

2017-94

RECD SEP 18 2017

Steven J. Onysko

September 17, 2017

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 Department of Environmental Quality's (DEQ's) Chief Administrative Officer's September 14, 2017, Denial of Appellant's August 30, 2017, Appeal of DEQ's Records Officer's August 23, 2017, Nonresponsive Fulfillment of Appellant's August 17, 2017, GRAMA Request vis-à-vis DEQ 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*

...

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 I] August 17, 2017, initial GRAMA request by Steven Onysko to the Department of Environmental Quality (DEQ) requesting access to "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 II] August 23, 2017, DEQ unsatisfactory-to-Appellant response to, and de facto denial of, the initial GRAMA request by Steven Onysko;

[Exhibit III] August 30, 2017, Steven Onysko appeal to DEQ Chief Administrative Officer of the GRAMA response/de facto denial by the DEQ GRAMA Records Officer;

[Exhibit IV] September 14, 2017, DEQ Chief Administrative Officer, Alan Matheson, denial of Steven Onysko appeal of the DEQ GRAMA Records Officer denial of the initial GRAMA request;

ISSUES CAUSING APPELLANT TO SEEK RELIEF PER TITLE 63G-2-401(2)(b)

DEQ in both its (i) August 23, 2017, nonresponsive de facto denial [Exhibit II] of Appellant's initial GRAMA request, and (ii) September 14, 2017, nonresponsive de facto denial [Exhibit III] of Appellant's initial appeal, obfuscates the issues with erroneous and misinterpreted citations from Appellant's filings, as well as Title 63G, General Government, Chapter 2, Government Records Access and Management Act.

On August 17, 2017, Appellant made GRAMA request to DEQ for access to view all computer metadata pertaining to an electronic document created and disseminated from DEQ-controlled computer facilities, purportedly by DEQ employee, Shane Bekkemellom.

There is but one relevant subsection of the Government Records Access and Management Act with respect to allowable fees that DEQ may charge Appellant:

63G-2-203 Fees

...

(5) A governmental entity may not charge a fee for:

...

(b) inspecting a record.

DEQ's August 23, 2017, Initial de Facto Nonresponsive Denial [Exhibit II]

On August 23, 2017, DEQ's initial fulfillment response, DEQ obfuscated the issues with "red herring" argument about records that Appellant did not even request, namely records purportedly located on the DEQ employee's local computer workstation hard drive:

Namely, on August 23, 2017, DEQ responded:

The Department of Technology Services (DTS) has informed the Department of Environmental Quality (DEQ) that it is possible to search for metadata on the computer for the DEQ employee, Shane Bekkemellom. DTS has informed me that the cost of doing so would be at their average hourly rate of \$47.00 per hour. They have estimated the time to conduct this research as follows: 1) Copy hard drive, 3-10 hours (depends on size of hard drive) at a cost of \$141.00-\$470.00; 2) Pull metadata and search the seven items you have requested, 12-20 hours at a cost of \$1128.00-\$1880.00. Thus, the estimated cost for DTS to do the search is \$1269.00-\$2350.00.

Appellant concedes that such dissection of the computer workstation hard drive would entail 63G-2-203(2)(a)-cited, requester-incurred costs for compiling records in form other than that normally maintained by the governmental entity,

63G-2-203 Fees.

(1) *A governmental entity may charge a reasonable fee to cover the governmental entity's actual cost of providing a record. This fee shall be approved by the governmental entity's executive officer.*

(2)

(a) *When a governmental entity compiles a record in a form other than that normally maintained by the governmental entity, the actual costs under this section may include the following . . .*

but Appellant never requested these purported local computer workstation hard drive-located records, nor did Appellant request any other DEQ records that (i) are in a form other than that normally maintained by the governmental entity, or (ii) would require more than *de minimis* DTS staff time to display on a computer screen for Appellant's viewing! DEQ needs to do a better job of reading the GRAMA request by Appellant.

Appellant parenthetically notes that DEQ's response proposes assessment of costs to Appellant is based on "DTS average hourly rate of \$47.00 per hour." This "average hourly rate" cost basis indisputably violates provisions at 63G-2-203, Fees:

63G-2-203 Fees.

...

(2)

(a) *When a governmental entity compiles a record in a form other than that normally maintained by the governmental entity, the actual costs under this section may include the following:*

(i) *the cost of staff time*

...

