

#2015-87

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November 11th, 2015

Via hand-delivery and email

UTAH STATE RECORDS COMMITTEE
Nova Dubovik, Executive Secretary
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NOTICE OF APPEAL TO RECORDS COMMITTEE

Appellant's name: Jordanelle Special Service District
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Dear Messrs. and Mmes. of the Utah State Records Committee:

Jordanelle Special Service District ("JSSD") was the subject of an audit by the Utah State Auditor (the "Auditor"), which led to the issuance of Findings and Recommendations, Report No. 13-JSSD-8L (the "JSSD Audit"). The JSSD Audit was issued on April 16, 2015, and is final. On June 8, 2015, JSSD served a GRAMA request on the Auditor seeking all files related to the JSSD Audit. As the subject of the JSSD Audit, it was looking for the production of all information received by the Auditor and/or relied upon by the Auditor in reaching the conclusions laid out in the JSSD Audit.

Pursuant to section 403 of the Government Records Access and Management Act ("GRAMA"), JSSD hereby appeals to the Utah State Records Committee (the "Records Committee") the denial by the Auditor dated October 13, 2015 where in the Auditor denies in its entirety JSSD's appeal. Attached hereto as Exhibit 1 is the denial of JSSD's record request by Mr. Dougall (the "Dougall Letter"). This appeal is made on the grounds that JSSD is entitled to all information and documents the Auditor reviewed and considered in reaching its conclusions.

JSSD sets forth below a brief statement of facts, as well as the reasons and legal authority which entitles it to reversal of the Auditor's denial.

Statement of Facts

JSSD is a special service district, which is a separate and distinct entity, created by Wasatch County over twenty years ago. Starting in 2010, JSSD became embroiled in several lawsuits involving the creation of a special service area ("Area C") and the construction of certain improvements within Area C.

In January 2014, the Auditor announced that it would be investigating JSSD's "potential misuse of credit cards." At the time, and frequently thereafter, JSSD explained to the Auditor its concern that the Auditor was being used by private litigants to gain a tactical advantage in litigation.¹ JSSD's concern was not unfounded. For instance, when the Auditor's investigation started, the litigants presented JSSD with a standstill agreement which demanded that JSSD stand-down from any litigation. (Standstill Agreement, attached hereto as Exhibit 2.) The standstill agreement stated that it was supported by the Auditor and the Utah Governor. Yet, neither the Auditor nor the Utah Governor's Office ever authorized the standstill agreement, although, strangely enough, a copy of the standstill agreement was forwarded to the Auditor *the same day* it was presented to JSSD.

As a result, on July 21, 2014, JSSD made a request to the Auditor under GRAMA. JSSD requested all documents related to the standstill agreement. That GRAMA request was partly denied. The Auditor claimed that it was unable to provide JSSD the records because they were part of an *ongoing investigation* by the Auditor. JSSD appealed the Auditor's decision to this Committee. In a 4 to 2 decision, this Committee affirmed the Auditor's decision. (12/22/2014 Decision and Order, attached hereto as Exhibit 3.) JSSD appealed the Committee's decision to the Third Judicial District Court. Petition for Judicial Review, Case No. 150900423 (1/20/2015).

On April 16, 2015, while judicial review was pending, the Auditor concluded the investigation and issued its Findings and Recommendations. (Report No. 13-JSSD-8L). Several days later, on April 20, 2015, JSSD and the Auditor mutually agreed to dismiss the Petition for Judicial Review without prejudice on the basis that since the audit of JSSD had been completed, it obviated the justification used by the Auditor to withhold records. The Auditor had argued before this committee that the records were protected under Utah Code Ann. § 63G-2-305(16), which states that protected records include "records of a governmental audit agency relating to an ongoing or planned audit *until the final audit is released.*" (See 12/22/2014 Decision and Order at ¶ 5 (emphasis added).)

