

1998

Mark Graham v. Davis County Solid Waste Management, Energy Recovery Special Service District, The Districts Administrative Control Board, and LeGrand Bitter : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARK GRAHAM

Appellant/Plaintiff,

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,

Appellees/Defendants.

UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 980218-CA

Case No. 980218-CA

BRIEF OF APPELLANT MARK GRAHAM

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

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MARK GRAHAM,
Appellant/Plaintiff,
vs.
DAVIS COUNTY SOLID WASTE
MANAGEMENT AND ENERGY
RECOVERY SPECIAL SERVICE
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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

ISSUES PRESENTED FOR REVIEW

1. Did Judge Memmott err in concluding that Utah Code Ann. § 63-2-203(2) authorized the District to charge for search and retrieval of the public records requested by Graham?
2. Did Judge Memmott err in concluding that the District could refuse to permit Graham to inspect the requested records without prior payment of the “compilation” fee?
3. If Graham substantially prevails in this action, is an award of attorneys’ fees and other litigation costs appropriate?

STANDARD OF REVIEW

The issues presented in this appeal involve questions of statutory construction. Because it is the role of an “appellate court to define what the law is, and because the operation of statutes must be uniform throughout the state,” the District Court’s ruling on matters of statutory construction are accorded no deference and are reviewed for correctness. Mariemont Corp. v. White City Water Improvement Dist., 958 P.2d 222, 223 (Utah 1998).

Furthermore, when reviewing a District Court’s grant of summary judgment, the court must “view the facts and all reasonable inferences drawn therefrom in the light most favorable

to the nonmoving party.” V-1 Oil Co. v. Utah State Tax Comm’n, 949 P.2d 906, 916 (Utah 1997).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statutory provisions of Utah’s Government Records Access and Management Act (“GRAMA”) are determinative in this appeal:

Utah Code Ann. § 63-2-102 (1997)

Utah Code Ann. § 63-2-201 (1997)

Utah Code Ann. § 63-2-203 (1997)

Utah Code Ann. § 63-2-802 (1997)

The foregoing statutory provisions are included in the Addendum to this brief.

STATEMENT OF THE CASE

A. Nature of the Case

Pursuant to Utah’s Government Records Access and Management Act, Mark Graham seeks access to public records which the Davis County Solid Waste Management and Energy Recovery Special Service District refuses to disclose without prior payment of a “compilation” fee. This is an appeal from the Honorable Jon M. Memmott’s Ruling granting summary judgment in favor of the District.

B. Statement of Facts

Appellant Mark Graham (“Graham”) is a resident of Layton, Utah who for several years has been active in monitoring and improving air quality in Davis County. (R. at 130.)

Graham is a member of the Residents of Davis County Clear Air Committee ("Committee"), a loosely-structured, non-profit organization made up of citizens interested in minimizing air pollution in Davis County. (R. at 130.) In particular, Graham and other members of the Committee have monitored the activities of the Davis County Solid Waste Management and Energy Recovery Special Service District ("the District"), a taxpayer-supported special service district that operates a solid-waste incinerator in Davis County. (R. at 130.)

As a political subdivision of the State of Utah and a governmental entity pursuant to Utah Code Ann. § 63-2-103(9), the District is subject to the provisions of Utah's Government Records Access and Management Act ("GRAMA"). (R. at 245.) On April 28, 1997, Graham filed a written GRAMA request with the District requesting access to records relating to government-mandated stack tests performed by the District in February and April 1997. (R. at 23.) Because Graham intended to use the materials for educational purposes, he requested that the District provide copies of the records free of charge pursuant to Utah Code Ann. § 63-2-203(4)(a) (1997).

On May 7, 1997, the District responded to the GRAMA request in a letter addressed to Graham personally. (R. at 24.) The letter, signed by District Director LeGrand Bitter ("Bitter"), stated that a copy of the District's current contract with Rigo and Rigo Associates that Graham requested would be available after payment of \$2.00 for copying costs. (R. at 24.) Bitter advised Graham, however, that because the remaining documents requested amounted to several hundred pages, "copies will not be made until further request is made by you." (R. at 24.) Bitter also indicated that "[s]taff time and overhead will be billed at \$20.00

per hour for compilation of the documents and for a staff member to be present during your review.” (R. at 24.)

On May 19, 1997, under protest and reservation of rights, Graham sent the District \$2.00 to pay for the photocopy of the District’s contract with Rigo and Rigo Associates. (R. at 25.) In a subsequent letter to the District on May 22, 1997, Graham insisted that “the District has no statutory authority to charge me the \$20 per hour mentioned in your letter.” (R. at 26.) Graham requested that he be allowed access to the records free of charge and asked the District to set a date for inspection between May 27 and June 10, 1997, but excluding June 4. (R. at 26.)

On May 29, 1997, the District sent Graham a copy of the Rigo and Rigo contract. (R. at 27.) The enclosed letter indicated that the additional documents requested would be available to review in the District offices on June 10 but that the District intended to bill Graham “for the staff time incurred in filling your request.” (R. at 27.) The following week, Graham received another letter dated June 4, 1997 indicating that the documents he had requested had been compiled but that he would not be allowed to view the records until he paid \$280.00 incurred by the District in staff time and overhead. (R. at 28.)

On June 9, 1997, pursuant to District Ordinance 92-C, Graham appealed the District’s \$280.00 charge for producing the records contained in his GRAMA request. (R. at 29-31.) The letter of appeal was signed by Graham and made no reference to the Committee. (R. at 29-31.) Bitter denied Graham’s appeal on June 24, 1997. (R. at 34.)

On July 2, 1997, Graham appeared before the District’s Administrative Review Board (“Board”) to appeal Bitter’s decision. (R. at 247.) The Board voted to deny Graham’s appeal

immediately following the meeting. (R. at 247.) The next day, the Board mailed a written denial of appeal addressed to Graham personally. (R. at 247.)

C. Course of Proceedings

Graham, acting *pro se*, filed a complaint in the Second Judicial District for Davis County on July 30, 1997 seeking judicial review of the Board's decision to deny his appeal. (R. at 1-6.) Graham sought declaratory and injunctive relief declaring that the District's refusal to allow inspection or copying of the requested records without prior payment of \$280.00 was unlawful, that the District be ordered to make the requested records available for inspection by Graham free of charge, and that the District be ordered to pay Graham's litigation costs incurred in prosecuting this action. (R. at 1-6.) The Complaint was brought in the name of the Committee but was filed by Graham appearing *pro se*. (R. at 1-6.)

The District's Answer on August 25, 1997 alerted Graham to the fact that Graham, not the Committee, was the proper party plaintiff. (R. at 35-40.) On September 19, 1997, soon after this pleading error was brought to his attention, Graham filed a Motion to File an Amended Complaint substituting Graham as plaintiff in place of the Committee. (R. at 114-15.)

In response, the District filed a Motion to Dismiss or for Summary Judgment on October 3, 1997 arguing that the Committee was not a proper party plaintiff and opposing the substitution of Graham for the Committee. (R. at 46-48.) That same day, mistakenly believing that the matter had been properly submitted for decision, Judge Jon M. Memmott of the Second Judicial District Court of Davis County issued an Order Granting Leave to File

Amended Complaint. (R. at 125.) Because the matter was not ripe for decision on October 3, the trial court later withdrew this order. (R. at 152.)

On November 18, 1997, after the motions were fully briefed, the trial court denied the District's Motion to Dismiss and granted Graham's Motion to Amend. (R. at 144-52.) The trial court ruled that Graham's timely request to amend the complaint when notified that he could not represent the Committee *pro se* argued against dismissal of the case. (R. at 144-52.) Furthermore, the trial court held that Graham should be allowed to amend the complaint under Utah Rules of Civil Procedure 15(a) and that the identity of interest between Graham and the Committee allowed the amendment to relate back to the date of filing. (R. at 144-52.)

On January 16, 1998, Graham filed a Motion for Summary Judgment seeking the trial court's determination, as a matter of law, that the District's refusal to permit inspection or copying of the requested records without prior payment of the \$280.00 "compilation" fee was unlawful under GRAMA. (R. at 159.) The District opposed Graham's motion and filed a Cross-Motion for Summary Judgment seeking judgment in its favor. (R. at 174-76.) On April 6, 1998, the trial court ruled, as a matter of law, that GRAMA permitted the District to charge Graham \$280.00 for compiling the requested records and accordingly granted summary judgment in favor of the District. (R. at 245-54.) On May 5, 1998, Graham, through counsel, filed a Notice of Appeal from the trial court's Ruling. (R. at 258-60.)