(b) *An hourly charge under Subsection (2)(a) may not exceed the salary of the **lowest paid employee** who, in the discretion of the custodian of records, has the necessary skill and training to perform the request. [Emphasis added.]*

It is a moot point, however, inasmuch as Appellant is not seeking records that require local hard drive forensic dissection at a specious, DEQ-estimated cost of \$1269.00-\$2350.00. [Swindlingly, DEQ wants to extort from charge Appellant \$47/hour DTS employee wages for a DTS employee to watch 3-10 hours after a several-minute setup of the hard drive copying to other data storage format.]

DEQ's September 14, 2017, de Facto Nonresponsive Denial of Appeal [Exhibit III]

In his August 30, 2017, appeal, Appellant made multiple objections to DEQ's August 23, 2017, de facto nonresponsive denial [Exhibit II]. DEQ chose not to address any of Appellant's appeal issues in its September 14, 2017, de facto nonresponsive appeal denial [Exhibit III]. Appellant, therefore, paraphrases his August 30, 2017, arguments herein as they are now the basis for Appellant's appeal to the State Records Committee.

1. DEQ Executive Director Alan Matheson disregarded Appellant's August 30, 2017, argument that Matheson, because of appearance of vested interest in continued denial of Appellant access to the Bekkemellom document metadata, and other documents' metadata, should recuse from consideration of Appellant's August 30, 2017, appeal. Yet, Matheson signed the DEQ appeal denial, dated September 14, 2017.
2. Appellant never requested the records that DEQ proposed to charge Appellant \$1269.00 - \$2350.00, to compile.
3. Appellant's primary request for "network" metadata was ignored by DEQ in DEQ's de facto denial. That circumstance is a violation of 63G-2-205(2)(a), by which DEQ was required to describe the denied metadata:

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);
4. DEQ also failed in its de facto GRAMA request denial to provide 63G-2-205(2)(a)-required description of any emails (i) within DEQ or other agency, (ii) among DEQ and other agencies including DHRM, or (iii) "incoming to" or "outgoing from" any agency, with attachment or other incorporation of the Bekkemellom document versions. Appellant is aware of at least two emails with attachments, dated November 17, 2017, and November 18, 2017, respectively, from Shane Bekkemellom to DHRM's Dana Powers. Appellant further argues that these emails not only warranted 63G-2-205(2)(a)-required description, but also 63G-2-202 release to Appellant, by DEQ per Appellant's initial GRAMA request.

DEQ wrote in the September 14, 2017, appeal denial:

Your request for a waiver of costs is denied because you have not demonstrated that your request would satisfy any condition for a waiver under the GRAMA statute, including that the request would primarily benefit the public.

DEQ's response is impeached by 63G-2-203, Fees, which Appellant did, in fact, cite on August 30, 2017, in appeal [Exhibit III]:

63G-2-203 Fees

...

(5) A governmental entity may not charge a fee for:

...

(b) inspecting a record.

And, even if DEQ's erroneous argument that Appellant has asked that records be "provided," Appellant has, in fact, demonstrated with argument, which any reasonable person would accept, that Appellant's request for fee waiver does satisfy -- in DEQ's own words -- *condition for a waiver under the GRAMA statute, including that the request would primarily benefit the public.*

63G-2-203 Fees. [Emphasis added.]

(1) A governmental entity may charge a reasonable fee to cover the governmental entity's actual cost of providing a record ...

(2)

(a) When a governmental entity compiles a record in a form other than that normally maintained by the governmental entity, the actual costs under this section may include ...

...

(4) A governmental entity may fulfill a record request without charge and is encouraged to do so if it determines that:

(a) releasing the record primarily benefits the public rather than a person;

(b) the individual requesting the record is the subject of the record ...

(5) A governmental entity may not charge a fee for:

...

(b) inspecting a record.

DEQ's assertion that Appellant made no satisfactory demonstration on August 30, 2017 [Exhibit III], that cost waiver is warranted, is arbitrary and capricious, and, in fact, would be deemed untruthful by any reasonable person.

With respect to benefitting the public, Appellant strongly suspects that individuals within DEQ, DHRM, and other State agencies have engaged in conduct with respect to the Bekkemellom document, and its various versions and associated emails, that raises Utah Title 76-8-511, Falsification or Alteration of Government Record, questions. Namely, it is indisputable that the public has a vested interest in identifying, for purposes of then holding accountable, perpetrators of violations of any portion of Utah Criminal Code. In Exhibit I, it is shown that Bekkemellom purportedly dated the document November 9, 2016. Yet, he emailed the ostensible "new" document to DHRM's Dana Powers on November 18, 2016 [see last page, Exhibit I]. No reasonable person would deny an appearance, at least, of falsification of government record.

