

PUBLIC

In the Utah Court of Appeals

Mark Christopher Tracy dba
Emigration Canyon Home Owners
Association

Petitioner / Appellant

v.

Simplifi Company, Jennifer Hawkes
and Eric Hawkes

Respondents / Appellees

Case no. 20200705-CA

Brief of Appellant

Appeal from Order Granting Motion to Dismiss Petition for *de novo*
Judicial Review of the Denied Request for Access to Governmental
Records Regarding Lead Contamination of a Public Drinking Water
System entered in the Third Judicial District, Salt Lake County Division,
the Honorable Robert P. Faust presiding

No. 200905123

JEREMY R. COOK
TIM E. NIELSON
Cohne Kinghorn P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111
Tel: 801-363-4300
Counsel for Appellees

MARK CHRISTOPHER TRACY
1160 E. Buchnell Dr.
Sandy, Utah 84094
Tel. 929-208-6010
m.tracy@echo-association.com
Pro Se Appellant

Oral Argument Requested

No. 20200705-CA

IN THE
UTAH COURT OF APPEALS

PARTIES ON APPEAL*

MARK CHRISTOPHER TRACY DBA EMIGRATION CANYON HOME
OWNERS ASSOCIATION,

Appellant and Petitioner Below

v.

SIMPLIFI COMPANY, JENNIER HAWKES and ERIC HAWKES,

Appellees and Respondents Below

ADDITIONAL PARTIES BELOW

None.

* -- Counsel for parties are listed on the front cover of this brief.

Table of Contents

TABLE OF AUTHORITIES iv

INTRODUCTION.....1

STATEMENT OF ISSUES.....6

STATEMENT OF THE CASE9

SUMMARY OF ARGUMENT19

ARGUMENT19

I. UTAH STATE STATUTE, ADMINISTRATIVE AND COURT RULES OF CIVIL PROCEDURE, AS WELL AS STATE AND FEDERAL AUTHORITY GUARANTEE THE PUBLIC’S RIGHT TO GOVERNMENTAL RECORDS IN POSSESSION OF A PRIVATE CORPORATION AND INDIVIDUALS.....18

 A. Utah State Statute Provides That GRAMA Provisions Apply to an “Office” of Government Entity Funded to Carry out the People’s Business While the Utah Administrative Code Requires Lead Contamination Documents to be Maintained on the “Premises” of the Water System Operator for Public Inspection and the Rules of Civil Procedure Dictate That Simplifi Respondents are Necessary Parties to the Present Litigation.....19

 B. Sister States Also Apply Public Record Statues to Private Entities.....23

 C. Federal Courts Apply Freedom of Information Act and Federal Civil Rights Violations to Private Entities and Individuals.....25

II. INDIVIDUALS IN LAWFUL POSSESSION OF PUBLIC RECORDS REQUIRED TO BE MAINTAINED ON BUSINESS PREMISES FOR PUBLIC INSPECTION ARE SUBJECT TO CRIMINAL SANCTIONS FOR WILLFUL REFUSAL TO ALLOW ACCESS.....26

III. THE DISTRICT COURT IMPROPERLY STRUCK EVIDENCE OF
DEPUTY MAYOR HAWKES' STATUS AS DIRECTOR AND
OFFICER OF SIMPLIFI.....28

CONCLUSION31
CLAIM FOR ATTORNEY FEES32
CERTIFICATE OF COMPLIANCE34
CERTIFICATE OF SERVICE.....35

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Bell</i> , 2010 UT 47.....	19
<i>A.S. Abell Publ'g Co. v. Mezzanote</i> , 297 Md. 26, 464 A.2d 1068 (1983).....	24
<i>Blue Cross & Blue Shield v. State of Utah</i> , 779 P.2d 634 (Utah 1989).....	6, 7
<i>Buzas Baseball v. Salt Lake Trappers</i> , 925 P. 2d 941 (Utah 1996).....	30
<i>Cf. Forsberg v. Hous. Auth. of Miami Beach</i> , 455 So.2d 373 (Fla.1984).....	23
<i>Connecticut Humane Soc'y v. Freedom of Info. Comm'n</i> , 218 Conn. 757, 59 1 A.2d 395 (1991).....	23
<i>Duke v. Graham</i> , 2007 UT 31, 158 P.3d 540.....	19
<i>Ellison v. Garbarino</i> , 48 F.3d 192 (6th Cir.1995).....	25
<i>First Southwestern Fin. Servs. v. Sessions</i> , 875 P.2d 553 (Utah 1994).....	30
<i>Kan. Op. Att'y Gen.</i> 93-130 (1993), available at 1993 WL 467822, 1993 Kan. AG LEXIS 116.....	24
<i>Marks v. McKenzie High School Fact- Finding Team</i> , 319 Or. 451, 878 P.2d 417 (1994).....	24
<i>Memphis Publishing v. Cherokee Children</i> , 87 SW 3d 67 (Tenn. 2002).....	22
<i>News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group</i> , 596 So.2d 1029 (Fla.1992).....	24
<i>Richins v. Delbert Chipman & Sons Co.</i> , 817 P.2d 382 (Utah Ct. App. 1991).....	8
<i>Ry. Labor Executives' Ass'n v. Consol. Rail Corp.</i> , 580 F.Supp. 777 (D.D.C.1984).....	25
<i>Sill v. Hart</i> , 2007 UT 45, 162 P.3d 1099.....	19
<i>Washington Research Project, Inc. v. Department of Health, Educ. & Welfare</i> , 504 F.2d 238 (D.C.Cir.1974).....	24
<i>Wolotsky v. Huhn</i> , 960 F.2d 1331 (6th Cir.1992).....	25

STATUTES

Utah Code § 63G-2-102.....19
Utah Code § 63G-2-103 (11)(b)1, 7, 18, 20, 21
Utah Code § 63G-2-801 (3)(a).....1, 7, 18, 27
Utah Code § 63G-2-801 (1)(a).....26
Utah Code § 63G-2-802 (2)(a).....30

RULES

Utah Administrative Code R309-105-17(2)(a)-(b)..... 5, 13, 20
Utah Rules of Civil Procedure, Rule 6 (b).....29
Utah Rules of Civil Procedure, Rule 7 (n)29
Utah Rules of Civil Procedure, Rule 19 (a)22

In the Utah Court of Appeals

Mark Christopher Tracy dba
Emigration Canyon Home Owners
Association

Petitioner / Appellant

v.

Simplifi Company, Jennifer Hawkes
and Eric Hawkes

Respondents / Appellees

Case no. 20200705-CA

Brief of Appellant

INTRODUCTION

The present appeal addresses the transfer of government functions and services to a private for-profit corporation as related to the public’s right to access governmental records codified in the Utah Government Records Access and Management Act (“GRAMA”). While state and federal courts have decided the issue of increasing privatization of government functions and services in favor of continued accountability and transparency, this case is a matter of first impression in the State of Utah and requests that the Court affirm the legislative intent of GRAMA provisions and apply Utah Code §§ 63G-2-103(11)(b) and criminal sanctions of -801 (3)(a) to private corporations and individuals without limitation.

