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

STEVEN J. ONYSKO, an individual, Petitioner, **vs.** **PATRICIA SMITH-MANSFIELD**; Chair, Utah State Records Committee; **UTAH STATE RECORDS COMMITTEE**; **UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY**; **UTAH DIVISION OF DRINKING WATER**; **MARIE E. OWENS**; and **YING-YING MACAULEY**, Interim Director, Division of Drinking Water, Respondents.	**RULING AND ORDER DENYING PETITIONER'S OBJECTIONS TO EVIDENCE, MOTION TO CERTIFY, MOTION TO INVITE COURT ERROR, and MOTION FOR CLARIFICATION; DENYING RESPONDENTS THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY'S AND DIVISION OF DRINKING WATER'S MOTIONS FOR SUMMARY JUDGMENT; and GRANTING RESPONDENT PATRICIA SMITH-MANSFIELD'S MOTION TO DISMISS** **Case No. 200907218** **Judge Adam T. Mow**

Before the Court are two Motions for Summary Judgment filed by Respondents Utah Division of Drinking Water's (the "Division") and Utah Department of Environmental Quality (collectively "DEQ") as well as a Motion to Dismiss filed by Respondent Patricia Smith-Mansfield. Also before the Court are Objections to two separate Declarations of Tim Davis, a Motion to Certify, a Motion to Invite Court Error, and a Motion for Clarification filed by Petitioner Steven J. Onysko.

The Court heard oral argument on these matters at a November 23, 2021, hearing, at which hearing Petitioner appeared *pro se*, DEQ was represented by Michael Stahler and Bret Randall, and Ms. Smith-Mansfield was represented by Paul Tonks. Pursuant to a November 18, 2021, Minute Entry, the Court also took evidence at the November 23, 2021, hearing on the issue of subject matter jurisdiction, including Petitioner's testimony and exhibits "1" through "4" and

portions of exhibit "5" presented by DEQ.[1] Following the hearing, the Court took the matters under advisement. The Court, having fully reviewed the briefing on the matters, having considered the argument of counsel as well as the evidence presented at the November 23, 2021, hearing, and having now been fully informed, rules and orders as follows.

FINDINGS OF FACT[2]

1. On or about November 4, 2019, Petitioner submitted a records request to the Utah Department of Environmental Quality by completing an online form.

2. The data Petitioner put into the online form generated the two-page Request for Public Information form the Court received as Exhibit 1 at the November 23, 2021, hearing.[3]

3. Petitioner requested in the Request for Public Information:

> [V]iewing access to all records and documents relating to lead in, including but not limited to, lead contamination of, public drinking water in Emigration Improvement District, UTAH18141 Public Water System. This request includes, but is not limited to, (1) correspondence between DDW and EID, and to/from third parties to DDW and/or EID, including EPA, about lead presence in the drinking water provided by EID through final use locations of EID water users (e.g., information on detected lead both upstream and downstream of the EID drinking water service connections in the EID service area); (2) drinking water quality sample results for any detected lead presence in the EID source water and distribution system, as well as within residential or business property plumbing receiving EID drinking water; (3) DDW communications to EID, including, but not limited to, vis-à-vis water quality violations, vis-à-vis advice or directives or orders or action plans by DDW with respect to EID needed or required action for lead in the EID drinking water, etc., or vis-à-vis potential or actual health impacts of lead in the EID drinking water on EID drinking water users; and (4) any DDW documentation of EID responsibilities under the

[1] *See* Min. Entry Re: Nov. 23, 2021 Hr'g & Bifurcation of De Novo Review 3, Nov. 18, 2021.
[2] Pursuant to the Minute Entry issued in this matter on November 18, 2021, the Court took evidence "solely on Petitioner's intent as to any fee waiver request." *See id.* Having heard Petitioner's testimony and reviewed the evidence presented by DEQ, the Court makes the following findings of fact related to the foregoing issue.
[3] *See* DEQ Ex. 1.

> Safe Drinking Water Act, the Utah Safe Drinking Water Act, or any other public water system regulations, to inform EID public drinking water users of any lead in the drinking water served by EID.[4]

4. Petitioner only requested viewing and inspection access to the records, so he clicked the appropriate part of the online form to make such a request. He did not want to request a copy of the records.

5. Petitioner requested access to the records because he believes providing such access primarily benefits the public.

6. At the time of completing the records request, Petitioner believed that he should not have to pay any fees to DEQ to view and inspect the requested records, so he clicked the part of the online form that pertains to seeking a fee waiver.