On May 18, 1998, the District filed a Notice of Cross-Appeal of the portion of the trial court's April 6, 1998 Ruling denying the District attorneys' fees and the trial court's

November 18, 1997 Order granting Graham's Motion to Amend the Complaint and denying the District's Motion to Dismiss or for Summary Judgment. (R. at 272-73.)

SUMMARY OF ARGUMENT

The District's imposition of a \$280.00 "compilation" fee, representing the cost of staff time expended in searching for and retrieving records responsive to Graham's request, violates GRAMA because Graham did not request the District to compile a record in a different form within the meaning of Utah Code Ann § 63-2-203(2) (1997). The plain language of § 63-2-203(2) limits charges for staff time to those instances where an individual has requested a governmental entity to provide a record in a particular format *other* than the form in which the governmental entity normally maintains the record. The legislative history of GRAMA's 1994 fee amendments confirms that § 63-2-203(2) was only intended to apply when the government agency changes or modifies the form in which the record is maintained in response to a specific request. Furthermore, GRAMA's purpose of promoting open government would be frustrated if governmental agencies were allowed to charge substantial search and retrieval fees as a condition of access to public records. Because Graham's request merely sought access to existing District records in their existing format, the District was not entitled to impose the \$280.00 compilation fee as a condition of access.

Even if § 63-2-203(2) is construed to permit the District to charge a "compilation" fee to provide *copies* of the subject records, the District is not permitted to charge Graham a fee for merely *inspecting* the records. GRAMA expressly forbids governmental entities from

assessing fees against individuals wishing to inspect public records. Furthermore, GRAMA's prohibition on inspection fees is not subject to the compiling fee provisions of § 63-2-203.

If Graham substantially prevails in this action, the Court should award Graham his attorneys' fees and costs incurred, as provided by GRAMA, as a result of the District's wrongful refusal to allow Graham to inspect the District's public records without paying the \$280.00 compilation fee. An award of attorneys' fees is particularly appropriate in this case because Graham's original GRAMA request and his pursuit of this appeal are in the public interest.

ARGUMENT

I. UNDER UTAH CODE ANN. 63-2-203(2), THE DISTRICT MAY NOT CHARGE GRAHAM FOR THE COST OF STAFF TIME FOR SEARCH AND RETRIEVAL OF REQUESTED DOCUMENTS BECAUSE THE DISTRICT DID NOT COMPILE A RECORD IN A FORM DIFFERENT FROM THAT NORMALLY MAINTAINED BY THE DISTRICT.

The District's charge of \$280.00 for the staff time required to respond to Graham's records request was unlawful under GRAMA because Graham did not request that the District compile a record in a different form within the meaning of § 63-2-203(2). The starting place for construing a statute is its plain language. See V-1 Oil Co. v. Utah State Tax Comm'n, 942 P.2d 906, 916-17 (Utah 1997). When the language of the statute is ambiguous, however, the court may then "seek guidance from the legislative history and relevant policy considerations." Id. The plain language, legislative history, and public policies underlying Utah Code Ann. § 63-2-203(2) each support the conclusion that governmental entities may not charge for staff time required to fulfill a GRAMA request for existing public records in their existing format.

A. Plain Language

Under the plain language of § 63-2-203(2), the District was not permitted to charge Graham for staff time when Graham did not request the records in a form other than that normally maintained by the District. The Utah Supreme Court has indicated that “when faced with a question of statutory construction, we look first to the plain language of the statute.” CIG Exploration, Inc. v. Utah State Tax Comm’n, 897 P.2d 1214, 1216 (Utah 1995).¹

Under the plain language of § 63-2-203(2), the District may not charge Graham for staff time involved in search and retrieval of the requested records because Graham did not request that the District compile these records in a form not used by the District. Section 63-2-203(2) allows governmental entities to charge for staff time involved in complying with a records request only when a requester has asked the entity to provide a record in a form different than that in which the governmental entity normally maintains the record. The relevant portion of GRAMA’s fee section provides:

(2) When a governmental entity *compiles a record in a form other than that normally maintained by the governmental entity*, the actual costs under this section may include the following:

- (a) the cost of staff time for summarizing, compiling, or tailoring the record either into an organization or media to meet the person’s request;
- (b) the cost of staff time for search, retrieval, and other direct administrative costs of complying with the request. . . .

¹ When interpreting provisions of state open records acts similar to GRAMA, courts have narrowly construed any provisions restricting access to public records. See, e.g., McFrugal Rental v. Garr, 418 S.E.2d 60, 61 (Ga. 1992) (“By its nature, any fee imposed pursuant to [the fee provisions of the Open Records Act] constitutes a burden on the public’s right of access to public records. Therefore, the statute must be narrowly construed.”).

Utah Code Ann. § 63-2-203(2) (1997) (emphasis added). The government entity's authority to charge for the costs listed in subsections (2)(a) and (2)(b) is expressly conditioned by the clause: "When a governmental entity compiles a record in a form other than that normally maintained by a governmental entity." The plain reading of this provision is that the staff time required to fulfill a records request cannot be charged to the requester except in those circumstances when this express condition is satisfied. In this case, because Graham did not request that the District compile the requested records in a form not used by the District, the District was not permitted to charge Graham for the staff time used to search for and retrieve the records.²

This reading of § 63-2-203(2) is further supported by complementary provisions of GRAMA. The Utah Supreme Court has indicated that when "doubt or uncertainty exists as to the meaning or application of an act's provisions, the court should analyze the act in its entirety and 'harmonize its provisions in accordance with the legislative intent and purpose.'" Benyon v. St. George-Dixie Lodge # 1743, 854 P.2d 513, 518 (Utah 1993) (quoting Osuala v. Aetna Life & Casualty, 608 P.2d 242, 243 (Utah 1980)). When interpreting GRAMA's fee provisions, it is particularly helpful to read § 63-2-203(2) in conjunction with § 63-2-201(8). Section 63-2-201(8) provides in relevant part:

- (b) Upon request a governmental entity shall provide a record in a particular format if:
 - (i) the governmental entity is able to do so without unreasonably interfering with the governmental entity's duties and responsibilities; and

² Furthermore, the Legislature's choice of the phrase "compiling *a* record" indicates that it did not intend this section to apply to the act of retrieving and gathering multiple records together in response to a GRAMA request. Utah Code Ann. § 63-2-203(2) (1997) (emphasis added).

(ii) the requester agrees to pay the governmental entity for its costs incurred in providing the record in its requested format in accordance with Section 63-2-203.

Utah Code Ann. § 63-2-201(8)(b) (1997). Section 63-2-201(8) informs requesters that they have the right to request records in a different format if they are willing to pay the costs incurred in accordance with § 63-2-203. Section 63-2-203 then specifies the fees the government can charge for performing this service “to meet the person’s request.” Thus, when viewed in the context of the entire act, GRAMA’s provision allowing for “compiling” fees is understood to be limited to those exceptional situations where the requester has asked the entity to perform work beyond what is involved in responding to a routine records requests. In this case, Graham did not request that the District provide a record in a particular format nor did he request that the District summarize, transform, or manipulate the information in any way.³ Instead, Graham simply requested access to existing District records in their existing form. GRAMA does not allow entities to charge for staff time in fulfilling such routine requests.

In interpreting the language of § 63-2-203(2), the trial court erred by failing to give the conditional clause in subsection (2) any meaning independent of the following subordinate clauses. The Utah Supreme Court has counseled that when analyzing the plain language of the statute, “we must attempt to give each part of the provision a relevant and independent

³ The fact that some of the records may have been stored electronically in computer format does not assist the District’s position. At no time did Graham ask the District to manipulate, transform or convert the computer data to another format. Moreover, the District “may not use the physical form, electronic or otherwise, in which a record is stored to deny, or unreasonably hinder the rights of persons to inspect and receive copies of a record under [GRAMA].” Utah Code Ann. § 63-2-201 (1997).

meaning so as to give effect to all its terms.” In re Worthen, 926 P.2d 853, 866 (Utah 1996). The trial court misconstrued § 63-2-203(2) by defining the qualifying phrase “compiles a record in a form other than that normally maintained by the governmental entity” by reference to the type of work that may be billed to the requester if the condition is fulfilled. The trial court found that “any of the tasks listed at 63-2-203(a) through (c) must, by necessity, be encompassed within the term compile.” (R. at 252.) However, if the Legislature intended to allow for staff time charges whenever the governmental entity performed any of the tasks listed in Subsections (2)(a) through (c), there would be no need for the qualifying language at the outset of Subsection (2). If the trial court’s reading is accepted, the conditional clause at the beginning of the section would be rendered mere surplusage. Thus, the trial court’s interpretation of the statute ignores the fundamental tenet of statutory construction that the independent meaning of each provision must be given effect.

