

Mark Christopher Tracy
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1160 E. Buchnell Dr.
Sandy, Utah 84094
Tel: 929-208-6010
Pro se Appellant

IN THE UTAH COURT OF APPEALS

MARK CHRISTOPHER TRACY,

Petitioner / Appellant,

v.

SIMPLIFI COMPANY, JENNIFER
HAWKES, and ERIC HAWKES

Respondents / Appellees.

**APPELLANT’S RESPONSE TO
SUA SPONTA MOTION FOR
SUMMARY DISPOSITION**

Case No.: 20210227-CA

Trial Court Case No.: 200905074

Pursuant to this Court’s Order dated December 17, 2021, *pro se* Appellant Mark Christopher Tracy (“Mr. Tracy”) submits the following *Appellant’s Response to the Sua Sponta Motion for Summary Disposition*.

The instant appeal concerns the transmission of a duplicitous electronic data file by the designated public records office of a Utah special service water district,¹ and directly presents the issue if the deliberate fabrication of government documents directly relevant to pending state² and

¹ For the instant motion, the factual allegations of the Petition for de novo Judicial Review of the Denied Request for Disclosure of Government Records (“*Petition*”) are assumed true and all permissible inferences are to be drawn in favor of Mr. Tracy as the non-moving party of a granted Rule 12(b)(5) motion to dismiss. *St. Benedict’s Dev. v. St. Benedict’s Hosp.*, 811 P. 2d 194 (Utah 1991).

² *Emigration Canyon Home Owners Association v. Kent L. Jones and Emigration Improvement District*, No. 20200295, (Utah Ct. App., Stay Order, December 15, 2021).

federal³ litigation involving ground and surface water depletion⁴ and corresponding drinking-water contamination in Emigration Canyon⁵ constitutes a willful violation of the Utah Government Records Access and Management Act (“GRAMA”) permitting injunctive relief and recovery of attorney fees and costs.⁶

In concurrent litigation involving the same parties to the present appeal, and following the willful refusal to disclose laboratory test results of lead contamination of public drinking water system UT18143, owned by Emigration Improvement District (“EID” aka Emigration Canyon Improvement District aka ECID) and operated by Appellee Simplifi Company (“Simplifi”) through Appellees Emigration Canyon Deputy Mayor Jennifer Hawkes (“Deputy Mayor Hawkes”) and EID General Manager, EID Financial Manager, EID Election Specialist, EID Public Records Officer, and Appellee Eric Hawkes (“Mr. Hawkes”)(collectively “Simplifi Appellees”),⁷ this Court ruled that it was “unnecessary” to rule if GRAMA provisions apply to a private Utah corporation and controlling shareholders in sole custody of requested public records,⁸ due to the

³ *United States ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, No. 21-4049 & 21-4143 (10th Cir., Order, December 13, 2021); see also Brian Maffly, ‘We Don’t Need Your Water’: Emigration Canyon Water Fight Breaks Out in Court, Salt Lake Tribune (June 18, 2015), <https://archive.sltrib.com/article.php?id=2618507&itype=CMSID>, and Emma Penrod, *Paranoia and a ‘Preposterously’ Oversized Water Tank*, High Country News (June 28, 2019), <https://www.hcn.org/articles/water-paranoia-and-a-preposterously-oversized-water-tank-in-utah>.

⁴ See Brian Maffly, *Why is Emigration Creek — A Historic Utah Waterway — Dry? Blame Runs from Climate Change to Drought to Development to Water-Sucking Wells*, Salt Lake Tribune (September 8, 2018), <https://www.sltrib.com/news/environment/2018/09/08/why-is-emigration-creek/>.

⁵ Brian Maffly, *Lead Shows Up in Emigration Canyon Drinking Water* (November 8, 2020), <https://www.sltrib.com/news/environment/2019/11/08/lead-shows-up-emigration/>.

⁶ Utah Code Ann. § 63G-2-802.

⁷ As EID has no physical presence, no employees, and retains no government records per Utah Code Ann. § 63G-2-204(1)(a), it was not a party to the proceedings below.

⁸ Under the federal Safe Drinking Water Act of 1974, all records of lead contamination of drinking water must be maintained at the business premises of Simplifi Appellees regardless if organized as a public or private entity. 40 CFR § 141.33.

fact that the GRAMA request form originally submitted to Simplifi Appellees⁹ identified only EID as the contracting governmental entity and not Simplifi Appellees as the designated “EID Public Records Office” (“Lead-Records Lawsuit”).¹⁰ *See Mark Christopher Tracy v. Simplifi et. al.* No. 20200705, (Utah Ct. App, September 14, 2021), attached as **Exhibit A**.

This present sua sponte motion now asks if the present appeal must also be dismissed for the same reason.

As the issue of the application of GRAMA provisions to a private Utah corporation and controlling shareholders in sole possession of government records is now unavoidable, and the claims of error of the present appeal were neither identified nor resolved in the Lead-Records Lawsuit, the Court should withdraw its sua sponta motion for summary disposition and allow the case to proceed to briefing. *See e.g., State v. Geukgeuzian*, 2004 UT 16 at ¶ 13.

FACTUAL AND PROCEDURAL BACKGROUND OF APPEAL

1. The public’s right to access information concerning the conduct of the people’s business records is a constitutionally protected right in the State of Utah.¹¹

⁹ The preprinted GRAMA request form published by the Utah State Office of Government Records Ombudsman provides that the requestor identifies the “governmental agency *or* office” (emphasis added) [Petition at Ex. AA] while Utah Code Ann. § 63G-2-204(1)(a) requires that the GRAMA request is submitted to the “government entity that retains the [requested] record.”

¹⁰ On February 22, 2021, the Utah State Records Committee denied Mr. Tracy’s request for disclosure of public records as the GRAMA request listed Simplifi instead of “Emigration Improvement District c/o Simplifi Company.” As EID has no physical presence separate from the private residence of Deputy Mayor Hawkes and Mr. Hawkes, both the previous rulings by this Court and the State Records Committee appear contrary to 40 CFR § 141.33 and Utah Code Ann. § 63G-2-204(1)(a). *See* Utah State Records Committee Decision and Order, attached as **Exhibit B**.

