2010

# S. Steven Maese v. Tooele County : Brief of Appellant

Utah Court of Appeals

Case № 20100357-CA

# In the Utah Court of Appeals

S. Steven Maese,
Plaintiff *and* Appellant,

*-v-*

Tooele County,
Defendant *and* Appellee.

## Brief *of* Appellant

Appeal from judgment granting motion for summary judgment in favor of Tooele County, dismissing Mr. Maese's Complaint appealing the denial of his Government Records Access Management Act request by Tooele County.

This judgment was entered in the Third Judicial District Court, in and for Tooele County, State of Utah, the Honorable Stephen L. Henroid presiding.

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES



## STATUTES



## RULES

Case № 20100357-CA

# In the Utah Court of Appeals

S. Steven Maese,
Plaintiff *and* Appellant,

*-v-*

Tooele County,
Defendant *and* Appellee.

## Opening Brief *of* Appellant

## STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter under Utah Code Ann. § 78A-4-103(2)(b)(i). The Appellant, S. Steven Maese, appeals the dismissal, vis-à-vis summary judgment, of his complaint for judicial review of Tooele County's denial of his GRAMA request. Mr. Maese timely filed his notice of appeal.

## STATEMENT OF ISSUES

**POINT I.** When evaluating a motion to dismiss under Utah. R. Civ. P. 56, the trial court must accept all facts as alleged by the plaintiff as true. Here, Maese alleged the Tooele County property transaction database is a public record and that Tooele County failed to give him a copy of that public record. Tooele County moved for summary judgment on Maese's complaint, stating the database is not a public record and that it gave Maese access to the record. Did the trial court err by granting summary judgment where genuine issues of material fact are still in dispute?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

The Court must "review the trial court's legal conclusions and ultimate grant [ ] of a motion for summary judgment for correctness and view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party."[1] The Court reviews the grant of summary judgment for correctness, giving no deference to trial court's legal conclusions.[2] A motion for summary judgment should be granted only when "there is no genuine issue as to any material fact."[3]

Maese preserved this claim in his opposition to the County's motion for summary judgment.[4]

**POINT II.** Under GRAMA, the public is entitled to take a copy of public records. Here, Maese asked for a copy of Tooele County's property transaction database, in the electronic format that Tooele County keeps it. Tooele County denied Maese's request. It stated that Maese could access the database at the Tooele County Recorder's Office during regular business hours. Did the trial court err by ruling a government entity complies with GRAMA when it provides *access to* records instead of *requested copies* of records?

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[1] *Brigham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 10 (internal quotations and citations omitted).

[2] *SUWA v. AGRC*, 2008 UT 88, ¶ 12.

[3] *Id.*

[4] R. at 176.

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

The Court must "review the trial court's legal conclusions and ultimate grant [ ] of a motion for summary judgment for correctness and view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party."[5] The Court reviews the grant of summary judgment for correctness, giving no deference to trial court's legal conclusions.[6] A motion for summary judgment should be granted only when "there is no genuine issue as to any material fact."[7]

Maese preserved this claim in his opposition to the County's motion for summary judgment.[8]

## RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

The following rules, statutes, and constitutional provisions are relevant to the issues on appeal and are attached at ADDENDUM A:

RULES

- Utah Rule of Civil Procedure 56 (2009);

STATUTES

- Utah Code Ann. § 63G-2-101, et seq. (2009).

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[5] *Brigham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 10 (internal quotations and citations ommitted).

[6] *SUWA v. AGRC*, 2008 UT 88, ¶ 12.

[7] *Id.*

[8] R. at 176.

## STATEMENT OF THE CASE

On July 13, 2009, Maese submitted a Government Records Access Management Act request to Tooele County requesting, "a copy of: [t]he property transaction database, in the electronic format that Tooele County keeps it, in its entirety."[9] On July 23, 2009, Tooele County denied his request. Maese timely appealed, and on August 13, 2009, Tooele County denied his appeal of their denial.

Maese timely appealed Tooele County's final denial of his GRAMA request and exhausted all remedies available to him prior to timely filing a complaint in the Third Judicial District Court for judicial review of Tooele County's denial.

Toole County moved for summary judgment on Maese's complaint under Utah R. Civ. P. 56 on September 22, 2009. Maese opposed that motion and submitted affidavits in support of his opposition. The trial court granted that motion on March 29, 2010.

Maese timely filed the instant appeal.

## STATEMENT OF FACTS

On July 13, 2009, Steven submitted a GRAMA request to Calleen Peshell, Tooele County Records Supervisor, asking for "The property transaction database, in the electronic format that Tooele County keeps it, in its entirety."[10] On July 23, 2009, Doug Hogan, County Attorney, wrote Steven a letter denying his request.[11] On August 10, 2009, and

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[9] R. at 7-8.

