

One Utah Center, Suite 800
201 South Main Street
Salt Lake City, UT 84111-2221
TEL 801.531.3000
FAX 801.531.3001
www.ballardspahr.com

Mark R. Gaylord
Direct: 801.531.3070
Fax: 801.321.9070
gaylord@ballardspahr.com

September 28, 2015

Via email & hand-delivery

John Dougall
Chief Administrative Officer
OFFICE OF THE UTAH STATE AUDITOR
310 STATE CAPITOL BLDG, STE E310
SALT LAKE CITY, UT 84114
jdougall@utah.gov

NOTICE OF APPEAL

Petitioner's name: Jordanelle Special Service District
Mailing address: c/o Mark R. Gaylord, Esq.
BALLARD SPAHR LLP
201 S. Main Street
Salt Lake City, Utah, 84111
Daytime Tel. No.: (801) 531-3000

Dear Mr. Dougall:

As you know, this firm represents Jordanelle Special Service District (the "Requester" or "JSSD"). Under section 401 of the Government Records Access and Management Act any person may appeal a determination by filing a notice of appeal. Utah Code Ann. § 63G-2-401(1)(a),(2). Pursuant to this section, JSSD hereby gives you notice of its appeal of the Office of the Utah State Auditor's (the "Auditor") August 27, 2015 response to its GRAMA request dated June 8, 2015. In submitting this appeal, JSSD is demanding production of all documents and communications set out in its request, specifically all records the Auditor received during its Audit, exclusive of documents the Auditor received from JSSD which is already in JSSD's possession. As part of JSSD's appeal, we provide a statement of facts, as well as reasons and legal authority in support of JSSD's appeal. *Id.* at § 63G-2-401(3).

Short Statement of Facts

On June 8, 2015, JSSD made a request to the Auditor under GRAMA. (*See* GRAMA Request Form 6/8/2015, attached as Exhibit A.) On August 27, 2015, JSSD, by and through the undersigned, received a letter from Linda Siebenhaar. (*See* Letter 8/27/2015, attached as Exhibit B.)

Accompanying Ms. Siebenhaar's letter were two binders containing various responsive records. However, Ms. Siebenhaar also explained that "not all documents responsive to [JSSD's] request c[ould] be provided pursuant to the requirements of GRAMA." (Letter 8/27/2015.) Ms. Siebenhaar provided a general explanation of the types of responsive records that were withheld as well as statutes that purportedly exempted those records. This included:

- Communications with the Hotline complainant(s) or with persons who requested anonymity (*Utah Code* § 63G-2-305(10) and *Utah Code* § 67-3-1 (15) (a) (ii)).
- Communications or documents related to the private land transaction between the Bests and Fishin' with Bread. Per *Utah Code* § 63G-2-103 (22) (b), material that is legally owned by an individual in the individual's private capacity is not considered a public record and is, therefore, not subject to the requirements of GRAMA.
- Various records or communications with representatives from the Attorney General's Office. Per 63G-2-305(17), these records are deemed "protected" as they are subject to the attorney-client privilege.

(emphasis in original).

Upon review of the records provided, we also noticed that a significant number of records were redacted. We have attached these redacted documents. (*See Redacted Documents*, attached as Exhibit C.) Ms. Siebenhaar gave no basis for the redaction of these documents.

Legal Authority and Reasoning

At the outset, it is important to note that there is a presumption that "government records are public." *See Southern Utah Wilderness All. v. Automated Geo. Ref. Ctr.*, 2008 UT 88, ¶ 21, 200 P.3d 643. There are of course exemptions to this presumption contained in Utah Code Ann. § 65G-2-305. When construing the provisions in the Utah Code, the law requires that you look to the provision's plain language. *Salt Lake City Corp. v. Haik*, 2014 UT App 193, ¶ 8. This means giving the language their "plain, natural, ordinary, and commonly understood meaning." *Gohler v. Wood*, 919 P.2d 561, 562-63 (Utah 1996).

1. JSSD was Given No Basis for the Redaction of Responsive Records.

As already noted, a significant number of records provided to JSSD in response to its GRAMA request are redacted. JSSD considers these redactions to be denials under GRAMA. Utah Code Ann. § 63G-2-204(8) ("If the governmental entity fails to provide the requested records . . . that failure is considered the equivalent of a determination denying access to the record."). More troubling is that JSSD was given no basis for the redactions. Utah Code Ann. § 63G-2-205(2)(a)-(b) states that "notice of denial shall contain . . . a description of the record or *portions of the record* to which access was denied," and "citations to the provisions of this

chapter . . . that exempt the record or *portions of the record* from disclosure” (emphasis added).