¹¹ Utah Code Ann. § 63G-2-102(1)(a).

2. Mr. Tracy is a federal whistleblower in what has alleged to be the longest, most profitable, and perhaps most economically destructive water grabs in the history of the State of Utah [*Petition* at page 5, no. 15].¹²
3. Sometime after June 2014, Simplifi Appellees assumed operation of water system UT18143 owned by EID [*Petition* at page 6, ft. no. 5].
4. The private residence of Deputy Mayor Hawkes and Mr. Hawkes is identified both as the physical location of EID registered with the Utah Lt. Governor’s Office and the primary place of business of Simplifi recorded with the Utah Department of Commerce [*Petition* at page 10, no. 30].
5. Utah Code Ann. § 63G-2-103(11)(b) provides that a governmental entity also includes “every office ... that is funded or established by the government [entity] to carry out the public's business” [*Petition* at page 14, no. 46].
6. In the 2019 calendar year, EID through “EID Financial Manager” Mr. Hawkes paid Deputy Mayor Hawkes and Mr. Hawkes through Simplifi \$97,321.08 for manager compensation, office expenses and internet and computer expenses equaling 20% of EID’s operating expenses for that calendar year [*Petition* at page 6, ft. no. 5].
7. In an email correspondence dated February 24, 2021, Simplifi Appellee’s current legal counsel Jeremy R. Cook, Esq., of the Salt Lake City law firm Cohne Kinghorn P.C., (“Utah Attorney Cook”) verified Simplifi Respondents’ legal status as the “EID Public Records Office.” *See* email correspondence to Mr. Tracy, attached as **Exhibit C**.
8. EID will default on federally-backed loan obligations if Simplifi Appellees are unable to maintain current revenue consisting of monthly “fire-hydrant rental fees,” and “standby

¹² *See* footnote no. 3 *supra*.

fees” paid by Emigration Canyon residents unaware of extensive groundwater depletion and corresponding drinking-water contamination [*Petition* at page 10, no. 27].

9. With no other income source, Simplifi Appellees have a vital economic interest in concealing government records in their sole physical custody related to groundwater depletion and corresponding drinking-water contamination in Emigration Canyon [*Petition* at page 9, no. 26].
10. On, September 2018, for the first time on record, the Emigration Canyon stream suffered total depletion less than 2 miles from Utah’s Hogle Zoo as predicted in hydrology reports and oral testimony presented to the Utah State Engineer by the predecessor in interest to Simplifi Appellees’ current legal counsel Cohne Kinghorn P.C.¹³ [*Petition* at page 7, no. 19].
11. On June 16, 2020, the Emigration Canyon Home Owners Association (“The ECHO-Association”) recorded massive ground subsidence and a 700-foot fissure in the Canyon’s Freeze Creek drainage area,¹⁴ believed caused by groundwater depletion of the Emigration Canyon’s Twin Creek Aquifer via operation of large-diameter commercial wells by Simplifi Appellees as documented in a 2000 geohydrological study [*Petition* at page 7, no. 20].
12. On July 6, 2020, Mr. Hawkes informed Utah Attorney Cook that water system UT18143 had exceeded mandatory federal reporting standards for lead contamination of drinking

¹³ See video recording and illustrative diagrams entitled “Interference with Groundwater Movement by the Emigration Oaks Development” at the website administered by The ECHO-Association at https://echo-association.com/?page_id=2204.

¹⁴ See audio and video recording entitled “Aerial and Ground Recording of the Emigration Oaks PUD (YouTube)” at the website administered by The ECHO-Association at https://echo-association.com/?page_id=3310.

water but then failed to inform Canyon residents [*Petition* at page 14, no. 42]. *See also* “Email Correspondence from EID General Manager Eric Hawkes of Simplifi Company to EID Trustees and Utah Attorney Cook, attached as **Exhibit D**.

13. On June 10, 2020, Mr. Tracy submitted a GRAMA request to Simplifi Appellees as the designated EID Public Records Office for all telemetry data for EID production wells and water storage facilities since September 1, 1998 [*Petition* at page 15, no. 49].
14. Upon non-response, on July 27, 2020, Mr. Tracy appealed to EID Trustee Chairman Michael Scott Hughes,¹⁵ as the designated GRAMA chief administrative officer (“CAO Hughes”) per Utah Code Ann. § 63G-2-401(1)(a) [*Petition* at page 15, no. 50].
15. On July 9, 2020, Simplifi through Mr. Hawkes, and not CAO Hughes, transmitted a data file, which did not correspond with the water levels previously reported by Simplifi Appellees during EID public trustee meetings [*Id.*].
16. To avoid additional legal action, Mr. Tracy reported the discrepancy to both Simplifi Appellees and EID trustees on July 15, 2020 [*Petition* at page 15, no. 50].
17. No response was received and Mr. Hawkes refused to disclose water levels of EID production wells during the following EID trustee meeting on August 6, 2020, although the issue was identified in the public meeting agenda [*Petition* at page 15, no. 52].
18. On August 10, 2021, Mr. Tracy filed the present legal action against Simplifi Appellees for willful violation of GRAMA provisions, requesting injunctive relief and award of attorney fees and costs (“Telemetry Lawsuit”).

¹⁵ *See* audio record entitled “Trustee Chairman Hughes: EID Has No Obligation to Report Lead Contamination to Water Users and Standby Customers” at the website administered by The ECHO-Association at https://echo-association.com/?page_id=1661.