[10] *Ibid.*

[11] R at 9-10.

addressed to Colleen S. Johnson, Chair of the Tooele County Commission, Steven appealed the denial. On August 13, 2009, the Chair denied Steven's appeal.[12]

Tooele County filed its Motion for Summary Judgment on September 22, 2009 under Rule 56 alleging that the records Maese seeks are not public records and are accessible at the County Recorder's Office during normal business hours.[13] The Court granted Tooele motion on March 29, 2010 and issued a final ruling.[14] In its decision, the Court found "The unambiguous language of the statute provides that [Tooele County] is not required to create a special record for [Maese] or, provide [Maese] with an electronic copy of its records if there is a paper equivalent. [Tooele County], in its correspondence, has directed [Maese] to the equivalent paper records available at the County Recorder's Office...Because [Maese concedes that [Tooele's] CTS record is a public record, and because pursuant to statute [Tooele] is not required to provide [Maese] with an electronic copy of its records as a paper equivalent is available at the County Recorder's Office, [Tooele's] Motion for Summary Judgment is granted."[15]

Maese disputed the facts found by the Court in his opposition to Tooele's motion for summary judgment and provided affidavits in support of his disputes of fact.[16]

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[12] R. at 4.

[13] R. at 125.

[14] R. at 378.

[15] R. at 382-83.

[16] R. at 176; 309.

## SUMMARY OF ARGUMENT

Contrary to the County's assertion, Maese requested a record; its denial letter states as much but uses an unsanctioned means test to deny his request. But the County's previous stance is inconsistent with its current position. So now the County uses vitriolic words like "parasitic" in its pleadings to hide the central issue: Its CTS Database is a public record. Yet based on a false premise, the County uses a series of "even if" arguments which fail to persuade: The CTS Database is not a record; even if it is a record it is proprietary; even if it is nonproprietary, it is a private record; even if it is public, Mr. Maese's request requires record manipulation; even if...

Maese unequivocally advanced a singular argument at the trial court: The County's CTS Database is a public record; if it contains private data, the County must segregate or redact that data. Accordingly, the trial court was required to deny the County's Summary Judgment Motion.

**POINT I.** Under Utah R. Civ. P. 56, a trial court cannot enter judgment as a matter of law where there are genuine issues of material fact in dispute. Here, Maese alleged the Tooele County property transaction database is a public record and that Tooele County failed to give him a copy of record. Maese supported his allegations by providing affidavit testimony indicating that the records were public, that they were not part of the County's software system, and that the records available at the County Recorder's Office were not the records he requested.

On these grounds alone, the trial court should have denied the County's motion. In-

stead, the trial court struck the expert affidavit offered by Maese, and granted summary judgment in favor of Tooele County. Where Maese provides substantial evidentiary support for his disputes of fact, and requested a continuance under Rule 56(f) to allow for additional discovery to defeat Tooele's allegations, the court should have denied the motion and allowed discovery to continue.

**POINT II.** Under GRAMA, the public has the right to inspect records *and* take copies of those records. Here, Tooele County argued it allows the public access to its property records database through a subscription service and offers paper copies of individual records within that database; therefore, it need not give the public a copy of the entire Database. Yet the Database is a new and independent public record greater than the sum of its parts; it contains metadata and other variables not available online or through paper copies. Accordingly, because the Database is an independent public record, the County must provide copies of that record on demand.

## ARGUMENT

In evaluating Tooele County's Motion for Summary Judgment, the trial court was required to "view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party."[17] Judgment under Rule 56 of the Utah Rules of Civil Procedure is warranted only when there are no genuine issues of material fact in dispute.[18]

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[17] *Brigham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 10 (internal quotations and citations ommitted).

[18] *Ibid.*

**POINT I. The Court erred by granting summary judgment in favor of Tooele where Maese disputed the facts as alleged by Tooele and provided affidavit support for his dispute.**

The Court erred, as a matter of law, in dismissing Mr. Maese's complaint. Specifically, the Court made finding of facts contrary to the allegations in Mr. Maese's affidavits and opposition to summary judgment that Tooele County has not provided the records he requested and that the records are public because they are not part of the County's proprietary software. In a motion for summary judgment, the Court must accept Maese's factual allegations all reasonable inferences to be drawn therefrom in the light most favorable to him. Because Mr. Maese has alleged, with additional supporting facts, that Tooele County has not provided the requested records, the Court must accept those facts as true in adjudicating Tooele's summary judgment motion.

Here, the Court made a legal conclusion that Tooele has provided the records motion without considering any of Maese's allegations and evidence as true or in a light most favorable to him. In fact, the Court struck the affidavit testimony of Stephen Coleman. Mr. Coleman testified that he has experience with CTS databases similar to Tooele's and that the County's claims that the records cannot be provided separate from the software is patently incorrect. The trial court struck the affidavit, however, and failed to consider it or Maese's request for discovery to continue so he could discover additional facts to refute Tooele's allegations.

Maese properly disputed each material fact in Tooele's summary judgment motion, with citation to appropriate supporting affidavits.[19] The Rule 56(f) affidavit laid out a clear plan for discovery regarding Tooele's allegations and that the plan would likely

[19] R. at 176-81.

lead to evidence to dispute those allegations.[20] The Coleman affidavit specifically alleged that he has worked for SQL databases, like Tooele's, for over eight years, and that the "SQL databases are files independent of any software which contain electronic data."[21] That testimony alone should have been enough to prevent the trial court from holding that Tooele does not have to provide the database because it would "unreasonably interfere with its duties and responsibilities" because the SQL database is part of its proprietary software."[22]

The trial court erred in failing to accept Maese's allegations, supported by evidence, indicating material facts were disputed, and summary judgment could not have entered as a matter of law. As demonstrated below, Maese showed that Tooele's database is a public record, subject to GRAMA, and was not provided to him.

