



State of Utah

GARY R. HERBERT  
Governor

SPENCER J. COX  
Lieutenant Governor

Department of  
Environmental Quality

L. Scott Baird  
Executive Director

Kim Shelley  
Deputy Director

January 17, 2020

Steven Onysko  
2286 Doc Holiday Dr  
Park City, UT 84060

SENT VIA E-MAIL and regular mail:  
[onysko5@burgoyne.com](mailto:onysko5@burgoyne.com)

Re: Appeal to Chief Administrative Officer, Denial of Request for Fee Waiver

Dear Mr. Onysko:

In accordance with Utah Code § 63G-2-401(9), I have been delegated to act as the chief administrative officer of the Utah Division of Drinking Water (DDW) to respond to your Notice of Appeal dated January 3, 2020 which was filed in accordance with the provisions of Utah Code § 63G-2-401.

This letter is in response to your appeal of the Director of the DDW's December 6, 2019 response to your fee waiver request. In the response, the Director concluded after considering the fee waiver request and the scope of your GRAMA request that the Division would grant your fee waiver request in part and deny your request in part. That it was granted insofar as relating to the records and information produced under cover of that letter, as well as the cost of the initial screening-level email search by DTS as described in the December 6, 2019 letter, as the Division would absorb the DTS charges for that initial search. The Division was not willing to waive the recoverable fees relating to the other records that have been identified, or that may in the future be identified in connection with the Division's searches. In denying that part of the waiver request, the Division cited limited staff and financial resources that would be burdensome for the Division to absorb in responding to this GRAMA Request that is broad in scope and unlimited in time. The Division required payment of the estimated fee of \$2934.56 prior to processing the request, as the fees were expected to exceed \$50. See Utah Code § 63G-2-203(8).

It is important to note that there has been no denial of your record request. The December 6, 2019 letter denies your request for a fee waiver. The decision to grant or deny a request for a fee waiver is in the discretion of the agency and does not involve the balancing test that applies to the record request itself. A fee waiver request involves reasonableness and may include balancing of the public interest in light of the volume and breadth of the request and the effort necessary to compile the requested documents free of charge. *Salt Lake City Corp. v. Jordan River Restoration Network*, 2018 UT 62.

Your Notice of Appeal includes nine claims – Claims 2.1 – 2.9.

**Claim 2.1**

You seem to be claiming that the Director’s statement in her December 6, 2019 response letter that the “GRAMA does not require the agency to conduct research” on behalf of the requester has no foundation or truthfulness in GRAMA.

**Response:** Utah Code § 63G-2-201(8) is instructive here in stating what a governmental entity is not required to do in response to a records request. In the context in which this statement is made by the Director in her December 6, 2019 letter, I agree that GRAMA does not require the agency to conduct research on your behalf, or to produce records that do not exist. Owens letter, December 6, 2019, page 2.

**Claim 2.2**

You seem to be claiming that the Director’s statement in her December 6, 2019 letter that the denial of a fee waiver request is not equivalent to the denial of access to the records requested is not correct given the plain language of § 63G-2-203(6)(a).

**Response:** The Director’s December 6, 2019 letter is the denial of a fee waiver request, not the denial of record request. Utah Code § 63G-2-203(6)(a) is only speaking of the right to appeal under § 63G-2 Part 4 as being the same as when access to a record is denied under § 63G-2-205 based upon a record classification. Denial of a fee waiver request is reviewed differently than a denial of access to records based upon a classification.

**Claim 2.3**

You seem to be claiming that because the denial did not reference the record classifications as required in the notice of denial provisions in Section 63G-2-205, that all records must now be presumed public.

**Response:** As there has been no records denial based upon records classification, 63G-2-205 is only procedural for purposes of a denial of a request for a fee waiver. As there has yet to be a records classification, there is no basis the records now be presumed public.

**Claim 2.4**

You seem to be claiming that the Director denied Appellant access to public records that she concedes already exist, i.e., raw technical data provided by the public water systems to the agency on a period basis which is entered into an EPA-shared database known as SDWIS; email records from a variety of current and former agency employees; and denial of in person review of the records. That this demonstrates that DDW at least in part denies Appellant access to public documents.

**Response:** The agency’s December 6, 2019 letter does not deny access to the raw technical data. As an accommodation, the agency has queried all data relating to lead on the EID system that exists in the agency’s database, which it included under cover of the letter in an Excel spreadsheet format. This information was provided free of charge. However, because of the extensive work

which would be required in converting the raw technical data into a format being requested by the appellant it will charge fees for this work. I am satisfied that the agency has reasonably complied with GRAMA in responding to this part of the GRAMA request. If the agency is willing to identify and produce all technical data submitted over time by EID, in a format which can be agreed upon, then it is free to do so and to require that the requester pay for the costs. See § 63G-2-201(9).

Regarding the requested email search, the parties do not dispute that emails are a public record. The emails also come with the largest bill. The projected fee for the emails is \$2456.60, which the agency is unwilling to waive. The agency has stated that it must be paid in advance. Utah Code § 63G-2-203(1) provides that “a governmental entity may charge a reasonable fee to cover the governmental entity’s actual costs of providing a record.” Section 63G-2-203(8) provides that a government entity may require payment of future estimated fees before beginning to process if fees are expected to exceed \$50. This is not a record denial.

