

10 THINGS THAT YOU NEED TO KNOW ABOUT GRAMA¹

1. GRAMA IS HARD

- Very little in GRAMA is black and white
- GRAMA requires you to analyze data and think about a variety of issues....
- GRAMA has gotten more complex b/c of the ease of creating records—texts, tweets, chats, etc.
- For every Rule, there's a “BUT”

2. GRAMA IS ABOUT TRANSPARENCY---TRANSPARENCY IS GOOD FOR GOVERNMENT

- a. Increases Confidence in Government
- b. Tax payers pay your salary and everyone in your agency—they deserve to know how money is spent.
- c. Transparency helps uncover and root out wrong doing.
- d. Transparency is the law...with exceptions.
- d. You will need to remind people for whom you work that transparency is good for government....try to do this with a smile.

63G-2-102 Legislative intent.

- (1) In enacting this act, the Legislature recognizes two constitutional rights:
 - (a) the public's right of access to information concerning the conduct of the public's business; and
 - (b) the right of privacy in relation to personal data gathered by governmental entities.
- (2) The Legislature also recognizes a public policy interest in allowing a government to restrict access to certain records, as specified in this chapter, for the public good.
- (3) It is the intent of the Legislature to:
 - (a) promote the public's right of easy and reasonable access to unrestricted public records;
 - (b) specify those conditions under which the public interest in allowing restrictions on access to records may outweigh the public's interest in access;
 - (c) prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter;
 - (d) provide guidelines for both disclosure and restrictions on access to government records, which are based on the equitable weighing of the pertinent interests and which are consistent with nationwide standards of information practices;
 - (e) favor public access when, in the application of this act, countervailing interests are of equal weight; and
 - (f) establish fair and reasonable records management practices.

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3. GRAMA GOVERNS RECORDS: Knowing what IS and IS NOT a RECORD is critical 63G-2-103

<p>"Record" means a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics:</p> <p>(i) that is: <u>prepared, owned received, or retained</u> by a governmental entity or political subdivision; and</p> <p>(ii) where all of the information in the original is reproducible by photocopy or other mechanical or electronic means.</p>	<p>15 Categories of "NON-RECORDS" – need to know what those are.</p> <ul style="list-style-type: none"> • Personal Notes • Temporary Drafts (BUT....) • Copyrighted material where government doesn't own copyright • Proprietary software • "Deliberative Process" privilege—for judges and ALJs, Board of Pardons • Junk Mail • Books that are contained in libraries • Private Phone number (IF there is a public number provided for the person) • OTHERS...
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NOTE: just because it isn't a record, doesn't mean your agency CAN'T give it out (like a calendar or personal note...) but it is not a record governed by GRAMA.

4. GRAMA LOOKS AT THE CONTENT OF THE RECORD, NOT THE FORM.

This is a corollary to the 3rd point—that GRAMA is about RECORDS. The CONTENT of record determines how it is classified—not the FORM.

Example: “all emails are classified as private” –NO. that is looking at form, not content

Example: all records about investigation X—includes emails, texts, notes, forms, etc.

5. RECORDS ARE PRESUMPTIVELY PUBLIC—THE GOVERNMENT’S BUSINESS IS THE PUBLIC’S BUSINESS

A. When interests are equal, the public’s interest will prevail...

B. Reminder---transparency is good for Government.

6. THERE ARE A LOT OF SECTIONS IN GRAMA THAT PROTECT THE RECORDS OF CLIENTS AND PERSONS WHO INTERACT WITH GOVERNMENT AGENCIES...

“PRIVATE”

“CONTROLLED”

“PROTECTED”

(and don’t forget exempt records—those covered by other requirements—like HIPAA, FERPA, etc...)

7. THERE IS ALMOST NOTHING IN GRAMA THAT PROTECTS A GOVERNMENT EMPLOYEE FROM A RECORD JUST BECAUSE IT IS EMBARRASSING TO THE EMPLOYEE...

