

1996

# Joseph M. Wisden v. Washington County : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Robert R. Wallace; Bruch M. Pritchett, Jr.; Hanson, Epperson and Smith; Attorneys for Appellee.  
Joseph M. Wisden; Attorney for Appellant; Pro Per.

---

## Recommended Citation

Brief of Appellant, *Wisden v. Washington County*, No. 960021 (Utah Court of Appeals, 1996).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/17](https://digitalcommons.law.byu.edu/byu_ca2/17)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
K F U  
50

MAY - 6 1996

.A10

DOCKET NO. 960021 CA

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JOSEPH M. WISDEN,

*Petitioner/Appellant,*

- US -

WASHINGTON COUNTY,

*Respondent/Appellee.*

Case No. 960021 CA

**APPELLANT'S BRIEF**

Priority #15

This appeal is taken from the 30 November 1995, JUDGMENT OF DISMISSAL pursuant to Respondent's 2 October 1995, MOTION TO DISMISS, the Honorable G. Rand Beacham, presiding.

Robert R. Wallace  
Bruce M. Pritchett, Jr.  
HANSON, EPPERSON & SMITH, P.C.  
4 Triad Center, Suite 500  
P. O. Box 2970  
Salt Lake City, Utah 84110-2970  
(801) 363-7611

*Attorneys for the  
Respondent/Appellee*

JOSEPH M. WISDEN  
465 South Bluff Street, #160  
St. George, Utah 84770  
(801) 674-0378

*Attorney for the Petitioner/Appellant,  
Pro Per*

**FILED**

Utah Court of Appeals

**MAY 6 - 1996**

Marilyn M. Branch  
Clerk of the Court

## IN THE UTAH COURT OF APPEALS

---

JOSEPH M. WISDEN,

*Petitioner/Appellant,*

- vs -

WASHINGTON COUNTY,

*Respondent/Appellee.*

---

Case No. 960021 CA

**APPELLANT'S BRIEF**

Priority #15

This appeal is taken from the 30 November 1995, JUDGMENT OF DISMISSAL pursuant to Respondent's 2 October 1995, MOTION TO DISMISS, the Honorable G. Rand Beacham, presiding.

Robert R. Wallace  
Bruce M. Pritchett, Jr.  
HANSON, EPPERSON & SMITH, P.C.  
4 Triad Center, Suite 500  
P. O. Box 2970  
Salt Lake City, Utah 84110-2970  
(801) 363-7611

*Attorneys for the  
Respondent/Appellee*

JOSEPH M. WISDEN  
465 South Bluff Street, #160  
St. George, Utah 84770  
(801) 674-0378

*Attorney for the Petitioner/Appellant,  
Pro Per*

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
JURISDICTION .....	1
ISSUES PRESENTED ON APPEAL .....	1
VERBATIM RECITALS OF CONSTITUTIONAL PROVISIONS, STATUTES & RULES	
<i>Utah Constitution</i> , Article 8, Section 5 .....	3
<i>Utah Rules of Civil Procedure</i> , Rule 12(b)(6).....	3
<i>Utah Code Annotated</i> 63-2-103(17) .....	4
<i>Utah Code Annotated</i> 63-2-103(18)(a) .....	4
<i>Utah Code Annotated</i> 63-2-103(18)(b)(vi) .....	4
<i>Utah Code Annotated</i> 63-2-201(2) .....	4
<i>Utah Code Annotated</i> 63-2-201(3)(b) .....	4
STATEMENT OF THE CASE	
Nature of the Case .....	4
Course of the Proceedings and Disposition in the Court Below.....	4
Statement of the Facts.....	7
SUMMARY OF ARGUMENT .....	15
ARGUMENT	
Issue #1 .....	16
Did the District Court err in granting Respondent's MOTION TO DISMISS? In other words, was Petitioner's PETITION FOR JUDICIAL REVIEW OF G. R. A. M. A. REQUEST DENIALS fatally flawed?	
Issue #2 .....	21
Does the <i>Utah Government Records Access and Management Act</i> , U.C.A. §63-2-101 et seq. identify, define, or even contemplate "non-records?"	
Issue #3 .....	23
Did the District Court improperly apply U. C. A. §63-2-103(18)(b)(vi) to Petitioner's case?	
Issue #4 .....	25
Can Petitioner be expected or obligated by his government to travel beyond the geographic boundaries of the county in which he lives, in order for him to obtain access to the records he seeks? In other words, is there an issue of convenience at play to deny Petitioner access to the records he seeks?	
CONCLUSION .....	26
CERTIFICATE OF SERVICE .....	28
ADDENDUMS	
Addendum #1 — JUDGMENT OF DISMISSAL .....	29

## **TABLE OF AUTHORITIES**

1. <u>FREGARD v. FIRST W. NAT'L BANK</u> , 738 P.2d 614 (Utah 1987)	.....	pp.	1, 17
2. <u>MOUNTEER v. UTAH POWER &amp; LIGHT CO.</u> , 823 P.2d 1055 (Utah 1991)	.....	pp.	1, 3, 17
3. <u>RICHMOND NEWSPAPERS INC. ET AL., v. VIRGINIA ET AL.</u> , 448 U.S. 555 (1980)	.....	pp.	1, 3, 17
4. <u>SOC'Y OF PROFESSIONAL JOURNALISTS v. SECRETARY OF LABOR</u> , 616 F.Supp. 569 (D.Utah 1985)	.....	pp.	1, 16
5. <u>THE SOCIETY OF PROFESSIONAL JOURNALISTS v. BRIGGS ET AL.</u> , 675 F.Supp 1308 (D.Utah 1987)	.....	pp.	1, 3, 16, 17, 22
6. <u>Utah Rules of Civil Procedure</u> , Rule 12(b)(6)	.....	pp.	1, 3, 13
7. <u>Utah Code Annotated</u> §63-2-101 et seq.	.....	pp.	2, 4, 13, 17, 21
8. <u>Utah Code Annotated</u> 63-2-103(17)	.....	pp.	2, 4, 14, 19
9. <u>Utah Code Annotated</u> 63-2-103(18)(a)	.....	pp.	2, 4, 13, 14, 15 19, 20
10. <u>Utah Code Annotated</u> 63-2-103(18)(b)(vi)	.....	pp.	2, 4, 14, 15, 20 21, 23, 26
11. <u>Utah Code Annotated</u> 63-2-201(2)	.....	pp.	2, 4, 14, 19
12. <u>Utah Code Annotated</u> 63-2-201(3)(b)	.....	pp.	4, 14, 19
13. <u>Utah Code Annotated</u> §78-2(a)-3(2)(a)	.....	p.	1
14. <u>Utah State Constitution</u> , Article 8, Section 5	.....	pp.	1, 3
15. <u>Washington County Ordinance</u> , #529 et seq.	.....	pp.	2, 4, 5, 12, 18

## **JURISDICTION**

This appeal is taken from the 30 November 1995, JUDGMENT OF DISMISSAL pursuant to Respondent's 2 October 1995, MOTION TO DISMISS, the Honorable G. Rand Beacham, presiding.