Without an explanation of the basis for redacting these records, JSSD is limited in determining whether the Auditor legally withheld these portions. We request that the Auditor expressly provide the basis for redacting and therefore withholding portions of the records. To the extent the redactions were done pursuant to the reasons provided by Ms. Siebenhaar in her letter, as explained below, we do not believe these redactions were proper and request that the full, unredacted copies, be provided.

2. The Sections that Exempt the Disclosure of Anonymous Complaints are Not Applicable.

In the denial letter, Ms. Siebenhaar explains that “Communications with the Hotline complainant(s) or with persons who requested anonymity” were withheld. The letter provides two provisions that purportedly exempt from disclosure the requested records; first, Utah Code Ann. § 63G-2-305(10). That section states:

(10) records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records:

(a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;

(b) reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings;

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

(d) reasonably could be expected to disclose the identity of a source who is not generally known outside of government and, in the case of a record compiled in the course of an investigation, disclose information furnished by a source not generally known outside of government if disclosure would compromise the source; or

(e) reasonably could be expected to disclose investigative or audit techniques, procedures, policies, or orders not generally known outside of government if disclosure would interfere with enforcement or audit efforts.

Suffice it say, that even assuming the withheld records (and redactions) were “created or maintained for . . . audit purposes,” the only subsection that appears remotely applicable is

subsection (d).¹ Subsection (d), however, is applicable only if release of the record would reasonably be expected to “disclose the identity of a source who is not generally known outside government.” The only reasonable interpretation of this language is that the person must be an official government source—such as an undercover officer, detective, employee, or informant. This language cannot mean that any person who provides information is a “source who is not generally known outside of government.” Such a standard would be nearly impossible to evaluate, since JSSD could never know whether the person is known to others “outside of government.”

Even assuming the latter meaning applies, if JSSD or *others* know that the person has provided information, then the Auditor must release this information because then the person *is* known outside government. Alternatively, if the Auditor can provide the information without revealing the identity of the person then it must do so. Here, it is obvious that the persons who provided information are known “outside the government.” In fact, based on many of the communications, redacted and otherwise, it is clear that the persons are adversaries of JSSD in pending litigation. Hence, there is no reasonable basis for withholding this information from JSSD.

Furthermore, there is simply no evidence that suggests any of the persons who purportedly have sought “anonymity” requested “anonymity.” To the contrary, the written communications reveal that no such request was ever made. The redacted communications are silent on this issue, and therefore the redactions are improper and contrary to Utah law.

Additionally, even if the identity of a person may not be provided, it is inappropriate to withhold the information provided by the third person. For example, there is a February 23, 2015 email to Messrs. Dougall and Tonks in which an “incident” is recounted for the Auditor. It is redacted without explanation. JSSD is entitled to the contents of the communication. This is especially true since it appears the content of the redaction is related to litigation that is currently on-going between JSSD and owners within Area C. The same is true with respect to the “Memo” entitled “3JSSD&L-RVSPD Change in Audit Plan and Program.” There, key facts have been redacted without explanation. It is improper to withhold this content.

¹ Under no stretch of the imagination, would subsections (a)–(c) or (e) apply in this context. In fact, quite the contrary, as the Auditor is well aware, JSSD has been embroiled in litigation with a number of property owners/developers located within Area C, a District that JSSD serves, over the construction of Improvements that directly and indirectly benefit the owners within Area C. This included Cumming Land & Livestock, LLC, BV Jordanelle, LLC and BV Lending, LLC (formerly Aspens), VR Acquisitions, LLC (formerly Victory Ranch) and others. All of these entities have individuals who have been their spokesperson, including David Cummings. To the extent any of these entities and/or individuals (on their own behalf and/or representing the entities interests) requested “anonymity” or was a “Hotline complainant,” does not give the Auditor the right to withhold this information once the final audit has been released. JSSD is entitled to know what its adversaries have represented to third-parties, including the Auditor. The Auditor cannot hide behind subsection 305(10).

The other provision that purportedly exempts from disclosure the requested records is Utah Code Ann. § 67-3-1(15)(a)(ii). This section states that protected records are “records and audit workpapers *to the extent* they would disclose the identity of a person who during the course of an audit, communicated the existence of any waste . . . if the information was disclosed on the condition that the identity of the person be protected.” Thus, in order to be a protected record (or justify redaction) under this part, the record must meet at least four parts:

- (1) release would “disclose the identity of a person”;
- (2) the person, whose identity would be disclosed, communicated with the Office “during the course of an audit”;
- (3) the person, whose identity would be disclosed, during the course of an audit communicated “the existence of any waste of public funds, property, or manpower, or a violation or suspected violation of a law, rule, or regulation adopted under the laws of this state, a political subdivision of the state, or any recognized entity of the United States”; and
- (4) the information provided by the person was given “on the condition that [his or her] identity be protected.”

