

IN THE UTAH COURT OF APPEALS

Mark Christopher Tracy dba
Emigration Canyon Home Owners
Association

Petitioner / Appellant

v.
Simplifi Company, Jennifer Hawkes
and Eric Hawkes

Respondents / Appellees

Appeal No. 20200705-CA

BRIEF OF APPELLEES

Appeal from the Third District Court, Salt Lake County, Judge Robert P. Faust,
Case No. 200905123

JEREMY R. COOK
TIMOTHY J. BYWATER
TIMOTHY E. NIELSON
Cohne Kinghorn P.C.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111
Tel: 801-363-4300
Counsel for Appellees

MARK CHRISTOPHER TRACY
1160 E. Buchnell Dr.
Sandy, Utah 84094
Tel. 929-208-6010
m.tracy@echo-association.com
Pro Se Appellant

LIST OF PARTIES

- Mark Christopher Tracy dba Emigration Canyon Home Owners Association, Petitioner / Appellant
- Eric Hawkes, Defendant / Appellee
- Jennifer Hawkes, Defendant / Appellee
- Simplifi Company, Defendant / Appellee

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INTRODUCTION

Emigration Improvement District (“**EID**”) is a small Utah local district that provides culinary water to residents in Emigration Canyon. EID is governed by a three-member elected board of trustees. Due to EID’s size, EID does not have any full-time employees. Instead, EID contracts with individuals and entities to provide services for EID. EID contracts with Mr. Hawkes, through Simplifi Company, to provide accounting and management services for the District, which includes responding to GRAMA requests on behalf of EID. As a local district, EID is subject to the Utah Governmental Records Access and Management Act (“**GRAMA**”).

Mark Christopher Tracy, dba Emigration Canyon Homeowners Association (“**Mr. Tracy**”) does not reside in Emigration Canyon and is not a customer of EID. Nevertheless, since 2014, Mr. Tracy has filed numerous lawsuits against EID or individuals associated with EID. Mr. Tracy has also served numerous GRAMA requests on EID, and EID has responded to multiple GRAMA requests from Mr. Tracy.

On July 2, 2020, Mr. Tracy sent an email to Mr. Hawkes at the email address “eric@ecid.org” requesting copies of EID’s lead testing results (the “**GRAMA Request**”). The GRAMA Request also requested an expedited response to the GRAMA Request. On Thursday, July 9, 2020, Mr. Hawkes, on behalf of EID, sent a timely response email to Mr. Tracy indicating that EID had received his GRAMA Request; that EID denied his request for an expedited response; and that EID was “looking at the costs associated with providing this information to you and will get back with you as soon as

possible.” The email also stated: “As an alternative option, you may want to consider contacting DDW (Division of Drinking Water) as they receive all the test results directly from the lab regarding any lead testing. They may be able to provide you this information quicker and with less expense as they have more resources available to them than the District.”

On the same day, July 9, 2020, Mr. Tracy sent an email to EID appealing only the denial of the expedited response. Specifically, the email stated: “We hereby appeal the denial of an *expedited response* to our request for lead contamination laboratory test results to Chief Administrative Officer of Emigration Improvement District (“EID” aka ECID) under Utah Code Ann. § 63G-2-401 (1)(a).” *Petition*, Exhibit EE, R. 98. On July 27, 2020, Mr. Hawkes sent Mr. Tracy a response email that stated in part: “I have attached a copy of the results for the latest lead & copper testing. I believe you have already received the previous testing results from DDW as per your GRAMA request.” R. 163-164.

Despite having received the requested documents from EID or the Utah Division of Drinking Water (“**DDW**”), Mr. Tracy filed this action three days later. However, instead of naming EID (the governmental entity), Mr. Tracy named only Eric Hawkes (“**Mr. Hawkes**”), his wife Jennifer Hawkes (“**Mrs. Hawkes**”) and the Simplifi Company (collectively “**Appellees**”). As Judge Faust correctly determined, there is no basis to sue Appellees as opposed to EID.

STATEMENT OF ISSUES

Issue 1: Whether Utah Code Ann. § 63G-2-802 only confers courts with subject matter jurisdiction to review alleged GRAMA violations by a government entity or political subdivision.

Standard of Review: Questions of subject matter jurisdiction concern a court's power to hear a case, “[a] court has subject matter jurisdiction if the case is one of the type of cases the court has been empowered to entertain by the constitution or statute from which the court derives its authority.” *State v. Smith*, 2014 UT 33, ¶ 18, 344 P.3d 573, 578. “[Q]uestions regarding subject matter jurisdiction may be raised at any time because such issues determine whether a court has authority to address the merits of a particular case.” *Housing Auth. v. Snyder*, 2002 UT 28, ¶ 11, 44 P.3d 724. In addition, because subject matter jurisdiction is a prerequisite to this court's power to consider the substantive issues, the requirement that the court have proper jurisdiction over the subject of the dispute cannot be waived. *See, e.g., Chen v. Stewart*, 2004 UT 82, ¶ 34, 100 P.3d 1177; *Barnard v. Wassermann*, 855 P.2d 243, 248 (Utah 1993). Issues relating to subject matter jurisdiction are threshold questions that should be addressed before resolving other claims. *See Snyder*, 2002 UT 28 at ¶ 11, 44 P.3d 724. When appellate courts lack subject matter jurisdiction over an action, they “retain only the authority to dismiss the action.” *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah Ct. App. 1989).

Issue 2: Whether the District Court correctly dismissed Mr. Tracy’s petition for failing to name EID, the governmental entity, in a Petition for Review of a GRAMA request brought pursuant to Utah Code Ann. § 63G-2-802.

Standard of Review: Courts “review a decision granting a motion to dismiss for correctness, granting no deference to the decision of the district court.” *Fehr v. Stockton*, 2018 UT App 136, ¶ 8, 427 P.3d 1190 (cleaned up). “When reviewing a motion to dismiss based on Rule 12(b)(6), an appellate court must accept the material allegations of the complaint as true, and the trial court’s ruling should be affirmed only if it clearly appears the complainant can prove no set of facts in support of his or her claims.” *Mackey v. Cannon*, 2000 UT App 36, ¶ 9, 996 P.2d 1081 (cleaned up). In reviewing “a rule 12(b)(6) dismissal, our inquiry is concerned solely with the sufficiency of the pleadings, and not the underlying merits of the case.” *Fehr*, 2018 UT App 136, ¶ 8, 427 P.3d 1190 (cleaned up). *Haynes v. Dep’t of Pub. Safety*, 2020 UT App 19, ¶ 5, 460 P.3d 565, 567. Appellees preserved this argument in its Motion to Dismiss. R. 128-180.

STATEMENT OF THE CASE

This matter arises from a Petition for Review filed by petitioner Mark Tracy in response to a GRAMA request that he served upon the Emigration Improvement District (“**EID**”). R. 1-16, 91-92. EID is local district created by the Salt Lake County Council in 1968 that has authority to provide water and sewer service to residents within Emigration Canyon. R. 129, *see also* Petition, R. 1-17, ¶ 17. On July 2, 2020, Mr. Tracy served a GRAMA request (“**GRAMA Request**”) on the EID. R. 91-92. As a public

water system, EID is required to routinely test the water quality in its system and submit the results to the Utah Division of Drinking Water (“**DDW**”). In his GRAMA Request, Mr. Tracy asked for laboratory results for the presence of lead in a public water system owned and operated by the EID. R. 10, ¶¶ 21-23, 25-28. Mr. Tracy asked that EID process his GRAMA Request in an expedited manner. R. 91-92.

