

#2017-76

REC'D AUG 04 2017

The Salt Lake Tribune

90 S. 400 West, Suite 700, Salt Lake City, UT 84101-1431
8742

1-888-257-

Aug. 4, 2017

Nova Dubovik
Executive Secretary of the State Records Committee
346 S. Rio Grande
Salt Lake City, UT 84101-1106
BY EMAIL, to ndubovik@utah.gov

Dear Records Committee members,

This is to appeal the denial of a GRAMA request that I filed with the Utah Attorney General's Office, numbered as Request #17-164, filed on June 21, 2017. The denial was dated June 28 and signed by Lonny J. Pehrson.

I then appealed to the attorney general. His solicitor general, Tyler R. Green, upheld the denial in a letter dated July 17.

I am asking you to review en camara the documents that I seek to determine whether the public interest in their release would outweigh the state's interest in nondisclosure — and to possibly release them accordingly.

My request was for the following:

- *A copy of the legal opinion requested by legislative leaders about the special election process imposed by Gov. Gary Herbert to fill the congressional seat to be vacated by Rep. Jason Chaffetz.*

The agency denied my request, saying it was classified as protected based on two provisions of GRAMA:

- *Utah Code §63G-2-305(18) — "records prepared for or by an attorney, consultant, surety, indemnitor, insurer, employee, or agent of a governmental entity for, or in anticipation of, litigation or a judicial, quasi-judicial, or administrative proceeding;"*
- *Utah Code §63G-2-305(22) — "drafts, unless otherwise classified as public."*

I attached the subsequent letter from Solicitor General Tyler R. Green that upheld the denial and reiterated the same reasons in a letter dated July 17, 2017.

Some key circumstances have changed since Mr. Green upheld the denial.

He wrote, "The justification for the work-product classification still exists, as litigation related to the subject of the report is ongoing. And disclosure of the record now could interfere with any future litigation related to the election."

However on Aug. 2, U.S. District Court Judge David Nuffer resolved the only pending litigation, a lawsuit by the new United Utah Party seeking to be added to the ballot for the special election in the 3rd congressional district. Nuffer ordered the party and its nominee, Jim Bennett, to be included. The lieutenant governor

announced he will not appeal that decision. So the only pending litigation is now resolved.

Since no lawsuits are pending, that would seem to nullify the state's argument that withholding the documents sought could somehow interfere with them. Additionally, withholding the documents because someone might possibly, somehow, some day file lawsuits in the future could be an argument against releasing any document at any time — which would not be in the public interest.

Of note, Nuffer in his opinion also said he believes the lieutenant governor has clear ability under current law to schedule and arrange special elections with wide discretion, one of the points that may have been addressed in the documents sought. I am attaching a copy of Nuffer's opinion.

Following are additional arguments to counter the state's other assertions.

About the first reason that the opinion was written "for, or in anticipation of, litigation or a judicial, quasi-judicial, or administrative proceeding," I argue that is not the case at all.

I attach the letter requesting the legal opinion from Senate President Wayne Niederhauser and House Speaker Greg Hughes. It never mentions nor refers to a need for the opinion because of likely court proceedings. It asks for clarification of duties by the executive and legislative branches. The two leaders have said they wanted the opinion to answer questions about the process as they considered potential *legislative* action, or applying pressure to allow such legislation in a special session or perhaps at the next general session.

The legislative leaders have been quoted in the press saying they do not plan to file any lawsuits themselves because they do not want to interfere with the money and efforts spent by candidates so far. As I mentioned, the only lawsuit that actually was filed — by the United Utah Party — was resolved on Aug. 2.

In short, I contend the opinion was requested to help clarify duties for special elections of the executive and legislative branches, not for a lawsuit.

About the second reason, the office contends in its denial that the opinion is a draft "because it was never provided to the Legislature. Although Utah Code §63-G-2-301(3)(j) provides that drafts under certain circumstances are 'normally public,' none of those circumstances apply here." I contend that it is not a draft. As Legislative General Counsel John Fellows told a joint caucus of House members, it was completed, reviewed and signed — which he said means it is not a draft, but a final document. He said once it is signed, it should be released. I agree, and argue that the opinion is not a draft since it was completed, reviewed and signed.

I ask the committee to review the documents in private to determine if the public good in disclosure would outweigh the state's interest in keeping them private, and then possibly order their disclosure.

My contact information is: email, ldavidson@sltrib.com; work: 801-257-8752; cell: 801-455-9372.

Sincerely,

...

]