

1998

Mark Graham v. Davis County Solid Waste Management, Energy Recovery Special Service District, The District's Administrative Control Board : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**OF APPEALS
BRIEF**

MARK GRAHAM,)
)
Appellant/Cross-Appellee/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,)
)
Appellees/Cross-Appellants/)
Defendants.)

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DOCKET NO. 980218-CA

Case No. 980218-CA

Priority No. 15

BRIEF OF APPELLEES AND CROSS-APPELLANTS

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

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Attorneys for Appellees/Cross-
Appellants/Defendants

FILED

OCT 19 1998

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

MARK GRAHAM,)	
)	
<i>Appellant/Cross-Appellee/Plaintiff,</i>)	
)	
v.)	
)	
DAVIS COUNTY SOLID WASTE)	Case No. 980218-CA
MANAGEMENT AND ENERGY)	
RECOVERY SPECIAL SERVICE)	Priority No. 15
DISTRICT, THE DISTRICT'S)	
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BOARD and LeGRAND BITTER, THE)	
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Attorneys for Appellees/Cross-
Appellants/Defendants

COMPLETE LIST OF ALL PARTIES IN THE TRIAL COURT

Residents of Davis County Clear Air Committee, the original plaintiff.

According to documents in the record, R. 67, the Clear Air Committee includes at least the following individuals:

Mark Graham

David Larson

Pam Larsen

Brian Shuppy

Mark Stull

Angie Stull

Layton Smith

Kathleen Boswell

Ryan J. Boswell

Kent Meacham

Alan Johnson

Terry George

Mark Graham, the substituted plaintiff.

Davis County Solid Waste Management and Energy Recovery Special
Service District.

The Administrative Control Board of the District, which currently is comprised of the following individuals:

Jerry Stevenson, Mayor of the City of Layton

Richard Harvey, Mayor of the City of Fruit Heights

Darin L. Hicks, City Councilman from the City of Woods Cross

Carol R. Page, Davis County Commissioner

Gayle Stevenson, Davis County Commissioner

Dan McConkie, Davis County Commissioner

Michael Barton, City Councilman from the City of Centerville

Curt M. Oda, City Councilman from the City of Clearfield

Arverd Taylor, City Councilman from the City of Clinton

Larry Haugen, City Councilman from the City of Farmington

Brian Cook, Mayor of the City of Kaysville

Tony London, City Councilman from the City of Morgan

Sheila Wilkinson, Morgan County Commissioner

Jim Dixon, Mayor of the City of North Salt Lake

Val J. Petersen, City Councilman from the City of South Weber

Max Hill, City Councilman from the City of Sunset

Jon Jepperson, City Councilman from the City of Syracuse

Val Petersen, City Councilman from the City of West Bountiful

Jay Ritchie, Mayor of the City of West Point

LeGrand W. Bitter, Executive Director of the District

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Utah R. Civ. P. 17(a)

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PRELIMINARY STATEMENT

Mark Graham ("Graham") argues that staff time can be charged to a requester of records under GRAMA only if staff is employed in reformatting the records into media other than how they are kept by the governmental entity (e.g., paper to computer disk or laser disk). Under his interpretation, government staff could be diverted from their normal duties and spend hundreds, if not thousands, of hours compiling records for inspection by a requester, but if the records are kept in paper format by the government and requested to be compiled in paper format for the requester, no staff time charges could be made.

This result cannot be what the Utah Legislature intended. If Graham is right, environmental activists, like himself, and others who oppose the District's¹ solid waste operations for one reason or another could literally pummel the District with far-reaching requests for records under GRAMA and bring District operations to a halt. They would avoid paying staff time costs by simply requesting that the records be produced in the same media maintained by the District. The same could also happen to state agencies that are subject to GRAMA's provisions. Government could be brought to its knees. Graham is wrong, and the Court should affirm the trial court's recognition

¹ The "District" means collectively defendants, appellees, and cross-appellants 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.

that Graham's arguments are "nonsensical" and "could only with great difficulty be seriously argued." R. 253.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1998). The Utah Supreme Court had jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1998), and that court transferred the case to this Court pursuant to Utah Code Ann. § 78-2-2(4) (1998).

ISSUES PRESENTED FOR REVIEW²

1. Did the substitution of Graham as plaintiff simply commence an entirely new, but at that point untimely, appeal from an administrative action of the District where the original complaint was void because it was filed by an unincorporated committee representing itself *pro se*, which committee was prohibited from access to Utah's courts for failure to comply with the Utah Assumed Name Statute?

This issue was raised by the District in its Motion to Dismiss or for Summary Judgment, R. 46-47, and in its Memorandum in Opposition to Plaintiff's Motion to File an Amended Complaint and in Support of Defendants' Motion to Dismiss or for Summary Judgment. R. 49-63. The trial court ruled in Graham's favor

² The District notes that Graham does not set forth in his Issues Presented for Review where each issue was preserved in the trial court.

on this issue and allowed him to be substituted as plaintiff, with the substitution relating back to the date of the filing of the original complaint. R. 144-53.

This is an issue of law that is reviewed for correctness. *Drake v. Industrial Comm'n of Utah*, 939 P.2d 177, 181 (Utah 1997).

2. Does the Utah Government Records Access and Management Act, Utah Code Ann. § 63-2-101, *et seq.* (1997) ("GRAMA"), allow a governmental entity to charge fees for staff time incurred filling a records request only when the requester asks that the records be put in an entirely different format than the records are maintained by the governmental entity, thereby allowing a requester to completely avoid staff time charges, no matter how much time may be required to fill the request, by simply requesting that records be produced in the same format as maintained by the entity?

The trial court ruled in the District's favor on this issue. R. 245-53. It is an issue of law that is reviewed for correctness. *Drake v. Industrial Comm'n of Utah*, 939 P.2d 177, 181 (Utah 1997).

3. If Graham prevails on this appeal, should he be awarded attorney fees under GRAMA even though the District's decision concerning the staff time charges at issue had a reasonable basis as demonstrated by the trial court's carefully reasoned opinion in the District's favor, even though factual issues would need to be resolved before an award of attorney fees could be made, and even though claims for

attorney fees are subject to the procedural requirements of the Utah Governmental Immunity Act?

Because the trial court ruled in the District's favor, it did not award Graham any attorney fees. R. 253.

DETERMINATIVE STATUTORY AND LEGAL PROVISIONS

Copies of the following determinative statutory and legal provisions are reproduced in Addendum A, except the District's Ordinance No. 92-C, which is reproduced in Addendum B:

Utah Code Ann. § 42-2-5 (1997)

Utah Code Ann. § 42-2-10 (1997)

Utah Code Ann. § 63-2-201(1) (1997)

Utah Code Ann. §§ 63-2-203(2), (7) and (8) (1997)

Utah Code Ann. § 63-2-802 (1997)

Utah Code Ann. § 78-51-40 (1997)

Utah R. Civ. P. 15(c)

Utah R. Civ. P. 17(a)

The District's Ordinance No. 92-C

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Trial Court.

Graham seeks review of an order of the trial court dismissing an appeal from an administrative decision under GRAMA made by the District's Administrative Control Board. R. 245-53. Graham, as a member and on behalf of an unincorporated committee called the Residents of Davis County Clear Air Committee (the "Clear Air Committee"), sought to inspect certain records maintained by the District. R. 23. The District refused to allow the Clear Air Committee to review the records prior to payment of a nominal amount to cover 14 hours of staff time incurred by District staff retrieving and compiling the records. R. 24, 27, 28, 32-33. The District's Administrative Control Board affirmed the District's executive director's decision on this issue. R. 34.

The Clear Air Committee, representing itself *pro se* through Graham, who is not a licensed attorney, filed a complaint in the trial court appealing the District's decision. R. 1-34. The District moved to dismiss because, among other reasons, the Clear Air Committee had not registered its assumed name with the Utah Division of Corporations and Commercial Code, and because the Clear Air Committee cannot represent itself in court *pro se*. R. 46-47. Graham moved to "amend" the

complaint by substituting himself as plaintiff. R. 114-15. The trial court granted Graham's motion to amend and denied the District's motion to dismiss. R. 144-53.

Thereafter, Graham filed a motion for summary judgment on the merits, and the District filed a cross-motion for summary judgment. R. 159-73, 174-200. On April 6, 1998, the trial court granted the District's cross-motion for summary judgment in a nine-page decision. R. 245-53.

B. Statement of Facts.

Graham is an individual who is also a member of the Clear Air Committee. R. 146. The Clear Air Committee is allegedly "a non-profit organization dedicated to minimizing air pollution in Davis County." R. 1. Graham is not licensed to practice law in Utah. R. 146. Graham is only one of several members of the Clear Air Committee, as evidenced by correspondence to the District from the Committee signed by several individuals. R. 67.

Defendant Davis County Solid Waste Management and Energy Recovery Special Service District is a political subdivision of the state of Utah and a "governmental entity" pursuant to Utah Code Ann. § 63-2-103(9) (1997). R. 245. Defendant Administrative Control 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 Administrative Control Board is also a "governmental entity" pursuant to Utah Code Ann. § 63-2-103(9) (1997). R. 246.