On July 9, 2020, Mr. Hawkes, the designated Records Officer for EID,¹ responded on behalf of EID to the GRAMA request. In his response on behalf of EID, Mr. Hawkes denied Mr. Tracy’s request to process his GRAMA Request in an expedited manner, but he never suggested that EID would not provide documents in response to the GRAMA Request. R. 94. Rather, he responded that they were evaluating his request and would get back to him as soon as possible. *Id.* Mr. Hawkes also suggested that Mr. Tracy could contact DDW because the lab results were transmitted directly to DDW, so they may be able to provide a quicker response for less cost. *Id.* EID never indicated that the information Mr. Tracy had requested was not public, nor did it indicate that it would not supply Mr. Tracy with the information he requested. *See id.* It simply denied his expedited request and notified him that it was evaluating the request and would get back to him as soon as possible with the information.

After receiving the July 9, 2020 response from the EID regarding his GRAMA Request, Mr. Tracy sent another email dated July 9, 2020, indicating that he was appealing EID’s denial of the “expedited” request:

¹ <https://openrecords.utah.gov/GRAMA/agencyDetail.php?2033>

We hereby appeal the denial of an *expedited response* our request for lead contamination laboratory test results to Chief Administrative Officer of Emigration Improvement District (“EID” aka ECID) under Utah Code sec. 63G-2-401(1)(a).

R. 98 (emphasis added). Mr. Tracy directed his appeal to the Chief Administrative Officer of the Emigration Improvement District, who is the chair of the EID board of trustees.² *Id.* Neither the initial GRAMA Request nor the appeal of the denial of Mr. Tracy’s expedited request were directed toward Mr. Hawkes or Jennifer Hawkes individually, or Simplifi Company.

On July 27, 2020, Mr. Hawkes, on behalf of the EID, emailed Mr. Tracy the information he had initially requested. EID’s response stated in part:

I have attached a copy of the results for the latest lead & copper testing. I believe you have already received the previous testing results from DDW as per your GRAMA Request.

R. 163-164.

Mr. Tracy never filed an appeal challenging the sufficiency of the information he had received from EID as required by Utah Code Ann. § 63G-2-404(2)(b).

On July 31, 2020, four days after receiving the test results from the EID, Mr. Tracy filed this action in the Third District Court of Utah. In his Petition, and despite the fact that his GRAMA Request and all related communications had been directed to the EID and its designated officials, Mr. Tracy did not name the EID, the actual government

² Mr. Hawkes is an independent contractor who provides services directly to the EID. Mrs. Hawkes does not hold any position or office with EID. She also does not provide any direct services to EID.

entity on which he had served his GRAMA Request, as a party. R. 91-92. Rather, he named Eric Hawkes and Jennifer Hawkes, individually, and Simplifi Company, a private corporation. R. 1-17.

In his Petition Mr. Tracy requested the following relief:

1. An Order directing the Respondents to provide Petitioner inspection and copies of all original documents related to lead contamination of water system no. 18143 from July 9, 2010 to the date of the Order;
2. An Order enjoining Respondents for violations of the Governmental Records Access and Management Act per Utah Code Ann. § 63G-2-802(1).

Id. Mr. Tracy also sought to recover attorney fees. *Id.*

On August 26, 2020, Respondents filed a Rule 12(b)(6) motion to dismiss based on Mr. Tracy's failure name a governmental entity as a party to the action. R. 128-182. As grounds, Respondents argued that because GRAMA required Mr. Tracy to name a governmental entity as a party, which he had failed to do, his claims failed as a matter of law. R. 133-135. Further, Respondents argued GRAMA did not allow Mr. Tracy to bring suit against private individuals and a private company. *Id.* Respondents also argued that Mr. Tracy's action was barred because he had failed to exhaust his administrative remedies. R. 135-136.

After briefing was complete, the district court entered its Memorandum Decision and Order (“**Order**”) dismissing Mr. Tracy's Petition. Among the grounds for dismissal, the court ruled that GRAMA did not apply to private individuals and that it required Mr. Tracy to name “EID (a governmental entity)” as a party to this action. R. 231-232. The

district court also ruled that GRAMA only applies to governmental entities and that because Respondents are not governmental entities, they could not be sued individually under GRAMA. *Id.* The court also found that EID has the legal authority over the documents, that EID had never taken the position that the documents were not public records and not controlled by EID, and that the EID, had, “in fact, responded to the GRAMA Request. . . .” R. 231-233. The district court correctly concluded that EID was a “necessary party” to the action. *Id.* While not explicitly stated in its Order, the district court dismissed Mr. Tracy’s Petition because his failure to name a government entity deprived the court of subject matter jurisdiction.

On Appeal, Mr. Tracy raises three issues, none of which were the subject of his Petition:

1. Does the Utah Government Records Access and Management Act apply to a private for-profit corporation funded entirely by a governmental entity to carry out the people’s business?
2. Are officers and directors of a private for-profit corporation subject to criminal penalties of the Utah Government Records Access and Management Act for the willful refusal to allow access to governmental records of drinking water lead contamination required under the Uta Administrative Rules to be maintained on the premises of the water operator for public inspection for a period of no less than 12 years.
3. Did the district court error when it granted Simplifi Respondents’ untimely motion to strike Mr. Tracy’s objection to the reply memorandum evidencing Deputy Mayor Hawkes’ status of and officer, director and registered agent of Simplifi.

See Appellant’s Brief pp. 6-8.

These issues are not the subject of the GRAMA Request giving rise to this litigation. *See* Petition, R. 1-18. Rather, Mr. Tracy filed his Petition pursuant to Utah Code Ann. § 63G-2-802 seeking a court order “directing respondents to provide Petitioner inspection and copies all original documents related to lead contamination” of the EID water system and “[a]n Order enjoining respondents for violations” of GRAMA. R. 16. His petition did not ask the court for a declaratory relief or ruling that GRAMA applies to private individuals and private companies. Regardless, because Utah Code Ann. § 63G-2-802 (“**Section 802**”) only allows courts to review the actions of, impose injunctive relief against, government entities and political subdivisions, not private individuals, this court lack subject matter jurisdiction to hear Mr. Tracy’s appeal. Second, because Mr. Tracy failed to name EID as a party to this action, the district court correctly dismissed Mr. Tracy’s Petition.

SUMMARY OF ARGUMENT

This is a simple case. Section 802 of GRAMA limits judicial review to actions taken by a “government entity or political subdivision”, which requires a petitioner to name an actual governmental entity or political subdivision of the State of Utah. *See* Utah Code Ann. § 63G-2-802(1). Section 802 unambiguously limits a court’s jurisdiction to only reviewing the actions of government entities and political subdivisions. Further, Section 802 does grant courts subject matter jurisdiction to impose injunctive relief against individuals and private corporations. Indeed, nothing in GRAMA allows a person seeking judicial relief under Section 802 to sue an individual to

obtain records from a government entity instead of suing the actual governmental entity. This is particularly true in this case because the GRAMA request giving rise to this action was sent to EID; requested information about EID's water system; the denial of expedited processing was appealed to EID; and the GRAMA Request was ultimately responded to by EID. The GRAMA Request was not directed to any private individual or private company, nor did it request information about private individuals or a private company. The GRAMA Request was entirely related to laboratory testing of the EID water system. Despite these indisputable facts, Mr. Tracy failed to name the EID as a party to this action. That failure deprives this court of subject matter jurisdiction.

