

#2017-124

RECD DEC 26 2017  
HP

State Records Committee members,

Thank you for your diligence, attention, and time spent reviewing this records request denial appeal. It is of great public interest to understand the costs, benefits, and other implications of the policies and operations of each and every division of the State of Utah. The Department of Environmental Quality must be particularly transparent, as it's statutory obligation to keep Utahns safe from environmental dangers applies to all Utahns - now, and forever.

In the instance of my December 12th, 2017 dated GRAMA request, the Division of Waste Management and Radiation Control failed to meet several statutory burdens listed in GRAMA statute by failing to release the records requested.

I am appealing this decision to this committee because the records denial in question was created and signed by the chief administrative officer of the division in question, rather than the GRAMA appeals officer. The department lists:

"Kaci McNeill | GRAMA Records Officer

Phone: (801) 536-0228

195 North 1950 West, Salt Lake City, UT 84116"

Yet, the initial denial of the records request dated Dec 12th, 2017 is a letter signed by Mr. Anderson, and although the email the letter was sent in was a division GRAMA associated general email account, the denial is from Mr. Anderson.

Thus, I appeal the records access denial decision dated Dec 22nd, 2017 to this committee.

First,

Mr. Anderson writes in a department letter dated December 22nd, 2017, titled: "RE: December 12th, 2017 GRAMA Request", that, "I have not denied your GRAMA request." This is inaccurate statutory analysis, because in that Dec 12th request, I specifically requested an expedited (5) day response for records release as specified under GRAMA statute.

Please note:

UC 63G-2-204(3) reads: "After receiving a request for a record, a governmental entity shall:  
(a) review each request that seeks an expedited response and notify, within five business days after receiving the request, each requester that has not demonstrated that their record request benefits the public rather than the person that their response will not be expedited; and  
(b) as soon as reasonably possible, but no later than 10 business days after receiving a written request, or five business days after receiving a written request if the requester demonstrates that expedited response to the record request benefits the public rather than the person:  
(i) approve the request and provide a copy of the record;  (ii) deny the request in accordance with the procedures and requirements of Section 63G-2-205;  (iii) notify the requester that it does not maintain the record requested and provide, if known, the

name and address of the governmental entity that does maintain the record; or  (iv) notify the requester that because of one of the extraordinary circumstances listed in Subsection (5), it cannot immediately approve or deny the request, and include with the notice:  (A) a description of the circumstances that constitute the extraordinary circumstances; and (B) the date when the records will be available, consistent with the requirements of Subsection (6).

UC 63G-2-204(8) reads: "If the governmental entity fails to provide the requested records or issue a denial within the specified time period, that failure is considered the equivalent of a determination denying access to the record. "

Thus, Mr. Anderson's claim in the Dec 22nd letter that: "The applicable time period for responding to your December 12, 2017 request is ten (10) business days after the date the request was received," is incorrect. GRAMA requestors seeking expedited response maintain an applicable time period for request response of 5 business days - not 10, and are entitled to review and decision of the chief records officer of the requested entity within 5 business days. That did not occur, and thus functioned as an official denial.

Second,

In the letter dated Dec 22, Mr. Anderson claims: "Your request duplicates a prior request received in our office on September 18, 2017. That request was denied and subsequently appealed to me. In a letter dated October 2, 2017, I responded to your appeal and explained that in circumstances where it is necessary to identify potentially relevant information and to compile information to create a new record, GRAMA allows an agency to require the payment of fees before processing the request. I explained that the costs to compile the information would be incurred by DTS and it was not in my authority to waive or adjust the fees and denied your request."

On this claim, it is clear that the GRAMA request submitted September 18, 2017, and the recent GRAMA request submitted December 12th, 2017 are not duplicate requests. Mr. Anderson gives no justification as to why they are duplicate requests or any indication that the second request is frivolous in nature. Similarities in documents do not make them duplicate documents. If I requested a duplicate Driver's License from the State and receive a new license that containing different information than my currently valid ID, the new license would not be a duplicate license. The same standard applies here. Comparing the two requests reveals claims of a duplicate request to be obviously invalid. Clearly, any reasonable standard of duplication does not apply to this case. Thus, Mr. Anderson failed to respond to my request for fee waiver and I seek remedy in the waiver of all fees related to this request.

Third,

The Dec 22nd letter did not explain the necessity to create any form of new record to reply to the request, nor did it explain any justification for denial of fee waiver. Specifically, it did not respond to the claim of statutory regulations that define reporters seeking records as acting in

the public interest. I am a investigated reporter who has published pieces across multiple publications. Statutorily, these are the types of situations designed for actions taken in the public interest to be encouraged. If this request is not an action in the public interest, I find it hard to describe any hypothetical request that would meet the public interest standard. As Mr. Anderson made no response to claims seeking financial relief of requestors seeking access to records in the public benefit, a full fee waiver ought to be applied and I am seeking such.