The plain language of § 63-2-203(2) limits its application to extraordinary records requests in which the requester asks the governmental entity to provide the information in a customized format. The District and the trial court erred in applying this section to Graham’s routine records request.⁴

B. Legislative History

The legislative history of GRAMA’s 1994 fee amendments indicate that § 63-2-203(2) was only intended to apply when the governmental agency modified the form of a record in

⁴ Ordinance No. 92-C, adopted by the District pursuant to GRAMA, permits the District to charge Graham 25 cents per page for each page of public records Graham requests to be photocopied. (R. at 101.) To be lawful under GRAMA, the 25 cents per page fee must reflect the District’s “actual costs of duplicating a record,” Utah Code Ann. § 63-2-203(1) (1997).

response to a specific request. Under accepted rules of statutory construction, “we need not look beyond the plain language of this provision unless we find some ambiguity in it. . . . If we find the provision ambiguous, however, we then seek guidance from the legislative history and relevant policy considerations.” V-1 Oil Co. v. Utah State Tax Comm’n, 942 P.2d 906, 916-17 (Utah 1997). Although Graham believes the statutory language is clear on its face, the legislative history of GRAMA’s 1994 fee amendments further supports the conclusion that the District may not lawfully impose the \$280.00 “compilation” fee as a condition of access to these public records.

The Senate floor debates concerning the 1994 amendments, which added the current language regarding compilation fees, confirm that the language used in 63-3-203(2) was meant to apply to situations where the record is “changed” in some way by the government entity. In introducing the proposed amendment to GRAMA’s fee provisions, the sponsor of the bill, Senator David Steele, provided the following summary:

Now this new section 2: “When a governmental entity compiles a record in a form other than that normally maintained by the governmental entity.” *So if we’ve made a change--it’s not just the exact same form, we’ve asked them to modify that form--then this is what that section deals with. And it simply outlines that the cost of staff time for research could be incurred.”*

Senator Steele, sponsor of SB 147, 50th Utah Legislature, Feb. 9, 1994, senate tape 21, line 3405 (emphasis added) (appendix A, page 2, lines 9-14). Senator Steele’s explanation makes clear that Subsection (2) was only intended to deal with situations where the requester asked the governmental agency to make a change or to modify the existing form of the record. In this case, Graham did not request that the District make any changes to the form of the

record. Because Graham merely requested access to the District's records in their existing form, the charges allowed in Subsection (2) cannot lawfully be imposed.

In addition, the legislative history indicates that the fee amendments were modeled after a Colorado statute which clearly provides for fees only when data has been manipulated to produce a record in a form not used by the agency. When introducing the bill, Senator Steele indicated that language used in the amendments was drawn from the Colorado statute and that the Colorado statute had been examined and discussed in committee when considering the amendments. See Senator Steele, sponsor of SB 147, 50th Utah Legislature, Feb. 9, 1994, senate tape 21, line 3405 (appendix A, pg. 3., lines 25-27). The analogous fee provisions of the Colorado statute read:

If, in response to a specific request, the state or any of its agencies, institutions or political subdivisions has performed a manipulation of data so as to generate a record in a form not used by the state or by said agency, institution or political subdivision, a reasonable fee may be charged to the person making the request. Such fee shall not exceed the actual cost of manipulating the said data and generating the said record in accordance with the request.

Colo. Rev. Stat. Ann. § 24-72-205(3) (1997) (emphasis added). GRAMA's provisions are closely parallel to this Colorado statute. Specifically, § 63-2-201(8)(b) instructs governmental entities that they may provide a record in a particular format "upon request" and § 63-2-203(2) allows the governmental entity to recoup its actual costs "[w]hen [it] compiles a record in a form other than that normally maintained."

The meaning of "compiles a record in a form other than that normally maintained" can be ascertained by reference to the corresponding language in the Colorado statute which was used as a model for GRAMA's 1994 fee amendments. Instead of the word "compiles," the Colorado statute uses the phrase "manipulation of data." If GRAMA's fee provision was

intended to have a similar meaning as Colorado's statute, the word "compiles" must be read to mean something more than retrieving requested documents from multiple sources. The phrase "manipulation of data" instead suggests that the entity has been asked to perform a task which generates a new record with an increased value to the requester beyond that of the raw information contained in the existing records. Here, no such work was requested by Graham or performed by the District in response to his GRAMA request. Like the additional fees provided in the model Colorado statute, the charges in § 63-2-203(2) were not intended to apply to requests for access to existing records, such as Graham's.

C. Underlying Policy Considerations

Because conditioning access to public records upon payment of substantial fees will undoubtedly chill exercise of the public's constitutional right of access, this Court should limit the application of § 63-2-203(2) to those exceptional circumstances under which the provision most clearly applies. The public's right of access to government records is a right of constitutional dimension. In Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), the United States Supreme Court observed that the First Amendment was primarily intended to protect public debate essential to self-government, and because "meaningful self-government requires an informed electorate, . . . where the representative government itself maintains control of information essential to such an informed public discourse, the government may be affirmatively required to provide that information to the public." Eugene Cerruti, Dancing in the Courthouse: The First Amendment Right of Access Opens a New Round, 29 U. Rich. L. Rev. 237, 239 (1995); see also Society of Professional Journalists v. Briggs, 675 F.Supp. 1308, 1310 (D. Utah 1987) (recognizing First Amendment right of access to public records).

The public's right of access implicit in the First Amendment must be closely guarded to protect the unrestricted flow of information necessary for self-government.

In drafting Utah's open records act, the Utah Legislature expressly recognized the public's "constitutional right[] . . . of access to information concerning the conduct of the public's business." Utah Code Ann. § 63-2-102(1) (1997). In drafting GRAMA's provisions, the Utah Legislature intended to "promote the public's right of easy and reasonable access to unrestricted public records." Utah Code Ann. § 63-2-102 (3)(a). The Act permits limitations on the public's right of access only as expressly provided by statute when the "public interest in allowing restrictions on access to records may outweigh the public's interest in access." Utah Code Ann. §§ 63-2-102(3)(b), -201(2) (1997).

The Utah Supreme Court has recognized "that it is the policy of this state that public records be kept open for public inspection in order to prevent secrecy in public affairs." KUTV, Inc. v. Utah State Bd. of Educ., 689 P.2d 1357, 1361 (Utah 1984) (citation omitted); see also Rathmann v. Davenport Community Sch. Dist., 1998 Iowa Sup. LEXIS 137, *11-12 (Iowa July 1, 1998) (holding that purpose of state open records acts is "'to open the doors of government to public scrutiny--to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act'"). Because the purpose and intention of state open records acts is "to further the concept of open government, . . . charges for public records must be kept to a minimum . . . so as to maximize access thereto." Shultz v. New York Board of Elections, 633 N.Y.S.2d 915, 922 (N.Y. App. Div. 1995).

A government body's unauthorized imposition of fees as a condition of access to public records is just as harmful to the public interest in open government as an outright

denial of access to such records. Government agencies should not be permitted to use GRAMA's fee provisions as a mechanism to hinder access to public records, or make it difficult or impossible for those who monitor or are critical of the agency to access agency information. See State of Hawai'i Org. of Police Officers v. Society of Professional Journalists, 927 P.2d 386, 400-01 (Haw. 1996).

The statute's plain language, its legislative history, and public policy considerations all favor a construction of § 63-2-203(2) that allows charges for staff time only when an individual requests that the governmental entity provide the records in a custom format. Because Graham requested access to the District's records in their existing format, the Court should hold that § 63-2-203(2) does not apply to the facts of this case and that the District may not charge Graham \$280.00 as a condition of access.

II. BECAUSE GRAMA DIRECTS GOVERNMENTAL ENTITIES TO ALLOW INSPECTION OF PUBLIC RECORDS FREE OF CHARGE, THE DISTRICT'S REFUSAL TO PERMIT GRAHAM TO INSPECT THE RECORDS WITHOUT PRE-PAYMENT OF THE "COMPILATION" FEE WAS UNLAWFUL.

Even if the District is permitted to charge a "compilation" fee under § 63-2-203 to recover its actual costs to provide *copies* of the subject records to Graham, the District is not permitted to charge Graham for merely *inspecting* the records. GRAMA *expressly* provides that a governmental entity may not charge a fee for allowing an individual to inspect public records. See Utah Code Ann. §§ 63-2-201(1), -203(5) (1997). There is no exception to this statutory proscription. Subsection (5) of § 63-2-203 reads as follows:

- (5) A governmental entity may *not* charge a fee for:
 - (a) reviewing a record to determine whether it is subject to disclosure, except as permitted by Subsection (2)(b); or

(b) *inspecting a record*.

