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**IN THE THIRD DISTRICT COURT  
IN AND FOR THE STATE OF UTAH**

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MARK CHRISTOPHER TRACY, DBA  
EMIGRATION CANYON HOME OWNERS  
ASSOCIATION,

Petitioner,

vs.

SIMPLIFI COMPANY, a Utah Corporation,  
ERIC HAWKES, an individual, and  
JENNIFER HAWKES, an individual

Respondents.

**REPLY BRIEF IN SUPPORT OF  
MOTION TO DISMISS PETITION FOR  
JUDICIAL REVIEW**

**RE: WATER TELEMTRY OF A  
PUBLIC DRINKING WATER SYSTEM**

Case No. 200905074

Judge: Kouris

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Respondents Simplifi Company (“**Simplifi**”), Eric Hawkes (“**Mr. Hawkes**”) and Jennifer Hawkes (“**Mrs. Hawkes**”) (collectively “**Respondents**”) through counsel, and pursuant to Utah Rule of Civil Procedure 12(b)(6), respectfully submit this reply in support of Respondents’ *Motion to Dismiss Petition for Judicial Review*.<sup>1</sup>

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<sup>1</sup> The Court should note that Judge Faust recently issued a *Memorandum Decision and Order* dismissing a case involving the identical issue in this case. *See* Case No. 200905123. That case has been appealed to the Utah Court of Appeals, and is currently pending as Case No. 20200705.

## ARGUMENT

### **I. This Action Should Be Dismissed Because Petitioner Failed to Articulate Any Legal Basis or Rational for Suing Respondents.**

The sole basis for this action is that the Emigration Improvement District (“EID”), which is a local district of the state of Utah and 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 water telemetry data for EID’s public drinking water wells and storage tanks.

Nevertheless, Petitioner argues that EID is not a proper or necessary party, and instead as an “independent contractor” in possession and control of governmental record, URCP 19(a) mandates that Simplifi (but not Mr. Hawkes or Mrs. Hawkes) is a necessary party to the present litigation. *Response*, p. 16.<sup>2</sup> Rule 19 does not state, or even remotely support, an argument that Respondents<sup>3</sup>, and not EID, are the proper parties to this action. Clearly, if Petitioner’s claim is that EID failed to respond to a GRAMA request, then EID is a necessary party. Petitioner also fails to cite any Utah cases to support his position that Respondents are proper or necessary parties to this action.

Petitioner also completely ignores that GRAMA only applies to “governmental entities.” *See* Utah Code Ann. 63G-2-103(11). Simplifi and Mr. Hawkes are not governmental entities.

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<sup>2</sup> Petitioner’s assertion that Mr. Hawkes and/or Simplifi are in the sole possession and control of telemetry data is false. The telemetry data is stored on computers owned by EID that are located in a well house owned and operated by EID.

<sup>3</sup> Because EID is a relatively small district, EID contracts with Simplifi to provided accounting and management services for the District. The services are provided by Mr. Hawkes. Mrs. Hawkes has no direct involvement with EID.

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

Petitioner also argues that it was necessary to sue Respondents, but not EID, based on Petitioner's baseless assertion that EID does not have legal authority or the ability to require its agent to produce EID's records. Not only does EID have legal authority and control over its documents and information, but Petitioner completely ignores the fact that EID responded to the GRAMA request and provided information to Petitioner that EID believed were responsive to his request. Most notably, in the Petition, Petitioner alleged that: "After receipt of the data file from Mr. Hawkes, The ECHO Association reported that the file transmitted by Mr. Hawkes on July 15, 2020 did not match the water levels previously reported by Mr. Hawkes to EID trustee . . . ." *Petition*, p. 15, ¶ 51. In other words, Petitioner's assertion is that he received data files from EID in response to his GRAMA request to EID, and that he was able to access the data files and compare the data to telemetry reports reviewed by the EID board of trustees in a public meeting.<sup>4</sup> EID has never taken the position that the documents were not public records of EID, and Petitioner had no reason to believe it was necessary to sue Respondents to obtain EID's records.

Petitioner also argues that Simplifi Respondents "failed to transmit hard copies of tables and charts as required in [EID's] Water Management and Conservation Plan." *Response*, p. 22. Again, Petitioner is arguing that because a Water Management and Conservation Plan adopted by EID in 2002 indicated that EID kept hard copies of tables and graphs, that EID should have

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<sup>4</sup> EID disputes that any of the data was different or manipulated.

produced those hard copies.<sup>5</sup> Again, if the argument is that EID's Water Management and Conservation Plan indicated that EID had the documents, Petitioner should have brought the action against EID for allegedly failing to respond to the GRAMA request, not Respondents.

In summary, EID is a necessary party to this action, and Petitioner has failed to cite any provision of GRAMA or any Utah case law to support his position that Respondents are proper or necessary parties.