7. The Court does not find credible Petitioner's testimony at the November 23, 2021, evidentiary hearing that he did not intend to seek a fee waiver in submitting his records request. This is because, in addition to the form Petitioner completed for the records request indicating a fee waiver was requested, Petitioner appealed the denial of the fee waiver.[5]

8. On or about January 3, 2020, Petitioner sent a letter to Kim Shelley, the Director of Operations of DEQ appealing DEQ's December 6, 2019, response to his records request. At the November 23, 2021, evidentiary hearing, the Court received the December 6, 2019, DEQ response as Exhibit 4 and the January 3, 2020 letter as Exhibit 5.[6]

[4] *Id.* at 1.
[5] *See* DEQ Ex. 5, at 1.
[6] *See* DEQ Exs. 4, 5.

9. Page 5 of the December 6, 2019, response states that Petitioner's records request "includes a request for [sic] waive fees for the records."[7]

10. The Division of Drinking Water went on in the response to grant in part and deny in part Petitioner's fee waiver request.[8]

11. In appealing this decision, Petitioner included as an exhibit to his January 3, 2020, appeal letter the two-page Request for Public Information form the Court received as Exhibit 1 at the November 23, 2021, hearing, which form indicates Petitioner requested a fee waiver.[9]

12. Further, on page 13 of his January 3, 2020, letter, Petitioner appeals to Director Shelley that Petitioner's records request be fulfilled "with deserved Utah Title § 63G-2-203(4)(a) fee waiver, which is warranted."[10]

13. Petitioner also states on page 19 of his January 3, 2020, letter that he appeals on multiple grounds, including that his "fee waiver request was illegitimately denied."[11]

14. Petitioner further asks on page 20 of his January 3, 2020, letter for Director Shelley to rescind the denial of his "fee waiver request."[12]

UNDISPUTED MATERIAL FACTS[13]

1. On November 14, 2019, the Division provided Petitioner with an initial response to Petitioner's November 4, 2019, Request. The initial response provides instructions as to how

[7] DEQ Ex. 4, at 5.
[8] *See id.* at 5-6.
[9] DEQ Ex. 5, at 23-24.
[10] *Id.* at 13.
[11] *Id.* at 19.
[12] *Id.* at 20.
[13] In addition to the Findings of Fact set forth above, a number of facts are undisputed in this matter. The undisputed facts are drawn from the undisputed facts listed in the parties' respective memoranda and are included for the purpose of addressing DEQ's Motions for Summary Judgment. While Petitioner purports to dispute all the facts, he fails to directly address the facts in the Motions for Summary Judgment in accordance with rule 56. Furthermore, Petitioner bases his dispute on his objections to the Davis declarations, which are overruled, as discussed below. Accordingly, the Court may rely on the following undisputed facts in addressing DEQ's Summary Judgment Motions.

Petitioner could access certain public records for Emigration Improvement District ("EID") through DEQ's public records database and its EZ Search function and indicating that a search using the instructions provided "should pull down 108 documents." The initial response further provided "[a]s to all [EID] records that are on the database, the Division considers this response as partial fulfillment of the GRAMA request. . . . Two other categories of records, which are not published to the database, are potentially responsive to the GRAMA request: Emails and specific sampling data. The process of searching for and classifying these records is expected to require significant time."[14]

2. Through a letter dated November 17, 2019, Petitioner replied that he "had already engaged in the search methods that [DEQ] advise[d]" and found the documents provided to be incomplete and outdated. Petitioner further requested that the Division immediately publish to its website the Annual Drinking Water Reports for the EID for the years 2016, 2017, and 2018.[15]

3. In a letter dated December 6, 2019, then Director Marie Owens provided notice to Petitioner of several matters relating to his Request. The letter notified Petitioner that:

a. "In many respects, this GRAMA request is broadly worded and undefined" and that a reasonably specific request was one for "all public records relating to Emigration Improvement District (aka EID or 18143), which records also involve 'lead.'"[16]

b. In addition to the EZ search mentioned in the Initial Response, the agency maintains a publicly-accessible database called Waterlink.[17]

[14] Davis Decl. Ex. 2, at 2, July 1, 2021.
[15] *Id.* Ex. 3, at 1-4.
[16] *Id.* Ex. 4, at 2.
[17] *See id.*

c. The Division does not maintain traditional paper files. Its legacy files (1996 to 2008) were scanned but are not formatted to allow for searching.[18]

d. The Division completed a search of its records except for emails and legacy files (1996 to 2008) that were not formatted for searching.[19]

e. The Division interpreted Petitioner's request, in his November 17, 2019, letter, that the Division publish to its website EID's Consumer Confidence Reports, as a new GRAMA request for those records and produced them free of charge.[20]

f. The Division interpreted Petitioner's GRAMA Request as requesting all data relating to lead in the EID system that exists in the agency's database. This information was provided to Petitioner free of charge in an Excel spreadsheet.[21]

g. The Division did not search emails but based on preliminary evaluation through the Department of Technical Services ("DTS"), there were 34 separate accounts at DEQ that may have responsive records, amounting to about 344 MB of data. DTS charges the Division for its email searches and based on the preliminary evaluation, DTS would likely charge the Division $1,598 to perform the searches. The Division also cautioned that the DTS search would produce significant volumes of email records that are "false positives." Culling out the false positives was expected to require considerable time for the Division's GRAMA officer at the time, whose hourly rate was $33.49.[22]

