

1998

Mark Graham v. Davis County Solid Waste Management, Energy Recovery Special Service District, The District's Administrative Control Board, and LeGrand Bitter : Reply Brief of Cross-Appellants

Utah Court of Appeals

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Jeffrey J. Hunt; R. Eric Smith; Parr Waddoups Brown Gee & Loveless; Attorneys for Plaintiff/Appellant/Cross-Appellee

Larry S. Jenkins; Susan J. Miller; Wood Crapo LLC; Attorneys for Defendants/Appellees/Cross-Appellants

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IN THE UTAH COURT OF APPEALS

MARK GRAHAM,

Plaintiff/Appellant/Cross-Appellee,

vs.

DAVIS COUNTY SOLID WASTE
MANAGEMENT AND ENERGY
RECOVERY SPECIAL SERVICE
DISTRICT. THE DISTRICT'S
ADMINISTRATIVE CONTROL BOARD
and LeGRAND BITTER, THE DISTRICT'S
EXECUTIVE DIRECTOR,

Defendants/Appellees/Cross-Appellants.

**UTAH COURT OF APPEALS
BRIEF**

**UTAH
DOCUMENT**

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DOCKET NO. 980218-CA

Case No. 980218-CA

Priority No. 15

**RESPONSE BRIEF OF MARK GRAHAM AS CROSS-APPELLEE and
REPLY BRIEF OF MARK GRAHAM AS APPELLANT**


**On Appeal from the Judgment of the
Second Judicial District Court of Davis County, State of Utah
Honorable Jon M. Memmott, District Judge**

Larry S. Jenkins (4854)
Susan J. Miller (7263)
WOOD CRAPO LLC
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060

Attorneys for Defendants/
Appellees/Cross-Appellants

Jeffrey J. Hunt (5855)
R. Eric Smith (8272)
PARR WADDOUPS BROWN GEE &
LOVELESS
185 South State St.
Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 532-7840

Attorneys for Plaintiff/Appellant/
Cross-Appellee Mark Graham


Utah Court of Appeals

NOV 23 1998

Julia D'Alesandro
Clerk of the Court

MARK GRAHAM,
Plaintiff/Appellant/Cross-Appellee,
vs.
DAVIS COUNTY SOLID WASTE
MANAGEMENT AND ENERGY
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ADMINISTRATIVE CONTROL BOARD
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Attorneys for Defendants/
Appellees/Cross-Appellants

Attorneys for Plaintiff/Appellant/
Cross-Appellee Mark Graham

**RESPONSE BRIEF OF MARK GRAHAM
AS CROSS-APPELLEE**

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STATEMENT OF JURISDICTION FOR CROSS-APPEAL

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1997). The Utah Supreme Court had jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2-2-(3)(j) (1997), and that court transferred the case to this Court pursuant to Utah Code Ann. § 78-2-2(4) (1997).

ISSUE PRESENTED FOR REVIEW IN CROSS-APPEAL

Did the trial court properly exercise its discretion in permitting Graham to amend the Complaint and in determining that the amendment relates back to the time the Complaint was filed? The trial court ruled in favor of Graham on this issue. R. 144–53.

STANDARD OF REVIEW FOR CROSS-APPEAL

A trial court's decision to permit amendment of a complaint is upheld unless there was abuse of discretion. See Fishbaugh v. Utah Power & Light, 353 Utah Adv. Rep. 20, 21 (Utah 1998).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rules are determinative in this appeal, and are reproduced in an Addendum hereto:

Utah Code Ann. § 63-2-404 (1997)

Utah R. Civ. P. 15(a)

Utah R. Civ. P. 15(c)

STATEMENT OF THE CASE

The Statement of the Case set forth in the opening brief of Mark Graham ("Graham") adequately sets forth the Statement of the Case and is incorporated herein by reference. See Brief of Appellant Mark Graham ("Graham Brief") at 2-7.

SUMMARY OF ARGUMENT

The trial court properly reached the merits of this case, and its rulings on the procedural issue presented by Defendants' cross-appeal should therefore be affirmed in all respects. As the requester of public records, Graham was entitled to seek judicial review of the District's records decision pursuant to section 63-2-404(2) of the Utah Code and, therefore, was properly substituted as plaintiff in the trial court's discretion. The trial court did not abuse its discretion in substituting Graham as plaintiff in place of the Residents of Davis County Clear Air Committee (the "Committee") because Graham filed his motion promptly after learning that the Committee was not the proper party to seek review of the records decision; Graham's failure to name the proper plaintiff resulted from a simple lack of procedural knowledge made by a *pro se* litigant, and not from bad faith; and the Davis County Solid Waste Management and Energy Recovery Special Service District (the "District"), which had dealt with Graham personally throughout the administrative review and had ample notice of his interest in the proceeding, suffered no prejudice as a result of the amendment. Further, the trial court properly ruled that Graham's amendment relates back to the time the Complaint was filed, because Graham and the

Committee have an identical interest in seeking access to the records to advance the anti-pollution goals of the Committee.¹

ARGUMENT

I. GRAHAM IS A PROPER PLAINTIFF TO SEEK REVIEW OF THE DISTRICT'S DECISION REGARDING THE REQUESTED RECORDS BECAUSE GRAHAM PERSONALLY INITIATED THE GRAMA REQUEST AND PURSUED THE ADMINISTRATIVE APPEALS.

The trial court correctly found that Graham is a proper party to seek judicial review of the District's records decision and could therefore be substituted as plaintiff. Under GRAMA, the "requester" of the records may seek judicial review of the agency's determinations with respect to the records request. See Utah Code Ann. § 63-2-404(2) (1997). Because Graham is the requester of the records within the meaning of GRAMA's judicial review provisions, Graham is a proper party plaintiff.

Graham is a requester entitled to petition for judicial review of the District's decision because Graham was personally responsible for the records request and administrative appeal. Additionally, throughout the administrative process the District treated the GRAMA request as a request from Graham personally. R. 149-50. The trial court expressly found that even the

¹ The District's curious characterization of its cross-appeal is instructive as to its merit. While purporting to feel "duty-bound to protect the integrity of the Court by raising and addressing this [procedural] issue," the District states it "would prefer to have the Court rule on the merits of Graham's appeal." Brief of Appellees and Cross-Appellants ("District Brief") at 17 n.3. Contrary to the District's suggestion, reaching the merits of Graham's request to access public records does not threaten the integrity of the Court nor does the Court require any assistance from the District to protect its integrity. With all due respect to the District, this case has nothing to do with judicial integrity; rather, the issue here is whether the District may levy unauthorized and excessive fees upon Graham, a citizen watchdog and critic of the District, as a condition of Graham's access to public records held by the District.

District appeared somewhat confused about whether it was dealing with the Committee or with Graham individually. R. 149. In fact, all of the written correspondence from the District was addressed to Graham and devoid of any reference to the Committee. Because Graham initiated the GRAMA request that the District treated as a request from Graham personally, the trial court correctly found that Graham is the requester of the records entitled to seek review of the District's decision.

Because Graham was entitled to seek judicial review of the District's records decision, he could properly be substituted as plaintiff at the trial court's discretion.

II. THE TRIAL COURT PROPERLY ALLOWED GRAHAM TO AMEND THE COMPLAINT UNDER RULE 15(a) BECAUSE GRAHAM'S MOTION TO AMEND WAS TIMELY, AND BECAUSE THE AMENDMENT WAS JUSTIFIED AND CAUSED NO PREJUDICE TO THE DISTRICT.

The trial court did not abuse its discretion by granting leave to amend the Complaint in order to substitute Graham as plaintiff in place of the Committee. Under the *Utah Rules of Civil Procedure*, leave to amend the pleadings "shall be freely given when justice so requires." Utah R. Civ. P. 15(a). Utah courts interpret Rule 15(a) broadly to liberally allow amendments to the pleadings. See Fishbaugh v. Utah Power & Light, 353 Utah Adv. Rep. 20, 23 (Utah 1998) ("Courts should be liberal in allowing amendments to the end that cases may be fully and fairly presented on their merits.") (quoting Timm v. Dewsnap, 851 P.2d 1178, 1183 (Utah 1993) (quoting Hansen v. Luke, 46 Utah 26, 38, 148 P. 452, 457 (1915))); Gillman v. Hansen, 26 Utah 2d 165, 168, 486 P.2d 1045, 1046 (1971) ("The rule in this state has always been to allow amendments freely where justice requires, and especially is this true before trial."); Keller v. Gerber, 114 Utah 345, 350, 199 P.2d 562, 565 (1948) ("The rules governing amendment of pleadings are very broad and liberal in this state."). In Utah, "wide latitude is granted the trial

court in permitting amendments to pleadings, and so long as there is no abuse of discretion, such rulings will not be overturned." Keller, 114 Utah at 351, 199 P.2d at 565.

The decision to permit amendments to the pleadings rests in the sound discretion of the trial court. See First OK Corp. v. Curtis, 550 P.2d 157, 158 (Utah 1976); Dupler v. Yates, 10 Utah 2d 251, 270, 351 P.2d 624, 637 (1960); Kleinert v. Kimball Elevator Co., 854 P.2d 1025, 1028 (Utah Ct. App. 1993). In exercising that discretion, Utah courts have focused on three factors: the timeliness of the motion, the justification given by the movant for delay, and the resulting prejudice to the responding party. See Kleinert, 854 P.2d at 1028. In this case, each of these factors supports the trial court's grant of leave to amend the Complaint.

First, Graham's motion to amend was timely because he filed it promptly after learning that the Committee was not the proper party to seek judicial review of the records decision. In Keller, the Utah Supreme Court affirmed the trial court's decision to allow the plaintiff in a claim and delivery action to amend his complaint to allege the element of ownership where the plaintiff sought the amendment as soon as the defect in the pleading was called to the attention of the court by defendant's motion for a directed verdict. See Keller, 114 Utah at 350-52, 199 P.2d at 565. Likewise, the District's Answer in this case notified Graham that he was not permitted to represent the Committee *pro se* and that the Committee was not the proper party to seek judicial review of the District's records decision. As soon as the defect in the Complaint was called to his attention, Graham sought to amend the Complaint to substitute himself as plaintiff. The timeliness of Graham's motion supports the trial court's decision to allow the amendment.

Second, Graham's failure to name the proper plaintiff resulted from a *pro se* plaintiff's understandable lack of knowledge concerning legal procedure and not from bad faith or dilatory motives. Graham filed the Complaint within the thirty-day period provided by section 63-2-404(2)(b) of the Utah Code with a good faith belief that the Committee was the proper plaintiff and was properly represented. The error in naming the plaintiff was not an attempt to circumvent the statute of limitations or cause undue delay. Rather, Graham reasonably believed, based on his dealings with the District, that he was properly representing the interests he shared with the Committee by appealing the District's decision in the Committee's name. As a layman acting *pro se*, Graham's lack of knowledge is ample justification for the pleading error and supports the trial court's decision to allow the amendment. See Winter v. Northwest Pipeline Corp., 820 P.2d 916, 918 (Utah 1991) ("[T]his Court has generally been more lenient with *pro se* litigants").