Utah Code Ann. § 63-2-203 (1997) (emphasis added). Unlike subsection (5)(a), subsection (5)(b), which prohibits fees for inspecting a record, is not subject to the fee provisions of subsection (2)(b). GRAMA's mandate that the public be allowed to inspect public records free of charge is express, absolute, and not subject to the "compilation" fees provided in subsection (2)(b).

The Minnesota Supreme Court's interpretation of that state's fee statute is helpful in understanding the effect of GRAMA's free inspection provisions on its compilation fee provisions. Like GRAMA, Minnesota's open records statute prohibits fees for inspection of public records yet separately allows an agency to charge for search, retrieval, and compilation of information in certain limited circumstances. See Minn. Stat. § 13.03(3) (1990). Noting that the "purpose of this provision is to prevent the assessment of fees for mere requests to inspect public data," the Minnesota Supreme Court held that "[n]o charge may be assessed for access to or inspection of public data or for the cost of retrieving and compiling documents for inspection." Demers v. City of Minneapolis, 468 N.W.2d 71, 75 (Minn. 1991).

Like the Minnesota statute, GRAMA prohibits fees for inspection of public records but allows agencies to charge for search, retrieval and compilation of records in certain circumstances. See Utah Code Ann. § 63-2-203(2) & (5) (1997). However, the compilation fee provisions must not be interpreted in a way that would defeat the Legislature's clearly expressed and unqualified intention that the public be permitted to inspect records free of charge. Instead, because there is no indication in the act that the Legislature intended to limit or condition the public's statutory right to inspect government records free of charge, this

Court should hold that the District wrongfully prevented Graham from inspecting the District's records based on non-payment of the "compilation" fee.

III. PURSUANT TO UTAH CODE ANN. § 63-2-802, THIS COURT SHOULD AWARD GRAHAM REASONABLE ATTORNEYS' FEES AND COSTS INCURRED IN PURSUING THIS APPEAL BECAUSE THE DISTRICT WRONGFULLY DENIED ACCESS TO PUBLIC RECORDS WHICH GRAHAM HAD A RIGHT TO INSPECT.

Because the District withheld access to public records in violation of GRAMA, Graham is entitled to reasonable attorneys' fees and costs incurred in appealing the District's decision. GRAMA's applicable provisions on attorneys' fees read in relevant part:

(2)(a) A district court may assess against any governmental entity or political subdivision reasonable attorneys' fees and other litigation costs reasonable incurred in connection with a judicial appeal of a denial of a records request if the requester substantially prevails.

(b) In determining whether to award attorneys' fees under this section, the court shall consider:

- (i) the public benefit derived from the case;
- (ii) the nature of the requester's interest in the records; and
- (iii) whether the governmental entity's or political subdivision's actions had a reasonable basis.

Utah Code Ann. § 63-2-802(2) (1997). If Graham substantially prevails on the merits of this appeal, the three considerations outlined in § 63-2-802 support awarding Graham attorneys' fees.

First, if Graham prevails, the public benefit derived from this case will be significant. By pursuing this appeal, Graham may succeed in preventing governmental entities from effectively denying public access to government records by charging excessive fees.

Second, Graham requested the District's records to advance the public's collective interest in promoting clean air and minimizing sources of air pollution, not for any

commercial purpose. As a clean-air activist and member of a watchdog group on air pollution, Graham requested the records as part of an on-going effort to monitor the District's activities to ensure that it was acting in accordance with the law and the best interests of the public. Records requests for the purpose of educating the public about the activities of the government in order to effect political change further the essential purpose of the open records act: to facilitate informed public discourse essential to self-government.

Third, 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, Graham put the District on notice from the start that it could not lawfully levy the "compilation" fee as a condition of access to the records. Graham pointed out the specific statutory provisions of GRAMA that allowed him to inspect the records free of charge and which precluded the District from levying its punitive "compilation" fee. In the face of such notice and the clear language of the statute, the District persisted in defending its position through two administrative hearings and proceedings in the trial court, during which Graham represented himself *pro se*. In light of such facts and the public interests at stake, the District's actions were not reasonable and an award of attorneys' fees in this case is proper and just.

Because Graham's original GRAMA request and his pursuit of this appeal are in the public interest, Graham is entitled to attorneys' fees incurred as a result of the District's unlawful refusal to allow Graham to inspect or copy the requested records without prepayment of the "compilation" fee.

CONCLUSION

For the foregoing reasons, Graham respectfully requests that this Court reverse the trial court's entry of summary judgment in favor of the District, 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 14 day of September, 1998.

PARR WADDOUPS BROWN GEE & LOVELESS

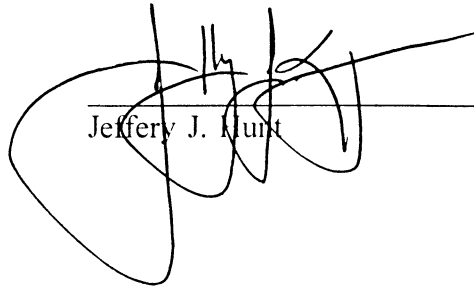


Jeffrey J. Hunt
Attorneys for Plaintiff/Appellant Mark Graham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of September 1998, I mailed two (2) true and correct copies of the foregoing BRIEF OF APPELLANT MARK GRAHAM by United States First Class Mail, postage prepaid, to the following:

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



Jeffery J. Hunt

ADDENDUM

FILED

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS SEP 15 1998

MARK GRAHAM,

Appellant/Plaintiff,

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,

Appellees/Defendants.

Julia D'Alesandro
Clerk of the Court

Case No. 980218-CA

**SUPPLEMENTATION OF ADDENDUM TO
BRIEF OF APPELLANT MARK GRAHAM**

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

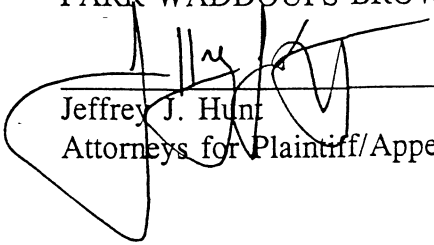
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Appellant Mark Graham, through his undersigned counsel, respectfully submits the attached Ruling of the District Court on Plaintiff's and Defendant's Cross-Motions for Summary Judgment, which was inadvertently omitted from the Addendum to Appellant's Brief filed with the Court on September 14, 1998.

DATED this 15 day of September 1998.

PARR WADDOUPS BROWN GEE & LOVELESS

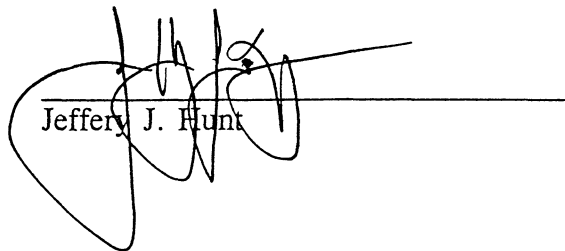


Jeffrey J. Hunt
Attorneys for Plaintiff/Appellant Mark Graham

CERTIFICATE OF SERVICE

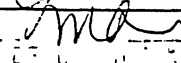
I HEREBY CERTIFY that on the 15 day of September 1998, I mailed two (2) true and correct copies of the foregoing **SUPPLEMENTATION OF ADDENDUM TO BRIEF OF APPELLANT MARK GRAHAM** by United States First Class Mail, postage prepaid, to the following:

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


Jeffery J. Hunt

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY PH '98
STATE OF UTAH

CLERK, DISTRICT COURT

BY: 
CLERK

MARK GRAHAM,

Plaintiff,

v.

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.

**RULING ON PLAINTIFF'S AND
DEFENDANTS' CROSS MOTIONS
FOR SUMMARY JUDGMENT**

Case No. 970700320

The matters of plaintiffs' motion for summary judgment and defendants' cross-motion for summary judgment come before the Court for decision on the parties' respective notices to submit. The Court has reviewed both parties' pleadings and other submitted materials, as well as the applicable law. Having done so, and now being fully advised, it is the Court's conclusion that plaintiff's motion for summary judgment should be denied and defendants' motion for summary judgment should be granted.

