

Notice of Appeal  
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Nova Dubovik <ndubovik@utah.gov>  
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## GRAMA Appeal

1 message

Robert Gehrke <gehrke@sltrib.com>  
To: ndubovik@utah.gov, grama\_coordinator@utah.gov

Tue, Nov 3, 2015 at 2:10 PM

Utah State Records Committee  
GRAMA Appeal  
Attn: Nova Dubovik  
346 S. Rio Grande  
Salt Lake City, UT 84101-1106  
Phone: 801-531-3834  
Via E-Mail

November 3, 2015

To Whom It May Concern,

On July 21, 2015, I filed a Government Records Access and Management Act request to the Utah Attorney General's Office on behalf of *The Salt Lake Tribune* seeking "copies of the file of any closed investigation conducted into San Juan County Commissioner Phil Lyman within the last five years."

Lyman is a San Juan County commissioner who was convicted of leading a protest ride across closed-off areas of federal land in Southern Utah. I have reason to believe he was also a subject of an investigation by the state into allegations of malfeasance stemming directly from his public service.

After requesting repeated extensions to respond to the request, the Utah Attorney General's office on Oct. 23, 2015, responded with a blanket denial, declining to acknowledge whether any records were responsive to the request and failing to state any legal grounds for denying the request, as required by law (Utah Code 63G-2-205(2)).

I appealed the request to Attorney General Sean Reyes on Oct. 26, 2015, arguing that, without having provided any legal rationale for denying the release, the office should immediately release the records. I also argued that, if the office contended that the records were investigative in nature and might impede an ongoing investigation or trial, the law and legal precedent dictated that the records should nonetheless be released.

On Oct. 30, 2015, Chief of Staff Parker Douglas responded to my appeal, affirming the denial.

Notably, in confirming the denial of the request, Douglas offered a new rationale for refusing to release the records, namely that releasing the information would constitute a "clearly unwarranted invasion of privacy" of Commissioner Lyman.

The Tribune disagrees with the interpretation and contends that the release of the records would serve an important public purpose, shedding important light on the conduct of elected public officials entrusted with an important fiduciary duty and accordingly asks the records committee to reverse the ruling and order the release of the records.

### Argument:

First, because the office failed to provide a legal basis for denying the GRAMA request, the records should be released immediately, without need for further discussion. Asserting new claims for refusing to release records on appeal and constantly shifting arguments makes it impossible to meaningfully address the underlying issues of the matter.

Second, the Attorney General's office contends that releasing the records that might be responsive to the Lyman request would constitute a "clearly unwarranted invasion of privacy," and categorizes the records as "private." This is an incorrect interpretation of statute and case law.

Assuming there are records responsive to the request, they would deal explicitly with a public official's conduct in a public office, actions taken on the public's behalf and his fitness to exercise the public trust. It is reasonable that when one serves in a position of public trust, the manner in which one executes that office is a matter of profound public interest — and not a matter of personal privacy.

The Attorney General's office contends that, if prosecutors declined to file charges in the matter, then releasing the documents responsive would constitute an invasion. Again, this does not hold with precedent established by the Attorney General's office or the Records Committee.

In *Schroeder v. Utah Attorney General's Office* (No. 20121057), issued last August, the Utah Supreme Court unanimously ordered the Attorney General's office to release bank records of Envision Ogden, a non-profit founded by the Ogden mayor that had been under investigation by the Attorney General's office, pursuant a GRAMA request.

In that case, the Attorney General's office notably released many of the investigative records responsive to Mr. Schroeder's request. The Records Committee ordered the office to release additional records.

Ultimately, the Utah Supreme Court ordered the release of bank records that — as is the case with the documents in the present request — were evidence gathered in a closed investigation that did not yield criminal charges.

It should be noted that GRAMA affords special, explicit protection to bank records, yet the court nonetheless found cause to release them pursuant the request. The district court had even ruled that there is a specific constitutional protection for bank records, which, again, the Utah Supreme Court overturned. The court also ordered the release of documents protected as "attorney work product," which again are afforded specific GRAMA protections.

That is because the Utah Supreme Court, applied the weighting test in Utah Code 63G-2-404(8)(a), which says that otherwise properly protected information can be released provided "the interest favoring access outweighs the interest favoring restriction of access."

Accordingly, the court ruled: "Applying the proper standard, we conclude that the records should be disclosed because Ogden's citizens have a right to know about potential public corruption, and the State's closure of the investigation years ago substantially reduces any interest the State has in protecting attorney work product."

