

REC'D BOT 08 2017

#2017-103

Steven J. Onvsko

Nova Dubovik
Executive Secretary
State Records Committee
346 S. Rio Grande
Salt Lake City, UT 84101-1106

Ms. Dubovik:

Subject: Appeal to State Records Committee of the Office of the Attorney General (OAG) September 19, 2017, Solicitor General Tyler Green Denial of Steven Onvsko's March 6, 2017, GRAMA Request to OAG vis-à-vis Computer System Metadata and Other Records

This communication to you is my GRAMA-related appeal per:

Title 63G-2-401. Appeal to chief administrative officer – Notice of the decision of the appeal.

...

(5)

(a) *The chief administrative officer shall make a decision on the appeal within:*

(i) *five business days after the chief administrative officer's receipt of the notice of appeal; or*

(ii) *12 business days after the governmental entity sends the notice of appeal to a person who submitted a claim of business confidentiality.*

(b)

(i) *If the chief administrative officer fails to make a decision on an appeal of an access denial within the time specified in Subsection (5)(a), the failure is the equivalent of a decision affirming the access denial.*

Title 63G-2-402. Appealing a decision of a chief administrative officer.

(1) *If the decision of the chief administrative officer of a governmental entity under Section 63G-2-401 is to affirm the denial of a record request, the requester may:*

(a)

(i) *appeal the decision to the records committee, as provided in Section 63G-2-403; or*

...

(2) *A requester who appeals a chief administrative officer's decision to the records committee or a local appeals board does not lose or waive the right to seek judicial review of the decision of the records committee or local appeals board.*

(3) *As provided in Section 63G-2-403, an interested party may appeal to the records committee a chief administrative officer's decision under Section 63G-2-401 affirming an access denial.*

I am aware of my following obligations:

Title 63G-2-403(2).

...

(2) The notice of appeal shall:

- (a) contain the name, mailing address, and daytime telephone number of the records committee appellant;***
- (b) be accompanied by a copy of the decision being appealed; and***
- (c) state the relief sought.***

Title 63G-2-403(3).

(3) The records committee appellant:

(a) shall, on the day on which the notice of appeal is filed with the records committee, serve a copy of the notice of appeal on:

(i) the governmental entity whose access denial is the subject of the appeal, if the records committee appellant is a requester or interested party; or

(ii) the requester or interested party who is a party to the local appeals board proceeding that resulted in the decision that the political subdivision is appealing to the records committee, if the records committee appellant is a political subdivision; and

(b) may file a short statement of facts, reasons, and legal authority in support of the appeal.

I have attached copies of:

[Exhibit A] March 6, 2017, initial GRAMA request by Steven Onysko to the Office of the Attorney General (OAG) requesting "metadata" for a document purportedly authored by Shane Bekkemellom (copy of that document is embedded in the original GRAMA request), and other records/documents access;

[Exhibit B] August 11, 2017, OAG incomplete response to, and substantial denial of, the initial GRAMA request by Steven Onysko;

[Exhibit C] September 1, 2017, Steven Onysko appeal to OAG Chief Administrative Officer of the GRAMA request denial by the OAG GRAMA Records Officer;

[Exhibit D] September 19, 2017, OAG Solicitor General, Tyler Green, denial of Steven Onysko appeal of the OAG GRAMA Records Officer denial of the initial GRAMA request;

Issues Causing Appellant To Seek Relief Per Title 63G-2-401(2)(b)

i. GRAMA Request to OAG Records Officer, March 6, 2017 [Exhibit A]; Denied August 11, 2017 [Exhibit B];

On March 6, 2017, Appellant submitted an initial GRAMA request to the Office of the Attorney General (OAG) for records related to a document purportedly written by State employee Shane Bekkemellom on November 9, 2016, alleging events of November 9, 2016, involving Shane Bekkemellom and Steven Onysko. A copy of that document, referred to as the Bekkemellom document, was attached to Appellant's original GRAMA request [Exhibit A], and is included herein at pp. 17-18 in this October 2, 2017, appeal to the State Records Committee. [Redacted version in Appellant's March 6, 2017, GRAMA request has been replaced herein with a version without redaction.]