## **II. The Cases Cited by Petitioner Do Not Support His Argument.**

The cases cited by Petitioner from "sister states" do not support Petitioner's argument.

First, none of the cases relied upon by Petitioner from other states interpret an identical, or even similar, records access act. For example, in *Memphis Publishing v. Cherokee Children*, 87 SW 3d 67 (Tenn. 2002), the court considered whether a non-profit public benefit corporation was subject to a provision that broadly applied to "state, county and municipal records." *Id.* at 72. In contrast, Utah Code Ann. 63G-2-103(11) specifically defines "governmental entity," and includes such entities as "a governmental nonprofit corporation as defined in Section 11-13a-102."

Second, the cases relied upon by Petitioner all apply the "functional equivalency test" to determine if an entity is a "governmental entity," and Utah courts have not adopted the "functional equivalency test." Again, in contrast to other states that have vague statutes with respect to what entities are subject to the state records act, GRAMA specifically defines "governmental entity" for purposes of the act; and the definition clearly does not include for-

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<sup>5</sup> Petitioner's request asked for "All telemetry date (sic)(water level reports) . . . since September 1, 1998." EID produced the telemetry data as requested. If Petitioner wanted the charts and graphs provided to the Board at each meeting, Petitioner could have requested those documents.

profit corporations that contract with governmental entities, and certainly does not include every officer or employee of the for-profit corporation.

In summary, the cases cited by Petitioner do not support his argument.

### **III. Respondents Were Not Required to Produce to Files in a Different Format.**

Petitioner argues that based on his research of the software program used by EID, EID could have provided the information in an excel format by simply pushing a button. This is simply not correct. Clearly, if EID was able produce the information in excel format by simply pushing a button, EID would have avoided this entire litigation by just providing the information in the format requested by Petitioner. Regardless, Utah Code Ann. § 63G-2-201 states in part:

- (8) In response to a request, a governmental entity is not required to:
  - (a) create a record;
  - (b) compile, format, manipulate, package, summarize, or tailor information;
  - (c) provide a record in a particular format, medium, or program not currently maintained by the governmental entity . . . .

(emphasis added).

Since EID does not maintain the data in an excel format, EID is not required to provide the data to Petitioner in excel format.

### **IV. Respondents Should Be Awarded Their Attorney Fees.**

Respondents acknowledge that they are only entitled to attorney fees once they are the prevailing party, but given the history of frivolous and vexatious litigation by Petitioner against EID and Respondents, the Court should grant Respondent's their reasonable attorneys' fees in conjunction with dismissal of this action.

Primarily, the Petition includes over 30 exhibits and pages of allegations that have absolutely no connection to EID's alleged failure to respond to a GRAMA request. For example, the allegations in paragraphs 9-19 are allegations that Petitioner apparently believes support his

theory that EID's goal is to provide water for massive future development in Emigration Canyon, but have nothing to do with the alleged denial of the GRAMA request. Petitioner makes no attempt to articulate how these alleged facts and exhibits relate to a claim that EID failed to timely respond to a GRAMA request. Instead, the purpose of the allegations are clearly just an attempt to legitimize Mr. Tracy's attacks against EID and Respondents by including them in a legal action.

Likewise, the fact that Petitioner named Mrs. Hawkes is also indicative of Petitioner's bad faith and his ulterior motive in bringing this action. Mrs. Hawkes has nothing to do with EID. Instead, her inclusion in this action was likely an attempt to suggest that there was a conspiracy to deny the records request because Mrs. Hawkes is on the Emigration Metro Township Council. Clearly, naming a person in a lawsuit who has no possible involvement is bad faith.

Finally, Petitioner served this Petitioner after Judge Faust had already dismissed a similar GRAMA appeal case against Respondents based on his finding that Petitioner had no basis to sue Respondents as opposed to EID. *See* Case No. 200905123. Nevertheless, instead of amending his Petition to bring a claim against EID, Petitioner served the Petition on Respondents and continued to pursue his claims against only Respondents.

In summary, based on the allegations in the Petition, it is clear that the Petition has nothing to do with obtaining records from EID. EID and those associated with EID should not have to continue to expend time, money and resources responding to frivolous lawsuits that have no merit and are filed for the sole purpose of harrassing EID and Respondents. Therefore, the Court should award Respondents their reasonable attorney fees and costs.

**CONCLUSION**

The Court should dismiss this case with prejudice and award EID its reasonable attorney fees in accordance with Utah Code Ann. § 78B-5-825(1)

DATED this 19th day of January 2021.

COHNE KINGHORN

/s/ *Jeremy R. Cook*  
Jeremy R. Cook

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 19<sup>th</sup> day of January 2021, a true and correct copy of the foregoing document was served by 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](mailto:m.tracy@echo-association.com)

*/s/ Jeremy Cook*