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GRAMA Notice of Appeal to State Records Committee

Note: Utah Code § 63G-2-403 (GRAMA) provides that any person may further appeal the chief administrative officer's denial of an appeal by filing a notice of appeal with the State Records Committee. This notice must be filed within 30 days of the response from a governmental entity's chief administrative officer or 45 days if the chief administrative officer failed to make a determination.

Requester's information

Name: Swen Heimberg c/o Phillip W. Dyer & Benjamin R. Dyer, Dyer Law Group PLLC Date: April 1, 2015
Address: 136 South Main Street, Ste. 221
City/State/Zip: Salt Lake City, UT 84101
Daytime telephone number: (801) 363-5000

Make request to

Nova Dubovik
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ndubovik@utah.gov

Explanation of Relief Sought

Note: Relief can relate to conflicts over denial of access to records (Utah Code § 63G-2-402) as well as disputes over fees (Utah Code § 63G-2-203(6)) or extraordinary circumstances (Utah Code § 63G-2-402).

The State Records Committee can also use the weighing provision to order the release of records that are properly restricted if it determines that the interests favoring access are greater than or equal to the interests favoring restriction (Utah Code § 63G-2-203(11))

See attached.

Inclusions for notice of appeal

The State Records Committee requires documentation and has specific appeals procedures which are outlined in Administrative Rule: Title R35. Administrative Services, Records Committee, and should be reviewed by a petitioner.

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
(see Utah Code § 63G-2-403(3)(b)).
- Original GRAMA request
- Notice of denial from the governmental agency's records officer
- Notice of appeal to the governmental entity's chief administrative officer
- Notice of denial from the governmental entity's chief administrative officer

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

Request assistance

A petitioner may request assistance from the government records ombudsman. The ombudsman's responsibility is to serve as a resource for a person who is filing an appeal relating to a records request. The ombudsman may also attempt to mediate disputes between requesters and responders (Utah Code § 63A-12-111(2)).

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The Dyer Law Group

April 1, 2015

HAND DELIVERED

Nova Dubovik
Archivist & Executive Secretary
Utah State Archives and Records Service
346 South Rio Grande Street
Salt Lake City, Utah 84101

RE: Appeal of Utah Department of Public Safety's Denial of Officer Swen Heimberg's Appeal of Peace Officer Standards and Training's Denial/Response to Officer Swen Heimberg's GRAMA Requests dated March 2, 2015 regarding the Matter of the Peace Officer Certification of Swen Heimberg

Dear Ms. Dubovik,

This office represents Officer Swen Heimberg ("Officer Heimberg") in the above-referenced matter. By this letter and through his counsel, Mr. Heimberg hereby appeals the Department of Public Safety's ("DPS") and Lt. James Higgs ("Lt. Higgs") response/denial of Officer Heimberg's Appeal of Utah Peace Standards Training's ("POST") response/denial of Officer Heimberg's Government Records Access Management Act ("GRAMA") Requests dated July 11, 2014 and July 14, 2014 (collectively Mr. Heimberg's "GRAMA Requests") under Utah Code Ann. §63G-2-403(2013). Officer Heimberg's appeal is timely because he is bringing his appeal within 30 days of DPS's/Lt. Higgs' March 2, 2015, response/objection/denial of his GRAMA Requests. For the purposes of this appeal, Officer Heimberg's mailing address is c/o Dyer Law Group: 136 South Main St., Ste. 221, Salt Lake City, UT 84101 and his phone number is c/o Dyer Law Group: (801) 363-5000.

Statement of Facts

POST has alleged that Officer Heimberg unlawfully accessed Bureau of Criminal Identification ("BCI") records for a non-law enforcement purpose. South Salt Lake Police Department ("SSLPD") conducted an internal investigation into Officer Heimberg's accessing of BCI records. Thereafter, on February 21, 2013, POST opened an administrative investigation into SSLPD's allegations that Officer Heimberg had improperly accessed BCI records. POST's investigative file indicates that POST reviewed SSLPD's internal affairs investigation file as part of its investigation. As part of its investigation, POST reviewed Officer Heimberg's radio logs, Spillman chat logs, dispatch tapes and internal affairs interviews. POST also conducted phone interviews with persons whose BCI records Officer Heimberg was alleged to have accessed.