Around June 8, 2015, JSSD filed a GRAMA request. (GRAMA Form, attached as Exhibit 4.) JSSD was the subject of the audit, which had concluded, and therefore requested the records related to the audit. After several discussions between representatives of JSSD and the Auditor, on August 27, 2015 the Auditor's Records Officer responded to the GRAMA request by providing only

¹ As expected, shortly after the Auditor's report was issued, the litigants began selectively incorporating and referring to the audit in their filings with the Court. In one case, a private litigant quoted the audit in support of the false notion that JSSD "defend[s] inappropriate activity," "cloud[s] relevant facts by distorting, deflecting, and manipulating facts and information," and "throw[s] mud in a clear pool of water so that the picture becomes cloudy."

two binders of documents containing (a) a few written communications and (b) the Auditor's work papers. (Ms. Siebenhaar Letter, attached as Exhibit 5.) The Records Officer, however, refused to produce responsive records, including at least two boxes of documents.² Among the reasons given for not producing responsive records included:

- Communications with the Hotline complainant(s) or with persons who requested anonymity (*Utah Code* § 63G-2-305(10) and *Utah Code* § 67-3-1(15) (a) (ii)).
- Communications or documents related to the private land transaction between the Bests and Fishin' with Bread. Per *Utah Code* § 63G-2-103 (22) (b), material that is legally owned by an individual in the individual's private capacity is not considered a public record and is, therefore, not subject to the requirements of GRAMA.
- Various records or communications with representatives from the Attorney General's Office. Per 63G-2-305 (17), these records are deemed "protected" as they are subject to the attorney-client privilege.

(*Id.* (italics in original).) Further, a significant portion of the documents produced were heavily redacted. The Records Officer gave no justification for redacting these documents.

JSSD appealed the partial denial of its GRAMA request, including the redactions. (Notice of Appeal, attached as Exhibit 6.)

Mr. Dougall adopted and reaffirmed the Records Officer's decision in a letter dated October 13, 2015. (Dougall Letter at 2.) In addition, Mr. Dougall purported to make additional findings not included in the initial response. Mr. Dougall's additional findings can be summed up in three arguments: (i) the records were withheld because they were given or obtained by the Auditor from individuals that requested anonymity (¶¶ 1, 5), (ii) the records were withheld because they relate to an ongoing audit (¶¶ 2-4), (iii) the records were withheld because governmental entities do not have the right to file a GRAMA request (¶¶ 6-13).³

As explained below, none of the reasons provided by the Auditor justify it withholding hundreds or thousands of pages of records or redacting documents.

Legal Authority and Reasoning

There is a presumption that "government records are public." See *Southern Utah Wilderness All. v. Automated Geo. Ref. Ctr.*, 2008 UT 88, ¶ 21, 200 P.3d 643. There are of course exemptions to this presumption contained in Utah Code Ann. § 65G-2-305. When construing the provisions in the

² In one of the documents produced entitled "Special Project Documentation Form," there is a reference by the Auditor to having received "2 boxes of documents and [redaction]."

³ The letter of October 13, 2015 represents the first time that the Auditor has raised this argument and was not an position taken by the Auditor in JSSD's prior GRAMA request.

Utah Code, the law requires that you look to the provision's plain language. *Salt Lake City Corp. v. Haik*, 2014 UT App 193, ¶ 8, 334 P.3d 490. This means giving the language their "plain, natural, ordinary, and commonly understood meaning." *Gohler v. Wood*, 919 P.2d 561, 562-63 (Utah 1996).

1. JSSD was Given No Basis for the Redaction of Responsive Records.

As already noted, a significant number of records provided to JSSD in response to its GRAMA request are redacted, including the records attached as Exhibit 7 hereto. JSSD considers these redactions to be denials under GRAMA. Utah Code Ann § 63G-2-204(8) ("If the governmental entity fails to provide the requested records . . . that failure is considered the equivalent of a determination denying access to the record."). More troubling is that JSSD was given no basis for the redactions. Utah Code Ann. § 63G-2-205(2)(a)-(b) states that "notice of denial shall contain . . . a description of the record or *portions of the record* to which access was denied," and "citations to the provisions of this chapter . . . that exempt the record or *portions of the record* from disclosure . . ." (emphasis added).

