

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
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Sandy, Utah 84094
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Pro se Respondent

IN THE THIRD DISTRICT COURT IN AND FOR THE STATE OF UTAH

<p>EMIGRATION IMPROVEMENT DISTRICT, Petitioner, vs. UTAH STATE RECORDS COMMITTEE, and MARK CHRISTOPHER TRACY d/b/a Emigration Canyon Home Owners Association, Respondents.</p>	<p>RESPONDENT MARK CHRISTOPHER TRACY'S MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW OF THE DECISION AND ORDER OF THE UTAH STATE RECORDS COMMITTEE</p> <p>Case No. 210905044 Judge: Laura Scott</p>
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Pursuant to Utah R. Civ. P. 12(b)(1) and (6) Respondent Mark Christopher Tracy (“Mr. Tracy”) d/b/a Emigration Canyon Home Owners Association (“The ECHO-Association”) hereby submits the following Motion to Dismiss Petition for Judicial Review of the Decision and Order of the Utah State Records Committee (“SRC”) filed by Emigration Improvement District (“EID” aka Emigration Canyon Improvement District, aka ECID)(hereafter “Petition”).¹

The matter before this Court concerns the continued refusal of a Utah special service water district to disclose government records related to emergency fire protection and thus public health and safety in Emigration Canyon, Utah (the “Canyon”).

¹ To date, EID has not served Mr. Tracy the Petition under Utah R. Civ. P. 4(d).

As EID has presented no factual allegation supporting any plausible legal basis to refuse compliance with a decision and order of the SRC under the Utah Government Records and Management Act (“GRAMA”),² and having failed to file notice of intent to appeal required to establish jurisdiction required for judicial review pursuant to Utah Code Ann. § 63G-2-403(15)(a), the Court should dismiss the Petition and award Mr. Tracy reasonable attorney fees and costs per Utah Code Ann. § 63G-2-802(2)(a).

I. ARGUMENT

A. Background and Procedural History.

EID is a special service water district providing culinary drinking water to less than half of Canyon residents via water system no. 18143 originally constructed by The Boyer Company LC and City Development Inc., to service the luxurious Emigration Oaks Private Urban Development (“Emigration Oaks PUD”) with a surface water right stripped from the only active federal military cemetery created by an Act of Congress and signed into law by United States President Ulysses S. Grant in 1874 to be forever used “for the burial of the dead” (“Boyer Water System”).³

Since 2014, with the assistance of EID’s current legal representative Jeremy R. Cook, Esq. of the Salt Lake City law firm Cohne Kinghorn P.C., (“Utah Attorney Cook”), the private water system operator Simplifi Company (“Simplifi”) commenced tax foreclosure proceedings against 46 Canyon residents not connected to the Boyer Water System to finance construction of a

² Utah Code Ann. § 63G-2-102(1)(a).

³ See open letter to United States congressional leaders available at the website administered by The ECHO-Association at https://echo-association.com/?page_id=6908.

“preposterously oversized” water system⁴ and thus facilitate massive future development in the Canyon at public expense and extraordinary private profit.

In September 2014, Mr. Tracy commenced legal action under the federal False Claims Act (“FCA Litigation”) against EID trustees, managers, and private land developers The Boyer Company LC, City Development Inc., and the former CEO of Energy Solution Inc., and EID Advisory Committee Chairman R. Steve Creamer *et al.* for the alleged fraudulent acquisition and diversion of \$6.3 million dollars of federally-backed funds currently pending with the United States Court of Appeals for the 10th Circuit.⁵

In September 2018, for the first time on record, and as alleged in the FCA Litigation, the historic Canyon Stream suffered total depletion less than 2 miles from Utah’s Hogle Zoo as accurately predicted by EID’s own hydrologist.⁶

A year later in November 2019, the private water system operator reported that the Boyer Water System had exceeded federal drinking water standards for lead contamination but refused to inform water users and 100 “standby customers” that all water sources and distribution lines of the Boyer Water System had tested positive for lead contamination since April 18, 1994.⁷

⁴ See High Country News article “Paranoia and a ‘Preposterously’ Oversized Water Tank” by Emma Penrod available at the website administered by The ECHO-Association at https://echo-association.com/?page_id=405.

⁵ *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, No. 21-4051 (10th Cir. pending).

⁶ See Salt Lake Tribune article “Why is Emigration Creek — a Historic Utah Waterway — Dry?” by Brian Maffly at the website administered by The ECHO-Association at https://echo-association.com/?page_id=405; see also audio and illustrative diagrams recording entitled “Utah State Engineer Hearing – Barnett Testimony (December 15, 1995)” at the website administered by The ECHO-Association at https://echo-association.com/?page_id=2204.

