

Mark Christopher Tracy
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Pro se Petitioner

BEFORE THE UTAH STATE RECORDS COMMITTEE

MARK CHRISTOPHER TRACY, dba
EMIGRATION CANYON HOME OWNERS
ASSOCIATION,

Petitioner,

vs.

EMIGRATION IMPROVEMENT DISTRICT
and SIMPLIFI COMPANY

Respondents.

**REQUEST FOR CIVIL PENALTY FOR
NONCOMPLIANCE WITH THE
DECISION AND ORDER OF THE UTAH
STATE RECORDS COMMITTEE**

Case No.: 21-09

Pursuant to Utah Code § 63G-2-403(15)(d)(i)(B), Petitioner Mark Christopher Tracy (“Mr. Tracy”) dba Emigration Canyon Home Owners Association (“The ECHO-Association”) hereby submits this *Request for Civil Penalty for Noncompliance with the Decision and Order of the Utah State Records Committee*.

I. STATEMENT OF FACTS

1. On September 25, 2020, Mr. Tracy requested all email correspondence regarding lead contamination of water system 18143 owned by Emigration Improvement District (“EID” aka Emigration Canyon Improvement District aka ECID) and operated by the Simplifi Company (“Simplifi”) through Emigration Canyon Deputy Mayor Jennifer Hawkes (“Deputy Mayor

Hawkes”) and EID General Manager, EID Financial Manager, and EID Public Records Officer Eric Hawkes (“Mr. Hawkes”) as the designated “EID records office”¹ since January 1, 2013.

2. After appeal of the de facto denied request to the Utah State Records Committee (“SRC”), EID through its legal representative Jeremy R. Cook (“Utah Attorney Cook”) produced a single responsive email correspondence, despite the fact that all EID water sources had tested positive for lead contamination since April 1994.²

3. In its Decision and Order, the SRC directed Respondents “to do a more thorough search for records and provide *any public records* responsive to Mr. Tracy’s records request including records retained by Simplifi on behalf of EID” (emphasis added). See SRC Decision and Order dated February 22, 2021, attached as **Exhibit B**.

4. EID and Simplifi Respondents failed to appeal.

5. On March 31, 2021, Mr. Hawkes acting as “EID Records Custodian” transmitted Notice of Compliance to the SRC including six (6) additional email correspondences not previously disclosed to the SRC but expressly failed to certify search and/or results of public records created after September 18, 2020 contrary to the SRC Decision and Order. See Notice of Compliance, attached as **Exhibit C**.

II. ARGUMENT

6. 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 during normal business hours under Utah Code Ann. § 63G-2-201(1)(a).

¹ See true and correct copy of email correspondence of Utah Attorney Cook dated February 24, 2021, attached as **Exhibit A**; see also Utah Code Ann. § 63G-2-103(11)(b)(i).

² See Microsoft Excel spreadsheet entitled “Lead Contamination Table – EID Water Sources and Customers” available at the website maintained by The ECHO-Association at https://echo-association.com/?page_id=4950.

7. The SRC Decision and Order required EID and Simplifi Respondents to produce “any public records” responsive to Mr. Tracy’s request and was not limited to government records created prior to September 18, 2020.

8. Pursuant to Utah Code § 63G-2-403(15)(c), if the SRC orders the governmental entity to produce a record and no appeal is filed, the government entity shall comply with the order of the Committee and shall: (1) Produce the record; and (2) File a notice of compliance with the Committee.

9. As Mr. Hawkes failed to certify search and/or production of government records created after September 18, 2020 and failed to file Notice of Compliance consistent with the SRC Decision and Order, the SRC may impose a civil penalty of up to \$500 for each day of continuing noncompliance pursuant to Utah Code § 63G-2-403(15)(d)(i)(B).

10. In imposing a civil penalty, the SRC shall consider the gravity and circumstances including whether the failure to comply was due to neglect or was willful or intentional under Utah Code § 63G-2-403(15)(d)(ii).

