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VIA ELECTRONIC MAIL

Supreme Court of Utah
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April 16, 2021

Ref: Request for Retention – *Mark Christopher Tracy dba Emigration Canyon Home Owners Association v. Simplifi Company, Jennifer Hawkes and Eric Hawkes* (Appellate Case No. 20210227-SC)

Dear Clerk of the Utah Supreme Court,

Pursuant to the order dated April 7, 2021, I hereby request the Court retain the above referenced matter on its docket.

A. NAME OF THE CASE AND APPELLATE CASE NUMBER

Mark Christopher Tracy dba Emigration Canyon Home Owners Association v. Simplifi Company, Jennifer Hawkes and Eric Hawkes, Appellate Case No. 20210227-SC.

B. NAMES OF ALL PARTIES INVOLVED IN THE CASE AND THE ATTORNEYS AND FIRMS REPRESENTING THE PARTIES

1. Mark Christopher Tracy, dba Emigration Canyon Home Owners Association, an individual, *pro se* Appellant;

2. Simplifi Company, a Utah Corporation, Appellee, represented by Jeremy R. Cook of Cohne Kinghorn, P.C;
3. Jennifer Hawkes, an individual, and principal of Simplifi Company, Appellee represented by Jeremy R. Cook of Cohne Kinghorn, P.C; and lastly,
4. Eric Hawkes, an individual, and principal of Simplifi Company, Appellee represented by Jeremy R. Cook of Cohne Kinghorn, P.C.

C. CONCISE STATEMENT OF ISSUES PRESENTED ON APPEAL

The present appeal addresses the public’s constitutional right to access government records maintained by a Utah corporation at the private residence of controlling shareholders at taxpayer expense and in particular an award of attorney fees and costs to the “records office of a government entity” as defined under Utah Code Ann. § 63G-2-103(11)(b)(i).

Specially, sometime in 2013, Emigration Improvement District (“EID” aka Emigration Canyon Improvement District aka ECID), a Utah special service water district providing culinary drinking water to less than half of Emigration Canyon residents, awarded a no-bid contract to the Simplifi Company (“Simplifi”) to create and maintain government records related to the operation of water system no.18143 compensated with an annual remuneration of \$118,000.00 of taxpayer funds for the current calendar year.

EID trustees designated the private residence of Simplifi’s sole shareholders Emigration Canyon Deputy Mayor Jennifer Hawkes (“Deputy Mayor Hawkes”) and her spouse Eric Hawkes (“Mr. Hawkes”) as both the physical location of EID as wells as the “EID records office” whereby Mr. Hawkes is registered with the Utah State Ombudsman as the “EID certified public records officer.”

As EID has neither physical presence nor employees, all government records are in the sole physical custody of Deputy Mayor Hawkes and Mr. Hawkes as “independent contractors” through Simplifi thereby effectively circumventing criminal sanctions for willful refusal to release government records under Utah Code Ann. § 63G-2-801(3)(a).

In September 2018, for the first time in recorded history, the Emigration Canyon stream suffered total depletion less than 2 miles from Utah’s Hogle Zoo and Mr. Tracy’s dba entity Emigration Canyon Homes Owners (“The ECHO-Association”) began documenting ground subsidence and massive fissures in the Freeze Creek Drainage area, believed to be caused by the operation of large-diameter commercial wells owned by EID and operated by Simplifi through an improper water-extraction method known as “Groundwater Mining.” *See* aerial audio-video recording available at the website maintained by the Emigration Canyon Home Owners Association at https://echo-association.com/?page_id=3310.

On June 10, 2020, Mr. Tracy submitted a request to Mr. Hawkes under the Utah Government Records Access and Management Act (“GRAMA”) for water level reports (*i.e.*, telemetry data) of EID’s four (4) production wells and two (2) water storage facilities, whereby Mr. Hawkes transmitted an electronic data file, which proved inconsistent with water levels previously reported by Mr. Hawkes to EID trustees during public meetings. Mr. Hawkes further demanded payment of \$3,000.00 from Mr. Tracy to convert the data file to an Excel spreadsheet, although data conversion was included as a standard software feature and would have taken no more than 5 minutes to complete.

After EID Trustee Chairman Michael Scott Hughes failed to acknowledge or respond to Mr. Tracy’s subsequent appeal to Chief Administrative Officer, Mr. Tracy filed de novo judicial review against Simplifi, and its sole shareholders Deputy Mayor Hawkes and Mr. Hawkes as the

“EID records office” as per Utah Code 63G-2-103(11)(b)(1) for the de facto denied request for disclosure of government records.

Relying solely upon the factual representations of the moving party, the district court granted Simplifi Respondents’ Rule 12(b)(6) motion to dismiss ruling that a private Utah corporation and its sole shareholders, compensated with taxpayer funds to maintain government records at a private residence are exempt from GRAMA provisions thereby citing a decision of Utah State Third District Court (Judge Faust) decided after filing and currently pending with the Utah Court of Appeals. *See Mark Christopher Tracy dba Emigration Canyon Home Owners Association v. Simplifi Company et al.* (UT App) Docket No. 20200705-CA (pending).

The district court further awarded Simplifi Respondents attorney fees and costs in the amount of \$5,895.55 under Utah Code Ann. 78B-5-825(1) ruling the petition for de novo judicial review of the de facto denied request for government records by Simplifi through Deputy Mayor Hawkes and Mr. Hawkes was “without merit” and based upon “bad faith” for having failed to include the contracting governmental entity as a “necessary party [under Rule 19(a) Utah Rules of Civil Procedure].”

D. BRIEF EXPLANATION OF REASONS SUPPORTING RETENTION

Although the privatization of governmental functions is not a novel concept in the United States and many jurisdictions recognize the application of public records statutes to private companies and individuals performing government functions -- such as creating and maintaining public records of a public drinking water supplier -- to date, the issue has not been decided by Utah courts.

As the right to access public documents is recognized as a constitutional right in the State of Utah, an award of attorney fees and costs for bringing legal action against the public records

office of a governmental entity will chill future action against bad-faith actors, who choose to engage “private independent contractors” instead of public employees to maintain governmental records at a private residence, thereby effectively circumventing criminal sanctions of Utah Code Ann. § 63G-2-801(3)(a) if the district court’s decision is allowed to stand.

Lastly, increasing privatization of government functions by a private Utah corporation and controlling shareholders in sole physical custody of government records owned by the State of Utah under Utah Code Ann. § 63A-12-105(2)(a) is likely to recur in future cases justifying retention of the current case on the docket of the Utah Supreme Court.

Respectfully Submitted,

/s/ Mark Christopher Tracy

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Request for Retention* was sent via electronic mail to the following:

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