

GRAMA Notice of Appeal to State Records Committee

Requester's Information

Date: 4-18-19

Name: Elias Faraclas

Address: 5217 N Quail Run CT, Lehi UT 84043

Phone: 860-377-4643

Attention:

SRC Executive Secretary

346 South Rio Grande Street

Salt Lake City, Utah 84101

gproctor@utah.gov

Explanation of Relief Sought:

The justification and explanation for the relief sought continues below. Specific relief is enumerated below in the Relief Requested section.

Inclusions for notice of appeal:

This petition to appeal to the State Records Committee requires the following attachments or inclusions:

- Statement of facts, reasons, and legal authority in support of this appeal: X
- Original GRAMA request: X
- Notice of denial from the governmental agency's records officer: X
- Notice of appeal to the governmental entity's chief administrative officer: X
- Notice of decision from the governmental entity's chief administrative officer: X

This notice of appeal must, on the same day, also be forwarded to the governmental entity to which the records request was made (Utah Code § 63G-2- 403(3)).

- Notice of appeal sent to agency: X

Statement of facts, reasons, and legal authority in support of this appeal

Overview

A GRAMA request was submitted to obtain the records related to a development agreement that Lehi City entered into. The GRAMA request was specific in the types of documents expected and the city did not deliver them. Even after an appeal to the city pointing this out, some additional records were produced while others were not. This appeal will list some of the records that Lehi City knowingly did not comply with delivering. Given the repeated history of Lehi City knowingly not complying with the GRAMA statutes, a large question still exists as to what additional records should be delivered as responsive to this GRAMA request yet are being concealed.

This appeal also covers the issue of Lehi City intentionally mutilating records in order to purposefully not comply with the GRAMA statutes. The accompanying documentation will show that Lehi City changed the format of delivering emails with the purpose of obstructing a complete delivery of the required records.

Finally, this appeal will address the issue of the drafts requested. Some of the records not delivered are not drafts and thus not classified as protected. Some of the records not delivered are drafts and thus classified as protected. It should also be pointed out that the GRAMA statutes specifically indicate that when considering classification of records, protected records can and should be released when the interests favoring access are greater than or equal to the interest favoring restriction of access.

Initial GRAMA Request

On February 20th, the following GRAMA request was submitted: [[Open Records Portal Details.pdf](#)]

The records being requested are the final TMTH Development Agreement and all related records. The TMTH Development agreement is the agreement required by Ordinance #07-2018. Related records include all records generated or obtained by Lehi City between the passing of the ordinance on Jan 16 2018 and the signing of the development agreement. These records will include all emails, instant messaged [sic], SMS messages, documents relating to the development agreement. Records include all

sources contributing to this development agreement such as the mayor, city council, and planning department.

I received a response from the city on February 21: [Response from City 2-21-19.pdf]

Mr. Faraclas,

Below is a link for the e-mails you requested.

<https://drive.google.com/file/d/1CfPMP9iOdA9phdHLlwCiBNyKy2dwuezK/view?usp=sharing>

As is plainly clear from the initial GRAMA request, emails were but one of the many types of records requested. This was pointed out to the city [Response from City 2-21-19.pdf]

Hi Marilyn,

Thank you for this update. This is not a complete response, however. For example, I see no communication at all to/from TMTH and the city; no drafts of the development agreement, no discussion on the development agreement between the mayor's office and the planning department, etc. It is not a credible claim that after a year TMTH just showed up without any discussion at all with the city with an agreement in hand that was signed.

Please fulfill the GRAMA requirements and supply all of the information requested; much of which is expected not to necessarily be an email.

Best Regards,

Elias Faraclas

In an attempt to help the city be more responsive to the original GRAMA request, I had a phone conversation with Marilyn Banasky, the Lehi City recorder. In this conversation I reiterated the points from the previous email I had sent her. On February 28th, I received the following email from Ms. Banasky which included a single additional document, representing an email, as well as the official denial from Lehi City with respect to any additional records. [2-28 Banasky Response.pdf]

Mr. Faraclas,

I am in receipt of your GRAMA request dated February 12, 2019.

On February 21, 2019, in response to your request, I produced several e-mails regarding the TMTH development. Earlier this week, we had a phone conversation wherein you felt some of the e-mails were missing. I told you that those e-mails were between the attorneys. After further research, the City has determined that the e-mails between the

attorneys fall outside of the attorney client privilege and the scope of the attorney work product privilege. I have attached a pdf with those e-mails.

Your GRAMA request also included a request for the drafts of the Development Agreement. After further research and consultation with the Government Records Ombudsman, the City has determined that the drafts are protected records under Utah State Code 63G-2-305(22) and your request is therefore denied.

You have the right to appeal the denial of the protected records within thirty (30) days to the Lehi City Administrator, Jason Walker. The address is 153 N. 100 E., Lehi, Utah.