Defendant LeGrand Bitter is the Executive Director of the district. The Executive Director's office is a "governmental entity" pursuant to Utah Code Ann. § 63-2-103(9) (1997). *Id.*

In February and April of 1997, the District performed initial compliance testing as required by Condition No. 8 of 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. *Id.* On April 28, 1997, Graham, on behalf of the Clear Air Committee, submitted a written request to the District pursuant to GRAMA seeking to inspect and copy certain government records related to the District's February and April 1997 air emissions stack testing. R. 3, 23, 246.

The 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

R. 23, 246-47.

In response, the District provided some of the requested records. R. 3, 24, 247. The District also informed Graham that other documents the Clear Air Committee requested, amounting to hundreds of pages of unbound documents, would be made available after payment of \$280, based on 14 hours of staff time necessary to retrieve and compile the documents. R. 3, 28, 247.

Because of the variety of records involved in accommodating the Clear Air Committee's request, the District could not and did not store them in one document, computer program, or central file. The District had to take files, documents, and data from several sources and organize them in order to respond to the request. The District made a thorough search of all files and records related to the testing to ensure that the District produced everything relevant. R. 240, 248.

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. John Watson, Bart Baker, certain operators and maintenance personnel, and Jack Schmidt searched, retrieved, and compiled the records requested by the Clear Air Committee.

Collectively, they spent a total of 14 hours. 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. 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 the Clear Air Committee requested had been stored on tape, requiring an operator to peruse the computer and tapes to locate and print hard copies of the information requested. R. 240-41, 248.

In compliance with GRAMA and the District's GRAMA Ordinance (*see* Addendum B, Ordinance No. 92-C.), the District does not charge for time incurred in reviewing the records to determine whether they are private, controlled, or protected under GRAMA, although a review of the records the Clear Air Committee requested was made to make such a determination. Staff time charges assessed by the District on the Clear Air Committee's records request were based on the Ordinance, but were less than actual cost because employees who reviewed files to find the requested records are paid more than \$20 per hour. R. 241-42, 248-49.

On or about June 9, 1997, Graham appealed to the District's Executive Director the decision to charge \$20 per hour for staff time. R. 3, 29-31, 247. Graham's appeal to the District's Executive Director was denied. Graham was also

informed of the right to appeal the Executive Director's decision to the District's Administrative Control Board. R. 4, 32-33, 247.

On July 2, 1997, Graham appeared before the Administrative Control Board to appeal the Executive Director's decision. R. 247. At this hearing, he made it clear that he was appearing on behalf of the Clear Air Committee. R. 4, 82. By letter dated July 3, 1997, the Board notified Graham that it denied the Clear Air Committee's appeal by a unanimous vote of its members. The Board found that "[t]he evidence presented to the Board demonstrated that significant time had been incurred by staff to retrieve and compile the records you seek to review. Pursuant to Utah Code Ann. §§ 63-2-203(2)(a) and (b), and Ordinance No. 92-C, section 10, of the District, the Executive Director properly requested that you pay the reasonable cost of staff time—14 hours at \$20.00 per hour—prior to review of the records." R. 4, 34, 247. On July 8, 1997, Graham sent another letter to the District confirming that the appeal to the Administrative Control Board had been taken by the Clear Air Committee. R. 91.

On July 30, 1997, the Clear Air Committee filed this lawsuit appealing the Administrative Control Board's decision. R. 1, 6, 247. The Clear Air Committee filed it purporting to represent itself *pro se* through Graham. R. 1, 6. As of that date, the Clear Air Committee had not registered its name with the Utah Division of Corporations and Commercial Code. R. 93-96.

On September 19, 1997, Graham, who was not a party, moved the trial court for an order allowing him to "amend" the complaint to substitute himself, individually, for the Clear Air Committee as the named party plaintiff. R. 114-15. The District opposed the motion and filed a motion to dismiss or for summary judgment, arguing that because Graham was not licensed as an attorney and because the Clear Air Committee had not properly registered its name pursuant to the Assumed Name Statute, the filing of the complaint was void. Substituting Graham as the plaintiff would constitute the initiation of a new action that would be untimely. R. 46-113.

On November 18, 1997, the trial court entered a memorandum decision granting Graham's motion to be substituted as the plaintiff in this action and denied the District's motion to dismiss or for summary judgment. R. 144-53. A copy of this ruling is attached as Addendum C. The trial court ruled that although the District was correct that Graham could not represent the Clear Air Committee *pro se*, his filing of the complaint on behalf of the Clear Air Committee was not void *ab initio*. Allowing Graham to substitute himself as plaintiff would correct that problem. R. 148-49. The trial court also ruled that it was not clear that the Clear Air Committee had to comply with the provisions of the Utah Assumed Name Statute because the court was "not entirely convinced that a community association organized for the purposes of monitoring pollution compliance is carrying on, conducting, or transacting business such to put it within the purview of" the Assumed Name Statute. R. 149. In any

event, the trial court believed allowing Graham to be substituted as plaintiff corrected the problem. *Id.* Finally, the trial court believed that there were issues of fact whether the Clear Air Committee was the only proper party plaintiff, and it believed, based on the evidence before it, that the Clear Air Committee and Graham had sufficient identity of interests to allow relation back of the substitution. R. 149-51.

Thereafter, on January 16, 1998, Graham filed a motion for summary judgment on the applicable language of GRAMA. R. 159. The District responded with a cross-motion for summary judgment on February 9, 1998. R. 174-75.

On April 6, 1998, the trial court issued a Ruling on Plaintiff's and Defendants' Cross Motions for Summary Judgment. R. 245-53. A copy of this ruling is attached as Addendum D. The trial court accepted the District's statement of undisputed facts, R. 245 n.1, and noted that the crux of the dispute focused on the meaning of Utah Code Ann. § 63-2-203(2) (1997). This section provides in relevant part:

(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).

R. 250.

The trial court wrote that "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: [.]" R. 250-51. It noted that "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." R. 251.

After stating basic rules of statutory construction, the trial court ruled for the District. It held:

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. . ."

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)."

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

R. 251-53 (bold emphasis added; other emphasis in original).

Graham timely filed his notice of appeal on May 5, 1998, R. 258-60, and the defendants timely filed their notice of cross-appeal from the trial court's denial of the District's motion to dismiss on May 19, 1998. R. 272-73.

SUMMARY OF THE ARGUMENT

The trial court should not have reached the merits of this case because it lacked jurisdiction. The Clear Air Committee's filing of the original complaint was void because it cannot represent *pro se* and because it is barred from access to the courts of Utah for failure to comply with Utah's Assumed Name Statute. Because the original complaint was void, Graham's substitution as plaintiff commenced an entirely new, but by that time an untimely, appeal from the District's decision.

If this Court concludes that the trial court had jurisdiction, the trial court's decision on the merits should be affirmed in all respects. The District had to spent 14

hours of staff time compiling the records the Clear Air Committee requested. Due to the nature of the requests, the District had to thoroughly review District records and computer databases and cull those records requested by the Clear Air Committee. In doing so, under the plain meaning of the words "compile" and "form," the District compiled the records in a form not normally maintained by the District, but in a form specifically requested by the Clear Air Committee.

Public policy demands such a result. If records requesters only are required by GRAMA to pay for staff time incurred filling a records request when the requester specifically asks that the records be put in an entirely different format or media, requesters could avoid costs, yet needlessly tie up government operations, by simply requesting that paper records be produced on paper, computer records on computer disks, and so forth. By requiring requesters to pay staff time incurred compiling records, as requesters must pay under other public access laws such as the Freedom of Information Act, it will encourage requesters to draft their requests narrowly to seek only the information they really need and will protect the public coffers when a request necessarily requires significant staff time to fill.

Graham is not entitled to attorney fees and costs because the District's position has a reasonable basis. The District's position prevailed in the trial court and will prevail on appeal. However, if Graham prevails, attorney fees still are not justified because the District had a reasonable basis for its actions. At the very least, a

determination of whether Graham is entitled to attorney fees requires a remand to the trial court to resolve issues of fact and Graham's compliance with the provisions of the Utah Governmental Immunity Act.

ARGUMENT

I.

THE CLEAR AIR COMMITTEE'S COMPLAINT WAS VOID WHEN FILED AND GRAHAM'S SUBSTITUTION AS PLAINTIFF COMMENCED A NEW ACTION THAT WAS NOT TIMELY³

The Clear Air Committee's original complaint was void when it was filed because the Clear Air Committee cannot represent itself in court *pro se* and because it was prohibited from access to the courts for failure to register its assumed name. Therefore, an appeal from the Administrative Control Board's decision was never perfected within the time period allowed. Because the complaint was void when filed, Graham's substitution as plaintiff commenced a new action, but one that was untimely and should have been dismissed.

The Utah Supreme Court has written that "[i]t has long been the law of this jurisdiction that a corporate litigant must be represented in court by a licensed

³ The District would prefer to have the Court rule on the merits of Graham's appeal, but because a serious question exists concerning whether the trial court had subject matter jurisdiction the District feels duty-bound to protect the integrity of the Court by raising and addressing this issue.

attorney." *Tracy-Burke Assoc. v. Department of Employment Sec., Industrial Comm'n of Utah*, 699 P.2d 687, 687 (Utah 1985).

