

Marcus R. Mumford (12737)  
Helen H. Redd (6020)  
MUMFORD PC  
405 South Main, Suite 975  
Salt Lake City, Utah 84111  
Telephone: (801) 428-2000  
Facsimile: (801) 662-0082  
Email: [mrm@mumfordpc.com](mailto:mrm@mumfordpc.com)  
[helen@helenreddlaw.com](mailto:helen@helenreddlaw.com)

BY EMAIL

December 31, 2015

Nova Dubovik  
State Records Committee  
346 S. Rio Grande  
Salt Lake City, UT 84101-1106  
[ndubovik@utah.gov](mailto:ndubovik@utah.gov)

### GRAMA Appeal – Office of the Attorney General

Consistent with the authority cited below, we appeal the decision by the Office of the Attorney General (“OAG”) to deny records requested under the Government Records Access and Management Act (“GRAMA”). The OAG failed to meet its obligation to give our request “conscientious and neutral” consideration. The request contained sufficient specificity to locate records, had the OAG been interested in conducting their review in a conscientious and neutral manner. We renew our request for access to the information responsive to the initial request.

#### I. BACKGROUND

On October 9, 2015, we submitted a GRAMA request (“the request”) to the OAG for records supporting representations the OAG has made on multiple occasions that paid no restitution in case No. 051905391. (*See Attachment 1* for the specific request). By letter dated October 26, 2015, Mr. Blaine Ferguson informed us that our request lacked specificity and denied it on that basis. (*See Attachment 2*). We appealed the initial determination by Mr. Ferguson, and that appeal was denied by letter dated December 3, 2015. (*See Attachment 3*). We disagree with the OAG’s conclusion and therefore appeal the denial of the request to the State Records Committee.

By way of background, it would be helpful to understand the circumstances surrounding this request. [redacted] was charged with crimes in 2005 by the OAG. In 2008, he entered a plea in abeyance which imposed upon him \$4.1 million in “restitution.” The order required [redacted] to pay “restitution” under the supervision of the OAG and then-Attorney General Mark Shurtleff. Thus, [redacted] began paying “restitution” directly to Mark Shurtleff and others as directed by the OAG. Finally, in 2009, upon review of monies paid as directed by Attorney General Shurtleff,

realized he had paid more than required by the plea in abeyance and subsequently discontinued payment. In response, the OAG, at Mr. Shurtleff's direction, initiated proceedings to incarcerate [redacted] for failing to fulfill his obligations under the plea in abeyance. In August 2011, OAG then-Criminal Division Section Chief Mr. Scott Reed represented to the Court that [redacted] had paid "absolutely nothing" in restitution. Later, in January 2012, Mr. Reed made the same representation to the Board of Pardons and Parole which not only resulted in parole being denied, but set the next parole hearing out another 60 months, notwithstanding the sentencing matrix recommended 14 months of total confinement. The Board adopted the OAG's desire, as expressed by Mr. Reed, that [redacted] be confined for a period of time significantly exceeding the matrix guideline.

Recently, in July 2015, [redacted] requested that the Board of Pardons and Parole release him from prison and presented evidence to the Board that 1) he never owed any restitution in the first place, and 2) he nevertheless paid "restitution" to Mark Shurtleff and his associates as directed by Mark Shurtleff and approved by the OAG. The Board asked the OAG to respond to the evidence presented by [redacted] by October 1, 2015. The OAG did not respond by the Board's deadline, but instead requested an extension of time. The Board allowed the OAG more time, but in the same order, granted [redacted] immediate release from prison on October 6, 2015. The OAG thereafter filed its response with the Board on October 30, 2015, asserting again that [redacted] had not paid restitution. This October 30th date is significant to this GRAMA appeal because October 30th was only four days after the OAG denied our GRAMA request on October 26th, claiming there were simply too many records the OAG would have to review to comply. This seems to conflict with the actions of the OAG at the time, as the OAG must have relied on some of the same documents which would be responsive to the request when it reasserted to the Board on October 30th that [redacted] had paid no restitution.

## II. APPEAL

In U.C.A. 63G-2-102, GRAMA's prefatory language, the Legislature recognized "the public's right of access to information concerning the conduct of the public's business" and there laid out its intent for GRAMA. Pertinent to this appeal, part of that intent was to "prevent abuse of confidentiality by governmental entities." The OAG, by their actions with regard to this request, has shown that it is not interested in disclosing records and has resorted to creativity in its arguments to deny the request. The Supreme Court of Utah has stated that agencies must be "conscientious and neutral" in their evaluation of GRAMA requests: "When the [agency] received the [redacted] request, it assumed the statutory responsibility to determine the report's classification status by taking into account the entire scope of GRAMA, including its expressions of legislative intent, *its presumptions favoring access*, and its mandate that when competing interests fight to a draw, disclosure wins.... Here, the [agency] was required to conduct a *conscientious and neutral evaluation* of the report's GRAMA status without regard to existing designations or classifications." *Deseret News Pub. Co. v. Salt Lake Cnty.*, 182 P.3d 372, 379 (Utah 2008) (emphasis supplied). The OAG has shirked its duty to be conscientious and neutral in the review of this request. The OAG chose to simply deny the request, rather than review its records for responsive documents. The reasons given for the initial and appeal denial vary greatly, and thus, we will address each separately.