Pursuant to the granting of Respondent's pre-answer MOTION TO DISMISS from the District Court below, Petitioner appeals to the Utah Court of Appeals, which has appellate jurisdiction over this matter pursuant to the Utah Judicial Code, U.C.A. §78-2(a)-3(2)(a), also Article 8 Section 5, Utah State Constitution.

## **ISSUES PRESENTED ON APPEAL**

**POINT #1.** DID THE DISTRICT COURT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS? IN OTHER WORDS, WAS PETITIONER'S PETITION FOR JUDICIAL REVIEW OF G. R. A. M. A. REQUEST DENIALS FATALLY FLAWED?

### **STANDARD OF REVIEW**

The Standard of Review considered under a Rule 12(b) motion to dismiss for failure to state a claim, is that all reasonable inferences made with regard to the original complaint (*PETITION FOR JUDICIAL REVIEW OF G. R. A. M. A. REQUEST DENIALS, in this case*) and the facts alleged are to be construed as true and considered in a light most favorable to the Petitioner.

1. FREEGARD v. FIRST W. NAT'L BANK, 738 P.2d 614 (Utah 1987)
2. MOUNTEER v. UTAH POWER & LIGHT CO., 823 P.2d 1055 (Utah 1991)
3. RICHMOND NEWSPAPERS INC. ET AL. v. VIRGINIA ET AL., 448 U.S. 555 (1980)
3. SOC'Y OF PROFESSIONAL JOURNALISTS v. SECRETARY OF LABOR, 616 F.Supp. 569 (D.Utah 1985)
3. THE SOCIETY OF PROFESSIONAL JOURNALISTS v. BRIGGS ET AL., 675 F.Supp 1308 (D.Utah 1987)

**POINT #2.** DOES THE UTAH GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT, U.C.A. §63-2-101 ET SEQ, IDENTIFY, DEFINE, OR EVEN CONTEMPLATE “NON-RECORDS?”

**STANDARD OF REVIEW**

This issue on review is governed by the clear and plain language of the statute and the statutes’ definition of the term “non-record.” This review is an issue of first impression by an appellate court in Utah. Statutes and appellate court decisions which may bear influence on the issues under review might include:

1. Utah Code Annotated, §63-2-101 et seq., [Governmental Records Access and Management Act (G. R. A. M. A.)]
2. Washington County Ordinance, #529 et seq.

**POINT #3.** DID THE DISTRICT COURT IMPROPERLY APPLY U. C. A. §63-2-103(18)(b)(vi) TO PETITIONER’S CASE?

**STANDARD OF REVIEW**

This issue on review is governed by the clear and plain language of the statute and the application of U. C. A. §63-2-103(18)(a) in contradistinction to U. C. A. §63-2-103(18)(b)(vi) as applied to Petitioner’s case. This review is an issue of first impression by an appellate court in Utah. Statutes and appellate court decisions which may bear influence on the issues under review might include:

1. U. C. A. §63-2-103(17)
2. U. C. A. §63-2-103(18)(a)
3. U. C. A. §63-2-103(18)(b)(vi)
4. U. C. A. §63-2-201(2)

**POINT #4.** CAN PETITIONER BE EXPECTED OR OBLIGATED BY HIS GOVERNMENT TO TRAVEL BEYOND THE GEOGRAPHIC BOUNDARIES OF THE COUNTY IN WHICH HE LIVES, IN ORDER FOR HIM TO OBTAIN ACCESS TO THE RECORDS HE SEEKS. IN OTHER WORDS, IS THERE AN ISSUE OF CONVENIENCE AT PLAY TO DENY PETITIONER ACCESS TO THE RECORDS HE SEEKS?

#### **STANDARD OF REVIEW**

The Standard of Review considered under a Rule 12(b) motion to dismiss for failure to state a claim, is that all reasonable inferences made with regard to the original complaint (*a PETITION FOR JUDICIAL REVIEW OF G. R. A. M. A. REQUEST DENIALS in this case*) are to be construed as true and in a light most favorable to the Petitioner.

1. MOUNTEER v. UTAH POWER & LIGHT COMPANY, 823 P.2d 1055 (Utah 1991)
2. SOCIETY OF PROF. JOURNALISTS v. BRIGGS, 675 F.Supp 1308 (D.Utah 1987)
3. RICHMOND NEWSPAPERS INC. ET AL. v. VIRGINIA ET AL., 448 U.S. 555 (1980)

#### **VERBATIM RECITALS OF CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS**

##### Utah Constitution, Article 8, Section 5

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

##### Utah Rules of Civil Procedure, Rule 12(b)(6)

(b) how presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party.



Utah Code Annotated 63-2-103(17)

“Public record” means a record that is not private, controlled, or protected and that is not exempt from disclosure as provided in Subsection 63-2-201 (3)(b).

Utah Code Annotated 63-2-103(18)(a)

“Record” means all books, letters, documents, papers, maps, plans, photographs, films, cards, tapes, recordings, electronic data, or other documentary materials regardless of physical form or characteristics;

Utah Code Annotated 63-2-103(18)(b)(vi)

(b) “Record” does not mean:

(vi) books and other materials that are cataloged, indexed, or inventoried and contained in the collections of libraries open to the public, regardless of physical form or characteristics of the material;

Utah Code Annotated 63-2-201(2)

All records are public unless otherwise expressly provided by statute.

Utah Code Annotated 63-2-201(3)(b)

(3) The following records are not public;

(b) records to which access is restricted pursuant to court rule, another state statute, federal statute, or federal regulation, including records for which access is governed or restricted as a condition of participation in a state or federal program or for receiving state or federal funds.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Petitioner sought Judicial review of Respondent’s denial of access to public records pursuant to the Utah Government Records Access and Management Act (G. R. A. M. A.), U.C.A. §63-2-101 et seq, also Washington County Ordinance #529 et seq.

### **Course of the Proceedings and Disposition in the Court Below**

1. On 8, 9, 10, 11, and 14 August 1995, Petitioner/Appellant physically attempted to gain access to and review certain public records housed at the Washington County Attorney’s Office in St. George, Utah. (**Record, pages 2**

**thru 5)**

2. On 9 August 1995, Petitioner submitted a written G. R. A. M. A. request to the custodian of the records of the Washington County Attorneys' Office, which was denied by Eric Ludlow, by letter on 16 August 1995.