Finally, the trial court's decision should be upheld because the amendment did not result in any prejudice to the District. The Utah Supreme Court has held that a "primary consideration that a trial judge must take into account in determining whether leave should be granted is whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare." Bekins Bar V Ranch v. Huth, 664 P.2d 455, 464 (Utah 1983) (finding no error in allowing amendment late in trial where record did not need to be amplified by either party to permit adjudication of new issue). In this case, Graham did not seek to amend the Complaint to raise unanticipated issues which might result in prejudice to the District. Rather, he simply sought to substitute himself as the plaintiff in the lawsuit. The District dealt with Graham personally throughout the administrative review of Graham's

GRAMA request and had ample notice of Graham's interest in the proceeding. Instead of suffering prejudice as a result of the amendment, the District was merely required to litigate the merits of Graham's case. In the absence of prejudice, the Utah Supreme Court has adopted a policy of resolving cases on their merits rather than on procedural technicalities. See Meyers v. Interwest Corp. 632 P.2d 879, 882 (Utah 1981). Given this policy, the trial court properly exercised its discretion under Rule 15(a) by granting Graham's motion to amend where there was no prejudice to the District.

III. THE TRIAL COURT CORRECTLY HELD THAT THE AMENDED COMPLAINT SHOULD RELATE BACK TO THE DATE OF FILING BECAUSE THE COMMITTEE AND GRAHAM SHARE AN IDENTITY OF INTEREST.

Because the Committee and Graham share an identity of interest, the trial court properly allowed the Amended Complaint to relate back to the date of filing, thereby making Graham's appeal timely. The general rule allows the amendment to relate back to the date of filing "[w]henver the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence, set forth or attempted to be set forth in the original pleading." Utah R. Civ. P. 15(c).² By allowing amendments to the pleadings to relate back to the date of the

² The District suggests that the rules of civil procedure permitting amendment of a pleading "presume[] that the original filing of the pleading was otherwise valid," or in other words, that there are some pleading defects that are beyond the help of the provisions of Rule 15. District Brief at 21. The District's assertion is wholly unsupported by authority and, as explained throughout this Response Brief, completely ignores the purpose of the rule, which is to save pleadings that, absent the rule, would be "void" or "invalid." See, e.g., Beerheide v. Zavaras, 997 F. Supp. 1405, 1409 (D. Col. 1998) (granting motion to amend complaint where original claim became void when statute on which it was based was declared unconstitutional); Unilever (Raw Materials) Ltd. v. M/T Stolt Boel, 77 F.R.D. 384, 386-87 (S.D.N.Y. 1977) (granting motion to amend complaint to substitute plaintiff where original claim was void because wrong party brought suit).

original filing, Rule 15(c) allows for additional claims or defenses to be brought "even if a statute of limitations has run during the intervening time." Ringwood v. Foreign Auto Works Inc., 786 P.2d 1350, 1359 (Utah Ct. App. 1990) (affirming trial court's conclusion that amendment related back where claim in amended complaint was based on essentially same transaction as original complaint). Generally, Rule 15(c) only applies to the addition of new claims or defenses, not to the addition or substitution of parties. See Wilcox v. Geneva Rock Corp., 911 P.2d 367, 369 (Utah 1996).

However, an exception allows for relation back "when new and old parties have an identity of interest; so it can be assumed or proved that the relation back is not prejudicial." Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976). According to the Utah Supreme Court, the "rationale underpinning this exception is one which obstructs a mechanical use of a statute of limitations; to prevent adjudication of a claim. Such is particularly valid where, as here, the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage." Id.

In this case, the trial court found an identity of interest between Graham and the Committee in seeking access to the government records regarding the stack tests. R. 150, 151. In fact, the Committee's interest is indistinguishable from Graham's interest in seeking access to the records to advance the anti-pollution goals of the Committee. Not only did Graham and the Committee share a common interest in viewing the government records, but Graham, the substituted plaintiff, was also involved in the proceedings from the earliest stage. Because the Doxey-Layton exception requiring identity of interest is satisfied, the trial court properly ruled

that the amendment substituting Graham as plaintiff should relate back to the date of the original filing.

Tracy-Burke Associates v. Department of Employment Security, 699 P.2d 687 (Utah 1985) (per curiam), and sections 42-2-5 et seq. of the Utah Code (Utah's assumed name statute) do not require a different result. Tracy-Burke is inapposite because, as the trial court observed, the Tracy-Burke court never addressed whether the corporation could have corrected its actions with the appearance of counsel. R. 148. Moreover, even had Tracy-Burke held that the corporation's petition for review was not correctable, Tracy-Burke would still be distinguishable from this case. In Tracy-Burke, the nonlawyer president of a corporation insisted on representing the company before the Utah Supreme Court, even after she was warned she could not do so. See Tracy-Burke Associates, 699 P.2d at 688. Permitting the corporation to correct its mistake would have been unjust and ineffectual because the corporation already had been warned and provided such opportunity. Additionally, there is no Utah rule of appellate procedure instructing appellate courts to grant leave to correct technical mistakes in pleadings. By contrast, in this case, Graham, pursuant to a rule of civil procedure expressly directing district courts to freely grant leave to amend, promptly moved to amend his Complaint after learning of the defect in naming the plaintiff.

As with Tracy-Burke, Utah's assumed name statute simply does not speak to the procedural issue in this appeal. The statute does not indicate that a complaint filed by an unregistered person is unamendable. More importantly, the Committee does not fall within the purview of the statute. The statute only applies to persons who carry on or transact "business" in Utah, and requires the registrant to set forth the name of the "owner" of the business, and the

"principal place of business." See Utah Code Ann. § 42-2-5(1) (1997). The purpose of the statute is to protect people who transact business with persons under the assumed name. See Putnam v. Industrial Comm'n, 80 Utah 187, 205, 14 P.2d 973, 982 (1932) (discussing earlier version of assumed name statute) . The terms quoted above from the statute, considered with the policy of the statute in mind, clearly indicate that the statute is intended to apply only to persons or entities engaged in commerce or transactions involving the exchange of money, services, or other items of value. The Committee, which does not carry on any "business" or commerce of any kind, does not have an "owner," and does not have a "principal place of business," is not subject to the statute.

IV. BECAUSE THE AMENDMENT REMEDIED ANY DEFECTS IN THE COMPLAINT, THE TRIAL COURT PROPERLY DENIED THE DISTRICT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT BASED ON THE *PRO SE* REPRESENTATION OF THE COMMITTEE OR VIOLATION OF THE ASSUMED NAMES STATUTE.

The trial court properly refused to dismiss Graham's case because the amendment substituting Graham as plaintiff remedied any defects in the original Complaint. The Utah Supreme Court has held that "[i]n the absence of prejudice, it is appropriate to pursue that policy which favors resolution of disputes on the merits rather than technicalities. Accordingly, amendments are allowed to complaints and process, even though the amendment relates back to the time of original filing and even though, but for the right to amend, the limitation period would have run." Meyers v. Interwest Corp., 632 P.2d 879, 882 (Utah 1981) (holding that trial court had jurisdiction to grant permission to amend summons even though statute of limitations had run). To advance this judicial policy, Rules 15(a) and 15(c) provide a mechanism that allows parties to correct oversights, errors, or omissions in the pleadings.

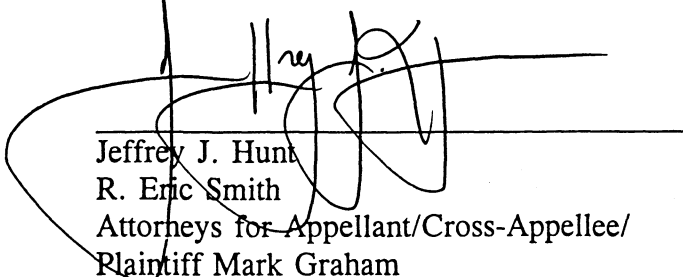
In this case, the trial court properly employed Rules 15(a) and 15(c) to remedy a technical error in naming the plaintiff which would have otherwise resulted in dismissal. It would undermine the purpose of the liberal amendment rules to hold that despite the curative amendment, Graham's case should have nonetheless been dismissed due to defects in the original Complaint. See Wilcox v. Geneva Rock Corp., 911 P.2d 367, 370 (Utah 1996) (stating that Rule 15 attempts to insure "that a technical error in the pleadings could no longer defeat the parties' right to proceed on the merits"). Therefore, the trial court's November 18, 1997 Ruling denying the District's Motion to Dismiss or for Summary Judgment should be affirmed.

CONCLUSION

For the foregoing reasons, Graham respectfully submits that the trial court did not abuse its discretion in permitting Graham to amend his Complaint and allowing the amendment to relate back to the time the original Complaint was filed. Accordingly, this Court should affirm the trial court's Ruling permitting such amendment and denying the District's Motion to Dismiss or for Summary Judgment.

DATED this 23 day of November, 1998.

PARR WADDOUPS BROWN GEE & LOVELESS



Jeffrey J. Hunt
R. Eric Smith
Attorneys for Appellant/Cross-Appellee/
Plaintiff Mark Graham

ADDENDUM TO RESPONSE BRIEF

63-2-404. Judicial review.

- (1) (a) Any party to a proceeding before the records committee may petition for judicial review by the district court of the records committee's order.
 - (b) The petition shall be filed no later than 30 days after the date of the records committee's order.
 - (c) The records committee is a necessary party to the petition for judicial review.
 - (d) The executive secretary of the records committee shall be served with notice of the petition in accordance with the Utah Rules of Civil Procedure.
- (2) (a) A requester may petition for judicial review by the district court of a governmental entity's determination as specified in Subsection 63-2-402(1)(b).
 - (b) The requester shall file a petition no later than:
 - (i) 30 days after the governmental entity has responded to the records request by either providing the requested records or denying the request in whole or in part;
 - (ii) 35 days after the original request if the governmental entity failed to respond to the request; or
 - (iii) 45 days after the original request for records if:
 - (A) the circumstances described in Subsection 63-2-401(1)(b) occur; and
 - (B) the chief administrative officer failed to make a determination under Section 63-2-401.
- (3) The petition for judicial review shall be a complaint governed by the Utah Rules of Civil Procedure and shall contain:
 - (a) the petitioner's name and mailing address;
 - (b) a copy of the records committee order from which the appeal is taken, if the petitioner brought a prior appeal to the records committee;
 - (c) the name and mailing address of the governmental entity that issued the initial determination with a copy of that determination;
 - (d) a request for relief specifying the type and extent of relief requested; and
 - (e) a statement of the reasons why the petitioner is entitled to relief.
- (4) If the appeal is based on the denial of access to a protected record, the court shall allow the claimant of business confidentiality to provide to the court the reasons for the claim of business confidentiality.
- (5) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.
- (6) The district court may review the disputed records. The review shall be in camera.
- (7) The court shall:
 - (a) make its decision de novo, but allow introduction of evidence presented to the records committee;
 - (b) determine all questions of fact and law without a jury; and
 - (c) decide the issue at the earliest practical opportunity.
- (8) (a) The court may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private, controlled, or protected if the interest favoring access outweighs the interest favoring restriction of access.

