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VIA U.S. MAIL AND EMAIL

Ms. Gina Proctor
SRC Executive Secretary
Utah State Records Committee
346 South Rio Grande
Salt Lake City, Utah 84101-1106
gproctor@utah.gov

Re: GRAMA Appeal of Denial of Records Request Relating to Public Lands
Policy Coordinating Office (“PLPCO”)

Dear Ms. Proctor:

Our firm represents the reporter and requester, James Tobias.¹ Pursuant to Utah Code section 63G-2-403 of the Utah Government Records Access and Management Act (“GRAMA”), Mr. Tobias hereby appeals the refusal by the office of Governor Gary Herbert (“Governor’s Office”) on May 31, 2018 (“Denial”), to release certain documents regarding the management of public lands in Utah (the “Withheld Records”) that are subject to and requested by Mr. Tobias under GRAMA.²

In short, this appeal is about access to an email attachment that was transmitted from members of the Governor’s staff to individuals at the Sutherland Institute, a private organization. The title and surrounding context of the email suggest that the attachment contains a list of the “transition objectives” of the Public Lands Policy Coordinating Office (“PLPCO”), which is an arm of the Governor’s Office. The Governor’s Office claims the attachment is a protected “draft,” and that its disclosure would reveal the Governor’s contemplated courses of action before he has made them public. But under GRAMA, once the

¹ Mr. Tobias may be reached through his legal counsel at Parr Brown Gee & Loveless.

² A copy of the initial GRAMA request dated October 5, 2017 (“GRAMA Request”), is attached hereto as Exhibit A, and a copy of the Denial is attached hereto as Exhibit B. Before appealing to this Committee, Mr. Tobias timely appealed the Denial to the Chief Administrative Officer for GRAMA appeals for the Governor’s Office, a copy of which is attached hereto as Exhibit C. A copy of the Chief Administrative Officer’s decision affirming the Denial is attached hereto as Exhibit D.



attachment has been disclosed to the Sutherland Institute, which it undisputedly was here, it can no longer be classified as protected—it is instead now public. And even if it were protected (which, to be clear, it is not), the public’s right to know the contents of email attachments being shared between the Governor’s Office and the Sutherland Institute regarding important public-lands policy and objectives outweighs whatever interests the Governor’s Office might have in keeping the document secret.

FACTUAL BACKGROUND

Mr. Tobias is a public-lands journalist who has written numerous articles about the stewardship of public lands in the United States, in the West, and in Utah in particular. He is a contributing writer for *Pacific Standard* and a freelance reporter. His work has appeared in numerous publications, including *The New York Times*, *The Nation*, *Outside*, *High Country News*, and *The Guardian*. He is a contributing writer for *The Nation* and *Pacific Standard* and a former staff reporter for the *Missoula Independent*, Montana’s largest newsweekly.

One of the most important public-lands issues in recent history, and particularly in Utah, has been the debate over federal management of public lands. The public debate over the interplay between federal and state control of these areas of land has been—to put it lightly—spirited. This issue continues to inspire passionate discussions at the national, state, and local levels.³

A necessary corollary to and requirement for any meaningful debate about policy is the public’s knowledge of its elected officials’ stances and participation on the important issues. Mr. Tobias’ interest in these issues led him to investigate the position of certain Utah officials with respect to the federal government’s 2017 decision to reduce two national monuments in Utah: Bears Ears National Monument and Grand Staircase Escalante National Monument (the “Monuments”).

³ There are numerous examples of the many, many articles on this issue. See, e.g., Kirk Siegler, *With National Monuments Under Review, Bears Ears Is Focus Of Fierce Debate*, NPR.ORG (May 5, 2017), available at <https://www.npr.org/2017/05/05/526860725/with-national-monuments-under-review-bears-ears-is-focus-of-fierce-debate>; Eric Lipton and Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show*, THE NEW YORK TIMES (Mar. 2, 2018), available at <https://www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html>; Andrew Cullen, *Trump Move Stirs Debate over Utah Monuments*, REUTERS (Nov. 3, 2017), available at <https://www.reuters.com/article/us-usa-trump-monument-widerimage/trump-move-stirs-debate-over-utah-monuments-idUSKBN1D31PP>; Judy Fahys, *On First Anniversary Of Bears Ears Designation, Voices From The Debate*, KUER.ORG (Dec. 28, 2017), available at <http://www.kuer.org/post/first-anniversary-bears-ears-designation-voices-debate#stream/0>.