[18] *See id.* at 3.
[19] *See id.*
[20] *See id.*
[21] *See id.* at 4.
[22] *Id.*

h. The request for in-person review was denied as the agency does not maintain traditional paper files of the requested records and the records must be reviewed and classified before they can be released to Petitioner.[23]

i. The request for fee waiver was denied as the agency believes that it already provides adequate levels of information to the public and the cost of the search would significantly impact the agency's limited budget.[24]

j. The Division would require prepayment of estimated fees in the amount of $2,394.56 prior to initiating searches of its legacy files (1996 to 2008) and emails. This was calculated as: $462.96 for searches for lead-related EID documents stored on the DDW system, $1,598.00 for DTS to search for emails, $858.60 for screening of the emails, and $15.00 for the electronic storage format.[25]

k. The letter may be considered a final agency decision as to Petitioner's fee waiver request and that he had the right to appeal this decision to the Director of Operations at the time, Kim Shelley.[26]

4. On January 3, 2020, Petitioner submitted a timely appeal to DEQ's Chief Administrative Officer at the time, Kim Shelley (the "CAO").

5. The CAO denied Petitioner's appeal in a written decision dated January 17, 2020. The decision informed Petitioner of his right to appeal the determination to the State Records Committee or by filing a petition for judicial review.[27]

[23] *Id.* at 5.
[24] *Id.* at 6.
[25] *Id.*
[26] *Id.* at 7.
[27] *Id.* Ex. 5, at 5.

6. On February 16, 2020, Petitioner filed a timely appeal to the State Records Committee. In DEQ's Statement of Facts, Reasons, and Legal Authority submitted to the State Records Committee, the Division modified its fee estimate because it had since hired a new GRAMA records officer with a lower hourly rate. The Division therefore revised its fee estimate to $2,435.96.[28]

7. The Division has reviewed its prior decisions and reaffirmed its outlined positions.[29]

8. The State Records Committee denied Petitioner's appeal in a written decision dated October 20, 2020.[30]

DISCUSSION[31]

A. Jurisdiction/Mootness[32]

Rule 56 of the Utah Rules of Civil Procedure provides that summary judgment shall be granted "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law."[33]

> A movant who seeks summary judgment on a claim on which it will bear the burden of persuasion at trial cannot seek summary judgment without producing affirmative evidence in support of the essential elements of its claim. But a movant who seeks summary judgment on a claim on which the nonmoving party bears the

[28] *See id.* Ex. 6, at 14.
[29] *See* Davis Decl. 7-8.
[30] *See id.* Ex. 7, at 5.
[31] In multiple memoranda, Petitioner argues that both DEQ and Smith-Mansfield failed to include sufficient analysis in their respective briefing, thus precluding the relief sought. Courts have clarified "an issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of the research and argument to the reviewing court." *See Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶5 n.4, 416 P.3d 635. In reviewing the analysis in Respondents' various memoranda, it does not appear that the analysis is so lacking as to shift the burden of research and argument to the Court. Accordingly, the Court declines Petitioner's request to disregard the memoranda and will consider the same in reaching its decision.
[32] As noted in the Court's November 18, 2021, Minute Entry, "Petitioner's intent as to any fee waiver request is pivotal to how this case proceeds." *See* Min. Entry 3. Accordingly, the Court will first address this issue before addressing the remainder of the matters.
[33] UTAH R. CIV. P. 56(a).

> burden of persuasion may show that there is no genuine issue of material fact without producing its own evidence.[34]

Upon the moving party's satisfaction of this burden, the burden shifts to "[t]he non-moving party[, who] must [then] set forth specific facts showing that there is a genuine issue for trial" to survive a summary judgment motion.[35] Finally, in addressing a summary judgment motion, a court is required "to draw all reasonable inferences in favor of the nonmoving party."[36] It is in this context the Court examines DEQ's Second Summary Judgment Motion.