**a. INITIAL DENIAL OF GRAMA REQUEST**

A request for records under GRAMA must include “a description of the record requested that identifies the record with reasonable specificity.” U.C.A. 63G-2-204(1)(b). Our request supplied just such a description with reasonable specificity. In the initial denial, Mr. Ferguson states that the request “calls upon the Office to search through what would undoubtedly be a large number of records, having no date range, and to then conduct a legal review of each record it finds to determine whether the record ‘would support’ certain representations.”

First, while, section 63G-2-204(5)(e) allows the OAG to delay its response due to a large number of records, it does not allow the OAG to deny on that basis. And, as stated above, the OAG’s response on this point was contradicted, when on October 30, 2015, the OAG issued a letter to the Board of Pardons and Parole on the subject of \_\_\_\_\_ restitution. The issuance of that letter certainly shows that the OAG has access to the records and could, with reasonable effort, review them for their responsiveness to this request.

Second, and still regarding the “large number of records,” the OAG with reasonable effort most likely could have identified, within the case file, categories of responsive records. As a few potential examples: witness statements, statements from victims and communications the OAG had with purported victims, and financial records. The OAG instead made no effort to look for and find anything responsive to the request.

Third, the GRAMA statute does not require a date range. The dates listed in the request, while not in the form of a “range”, do highlight key dates from which the OAG could reasonably determine a range, if one were necessary. August 23, 2011 is a date by which a record would have existed if it was relied on by the OAG at the hearing on that date. January 30, 2012 is another date that serves to bookend the scope of the search, when Mr. Scott Reid sent a letter to the Board of Pardons and Parole. Had the OAG chosen to *conscientiously* evaluate our request, it undoubtedly would have realized that the request was reasonably specific.

Fourth, the denial seems to indicate that because a legal review of documents would have to be accomplished, it is an improper request. However, the GRAMA statute does not support this justification. Indeed, nowhere in GRAMA does it allow an agency to deny a request simply because it would require a legal review. The OAG’s reasons for denial of \_\_\_\_\_ request demonstrates an unwillingness to put forth the effort to evaluate and process this request. They did not evaluate the request in a conscientious and neutral manner.

**b. DENIAL OF GRAMA APPEAL**

On December 3, 2015, Mr. Parker Douglas, responded to the GRAMA Appeal and affirmed the denial of our GRAMA request. Curiously, he did so for different reasons than were previously cited by Mr. Ferguson. Mr. Douglas stated that that the “fundamental problem” is that our request “in effect calls upon the Office to gather all records having anything to do with restitution obligation and then make a subjective determination regarding whether or not each record supports certain representation and statements of the Office.” Mr. Douglas then discusses that it would be problematic to determine where on a “sliding scale of ‘supportiveness’” each record

would fall and that doing so would require them to take on an advocacy role. These are examples of what we believe to be creative arguments to justify the denial of our request. But they are improper grounds for denial for the following reasons.

First, Mr. Douglas intimates that making a subjective determination regarding the content of a record would be some monumental feat. It's unclear why he would take that position. Any GRAMA request is going to require the agency responding to make a determination of some kind. A determination regarding whether a record is responsive is inherent to the GRAMA process. If such were a permissible ground for denial of GRAMA requests, GRAMA's ends and the legislative intent would be frustrated.

Second, Mr. Douglas points to a problem regarding a "subjective sliding scale of 'supportiveness'". This alliterative argument may have been appropriate if the request had been for records that "strongly support" or that were the "most supportive" of certain representations. But, as can be seen by reviewing Attachment 1, our request asked for records that "would support" representations and statements made by the OAG. No gradations are necessary, and no sliding scale is required. An individual should be able to review a record and determine if it supports the OAG's representations that failed to pay restitution or if it does not. Again, this appears to be little more than a specious argument intended to avoid the OAG's responsibilities under GRAMA.

Relatedly, Mr. Douglas claims that in determining where on the scale each record fell, his office would have to take on an advocacy role which would be inconsistent with the concept of "conscientious and neutral." Here, Mr. Douglas's efforts to avoid his office's responsibility under GRAMA is especially evident. He is grasping at any excuse to avoid giving the request due consideration. It is entirely unclear how Mr. Douglas arrives at the conclusion that his office would be required to become an advocate while evaluating this request. This is merely a pretext to avoid consideration of the request. Using the requirements of GRAMA as a shield to block access or even avoid properly considering a GRAMA request is improper.

Lastly, Mr. Douglas renews Mr. Ferguson's argument that because this request would require a legal review, it is improper. We addressed this point above, but reiterate here that whether the agency determines a legal review is required is not a valid reason to deny a request under GRAMA.

### III. CONCLUSION

was incarcerated for nearly 50 months due to the representations made by the OAG, first to the state court and later to the Board of Pardons and Parole. They should be able to point to records supporting those representations with relative ease, especially given their recent response to the Board. The efforts they have taken and the arguments they have created to avoid answering this request is wholly inconsistent with the intent of GRAMA. For the reasons and the authority cited above, we request that the Committee order the OAG to respond to request.

GRAMA Appeal -- Office of the Attorney General  
December 31, 2015  
Page 5

DATED: December 31, 2015

/s/  
*Helen H. Redd*

Attachments:

1. GRAMA Request, dated Oct 9, 2015
2. Initial Denial, dated Oct 26, 2015
3. Appeal Denial, dated Dec 3, 2015