

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



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February 17, 2015

Nova Dubovik
State Records Committee Executive Secretary
State Archives
346 S Rio Grande
SLC, UT 84101-1106
(801) 531-3861

RE: Appeal of Director Cragun's denial of second GRAMA request of Paul G. Amann

Dear Ms. Dubovik:

I am in receipt of Ms. Cragun's letter dated January 16, 2015. Ms. Cragun ("DHRM") provides a list of "Bases of denial" each of which does not pertain to the instant request.

1.) DHRM acknowledges that the records described "are in DHRM's files." She acknowledged that in the hearing before the State Records Committee on January 8, 2014. However, DHRM, through counsel Bob Thompson, claimed and continues to claim DHRM "retains" rather than "maintains" said records.

There is no basis for this sort of hair-splitting. Section 63G-2-103 of the Utah Code provides the relevant definitions to the "Government Records Access Management Act." §§ 63G-2-101 & 63G-2-103. There is no definition provided for "maintain." Nor is there a definition provided for "retain." That's because they're synonymous. In the absence of a definition from the legislature, we may assume the common meaning.

A look at the primary definitions of each of these words from a venerable dictionary is persuasive. *Webster's Encyclopedic Unabridged Dictionary of the English Language* defines "maintain" as "v.t. 1. to keep in existence or continuance; preserve; retain." *Webster's Encyclopedic Unabridged Dictionary of the English Language* defines "retain" as "v.t. 1. to keep possession of." "Maintain" and "retain" are synonymous. The records committee should not countenance DHRM's efforts to conceal these records by this artifice.

If DHRM desires to create a distinction in the definitions of these words that does not currently exist, it should attempt to do so through the legislature by endeavoring to amend the definitions section of Title 63G, Chapter 2 to provide different definitions than those which currently exist. Otherwise, DHRM is merely asserting a distinction that has no difference.

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Per [Signature]

DHRM conducted the subject investigation in conjunction with the AG's office. It retains and maintains the records from that investigation. It should not be heard to pass the buck back to the AG's office to provide those records. DHRM offers no basis for this maneuver. It's merely an attempt to stonewall the requestor and prevent access to records that DHRM maintains/retains.

2. DHRM next relies on § 63G-2-302(2)(d) claiming that release of the records would constitute an "unwarranted invasion of personal privacy of the complainant." However, that section states, "(2) The following records are private if properly classified by a governmental entity: . . . (d) other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy." This section clearly contemplates keeping "data" private. The logical implication of the use of the word "data" is information derived by calculation or experimentation. In any event, it is something beyond mere "records" or that section would read, "The following records are private if properly classified by a governmental entity other records . . . on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy." No "data" has been sought - only records. DHRM's reliance on this provision is infirm.

3. DHRM next relies on § 63G-2-305(1)(d) which states,

(10) records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records:

...
(d) reasonably could be expected to disclose the identity of a source who is not generally known outside of government and, in the case of a record compiled in the course of an investigation, disclose information furnished by a source not generally known outside of government if disclosure would compromise the source;

The weakness of DHRM's argument that it "retains" the records is exposed, for this statute does not cover records that are "retained." If DHRM merely "retains" the records, by DHRM's lights, this section of the code does not apply and the records must be provided.

Second, DHRM has not met the first part of the test. It has not established that the records are "maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records." Nor has DHRM met the second part of this test. DHRM has not established that release of the records "reasonably could be expected to disclose the identity of a source who is not generally known outside of government and, in the case of a record compiled in the course of an investigation, disclose information furnished by a source not generally known outside of government if disclosure would compromise the source."

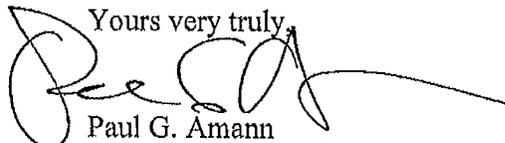
DHRM has not established that the identities would be disclosed. It has not established that the sources are not generally known outside of government. Nor has it established that disclosure would compromise the source. For all these reasons, the records should be provided.

Nova Dubovik
February 17, 2015
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Moreover, contact has been made by numerous of the witnesses (*e.g.*,
and they have indicated that they do not have any objection to
providing the records. DHRM has no basis to withhold them and they should be provided
forthwith.

