

# 2017-12

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Via U.S. First Class Mail

Janell E. Tuttle  
Executive Secretary  
Utah State Records Committee  
346 South Rio Grande  
Salt Lake City, UT 84101

Ms. Tuttle,

Libertas Institute ("Libertas"), through counsel of record Salcido Law Firm, PLLC, appeals the denial of its Government Records Access and Management Act ("GRAMA") request made on December 9, 2016, to the Utah State Tax Commission (attached as Exhibit A). Libertas requested a copy of the sales tax agreement ("Agreement") made between the State of Utah ("State") and the online retailer Amazon from the Utah Tax Commission ("Commission"). This appeal is made pursuant to Utah Code § 63G-2-403 and seeks to overturn the following decisions and orders of the Commission:

Decision and Order issued by the Commission on December 20, 2016, attached as Exhibit B.

Decision of Mr. Barry Conover, Executive Director of the Commission, attached as Exhibit C.

## **RELIEF SOUGHT**

### **Introduction**

On December 7, 2016, Governor Gary Herbert announced that the State and Amazon had agreed upon terms for Amazon to start collecting both state and local sales tax made directly from sales on Amazon. The actual Agreement was not made public and little was known about its terms, the negotiations behind it, or the incentives of the State and Amazon to enter into such a contract. The Commission stated that "Amazon will receive the same 1.31 percent of the taxes-collected handling fee that in-state retailers receive for collecting sales tax." *See Salt Lake Tribune*, "Utah won't release details on Amazon tax deal, says info would give advantage to competitors" <http://www.sltrib.com/news/4830230-155/utah-denies-open-records-request-for-details> (accessed Sunday, January 22, 2017).

Given the lack of transparency regarding this arrangement, Libertas filed a GRAMA request with the Commission to obtain more details surrounding the Agreement. This GRAMA request was denied by the Commission on December 20, 2016, citing Utah Code § 63G-2-305 as a basis for the denial. Section 305 controls the dissemination of protected records. Thus, the Commission ruled the agreement was a protected record and could not be released.

Thereafter, pursuant to Utah Code § 63G-2-401, Libertas filed an appeal to the Chief Administrative Officer of the Commission, Executive Director Barry Conover. Mr. Conover denied Libertas' appeal on January 11, 2017. This decision stated that denial was based more specifically on Utah Code § 63G-2-305, subsections (1) and (2). These two subsections concern trade secrets and unfair competition. This appeal to the State Records Committee follows.

### Legal Analysis

The legislative intent of the GRAMA statute is clear: government records should be made public with the exception of limited records that should be restricted for the public good. *See Utah Code § 63G-2-102*. Specifically, the legislative intent includes preventing "abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter" and favoring "public access when, in the application of this act, countervailing interests are of equal weight." Utah Code § 63G-2-102(3)(c) and (e). Additionally, the Utah Supreme Court "recognizes that it is the policy of this state that public records be kept open for public inspection in order to prevent secrecy in public affairs." *KUTV, Inc. v. Utah State Bd. Of Educ.*, 689 P.2d 1357, 1361 (Utah 1984). Finally, "[G]overnment records are presumptively public under GRAMA," and the State "bears the burden" to prove a record is nonpublic. *Deseret News Pub. Co. v. Salt Lake County*, 2008, UT 26 ¶ 53, 182 P. 3d 372, 384.

With this statutory and legal framework in mind, the GRAMA denial by the Commission should be reversed for two reasons. *First*, the Agreement is inappropriately classified as a protected record. *Second*, even if it is a protected record, the Agreement should be disclosed because the public interest favoring access is greater than or equal to the interest favoring restriction of access.