Without an explanation of the basis for redacting these records, JSSD is limited in determining whether the Auditor legally withheld these portions. We request that the Auditor expressly provide the basis for redacting and therefore withholding portions of the records. To the extent the redactions were done pursuant to the reasons provided by Ms. Siebenhaar and Mr. Dougall in their letters, as explained below, we do not believe these redactions were proper and request that the full, unredacted copies, be provided.

2. The Audit Has Concluded and Utah Code §§ 63G-2-305(10) and (16) Do Not Apply.

In paragraphs 2 through 4 of his additional finds, Mr. Dougall obliquely refers to Utah Code Ann. §§ 63G-2-305(10) and (16) as supporting the Auditor's decision to withhold records.

Both of these sections are irrelevant to JSSD's GRAMA request. As Mr. Dougall himself states, "[r]ecords of a governmental audit agency relating to an ongoing or planned audit" are protected "until the final audit is released." (Dougall Letter ¶ 2.) It is undisputed that the audit is over and the final audit has been released. (Report No. 13-JSSD-8L.) That the Auditor would use these sections for withholding records is incredible. The last time JSSD and the Auditor were before this Committee the Auditor used the same sections to prevent JSSD from obtaining records, stressing as follows:

In this case, the State Auditor has classified these protected records for the simple reason that *while the audit is going on*, we need to protect [inaudible]

(Transcript ("Tr.") at p. 3 (Tonks), attached as Exhibit 8.) The Auditor stated, "*until the audit is released*, we really can't disclose more than that." (*Id.* at p. 7 (Tonks).) This Committee, relying on those representations, ordered that "[t]he requested records [were] . . . protected *until the final audit [was] released*." (12/22/2014 Decision and Order at 4.) Because the audit has been released, these sections are inapplicable to JSSD's GRAMA request.

3. JSSD is Allowed to Submit a GRAMA Request.

In paragraphs 6 through 13 of Mr. Dougall's additional findings, Mr. Dougall essentially seeks to strip JSSD, and other similarly situated entities, of their GRAMA rights. Mr. Dougall argues that "[the Auditor's] review of GRAMA shows that the statute does not provide governmental entities with a right to file a GRAMA request as outlined in Utah Code § 63G-2-204." Mr. Dougall bases this on the definition of "person" and the fact that it does not include the language "governmental entity." (Dougall Letter at 3.)

First, only through jumping through several semantic hoops and a convoluted argument can the Auditor deny JSSD, and others similarly situated, the benefits under GRAMA. Nothing in section 204 of GRAMA prevents governmental entities from making GRAMA requests. Section 204(1) simply states that "[e]very person has the right to inspect a public record free of charge, and the right to take a copy of a public record . . ." Mr. Dougall wants to improperly read into this the negative implication that because every person has the right to inspect public records governmental entities are not permitted that right. Yet, nothing in this section prohibits JSSD from filing a GRAMA request or prescribes the method by which JSSD must request public records. Rather, section 201(2) clearly states that a "record is public unless otherwise expressly provided by statute."

Further, Mr. Dougall's argument that JSSD must request records "through the record sharing provision of Utah Code § 63G-2-206" is misleading at best because he fails to quote the text of Section 206 and fails to explain the purpose of Section 206. Section 206(1) through (3) involves situations where "[a] governmental entity may provide a record that is *private, controlled, or protected* to another governmental entity . . ." (emphasis added). Section 206 **does not** deal with situations where a requester asks for public records—which is exactly what JSSD is requesting. JSSD is not at this time asking for "a record that is private, controlled, or protected"; JSSD is simply seeking public records.