ARGUMENT

I. SECTION 802 DOES NOT CONFER SUBJECT MATTER JURISDICTION OVER INDIVIDUALS AND PRIVATE COMPANIES.

As a preliminary matter, before the court can proceed with Mr. Tracy's appeal it must first determine if it has subject matter jurisdiction over this action. The answer to that question is no. Questions of subject matter jurisdiction concern a court's power to hear a case, "[a] court has subject matter jurisdiction if the case is one of the type of cases the court has been empowered to entertain by the constitution or statute from which the court derives its authority." *State v. Smith*, 2014 UT 33, ¶ 18, 344 P.3d 573, 578. "[Q]uestions regarding subject matter jurisdiction may be raised at any time because such issues determine whether a court has authority to address the merits of a particular case." *Housing Auth. v. Snyder*, 2002 UT 28, ¶ 11, 44 P.3d 724. In addition,

because subject matter jurisdiction is a prerequisite to this court's power to consider the substantive issues, the requirement that the court have proper jurisdiction over the subject of the dispute cannot be waived. *See, e.g., Chen v. Stewart*, 2004 UT 82, ¶ 34, 100 P.3d 1177; *Barnard v. Wassermann*, 855 P.2d 243, 248 (Utah 1993). Issues relating to subject matter jurisdiction are threshold questions that should be addressed before resolving other claims. *See Snyder*, 2002 UT 28 at ¶ 11, 44 P.3d 724. When appellate courts lack subject matter jurisdiction over an action, they “retain only the authority to dismiss the action.” *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah Ct. App. 1989).

Section 802 unambiguously limits judicial review of alleged GRAMA violations to actions against “governmental entities and political subdivisions that violate or proposes to violate provisions of [GRAMA].” Utah Code Ann. § 63G-2-802(1). When faced with questions regarding statutory interpretation the court’s:

[P]rimary goal is to evince the true intent and purpose of the Legislature. The best evidence of the legislature's intent is the plain language of the statute itself. Thus, [w]hen interpreting a statute, we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning. Additionally, we presume that the expression of one term should be interpreted as the exclusion of another. We therefore seek to give effect to omissions in statutory language by presuming all omissions to be purposeful.

Marion Energy, Inc. v. KFJ Ranch P'ship, 2011 UT 50, ¶ 14, 267 P.3d 863, 866 (internal citations quotations omitted).

Section 802 of GRAMA unambiguously limits subject matter jurisdiction to judicial review for alleged GRAMA violations by a governmental entity or political subdivision:

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.

Utah Code Ann. § 63G-2-802(1) (emphasis added). GRAMA includes a long definition of what constitutes a “governmental entity”; however, the relevant sub-definition is:

(v) any political subdivision of the state, but, if a political subdivision has adopted an ordinance or a policy relating to information practices pursuant to Section 63G-2-701, this chapter shall apply to the political subdivision to the extent specified in Section 63G-2-701 or as specified in any other section of this chapter that specifically refers to political subdivisions.

Utah Code Ann. § 63G-2-102(11)(a)(v). Utah law defines political subdivisions as a “county, municipality, school district, community reinvestment agency, *local district*, *special service district*, an entity created by an interlocal agreement adopted under Title 11, Chapter 13, Interlocal Cooperation Act, a local building authority, or any other governmental subdivision or public corporation.” Utah Code Ann. § 63A-15-102 (emphasis added). Accordingly, as a matter of law, the EID is a governmental entity for the purposes of GRAMA.

GRAMA also states: “‘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” Utah Code Ann. § 63G-2-102(11)(a)(v). Simplifi, Mr. Hawkes,

and particularly Mrs. Hawkes, are not an agency or department of EID. More importantly, the statute clearly states that a governmental entity includes an office or agency of the governmental entity listed in 11(a), not that each office, agency, board, bureau committee, department, advisory board, or commission is itself a separate governmental entity. For example, Salt Lake City's finance department is subject to GRAMA, but it is not a separate governmental entity, and GRAMA would not require or allow a person to serve a GRAMA request on the finance department or the individual employees in the finance department. This obvious not only from the statutory language, but GRAMA states that a records officer "means the individual appointed by the chief administrative officer of each governmental entity, or the political subdivision to work with state archives in the care, maintenance, scheduling, designation, classification, disposal, and preservation of records." Utah Code Ann. § 63G-2-102(22). Obviously, each department, office, committee, or advisory board of a county, city or local district does not have its own chief administrative officer, and the statutory language does not contemplate a separate records custodian for every office, department or advisory board of a county, municipality, or local district. Accordingly, even if Mr. Hawkes or Simplifi could be considered an agency of EID, GRAMA requires any action to be brought against EID.

Beyond defining what constitutes a "governmental entity" GRAMA provides specific definitions for "contractors" and "individuals". Contractors are defined as:

- (i) any person who contracts with a governmental entity to provide goods or services directly to a governmental entity; or
- (ii) any private, nonprofit organization that receives funds from a governmental entity

Utah Code Ann. § 63G-2-103(5)(a). GRAMA defines “individual” as “a human being.”

Id. Sec. 103(13). Neither individual nor human being are included in the definitions of “political subdivision” or “governmental entity.” Conspicuously absent from the statutory definitions of governmental entity and political subdivision are individuals, contractors, and private corporations. In fact, the parties subject to Section 802 review, e.g. governmental entities and political subdivisions, are specifically non-human entities. Nothing in GRAMA or Section 802 remotely suggests courts have subject matter jurisdiction to order individuals who perform services, like responding to GRAMA requests on behalf of a governmental entity, to comply with GRAMA. The specific relief allowed by Section 802 can only be imposed on governmental entities and political subdivisions. Accordingly, the only parties that can be named in a suit brought pursuant to Section 802 are governmental entities and political subdivisions.

Further, the omission of contractors and individuals from the definitions of government entity and political subdivision in GRAMA and in Section 802 cannot be overlooked and must be considered. *See Marion Energy*, 2011 UT 50, ¶ 14. If the legislature intended that Section 802, and GRAMA more broadly, extended subject matter jurisdiction to private individuals, including contractors, it would have included them in the definition of “governmental entity” and “political subdivision, but it did not.

Accordingly, because the legislature excluded “individuals” and “contractors” from Section 802, it only applies to governmental entities and political subdivisions. However, because Mr. Tracy only named private individuals and a private company as parties to this action, the court lacks subject matter jurisdiction.

Despite the clear and unambiguous statutory language that Section 802 only applies to actions against governmental entities, Mr. Tracy intentionally refused to name EID.³ His failure to do so is fatal to his claim and deprives this court of subject matter jurisdiction.

II. THE DISTRICT COURT CORRECTLY DISMISSED MR. TRACY’S PETITION FOR FAILING TO NAME A GOVERNMENTAL ENTITY AS A PARTY TO THE ACTION.