**(Record, page 5, ¶ #31)**

3. On 11 August 1995, pursuant to the in person denials of 8, 9, 10, & 11 August 1995, and pursuant to Washington County Ordinance No. 529, at ¶ 10(B)(1), Petitioner filed an administrative appeal to the Washington County Commission. **(Record, pages 2 thru 6, ¶¶ #1, #4, #11, #12, #21, #22, #24, #25, & #34)**

4. Twenty-One (21) days then passed without the County Commission responding to Petitioner's administrative appeal, and Petitioner sought remedy in District Court for judicial review of the Washington Countys' denials of Petitioner's G. R. A. M. A. Requests, on 8 September 1995. **(Record, page 6, ¶ #34 and Record, page 1)**

5. Respondent/Appellee was served the SUMMONS and PETITION on 12 September 1995, by one (1) Gary Stubbs, a local process server. **(Record, page 11)**

6. The RETURN OF SERVICE was filed with the Fifth Judicial District Court on 14 September 1995. **(Record, page 12)**

7. On or about 2 October 1995, Respondent caused to be filed its MOTION TO DISMISS, arguing that the documents sought by the Petitioner were "non-records" "subject to GRAMA." **(Record, page 17)**

8. On 3 October 1995, the District Court entered a DEFAULT CERTIFICATE against the Respondent. **(Record, page 13)**

9. On 11 October 1995, Petitioner filed his OPPOSITION TO RESPONDENT'S MOTION TO DISMISS. **(Record, page 43)**

10. On 11 October 1995, Petitioner filed his MOTION FOR SUMMARY JUDGMENT. (**Record, page 6, ¶ #48**)

11. On 23 October 1995, Petitioner filed a NOTICE TO SUBMIT on Respondents' MOTION TO DISMISS. (**Record, page 57**)

12. On 23 October 1995, Petitioner filed a NOTICE TO SUBMIT on his MOTION FOR SUMMARY JUDGMENT. (**Record, page 59**)

13. On 26 October 1995, Petitioner caused an AFFIDAVIT OF PREJUDICE to be filed against Judge G. Rand Beacham. (**Record, page 61**)

14. On 13 November 1995, the Court issued an ORDER CERTIFYING AFFIDAVIT OF PREJUDICE TO JUDGE J. PHILIP EVES. (**Record, page 142**)

15. On 15 November 1995, Respondent caused to be filed its MOTION TO SET ASIDE DEFAULT CERTIFICATE and MEMORANDUM IN SUPPORT. (**Record, pages 64 & 66 respectively**)

16. On 17 November 1995, Respondent caused to be filed its OBJECTION TO PLAINTIFF'S [sic] NOTICE TO SUBMIT THE MOTION TO DISMISS; AND MOTION AND MEMORANDUM TO ACCEPT REPLY MEMORANDUM, DEFENDANTS' [sic] REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, and SECOND NOTICE TO SUBMIT MOTION TO DISMISS. (**Record, pages 91, 94, & 139 respectively**)

17. On 17 November 1995, Respondent also caused to be filed its OBJECTION TO PLAINTIFF'S [sic] NOTICE TO SUBMIT THE MOTION FOR SUMMARY JUDGMENT, DEFENDANT'S [sic] RULE 56(f) MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFF'S [sic] MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN SUPPORT OF DEFENDANT'S [sic] RULE 56 (f) MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFF'S [sic] MOTION FOR SUMMARY JUDGMENT, and AFFIDAVIT OF BRUCE M. PRITCHETT, JR. (**Record, pages 78, 81, 83, & 88 respectively**)

18. On 22 November 1995, the Court entered its RULING regarding Petitioner's 26 October 1995, AFFIDAVIT OF PREJUDICE, denying Petitioner's effort to recuse Judge Beacham. **(Record, page 143)**

19. On 30 November 1995, the Court below rendered its JUDGMENT OF DISMISSAL, which was caused to be mailed to the Petitioner on 1 December 1995. **(Record, page 147)**

20. On 3 January 1995, Petitioner filed his NOTICE OF APPEAL in this matter. **(Record, page 153)**

### **Statement of the Facts**

1. On Tuesday, 8 August 1995, at approximately 8:30 am., Petitioner attempted to gain access to the Law Library at the Washington County Attorney's Office at 178 N. 200 East in St. George, Utah, to exercise his 1st Amendment Right to access to public documents contained at that location. **(Record, page 2 ¶ #1)**

2. There is a new partition built in the reception area of the County Attorney's Office, with a locked door blocking access to the Law Library. **(Record, page 2 ¶ #2)**

3. Upon discovering the blocked access to the Law Library, Petitioner asked the receptionist (Jane Doe #1) who was sitting there, for access to the Law Library. This constitutes Petitioner's first (1st), in person, G. R. A. M. A. Request. **(Record, page 2 ¶ #3)**

4. The receptionist informed Petitioner that the Law Library was no longer available or open to the public, and she made no effort to offer or allow him beyond the door blocking access. **(Record, page 2 ¶ #4)**

5. Petitioner requested to speak to someone with more authority than her and asked the receptionist to get someone else for him to speak to.

**(Record, page 2 ¶ #5)**

6. Jane Doe #1 left the reception area and went back into the office area, beyond Petitioner's view. A secretary for one of the attorneys returned (Jane Doe #2)) and informed Petitioner that the Law Library was not public, it was for the exclusive use of the Washington County attorneys. **(Record, page 2 ¶ #6)**

7. Jane Doe #2 informed Petitioner that all the Law books and information he desired to review or obtain could be found at the Washington County Public Library over on Main Street. She also stated that all the law books contained in the Law Library at the Washington County Attorneys office were contained on CD's (compact disc) for use on the computer terminals at the Public Library. **(Record, page 2 ¶ #7)**

8. Petitioner asked to speak to Eric Ludlow, and was informed that he was not there. Petitioner asked to speak to any other attorney in the office and was informed they were all over at the courthouse. **(Record, page 3 ¶ #8)**

9. As of 8 August 1995, at approximately 10:30 am. there were no law books or legal reference books available on CD or by any other media at the Washington County Library, on Main Street, in St. George, Utah. Jane Doe #2's representation to Petitioner was a lie and therefore a fraud. **(Record, page 3 ¶ #9)**

10. The above facts stated in ¶¶ #1 through #9, constituted Petitioner's first (1st) G. R. A. M. A. request denial by the Washington County Attorney's Office. **(Record, page 3 ¶ #10)**

11. On Wednesday, 9 August 1995, at approximately 8:45 am., Petitioner again attempted to gain access to the Law Library at the Washington County Attorney's Office at 178 N. 200 East in St. George, Utah, to exercise his 1st Amendment Right to access to public documents contained at that location. **(Record, page 3 ¶ #11)**