Finally, Mr. Dougall's rationale goes against numerous decisions by this very Committee, which on several occasions has resolved GRAMA requests made by governmental entities. *See Salt Lake City Corp. v. Utah Dept. of Emp. Sec'y*, Appeal 94-03; *Salt Lake City Corp. v. Ind. Comm'n of Utah*, Appeal 94-16. Hence, the Auditor is improperly denying JSSD records that are public and subject to production pursuant to GRAMA

4. None of the Records Were Provided on the Condition of Anonymity.

In paragraphs 1 and 5 of Mr. Dougall's additional findings, Mr. Dougall claims that the Auditor was justified in withholding documents because the documents would disclose the identity of a person who provided information or records to the Auditor during its audit. (Dougall Letter at 2-3.) The two sections that the Auditor has cited in support of this contention is Utah Code Ann. § 63G-2-305(10) and § 67-3-1(15)(a)(ii). Neither section supports the Auditor's decision to withhold records.

Utah Code Ann. § 63G-2-305(10) states as follows:

(10) records **created or maintained for** civil, criminal, or administrative enforcement purposes or **audit purposes**, or for discipline, licensing, certification, or registration purposes, **if release of the records:**

(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.

(emphasis added). Suffice it say, that even assuming the withheld records (and redactions) were “created or maintained for . . . audit purposes,” the only subsection that appears remotely applicable is subsection (d).⁴ Subsection (d), however, is applicable only if release of the record would reasonably be expected to “disclose the identity of a source who is not generally known outside government.” The only reasonable interpretation of this language is that the person must be an official government source—such as an undercover officer, detective, employee, or informant. This language cannot mean that any person who provides information is a “source who is not generally known outside of government.” Such a standard would be nearly impossible to evaluate, since JSSD could never know whether the person is known to others “outside of government.”

⁴ Under no stretch of the imagination, would subsections (a)–(c) or (e) apply in this context. As explained above, the Auditor is well aware JSSD has been embroiled in litigation with a number of property owners/developers located within Area C, over the construction of Improvements that directly and indirectly benefit the owners within Area C. This included Cumming Land & Livestock, LLC, BV Jordanelle, LLC and BV Lending, LLC (formerly Aspens), VR Acquisitions, LLC (formerly Victory Ranch) and others. All of these entities have individuals who have been their spokesperson, including David Cummings. To the extent any of these entities and/or individuals (on their own behalf and/or representing the entities interests) requested “anonymity” or was a “Hotline complainant,” does not give the Auditor the right to withhold this information once the final audit has been released. JSSD is entitled to know what its adversaries have represented to third-parties, including the Auditor.

Even assuming the latter meaning applies, if JSSD or *others* know that the person has provided information, then the Auditor must release this information because then the person *is* known outside government. Alternatively, if the Auditor can provide the information without revealing the identity of the person then it must do so. Here, it is obvious that the persons who provided information are known "outside the government." In fact, based on many of the communications, redacted and otherwise, it is clear that the persons are, as JSSD has suspected since the audit of JSSD began, direct adversaries of JSSD in pending litigation. Hence, there is no reasonable basis for withholding this information from JSSD.

Furthermore, there is simply no evidence that suggests any of the persons who purportedly have sought "anonymity" requested "anonymity." To the contrary, the written communications reveal that no such request was ever made. The redacted communications are silent on this issue, and therefore the redactions are improper and contrary to Utah law.

Additionally, even if the identity of a person may not be provided, it is inappropriate to withhold the information provided by the third person. For example, there is a February 23, 2015 email to Messrs. Dougall and Tonks in which an "incident" is recounted for the Auditor. It is redacted without explanation. JSSD is entitled to the contents of the communication. This is especially true since it appears the content of the redaction is related to litigation that is currently ongoing between JSSD and owners within Area C. The same is true with respect to the "Memo" entitled "3JSSD8L-RVSPD Change in Audit Plan and Program." There, key facts have been redacted without explanation. It is improper to withhold this content.

The other section that purportedly exempts from disclosure the requested records is Utah Code Ann. § 67-3-1(15)(a)(ii). This section states that protected records are "records and audit workpapers *to the extent* they would disclose the identity of a person who during the course of an audit, communicated the existence of any waste . . . if the information was disclosed *on the condition* that the identity of the person be protected." (emphasis added). Thus, in order to be a protected record (or justify redaction) under this part, the record must meet at least four parts:

- (1) release would "disclose the identity of a person";
- (2) the person, whose identity would be disclosed, communicated with the Office "during the course of an audit";
- (3) the person, whose identity would be disclosed, during the course of an audit communicated "the existence of any waste of public funds, property, or manpower, or a violation or suspected violation of a law, rule, or regulation adopted under the laws of this state, a political subdivision of the state, or any recognized entity of the United States"; and
- (4) the information provided by the person was given "on the condition that [his or her] identity be protected."