The district court correctly ruled that Section 802 requires litigants seeking injunctive relief to name an actual governmental entity in an action brought to enforce the

³ Mr. Tracy has failed to articulate any reason why he needs to sue Mr. and Mrs. Tracy individually, and Simplifi rather than the EID. The EID has never taken the position that the information he requested is not public, nor has it refused to provide him with the information. It has never represented or argued that Mr. Tracy is not entitled to the information he requested. EID has never asserted that Mr. Hawkes, Mrs. Hawkes, and Simplifi are the actual custodians of the public records – versus the EID - and are refusing to produce the information because the information is hidden away in their basement. *See* Opening Brief, pp. 5, 12, 9. To the contrary, in an email Mr. Hawkes sent as the EID Records Officer, he did not refuse to produce the information, he actually informed Mr. Tracy of a quicker and more efficient way to obtain the information. R. 94. The only logical inference to draw from Mr. Tracy’s unrelenting pursuit of this claim against Mr. and Mrs. Hawkes individually is to harass them with frivolous and vexatious litigation. *See* Motion to Dismiss, R. 128-141. Regardless there was no suggestion in the GRAMA Request and no allegations in the Petition that Mr. and Mrs. Tracy were inappropriately hiding public documents in their basement. *See* Tracy Br. 5, 9, 12.

provisions of GRAMA. EID incorporates by reference its statutory interpretation arguments set forth in Section I as if fully set forth herein.

The EID is indisputably the correct party that Mr. Tracy needed to name if he wanted injunctive relief related to his GRAMA Request. In fact, Mr. Tracy clearly understood this. Mr. Tracy's failure to name EID cannot be explained by simple oversight or a misunderstanding. In fact, Mr. Tracy's understanding that EID is the correct party is repeatedly referenced in his complaint, its supporting documents, and his brief. First, he served his GRAMA Request on the EID. R. 91-92. Second, he served his July 9, 2020 appeal of the denial of his expedited request to "the Chief Administrative Officer of Emigration Canyon Improvement District. . . ." R. 98. Third, he commits several pages of his Petition to outlining the history and ownership of the EID water system, including that the EID "is a limited purpose local governmental entity created by Salt Lake County...." R. 9, ¶ 17.⁴ The fact that Mr. Hawkes, EID's Records Officer, responded to Mr. Tracy's GRAMA Request on behalf of the EID does not make him "a government entity" or subject him individually to judicial action brought pursuant to

⁴ It is hard to discern what purpose Mr. Tracy has for filing this appeal because his Petition acknowledged that he received the information he requested from the EID on July 27, 2020, four days before filing his Petition. R. 13-14, ¶ 34 ("Mr. Hawkes disclosed . . . a DEQ spreadsheet indicating that all 20 homes connected to the EID Water System...."). Mr. Tracy never filed an appeal with the EID challenging the sufficiency of the information he received from EID.

Section 802.⁵ The fact that Mr. Tracy failed to name EID is particularly curious because Mr. Tracy clearly understands that the EID is the proper party, but, for whatever reason he declined to name it as a party to this action.

Despite knowing and acknowledging that EID is the governmental entity from which Mr. Tracy requested the information, he asks the court to ignore the clear jurisdictional limitations imposed by Section 802. Indeed, Mr. Tracy asks the court to extend the reach of Section 802 to private individuals. However, he cites no Utah case law or statute supporting this position. Rather, he relies on out of state cases, which do not support extending the jurisdictional reach of Section 802 to private individuals and private companies.

Despite Mr. Tracy's obvious jurisdictional limitations imposed by Section 802, Mr. Tracy asserts that because Mr. Hawkes is a contractor who provides service directly to EID, he should be subject to Section 802. *See* Brief, p. 24, citing *Memphis Publishing v. Cherokee Children*, 87 SW 3d 67 (Tenn. 2002). *Memphis Publishing* is inapposite. Most notably, the petitioner in that case had requested the records of the private entity that was providing services to the government, namely Cherokee Children Services. *See* 87 SW 3d at 71-72. In this case, Mr. Tracy requested information from EID directly. R. 91-92. He did not request any information from or about Mr. or Mrs. Hawkes, or Simplifi. R. 91-92.

⁵ It is even harder to fathom how Mr. Tracy believes Simplifi and Mrs. Hawkes could subject to the Section 802 as neither party was identified in, or involved in any way with the processing of, the GRAMA Request giving rise to this action.

Next, Mr. Tracy cites several cases for the notion that the court should extend the reach of Section 802 to private entities based on the “functional equivalent test”. Brief pp. 24-26. Once again, these cases do not support disregarding the unambiguous jurisdictional limitations imposed by Section 802. As a preliminary matter, these cases all involve public information requests that had been served directly on the supposed “governmental entity” or “public subdivision” that was a party to the action. In this case it is undisputed that EID is a governmental entity. *See* Compl. Para 17. It is also indisputable that Mr. Tracy served his GRAMA request on the EID, not the private individuals and corporation subject to this appeal. Mr. Tracy never served a GRAMA request on the Appellees.

Further, none of the cases cited by Mr. Tracy stand for the legal proposition that Section 802 should extend subject matter jurisdiction over private individuals who respond to public records requests on behalf of a governmental entity. Indeed, none of the cases held that statute like Section 802 conferred jurisdiction, and allowed courts to impose injunctive relief, on private individuals for alleged violations of public records statutes by a governmental entity. *See Connecticut Human Society v. Freedom of Info. Comm’n*, 218 Conn. 757, 591 A.2d 395, 397 (1991)(public records suit brought against the Humane Society of Connecticut for allegedly failing to file a schedule of its meetings with the secretary of state; held, Humane Society not a public entity); *News and Sun-Sentinel Co. v Schwab, Twitty and Hanser Architecture Group*, 596 So.2d 1029 (Fla. 1992)(private architecture firm that provided professional services for a governmental

entity was not, itself, a public agency subject to Florida's public records statute); *News and Observer Publ'g Co. v. Wake County Hosp. Sys., Inc.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981)(county created hospital authority was a public entity that was required to respond to a public records request); *Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451, 878 P.2d 417 (1994)("fact-finding team" that convened to make recommendations to a public school that was served directly with a public records request was required to respond to the request); *Kan. Op. Att'y Gen. 93-130* (1993), 1993 WL 467822, (publicly created turnpike authority was a public entity required to respond to public records request).

None of these cases involve individuals being sued for failing to comply with local public records law. None of the cases cited by Mr. Tracy stand for the proposition that the individual who responds to a public records request on behalf of a public entity can be named individually for alleged violations of public records laws. None of the cases held that the spouse and private company owned by a person responsible for responding to a public records request on behalf of a governmental entity could be named individually in a suit based on a records request served on a separate and distinct governmental entity.

In fact, one common theme in all of these cases is the defendant who was being sued had been served with a public records request. In this case, Mr. Tracy served his public records request on the EID requesting information from the EID. Accordingly, none of these cases suggest this court should disregard the limited jurisdiction Section 802 confers upon courts to provide injunctive relief against governmental entities for

alleged violations of GRAMA. Accordingly, the district court's dismissal of Mr. Tracy's action for failing to name the EID as a party should be affirmed.