On April 30, 2014, POST sent a letter to Officer Heimberg notifying him that POST was recommending that his peace officer certification be suspended for a period for 18 months. On the same day, POST Director J. Scott Stephenson issued a Notice of Agency Action stating that POST was seeking to take administrative action against

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Officer Heimberg's peace officer certification. Director Stephenson thereafter issued an Amended Notice of Agency Action on June 2, 2014. The Amended Notice of Agency Action is attached hereto as Exhibit A. On June 27, 2014, Officer Heimberg's counsel sent an email requesting an extension of time to respond to the Amended Notice of Agency Action due to the Fourth of July holiday. On July 1, 2014, Marcus R. Yockey, Special Assistant Attorney General for the Utah Department of Public Safety, sent an email to Officer Heimberg's counsel confirming an extension of time for Officer Heimberg to file a response to the Amended Notice of Agency Action. On July 7, 2014, Officer Heimberg's counsel timely filed his Response to Amended Notice of Agency Action. Officer Heimberg's Response to the Amended Notice of Agency Action is attached hereto as Exhibit B.

POST's process for suspension or revocation of an officer's peace officer certification is governed by the Utah Administrative Code that provides for "limited discovery" but which "does not extend to interrogatories, requests for admissions, request for production of documents, request for the inspection of items or depositions." *See*, Utah Admin. Code R728-409-13(A). The administrative code further provides that "disclosure of all discovery materials is subject to the provisions of [GRAMA]." *See*, Utah Admin. Code R728-409-13(C). Accordingly, on July 11, 2014, Officer Heimberg's counsel submitted a GRAMA Request to Sergeant Brad Macfarlane ("Sgt. Macfarlane") via email (the "July 11th GRAMA Request"). Officer Heimberg's July 11th GRAMA Request is attached hereto as Exhibit C. Thereafter, on July 14, 2014, Officer Heimberg's counsel submitted a second GRAMA Request to Sgt. Macfarlane (the July 14th GRAMA Request). The July 14th GRAMA Request is attached hereto as Exhibit D.

POST responded to Officer Heimberg's July 11th GRAMA Request ("POST's Response"), stating that Officer Heimberg's entire investigative file had been classified as protected and private under the applicable GRAMA sections.¹ Accordingly, POST provided "a copy of the materials contained in its investigative file it intends to use in the adjudicative proceeding." On August 11, 2014, and in response to Mr. Heimberg's GRAMA Requests, POST produced a portion of POST's Investigative File regarding allegations that Officer Heimberg had improperly accessed to BCI.

As to Officer Heimberg's July 11th GRAMA Request for POST investigative files regarding _____ and/or other officers who were found by POST to have violated U.C.A. §53-6-211(1)(d), POST responded that Officer Heimberg was not entitled to the requested documents because the same were classified as private and/or protected. Regarding Officer Heimberg's July 14, 2014 Request, POST has not produced the requested investigative files/records of _____ and/or _____ POST's refusal to respond to Officer Heimberg's July 14th Request is therefore a denial by the explicit terms of GRAMA. *See*, U.C.A. §63G-2-204(8)(2008).

POST granted Officer Heimberg's July 11th GRAMA Request for each and

1. Although POST's Response to Officer Heimberg's July 11th GRAMA Request is dated July 31, 2014 on its face, the envelope in which POST's Response was mailed shows that POST's Response was mailed on August 6, 2014. Accordingly, this appeal is not only timely but is submitted three (3) days before the 30 day appeal deadline has lapsed. POST's Response and the envelope in which it was mailed are attached hereto collectively as Exhibit E.



every final order issued by POST where it was determined that there had been a violation of U.C.A. §53-6-211(1)(d), as well as the decision(s), Findings of Fact and/or Conclusions of Law issued by an ALJ employed with POST relating to alleged violations of U.C.A. §53-6-211(1)(d), but initially required payment of a \$4,500.00 deposit before producing any documents requested in Officer Heimberg's July 11th Request. Although POST initially required a \$4,500.00 deposit prior to production, POST has now produced a portion of Officer Heimberg's POST investigative file at a production cost of \$0.50 per page.²