19. On December 7, 2020, during appellate review of the Lead-Records Lawsuit, Mr. Tracy served Simplifi Appellees the Telemetry Lawsuit as required under Rule 4(b) Utah R. Civ. P.
20. Simplifi Appellees through Utah Attorney Cook filed motion to dismiss under Rule 12(b)(6) Utah R. Civ. P.
21. The district court refused to stay proceedings during appellate review of the Lead-Records Lawsuit, granted dismissal based solely upon factual representations of the moving party and awarded Simplifi Appellees \$5,758.50 in legal fees and costs against Mr. Tracy. *Mark Christopher Tracy v. Simplifi et. al.* No. 200905074, Memorandum Decision and Order, and Judgement, No. 200905074 (Utah 3rd Dist.), attached as **Exhibit E** and **Exhibit F**.¹⁶
22. Mr. Tracy timely appealed.

ARGUMENT

Unlike the Lead-Records Lawsuit, the present case involves four (4) claims of error: (i) whether the district court may disregard factual allegations of the non-moving party under a Rule 12(b)(6) motion to dismiss, [Docketing Statement at no. 6, attached as **Exhibit G**] (ii) if the private Utah corporation and controlling shareholders contracted by a special service water district to act as the designated “Public Records Office” may usurp the function of the chief administrative officer [*id.*], (iii) whether transmission of a fabricated data file constitutes a willful violation of GRAMA provision allowing injunctive relief and an award of attorney fees and costs against the contracted Public Records Office of a Utah special water service district [*id.*], and (iv) if

¹⁶ During appellate review, the district court issued an Amended Judgement awarding Simplifi Appellees legal fees and costs in the amount of \$9,029.00 and finding Mr. Tracy to be a vexatious litigant under Utah R. Civ. P. 83(b)(4) for having requested public records from Simplifi Appellees as the designated EID Public Records Office. *Tracy v. Kouris*, No. 20210891-SC (Utah, Notice of Nonresponse, December 8, 2021).

compliance with Rule 4(b) Utah R. Civ. P. constitutes “harassment” and “bad faith” under Utah Code Ann. § 78B-5-825(1) permitting an award of attorney fees and costs against the requestor of government records [*id.*].

As such, the issues of the present appeal were neither addressed not resolved in the Lead-Records Lawsuit. Summary disposition of the present appeal is therefore unappropriated. *See e.g., State v. Geukgeuzian*, 2004 UT 16 at ¶ 13.

CONCLUSION

As the previous ruling in the Lead-Records Lawsuit is not dispositive of any claim of error of the present appeal, this Court should withdraw its sua sponta motion for summary disposition and set the briefing schedule.

DATED this 10th day of January 2022.

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Appellant

EXHIBIT A

SEP 14 2021

IN THE UTAH COURT OF APPEALS

<p>MARK CHRISTOPHER TRACY, Appellant, <i>v.</i> SIMPLIFI COMPANY, JENNIFER HAWKES, AND ERIC HAWKES, Appellees.</p>	<p>ORDER Case No. 20200705-CA</p>
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Before Judges Christiansen Forster, Harris, and Hagen.

Mark Christopher Tracy filed a petition for review in the district court complaining that Simplifi Company, Jennifer Hawkes, and Eric Hawkes (collectively, Respondents) had violated Utah’s Government Records Access and Management Act (GRAMA), and asking the court for an injunction and other relief. Respondents filed a motion asking the district court to dismiss Tracy’s petition. The court granted that motion, and Tracy now appeals. We affirm the district court’s determination, and we do so in this unpublished order. Our rules of appellate procedure empower us to decide any case in an expedited manner, without issuing a published opinion; we elect to do so here, determining on our own motion that this matter is appropriate for such disposition. *See* Utah R. App. P. 31(a) (“The court may dispose of any qualified case under this rule upon its own motion before or after oral argument.”); *id.* R. 31(b)(1), (5).

Emigration Improvement District (the District) is a governmental entity created by Salt Lake County that is authorized to provide water and sewer services to houses located in Emigration Canyon. Eric Hawkes is the District’s representative and its designated records officer. Simplifi is a private company contracted to operate and maintain the public water system owned by the District. Eric and Jennifer Hawkes are directors of Simplifi.

On July 2, 2020, Tracy submitted a GRAMA request via email to the District. On its face, the request was made to “Emigration Improvement District,” and was not directed to any of the Respondents. The request was delivered to Eric Hawkes, at his official District email address (eric@ecid.org), apparently in his capacity as the District’s designated records officer. The request was not sent to any email associated with Simplifi or Jennifer Hawkes. In the request, Tracy sought “[a]ll laboratory test results

(‘chemical analysis’) for the presence of lead contamination in public drinking water system No. ‘18143’ (Emigration Improvement District) for the past ten (10) years.” Tracy also asked for an expedited response to the request.

On July 9, 2020, Eric Hawkes, on behalf of the District, responded by email to Tracy’s GRAMA request, stating as follows:

The District received your GRAMA request regarding the Lead Testing for the past 10 years. Your request for an expedited response has been denied. We are looking at the costs associated with providing this information to you and will get back with you as soon as possible.

Tracy considered this response a complete denial of his GRAMA request—a position apparently not shared by the District, who viewed the July 9 email as a denial only of the request for expedited treatment—and subsequently appealed the denial to the District’s chief administrative officer.

On July 27, 2020, Eric Hawkes, on behalf of the District, sent another email to Tracy, this time stating as follows:

I have attached a copy of the results of the latest lead & copper testing. I believe you have already received the previous testing results from [the Utah Division of Drinking Water] as per your [separate] GRAMA request. Thank you for your patience as we have been processing these results and working with [the Utah Division of Drinking Water]. The District has sent the homeowners a copy of their results and sent a public notice to water users on the copper results. Please let me know if you have any questions.