(b) The court shall consider and, where appropriate, limit the requester's use and further disclosure of the record in order to protect privacy interests in the case of private or controlled records, business confidentiality interests in the case of records protected under Subsections 63-2-304(1) and (2), and privacy interests or the public interest in the case of other protected records.

History: C. 1953, 63-2-404, enacted by L. 1991, ch. 259, § 29; 1992, ch. 280, § 36; 1995, ch. 133, § 4.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, subdivided Subsection (1) and added Subsections (1)(c) and (1)(d).

63-2-405. Confidential treatment of records for which no exemption applies.

(1) A court may, on appeal or in a declaratory or other action, order the confidential treatment of records for which no exemption from disclosure applies if:

(a) there are compelling interests favoring restriction of access to the record; and

(b) the interests favoring restriction of access clearly outweigh the interests favoring access.

(2) If a governmental entity requests a court to restrict access to a record under this section, the court shall require the governmental entity to pay the reasonable attorneys' fees incurred by the lead party in opposing the governmental entity's request, if:

(a) the court finds that no statutory or constitutional exemption from disclosure could reasonably apply to the record in question; and

(b) the court denies confidential treatment under this section.

(3) This section does not apply to records that are specifically required to be public under statutory provisions outside of this chapter or under Section 63-2-301, except as provided in Subsection (4).

(4) (a) Access to drafts and empirical data in drafts may be limited under this section, but the court may consider, in its evaluation of interests favoring restriction of access, only those interests that relate to the underlying information, and not to the deliberative nature of the record.

(b) Access to original data in a computer program may be limited under this section, but the court may consider, in its evaluation of interests favoring restriction of access, only those interests that relate to the underlying information, and not to the status of that data as part of a computer program.

History: C. 1953, 63-2-405, enacted by L. 1992, ch. 280, § 37.

any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) *When plaintiff may bring in third party.* When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Rule 15. Amended and supplemental pleadings.

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subverted thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) *Supplemental pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 16. Pretrial conferences, scheduling, and management conferences.

(a) *Pretrial conferences.* In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted for lack of management;

- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation;
- (5) facilitating the settlement of the case; and
- (6) considering other matters as may aid in the orderly disposition of the case.

(b) *Scheduling and management conferences.* In any action, in addition to any pretrial conferences that may be scheduled, the court in its discretion may direct that a scheduling or management conference be held. The court may direct the attorneys or unrepresented parties to appear before the court. Scheduling or management conferences may also be held by way of telephone conferencing between the court and counsel as the particular case may require. Decisions and agreements reached at scheduling and management conferences may be formally made an order of the court. At the conference, the court may consider the following matters:

- (1) the formation and simplification of the issues, including the elimination of frivolous claims or defenses;
- (2) the necessity or advisability of joining additional parties or amendment of pleadings;
- (3) the completion of outstanding discovery;
- (4) the time for filing and hearing of motions;
- (5) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on admissibility of evidence;
- (6) the identification of witnesses and documents, the need for and schedule for filing and exchanging trial briefs, and the dates for a final pretrial and scheduling conference and for a trial;
- (7) the advisability of referring matters to a lower court that has appropriate jurisdiction to hear the case;
- (8) the possibility of settlement;
- (9) the need for adopting special procedures for managing particularly difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
- (10) the form and substance of a pretrial order, if it is determined that a formal pretrial order is necessary in the particular case; and
- (11) such other matters as may aid in the disposition of the case.

(c) *Final pretrial or settlement conferences.* In any action where a final pretrial conference has been ordered, it shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties, and the attorneys attending the pretrial, unless waived by the court, shall have available, either in person or by telephone, the appropriate parties who have authority to make binding decisions regarding settlement.

(d) *Sanctions.* If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

**REPLY BRIEF OF MARK GRAHAM
AS APPELLANT**

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**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, AND RULES**

The following statutes, in addition to those set forth in Graham's opening brief, are determinative in this appeal:

Utah Code Ann. § 63-2-103 (1997)

Utah Code Ann. § 63-2-204 (1997)

Utah Code Ann. § 63-2-302 (Supp. 1998)

Utah Code Ann. § 63-2-303 (1997)

Utah Code Ann. § 63-2-304 (1997)

Utah Code Ann. § 63-30-10.6 (1997)

Utah Code Ann. § 63-30-11 (Supp. 1998)

Copies of the foregoing provisions are provided in an Addendum to this Reply Brief.

ARGUMENT¹

I. THE DISTRICT'S INTERPRETATION OF SECTION 63-2-203(2) ERRONEOUSLY IGNORES THE CONTEXT OF GRAMA AS A WHOLE.

As Graham pointed out in his opening brief, a governmental entity in Utah is authorized to charge fees for records access only if the "governmental entity compiles a record in a form other than that normally maintained by the governmental entity." Utah Code Ann. § 63-2-203(2) (1997); see Graham Brief at 9–12. The District contends that to "compile a record" for purposes of section 63-2-203(2) means to gather documents from various files and put them into a new arrangement. See District Brief at 27–28. The District arrives at this

¹ Contrary to the suggestion of the District, all of the issues presented for review in Graham's opening brief were preserved in the trial court. All of the issues presented were raised in Graham's motion for summary judgment and decided by the trial court. R. 159–73, 223–27, 245–54.

definition by looking to dictionary definitions of "compile" and "form" and by considering other words in section 63-2-203(2). See id. at 26–27. The District's mode of statutory construction, however, is seriously flawed.

Defining the terms "compile" and "form" by the selective use of dictionary definitions is a flawed method of statutory construction, particularly where, as here, the District gives no meaning to other words in the statute and ignores the context in which the terms are used. Many words have multiple meanings. "Compile," for example, can, in a vacuum, mean to gather and retrieve documents and place them into a stack, or it can mean something more narrow, such as to edit and compose a book, or to sort and manipulate data. See, e.g., Merriam Webster's Collegiate Dictionary 235 (10th ed. 1994) (defining "compile" as, inter alia, "to collect and edit into a volume" and "to run (as a program) through a compiler"); Webster's New World Dictionary 290 (2d ed. 1980) (defining "compile" as, inter alia, "to gather and put together (statistics, facts, etc.) in an orderly form"), quoted in District Brief at 26. The proper meaning of the term "compile" as used in GRAMA can only be determined by the statutory context. See Morton Int'l, Inc. v. Auditing Div., 814 P.2d 581, 590 (Utah 1991) (endorsing "rule of statutory construction which provides that terms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion").

When the terms "compile" and "form" are read in context, giving meaning to all of the terms used in the statute, it is clear that the statute does not permit the District to levy a fee for retrieving and gathering together multiple records in response to a GRAMA request. The Legislature's use of the singular in "compiles a record," Utah Code Ann. § 63-2-203(2) (1997) (emphasis added), makes clear that retrieving and gathering together multiple records

stored in various filing cabinets is not an activity for which the Legislature authorized governmental entities to levy fees. Under the District's strained interpretation, it would be lawful for the District to assess a "compilation" fee for a single GRAMA request seeking multiple records located in different filing cabinets while unlawful to charge such a fee in response to multiple GRAMA requests, each of which sought access to only a single record. Clearly, such an absurd result is neither compelled by statute nor intended by the Legislature.

In addition, a complementary provision of GRAMA, section 63-2-201(8)(b), informs records requesters that they have the right to request records in a "particular format" provided they pay the costs incurred as provided under section 63-2-203. Utah Code Ann. § 63-2-201(8)(b) (1997). This makes clear that the fees authorized under section 63-2-203(2) are limited to requests that involve the transformation or manipulation of data into a specialized format. Graham, however, simply requested the records in their existing format. He did not request that the District summarize, transform, or manipulate the information in any way.

Further, the District's interpretation ignores the provision of GRAMA which unequivocally provides that "[a] governmental entity may not charge a fee for . . . inspecting a record." See Utah Code Ann. § 63-2-203(5)(b) (1997) (emphasis added). If records requesters must pay "access" and "compilation" fees prior to inspecting records, then the Legislature's clearly expressed and unqualified intention that inspection be free is eviscerated.

Finally, the District's interpretation also ignores section 63-2-103(4)(b)(ii) of the Utah Code, from which GRAMA's most direct definition of "compile" can be gleaned. That section provides that the term "computer program" does not mean "analysis, compilation, and other manipulated forms of the original data produced by use of the program." Utah Code

Ann. § 63-2-103(4)(b)(ii) (1997). This provision indicates that an "analysis" and a "compilation" are both "manipulated forms" of "original data." As the root of "compilation," then, the verb "compile," for GRAMA purposes, must mean to "manipulate the form" of "original data." This definition is entirely consistent with the language in sections 63-2-203(2) and 63-2-201(8)(b) previously discussed, but is inconsistent with the District's much broader definition.

In sum, the plain language of section 63-2-203(2), when read in context and giving meaning to all the terms of the statute, applies only when the records requester asks the governmental entity to provide information in a customized format. The trial court's construction of the statute is in error and should be corrected by this Court.

**II. "COMPILE" SHOULD BE CONSTRUED NARROWLY BECAUSE
REQUIRING GOVERNMENT TO BEAR THE MAJORITY OF ACCESS
COSTS ADVANCES PUBLIC POLICY AND IS LOGICAL AND FAIR.**

Graham agrees that the proper construction of section 63-2-203(2) prohibits governmental entities from charging the public for staff time associated with the search and retrieval of public records in their existing format. See District Brief at 26.

It is important to observe, however, that maximizing government's recovery of costs associated with records requests, while laudable in theory, is not among the public policies the Legislature intended to promote when it enacted GRAMA. See Utah Code Ann. § 63-2-102 (1997) (identifying legislative intent of GRAMA). Rather, the Legislature intended GRAMA to "promote the public's right of easy and reasonable access to unrestricted public records." Utah Code Ann. § 63-2-102(3)(a).

