

IN THE SUPREME COURT OF THE STATE OF UTAH

MARK CHRISTOPHER TRACY d/b/a
Emigration Canyon Home Owners
Association

Petitioner and Appellant,

v.

SIMPLIFI COMPANY, JENNIFER
HAWKES, and ERIC HAWKES

Respondents and Appellees.

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UTAH APPELLATE COURTS

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Supreme Court Case No. 20210754-SC

Appeal No. 20200705-CA

District Court Case No. 200905123

PETITION FOR WRIT OF CERTIORARI

*Appeal from Order Granting Motion to Dismiss Petition for Disclosure of
Government Records Regarding Lead Contamination of a Public Drinking Water
System entered in the Third Judicial District, Salt Lake County Division,
the Honorable Robert P. Faust*

Jeremy R. Cook
jcook@cklaw.com
Tim E. Nielson
tnielson@cklaw.com
Timothy J. Bywater
tbywater@cklaw.com
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111
Tel: 801-363-4300

Attorneys for Respondents

Mark Christopher Tracy
m.tracy@echo-association.com
1160 E. Buchnell Dr.
Salt Lake City, Utah 84094
Tel: 929-208-6010

Pro Se Appellant

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tbywater@cklaw.com

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111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111
Tel: 801-363-4300

Attorneys for Respondents

Mark Christopher Tracy
m.tracy@echo-association.com
1160 E. Buchnell Dr.
Salt Lake City, Utah 84094
Tel: 929-208-6010

Pro Se Appellant

LIST OF ALL PARTIES

The parties to the proceedings below are Mark Christopher Tracy (“Mr. Tracy”) d/b/a Emigration Canyon Home Owners Association (“The ECHO-Association”) as Petitioner for disclosure of government records in the custody of Simplifi Company, and its shareholders Emigration Canyon Deputy Mayor Jennifer Hawkes and Eric Hawkes (collectively and hereafter “Simplifi Appellees”) as Respondents and designated Public Records Office of Emigration Improvement District (“EID” aka Emigration Canyon Improvement District aka ECID).¹

¹ As EID has no physical presence and does not retain public records per Utah Code Ann. § 63G-2-204(1)(a) it was not a party to the proceedings below.

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QUESTION PRESENTED FOR REVIEW

Is the Public Records Office and private operator of a public drinking water system immune from legal action under the Utah Government Records and Management Act (“GRAMA”) for the willful refusal to disclose government records required under state and federal law to be maintained at its business premises for review and inspection for a period not less than 10 years?

OPINION BELOW

In an opinion not for official publication, a panel of the Utah Court of Appeals unanimously affirmed the district court’s dismissal of Mr. Tracy’s petition for court ordered disclosure of government records and injunctive relief.

JURISDICTION

The Court of Appeals issued its decision on September 14, 2021. No petition for rehearing was filed. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-3-102(3)(a).

CONTROLLING PROVISIONS

40 CFR § 141.2. Definitions.

Public water system means a system for the provision to the public of water for human consumption through pipes or, after August 5, 1998, other constructed conveyances, if such system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals daily at least 60 days out of the year. Such term includes: any collection, treatment, storage, and distribution facilities ***under control of the operator*** of such system and used primarily in connection with such system; and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system (emphasis added).

40 CFR § 141.33. Record Maintenance.

Any owner or operator of a public water system subject to the provisions of this part *shall retain on its premises or at a convenient location near its premises* the following records:

(a) Records of microbiological analyses and turbidity analyses made pursuant to this part shall be kept for not less than 5 years. Records of chemical analyses made pursuant to this part shall be kept for not less than 10 years (emphasis added).

Utah Administrative Code R309-105-17. Record Maintenance.

(2) Lead and copper recordkeeping requirements.

(a) Any water system subject to the requirements of R309-210-6 *shall retain on its premises* original records of all sampling data and analyses, reports, surveys, letters, evaluations, schedules, Director determinations, and any other information required by R309-210-6.

(b) Each water system shall retain the records required by this section for no fewer than 12 years (emphasis added).

Utah Code Ann. § 63G-2-102. Legislative intent.

(1) In enacting this act, the Legislature recognizes two constitutional rights:

(a) the public's right of access to information concerning the conduct of the public's business; and

(b) the right of privacy in relation to personal data gathered by governmental entities.

Utah Code Ann. § 63G-2-103. Definitions.

(11)(b) "Governmental entity" also means:

(i) every office, agency, board, bureau, committee, department, advisory board, or commission of an entity listed in Subsection (11)(a) that is *funded or established by the government to carry out the public's business* (emphasis added);

Utah Code Ann. § 63G-2-204. Record request -- Response -- Time for responding.

(1)(a) A person making a request for a record *shall submit to the governmental entity that retains the record* a written request containing:

- (i) the person's:
 - (A) name;
 - (B) mailing address;
 - (C) email address, if the person has an email address and is willing to accept communications by email relating to the person's records request; and
 - (D) daytime telephone number; and
- (ii) a description of the record requested that identifies the record with reasonable specificity.