Through his research, Mr. Tobias came to learn that a branch of the Governor's Office called the Public Lands Policy Coordinating Office ("PLPCO")⁴ had been communicating with a conservative think-tank in Utah, the Sutherland Institute. According to various sources, the Sutherland Institute appears to have played a role in the federal government's decision to reduce the size of the Monuments.⁵

As part of his work on public-lands issues, Mr. Tobias sought to understand the interplay between private organizations like the Sutherland Institute, on the one hand, and the State of Utah, on the other. To that end, Mr. Tobias submitted the GRAMA Request to the Governor's Office on October 5, 2017, requesting "[a]ny and all available communications and correspondence between Public Lands Policy Coordinating Office Director Kathleen Clarke and/or her staff, and any representatives, operatives, staffers or lobbyists of the Sutherland Institute, a non-profit think tank based in Salt Lake City" at any time "between March 2016 and the present." Ex. A. The GRAMA Request specifically indicated that Mr. Tobias sought the documents in order to make them available to the general public and that the GRAMA Request was not being made for commercial purposes. *Id.*

On March 7, 2018, the Governor's Office sent Mr. Tobias an initial response ("Initial Response") indicating that, due to "extraordinary circumstances," it needed more time to produce responsive documents.⁶ Then on April 12, 2018, the Governor's Office produced certain redacted records responsive to the GRAMA Request (the "Production") and noted that certain records may be excluded from the Production (the "Supplemental Response")⁷ because they: "(1) constitute drafts, or (2) would reveal the Governor's contemplated courses of action." Ex. G. Following the Supplemental Response, the Governor's Office continued corresponding with Mr. Tobias until May 31, 2018, when the Governor's Office issued the Denial with its final determination to decline releasing the Withheld Records in response to the Request. *See* Ex. B.

⁴ According to its website, PLPCO is a statutorily created division of the Governor's Office that is tasked with development and coordination of policy initiatives, overseeing and staffing the Resource Development Coordinating Committee, providing researching and administrative support to the Constitutional Defense Council, defending the State's policies and interest on public lands by providing support to the Attorney General's Office in connection with litigation involving public lands, and preserving archaeological sites located on Utah's public lands. *See* <http://publiclands.utah.gov/about/>.

⁵ *See* Bryan Schott, *Sutherland Institute Authored Resolution Urging Trump to Overturn Bears Ears*, UTAHPOLICY.COM (July 12, 2017), available at <https://www.utahpolicy.com/index.php/features/today-at-utah-policy/13748-sutherland-institute-authored-resolution-urging-trump-to-overturn-bears-ears>.

⁶ The Initial Response is attached hereto as Exhibit E.

⁷ The Production is attached hereto as Exhibit F, and the Supplemental Response is attached hereto as Exhibit G.

Among the Withheld Records ultimately excluded from the Production was an attachment to an email with the subject line of “PLPCO Transition Objectives”. Although the PLPCO Transition Objectives attachment itself was withheld from the Production, the Governor’s Office did produce a number of emails exchanged between individuals on the Governor’s staff, on the one hand, and members of the Sutherland Institute, on the other. These emails reveal that the withheld PLPCO Transition Objectives attachment was provided to, at the very least, individuals at the Sutherland Institute.

For instance, Matthew Anderson, a Policy Analyst at the Sutherland Institute, emailed Redge Johnson, a Consultant in the PLPCO, and stated “Hi Redge, Can you send me a list of public lands [*sic*] priorities from your office? I’m going to start compiling everyone’s list into one big master document in the next few days.” *See* Ex. F at 7. The purpose of requesting the list of public-lands priorities was apparently to facilitate a discussion among certain stakeholders about their “wish lists” for public lands. *Id.* at 1. Mr. Johnson later asked whether Mr. Anderson had received a copy of “the list” from PLPCO. *Id.* at 2. Mr. Anderson responded the next day that he had not. *Id.*

As another example, the Production also includes an undated email string appearing to be from the same week as the Anderson-Johnson correspondence above. This undated email string shows that Carmen Bailey, an Assistant Director at PLPCO, sent an email titled “PLPCO Transition Objectives” to Mr. Johnson. *Id.* at 9. Mr. Johnson then forwarded that email to Mr. Anderson with a message stating “Hello Matt. Here is PLPCO’s list. Let me know when and where for the meeting on Friday.” *Id.* The attachment to this email, which the Governor’s Office has refused to produce, is at the center of this appeal.