12. Petitioner again asked the receptionist (Jane Doe #1) who was sitting there, for access to the Law Library. The receptionist informed Petitioner that the Law Library was not available or open to the public, and she made no effort to offer or allow him beyond the door blocking access. This constitutes Petitioner's second (2nd), in person, G. R. A. M. A. Request. **(Record, page 3 ¶ #12)**

13. On first entering the County Attorney's Office, Brent Langston, an Assistant Washington County Attorney, had just preceded Petitioner into the office, by about 30 seconds. While Petitioner waited for the receptionist to answer a call from the back, he could hear Brent Langston conversing with others in back and out of view from the reception area. **(Record, page 3 ¶ #13)**

14. Petitioner then asked Jane Doe #1 for her name, and she asked him to repeat his question. Petitioner again asked her for her name and she refused to give it to him. **(Record, page 3 ¶ #14)**

15. Petitioner informed Jane Doe #1 that she was a public servant and she again refused to give him her name. **(Record, page 4 ¶ #15)**

16. Petitioner asked to speak to Eric Ludlow and Jane Doe #1 informed him that Ludlow was not there. **(Record, page 4 ¶ #16)**

17. Petitioner asked to speak to any attorney that was there and Jane Doe #1 advised him that there were no attorney's in the building. **(Record, page 4 ¶ #17)**

18. Petitioner informed Jane Doe #1 that he had just seen Brent Langston enter the building, and Jane Doe #1 responded that he had left. (Less than 2 minutes had expired since Petitioner entered the Office.) Petitioner again insisted to speak to an attorney and Jane Doe #1 responded that all the attorneys were over at the courthouse. Jane Doe #1 lied to Petitioner in two (2) instances. **(Record, page 4 ¶ #18)**

19. Petitioner immediately went to the courthouse and no attorneys were there. He checked the foyer and the courtrooms and all were empty. **(Record, page 4 ¶ #19)**

20. The above facts stated in ¶¶ #11 through #19, constituted Petitioner's second (2nd) G. R. A. M. A. request denial. **(Record, page 4 ¶ #20)**

21. On Thursday, 10 August 1995, at approximately 9:00 am., Petitioner again attempted to gain access to the Law Library at the Washington County Attorney's Office at 178 N. 200 East in St. George, Utah, to exercise his 1st Amendment Right to access to public documents contained at that location. **(Record, page 4 ¶ #21)**

22. Petitioner asked the secretary (Jane Doe #3) who was standing there, for access to the Law Library. The secretary informed Petitioner that the Law Library was not available or open to the public, and she made no effort to offer or allow him beyond the door blocking access. This constitutes Petitioner's third (3rd), in person, G. R. A. M. A. Request. **(Record, page 4 ¶ #22)**

23. The above facts stated in ¶¶ #21 & #22, constituted Petitioner's third (3rd) G. R. A. M. A. request denial. **(Record, page 4 ¶ #23)**

24. On Friday, 11 August 1995, at approximately 8:45 am., Petitioner again attempted to gain access to the Law Library at the Washington County Attorney's Office at 178 N. 200 East in St. George, Utah, to exercise his 1st





32. The description of the records sought to be inspected include, but are not limited to: United States Code; Pacific Reporter, all volumes; Pacific Reporter 2nd, Vol's. 1 through the present; Pacific Reporter Digest, 1st, 2nd, & 3rd editions; American Jurisprudence, all volumes; Words and Phrases, all volumes; Corpus Juris Secundum, all volumes; American Law Review, 1st, 2nd, 3rd, 4th, & Federal editions, all volumes; Utah Law Review, all volumes; Federal Reports, all volumes, U. S. Reports, Lawyer's edition, all volumes; Black's Law Dictionary; and any other reference material, book, or periodical maintained in the Law Library or any attorneys' offices housed at the Washington County Attorney's Office at the above address. **(Record, page 6 ¶ #32)**

33. The Law Library in question remains open to "licensed" attorneys, establishing a special class of persons in Utah, and violating the provisions of establishment of a title of nobility. **(Record, page 6 ¶ #33)**

34. On 11 August 1995, pursuant to Washington County Ordinance No. 529, at ¶ 10(B)(1), Petitioner filed an administrative appeal to the Washington County Commission. After twenty-one (21) days passed, Petitioner petitioned the District Court for judicial review of the Washington County's denials of his G. R. A. M. A. Requests. **(Record, page 6 ¶ #34)**

35. The Law Library at the Washington County Attorney's Office at 178 No. 200 East, in St. George, Utah, has traditionally been open to the public. **(Record, page 6 ¶ #35)**

36. The Petitioner in this cause of action has used the Law Library at the Washington County Attorney's Office at 178 No. 200 East, in St. George, Utah, since September 1989, establishing a tradition of six (6) years of exercising his constitutional right of free access, pursuant to the 1st and 14th amendments to the U.S. Constitution. **(Record, page 6 ¶ #36)**

37. It is necessary and imperative that Petitioner have free access to the Law Library at the Washington County Attorney's Office at 178 No. 200 East, in St. Gorge, Utah, as to deprive him of such also denies him his constitutional right of self representation to the various lawsuits (including this one) he presently has pending. **(Record, page 7 ¶ #37)**

38. It is entirely unreasonable for the Washington County Attorney to expect the Petitioner, who is indigent, to travel outside Washington County, to Utah County, Salt Lake County, and even outside Utah to a foreign state, namely Nevada, to exercise his rights to free access of public documents and self representation of his law suits. **(Record, page 7 ¶ #38)**

39. Judge Beacham, presiding in the Court below, asserts in his 30 November 1995, JUDGMENT OF DISMISSAL, that Petitioner failed to meet the requirement of Rule 56, suggesting an improper or absence of supporting affidavit. **(Record, page 148, last paragraph)**

40. Judge Beacham, ruled in his JUDGMENT OF DISMISSAL, that Respondent's MOTION TO DISMISS, was "clearly a Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted."