11. In the present case, it is now known that EID, Simplifi and Utah Attorney Cook failed to warn existing and future water users of lead contamination in July 2020. *See* email correspondence dated July 6, 2020, attached as **Exhibit D**.

12. The refusal to comply with Mr. Tracy’s GRAMA request from September 25, 2020 and the subsequent SRC Decision and Order from February 22, 2021 was willful and was intended to conceal the intentional refusal to inform the 300 homes connected to water system no. 18143 owned by EID and operated by Simplifi of lead contamination of drinking water.

III. CONCLUSION

Due to threat to public health and safety from the intentional refusal to comply with both a lawful request for government records by Mr. Tracy and the SRC Decision and Order, Mr. Tracy

respectfully requests the SRC impose Respondents EID and Simplifi a civil penalty of \$500 per day since February 22, 2021.

DATED this 29th day of April, 2021.

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 29th day of April, 2021, a true and correct copy of the foregoing **REQUEST FOR CIVIL PENALTY FOR NONCOMPLIANCE WITH THE DECISION AND ORDER OF THE UTAH STATE RECORDS COMMITTEE** was sent via electronic mail to the following:

Rebekkah Shaw
srcsecretary@utah.gov
346 South Rio Grande St.
Salt Lake City, UT 84101-1106

Executive Secretary Utah State Records Committee

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

EXHIBIT A

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

Mr. Tracy,

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

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

Thanks,
Jeremy

EXHIBIT B

BEFORE THE STATE RECORDS COMMITTEE OF THE

STATE OF UTAH

MARK TRACY,

Petitioner,

v.

EMIGRATION IMPROVEMENT
DISTRICT, and SIMPLIFI COMPANY,

Respondents.

DECISION AND ORDER

Case No. 21-09

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

FACTS

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

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

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

STATEMENT OF REASONS FOR DECISION

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

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

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

ORDER

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

RIGHT TO APPEAL

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

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

PENALTY NOTICE

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

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

Entered this 22 day of February 2021

BY THE STATE RECORDS COMMITTEE



KENNETH R. WILLIAMS
Chair, State Records Committee

CERTIFICATE OF SERVICE

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

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

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

Rebekkah Shaw

Rebekkah Shaw
Executive Secretary

EXHIBIT C

March 30, 2021

Rebekkah Shaw
Executive Secretary
State Records Committee
346 S. Rio Grande Street
Salt Lake City, UT 84101-1106
rshaw@utah.gov

RE: Notice of Compliance

Dear Ms. Shaw:

In accordance with the Decision and Order in Case No. 21-09, the Records Committee ordered that Emigration Improvement District ("EID") do a more thorough search for records responsive to the following records request from Mr. Tracy submitted to the District on September 18, 2020:

"All email correspondence between EID General Manager Eric Hawkes and/or Deputy Emigration Canyon Mayor Jennifer Hawkes of the Simplifi Company with EID trustees Michael Scott Hughes, David Bradford, Brent Tippetts and Dr. Mark Stevens regarding lead contamination of water system 18143 since January 1, 2013."

The letter confirms that I have conducted a second search of my emails (and my wife's emails although she has no involvement with EID) and I have found additional email correspondence between January 1, 2013 and September 18, 2020 (the date of the request) that are response to the request. I have included copies of the emails with this correspondence. In addition, though not responsive to the request, EID has posted all lead testing results on its webpage at <https://www.ecid.org/projects>.

Please let me know if you have any questions or if the Records Committee requires any additional information.



Eric Hawkes, EID Records Custodian

EXHIBIT D

From: Eric Hawkes <eric@ecid.org>

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

Subject: EID - Meeting Agenda??

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

Hi Gentlemen,

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

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

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

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

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

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

Thoughts on the meeting?

--

Eric Hawkes

(p) 801.243.5741

(e) eric@ECID.org

(w) www.ECID.org