III. MR. TRACY'S REQUEST FOR AN ADVISORY OPINION REGARDING THE APPLICABILITY OF A CRIMINAL STATUTE IS WITHOUT MERIT.

Mr. Tracy's request that the Court issue an advisory opinion regarding the applicability of a criminal statute warrants little discussion. First, Mr. Tracy did not file this action pursuant to Utah Code Ann. § 63G-2-801 ("**Section 801**"). Second, Section 801 does not allow private individual citizens to bring criminal actions against other private individual citizens for alleged violations of GRAMA relating to actions taken by an individual on behalf of a government entity.⁶ Third this court does not issue advisory opinions unrelated to the underlying litigation. *See Summit Water Distrib. Co. v. Summit County*, 2005 UT 73, ¶ 50, 123 P.3d 437 ("Our settled policy is to avoid giving advisory opinions in regard to issues unnecessary to the resolution of the claims before us."); *Reynolds v. Reynolds*, 788 P.2d 1044, 1045 (Utah Ct.App.1990) (noting that the function of courts is not to give opinions on merely abstract or theoretical matters). In this case, Mr. Tracy did not even cite Section 801 in his Petition, accordingly this requested relief is not before the court.

⁶ Indeed, the Utah Court of Appeals has determined that a "private person does not become an agent of law enforcement simply because the private person desires that someone be arrested or prosecuted." *Orem v. Santos*, 304 P.3d 883, 2013 UT App 155, ¶ 16, citing *State v. Koury*, 824 P.2d 474, 478, n.2 (Utah Ct. App. 1991).

IV. THE DISTRICT COURT DID NOT ERR IN STRIKING THE SUR-REPLY.

Mr. Tracy argues that the district court erred by striking evidence that Mrs. Hawkes is the “deputy mayor” of Emigration Canyon Metro Township and is a director and officer of Simplifi. Br. 29-31. While the district court ruled that Mr. Tracy’s “Objection to Reply Memorandum” was an improper reply memorandum, that decision has no bearing on the jurisdictional requirement that Mr. Tracy’s request for judicial review was limited to the actions of EID and that Section 802 required him to name EID as a party to this action. It is indisputable that the GRAMA Request giving rise to this action was served on EID. It is also indisputable that the information requested in the GRAMA Request was solely related to “the presence of lead contamination” in the EID water system. R. 91. Mrs. Hawkes and her involvement in Simplifi have absolutely nothing to do with the “presence of lead” in the EID water system, or EID’s response to the GRAMA Request. Similarly, Mrs. Hawes’ role as the deputy mayor of a separate and distinct governmental entity has nothing to do with the GRAMA Request served on EID. Thus, Mrs. Hawkes’ purported title of “deputy mayor” of an unrelated governmental entity and her role as an officer and director in a private company that was not subject of the GRAMA Request had no bearing on the district court’s determination that Mr. Tracy’s failure to name the EID was fatal to his claim.

CONCLUSION

The legal absurdity of Mr. Tracy’s position that GRAMA allows him to bring suit against a governmental official and his spouse, individually, and a private company

owned by those private individuals, simply because one of those individuals responded on behalf of a governmental entity to a GRAMA Request directed at that governmental entity cannot be understated. This is particularly confounding because the issues on appeal are wholly unrelated to the GRAMA Request giving rise to this action. The fact that Mr. Hawkes is compensated for services he provides to the EID does not subject he, his wife, and a private company owned by them, to having to defend a lawsuit on behalf of the governmental entity that was responsible for responding to the GRAMA Request.⁷ Nothing in Section 802, GRAMA globally, or the cases cited by Mr. Tracy remotely supports his assertion that because Mr. Hawkes receives money from the EID he becomes legally responsible for responding to lawsuits, individually, on behalf of that entity. Mr. Tracy's attempt to sue these private individuals and their company blatantly disregards the law is nothing more than a bad faith claim intended to harass Respondents.

Because Section 802 only grants courts limited jurisdiction to review alleged violations of GRAMA by governmental entities, the district court correctly dismissed Mr. Tracy's claims against Respondents. Further, the district court also correctly concluded that because EID legally responsible for the documents it was a necessary and indispensable party. Mr. Tracy's failure to EID is fatal to his claim and deprives this court of subject matter jurisdiction over this action.

⁷ It is not clear how a court could grant Mr. Tracy's requested relief. His Petition seeks a court order to provide "Petitioner with inspection and copies of all original documents related to lead contamination" of a water system owned and operated by the EID. Mr. and Mrs. Hawkes and Simplifi are clearly not the owners and operators of the EID water system. *See Complaint.*

Respectfully submitted this 3rd day of February, 2021.

COHNE KINGHORN, P.C.

By: /s/ Jeremy R. Cook
Jeremy Cook
Timothy J. Bywater
Timothy E. Nielsen
Attorneys for Respondents/Appellees
Eric Hawkes, Jennifer Hawkes,
Simplifi Company

CERTIFICATE OF COMPLIANCE

I, Jeremy Cook, counsel for Eric Hawkes, Jennifer Hawkes and Simplifi Company, hereby certify that the foregoing Brief of Appellee, complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(g) and contains 6,475 words, excluding the parts of the brief exempted by Utah Rule of Appellate Procedure 24(g)(2). This brief has been prepared using Microsoft Word for Office 365 MSO (16.0.11929.20708).

I also certify that the foregoing Brief of Appellee complies with Utah Rule of Appellate Procedure 21(h) and does not contain non-public information.

Dated this 3rd day of February, 2021.

By: /s/ Jeremy R. Cook
Jeremy R. Cook

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 3rd day of February, 2021, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served, via email to the following:

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094
m.tracy@echo-association.com

/s/ Jeremy R. Cook

ADDENDUM

1. District Court Memorandum and Order
2. July 9, 2020 Email regarding Expedited Appeal
3. Chapter 2 Government Records Access and Management Act – Definitions
4. GRAMA Request Form
5. GRAMA Section 63G-2-802 Injunction – Attorney Fees
6. July 9, 2020 Email – Denial of Expedited Request
7. July 27, 2020 Email – Emigration Improvement District GRAMA Response

ADDENDUM 1

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

MARK CHRISTOPHER TRACY, dba EMIGRATION CANYON HOME OWNERS' ASSOCIATION, Petitioners, vs. SIMPLIFI COMPANY, a Utah Corporation, ERIC HAWKES, an Individual, and JEN NIFER HAWKES, an Individual, Respondents.	MEMORANDUM DECISION AND ORDER Case No. 200905123 Honorable Robert P. Faust
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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



CERTIFICATE OF SERVICE

I hereby certify that I mailed/mailed a true and correct copy of the foregoing
Memorandum Decision and Order, to the following, this 16th day of September 2020:

Mark Christopher Tracy
1160 East Buchnell Drive
Sandy UT 84094
m.tracy@echo-association.com

Jeremy Cook
111 E Broadway, Ste. 1100
Salt Lake City UT 84111
JCOOK@CK.LAW

A handwritten signature in black ink, appearing to be 'JC', is written above a horizontal line.

ADDENDUM 2

From: The ECHO-Association <m.tracy@echo-association.com>
Date: July 9, 2020 at 10:00:36 AM PDT
To: Eric Hawkes <eric@ecid.org>
Cc: Brian Maffly <bmaffly@sltrib.com>
Subject: GRAMA Appeal - Laboratory Test Results for Lead Contamination of EID Water System No. 18143 Operated by the Simplifi Company

Dear Mr. Hawkes,

We hereby appeal the denial of an expedited response our request for lead contamination laboratory test results to Chief Administrative Officer of Emigration Improvement District ("*EID*" aka ECID) under Utah Code sec. 63G-2-401 (1)(a).