GRAMA provides for judicial review of an agency decision in two circumstances: where an agency has denied access to records and where an agency has denied a fee waiver request.[37] Petitioner first argues that DEQ's imposition of a fee and requiring its prepayment prior to fulfilling Petitioner's records request constitutes a denial of access to the records he requested. However, the imposition of a fee does not constitute a denial of a GRAMA request overall. GRAMA authorizes DEQ to assess fees for the provision of records pursuant to a GRAMA request.[38] Thus, DEQ has not in fact denied Petitioner access to records but has instead only assessed a fee and required its prepayment prior to fulfilling Petitioner's Request, which are both actions supported by the plain language of section 63G-2-203. Accordingly, there is no appealable order regarding denial of record access for the Court to review at this juncture.

Nevertheless, GRAMA also provides "[a] person who believes that there has been an unreasonable denial of a fee waiver . . . may appeal the denial in the same manner as a person

[34] *Salo v. Tyler*, 2018 UT 7, ¶26, 417 P.3d 581.
[35] *Peterson v. Coca-Cola USA*, 2002 UT 42, ¶20, 48 P.3d 941.
[36] *IHC Health Serv., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶19, 196 P.3d 588.
[37] *See* Utah Code Ann. § 63G-2-404; *see also id.* § 63G-2-203(6)(a).
[38] *See Jordan River Restoration Network*, 2018 UT 62, ¶78, 435 P.3d 179 ("[A]llowing governmental entities to impose fees is one way that GRAMA balances the government's interests and the public's right of access.").

appeals when inspection of a public record is denied under Section 63G-2-205."[39] Petitioner has repeatedly asserted that he has not requested a fee waiver. But following the November 23, 2021, evidentiary hearing, the Court did not find credible Petitioner's testimony or assertions that he did not intend to seek a fee waiver in submitting his records request. The Court finds that Petitioner requested a fee waiver in the November 4, 2019, records request and the subsequent denial in part of that fee waiver request is subject to appeal in accordance with section 63G-2-203. Moreover, the issue is not moot as the reasonableness of DEQ's denial of Petitioner's fee waiver remains in controversy.[40] Therefore, the Petition is not subject to dismissal for lack of subject matter jurisdiction or mootness.

B. The Objections to the Tim Davis Declarations

In both Objections to the Davis Declarations, Petitioner argues that Mr. Davis's two declarations should be stricken in their entirety as (1) Mr. Davis has not been designated as an expert witness and yet offers expert testimony, (2) the declarations contain improper opinion testimony for which Mr. Davis lacks personal knowledge, and (3) the declarations are irrelevant.[41] The Declarations do not contain opinions for which an expert designation is required. Nor do they contain improper lay opinions. Instead, they contain only statements Mr. Davis makes on behalf of the Division or serve to authenticate the documents filed in conjunction with the Declarations. The Utah Rules of Evidence provide "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce

[39] Utah Code Ann. § 63G-2-203(6)(a).
[40] *Motorola Sols., Inc. v. Utah Commc'ns Auth.*, 2019 UT 66, ¶10, 455 P.3d 91 ("A motion becomes moot when the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect.").
[41] Petitioner also filed an Objection to new evidence in DEQ's Opposition Memorandum. However, this Objection addresses the same issues raised in the Objections to the Davis Declarations. Accordingly, the analysis below regarding the Davis Declarations applies with equal weight to this third Objection and that Objection is therefore overruled as discussed below.

evidence sufficient to support a finding that the item is what the proponent claims it is."[42] "Testimony of a [w]itness with [k]nowledge [] that an item is what it is claimed to be . . . satisfies the requirement."[43] Moreover, "[g]enerally, the requisite foundation can be made by the custodian of the records."[44]

Utah Code provides that the Director of the Division shall, among others, "advise, consult, and cooperate with other agencies of this and other states, the federal government, and with other groups, political subdivisions, and industries in furtherance of the purpose of this chapter" and "subject to the provisions of this chapter, enforce rules made by the board through the issuance of orders that may be subsequently revoked."[45] It is the Division Director who is authorized to coordinate with the State Records Committee regarding the provision of records pursuant to a GRAMA request such as the one at issue in the present case. Accordingly, Mr. Davis possesses sufficient knowledge regarding Petitioner's records request and subsequent DEQ actions to permit him to offer foundation testimony.

And as the designated representative of the Division, Mr. Davis may properly review Division records for the purpose of testifying on behalf of the Division. In so doing, Mr. Davis speaks not for himself, but on behalf of the Division. Mr. Davis' personal knowledge regarding the matters for which he so testifies is largely irrelevant, so long as he has properly reviewed the Division's records. Mr. Davis states in his first declaration that he "ha[s] reviewed the Division's official records concerning this matter."[46] This is sufficient, under the Utah Rules of Evidence, to establish that Mr. Davis possesses knowledge regarding the information found in the files, which

[42] UTAH R. EVID. 901(a).
[43] *Id.* R. 901(b)(1).
[44] *State v. Bertul*, 664 P.2d 1181, 1184 (Utah 1983).
[45] Utah Code Ann. § 19-4-106(2)(b), (d).
[46] Davis Decl. 2.

information is later in his Declaration. Thus, to the extent that he is testifying regarding actions previously undertaken by the Division or the authenticity of Division documents, he is competent to so testify.

