

Jeremy R. Cook (10325)
Tim E. Nielsen (17424)
COHNE KINGHORN, P.C.
111 E. Broadway, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 363-4300
Facsimile: (801) 363-4378
Email: jcook@ck.law
tnielsen@ck.law

Attorneys for Eric Hawkes, Jennifer Hawkes and Simplifi Company

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

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:**

- (1) JUDICIAL REVIEW OF DENIED
REQUEST FOR DISCLOSURE OF
PUBLIC RECORDS;**
- (2) INJUNCTION FOR VIOLATIONS OF
THE GOVERNMENT RECORDS
ACCESS AND MANAGEMENT ACT;**
- (3) AWARD OF ATTORNEY FEES AND
COSTS**

**RE: LEAD CONTAMINATION
LABORATORY TEST RESULTS OF A
PUBLIC DRINKING WATER SYSTEM**

Case No. 200905123

Judge: Robert Faust

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*.

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 lead testing results for EID’s public drinking water system.

Nevertheless, Petitioner argues that “EID is neither a named nor necessary party to the present litigation under Rule 19 URCP” because Rule 19 states that a party necessary to proceedings “shall be joined . . . if in his [or her] absence complete relief cannot be accorded among those already parties.” *Response*, p. 3. Rule 19 does not state, or even remotely support, an argument that Respondents¹, 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 cases to support his position that Respondents are proper or necessary parties to this action.

Furthermore, Petitioner 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. The only reason the records are public records is because they are records of EID (a

¹ Because EID is a relatively small district, EID contracts with Simplifi to provided accounting and management services for the District. The services are primarily provided by Mr. Hawkes. Mrs. Hawkes has no direct involvement with EID.

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 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, but Petitioner completely ignores the fact that EID responded to the GRAMA request and provided documents to Petitioner that EID believed were responsive to his request. Moreover, 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. There is simply 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.

Clearly, Petitioner is just trying to harrass people associated with EID by bringing an action against them personally. Accordingly, this action should be dismissed in its entirety.

II. Petitioner Did Not Appeal the Denial of the Records Request.

Contrary to Petitioner's argument, there was no "de facto" denial of the records request, and Petitioner's appeal email only appealed the denial of the expedited response.

On July 9, 2020, Petitioner sent an email that stated in part: "We hereby appeal the denial of an expedited response to our request for lead contamination laboratory results" *Petition*, Exhibit EE (emphasis added). The email further stated:

Relief Sought / Ground for Appeal: Expedited Response for the production of laboratory test results for lead contamination will be published on The ECHO-Association website . . . and therefore benefits the public under Utah Code sec. 63G-2-204(5) justifying an expedited response under subsection 4(a).

Id.

In other words, the basis of the appeal to the chief administrative officer of EID was that ECHO Association is entitled to expedited responses for GRAMA requests if Mr. Tracy intends to publish the information on his website. Petitioner never appealed the purported denial of access to the records, and Petitioner never informed EID what documents Petitioner allegedly had not been able to obtain from the Division of Drinking Water or EID's response to his GRAMA request.

Accordingly, the Court should dismiss this case because Petitioner failed to appeal the purported denial of his GRAMA request to the chief administrative officer, which is a prerequisite to seeking judicial review.

III. 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 9-12 (including subparts and related exhibits) 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.

Moreover, this is certainly not the first bad faith filing against EID or those associated with EID by Petitioner. As noted in Respondents' *Motion to Dismiss*, Judge Parrish recently found that "Tracy's behavior was vexatious and that the suit was brought primarily for purposes of harassment. Accordingly, the court will award attorneys' fees to Defendants pursuant to 31 U.S.C. section 3730(d)(4)." *See FCA Fee Order*, p. 12. In this action, Mr. Tracy follows the same pattern of manufacturing litigation, including a bunch of allegations and exhibits that are totally irrelevant to the pending action, and then attempting to legitimize his conspiracy theories and attacks against EID because they are the subject of pending litigation.

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.

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 harassing 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 1st day of September, 2020.

COHNE KINGHORN

/s/ Jeremy R. Cook

Jeremy R. Cook

Tim Nielsen

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September 2020, a true and correct copy of the foregoing document was served by email and first-class mail to the following:

Mark Christopher Tracy
dba Emigration Canyon Home Owners Association
1160 E. Buchnell Dr.
Sandy, Utah 84094

/s/ Jeremy Cook