Because the records withheld (or portions redacted) do not meet one or more of the four part test, particularly part (4), the Office must release the record in full.

The communications, in particular, stand out as improperly redacted. As noted above, in none of the communications does the sender provide information “on the condition that [their] identity be protected.” Further, in several instances, the sender indicates that their identity is generally known outside of the State Auditor’s Office. For example, the sender on February 5, 2013 states for example, “[w]e have a great deal of information,” “[w]e would also be happy to come down and meet or have you up here.” In another email, on March 25, 2013, the sender states that he/she is forwarding an email from a citizen. Neither the author of the email, nor the “email from a citizen” suggest the information was intended to remain protected. Nor does any of the redacted information reveal that the unidentified person(s) communicated the “existence of any waste of public funds, property, or manpower or a violation or suspected violation of a law rule or regulation.” Although the Auditor may have been critical of JSSD’s record keeping, it made no findings of waste of public funds or violations of Utah law. Under any interpretation of the above provisions, the identity of this person or persons cannot be deemed protected and should be released, along with all documents and information withheld and/or redacted.⁵

5. Records Related to the Land Transaction Between the Bests and Fishin’ With Bread Must be Disclosed.

In the denial letter, JSSD was also denied records related to, among other things, the land transaction between the Bests and Fishin’ with Bread. The denial is based on the dubious reasoning that the documents and communications are not “records” under Utah Code Ann. § 63G-2-103(22)(b), a definitional provision. First, the definitional provision of GRAMA is not a proper basis for wholesale denying documents and communications. There is no claim that these records are protected under GRAMA or exempt from disclosure under Utah Code Ann. § 63G-2-302, 303, 304, or 305. These documents and communications were provided to the Auditor to facilitate and support the Auditor’s audit. The audit has been concluded, and the Auditor’s refusal to disclose these records is improper.

Second, all documents and communications related to the land transaction between the Bests and Fishin’ with Bread are “records” under GRAMA. Obviously these documents were received by the Auditor and are being retained by the Auditor. Utah Code Ann. § 63G-2-103(22)(a) states that a “[r]ecord” means a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics . . . that is prepared, owned, *received*, or *retained* by a governmental entity or political subdivision . . .” (emphasis added). This section uses the disjunctive “or,” therefore, if the document or communication was “received” or “retained” by the Auditor, then it is a record under GRAMA, and unless exempt from disclosure under § 63G-2-201(3)(b), must be disclosed. However, even a broad reading of section 201(3)(b) cannot support withholding records from production. JSSD is entitled to all records relied upon by the Auditor to form his opinion.

⁵ To the extent the Auditor is trying to protect the private information of a person, e.g., social security number or financial account number, that information may be redacted, but not the content of the communication or record.

Finally, even assuming it is true that the documents or communications withheld are “legally owned by an individual,” it is simply unreasonable for the Auditor to withhold a document or communication on that basis. GRAMA specifically allows the Auditor to provide copies. See Utah Code Ann. § 63G-2-201. Moreover, the conclusory statement that the documents are “legally owned by an individual” does not help. In the instance referred to in the documents produced, the producing party voluntarily turned over the records without condition and the Auditor relied upon this information. The Auditor cannot hide behind § 103(2)(b)(iii) to deny JSSD access to these records.

6. Documents Provided to the Auditor are Not Protected from Production Under GRAMA.

Regardless of the foregoing, the Auditor appears to be withholding a considerable amount of information and documents provided by third-parties. All that was produced by the Auditor on August 27, 2015 were two binders containing (a) a few written communications and (b) the Auditor’s work papers. However, upon review of the “Special Project Documentation Form,” there is reference made to the Auditor having received “2 boxes full of documents and [redaction].” Yet the two boxes were withheld. JSSD is entitled to these records and the Auditor has no legal basis for withholding these records.