“OR, EMAIL WILL BE THE DEATH OF US ALL”

8. THERE ARE VERY FEW WAYS TO PROTECT GOVERNMENT AGENCIES FROM “DIFFICULT REQUESTERS”

- A. “Reasonable Specificity”
- B. Fees
- C. Extraordinary circumstances—gives you more time to respond
- D. Don’t have to respond to duplicative requests, can direct people to where the information is on –line if it is, etc...
- E. **Your question: Don’t have to create a record in response to a request for records. (you CAN create a record, but GRAMA doesn’t require it).**
- F. Know what is a request for records, as opposed to a request for something else—relief, a meeting, an explanation, etc...)
- G. Communication with Requestor... ? Sometimes this can help clarify. With a difficult requester...it may not.

9a. A RECORD’S CLASSIFICATION IS ONLY THE BEGINNING... or “Deseret News changed Everything.”

2008 Utah Supreme Court Case.

“Unlike a governmental entity’s classification of a type of record containing information expressly classified by GRAMA, the county’s classification...represents at most a “prediction” of how a particular investigative report would be treated.

“GRAMA requires the county to conduct a conscientious and neutral assessment of the report...”

GRAMA does not contemplate adversarial combat over record requests. It instead envisions an impartial, rational, balancing of competing interests.”

9b DISCOVERY vs. GRAMA REQUEST:

* Discovery relates to get records in conjunction with an active lawsuit—could be state, federal, or a formal administrative hearing.

* GRAMA request goes to the records person, who may or may not know that litigation is going on....

* As of now, GRAMA request and discovery are two separate processes. If you get something like looks like discovery (court paper—has the word Subpoena) then talk to your legal counsel ASAP.

* two protections: Section 207(2)(c)—there can be a protective order issued in a litigation case... Or you don’t have to respond to duplicative requests—if the discovery request and the GRAMA request are identical.

- **WHEN IN DOUBT—ASK AN ATTORNEY? WARNING SIGNS “notice of claim, complaint, Order to Show Cause, Subpoena”**

10. GRAMA IS HARD.... (AGAIN). YOU NEED HELP

- a.** Know who your lawyer is who knows GRAMA and can help.
- b.** Know what your resources are at Archives.
 - i. people who help with classification and retention
 - ii. Records Ombudsman
- c.** Electronic media has made it harder—b/c people “talking” creates a record... tweets, chats, emails, etc.
- d.** What I tell my clients.
 - i. Don't Press send unless you are OK with that email being given to a reporter.
 - ii. One subject, One Email.
 - iii. Email will be the death of us all. Pick up the phone.
 - iv. Understand that Email, texts, chats are quite possibly government records. Be as professional as you would be if you knew you were creating a government record---because you are.

THINKING/DECISION TREE FOR GRAMA REQUESTS

This is just the basics. Create your own framework to make sure you consider everything. Add in your agency specific provisions as needed.

- 1. Is this A GRAMA request? (in writing/reasonable specificity, with contact information)**
- 2. Is the request for Records? (as opposed to something else?)**
- 3. Does my agency, prepare, maintain, receive or retain the records? (if not, and you can refer to agency that does, please do).**
 - a. Are the records available publicly? If yes, you can refer to the public website.**
- 4. Gather the records**
- 5. Review the records –determine:**
 - a. what is responsive to request (if you do a general search, you may capture a lot of records that are NOT responsive, too)**
 - b. Of the responsive records, what is public, private, protected, controlled and exempt.**
 - i. Sometimes a record is primarily public with SOME private information (tax payer IDs, social security numbers, etc.). Determine whether you can segregate or redact.**
 - c. For non-public information, determine if requestor is entitled to the record**
 - d. For exempt information—determine whether another law controls and what to do about that.**
- 6. Determine what records the requestor is entitled to receive.**
- 7. Provide those records.**
- 8. If records are withheld or redacted, provide a denial letter, with appeal information.**
- 9. Determine whether you can charge fees. Then determine whether a fee waiver is requested, and whether to grant a fee waiver.**
- 10. Do this all in 10 days—unless request is expedited, in which case, do it in 5!!!!**
- 11. If you have any questions or concerns, consult your legal counsel for assistance!**

(NOTE—I ALWAYS KEEP AN ELECTRONIC COPY OF WHAT I HAVE PROVIDED, especially if the records are public—this avoids duplicating the same request for another requester. It also prevents against duplicative requests—since you know clearly what you gave out before).

(NOTE: Under the general GRAMA retention schedule SG 1-64, GRAMA requests are retained for 2 years after the final action and are then destroyed. Determine whether your agency has a different GRAMA retention schedule).