To promote such access, GRAMA requires government agencies to bear most of the costs associated with GRAMA requests. The wisdom of this approach is apparent. By bearing the access costs, government officials are encouraged to keep orderly records and to act efficiently in responding to records requests — both of which promote better access. Additionally, government officials are reminded that their role with respect to public records is that of stewards, not owners, and they may take active steps to promote access. Finally, when records are freely available for inspection, the public is far more likely to seek access to government records than if "access" or "compilation" fees are imposed. Better access, in turn, means better government, as government officials become more accountable for their decisions and members of the public have "access to information concerning the conduct of the public's business." Utah Code Ann. § 63-2-102(1)(a) (1997).

Requiring the government to bear access costs is also fair and logical. Because government officials are the custodians of public records, they necessarily must act as intermediaries to retrieve those records for the public. It would be unfair to charge members of the public search and retrieval costs when they could retrieve the records themselves given the opportunity. It would be particularly unfair to charge access fees under the District's definition of "compile a record," a definition so broad it would authorize assessment of fees where, for example, a records request takes more than fifteen minutes to fill simply because the records requested are kept off-site.

Conversely, it is fair to require the requester to bear the costs of a GRAMA request where the requester seeks not merely access to government records, but access upon special terms imposed by the requester. For example, if the governmental entity stores records in a

particular electronic format, but the requester wants the records formatted for different software, imposition of fees for staff time spent converting the records is appropriate and authorized under GRAMA. See Utah Code Ann. §§ 63-2-201(8)(b), -203(2) (1997).

In short, public policy, logic, and fairness considerations support Graham's construction of section 63-2-203(2).

III. THE DISTRICT'S PUBLIC POLICY ARGUMENT FAILS BECAUSE PERMITTING FREE PUBLIC ACCESS TO RECORDS WILL NOT OVERBURDEN GOVERNMENT.

The District advances a "parade of horrors" policy argument by suggesting that "abusive requests" would "overburden" government agencies if agencies could not charge fees for retrieving records in their existing format. See District Brief at 31-32. However, the record is devoid of any evidence suggesting that abusive requests are or will become a problem for the District or in Utah generally, nor has the District argued that Graham's request was abusive.

Moreover, GRAMA already has mechanisms in place to protect against abusive requests. For example, a government entity is not required to create a new record in response to a request, see Utah Code Ann. § 63-2-201(8)(a) (1997); need not fulfill a person's records request that unreasonably duplicates prior requests from that person, see id. § 63-2-201(8)(c); may require a requester of more than fifty pages of records to copy the records herself, see id. § 63-2-201(9); can delay responding to requests when the request is for voluminous records, or when the request is otherwise extraordinary, see id. § 63-2-204(4); and may require payment of past fees and future estimated fees before beginning to process certain large requests or if the requester has not paid fees from previous requests, see id. § 63-2-203(8).

Additionally, government agencies need not provide public access to dozens of categories of private, protected, and controlled records. See id. §§ 63-2-303, -304; Utah Code Ann. § 63-2-302 (Supp. 1998).

Finally, authority from other jurisdictions discredits the District's conclusory assertion. The District cites Illinois and Oklahoma authorities for the proposition that the records access laws of other jurisdictions generally permit a government entity to charge fees for merely retrieving records in their existing format. See District Brief at 25. On the contrary, the Illinois and Oklahoma authorities, in addition to the Minnesota and Colorado authorities already cited by Graham, see Graham Brief at 14–15, 18, strongly suggest that permitting free public access to public records will not overburden Utah government entities.

The Illinois Freedom of Information Act, interpreted in Hamer v. Lentz, 525 N.E.2d 1045 (Ill. App. Ct. 1988), and in Family Life League v. Department of Public Aid, 493 N.E.2d 1054 (Ill. 1986), both of which are relied upon by the District, provides in relevant part as follows:

Each public body may charge fees reasonably calculated to reimburse its actual cost for reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records. Such fees shall exclude the costs of any search for and review of the record, and shall not exceed the actual cost of reproduction and certification, unless otherwise provided by State statute.

5 Ill. Comp. Stat. Ann. 140/6(a) (1998) (emphasis added). Thus, in Illinois a government entity cannot charge the requester for time spent searching for and retrieving government records. However, if, as in Family Life League, a "special computer program will have to be developed" in order to fill the request — that is, if the records must be delivered in a different format — then assessment of fees is appropriate. See 493 N.E.2d at 1059. Apparently, the

specter foreseen by the District — that abusive requests will inevitably result if government agencies cannot assess fees for searching and retrieval costs — has not appeared in Illinois.

Oklahoma's records access act, interpreted in Merrill v. Oklahoma Tax Commission, 831 P.2d 634 (Okla. 1992), also relied upon by the District, similarly undermines the District's policy arguments. The Oklahoma statute provides in part that "a public body may charge a fee only for recovery of the reasonable, direct costs of document copying, or mechanical reproduction" unless the request is "solely for commercial purposes" or "would clearly cause excessive disruption of the public body's essential functions." Okla. Stat. tit. 51, § 24A.5(3) (1997) (emphasis added); see also Merrill, 831 P.2d at 641–42 (assessing, pursuant to this statutory provision, duplication costs where citizen requested, for purpose of benefitting his law practice, his own microfilm copy of annual record of names and addresses of 1.3 million taxpayers and his own computer-tape copy of list of unclaimed property, and where government agency did not typically provide microfilm or computer tape copies and had already made original records available to requester for inspection and copying). Thus, in Oklahoma, as in Illinois, assessment of access fees is the exception rather than the rule, and yet there is no evidence that abusive requests have become a problem.

IV. LEGISLATIVE HISTORY SUPPORTS GRAHAM'S INTERPRETATION OF SECTION 63-2-203(2)

Notwithstanding Senator Steele's statement that the Utah Legislature modeled the GRAMA amendments after Colorado's records access statute, see Graham Brief at 14, the District contends that the Colorado statute does not support Graham's interpretation of GRAMA because the two statutes do not use "exactly" the same wording. See District Brief at 30–31. It is not uncommon, however, for the statutes of two jurisdictions to be interpreted

similarly, despite some variations in the terms used. See, e.g., APS v. Briggs, 927 P.2d 670, 674 (Utah Ct. App. 1996) (despite variations between Utah and California versions of one-action statute, stating that "California decisions are especially helpful to us in interpreting Utah's one-action statute, because Utah's statute is patterned after California's one-action statute, and because Utah and California have interpreted their one-action statutes almost uniformly").

In this case, the close parallels between the Utah and Colorado open records acts, in addition to Senator Steele's statement, provide good reason to interpret the two acts similarly. Graham has already pointed out how sections 63-2-201(8)(b) and 63-2-203(2) of GRAMA parallel section 24-72-205(3) of the Colorado statute, which provides that assessment of fees in Colorado is appropriate only when, "in response to a specific request, the state . . . has performed a manipulation of data so as to generate a record in a form not used by the state." See Colo. Rev. Stat. Ann. § 24-72-205(3) (1997); Graham Brief at 14. Additionally, Section 63-2-103(4)(b)(ii) of GRAMA, as explained previously in this brief, parallels the language quoted from the Colorado statute because section 63-2-103(4)(b)(ii) indicates that the term "compile" means to "manipulate the form" of "original data." See supra pp. 3-4.

Thus, legislative history suggests that GRAMA, similar to the model Colorado statute, should be interpreted as permitting the levying of fees only when the records requester asks for records in a different format.

V. THIS COURT SHOULD ORDER AN AWARD OF COSTS AND FEES WITHOUT REMAND.

If Graham substantially prevails on the merits of this appeal, this Court can and should award Graham attorneys' fees and litigation costs pursuant to section 63-2-802(2) of the Utah Code. See Utah Code Ann. § 63-2-802(2) (1997). All the evidence relevant in determining the public benefit derived from this case, the nature of Graham's interest in the records, and whether the District acted reasonably is contained in the record on appeal. As more fully explained in Graham's opening brief, an award of attorneys fees under the statute is appropriate in this case because (i) the public benefit derived from this case will be substantial, (ii) Graham requested the records to advance the public's common interest in promoting clean air, and (iii) government agencies should be discouraged from imposing unauthorized and excessive fees as a condition of access to public records, particularly where, as here, the requester is a citizen watchdog and critic of the agency.

Moreover, contrary to the District's assertion, compliance with the Utah Governmental Immunity Act (the "Act") procedures is not a precondition to this Court's award of attorneys' fees. The Act merely specifies the procedure Graham must follow once an award of attorneys' fees is made and a claim for such fees against the District arises. See Utah Code Ann. § 63-30-11(1)–(2) (Supp. 1998). The Act expressly provides that notice of claim may be filed contemporaneously with a petition for judicial review of a government entity's records decision. See Utah Code Ann. § 63-30-10.6(1) (1997). Graham already has given the District such notice in his Docketing Statement and opening brief. See Docketing Statement at 5; Graham Brief at 19–20. If the District maintains that such notice is insufficient, then Graham will file a formal notice of claim against the District for attorneys fees incurred in

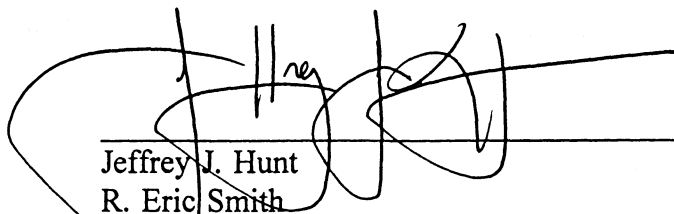
this appeal if and when this Court awards such fees. In no way, however, is the filing of such a notice of claim a procedural prerequisite to this Court's award of attorney's fees. To the contrary, Graham has no monetary claim against the District, and thus no duty to notify the District of such claim, unless and until the Court makes an award of attorneys' fees.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Graham's opening brief, Graham respectfully requests that this Court reverse the district court's entry of summary judgment in favor of the District, enter judgment in favor of Graham, issue an order permitting Graham to inspect the requested records free of charge, and award Graham his reasonable attorneys' fees and costs incurred in this appeal.

DATED this 23 day of November, 1998.

PARR WADDOUPS BROWN GEE & LOVELESS

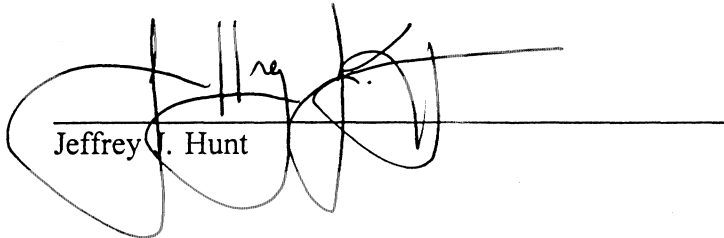


Jeffrey J. Hunt
R. Eric Smith
Attorneys for Plaintiff/Appellant/
Cross-Appellee Mark Graham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of November, 1998, I mailed two (2) true and correct copies of the foregoing **RESPONSE BRIEF OF MARK GRAHAM AS CROSS-APPELLEE** and **REPLY BRIEF OF MARK GRAHAM AS APPELLANT** by United States First Class Mail, postage prepaid, to the following:

Larry S. Jenkins
Susan J. Miller
WOOD CRAPO LLC
Attorneys for Defendants/Appellees/Cross-Appellants
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111


Jeffrey J. Hunt

ADDENDUM TO REPLY BRIEF

pertinent interests and which are consistent with nationwide standards of information practices;

(e) favor public access when, in the application of this act, countervailing interests are of equal weight; and

(f) establish fair and reasonable records management practices.