Finally, beyond Mr. Davis' institutional knowledge as the designated representative for the Division, he has also declined to reverse the Division's prior decisions while acting in his capacity as the Director of the Division. Such decision represents a new agency action and Mr. Davis is competent to testify with regard to it. This determination independently precludes striking the Davis Declarations as Petitioner requests.

As to Petitioner's assertion that Mr. Davis' testimony is irrelevant, the Utah Rules of Evidence provide "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[47] In the context of GRAMA fee waivers, a reviewing court is instructed to consider "those circumstances under which GRAMA encourages a fee waiver" and "any other evidence it finds relevant to the reasonableness of the entity's denial."[48] The Division Director's testimony—especially that regarding the denial of Petitioner's fee waiver request and associated documents—is relevant to the Court's decision. Accordingly, Mr. Davis' Declarations are not properly excluded as irrelevant. Petitioner's Objections are overruled and the Court may therefore consider the Davis Declarations in addressing the Summary Judgment Motions.

C. The First Summary Judgment Motion

Resolution of the First Summary Judgment Motion is governed by the summary judgment standard discussed above. In their First Summary Judgment Motion, DEQ argues that

[47] UTAH R. EVID. 401(a)-(b).
[48] *Salt Lake City Corp. v. Jordan River Restoration Network*, 2018 UT 62. ¶¶53-54, 435 P.3d 179.

they are entitled to judgment as a matter of law with regard to whether their denial, in part, of Petitioner's fee waiver request was reasonable. Resolution of this issue requires interpretation of the applicable statutes. "When faced with a question of statutory interpretation, our primary goal is to evince the true intent and purpose of the Legislature."[49] The Court "determine[s] the statute's meaning by first looking to the statute's plain language, and give[s] effect to the plain language unless the language is ambiguous."[50]

> When interpreting a statute [a court] assume[s], absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning. Additionally, [a court] presume[s] that the expression of one term should be interpreted as the exclusion of another. [The court] therefore seek[s] to give effect to omissions in statutory language by presuming all omissions to be purposeful.[51]

The Court must construe "each part or section [] in connection with every other part or section so as to produce a harmonious whole."[52] "If the plain meaning of the statute can be discerned from its language, then we need not employ any other interpretive tools."[53]

In the June 3, 2021, Ruling and Order, the Court determined that the fee provisions found in GRAMA would apply to Petitioner's GRAMA Request.[54] GRAMA provides "[a] governmental entity may charge a reasonable fee to cover the governmental entity's actual cost of providing a record."[55] Furthermore,

> [w]hen a governmental entity compiles a record in a form other than that normally maintained by the governmental entity, the actual costs under this section may include the following: (i) the cost of staff time for compiling, formatting, manipulating,

[49] *Stone Flood & Fire Restoration, Inc. v. Safeco Ins. Co. of Am.*, 2011 UT 83, ¶18, 268 P.3d 170.
[50] *Am. Fork City v. Pena-Flores*, 2002 UT 131, ¶9, 63 P.3d 675.
[51] *Aequitas Enters., LLC v. Interstate Inv. Grp., LLC*, 2011 UT 82, ¶15, 267 P.3d 923.
[52] *Hertzske v. Snyder*, 2017 UT 4, ¶12, 390 P.3d 307.
[53] *State v. Hunt*, 2018 UT App 222, ¶
[54] *See* Ruling & Order on Mots. for Summ. J., Mots. to Dismiss, & Mot. in Limine 7, June 3, 2021.
[55] Utah Code Ann. § 63G-2-203(1).

> packaging, summarizing, or tailoring the record either into an organization or media to meet the person's request; (ii) the cost of staff time for search, retrieval, and other direct administrative costs for complying with a request; and (iii) in the case of fees for a record that is the result of computer output other than word processing, the actual incremental cost of providing the electronic services and products together with a reasonable portion of the costs associated with formatting or interfacing the information for particular users.[56]

"An hourly charge under [the foregoing] may not exceed the salary of the lowest paid employee who, in the discretion of the custodian of records, has the necessary skill and training to perform the request."[57] And a request may be fulfilled without charge and a governmental entity is encouraged to do so if "(a) releasing the record primarily benefits the public rather than a person; (b) the individual requesting the record is the subject of the record . . . ; or (c) the requester's legal rights are directly implicated by the information in the record, and the requester is impecunious."[58]