...

(4) After receiving a request for a record, a governmental entity shall:

...

(b) as soon as reasonably possible, but no later than 10 business days after receiving a written request, or five business days after receiving a written request if the requester demonstrates that expedited response to the record request benefits the public rather than the person:

- (i) approve the request and provide a copy of the record;
- (ii) deny the request in accordance with the procedures and requirements of Section 63G-2-205;
- (iii) notify the requester that it does not maintain the record requested and provide, if known, the name and address of the governmental entity that does maintain the record; or
- (iv) notify the requester that because of one of the extraordinary circumstances listed in Subsection (6), it cannot immediately approve or deny the request, and include with the notice:

(A) a description of the circumstances that constitute the extraordinary circumstances; and

(B) the date when the records will be available, consistent with the requirements of Subsection (7).

...

(8)(a) If a request for access is submitted to an office of a governmental entity other than that specified by rule in accordance with Subsection (3), *the office shall promptly forward the request to the appropriate office.*

...

(9) If the governmental entity *fails to provide the requested* records or issue a denial within the specified time period, that failure is considered the equivalent of a determination denying access to the record (emphasis added).

Utah Code Ann. § 63G-2-801. Criminal penalties.

(3) (a) A public employee who intentionally refuses to release a record, the disclosure of which the employee knows is required by law, is guilty of a class B misdemeanor.

...

(c) A public employee who intentionally refuses to release a record, the disclosure of which the employee knows is required by a final unappealed order from a government entity, the State Records Committee, or a court is guilty of a class B misdemeanor.

Utah Code Ann. § 63G-2-802. Injunction -- Attorney fees.

(1) A district court in this state may enjoin any governmental entity or political subdivision that violates or proposes to violate the provisions of this chapter.

STATEMENT OF THE CASE

I. Nature of the Case.

The present Petition addresses the transfer of government functions and services to a private for-profit shell corporation as related to the public's constitutional right to access government records under GRAMA. While state and federal courts have decided the issue of increasing privatization of government functions and services in favor of continued accountability and transparency, this case is a matter of first impression in the State of Utah and requests that this Court grant certiorari and affirm the original legislative intent of

GRAMA² and apply Utah Code §§ 63G-2-103(11)(b) to private corporations and controlling shareholders without limitation.

The following background demonstrates how limited and/or unenforceable access to governmental records in possession of a private for-profit shell corporation and its sole shareholders is a threat to public health and safety as well as contrary to state and federal law.

II. Factual Background.

Emigration Canyon (the “Canyon”) is home to approximately 677 households. The majority of homeowners are either serviced with culinary drinking water via single-family domestic wells or from Salt Lake City Public Utilities while approximately 300 domestic units are connected to public drinking-water system no. 18143 germane to the present Petition [R3-4].

Originally constructed to service the luxurious Emigration Oaks Private Urban Development on the north side of the Canyon, in August 1998, private land-developers transferred legal title and financial liability of a defunct 355,000 gallon tank and two large-diameter commercial wells (“Boyer Water System”) to EID [R4-5].

Although both water sources of the Boyer Water System had tested positive for lead contamination and the operation of one had been expressly forbidden by the Utah Division of Drinking Water (“DDW”), the three-member EID board of trustees awarded EID trustee chairman Fred A. Smolka’s for-profit, limited liability shell corporation a lucrative contract

² Utah Code Ann. § 63G-2-102(1)(a).

to operate the Boyer Water System with Mr. Smolka christening himself as “EID General Manager,” “EID Financial Manager,” and “EID Election Specialist” as a “private independent contractor” thereby effectively privatizing operation of the Utah special service district [R10].

Fifteen years later, EID awarded the Simplifi Company (“Simplifi”), another for-profit shell corporation, controlled by Appellee/Respondent Jennifer Hawkes, Deputy Mayor of Emigration Canyon (“Deputy Mayor Hawkes”), and her spouse Appellee/Respondent Eric Hawkes (“Mr. Hawkes”) the same no-bid contract to operate the Boyer Water System with Mr. Hawkes registered with the Utah State Office of the Government Records Ombudsman as the EID certified public records officer [R5].

The perpetual public contract provided Simplifi Respondents an annual fixed remuneration of \$97,321.08 of public funds for the 2019 calendar year – a compensation comparable to the salary of the Utah State governor and equaling 20% of EID’s annual operating expense [R9].

In September 2014, and February 2019 Petitioner/Appellant Mark Christopher Tracy (“Mr. Tracy”) commenced state and federal litigation against Mr. Hawkes including current and former EID trustees, managers, consultants, private land-developer and EID Advisory Committee Chairman R. Steve Creamer (“EID Chairman Creamer”), The Boyer Company LC and City Development Inc. *et al* [R5].³

³ *United States of America ex rel. Mark Christopher Tracy v. Emigration Improvement District et al.*, No. 21-4051 (10th Cir. pending) and *Emigration Canyon Home Owners Association v. Kent L. Jones and Emigration Improvement District*, No. 20200295 (Utah Ct. App. pending).