On June 6, 2018, Mr. Tobias appealed the Denial to the Chief Administrative Officer for GRAMA appeals for the Governor’s Office. *See* Ex. C. In that appeal, Mr. Tobias stated that the Governor’s Office had not identified a valid basis for withholding the Withheld Records, including the PLPCO Transition Objectives attachment, and addressed both of the reasons offered in the Denial for the Withheld Records. Mr. Tobias’ explanations for contesting each of these two reasons are provided below in turn.

First, the Governor’s Office had no basis to withhold the document as a “draft” because Utah Code section 63G-2-305(22) states that “drafts” are protected only where they are not “otherwise classified as public.” In other words, the Governor’s Office does not have “carte blanche to withhold any and all records simply because they are drafts.” Ex. C. “To the contrary,” GRAMA “states that ‘drafts’ are ‘normally public’ whenever they ‘are circulated to anyone other than: (i) a governmental entity; (ii) political subdivision; (iii) federal agency if

the governmental entity and the federal agency are jointly responsible for implementation of a program or project that has been legislatively approved; (iv) a government-managed corporation; or (v) a contractor or private provider.” *Id.* (quoting Utah Code § 63G-2-301(3)(j)). The PLPCO Transition Objectives were transmitted to the Sutherland Institute, which is not one of the enumerated entities identified in (i) through (v), so the draft is therefore public and should be produced. *Id.*

Second, Utah Code section 63G-2-305(29) does not provide a valid basis to withhold the PLPCO Transition Objectives. That section states that records may be protected where they are “records of the governor’s office, including budget recommendations, legislative proposals, and policy statements, that if disclosed would reveal the governor’s contemplated policies or contemplated courses of action before the governor has implemented or rejected those policies or courses of action or made them public.” But the Governor’s Office had “made [the PLPCO Transition Objectives] public” by transmitting them to the Sutherland Institute, so that document cannot be classified as protected under section 63G-2-305(29).

On July 17, 2018, the Chief Administrative Officer for the Governor’s Office issued a decision upholding the Denial, summarily stating that “the requested record is protected under GRAMA as a record that (1) constitutes a draft, or (2) if disclosed, would reveal the Governor’s contemplated policies or contemplated courses of action before the Governor has implemented or rejected those policies or courses of action or made them public.” Ex. D. The letter from the Chief Administrative Officer did not substantively address any of the analysis offered by Mr. Tobias that disclosure to the Sutherland Institute makes the PLPCO Transition Objectives a public record—not a protected one. *See id.*

Mr. Tobias has been pursuing the Withheld Records on behalf of the public, which has a strong interest in knowing the details contained within them, particularly as they relate to the “transition objectives” of those trusted with the management of public lands in Utah. To that end, Mr. Tobias now appeals to this Committee seeking an order directing the Governor’s Office to release the PLPCO Transition Objectives and any other Withheld Records.

ARGUMENT

If this Committee upholds the Governor’s Office’s decision to withhold the PLPCO Transition Objectives, it would signal loud and clear to the Governor’s Office—and all other public entities subject to GRAMA—that governmental entities are free to circulate purported “drafts” to certain private interest groups while keeping all others in the dark by denying them equal access. This flies in the face of GRAMA and must be corrected.

The foundation of GRAMA is the presumption of public access to government records. “A record is public unless otherwise expressly provided by statute.” Utah Code § 63G-2-201(2). In enacting GRAMA, the Legislature declared its intent to “promote the public’s right of easy and reasonable access to unrestricted public records;” to “specify those conditions under which the public interest in allowing restrictions on access to records may outweigh the public’s interest in access;” and to “prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter[.]” Utah Code § 63G-2-102(3); *see also Deseret News Publ’g Co. v. Salt Lake Cnty.*, 2008 UT 26, ¶ 13, 182 P.3d 372, 376. The Utah Supreme Court has long “recognize[d] that it is the policy of this state that public records be kept open for public inspection in order to prevent secrecy in public affairs.” *KUTV Inc. v. Utah State Bd. of Educ.*, 689 P.2d 1357, 1361 (Utah 1984). And it has specifically instructed governmental entities not to engage in “adversarial combat over record requests.” *Deseret News*, 2008 UT 26, ¶ 25. Rather, an entity is “required to conduct a conscientious and neutral evaluation” of every GRAMA request and engage in “an impartial, rational balancing of competing interests.” *Id.* ¶¶ 24-25. “[T]he overriding allegiance of the governmental entity must be to the goals of GRAMA and not to its preferred record classification,” always conscious of the “mandate that when competing interests fight to a draw, disclosure wins.” *Id.*

GRAMA mandates that public records be released upon request except for those records that fit within one of the Act’s narrowly construed exceptions. Utah Code § 63G-2-201. Here, the Denial states that the GRAMA Request was denied because the PLPCO Transition Objectives document was purportedly (1) a draft or (2) revealing of contemplated policies or courses of action. However, neither section can be used to shield a document that has been circulated outside the Governor’s Office to an entity that is not enumerated in GRAMA’s subsection 301(3)(j).