A corporation is not a natural person. It is an artificial entity created by law and as such it can neither practice law nor appear or act in person. Out of court it must act in its affairs through its agents and representatives and in matters in court it can act only through licensed attorneys. A corporation cannot appear in court by an officer who is not an attorney and it cannot appear in *propria persona*.

Id. at 687; accord *Tuttle v. Hi-Land Dairyman's Ass'n*, 350 P.2d 616, 618 (Utah 1960) (citing *Paradise v. Nowlin*, 195 P.2d 867, 867 (Cal. Dist. Ct. App. 1948)). Indeed, Utah Code Ann. § 78-51-40 (1996) specifically prohibits both corporations and voluntary associations, like the Clear Air Committee, from practicing law.⁴

The California Court of Appeals held in *Paradise* that a notice of appeal and an opposition brief filed *pro se* by a corporation was "void" by reason of the corporation's lack of power to represent itself in an action in court." 195 P.2d at 867 (emphasis added). In *Tracy-Burke*, the Utah Supreme Court relied on *Paradise* to dismiss a petition for a writ of review challenging a decision of the Industrial

Utah Code Ann. § 78-51-40 provides in relevant part:

It shall be unlawful for any corporation or voluntary association . . . to hold itself out to the public by advertisement or otherwise as being entitled to practice law or to furnish attorneys or counselors, or to render legal services or advice of any kind in any action or proceeding, or to solicit directly or indirectly any claim or demand for the purpose of bringing action thereon

Commission because the petition had been filed by the corporation *pro se*. 699 P.2d at 687. If the corporation's actions in *Tracy-Burke* had not been void when filed, the actions could have been corrected by the appearance of an attorney for the corporation. Yet, the Supreme Court, implying that the filing by the corporation itself could not be corrected, dismissed the petition outright rather than instructing the corporation to have counsel make an appearance.

This is significant because the petition in *Tracy-Burke* was essentially the same type of proceeding filed by the Clear Air Committee in this case—it was an appeal to a court from a decision of an administrative agency. Graham, as a member of the Clear Air Committee, but not a licensed attorney, filed the complaint *pro se* for the Clear Air Committee as an appeal from the Administrative Control Board's decision. Because the Clear Air Committee is a voluntary unincorporated association, it cannot practice law by itself. Utah Code Ann. § 78-51-40. As such, the filing of the complaint was void under *Tracy-Burke* and *Paradise*.

In addition, the complaint filed by the Clear Air Committee was void because the Clear Air Committee was barred from access to the trial court for failing to comply with the requirements of Utah's Assumed Name Statute, Utah Code Ann. §§ 42-2-5 to 42-2-11 (1997). This statute requires that

[e]very person who carries on, conducts, or transacts
business in this state under an assumed name, whether that
business is carried on, conducted, or transacted as an

individual, **association**, partnership, corporation, or otherwise, shall file with the Division of Corporations and Commercial Code a certificate setting forth: the name under which the business is, or is to be carried on

Id. § -5 (emphasis added).⁵

A penalty barring access to the courts of the state of Utah is imposed on those who fail to comply with the Assumed Name Statute. The statute provides that a non-complying party "**shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state.**" *Id.* § -10 (emphasis added); *accord Blodgett v. Zions First Nat'l Bank*, 752 P.2d 901 (Utah Ct. App. 1988). Upon compliance with Utah's Assumed Name Statute, this penalty may be removed. *Wall Inv. Co. v. Garden Gate Distrib., Inc.*, 593 P.2d 542 (Utah 1979).

Here, the Clear Air Committee failed to file an assumed name registration with the Utah Department of Commerce, Division of Corporations and Commercial Code prior to filing suit. R. 93-96. It also did not correct that failure prior to the

⁵ There is some question whether the Clear Air Committee could even register its name with the Division of Corporations and Commercial Code. The full name of the Clear Air Committee is "Residents of Davis County Clear Air Committee." Utah Code Ann. § 42-2-6.6(6) (1997) provides that "[a] name that implies by any word in the name that it is an agency of the state or of any of its political subdivisions, if it is not actually such a legally established agency, may not be approved for filing by the Division of Corporations and Commercial Code." Thus, inclusion of the words "Davis County" in the name of the Clear Air Committee may be illegal.

expiration of the 30-day appeal period following the Administrative Control Board's denial of the Clear Air Committee's appeal. *Id.* Consequently, under Utah Code Ann. § 42-2-10 (1997), it was barred from filing any action in the trial court within the relevant appeal time, and its filing was void.

Because the filing of the original complaint by the Clear Air Committee was void, there was no valid action for which Graham could be substituted as plaintiff. At most, his "substitution" signaled the commencement of a wholly new action that began with the substitution. The trial court, therefore, erred when it allowed Graham's substitution to relate back to the original filing of the complaint by the Clear Air Committee.

Rules 15(c) and 17(a) of the Utah Rules of Civil Procedure do not require a different result because neither deal with a situation where the filing of the original pleading was void. Indeed, under both it is presumed that the original filing of the pleading was otherwise valid. Rule 15(c) allows an amendment to relate back to the date of the original filing if the claims made in the amended pleading arose out of the same transaction, occurrence, or conduct set forth in the original pleading. Utah R. Civ. P. 15(c). If the original pleading is void, however, there is nothing to which the amended pleading may relate back.

Similarly, under Rule 17(a), if an action is commenced in the name of a party who is not the real party in interest, the action cannot be dismissed until a

reasonable time is allowed to substitute or join the real party in interest. Again, however, this rule assumes that a valid action was commenced in the first place.

Furthermore, any substitution of the real party in interest "shall have the same effect as if the action had been commenced in the name of the real party in interest." Utah R. Civ. P. 17(a). This rule does not even apply here because the original complaint in the trial court was filed by and in the name of a real party in interest—the Clear Air Committee. The Clear Air Committee was the entity that made the records request to the District and appealed the decision to charge for staff time to the District's Administrative Control Board. R. 3, 23, 82.⁶ Thus, it was a real party in interest, and there was no need to substitute Graham as the plaintiff to name a different real party in interest.

The only reason substitution was requested was that Graham suddenly realized—when the District brought it to his attention in the District's Answer—that the Clear Air Committee could not represent itself in court, and that it had not registered its name with the Division of Corporations and Commercial Code. Graham did not seek substitution because the Clear Air Committee was not a real party in interest. Therefore, Graham cannot rely upon Rule 17(a) for his substitution to relate back to the date the original complaint was filed.

⁶ The Assumed Name Statute did not preclude the Clear Air Committee from participating in administrative proceedings before the District, but it does preclude the Clear Air Committee's access to the courts.

Because the filing of the complaint by the Clear Air Committee was void and Graham's substitution as plaintiff at most commenced a new action, the complaint should have been dismissed as untimely. The earliest Graham could be considered to have been substituted as plaintiff was the date of his motion to amend, September 19, 1997, which was well beyond the 30-day appeal period allowed under the District's GRAMA Ordinance. Ordinance No. 92-C § 11F, Addendum B; *see also* Utah Code Ann. § 63-2-404 (1997) (establishing 30-day time period for appeal from records committee decision). The District's Administrative Control Board's decision on the Clear Air Committee's appeal was complete no later than July 3, 1997. The Court should rule that Graham's amended complaint was untimely and that the trial court lacked jurisdiction to consider the merits of the case.

II.

THE TRIAL COURT PROPERLY RULED THAT THE DISTRICT COULD CHARGE GRAHAM AND THE CLEAR AIR COMMITTEE FOR STAFF TIME INCURRED RESPONDING TO THE GRAMA REQUEST

If the Court concludes that the trial court properly considered the merits of this case, the trial court's ruling on the merits should be affirmed. The trial court appropriately ruled that the District could charge Graham staff time incurred responding to the Clear Air Committee's GRAMA request, even though some of the records requested were not transformed from one medium to another.

A. **A Common Sense Reading of the Plain Language of Section 63-2-203 Supports the Trial Court's Decision that the District Can Charge for Staff Time**

GRAMA reads, in relevant part, that "[e]very 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." Utah Code Ann. § 63-2-201(1) (1997) (emphasis added). Thus, the right to inspect records free of charge is expressly made subject to section 63-2-203, which is the section allowing a governmental entity to charge fees.⁷ That sections reads:

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. . . .
- (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

⁷ Utah's statute is very different from the Minnesota statute and case law Graham relies upon. While Utah's statute provides for a right to inspect records free of charge, it strikes a balance in an effort to protect public entities and public tax monies by authorizing fees in certain circumstances.

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).

Id. § 63-2-203(2) (emphasis added).