That same weighting test, applied to the Lyman records, should tip the scales in favor of release of the material.

The court acknowledged the potentially sweeping breadth of the its ruling in *Schroeder*:

"At first blush, it seems to suggest that anytime the state seizes evidence in a criminal investigation, it places that evidence in the public domain. ... But we also note that even though our state constitution does not prohibit access to some sensitive categories of information, that does not mean state investigators must share their case files with anyone curious enough to ask for a copy. GRAMA recognizes more than sixty separate categories of protected records, including provisions that protect records whose disclosure would compromise an investigator's source of information, —interfere with investigations, —could be expected to disclose investigative . . . techniques, or —jeopardize the life or safety of an individual."

In the present matter, the Attorney General contends that release of the records would constitute a "clearly unwarranted invasion of privacy," and the burden should fall to the office to demonstrate that there is an expectation of privacy, that the release of the documents would compromise the privacy of the subject, and that such an invasion would be clearly unwarranted.

Here, the Attorney General errs in neglecting the case law on the topic of "clearly unwarranted" invasions of privacy, specifically the Utah Supreme Court's ruling in *Deseret News Publishing Co. v. Salt Lake County* (No. 20060454).

In the case, the unanimous court held that an investigation into allegations of sexual harassment by a public employee prepared by the county could not be withheld under 63G-2-305(10). While the statute the Attorney General's office now cites is 63G-2-302(2)(d), the language of both sections of code is identical.

The court's findings in the *Deseret News* case were threefold: 1. Releasing the report was not an unwarranted invasion of privacy; 2. With no disciplinary action contemplated, there was no basis for withholding the release of the report; and 3. The public's interest is served in releasing the report pertaining to a high-ranking public employee.

In the present appeal, each of the factors weighs more heavily toward releasing the records than in the case presented to the justices.

First, releasing the findings of the investigation into Commissioner Lyman clearly does not constitute an unwarranted invasion of his privacy.

In the *Deseret News* case, the subject of the investigation was an appointed official accused of sexual harassment. The documents that are the subject of my request, as mentioned above, pertain to Commissioner Lyman's conduct as an elected representative of the people of San Juan County and the discharge of that public office.

As the court unanimously ruled in *Deseret News*, merely because the release of the material might impinge on the subject's privacy, it does not mean it is necessarily "clearly unwarranted." If the invasion of an employee's privacy in what was essentially a human resources violation was deemed warranted by the court, certainly potential criminal activity or civil violations by an elected officeholder acting in his official capacity should warrant release of the information, as well.

Second, the court found that documents can only be reasonably be expected to interfere with investigations or a fair trial if such an investigation or trial is possible. The Lyman request only asks for closed investigations, meaning a determination has been made to no longer investigate the matter or to pursue charges based on the findings. It stands to reason that, if there is no investigation or trial, the release of the documents could not possibly interfere with those state interests or Mr. Lyman's constitutional rights.

To that end, the court in the *Deseret News* case cited the U.S. District Court ruling in *Badran v. U.S. Department of Justice*, which stated: "If an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, the FOIA would be meaningless; all information could fall into that category." (652 F.Supp. 1437 (1987))

Third, and most importantly, the release of the information has a clear bearing on the public interest and the integrity of a representative democracy. Assuming there are documents responsive to the request, it suggests that there was some cause for the top legal office in the state to investigate alleged civil or criminal violations by Mr. Lyman. There can be little argument that, if such conduct occurred, it is certainly a matter that the public has an interest and right to know. That was the crucial direction that court provided in the landmark *Deseret News* case — that the public's right to know can and often does outweigh the aforementioned arguments for concealing information when the balancing test is applied.

That was also the case in *Schroeder*, where the court ruled that one document in particular had been properly classified as "attorney work product," and as such could be exempted from release under GRAMA. But applying a balancing test directed by Utah Code 63G-2-404(8)(a), determined that even though it was properly classified there was a clear public interest in knowing the contents of the record.

In doing so, the *Schroeder* court stated that "the balancing analysis under GRAMA must be tethered to the specific interests of the parties and the particularized application of the relevant public policies at issue," and gave clear direction on how the balancing test should be employed.

The Attorney General's office has not articulated a specific privacy interest that may be invaded or public policy that might be impeded if the records are released. But there are direct and clear public policy implications that, *The Tribune* has reason to believe — and would likely be validated by an in camera review — are at the heart of the current appeal.