"[I]f an agency is required to do more than simply retrieve and make available a record in its original form, then the agency may charge a compilation fee for its production."[59] But

> when a request for public records does not specify that the records be compiled in a form other than that used by the agency, the burden is on the agency to show that it is impossible to allow the requestor to obtain the records on his or her own and that compliance with the request requires the compilation of the records in a form other than that normally maintained by the agency.[60]

Furthermore, when faced with a challenge to an agency's decision concerning fee waiver, "the ultimate question is not whether the entity abused its discretion, but whether its decision was

[56] *Id.* § 63G-2-203(2)(a)(i)-(iii).
[57] *Id.* § 63G-2-203(2)(b).
[58] *Id.* § 63G-2-203(4)(a)-(c).
[59] *Graham v. Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, ¶26, 979 P.2d 363.
[60] *Id.* at ¶28.

reasonable. The court should make this decision *de novo*."[61] When making such determination, the Court must "view the entity's decision in the context of the governing statute" and "examine this and any other evidence it finds relevant to the reasonableness of the entity's denial."[62] Finally, "the party seeking the remedy of overturning the Committee's decision must bear the burden of proof."[63]

Here, the Division considered the factors in section 63G-2-203(4) and ultimately determined that, based on the number of records likely to be produced as well as the amount of time necessary to fulfill the request and the corresponding burden placed on the Division thereby, the fees would be only partially waived. Such determination falls squarely within the authority afforded the Division under section 63G-2-203. And the Division has presented evidence in support of their assertion that a response to the GRAMA Request would require compiling records in a form in which they are not maintained.[64] Thus, DEQ has carried its burden to show that fees for compilation are warranted.

Nevertheless, DEQ is not entitled to judgment as a matter of law with regard to the reasonableness of its decision on Petitioner's fee waiver request. One of the primary cases relied upon by DEQ in seeking summary judgment in this matter, *Jordan River Restoration Network*, was decided not on summary judgment, but after a trial *de novo*. And "reasonableness [is generally a] question[] for the fact finder."[65] Unless reasonable minds could not conclude that DEQ's decision was unreasonable, summary judgment is unwarranted.[66]

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[61] *Jordan River Restoration Network*, 2018 UT 62, at ¶52, 435 P.3d 179.
[62] *Id.* at ¶¶53-54.
[63] *Id.* at ¶61.
[64] *See* Davis Decl. Ex. 4.
[65] *Stern v. Metro. Water Dist. of Salt Lake & Sandy*, 2012 UT 16, ¶73, 274 P.3d 935.
[66] *See id.*

While Petitioner has largely omitted from his briefing on the First Summary Judgment Motion any reference to the reasonableness of DEQ's fee waiver determination, choosing instead to focus on his assertion that the decision amounts to a *de facto* denial of access to records, the Court has admitted into evidence documents demonstrating that Petitioner sought the information for a public rather than a private purpose.[67] And Petitioner has further argued in his Appeal to DEQ that the amount of fees DEQ sought to impose was "extortionate, with poorly-veiled intent to intimidate [Petitioner] into foregoing his GRAMA request."[68] Based on this, reasonable minds could conclude that DEQ's decision regarding Petitioner's fee waiver request was unreasonable. So, DEQ is not entitled to judgment as a matter of law with regard to this issue and it must be addressed at a trial de novo.

Nevertheless, while Petitioner is entitled to a trial de novo, such trial shall be limited to the reasonableness of DEQ's decision regarding Petitioner's fee waiver request. Other matters, such as the accuracy of the information DEQ has previously provided to Petitioner and whether the amount of the fee assessed by DEQ constitutes a de facto denial of access to records—issues Petitioner has repeatedly raised both in briefing before this Court and in prior filings with the State Records Committee—are outside the scope of the issues to be reviewed in this proceeding. The Court will not hear testimony or argument on such issues at trial.

D. The Motion to Dismiss

Rule 21 of the Utah Rules of Civil Procedure provides "[m]isjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on

[67] *See* DEQ Ex. 1, at 2.
[68] DEQ Ex. 5, at 19.

motion of any party or of its own initiative."[69] While Smith-Mansfield bases her Motion on rule 21, she has, in fact, sought dismissal of the claims asserted against her in her individual capacity. Therefore, cases interpreting rule 12 are instructive. In addressing a motion to dismiss, the Court "accept[s] the plaintiff's description of facts alleged in the complaint as true, but [] need[s] not accept extrinsic facts not pleaded nor need [it] accept legal conclusions in contradiction of the pleaded facts."[70]

In the Petition, Petitioner has only included facts regarding actions Ms. Smith-Mansfield took in her official capacity as the Utah State Records Committee Chair.[71] Petitioner concedes as much in his opposition memorandum, asserting that any injunction served on the State Records Committee would necessarily also constrain the Chair of that Committee. However, this is not a basis for the inclusion in this action of the Chair in their individual capacity—any decision applicable to the Committee as a whole will necessarily also apply to the Chair in their official capacity regardless whether they are included as a party to the action.