About two weeks later, Tracy filed a petition for judicial review of the allegedly denied GRAMA request and requested an injunction along with an award of attorney fees. *See* Utah Code Ann. §§ 63G-2-404, -802 (LexisNexis 2019) (establishing the procedure for seeking judicial review of a denied GRAMA request, and authorizing a district court to enjoin a governmental entity and award attorney fees under GRAMA when appropriate). Importantly, Tracy’s petition did not name the District as a respondent from whom relief was sought; instead, the petition named Respondents as the parties from whom relief was sought. In the petition, however, Tracy clearly identified the GRAMA request at issue as the one he submitted to the District on July 2, 2020. Indeed, a copy of that GRAMA request was attached to the petition, and (as noted

above) that GRAMA request was directed only to the District, and not to any of the Respondents.¹

Instead of answering the petition, Respondents filed a motion, pursuant to Utah Rule of Civil Procedure 12(b)(6), asking the court to dismiss Tracy's petition. In the motion, Respondents asserted that Tracy had failed to state a claim upon which relief could be granted because there was "no basis for [Tracy] to sue Simplifi, Mr. Hawkes, and Mrs. Hawkes based on a claim that the Emigration Improvement District ('the District') did not respond to a GRAMA request." The district court ultimately granted Respondents' motion to dismiss, concluding among other things that Respondents were not proper parties to the action and Tracy was entitled to no relief against them.

Tracy now appeals. "A ruling on a motion to dismiss presents a legal question that we review for correctness, affording no deference to the district court's decision." *Turner v. Staker & Parson Cos.*, 2012 UT 30, ¶ 7, 284 P.3d 600. "A motion to dismiss is appropriate only where it clearly appears that the plaintiff would not be entitled to relief under the facts alleged or under any set of facts he could prove to support his claim." *Larsen v. Davis County School Dist.*, 2017 UT App 221, ¶ 9, 409 P.3d 114 (quotation simplified).

"GRAMA establishes a process through which an individual may request access to a government record." *McKittrick v. Gibson*, 2021 UT 48, ¶ 20 (citing Utah Code Ann. § 63G-2-204(1)). "And when a governmental entity denies such a request, GRAMA establishes a process to appeal that decision." *Id.* (citing Utah Code Ann. §§ 63G-2-401 to -404, -701(5)–(6)). Specifically, GRAMA permits a party to file "[a] petition for judicial review of an order or decision." *See* Utah Code Ann. § 63G-2-404(1)(a).

In the present case, Tracy apparently attempted to seek judicial review of the District's alleged denial of a GRAMA request he made to and served upon the District on July 2, 2020. But Tracy did not name the District as a party to this action. Instead, he filed his action against Respondents, none of whom—at least according to the allegations set forth in the petition²—were ever named in a GRAMA request. Tracy has

1. In deciding whether to grant a motion to dismiss, courts may properly consider documents attached to the complaint, in addition to the complaint itself. *See Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 10, 104 P.3d 1226.

2. In reviewing a district court's order dismissing a case for failure to state a claim, "we assume the truth of the factual allegations in the complaint and draw all reasonable inferences therefrom in the light most favorable to the plaintiff." *See Fehr v. Stockton*, 2018 UT App 136, ¶ 8, 427 P.3d 1190 (quotation simplified).

no grounds to bring an action against Respondents for judicial review of a denied GRAMA request when he never submitted a GRAMA request to Respondents in the first place. In short, Tracy is not entitled to relief under the facts alleged in his petition because the alleged denial of the GRAMA request was made by the District, not Respondents. If Tracy had alleged that he had submitted a GRAMA request to Respondents, or if he had sued the District instead of Respondents, the situation may be different.³ But here, where Tracy's GRAMA request was directed only to the District, but his petition for review is addressed only to Respondents, his petition states no claim upon which relief may be granted.⁴

Accordingly, we AFFIRM the district court's order granting the Respondents' motion to dismiss.

Dated this 14th day of September, 2021.

FOR THE COURT:



Ryan M. Harris, Judge

3. We do not mean to suggest that it would have been proper to serve a GRAMA request on Respondents. Although the parties spent much of their briefing energy on whether GRAMA applies to nongovernmental entities and individuals, it is not necessary for us to reach that issue to resolve this appeal.

4. Respondents attempt to characterize the problem with Tracy's petition as one grounded in subject-matter jurisdiction. But that is an inapt characterization. Utah district courts—which are courts of general jurisdiction—of course have subject-matter jurisdiction to consider petitions for judicial review regarding potential GRAMA violations. *See* Utah Code Ann. § 63G-2-404 (LexisNexis 2019). The fact that Tracy may not have sued the right parties, or that he otherwise does not meet the statutory requirements for a GRAMA claim, does not implicate the court's subject-matter jurisdiction; rather, it simply means that Tracy's claim lacks merit. *See, e.g., Zion Village Resort LLC v. Pro Curb U.S.A. LLC*, 2020 UT App 167, ¶¶ 51–55, 480 P.3d 1055.

EXHIBIT B

BEFORE THE STATE RECORDS COMMITTEE OF THE

STATE OF UTAH

MARK TRACY,

Petitioner,

v.

EMIGRATION IMPROVEMENT
DISTRICT, and SIMPLIFI COMPANY,

Respondents.

DECISION AND ORDER

Case No. 21-09

By this appeal, Petitioner, Mark Tracy, seeks access to records allegedly held by Respondents, Emigration Improvement District and Simplifi Company.

FACTS

In September 2020, Mr. Tracy, President of the Emigration Canyon Home Owners' Association, made three requests for records pursuant to the Government Records Access and Management Act ("GRAMA"). The request to Emigration Improvement District ("EID") was for e-mail correspondence regarding lead contamination of water system 18143 and the use of public funds for private legal costs. Mr. Tracy made a similar request to Simplifi Company ("Simplifi"), a contractor for EID.

After Mr. Tracy's appeals were denied, he filed three appeals (2020-115, 2020-121,

2020-125) with the State Records Committee (“Committee”). Because of the similar nature of the appeals, the Committee combined the appeals for an electronic hearing held on February 11, 2021. After carefully considering the requested relief of the parties, the Committee issues the following Decision and Order.