**(Record, page 149, first paragraph)**

41. Judge Beacham found in his JUDGMENT OF DISMISSAL, that the term "public documents", are not defined in G. R. A. M. A. **(Record, page 150, first paragraph)**

42. The "GRAMA" Judge Beacham refers to is presumed to mean the Utah Government Records Access and Management Act, U. C. A. §63-2-101 et seq. **(Not in Record)**

43. G. R. A. M. A. at U. C. A. §63-2-103(18)(a) defines "Record" to mean all "books, letters, documents, [etc.]" Therefore, a "document" is a

“record” and Petitioner’s use of the word “document” is no different than if he were to use the word “record.” The words “document” and “record” are synonymous. **(Not in Record)**

44. G. R. A. M. A. at U. C. A. §63-2-103(17) defines “public record” to mean “a record that is not private, controlled, or protected and that is not exempt from disclosure as provided in Subsection 63-2-201 (3)(b). *[Subsection 63-2-201 (3)(b) is not applicable in this particular case.]* **(Not in Record)**

45. G. R. A. M. A. at U. C. A. §63-2-201(2) also states that, “All records are public unless otherwise expressly provided by statute.” **(Not in Record)**

46. Judge Beacham, referencing G. R. A. M. A. at U. C. A. §63-2-103(18)(b)(vi) ruled in his JUDGMENT OF DISMISSAL, that “The fatal flaw in the Petition is that books *[which were records Petitioner sought to inspect]* are not records to which GRAMA applies.” **(Record, page 149, first paragraph)**

47. As indicated in ¶ #43, above, G. R. A. M. A. at U. C. A. §63-2-103(18)(a) defines “Record” to mean all “**books**, *[etc.]*” Therefore, Judge Beacham’s ruling in his JUDGMENT OF DISMISSAL, is in error. **(Not in Record)**

48. “Non-record” as referred to by Judge Beacham in his JUDGMENT OF DISMISSAL, **[Record, page 151, first paragraph]** is not defined under G. R. A. M. A. **(Not in Record)**

49. Judge Beacham erroneously found in his JUDGMENT OF DISMISSAL, that Petitioner conceded that the subject “books and other materials” petitioner sought, were in fact “contained in the collections of libraries open to the public.” **(Record, page 150, last paragraph)**

50. Petitioner did not concede such facts *[see ¶ #49, immediately above]* as represented by Judge Beacham, and here asserts that the operative phrase of

the section of G. R. A. M. A. Judge Beacham refers to is “contained in the collections of libraries open to the public. **(Not in Record)**”

### **SUMMARY OF ARGUMENTS**

**POINT 1.** Petitioner argues that the District Court below did not properly apply the appropriate standard of review for a MOTION TO DISMISS. The Court below did not construe the facts alleged in the PETITION, as true, and in a light most favorable to the Petitioner.

The District Court below misconstrued Petitioner’s facts alleged, and even misrepresents, in its JUDGMENT OF DISMISSAL, the actual facts Petitioner alleged.

Petitioner also argues the public’s right to access.

**POINT 2.** Petitioner argues that there is not a definition of “non-record” contained in G. R. A. M. A., nor does the statute even contemplate any items or categories classified as “non-records.”

**POINT 3.** Petitioner argues that the District Court below improperly applied U. C. A. §63-2-103(18)(b)(vi) to the facts of this case and stands U. C. A. §63-2-103(18)(a) on its head.

**POINT 4.** Petitioner argues that he or any other individual participating in their self-represented governmental scheme, cannot be compelled or obligated to travel beyond the boundaries of his county, or to foreign lands, in order to exercise his rights to access to public documents and participate in his government. Particularly where his local government possess the very documents and records he seeks to inspect.

## **ARGUMENT**

**POINT 1.** DID THE DISTRICT COURT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS? IN OTHER WORDS, WAS PETITIONER'S PETITION FOR JUDICIAL REVIEW OF G. R. A. M. A. REQUEST DENIALS FATALLY FLAWED?

“If the government is given the unfettered discretion to decide what information to make available to the press and public, it has the power to distort the information and hide the truth. The first amendment guarantees of free speech and free press protect our right to freely criticize the government without fear of censorship by the government. But censorship in speaking and publishing is not the only form of censorship that must be prevented. The process of filtering information—selectively releasing some information while withholding other information—can be effectively used to prevent criticism and hide mistakes. The first amendment guarantees apply to both forms of censorship.” *Soc’y of Professional Journalists v. Secretary of Labor*, 616 F.Supp. 569, 576 (D.Utah 1985). cited in *Society of Professional Journalists v. Briggs et al.*, 675 F. Supp 1308, 1309 (D.Utah 1987)

That same Court agreed and held “that there is a constitutional right of access to public documents.” Id.

In Richmond Newspapers, Inc. v. Virginia, Justice Stevens noted that “the core of the First Amendment is access to information about the operation and functioning of government.” 448 U.S. 555, 583-84, 100 S.Ct. 2814, 2830-31, 65 L.Ed.2d 973 (1980), cited in Society of Professional Journalists v. Briggs et al., Id.

In 1986, the Utah Legislature enacted the Archives and Records Service Act, and in 1991, redefined and recodified it as the Government Records Access and Management Act (G. R. A. M. A.). Enacting the Archives Act, the Legislature articulated and memorialized the following public policy:

In enacting this act, the Legislature recognizes two fundamental constitutional rights: (a) the right of privacy in relation to personal data gathered by state agencies, and (b) the public’s right of access to information concerning the conduct of the public’s business.

Petitioner asserts it is axiomatic that he has a constitutional right of access to public documents.

In reviewing the dismissal of Petitioner’s action, the Court must view the PETITION and all reasonable inferences in his favor. see Munteer v. Utah Power & Light Co., 823 P.2d 1055 (Utah 1991) In addition, Dismissal is only appropriate when it appears to a certainty that the Petitioner would not be entitled to relief under any state of facts which could be proved in support of his claims. see Freegard v. First W. Nat’l Bank, 738 P.2d 614, 616 (Utah 1987)

In ruling on Respondent's MOTION TO DISMISS, the Court below observed, "With respect to the merits of respondent's Motion to Dismiss, the Court first notes that respondent has not raised issues concerning the formal adequacy of the Petition or with respect to petitioner's compliance with required administrative procedures. While it appears to the Court that the Petition may not meet the requirements of Utah Code Ann. § 63-2-404 and it is not clear from the file whether petitioner in fact exhausted his administrative remedies, ..." It is clear by the Courts' remarks regarding Petitioner's administrative remedies or his pursuit of those avenues for redress, the Court below did not take cognitive recognition of Petitioner's statement of facts. Petitioner clearly alleged with a verified PETITION that he administratively attempted to personally inspect public records in the Washington County attorneys' possession, then filed a written request under Washington Countys' Ordinance #529 (G. R. A. M. A.), and then pursued his administrative appeal, which was denied him by way of non-response.

Petitioner understands that the Court below asserts that its decision was not controlled or affected by its erroneous observation of Petitioner's statement of facts, however, Petitioner makes the point that the Court below clearly demonstrated its own error and inattention to Petitioner's stated facts, which the Court was obligated to construe as true. Instead, the Court below indicated that it was not clear as to whether Petitioner had exhausted his administrative remedies or whether he had complied with the appeal process under G. R. A. M. A. This demonstrates shear lack of attention to this case and Petitioner's verified statement of facts.

The Court below indicates that it decided this case as a matter of law, pursuant to G. R. A. M. A. The Court first observes Petitioner's use of the term "public documents," and claims such term is not "defined in GRAMA *[sic]*." The Court below clearly misinterprets the plain language of the statute.