FINDINGS OF FACT

The Court finds no dispute as to the following relevant material facts:¹

1. That defendant Davis County Solid Waste Management and Energy Recovery Special Service District ("**District**") is a political subdivision of the State of Utah and a "governmental entity" pursuant to U.C.A. § 63-2-103(9);

¹ The Court has taken the following facts from the parties' memoranda in support and opposition of their respective motions. Plaintiff's facts are not supported by any reference to the record, but as defendant raises no objection and does not dispute such facts, the Court will allow them. Plaintiff disputes several of defendant's (properly supported) facts, but only on legal grounds which the Court dismisses and as to their relevancy, not their truthfulness or accuracy. Furthermore, plaintiff provides no reference to any record which would put their truthfulness at issue.

2. That defendant Administrative Control Board (“**Board**”) is the governing body of the district, and has the legal authority to make determinations regarding public access to records in the district’s offices and agencies. The Board is also a “governmental entity” pursuant to U.C.A. § 63-2-103(9);

3. That defendant Bitter is and was at also times relevant to this action the executive director of the District. The Executive Director’s office is a “governmental entity” pursuant to U.C.A. § 63-2-103(9);

4. That in February and April of 1997, the District performed initial compliance testing as required by condition no. 8 of the Approval Order Number DAQE-850-96 dated September 10, 1996 (“**Approval Order**”) issued by the State of Utah Department of Environmental Quality, Division of Air Quality;

5. That on April 28, 1997 plaintiff submitted a written request to the District pursuant to U.C.A. § 63-2-101 *et seq.* of the Utah Government Records access and Management Act (“**GRAMA**”) for the right to inspect as well as copy certain governmental records concerning the 1997 stack tests;

6. That the written request asked for:

1. The current contract(s) between the Special Service District and Dr. H. Gregor Rigo and/or his firm, Rigo & Rigo Associates;

2. Records relating to the stack test(s) conducted during January and/or February, 1997, namely:

a. samples taken, journals, personal field notes, and inspection logs;

b. laboratory analysis of air samples taken;

c. any correspondence between the District and the entities responsible for gathering and/or analyzing and evaluating the air samples subsequent to the date of sampling;

d. memos or internal documents (within the Special Service District) relating to the stack test or the laboratory analysis;

e. any deviation or departure from the prescribed methods for gathering samples and their reason(s), or problems encountered during the sample gathering process.

7. That on May 7, 1997 the District responded to plaintiff in writing. The letter said, in relevant part, “. . . copies will not be made until further request is made by you,” and went on to say, “Staff time and overhead will be billed at \$20.00 per hour for compilation of the documents;

8. That on May 22, 1997 plaintiff wrote to the District asking the District to set a date between May 27 and June 10 (but excluding June 4) for inspection of the requested government records;

9. That on May 29, 1997 the District sent plaintiff some of the material requested, specifically, the District’s contract with Rigo and Rigo Associates;

10. That on June 4, 1997 the District responded in writing by stating its intention to charge the plaintiff \$280.00 for staff time before allowing plaintiff to either inspect or copy the requested material;

11. That on June 9, 1997 plaintiff appealed the District’s denial to Bitter, the District’s executive director, pursuant to the District’s Ordinance 92-C, which is in accordance with GRAMA;

12. That on June 24, 1997 Bitter responded in writing, denying the appeal;

13. That on July 2, 1997 plaintiff appealed Bitter’s decision to the Board at its monthly meeting;

14. That on July 2, 1997 the Board voted to deny plaintiff’s appeal, sending written notice of that vote the next day;

15. That the District has never claimed that the government records requested by plaintiff are private, controlled or protected, or that plaintiff has no right to inspect such records;

16. That this action was filed July 30, 1997;

17. That because of the variety of records involved in accommodating Mr. Graham's request, the District could not and did not store them in one document, computer program, or central file;

18. That the District had to take files, documents, and data from several sources and organize them in order to respond to Mr. Graham's request;

19. That the district made a thorough search of all files and records related to the testing to insure that the District produced everything relevant;

20. That in order to do so, it was necessary for the District to contact those people who may have been involved in the testing at issue and obtain their assistance;

21. That John Watson, Bart Baker, certain operators and maintenance personnel, and Jack Schmidt searched, retrieved, and compiled the records requested by Mr. Graham. Collectively, they spent a total of 14 hours;

22. That the District retrieved and compiled information from District files located at individual employees' work stations, daytimers, operator logs, testing protocols, general District files that may relate to testing, and a computer database;

23. That research on the computer database was a time-consuming process. The database is continually updated, and after a period of time, information stored in the database is downloaded to tape. Some of the information Mr. Graham requested had been stored on tape, requiring an operator to peruse the computer and tapes to locate and print hard copies of the information plaintiff requested;

24. That the district assessed plaintiff a \$280.00 fee based on the 14 hours actually expended for the several searches by the District staff;

25. That in compliance with GRAMA and the Ordinance, plaintiff will not be charged for time incurred in reviewing the records to determine whether they were private, controlled or

protected under GRAMA, although a review of the records requested by plaintiff was made to make such a determination;

26. That staff time charges assessed by the District on plaintiff's records request were based on the Ordinance, but were less than actual cost because employees who reviewed the files are paid more than \$20.00 per hour;

27. That recently, the District was charged \$25.00 per hour for staff time incurred by Hill Air Force Base in responding to Freedom of Information Act request by the District.

STANDARD OF REVIEW

Before turning to the merits of the case, the Court notes the applicable standard of review. Summary judgment is appropriate "only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Beynon v. St. George-Dixie Lodge # 1743, 854 P.2d 513, 514-515 (Utah 1993); see also Alf v. State Farm Fire and Cas. Co., 850 P.2d 1272, 1274 (Utah 1993).

In considering a motion for summary judgment, the Court must examine the evidence in "a light most favorable to the party opposing summary judgment." Hunt v. Hurst, 785 P.2d 414, 415 (Utah 1990). Allegations or denials in the pleadings are not a sufficient basis for opposing summary judgment, see Hall v. Fitzgerald, 671 P.2d 224 (Utah 1983), and when a motion for summary judgment is filed and supported by an affidavit or affidavits, the party opposing the motion has an affirmative duty to respond with affidavits or other materials allowed by Rule 56(e) of the Utah Rules of Civil Procedure. See D & L Supply v. Saurini, 775 P.2d 420 (Utah 1989); Thayne v. Beneficial Utah Inc., 874 P.2d 120 (Utah 1994). Rule 4-501(2)(b) of the Utah Code of Judicial Administration states:

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or

sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(emphasis added)

LEGAL ARGUMENTS AND RULING

Upon competing motions for summary judgment, there appear to be few disputed facts between the parties. Plaintiff, in his reply memo, well characterizes the essential dispute between the parties as concerning the interpretation and application of GRAMA statutes, specifically U.C.A. § 63-2-203(2), to the facts of this case. U.C.A. § 63-2-203(2) reads as follows:

(2) When a governmental entity compiles a record in a form other than that normally maintained by the governmental entity, the actual costs under this section may include the following:

(a) the cost of staff time for summarizing, compiling, or tailoring the record either into an organization or media to meet the person's request;

(b) the cost of staff time for search, retrieval, and other direct administrative costs for complying with a request. The hourly charge may not exceed the salary of the lowest paid employee who, in the discretion of the custodian of records, has the necessary skill and training to perform the request; provided, however, that no charge may be made for the first quarter hour of staff time; and

(c) in the case of fees for a record that is the result of computer output other than word processing, the actual incremental cost of providing the electronic services and products together with a reasonable portion of the costs associated with formatting or interfacing the information for particular users, and the administrative costs as set forth in Subsections (2)(a) and (b).

Defendants argue that the \$280.00 fee they request is provided for by the statute. Plaintiff argues it is not. The parties are before the Court, requesting the Court resolve their dispute.

Plaintiff's critical argument revolves around the meaning of the words "compile" and "form" and their context, in the phrase: "When a governmental entity compiles a record in a form other than that normally maintained by the governmental entity, the actual costs under this

section may include the following: [.]” Plaintiff argues that the meanings of “compile” and “form” are vague and ambiguous and as such must be construed as narrowly as possible, thereby excluding all charges for any records that are already maintained by the government agency, and only allowing charges for a record that is “transformed” into a different record. Defendants argue that the fees they are charging are allowable under the plain reading of the statute.

The Utah Supreme Court has expressed guidelines on statutory construction as follows:

The applicable principles of statutory construction are clear. "We look first to the plain language of the statute to discern the legislative intent 'Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy consideration.'"

City of South Salt Lake v. Salt Lake County, 925 P.2d 954, 957 (Utah 1996). Furthermore,

Indeed, it is a "fundamental principle of statutory construction (and . . . of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."