History: C. 1953, 63-2-102, enacted by L. 1991, ch. 259, § 9; 1992, ch. 280, § 14. act" means Laws 1991, ch. 259, which revised this chapter; see "Revision of Chapter" note under the chapter heading.

63-2-103. Definitions.

As used in this chapter:

(1) "Audit" means:

(a) a systematic examination of financial, management, program, and related records for the purpose of determining the fair presentation of financial statements, adequacy of internal controls, or compliance with laws and regulations; or

(b) a systematic examination of program procedures and operations for the purpose of determining their effectiveness, economy, efficiency, and compliance with statutes and regulations.

(2) "Chronological logs" mean the regular and customary summary records of law enforcement agencies and other public safety agencies that show the time and general nature of police, fire, and paramedic calls made to the agency and any arrests or jail bookings made by the agency.

(3) "Classification," "classify," and their derivative forms mean determining whether a record series, record, or information within a record is public, private, controlled, protected, or exempt from disclosure under Subsection 63-2-201(3)(b).

(4) (a) "Computer program" means a series of instructions or statements that permit the functioning of a computer system in a manner designed to provide storage, retrieval, and manipulation of data from the computer system, and any associated documentation and source material that explain how to operate the computer program.

(b) "Computer program" does not mean:

(i) the original data, including numbers, text, voice, graphics, and images;

(ii) analysis, compilation, and other manipulated forms of the original data produced by use of the program; or

(iii) the mathematical or statistical formulas (excluding the underlying mathematical algorithms contained in the program) that would be used if the manipulated forms of the original data were to be produced manually.

(5) (a) "Contractor" means:

(i) any person who contracts with a governmental entity to provide goods or services directly to a governmental entity; or

(ii) any private, nonprofit organization that receives funds from a governmental entity.

(b) "Contractor" does not mean a private provider.

(6) "Controlled record" means a record containing data on individuals that is controlled as provided by Section 63-2-303.

(7) "Designation," "designate," and their derivative forms mean indicating, based on a governmental entity's familiarity with a record series or

based on a governmental entity's review of a reasonable sample of a record series, the primary classification that a majority of records in a record series would be given if classified and the classification that other records typically present in the record series would be given if classified.

(8) "Government audit agency" means any governmental entity that conducts audits.

(9) (a) "Governmental entity" means:

(i) executive department agencies of the state, the offices of the governor, lieutenant governor, state auditor, attorney general, and state treasurer, the Board of Pardons and Parole, the Board of Examiners, the National Guard, the Career Service Review Board, the State Board of Education, the State Board of Regents, and the State Archives;

(ii) the Office of the Legislative Auditor General, Office of the Legislative Fiscal Analyst, Office of Legislative Research and General Counsel, the Legislature, and legislative committees, except any political party, group, caucus, or rules or sifting committee of the Legislature;

(iii) courts, the Judicial Council, the Office of the Court Administrator, and similar administrative units in the judicial branch;

(iv) any state-funded institution of higher education or public education; or

(v) any political subdivision of the state, but, if a political subdivision has adopted an ordinance or a policy relating to information practices pursuant to Section 63-2-701, this chapter shall apply to the political subdivision to the extent specified in Section 63-2-701 or as specified in any other section of this chapter that specifically refers to political subdivisions.

(b) "Governmental entity" also means every office, agency, board, bureau, committee, department, advisory board, or commission of the entities listed in Subsection (9)(a) that is funded or established by the government to carry out the public's business.

(10) "Gross compensation" means every form of remuneration payable for a given period to an individual for services provided including salaries, commissions, vacation pay, severance pay, bonuses, and any board, rent, housing, lodging, payments in kind, and any similar benefit received from the individual's employer.

(11) "Individual" means a human being.

(12) (a) "Initial contact report" means an initial written or recorded report, however titled, prepared by peace officers engaged in public patrol or response duties describing official actions initially taken in response to either a public complaint about or the discovery of an apparent violation of law, which report may describe:

(i) the date, time, location, and nature of the complaint, the incident, or offense;

(ii) names of victims;

(iii) the nature or general scope of the agency's initial actions taken in response to the incident;

(iv) the general nature of any injuries or estimate of damages sustained in the incident;

(v) the name, address, and other identifying information about any person arrested or charged in connection with the incident; or

(vi) the identity of the public safety personnel (except undercover personnel) or prosecuting attorney involved in responding to the initial incident.

(b) Initial contact reports do not include follow-up or investigative reports prepared after the initial contact report. However, if the information specified in Subsection (a) appears in follow-up or investigative reports, it may only be treated confidentially if it is private, controlled, protected, or exempt from disclosure under Subsection 63-2-201(3)(b).

(13) "Person" means any individual, nonprofit or profit corporation, partnership, sole proprietorship, or other type of business organization.

(14) "Private provider" means any person who contracts with a governmental entity to provide services directly to the public.

(15) "Private record" means a record containing data on individuals that is private as provided by Section 63-2-302.

(16) "Protected record" means a record that is classified protected as provided by Section 63-2-304.

(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).

(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:

(i) which are prepared, owned, received, or retained by a governmental entity or political subdivision; and

(ii) where all of the information in the original is reproducible by photocopy or other mechanical or electronic means.

(b) "Record" does not mean:

(i) temporary drafts or similar materials prepared for the originator's personal use or prepared by the originator for the personal use of an individual for whom he is working;

(ii) materials that are legally owned by an individual in his private capacity;

(iii) materials to which access is limited by the laws of copyright or patent unless the copyright or patent is owned by a governmental entity or political subdivision;

(iv) proprietary software;

(v) junk mail or commercial publications received by a governmental entity or an official or employee of a governmental entity;

(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;

(vii) daily calendars and other personal notes prepared by the originator for the originator's personal use or for the personal use of an individual for whom he is working;

(viii) computer programs as defined in Subsection (4) that are developed or purchased by or for any governmental entity for its own use; or

(ix) notes or internal memoranda prepared as part of the deliberative process by a member of the judiciary, an administra-

tive law judge, a member of the Board of Pardons and Parole, or a member of any other body charged by law with performing a quasi-judicial function.

(19) "Record series" means a group of records that may be treated as a unit for purposes of designation, description, management, or disposition.

(20) "Records committee" means the State Records Committee created in Section 63-2-501.

(21) "Records officer" means the individual appointed by the chief administrative officer of each governmental entity, or the political subdivision to work with state archives in the care, maintenance, scheduling, designation, classification, disposal, and preservation of records.

(22) "Schedule," "scheduling," and their derivative forms mean the process of specifying the length of time each record series should be retained by a governmental entity for administrative, legal, fiscal, or historical purposes and when each record series should be transferred to the state archives or destroyed.

(23) "State archives" means the Division of Archives and Records Service created in Section 63-2-901.

(24) "State archivist" means the director of the state archives.

(25) "Summary data" means statistical records and compilations that contain data derived from private, controlled, or protected information but that do not disclose private, controlled, or protected information.

History: C. 1953, 63-2-103, enacted by L. 1991, ch. 259, § 10; 1992, ch. 280, § 15; 1994, ch. 13, § 4.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, in Subsections

(9)(a)(i) and (18)(a)(ix) substituted "Board of Pardons and Parole" for "Board of Pardons" and transposed Subsections (11) and (12), and likewise Subsections (14) and (15), to alphabetize the defined terms.

NOTES TO DECISIONS

ANALYSIS

Governmental entity.
Public records.
Registers under merit system.
Salaries of college employees.
School records.
— School board minutes.
— Survey questionnaire and responses.

Governmental entity.

Former Chapter 2 and the Public and Private Writings Act (§ 78-26-1 et seq.) did not apply to the Utah State Bar because it is not a "state agency" or "public office" within the meaning of those provisions. *Barnard v. Utah State Bar*, 804 P.2d 526 (Utah 1991).

Public records.

Settlement agreements involving public entities are public documents. *Society of Professional Journalists v. Briggs*, 675 F. Supp. 1308 (D. Utah 1987).

Registers under merit system.

"Eligible register" and "promotional register" provided for under Deputy Sheriffs Merit Sys-

tem Act, § 17-30-1 et seq., are public records subject to public inspection. *Deputy Sheriffs Mut. Aid Ass'n v. Salt Lake County Deputy Sheriffs Merit Sys. Comm.*, 24 Utah 2d 110, 466 P.2d 836 (1970).

Salaries of college employees.

The right of the public to know the salaries paid to college employees outweighs the right of privacy of the employees or of the institution to carry on its operations in secret. *Redding v. Brady*, 606 P.2d 1193 (Utah 1980).

School records.

— School board minutes.

Notes taken at the meetings of a local board of education, which were later transcribed, approved, and placed in the journal, were not classifiable as a public writing, whereas the transcribed minutes, in final form, but awaiting only approval and placement in the journal, were a public writing. *Conover v. Board of Educ.*, 1 Utah 2d 375, 267 P.2d 768 (1954).

When a clerk's untranscribed notes are not a public writing but his transcribed minutes are such a public writing, the minutes should be

(7) (a) All fees received under this section by a governmental entity subject to Subsection (3)(a) shall be retained by the governmental entity as a dedicated credit.

(b) Those funds shall be used to recover the actual cost and expenses incurred by the governmental entity in providing the requested record or record series.

(8) A governmental entity may require payment of past fees and future estimated fees before beginning to process a request if fees are expected to exceed \$50, or if the requester has not paid fees from previous requests. Any prepaid amount in excess of fees due shall be returned to the requester.

(9) This section does not alter, repeal, or reduce fees established by other statutes or legislative acts.

History: C. 1953, 63-2-203, enacted by L. 1991, ch. 259, § 14; 1992, ch. 280, § 20; 1994, ch. 194, § 2; 1995, ch. 20, § 114.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, in Subsection (1) deleted “or compiling a record in a form other than that maintained by the governmental entity” from the end of the first sentence and added the second sentence; added Subsections (2) and (6), redesignating the other subsections

accordingly; in Subsection (3)(a) substituted “the fees defined in Subsection (2), or other actual costs associated with this section” for “fees” in the first sentence and “May 1, 1995” for “April 26, 1993” in the third sentence; and in Subsection (5)(a) added “except as permitted by Subsection (2)(b).”