This section further provides that "[t]hose funds shall be used to recover the actual cost and expenses incurred by the governmental entity in providing the requested record or record series." *Id.* § 63-2-203(7)(b). This is consistent with public records access laws in other jurisdictions. *See Hamer v. Lentz*, 525 N.E.2d 1045, 1049 (Ill. App. Ct. 1988) (citing *Family Life League v. Department of Public Aid*, 493 N.E.2d 1054, 1059 (1986)) (finding that "the court may order the payment by plaintiff of `the reasonable cost of exercising [his] rights.'"); *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 646 (D.C. Cir. 1987) (stating "FOIA generally requires requesters to pay the costs of searches"); *Merrill v. Oklahoma Tax Comm'n*, 831 P.2d 634, 642-43 (Okla. 1992) (finding Open Records Act permitted Commission to charge fees for records request); 5 U.S.C.A. § 552(a)(4)(A). Furthermore, under GRAMA "[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." *Id.* § 63-2-203(8) (emphasis added). This is all that the District did.

Graham argues that the Court should adopt an extremely narrow definition of the term "compile." To adopt Graham's proposal, however, would completely eviscerate the ability of a political subdivision to recoup costs incurred in responding to GRAMA requests. "Compile" is not a defined term under GRAMA. However, it is a well-established rule of statutory construction that a term should be interpreted and applied in accordance with its usually accepted meaning. *Morton Int'l, Inc. v. Auditing Div. of Utah State Tax Comm'n*, 814 P.2d 581, 590 (Utah 1991).

The term "compile" is defined by *Webster's New World Dictionary* 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 New World Dictionary* 290 (2d ed. 1980). The term "form" means, inter alia, "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. . . ." *Id.* at 548. "Record" is a defined term under GRAMA that 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.

Utah Code Ann. § 63-2-103(18)(a) (1997).

Thus, the phrase "compiles a record in a form other than that normally maintained" should be construed to mean to gather and put together all books, letters, documents, etc. from various sources into an orderly arrangement, but in an arrangement different than the records are normally kept in District files. That is precisely what the District did.

This interpretation is consistent with other words used in the same section of GRAMA. When meaning cannot be ascertained by using the usual meaning of a term, questionable terms or phrases may be "ascertained by reference to words or phrases associated with them." *Morton*, 814 P.2d at 590-91. Here, the words surrounding the term "compile" include "summarizing, compiling or tailoring the record either into an organization or media to meet the person's request" and "search, retrieval, and other direct administrative costs." Utah Code Ann. § 63-2-203(2) (1997).

In this case, the records in question include samples, journals, personal field notes, inspection logs, and memos and internal documents concerning stack testing and laboratory analyses. Because of the variety of records involved, the District could not and did not store them in one document, computer program, or central file.

R. 240. Moreover, the District had to take raw data and organize it in order to respond to Graham's request. *Id.*

The District made a thorough search of all files and records related to the testing to ensure that the District produced everything relevant. *Id.* In doing so, it was necessary for the District to contact those people who may have been involved in that testing. *Id.* The District accordingly enlisted the assistance of Jack Schmidt, John Watson, Bart Baker, and certain operators and maintenance personnel who spent a total of 14 hours searching, retrieving, and compiling the records that Graham requested.

R. 241.

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. *Id.* 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 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 Graham requested. *Id.*

Therefore, to accommodate Graham, it was necessary for the District to gather, assemble, collect, accumulate, or amass Graham's specific requests into one place or into a new organization, which created a new record. This new organization was specifically tailored to meet Graham's request and is in a "form other than that normally maintained" by the District. Based on the usual meaning of the term

"compile" and taken in the context of the surrounding language in the GRAMA statute, the District did "compile[] a record in a form other than that normally maintained by the governmental entity." Utah Code Ann. § 63-2-203(2) (1997).

B. Section 63-2-203 Allows a Charge of Staff Time Even Without a Request that Records Be Compiled in a Certain Format

Graham's argument that section 63-2-203(2) only allows a governmental entity to charge a fee for staff time if the requester specifically asks that it be compiled in a format different from that maintained by the entity is contrary to the plain language of section 63-2-203. That section specifically allows a governmental entity to charge if the "governmental entity compiles a record in a form other than that normally maintained by the governmental entity. . . ." The section makes no reference to allowing fees only when the requester asks for the records to be compiled in a different format, it only references how the entity compiles the records.

Yet, Graham did ask that the records be compiled in a form other than that normally maintained by the District. As explained above, by the way his requests were structured, the District had to cull through numerous District files and computer databases to pull out and compile the records Graham requested. They necessarily were put together in a different organization than normally maintained by the District because Graham's requests were specifically directed at only certain documents.

Therefore, under even Graham's argument, the District would be entitled to charge fees for staff time.

C. The Legislative History Does Not Support Graham's Interpretation

Graham's appeal to the legislative history is similarly unavailing. Graham cites statements purportedly made by Senator Steele when the language of section 63-2-203(2) was amended in 1994. Senator Steele allegedly stated that the language, "[w]hen a governmental entity compiles a record in a form other than that normally maintained by the governmental entity," means that to qualify under section 63-2-203(2) the records cannot be compiled in "the exact same form." Aplt. Br. at 13. As demonstrated above, using the plain meaning of the words "compile" and "form," the records that were retrieved and compiled for Graham were not compiled in "the exact same form." The District had to gather, assemble, collect, accumulate, and amass Graham's specific requests into one place or into a new organization specifically tailored to meet Graham's request. As such, the records as so compiled were in a "form other than that normally maintained" by the District.

Graham also cites to comments by Senator Steele that the amendments were intended to have been "taken **exactly** from the Colorado statute." Aplt. Br. App. A at 3 (emphasis added). Yet, as Graham admits, the Colorado statute does not use "exactly" the same wording, and as such, regardless of Senator Steele's supposed

intent, cannot have the exact same meaning. The Colorado statute Graham cites requires the governmental entity to perform "a **manipulation of data** so as to generate a record in a **form not used** by the state or by said agency." Colo. Rev. Stat. Ann. § 24-72-205(3) (1997) (emphasis added). Nowhere does GRAMA require "a manipulation of data" or that a governmental entity put the record "in a form not used by the . . . agency." "Manipulating data" into a format entirely foreign to the governmental entity is very different from simply compiling a record in a form not normally maintained by the governmental entity. Therefore, the Colorado statute does not support Graham's position.

D. Public Policy Favors Protecting Governmental Entities from Abusive Records Requests So Long as Public Access Is Not Denied

Graham's public policy argument also fails. Under the District's interpretation, broad public access is still available and First Amendment rights are protected, but a balance is struck to protect public coffers from abusive requests. Records requesters could tie up government operations needlessly if they only have to pay staff time for compilation when they specifically ask for the records to be put in different media than the records are maintained by governmental entities. Governmental entities should be allowed to charge staff time compilation costs to protect our tax dollars from abusive requests. Allowing governmental entities to do this would not hamper access to records, but would encourage records requesters to

draft their requests narrowly so as to not overburden state and local government.

Records requesters will still have their records, and our local governments will still be able to carry out their functions and also protect our tax dollars.

For simple compilations of records, GRAMA provides its own protection of public access because it does not allow governmental entities to charge for the first 15 minutes of staff time attributable to compiling the record. Utah Code Ann. § 63-2-203(2)(b) (1997) ("no charge may be made for the first quarter hour of staff time").⁸ Thus, if a search of several different sources or for a single record does not take more than 15 minutes, the requester does not have to pay administrative costs. The vast majority of GRAMA requests handled by the District fall into this category. Yet, if a records request requires complicated searching and retrieval, our tax dollars are protected by the requirement that the requester pay certain costs.

E. The District's GRAMA Ordinance Allows Charging Graham for the Staff Time Incurred

The Utah legislature has authorized each political subdivision to "adopt an ordinance or a policy applicable throughout its jurisdiction relating to information practices including classification, designation, access, denials, segregation, appeals, management, retention, and amendment of records." Utah Code Ann. § 63-2-701(1)(a) (1997). On June 10, 1992, the District adopted Ordinance No. 92-C (the

⁸ The District will not charge Graham for the first 15 minutes it spent compiling the records he requested. This will reduce the charge to \$275.

"Ordinance"), which is a policy that sets forth, among other things, the District's response procedures pertinent to a records request as well as the applicable fees.

Ordinance No. 92-C at 9-11, §§ 9, 10, Addendum B.

Pursuant to the Ordinance, the District's fee schedule is as follows:

1. Reviewing a record to determine whether it is subject to disclosure . . . No charge
2. Inspection of record by requesting person . . . No charge
3. Copy Fees . . . 25 cents per page
4. Computer Disk . . . \$5.00 (Plus overhead and time of District staff in preparation of information request billed at the rate of \$20.00 per hour)
5. Other Forms . . . Actual cost (Minimum \$5.00 plus overhead and time of District staff in preparation of information request billed at the rate of \$20.00 per hour.)
6. Miscellaneous Fees . . . Actual cost (Minimum \$5.00 plus overhead and time of District staff in preparation of information request billed at the rate of \$20.00 per hour.)

Ordinance No. 92-C at 10-11, § 10, Addendum B.

The fees the District charged Graham are in accordance with GRAMA and the Ordinance. Utah Code Ann. § 63-2-203 (1997); Ordinance No. 92-C at 10-11, § 10. The \$280 fee assessed by the District is based on the 14 actual hours expended for the several searches by District staff. R. 241. In compliance with GRAMA and the District's Ordinance, Graham was not 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 Graham requested was made to make such a determination. *Id.* Graham also will not be charged for inspecting the records, only for the retrieval and compilation of the records, as set forth above.