State v. Hunt, 906 P.2d 311, 313 (Utah 1995). Finally, “[w]e must assume that each term in the statute was used advisedly by the Legislature and that each should be interpreted and applied according to its usually accepted meaning.” West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982).

In the Court’s opinion, the statute is neither vague nor ambiguous, nor is it difficult to construct, given the plain meaning of its terms. Defendants provide that *Webster’s New World Dictionary* defines “compile” as: “to gather and put together (statistics, facts, etc.) in an orderly form” and “to compose (a book, etc.) of materials gathered from various sources.” *Webster’s* defines “form,” *inter alia*, as: “the particular mode of existence a thing has or takes;” “arrangement, esp. orderly arrangement; way in which parts of a whole are organized; pattern; style. . .”²

² *Webster’s New World Dictionary*, (2d ed. 1980) 290, and 548, respectively. By coincidence, the Court uses the same dictionary, and has reviewed these citations for accuracy.

Plaintiff's request consists of records falling into five separate categories (*see*, Court's Findings of Fact No. 6, a-e, *supra*). Defendants' un rebutted evidence, from the affidavit of John K. Schmidt submitted in support of their memorandum, shows that 14 hours of staff time was spent in responding to plaintiff's request (*see*, Court's Findings of Fact Nos. 17-23, *supra*). From the facts submitted it is quite clear to the Court that the requested fee was incurred as a direct result of the District's "summarizing, compiling [and] tailoring the record either into an organization or media to meet the person's request;" their "search, retrieval, and other direct administrative costs for complying with [the] request; and "the actual incremental cost of providing the electronic services and products together with a reasonable portion of the costs associated with formatting or interfacing the information for particular users, and the administrative costs as set forth in Subsections (2)(a) and (b)." [*See* U.C.A. § 63-2-203(2)(a)-(c).]

Plaintiff argues that the District should have been able to respond to his requests by simply retrieving the records and presenting them to him, yet does not support these allegations by evidence acceptable under Rule 56, U.R.Civ.P.³ As made clear by defendants, the records were kept in neither the form nor the media requested by plaintiff and they therefore needed to be "compiled" into that form to conform to his requests.

The Court finds that the common meaning of the terms "compile" and "form" would include the work performed by the District. As further support, the context of the words within the statute supports this conclusion. "Compile" is the only verb in U.C.A. § 63-2-203(2) defining what actual costs may be charged for. Therefore, as the same section goes on to state "the actual costs under this section *may include the following*. . .," any of the tasks listed at 63-2-203(2)(a) through (c) must, by necessity, be encompassed within the term "compile." Any other

³ Plaintiff's comment with respect to the storage capacity of Iomega "Zip" data storage drives is neither supported by evidence, nor relevant. Defendants supported averment is that the data had to be pulled from several sources, and that old files were constantly being put on computer storage tapes, necessitating the time for perusing such files to find and copy the relevant requested material.

reading of the section would be nonsensical, and, in the Court's opinion, could only with great difficulty be seriously argued.

Plaintiff does not dispute the actual number of staff hours worked nor the rate charged. As such, the Court would find both reasonable under the statute as well as in the Court's experience. In sum, the Court finds defendant's facts and arguments persuasive, and would award summary judgment in their favor.

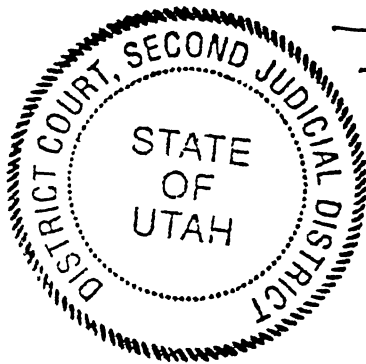
CONCLUSION

Based on the foregoing reasons, the Court rules that plaintiff's Motion for Summary Judgment is HEREBY DENIED. Defendants' Cross-Motion for Summary Judgment is .
HEREBY GRANTED.

No attorneys' fees are awarded.

Dated April 6, 1998.

BY THE COURT:



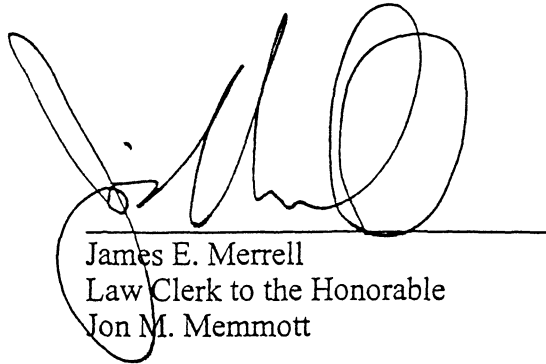
Jon M. Memmick
DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling on April 6th, 1998, postage prepaid, to the following:

Mark Graham
Plaintiff Pro Se
2211 East 1200 North
Layton, Utah 84040

Larry S. Jenkins
Susan J. Mueller
Attorneys for Defendants
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111



James E. Merrell
Law Clerk to the Honorable
Jon M. Memmott

Constitutional Provisions and Statutes

Section		Section	
63-2-802.	Injunction — Attorneys' fees.	63-2-903.	Duties of governmental entities.
63-2-803.	No liability for certain decisions of a governmental entity or a political subdivision.	63-2-904.	Rulemaking authority.
63-2-804.	Disciplinary action.	63-2-905.	Records declared property of the state — Disposition.
Part 9		63-2-906.	Certified and microphotographed copies.
Archives and Records Service		63-2-907.	Right to replevin.
63-2-901.	Division of Archives and Records Service created — Duties.	63-2-908.	Inspection and summary of record series.
63-2-902.	State archivist — Duties.	63-2-909.	Records made public after 75 years.

PART 1

GENERAL PROVISIONS

63-2-101. Short title.

This chapter is known as the "Government Records Access and Management Act."

History: C. 1953, 63-2-101, enacted by L. 1991, ch. 259, § 8.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Governmental Law, 1992 Utah L. Rev. 375.

Am. Jur. 2d. — 66 Am. Jur. 2d Records and Recording Laws §§ 1, 2.

C.J.S. — 76 C.J.S. Records §§ 1, 2.

A.L.R. — What constitutes "final opinion" or "order" of federal administrative agency required to be made available for public inspection and copying within meaning of 5 USCS § 552(a)(2)(A), 114 A.L.R. Fed. 287.

63-2-102. Legislative intent.

- (1) In enacting this act, the Legislature recognizes two constitutional rights:
 - (a) the public's right of access to information concerning the conduct of the public's business; and
 - (b) the right of privacy in relation to personal data gathered by governmental entities.

(2) The Legislature also recognizes a public policy interest in allowing a government to restrict access to certain records, as specified in this chapter, for the public good.

- (3) It is the intent of the Legislature to:

- (a) promote the public's right of easy and reasonable access to unrestricted public records;
- (b) specify those conditions under which the public interest in allowing restrictions on access to records may outweigh the public's interest in access;
- (c) prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter;
- (d) provide guidelines for both disclosure and restrictions on access to government records, which are based on the equitable weighing of the

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.

Meaning of “this act.” — The phrase “this

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

available to the public within a reasonable time. While "reasonable time" might vary, it would necessarily be before any important action was to take place. *Conover v. Board of Educ.*, 1 Utah 2d 375, 267 P.2d 768 (1954).

—Survey questionnaire and responses.

School board's survey questionnaire concerning religious and racial discrimination at school and student responses thereto were "public records" and would be subject to inspection by an interested citizen unless they were confidential or of such a nature that it would be in

public interest to prevent disclosure; in an action to compel disclosure, district court should have held an in camera inspection of the questionnaire and permitted disclosure unless it specifically found, on basis of its inspection, that it would be impossible to edit the questionnaire responses to preserve confidentiality and/or that release of documents in whole or in part would be clearly contrary to public interest. *KUTV, Inc. v. Utah State Bd. of Educ.*, 689 P.2d 1357 (Utah 1984).

COLLATERAL REFERENCES

Utah Law Review. — Note, *Society of Professional Journalists v. Briggs: Toward a Differential Balancing Test for the Right of Access*, 1989 Utah L. Rev. 787.

63-2-104. Administrative Procedures Act not applicable.

Title 63, Chapter 46b, Administrative Procedures Act, does not apply to this chapter except as provided in Section 63-2-603.

History: C. 1953, 63-2-104, enacted by L. 1991, ch. 259, § 11; 1992, ch. 280, § 16.

63-2-105. Confidentiality agreements.