To the extent the record withheld (or portions redacted) does not meet one of these four parts, the Office must release the record in full.

The communications, in particular, stand out as improperly redacted. As noted above, in none of the communications does the sender provide information “on the condition that [their] identity be protected.” Further, in several instances, the sender indicates that their identity is generally known outside of the State Auditor’s Office. For example, the sender on February 5, 2013 states for example, “[w]e have a great deal of information,” “[w]e would also be happy to come down and meet or have you up here.” In another email, on March 25, 2013, the sender states that he/she is forwarding an email from a citizen. Nor does any of the redacted information reveal the unidentified person(s) communicated the “existence of any waste of public funds, property, or manpower or a violation or suspected violation of a law rule or regulation.” Although the Auditor may have been critical of JSSD’s record keeping, it made no findings of waste of public funds or violations of Utah law. Under any interpretation of the above provisions, the identity of this person or persons cannot be deemed protected and should be released immediately, along with all documents and information withheld and/or redacted.

3. All Communications and Documents Related to the Land Transaction Between the Bests and Fishin’ With Bread Must be Disclosed.

In the denial letter, JSSD was also denied records related to, among other things, the land transaction between the Bests and Fishin’ with Bread. The denial is based on the dubious reasoning that the documents and communications are not “records” under Utah Code Ann. § 63G-2-103(22)(b), a definitional provision. First, the definitional provision of GRAMA is not a

proper basis for wholesale denying documents and communications. There is no claim that these records are protected under GRAMA or exempt from disclosure under Utah Code Ann. § 63G-2-302, 303, 304, or 305. These documents and communications were provided to the Auditor to facilitate and support the Auditor's audit. The audit has been concluded, and the Auditor's refusal to disclose these documents is improper.

Second, all documents and communications related to the land transaction between the Bests and Fishin' with Bread are "records" under GRAMA. Obviously these documents were received by the Auditor and are being retained by the Auditor. Utah Code Ann. § 63G-2-103(22)(a) states that a "[r]ecord" 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 . . . that is prepared, owned, *received*, or *retained* by a governmental entity or political subdivision . . ." (emphasis added). This section uses the disjunctive "or," therefore, if the document or communication was "received" or "retained" by the Auditor, then it is a record under GRAMA, and unless exempt from disclosure under § 63G-2-201(3)(b), must be disclosed. However, even a broad reading of section 201(3)(b) cannot support withholding records from production. JSSD is entitled to all documents and records relied upon by the Auditor to form his opinion.

Finally, even assuming it is true that the documents or communications withheld are "legally owned by an individual," it is simply unreasonable for the Auditor to withhold a document or communication on that basis. GRAMA specifically allows the Auditor to provide copies. *See* Utah Code Ann. § 63G-2-201. Moreover, the conclusory statement that the documents are "legally owned by an individual" does not help. In the instance referred to in the documents produced, the producing party voluntarily turned over the records without condition and the Auditor relied upon this information. The Auditor cannot hide behind § 103(2)(b)(iii) to deny JSSD access to these records.

4. Documents Provided To the Auditor Are Not Protected from Production Under GRAMA

Regardless of the foregoing, the Auditor appears to be withholding a considerable amount of information and documents provided by third-parties. All that was produced by the Auditor on August 27, 2015 were two binders containing (a) a few written communications and (b) the Auditor's work papers. However, upon review of the "Special Project Documentation Form," there is reference made to having received "2 boxes full of documents and [redaction]." Where are the two boxes of documents? JSSD is entitled to this information and the Auditor has no legal basis for withholding this information.

Similarly, the Auditor has no basis to withhold and/or redact information from the various reports it created. There is simply no indication that the redactions are made to protect the identity of anyone but rather appears to protect facts. The time to protect facts is long gone. The Audit has been finalized and JSSD is now entitled to all the information the Auditor had within its possession, custody and control relating to the audit, whether provided by JSSD or third-parties.

The best example of the Auditor's improper withholding of information can be seen in a document entitled – 3JSSD8L-45 Fishin' With Bread Transaction. The Auditor has wholesale redacted the "Background Info." Why? What possible basis in law does the Auditor have for redacting the facts set forth in the Background section? The "Fishin' With Bread" transaction lies at the heart of two lawsuits JSSD is currently embroiled in; what third-parties are telling the Auditor is directly relevant to those issues.