On September 2, 2014, Mr. Heimberg timely appealed POST's response/denial of Mr. Heimberg's GRAMA Requests and requirement that Officer Heimberg deposition \$4,500.00 for production of responsive documents at \$0.50 per page. Officer Heimberg's September 2, 2014 appeal is attached hereto as Exhibit F. On March 2, 2015, after an agreed upon extension of time for the Department of Public Safety to respond to Officer Heimberg's GRAMA Appeal between the parties, Lt. Higgs sent a letter to Officer Heimberg's counsel indicating that DPS/POST would produce the Notices of Agency Action regarding unauthorized access of BCI records, any Default Orders or Hearing Waivers and any audio recordings of POST Counsel meetings. Lt. Higgs' March 2, 2015, letter is attached hereto as Exhibit G. However, Lt. Higgs' March 2, 2015, letter did not address, nor indicate that DPS/POST would produce, the investigative files requested in Mr. Heimberg's GRAMA Requests, including the full investigative reports of Officer Heimberg,

Mr. Higgs' March 2, 2015 letter did not address/verify Mr. Heimberg's GRAMA request for copies of investigative files regarding each peace officer identified in any Final Order who was determined to have violated U.C.A. §53-6-211(1)(d) such that the same was effectively denied. Moreover, Lt. Higgs' March 2, 2015, letter did not address Officer Heimberg's appeal of the required \$4,500.00 deposit demanded by POST or the cost of production of \$0.50 per page such that they are deemed denied.

Officer Heimberg's counsel would note that Lt. Higgs' letter makes reference to correspondence "to narrow your records request as it relates to your client, Officer Swen Heimberg." Officer Heimberg's counsel recalls no such agreement to narrow the terms of the GRAMA Requests that are the subject of this appeal.

Accordingly, and by this letter, Officer Heimberg hereby appeals DPS's and/or Lt. Higgs' response/denial of Officer Heimberg's appeal of POST's denial/response to both Officer Heimberg's July 11th Request and July 14th Request regarding POST's investigative files.

2. On August 7, 2014, the Honorable J. Richard Catten issued a subpoena duces tecum to the City of South Salt Lake in the Matter of the Peace Officer Certification of: Swen Heimberg (the "SSLPD Subpoena"). The SSLPD Subpoena and Invoice are attached hereto as Exhibit H. The SSLPD Subpoena requested production of SSLPD's investigative affairs file regarding Officer Heimberg, as well as the investigative affairs files for SSLPD officers alleged to have improperly accessed BCI reports. On August 20, 2014, SSLPD provided an invoice to Officer Heimberg's counsel totaling \$100.00 for the production of the documents (at \$0.25 per page) and recordings (at \$5.00/recording) requested in the SSLPD Subpoena. All of the requested SSLPD investigative affairs files are believed to have been produced by SSLPD in unredacted form.



Reasons for Appeal and Legal Authority

A. POST did not explicitly reply/deny the entirety of Officer Heimberg's Appeal such that Officer Heimberg is hereby appealing POST's denial of its entirety.

As set forth hereinabove, a GRAMA request to which a governmental agency fails/refuses to respond is deemed denied. Inasmuch as Lt. Higgs' March 2, 2015 letter does not address Officer Heimberg's GRAMA Requests for the POST investigative files regarding _____ and _____ of SSLPD, the GRAMA Requests have been denied by DPS/POST. In addition, Lt. Higgs' March 2, 2015 letter does not address Mr. Heimberg's request for copies of POST's entire investigative files and any decision(s), recommendation(s), Findings of Fact and/or Conclusions of Law regarding each peace officer identified in a Final Order who was determined to have violated U.C.A. §53-6-211(1)(d). Accordingly, Officer Heimberg hereby appeals the denial of Officer Heimberg's Appeal of POST's response/denial of his GRAMA Requests for the reasons set forth herein and requests that POST/DPS be ordered to produce the documents requested by Officer Heimberg in his GRAMA Requests, including, without limitation, copies of any and all files, reports, daytimer/calendar entry(ies), memoranda, emails, documents, statements and/or audio tape recordings (and transcripts thereof) that are in possession or control of POST.

