

DEC - 8 2015

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE DEPARTMENT, SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY CORPORATION,

Petitioner,

v.

**JORDAN RIVER RESTORATION
NETWORK, et al,**

Respondents.

**JORDAN RIVER RESTORATION NETWORK,
JEFF SALT**

Counterclaimants

v.

SALT LAKE CITY CORPORATION,

Counterclaim Defendant

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Case No. 100910873

Judge Andrew Stone

This case involves an appeal of a State Records Committee decision under the Government Records Access and Management Act ("GRAMA"). Salt Lake City ("SLC") appeals a decision requiring it to provide certain records free of charge to the Jordan River Restoration Network ("JRRN").

Findings of Fact

Procedural Background

1. At issue in this case is a GRAMA request made by Respondent JRRN on March 1, 2010.

2. JRRN is a coalition of individuals and organizations interested in restoring and preserving areas along the Jordan River in Salt Lake County. The coalition at its inception included birdwatchers, equestrians, OHV riders model airplane enthusiasts and other individuals and associations.
3. In summer 2003, JRRN's principal or founder, Jeff Salt, learned of plans by SLC to develop a portion of land along the Jordan River in northern Salt Lake City as a sports complex, involving developed fields for soccer and other team sports.
4. The plans surprised Mr. Salt, as they appeared incompatible with what he, as an active participant in outdoor space planning in Salt Lake City, understood the plan to be for that area of riverfront.
5. The area of riverfront at issue was previously owned by the State of Utah.
6. A bond initiative was presented to voters in the November 2003 election that included funding for the proposed sports complex. The initiative passed.
7. JRRN and Mr. Salt came to oppose construction of the Sports Complex at its site along the river.
8. On March 10, 2010, Mr. Salt, acting on behalf of JRRN, made a request under GRAMA for a number of documents, using a SLC-provided form and attaching three and one half pages setting forth the request. The request asked that SLC waive any fees associated with complying with the request. The request is discussed further below.
9. On March 16, 2010, in a letter signed by Sonya Kintaro, SLC notified JRRN that it deemed the requested response voluminous and would therefore require more time to comply with the request. SLC also stated it would not waive fees associated with complying.
10. On April 15, 2010, JRRN appealed the denial of the waiver and the determination that the request was voluminous to the Salt Lake City Records Appeals Board.
11. On May 19, 2010, the SLC Records Appeals Board agreed that the request was voluminous, but reversed the denial of the fee waiver.
12. JRRN appealed the decision deeming the request to be voluminous to the State Records Committee on May 27, 2010. SLC cross-appealed the decision to waive fees on May 28.
13. On June 17, 2010, the State Records Committee issued a decision agreeing that fees should be waived and requiring certain responses from the SLC in a short period of time.
14. SLC filed this action for de novo review on June 18, 2010.
15. The parties engaged in initial motion practice. The case languished. After an OSC was issued, more motions followed. Thereafter, counterclaims filed by JRRN were dismissed and the case

was set for trial. The Court held a bench trial on December 3 and 4, 2015 and enters these Findings and Conclusions based on the evidence presented at trial.

The Request

16. JRRN's request dated March 10, 2010 consists of a single page city-provided form with three and one-half pages of typewritten attachments. The form provides space in which to describe the requested records, in which JRRN and/or Mr. Salt wrote: "See attached list" "I can accept documents on digital disk." Below that section, the form provides blanks for checkmarks as follows:

_____ I would like to inspect the records

_____ I would like to receive a copy of the records. I understand that I will be responsible for copy costs. I authorize costs up to \$_____

_____ I would like to receive a copy of the records and request a waiver of copy fees pursuant to UCA63G-2-203(4). Please explain your circumstances.

17. JRRN or Mr. Salt checked the last box, and in the space provided following, wrote "nonprofit organization, information for public good and education, not used for profit."

18. The pages attached to JRRN's request run three and one half mostly single-spaced pages, and set forth 21 separately numbered requests. Two of the requests set out 15 subparts.

19. Jeff Salt testified that these records were needed in order to understand the selection of the site for the athletic complex.

20. The site was expressly mentioned in the bond election information materials circulated publicly in 2003.

21. On June 15, 2010, Mr. Salt sent an email listing numerous documents potentially responsive to the request that he already possessed.