The scope of the request initially presented to OAG on March 6, 2017, was only partially acknowledged by OAG records officer Lonnie when he wrote on August 11, 2017, in his denial letter to Appellant [Exhibit B]:

I am writing in response to your above-referenced request for records related to the "Documentation" memo you obtained from OSHA and which you submitted as "Exhibit 1" to your request. You assert that this document was authored either by Craig Anderson or Shane Bekkemellom and thereby request all records related to the creation, modification or transmittal of this document.

Appellant herein concedes no reduction in scope of the original March 6, 2017, GRAMA request to OAG [Exhibit A] and Appellant merely notes, but does not agree with, Pehrson's paraphrasing.

OAG's records officer Lonnie Pehrson additionally wrote on August 11, 2017, in his denial letter to Appellant [Exhibit B]:

I have been informed by our Human Resources Manager that Shane Bekkemellom is not an employee of the Attorney General's Office (OAG). Instead, he is a Department of Environmental Quality (DEQ) employee who is merely assigned to assist OAG attorneys located at the DEQ offices ...

I was further informed by our IT Director that, although the OAG provides an email account for Mr. Bekkemellom's use, his telephone, work station computer and network access is administered and maintained by the Utah Department of Technology Services (DTS) on behalf of the DEQ. Therefore, our Office does not have access to any telephone or computer records generated by Mr. Bekkemellom, other than those created through his OAG email account. Consequently, the OAG does not possess Ms. Bekkemellom's word processing files, any properties related to those files, nor any metadata. The OAG must therefore deny that part of Request No. 17-037.

Appellant submits that OAG's arguments are irrelevant with respect to Bekkemellom's actual employing State agency as GRAMA does not pivot on the employing State agency of the creator of a State record.

Consider the following Utah Code sections:

Title 63G General Government

Chapter 2 Government Records and Management Act

Part 2 Access to Records

Section 63G-2-204 Requests -- Time limit for response and extraordinary circumstances.

(1) A person making a request for a record shall furnish the governmental entity with a written request containing:

(a) the person's name, mailing address, and daytime telephone number, if available; and

(b) a description of the record requested that identifies the record with reasonable specificity.

(2)

(a) Subject to Subsection (2)(b), a person making a request for a record shall submit the request to the governmental entity that prepares, owns, or retains the record. [Emphasis added.]

Appellant therein has legal prerogative to seek access to the Bekkemellom document and metadata at as many as three different State agencies if, in fact, three different State agencies individually or jointly prepare, own, and retain the records, respectively.

Appellant asserts that the Office of the Attorney General (OAG), the Department of Environmental Quality (DEQ), and Department of Technology Services (DTS) -- with respect to the Bekkemellom document and metadata -- are subject to the tenets of 63G-2-204((2)(a). Therefore, OAG's August 11, 2017, denial of Appellant's GRAMA request is illegitimate.

ii. GRAMA Appeal to OAG Administrative Officer Designee, September 1, 2017 [Exhibit C]; Denied September 19, 2017 [Exhibit D]

The scope of the request appealed to OAG on September 1, 2017, to OAG chief administrative officer designee Tyler Green is only partially acknowledged by Green in his September 18, 2017, appeal denial letter to Appellant [Exhibit D]:

Your request seeks records-including computer backup files and metadata-related to the creation, modification, or transmittal of a document attached as Exhibit 1 to your request, which you believe was created either by OAG employee Craig Anderson or Department of Environmental Quality (DEQ) employee Shane Bekkemellom.

Appellant herein concedes no reduction in scope of the original March 6, 2017, GRAMA request to OAG [Exhibit A] and Appellant merely notes, but does not agree with, Green's paraphrasing.

OAG's Solicitor General Tyler Green additionally wrote on September 18, 2017, in his appeal denial letter to Appellant [Exhibit D]:

Mr. Pehrson provided you with 11 pages of responsive email records showing that Mr. Bekkemellom was the sole author and transmitter of the document in question. You were informed that all other records regarding the document, including computer backup files and metadata, would have to be obtained from the Utah Department of Technology Services (DTS), which administers Mr. Bekkemellom's network access on behalf of the DEQ. [Emphasis added.]

Your appeal challenges the Office's determination that it does not own or maintain any records for Mr. Bekkemellom besides email. You assert that this is "not credible" given the need for Mr. Bekkemellom to "interface" and share files and electronic records with OAG employees. This assertion, however, is apparently based on the assumption that the network access for OAG attorneys located at the DEQ's offices is administered by the OAG. This assumption is incorrect. As I have confirmed with our IT personnel, the network access for OAG attorneys stationed at the DEQ is administered by DTS. This explains how Mr. Bekkemellom is able to interface and share files with them. Therefore, your claim that you have been denied access to computer network records maintained by the OAG has no merit. [Emphasis added.]