G. R. A. M. A. at U. C. A. §63-2-103(18)(a) defines "Record" to mean all "books, letters, **documents**, *[etc.]*" Therefore, a "document" is a "record" and Petitioner's use of the word "document" is no different than if he were to use the word "record." The words "document" and "record" are synonymous.

G. R. A. M. A. at U. C. A. §63-2-103(17) defines "public record" to mean "a record that is not private, controlled, or protected and that is not exempt from disclosure as provided in Subsection 63-2-201 (3)(b). *[Subsection 63-2-201 (3)(b) is not applicable in this particular case.]* Therefore, the logical conclusion may be inferred that Petitioner's use of the term "public document" is circumscribed within the language of G. R. A. M. A. In addition U. C. A. §63-2-201(2) also states that, "All records are public unless otherwise expressly provided by statute."

The Court below then goes on to recognize that Petitioner did in fact use the word "record." **OH MY GOSH!** But then it simply passes on to its next misconstruance and misapplication of G. R. A. M. A.

The Court below observed that, "Paragraph 32 of the Petition specifies, however, that 'the records sought to be inspected' are in fact specifically named books 'and any other reference material, book, or periodical' maintained in the Washington County Attorney's law library. the fatal flaw in the Petition is that such books are not records to which GRAMA applies."



G. R. A. M. A. at U. C. A. §63-2-103(18)(a) defines "Record" to mean all "**books, [etc.]**" The Court below merely passed over that applicable portion of the statute to misapply an inapplicable section to Petitioner's cause of action. The Court below stated, "GRAMA clearly provides that the term 'record' as used in GRAMA does not refer to

books and other materials that are cataloged, indexed, or inventoried and contained in the collections of libraries open to the public, regardless of physical form or characteristics of the material.

U.C.A. § 63-2-103(18)(b)(vi)"

In a paramount effort to construe the statute in light least favorable to the Petitioner, the Court below continued with the following erroneous observation. "Respondent asserts, petitioner appears to concede, and the Court takes notice of the fact that the "books and other materials" identified by petitioner as the subject of his Petition are in fact "contained in the collections of libraries open to the public." Petitioner conceded no such thing! The Court goes on in an attempt to elucidate, but in actuality it muddies its findings and further casts aspersion on the intent of the Legislature for open access of public records maintained by the Washington County Attorney.

At this point the Petitioner must go to extraordinary lengths to analyze the Courts' error and the misapplication of its conclusion to the facts of this case.

The operative phrase of the section of the statute the Court below references is, "contained in the collections of libraries open to the public," Petitioner will repeat this for emphasis. "libraries **open to the public,**" The PETITION clearly alleges a new partition and locked doors now stand between the Petitioner and the records he seeks access to. Such facts clearly

demonstrate a lack of access, and would be reasonably construed as **not being open to the public!** The moment the Law Library housed at the Washington County Attorney's office, was closed to free and open access by the public, and remained closed even after request for access was made by the Petitioner, such library no longer could be classified as public, and G. R. A. M. A. at U. C. A. §63-2-103(18)(b)(vi), referred to by the Court below, was not applicable to bar Petitioner's redress through his PETITION FOR JUDICIAL REVIEW, or grant the remedy sought by Respondent's MOTION TO DISMISS, "as a matter of law." As a matter of law, the Court below did err.

The Washington County Attorney is the custodian of "public records" which he is denying access to by the public, and in contemptuous violation of G. R. A. M. A.

**POINT 2. DOES THE UTAH GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT, U.C.A. §63-2-101 ET SEQ, IDENTIFY, DEFINE, OR EVEN CONTEMPLATE "NON-RECORDS?"**

Petitioner contends that the answer to this question is an absolute "No!" Respondent and the Court stretch far afield to liberally construe G. R. A. M. A. to define "non-record."

The scheme under which G. R. A. M. A. operates suggests a posture of openness and unrestrained (free) access. G. R. A. M. A. at U. C. A. §63-2-301(3) clearly states "The list of public records in this section is not exhaustive and should not be used to limit access to records.

The concept postulated by the Respondent and the Court below, suggesting that G. R. A. M. A. defines those records sought by the Petitioner as “non-records” is not merely novel, it is outright preposterous, and suggests mental imbalance and a retreat from reason, logic, and common sense. It is clear that as students of the law, those individuals representing the Respondent and the Court below fully understand the ramifications of the court decisions heretofore cited by the Petitioner, which declare axiomatically his constitutional right to access to public “documents.”

As pointed out in Petitioner’s POINT 1 above, the Court below nitpicks at Petitioner’s frequent use of the word “document” in his pleadings, instead of the Courts’ more favored term “record.” In the Briggs case, J. Green favored the word “document.” **OH MY GOSH!** Isn’t that what the Petitioner used?

In either case, the Utah Legislature did not appear so fastidious, it merely expressed a broader intent by articulating “the public’s right of access to information concerning the conduct of the public’s *business*.” Id.

The Respondents’ intent is clearly to deprive the Petitioner his constitutional right of access to information regarding his governments’ business, which intent is evidently supported by the Court below. Is shark courtesy factored in here somewhere?

There are but four (4) definitions of records found in G. R. A. M. A., and none of them identify with “non-records.”

The clear and plain language of the statute belies the Courts’ ruling that G. R. A. M. A. defines “non-record.” Using the Courts’ power of reasoning, to define an animal that was not a horse the dialog would go something like this.

Dummy claims he saw a “horse.” Dummy can’t have seen a horse, it was actually not a horse because Farmer John defines what Dummy saw as

horses, equine animals, saddled creatures used for riding, and other four legged mammals characterized by hooves, pointy ears, manes, and long flowing tails with horse hair, that are cataloged, itemized, characterized and otherwise crossbred with jackasses.

Therefore, what Dummy saw was a “non-horse.”.

What the statute, referred to by the Court below is actually saying, is that those documents that might be sought, pursuant to G. R. A. M. A., from a government entity that is a public library, are not available through G. R. A. M. A. because a library that is “open to the public,” means exactly that — **OPEN TO THE PUBLIC!** A request pursuant to G. R. A. M. A. made to a public library is as preposterous as the Courts’ explanation that the “records” Petitioner seeks are actually “non-records.” Such a request to a public library is unnecessary. G. R. A. M. A. at U. C. A. §63-2-103(18)(b)(vi), is intended to lend reason, logic, and common sense to an otherwise stupid bureaucrat. It is not for the use the Court below has put it to.