Therein, Mr. Tracy alleged fraudulent consolidation of senior water rights in the Canyon in violation of the federal False Claims Act to include active concealment of drinking water contamination in violation of the Safe Drinking Water Act of 1974 [*id.*].

During the pendency of state and federal litigation, on October 29, 2019, Mr. Tracy learned that a single Canyon resident of the approximately 300 homes connected the Boyer Water System had received a form notification of lead contamination in drinking water sent via United States postal service [R11].

At his own initiative and expense, Mr. Tracy published an electronic press release hyperlinked to the website of Mr. Tracy's dba entity The ECHO-Association warning water users and customers of the Boyer Water System operated by Simplifi Respondents. Mr. Tracy's press release achieved wide-spread dissemination of the initial warning, which had only notified two known homeowners [R11-12].⁴

Simplifi Respondents responded by circulating an "Enhanced Customer Notice" to all Canyon residents insisting to have found "**No detection of lead (ND) in all three wells currently in operation**" (emphasis in original).⁵ Without factual basis or justification, Simplifi Respondents speculated that drinking water contamination was "likely the result of plumbing within the homes tested, not from the water being provided by the Emigration Improvement District" but then refused to disclose actual laboratory test results, which

⁴ Mr. Tracy's warning was subsequently reported by the Salt Lake Tribune (*see* "Lead Shows Up in Emigration Canyon Drinking Water" by Brian Maffly available at the website administered by the Emigration Canyon Home Owners Association at https://echo-association.com/?page_id=405).

⁵ Simplifi Respondents operate four (4) large-diameter commercial wells of the Boyer Water System.

must be maintained at the premises of the water system operator (regardless if organized as a private or public entity) for a period no less than 10 years under state and federal regulations [R12].⁶

III. Procedural Background.

Upon Mr. Tracy's denied request for laboratory test results [R15] and upon receipt of an unrequested and duplicitous data table from Mr. Hawkes [R13] following Mr. Tracy's appeal to the chief administrative officer and EID Trustee Chairman Michael Scott Hughes [R15-16], Mr. Tracy commenced legal action against Simplifi Respondents for court ordered disclosure of public records and injunctive relief for willful violations of GRAMA provisions [R16].

The district court however ruled that GRAMA applies "[only] to governmental entities" and "Simplifi and Mr. [and Mrs.] Hawkes are not governmental entities" thereby granting Simplifi Respondents' motion to dismiss with prejudice [Appendix A]. On appeal, the Court of Appeals declined to affirm that a private corporation and controlling shareholders acting as the "Public Records Office" of a governmental entity are exempt from GRAMA provisions but affirmed the district court's dismissal finding that Mr. Tracy's original request "was not directed" to Simplifi Respondents [Appendix B].

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⁶ 40 CFR § 141.33.

ARGUMENT

I. Summary of Argument.

The ruling of the trial court is inconsistent with both state and federal statute while the legal conclusions of the Utah Court of Appeals is inconsistent with the court record and the court's own factual recitals. The present case is an ideal opportunity for this Court to clarify an important issue of public health and safety and affirm the original legislative intent in protecting the public's constitutional right to access government records in the custody of a private shell corporation and controlling shareholders.

II. The Ruling of the Trial Court is Inconsistent with both Utah Statute and Federal Law.

The district court failed to note that a private corporation funded by a governmental entity to "carry out the public business" is also a "governmental entity" under Utah Code Ann. § 63G-2-103(11)(a) as cited in the Petition [R14-15].

Moreover, as operator of a public water system with more than 15 connections, under federal rules promulgated under the Safe Drinking Water Act of 1974, as operator of the Boyer Water System, Simplifi Respondents were required to maintain laboratory test result on the "business premises" for review and inspection regardless if organized as a public or private entity.⁷

As the private residence of Deputy Mayor Hawkes and Mr. Hawkes is registered as the physical location for both EID and Simplifi [R10], and only Simplifi Respondents may

⁷ 40 CFR § 141.33 and Utah Administrative Code R309-105-17(2)(a) and (b).

allow or deny access to requested public records, a judgement entered against only EID would be unenforceable.

III. The Court of Appeals' Legal Conclusion Is Inconsistent with the Court Record and the Court's Own Factual Recitals.

The Court of Appeals narrated that Mr. Tracy submitted a GRAMA request for laboratory test results of lead contamination to Mr. Hawkes “via email” and but the request was “was not directed” to any of the Respondents. The court reasoned that “[t]he request was delivered to Eric Hawkes, at his official District email address (eric@ecid.org), apparently in his capacity as the District’s designated records officer. The request was not sent to any email associated with Simplifi or Jennifer Hawkes” [Appendix A at page 2].