This Committee should order that the PLPCO Transition Objectives and any other Withheld Records be disclosed for three reasons: (1) they are not protected drafts under Utah Code section 63G-2-305(22); (2) they have been “made public” under Utah Code section 63G-2-305(29); and (3) even if they were properly classified as a protected record (but, to be clear, they were not), this Committee should nevertheless order disclosure because the public interest in disclosure outweighs whatever limited interests remain in secrecy after the Governor’s Office elected to disclose the records to the Sutherland Institute.

I. The PLPCO Transition Objectives document is not a protected draft.

As Mr. Tobias stated in his appeal to the Governor’s Chief of Staff, it is not enough under GRAMA to deny a request simply because the responsive document is a “draft.” Under

Utah Code section 63G-2-305(22), “drafts” are protected only where they are not “otherwise classified as public.” And “drafts” are “normally public” whenever they “are circulated to anyone other than: (i) a governmental entity; (ii) political subdivision; (iii) federal agency if the governmental entity and the federal agency are jointly responsible for implementation of a program or project that has been legislatively approved; (iv) a government-managed corporation; or (v) a contractor or private provider.” *Id.* § 63G-2-301(3)(j). Because the PLPCO Transition Objectives were transmitted to the Sutherland Institute, which is not one of the enumerated entities listed in (i) through (v), the draft is “classified as public” and should be produced.

Moreover, section 301(3)(k) of GRAMA classifies as public “drafts that have never been finalized but were relied upon by the governmental entity in carrying out action or policy.” Even if the PLPCO Transition Objectives were not finalized, they are public records to the extent the Governor’s Office relied on them for purposes of facilitating a discussion about and any decisions on public-lands policy and management. It would be inconsistent for the Governor’s Office to claim it has not relied on the PLPCO objectives while also asserting that the drafts reveal the Governor’s contemplated courses of action.

II. The PLPCO Transition Objectives document has been “made public” by the Governor’s Office through its voluntary disclosure.

Nor does Utah Code section 63G-2-305(29) provide a valid basis to withhold the Withheld Records. That section states that records may be classified as protected where they are “records of the governor’s office, including budget recommendations, legislative proposals, and policy statements, that if disclosed would reveal the governor’s contemplated policies or contemplated courses of action before the governor has implemented or rejected those policies or courses of action or made them public.” But the Governor’s Office “made [the PLPCO Transition Objectives] public,” at least by transmitting them to the Sutherland Institute, so that document cannot be classified as protected under 63G-2-305(29).

III. The public interest in disclosure outweighs whatever marginal secrecy interests remain after disclosure to the Sutherland Institute.

Given the substantial public debate over the federal/state balance in managing public lands, the PLPCO’s Transition Objectives are a matter of significant public importance. The public has a right to know what information its elected officials are sharing with any private interest groups, including but not limited to the Sutherland Institute. These communications

Ms. Gina Proctor
SRC Executive Secretary
Utah State Records Committee
August 13, 2018
Page 8

are important to understanding the State of Utah's involvement in the Sutherland Institute's objectives of rolling back national monuments in Utah.

Weighing against this substantial public interest in disclosure would be any interest of the Governor's Office in being able to maintain secret communications regarding important policy issues with only certain special interest groups while excluding all others. That interest is simply not legitimate. But even if it were, it is substantially outweighed by the public's right to know.

Consequently, even if the Withheld Records were properly classified as non-public under GRAMA (they were not), this Committee should release the records under Utah Code section 63G-2-403(11)(b) because "the public interest favoring access is greater than or equal to the interest favoring restriction of access." *Id.*

For all of the reasons above, this Committee should grant the appeal and reverse the Governor's Office's refusal to release the Withheld Records.

Sincerely,
PARR BROWN GEE & LOVELESS



Jeremy M. Brodis

Cc: Jeffrey J. Hunt, Esq.
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