4. DHRM's fourth argument is a recitation of its second and third arguments, both of which fail.
5. DHRM's fifth argument is that the petitioner is not entitled to the records because, although he could seek them in a professional capacity, he has sought them in a personal capacity. Again, the State Records Committee should not allow this sort of gamesmanship/word-parsing. The petitioner seeks the records both in his personal and professional capacity.
6. DHRM's sixth defense to the request is that "some of the documents are drafts." DHRM then cites to § 63G-2-22(b)(ii) which reads, "(b) "Record" does not mean: (ii) a temporary draft or similar material prepared for the originator's personal use or prepared by the originator for the personal use of an individual for whom the originator is working." It is petitioner's understanding that this matter was purely professional and that there no one was taking notes for their own personal purposes. Whatever drafts were made were part of the investigation and should have been for purely professional purposes. They are therefore subject to GRAMA. If any investigator was making notes or drafts for "personal purposes," the State Records Committee should be questioning what those personal purposes were
7. DHRM's seventh defense is a repeat of its sixth defense, which is untenable.

For the reasons stated, petitioner appeals to the State Records Committee to have the Committee address these issues.

Yours very truly,

Paul G. Amann
Assistant Attorney General



State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

**Department of Human Resource
Management**

DEBBIE CRAGUN, MAOM, SPHR
Executive Director

WENDY PETERSON, SPHR
Deputy Director

To: Paul G. Amann
Box 140872
Salt Lake City, UT 84114
(801) 366-0196

From: Robert Thompson *RJT*
Labor Relations Director
Utah Department of Human Resource Management

Date: December 17, 2014

Subject: Response to renewed GRAMA request

Dear Mr. Amann,

Ms. Debbie Cragun, Executive Director of the Department of Human Resources Management (DHRM) has asked that I respond to your most recent letters concerning your request for records under the Government Records Access and Management Act. As you know I am the records officer for DHRM.

As you are aware on November 21, 2014 Ms. Cragun denied your appeal for the following records:

Complaint filed by Ann Skaggs (or "Department of Commerce employee") on or about October 7, 2014, alleging "workplace harassment" against Assistant Attorney General Paul G. Amann (the "complaint") and any and all records which Skaggs (or "employee") alleges support her complaint including but not limited to any documents kept by Skaggs (or "employee"). Also include:

- Any and all communications to or from Securities Division employees regarding the complaint;*
- Any and all communications between Securities Division employees and Attorney General's office employees regarding the complaint;*
- Any and all communications between Skaggs (or "employee") and DHRM.*

To our knowledge Ms. Cragun's November 21, 2014 decision has not been appealed. On December 3, 2014 and again on December 12, 2014 you wrote Ms. Cragun challenging the basis of her decision and ostensibly to renew your request for the above referenced documents. You further requested "any documents generated by Ms. Adkins during her now compete investigation" and "the results of DHRM's investigation and any documentation generated through that investigation."

This letter is in response to your "renewed" records request. First, our records show the investigation subject to your request was completed on or about December 3, 2014. That is the day the Attorney General's office with assistance from a DHRM specialist finished their report.

After carefully considering your request I am providing you a copy of the requested complaint and all records used to support the complaint, all communications known to DHRM that occurred between Securities Division employees regarding the complaint, communications between complainant and DHRM, and the letter generated by Ms. Adkins informing complainant of the investigative results.

Regarding the investigative results, I must deny your request. Any investigative results or reports were produced and prepared by the Attorney General's office with requested assistance from DHRM. The Attorney General's office owns and maintains control of how and for what substantive purpose the results or reports will be used. Under such circumstances disclosure would conflict with fiduciary responsibilities owed by DHRM to the Attorney General's office. Moreover, because the requested investigative results are presumably for administrative purposes and DHRM is not privy to those purposes it would be inappropriate under Utah Code Ann. §63G-305(10)(b) to release this record. We believe such request would be better directed to the Utah Attorney General's Office.