Appeal to Lehi City

As the response from Lehi City was entirely adequate, the following was sent to the Lehi City Administrator, Jason Walker, in appeal: [3-14 Appeal send to City.pdf, City Appeal.pdf]

*Jason Walker
Lehi City Administrator
153 N. 100 E., Lehi, Utah 84043*

3-14-2019

Mr. Walker,

I am writing to appeal Lehi City's inadequate response of my GRAMA request. On 2-20-19 I requested:

The records being requested are the final TMTTH Development Agreement and all related records. The TMTTH Development agreement is the agreement required by Ordinance #07-2018. Related records include all records generated or obtained by Lehi City between the passing of the ordinance on Jan 16 2018 and the signing of the development agreement. These records will include all emails, instant messaged, SMS messages, documents relating to the development agreement. Records include all sources contributing to this development agreement such as the mayor, city council, and planning department.

Ms. Banasky provided me with one collection of emails using TMTTH as a search term as well as a second document containing an email thread. This is an inadequate and incomplete response.

Please note that the GRAMA request was for the TMTTH Development Agreement and all related records. The TMTTH Development Agreement was never provided.

The GRAMA request indicated that the records will include all emails, instant messaged, SMS messages, documents relating to the development agreement. No instant messages, SMS messages, or documents were provided even though their existence is well known.

There are multiple instances where referenced attachments have been removed from the copies of the emails that were delivered. This is tantamount to mutilation of these records which is prohibited by the GRAMA statutes. [Utah Code Ann. § 63-2-905(2)a]. While drafts are protected records under Utah State Code 63G-2-305(22), there are many documents missing which are not drafts and are not protected.

It is obvious that Lehi City, again, is not in compliance with the GRAMA requirements. Moreover, Lehi City did not even make a good faith effort to comply with the requirements as the majority of the GRAMA request was not addressed, obvious documents were not included, and existing records were mutilated.

As is required by the GRAMA statutes, please instruct the city staff to deliver a complete and adequate response to the request.

On March 19th, I received the following response from Lehi City [3-19 Emails with Lehi City.pdf, TMTH Development Agreement.pdf]

Mr. Faraclas,

Your appeal claims that you never received the executed TMTH Development Agreement. I show that I e-mailed that to you on February 12, 2019. I am attaching it again to ensure that you have it.

In your appeal you mention attachments to e-mails that you believe you are entitled to that aren't drafts. Can you be more specific and tell me which attachments you are referring to?

To which I responded [3-19 Emails with Lehi City.pdf]

Ms. Banasky,

I am in receipt of the THTM Development agreement. Thank you.

The appeal listed all of the items that were not delivered. As the drafts of the development agreement are the only drafts referenced, all of the other documents are required to be delivered. These documents specifically include all of the attachments that are not drafts of the development agreement. As also specified in the appeal, the city has not delivered any records outside of the email search, This is not sufficiently responsive to the GRAMA request.

On March 28th, I received the two following emails which included additional records as well as Lehi City's final denial of anything additional. [3-28 Appeal Response 1.pdf, 3-28 Appeal Response 2.pdf, 032819 Faraclas Appeal Letter.pdf]

Issues for the Records Committee

Incomplete Response to GRAMA Request

As the city has pointed out, drafts are protected records under Utah State Code 63G-2-305(22). However, other than drafts of the development agreement, none of the other attachments listed below are drafts and are a part of the record requested.

Also, for clarity, while drafts of the Development Agreement can be considered drafts, none of the documents pertaining to the Area Plan Amendment are drafts. The Area Plan Amendment was passed by Lehi City council on January 16th, 2018. This predates this scope of this GRAMA request as well as all of the records being considered. It is not possible to have a draft for an ordinance that has already been passed. Hence any records pertaining to the Area Plan Amendment are not drafts, are not protected records, and must be delivered as responsive to the GRAMA request.

Page	Missing Records
2	<ul style="list-style-type: none"> • The referenced attachment of the changes • TMTH - Exhibit B to dev Agmt - Area Plan Amendment.docx • TMTH - Geneva - development Agreement.docx
5	<ul style="list-style-type: none"> • Attached edits to the Area Plan Addendum
24	<ul style="list-style-type: none"> • Attached documents
30	<ul style="list-style-type: none"> • Development Agreement REDLINE.pdf • Area Plan Amendment REDLINE.pdf • TMTH - Exhibit B to Dev Agmt - Area Plan Amendment.docx • TMTH - Geneva - Development Agreement.docx
44	<p>Attached final versions of:</p> <ul style="list-style-type: none"> • Development Agreement • Area Plan Addendum (exhibit B to Development Agreement)
45	<ul style="list-style-type: none"> • DRC/Planning Commission checklist
46	<ul style="list-style-type: none"> • Notice of Ordinance Adopting the Central Canyon Addendum to the Traverse Mountain Area Plan (Ordinance No. 07-2018)