Similarly, the Auditor has no basis to withhold and/or redact information from the various reports it created. There is simply no indication that the redactions are made to protect the identity of anyone but rather appears to protect facts. The time to protect facts is long gone. The Audit has been finalized and JSSD is now entitled to all the information the Auditor had within its possession, custody and control relating to the audit, whether provided by JSSD or third-parties.

The best example of the Auditor’s improper withholding of information can be seen in a document entitled – 3JSSD8L-45 Fishin’ With Bread Transaction. The Auditor has wholesale redacted the “Background Info.” Why? What possible basis in law does the Auditor have for redacting the facts set forth in the Background section? The “Fishin’ With Bread” transaction lies at the heart of two lawsuits JSSD is currently embroiled in; what third-parties are telling the Auditor is directly relevant to those issues.

Finally, the Auditor provides no legal justification for redacting its work papers. Yet, throughout the production of documents, the Auditor has made wholesale redactions without explanation. This is a denial of JSSD’s request for documents to which JSSD is entitled, and provides the grounds for this appeal.

7. Any Communications Not Subject to the Attorney-Client Privilege Must be Disclosed.

In her denial letter, Ms. Siebenhaar also explained that “[v]arious records or communications with representatives from the Attorney General’s Office” were withheld. These records and communications were withheld “[p]er 63G-2-305(17)” because according to her they were “deemed ‘protected’ [by] the attorney-client privilege.” While we of course respect the attorney-client privilege, we are concerned that there may be documents that do not fall within this exemption. The attorney-client privilege has a very specific meaning and protects a very specific category of communications.

Under Utah law the “mere existence of an attorney-client relationship does not ipso facto make all communications between them confidential.” *Southern Utah Wilderness All. v. Automated Geo. Reference Ctr.*, 2008 UT 88, ¶ 33, 200 P.3d 643 (internal quotation marks omitted). To “rely on the attorney-client privilege, a party must establish: (1) an attorney-client relationship, (2) the transfer of confidential communication,⁶ and (3) the purpose of the transfer was to obtain legal advice.” *Id.* Thus, even assuming there exists an attorney-client relationship between the Auditor and the Attorney General’s Office, the Auditor must still determine whether the communication was confidential, i.e., “not intended to be disclosed to third persons,” and was for the *purpose* of obtaining legal advice. If the Auditor’s communication with the Attorney General’s Office was not to obtain legal advice, but was, for example, to forward information to them, that communication would not be protected by the attorney-client privilege or § 63G-2-305(17).

Conclusion & Relief Sought

For the foregoing reasons JSSD requests that the Records Committee reverse the decision of the Auditor and order the Auditor to provide JSSD un-redacted copies of all records received by the Auditor and/or relied upon by the Auditor in reaching the conclusion laid out in the JSSD Audit, including but not limited to (i) the records responsive to paragraphs 1-19 of Exhibit 1 to JSSD’s GRAMA Request Form, (ii) the two boxes of records obtained from the complainant which have not been produced in violation of GRAMA, and (iii) the redacted records attached hereto as Exhibit 7. In addition, JSSD requests that the Auditor be ordered to provide JSSD all records and communications between the Auditor and the Attorney-General’s Office that are not protected by the attorney-client privilege as defined by Utah law; or at the very least, the Auditor should provide a “privilege log” of all communications that are being withheld so that JSSD can evaluate the veracity of the privilege.

Very truly yours,

BALLARD SPAHR LLP



Mark R. Gaylord

MRG/ZAS/mje

Enclosure

cc: Office of the Utah State Auditor (*via email*)
John Dougall (*via email*)
Paul Tonks (*via email*)
Van Christiansen (*via email*)
Mike Kohler (*via email*)

⁶ “Confidential Communication” is defined in Rule 504(a)(6) of the Utah Rules of Evidence as “communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”