STATEMENT OF REASONS FOR DECISION

1. A person making a request for a record shall submit to the governmental entity that retains the record a written request for the record describing the record requested with reasonable specificity. Utah Code § 63G-2-204(1)(a). GRAMA defines governmental entities in Utah Code § 63G-2-103(11).
2. Regarding appeals 2020-115 and 2020-121, a review of the file shows that these records requests were made to Simplifi, a private company. Although work was done by Simplifi on behalf of EID, Simplifi is not a governmental entity. If a records requester desires records of a governmental entity that are held by a private entity, the request for records should be made to the governmental entity pursuant to Utah Code § 63G-2-204(1).
3. GRAMA’s definition of “record” includes records: (1) Prepared, owned, received, or retained by a governmental entity or political subdivision; and (2) Where all of the information in the original is reproducible by photocopy or other mechanical or electronic means. Utah Code § 63G-2-103(22)(a). It should be noted that a record does not need to be retained by a governmental entity in order for the record to be subject to GRAMA.

GRAMA could apply to a record that a governmental entity prepared, owned, or received even though the record is retained by another party.

4. In the present case, evidence was presented that Simplifi retains records that are owned by EID that are subject to the records request made by Mr. Tracy. Accordingly, the Committee finds that the records requests made to Simplifi were not properly requested to the governmental entity pursuant to GRAMA, and appeals 2020-115 and 2020-121 are denied.
5. Accordingly, the Committee finds that EID may be the holder of records responsive to Mr. Tracy's request in Appeal 2020-125 submitted to EID for e-mail correspondence regarding lead contamination of water system 18143 and records regarding the use of public funds for private legal costs. EID is ordered to do a more thorough search for records and provide any public records responsive to Mr. Tracy's records request including records retained by Simplifi on behalf of EID.

ORDER

THEREFORE, IT IS ORDERED THAT the appeals of Petitioner, Mark Tracy, are hereby **GRANTED** in part, and **DENIED** in part.

RIGHT TO APPEAL

A party to a proceeding before the Committee may seek judicial review in District Court of a Committee's Order by filing a petition for review of the Committee Order as provided in

Utah Code § 63G-2-404. Utah Code § 63G-2-403(14). A petition for judicial review of a Committee Order "shall be filed no later than 30 days" after the date of the Committee Order. Utah Code § 63G-2-404(1)(a). The petition for judicial review must be a complaint which is governed by the Utah Rules of Civil Procedure and include the Committee as a necessary party and contain the required information listed in Subsection -404(2). Utah Code § 63G-2-404(1) & (2). The court shall make its decision *de novo* but shall allow introduction of evidence presented to the Committee, determine all questions of fact and law without a jury, and decide the issue at the earliest practical opportunity. Utah Code § 63G-2-404(6). In order to protect a parties' rights on appeal, a party may wish to seek advice from an attorney.

PENALTY NOTICE

Pursuant to Utah Code § 63G-2-403(15)(c), if the Committee orders the governmental entity to produce a record and no appeal is filed, the government entity herein shall comply with the order of the Committee and shall: (1) Produce the record; and (2) File a notice of compliance with the Committee. If the governmental entity ordered to produce a record fails to file a notice of compliance or a notice of intent to appeal, the Committee may do either or both of the following: (1) Impose a civil penalty of up to \$500 for each day of continuing noncompliance; or (2) Send written notice of the entity's noncompliance to the Governor. Utah Code § 63G-2-403(15)(d)(i)(B). In imposing a civil penalty, the Committee shall consider the gravity and circumstances of the violation, including whether the failure to comply was due to neglect or

was willful or intentional. Utah Code § 63G-2-403(15)(d)(ii).

Entered this 22 day of February 2021

BY THE STATE RECORDS COMMITTEE



KENNETH R. WILLIAMS
Chair, State Records Committee

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing **Decision and Order**, U.S. mail postage prepaid, this 22 day of February 2021 to the following:

MARK TRACY
1160 E. Buchnell Dr.
Sandy, UT 84094
Petitioner

JEREMY COOK
COHNE KINGHORN
111 East Broadway, 11th Floor
Salt Lake City, UT 84111
*Counsel for Respondent,
Emigration Improvement District*

EXHIBIT C

From: Jeremy Cook <jcook@ck.law>
Date: February 24, 2021 at 2:40:28 PM PST
To: mark.tracy72@gmail.com, The ECHO-Association <m.tracy@echo-association.com>
Cc: "Eric Hawkes (eric@ecid.org)" <eric@ecid.org>
Subject: GRAMA Requests

Mr. Tracy,

As you are aware, on February 10, 2021, Judge Kouris awarded fees against you and in favor of EID's records office, Eric Hawkes, Simplifi Company and Jennifer Hawkes related to a previous GRAMA request that you submitted to EID. Judge Kouris found that the filing of a GRAMA appeal against Eric Hawkes, Jennifer Hawkes and Simplifi Company (all of which you have continued to include in your GRAMA request despite Judge Kouris' decision) lacked merit and was filed in bad faith.

In accordance with Utah Code Ann. 63G-2-203(8)(a), a governmental entity may require payment of past fees and future estimated fees before beginning to process a request if: (ii) the requester has not paid fees from previous requests. Based on your request, the fees owed to Eric Hawkes, Jennifer Hawkes and Simplifi Company are clearly past due and owing fees related to the attached GRAMA requests. Accordingly, EID will not process to the attached GRAMA requests until the amount of \$5,758.50 is paid in full (see attached Judgment).

Thanks,
Jeremy

<image001.png>
<image002.png>

Jeremy R. Cook
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
Phone: 801.363.4300 (after hours ext. 133) | Cell: 801.580.8759
jcook@cohnekinghorn.com

EXHIBIT D

From: Eric Hawkes <eric@ecid.org>

Date: Mon, Jul 6, 2020 at 8:44 AM

Subject: EID - Meeting Agenda??