The court’s ruling is however inconsistent with both the Petition and the court record.

The Petition records that the GRAMA request for lead contamination test results was sent to the private residence of Simplifi Respondents at the “physical address listed on the EID website [via certified United States postal service].”⁸

Moreover, the Petition records that following Mr. Tracy’s appeal to the chief administrative officer on July 9, 2020, Mr. Hawkes (and not the chief administrative officer) transmitted an unrequested and duplicitous data sheet inconsistent with lead testing results on file with DDW [R13-14 and Exhibit Z at R86].

⁸ Petition at page 15, nos. 42 and 43 [R15]; *see also* email correspondence from Mr. Tracy to Mr. Hawkes dated July 2, 2021 at 2:25 PM at Ex. BB [R94].

As Mr. Tracy requested injunctive relief under Utah Code Ann. § 63G-2-802(1) for willful violations of a lawful GRAMA request (*i.e.*, intentional withholding of government documents in the sole custody of Simplifi Respondents),⁹ the “Government agency or office” listed on the preprinted form published by the Office of the Government Records Ombudsman [R91-92] was not dispositive of the legal question before the court.

IV. This Case Is an Ideal Opportunity to Decide an Important Question of Law.

Whether a “quasi-governmental” entity such as a Utah special service water district may hinder the public’s constitutional right to access government records by placing documents in the custody of a private for-profit shell corporation is a matter of significant import, which will most certainly reoccur.

The purpose of GRAMA is expressly recorded in Utah Code § 63G-2-102(1)(a) and provides that “the Legislature recognizes two constitutional rights: (a) the public’s right of access to information concerning the conduct of the public's business; and b) the right of privacy in relation to personal data gathered by governmental entities.”

Statutory analysis however does not stop at the plain language of the statute. This Court held that “plain language analysis” is not so limited to inquire into individual words and subsections in isolation but rather that each part or section be “construed in connection with every other part or section so as to produce a harmonious whole.” *Anderson v. Bell*, 2010 UT 47 (citing *Sill v. Hart*, 2007 UT 45, ¶ 7).

⁹ Petition at pages 13-14, No. 34 [R13-14].

Utah Code § 63G-2-201 mandates that “a person has a *right to inspect* a public record free of charge, and the right to take a copy of a public record during normal working hours” if the record is not confidential and exempt from disclosure (emphasis added).

Did the Utah legislature however intend to exempt private for-profit corporations and individuals in possession of governmental records?

In a word, no.

Utah Code § 63G-2-103(11)(b)(i) provides that a “government entity” also includes “*every office, agency, board, bureau, committee, department, advisory board, or commission of an entity listed in Subsection (11)(a) that is funded or established by the government to carry out the public's business*” (emphasis added).

With the designation “every office” with the additional requirement of “funded... to carry out the public’s business” it is clear that the Utah State legislature did not exempt any private corporate form from GRAMA requirements.

This statutory interpretation is also consistent with 40 CFR § 141.33 and Utah Administrative Code R309-105-17(2)(a)-(b), which mandates that “[a]ll public water systems shall retain *on their premises* or at convenient location *near their premises*” the “original records of all sampling data and analysis” of lead contamination for a period “no fewer than 12 years” for public review and inspection (emphasis added).

With no employees and no physical presence of its own, EID (through Mr. Hawkes) paid public funds to Simplifi for “office expenses” and further designated Mr. Hawkes as the “EID records manager,” “EID general manager,” “EID financial manager” and EID Election Specialist compensated entirely through Simplifi [R9].

In short, Mr. Hawkes pays himself and his spouse public funds through a private corporation as a textbook example of *de facto* and *de jure* privatization of governmental functions and services falling within the broad statutory language of Utah Code 63G-2-102 (11)(b)(i) as an “office” of a governmental entity “funded to carry out the public’s business.”

Furthermore, the designation of the private residence of Deputy Mayor Hawkes and Mr. Hawkes as the physical location of EID with the Utah Lt. Governor’s Office [R10] has inescapable implications. Namely, EID has bestowed upon Simplifi Respondents the governmental function of operating the Boyer Water System and therewith Simplifi Respondents create and maintain public records at the same location registered with the Utah Division of Corporations and Commercial Code for Simplifi.

Since assuming title of the Boyer Water System in August 1998, as per the Utah Public and Open Meetings Act, the only discernable actions of EID as a governmental entity are recorded in the EID board of trustees monthly meeting minutes convened (and frequently canceled) at the private residence of former EID Trustee Chairman Smolka, the Emigration Canyon Fire Station, or via the internet platform Zoom during the COVID-19 pandemic.

Lastly, EID lacks authority to order or allow entry into a private home. Therefore, a judgment against EID to disclose public records maintained at the private residence of Deputy Mayor Hawkes and Mr. Hawkes would be a legal impossibility and thus unenforceable.

Utah R. Civ. P. 19 (a) URCP mandates that “a person who is subject to service of process . . . *shall* be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties” (emphasis added).