If a governmental entity or political subdivision receives a request for a record that is subject to a confidentiality agreement executed before April 1, 1992, the law in effect at the time the agreement was executed, including late judicial interpretations of the law, shall govern access to the record, unless all parties to the confidentiality agreement agree in writing to be governed by the provisions of this chapter.

History: C. 1953, 63-2-105, enacted by L. 1992, ch. 280, § 17.

PART 2

ACCESS TO RECORDS

63-2-201. Right to inspect records and receive copies of records.

(1) Every person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours, subject to Sections 63-2-203 and 63-2-204.

(2) All records are public unless otherwise expressly provided by statute.

(3) The following records are not public:

(a) records that are private, controlled, or protected under Sections 63-2-302, 63-2-303, and 63-2-304; and

(b) records to which access is restricted pursuant to court rule, another state statute, federal statute, or federal regulation, including records for

which access is governed or restricted as a condition of participation in a state or federal program or for receiving state or federal funds.

(4) Only those records specified in Section 63-2-302, 63-2-303, or 63-2-304 may be classified private, controlled, or protected.

(5) (a) A governmental entity may not disclose a record that is private, controlled, or protected to any person except as provided in Subsection (5)(b), Section 63-2-202, or Section 63-2-206.

(b) A governmental entity may disclose records that are private under Subsection 63-2-302(2) or protected under Section 63-2-304 to persons other than those specified in Section 63-2-202 or 63-2-206 if the head of a governmental entity, or a designee, determines that there is no interest in restricting access to the record, or that the interests favoring access outweighs the interest favoring restriction of access.

(6) (a) The disclosure of records to which access is governed or limited pursuant to court rule, another state statute, federal statute, or federal regulation, including records for which access is governed or limited as a condition of participation in a state or federal program or for receiving state or federal funds, is governed by the specific provisions of that statute, rule, or regulation.

(b) This chapter applies to records described in Subsection (a) insofar as this chapter is not inconsistent with the statute, rule, or regulation.

(7) A governmental entity shall provide a person with a certified copy of a record if:

- (a) the person requesting the record has a right to inspect it;
- (b) the person identifies the record with reasonable specificity; and
- (c) the person pays the lawful fees.

(8) (a) A governmental entity is not required to create a record in response to a request.

(b) Upon request, a governmental entity shall provide a record in a particular format if:

- (i) the governmental entity is able to do so without unreasonably interfering with the governmental entity's duties and responsibilities; and
- (ii) the requester agrees to pay the governmental entity for its costs incurred in providing the record in the requested format in accordance with Section 63-2-203.

(c) Nothing in this section requires a governmental entity to fulfill a person's records request if the request unreasonably duplicates prior records requests from that person.

(9) If a person requests copies of more than 50 pages of records from a governmental entity, and, if the records are contained in files that do not contain records that are exempt from disclosure, the governmental entity may:

- (a) provide the requester with the facilities for copying the requested records and require that the requester make the copies himself; or
- (b) allow the requester to provide his own copying facilities and personnel to make the copies at the governmental entity's offices and waive the fees for copying the records.

(10) (a) A governmental entity that owns an intellectual property right and that offers the intellectual property right for sale or license may control by ordinance or policy the duplication and distribution of the material based on terms the governmental entity considers to be in the public interest.

(b) Nothing in this chapter shall be construed to limit or impair the rights or protections granted to the governmental entity under federal copyright or patent law as a result of its ownership of the intellectual property right.

(11) A governmental entity may not use the physical form, electronic or otherwise, in which a record is stored to deny, or unreasonably hinder the rights of persons to inspect and receive copies of a record under this chapter.

History: C. 1953, 63-2-201, enacted by L. 1991, ch. 259, § 12; 1992, ch. 280, § 18; 1994, ch. 194, § 1.

Amendment Notes. — The 1994 amend-

ment, effective May 2, 1994, added "in accordance with Section 63-2-203" at the end of Subsection (8)(b)(ii) and made stylistic changes.

COLLATERAL REFERENCES.

A.L.R. — State freedom of information act requests: right to receive information in particular medium or format, 86 A.L.R.4th 786.

63-2-202. Access to private, controlled, and protected documents.

- (1) Upon request, a governmental entity shall disclose a private record to:
 - (a) the subject of the record;
 - (b) the parent or legal guardian of an unemancipated minor who is the subject of the record;
 - (c) the legal guardian of a legally incapacitated individual who is the subject of the record;
 - (d) any other individual who:
 - (i) has a power of attorney from the subject of the record;
 - (ii) submits a notarized release from the subject of the record or his legal representative dated no more than 90 days before the date the request is made; or
 - (iii) if the record is a medical record described in Subsection 63-2-302(1)(b), is a health care provider, as defined in Subsection 26-33a-102(7), if releasing the record or information in the record is consistent with normal professional practice and medical ethics; or
 - (e) any person to whom the record must be provided pursuant to court order as provided in Subsection (7) or a legislative subpoena as provided in Title 36, Chapter 14.
- (2) (a) Upon request, a governmental entity shall disclose a controlled record to:
 - (i) a physician, psychologist, certified social worker, insurance provider or agent, or a government public health agency upon submission of a release from the subject of the record that is dated no more than 90 days prior to the date the request is made and a signed acknowledgment of the terms of disclosure of controlled information as provided by Subsection (b); and
 - (ii) any person to whom the record must be disclosed pursuant to court order as provided in Subsection (7) or a legislative subpoena as provided in Title 36, Chapter 14.

63-2-203. Fees.

(1) A governmental entity may charge a reasonable fee to cover the governmental entity's actual cost of duplicating a record. This fee shall be approved by the governmental entity's executive officer.

(2) When a governmental entity compiles a record in a form other than that normally maintained by the governmental entity, the actual costs under this section may include the following:

(a) the cost of staff time for summarizing, compiling, or tailoring the record either into an organization or media to meet the person's request;

(b) the cost of staff time for search, retrieval, and other direct administrative costs for complying with a request. The hourly charge may not exceed the salary of the lowest paid employee who, in the discretion of the custodian of records, has the necessary skill and training to perform the request; provided, however, that no charge may be made for the first quarter hour of staff time; and

(c) in the case of fees for a record that is the result of computer output other than word processing, the actual incremental cost of providing the electronic services and products together with a reasonable portion of the costs associated with formatting or interfacing the information for particular users, and the administrative costs as set forth in Subsections (2)(a) and (b).

(3) Fees shall be established as follows:

(a) Governmental entities with fees established by the Legislature shall establish the fees defined in Subsection (2), or other actual costs associated with this section through the budget process. Governmental entities with fees established by the Legislature may use the procedures of Section 63-38-3.2 to set fees until the Legislature establishes fees through the budget process. A fee set by a governmental entity in accordance with Section 63-38-3.2 expires on May 1, 1995.

(b) Political subdivisions shall establish fees by ordinance or written formal policy adopted by the governing body.

(c) The judiciary shall establish fees by rules of the judicial council.

(4) A governmental entity may fulfill a record request without charge and is encouraged to do so when it determines that:

(a) releasing the record primarily benefits the public rather than a person;

(b) the individual requesting the record is the subject of the record, or an individual specified in Subsection 63-2-202(1) or (2); or

(c) the requester's legal rights are directly implicated by the information in the record, and the requester is impecunious.

(5) A governmental entity may not charge a fee for:

(a) reviewing a record to determine whether it is subject to disclosure, except as permitted by Subsection (2)(b); or

(b) inspecting a record.

(6) (a) A person who believes that there has been an unreasonable denial of a fee waiver under Subsection (4) may appeal the denial in the same manner as a person appeals when inspection of a public record is denied under Section 63-2-205.

(b) The adjudicative body hearing the appeal has the same authority when a fee waiver or reduction is denied as it has when the inspection of a public record is denied.

(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

63-2-802. Injunction — Attorneys' fees.

(1) A district court in this state may enjoin any governmental entity or political subdivision that violates or proposes to violate the provisions of this chapter.

(2) (a) A district court may assess against any governmental entity or political subdivision reasonable attorneys' fees and other litigation costs reasonably incurred in connection with a judicial appeal of a denial of a records request if the requester substantially prevails.

(b) In determining whether to award attorneys' fees under this section, the court shall consider:

(i) the public benefit derived from the case;

(ii) the nature of the requester's interest in the records; and

(iii) whether the governmental entity's or political subdivision's actions had a reasonable basis.

(c) Attorneys' fees shall not ordinarily be awarded if the purpose of the litigation is primarily to benefit the requester's financial or commercial interest.

(3) Neither attorneys' fees nor costs shall be awarded for fees or costs incurred during administrative proceedings.