### *A. Whether or not the County's CTS Database is a record under GRAMA is a contested material fact and therefore the trial court should have denied Tooele's motion.*

The County's CTS Database is record. Examining GRAMA's plain language and facts provided by the County prove that. GRAMA defines records with specificity:

> (22) (a) "Record" means a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics:
>
> (i) that is prepared, owned, received, or retained by a governmental entity or political subdivision; and

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[20] R. at 188-91 (Rule 56(f) Affidavit of Kelly Ann Booth).

[21] R. at 192-93 (Affidavit of Stephen Coleman).

[22] R. at 183.

(ii) where all of the information in the original is reproducible by photocopy or other mechanical or electronic means.[23]

The County's assertions confirm that its CTS database is a record. First, the County coined the phrase "CTS database."[24] The *Random House Dictionary* defines "database" as:

da·ta·base [dey-tuh-beys]

–noun

1. a comprehensive collection of related data organized for convenient access, generally in a computer.[25]

Therefore the Database is electronic data. Second, without question and evidenced by its Statement of Undisputed Facts, the County prepared, owns, and retains the Database.[26] The third and final prong, reproducibility, is evidenced by the County's original denial letter to Mr. Maese. There, the County wrote, "...it is possible to make an electronic copy of the property transaction database..."[27]

The County attempted to overcome its own facts by asserting contradictory facts; namely, that the Database is a software program and is proprietary. Beyond the County's apparent contradictions, the Coleman declaration disputes these facts.[28] Therefore,

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[23] Utah Code Ann. § 63G-2-103.

[24] R. at 127 (ii).

[25] database. Dictionary.com. *Dictionary.com Unabridged.* Random House, Inc. http://dictionary.reference.com/browse/database (accessed: October 02, 2009).

[26] R. at 127.

[27] R. at 9-10.

[28] R. at 192-93.

whether or not the Database is a record is contested material fact central to this matter's adjudication.

### B. *Whether or not the County's CTS Database is proprietary software is a contested material fact and therefore the County's Motion must be denied.*

The Database cannot be proprietary software or a computer program because it does not direct a computer's operation. Microsoft's SQL Server is a computer program – although not proprietary – and the Database is simply a product of that program.

Under GRAMA, proprietary software is exempt from disclosure. While GRAMA does not define software, the *Random House Dictionary* defines "software" as:

> soft·ware [sawft-wair, soft-]
>
> –noun
>
> 1. *Computers.* the programs used to direct the operation of a computer, as well as documentation giving instructions on how to use them. Compare HARDWARE (def. 5).[29]

The County built the Database with Microsoft SQL Server.[30] This is similar to writing a letter in Microsoft Word or Corel WordPerfect; the document is the data, the word processing program is the software which creates the data. The County merely asserted that the Database is proprietary software because it inputted and formatted the data within; this is a conclusion, not a fact. Yet as Maese asserted in the Coleman declaration, the Database is not a software program, proprietary or otherwise.[31]

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[29] software. Dictionary.com. *Dictionary.com Unabridged.* Random House, Inc. http://dictionary.reference.com/browse/software (accessed: October 02, 2009).

[30] R. at 127.

[31] R. at 192-93.

The Database cannot direct the operation of a computer. Microsoft's SQL Server directs the operation of a computer, and in doing so accesses the data within the Database. Therefore, whether or not the Database is proprietary software is contested material fact central to this matter's adjudication.

### C. *Whether or not the County's CTS Database is material that is cataloged, indexed, or inventoried in the collections of a library open to the public was a contested material fact and therefore trial court should have denied Tooele's motion.*

The County's CTS Database is not material cataloged, indexed or inventoried in collections of a library open to the public. It is a public record, in and of itself.

Under GRAMA, "Record" does not mean:

> material that is cataloged, indexed, or inventoried and contained in the collections of a library open to the public, regardless of physical form or characteristics of the material;[32]

Under the County's assertions and agreed by all, the Database is comprised of property transaction which statutorily are public.[33] Yet the County failed to allege that the Database is housed in a catalog, index, or inventory and therefore it cannot be deemed "material." While the underlying records may be indexed, Maese disputed that a pay service equals "a library open to the public." Through the County's own assertions, whether or not the County's CTS Database is material that is cataloged, indexed, or inventoried in the collections of a library open to the public is a contested material fact central to this matter's adjudication.

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[32] Utah Code Ann. § 63G-2-103(22)(b)(viii).

[33] Utah Code Ann. § 63G-2-301(2)(g).