As an “independent contractor” in sole possession and control of governmental records, Simplifi Respondents are the only necessary parties to the present litigation and Mr. Tracy’s has properly pursued litigation against the only parties who can accord relief.

In its ruling, the district court failed to apply the statutory provisions of Utah Code Ann. § 63G-2-201 (11)(b), Utah Administrative Code R309-105-17(2)(a)-(b) and Utah R. Civ. P. 19(a). Instead, the district court accepted Simplifi Respondents bald and unsubstantiated claim that the contracting governmental entity “maintains legal control” over public documents in possession of an “independent contractor.”

This statutory interpretation is also consistent with other states, which apply public record statutes to private entities.

In *Memphis Publishing Company*, the Supreme Court of Tennessee expressly confirmed that the Tennessee Public Records Act applies to a non-profit corporation.

Under similar circumstances, the private entity had contracted with the Tennessee Department of Human Services to help administer a state-subsidized day care program.¹⁰ Although the trial court had determined that the non-profit corporation was similarly an “independent contractor” of a governmental agency, the Tennessee Supreme Court rejected the application of agency law accepted by both the district court and the Utah Court of

¹⁰ *Memphis Publishing v. Cherokee Children*, 87 SW 3d 67 (Tenn. 2002).

Appeals and affirmed the broad mandate of the public records act “to promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people.”¹¹

The court distinguished when the records of private corporation are considered “governmental” and thus subject to public scrutiny while purely private organizations are exempt.

Drawing from the “functionality equivalency test” developed by the Connecticut Supreme Court,¹² the court delineated the determining factors, which establish the public’s right to access documents: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.¹³

While no single factor is dispositive in a “case-by-case analysis,” the court recited that “[i]n light of the myriad of organizational arrangements that may be confronted, under the functional equivalency approach, each new arrangement must be examined anew and in its own context.”¹⁴

¹¹ Citing *Cf. Forsberg v. Hous. Auth. of Miami Beach*, 455 So.2d 373, 378 (Fla.1984).

¹² See *Connecticut Humane Soc’y v. Freedom of Info. Comm’n*, 218 Conn. 757, 591 A.2d 395, 397 (1991).

¹³ *Id.* at 397.

¹⁴ Quoting *Washington Research Project, Inc. v. Department of Health, Educ. & Welfare*, 504 F.2d 238, 245-46 (D.C. Cir.1974).

Similar tests for the application of public records statutes to private corporations are recognize in Maryland,¹⁵ Florida,¹⁶ North Carolina,¹⁷ Oregon,¹⁸ and Kansas.¹⁹

In the present case, all governmental records of EID are in the sole possession of Deputy Mayor Hawkes and Mr. Hawkes at their private residence. Moreover, EID has fully relinquished its public duty to preserve and control governmental records to a private corporation under the first prong of performing a governmental function test.

Next, Simplifi Respondents have no other income source other than public funds administered by Mr. Hawkes on behalf of EID. As the corporate form appears to be a mere shell intended to obscure a lucrative salary for part-time employment, Simplifi is subject to GRAMA provisions under the second prong public-funding test.

Lastly, EID's board of trustees have decided no issue related to Mr. Tracy's Lead Contamination GRAMA in accordance with the Utah Open and Public Meetings Act. Absent recording of deliberations and/or resolution in a board of trustee meeting minutes, EID has fully transferred decision-making authority to Simplifi through Mr. Hawkes as the "EID certified public records officer" under the third prong governmental-control test.

¹⁵ *A.S. Abell Publ'g Co. v. Mezzanote*, 297 Md. 26, 464 A.2d 1068, 1074 (1983).

¹⁶ *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group*, 596 So.2d 1029, 1031 (Fla.1992).

¹⁷ *News and Observer Publ'g Co. v. Wake County Hosp. Sys., Inc.*, 55 N.C.App. 1, 284 S.E.2d 542, 544-49 (1981).

¹⁸ *Marks v. McKenzie High School Fact- Finding Team*, 319 Or. 451, 878 P.2d 417, 424-26 (1994).

¹⁹ *Kan. Op. Att'y Gen.* 93-130 (1993), available at 1993 WL 467822, 1993 Kan. AG LEXIS 116.

Under the functionality-equivalency test applied in other states, Simplifi is subject to GRAMA provisions.

Federal courts have also favorably discussed the application of the functional equivalency analysis in applying the Freedom of Information Act (“FOIA”) to private entities.²⁰ Likewise, federal courts recognized liability under 42 U.S.C. § 1983 for private companies acting “under the color of state law” when fulfilling governmental functions and responsibilities under a “public function test.”²¹

As operator of a public water system, contracted to perform governmental functions as the “EID Public Records Office,”²² Simplifi Respondents are in no way exempt from FOIA requirements and are likewise subject to federal litigation under possible § 1983 violations.