Please note the following for the purpose of this appeal:

Name: Mark Christopher Tracy dba "Emigration Canyon Home Owners Association" ("*The ECHO-Association*")

Mailing Address: 1160 E. Buchnel Dr., Sandy, Utah 84094

Daytime Phone Number: 929-208-6010

Relief Sought / Grounds for Appeal: Expedited Response for the production of laboratory test results for lead contamination will be published on The ECHO-Association website under the rubric "Water Contamination" of the EID public water system No. 18143 (see https://echo-association.com/?page_id=4972) and therefore benefits the public under Utah Code sec. 63G-2-204 (5) justifying an expedited request under subsection (4)(a).

Moreover, we believe that lead contamination may be related to the groundwater mining of the Freeze Creek Aquifer as identified in the 2000 Barnett-Yonkee Study and the improper disposal of construction waste by EID Advisory Committee Chairman R. Steve Creamer (see https://echo-association.com/?page_id=3310; see also https://echo-association.com/?page_id=1474)

Salt Lake Tribune environmental reporter Brian Maffly cc'ed here.

Also, please note that it appears that the EID water system operator Aqua Environmental Services has not transmitted the lead contamination test results to the Utah Department of Environmental Quality as purported by you below. (See water.link.gov report from July 9, 2020):

As such we have requested copies of the actual lab reports believed to have been created by Chemtech Ford Laboratories as identified in our original GRAMA request.

We await the decision of the Chief Administrative Officer.

Kind Regards,

Mark Christopher Tracy
Tel. 929-208-6010

ADDENDUM 3

Chapter 2

Government Records Access and Management Act

Part 1

General Provisions

63G-2-101 Title.

This chapter is known as the "Government Records Access and Management Act."

Renumbered and Amended by Chapter 382, 2008 General Session

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.
- (2) The Legislature also recognizes a public policy interest in allowing a government to restrict access to certain records, as specified in this chapter, for the public good.
- (3) It is the intent of the Legislature to:
 - (a) promote the public's right of easy and reasonable access to unrestricted public records;
 - (b) specify those conditions under which the public interest in allowing restrictions on access to records may outweigh the public's interest in access;
 - (c) prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter;
 - (d) provide guidelines for both disclosure and restrictions on access to government records, which are based on the equitable weighing of the pertinent interests and which are consistent with nationwide standards of information practices;
 - (e) favor public access when, in the application of this act, countervailing interests are of equal weight; and
 - (f) establish fair and reasonable records management practices.

Renumbered and Amended by Chapter 382, 2008 General Session

63G-2-103 Definitions.

As used in this chapter:

- (1) "Audit" means:
 - (a) a systematic examination of financial, management, program, and related records for the purpose of determining the fair presentation of financial statements, adequacy of internal controls, or compliance with laws and regulations; or
 - (b) a systematic examination of program procedures and operations for the purpose of determining their effectiveness, economy, efficiency, and compliance with statutes and regulations.
- (2) "Chronological logs" mean the regular and customary summary records of law enforcement agencies and other public safety agencies that show:
 - (a) the time and general nature of police, fire, and paramedic calls made to the agency; and
 - (b) any arrests or jail bookings made by the agency.

- (3) "Classification," "classify," and their derivative forms mean determining whether a record series, record, or information within a record is public, private, controlled, protected, or exempt from disclosure under Subsection 63G-2-201(3)(b).
- (4)
 - (a) "Computer program" means:
 - (i) a series of instructions or statements that permit the functioning of a computer system in a manner designed to provide storage, retrieval, and manipulation of data from the computer system; and
 - (ii) any associated documentation and source material that explain how to operate the computer program.
 - (b) "Computer program" does not mean:
 - (i) the original data, including numbers, text, voice, graphics, and images;
 - (ii) analysis, compilation, and other manipulated forms of the original data produced by use of the program; or
 - (iii) the mathematical or statistical formulas, excluding the underlying mathematical algorithms contained in the program, that would be used if the manipulated forms of the original data were to be produced manually.
- (5)
 - (a) "Contractor" means:
 - (i) any person who contracts with a governmental entity to provide goods or services directly to a governmental entity; or
 - (ii) any private, nonprofit organization that receives funds from a governmental entity.
 - (b) "Contractor" does not mean a private provider.
- (6) "Controlled record" means a record containing data on individuals that is controlled as provided by Section 63G-2-304.
- (7) "Designation," "designate," and their derivative forms mean indicating, based on a governmental entity's familiarity with a record series or based on a governmental entity's review of a reasonable sample of a record series, the primary classification that a majority of records in a record series would be given if classified and the classification that other records typically present in the record series would be given if classified.
- (8) "Elected official" means each person elected to a state office, county office, municipal office, school board or school district office, local district office, or special service district office, but does not include judges.
- (9) "Explosive" means a chemical compound, device, or mixture:
 - (a) commonly used or intended for the purpose of producing an explosion; and
 - (b) that contains oxidizing or combustive units or other ingredients in proportions, quantities, or packing so that:
 - (i) an ignition by fire, friction, concussion, percussion, or detonator of any part of the compound or mixture may cause a sudden generation of highly heated gases; and
 - (ii) the resultant gaseous pressures are capable of:
 - (A) producing destructive effects on contiguous objects; or
 - (B) causing death or serious bodily injury.
- (10) "Government audit agency" means any governmental entity that conducts an audit.
- (11)
 - (a) "Governmental entity" means:
 - (i) executive department agencies of the state, the offices of the governor, lieutenant governor, state auditor, attorney general, and state treasurer, the Board of Pardons and Parole, the

- Board of Examiners, the National Guard, the Career Service Review Office, the State Board of Education, the Utah Board of Higher Education, and the State Archives;
- (ii) the Office of the Legislative Auditor General, Office of the Legislative Fiscal Analyst, Office of Legislative Research and General Counsel, the Legislature, and legislative committees, except any political party, group, caucus, or rules or sifting committee of the Legislature;
 - (iii) courts, the Judicial Council, the Administrative Office of the Courts, and similar administrative units in the judicial branch;
 - (iv) any state-funded institution of higher education or public education; or
 - (v) any political subdivision of the state, but, if a political subdivision has adopted an ordinance or a policy relating to information practices pursuant to Section 63G-2-701, this chapter shall apply to the political subdivision to the extent specified in Section 63G-2-701 or as specified in any other section of this chapter that specifically refers to political subdivisions.
- (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;
 - (ii) as defined in Section 11-13-103, an interlocal entity or joint or cooperative undertaking;
 - (iii) as defined in Section 11-13a-102, a governmental nonprofit corporation;
 - (iv) an association as defined in Section 53G-7-1101;
 - (v) the Utah Independent Redistricting Commission; and
 - (vi) a law enforcement agency, as defined in Section 53-1-102, that employs one or more law enforcement officers, as defined in Section 53-13-103.
- (c) "Governmental entity" does not include the Utah Educational Savings Plan created in Section 53B-8a-103.
- (12) "Gross compensation" means every form of remuneration payable for a given period to an individual for services provided including salaries, commissions, vacation pay, severance pay, bonuses, and any board, rent, housing, lodging, payments in kind, and any similar benefit received from the individual's employer.
- (13) "Individual" means a human being.
- (14)
- (a) "Initial contact report" means an initial written or recorded report, however titled, prepared by peace officers engaged in public patrol or response duties describing official actions initially taken in response to either a public complaint about or the discovery of an apparent violation of law, which report may describe:
 - (i) the date, time, location, and nature of the complaint, the incident, or offense;
 - (ii) names of victims;
 - (iii) the nature or general scope of the agency's initial actions taken in response to the incident;
 - (iv) the general nature of any injuries or estimate of damages sustained in the incident;
 - (v) the name, address, and other identifying information about any person arrested or charged in connection with the incident; or
 - (vi) the identity of the public safety personnel, except undercover personnel, or prosecuting attorney involved in responding to the initial incident.
 - (b) Initial contact reports do not include follow-up or investigative reports prepared after the initial contact report. However, if the information specified in Subsection (14)(a) appears in follow-up or investigative reports, it may only be treated confidentially if it is private, controlled, protected, or exempt from disclosure under Subsection 63G-2-201(3)(b).
- (15) "Legislative body" means the Legislature.