⁷ See electronic documents, lead contamination laboratory test results, and audio-video recordings of EID trustee meetings available at the website maintained by The ECHO-Association at https://echo-association.com/?page_id=4955.

On January 16, 2019, as alleged in the FCA Litigation, the Utah State Engineer approved EID's proposal for the construction of over 500 additional homes in the Canyon currently pending with the Utah Court of Appeals.⁸

On June 2, 2021, as alleged in the FCA Litigation, Canyon resident Karen Penske reported drinking water contamination of her private well and therewith impairment of a senior perfected water right as both recorded and predicted in EID's own hydrological study from June 2000,⁹ leading to federal Civil Rights Act litigation against Utah Attorney Cook and the private water system operator.¹⁰

To secure public records relevant to pending state and federal litigation, Mr. Tracy requested disclosure of lead contamination laboratory test results ("Lead-Contamination GRAMA"), and telemetry data believed to document groundwater mining of Canyon aquifers via operation of large-diameter commercial wells expressly forbidden by the Utah State Engineer and EID's own hydrologist ("Groundwater-Mining GRAMA").¹¹

Following receipt of an unrequested and duplicitous data table in response the Lead-Contamination GRAMA, and an erroneous electronic data file in response to the Groundwater-Mining GRAMA from the private water system operator, Mr. Tracy commenced legal action

⁸ *Emigration Canyon Home Owners Association v. Kent L. Jones and Emigration Improvement District*, No. 20200295 (Utah Ct. App. pending).

⁹ See excerpt of 2000 Barnett-Yonkee Study at the website administered by The ECHO-Association at https://echo-association.com/?page_id=3310.

¹⁰ *Mark Christopher Tracy v. Simplifi et al.*, Case No. 2:21-cv-444-RJS-CMR (D. Utah pending)

¹¹ See footnote no. 6 supra; see also audio-video recording entitled "Aerial and Ground Recording of the Emigration Oaks PUD (YouTube)" available at the website administered by The ECHO-Association at https://echo-association.com/?page_id=3310.

against the EID Public Records Office¹² currently pending before the Utah Court of Appeals,¹³ and the Utah Supreme Court.¹⁴

On September 11, 2020, upon express confirmation that water distribution lines of the Boyer Water System were grossly undersized, and the private water system operator had manipulated pressure reducing valves in order to issue water letters for new construction in the Canyon,¹⁵ Mr. Tracy submitted a GRAMA request for all fire-flow test results since August 1, 1998 (“Fire-Flow GRAMA”).

Following the de facto denied request, on February 11, 2021, the SRC denied Mr. Tracy’s appeal as the pre-printed GRAMA request form completed by Mr. Tracy had listed only the EID Public Records Office and not “Emigration Improvement District c/o Simplifi Company.”

Mr. Tracy submitted a revised Fire-Flow GRAMA request the same day.

Upon de facto denial and subsequent appeal, the SRC ordered EID to disclose all fire flow test results and file either notice of compliance or notice of intent to appeal within 30 days. *See* SRC Decision and Order dated on August 23, 2021, attached as Exhibit A.

¹² Legal action is also pending against EID for the de facto refusal to allow access to public documents related to lead contamination of drinking water. *See Steve J. Onysko v. Patricia Smith-Mansfield, Chair, Utah State Records Committee and Emigration Improvement District*, Case No. 20090661 (Utah 3rd Dist. pending).

¹³ *See Mark Christopher Tracy v. Simplifi et al.*, Case No. 20210227 (Utah Ct. App. pending). The case is currently stayed following the issuance of the Court’s ruling in case no. 20200705-CA. *See* Corrected Order, available at the website administered by The ECHO-Association at https://echo-association.com/?page_id=8229; *see also Mark Christopher Tracy v. Simplifi et al.*, Case No. 20200705 (Utah Ct. App. September 14, 2021) and *Mark Christopher Tracy v. Simplifi et al.*, Case No. 20210743-CA (Utah Ct. App. pending).

¹⁴ *Mark Christopher Tracy v. Simplifi et al.*, Case No. 20210754-SC (Utah pending)

¹⁵ *See* audio-video recording entitled “Mayor Smolka, EID, and Eric Hawkes of the Simplifi Company – Misrepresentation of Fire Protection Lines in Violation of the Safe Drinking Water Act of 1974” at the website maintained by The ECHO-Association at https://echo-association.com/?page_id=7603.