The fees the District charged Graham were reasonable. Staff time charges assessed by the District on Graham's records request were based on the Ordinance, but were less than actual costs. *Id.*; see *Merrill v. Oklahoma Tax Comm'n*, 831 P.2d 634, 642-43 (Okla. 1992) (finding charges of \$350 for a microfiche copy and \$258 for a computer tape copy, which included labor and administrative costs, not unreasonable under Oklahoma's Open Records Act). Recently, the District paid a federal agency \$25 per hour for staff time incurred by that agency responding to a FOIA request. R. 241.

The District's charges were proper under GRAMA and the District's GRAMA Ordinance. The Court should affirm the trial court on this issue.

III.

GRAHAM IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES OR COSTS

GRAMA provides that the Court may, in its discretion, award attorney fees and costs incurred in a judicial appeal "of a denial of a records request if the requester substantially prevails." Utah Code Ann. § 63-2-802(2)(a) (1997). In making

its decision, the Court is required to consider "the public benefit derived from the case; the nature of the requester's interest in the records; and whether the governmental entity's or political subdivision's actions had a reasonable basis." *Id.* § 63-2-802(b). Because the District, not Graham, is entitled to judgment, Graham is not entitled to the fees and costs he seeks.

If Graham prevails on this appeal, the Court should not order that Graham be awarded fees on remand. The trial court's carefully reasoned opinion, agreeing with the District's position on the fees charged, demonstrates that the District's actions had more than a reasonable basis. The remaining issues that must be addressed to determine whether fees should be assessed are factual inquiries that should be left to the trial court for determination. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998) (attorney fees for prevailing party on appeal remanded to trial court for determination).

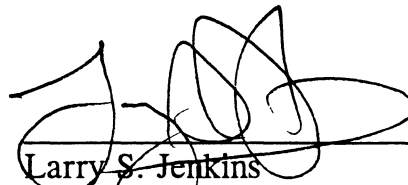
In any event, Utah Code Ann. § 63-2-802(5) (1997) provides that claims for attorneys' fees under GRAMA are subject to the provisions of the Utah Governmental Immunity Act. Presumably, that means after prevailing, if he does, Graham would have to follow the procedural requirements of the Governmental Immunity Act before he could be entitled to recover. Such cannot be accomplished during the course of this appeal.

CONCLUSION

The Court should rule that the trial court lacked jurisdiction to consider the merits of this case because the filing of the original complaint by the Clear Air Committee was void, and the substitution of Graham as plaintiff was untimely. If the Court concludes that the trial court properly reached the merits of this case, the Court should affirm the trial court's decision on the merits in all respects.

DATED this 19th day of October, 1998.

WOOD CRAPO LLC

A handwritten signature in black ink, appearing to read "Larry S. Jenkins", is written over a horizontal line.

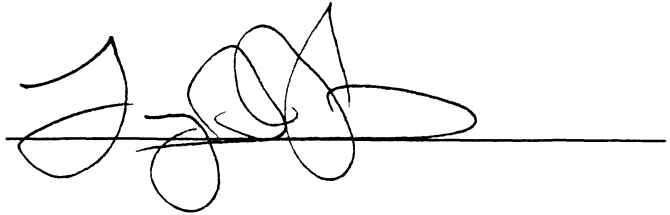
Larry S. Jenkins
Attorneys for
Appellees/Cross-Appellants/Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 1998, I caused to be mailed in the U.S. mail, postage prepaid, two true and correct copies of the foregoing **Brief of Appellees and Cross-Appellants** to the following:

Jeffrey J. Hunt
Parr Waddoups Brown Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

Attorneys for Mark Graham



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Addendum A

Utah Code Ann. § 42-2-5. Certificate of assumed and of true name - Contents - Execution - Filing.

(1) Every person who carries on, conducts, or transacts business in this state under an assumed name, whether that business is carried on, conducted, or transacted as an individual, association, partnership, corporation, or otherwise, shall file with the Division of Corporations and Commercial Code a certificate setting forth:

(a) the name under which the business is, or is to be carried on, conducted, or transacted, and the full true name, or names, of the person owning, and the person carrying on, conducting, or transacting the business;

(b) the location of the principal place of business, and the street address of the person.

(2) The certificate shall be executed by the person owning, and the person carrying on, conducting, or transacting the business, and shall be filed not later than 30 days after the time of commencing to carry on, conduct, or transact the business.

(3) "Filed" means the Division of Corporations and Commercial Code has received and approved, as to form, a document submitted under the provisions of this chapter, and has marked on the face of the document a stamp or seal indicating the time of day and date of approval, the name of the division, the division director's signature and division seal, or facsimiles of the signature or seal.

Utah Code Ann. § 42-2-10. Penalties.

Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with:

- (1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state; and
- (2) may be subject to a penalty in the form of a late filing fee determined by the division director in an amount not to exceed three times the fees charged under Section 42-2-7 and established under Section 63-38-3.2.

Utah Code Ann. § 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.

.

Utah Code Ann. § 63-2-203. Fees.

.

(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).

. . . .

(7)(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.

. . . .

Utah Code Ann. § 63-2-802. Injunction - Attorneys' fees.

. . . .

(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.

Utah Code Ann. § 78-51-40. Corporations and associations forbidden to practice - Exceptions.

It shall be unlawful for any corporation or voluntary association, except such as are organized for benevolent or charitable purposes, or organizations approved by the Supreme Court and formed for the purpose of assisting persons without means in the pursuit of civil remedies, to hold itself out to the public by advertisement or otherwise as being entitled to practice law or to furnish attorneys or counselors, or to render legal services or advice of any kind in any action or proceeding, or to solicit directly or indirectly any claim or demand for the purpose of bringing action thereon. Any corporation or voluntary association violating any of the provisions of this section is liable to a fine of not more than \$5,000; and every officer, agent or employee of such corporation or voluntary association who directly or indirectly engages on behalf of such corporation or voluntary association in any of the acts herein prohibited, or assists such corporation or voluntary association to do

such prohibited acts, is guilty of a misdemeanor. The fact that such officer, agent or employee is a duly and regularly licensed attorney at law shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited herein, nor shall such fact be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section.

Rule 15, Utah Rules of Civil Procedure. Amended and supplemental pleadings.

. . . .

(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.

. . . .

Rule 17, Utah Rules of Civil Procedure. Parties plaintiff and defendant.

(a) Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

. . . .

Addendum B

ORDINANCE NO. 92-C

AN ORDINANCE ADOPTING A POLICY RELATING TO INFORMATION PRACTICES INCLUDING CLASSIFICATION, DESIGNATION, ACCESS, DENIALS, SEGREGATION, APPEALS, MANAGEMENT, RETENTION AND AMENDMENT OF RECORDS IN ACCORDANCE WITH THE PROVISIONS OF THE UTAH "GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT" AND PROVIDING FOR AN EFFECTIVE DATE.

SUMMARY OF ORDINANCE

This Ordinance adopts a policy relating to information practices including classification, designation, access, denials, segregation, appeals, management, retention and amendment of records in accordance with provisions of the Utah Government Records Access and management Act" and provides for an effective date for such Ordinance.

DATED this 11th day of June, 1992.

DAVIS COUNTY SOLID WASTE MANAGEMENT
AND ENERGY RECOVERY SPECIAL SERVICE
DISTRICT

By: Robert W. Arbuckle
ROBERT W. ARBUCKLE
Chairman
Administrative Control Board

ATTEST:

By: Gayle A. Stevenson
GAYLE A. STEVENSON
Secretary

Date of Publication: _____
B:GramaSumm

KING & KING
LAWYERS
251 EAST 200 SOUTH
P. O. BOX 220
CLEVELAND, UTAH 84015

ORDINANCE NO. 92-C

AN ORDINANCE ADOPTING A POLICY RELATING TO INFORMATION PRACTICES INCLUDING CLASSIFICATION, DESIGNATION, ACCESS, DENIALS, SEGREGATION, APPEALS, MANAGEMENT, RETENTION AND AMENDMENT OF RECORDS IN ACCORDANCE WITH THE PROVISIONS OF THE UTAH "GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT" AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Utah State Legislature has adopted the "Government Records Access and Management Act", hereinafter sometimes referred to as "GRAMA" or the "Act"; and,

WHEREAS, it is the intent of GRAMA, *inter alia*, to establish fair and reasonable records management practices in accordance with the requirements of said Act; and,

WHEREAS, GRAMA permits each political subdivision to adopt a policy relating to information practices subject to the requirements of the said Act; and,

WHEREAS, the Davis County Solid Waste Management and Energy Recovery Special Service District (District) does now find that it is both necessary and desirable to adopt fair and reasonable records management practices for the District in accordance with and as required by the said Act,

NOW, THEREFORE, BE IT ORDAINED BY THE ADMINISTRATIVE CONTROL BOARD OF THE DAVIS COUNTY SOLID WASTE MANAGEMENT AND ENERGY RECOVERY SPECIAL SERVICE DISTRICT, a public body of the State of Utah, as follows, to-wit:

Section 1 - General Purpose

- A. The Davis County Solid Waste Management and Energy Recovery Special Service District (hereinafter sometimes referred to as the "District") adopts this policy to establish guidelines for open government information recognizing the need to maintain and preserve accurate records, provide public access to public records and preserve the right of privacy of personal data collected or received by the District.