Title 76 Utah Criminal Code

**Chapter 8, Offenses Against the Administration of
Government**

Part 5, Falsification in Official Matters

...

**76-8-511 Falsification or alteration of
government record – Penalty.**

A person is guilty of a class B misdemeanor if under circumstances not amounting to an offense subject to a greater penalty under Title 76, Chapter 6, Part 5, Fraud, the person:

- (1) knowingly makes a false entry in or false alteration of anything belonging to, received, or kept by the government for information or record, or required by law to be kept for information of the government;
- (2) presents or uses anything knowing it to be false and with a purpose that it be taken as a genuine part of information or records referred to in Subsection (1); or
- (3) intentionally destroys, conceals, or otherwise impairs the verity or availability of the information or records, knowing that the destruction, concealment, or impairment is unlawful.

The implication of Bekkemellom, and his employer DEQ, having possibly falsified a date of November 9, 2016, on this particular document of apparent November 18, 2016, origin is huge. On November 10, 2016, DEQ received notice from the Office of Occupational Safety and Health Administration (OSHA), Department of Labor, that Appellant had filed a discrimination complaint against DEQ per whistleblower protection provisions of the federal Safe Drinking Water Act (SDWA).

The Bekkemellom false allegations about Appellant's conduct in the Office of the Attorney General, on November 9, 2017, would have immensely greater legal value to DEQ if they were to have been date-documented before the November 10, 2016, OSHA notification of DEQ that Appellant had filed a SDWA discrimination (i.e., whistleblower) action against DEQ. Had Bekkemellom's false accusations been dated after November 9, 2016, OSHA almost certainly would have dismissed the allegations for appearance of pretextual retaliation against Appellant for his November 10, 2016, whistleblower filing.

Appellant has already argued to OSHA -- in the ongoing SDWA complaint action -- that the November 17, 2016, email to DHRM by Bekkemellom of the purported November 9, 2016-authored document is prima facie evidence of collusion between DEQ and DHRM illegitimately to pre-date the Bekkemellom false allegations before DEQ knowledge gained on November 10, 2016, of Appellant's whistleblower complaint filing at OSHA,

On August 30, 2017 [Exhibit III], Appellant made other valid cost waiver arguments which any reasonable person would accept. These, and the previous arguments, are summarized as follows:

- DEQ statutorily erred in invoking 63G-2-203(1), which pertains to cost of *providing records*, not viewing records, to the whole of Appellant's GRAMA request, whose preponderance pertains to only access to view records, not being provided with records;
- DEQ statutorily erred in invoking 63G-2-203(2)(a), and misrepresenting that Appellant's request would encumber DEQ to compile records in a form other than that normally maintained by the governmental entity; Appellant's GRAMA request is to view records that already exist;
- DEQ acted inconsistent with Legislative intent in not adhering to 63G-2-203(4)(a)-encouraged waiver of costs where public interest is paramount, for example, public interest in policing committed offenses by individuals, e.g., offenses such as 76-8-511 Falsification or alteration of government record;
- DEQ acted inconsistent with Legislative intent in not adhering to 63G-2-203(4)(b)-encouraged fulfillment of records requests without charge to requesting individuals who are the subject of the records, as is the case for Appellant vis-à-vis the Bekkemellom document's subject matter;
- DEQ statutorily erred inasmuch as 63G-2-203(5)(b) prohibits the agency from charging a fee simply to inspect a record, which is all that Appellant has sought to do in the preponderance of his GRAMA request;

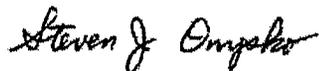
**RELIEF SOUGHT BY APPELLANT FOR THE CHIEF ADMINISTRATIVE
OFFICER'S 63G-2-401(5)(b)(i) DENIAL**

Appellant wants DEQ to fulfill completely Appellant's August 17, 2017, GRAMA request [Exhibit I] for viewing access to the metadata associated with the Bekkemellom document [attachment in Exhibit I], and all its versions, and all emails referencing or attaching, or otherwise using, any of these versions.

Appellant wants DEQ to desist from further obfuscation of these matters, and to desist from demand of Appellant payment of any fees or costs, and instead he wants DEQ to fulfill Appellant's metadata GRAMA request.

Appellant asks the Committee to order DEQ compliance in this regard at no cost to Appellant for reasons including the public's vested interest, per 63G-2-203(4)(a), in determining if violations of Utah Criminal Code have been committed by State employees.

Respectfully,



Steven J. Onysko
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435-214-9251 (daytime)

cc: Nova Dubovik, Executive Secretary, Utah State Records Committee, ndubovik@utah.gov
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