Many of those same policies were directly implicated in the court's weighting in the *Schroeder* case, when it noted that releasing properly protected documents would "serve the significant public policy interest of allowing Ogden's citizens to know whether their elected officials engaged in unethical, and potentially criminal, activity."

## **Conclusion:**

In summary, because the office failed to cite a specific cause for withholding the documents until the matter was on appeal, the records should be presumed to be public and released without further debate.

If the committee deems it acceptable for new justifications for withholding records to be tacked on later, then the question becomes whether the release of the investigative records would constitute a "clearly unwarranted invasion of privacy."

In the *Schroeder* case, the office released many of the investigative records on its own accord, setting a precedent that it should likewise follow here, but has chosen not to. The Records Committee and courts ordered the release of others, applying a balancing test that should be followed here. It is the belief of *The Tribune* that the application of the test tilts the scales decidedly toward disclosure of the documents.

Based on the court's ruling in the *Deseret News* case, it is *The Tribune's* belief that the release responsive documents would not constitute an unwarranted invasion of Mr. Lyman's privacy. Because the request seeks only files from closed investigations, there can be no argument that there is a contemplated trial or ongoing investigation that may be impeded by the release of the records. And inasmuch as the documents pertain to potential civil or criminal violations that may have been committed by a sitting elected official, the voters and the public have a clear interest and right to know the content of the documents.

Therefore, I formally request the prompt release of any documents responsive to this request.

Furthermore, I would ask the Records Committee to direct the Attorney General's office to expedite the production of the records. It is approaching four months since this request was filed and Mr. Douglas alludes to "other exemptions" that may apply, if there are records, creating the potential for further delay in producing the records and additional appeals and hearings before this committee that go against the spirit of the open records law and the public's right to know.

Thank you for your consideration.

Sincerely,  
Robert Gehrke  
The Salt Lake Tribune  
90 So. 400 West Suite 700  
Salt Lake City, UT 84101  
801-707-9929

cc: Utah Attorney General's GRAMA Coordinator

Attachments: July 21, 2015 Lyman GRAMA request  
Oct. 23, 2015 Denial by Blaine Ferguson  
Oct. 26, 2015 Appeal to Attorney General Sean Reyes  
Oct. 30, 2015 Letter from Parker Douglas affirming denial  
Utah Supreme Court ruling in *Deseret News v. Salt Lake County*  
Utah Supreme Court ruling in *Schroeder v. Attorney General*

Records Officer Denial  
Response Oct. 23, 2015

Dear Mr. Gehrke,

This is the response of the Attorney General's Office to your above-referenced GRAMA request, which asks for the following:

"I am seeking copies of the file of any closed investigation conducted into San Juan County Commissioner Phil Lyman within the last five years."

As the result of an extension, the deadline for the Office to respond to your request is 10-23-15. I have appreciated your patience as we have processed your request.

Without saying whether it has any records responsive to your request, the Office respectfully denies your request. The Office can provide you with no further information in response to your request.

You have the right to appeal to the chief administrative officer of the Attorney General's Office, as provided in Utah Code Ann. Section 63G-2-401(1)(a) (West Supp. 2015). The notice of appeal would need to be sent to Attorney General Sean D. Reyes at the following address:

(If by hand-delivery)

GRAMA Appeal

Office of the Attorney General  
Utah State Capitol Complex  
350 North State Street Suite 230  
Salt Lake City, UT 84114

(If by mail)

GRAMA Appeal  
Office of the Attorney General  
PO Box 140860  
Salt Lake City, UT 84114-0860

(If by email)

GRAMA Coordinator  
grama\_coordinator@utah.gov

To do so, you must file a Notice of Appeal with that officer within 30 days after the date of this response. Your Notice of Appeal must contain your name, your mailing address, your daytime telephone number, and a statement of the relief you seek. With your Notice of Appeal, you may also file a short statement of facts, reasons and legal authority in support of your appeal. Please note that Utah Code Ann. Section 63G-2-401(9) (West Supp. 2015) provides that the duties of the chief administrative officer for handling such appeals may be delegated.

Sincerely,

Blaine Ferguson

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Robert Gehrke  
The Salt Lake Tribune  
801-707-9929

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**5 attachments**



**LymanGRAMA.pdf**  
102K



**LymanGRAMAAppeal.rtf**  
8K



**2015-10-30 letter to Gehrke re #15-97.pdf**  
392K



**UtahSupremeCourt-2015UT77-regarding-srcappeal-2011-12.pdf**  
296K



**deseretnews-v-slco.pdf**  
97K