester who disagrees with the denial of records or the

denial of fee waivers, GRAMA provides an appeals process. In some cases, disputes can be resolved by careful reading and application of the law.

- 4. Separate and simplify complex requests.** For complex requests or when multiple records were requested, communication or mediation can help clarify the request or separate the issues. GRAMA requires that “A person making a request for a record shall submit the request to the governmental entity with a written request containing...a description of the record requested that identifies the record with reasonable specificity.” (Utah Code 63G-2-204(1)(2011)) Reasonable specificity means that a records officer must be able to understand what is being asked for, however, a reasonably specific request can still be voluminous or complex. Breaking down requests for multiple records and communicating about what is wanted may be keys to resolving a conflict.

- 5. Consider weighing provisions and other options to satisfy all parties.** With some exceptions, GRAMA allows the chief administrative officer to uphold a classification and at the same time use the weighing provision to release records. “...the chief administrative officer may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private... or protected... if the interests favoring access are greater than or equal to the interests favoring restriction of access.” (Utah Code 63G-2-401(6)(2012)) Mediation or some other communication with the requester will be necessary to enable a chief administrative officer to understand the requester’s argument and make this determination. Releasing records under the weighing provision is only one possible solution that may satisfy both parties. A requester may be satisfied with denial if he understands what a record does or does not contain. Redactions or release of records at a later date such as at the close of an investigation may be satisfactory. Many uniquely tailored solutions are possible.

- 6. Requesters can pursue mediation and appeals through the State Records Committee at the same time.** The records ombudsman is not a member of the State Records Committee and is able to work with parties while the appeals process is moving forward. Since appeals can be time consuming, a requester may want to preserve the opportunity for a prompt hearing in the event that mediation is not successful. The request for a hearing can be withdrawn when a resolution is reached.

Advantages and Disadvantages of Mediation

Before deciding to involve the state records ombudsman in mediation, consider the advantages and disadvantages of mediation in light of the specific issue and desired outcome. Some of the advantages of mediation are:

- 1. Saving time and money.** Appeals to the State Records Committee or other board require the preparation and submission of arguments to be presented at the hearing. When an appeal is filed and a hearing scheduled, it may take up to 52 days for the hearing to occur. If a hearing results in an order to provide records, the governmental

entity has another 30 days to do so. Successful mediation may possibly expedite a resolution.

- 2. Possible win/win resolutions.** In order for mediation to be successful conflicting parties must come to a mutually satisfactory resolution. Possibilities are much broader than a simple determination in favor of one side or the other. Mediation provides the opportunity to communicate and understand the opposite point of view. It enables parties to explore the possibilities for resolving conflict.
- 3. Partial resolution and clarification of unresolved issues to be appealed or litigated.** It may be that parties agree on some points but are still not able to reach a full resolution. In these cases, mediation is still successful to the extent that it clarifies unresolved points and supports the subsequent appeal or litigation.

Some disadvantages of mediation are:

- 1. Playing one's hand.** During mediation the opposing party may obtain information or insight that can be used to support their position in a later appeal or litigation. When parties are concerned about this, or if a party takes a position that leaves no room for compromise, then moving forward with litigation or an appeal may be the best strategy.
- 2. Lack of legal decision.** Resolution through mediation does not yield a legal decision. Judgments and State Records Committee decisions are valuable, because they help interpret the law. Sometimes one or both parties desire an external decision which is a directive and an interpretation of the law.

Mediation case studies

Case #1

Ms. R. is a criminal defense attorney who is using a GRAMA request to supplement discovery. She submitted a comprehensive request to a local law enforcement agency for various police reports and copies of some policies and procedures. The agency provided some records but denied most. The parties agreed to mediate. Ms. R. came to the mediation meeting with a table of the requested records so that each could be discussed in turn. In most instances the city was able to satisfy Ms. R. that a search had been made and had yielded no information helpful to her case. The agency agreed to provide search results for initial contact reports involving three individuals and also a list of all of their policies so that Ms. R. can determine whether or not any are responsive to her needs.

Case #2

A private citizen who is interested in a particular issue that was before the Legislature, requested copies of email to or from certain municipal employees who might have had reason to discuss

the issue of interest with legislators during the period the issue was up for legislative discussion. The city responded by providing many email records and also a log of email records that were being denied based on attorney client privilege. At mediation the parties discussed the meaning of attorney client privilege and the city's need to protect it. After understanding the concept the requester and the city agreed that the city will provide copies of privileged email in which only the header information remains and the body and substance of the email is redacted.

Case #3

The *Salt Lake Tribune* was researching the wrongful use of deadly force by law enforcement and requested records relating to a Highway Patrol trooper who was dismissed from employment after shooting a robbery suspect in 2006. The Department of Public Safety provided records responsive to the request, but classified other records as protected because they were prepared for an administrative proceeding. (Utah Code 63G-2-305(17)) The parties agreed to mediate. In the discussion the *Tribune* reporter contested that the records should be public because they related to disciplinary actions against a past employee and the charges on which the action was taken had been sustained. (Utah Code 63G-2-301(2)(o)) Both parties believed that GRAMA clearly supported their position and wanted the State Records Committee to make the decision.

Ombudsman contact information

State Records Ombudsman

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[Ombudsman website](#)