The 1995 amendment, effective May 1, 1995, substituted “Section 63-38-3.2” for “Subsection 63-38-3(3)” in two places in Subsection (3)(a).

63-2-204. Requests — Time limit for response and extraordinary circumstances.

(1) A person making a request for a record shall furnish the governmental entity with a written request containing his name, mailing address, daytime telephone number, if available, and a description of the records requested that identifies the record with reasonable specificity.

(2) A governmental entity may make rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, specifying where and to whom requests for access shall be directed.

(3) (a) As soon as reasonably possible, but no later than ten business days after receiving a written request, or five business days after receiving a written request if the requester demonstrates that expedited response to the record request benefits the public rather than the person, the governmental entity shall respond to the request by:

(i) approving the request and providing the record;

(ii) denying the request;

(iii) notifying the requester that it does not maintain the record and providing, if known, the name and address of the governmental entity that does maintain the record; or

(iv) notifying the requester that because of one of the extraordinary circumstances listed in Subsection (4), it cannot immediately approve or deny the request. The notice shall describe the circumstances relied upon and specify the date when the records will be available.

(b) Any person who requests a record to obtain information for a story or report for publication or broadcast to the general public is presumed to be acting to benefit the public rather than a person.

(4) The following circumstances constitute “extraordinary circumstances” that allow a governmental entity to delay approval or denial by an additional

period of time as specified in Subsection 63-2-204(5) if the governmental entity determines that due to the extraordinary circumstances it cannot respond within the time limits provided in Subsection (3):

(a) another governmental entity is using the record, in which case the originating governmental entity shall promptly request that the governmental entity currently in possession return the record;

(b) another governmental entity is using the record as part of an audit, and returning the record before the completion of the audit would impair the conduct of the audit;

(c) the request is for a voluminous quantity of records;

(d) the governmental entity is currently processing a large number of records requests;

(e) the request requires the governmental entity to review a large number of records to locate the records requested;

(f) the decision to release a record involves legal issues that require the governmental entity to seek legal counsel for the analysis of statutes, rules, ordinances, regulations, or case law;

(g) segregating information that the requester is entitled to inspect from information that the requester is not entitled to inspect requires extensive editing; or

(h) segregating information that the requester is entitled to inspect from information that the requester is not entitled to inspect requires computer programming.

(5) If one of the extraordinary circumstances listed in Subsection (4) precludes approval or denial within the time specified in Subsection (3), the following time limits apply to the extraordinary circumstances:

(a) for claims under Subsection (4)(a), the governmental entity currently in possession of the record shall return the record to the originating entity within five business days of the request for the return unless returning the record would impair the holder's work;

(b) for claims under Subsection (4)(b), the originating governmental entity shall notify the requester when the record is available for inspection and copying;

(c) for claims under Subsections (4)(c), (d), and (e), the governmental entity shall:

(i) disclose the records that it has located which the requester is entitled to inspect;

(ii) provide the requester with an estimate of the amount of time it will take to finish the work required to respond to the request; and

(iii) complete the work and disclose those records that the requester is entitled to inspect as soon as reasonably possible;

(d) for claims under Subsection (4)(f), the governmental entity shall either approve or deny the request within five business days after the response time specified for the original request has expired;

(e) for claims under Subsection (4)(g), the governmental entity shall fulfill the request within 15 business days from the date of the original request; or

(f) for claims under Subsection (4)(h), the governmental entity shall complete its programming and disclose the requested records as soon as reasonably possible.

(6) (a) If a request for access is submitted to an office of a governmental entity other than that specified by rule in accordance with Subsection (2), the office shall promptly forward the request to the appropriate office.

(b) If the request is forwarded promptly, the time limit for response begins when the record is received by the office specified by rule.

(7) If the governmental entity fails to provide the requested records or issue a denial within the specified time period, that failure is considered the equivalent of a determination denying access to the records.

History: C. 1953, 63-2-204, enacted by L. 1991, ch. 259, § 15; 1992, ch. 280, § 21.

63-2-205. 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 63-2-201(3)(b);

(b) citations to the provisions of this chapter, court rule or order, another state statute, federal statute, or federal regulation that exempt the record or portions of the record from disclosure, provided that the citations do not disclose private, controlled, or protected information or information exempt from disclosure under Subsection 63-2-201(3)(b);

(c) a statement that the requester has the right to appeal the denial to the chief administrative officer of the governmental entity; and

(d) the time limits for filing an appeal, and the name and business address of the chief administrative officer of the governmental entity.

(3) Unless otherwise required by a court or agency of competent jurisdiction, a governmental entity may not destroy or give up custody of any record to which access was denied until the period for an appeal has expired or the end of the appeals process, including judicial appeal.

History: C. 1953, 63-2-205, enacted by L. 1991, ch. 259, § 16; 1992, ch. 280, § 22.

63-2-206. Sharing records.

(1) A governmental entity may provide a record that is private, controlled, or protected to another governmental entity, a government-managed corporation, a political subdivision, the federal government, or another state if the requesting entity:

(a) serves as a repository or archives for purposes of historical preservation, administrative maintenance, or destruction;

(b) enforces, litigates, or investigates civil, criminal, or administrative law, and the record is necessary to a proceeding or investigation;

(c) is authorized by state statute to conduct an audit and the record is needed for that purpose; or

sanctions against persons regulated by a governmental entity, but not including records that initiate employee discipline.

(3) The list of public records in this section is not exhaustive and should not be used to limit access to records.

History: C. 1953, 63-2-301, enacted by L. 1991, ch. 259, § 18; 1992, ch. 280, § 25; 1994, ch. 99, § 2; 1995, ch. 133, § 1; 1996, ch. 159, § 3.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, in Subsection (1)(b), inserted "from state appropriated funds."

The 1995 amendment, effective May 1, 1995, deleted "from state appropriated funds" after "compensation" in Subsection (1)(b) and changed "formal charges" to "charges on which the disciplinary action was based" in Subsection (2)(o)(ii).

The 1996 amendment, effective July 1, 1996, substituted "Division of Forestry, Fire and State Lands" for "Division of State Lands and Forestry" and added "School and Institutional Trust Lands Administration" to the list of governmental entities set out in Subsections (1)(g) and (2)(p).

Cross-References. — Exemption for governmental records containing digital signature information, § 46-3-504.

NOTES TO DECISIONS

Judicial records.

Sealed depositions are "judicial records" and are presumptively public and subject to inspections. This statutory right of inspection can be

restricted only for good cause shown under the protective order provision of Utah Rule of Civil Procedure 26(c). *Carter v. Utah Power & Light Co.*, 800 P.2d 1095 (Utah 1990).

63-2-302. Private records.

(1) The following records are private:

(a) records concerning an individual's eligibility for unemployment insurance benefits, social services, welfare benefits, or the determination of benefit levels;

(b) records containing data on individuals describing medical history, diagnosis, condition, treatment, evaluation, or similar medical data;

(c) records of publicly funded libraries that when examined alone or with other records identify a patron;

(d) records received or generated for a Senate or House Ethics Committee concerning any alleged violation of the rules on legislative ethics, prior to the meeting, and after the meeting, if the ethics committee meeting was closed to the public;

(e) records received or generated for a Senate confirmation committee concerning character, professional competence, or physical or mental health of an individual:

(i) if prior to the meeting, the chair of the committee determines release of the records:

(A) reasonably could be expected to interfere with the investigation undertaken by the committee; or

(B) would create a danger of depriving a person of a right to a fair proceeding or impartial hearing;

(ii) after the meeting, if the meeting was closed to the public;

(f) records concerning a current or former employee of, or applicant for employment with, a governmental entity that would disclose that individual's home address, home telephone number, social security number, insurance coverage, marital status, or payroll deductions; and

(g) that part of a record indicating a person's social security number if provided under Section 31A-23-202, 31A-26-202, 58-1-301, 61-1-4, or 61-2-6.

(2) The following records are private if properly classified by a governmental entity:

(a) records concerning a current or former employee of, or applicant for employment with a governmental entity, including performance evaluations and personal status information such as race, religion, or disabilities, but not including records that are public under Subsection 63-2-301(1)(b) or 63-2-301(2)(o), or private under Subsection 63-2-302(1)(b);

(b) records describing an individual's finances, except that the following are public:

(i) records described in Subsection 63-2-301(1);

(ii) information provided to the governmental entity for the purpose of complying with a financial assurance requirement; or

(iii) records that must be disclosed in accordance with another statute;

(c) records of independent state agencies if the disclosure of those records would conflict with the fiduciary obligations of the agency;

(d) other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy; and

(e) records provided by the United States or by a government entity outside the state that are given with the requirement that the records be managed as private records, if the providing entity states in writing that the record would not be subject to public disclosure if retained by it.

History: C. 1953, 63-2-302, enacted by L. 1991, ch. 259, § 19; 1992, ch. 280, § 26; 1995, ch. 74, § 1; 1996, ch. 195, § 1; 1997, ch. 232, § 67.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, added “prior to the meeting, and after the meeting” to Subsection (1)(d), added Subsection (1)(e), and made re-

lated and stylistic changes.

The 1996 amendment, effective April 29, 1996, in Subsection (2)(d) substituted “a clearly unwarranted” for “an unwarranted” and made a punctuation change at the end of Subsection (2)(a).

The 1997 amendment, effective July 1, 1997, added Subsection (1)(g).

COLLATERAL REFERENCES

Am. Jur. 2d. — 62 Am. Jur. 2d Privacy § 1 et seq.; 66 Am. Jur. 2d Records and Recording Laws §§ 27 to 30.

C.J.S. — 76 C.J.S. Records §§ 35 to 41; 77 C.J.S. Right of Privacy §§ 1 to 8.

A.L.R. — Public disclosure of person's indebtedness as violation of right to privacy, 33 A.L.R.3d 154.

Confidentiality of records as to recipients of public welfare, 54 A.L.R.3d 768.

Waiver or loss of right of privacy, 57 A.L.R.3d 16.

Juvenile court records, expungement of, 71 A.L.R.3d 753.

When are government records “personnel files” exempt from disclosure under Freedom of Information Act provision (5 USCS § 552 (b)(6)) exempting certain “personnel,” medical, and similar files, 104 A.L.R. Fed. 757.

When are government records “similar files” exempt from disclosure under Freedom of Information Act provisions (5 USCS § 552(b)(6)) exempting certain personnel, medical, and “similar” files, 106 A.L.R. Fed. 94.

63-2-303. Controlled records.

A record is controlled if:

(1) the record contains medical, psychiatric, or psychological data about an individual;

(g) that part of a record indicating a person's social security number if provided under Section 31A-23-202, 31A-26-202, 58-1-301, 61-1-4, or 61-2-6

(2) The following records are private if properly classified by a governmental entity.