The following background demonstrates how a policy of limited and/or unenforceable access to governmental records in possession of a private for-profit corporation is a threat to public health and safety.

Emigration Canyon (the “Canyon”) is home to approximately 677 households. A majority of homeowners are either serviced with culinary drinking water via single-family domestic wells or from Salt Lake City Public Utilities while approximately 300 domestic units are connected to public drinking-water system no. 18143 germane to the present action.

Originally constructed to service the luxurious Emigration Oaks Private Urban Development (“Emigration Oaks PUD”) on the north side of the Canyon, in August 1998, private land-developers transferred legal title and financial liability of a defunct 355,000 gallon tank and two large-diameter commercial wells (“Emigration Oaks Water System”) to Emigration Improvement District (“EID” aka Emigration Canyon Improvement District aka ECID), a Utah special service water district.

Although both water sources of the Emigration Oaks Water System had tested positive for lead contamination and the operation of one had been expressly forbidden by the Utah Division of Drinking Water (“DDW”), EID’s board of trustees (“EID Board”) awarded the trustee chairman’s own for-profit limited liability corporation a lucrative contract to operate the water system with the

trustee chairman christening himself “EID General Manager,” “EID Financial Manager,” and “EID Election Specialist” as an independent contractor.

Circa 15 years later, the EID Board awarded Simplifi Company (“Simplifi”), another Utah for-profit corporation, controlled by Appellee Jennifer Hawkes, Deputy Mayor of Emigration Canyon (“Deputy Mayor Hawkes”), and her spouse Appellee Eric Hawkes (“Mr. Hawkes,” collectively “Simplifi Respondents”) operation of the Emigration Oaks Water System.

The perpetual no-bid contract provided Simplifi Respondents an annual remuneration of **\$118,000.00** of public funds for the current calendar year – a compensation exceeding the salary of the Utah State governor and equaling 25% of EID’s annual operating expense.

In September 2014, and February 2019 Appellant Mark Christopher Tracy (“Mr. Tracy”) commenced state and federal litigation against Mr. Hawkes including current and former EID trustees, managers, consultants, private land-developer and EID Advisory Committee Chairman R. Steve Creamer (“EID Chairman Creamer”), The Boyer Company LC and City Development Inc.

Therein, Mr. Tracy alleged fraudulent consolidation of senior water rights in the Canyon,¹ violations of the federal False Claims Act including concealment of drinking water contamination.²

During the pendency of state and federal litigation, on October 29, 2019, Mr. Tracy learned that two of the approximately 300 homes connected the Emigration Oaks Water System had received notification of drinking water lead contamination sent via United States postal service.

At his own initiative and expense, Mr. Tracy published an electronic press release hyperlinked to the website of Mr. Tracy's dba entity Emigration Canyon Home Owners Association ("The ECHO-Association") warning EID's water users and customers.

Mr. Tracy's press release achieved wide-spread dissemination of the initial warning,³ which had only notified two known homeowners. Simplifi Respondents

¹ In a related appeal before this Court, Mr. Tracy's dba entity Emigration Canyon Home Owners Association petitioned the district court for *de novo* judicial review of permanent change applications filed by EID approved for the construction of over 500 additional homes in the Canyon as alleged in the FCA Lawsuit (*Emigration Canyon Home Owners Association v. Kent L. Jones and Emigration Improvement District*, (Ut. Ct. App.) Case No. 20200295-CA).

² *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, (D. Utah) Case No. 2:14-cv-701-JNP-JCB.

³ Mr. Tracy's warning was subsequently reported by the Salt Lake Tribune (*see* "Lead Shows Up in Emigration Canyon Drinking Water" available at the website administered by the Salt Lake Tribune at [https://www.sltrib.com/news/environment/2019/11/08/lead-shows-up-emigration/.](https://www.sltrib.com/news/environment/2019/11/08/lead-shows-up-emigration/))

responded by circulating an “Enhanced Customer Notice” to all Emigration Canyon residents insisting to have found “**No detection of lead (ND) in all three wells currently in operation**”⁴ (emphasis in original).

Without factual basis or justification, Simplifi Respondents speculated that drinking water contamination of Emigration Oaks Water System was “likely the result of plumbing within the homes tested, not from the water being provided by the Emigration Improvement District” but then refused to allow access to actual laboratory test results,^{5,6} which must be maintained at the premises of the water system operator for a period no fewer than 12 years for public review and inspection.⁷

Upon discovery that the EID Board had contracted Deputy Mayor Hawkes and Mr. Hawkes through Simplifi to maintain drinking water test results in the basement of their private residence, Mr. Tracy filed legal action against Simplifi Respondents with the Utah Third District Court for *de novo* judicial review of the denied request for access to governmental records.

⁴ Simplifi is contracted by the EID Board to operate four large-diameter commercial wells.

⁵ See e.g. *Steve J. Onysko v. Emigration Improvement District et al.*, (Utah 3rd District) Case No. 200906661.

⁶ See e.g. *Steve J. Onysko v. Utah Department of Environmental Quality et al.*, (Utah 3rd District) Case No. 200907218.

⁷ Utah Administrative Code R309-105-17(2)(a)-(b).

In a cursory finding, the district court however ruled that GRAMA provisions apply only to governmental entities and not a private corporation and individuals thereby granting Simplifi Respondents' motion to dismiss with prejudice. The district court further granted Simplifi Respondents' untimely motion to strike Mr. Tracy's objection to the supplemental argument of the reply memorandum arguing that Deputy Mayor Hawkes has "nothing to do with EID" despite Deputy Mayor Hawkes' position as director, officer, and registered agent of Simplifi, the private corporation contracted by the EID Board to operate the Emigration Oaks Water System and maintain governmental records.

To date, and for reasons currently unknown, Simplifi Respondents, the EID Board and DDW continue to thwart access to governmental records of lead contamination.

The present appeal requests that the Court affirm the public's right to scrutinize the performance of governmental services directly related to public health and safety *especially when* a for-profit private corporation is contracted by a governmental entity to perform governmental functions and duties at public expense.

STATEMENT OF ISSUES

1. *Does the Utah Government Records Access and Management Act apply to a private for-profit corporation funded entirely by a governmental entity to carry out the people's business?*

Standard of Review: A legal conclusion supporting a motion to dismiss is a question of law reviewed *de novo* with no presumption of correctness accorded to the findings of the district court. See e.g., *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636 (Utah 1989).