To date, EID has filed neither notice of compliance nor notice of intent to appeal.¹⁶

B. The District Court Lacks Jurisdiction to Review the SRC Decision and Order.

Utah Code Ann. 63G-2-403(15)(a) mandates that “[u]nless a notice of intent to appeal is filed under Subsection (15)(b), each party to the proceeding *shall comply* with the order of the State Records Committee” (emphasis added).

It is well recognized that failure to file a timely notice of appeal is jurisdictional, and the court lacks jurisdiction to hear an appeal if notice was not timely filed. *Bowen v. Riverton City*, 656 P. 2d 434, 436 (Utah 1982).

As EID failed to file notice of intent to appeal required under Utah State statute, this Court lacks jurisdiction to review the SRC Decision and Order and EID must comply without further delay.

C. The Petition Alleges No Facts and Cites No Legal Authority for EID to Thwart a Constitutional Right to Access Public Records.

The Petition records that Mr. Tracy requested, and the SRC ordered disclosure of non-protected government records. While EID cites numerous irrelevant facts and quotes related to state and federal litigation currently pending before the United States Court of Appeals for the 10th Circuit, the Utah Court of Appeals, and the Utah Supreme Court, EID argues without reference to

¹⁶ Following Mr. Tracy’s *Request for Motion for Civil Penalties* filed with the SRC on September 27, 2021, (see https://echo-association.com/?page_id=8659), Utah Attorney Cook transmitted an electronic copy of the Petition to Mr. Tracy. To date, and despite EID’s continued disregard of SRC orders to disclose government documents of emergency fire protection, the SRC has not assessed civil penalty for noncompliance, nor transmitted written notice the Governor’s office under Utah Code Ann. § 63G-2-403(15)(d)(i).

any legal authority that it may withhold government records until a judgment issued in favor of a private company and controlling shareholders is satisfied.¹⁷

This factual allegation, assumed true for the purpose of the present motion, is however legally insufficient for EID to deny the public's constitutional right to access government records.¹⁸ Although not referenced by EID, Utah Code Ann. § 63G-2-203(8)(a)(ii) expressly provides that a governmental entity may require payment “of past fees and future estimated fees before beginning to process a request if... the requester has not *paid fees from previous requests*” (emphasis added).

In the present case, and as expressly affirmed by Utah Attorney Cook during the SRC public hearing, EID has neither monetary claim nor judgement against Mr. Tracy for past fees related to processing a previous request for access to government records.

The Petition filed with this Court is thus a thinly veiled subterfuge to allow EID to continue concealment of public documents directly related to pending state and federal litigation against EID and Utah Attorney Cook.

D. The Court Should Award Legal Fees and Costs to Mr. Tracy.

Pursuant to Utah Code Ann. § 63G-2-802(2)(a), the court may assess the governmental entity reasonable attorney fees and other litigation costs if the requestor is entitled to access public records, and if the requestor substantially prevails.

As EID failed to properly perfect jurisdiction of the court by filing a simple and mandatory notice of intent to appeal and has articulated no factual allegations of outstanding fees owed to

¹⁷ Petition at no. 15 [unidentified page].

¹⁸ See footnote no. 2 supra.

EID for processing a previous GRAMA request for disclosure of government records, the court should award Mr. Tracy reasonable attorney fees and costs of the present Action upon dismissal of the Petition.

II. CONCLUSION

Despite have been ordered by the SRC on three (3) separate occasions to produce fire flow test results under Utah Administrative Code R35-1-2(5) and Utah Code Ann. § 63G-2-403(15)(a), to date EID has not disclosed a single responsive document. *See* true and correct copy of email correspondence of the SRC Executive Secretary dated February 2, 2021, attached as Exhibit B, Notice of Appeal No. 2021-67 dated May 12, 2021, attached as Exhibit C, and SRC Decision and Order dated August 23, 2021, attached as Exhibit A.

For the foregoing reasons, this Court should grant the motion to dismiss and award Mr. Tracy reasonable attorney fees and costs.

DATED this 1st day of November 2021.

MARK CHRISTOPHER TRACY dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy
Pro se Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November 2021, a true and correct copy of the foregoing **RESPONDENT MARK CHRISTOPHER TRACY'S MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW OF THE DECISION AND ORDER OF THE UTAH STATE RECORDS COMMITTEE** was sent via electronic mail to the following counsel of record:

Jeremy R. Cook
jcook@ck.law
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111
Attorney for Petitioner Emigration Improvement District

Paul H. Tonks
phtonks@agutah.gov
Assistant Attorney General
Utah Office of Attorney General
4315 S. 2700 W. 3rd Floor
Salt Lake City, Utah 84129
Attorney for Respondent Utah State Records Committee

/s/ Mark Christopher Tracy
Mark Christopher Tracy

EXHIBIT A

BEFORE THE STATE RECORDS COMMITTEE OF THE

STATE OF UTAH

MARK TRACY,

Petitioner,

v.