### **Claim 2.5**

You seem to be claiming that the Director makes an illegitimate fee waiver denial finding on the basis that “the agency believes that it already provides adequate levels of information to the public.” That the Director when considering whether to waive fees should not have considered the levels of related information the agency already provides to the public, free of charge.

**Response:** As noted by the Director, the sole basis provided for your fee waiver request is that the request primarily benefits the public. Owens December 6, 2019 letter, page 5. The level of information that is already provided by the agency to the public free of charge would be a reasonable consideration for the Director to weigh in considering your fee waiver request.

### **Claim 2.6**

You seem to be claiming that DDW’s search-associated fees are illegitimate because the fees were not authorized or calculated under authority of a Section 63J-1-504 fee schedule.

**Response:** Your claim is simply without basis. The Director’s December 6, 2019 letter provides a detailed fee estimate, consistent with the Department of Environmental Quality’s 2019 Fee Schedule for GRAMA associated services.

The overall fee estimate is \$2934.56, the largest portion of which is an estimated \$2456.60 to produce the email records. As described in the letter, this figure was arrived at from information provided by a DTS initial screening level search using search terms formulated by the Division based upon your GRAMA request. The initial screening-level search identified an estimated MG of data equating to a certain number of items of email data and a certain number of email accounts, and then identified what would be required to produce the information from the search to the Division. Using this information, the Division estimated the DTS fee to the agency to be \$1,598. The Division then estimated the amount of staff time it would take to review the emails and what the lowest rate of a qualified staff member would be – 30 hours of work at \$33.49/hr. All of which totaled the estimated \$2934.56. Owens December 6, 2019 letter, page 4. Your claim does not claim that this work would not be required in an email search or that this is not an accurate estimate of what the agency’s actual costs would be in providing these records.

The Director's December 6, 2019 letter details the work that would be required of the agency to provide lead data in a format not currently maintained by the agency. Owens December 6, 2019 letter, pages 3-4. Again, if you and the agency can agree on a fee for creating or producing such a record, the statute allows you to do so. There is no basis that you have shown to suggest that the \$462.96 estimated fee is unreasonable.

**Claim 2.7**

You seem to be claiming that whether the public already benefits from enough public records about Utah public drinking water cannot be factored into whether to grant a fee waiver request.

**Response:** This seems to be restating your Claim 2.5. I will repeat my response. The sole basis provided for your fee waiver request is that the request primarily benefits the public. Owens December 6, 2019 letter, page 5. Information that is already provided by the agency to the public free of charge would be a reasonable consideration for the Director to weigh in considering your fee waiver request. The Director may choose what to consider in whether to grant or deny a fee waiver request that stands the test of reasonableness.

**Claim 2.8**

You seem to be claiming that the requested fee is in violation of Utah Code § 19-1-306(2)(b), namely the agency's fee calculations are improper because it exceeds the allowable amount under 40 C.F.R. Part 2 as required under § 19-1-306(2)(b), i.e., that 40 C.F.R. Part 2 on January 1, 1992 caps costs and fees of documents searches at \$20 per hour and \$0.15 per page for document copies.

**Response.** Your claim that the § 19-1-306 applies to what the Division can charge under its fee schedule to produce records under a GRAMA request is misplaced. Section 19-1-306 addresses the handling of requests for certain classifications of records, i.e., trade secret and confidentiality of business records, and of when the standards and interpretation of the federal Freedom of Information Act governs access to those records. It does not purport to apply to controlling fee schedules.

**Claim 2.9**

You seem to be claiming that the Director invoked illegitimate de facto policy without going through rulemaking by asserting that it already provides adequate levels of information to the public and may therefore deny a fee waiver request.

**Response.** Again, as the sole basis provided for your fee waiver request is that the request primarily benefits the public, Owens December 6, 2019 letter, page 5, information that is already provided by the agency to the public free of charge would be a reasonable consideration for the Director to weigh in considering your fee waiver request. See Response to Claim 2.5. This is a consideration that the Director weighed in determining whether to grant your fee waiver request, it is not a matter that requires policy or rule making.

**DECISION**

Based on the foregoing, your appeal is denied.

Under Utah Code § 63G-2-402, you have the right to immediately appeal this decision by appealing to the State Records Committee pursuant to Utah Code § 630-2-403, or by filing a petition for judicial review in district court pursuant to Utah Code § 630-2-404. Any appeal must be brought within 30 days after the date of this decision. An appeal to the State Records Committee should be addressed to:

Gina Proctor  
Executive Secretary of the State Records Committee  
346 S. Rio Grande  
Salt Lake City, UT 84101-1106  
Phone: 801-531-3834  
E-mail: gproctor@utah.gov.

Sincerely,

A handwritten signature in blue ink that reads "Kim Shelley". The signature is written in a cursive, flowing style.

Kim Shelley  
Designated Chief Administrative Officer