Preservation: Preserved in Mr. Tracy's petition for judicial review (R15 at ¶ 41), Mr. Tracy's opposition to motion to dismiss (R122 at ¶ 2), Mr. Tracy's objection to the reply memorandum (R202 at ¶ 2), Mr. Tracy's objection to motion to strike objection to the reply memorandum (Addendum A⁸ at page 2), and Mr. Tracy's opposition to Simplifi Respondents' fourth motion for attorney fees (R346 at ¶ 2) including specific references to Utah Code § 63G-2-103 (11)(b)(i) and Rule 19 (a) Utah Rules of Civil Procedure ("URCP").

2. *Are the officers and directors of a private for-profit corporation subject to criminal penalties of the Utah Government Records Access and Management Act for the willful refusal to allow access to governmental records of drinking water lead contamination required under Utah Administrative Rules to be maintained on the premises of the water operator for public inspection for a period no less than 12 years?*

⁸ It appears that Mr. Tracy's objection to Simplifi Respondents' motion to strike objection to reply memorandum was mistakenly omitted from the record and record index although Mr. Tracy's objection is referenced in Simplifi Respondents' request to submit for decision (R227 at no. 6) and was expressly overruled by the district court (R232 at ¶ 3).

Standard of Review: A legal conclusion supporting a motion to dismiss is a question of law reviewed *de novo* with no presumption of correctness accorded to the findings of the district court. *Id.*

Preservation: Preserved in Mr. Tracy's objection to the reply memorandum (R202 at ¶ 3), Mr. Tracy's objection to motion to strike objection to reply memorandum (Addendum A at page 2, ¶ 2), and Mr. Tracy's opposition to Simplifi Respondents' fourth motion for attorney fees (R348 at ¶ 2) including specific reference to Utah Code § 63G-2-801(3)(a) and Utah Administrative Rule R-309-105-17 (2)(a) and (b).

3. *Did the district court error when it granted Simplifi Respondents' untimely motion to strike Mr. Tracy's objection to the reply memorandum evidencing Deputy Mayor Hawkes' status as an officer, director and registered agent of Simplifi?*

Standard of Review: Review of questions of law are reviewed for correctness without giving deference to the district court's interpretations. *See e.g., Richins v. Delbert Chipman & Sons Co.*, 817 P.2d 382, 385 (Utah Ct. App. 1991).

Preservation: Preserved in Mr. Tracy's objection to motion to strike objection to reply memorandum (Addendum A at page 2, ¶ 3) including specific references to filing deadline under Rule 7 (f) URCP and prohibition against a motion to strike evidence under Rule 7 (n) URCP.

STATEMENT OF THE CASE

This is an appeal of the district court's dismissal of Mr. Tracy's petition for *de novo* judicial review of the denied request for access to governmental records of drinking water lead contamination of a public water system wherein the records are in sole possession of a private corporation and individuals, and are maintained in the basement of a private residence.

The relevant factual and procedural backgrounds are as follows:

In August 1998, The Boyer Company LC through Kem Gardner and City Development Inc., through Walter J. Plumb III transferred legal title and liability of the defunct Emigration Oaks Water System to EID, which at that time was operated for the sole benefit of the Emigration Oaks PUD through the EID Board.

The water system consisted of a severely undersized 355,000 gallon tank and two (2) improperly constructed large-diameter commercial wells identified as the Emigration Oak Reservoir, Boyer Well Nr. 1 (aka Freeze Creek Well) and Boyer Well Nr. 2. R10 at ¶ 22.

Simultaneously with the transfer of legal title from private land-developers, the EID Board through EID trustee chairman Fred A. Smolka ("Trustee Chairman Smolka") and EID trustee Lynn Hales ("Trustee Hales") awarded Trustee Chairman Smolka's own for-profit Utah corporation Management Enterprises LLC, a lucrative no-bid contract to operate the Emigration Oaks Water System

whereby Trustee Chairman Smolka assumed title as “EID General Manager,” “EID Financial Manager,” and “EID Election Specialist” as an independent contractor.⁹ R5 at ¶ 10(d).

With the assistance of Simplifi Respondents’ present legal counsel,¹⁰ the EID Board had assumed title and liability of the Emigration Oaks Water System despite the fact that on April 18, 1994, Boyer Well Nr. 2 had exceeded 2x the “action level” for lead contamination in public drinking water, Boyer Well Nr. 1 test results showed detectable amounts of lead contamination (R10 at ¶ 22), and the operation of Boyer Well Nr. 2 had been expressly forbidden by DDW on September 20, 1995 (Exhibit N at R56-57).

The Boyer Company LC, City Development Inc., Management Enterprises LLC and Smolka Construction Inc., failed to warn customers of the Emigration Oaks Water System of drinking water lead contamination but instead secured approval from Salt Lake County for the further massive expansion of the Emigration Oaks PUD promising future water service to unsuspecting buyers at extraordinary private profit. R5 at ¶ 10(d).

⁹ Trustee Smolka in turn awarded Smolka Construction, Inc., a for-profit Utah corporation owned by Trustee Chairman Smolka’s brother Joseph (aka Joe) Smolka, the current Mayor of Emigration Canyon, a no-bid contract as “EID operations manager.”

¹⁰ Cohne Kinghorn P.C. through Utah Attorney Cook is legal counsel of record for Deputy Mayor Hawkes, Mr. Hawkes, Trustee Chairman Smolka, EID Trustee Hales and EID in pending state and/or federal litigation.

In August 2003, EID completed construction of the Brigham Fork Well and Wildflower Reservoir with federally-backed funds on property belonging to EID Chairman Creamer thereby agreeing to comply with customer reporting requirements of the Safe Drinking Water Act of 1974. R6 at ¶ 10(f).

On November 2, 2002, the Brigham Fork Well tested positive for lead contamination. Management Enterprises, LLC and Smolka Construction, Inc. failed to warn existing water users of the Emigration Oaks Water system and 97 property owners promised future water service for undeveloped parcels under so-called “stand-by contracts.” R10 at ¶ 22.

On January 31, 2014, EID secured an operating permit from DDW for the newly completed Upper Freeze Creek Well constructed on 20 acres acquired by the EID Board from Walter J. Plumb III of City Development Inc. DDW issued the permit and EID began operation of the underground water source despite the fact that sample results indicated drinking water lead contamination on July 18, 2013. R10 at ¶ 22.

To date, The Boyer Company LC, City Development Inc., Management Enterprises LLC, and Smolka Construction, Inc., have failed to warn existing water users of lead contamination of all drinking-water sources servicing 300 homes currently connected to the Emigration Oaks Water System including 98 owners of vacant parcels promised future water service by the district. R13 at ¶ 31.