Section 2 - District Policy

- A. In adopting this policy, the District recognizes the enactment of Government Records Access and Management Act by the Utah State Legislature (Sections 63-2-101 et seq., Utah Code Annotated, 1953) and the application of that Act to the District records. The purpose of these policies is to conform to Section 63-2-701 which provides that each political subdivision may adopt an ordinance or a policy relating to information practices including classification, designation, access, denials, segregation, appeals, management, retention and amendment of records. The intent of this policy is to provide modifications to the general provisions of State law, where allowed, to meet the public needs, operation, management capabilities and resources of the District.

Section 3 - Compliance with State Law

- A. In adopting this policy, the District recognizes the following sections of the Government Records Access and Management Act apply to the District and adopts by reference such provisions as part of this policy. Any inconsistency or conflict between this policy and the following referenced statutes, where discretion is not allowed by the statute, shall be governed by the statute.

Part 1 General Provisions

\$63-2-101	Short title
\$63-2-102	Legislative intent
\$63-2-103	Definitions
\$63-2-104	Administrative Procedures Act not applicable
\$63-2-105	Confidentiality agreements

Part 2 Access to Records

\$63-2-201	Right to inspect records and receive copies of
\$63-2-202	Access to private, controlled and protected documents
\$63-2-205	Denials
\$63-2-206	Sharing records

Part 3 Classification

\$63-2-301	Records that must be disclosed
\$63-2-302	Private records
\$63-2-303	Controlled records
\$63-2-304	Protected records
\$63-2-305	Procedure to determine classification
\$63-2-306	Duty to evaluate records and make designations and classifications
\$63-2-307	Segregation of records
\$63-2-308	Business confidentiality claims

Part 4 [NOT APPLICABLE]

Part 5 [NOT APPLICABLE]

Part 6 Accuracy of Records

\$63-2-601	Rights of individuals on whom data is maintained
\$63-2-602	Disclosure to subject of records - Context of use

Part 7 Applicability to Political Subdivisions:
The Judiciary and the Legislature

§63-2-701 Political subdivisions to
 enact ordinances in
 compliance with chapter

Part 8 Remedies

§63-2-801 Criminal penalties
§63-2-802 Injunction - Attorneys'
 Fees
§63-2-803 No liability for certain
 decisions of a
 governmental entity
§63-2-804 Disciplinary action

Part 9 Archives and Records Service

§63-2-905 Records declared property
 of the State -
§63-2-907 Right to replevin

Part 10 Other

§63-30-10.6 Attorneys' fees for
 records request

Section 4 - Definitions

As used in this ordinance, the following definitions shall be applicable.

- A. "Act" shall refer to the Government Records Access and Management Act, §§63-2-1, et seq., Utah Code Annotated, 1953, as amended.
- B. "District" shall refer to the Davis County Solid Waste Management and Energy Recovery Special Service District.
- C. "Computer software program" means the 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, manuals, or other source material explaining how to operate the software program. "Software" does not include the

original data or record which is manipulated by the software.

- D. "Controlled" records shall be those defined as controlled under the provisions of the Act.
- E. "Data" shall refer to individual entries (for example, birth date, address, etc.) in records.
- F. "Dispose" means to destroy, or render irretrievable or illegible, a record or the information contained in it by any physical, electronic, or other means, including unauthorized deletion or erasure of electronically recorded audio, visual, non-written formats, data processing, or other records.
- G. "Non-public" records shall refer to those records defined as private, controlled, or protected under the provisions of the Act.
- H. "Private" records shall refer to those records classified as private under the provisions of the Act.
- I. "Protected" records shall refer to those records classified as protected under the provisions of the Act.
- J. "Public" records shall refer to those records which have not been classified as non-public in accordance with the provisions of the Act.
- K. (1) "Record" means all books, letters, documents, papers, maps, plans, photographs, films, cards, tapes, recordings, or other documentary materials, and electronic data regardless of physical form or characteristics, prepared, owned, used, received, or retained by the District where all the information in the original is reproducible by some mechanical, electronic, photographic or other means.

(2) "Record" does not mean:

- (a) Temporary drafts or similar materials prepared for the originator's personal use or prepared by the originator for the personal use of a person for whom he is working;

- (b) Materials that are legally owned by an individual in his private capacity;
- (c) Materials to which access is limited by the laws of copyright or patent;
- (d) Junk mail or commercial publications received by the District or by an officer or employee of the District;
- (e) Personal notes or daily calendars prepared by any District employee for personal use or the personal use of a supervisor or such notes, calendars or internal memoranda prepared for the use of an officer or agency acting in a quasi-judicial or deliberative process or pursuant to matters discussed in a meeting closed pursuant to Utah Open Meetings Act; or
- (f) Proprietary computer software programs as defined in subsection C. above that are developed or purchased by or for the District for its own use.

Section 5 - Public Right to Records

- A. Members of the public shall have the right to see, review, examine and take copies, in any format maintained by the District, of all District governmental records defined as "public" under the provisions of this Policy, upon the payment of the lawful fee and pursuant to the provisions of this Policy and the Act.
- B. The District has no obligation to create a record or record series in response to a request from a member of the public, if the record requested is not otherwise regularly maintained or kept.
- C. When a record is temporarily held by a custodial District agency, pursuant to that custodial agency's statutory functions, such as records storage, investigation, litigation or audit, the record shall not be considered a record of the custodial agency for the purposes of this Policy. The record shall be considered a record of the District and any requests for access to such

records shall be directed to the District, rather than the custodial agency, pursuant to these procedures.

- D. Original documents shall not leave the custody of the District. Document inspection will occur in the conference area of the administrative office building or such other area designated by the Records Officer. Private citizens will not be allowed in the vault where original documents are maintained. The appropriate documents and/or files given to the individual will be accounted for subsequent to the individual's inspection and prior to his/her departure from the District offices.

Section 6 - Public, Private, Controlled and Protected Records

- A. Public records shall be all those District records that are not private, controlled, or protected and that are not exempt from disclosure as provided in subsection 63-2-201(3)(b) of the Act. Public records shall be made available to any person. All District records are considered public unless they are (1) expressly designated, classified, or defined otherwise by the District in accordance with policies and procedures established by this Policy, (2) are so designated, classified or defined by the Act, or (3) are made non-public by other applicable law.
- B. Private records shall be those District records classified as "private", as defined in the Act §63-2-302 (U.C.A., 1953, as amended) and as designated, classified, or defined in procedures established pursuant to this Policy. Private records shall be made available to the following persons: The subject of the record, the parent or legal guardian of a minor who is the subject of the record, the legal guardian of an incapacitated individual who is the subject of the record, any person who has a power of attorney or a notarized release from the subject of the record or his legal representative, or any person possessed of and serving a legislative subpoena or a court order issued by a court of competent jurisdiction.
- C. Controlled records shall be those District records classified as "controlled", as defined in the Act,

§63-2-303 (U.C.A., 1953, as amended) and as designated, classified, or defined in procedures established in this Policy. Controlled records shall be made available to a physician, psychologist, or licensed social worker who submits a notarized release from the subject of the record or any person presenting a legislative subpoena or a court order issued by a court of competent jurisdiction.

- D. Protected records shall be those District records classified as "protected" as defined in the Act, §63-2-304 (U.C.A., 1953, as amended) and as designated, classified or defined in procedures established in this Policy. Protected records shall be made available to the person who submitted the information in the record, to a person who has power of attorney or notarized release from any persons or governmental entities whose interests are protected by the classification of the record, or to any person presenting a legislative subpoena or a court order regarding the release of the information and issued by a court of competent jurisdiction.

Section 7 - Privacy Rights

- A. The District recognizes and upholds the personal right of privacy retained by persons who may be the subject of governmental records.
- B. The District may, as determined appropriate by the District Executive Director, notify the subject of a record that a request for access to the subject's record has been made.
- C. The District may require that the requester of records provide a written release, notarized within thirty (30) days before the request, from the subject of the records in question before access to such records is provided.

Section 8 - Designation, Classification and Retention

- A. All District records and records series, of any format, shall be designated, classified and scheduled for retention according to the provisions of the Act and this Policy. Any records or record series generated in the future shall also be so

designated, classified and scheduled for retention. Records designation classification and scheduling for retention shall be conducted under the supervision of the District Executive Director.

Section 9 - Procedures for Records Request

- A. Under circumstances in which a District is not able to respond immediately to a records request, the requester shall fill out and present to the District a written request on forms provided by the District. The date and time of the request shall be noted on the written request form and all time frames provided under this Policy shall commence from that time and date. Requesters of non-public information shall adequately identify themselves and their status prior to receiving access to non-public records.
- B. The District may respond to a request for a record by approving the request and providing the records, denying the request, or such other appropriate response as may be established by policies and procedures.
- C. (1) In most circumstances and excepting those eventualities set out below, the District shall respond to a written request for a public record within ten business days after that request.