(a) records concerning a current or former employee of, or applicant for employment with a governmental entity, including performance evaluations and personal status information such as race, religion, or disabilities, but not including records that are public under Subsection 63-2-301(1)(b) or 63-2-301(2)(o), or private under Subsection 63-2-302(1)(b);

(b) records describing an individual's finances, except that the following are public:

(i) records described in Subsection 63-2-301(1);

(ii) information provided to the governmental entity for the purpose of complying with a financial assurance requirement; or

(iii) records that must be disclosed in accordance with another statute;

(c) records of independent state agencies if the disclosure of those records would conflict with the fiduciary obligations of the agency;

(d) other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy; and

(e) records provided by the United States or by a government entity outside the state that are given with the requirement that the records be managed as private records, if the providing entity states in writing that the record would not be subject to public disclosure if retained by it.

History: C. 1953, 63-2-302, enacted by L. 1991, ch. 259, § 19; 1992, ch. 280, § 26; 1995, ch. 74, § 1; 1996, ch. 195, § 1; 1997, ch. 232, § 67.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, added “prior to the meeting, and after the meeting” to Subsection (1)(d), added Subsection (1)(e), and made re-

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The 1997 amendment, effective July 1, 1997, added Subsection (1)(g)

COLLATERAL REFERENCES

Am. Jur. 2d. — 62 Am Jur 2d Privacy § 1 et seq., 66 Am Jur 2d Records and Recording Laws §§ 27 to 30

C.J.S. — 76 C J S Records §§ 35 to 41, 77 C J S Right of Privacy §§ 1 to 8

A.L.R. — Public disclosure of person's indebtedness as violation of right to privacy, 33 A L R 3d 154

Confidentiality of records as to recipients of public welfare, 54 A L R 3d 768

Waiver or loss of right of privacy, 57 A L R 3d 16

Juvenile court records, expungement of, 71 A L R 3d 753

When are government records “personnel files” exempt from disclosure under Freedom of Information Act provision (5 USCS § 552 (b)(6)) exempting certain “personnel,” medical, and similar files, 104 A L R Fed 757

When are government records “similar files” exempt from disclosure under Freedom of Information Act provisions (5 USCS § 552(b)(6)) exempting certain personnel, medical, and “similar” files, 106 A L R Fed 94

63-2-303. Controlled records.

A record is controlled if:

(1) the record contains medical, psychiatric, or psychological data about an individual;

- (2) the governmental entity reasonably believes that:
 - (a) releasing the information in the record to the subject of the record would be detrimental to the subject's mental health or to the safety of any individual; or
 - (b) releasing the information would constitute a violation of normal professional practice and medical ethics; and
- (3) the governmental entity has properly classified the record.

History: C. 1953, 63-2-303, enacted by L. 1991, ch. 259, § 20; 1992, ch. 280, § 27.

COLLATERAL REFERENCES

A.L.R. — When are government records § 552 (b)(6)) exempting certain personnel, "medical files" exempt from disclosure under "medical," and similar files, 104 A.L.R. Fed. Freedom of Information Act provision (5 USCS 734.

63-2-304. Protected records.

The following records are protected if properly classified by a governmental entity:

- (1) trade secrets as defined in Section 13-24-2 if the person submitting the trade secret has provided the governmental entity with the information specified in Section 63-2-308;
- (2) commercial information or nonindividual financial information obtained from a person if:
 - (a) disclosure of the information could reasonably be expected to result in unfair competitive injury to the person submitting the information or would impair the ability of the governmental entity to obtain necessary information in the future;
 - (b) the person submitting the information has a greater interest in prohibiting access than the public in obtaining access; and
 - (c) the person submitting the information has provided the governmental entity with the information specified in Section 63-2-308;
- (3) commercial or financial information acquired or prepared by a governmental entity to the extent that disclosure would lead to financial speculations in currencies, securities, or commodities that will interfere with a planned transaction by the governmental entity or cause substantial financial injury to the governmental entity or state economy;
- (4) records the disclosure of which could cause commercial injury to, or confer a competitive advantage upon a potential or actual competitor of, a commercial project entity as defined in Subsection 11-13-3(3);
- (5) test questions and answers to be used in future license, certification, registration, employment, or academic examinations;
- (6) records the disclosure of which would impair governmental procurement proceedings or give an unfair advantage to any person proposing to enter into a contract or agreement with a governmental entity, except that this subsection does not restrict the right of a person to see bids submitted to or by a governmental entity after bidding has closed;
- (7) records that would identify real property or the appraisal or estimated value of real or personal property, including intellectual property, under consideration for public acquisition before any rights to the property are acquired unless:

- (2) the governmental entity reasonably believes that:
 - (a) releasing the information in the record to the subject of the record would be detrimental to the subject's mental health or to the safety of any individual; or
 - (b) releasing the information would constitute a violation of normal professional practice and medical ethics; and
- (3) the governmental entity has properly classified the record.

History: C. 1953, 63-2-303, enacted by L. 1991, ch. 259, § 20; 1992, ch. 280, § 27.

COLLATERAL REFERENCES

A.L.R. — When are government records § 552 (b)(6) exempting certain personnel, "medical files" exempt from disclosure under "medical," and similar files, 104 A.L.R. Fed. Freedom of Information Act provision (5 USCS 734.

63-2-304. Protected records.

The following records are protected if properly classified by a governmental entity:

- (1) trade secrets as defined in Section 13-24-2 if the person submitting the trade secret has provided the governmental entity with the information specified in Section 63-2-308;
- (2) commercial information or nonindividual financial information obtained from a person if:
 - (a) disclosure of the information could reasonably be expected to result in unfair competitive injury to the person submitting the information or would impair the ability of the governmental entity to obtain necessary information in the future;
 - (b) the person submitting the information has a greater interest in prohibiting access than the public in obtaining access; and
 - (c) the person submitting the information has provided the governmental entity with the information specified in Section 63-2-308;
- (3) commercial or financial information acquired or prepared by a governmental entity to the extent that disclosure would lead to financial speculations in currencies, securities, or commodities that will interfere with a planned transaction by the governmental entity or cause substantial financial injury to the governmental entity or state economy;
- (4) records the disclosure of which could cause commercial injury to, or confer a competitive advantage upon a potential or actual competitor of, a commercial project entity as defined in Subsection 11-13-3(3);
- (5) test questions and answers to be used in future license, certification, registration, employment, or academic examinations;
- (6) records the disclosure of which would impair governmental procurement proceedings or give an unfair advantage to any person proposing to enter into a contract or agreement with a governmental entity, except that this subsection does not restrict the right of a person to see bids submitted to or by a governmental entity after bidding has closed;
- (7) records that would identify real property or the appraisal or estimated value of real or personal property, including intellectual property, under consideration for public acquisition before any rights to the property are acquired unless:

- (a) public interest in obtaining access to the information outweighs the governmental entity's need to acquire the property on the best terms possible;
 - (b) the information has already been disclosed to persons not employed by or under a duty of confidentiality to the entity;
 - (c) in the case of records that would identify property, potential sellers of the described property have already learned of the governmental entity's plans to acquire the property; or
 - (d) in the case of records that would identify the appraisal or estimated value of property, the potential sellers have already learned of the governmental entity's estimated value of the property;
- (8) records prepared in contemplation of sale, exchange, lease, rental, or other compensated transaction of real or personal property including intellectual property, which, if disclosed prior to completion of the transaction, would reveal the appraisal or estimated value of the subject property, unless:
- (a) the public interest in access outweighs the interests in restricting access, including the governmental entity's interest in maximizing the financial benefit of the transaction; or
 - (b) when prepared by or on behalf of a governmental entity, appraisals or estimates of the value of the subject property have already been disclosed to persons not employed by or under a duty of confidentiality to the entity;
- (9) records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records:
- (a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;
 - (b) reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings;
 - (c) would create a danger of depriving a person of a right to a fair trial or impartial hearing;
 - (d) reasonably could be expected to disclose the identity of a source who is not generally known outside of government and, in the case of a record compiled in the course of an investigation, disclose information furnished by a source not generally known outside of government if disclosure would compromise the source; or
 - (e) reasonably could be expected to disclose investigative or audit techniques, procedures, policies, or orders not generally known outside of government if disclosure would interfere with enforcement or audit efforts;
- (10) records the disclosure of which would jeopardize the life or safety of an individual;
- (11) records the disclosure of which would jeopardize the security of governmental property, governmental programs, or governmental record-keeping systems from damage, theft, or other appropriation or use contrary to law or public policy;
- (12) records that, if disclosed, would jeopardize the security or safety of a correctional facility, or records relating to incarceration, treatment, probation, or parole, that would interfere with the control and supervision of an offender's incarceration, treatment, probation, or parole;

(13) records that, if disclosed, would reveal recommendations made to the Board of Pardons and Parole by an employee of or contractor for the Department of Corrections, the Board of Pardons and Parole, or the Department of Human Services that are based on the employee's or contractor's supervision, diagnosis, or treatment of any person within the board's jurisdiction;

(14) records and audit workpapers that identify audit, collection, and operational procedures and methods used by the State Tax Commission, if disclosure would interfere with audits or collections;

(15) records of a governmental audit agency relating to an ongoing or planned audit until the final audit is released;

(16) records prepared by or on behalf of a governmental entity solely in anticipation of litigation that are not available under the rules of discovery;

(17) records disclosing an attorney's work product, including the mental impressions or legal theories of an attorney or other representative of a governmental entity concerning litigation;

(18) records of communications between a governmental entity and an attorney representing, retained, or employed by the governmental entity if the communications would be privileged as provided in Section 78-24-8;

(19) personal files of a legislator, including personal correspondence to or from a member of the Legislature, but not correspondence that gives notice of legislative action or policy;

(20) (a) records in the custody or control of the Office of Legislative Research and General Counsel, that, if disclosed, would reveal a particular legislator's contemplated legislation or contemplated course of action before the legislator has elected to support the legislation or course of action, or made the legislation or course of action public; and

(b) for purposes of this subsection, a "Request For Legislation" submitted to the Office of Legislative Research and General Counsel is a public document unless a legislator submits the "Request For Legislation" with a request that it be maintained as a protected record until such time as the legislator elects to make the legislation or course of action public;

(21) research requests from legislators to the Office of Legislative Research and General Counsel or the Office of the Legislative Fiscal Analyst and research findings prepared in response to these requests;

(22) drafts, unless otherwise classified as public;

(23) records concerning a governmental entity's strategy about collective bargaining or pending litigation;

(24) records of investigations of loss occurrences and analyses of loss occurrences that may be covered by the Risk Management Fund, the Employers' Reinsurance Fund, the Uninsured Employers' Fund, or similar divisions in other governmental entities;