**POINT II. Tooele County improperly denied Maese's records request by alleging he has access to some of the requested records online; under GRAMA, access alone is an impermissible substitute.**

Maese requested a copy of Tooele County's Property Transaction Database. Tooele County refuses to give Maese a copy of its Database and justifies this by explaining it has provided him with *access* to the records within the database. GRAMA fails to permit this substitution. Therefore, Mr. Maese states a claim upon which this Court may grant relief.

Under GRAMA, "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..."[34]

The County asserts, and Maese agrees, that it provides access to individual records within the Property Transaction Database at its offices during normal business hours. Yet Mr. Maese requested a copy of the Property Transaction Database, in its entirety, not mere access. Implicitly, the County conceded its refusal to provide Maese with a copy of the Database.

Yet Maese asked the trial court to declare that the Database is, in fact, a public record kept by the County and Mr. Maese is entitled to a copy of it. Therefore, contrary to the County's assertion, it failed to fulfill GRAMA's requirements in either spirit or by the letter of the law. GRAMA explicitly bars the County from substituting "access" for "a

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[34] Utah Code Ann. § 63G-2-201(1) (emphasis added).

copy of" a record.[35] Accordingly, Maese stated a claim upon which the trial court may grant relief.

### D. *Maese asked the trial court to compel Tooele County to provide him with a copy of its Property Transaction Database in the electronic format that Tooele County keeps it; not to compile the Database into SQL format.*

Maese has never asked Tooele County to create, compile, format, manipulate, package, summarize or tailor its Property Transaction Database. Tooele County fails to make *a copy of* its Database available through any medium. Therefore Maese stated a claim upon which this Court may grant relief. The Court need look no further than Maese's original GRAMA request for affirmation.

Maese requested a copy of Tooele County's Property Transaction Database "in the electronic format that Tooele County keeps it..." In his Complaint, Maese alleged that Tooele County keeps the Database in a SQL format.

While Maese may be incorrect about the Database's format (which is why his requested discovery is necessary), he requested it in the native format that Tooele County keeps it in; regardless of format. The County seems to allege that its Database is kept in a format other than SQL, which requires it to create, compile, format, manipulate, package, summarize or tailor it. The County's contention requires this Court to reject the facts as Maese alleges them; an unlawful act.

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[35] Utah Code Ann. § 63G-2-201(11) states in relevant part, "(11) A governmental entity may not use the physical form, electronic or otherwise, in which a record is stored to deny...the rights of a person to inspect *and receive a copy of a record* under this chapter." (emphasis added).

Maese has not asked Tooele County to create, compile, format, manipulate, package, summarize, or tailor information or provide him the Database in particular format. Therefore, Maese did dispute material facts and demonstrate those disputes were genuine and not merely to avoid summary judgment.

## CONCLUSION

WHEREFORE, MAESE prays this Court reverse the trial court's grant of summary judgment remand the case for further proceedings on his claims.

RESPECTFULLY SUBMITTED on this 7th day of March, 2011.

LAW OFFICES OF
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Kelly Ann Booth
*Attorney for Plaintiff/Appellant*

# ADDENDUM A

**Rule 56. Summary judgment.**

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

## 63G-2-101. Title.

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

**63G-2-102. Legislative intent.**

(1) In enacting this act, the Legislature recognizes two constitutional rights:

(a) the public's right of access to information concerning the conduct of the public's business; and

(b) the right of privacy in relation to personal data gathered by governmental entities.

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

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

(a) promote the public's right of easy and reasonable access to unrestricted public records;

(b) specify those conditions under which the public interest in allowing restrictions on access to records may outweigh the public's interest in access;

(c) prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter;

(d) provide guidelines for both disclosure and restrictions on access to government records, which are based on the equitable weighing of the pertinent interests and which are consistent with nationwide standards of information practices;

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

(f) establish fair and reasonable records management practices.

**63G-2-103. Definitions.**

As used in this chapter:

(1) "Audit" means:

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

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

(2) "Chronological logs" mean the regular and customary summary records of law enforcement agencies and other public safety agencies that show:

(a) the time and general nature of police, fire, and paramedic calls made to the agency; and

(b) any arrests or jail bookings made by the agency.

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

(4) (a) "Computer program" means:

(i) a series of instructions or statements that permit the functioning of a computer system in a manner designed to provide storage, retrieval, and manipulation of data from the computer system; and

(ii) any associated documentation and source material that explain how to operate the computer program.

(b) "Computer program" does not mean:

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

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

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

(5) (a) "Contractor" means:

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

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

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

(6) "Controlled record" means a record containing data on individuals that is controlled as provided by Section 63G-2-304.

(7) "Designation," "designate," and their derivative forms mean indicating, based on a governmental entity's familiarity with a record series or based on a governmental entity's review of a reasonable sample of a record series, the primary classification that a majority of records in a record series would be given if classified and the classification that other records typically present in the record series would be given if classified.

(8) "Elected official" means each person elected to a state office, county office, municipal office, school board or school district office, local district office, or special service district office, but does not include judges.