B. POST has improperly denied Officer Heimberg access to the entirety of his POST investigative file.

POST's July 31, 2014, Response asserted that Officer Heimberg's investigative file is classified as protected under U.C.A. §63G-2-305(10) and private under U.C.A. §63G-2-302(2)(d). However, neither of the cited statutes is applicable in this matter. First, §63G-2-302(2)(d) defines "private" government records as, "other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy." POST has not identified what documents/records would be considered an invasion of personal privacy which is especially relevant given that the requested investigative file pertains directly to Officer Heimberg. Moreover, any issues regarding privacy can be addressed by appropriate and limited redaction of information that is deemed private by GRAMA.³

Furthermore, U.C.A. §63G-2-305(10) is inapplicable to Officer Heimberg's investigative file because U.C.A. §63G-2-305(10) prohibits the release of records that:

3. Officer Heimberg notes that any issue as to police officer privacy can be addressed by redaction of non-public information. Redaction has been supported by the Supreme Court of Utah, to-wit: "To facilitate classification, GRAMA permits a governmental entity to divide a record into its public and nonpublic parts by redacting nonpublic content." See, Deseret News at ¶16. However, only nonpublic information can be redacted under GRAMA as pointed out by the Court in Deseret News, "unless the invasion of privacy is clearly unwarranted, the public interest in disclosure must prevail." *Id.* at FN6. Moreover, Officer Heimberg's counsel have been authorized to enter into a mutually acceptable protective order as to the production of any documents that contain private/protected information that limits the use of those documents to the proceedings pending before POST.



- (a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;
- (b) reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings;
- (c) would create a danger of depriving a person of a right to a fair trial or impartial hearing;
- (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; or
- (e) reasonably could be expected to disclose investigative or audit techniques, procedures, policies, or orders not generally known outside of government if disclosure would interfere with enforcement or audit efforts; U.C.A. § 63G-2-305(10).

Of the subsections set forth hereinabove, only one applies – U.C.A. §63G-2-305(10)(c)’s consideration of deprivation of the right to an impartial hearing – and supports production of Officer Heimberg’s investigative file in its entirety so that Officer Heimberg is fully aware of the allegations against him and the investigation by POST into those allegations. Without the disclosure of the entirety of the POST investigative file, only one person will be deprived of an impartial hearing - Officer Heimberg.

Of the other subsections, none are applicable. The investigation regarding the allegations against Officer Heimberg is complete in this matter such that there is no reasonable expectation that production of the file in its entirety would interfere with an investigation nor would production interfere with any audit, disciplinary or enforcement proceedings. Redaction of the name(s) of any previously unidentified source(s) moots any argument as to the disclosure of the identity of a source not generally known outside of government. Lastly, Officer Heimberg’s file cannot be expected to disclose any investigative techniques not generally known outside of the government. Accordingly, Officer Heimberg requests that the Record Committee order POST to produce, in full, POST’s investigative file regarding Officer Heimberg and the allegations that are at issue in this matter.

C. POST has improperly classified POST investigative files and improperly denied production of the entirety of POST investigative files.

Officer Heimberg hereby appeals DPS’s/POST’s denial of his Appeal regarding POST’s denial/response to his GRAMA Requests for production of the investigative files

Investigative records are not records that qualify as private or protected under GRAMA. The Supreme Court of Utah has addressed this matter in



Deseret News Publishing Company v. Salt Lake County, wherein the Supreme Court of Utah held that,

“We conclude that government records are presumptively public under GRAMA, and thus, the County bears the burden of proving that it properly classified the investigative report as nonpublic. We hold that the County did not properly classify the investigative report as a private record under section 63-2-302(2)(d) because the public interest in the record's release outweighs the potential personal privacy intrusion suffered. We further hold that the County did not properly classify the investigative report as a protected record under section 63-2-304(9), an exception that should properly extend only to reasonably expected investigations rather than hypothetical ones. Finally, we find legitimate public interest in releasing the report.” Deseret News Publishing Company v. Salt Lake County, 2008 UT 8, ¶53 (Emphasis supplied).

The Utah Department of Public Safety should be well aware of the categorization of investigative files – in the case of Lawrence v. Utah Department of Public Safety and Utah State Records Committee, Case No. 120907748, the Honorable Judge L.A. Dever issued a Ruling on June 7, 2013, holding that investigative records that are the subject of a GRAMA request should be disclosed and that investigative records “are not records concerning performance evaluations or personal status information that qualified under the Code as private.” Judge Dever’s Ruling is attached hereto as Exhibit I. Thereafter, Judge Dever entered a judgment against the Utah Department of Public Safety holding that “investigative records...are presumptively public under Section 63G-2-201(2) and shall remain public and subject to disclosure...” Judge Dever continued, “Investigative records addressing alleged violations of the public trust fall outside of this Section because they are not the same kind, class, character or nature as the specifically enumerated categories of sensitive personal information identified as “performance evaluations and personal status information such as race, religion, or disabilities.” Judge Dever’s Judgment is attached hereto as Exhibit J (Emphasis supplied). Judge Dever subsequently awarded the Mr. Lawrence \$9,360.00 in attorney’s fees and costs incident to pursuing the appeal of this Department’s denial of his GRAMA request.