Finally, the Auditor provides no legal justification for redacting its work papers. Yet, throughout the production of documents, the Auditor has made wholesale redactions without explanation. This is a denial of JSSD's request of documents to which JSSD is entitled, and provides the grounds for this appeal.

5. Any Communications Not Subject to the Attorney Client Privilege Must be Disclosed.

In the denial letter, Ms. Siebenhaar also explained that "[v]arious records or communications with representatives from the Attorney General's Office" were withheld. These records and communications were withheld "[p]er 63G-2-305(17)" because according to her they were "deemed 'protected' [by] the attorney-client privilege." While we of course respect the attorney-client privilege, we are concerned that there may be documents that do not fall within this exemption. The attorney-client privilege has a very specific meaning and protects a very specific category of communications.

Under Utah law the "mere existence of an attorney-client relationship does not ipso facto make all communications between them confidential." *Southern Utah Wilderness All. v. Automated Geo. Reference Ctr.*, 2008 UT 88, ¶ 33, 200 P.3d 643 (internal quotation marks omitted). To "rely on the attorney-client privilege, a party must establish: (1) an attorney-client relationship, (2) the transfer of confidential communication,² and (3) the purpose of the transfer was to obtain legal advice." *Id.* Thus, even assuming there exists an attorney-client relationship between the Auditor and the Attorney General's Office, you must still determine whether the communication was confidential, i.e., "not intended to be disclosed to third persons," and was for the *purpose* of obtaining legal advice. If your communication with the Attorney General's Office was not to obtain legal advice, but was, for example, to forward information to them, that communication would not be protected by the attorney-client privilege or § 63G-2-305(17).

Conclusion & Relief Sought

For the foregoing reasons JSSD requests the following relief:

² "Confidential Communication" is defined in Rule 504(a)(6) of the Utah Rules of Evidence as "communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

- A detailed notice of denial, containing a description of the records or portions of the records to which access was denied and citations to the provisions of Chapter 2, Title 63G that exempt the records or portions of the records from disclosure.
- Unredacted copies of all records, including the records attached as Exhibit C.
- Unredacted copies of all communications and documents related to the land transaction between the Bests and Fishin' with Bread.
- All records and communications between the Auditor and the Attorney-General's Office that are not protected by the attorney-client privilege as defined by Utah law. We would further request a "privilege log" of all communications that are being withheld so that we are able to evaluate whether the privilege has been properly raised.
- Full, complete, and unredacted disclosure of all records responsive to paragraphs 1-19 of Exhibit 1 to JSSD's GRAMA Request Form, including, but not limited to, the two boxes of records obtained from the complainant which have not been produced in violation of GRAMA.

Very Truly Yours,



Mark R. Gaylord

MRG/mje
Attachments

cc: Paul Tonks (*via email*)
Van Christiansen (*via email*)
Mike Kohler (*via email*)

EXHIBIT A

NOTE FROM THE OFFICE OF THE UTAH STATE AUDITOR:

Exhibit A contains the GRAMA Request Form, dated 6/8/2015, from Mark R. Gaylord, as attorney for Jordanelle Special Service District.

This document was previously posted on our website as “1. Request for Production of Records on 6/8/2015 relating to JSSD and Report No. 13-JSSD-8L – Audit of the Jordanelle Special Service District” and can be viewed at:

<http://auditor.utah.gov/wp-content/uploads/sites/6/2013/06/6-8-15-GRAMA-Request-Ballard-Spahr-for-JSSD.pdf>

EXHIBIT B

NOTE FROM THE OFFICE OF THE UTAH STATE AUDITOR:

Exhibit B contains “Letter 8/27/2015” which is the Office of the Utah State Auditor’s Response to the GRAMA Request dated 6/8/2015 from Mark R. Gaylord, as attorney for Jordanelle Special Service District.

This document was previously posted on our website as “3. Response on 8/27/15” and can be viewed at:

<http://auditor.utah.gov/wp-content/uploads/sites/6/2013/06/8-27-15-Response-to-Mark-Gaylord.pdf>

EXHIBIT C

NOTE FROM THE OFFICE OF THE UTAH STATE AUDITOR:

Exhibit C contains “Redacted Documents” which were provided as part of the Office of the Utah State Auditor’s Response to the GRAMA Request dated 6/8/2015 from Mark R. Gaylord, as attorney for Jordanelle Special Service District.

All documents provided as part of the response—including the redacted documents in Exhibit C—are contained in the following document which was previously posted on our website as:
“3. ... copy of provided Records”
and can be viewed at:

<http://auditor.utah.gov/wp-content/uploads/sites/6/2013/06/GRAMA-Request-Docs.pdf>