EMIGRATION IMPROVEMENT
DISTRICT,

Respondent.

DECISION AND ORDER

Case No. 21-45

By this appeal, Petitioner, Mark Tracy, requests access to records allegedly held by Respondent, Emigration Improvement District (“District”).

FACTS

On February 11, 2021, Mr. Tracy made a request for records pursuant to the Government Records Access and Management Act (“GRAMA”) from the District. Mr. Tracy requested all fire flow test results of water system 18143 owned by the District and operated by Simplifi Company since August 1, 1998.

In an e-mail dated February 24, 2021, Jeremy Cook, legal counsel for the District, stated that based upon a decision made on February 10, 2021 awarding attorney fees against Mr. Tracy, the District “will not process the attached GRAMA request until the amounts of \$5,758.50 is paid in full.” Mr. Tracy filed an appeal with the chief administrative officer for the District on March 24, 2021, and after no response was made by the District, an appeal was filed with the State Records

Committee (“Committee”). On August 12, 2021, the Committee held a hearing during which the parties were allowed to participate electronically. At the hearing, the Committee considered the written materials, oral testimony, and oral arguments of the parties. After having carefully considered all evidence presented to the Committee, the Committee issues the following Decision and Order.

STATEMENT OF REASONS FOR DECISION

1. Pursuant to GRAMA, a person has the right to inspect a public record free of charge and take a copy of a public record during normal working hours subject to Utah Code §§ 63G-2-203 & -204. Utah Code § 63G-2-201(1)(a). A governmental entity may require payment of fees not paid by the requester from previous requests before beginning to process a request. Utah Code § 63G-2-203(8)(a)(ii).
2. In the present case, the District required Mr. Tracy to pay the judgment amount of \$5,758.50 prior to processing Mr. Tracy’s records request. The judgment was granted on February 10, 2021 after a court hearing with Judge Mark Kouris in *Tracy v. Simplifi, Co.*, 3rd Dist. Court Case No. 200905074, and memorialized in a written decision drafted by Mr. Cook and signed by Judge Kouris dated April 15, 2021.
3. A review of the April 15, 2021 Decision and Order shows the following pertinent facts about the case. On June 10, 2020, Mr. Tracy made a records request pursuant to GRAMA “correctly designat[ing]” the governmental entity as the District. After appealing the purported denial of his records request to the District’s board of trustees, Mr. Tracy filed the district court action against two private individuals and the Simplifi Company.
4. Although being informed “at least six times by this Court, Judge Faust, the State Records Committee, [and the District’s] attorney that GRAMA requests should be made only to” the

District, Mr. Tracy continued to include private individuals and the Simplifi Company in new GRAMA requests. Because of Mr. Tracy's actions, Judge Kouris found that "Respondents should be awarded reasonable attorneys' fees" pursuant to Utah Code § 78B-5-825(1) including attorney fees incurred responding to Mr. Tracy's Motion to Vacate the February 10, 2021 decision. The only named parties involved in the case were Mr. Tracy, the two private individuals, and the Simplifi Company, with Judge Kouris noting that Mr. Tracy failed to include the District as a party.

5. The question before the Committee is whether attorney fees awarded in a district court case to two private individuals and a company can be the basis for not processing a request for records pursuant to Utah Code § 63G-2-203(8)(a)(ii). The language used by the statute is that before processing a request, a governmental entity may require payment of fees "from previous requests." Although Judge Kouris ordered Mr. Tracy to pay attorney fees in the district court case, the fees were associated with the *Tracy v. Simplifi, Co.* case and not from a previous records request. As confirmed by the District's legal counsel, Judge Kouris' order did not require Mr. Tracy to pay the District any fees. Additionally, the records being requested have been classified as public records by the District.
6. Accordingly, the Committee finds that the attorney fees that Mr. Tracy has been ordered to pay by Judge Kouris, are not fees "from previous requests" to be paid to the District. Therefore, the District cannot rely upon Utah Code § 63G-2-203(8)(a)(ii) as a basis to deny Mr. Tracy access to public records. However, the District may require payment of future estimated fees before beginning to process Mr. Tracy's request if the fees are expected to exceed \$50 and may charge a reasonable fee to cover the governmental entity's actual cost of

providing the record pursuant to Utah Code § 63G-2-203(8)(a)(i) & -203(1)(a).