In response, Petitioner first argues that Ms. Smith Mansfield is an indispensable party and must be included per rule 19. Rule 19 provides that a person shall be joined as a party if:

> (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double,

[69] UTAH R. CIV. P. 21.
[70] *State v. Watson Pharm.*, 2019 UT App 31, ¶11, 440 P.3d 727.
[71] In case number 210901695, it was clarified that Ms. Smith-Mansfield no longer serves as Chair of the Committee. While Petitioner objects to the inclusion of an order from another Third District case with the Motion to Dismiss, Ms. Smith-Mansfield did not offer the decision as evidence but merely as a reference for the Court to review. Accordingly, Petitioner's objection on this point is overruled and the Court may properly consider this material in addressing the Motion to Dismiss.

> multiple, or otherwise inconsistent obligations by reason of his claimed interest.[72]

"A necessary party is one whose presence is required for a full and fair determination of his rights as well as of the rights of the other parties to the suit."[73] In the present case, Petitioner can be accorded complete relief in Ms. Smith-Mansfield's absence. As discussed above, the Chair of the Committee (in their official capacity) will be subject to any decision applicable to the Committee as a whole. Ms. Smith-Mansfield has minimal, if any, ability to impact the decisions of the Committee acting outside her position as the Chair of that Committee. Therefore, her absence will have minimal effect on the relief to be accorded Petitioner in this matter. Additionally, Ms. Smith-Mansfield claims no interest, in her individual capacity, relating to the subject of this action. Petitioner's argument on this point is without merit and rule 19 will not require joinder of Ms. Smith-Mansfield in her individual capacity.

Petitioner next seeks to draw comparisons between the statutes applicable to actions involving decisions of the State Engineer to GRAMA, arguing that cases interpreting the former have permitted the inclusion of other parties. However, such argument is irrelevant to the case at hand. Regardless whether other parties are permitted to be included in an action under other statutes, a petition must still contain sufficient factual allegations to support a claim against each respondent. As Petitioner has failed to allege any wrongdoing by Ms. Smith-Mansfield in her individual capacity, the claims asserted against her in this matter are properly dismissed in accordance with rule 12(b)(6).

E. The Motion to Certify

[72] UTAH R. CIV. P. 19(a).
[73] *White v. Jeppson*, 2014 UT App 90, ¶12, 325 P.3d 888.

In the Motion to Certify, Petitioner requests the Court certify as final that portion of the June 3, 2021, Ruling and Order where the Court determined that FOIA would not serve to limit the fees DEQ may charge for provision of records. Rule 54 provides "[w]hen an action presents more than one claim for relief . . . and/or when multiple parties are involved, the court may enter judgment as to one or more but fewer than all of the claims or parties only if the court expressly determines that there is no just reason for delay."[74] For an order to be properly certified as final under rule 54(b), the following three requirements must be met:

> [t]here must be multiple claims for relief or multiple parties to the action; the judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims or parties remain in the action; and the district court, in its discretion, must make an express determination that there is no just reason for delay."[75]

"Certification requires different claims, not merely different issues."[76] "[W]hen th[e] factual overlap is such that separate claims appear to be based on the same operative facts or on the same operative facts with minor variations, they are held not to constitute separate claims for rule 54(b) purposes."[77] Finally, courts have instructed district courts to "steadfastly adhere[] to a narrow approach to 54(b) certifications."[78]

In the present case, Petitioner seeks to certify as final the Court's decision regarding whether FOIA, rather than GRAMA, would apply to the fees DEQ sought to assess for Petitioner's GRAMA Request. This issue is inextricably tied to the issues remaining in the case. Specifically, the propriety of DEQ's decision regarding the fee waiver request Petitioner

[74] UTAH R. CIV. P. 54(b).
[75] *Al-Saleh v. Al-Saleh*, 2020 UT App 16, ¶2, 459 P.3d 1072.
[76] *Weiser v. Union Pac. R.R. Co.*, 932 P.2d 596, 597 (Utah 1997).
[77] *Gunnison Valley Bank v. Crotts*, 2011 UT App 410, ¶4, 266 P.3d 199.
[78] *Copper Hills Custom Homes, LLC v. Countrywide Bank, FSB*, 2018 UT 56, ¶17, 428 P.3d 1133.

included with his GRAMA Request. And the Court's decision interpreting the applicable statute in this case is not an order that would be appealable but for the fact that other claims or parties remain in the action. The Court has yet to determine whether DEQ violated the applicable statute by denying in part Petitioner's fee waiver request. The portion of the Order regarding the applicability of FOIA to Petitioner's GRAMA Request is not properly certified under rule 54(b).