(9) "Explosive" means a chemical compound, device, or mixture:

(a) commonly used or intended for the purpose of producing an explosion; and

(b) that contains oxidizing or combustive units or other ingredients in proportions, quantities, or packing so that:

(i) an ignition by fire, friction, concussion, percussion, or detonator of any part of the compound or mixture may cause a sudden generation of highly heated gases; and

(ii) the resultant gaseous pressures are capable of:

(A) producing destructive effects on contiguous objects; or

(B) causing death or serious bodily injury.

(10) "Government audit agency" means any governmental entity that conducts an audit.

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

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

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

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

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

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

(b) "Governmental entity" also means every office, agency, board, bureau, committee, department, advisory board, or commission of an entity listed in Subsection (11)(a) that is funded or established by the government to carry out the public's business.

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

(13) "Individual" means a human being.

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

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

(ii) names of victims;

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

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

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

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

(b) Initial contact reports do not include follow-up or investigative reports prepared after the initial contact report. However, if the information specified in Subsection (14)(a) appears in follow-up or investigative reports, it may only be treated confidentially if it is private, controlled, protected, or exempt from disclosure under Subsection 63G-2-201(3)(b).

(15) "Legislative body" means the Legislature.

(16) "Notice of compliance" means a statement confirming that a governmental entity has complied with a records committee order.

(17) "Person" means:

(a) an individual;

(b) a nonprofit or profit corporation;

(c) a partnership;

(d) a sole proprietorship;

(e) other type of business organization; or

(f) any combination acting in concert with one another.

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

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

(20) "Protected record" means a record that is classified protected as provided by Section 63G-2-305.

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

(22) (a) "Record" means a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics:

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

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

(b) "Record" does not mean:

(i) a personal note or personal communication prepared or received by an employee or officer of a governmental entity in the employee's or officer's private capacity;

(ii) a temporary draft or similar material prepared for the originator's personal use or prepared by the originator for the personal use of an individual for whom the originator is working;

(iii) material that is legally owned by an individual in the individual's private capacity;

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

(v) proprietary software;

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

(vii) a book that is cataloged, indexed, or inventoried and contained in the collections of a library open to the public;

(viii) material that is cataloged, indexed, or inventoried and contained in the collections of a library open to the public, regardless of physical form or characteristics of the material;

(ix) a daily calendar or other personal note prepared by the originator for the originator's personal use or for the personal use of an individual for whom the originator is working;

(x) a computer program that is developed or purchased by or for any governmental entity for its own use;

(xi) a note or internal memorandum prepared as part of the deliberative process by:

(A) a member of the judiciary;

(B) an administrative law judge;

(C) a member of the Board of Pardons and Parole; or

(D) a member of any other body charged by law with performing a quasi-judicial function;

(xii) a telephone number or similar code used to access a mobile communication device that is used by an employee or officer of a governmental entity, provided that the employee or officer of the governmental entity has designated at least one business telephone number that is a public record as provided in Section 63G-2-301;

(xiii) information provided by the Public Employees' Benefit and Insurance Program, created in Section 49-20-103, to a county to enable the county to calculate the amount to be paid to a health care provider under Subsection 17-50-319(2)(e)(ii); or

(xiv) information that an owner of unimproved property provides to a local entity as provided in Section 11-42-205.

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

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

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

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

(27) "Sponsored research" means research, training, and other sponsored activities as defined by the federal Executive Office of the President, Office of Management and Budget:

(a) conducted:

(i) by an institution within the state system of higher education defined in Section 53B-1-102; and

(ii) through an office responsible for sponsored projects or programs; and

(b) funded or otherwise supported by an external:

(i) person that is not created or controlled by the institution within the state system of higher education; or

(ii) federal, state, or local governmental entity.

(28) "State archives" means the Division of Archives and Records Service created in Section 63A-12-101.

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

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

**63G-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 63G-2-203 and 63G-2-204.

(2) A record is public unless otherwise expressly provided by statute.

(3) The following records are not public:

(a) a record that is private, controlled, or protected under Sections 63G-2-302, 63G-2-303, 63G-2-304, and 63G-2-305; and

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

(4) Only a record specified in Section 63G-2-302, 63G-2-303, 63G-2-304, or 63G-2-305 may be classified private, controlled, or protected.

(5) (a) A governmental entity may not disclose a record that is private, controlled, or protected to any person except as provided in Subsection (5)(b), Subsection (5)(c), Section 63G-2-202, 63G-2-206, or 63G-2-303.

(b) A governmental entity may disclose a record that is private under Subsection 63G-2-302(2) or protected under Section 63G-2-305 to persons other than those specified in Section 63G-2-202 or 63G-2-206 if the head of a governmental entity, or a designee, determines that:

(i) there is no interest in restricting access to the record; or

(ii) the interests favoring access outweighs the interest favoring restriction of access.

(c) In addition to the disclosure under Subsection (5)(b), a governmental entity may disclose a record that is protected under Subsection 63G-2-305(51) if:

(i) the head of the governmental entity, or a designee, determines that the disclosure:

(A) is mutually beneficial to:

(I) the subject of the record;

(II) the governmental entity; and

(III) the public; and

(B) serves a public purpose related to:

(I) public safety; or

(II) consumer protection; and

(ii) the person who receives the record from the governmental entity agrees not to use or allow the use of the record for advertising or solicitation purposes.