**POINT 3. DID THE DISTRICT COURT IMPROPERLY APPLY U. C. A. §63-2-103(18)(b)(vi) TO PETITIONER’S CASE?**

Petitioner has heretofore argued that the operative phrase that the Court below improperly applies is “libraries open to the public.” Petitioner’s argument in that regard was more fully expressed in POINT 2 above, however, Petitioner would vigorously argue that the Court below improperly applied U. C. A. §63-2-103(18)(b)(vi) to his case, and Respondents’ MOTION TO DISMISS should have been denied.

The Court below reasons that “The Utah Legislature has made the access provisions of GRAMA inapplicable to the books and materials in the law library of the Washington County Attorney because those books and materials are available in public libraries.” The Court below errs in this reasoning, which is also tied to Petitioner’s argument found in the following POINT 4.

If Washington County had a public library which housed the documents, records, or whatever term you want to use to describe the information regarding the conduct of the public’s business, then the reasoning of the Court below might be considered, however, that reasoning is even faulty.

Petitioner did not pursue his requests, under G. R. A. M. A., to a public library. His requests were specifically directed to a governmental entity (Washington County Attorney) that had purposely closed access to the public records (documents) it houses and maintains. In this regard, the Courts reasoning is faulty.

Even considering the scenario suggested by the Court below, that GRAMA is inapplicable to the documents in the law library at the County Attorneys’ office because those books and materials are available in public libraries, such reasoning does not comport with the intent of G. R. A. M. A., the Utah Legislature, and the various appellate court decisions on the subject.

Differences might be found, that are essential to the knowledge obtained, from otherwise identical documents (records) located in separate governmental repositories. It is unreasonable and irresponsible for one (1) governmental entity to point to another governmental entity and claim, “You can’t have what I have because they have it over there. You go get it from them.”

In this capacity, the Court below has seriously damaged the integrity and purpose of G. R. A. M. A. Likewise, the Court below assumed facts not in evidence, and failed to construe the facts alleged in Petitioner's verified PETITION in a light most favorable to him.

This argument actually returns to Petitioner's POINT 1, challenging the Courts' dismissal in favor of Respondents' MOTION TO DISMISS.

**POINT 4.** CAN PETITIONER BE EXPECTED OR OBLIGATED BY HIS GOVERNMENT TO TRAVEL BEYOND THE GEOGRAPHIC BOUNDARIES OF THE COUNTY IN WHICH HE LIVES, IN ORDER FOR HIM TO OBTAIN ACCESS TO THE RECORDS HE SEEKS. IN OTHER WORDS, IS THERE AN ISSUE OF CONVENIENCE AT PLAY TO DENY PETITIONER ACCESS TO THE RECORDS HE SEEKS?

The Court below turns against the Petitioner the issue of his indigence. With inconceivable lack of common sense, the Court below attempts to imbue Legislative intent into G. R. A. M. A. which is not there. The issue of inconvenience rises with the Respondent, not the Petitioner as the Court below attempts to portray.

The Respondent has persistently clouded Petitioner's G. R. A. M. A. Requests with a plethora of excuses, which mostly whine about convenience, or lack of it.

We don't have the staff.

We don't have the facility.

We are troubled with theft.

We are troubled with threats of terrorism.

We don't have privacy any more.

We don't have the equipment.

You can go somewhere else to get what you want. (ie. Nevada)

Petitioner has not yet been afforded the ability to discover whether Respondents' whining over convenience, as indicated above, is valid, and he does not represent Respondents' excuses in this APPELLANT'S BRIEF to grant any degree of validity to them.

The decision of the Court below, regarding convenience, ties itself back to its misapplication of G. R. A. M. A. at U. C. A. §63-2-103(18)(b)(vi), which Petitioner has heretofore demonstrated to be in error.

It does not matter one way or the other that the Legislature did not provide an indigence exception or an inconvenience exception to the statutory exclusions the Court below claims. It is clear, however, that the Court below was influenced in its decision by its own faulty reasoning.

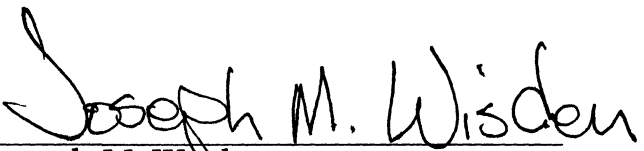
### **CONCLUSION**

It is clear and evident that Respondent chooses not to comply with Petitioner's Constitutional right to access to public documents. Prior appellate courts, both state and federal, have made the right axiomatic. This court must review the decision of the Court below in a light most favorable to the Petitioner and reverse its decision to dismiss Petitioner's claims.

WHEREFORE: Petitioner prays for relief in the following:

1. Reverse the decision of the District Court below.
2. Remand the case back to the District Court for further proceedings consistent with this Court's opinion, granting the Petitioner access to the public documents housed at the Washington County Attorneys' Office.
3. Award costs and fees to the Petitioner, on appeal.
4. Award any other remedies this Court deems just and appropriate.

DATED THIS 6th day of May, 1996.

  
\_\_\_\_\_  
Joseph M. Wisden



## **CERTIFICATE OF SERVICE**

I, Joseph M. Wisden, do hereby certify that I mailed or hand delivered true and correct original copies of the foregoing APPELLANT'S BRIEF, by personal delivery, or by depositing same with the United States Postal Service, first class postage prepaid, this 6th day of May, 1996, to the following:

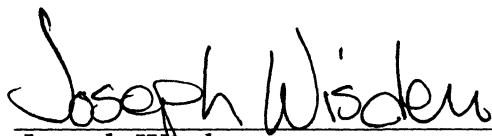
1 original & 7 copies

CLERK OF THE COURT  
Utah Court of Appeals  
230 So. 500 East • Suite #400  
Salt Lake City, Utah 84102  
(801) 578-3900

2 copies

ROBERT R. WALLACE  
BRUCE M. PRITCHETT, JR.  
HANSON, EPPERSON & SMITH, P.C.  
4 Triad Center • suite #500  
P. O. Box 2970  
Salt Lake City, Utah 84110-2970  
(801) 634-363-7611

*Attorneys for the Appellee*

  
\_\_\_\_\_  
Joseph Wisden

**ADDENDUM #1 — FOLLOWS THIS PAGE**

IN THE FIFTH JUDICIAL DISTRICT COURT FOR  
WASHINGTON COUNTY, STATE OF UTAH

---

JOSEPH M. WISDEN,	)	
	)	
Petitioner,	)	<b>JUDGMENT OF DISMISSAL</b>
	)	
vs.	)	
	)	
WASHINGTON COUNTY,	)	
	)	
Respondent.	)	Civil No. 950501367 AA

---

This matter was commenced by the filing of a "Petition for Review of G.R.A.M.A. Request Denials" which was served on Washington County on September 12, 1995. A Default Certificate was filed October 3, 1995. On the previous day, however, October 2, 1995, counsel for Washington County had served by mail a Motion to Dismiss and supporting Memorandum in response to the Petition. Thereafter, petitioner filed an "Opposition" to the Motion together with petitioner's Motion for Summary Judgment. On October 23, 1995, petitioner gave notice to submit both the Motion to Dismiss and the Motion for Summary Judgment to the Court for decision.