F. The Invited Error Motion

Petitioner requests the Court grant his request to voluntarily dismiss the remainder of the claims he has asserted in the present action to permit him to appeal the Court's decision regarding the applicability of FOIA to the fees assessed by DEQ with regard to Petitioner's GRAMA Request. As such, Petitioner's Motion is effectively a second rule 54(b) Motion. Nevertheless, in liberally construing Petitioner's pleadings, as the Court must, the Motion may also be addressed as one based on rule 41.

Rule 41 of the Utah Rules of Civil Procedure provides "an action may be dismissed at the plaintiff's request by court order only on terms the court considers proper."[79] "[A]bsent legal prejudice to the defendant, the trial court normally should grant [a voluntary] dismissal."[80] The following factors are relevant to the prejudice analysis: "the opposing party's effort and expense in preparing for trial, excessive delay and lack of diligence on the part of the movant, insufficient explanation for the need for a dismissal, and the present stage of litigation."[81] These factors "are by no means exclusive and any other relevant factors should also be considered."[82]

[79] UTAH R. CIV. P. 41(a)(2).
[80] *Rohan v. Boseman*, 2002 UT App 109, ¶21, 46 P.3d 753.
[81] *H&H Network Servs., Inc. v. Unicity Int'l , Inc.*, 2014 UT App 73, ¶5, 323 P.3d 1025.
[82] *Keystone Ins. Agency. LLC v. Inside Ins., LLC*, 2019 UT 20, ¶25, 445 P.3d 434.

This case has been ongoing for some time and will likely soon be ready for trial. And Petitioner has provided no satisfactory explanation for the need for dismissal other than his desire to appeal the Court's June 3, 2021, decision. This is an insufficient basis for dismissal. Petitioner's Motion is denied and the Court declines to permit Petitioner to voluntarily dismiss his remaining causes of action.

G. The Motion for Clarification

In the Motion for Clarification, Petitioner requests clarification of the Court's August 30, 2021, Ruling and Order where the Court denied Petitioner's Motion for Extension of Time to File a Reply Memorandum in Support of the Motion for Certification.[83] In the Ruling and Order, the Court ordered that any reply memorandum in support of the Motion for Certification was to be filed on or before September 7, 2021.[84] Petitioner ultimately filed his Reply Memorandum in Support of the Motion to Certify on or about September 3, 2021—within the time allowed under the August 30 Ruling and Order. Thus, the issue is now moot. The August 30, 2021, Order can no longer affect the parties' respective rights.[85] There is no need to clarify the August 30, 2021, Order and Petitioner's Motion for Clarification is properly denied on this basis.

CONCLUSION

Petitioner's Objections to the Davis Declarations are OVERRULED. The Court may therefore consider them in addressing DEQ's Summary Judgment Motions.

DEQ's First Summary Judgment Motion is DENIED. Petitioner is entitled to a trial *de novo*, limited to the issue of the reasonableness of DEQ's decision on his fee waiver request.

[83] *See* Ruling & Order Denying Pet'r's Mot. for Extension of Time 1, Aug. 30, 2021.
[84] *See id.*
[85] *See Motorola Sols., Inc.*, 2019 UT 66, at ¶10, 455 P.3d 91.

DEQ's Second Summary Judgment Motion is DENIED. Petitioner requested a fee waiver in his November 4, 2019, records request and this issue remains in controversy. The Court has jurisdiction in this matter and the issue raised in the Petition—the reasonableness of DEQ's decision regarding Petitioner's fee waiver request—is not moot. Rather, that issue shall be decided in a trial *de novo*.

Ms. Smith-Mansfield's Motion to Dismiss is GRANTED. Petitioner has failed to state a claim against Ms. Smith-Mansfield in her individual capacity and has pointed the Court to no authority supporting such claim.

Petitioner's Motion for Certification and Motion to Invite Court Error are both DENIED. The Court declines to certify as final that portion of the Court's June 3, 2021, Ruling and Order where the Court determined that FOIA would not serve to limit the fees DEQ may charge for provision of records or to permit Petitioner to voluntarily dismiss the remainder of his claims.

Petitioner's Motion for Clarification is DENIED as moot.

This Ruling and Order is the order of the Court and no further writing is necessary.

DATED this 18th day of January, 2022.

ADAM T. MOW
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 200907218 by the method and on the date specified.

EMAIL: STEVEN J ONYSKO onysko5@burgoyne.com

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01/18/2022 /s/ EMILY BROWN

Date: _____ _____

Signature