22. On March 11, 2010, Mr. Salt characterized the JRRN records request as "lengthy and rather extensive." He stated in the same email that "My request may take several weeks to fulfill because of the detail. In the past, the Recorder's Office has provided me with documents as they can, so the items should start trickling in after a few days."

23. Mr. Salt and JRRN did not specify any discrete category of documents that they believed existed that had not already been publicly disclosed.

24. The Court finds that JRRN's purpose was to primarily benefit the public. As a general proposition, release of documents concerning plans for the athletic complex would have benefitted the public, and not any one person.

The Response

25. Sonya Kintaro, who was records coordinator for the SLC at the time, testified that she made the decision, after consultation with counsel, to deny the fee waiver request. She testified that she never considered whether releasing the records would primarily benefit the public rather than a person. She testified that her decision was based on a SLC policy not to waive fees except in the case of small requests taking minimal time to compile.
26. Rick Graham, Director of Public Services both at the time of the request and at the time of trial, testified that he made the decision not to waive fees, after consultation with counsel. He also testified that the City's ordinary policy was not to waive fees except in cases involving small requests taking minimal time to compile. He acknowledged and testified that he considered that JRRN was acting primarily to benefit the public, but considered that a separate matter from the decision to waive fees. He testified that he believed waiving fees was within his discretion.
27. In fact, SLC had a written policy stating that its policy was not to waive fees, but adding that, by ordinance, SLC retained the authority to do so if releasing the record primarily benefits the public rather than a person.
28. Graham testified that he believed the City had waived fees on that basis in the past, but could not recall an example.
29. Graham also testified that the requests would require extensive review of documents dating back further than the seven years since the decision to proceed with the bond initiative.
30. Responding fully to the request would require searching at least 12 SLC departments and 58 employees' files. This involved physical files from various locations as well as digital files from different computers
31. Responding would require searching current files (physical and digital) and storage or archives.
32. Mr. Graham testified that his department (as opposed to all city departments) went ahead and responded to the request. He testified that the process of gathering documents from just his Department required over 108 hours of employee time. He testified that the rates SLC permits to be charged for compiling and copying such records, \$10/hour and \$0.10/ page, would not come close to covering SLC's costs in performing those activities.
33. No person from SLC weighed the potential public benefit to be derived from releasing the records against the anticipated cost to gather the documents. This is probative of an abuse of discretion.
34. No person from SLC asked JRRN to inspect the documents in lieu of production or to narrow its request.

The Dispute

35. In *Graham v. Davis County Solid Waste Management*, 979 P.2d 363 (UT. App 199) the Utah Court of Appeals stated: "If a records request involves the assembly of documents in a different medium or organization, the agency should, if appropriate . . . allow the requestor to avoid compilation charges by offering the requestor the option of searching for and retrieving the documents him or herself." JRRN argues that this placed the burden on SLC to propose less expensive means of satisfying JRRN's request to JRRN.
36. The nature of the request required substantial efforts to "compile" documents as defined in *Graham*. The request's breadth would require extracting many documents from disparate larger sources. The effort within Public Works required many hours and interrogating many employees as to the files they possessed. It would not have been feasible to allow JRRN the access needed to gather the documents themselves.
37. By the time of the GRAMA request, JRRN was clearly opposed to the Sports Complex as conceived at that time.
38. One inference that may be drawn in this case is the parties were in adversarial positions with regard to the Sports Complex; SLC was actively pursuing the project and JRRN was actively opposing it.
39. Mr. Salt testified, without specifying any discrete class of documents, that he hoped through this request to understand the underlying reason for the selection of the site in question (the former state lands in northern Salt Lake City). The request is not tailored to that issue, but rather appears calculated to require production of every conceivable document concerning the project.
40. One can infer that the request was deliberately onerous. The preponderance of evidence, however, suggests that JRRN had a genuine desire to know as much as possible in order to oppose the Sports Complex.
41. One can also infer that SLC refused the request out-of-hand as a result of the adversarial position the parties were in at the time. The preponderance of evidence, however, is that SLC was generally cooperative in providing JRRN and others information and the opportunity to comment on the Sports Complex proposal.
42. The imposition of a fee for compiling and copying documents relieves, in part, the burden on the responding entity involved in satisfying the request. Perhaps more importantly, it also creates an incentive in the requesting party to narrow its request. Absent some liability for the cost of retrieval and copying, a party requesting documents (and standing in an adversarial position with respect to the entity from whom the documents are requested at least vis-à-vis the issue

to which the documents relate) has no incentive to narrow its request or be reasonable in relation to the burden imposed on the responding party.