Prior to November 11, 2019, EID's independent contractors had neither identified nor disclosed possible drinking water lead contamination of the Emigration Oaks Water System in an open and public EID Board meeting conducted in accordance with the Utah Open and Public Meetings Act. *Id.*

Fifteen (15) years after assuming title and legal liability from private land-developers, the EID Board transferred operation of the Emigration Oaks Water System from Management Enterprises, LLC to Simplifi designating Mr. Hawkes as the "public records manager." This included oversight and control of 25 boxes of governmental documents previously maintained at the private residence of Trustee Chairman Smolka for Management Enterprises, LLC. R348 at ¶ 3.

In a community letter, dated June 2014, the EID Board insisted that as a governmental entity it not subject to Utah State statute prohibiting nepotism due to the fact that EID has no employees and operates entirely through independent contractors. Exhibit K at R50.

Since 2013, all governmental records of EID have been in the sole possession of Simplifi in the basement of the private residence of Deputy Mayor Hawkes and Mr. Hawkes. R203 at ¶ 1.

Deputy Mayor Hawkes and Mr. Hawkes are the sole directors and officers of Simplifi. R10 at ¶ 19.

Simplifi has no employees, owns no real property and has no other income source other than public funds transferred by Mr. Hawkes from EID's accounts maintained at Zions National Bank and Utah State treasury funds to Simplifi accounts controlled by Deputy Mayor Hawkes and Mr. Hawkes. R10 at ¶ 20.

The private residence of Deputy Mayor Hawkes and Mr. Hawkes is registered with the Utah State Lt. Governor's Office as the location for EID as a Utah special service water district and is likewise registered with the Utah Division of Corporation and Commercial Code as the place of business for Simplifi. R3 at ¶ 2 and R10 at ¶ 18.

In the 2019 calendar year, Mr. Hawkes transferred \$97,315.08 of public funds from EID accounts to Simplifi for "management compensation," "office expenses," and "internet and computer expenses." Exhibit J at R48.

As "EID Financial Manager," Simplifi through Mr. Hawkes is unable to maintain commensurate revenue flow through (i) the sale of culinary drinking-water to existing water users; (ii) the collection of "standby fees" to property owners promised future water service by EID; and (iii) the assessment of "fire-hydrant rental fees" billed to Canyon residents financial unable or unwilling to connect to the Emigration Oaks Water System. R9 at ¶ 150.

EID last certified Mr. Hawkes as "EID records manager" with the Utah State Records Ombudsman on July 10, 2020. R349 at ¶ 5.

Under Utah Administrative Code R309-105-17(2)(a)-(b) “Lead and Copper Recordkeeping Requirements” a public water system “shall retain on their premises original records of all sampling data and analyses, reports, surveys, letters, evaluations, schedules, Director determinations” for a period of “no fewer than 12 years” for public review and inspection. Cited at R202, ¶ 4.

The only “premises” of the Emigration Oakes Water System operated during normal working hours is the private residence of Deputy Mayor Hawkes and Mr. Hawkes accessible only with the explicit permission of both Deputy Mayor Hawkes and Mr. Hawkes or by court order. R203 at ¶ 1.

On September 26, 2014, Mr. Tracy commenced legal action against Mr. Hawkes as well as Trustee Chairman Smolka, Mayor Smolka, EID Trustee Hales, EID Chairman Creamer, and private land developers The Boyer Company LC and City Development Inc., *et al.* for alleged violations of the Safe Drinking Water Act of 1974 including drinking water contamination. R5 at ¶ 10(d).

As a special service water district, EID lacks governmental authority to permit access to the private residence of Deputy Mayor Hawkes and Mr. Hawkes or to order an disinclined independent contractor to release governmental documents, which may prove damaging in pending state and federal litigation. R122 at ¶ 5.

On October 28, 2019, two of the approximately 300 homeowners connected to the Emigration Oaks Water System reported on the internet platform Nextdoor to have received notification of drinking water lead contamination sent via the United States postal service. Exhibit S at R88-89.

Mr. Tracy immediately issued a community press release via electronic mail with hyperlinks to The ECHO-Association website available at https://echo-association.com/?page_id=4950 warning EID's water customers of drinking water lead contamination. Exhibit T at R72.

Shortly thereafter, Mr. Hawkes falsely reported on the internet platform Nextdoor that only "3 [of the 10 sampled homes] exceeded the water standard for lead (*this is the first time ever*)" and "we [unknown reference] do not believe the lead is coming from our water sources, but likely from the lead solder used in the plumbing of homes" (emphasis added). Exhibit S at R70.

Undisputedly, federal guidelines do not allow for any detectable amount of lead contamination in culinary drinking water, and evidence suggests that all sampled homes connected to the Emigration Oaks Water System have tested positive for drinking water lead contamination since 1995. *Id.*

On November 12, 2019, Simplifi Respondents issued a "Response Letter to Lead and Copper Testing" arguing that all EID water sources "currently in operation" were free of lead contamination speculating without factual basis that

that lead contamination was “likely caused” by “faulty plumbing” of sampled homes. Exhibit F at R371.

During the EID trustee meeting on June 11, 2020, Mr. Hawkes refused to answer questions from the public regarding mandatory lead testing of 20 homes required by DDW to be sampled prior to June 30, 2020. R12 at ¶ 28.

On July 27, 2020, Mr. Hawkes transmitted to Mr. Tracy a DDW table indicating that all 20 homes connected to the Emigration Oaks Water System purportedly sampled in June 2020 had yielded detectable levels of drinking water lead contamination (Exhibit Z at R86) whereby the testing locations and lead levels did not match the DDW chemical database report from July 19, 2020 (Exhibit Y at R84). R13 at ¶ 34.

To date, Simplifi Respondents, EID and DDW refuse access to laboratory test results of drinking-water contamination and have provided inaccurate and/or incomplete water-test results. R344 at ¶ 4.

On July 2, 2020, Mr. Tracy formally requested access to laboratory test results of lead contamination (“Lead-Contamination GRAMA”). Exhibit BB at R91-92.

On July 9, 2020, Mr. Hawkes reported that the Lead-Contamination GRAMA “has been denied [by unknown persons]” with the cursory remark that “[w]e [unknown reference] are looking at the costs associated with providing this

information to you and will get back with you as soon as possible” (Exhibit CC at R94) although Simplifi Respondents not convened an EID Board meeting in accordance with the Utah Open and Public Meetings Act since June 11, 2020, Mr. Hawkes had announced the cancelation of the July 9, 2020 EID Board meeting on the same day, and EID’s elected officials were not scheduled to meet again in public session until August 13, 2020. R15 at ¶ 43.

On July 9, 2020, Mr. Tracy appealed the *de facto* denial of the Lead-Contamination GRAMA to the chief administrative officer thereby providing a statement that the basis for the request for public records was related to possible contamination of Freeze Creek Aquifer through degradation of drinking-water quality from excessive groundwater mining and/or the disposal of asphalt and construction waste at the Wildflower Reservoir by the CEO of Energy Solutions and EID Chairman Creamer during the construction of EID Chairman Creamer’s private residence in the Emigration Oaks PUD (“Lead-Contamination GRAMA Appeal”). R15 at ¶ 44.