(2) Extraordinary circumstances shall justify the District's failure to respond to a written request for a public record within ten business days and shall extend the time for response thereto to that time reasonably necessary to respond to the request, as determined by the District Executive Director. Extraordinary circumstances shall include, but not be limited to, the following:
 - (a) Some other governmental entity is currently and actively using the record requested;
 - (b) The record requested is for either a voluminous quantity of records or requires the District to review a large number of records or perform extensive research to locate the materials requested;

- (c) The District is currently processing either a large number of records requests or is subject to extraordinary work loads in the processing of other work;
- (d) The request involves an analysis of legal issues to determine the proper response to the request;
- (e) The request involves extensive editing to separate public data in a record from that data which is not public; or
- (f) Providing the information request requires computer programming or other format manipulation.

(3) When a record request cannot be responded to within ten (10) business days, the District Records Officer shall give the requester an estimate of the time required to respond to the request. Such estimate may be given at any time within the ten (10) day period.

- D. The failure or inability of the District to respond to a request for a record within the time frames set out herein, or the District's denial of such a request, shall give the requester the right to appeal as provided in Section 11.

Section 10 - Fees

- A. Applicable fees for the processing of information requests under this Policy shall generally be set at actual cost or as otherwise established by policies adopted under this Policy. The District will charge the following fees for requests relating to the Government Records Access and Management Act.
 - 1. Reviewing a record to determine whether it is subject to disclosure.....No charge
 - 2. Inspection of record by requesting person.....No charge
 - 3. Copy Fees.....25 cents per page

4. ComputerDisk.....\$5.00
(Plus overhead and time of District staff in preparation of information request billed at the rate of \$20.00 per hour)
5. Other Forms.....Actual cost
(Minimum \$5.00 plus overhead and time of District staff in preparation of information request billed at the rate of \$20.00 per hour.)
6. Miscellaneous Fees.....Actual cost
(Minimum \$5.00 plus overhead and time of District staff in preparation of information request billed at the rate of \$20.00 per hour.)

Section 11 - Appeal Process

- A. Any person aggrieved by the District's denial or claim of extraordinary circumstances may appeal the determination within thirty calendar (30) days after notice of the District's action to the District Executive Director by filing a written notice of appeal. The notice of appeal shall contain the petitioner's name, address, phone number, relief sought and if petitioner desires, a short statement of the facts, reasons and legal authority for the appeal.
- B. If the appeal involves a record that is subject to business confidentiality or affects the privacy rights of an individual or person, the District Executive Director shall send a notice of the requester's appeal to the affected individual or person.
- C. The District Executive Director shall make a determination on the appeal within thirty business (30) days after receipt of the appeal. During this 30 day period the District Executive Director may schedule an informal hearing or request any additional information deemed necessary to make a determination. The District Executive Director

shall send written notice to the appellant and any affected person or individual providing the reasons for the District Executive Director's determination.

- D. In addition, if the District Executive Director affirms the denial in whole or in part, the denial shall include a statement that the requester has a right to appeal the denial to the District's Administrative Control Board within thirty (30) calendar days.
- E. The person may file a written notice of appeal to the Administrative Control Board to be heard at the next scheduled meeting of the Board. If there is no meeting scheduled in the next thirty (30) calendar days the Administrative Control Board shall schedule a special meeting for the purpose of hearing the appeal. The final decision of the Administrative Control Board shall be by majority vote of a quorum of the Board. The Board shall prepare a written decision outlining its final determination and reasons for the final determination.
- F. If the Administrative Control Board affirms the denial, in whole or in part, the person may petition for judicial review in District Court as provided in §63-2-404, U.C.A., 1953.

Section 12 - Reasonable Accommodation

- A. Reasonable accommodations regarding access to governmental records shall be provided to persons with disabilities in accordance with the Americans with Disabilities Act upon request of the applicant.

Section 13 - Records Amendments

- A. Government records held by the District may be amended or corrected as needed. Requests for amendments, corrections, or other changes shall be made in writing to the District having custody of the records and setting forth, with specificity, the amendment or correction requested. When an amendment or correction of a government record is made, both the original record and the amended or

corrected record shall be retained, unless provided otherwise by the Act or other State or Federal law.

Section 14 - Penalties

- A. District employees who knowingly refuse to permit access to records in accordance with the Act and this Policy, who knowingly permit access to non-public records, or who knowingly, without authorization or legal authority, dispose of, alter, or remove records or allow other persons to do so in violation of the provisions of the Act, this Policy or other law or regulation may be subject to criminal prosecution in accordance with the Act and disciplinary action, including termination of employment.
- B. In accordance with the Act, neither the District nor any of its officers or employees shall be liable for damages resulting from the release of a record where the requester presented evidence of authority to obtain the record, even if it may be subsequently determined that the requester had no such authority.

Section 15 - Records Officer

- A. The District Office Secretary is appointed to coordinate records access, management and archives activities and shall make annual reports of records services activities to the Executive Director who shall make an annual report of such activities to the Administrative Control Board.

Section 16 - Records Maintenance

- A. Records maintenance procedures shall be developed to ensure that due care is taken to maintain and preserve District records safely and accurately over the long term. The District Executive Director shall be responsible for monitoring the application and use of technical processes in the creation, duplication, and disposal of District records. He/she shall monitor compliance with required standards of quality, permanence, and admissibility pertaining to the creation, use, and maintenance of records.

- B. All District records shall remain the property of the District unless federal or state legal authority provides otherwise. Property rights to District records may not be permanently transferred from the District to any private individual or entity, including those legally disposable obsolete District records. This prohibition does not include the providing of copies of District records otherwise produced for release or distribution under this chapter.
- C. Custodians of any District records shall, at the expiration of their terms of office, appointment or employment, deliver custody and control of all records kept or received by them to their successors, supervisors, or to the District Executive Director.

Section 17 - Effective Date

This Ordinance shall become effective July 1, 1992 provided that prior to such time a copy of this Ordinance shall be deposited in the District Offices and a short Summary published in a newspaper published within the District.

PASSED AND ADOPTED this 10th day of June, 1992.

DAVIS COUNTY SOLID WASTE MANAGEMENT
AND ENERGY RECOVERY SPECIAL SERVICE
DISTRICT

By: Robert W. Arbuckle
ROBERT W. ARBUCKLE
Chairman

ATTEST:

By: Gayle A. Stevenson
GAYLE A. STEVENSON
Secretary

B:GramaOrd

Addendum C

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY,
STATE OF UTAH

NOV 13 4 13 PM '97

SECOND DISTRICT COURT

MARK E. 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.

Ma

**RULING ON PLAINTIFF'S
MOTION TO AMEND and
DEFENDANTS' MOTION TO DISMISS
OR FOR SUMMARY JUDGMENT**

Case No. 970700320

This matter is before the Court on Plaintiff's and Defendants' respective Notices to Submit on their (respective) motions. The Court has reviewed the parties' pleadings, as well as the applicable law on the issues raised in those pleadings. Having done so, and now being fully advised, the Court hereby rules as follows:

STANDARD OF REVIEW

Motion to Amend

Utah Rules of Civ. Pro. Rule 15(a) states in full:

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.

Pursuant to these rules, after the time for an amended pleading of right has passed, there are only two ways that an amendment to a pleading may be made: by leave of court, or by written consent of the other party. There was no consent by the other party, so the only way that this amended pleading may be allowed in would be by leave of court. The Utah Supreme Court, while recognizing such matters are within the sound discretion of the trial court, stated that "Rule 15 of the Utah Rules of Civil Procedure tends to favor the granting of leave to amend." Westley v. Farmer's Ins. Exch., 663 P.2d 93, 94 (Utah 1983).

Motion to Dismiss or for Summary Judgment

Defendants' motion to dismiss seeks dismissal based on evidence outside of the pleadings. Once matters outside the pleadings are presented to the Court and are not excluded by the Court, the motion is properly treated as one for summary judgment. Lind v. Lynch, 665 P.2d 1276 (Utah 1983) [quoting Rule 12(b)(6)].

Accordingly, in light of the foregoing, the Court notes that 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). Moreover, in considering a motion for summary judgement, 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).

Procedural History

A brief recital of the procedural history of this case is necessary to frame the Court's substantive ruling:

1. That this action was initially brought in the name of "Residents of Davis County Clear Air Committee, a non-profit organization (the "**Committee**") on July 30, 1997. Mark E. Graham ("**Graham**") lists himself as the individual actually filing the complaint, purporting to represent the committee in a pro-se capacity;

2. That plaintiff Graham, on September 19, 1997, moved the Court to allow amendment of the complaint, such amendment substituting Graham's name in place of the Committee as plaintiff. The motion was accompanied by a "Notice of Motion for Leave to File Amended Complaint, the proposed Amended Complaint, and an order granting leave to amend the complaint. The motion encompassed a certificate of service to counsel for defendants, and the "Notice of Motion" also apparently sought to apprise defendants of plaintiff's pending motion to amend;

3. That no response having being filed within the 10-day statutory period, the Court's clerk inadvertently placed the motion to amend before the Court for decision September 29, 1997. At that time, there had been no notice to submit filed, as required by Rule 4-501, Utah Code of Judicial Administration. The Court, believing the motion to have been properly submitted and no objection having been received at that juncture, signed plaintiff's order granting him leave to amend October 3, 1997;

4. The same day, October 3, 1997, defendants filed their (current) motion to dismiss or for summary judgment, supported by a "Memorandum in Opposition to Plaintiff's Motion to File an Amended Complaint and in Support of Defendants' Motion to Dismiss or for Summary Judgment;

5. That on October 14, 1997 plaintiff Graham filed with the Court a notice to submit on the motion to amend, which notice stated "the motion to file an amended complaint is fully briefed, including the attached memorandum filed on this date, and is ready for decision." Also filed by plaintiff Graham that same day were his "Memorandum in Support of Plaintiff's Motion to File an Amended Complaint, and in Opposition to Defendants' Motion to Dismiss or for Summary Judgment;" his "Memorandum in Opposition to Defendants' Motion to Dismiss or for Summary Judgment" (referencing the other memorandum filed that day); and his "Motion to Remand Case to District's Executive Director With Instructions."