(4) Notwithstanding Subsection (2), a court may only award fees and costs incurred in connection with appeals to district courts under Subsection 63-2-404(2) if the fees and costs were incurred 20 or more days after the requester provided to the governmental entity or political subdivision a statement of position that adequately explains the basis for the requester's position.

(5) Claims for attorneys' fees as provided in this section or for damages are subject to Title 63, Chapter 30, Governmental Immunity Act.

History: C. 1953, 63-2-802, enacted by L. 1991, ch. 259, § 39; 1992, ch. 280, § 47.

63-2-803. No liability for certain decisions of a governmental entity or a political subdivision.

Neither the governmental entity or political subdivision, nor any officer or employee of the governmental entity or political subdivision, is liable for damages resulting from the release of a record where the person or government requesting the record presented evidence of authority to obtain the record even if it is subsequently determined that the requester had no authority.

History: C. 1953, 63-2-803, enacted by L. 1991, ch. 259, § 40; 1992, ch. 280, § 48.

63-2-804. Disciplinary action.

A governmental entity or political subdivision may take disciplinary action which may include suspension or discharge against any employee of the governmental entity or political subdivision who intentionally violates any provision of this chapter.

Appendix A

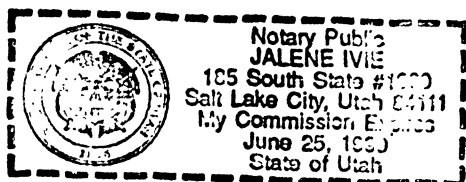
Senate during debates on Senate Bill 147 held on Day 24 of the 1994 General Session.

DATED this 10th day of September, 1998.

Diana Vagen

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

SUBSCRIBED AND SWORN TO before me this 10th day of September, 1998.



Jaleene Ivie

My commission expires:

June 25, 1999

Residing at:

Salt Lake County, Utah

50th Utah Legislature, General Session 1994, 24th day.
Senate Floor Debates, February 9, 1994.
Senate tape 21, line 3405

1 President: Senate Bill 147.

2
3 Clerk: Senate Bill 147 adequate funding for records request for Senator Dave Steele and
4 the committee report February 7, 1994. Mr. President, the education committee
5 reports favorable recommendation on Senate Bill 147 with a minimum sum page
6 5 and 6 respectfully Howard A. Stevenson, Committee Chair.

7
8 President: Senator Steele.

9
10 Steele: Motion to adopt the committee report.

11
12 President: Those in favor say aye.

13
14 Senators: Aye.

15
16 President: Opposed no. Motion carries. Senator Steele.

17
18 Steele: Thank you, Mr. President. This body ought to be aware of a couple of GRAMA
19 modifications that you'll be hearing this session. This is the first that I have. I
20 have two of them. This relates to how much a government entity may recoup for
21 their service of providing information records, what we believe to be appropriate
22 and yet recognize that sometimes the request is fairly significant.

23
24 Let me just give you an illustration. This is to a school district: "Description of
25 records sought: documents relating to out-of-court and court-ordered civil
26 settlements between the district, its agents, assigns and aggrieved parties between
27 June 1990 and September 1993." Think about that for just a moment, the amount
28 of time that that would take, staff time to be involved in supplying that type of
29 record information. Well, we're not trying to hide any records, and we're certainly
30 not trying to make it so expensive that people can't participate in getting records,
31 so that's the reason for this bill to see if we can clarify it a little bit.

32
33 If you look with me on page 3 the first change, you'll see that it said "a requestor
34 agrees to pay the government entity for its costs incurred in providing the record
35 in the requested format in accordance with the fee section." So if you'd move with
36 me from page 3 to page 5, this is the heart of the bill, the fee section. It has been
37 amended and I'll need to walk with the amendment very quickly on the first line
38 because we are running out of time. Page 5 line 2 after the word record the bill has

1 been amended to complete that sentence with a period so it reads: "A governmental
2 entity may charge a reasonable fee to cover the governmental entity's actual costs
3 of duplicating a record." Then that next language has been deleted and then
4 reinserted "this fee shall be approved by the governmental entity's executive
5 officer." So we don't want someone that is providing this information just to make
6 an arbitrary decision that the record is going to cost so much. It needs to be
7 reviewed by the appropriate governmental entity's executive.

8
9 Now, this new section 2: "When a governmental entity compiles a record in a form
10 other than that normally maintained by the governmental entity." So if we've made
11 a change—it's not just the exact same form, we've asked them to modify that form—
12 then this is what that section deals with. And it simply outlines that the cost of staff
13 time for research could be incurred. If you look at line 13 notice "no charge may
14 be made for the first quarter hour of staff time" in making this in a different form
15 than is normally maintained. So we're giving that requestor an opportunity to
16 access the governments ability to respond to the first 15 minutes of no charge.

17
18 I'd be happy to entertain any questions. I see Senator Oakey has one.

19
20 President: Senator Oakey.

21
22 Oakey: Thank you Mr. President. Senator Steele, I notice here on page 5 on line 17 it
23 says "costs associated with building and maintaining the information system."
24 Would that include the costs of the building and maintaining the information that's
25 going to be put on this record that they're trying to access.

26
27 Steele: There are systems like the GIS system and networks of on-line services and so
28 that's the process. Now that area both had some discussion and I have been
29 waiting for some proposal of language to amend that and haven't seen that yet.
30 I'm sure it's going to coming so I'm not in any hurry to move it forward without
31 further input from some people. But yes, that database collection process is what
32 we're addressing.

33
34 Oakey: Well, let me say that I think this is a major policy issue that we need to debate in
35 the legislature. I have a bill which will set up an information network to be
36 potentially called "Utah Net" and the bill will provide for the coordination of
37 databases all throughout state government. One of the key issues in that bill is
38 what is going to be the cost of providing access to these databases. The way the

1 Bill is going to read we thought would be to simply reference GRAMA. Because
2 we really have got to decide whether we're going to try to cover more than just our
3 actual out-of-pocket expense for delivering the information or whether we're going
4 to actually charge people for the creation of the data which is going on throughout
5 state government which the taxpayers have paid for in funding each agency. And
6 I don't think we have addressed that question. I can tell you there's a national
7 debate across this country on this very issue and we need to decide as a legislature
8 whether we're going to charge people for the cost of creating the data which
9 arguably they have already paid for in funding each of these agencies, their
10 operational expenses in each annual appropriation or whether we're simply going
11 to try to recover our actual costs of delivering the data to them either electronically
12 or through some paper record and so I'm concerned about language in this bill that
13 might make a decision for us that we haven't really focussed on. I think it's a
14 major policy issue. The data we're talking about is created has cost I'm sure
15 hundreds of millions or dollars and if we're going to try to recover all of that cost,
16 then the taxpayers are going to get a big bill every time they try to access the
17 information and I think we need to focus on that issue. I didn't realize it was
18 coming up in this Bill but I'm a little concerned that the language in here is not
19 precise. We'll open the door for that and personally I'm comfortable and I think
20 the members of the Senate are willing to decide what we're willing to do.

21
22 Steele: I appreciate your sensitivity of this because it is a major issue. This isn't one that
23 is glossed over and certainly the creation of GRAMA was done under a two year
24 process with a great deal of debate so Senator Oakey's comments I would hope
25 we'd all register because it is a direction of policy and a statement of policy. It is
26 not unique. This language is taken exactly from the Colorado statute and we talked
27 about that in our committee. And there is one other line of amendment that I could
28 draw your attention to on line 21 and 22. The amendment causes the language to
29 read this way "Governmental entities with fees established by the legislature" and
30 notice who are establishing those "shall establish the fees defined in the subsection
31 2" that's above the language that Senator Oakey was talking about "or the actual
32 cost associated with this section." Again, then it is giving that review of the
33 legislative process to these fees and charges. So it isn't done with a whimsical
34 process; it would give the authority to this body of the legislature to be
35 participatory. Now Senator, that language I just read was part of the amendment
36 and you'd have to be reading from that amendment page to identify that as well,
37 but I see that we're...
38

50th Utah Legislature, General Session 1994, 24th day.
Senate Floor Debates, February 9, 1994.
Senate tape 21, line 3405

1 Oakey: I have the amendment page here.
2
3 Steele: The day it came out with the Committee Report.
4
5 So, Mr. President, I notice that we're to noon if we just want to hold it over and
6 discuss it further, I'm certainly welcome, happy to do that.
7
8 Oakey: I think we need to. I certainly would not feel comfortable voting for this bill until
9 I know exactly what we're doing on this issue, because I think we're talking about
10 millions, hundreds of millions of dollars here.