Your appeal also asserts that you were denied access to the "metadata for the attachments to the various Bekkemellom emails that OAG found and provided in paper copy." It is not clear what you mean by "metadata" for these records, much less whether such metadata qualifies as a record under GRAMA. Nevertheless, I am remanding this portion of your request to Mr. Pehrson to determine if the email records can be provided in another format which would include any such "metadata." Mr. Pehrson will provide you with a supplemental response addressing this issue within 10 business days from the date of this decision. [Emphasis added.]

Finally, your appeal asserts that the Office failed to provide you with a description of any records or portions of records for which it denied access, as required under Utah Code § 63G-2-205(2)(a). Because I disagree with your contention that the Office withheld any responsive records within its custody or control, this grounds for appeal is also denied. [Emphasis added.]

Appellant actually shares the opinion of OAG's Solicitor General that DTS is the true holder of the records that Appellant has requested. But, Appellant has already made (i) GRAMA request to DTS, (ii) GRAMA appeal to DTS, and (iii) DTS-related GRAMA appeal to the State Records Committee, only to be denied State Records Committee appeal hearing [Exhibit E]. Reason cited by the Committee Executive Secretary was established precedent for such denied hearing at SRC Decision and Order 16-27, *Bryner v. Department of Technology Services* [Exhibit E].

Appellant's only recourse is now herein to appeal, to the State Records Committee, OAG's denial of access to records that per *Bryner v. Department of Technology Services* establishes are, in fact, OAG records rather than DTS records.

Appellant disagrees with OAG Solicitor General Tyler Green's statements, in his September 18, 2017, appeal denial letter to Appellant [Exhibit D] that:

It is not clear what you mean by "metadata" for these records, much less whether such metadata qualifies as a record under GRAMA.

First, any reasonable person would conclude that Appellant's initial March 6, 2017, GRAMA request [Exhibit A] contained more than sufficient explanation of Appellant's meaning of "metadata." Consider the following excerpted text from that initial GRAMA request [Exhibit A]:

Requester requests all metadata for the [purported Bekkemellom] document that identifies the State-administered computer system/network where the document was created, for example, a network-connected workstation of the Department of Environmental Quality (DEQ), or the Department of Human Resource Management (DHRM), or the Office of the Attorney General (OAG), or other.

Request requests access to all metadata pertaining to all versions of the document

Requester requests access to view the relevant State-administered computer system/network daily (or other) backup files from November 8, 2016, through January 14, 2017, for finding and viewing the [purported Bekkemellom] document . . . metadata evidencing date and time of the document's initial appearance, the individual who authored it, and subsequent versions' appearance, in the backup files, from the relevant computer system network;

Requester requests documentation of, and metadata for, the movement of any versions' copies of the [purported Bekkemellom] document . . . in paper or electronic format to or from the computer system/network of origin, to or from the U.S. Department of Labor, and to or from State employees or agents, including but not limited to documentation of, and copies of attachments to, a November 18, 2017, 4:15 p.m., email from sbekkemellom@utah.gov to dpowers@utah.gov; all similar emails between State employees or agents are also included in the request;

Requester requests access/viewing of all metadata for the [purported Bekkemellom] document . . . at a State computer via Windows Explorer or other similar software for purpose of viewing the metadata-demonstrated file creation date, file modification date(s), file size, file ownership, etc.

Requester requests access/viewing of any metadata or documentation/records in possession of, or otherwise controlled by DEQ or its agents such as DTS, that speak to the [Bekkemellom] document . . . author, all the document versions and metadata and respective dates, and all document versions' movement electronically or otherwise among any parties.

[Emphasis added.]

Second, consider Utah statutory definition of records:

Title 63G General Government

Chapter 2 Government Records and Management Act

Part 1 General Provisions

Section 63G-2-103 Definitions

As used in this chapter:

...

(22)

*(a) "Record" 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: [Emphasis added.]*

(i) that is prepared, owned, received, or retained by a governmental entity or political subdivision; and

(ii) where all of the information in the original is reproducible by photocopy or other mechanical or electronic means.