**DEFAULT CERTIFICATE**

Petitioner's "Opposition", Motion for Summary Judgment, and Notices to Submit all recite that "Respondent is in default" so that "no service is required", citing Rule 55 (a)(2) of the Utah Rules of Civil Procedure. That assertion is factually and legally incorrect. Rule 12 of the Utah Rules of Civil Procedure required respondent to

"serve" its response on or before October 2, 1995. U.R.C.P. Rule 5(b) allowed respondent to serve its response to the Petition by mailing it to petitioner at his known address. Respondent served its Motion to Dismiss and supporting Memorandum by mail on October 10, 1995. The rules do not require that response to be filed with the Clerk within twenty days, but only that the response be "served." Consequently, although respondent's Motion and Memorandum did not appear in the Court's file on October 3, respondent was in fact not in default. The Court considers this fact to constitute good cause to set aside the entry of default and does hereby set aside the entry of default made on October 3. See Rule 55(c), Utah Rules of Civil Procedure.

#### PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner's Motion for Summary Judgment fails to meet the requirements of U.R.C.P. Rule 56 and of Rule 4-501 of the Code of Judicial Administration in several respects including, without limitation, improper and incomplete form, the absence of supporting affidavits, and petitioner's failure to serve the Motion upon respondent. (With respect to the last stated defect, petitioner's repeated assertion that service upon respondent was not required, followed by petitioner's filing of Notices to Submit which recite that respondent has not filed any opposing memorandum or pleading, is at least disingenuous.) These defects in petitioner's Motion are sufficient ground for the Court to deny the Motion. In addition, however, the Court finds as a matter of law that petitioner is not entitled to the relief prayed for in petitioner's Motion, as explained below. On these bases, petitioner's Motion for Summary Judgment is denied.

## RESPONDENT'S MOTION TO DISMISS

In response to respondent's Motion to Dismiss, petitioner asserts that respondent's Motion does not constitute a proper response to the Petition and that the Motion fails to meet the requirements of Rule 12 of the Utah Rules of Civil Procedure. These assertions are legally incorrect. With respect to the facts of the case, respondent's Memorandum recites only petitioner's own allegations, without controverting or adding to the facts alleged. After making its argument, respondent's Memorandum concludes that the Petition should be dismissed as a matter of law. Respondent's Motion is clearly a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Respondent's failure to recite "Rule 12" does not change the clear substance of the Motion. Petitioner further asserts that respondent's Motion to dismiss is not an "ANSWER [sic]" to the Petition. This assertion may be factually correct, but it is legally irrelevant. Under Rule 12, respondent was required to make this Motion "before pleading." The Court finds that petitioner's "Opposition" to respondent's Motion to Dismiss raises no legitimate issues of fact or law.

With respect to the merits of respondent's Motion to Dismiss, the Court first notes that respondent has not raised issues concerning the formal adequacy of the Petition or with respect to petitioner's compliance with required administrative procedures. While it appears to the Court that the Petition may not meet the requirements of Utah Code Ann. § 63-2-404 and it is not clear from the file whether petitioner in fact exhausted his administrative remedies, those issues were not raised

by respondent and do not affect or control the Court's decision.

This matter can be decided as a matter of law, however, on the basis of the Government Records Access and Management Act, U.C.A. § 63-2-101 *et seq.* ("GRAMA"). The Court first notes that the Petition repeatedly uses the term "public documents", which is not defined in GRAMA. Paragraph 32 of the Petition specifies, however, that "the records sought to be inspected" are in fact specifically named books "and any other reference material, book, or periodical" maintained in the Washington County Attorney's law library. The fatal flaw in the Petition is that such books are not records to which GRAMA applies. GRAMA clearly provides that the term "record" as used in GRAMA does not refer to

books and other materials that are catalogued, indexed, or inventoried and contained in the collections of libraries open to the public, regardless of physical form or characteristics of the material.

U.C.A. § 63-2-103(18)(b)(vi).

Respondent asserts, petitioner appears to concede, and the Court takes notice of the fact that the "books and other materials" identified by petitioner as the subject of his Petition are in fact "contained in the collections of libraries open to the public." Consequently, the copies of such books and materials which are in the Washington County Attorney's law library are not subject to GRAMA because they are specifically excluded from the definition of "records", i.e., those documents which are subject to GRAMA. The Utah Legislature has made the access provisions of GRAMA inapplicable to the books and materials in the law library of the Washington County Attorney because those books and materials are available in public libraries.

Petitioner cites U.C.A. § 63-2-201(3)(b) for the proposition that a "public record" is a record that is not private, controlled or protected and that is not exempt from disclosure. Regardless of whether petitioner's interpretation of this statute is correct, it is irrelevant. The statute cited by petitioner identifies "records" which "are not public." The books and materials sought by petitioner are not "records" at all under GRAMA and, therefore, could not be "public records."

Petitioner seems to assert that the public libraries housing the books and materials which he seeks are not conveniently located and that, due to his claimed indigence, he cannot reasonably be expected to travel to any library location other than the Washington County Attorney's law library. The Legislature did not provide that a petitioner's simple assertion of inconvenience (i.e., that public libraries are not convenient to a particular petitioner) would eliminate the statutory exclusion of such books and materials from the definition of the term "record", so that those books and materials would then be subject to GRAMA. In other words, the Legislature did not provide an indigence exception or an inconvenience exception to the statutory exclusion of those books and materials from the scope of GRAMA.

Petitioner further asserts that past public use of the Washington County Attorney's law library "has established a tradition of open public access." Petitioner cites no authority supporting a right of access based on "tradition", however, and GRAMA contains no "tradition" exception to the exclusions from its scope.

Consequently, the Court finds that the Petition fails to state a claim upon which relief could be granted. The Petition is hereby dismissed with prejudice and on the

merits. The Court specifically reserves any question regarding respondent's entitlement to attorney's fees and costs in this matter.

DATED this 30th day of November, 1995.

  
G. RAND BEACHAM  
Fifth District Court Judge

Mailing Certificate

I hereby certify that on this 1st day of Dec., 1995, I mailed a true and correct copy of the above and foregoing, first-class postage prepaid, to the following:

Joseph M. Wisden  
465 South Bluff Street #160  
St. George, UT 84770

Robert R. Wallace, Esq.  
Hanson, Epperson & Smith, P.C.  
4 Triad Center, Suite 500  
P. O. Box 2970  
Salt Lake City, UT 84110-2970