Please be advised that you may appeal my decision to the State Records Committee. You have thirty (30) days from this denial to submit your appeal to the State Records Committee as specified in Utah Code Ann. §63G-2-403(1)(a) of GRAMA. Your appeal may be submitted to the following:

State Records Committee Executive Secretary
State Archives
346 S Rio Grande
SLC, UT 84101-1106
(801) 531-3861



State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

Department of Human Resource Management

DEBBIE CRAGUN, MAOM, SPHR
Executive Director

WENDY PETERSON, SPHR
Deputy Director

January 16, 2015

Paul Amann
pamann@utah.gov

Dear Mr. Amann:

I am writing in response to your letter of December 3, 2014, which I am treating as a new GRAMA request as of that date. Except as specified, your appeal is denied for the reasons described below. See attachment for a description of the documents withheld.

Bases for denial

1. We acknowledge that the records described below as withheld are in DHRM's files, but we believe the records should be considered to be maintained by the Attorney General's Office, for purposes of Utah Code Ann. § 63G-2-204(3)(b)(iii). Since it is primarily the interests of that Office and not DHRM that must be considered in determining whether to release the records, it is appropriate for DHRM to respond to a GRAMA request by notifying you, as we did, that it is the Attorney General's Office that maintains the record so that you may make a request of that Office. For example, many of the emails relate to legal matters for which the Attorney General's Office has provided representation. We are simply not in a position to know whether there is sensitive information in those emails.

Without waiving that basis, the bases described below would also apply in the event DHRM is determined to be the appropriate party to respond to the request.

2. Release of the records would constitute an unwarranted invasion of the personal privacy of the complainant under Utah Code Ann. § 63G-2-302(2)(d). They are also protected as an employment record under Utah Code Ann. § 63G-2-302(2)(a) and as witness information as described in Basis #3. In order to ensure appropriate employee working conditions, there is a significant public interest in protecting the privacy of individuals who make employment-related complaints. Although other considerations such as due process would clearly be important within the context of any action taken pursuant to a complaint, for purposes of GRAMA, those considerations do not outweigh the privacy interests of complainants such as the one in this matter, or the public interest in assuring that complaints are not discouraged.
3. Interview descriptions and other information provided by witnesses are protected under Utah Code Ann. § 63G-2-305(10)(d), and are private under Utah Code Ann. § 63G-2-302(2)(d). These individuals were promised confidentiality. I am sure you can appreciate how difficult it would be for us to get candid interviews with witnesses if we were unable to promise and keep confidentiality in association with these investigations, which is the reason Utah Code Ann. § 63G-2-305(10)(d) exists. Please note that all of the exemptions under Utah Code Ann. § 63G-2-305(10) apply to disciplinary matters.

4. Any information associated with a previous complaint made by the complainant in this matter is withheld under Utah Code Ann. § 63G-2-302(2)(d) and Utah Code Ann. § 63G-2-302(2)(a); the privacy of both the complainant and the accused would be violated by the documents' release. In addition, there are witness statements associated with that previous complaint that are protected under Utah Code Ann. § 63G-2-305(10)(d).
5. Attorney client, attorney work product and enforcement related information protected under Utah Code Ann. § 63G-2-305(17), (18), and (10). We recognize that you are or were in a position to have appropriate access to at least some of that information but since you are making the request in your personal capacity that is not a factor we can consider.
6. Some of the documents are drafts, subject to Utah Code Ann. § 63G-2-103(22)(b)(ii) or 63G-2-305(22). The former are not records subject to GRAMA.
7. In our hearing before the State Records Committee, you indicated that you intended for your renewed request to include notes made by the investigator. Ms. Adkins does have notes. They were created for her personal use as she prepared for interviews and as she prepared the report. They are therefore not records under Utah Code Ann. § 63G-2-103(22)(b)(ix) and therefore are not subject to the disclosure requirements of GRAMA.

Right to appeal

You have a right to appeal any records denial. If you wish to do so, you must file the appeal within 30 days of the date of this letter. An appeal may be made in state District Court by filing a complaint, or with the State Records Committee. An appeal to the State Records Committee may be made by filing the appeal with the Secretary of the Committee, Nova Duovik at one of the following addresses:

If by email

Nova Dubovik
ndubovik@utah.gov

If by U.S. mail or hand delivery

Nova Dubovik
State Archives
346 S. Rio Grande
Salt Lake City, UT 84101-1106

Sincerely,



Debbie Cragun
Executive Director