ORDER

THEREFORE, IT IS ORDERED THAT the appeal of Petitioner, Mark Tracy, is hereby **GRANTED.**

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 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 23 day of August 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 and electronic mail, this 23 day of August 2021 to the following:

MARK TRACY
1160 E. Buchnel Dr.
Sandy, Utah 84094
m.tracy@echo-association.com
Petitioner

JEREMY R. COOK
Cohne Kinghorn, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84114
jcook@ck.law
*Counsel for Respondent, the Emigration
Improvement District*



Rebekkah Shaw
Executive Secretary

EXHIBIT B

From: rshaw@utah.gov <rshaw@utah.gov> On Behalf Of SRC Secretary
Sent: Tuesday, February 2, 2021 5:43 PM
Subject: State Records Committee agenda

Good evening,

This is a friendly reminder for administrative deadlines prior to your respective hearing. The schedule is attached. Please be 30 minutes early (except for the first hearing) as the agenda is an estimate. The Chair may also break for lunch.

The Committee will be meeting using Zoom. All attendees will be muted upon entry, so the first thing you'll need to do before you present is to unmute your microphone. We are not requiring registration. Please join the meeting at this link:

<https://us02web.zoom.us/j/83856354906?pwd=ZEVXbmpFVzdBV25mNHJQazNxRzZ4QT09> If you are unfamiliar with Zoom and would like a test run, please let me know. If you would like to join by phone, please let me know and I will send you the number and passcode.

Governmental Entities: Governmental entities shall submit, no later than five business days before the hearing, a written statement of facts, reasons, and legal authority in support of the governmental entity's position. Please send a copy of the written statement by first class mail, postage prepaid, to the requester or interested party involved in the appeal. You can send the documents to me via email or first class mail, whichever you prefer. Disregard this reminder if you have already provided the statement of facts, reasons, and legal authority for your respective hearing unless the information needs to be updated. Utah Code 63G-2-403(5).

Please have the records ready for the State Records Committee to review per administrative rule R35-1-2(5). You can work with the Executive Secretary to coordinate this.

Petitioners: Petitioners are not required to submit a statement of facts, reasons, and legal authority; however, if a Petitioner has supplemental material please send a copy to the governmental entity and to me no later than five business days prior to your hearing, because there will not be time during the hearing.

Postpone Hearing or Withdraw Appeal: If a petitioner wishes to postpone the hearing or withdraw the appeal, the petitioner shall notify the Committee and the governmental entity in writing no later than two days prior to the scheduled hearing date. Pursuant to Administrative Rule R35-1-2(12)(a). <https://rules.utah.gov/publicat/code/r035/r035-01.htm>

Sincerely,
~Rebekkah

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Rebekkah Shaw
Executive Secretary, State Records Committee

346 South Rio Grande St.
Salt Lake City UT 84101
801.531.3851 / SRCsecretary@utah.gov
<20210202161426830.pdf>

EXHIBIT C



State of Utah

SPENCER J. COX
Governor

DIEDRE HENDERSON
Lieutenant Governor

Department of Administrative Services

JENNEY REES
Executive Director

Division of Archives and Records Service

KENNETH R. WILLIAMS
Director

Appeal Req. #2021-67

Sent via email

May 12, 2021

Mike Hughes
271 N. Margarthe Lane
Salt Lake City, UT 84108
mike@ecid.org

RE: Appeal to the State Records Committee

Dear Mr. Hughes:

The State Records Committee has received an appeal from Mr. Tracy. I understand he is requesting access to fire flow test results of water system 18143. This is to inform you that a hearing will be scheduled for **August 12th, 2021**. The meeting is expected to be held using Zoom. As we get closer to the hearing we will schedule a start time for your appeal, and I will send you details to join the meeting.

You are required to submit to me, no later than five business days prior to the hearing, a written statement of facts, reasons, and legal authority supporting your position. Under Utah Code 63G-2-403(5), you must also send copies of the same statements to the petitioner by first class mail.

The State Records Committee, under the authority of Utah Code 63G-2-403(9)(a), may review the disputed records in camera. **Therefore, please have the records in question available at the hearing and Bates stamped.**

If you have any questions please contact me, and if you are interested in mediation contact the state government records ombudsman, Rosemary Cundiff, at (801) 531-3858 or rcundiff@utah.gov.

Sincerely,

e/s: Rebekkah Shaw

Rebekkah Shaw
Executive Secretary