To: David Bradford <dave@ecid.org>, Michael Hughes <mike@ecid.org>, Mike <highscience@gmail.com>, Brent Tippets <brent@ecid.org>, Jeremy Cook <jcook@cohnekinghorn.com>, Don Barnett <dbarnett@barnettwater.com>

Hi Gentlemen,

I hope everyone had a safe and fun July 4th. I'm questioning whether we want to proceed with our meeting this week or cancel it or move it to next week.

I do not have any items that need to be approved that could not wait until our next meeting in August, and we do not have any additional agenda requests except for Brigham Fork, which now may not be the best time to have this discussion.

As for updates, we may have dodged the bullet with well #2, thus far, it appears the check valve at the wellhead was bad resulting in constricting the flows and increasing the amps on the motor to the point the telemetry would shut it off after 10 or 15 minutes. A water sample will be pulled and sent to the lab and it should be back in operation in the next couple of days (pending lab results and pump test).

I've contacted Badger meters and they will be coming out in the next couple of weeks to do a cellular data analysis on our system and we are getting things set up on the starter package.

We are in the middle of our external audit and there is a new fraud risk assessment questionnaire we need to go through, so expect something on that over the next few days.

Lastly, we have performed our lead /copper testing and looks like our test this round exceeded both lead and copper. I do not have any answers at this point in time and am not ready for public discussion until we have more communication with DDW this week. In the meantime, Mr Tracy continues to submit GRAMA requests on the same.

Thoughts on the meeting?

--

Eric Hawkes

(p) 801.243.5741

(e) eric@ECID.org

(w) www.ECID.org

EXHIBIT E

The Order of the Court is stated below:

Dated: February 24, 2021
01:34:01 PM

/s/ MARK KOURIS
District Court Judge



Prepared and Submitted by:

Jeremy R. Cook (10325)
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**IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH**

MARK CHRISTOPHER TRACY, DBA
EMIGRATION CANYON HOME OWNERS
ASSOCIATION,

Petitioner,

vs.

SIMPLIFI COMPANY, a Utah Corporation,
ERIC HAWKES, an individual, and
JENNIFER HAWKES, an individual

Respondents.

**MEMORANDUM DECISION AND
ORDER**

Case No. 200905074

Judge: Kouris

This case is a petition for *de novo* judicial review of a denial of a request for documents pursuant to the Utah Government Records Access and Management Act (“GRAMA”). This matter is before the Court on Respondents’ Motion to Dismiss. Oral arguments were held on February 10, 2021.

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As background, Emigration Improvement District (“EID”) is a local district that is subject to GRAMA. On June 10, 2020, petitioner Mark Christopher Tracy (“Mr. Tracy”) sent an email to EID’s records officer, Eric Hawkes (“Mr. Hawkes”) at the email address “eric@ecid.org.” The email included a GRAMA request form requesting telemetry data for EID’s water wells and water tanks (the “GRAMA Request”). The GRAMA request form correctly designated the governmental entity as EID.

On June 27, 2020, Mr. Tracy sent an email to Mr. Hawkes acknowledging receipt of a different GRAMA request for a link to a Zoom meeting of EID’s board of trustees, and appealing the *de facto* denial of the GRAMA request for the telemetry data. On July 9, 2020, Mr. Hawkes sent an email to Mr. Tracy that stated: “We can get the raw data files copied to a memory stick in Windows Format. The cost would be \$60 for an estimated one hour of labor, memory stick, and postage. The software needed for the "raw data" is LGH File Inspector available at Softwaretoolbox.com. The alternative option is to provide the data to you in an excel format, however the cost would be an estimated \$3000.00 for the software and the engineer/ IT to extract the data to an excel file. Please let me know how you would like to proceed.”

On July 15, 2020, at the request of Mr. Tracy, Mr. Hawkes emailed a link to a “zip” file that contained all of the telemetry data from 2004 to present. In the email, Mr. Hawkes stated: “The following link is the data files for EID's In Touch Telemetry as per your request to have the data files emailed. The files go from 2004 to present. Again the data can be converted to an excel file, but would require EID to purchase software and a consultant to complete the process and a

fee would be associated with completing the task. Let me know if you have any questions regarding the GRAMA.”

In accordance with Utah Code Ann. § 63G-2-401, on July 17, 2020, Mr. Tracy sent an email to EID’s Chief Administrative Officer, Michael Scott Hughes, appealing the purported denial of the GRAMA request. Mr. Tracy’s basis for the appeal was that the water levels reported in EID’s board of trustees meeting on May 5, 2016 didn’t reflect the data provided by EID in response to the GRAMA request, and EID should have provided the data in Microsoft Excel format at no cost. Throughout the appeal to Mr. Hughes, Mr. Tracy indicated that the governmental entity was EID. A copy of the appeal is attached as Exhibit CC of the Petition. After the appeal to the Chief Administrator of EID was denied, Mr. Tracy filed the instant appeal.

However, instead of bringing the action against EID, Mr. Tracy named only Eric Hawkes, Jennifer Hawkes and Simplifi Company (“Respondents”). GRAMA provides that a records request must be made to a governmental entity. *See* Utah Code Ann. § 63G-2-204(1)(a) (“A person making a request for a record shall submit to the governmental entity that retains the record a written request . . .”). GRAMA further provides that a requester may petition for judicial review of the decision of the chief administrative officer of the governmental entity. *See* Utah Code Ann. § 63G-2-404(1) (“If the decision of the chief administrative officer of a governmental entity under Section 63G-2-401 is to affirm the denial of a record request, the requester may: (a)(ii) petition for judicial review of the decision in district court.”) EID is the governmental entity. The records are public records because they are records of EID. Accordingly, EID is a necessary party.

In contrast, Respondents are not governmental entities. *See* Utah Code Ann. § 63G-2-103(11). Mr. Tracy failed to cite any case law to support the position that Respondents are proper or necessary parties to this action; or cite any provision or language in GRAMA supporting the position he can sue an individual or private company based on a governmental entity's alleged failure to respond to a GRAMA request.