#### **I. *The Committee Should Reverse The Commission's Denial Of The GRAMA Request Because The Agreement Is Not A Protected Record.***

Government record classification is controlled by the GRAMA Act, under Utah Code § 63G-2-101 *et. seq.* Utah Code § 63G-2-305(1) & (2) states:

The following records are protected if properly classified by a governmental entity:

- (1) trade secrets as defined in Section 13-24-2 if the person submitting the trade secret has provided the governmental entity with the information specified in Section 63G-2-309;
- (2) commercial information or nonindividual financial information obtained from a person if:

- (a) disclosure of the information could reasonably be expected to result in unfair competitive injury to the person submitting the information or would impair the ability of the governmental entity to obtain necessary information in the future;
- (b) the person submitting the information has a greater interest in prohibiting access than the public in obtaining access; and
- (c) the person submitting the information has provided the governmental entity with the information specified in Section 63G-2-309;

The GRAMA request by Libertas was denied by the Commission because the Agreement is purportedly a protected record under these two subsections. Utah Code § 63G-2-309, however, requires very specific information before the government can classify a record as "protected":

- (1)(a) (i) Any person who provides to a governmental entity a record that the person believes should be protected under Subsection 63G-2-305(1) or (2) or both Subsections 63G-2-305(1) and (2) shall provide with the record:
  - (A) a written claim of business confidentiality; and
  - (B) a concise statement of reasons supporting the claim of business confidentiality.

Thus, in order for the Commission to find the Agreement to be a protected record, Amazon must have provided information in accordance with section 309. The Commission made no indication that Amazon complied with this section 309 and there is no way for Libertas to discover if the statute was obeyed. As a preliminary matter, therefore, the Committee should determine if this information was presented to the Commission. Assuming it was provided, it is difficult to imagine how an agreement to collect sales tax could either contain trade secrets or reveal commercial secrets that could result in an unfair competitive injury to Amazon, thereby negating the "protected record" status of the Agreement.

#### **A. It Is Unlikely That The Agreement Contains Trade Secrets**

As previously noted, Utah Code § 63G-2-305(1) provides "protected record" status to trades secrets. Trade secrets are defined by Utah Code § 13-24-2:

- (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
  - (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
  - (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition of "trade secret" makes it difficult to conclude that the State would be disclosing any trade secrets of Amazon by revealing a tax collection Agreement. Indeed, it would seem more plausible that the government wishes to protect its own secrets on tax collection through online retailers rather than Amazon giving up any competitive advantage.

Now, if Amazon has a trade secret as to the actual process of collecting sales tax through their own coding and software, it is understandable that this could present a competitive advantage that the company would wish to protect as a trade secret. Libertas, however, is not seeking to discover the process whereby the taxes would be collected; instead, Libertas wants only the contractual terms between the State and Amazon to collect taxes. It is unlikely that this information contains any trade secrets.

**B. It Is Unlikely That The Agreement Contains Information That Would Result In Injury**

In Subsection 2 of Utah Code § 63G-2-305, a record is protected if it contains commercial information or nonindividual financial information and disclosure “could reasonably be expected to result in unfair competitive injury.” Utah Code § 63G-2-305(2)(a). Again, without any information from the Commission, one must create various scenarios in which a tax collection agreement could reveal information that would injure Amazon’s ability to remain competitive in Utah. Brick and mortar retailers are required to collect sales taxes, so it is not as if collecting sales tax is a unique job exclusive to Amazon.

Also, if disclosure “would impair the ability of the governmental entity to obtain necessary information in the future” then that commercial or financial information could be classified as protected. *Id.* Disclosure would not impair the ability of the State to obtain necessary information in the future, because the State has other powers (such as subpoena and other investigatory tools) to compel necessary information. Specifically with the Commission, it has many powerful tools to obtain tax information. *See Utah Code § 59-1-210.* Additionally, this portion of the statute is written so broadly it is difficult to determine what “necessary information” would be impaired by disclosure.

The analysis, however, does not end there. An injury or impairment is not the only necessary requirement for a record to be protected under Subsection 2. In addition to an injury or impairment, whoever submits the information must also have “a greater interest in prohibiting access than the public in obtaining access.” Utah Code § 63G-2-305(2)(b). For reasons described hereafter, Amazon cannot have a greater interest than the public in knowing the details of the Agreement.