47	<ul style="list-style-type: none"> • Attached letter
49	<ul style="list-style-type: none"> • Attached letter
74	<ul style="list-style-type: none"> • Attached comments on the Area Plan Amendment Documents
76	<ul style="list-style-type: none"> • Attached area plan amendment
79	<ul style="list-style-type: none"> • Attached minutes from Mark Johnson and the HOA board meeting
79	<ul style="list-style-type: none"> • Attached emails from Rob Clauson (developer)
79	<ul style="list-style-type: none"> • Attached 01.22.2018 TMMA Executive Session Approved Minutes
95	<ul style="list-style-type: none"> • Attached comments on the Area Plan Documents
96	<ul style="list-style-type: none"> • Mark Johnson “see attached”

Lehi City Mutilated Records

The initial response from Lehi City was a collection of .eml files (email files). These included all of the attachments. The next deliverable from Lehi City was a .pdf printout instead of the original .eml or collection of .eml. While the GRAMA statutes do not dictate the form that records need to be delivered in, it begs the question as to why Lehi City would change the format of how emails are delivered especially in the midst of a given GRAMA request. With the large number of documents that are responsive to this GRAMA request that were not delivered, as shown above, it seems that Lehi City intentionally changed the format with the express intent to attempt to conceal documents that were attached as part of the original record.

The GRAMA statutes prohibits the destruction or mutilation of records. [Utah Code Ann. § 63-2-905(2)a]. According to Dictionary.com, mutilate can be defined as to injure, disfigure, or make imperfect by removing or irreparably damaging parts. This is exactly what Lehi City did. By intentionally switching the formats of the records between deliveries they removed parts of the records. Lehi City mutilated the records.

Lehi City Acted in Bad Faith

Lehi City responded on Fed. 21 with a collection of emails only even though the GRAMA request explicitly requested SMS, Instant Messages, and other documents. When informed that the response was incomplete, Lehi City responded with a printout of a single email thread that removed all of the relevant documents. It was not until after an appeal was filed with the city that SMS and Instant Messages were delivered, more than a month later, on March 28th. And yet, not a single document has yet to be produced as responsive to a GRAMA request that

specifically asked for documents and where the existence of related documents is unquestionably true.

In the GRAMA code [Utah Code Ann. § 63G-2-102(3)a] the fundamental purpose of GRAMA is seen as:

(3) It is the intent of the Legislature to:

(a) promote the public's right of easy and reasonable access to unrestricted public records;

From Lehi City's responses to this GRAMA request, it is seen that they have been purposefully obstructing the "the public's right of easy and reasonable access to unrestricted public records".

Release the Drafts of the Development Agreement

The GRAMA code is also clear that any application of this code is meant to err on the side of public access. [Utah Code Ann. § 63G-2-102(3)e]

(3) It is the intent of the Legislature to:

...

(e) favor public access when, in the application of this act, countervailing interests are of equal weight;

Also, not all drafts are considered protected records as seen in Utah State Code 63G-2-305(22):

(22) drafts, unless otherwise classified as public;

The development agreement in question here was mandated by Lehi City council in conjunction with the passing of Ordinance #07-2018. The terms of the development agreement directly impact the public. The public has a strong interest in access to these drafts. While the final development agreement is now public, the government should not have any interest in classifying the drafts as protected.

The records committee has two options that would satisfy the public interest:

- 1) The records committee could classify these drafts as public. As Ordinance #07-2018 is land use legislation, it would be consistent with LUDMA (Land Use Development and Management Act) that all related documents are part of the public record.
- 2) The committee could also recognize the public interest in these records as sufficiently countervailing and hence order their release.

Requested Relief

- Compel Lehi City to release the records that it withheld improperly.
- Make a finding that Lehi City mutilated records.
- Make a finding that Lehi City did not act in good faith with respect to its GRAMA response.
- Order the release of the Drafts of the Development agreement.

List of Attached Documents

- Open Records Portal Details.pdf
- Response from City 2-21-19.pdf
- 2-28 Banasky Response.pdf
- 021219 Faraclas TMTTH Atty e-mails.pdf
- 3-14 Appeal send to City.pdf
- City Appeal.pdf
- 3-19 Emails with Lehi City.pdf
- TMTTH Development Agreement.pdf
- 3-28 Appeal Response 1.pdf
- 3-28 Appeal Response 2.pdf
- 032819 Faraclas Appeal Letter.pdf
- Text from Dale Bartlett via Messenger 2018-01-16 through 2019-02-12.pdf

List of Linked Documents

- <https://drive.google.com/file/d/1CfPMP9iOdA9phdHLlwCiBNyKy2dwuezK/view?usp=sharing>