The Court further finds that an award of attorney fees is proper. Utah Code Ann. § 78B-5-825(1) calls for an award of attorney fees in civil actions when “the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.” This provision requires proof on “two distinct elements.” *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 46, 86 P.3d 712. An award of fees under this provision requires a determination that the losing party's claim was “(1) without merit, and (2) not brought or asserted in good faith.” *Id.*

As set forth above, this action was without merit. The action was also not brought in good faith. First, the majority of the allegations in the Petition have nothing to do with a purported appeal of the denial of a GRAMA request for telemetry data. In fact Mr. Tracy does not reference the actual GRAMA request until paragraph 49 of the Petition, and the GRAMA form that is the purported basis of the appeal is Exhibit AA of the Petition. The vast majority of the allegations and exhibits relate to other complaints and issues that Mr. Tracy has with EID or Respondents, and are not necessary or proper for this action.

Second, Mr. Tracy's GRAMA request, appeal to the chief administrative officer of EID, and this appeal, establish that Mr. Tracy understood that EID was the governmental entity. There is no evidence that EID has ever taken the position that the telemetry data was not a public

record of EID, or that Mr. Tracy has any reason to believe it was necessary to sue Respondents to obtain EID's records. The GRAMA request was made to EID, and EID responded and provided the request data to Mr. Tracy. The Court is not persuaded that Mr. Tracy believed he had any legitimate basis to sue Respondents, and his motivation for suing Respondents, as opposed to EID, was simply to harass Respondents.

Third, throughout the Petition and his argument, Mr. Tracy refers to Mrs. Hawkes as Deputy Mayor Hawkes. Mr. Tracy has not alleged that Mrs. Hawkes had any involvement with EID's response to the GRAMA request, or that her position as Deputy Mayor of a separate governmental entity has any relevance to this action. Instead, her inclusion in this matter, and Mr. Tracy's reference to her position as Deputy Mayor of Emigration Canyon Metro Township, is indicative of the fact that the Petition is not about obtaining records from EID, but is instead about attacking and harassing Mr. and Mrs. Hawkes.

Finally, on September 16, 2020, Judge Faust issued a *Memorandum Decision and Order* addressing the identical issue in this action. *See* Case No. 200905123. Judge Faust determined that EID was a necessary party and that there was no basis to sue Respondents. *Id.* Instead of amending the Petition to properly name EID, Mr. Tracy served and prosecuted this action after the decision of Judge Faust, and after knowing that there was no legal basis for suing Respondents.

In summary, the Court grants Respondents' motion to dismiss and the Court awards Respondents their reasonable attorney fees against Mark Christopher Tracy. Respondents shall

submit a declaration of their attorney fees. This Memorandum and Order constitutes the Order regarding the matters addressed herein. No further order is required.

————— **COURT'S SIGNATURE AND DATE APPEAR AT TOP OF** —————
FIRST PAGE OF THIS DOCUMENT

EXHIBIT F

The Order of the Court is stated below:

Dated: February 24, 2021
01:34:23 PM

/s/ MARK KOURIS
District Court Judge



Prepared and Submitted by:

Jeremy R. Cook (10325)
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**IN THE THIRD DISTRICT COURT
IN AND FOR THE STATE OF UTAH**

MARK CHRISTOPHER TRACY, DBA
EMIGRATION CANYON HOME OWNERS
ASSOCIATION,

Petitioner,

vs.

SIMPLIFI COMPANY, a Utah Corporation,
ERIC HAWKES, an individual, and
JENNIFER HAWKES, an individual

Respondents.

JUDGMENT

Case No. 200905074

Judge: Kouris

The Court hereby finds as follows:

1. Pursuant to the Court's *Memorandum Decision and Order*, Respondents' Motion to Dismiss is **GRANTED**.

2. The Court awards judgment in favor of respondents Simplifi Company, Eric Hawkes and Jennifer Hawkes and against petitioner Mark Christopher Tracy for attorney fees in

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the amount of Five Thousand Seven Hundred and Fifty-Eight Dollars and Fifty Cents
(\$5,758.50).

3. The Court further orders that this judgment may be augmented for interest, attorney fees and costs incurred in obtaining and collecting the judgment as permitted by the Utah Rules of Civil Procedure.

– Court’s Signature and Date Appear at Top of First Page of this Document –

Approved as to form:

Mark Christopher Tracy

EXHIBIT G

Mark Christopher Tracy dba Emigration
Canyon Home Owners Association

Name

1160 E. Buchnell Dr.

Address

Sandy, Utah 84094

City, State, Zip

929-208-6010

Phone

m.tracy@echo-association.com

Email

I am the Appellant

Attorney for the Appellant and my Utah Bar number is _____

In the Supreme Court for Utah

450 South State Street, Salt Lake City, UT 84111

Mark Christopher Tracy dba Emigration
Canyon Home Owners Association
Appellant

v.

Simplifi Company, Jennifer Hawkes and Eric
Hawkes

Appellees.

**Docketing Statement – Civil Case
(URAP 9(c))**

20210227-SC

Appellate Court Case Number

200905074

Trial Court Case Number

(1) **Nature of the appeal.** This appeal is from the:

final judgment after a trial

final order

default judgment

judgment after order granting summary judgment

an order granting a motion to dismiss

(2) **Important dates.**

- When was the final judgment of the trial court entered? **February 24, 2021**
- When was the Notice of Appeal filed in the trial court? **March 26, 2021**
- Did you receive an extension of time under Appellate Rule 4(e) to file the Notice of Appeal?

Yes No

If yes, when was the Motion for an Extension of Time granted?

- Did you file any of the following motions?

Yes No

Motion filed under:	Date motion filed:	Date of orders ruling on the motion:
URCP 50(b)		
URCP 52(b)		
URCP 59		
URAP 4(g)		

- Are you an inmate confined in an institution?