The Committee should thoroughly review the agreement to see if it is actually a protected record. It must ensure that Amazon complied with Utah Code § 63G-2-309. It must also ensure the Agreement actually contains trade secrets or information that could result in unfair competitive injury to Amazon (which seems unlikely). If it does contain trade secrets or injurious information, it must still be established that the protected information is so wrapped up in the Agreement that it cannot be redacted to allow for disclosure of the remaining portions of the agreement. The Committee should also remember that “the overriding allegiance of the governmental entity must be to the goals of GRAMA and not to its preferred record classification.” *Deseret*, at ¶ 25. Additionally, “To facilitate classification, GRAMA permits a governmental entity to divide a record into its public and nonpublic parts by redacting nonpublic

content.” *Id.* at ¶ 16. At worst, the Agreement should be redacted so that its public terms are still known, and its trade secrets or commercial information remain protected.

**II. *The Committee Should Order Disclosure Of The Agreement Because The Public Interest Favoring Access Is Greater Than Or Equal To The Interest Favoring Restriction Of Access.***

If the Committee finds that the Agreement is properly classified as a protected record, it should still order its disclosure to the public. Utah Code § 63G-2-403(11)(b) reads as follows:

Except as provided in Section 63G-2-406, the records committee may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private, controlled, or protected if the public interest favoring access is greater than or equal to the interest favoring restriction of access.

Here, the public interest favoring access is much greater than the interest favoring restriction. In *Schroeder v. Utah Attorney General's Office*, 2015 UT 77, 358 P.3d 1075, a person was attempting to gain information regarding a corruption scandal. The Attorney General's Office was seeking to keep certain attorney work product from being disclosed by a GRAMA request related to the corruption investigation. The Supreme Court found that the attorney work product was a protected record; nonetheless, the Court stated it should be disclosed. The Court reasoned

On balance, then, it is clear to us that the public's right to access the Quicken Summary and the Post-it Note — documents relevant to potential corruption in the Ogden Mayor's Office — outweighs the State's interest in protecting the mental impressions and legal theories that might be disclosed in either document.

*Id.* at ¶ 60.

In the present matter, if the Agreement is a protected document, the Committee should follow the *Schroeder* court's lead and order the disclosure of the Agreement. In *Schroeder*, the issue was protection of confidential attorney work product, which has for generations been one of the most highly protected classifications of documents in our legal system. Before the Committee now is an issue that does not involve such a highly protected classification of documents: it is a simple tax deal between the State and Amazon. The public interest greatly outweighs Amazon's interest in restricting dissemination of the Agreement.

The State of Utah and Amazon entered into a secret agreement requiring Amazon to collect taxes on the sales made through its website. News reports indicate that 21 percent of online sales occur through Amazon. *See Salt Lake Tribune*, “Utah won't release details on Amazon tax deal, says info would give advantage to competitors.” Considering the seemingly innumerable amount of online retailers, this figure is extraordinary. The Amazon shoppers in

Utah are subject to Amazon's agreement with the State to collect sales taxes from them and yet, they are being denied the ability to know how the Agreement to take their property reads.

Disclosure of the Agreement is significant to the public interest in how their money is collected in taxes. The interest favoring restriction is minimal (or perhaps even nonexistent). The Commission claims that trade secrets or injurious information will be disclosed. Even if true, this interest is not greater than the interest of those Utahans whose income will be forcibly taken from them without having any knowledge of why or how it is being done.

**Conclusion**

The denial of Libertas' GRAMA request should be reversed. It is unlikely that the Agreement is a protected document, because there is no indication that Amazon complied with Utah Code § 63G-2-309; and, if it did, more transparency should exist on how the Agreement could contain any trade secrets or injurious commercial or financial information. Should the Agreement contain such required information, the information should be redacted to allow taxpayers to see the terms of the Agreement. Finally, the public interest favoring disclosure is greater than Amazon's interest in restricting its access, because Utah's Amazon shoppers, which constitute a significant percentage of Utah's consumers, will have their property seized under this secret contract. Accordingly, the Committee should be ordered to disclose the Agreement to Libertas.

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