The district court’s ruling that private individuals are exempt from criminal sanctions of GRAMA is further refuted by legislative intent as documented by the plain language of statute itself.

Utah Code 63G-2-801 (1)(a) provides:

²⁰ *Ry. Labor Executives' Ass'n v. Consol. Rail Corp.*, 580 F.Supp. 777, 778-79 (D.D.C. 1984).

²¹ *See Ellison v. Garbarino*, 48 F.3d 192, 195 (6th Cir.1995). “The public function test ‘requires that the private entity exercise powers which are traditionally exclusively reserved to the state.’” *Id.* (quoting *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir.1992)).

²² In an email dated February 24, 2021, Simplifi Respondents’ legal counsel Jeremy R. Cook of the Salt Lake City law firm Cohne Kinghorn P.C. confirmed Simplifi Respondents’ status as the “EID Public Records Office.” *See* Petition for Writ of Extraordinary Relief at Exhibit B filed with this Court on October 14, 2021 (district court case No. 200905074).

A public employee *or other person* who has lawful access to any private, controlled, or protected record under this chapter, and who intentionally discloses, provides a copy of, or improperly uses a private, controlled, or protected record knowing that the disclosure or use is prohibited under this chapter, is, except as provided in Subsection 53-5-708(1)(c), guilty of a class B misdemeanor (emphasis added).

In the present case, it is uncontested that both Deputy Mayor Hawkes and Mr. Hawkes have lawful control and access to governmental records when EID transferred operation of the Boyer Water System from Management Enterprises LLC to Simplifi sometime in 2013.

The district's court's conclusion that private individuals are exempt from GRAMA provisions is refuted by the designation "or another person" and would irrefutably apply if Deputy Mayor Hawkes or Mr. Hawkes improperly disclosed or used governmental records in their lawful possession.

Likewise, subsection (3)(a) further stipulates:

A public employee who intentionally refuses to release a record, the disclosure of which the employee knows is required by law, is guilty of a class B misdemeanor.

As an elected member of the Emigration Canyon Metro Township Counsel, it is uncontested that Deputy Mayor Hawkes is a public employee within the express definition of GRAMA.

Lastly, it is irrefutable that the governmental function of public records management has been transferred to Simplifi Respondents. It is also irrefutable that the Utah for-profit corporation operates solely through its officer and directors. As such, Deputy Mayor Hawkes and Mr. Hawkes are subject to injunctive relief for the willful and

unlawful refusal to disclose lead-contamination laboratory test results required by Utah Administrative Code and federal rules to be maintained on the premises of the water system operator for public inspection and review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

DATED this 14th day of October 2021.

MARK CHRISTOPHER TRACY
DBA EMIGRATION CANYON HOME
OWNERS ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October 2021, a true and correct copy of the foregoing **WRIT OF CERTIORARI** was sent via electronic mail pursuant to Utah R. of App. P. 26(b) to the following counsel of record. Two (2) paper copies will be provided upon request:

Jeremy R. Cook

jcook@ck.law

Tim E. Nielson

t Nielson@cklaw.com

Timothy J. Bywater

tbywater@cklaw.com

COHNE KINGHORN, P.C.

111 E. Broadway, Suite 1100

Salt Lake City, Utah 84111

*Attorney for Respondents Simplifi Company,
Jennifer Hawkes, and Eric Hawkes*

MARK CHRISTOPHER TRACY DBA
EMIGRATION CANYON HOME OWNERS
ASSOCIATION

/s/ Mark Christopher Tracy
Mark Christopher Tracy

APPENDIX

**Appendix A. Memorandum Decision and Order of the Third District Court for
Salt Lake County**

September 16, 2020

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

<p>MARK CHRISTOPHER TRACY, dba EMIGRATION CANYON HOME OWNERS' ASSOCIATION,</p> <p style="text-align:center">Petitioners,</p> <p>vs.</p> <p>SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an Individual, and JEN NIFER HAWKES, an Individual,</p> <p style="text-align:center">Respondents.</p>	<p style="text-align:center">MEMORANDUM DECISION AND ORDER</p> <p style="text-align:center">Case No. 200905123</p> <p style="text-align:center">Honorable Robert P. Faust</p>
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The above-entitled matter comes before the Court pursuant to Respondents Simplifi Company's ("Simplifi"), Eric Hawkes' ("Mr. Hawkes") and Jennifer Hawkes' ("Mrs. Hawkes") (collectively "Respondents") Motion to Dismiss. The matter was submitted for decision on September 14, 2020. Although oral argument was requested, the Court is not persuaded a hearing would be of assistance in the instant. Accordingly, the ruling with respect to the Motion will be addressed in the following Memorandum Decision and Order:

The basis for this action is that the Emigration Improvement District ("EID"), which is subject to the Utah Government Records Access and Management Act ("GRAMA"), failed to adequately respond to a request of Petitioner for public records of EID related to lead testing results for EID's public drinking water system. Based upon the allegation, EID is a necessary party and Petitioner has failed to cite any case law to support the position that Respondents are proper or necessary parties to this action. Indeed, GRAMA applies to "governmental entities." See Utah Code Ann. 63G-2-103(11). Simplifi and Mr. Hawkes are not governmental entities.