Simplifi Respondents failed to respond to the Lead-Contamination GRAMA Appeal and/or summon an EID Board meeting necessitating Mr. Tracy’s petition for *de novo* judicial review with the district court. R16 at ¶ 45.

EID's current legal counsel, Jeremy R. Cook, of the Salt Lake City law firm Cohne Kinghorn P.C. entered appearance at public expense through EID for Mr. Hawkes in the FCA Lawsuit. R369 at ¶ 1.

In the initial motion for attorney fees in the present case, Simplifi Respondents petitioned the district court to award EID reasonable attorney fees and costs (R140 at ¶ 4) but then revised its request in a second contradictory motion to award both Simplifi Respondents and EID attorney fees (R187 at ¶ 4 and ¶ 5) and then lastly to award only Simplifi Respondents attorney fees and costs in a third and fourth motion (R222 at ¶ 3 and R249 at ¶ 1). R343 at ¶ 2.¹¹

It appears that the private legal expenses of Simplifi Respondents in the present action are being paid with public funds administered by Simplifi through Mr. Hawkes. R369 at ¶ 1.

To date, Simplifi Respondents, the EID Board and Cohne Kinghorn P.C., the current legal counsel of both Simplifi Respondents and EID, continue to knowingly

¹¹ To date, the EID Board, Mr. Hawkes, and Utah Attorney Cook of the law firm Cohne Kinghorn P.C. refuse to confirm if public funds are being used for the private legal defense of Deputy Mayor Hawkes and Mr. Hawkes in the present litigation. EID through Utah Attorney Cook likewise denied Mr. Tracy's GRAMA request to access invoices of the Salt Lake City law firm Cohen Kinghorn P.C. (currently pending with the Utah State Records Committee in *Mark Christopher Tracy dba Emigration Canyon Home Owners Association v. Emigration Improvement District*, case no. 2020-121).

operate Boyer Well Nr. 2 without a valid operating permit in violation of the Safe Drinking Water Act of 1974. R10 at ¶ 21.

SUMMARY OF ARGUMENT

The problems associated with privatization of governmental functions laid bare in the present case are easily resolved with statutory interpretation of legislative intent, administrative rules and standing court rules of civil procedure currently in force in the State of Utah. The clear weight of state and federal authority also support the conclusion that the Court should follow legislative intent of GRAMA provisions and apply Utah Code §§ 63G-2-103(11)(b) and -801 (3)(a) directly to private for-profit corporations and controlling individuals. Evidence related to Deputy Mayor Hawkes' position as director, officer and registered agent of Simplifi should be permitted.

ARGUMENT

- I. **UTAH STATE STATUTE, ADMINISTRATIVE RULES AND COURT RULES OF CIVIL PROCEDURE, AS WELL AS STATE AND FEDERAL AUTHORITY GUARANTEE THE PUBLIC'S RIGHT TO GOVERNMENTAL RECORDS IN POSSESSION OF A PRIVATE CORPORATION AND INDIVIDUALS**
 - A. Utah State Statute Provides That GRAMA Provisions Apply to an "Office" of Government Entity Funded to Carry out the People's Business While the Utah Administrative Code Requires Lead Contamination Documents to be Maintained at on the "Premises" of the Water System Operator for Public

Inspection and the Rules of Civil Procedure Dictate That Simplified Respondents are Necessary Parties to the Present Litigation.

Whether a “quasi-governmental” entity such as a Utah special water district may hinder the public’s right to access governmental records by placing documents in the custody of a private for-profit corporation and controlling individuals is a matter of statutory interpretation. The best evidence of legislative intent “is the plain language of the statute itself.” *Duke v. Graham*, 2007 UT 31, ¶ 16, 158 P.3d 540.

The purpose of GRAMA is expressly recorded in Utah Code § 63G-2-102 and provides that “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.”

Statutory analysis however does not stop at the plain language of the statute. The Utah Supreme Court held that “plain language analysis” is not so limited to inquire into individual words and subsections in isolation but rather that each part or section be “construed in connection with every other part or section so as to produce a harmonious whole.” *Anderson v. Bell*, 2010 UT 47 (citing *Sill v. Hart*, 2007 UT 45, ¶ 7, 162 P.3d 1099).

As such, Utah Code § 63G-2-201 mandates that “a person has a *right to inspect* a public record free of charge, and the right to take a copy of a public record during normal working hours” if the record is not confidential and exempt from disclosure (emphasis added).

Did the Utah legislature however intend to exempt private for-profit corporations and individuals in possession of governmental records?

In a word, no.

Utah Code § 63G-2-103(11)(b)(i) provides that a “government entity” also includes “*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” (emphasis added).

With the designation “every office” with the additional requirement of “funded... to carry out the public’s business” it is clear that the Utah State legislature did not intend to exempt any private corporation from GRAMA requirements.

This statutory interpretation is also consistent with Utah Administrative Code R309-105-17(2)(a)-(b), which mandates that “[a]ll public water systems shall retain *on their premises* or at convenient location *near their premises*” the “original

records of all sampling data and analysis” of lead contamination for a period “no fewer than 12 years” for public review and inspection (emphasis added).

With no employees and no physical presence of its own, EID pays public funds to Simplifi for “office expenses” and further designated Mr. Hawkes as “EID records manager,” “EID general manager,” and “EID financial manager” contracted and compensated entirely through Simplifi.

This is a textbook example of *de facto* and *de jure* privatization of governmental functions and services falling within the broad statutory language of Utah Code 63G-2-102 (11)(b)(i) as an “office” of a governmental entity.

Furthermore, the designation of the private residence of Deputy Mayor Hawkes and Mr. Hawkes as EID’s physical location with the Utah Lt. Governor’s Office has inescapable implications. Namely, EID has bestowed upon Simplifi Respondents the additional governmental function of operating the Emigration Oaks Water System. Therewith, Simplifi Respondents create and maintain public records at the same location registered with the Utah Division of Corporations and Commercial Code for Simplifi.

Since assuming title of the Emigration Oaks Water System in August 1998, as per the Utah Public and Open Meetings Act, the only discernable actions of EID as a governmental entity are recorded in the EID Board’s monthly meeting minutes convened (and frequently canceled) at the private residence of Trustee Chairman

Smolka, the Emigration Canyon Fire Station, or via the internet platform Zoom during the COVID-19 pandemic.

Lastly, the EID Board lacks authority to order or allow entry into a private home. Therefore, an order of the district court against EID alone to allow access to governmental records maintained at the private residence of Deputy Mayor Hawkes and Mr. Hawkes would be a legal impossibility and thus unenforceable.

As such, Rule 19 (a) URCP mandates that “a person who is subject to service of process ... *shall* be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties” (emphasis added).