- (16) "Notice of compliance" means a statement confirming that a governmental entity has complied with an order of the State Records Committee.
- (17) "Person" means:
- (a) an individual;
 - (b) a nonprofit or profit corporation;
 - (c) a partnership;
 - (d) a sole proprietorship;
 - (e) other type of business organization; or
 - (f) any combination acting in concert with one another.
- (18) "Private provider" means any person who contracts with a governmental entity to provide services directly to the public.
- (19) "Private record" means a record containing data on individuals that is private as provided by Section 63G-2-302.
- (20) "Protected record" means a record that is classified protected as provided by Section 63G-2-305.
- (21) "Public record" means a record that is not private, controlled, or protected and that is not exempt from disclosure as provided in Subsection 63G-2-201(3)(b).
- (22)
- (a) "Record" means a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics:
 - (i) that is prepared, owned, received, or retained by a governmental entity or political subdivision; and
 - (ii) where all of the information in the original is reproducible by photocopy or other mechanical or electronic means.
 - (b) "Record" does not mean:
 - (i) a personal note or personal communication prepared or received by an employee or officer of a governmental entity:
 - (A) in a capacity other than the employee's or officer's governmental capacity; or
 - (B) that is unrelated to the conduct of the public's business;
 - (ii) a temporary draft or similar material prepared for the originator's personal use or prepared by the originator for the personal use of an individual for whom the originator is working;
 - (iii) material that is legally owned by an individual in the individual's private capacity;
 - (iv) material to which access is limited by the laws of copyright or patent unless the copyright or patent is owned by a governmental entity or political subdivision;
 - (v) proprietary software;
 - (vi) junk mail or a commercial publication received by a governmental entity or an official or employee of a governmental entity;
 - (vii) a book that is cataloged, indexed, or inventoried and contained in the collections of a library open to the public;
 - (viii) material that is cataloged, indexed, or inventoried and contained in the collections of a library open to the public, regardless of physical form or characteristics of the material;
 - (ix) a daily calendar or other personal note prepared by the originator for the originator's personal use or for the personal use of an individual for whom the originator is working;
 - (x) a computer program that is developed or purchased by or for any governmental entity for its own use;
 - (xi) a note or internal memorandum prepared as part of the deliberative process by:
 - (A) a member of the judiciary;

- (B) an administrative law judge;
- (C) a member of the Board of Pardons and Parole; or
- (D) a member of any other body, other than an association or appeals panel as defined in Section 53G-7-1101, charged by law with performing a quasi-judicial function;
- (xii) a telephone number or similar code used to access a mobile communication device that is used by an employee or officer of a governmental entity, provided that the employee or officer of the governmental entity has designated at least one business telephone number that is a public record as provided in Section 63G-2-301;
- (xiii) information provided by the Public Employees' Benefit and Insurance Program, created in Section 49-20-103, to a county to enable the county to calculate the amount to be paid to a health care provider under Subsection 17-50-319(2)(e)(ii);
- (xiv) information that an owner of unimproved property provides to a local entity as provided in Section 11-42-205;
- (xv) a video or audio recording of an interview, or a transcript of the video or audio recording, that is conducted at a Children's Justice Center established under Section 67-5b-102;
- (xvi) child pornography, as defined by Section 76-5b-103; or
- (xvii) before final disposition of an ethics complaint occurs, a video or audio recording of the closed portion of a meeting or hearing of:
 - (A) a Senate or House Ethics Committee;
 - (B) the Independent Legislative Ethics Commission;
 - (C) the Independent Executive Branch Ethics Commission, created in Section 63A-14-202; or
 - (D) the Political Subdivisions Ethics Review Commission established in Section 63A-15-201.
- (23) "Record series" means a group of records that may be treated as a unit for purposes of designation, description, management, or disposition.
- (24) "Records officer" means the individual appointed by the chief administrative officer of each governmental entity, or the political subdivision to work with state archives in the care, maintenance, scheduling, designation, classification, disposal, and preservation of records.
- (25) "Schedule," "scheduling," and their derivative forms mean the process of specifying the length of time each record series should be retained by a governmental entity for administrative, legal, fiscal, or historical purposes and when each record series should be transferred to the state archives or destroyed.
- (26) "Sponsored research" means research, training, and other sponsored activities as defined by the federal Executive Office of the President, Office of Management and Budget:
 - (a) conducted:
 - (i) by an institution within the state system of higher education defined in Section 53B-1-102; and
 - (ii) through an office responsible for sponsored projects or programs; and
 - (b) funded or otherwise supported by an external:
 - (i) person that is not created or controlled by the institution within the state system of higher education; or
 - (ii) federal, state, or local governmental entity.
- (27) "State archives" means the Division of Archives and Records Service created in Section 63A-12-101.
- (28) "State archivist" means the director of the state archives.
- (29) "State Records Committee" means the State Records Committee created in Section 63G-2-501.

- (30) "Summary data" means statistical records and compilations that contain data derived from private, controlled, or protected information but that do not disclose private, controlled, or protected information.

Amended by Chapter 365, 2020 General Session

63G-2-104 Administrative Procedures Act not applicable.

Title 63G, Chapter 4, Administrative Procedures Act, does not apply to this chapter except as provided in Section 63G-2-603.

Renumbered and Amended by Chapter 382, 2008 General Session

63G-2-105 Confidentiality agreements.

If a governmental entity or political subdivision receives a request for a record that is subject to a confidentiality agreement executed before April 1, 1992, the law in effect at the time the agreement was executed, including late judicial interpretations of the law, shall govern access to the record, unless all parties to the confidentiality agreement agree in writing to be governed by the provisions of this chapter.

Renumbered and Amended by Chapter 382, 2008 General Session

63G-2-106 Records of security measures.

The records of a governmental entity or political subdivision regarding security measures designed for the protection of persons or property, public or private, are not subject to this chapter. These records include:

- (1) security plans;
- (2) security codes and combinations, and passwords;
- (3) passes and keys;
- (4) security procedures; and
- (5) building and public works designs, to the extent that the records or information relate to the ongoing security measures of a public entity.

Renumbered and Amended by Chapter 382, 2008 General Session

63G-2-107 Disclosure of records subject to federal law.

- (1) Notwithstanding Subsection 63G-2-201(6), this chapter does not apply to a record containing protected health information as defined in 45 C.F.R., Part 164, Standards for Privacy of Individually Identifiable Health Information, if the record is:
 - (a) controlled or maintained by a governmental entity; and
 - (b) governed by 45 C.F.R., Parts 160 and 164, Standards for Privacy of Individually Identifiable Health Information.
- (2) The disclosure of an education record as defined in the Family Educational Rights and Privacy Act, 34 C.F.R. Part 99, that is controlled or maintained by a governmental entity shall be governed by the Family Educational Rights and Privacy Act, 34 C.F.R. Part 99.