Mr. Anderson writes in the Dec 22nd letter: "In a letter dated October 2, 2017, I responded to your appeal and explained that in circumstances where it is necessary to identify potentially relevant information and to compile information to create a new record, GRAMA allows an agency to require the payment of fees before processing the request. I explained that the costs to compile the information would be incurred by DTS and it was not in my authority to waive or adjust the fees and denied your request."

Mr. Anderson's analysis to the appeal and explanation of circumstances does not apply here because this appeal is not a duplicate appeal and is thus required to be responded to in the same manner as all GRAMA requests under GRAMA code. Moreover, the request did not ask to compile information into a new record - it simply asked for access to those records. Thus, the fees required here are unjustified and I seek the remedy of a full fee waiver. Also of note here is the claim that a different department maintains records of Mr. Anderson's department, which presents a variety of legal and ethical issues to be discussed at another time.

It is critical that government officials are not allowed to deny a records request because the official asserts the request makes similar claims to another request. This places an undue burden on requesters to provide explicit analysis each and every time a request is submitted, whereas an official could simply cross-apply analysis from another case. Mr. Anderson does not submit any of the previous responses along with his most recent, so there is no record in this case of the fee structure or justification for non-maintenance of records in his response.

Even if Mr. Anderson had submitted a sample cost for records retrieval and search for the request in question, it is important to note is the small scope of the records requests. Specific search terms and dates will make locating electronic records much more simple and there seems to be no legitimate argument regarding the scope of records requested. It is outrageous that Mr. Anderson claims the lowest hourly wage for a department employee to search email records is \$100 per hour, and he provides no justification for why that is the case.

Fourth,

The ramifications of denying this appeal are vast. If governmental organizations are able to deny records requests by simply defining them as "duplicate" requests based on ad hoc standards, or giving extraordinarily lacking explanations of how the records requested do not benefit the public, or that another agency maintains the records which would cost thousands to reacquire, GRAMA requests could undergo an overwhelming chilling effect.

If the department is allowed to ignore journalist records request expeditions and/or fee waivers by determining the request is not in the public interest without applying any standards of what the public interest is, records will become more and more unavailable for access and the public will suffer because of it. The denial of records access requests in this case specifically is particularly damaging, as the records requested involve an ongoing investigation that has already published an original article on the topic.

A link to the publication follows:

<http://www.sltrib.com/news/politics/2017/08/20/landfill-near-the-great-salt-lake-could-become-one-of-the-nations-largest-industrial-waste-repositories/>

The remedy sought is the immediate and full release of the following records originally denied release upon original request, and waiver of all fees applied to this request:

- Records since 2015 involving landfill fee schedules or the discussion with landfill industry executives, including records related to the department's involvement of the development and passage of Utah Legislature 2017 Session House Bill 115 - "Solid Waste Revisions", including records of public forum comments made to the department as well as any private communications made to department employees.

- Communications since 2010 involving Box Elder County government employees (specifically, records involving any @boxeldercounty.org email address)

- Communications since 2010 involving any @promontorypt.com / @allosenv.com / @stratarr.com / @blackemerald.com / @zionsbank.com / @brhd.org email addresses."

63G-2-102(1)(3) specifies the legislative intent of GRAMA statute. It specifies several legislative intents of GRAMA statute, including two particularly relevant clauses listed below: |

(a) promote the public's right of easy and reasonable access to unrestricted public records; (e) favor public access when, in the application of this act, countervailing interests are of equal weight;...

This request does not seem particularly burdensome in the least. Email searches requested here are simple and quick. HB115 is in the middle of the legislative process, and records involving it should be readily available.

This request is not a spelunking adventure seeking random buried treasure. It is not designed to burden a public department for political reasons. It is a legitimate request to inspect records relevant to the investigation of a published journalist. I am seeking information regarding an industrial landfill project that is one of the largest in the world, and the records requested have the potential to help me understand how and why this project happened. The citizens of the State of Utah deserve to have the dealings of their government officials conducted in the open sunlight. And if sunlight is the best disinfectant as Supreme Court Justice Brandeis once

remarked, I implore you: Please serve the duty to the public and maintain transparency in government by fulfilling this records request.

Again, I must emphasize my thanks for your time and diligent effort to resolve this matter,

~ Benjamin Empey  
Independent Journalist