43. The statute at the time permitted SLC to charge fees for retrieving and copying the requested documents. UCA §63G-2-203 (as eff. 2009). The same section provided that “A governmental entity may fulfill a record request without charge and is encouraged to do so when it determines that . . . releasing the record primarily benefits the public rather than a person.” Id. §§203(4).
44. SLC’s policy not to waive fees is permitted under the statute, though inconsistent with its hortatory language encouraging entities to waive fees in cases that would primarily benefit the public. The Court must read this language as indicating a Legislative intent to do no more than encourage such consideration. The Legislature certainly could have required such findings and resulting waiver if it wanted to, and must have used its permissive language advisedly. By merely encouraging governmental entities to make this analysis, the Legislature committed the decision whether to do so or not to the disclosing entities’ discretion.
45. SLC exercised its discretion by adopting a policy not to waive fees, but providing for the discretion to waive fees when disclosure serves to benefit the public. That determination, however, is a matter within SLC’s discretion.
46. The same state statute provides for an appeal of an “unreasonable denial of a fee waiver.”
47. The statute does not require the waiver of a fee in any circumstance. However, by implication, the provision of a right to appeal unreasonable denials means that denials of fee waivers must be reasonable.
48. The process followed in this case by SLC to reach its decision was less than ideal. The Court finds by a preponderance of the evidence that SLC did not consider the potential public benefit that might have been gained by release of the requested materials, and did not, as evidently contemplated by *Graham v. Davis County*, offer or consider less burdensome methods for satisfying JRRN’s request.
49. However, on this appeal, the Court is concerned with the substantive reasonableness of the underlying result. The statute provides only an appeal for an unreasonable denial of fee waiver, and contemplates a speedy remedy on de novo review. Utah Code 63G-2-404(7)(c). It is not for the Court to second-guess the exercise of SLC’s reserved discretion unless the totality of the circumstances shows the denial to be unreasonable.
50. The Court finds that the breadth of the request in this case was unreasonably large.
51. Mr. Salt testified to having a cooperative relationship with SLC employees, and has made a number of other GRAMA requests, both formal and informal.

52. No evidence suggests any effort by SLC to conceal information in this or any other requests. On the contrary, the evidence showed that Mr. Salt, JRRN and the public had a large amount of information concerning the project, much of it provided by SLC, and much of the information requested in the March 10, 2010 duplicated that information.
53. The evidence establishes that full compliance with the request would have required many more hours of employee time compiling and copying (whether copied in physical or electronic format). Despite the flaws in SLC's consideration of the request, it was not unreasonable to decline the requested fee waiver. On its face, the GRAMA request in this case would have required substantial time and effort. JRRN and Mr. Salt failed to show any potential incremental benefit to be derived from this substantial expenditure of public resources. Overall, the preponderance of the evidence establishes that the decision to deny the fee waiver was reasonable.

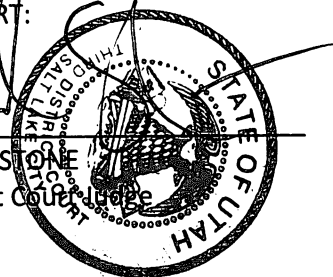
Conclusions of Law

54. The preponderance of the evidence shows that the decision to deny the requested fee waiver in this case and delay disclosure was reasonable given the voluminous nature of the request and the effort necessary to compile the requested documents.
55. SLC was entitled to charge for the costs of compiling and copying the documents requested by JRRN. The statute does not require SLC to waive fees for compiling or copying.
56. The Court upholds the City's decision to deny the fee waiver. Counsel for SLC is to prepare an appropriate order.

DATED this 8th day of December, 2015.

BY THE COURT:

ANDREW H. SALT
Third District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100910873 by the method and on the date specified.

MANUAL EMAIL: DAVID M BERNSTEIN bernstein.dm@gmail.com
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12/08/2015

/s/ MICHELLE ADAMS

Date: _____

Deputy Court Clerk