Amended by Chapter 380, 2016 General Session

63G-2-108 Certification of records officer.

ADDENDUM 4

GRAMA Request Form

Note: Utah Code § 63G-2-204 (GRAMA) requires a person making a records request furnish the governmental entity with a written request containing the requester's name, mailing address, daytime telephone number (if available); and a description of the record requested that identifies the record with reasonable specificity.

Requester's information

Mark Christopher Tracy dba "Emigration Canyon Home Owners Association"

July 2, 2020

Name: _____ Date: _____

Address: 1160 E. Buchnell Dr. _____

Sandy, Utah 84094 _____

City/State/zip: _____

929-208-6010

Daytime telephone number: _____

Request made to

Emigration Improvement District (aka Emigration Canyon Improvement District)

Government agency or office: _____
P.O. Box 58945

Address: _____

Salt Lake City, Utah 84158

City/State/zip: _____

Records requested

Note: The more specific and narrow the request, the easier it will be for an agency or office to respond to the request. If you are unsure about the records' description, contact the agency or office records officer.

Note: Government keeps records in "series" or groups of records. To find out what series an agency or office maintains, visit the Archives' website, <http://archives.utah.gov>. The record series retention schedules on the Archives' website include relevant descriptions.

Title or series number of records (if known): _____

Description of records including all relevant information—location of event(s) described in records, city, county, address; date range of the records; names of the person(s); and subject of the request.

All 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.

Note: If the record has a restricted access, GRAMA provides that certain individuals may still receive access.

- ☐ I am the subject of the record
- ☐ I am the authorized representative of the subject of the record
- ☐ I provided the information in the record

Considerations about the desired response

I would like to:

- ☐ View or inspect the records only
- ☒ Receive a copy of the records and pay associated fees. Please notify me if the amount will exceed
\$ 100.00
- ☒ Receive a copy of the records and request a fee waiver, according to Utah Code § 63G-2-203, because:
- ☒ Releasing the record primarily benefits the public
- ☐ I am the subject, or authorized representative, of the record
- ☐ My legal rights are directly implicated by the information of the record because
_____, and I am impecunious
- ☒ Receive an expedited response (5 days) because releasing the record benefits the public; I request the
information for a story or report for publication or broadcast to the general public

ADDENDUM 5

- (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.

Amended by Chapter 254, 2019 General Session

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.
- (2)
 - (a) A district court may assess against any governmental entity or political subdivision reasonable attorney fees and other litigation costs reasonably incurred in connection with a judicial appeal to determine whether a requester is entitled to access to records under a records request, if the requester substantially prevails.
 - (b) In determining whether to award attorneys' fees under this section, the court shall consider:
 - (i) the public benefit derived from the case;
 - (ii) the nature of the requester's interest in the records; and
 - (iii) whether the governmental entity's or political subdivision's actions had a reasonable basis.
 - (c) Attorney fees shall not ordinarily be awarded if the purpose of the litigation is primarily to benefit the requester's financial or commercial interest.
- (3) Neither attorney fees nor costs shall be awarded for fees or costs incurred during administrative proceedings.
- (4) Notwithstanding Subsection (2), a court may only award fees and costs incurred in connection with appeals to district courts under Subsection 63G-2-404(2) if the fees and costs were incurred 20 or more days after the requester provided to the governmental entity or political subdivision a statement of position that adequately explains the basis for the requester's position.
- (5) Claims for attorney fees as provided in this section or for damages are subject to Title 63G, Chapter 7, Governmental Immunity Act of Utah.

Amended by Chapter 334, 2019 General Session

63G-2-803 No individual liability for certain decisions of a governmental entity.

- (1) Neither the governmental entity, nor any officer or employee of the governmental entity, is liable for damages resulting from the release of a record where the person or government requesting the record presented evidence of authority to obtain the record even if it is subsequently determined that the requester had no authority.
- (2) Neither the governmental entity, nor any officer or employee of the governmental entity, is liable for damages arising from the negligent disclosure of records classified as private under Subsection 63G-2-302(1)(g) unless:
 - (a) the disclosure was of employment records maintained by the governmental entity; or
 - (b) the current or former government employee had previously filed the notice required by Section 63G-2-303 and:
 - (i) the government entity did not take reasonable steps to preclude access or distribution of the record; or
 - (ii) the release of the record was otherwise willfully or grossly negligent.

ADDENDUM 6

On Jul 9, 2020, at 8:05 AM, Eric Hawkes <eric@ecid.org> wrote:

Hi Mr. Tracy,

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. As an alternative option, you may want to consider contacting DDW (Division of Drinking Water) as they receive all the test results directly from the lab regarding any lead testing. They may be able to provide you this information quicker and with less expense as they have more resources available to them than the District.

Thanks,
Eric Hawkes
801-243-5741

On Thu, Jul 2, 2020 at 2:25 PM The ECHO-Association <m.tracy@echo-association.com> wrote:
Dear Mr. Hawkes,

Attached herewith is an electronic copy of the Request for Government Records ("**GRAMA**") regarding laboratory test results of lead contamination for public water system No. 18143 operated by the Simplifi Company for Emigration Improvement District ("**EID**" aka Emigration Canyon Improvement District).

A hard copy of this request will be sent today via certified United States postal service.

As you have refused to answer questions regarding lead testing and possible continued contamination during the past EID trustee meeting on June 11, 2020 (see excerpt of video and audio recording EID Trustee meeting available at https://echo-association.com/?page_id=5666), we have requested an expedited response to this GRAMA request under Utah Code sec. 63G-2-204 (5) as the information will be used for publication and broadcast to the general public (see https://echo-association.com/?page_id=5014).

Salt Lake Tribune environmental reporter Brian Maffly is cc'ed here (see e.g. <https://www.sltrib.com/news/environment/2019/11/08/lead-shows-up-emigration/>)

Please feel free to contact me directly with any questions.

Kind Regards,

Mark Christopher Tracy
Tel. 929-208-6010

ADDENDUM 7

From: Eric Hawkes <eric@ecid.org>

Sent: Monday, July 27, 2020 5:31 PM

To: The ECHO-Association <m.tracy@echo-association.com>

Subject: Re: GRAMA Request - Laboratory Test Results for Lead Contamination of EID Water System No. 18143 Operated by the Simplifi Company

Dear Mr. Tracy,

I have attached a copy of the results for the latest lead & copper testing. I believe you have already received the previous testing results from DDW as per your GRAMA request. Thank you for your patience as we have been processing these results and working with DDW. 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.

Thanks,
Eric Hawkes

On Thu, Jul 9, 2020 at 9:04 AM Eric Hawkes <eric@ecid.org> wrote:

Hi Mr. Tracy,

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. As an alternative option, you may want to consider contacting DDW (Division of Drinking Water) as they receive all the test results directly from the lab regarding any lead testing. They may be able to provide you this information quicker and with less expense as they have more resources available to them than the District.

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Salt Lake Tribune environmental reporter Brian Maffly is cc'ed here (see e.g. <https://www.sltrib.com/news/environment/2019/11/08/lead-shows-up-emigration/>)

Please feel free to contact me directly with any questions.

Kind Regards,

Mark Christopher Tracy
Tel. 929-208-6010