As an “independent contractor” in sole possession and control of governmental records, Simplifi Respondents are necessary parties to the present litigation. Mr. Tracy’s has pursued litigation against the only parties who can accord relief under URCP.

In its ruling, the district court failed to apply the statutory provision of Utah Code Ann. § 63G-2-201 (11)(b), Utah Administrative Code R309-105-17(2)(a)-(b) and Rule 19 (a) URCP. Instead, the district court accepted EID’s unsubstantiated claim that the district “maintains legal control” over public documents in possession of an independent contractor without providing further explanation.

B. Sister States Also Apply Public Record Statues to Private Entities.

In *Memphis Publishing Company*, the Supreme Court of Tennessee expressly confirmed that the Tennessee Public Records Act applies to a non-profit corporation.

Under similar circumstances, the private entity had contracted with the Tennessee Department of Human Services to help administer a state-subsidized day care program.¹² Although the trial court had determined that the non-profit corporation was similarly an “independent contractor” of a governmental agency, the Tennessee Supreme Court rejected the application of agency law and affirmed the broad mandate of the public records act “to promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people.”¹³

The court distinguished when the records of private corporation are considered “governmental” and thus subject to public scrutiny while purely private organizations are exempt.

Drawing from the “functionality equivalency test” developed by the Connecticut Supreme Court,¹⁴ the court delineated determining factors, which establish the public’s right to access company documents: (1) whether the entity

¹² *Memphis Publishing v. Cherokee Children*, 87 SW 3d 67 (Tenn. 2002).

¹³ Citing *Cf. Forsberg v. Hous. Auth. of Miami Beach*, 455 So.2d 373, 378 (Fla.1984).

¹⁴ See *Connecticut Humane Soc’y v. Freedom of Info. Comm’n*, 218 Conn. 757, 591 A.2d 395, 397 (1991).

performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.¹⁵

While no single factor is dispositive in a “case-by-case analysis,” the court reasoned that “[i]n light of the myriad of organizational arrangements that may be confronted, under the functional equivalency approach, each new arrangement must be examined anew and in its own context.”¹⁶

Similar tests for the application of public records acts to private corporations are recognize in Maryland,¹⁷ Florida,¹⁸ North Carolina,¹⁹ Oregon,²⁰ and Kansas.²¹

In the present case, all governmental records of EID are in the sole possession of Deputy Mayor Hawkes and Mr. Hawkes at their private residence. Moreover, the EID Board has fully relinquished its public duty to preserve and

¹⁵ *Id.* at 397.

¹⁶ Quoting *Washington Research Project, Inc. v. Department of Health, Educ. & Welfare*, 504 F.2d 238, 245-46 (D.C. Cir.1974).

¹⁷ *A.S. Abell Publ'g Co. v. Mezzanote*, 297 Md. 26, 464 A.2d 1068, 1074 (1983).

¹⁸ *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group*, 596 So.2d 1029, 1031 (Fla.1992)

¹⁹ *News and Observer Publ'g Co. v. Wake County Hosp. Sys., Inc.*, 55 N.C.App. 1, 284 S.E.2d 542, 544-49 (1981)

²⁰ *Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451, 878 P.2d 417, 424-26 (1994)

²¹ *Kan. Op. Att'y Gen.* 93-130 (1993), available at 1993 WL 467822, 1993 Kan. AG LEXIS 116.

control governmental records to a private corporation under the first prong “performing a governmental function” test.

Next, Simplifi has no other income source other than public funds administered by Mr. Hawkes on behalf of EID while all legal fees in pending state and federal litigation, including the instant action, are paid from the public coffers of EID. As Simplifi’s corporate form appears to be a mere shell intended to obscure a lucrative salary for part-time employment exceeding that of the Utah State governor, Simplifi is subject to GRAMA provisions under the second prong “public-funding” test.

Lastly, the EID Board has decided no issue related to Mr. Tracy’s Lead Contamination GRAMA in accordance with the Utah Open and Public Meetings Act. Absent recording of deliberations and/or resolution in an EID Board meeting, EID has transferred full decision-making authority to Simplifi through Mr. Hawkes as the contracted “certified records officer” under the third prong “governmental control” test.

Under the functionality-equivalency test applied in sister states, Simplifi is irrefutably subject to GRAMA provisions in their entirety.

C. Federal Courts Apply Freedom of Information Act Requirements and Federal Civil Rights Violations to Private Entities and Individuals.

Federal courts have also favorably discussed the application of the functional equivalency analysis in applying the Freedom of Information Act (“FOIA”) to private entities.²² Likewise, federal courts recognized liability under 42 U.S.C. § 1983 for private companies acting “under the color of state law” when fulfilling governmental functions and responsibilities under a “public function test.”²³

As operator of a public water system, contracted to perform governmental functions as the “public records manager”, Simplifi Respondents are in no way exempt from FOIA requirements and are likewise subject to federal litigation under possible § 1983 violations.

II. INDIVIDUALS IN LAWFUL POSSESSION OF PUBLIC RECORDS REQUIRED TO BE MAINTAINED ON BUSINESS PREMISES FOR PUBLIC INSPECTION ARE SUBJECT TO CRIMINAL SANCTIONS FOR WILLFUL REFUSAL TO ALLOW ACCESS

The district court’s ruling that private individuals are exempt from criminal sanctions of GRAMA is further refuted by legislative intent as documented by the plain language of statute itself.

²² *Ry. Labor Executives' Ass'n v. Consol. Rail Corp.*, 580 F.Supp. 777, 778-79 (D.D.C. 1984).

²³ *See Ellison v. Garbarino*, 48 F.3d 192, 195 (6th Cir.1995). “The public function test ‘requires that the private entity exercise powers which are traditionally exclusively reserved to the state.’” *Id.* (quoting *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir.1992)).

Utah Code 63G-2-801 (1)(a) provides:

A public employee *or other person* who has lawful access to any private, controlled, or protected record under this chapter, and who intentionally discloses, provides a copy of, or improperly uses a private, controlled, or protected record knowing that the disclosure or use is prohibited under this chapter, is, except as provided in Subsection 53-5-708(1)(c), guilty of a class B misdemeanor (emphasis added).

In the present case, it is uncontested that both Deputy Mayor Hawkes and Mr. Hawkes have lawful control and access to governmental records when EID transferred operation of the Emigration Oaks Water System from Management Enterprises, LLC to Simplifi sometime in 2013.

The district's court's conclusion that private individuals are exempt from GRAMA provisions is refuted by the designation "or another person" and would irrefutably apply if Deputy Mayor Hawkes or Mr. Hawkes improperly disclosed or used governmental records in their lawful possession.

Subsection (3)(a) further provides:

A public employee who intentionally refuses to release a record, the disclosure of which the employee knows is required by law, is guilty of a class B misdemeanor.