Yes No

If yes, when was the Notice of Appeal deposited in the institution's internal mail system? _____

- (3) **Claims or parties remaining before the trial court.** Is this appeal taken from an order certified as final under Utah Rule of Civil Procedure 54(b)?

Yes No

If yes, what claims and parties remain before the trial court?

- (4) **Issues on appeal.** Separately describe the issue(s) that you plan to argue in your appeal.

1) Is the records office of government entity subject to the Utah Government Records Access and Management Act (“**GRAMA**”) pursuant to Utah Code Ann. § 63G-2-103(11)(b)(i) when it is organized as a private Utah corporation and all government records are created and maintained at the private residence of the controlling shareholders?

2) Is the contracting governmental entity a “necessary party” to a petition for de novo judicial review commenced against the public records office under Rule 19(a) Utah Rules of Civil Procedure (“**URCP**”)?

3) May the district court grant a Rule 12(b)(6) motion to dismiss for failing to include a necessary party under Rule 19(a) URCP?

4) Is an petition for de novo judicial review “meritless” under Utah Code Ann. § 78B- 5-825(1) if the certified public records officer of a governmental entity transmits a false data file and demands payment of \$3,000 to covert data to a Excel spreadsheet, although data conversion was included as a standard software feature and would have taken 5 minutes to complete?

(6) **Summary of what happened in the trial court.** Briefly describe the facts relating to the issue(s) described above.

Sometime in 2013, Emigration Improvement District (“EID” aka Emigration Canyon Improvement District aka ECID), a Utah special service water district providing culinary drinking water to less than half of Emigration Canyon residents, awarded a no-bid contract to the Simplifi Company (“Simplifi”) to create and maintain government records related to the operation of water system no. 18143 compensated with an annual remuneration of \$118,000.00 of taxpayer funds for the current calendar year.

EID trustees designated the private residence of Simplifi’s sole shareholders Emigration Canyon Deputy Mayor Jennifer Hawkes (“Deputy Mayor Hawkes”) and her spouse Eric Hawkes (“Mr. Hawkes”) as both the physical location of EID as wells as the “EID records office” whereby Mr. Hawkes is registered with the Utah State Ombudsman as the “EID certified public records officer.”

As EID has neither physical presence nor employees, all government records are in the sole physical custody of Deputy Mayor Hawkes and Mr. Hawkes as “independent contractors” through Simplifi thereby effectively circumventing criminal sanctions for willful refusal to release government records under Utah Code Ann. § 63G-2-801(3)(a).

In September 2018, for the first time in recorded history, the Emigration Canyon stream suffered total depletion less than 2 miles from Utah's Hogle Zoo and Mr. Tracy's dba entity Emigration Canyon Homes Owners ("The ECHO-Association") began documenting ground subsidence and massive fissures in the Freeze Creek Drainage area, believed to be caused by the operation of large-diameter commercial wells owned by EID and operated by Simplifi through an improper water-extraction method known as "Groundwater Mining."

On June 10, 2020, Mr. Tracy submitted a request to Mr. Hawkes under the Utah Government Records Access and Management Act ("GRAMA") for water level reports (i.e., telemetry data) of EID's four (4) production wells and two (2) water storage facilities, whereby Mr. Hawkes transmitted an electronic data file, which proved inconsistent with water levels previously reported by Mr. Hawkes to EID trustees during public meetings. Mr. Hawkes further demanded payment of \$3,000.00 from Mr. Tracy to convert the data file to an Excel spreadsheet, although data conversion was included as a standard software feature and would have taken no more than 5 minutes to complete.

After EID Trustee Chairman Michael Scott Hughes failed to acknowledge or respond to Mr. Tracy's subsequent appeal to Chief Administrative Officer, Mr. Tracy filed de novo judicial review against Simplifi, and its sole shareholders Deputy Mayor Hawkes and Mr. Hawkes as the "EID records office" as per Utah Code 63G-2-103(11)(b)(1) for the de facto denied request for disclosure of government records.

Relying solely upon the factual representations of the moving party, the district court granted Simplifi Respondents' Rule 12(b)(6) motion to dismiss ruling that a private Utah corporation and its sole shareholders, compensated with taxpayer funds to maintain government records at a private residence are exempt from GRAMA provisions thereby citing a decision of Utah State Third District Court (Judge Faust) decided after filing and currently pending with the Utah Court of Appeals. See *Mark Christopher Tracy dba Emigration Canyon Home Owners Association v. Simplifi Company et al.* (UT App) Docket No. 20200705-CA (pending).

The district court further awarded Simplifi Respondents attorney fees and costs in the amount of \$5,895.55 under Utah Code Ann. 78B-5-825(1) ruling the petition for de novo judicial review of the de facto denied request for government records by Simplifi through Deputy Mayor Hawkes and Mr. Hawkes was "without merit" and based upon "bad faith" for having failed to include the contracting governmental entity as a "necessary party [under Rule 19(a) Utah Rules of Civil Procedure]."

(7) Have there been any appeals in this matter before this appeal? Are there any other appeals related to this appeal?

Yes No

If yes to either question, provide the appellate court case numbers. If the earlier or related appeal resulted in a written decision, provide the decision citation, if available.

Case Number	Citation (For example, 2015 UT 36 or 2015 UT App 103)
20200295-CA	<i>Emigration Canyon Home Owners Association v. Kent L. Jones and Emigration Improvement District</i> (pending)
20200705-CA	<i>Mark Christopher Tracy dba Emigration Canyon Home Owners Association v. Simplifi Company et al.</i> (pending)

April 16,2021
Date

Sign here ► /s/ Mark Christopher Tracy

Typed or Printed Name Mark Christopher Tracy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of January 2022, I caused a true and correct copy of the foregoing **APPELLANT’S RESPONSE TO SUA SPONTA MOTION FOR SUMMARY DISPOSITION** to be sent via electronic mail to the following:

Jeremy R. Cook
jcook@ck.law
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Attorney for Simplifi Company, Jennifer Hawkes and Eric Hawkes

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Appellant