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

(b) This chapter applies to records described in Subsection (6)(a) insofar as this chapter is not inconsistent with the statute, rule, or regulation.

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

(a) the person requesting the record has a right to inspect it;

(b) the person identifies the record with reasonable specificity; and

(c) the person pays the lawful fees.

(8) (a) In response to a request, a governmental entity is not required to:

(i) create a record;

(ii) compile, format, manipulate, package, summarize, or tailor information;

(iii) provide a record in a particular format, medium, or program not currently maintained by the governmental entity;

(iv) fulfill a person's records request if the request unreasonably duplicates prior records requests from that person; or

(v) fill a person's records request if:

(A) the record requested is accessible in the identical physical form and content in a public publication or product produced by the governmental entity receiving the request;

(B) the governmental entity provides the person requesting the record with the public publication or product; and

(C) the governmental entity specifies where the record can be found in the public publication or product.

(b) Upon request, a governmental entity may provide a record in a particular form under Subsection (8)(a)(ii) or (iii) if:

(i) the governmental entity determines it is able to do so without unreasonably interfering with the governmental entity's duties and responsibilities; and

(ii) the requester agrees to pay the governmental entity for providing the record in the requested form in accordance with Section 63G-2-203.

(9) (a) A governmental entity may allow a person requesting more than 50 pages of records to copy the records if:

(i) the records are contained in files that do not contain records that are exempt from disclosure, or the records may be segregated to remove private, protected, or controlled information from disclosure; and

(ii) the governmental entity provides reasonable safeguards to protect the public from the potential for loss of a public record.

(b) When the requirements of Subsection (9)(a) are met, the governmental entity may:

(i) provide the requester with the facilities for copying the requested records and require that the requester make the copies; or

(ii) allow the requester to provide the requester's own copying facilities and personnel to make the copies at the governmental entity's offices and waive the fees for copying the records.

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

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

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

(12) Subject to the requirements of Subsection (8), a governmental entity shall provide access to an electronic copy of a record in lieu of providing access to its paper equivalent if:

(a) the person making the request requests or states a preference for an electronic copy;

(b) the governmental entity currently maintains the record in an electronic format that is reproducible and may be provided without reformatting or conversion; and

(c) the electronic copy of the record:

(i) does not disclose other records that are exempt from disclosure; or

(ii) may be segregated to protect private, protected, or controlled information from disclosure without the undue expenditure of public resources or funds.

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

(1) Upon request, and except as provided in Subsection (11)(a), a governmental entity shall disclose a private record to:

(a) the subject of the record;

(b) the parent or legal guardian of an unemancipated minor who is the subject of the record;

(c) the legal guardian of a legally incapacitated individual who is the subject of the record;

(d) any other individual who:

(i) has a power of attorney from the subject of the record;

(ii) submits a notarized release from the subject of the record or the individual's legal representative dated no more than 90 days before the date the request is made; or

(iii) if the record is a medical record described in Subsection 63G-2-302(1)(b), is a health care provider, as defined in Section 26-33a-102, if

releasing the record or information in the record is consistent with normal professional practice and medical ethics; or

(e) any person to whom the record must be provided pursuant to:

(i) court order as provided in Subsection (7); or

(ii) a legislative subpoena as provided in Title 36, Chapter 14, Legislative Subpoena Powers.

(2) (a) Upon request, a governmental entity shall disclose a controlled record to:

(i) a physician, psychologist, certified social worker, insurance provider or producer, or a government public health agency upon submission of:

(A) a release from the subject of the record that is dated no more than 90 days prior to the date the request is made; and

(B) a signed acknowledgment of the terms of disclosure of controlled information as provided by Subsection (2)(b); and

(ii) any person to whom the record must be disclosed pursuant to:

(A) a court order as provided in Subsection (7); or

(B) a legislative subpoena as provided in Title 36, Chapter 14, Legislative Subpoena Powers.

(b) A person who receives a record from a governmental entity in accordance with Subsection (2)(a)(i) may not disclose controlled information from that record to any person, including the subject of the record.

(3) If there is more than one subject of a private or controlled record, the portion of the record that pertains to another subject shall be segregated from the portion that the requester is entitled to inspect.

(4) Upon request, and except as provided in Subsection (10) or (11)(b), a governmental entity shall disclose a protected record to:

(a) the person who submitted the record;

(b) any other individual who:

(i) has a power of attorney from all persons, governmental entities, or political subdivisions whose interests were sought to be protected by the protected classification; or

(ii) submits a notarized release from all persons, governmental entities, or political subdivisions whose interests were sought to be protected by the protected classification or from their legal representatives dated no more than 90 days prior to the date the request is made;

(c) any person to whom the record must be provided pursuant to:

(i) a court order as provided in Subsection (7); or

(ii) a legislative subpoena as provided in Title 36, Chapter 14, Legislative Subpoena Powers; or

(d) the owner of a mobile home park, subject to the conditions of Subsection 41-1a-116(5).

(5) A governmental entity may disclose a private, controlled, or protected record to another governmental entity, political subdivision, another state, the United States, or a foreign government only as provided by Section 63G-2-206.