As an elected member of the Emigration Canyon Metro Township Council, it is uncontested that Deputy Mayor Hawkes is a public employees within the express definition of GRAMA criminal sanctions.

Furthermore, it is irrefutable that the governmental function of public records management has been transferred to Simplifi. It is also irrefutable that the Utah for-profit corporation operates solely through its officer and directors. As such Deputy Mayor Hawkes and Mr. Hawkes are subject to criminal sanction for the willful and unlawful refusal to allow access to lead-contamination documents required by Utah Administrative Code to be maintained on the premises of the water system operator for public inspection and review.

Contrary to the district court's ruling, Deputy Mayor Hawkes and Mr. Hawkes are "public employees" performing governmental duties through Simplifi within the meaning GRAMA provisions.

Because criminal penalties are the only effective remedy in ensuring the public's right to access and review important governmental documents related to the health and safety of Canyon residents, the Court should affirm the application of Utah Code § 63G-2-801 (3)(a) in further proceedings before the district court.

III. THE DISTRICT COURT IMPROPERLY STRUCK EVIDENCE OF DEPUTY MAYOR HAWKES' STATUS AS DIRECTOR AND OFFICER OF SIMPLIFI

Rule 7 (n) URCP provides:

A party who objects to evidence in another party's motion or memorandum may not move to strike that evidence. Instead, the party must include in the subsequent memorandum an objection to the evidence.

In the reply memorandum, Simplifi Respondents presented supplemental arguments that Deputy Mayor Hawkes “has nothing to do with EID” and was thus an improper party to the present action.

Mr. Tracy’s filed objection to the reply memorandum presenting contradictory evidence of Deputy Mayor Hawkes’ registration with the Utah State Department of Commerce as an officer, director and registered agent of Simplifi.

Eight days later²⁴ Simplifi Respondents filed motion to strike Mr. Tracy’s objection as a “disallowed sur-reply.” R22 at ¶ 1.

Contrary to Rule 7 (n) URCP, and lacking a request for an extension of time due to excusable neglect or upon action of the Court prior to the expiration of time under Rule 6 (b)(1)(a) URCP, the district court granted the untimely motion to strike the objection and overruled Mr. Tracy’s objection to the motion to strike.

Evidence presented by Mr. Tracy is relevant to the determination of Deputy Mayor Hawkes’ lawful access and control of public documents as related to GRAMA provisions. Given these circumstances, the Court should reverse the district court’s ruling striking Mr. Tracy’s objection to the reply memorandum and permit evidence in further proceedings before the district court.

²⁴ Under Rule 7 (f) URCP, the moving party must file a response no later than seven days after the objection is filed.

CONCLUSION

As contracted operator of a public drinking-water system funded entirely to conduct the people's business, Simplifi is subject to GRAMA provisions as an "office" of EID.

Having sole possession of all governmental records at their private residence, Deputy Mayor Hawkes and Mr. Hawkes are subject to criminal sanctions for the unlawful refusal to allow access to documents of lead contamination required under Utah Administrative Code to be maintained on the premises of the contracted water system operator for a period of 12 years.

Lastly, the district court improperly granted Simplifi Respondents' motion to strike evidence of Deputy Mayor Hawkes' position as director and officer of Simplifi. The evidence presented by Mr. Tracy is relevant in establishing possible criminal liability for willful violations of GRAMA provisions.

Mr. Tracy respectfully requests that the Court reverse the district court's order granting Simplifi Respondents' motion to dismiss the petition for *de novo* judicial review, reverse the district court's order striking Mr. Tracy's objection to the reply memorandum, and remand the case for further proceedings consistent with the Court's order.

CLAIM FOR ATTORNEY FEES

The Utah Supreme Court has recognized that a party is entitled to reasonable attorney fees and costs on appeal under the authority of statute allowing for reasonable attorney fees at the trial court below.²⁵

Utah Code § 63G-2-802 (2) allows for the recovery of attorney fees against a governmental entity if the requestor substantially prevails whereby in the determination of an award the court shall consider (i) the public benefit derived from the case; (ii) the nature of the requester's interest in the records; and (iii) whether the actions of a governmental entity had a reasonable basis.

On December 21, 2020, more than one year after disclosing lead contamination test results to only two known water users, Simplifi Respondents transmitted to Mr. Tracy partial copies of laboratory test results completed by Chemtech Ford Laboratories. Simplifi Respondents however refused to provide an affidavit attesting to the accuracy and completeness of documents and continue to withhold and/or deny access to governmental documents required under Utah Administrative Code to be maintained for public inspection for a period of no less than 12 years.

²⁵ *Buzas Baseball v. Salt Lake Trappers*, 925 P. 2d 941, 954 (Utah 1996) citing *First Southwestern Fin. Servs. v. Sessions*, 875 P.2d 553, 555-56 (Utah 1994).

In sum, Simplifi Respondents continue to willfully and unlawfully deny Mr. Tracy's right to access governmental records, and have taken no action to correct previous misstatements regarding drinking water lead contamination in the Emigration Oaks Water System, while Mr. Tracy continues to provide warnings and notifications to Canyon homeowners and EID water customers via the website of Mr. Tracy's dba entity.²⁶

For these reasons, Mr. Tracy is entitled to an award of reasonable attorney fees for the cost of this appeal.

The Court should hold that if Mr. Tracy is entitled to reasonable attorney fees below, Mr. Tracy is also entitled to reasonable attorney fees in bringing this appeal.

Respectfully submitted this 4th day of January, 2021.

MARK CHRISTOPHER TRACY DBA
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

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

²⁶ See e.g., https://echo-association.com/?page_id=4950.

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(g)(1), I, Mark Christopher Tracy, certify that this brief contains **6,843 words**, excluding the table of contents, table of authorities, addenda, certificates of compliance and service.

In compliance with the typeface requirements of Utah R. App. P. 27(b), I also certify that this brief has been prepared in a proportionally spaced font using Microsoft Word v.16.44 in Time New Romans font, 14-point.

I also certify that this brief contains no non-public information in compliance with the non-public information requirements of Utah R. App. P. 21(h).

MARK CHRISTOPHER TRACY DBA
EMIGRATION CANYON HOME
OWNERS ASSOCIATION

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

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2021, a true and correct copy of the foregoing Brief of Appellant was sent via electronic mail as per Rule 26 (b) Utah R. of App. P. to the following counsel of record. 2 paper copies will be provided upon request:

Jeremy R. Cook
jcook@ck.law

- and -

Tim Nielsen
tnielsen@ck.law
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111

Attorneys for Simplifi Company, Jennifer Hawkes and Eric Hawkes

MARK CHRISTOPHER TRACY DBA
EMIGRATION CANYON HOME
OWNERS ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy

**Addendum A
to Appellant's Brief**

**Tracy v. Simplifi *et al.*
20200705-CA**

Objection to Motion to Strike Objection to Reply Memorandum

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094
Telephone: (929) 208-6010
Email: m.tracy@echo-association.com
Pro se Petitioner

IN THE THIRD DISTRICT COURT OF 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.