6. That on October 27, 1997 defendants filed with the Court their "Reply Memorandum in Opposition to Plaintiff's Motion to File an Amended Complaint and in Support of Defendants' Motion to Dismiss or for Summary Judgment."

LEGAL ARGUMENTS AND RULING

In this action, plaintiff requests judicial review of the defendants' decision to require payment before release of records sought under GRAMA.¹ Plaintiffs Committee and Graham sought release of records involving air pollution release tests from defendants. Apparently, defendants prepared the requested records, but will not allow review or release of the records until such time as plaintiff(s) pay the requested fees. The issue before the Court at present, however, is plaintiff(s) capacity to bring this suit at all. Essentially, defendants argue that the action must be dismissed and Graham must not be allowed to be substituted as plaintiff in an amended complaint because: 1. The initial filing of the lawsuit is void because Graham, a

¹ As far as the Court can tell by the pleadings submitted, this already somewhat protracted (and probably expensive) litigation stems entirely from defendants' \$280.00 request.

non-attorney, filed the suit in a representative capacity on behalf of the Committee; 2. The initial filing of the lawsuit in the name of the Committee is void because the Committee failed to comply with the Utah Assumed Name Statutes (especially UCA § 42-2-10); 3. The Committee, as the entity having administratively dealt with defendants, is the only proper party-plaintiff; and 4. Even if Graham were substituted as plaintiff, his claims do not relate back, and as such they are now time-barred.

With respect to the defendants' arguments, the Court finds:

Pro-Se Representation

It is clear that in Utah, a non-attorney may not represent anyone but him/her self in a court of law. Tracy-Burke v. Dept. of Employment Security, 699 P.2d 687, 688 (1985) (per curiam) (quoting Tuttle v. Hi-Land Dairyman's Association, 10 Utah 2d 195, 350 P.2d 616 (1960)). (See also, UCA § 78-51-25) In filing this case, Graham, a non-attorney, attempted to represent the Committee in a pro-se capacity. Defendants argue that doing so rendered the filing of this lawsuit void *ab initio*. As support, they cite a California case, Paradise v. Nowlin,² which held that an appellate brief filed by an individual representing a corporation *in propria persona* was void and without effect. The Tracy-Burke case, although it cites language from Paradise, does not, as defendants argue, stand for the proposition that this lawsuit is void *ab initio*. It simply held that the petition for review must be dismissed, as it stood in front of that Court, because of the improper representation. The issue of whether the initial filing of the petition was void was not addressed in that case, and has never been

² 195 P.2d 867 (Cal. Dist. Ct. App. 1948).

addressed by Utah's appellate courts. It is this Court's opinion that the circumstances of this case, in that plaintiff timely requested an amendment to conform with the rules as soon as he was notified of the error, would argue against dismissal on such grounds.

Violation of Utah's Assumed Name Statutes

UCA § 42-2-10 states, in relevant part, that:

Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with:

(1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state; and

The Court is not entirely convinced that a community association allegedly organized for the purposes of monitoring pollution compliance is carrying on, conducting, or transacting business such to put it within the purview of the above-cited statute. A search of Utah cases reveals little on the issue that would be helpful to the Court. Nevertheless, even assuming defendants' position to be meritorious on this point, the Court's position with respect to the pro-se representation issue would apply equally to this issue to preclude dismissal. Plaintiff's timely request to amend the complaint would serve to remedy any error that may have arisen as a result of its filing under an improperly registered assumed name.

Committee Only Proper Party-Plaintiff

On this issue, the Court finds that there are disputed issues of fact precluding summary judgment. It is plainly apparent from the filed communications between the parties that even defendants themselves were somewhat confused as to whether they were dealing with the Committee or with Graham. Much, if not all, of the correspondence from defendants

concerning the underlying issue in this case is addressed to Graham, in his personal capacity, rather than to the Committee. Such correspondence is often, but apparently not on every occasion, in response to Graham's correspondence stating that he was acting in behalf of the Committee.

The Court finds (below) that there is no evidence that there is not an identity of interest between Graham and the Committee. Furthermore, in none of the communications between the parties was there ever (as far as the evidence before the Court shows) an issue raised by defendants as to whether Graham or the Committee were administratively proceeding in an improper manner. Such findings, if unrebutted by further evidence, would surely raise substantial issues of estoppel against defendants' use of this argument.

No Relation Back

Rule 15(c), U.R.Civ.P. reads as follows:

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.

Utah Courts have had various occasions to interpret this language, and the most common feeling among the Courts, with respect to the substitution or addition of new parties, is that the parties sought to be substituted or added must have an "identity of interest" with the originally named parties. *See, e.g., Wilcox*, 911 P.2d 367 (Utah 1996); *Vina v. Jefferson Ins. Co.*, 761 P.2d 581 (Utah Ct. App. 1988); *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 217 (Utah 1984); and *Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976). The general rule relating to the application of Rule 15(c) was set forth in *Doxey-Layton*, 548 P.2d at 906. The Utah Supreme Court stated:

Generally Rule 15(c), U.R.C.P., will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings - whether plaintiff or defendant. This for the reason that such would amount to the assertion of a new cause of action, and if such were allowed to relate back to the filing of the complaint, the purpose of a statute of limitation would be defeated.

There is an exception to the is rule. The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest; so it can assumed or proved the relation back is not prejudicial. The rational underpinning this exception is one which obstructs a mechanical use of the 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., at 906. (emphasis added). Defendants vigorously attempt to show that there is no identity of interest between the Committee and Graham. Such arguments hardly persuade the Court. As set forth above, there is no evidence in front of the Court that Graham's interests in this matter are not substantially the same, if not identical, to those of the Committee. On the other hand, there is ample evidence that "the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage," weighing in favor of relation back.³

CONCLUSION

Based on the above findings and conclusions of law, the Court finds that, in the interests of justice, and with the policies of Rule 15 in mind, that plaintiff Graham's Motion to Amend should be granted and his claims shall be allowed to relate back to the time of the filing of the action.

³ Id. Doxey-Layton, as well as the majority of cases in this area, deal with the substitution of defendants, rather than plaintiffs. Nevertheless, the policies in those cases apply equally to cases such as this.

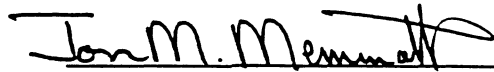
Conversely, the Court finds that defendants have not met their burden with respect to any of their arguments on their Motion to Dismiss or for Summary Judgment.

Therefore, plaintiff's Motion to Amend is HEREBY GRANTED and defendants' Motion to Dismiss or for Summary Judgment is HEREBY DENIED.

As the prior order of the Court (of October 3, 1997) granting plaintiff leave to amend was entered before the matter was ripe for decision, it is hereby withdrawn.

Dated November 18, 1997.

BY THE COURT:



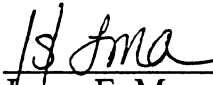
JON M. MEMMOTT
DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling on October ^{19th}, 1997, postage prepaid, to the following:

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Mark Graham, Pro Se
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Layton, Utah 84040



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

Addendum D

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY PH '99
STATE OF UTAH

CLERK OF DISTRICT COURT

BY 

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 judgement in their favor.

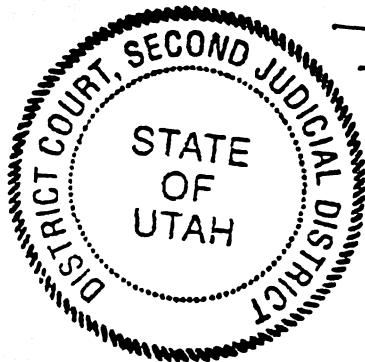
CONCLUSION

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:



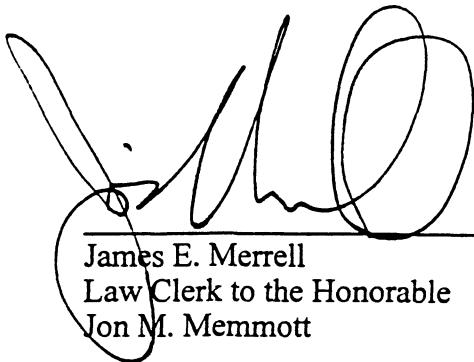
Jon M. Memmet
DISTRICT JUDGE

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:

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