(6) Before releasing a private, controlled, or protected record, the governmental entity shall obtain evidence of the requester's identity.

(7) A governmental entity shall disclose a record pursuant to the terms of a court order signed by a judge from a court of competent jurisdiction, provided that:

(a) the record deals with a matter in controversy over which the court has jurisdiction;

(b) the court has considered the merits of the request for access to the record;

(c) the court has considered and, where appropriate, limited the requester's use and further disclosure of the record in order to protect:

(i) privacy interests in the case of private or controlled records;

(ii) business confidentiality interests in the case of records protected under Subsection 63G-2-305(1), (2), (40)(a)(ii), or (40)(a)(vi); and

(iii) privacy interests or the public interest in the case of other protected records;

(d) to the extent the record is properly classified private, controlled, or protected, the interests favoring access, considering limitations thereon, outweigh the interests favoring restriction of access; and

(e) where access is restricted by a rule, statute, or regulation referred to in Subsection 63G-2-201(3)(b), the court has authority independent of this chapter to order disclosure.

(8) (a) A governmental entity may disclose or authorize disclosure of private or controlled records for research purposes if the governmental entity:

(i) determines that the research purpose cannot reasonably be accomplished without use or disclosure of the information to the researcher in individually identifiable form;

(ii) determines that:

(A) the proposed research is bona fide; and

(B) the value of the research outweighs the infringement upon personal privacy;

(iii) (A) requires the researcher to assure the integrity, confidentiality, and security of the records; and

(B) requires the removal or destruction of the individual identifiers associated with the records as soon as the purpose of the research project has been accomplished;

(iv) prohibits the researcher from:

(A) disclosing the record in individually identifiable form, except as provided in Subsection (8)(b); or

(B) using the record for purposes other than the research approved by the governmental entity; and

(v) secures from the researcher a written statement of the researcher's understanding of and agreement to the conditions of this Subsection (8) and the researcher's understanding that violation of the terms of this Subsection (8) may subject the researcher to criminal prosecution

under Section 63G-2-801.

(b) A researcher may disclose a record in individually identifiable form if the record is disclosed for the purpose of auditing or evaluating the research program and no subsequent use or disclosure of the record in individually identifiable form will be made by the auditor or evaluator except as provided by this section.

(c) A governmental entity may require indemnification as a condition of permitting research under this Subsection (8).

(9) (a) Under Subsections 63G-2-201(5)(b) and 63G-2-401(6), a governmental entity may disclose to persons other than those specified in this section records that are:

(i) private under Section 63G-2-302; or

(ii) protected under Section 63G-2-305 subject to Section 63G-2-309 if a claim for business confidentiality has been made under Section 63G-2-309.

(b) Under Subsection 63G-2-403(11)(b), the records committee may require the disclosure to persons other than those specified in this section of records that are:

(i) private under Section 63G-2-302;

(ii) controlled under Section 63G-2-304; or

(iii) protected under Section 63G-2-305 subject to Section 63G-2-309 if a claim for business confidentiality has been made under Section 63G-2-309.

(c) Under Subsection 63G-2-404(8), the court may require the disclosure of records that are private under Section 63G-2-302, controlled under Section 63G-2-304, or protected under Section 63G-2-305 to persons other than those specified in this section.

(10) A record contained in the Management Information System, created in Section 62A-4a-1003, that is found to be unsubstantiated, unsupported, or without merit may not be disclosed to any person except the person who is alleged in the report to be a perpetrator of abuse, neglect, or dependency.

(11) (a) A private record described in Subsection 63G-2-302(2)(f) may only be disclosed as provided in Subsection (1)(e).

(b) A protected record described in Subsection 63G-2-305(43) may only be disclosed as provided in Subsection (4)(c) or Section 62A-3-312.

(12) (a) A private, protected, or controlled record described in Section 62A-16-301 shall be disclosed as required under:

(i) Subsections 62A-16-301(1)(b), (2), and (4)(c); and

(ii) Subsection 62A-16-302(1).

(b) A record disclosed under Subsection (12)(a) shall retain its character as private, protected, or controlled.

**63G-2-301. Records that must be disclosed.**

(1) As used in this section:

(a) "Business address" means a single address of a governmental agency designated for the public to contact an employee or officer of the governmental agency.

(b) "Business email address" means a single email address of a governmental agency designated for the public to contact an employee or officer of the governmental agency.

(c) "Business telephone number" means a single telephone number of a governmental agency designated for the public to contact an employee or officer of the governmental agency.