Inasmuch as DPS/POST has improperly classified the investigative files set forth hereinabove, Officer Heimberg requests that the State Records Committee order that DPS/POST produce any/all of the investigative files that are responsive to Officer Heimberg’s GRAMA Requests.

- D. To the extent that POST intends to require a deposit of \$4,500.00 for production of the documents requested herein, Officer Heimberg appeals the reasonableness of the required deposit as well as the cost of \$0.50 per page.**

The last paragraph of POST’s July 31, 2014 Response states, “If you wish to proceed with your request, send a deposit of \$4500.00 [sic] check payable to



POST...The records will be released to you after the entire payment necessary to cover the actual cost of providing the records is received.” Since the July 31, 2014 Response, POST has only produced a partial investigative file for Officer Heimberg and charged Officer Heimberg \$108.00 for the same.⁴ Inasmuch as the requirement of a \$4,500.00 deposit has not been formally withdrawn by POST/DPS, Officer Heimberg hereby appeals the requirement for such a deposit as well as the cost of \$0.50 per page for production of documents. Officer Heimberg respectfully submits that a deposit requirement and/or a cost of \$0.50 per page are arbitrary and capricious. Specifically, POST’s Response did not provide any information regarding how many pages will be produced, whether the documents are producible in electronic format to save on the costs of production, what categories of responsive documents to be produced demanded a deposit of \$4,500.00⁵ or any other information by which Officer Heimberg can make a reasonable determination in the future should POST be ordered to produce the responsive investigative files requested hereinabove.

Although DPS/POST has now indicated that it will be charging \$0.50 per page for production of documents, DPS/POST has refused to produce the requested POST investigative files and did not address Officer Heimberg’s appeal of the costs for production such that Officer Heimberg is also including this issue in his appeal to the State Records Committee. Moreover, a production cost of \$0.50 per page for Officer Heimberg’s own investigative file is arbitrary and capricious given the Utah Legislature’s encouragement that subjects of records should have GRAMA fees for production waived, to-wit: “A governmental entity may fulfill a record request without charge and is encouraged to do so when it determines that:...(b) the individual requesting the record is the subject of the record...” U.C.A. §63g-2-203(4).

A review of applicable costs associated with production of documents under GRAMA indicates that the typical cost for production of documents – and in fact the cost set forth by the Utah Division of Archives and Records Services – is twenty-five cents (\$0.25) per page.⁶ If the costs associated with production of documents in response to the July 11th Request are calculated based upon POST’s rate of \$0.50 per page, the documents that POST believed to be responsive to the GRAMA Requests totaled 9,000 pages of documents in response to the GRAMA Requests. Officer Heimberg respectfully submits that it is arbitrary and capricious for POST to assert that it will produce 9,000 pages of documents without delineating what documents are to be produced to allow for Officer Heimberg to determine whether the documents to

4. Officer Heimberg notes that POST has subsequently invoiced Officer Heimberg’s counsel \$108.00 for production of his partial investigative file and that the same was billed at a rate of \$0.50 per page and \$25.00 per recording.

5. The overcharge for the production is even more egregious when taking into consideration that SSLPD invoiced Officer Heimberg \$100.00 to respond to the SSLPD Subpoena when the SSLPD Subpoena requested production of five (5) SSLPD investigative files, three (3) of which were also requested in the July 11th Request.

6. A review of records request information reveals that Salt Lake City charges “not more than \$0.25 per copy” (http://www.slcdocs.com/recorder/webqafees13_14.pdf), the Utah Division of Archives and Records Services charges \$0.25 per page (<http://archives.utah.gov/research/costs.html>) and the Utah State Courts charge \$0.25 per page (See, Code Of Judicial Administration Rule 4-202.08). A review of smaller cities indicates that some cities, i.e., Draper, Lehi and Nebo, charge between \$0.10 and \$0.15 per page. As noted above, SSLPD charged only \$0.25 per page.