The reason the records are public records is because they are records of EID (a governmental entity) and produced on behalf of EID. Petitioner does not cite to any provision or language in GRAMA supporting the position that it can sue an individual or private company based on a governmental entity's alleged failure to respond to a GRAMA request.

EID has legal authority and control over its documents, and in fact, responded to the GRAMA request and provided documents to Petitioner that EID believed were responsive to his request. In its initial response, EID indicated to Petitioner that Petitioner could likely acquire the requested documents more quickly through the Utah Division of Drinking Water; and it appears that Petitioner was provided, or had access to, all of the documents he was requesting prior to filing this action.

In sum, there is no evidence to suggest that EID has ever taken the position that the documents were not public records of EID and not controlled by EID, or that Petitioner had any reason to believe it was necessary to sue Respondents to obtain EID's records. Accordingly, Respondents' Motion to Dismiss is granted.

Additionally, Petitioner's Objection is an improper sur-reply that is not permitted under URCP Rule 7 and is, therefore, stricken. Petitioner's Objection to Motion to Strike Petitioner's Objection to Reply Memorandum is overruled.

This Memorandum Decision and Order constitutes the Order regarding the matters addressed herein. No further order is required.

DATED this 16th day of September 2020

BY THE COURT:


ROBERT P. FAUST
DISTRICT COURT JUDGE



Appendix B. Order of the Utah Court of Appeals

September 15, 2021

SEP 14 2021

IN THE UTAH COURT OF APPEALS

<p>MARK CHRISTOPHER TRACY, Appellant, <i>v.</i> SIMPLIFI COMPANY, JENNIFER HAWKES, AND ERIC HAWKES, Appellees.</p>	<p>ORDER Case No. 20200705-CA</p>
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Before Judges Christiansen Forster, Harris, and Hagen.

Mark Christopher Tracy filed a petition for review in the district court complaining that Simplifi Company, Jennifer Hawkes, and Eric Hawkes (collectively, Respondents) had violated Utah's Government Records Access and Management Act (GRAMA), and asking the court for an injunction and other relief. Respondents filed a motion asking the district court to dismiss Tracy's petition. The court granted that motion, and Tracy now appeals. We affirm the district court's determination, and we do so in this unpublished order. Our rules of appellate procedure empower us to decide any case in an expedited manner, without issuing a published opinion; we elect to do so here, determining on our own motion that this matter is appropriate for such disposition. *See* Utah R. App. P. 31(a) ("The court may dispose of any qualified case under this rule upon its own motion before or after oral argument."); *id.* R. 31(b)(1), (5).

Emigration Improvement District (the District) is a governmental entity created by Salt Lake County that is authorized to provide water and sewer services to houses located in Emigration Canyon. Eric Hawkes is the District's representative and its designated records officer. Simplifi is a private company contracted to operate and maintain the public water system owned by the District. Eric and Jennifer Hawkes are directors of Simplifi.

On July 2, 2020, Tracy submitted a GRAMA request via email to the District. On its face, the request was made to "Emigration Improvement District," and was not directed to any of the Respondents. The request was delivered to Eric Hawkes, at his official District email address (eric@ecid.org), apparently in his capacity as the District's designated records officer. The request was not sent to any email associated with Simplifi or Jennifer Hawkes. In the request, Tracy sought "[a]ll laboratory test results

(‘chemical analysis’) for the presence of lead contamination in public drinking water system No. ‘18143’ (Emigration Improvement District) for the past ten (10) years.” Tracy also asked for an expedited response to the request.

On July 9, 2020, Eric Hawkes, on behalf of the District, responded by email to Tracy’s GRAMA request, stating as follows:

The District received your GRAMA request regarding the Lead Testing for the past 10 years. Your request for an expedited response has been denied. We are looking at the costs associated with providing this information to you and will get back with you as soon as possible.

Tracy considered this response a complete denial of his GRAMA request—a position apparently not shared by the District, who viewed the July 9 email as a denial only of the request for expedited treatment—and subsequently appealed the denial to the District’s chief administrative officer.

On July 27, 2020, Eric Hawkes, on behalf of the District, sent another email to Tracy, this time stating as follows:

I have attached a copy of the results of the latest lead & copper testing. I believe you have already received the previous testing results from [the Utah Division of Drinking Water] as per your [separate] GRAMA request. Thank you for your patience as we have been processing these results and working with [the Utah Division of Drinking Water]. The District has sent the homeowners a copy of their results and sent a public notice to water users on the copper results. Please let me know if you have any questions.