(2) The following records are public except to the extent they contain information expressly permitted to be treated confidentially under the provisions of Subsections 63G-2-201(3)(b) and (6)(a):

(a) laws;

(b) the name, gender, gross compensation, job title, job description, business address, business email address, business telephone number, number of hours worked per pay period, dates of employment, and relevant education, previous employment, and similar job qualifications of a current or former employee or officer of the governmental entity, excluding:

(i) undercover law enforcement personnel; and

(ii) investigative personnel if disclosure could reasonably be expected to impair the effectiveness of investigations or endanger any individual's safety;

(c) final opinions, including concurring and dissenting opinions, and orders that are made by a governmental entity in an administrative,

adjudicative, or judicial proceeding except that if the proceedings were properly closed to the public, the opinion and order may be withheld to the extent that they contain information that is private, controlled, or protected;

(d) final interpretations of statutes or rules by a governmental entity unless classified as protected as provided in Subsections 63G-2-305(16), (17), and (18);

(e) information contained in or compiled from a transcript, minutes, or report of the open portions of a meeting of a governmental entity as provided by Title 52, Chapter 4, Open and Public Meetings Act, including the records of all votes of each member of the governmental entity;

(f) judicial records unless a court orders the records to be restricted under the rules of civil or criminal procedure or unless the records are private under this chapter;

(g) unless otherwise classified as private under Section 63G-2-303, records or parts of records filed with or maintained by county recorders, clerks, treasurers, surveyors, zoning commissions, the Division of Forestry, Fire, and State Lands, the School and Institutional Trust Lands Administration, the Division of Oil, Gas, and Mining, the Division of Water Rights, or other governmental entities that give public notice of:

(i) titles or encumbrances to real property;

(ii) restrictions on the use of real property;

(iii) the capacity of persons to take or convey title to real property; or

(iv) tax status for real and personal property;

(h) records of the Department of Commerce that evidence incorporations, mergers, name changes, and uniform commercial code filings;

(i) data on individuals that would otherwise be private under this chapter if the individual who is the subject of the record has given the governmental entity written permission to make the records available to the public;

(j) documentation of the compensation that a governmental entity pays to a contractor or private provider;

(k) summary data; and

(l) voter registration records, including an individual's voting history, except for those parts of the record that are classified as private in Subsection 63G-2-302(1)(i).

(3) The following records are normally public, but to the extent that a record is expressly exempt from disclosure, access may be restricted under Subsection 63G-2-201(3)(b), Section 63G-2-302, 63G-2-304, or 63G-2-305:

(a) administrative staff manuals, instructions to staff, and statements of policy;

(b) records documenting a contractor's or private provider's compliance with the terms of a contract with a governmental entity;

(c) records documenting the services provided by a contractor or a private provider to the extent the records would be public if prepared by the governmental entity;

(d) contracts entered into by a governmental entity;

(e) any account, voucher, or contract that deals with the receipt or expenditure of funds by a governmental entity;

(f) records relating to government assistance or incentives publicly disclosed, contracted for, or given by a governmental entity, encouraging a person to expand or relocate a business in Utah, except as provided in Subsection 63G-2-305(35);

(g) chronological logs and initial contact reports;

(h) correspondence by and with a governmental entity in which the governmental entity determines or states an opinion upon the rights of the state, a political subdivision, the public, or any person;

(i) empirical data contained in drafts if:

(i) the empirical data is not reasonably available to the requester elsewhere in similar form; and

(ii) the governmental entity is given a reasonable opportunity to correct any errors or make nonsubstantive changes before release;

(j) drafts that are circulated to anyone other than:

(i) a governmental entity;

(ii) a political subdivision;

(iii) a federal agency if the governmental entity and the federal agency are jointly responsible for implementation of a program or project that has been legislatively approved;

(iv) a government-managed corporation; or

(v) a contractor or private provider;

(k) drafts that have never been finalized but were relied upon by the governmental entity in carrying out action or policy;

(l) original data in a computer program if the governmental entity chooses not to disclose the program;

(m) arrest warrants after issuance, except that, for good cause, a court may order restricted access to arrest warrants prior to service;

(n) search warrants after execution and filing of the return, except that a court, for good cause, may order restricted access to search warrants prior to trial;

(o) records that would disclose information relating to formal charges or disciplinary actions against a past or present governmental entity employee if:

(i) the disciplinary action has been completed and all time periods for administrative appeal have expired; and

(ii) the charges on which the disciplinary action was based were sustained;

(p) records maintained by the Division of Forestry, Fire, and State Lands, the School and Institutional Trust Lands Administration, or the Division of Oil, Gas, and Mining that evidence mineral production on government lands;

(q) final audit reports;

(r) occupational and professional licenses;

(s) business licenses; and

(t) a notice of violation, a notice of agency action under Section 63G-4-201, or similar records used to initiate proceedings for discipline or sanctions against persons regulated by a governmental entity, but not including records that initiate employee discipline.

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

## 63G-2-308. Segregation of records.

Notwithstanding any other provision in this chapter, if a governmental entity receives a request for access to a record that contains both information that the requester is entitled to inspect and information that the requester is not entitled to inspect under this chapter, and, if the information the requester is entitled to inspect is intelligible, the governmental entity:

(1) shall allow access to information in the record that the requester is entitled to inspect under this chapter; and

(2) may deny access to information in the record if the information is exempt from disclosure to the requester, issuing a notice of denial as provided in Section 63G-2-205.

# CERTIFICATE *of* SERVICE

This is to certify that on the 7th day of March, 2011, two true and correct copies of the foregoing were served by the method indicated below, and addressed to the following:

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