No reasonable person would read GRAMA 63G-2-103(22)(a) and conclude anything other than metadata having 63G-2-103(22)(a) records status.

Relief Sought by Appellant for the Chief Administrative Officer's 63G-2-401(5)(b)(i) Denial

Appellant seeks relief in the form of Committee Order to OAG to fulfill Appellant's original March 6, 2017, GRAMA request to the fullest extent to which he is entitled per GRAMA. Such an Order would not preclude OAG from legitimate 63G-2-204((2)(a) denial of access if OAG deems that action appropriate. To date, however, OAG has not made good-faith effort to identify the relevant records nor to decide on Appellant's right to access.¹

Title 63G, Chapter 2, Government Records Access and Management Act (GRAMA), has no provision that allows OAG to withhold knowledge from Appellant of description and location of the OAG records on the dubious basis that DTS administers the one computer network that serves DEQ employee Shane Bekkemellom's email account which he uses for OAG work responsibilities, and the other computer network that serves DEQ employee Shane Bekkemellom's creation of computer software work-product, including word-processing documents. Certainly, GRAMA requires OAG to comply with:

¹ Appellant proffers two examples here. See at p. 28 herein, November 17, 2016, email from Bekkemellom to DHRM's Dana Powers, with attachment of the purported Bekkemellom-authored document. OAG did not provide Appellant with a copy of the attached document version. And, it is not credible that Bekkemellom did not receive an acknowledgement email, or other email response, from DHRM at his OAG email account on some DTS-serviced network.

Title 63G General Government

Chapter 2 Government Records and Management Act

Part 2 Access to Records

...

63G-2-205 Denials.

(1) If the governmental entity denies the request in whole or part, it shall provide a notice of denial to the requester either in person or by sending the notice to the requester's address.

(2) The notice of denial shall contain the following information:

(a) a description of the record or portions of the record to which access was denied, provided that the description does not disclose private, controlled, or protected information or information exempt from disclosure under Subsection 63G-2-201(3)(b);

OAG has failed to provide Appellant with an accounting of the preponderance of *de facto* denied records vis-à-vis his original March 6, 2017, GRAMA request [Exhibit A].

Appellant seeks relief in the form of access to all the records that he requested in his original March 6, 2017, GRAMA request [Exhibit A]. Where OAG denies this access, Appellant demands at least 63G-2-205(2)(a)-compliant denial of the access.

Appellant envisions relief in the form of Committee Order to OAG:

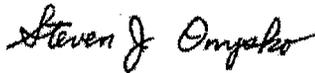
- to provide Appellant description of where and how the Appellant-requested records and metadata are stored and backed up by DTS as service to the Office of the Attorney General (OAG), or any other agency which owns (i) any Bekkemellom documents, and any associated documents (such as emails to/from agencies to one another with Bekkemellom document references or attachments) relating to Bekkemellom's OAG workplace activities, or (ii) any related metadata in question;
- to provide Appellant description of what documents exist, and when various drafts/versions of those documents were created and modified as evidenced in services to OAG by DTS;
- to provide Appellant access to the records and metadata requested on March 6, 2017 [Exhibit A] without cost or expense to Appellant consistent with:
 - Appellant's requested access to records and metadata does not require 63G-2-203(2)(a) compiling of a record in a form other than that normally maintained by the government entity;
 - Granting of Appellant's requested access to records and metadata rises to the level of 63G-2-203(4)(a)-allowed waiver of charges in primarily benefitting the public inasmuch as the public has a vested interest in learning whether or not individuals' conduct has risen to the level of:

(i) Title 76-8-511, Falsification or Alteration of Government Record - Penalty, and class B misdemeanor criminal activity [Exhibit F], in abrogation of Appellant's State employee rights [Exhibit G] in the matter of Bekkemellom document-based disciplinary action, including employment termination letter, by Appellant's State agency against Appellant; or,

(ii) criminal falsification of evidence in federal Safe Drinking Water Act discrimination complaint investigation by the Occupational Health and Safety Administration, U.S. Department of Labor;

- Granting of Appellant's requested access to records and metadata rises to the level of 63G-2-203(4)(b)-allowed waiver of charges inasmuch as Appellant is subject of the records; and,
- Granting of Appellant's requested access to records and metadata rises to the level of 63G-2-203(5)(b) prohibition of charges for inspecting records;

Respectfully,



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