About two weeks later, Tracy filed a petition for judicial review of the allegedly denied GRAMA request and requested an injunction along with an award of attorney fees. *See* Utah Code Ann. §§ 63G-2-404, -802 (LexisNexis 2019) (establishing the procedure for seeking judicial review of a denied GRAMA request, and authorizing a district court to enjoin a governmental entity and award attorney fees under GRAMA when appropriate). Importantly, Tracy’s petition did not name the District as a respondent from whom relief was sought; instead, the petition named Respondents as the parties from whom relief was sought. In the petition, however, Tracy clearly identified the GRAMA request at issue as the one he submitted to the District on July 2, 2020. Indeed, a copy of that GRAMA request was attached to the petition, and (as noted

above) that GRAMA request was directed only to the District, and not to any of the Respondents.¹

Instead of answering the petition, Respondents filed a motion, pursuant to Utah Rule of Civil Procedure 12(b)(6), asking the court to dismiss Tracy’s petition. In the motion, Respondents asserted that Tracy had failed to state a claim upon which relief could be granted because there was “no basis for [Tracy] to sue Simplifi, Mr. Hawkes, and Mrs. Hawkes based on a claim that the Emigration Improvement District (‘the District’) did not respond to a GRAMA request.” The district court ultimately granted Respondents’ motion to dismiss, concluding among other things that Respondents were not proper parties to the action and Tracy was entitled to no relief against them.

Tracy now appeals. “A ruling on a motion to dismiss presents a legal question that we review for correctness, affording no deference to the district court’s decision.” *Turner v. Staker & Parson Cos.*, 2012 UT 30, ¶ 7, 284 P.3d 600. “A motion to dismiss is appropriate only where it clearly appears that the plaintiff would not be entitled to relief under the facts alleged or under any set of facts he could prove to support his claim.” *Larsen v. Davis County School Dist.*, 2017 UT App 221, ¶ 9, 409 P.3d 114 (quotation simplified).

“GRAMA establishes a process through which an individual may request access to a government record.” *McKitrick v. Gibson*, 2021 UT 48, ¶ 20 (citing Utah Code Ann. § 63G-2-204(1)). “And when a governmental entity denies such a request, GRAMA establishes a process to appeal that decision.” *Id.* (citing Utah Code Ann. §§ 63G-2-401 to -404, -701(5)–(6)). Specifically, GRAMA permits a party to file “[a] petition for judicial review of an order or decision.” *See* Utah Code Ann. § 63G-2-404(1)(a).

In the present case, Tracy apparently attempted to seek judicial review of the District’s alleged denial of a GRAMA request he made to and served upon the District on July 2, 2020. But Tracy did not name the District as a party to this action. Instead, he filed his action against Respondents, none of whom—at least according to the allegations set forth in the petition²—were ever named in a GRAMA request. Tracy has

1. In deciding whether to grant a motion to dismiss, courts may properly consider documents attached to the complaint, in addition to the complaint itself. *See Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 10, 104 P.3d 1226.

2. In reviewing a district court’s order dismissing a case for failure to state a claim, “we assume the truth of the factual allegations in the complaint and draw all reasonable inferences therefrom in the light most favorable to the plaintiff.” *See Fehr v. Stockton*, 2018 UT App 136, ¶ 8, 427 P.3d 1190 (quotation simplified).

no grounds to bring an action against Respondents for judicial review of a denied GRAMA request when he never submitted a GRAMA request to Respondents in the first place. In short, Tracy is not entitled to relief under the facts alleged in his petition because the alleged denial of the GRAMA request was made by the District, not Respondents. If Tracy had alleged that he had submitted a GRAMA request to Respondents, or if he had sued the District instead of Respondents, the situation may be different.³ But here, where Tracy’s GRAMA request was directed only to the District, but his petition for review is addressed only to Respondents, his petition states no claim upon which relief may be granted.⁴

Accordingly, we AFFIRM the district court’s order granting the Respondents’ motion to dismiss.

Dated this 14th day of September, 2021.

FOR THE COURT:



Ryan M. Harris, Judge

3. We do not mean to suggest that it would have been proper to serve a GRAMA request on Respondents. Although the parties spent much of their briefing energy on whether GRAMA applies to nongovernmental entities and individuals, it is not necessary for us to reach that issue to resolve this appeal.

4. Respondents attempt to characterize the problem with Tracy’s petition as one grounded in subject-matter jurisdiction. But that is an inapt characterization. Utah district courts—which are courts of general jurisdiction—of course have subject-matter jurisdiction to consider petitions for judicial review regarding potential GRAMA violations. *See* Utah Code Ann. § 63G-2-404 (LexisNexis 2019). The fact that Tracy may not have sued the right parties, or that he otherwise does not meet the statutory requirements for a GRAMA claim, does not implicate the court’s subject-matter jurisdiction; rather, it simply means that Tracy’s claim lacks merit. *See, e.g., Zion Village Resort LLC v. Pro Curb U.S.A. LLC*, 2020 UT App 167, ¶¶ 51–55, 480 P.3d 1055.