(25) records, other than personnel evaluations, that contain a personal recommendation concerning an individual if disclosure would constitute a clearly unwarranted invasion of personal privacy, or disclosure is not in the public interest;

(26) records that reveal the location of historic, prehistoric, paleontological, or biological resources that if known would jeopardize the security

of those resources or of valuable historic, scientific, educational, or cultural information;

(27) records of independent state agencies if the disclosure of the records would conflict with the fiduciary obligations of the agency;

(28) records of a public institution of higher education regarding tenure evaluations, appointments, applications for admissions, retention decisions, and promotions, which could be properly discussed in a meeting closed in accordance with Title 52, Chapter 4, Open and Public Meetings, provided that records of the final decisions about tenure, appointments, retention, promotions, or those students admitted, may not be classified as protected under this section;

(29) records of the governor's office, including budget recommendations, legislative proposals, and policy statements, that if disclosed would reveal the governor's contemplated policies or contemplated courses of action before the governor has implemented or rejected those policies or courses of action or made them public;

(30) records of the Office of the Legislative Fiscal Analyst relating to budget analysis, revenue estimates, and fiscal notes of proposed legislation before issuance of the final recommendations in these areas;

(31) records provided by the United States or by a government entity outside the state that are given to the governmental entity with a requirement that they be managed as protected records if the providing entity certifies that the record would not be subject to public disclosure if retained by it;

(32) transcripts, minutes, or reports of the closed portion of a meeting of a public body except as provided in Section 52-4-7;

(33) records that would reveal the contents of settlement negotiations but not including final settlements or empirical data to the extent that they are not otherwise exempt from disclosure;

(34) memoranda prepared by staff and used in the decision-making process by an administrative law judge, a member of the Board of Pardons and Parole, or a member of any other body charged by law with performing a quasi-judicial function;

(35) records that would reveal negotiations regarding assistance or incentives offered by or requested from a governmental entity for the purpose of encouraging a person to expand or locate a business in Utah, but only if disclosure would result in actual economic harm to the person or place the governmental entity at a competitive disadvantage, but this section may not be used to restrict access to a record evidencing a final contract;

(36) materials to which access must be limited for purposes of securing or maintaining the governmental entity's proprietary protection of intellectual property rights including patents, copyrights, and trade secrets;

(37) the name of a donor or a prospective donor to a governmental entity, including a public institution of higher education, and other information concerning the donation that could reasonably be expected to reveal the identity of the donor, provided that:

(a) the donor requests anonymity in writing;

(b) any terms, conditions, restrictions, or privileges relating to the donation may not be classified protected by the governmental entity under this subsection; and

(c) except for public institutions of higher education, the governmental unit to which the donation is made is primarily engaged in educational, charitable, or artistic endeavors, and has no regulatory or legislative authority over the donor, a member of his immediate family, or any entity owned or controlled by the donor or his immediate family; and

(38) the following records of a public institution of education, which have been developed, discovered, or received by or on behalf of faculty, staff, employees, or students of the institution: unpublished lecture notes, unpublished research notes and data, unpublished manuscripts, creative works in process, scholarly correspondence, and confidential information contained in research proposals. Nothing in this subsection shall be construed to affect the ownership of a record.

History: C. 1953, 63-2-304, enacted by L. 1991, ch. 259, § 21; 1992, ch. 228, § 3; 1992, ch. 280, § 28; 1994, ch. 13, § 5; 1994, ch. 114, § 1; 1995, ch. 133, § 2; 1996, ch. 79, § 81; 1997, ch. 234, § 4.

Amendment Notes. — The 1994 amendment by ch. 13, effective May 2, 1994, substituted “Board of Pardons and Parole” for “Board of Pardons” twice in Subsection (12) and once in Subsection (33); deleted “and” from the end of Subsection (29); and added “and” to the end of Subsection (36).

The 1994 amendment by ch. 114, effective May 2, 1994, redesignated former Subsection

(19) as Subsection (19)(a); added Subsection (19)(b); and made stylistic changes.

The 1995 amendment, effective May 1, 1995, made a punctuation correction in Subsection (19)(b) and substituted “of the” for “reflecting” in Subsection (27).

The 1996 amendment, effective April 29, 1996, in Subsection (31) deleted “of the” after “52-4-7” and “Act” after “Meetings.”

The 1997 amendment, effective May 5, 1997, added Subsection (4), renumbering accordingly, and deleted “Open and Public Meetings” from the end of Subsection (32).

63-2-305. Procedure to determine classification.

(1) If more than one provision of this chapter could govern the classification of a record, the governmental entity shall classify the record by considering the nature of the interests intended to be protected and the specificity of the competing provisions.

(2) Nothing in Subsection 63-2-302(2), Section 63-2-303, or 63-2-304 requires a governmental entity to classify a record as private, controlled, or protected.

History: C. 1953, 63-2-305, enacted by L. 1991, ch. 259, § 22; 1992, ch. 280, § 29.

63-2-306. Duty to evaluate records and make designations and classifications.

(1) A governmental entity shall:

- (a) evaluate all record series that it uses or creates;
- (b) designate those record series as provided by this chapter; and
- (c) report the designations of its record series to the state archives.

(2) A governmental entity may classify a particular record, record series, or information within a record at any time, but is not required to classify a particular record, record series, or information until access to the record is requested.

Applicability of libel and slander exception to waiver of sovereign immunity under Federal Tort Claims Act (28 USCS § 2680(h)), 79 A.L.R. Fed. 826.

Applicability of 28 USCS §§ 2680(a) and 2680(h) to Federal Tort Claims Act liability arising out of government informant's conduct, 85 A.L.R. Fed. 848.

63-30-10.5. Waiver of immunity for taking private property without compensation.

(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation.

(2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain.

History: C. 1953, 63-30-10.5, enacted by L. 1987, ch. 75, § 3; 1991, ch. 76, § 5.

NOTES TO DECISIONS

Cited in Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241 (Utah 1990).

COLLATERAL REFERENCES

Utah Law Review. — Recent Development in Utah Law — Judicial Decisions — Civil Procedure, 1989 Utah L. Rev. 166.

63-30-10.6. Attorneys' fees for records requests.

(1) Immunity from suit of all governmental entities is waived for recovery of attorneys' fees under Sections 63-2-405 and 63-2-802.

Notwithstanding Section 63-30-11:

- (a) a notice of claim for attorneys' fees under Subsection (1) may be filed contemporaneously with a petition for review under Section 63-2-404; and
- (b) Sections 63-30-14 and 63-30-19 shall not apply.

(2) Any other claim under this chapter that is related to a claim for attorneys' fees under Subsection (1) may be brought contemporaneously with the claim for attorneys' fees or in a subsequent action.

History: C. 1953, 63-30-10.6, enacted by L. 1991, ch. 259, § 50; 1992, ch. 280, § 56.

63-30-11. Claim for injury — Notice — Contents — Service — Legal disability.

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action,

Applicability of libel and slander exception to waiver of sovereign immunity under Federal Tort Claims Act (28 USCS § 2680(h)), 79 A.L.R. Fed. 826.

Applicability of 28 USCS §§ 2680(a) and 2680(h) to Federal Tort Claims Act liability arising out of government informant's conduct, 85 A.L.R. Fed. 242.

63-30-10.5. Waiver of immunity for taking private property without compensation.

(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation.

(2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain.

History: C. 1953, 63-30-10.5, enacted by L. 1987, ch. 75, § 3; 1991, ch. 76, § 5.

NOTES TO DECISIONS

Cited in Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241 (Utah 1990).

COLLATERAL REFERENCES

Utah Law Review. — Recent Development in Utah Law — Judicial Decisions — Civil Procedure, 1989 Utah L. Rev. 166.

63-30-10.6. Attorneys' fees for records requests.

(1) Immunity from suit of all governmental entities is waived for recovery of attorneys' fees under Sections 63-2-405 and 63-2-501.

Notwithstanding Section 63-30-11:

(a) a notice of claim for attorneys' fees under Subsection (1) may be filed contemporaneously with a petition for review under Section 63-2-404; and

(b) Sections 63-30-14 and 63-30-19 shall not apply.

(2) Any other claim under this chapter that is related to a claim for attorneys' fees under Subsection (1) may be brought contemporaneously with the claim for attorneys' fees or in a subsequent action.

History: C. 1953, 63-30-10.6, enacted by L. 1991, ch. 259, § 50; 1992, ch. 280, § 56.

63-30-11. Claim for injury — Notice — Contents — Service — Legal disability.

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action,

regardless of whether or not the function giving rise to the claim is characterized as governmental.

- (3) (a) The notice of claim shall set forth:
 - (i) a brief statement of the facts;
 - (ii) the nature of the claim asserted; and
 - (iii) the damages incurred by the claimant so far as they are known.
- (b) The notice of claim shall be:
 - (i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and
 - (ii) directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.
- (4) (a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.
 - (b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.
 - (ii) The court may not grant an extension that exceeds the applicable statute of limitations.
 - (c) In determining whether or not to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

History: L. 1965, ch. 139, § 11; 1978, ch. 27, § 5; 1983, ch. 131, § 1; 1987, ch. 75, § 4; 1991, ch. 76, § 6.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
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 Clear statement of claims required.
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 Sufficiency of notice.
 — Nature of claim asserted.
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Constitutionality.

Functions of the notice of claim requirement in giving the affected governmental entity an opportunity to promptly investigate and remedy defects immediately, in avoiding unnecessary litigation, and in minimizing difficulties which might attend changes in administration provide sufficient justification for its imposition as to governmental but not other tort-feasors, and therefore this section does not deny equal protection. *Sears v. Southworth*, 563 P.2d 192 (Utah 1977).

Assignment of municipal debt.

Assignment directing city to pay debt it owes

assignor to assignee is not kind of claim required to be submitted to city in accordance with this statute. *Cooper v. Holder*, 21 Utah 2d 40, 440 P.2d 15 (1968) (decided under former law).

Clear statement of claims required.

The purpose of notice-of-claim requirement is to require every claimant to state clearly all of the elements of his claims to the board of commissioners or city council for allowance as a condition precedent to his right to sue the city and recover his damages in an ordinary action. *Sweet v. Salt Lake City*, 43 Utah 306, 134 P. 1167 (1913).

Conditions for right to recover.

Statutory right to recover is available only upon compliance with the conditions upon which right is conferred. One who seeks to enforce the right must by allegation and proof bring himself within the conditions prescribed thereby. *Hamilton v. Salt Lake City*, 99 Utah 362, 106 P.2d 1028 (1940).

Damages not specified.

A claim that stated the time, place and general nature of the injury and the sidewalk defect causing it fulfilled the purpose of former