**OBJECTION TO MOTION TO STRIKE
OBJECTION TO REPLY MEMORADUM**

Case No.: 200905123

Judge: Robert P. Faust

Under Rule 7 (f) of Utah Rules of Civil Procedure (“URCP”), Mark Christopher Tracy (“Mr. Tracy”) dba Emigration Canyon Home Owners Association (“The ECHO-Association”) hereby submits this Objection to the Motion to Strike the Objection to the Reply Memorandum filed by the Simplifi Company (“Simplifi”), Eric Hawkes (“Mr. Hawkes”) and Jennifer Hawkes (“Ms. Hawkes”)(collectively “Simplifi Respondents”).

I. ARGUMENT

The current motion to strike evidence presented in The ECHO-Association’s Objection to the Rely Memorandum is both improper as a motion and untimely as a response under the URCP.

Under Rule 7 (n) URCP, a party who objects to evidence in another party's motion or memorandum may not move to strike that evidence, but must rather include in a subsequent memorandum an objection to the evidence.

The present motion to strike evidence regarding Mrs. Hawkes' duties as Deputy Mayor of the Emigration Canyon Metro Township as well as Mrs. Hawkes' position as a director, officer and registered agent of Simplifi providing "management services" to Emigration Improvement District ("EID") acting as an "independent contractor" out of her private residence and therefore not bound to the directions of EID trustees thereby refuting Simplifi Respondents' evidentiary claim that Mrs. Hawkes "has no direct involvement with EID"¹ as documented the Objection to the Reply Memorandum² is therefore improper.

Moreover, under Rule 7 (f) URCP a moving party may file a response to an objection no later than 7 days after the objection is filed. In the calculation of time under Rule 6 (a)(1) URCP, when the period is stated in days or a longer unit of time, the day the event is triggered is not counted while every day including Saturday, Sunday and legal holidays is counted.

The Objection to the Reply memorandum was filed on September 2, 2020 and thus the Simplifi Respondents were required to file a response to the objection of evidence no later than September 9, 2020. As the present motion was filed on September 10, 2020 without a request for an extension of time due to excusable neglect or upon action of the Court under Rule 6 (b) URCP, the motion to strike the objection is also untimely as a response under Rule 7 (f) URCP.

[This Section Intentionally Left Blank]

¹ Simplifi Respondents' Reply Memorandum at footnote Nr. 1.

² The ECHO-Association's Objection to Reply Memorandum at page 3 *et seq.*

II. CONCLUSION

For the foregoing reasons, Mr. Tracy respectfully requests the Court disregard Simplifi Respondents' Motion to Strike the Objection to the Reply Memorandum as both improper and untimely and deny Simplifi Respondents' motion to dismiss The ECHO-Association's petition for judicial review of the denied request for public documents related to lead contamination of a public drinking-water system and lastly deny Simplifi Respondents' altered motion to award attorney fee and costs to Simplifi Respondents instead of EID.

As the time for responding to the Objection to the Reply Memorandum expired on September 9, 2020, the Motion to Dismiss is now ripe for decision under Rule 7 (g) URCP.

DATED this 10th day of September, 2020.

MARK CHRISTOPHER TRACY dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 2020, a true and correct copy of the foregoing **OBJECTION TO MOTION TO STRIKE OBJECTION TO REPLY MEMORADUM** was sent via electronic mail to the following counsel of record:

Jeremy R. Cook
jcook@ck.law
Tim Nielsen
tnielsen@ck.law
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111

Attorneys for Simplifi Company, Eric Hawkes and Jennifer Hawkes

/s/ Mark Christopher Tracy
Mark Christopher Tracy

**Addendum B
to Appellant's Brief**

**Tracy v. Simplifi *et al.*
20200705-CA**

Order Granting Motion to Dismiss

**Judge Robert Faust
Third District Court**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

<p>MARK CHRISTOPHER TRACY, dba EMIGRATION CANYON HOME OWNERS' ASSOCIATION,</p> <p style="text-align:center">Petitioners,</p> <p>vs.</p> <p>SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an Individual, and JEN NIFER HAWKES, an Individual,</p> <p style="text-align:center">Respondents.</p>	<p style="text-align:center">MEMORANDUM DECISION AND ORDER</p> <p style="text-align:center">Case No. 200905123</p> <p style="text-align:center">Honorable Robert P. Faust</p>
---	---

The above-entitled matter comes before the Court pursuant to Respondents Simplifi Company's ("Simplifi"), Eric Hawkes' ("Mr. Hawkes") and Jennifer Hawkes' ("Mrs. Hawkes") (collectively "Respondents") Motion to Dismiss. The matter was submitted for decision on September 14, 2020. Although oral argument was requested, the Court is not persuaded a hearing would be of assistance in the instant. Accordingly, the ruling with respect to the Motion will be addressed in the following Memorandum Decision and Order:

The basis for this action is that the Emigration Improvement District ("EID"), which is subject to the Utah Government Records Access and Management Act ("GRAMA"), failed to adequately respond to a request of Petitioner for public records of EID related to lead testing results for EID's public drinking water system. Based upon the allegation, EID is a necessary party and Petitioner has failed to cite any case law to support the position that Respondents are proper or necessary parties to this action. Indeed, GRAMA applies to "governmental entities." *See Utah Code Ann. 63G-2-103(11)*. Simplifi and Mr. Hawkes are not governmental entities.

The reason the records are public records is because they are records of EID (a governmental entity) and produced on behalf of EID. Petitioner does not cite to any provision or language in GRAMA supporting the position that it can sue an individual or private company based on a governmental entity's alleged failure to respond to a GRAMA request.

EID has legal authority and control over its documents, and in fact, responded to the GRAMA request and provided documents to Petitioner that EID believed were responsive to his request. In its initial response, EID indicated to Petitioner that Petitioner could likely acquire the requested documents more quickly through the Utah Division of Drinking Water; and it appears that Petitioner was provided, or had access to, all of the documents he was requesting prior to filing this action.

In sum, there is no evidence to suggest that EID has ever taken the position that the documents were not public records of EID and not controlled by EID, or that Petitioner had any reason to believe it was necessary to sue Respondents to obtain EID's records. Accordingly, Respondents' Motion to Dismiss is granted.

Additionally, Petitioner's Objection is an improper sur-reply that is not permitted under URCP Rule 7 and is, therefore, stricken. Petitioner's Objection to Motion to Strike Petitioner's Objection to Reply Memorandum is overruled.

This Memorandum Decision and Order constitutes the Order regarding the matters addressed herein. No further order is required.

DATED this 16th day of September 2020

BY THE COURT:


ROBERT P. FAUST
DISTRICT COURT JUDGE

