

Access to Public Records

APPENDIX A

In the entire landscape that is planning and zoning, one of the areas where our community philosophy all too often conflicts with how we actually manage our business is in the area of government records and open meetings. The Utah legislature has made the policy clear:

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.¹

The Government Records Access and Management Act (GRAMA) attempts to balance two weighty considerations: 1) the public's right of access to information and 2) the right of privacy that surrounds certain personal data that government entities gather.² It acknowledges that at times the protection of records is for the public good.³

In the land use arena, however, there is not much in the way of personal, private data that can be protected from public view by GRAMA. Anytime there are public emotions running high and anyone feels threatened or intimidated by public clamor, there is bound to be a lot of maneuvering behind the scenes and some effort to keep information close to the vest. This is usually inappropriate and often illegal.

What is a public record? Basically, GRAMA provides that all documents that are received by, created by, or in the possession of local agencies are public records unless specifically exempted by the GRAMA statute.⁴

As a practical matter, the way the process should work is that everyone who is interested in any land use application or pending decision should be able to review the file in its completeness so as to be able to fully participate in the public process. If a citizen does not have all the details, how is she supposed to be a full participant?

In the real world, however, there are two opposing factors. The first is simply the press of business. Staff reports and packets prepared for decision-makers are often not ready until a deadline just a few days before a hearing is held or a decision is made. In light of this, staff should share all the information in that packet with the public as soon as it is available to the public body involved so that all can participate fully.

Certainly, if the packet is completed three business days before the meeting, GRAMA is thwarted by a demand that everyone wanting to see it must file a GRAMA request and then wait five or ten business days as allowed by law. Local officials should respect the spirit of full participation and share with all concerned the documents and records that influence their decisions well before those decisions are made.

The second opposing factor is pure and simple politics and the reluctance we all have to being embarrassed. Citizen planners are not always professional, sophisticated experts and often are not sure themselves about what the public should know. They are sometimes very protective of business entities who are attempting to get permits for projects that the municipality wants to encourage.

Occasionally local officials will attempt to limit access to documents and claim that they represent business trade secrets or real estate deals that are not ready to become public. Sometimes the planning commission or city council just does not want the press or the public rummaging around in their business at will. The problem,

of course, is that it is not only the officials' business, but the public business, and GRAMA makes it clear where the bias lies when there is a request to make public documents public. Absent compelling reasons to keep records secret, they should be disclosed.

The right to know: There is an even deeper issue on the level of an applicant who is entitled to due process under the Constitution. Inherent in the right to due process is the right to know about and confront witnesses, to cross examine those offering testimony against one's interest, and to be heard on all the relevant matters that affect the decision to be made.⁵ This cannot be done if there are documents made available to decision-makers that the applicant cannot see. It is a breach of due process when decision-makers such as a board of adjustment, planning commission, site plan review committee, or city council have access to information and documents that affect their decisions and they do not share such information with the applicant whose rights are affected by their decisions.⁶

On another level, it is also unwise for municipal officials to avoid disclosure of documents and evidence that affect their decisions. Administrative decisions by local boards can only be challenged based on the record made of the decision. If all the information is not in the record, then the decision may not be upheld by the court or an arbitrator. The decision will only survive scrutiny if there is substantial evidence on the record, and information not disclosed cannot be considered as part of the record.⁷

It is in everyone's interest in a democracy to make sure that all participating know the facts and the factors that will support good, positive decisions, made in the light of day with information all can analyze and discuss.

Fees: GRAMA provides that every person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours, subject to the normal requirements of asking in advance and paying a fee for any copies that are desired.⁸

There is no charge for inspecting a record.⁹ Usually a place will be provided where a person can sit and review the file or other documents in a convenient manner. If you would like to copy the records, a charge may be imposed that has been predetermined by the municipal council or county commission. The law requires that fees

be set in ordinance and not just imposed by the staff.⁷No charge can be assessed for the time the staff takes to review a record to determine if it is public or for inspecting the record.¹⁰

A government entity may fulfill a record request without charge and is encouraged to do so if the record directly relates to a person's legal rights, and that person cannot afford to pay the fee.¹¹

Charge for compiling a record: The Utah courts have held that no charge for compilation of a record is to be made without previous notice of the charge. An agency may assess fees if the request involves extracting materials from a larger document of source and compiling them in a different form. If feasible and reasonable to do so, the agency should offer to allow the person requesting the record to compile it. If the agency compiles the record as a preferred way to provide it, rather than from necessity, no charge is to be made.¹²

Time limits: As far as the timing of a request goes, most of the time a record will be provided when it is asked for. Local officials may stick to the strict time frames that GRAMA provides, however, and require advance notice of no more than ten business days before the government responds to a GRAMA request.¹³ For requests by a citizen that are made for the benefit of the public and not just for their own personal benefit, up to five business days may pass before the record is produced or an explanation made as to why it was not produced.¹⁴

There are exceptions to the time limits, which may be pointed out by the municipality once the request is received. Remember that the bias of the law is meant to be in favor of access, so there should be a good reason for denial if the request for records is denied.

Public documents: Every document is public unless private, controlled, or protected.¹⁵

Private documents: Generally relate to individuals and their private interests, such as eligibility for benefits, medical history, employment, library circulation, etc.¹⁶

Controlled documents: Mainly medical records of individuals shared with a limited audience.¹⁷

Protected documents: Generally, trade secrets, financial and commercial information for companies, test questions, appraisals for future property transactions, investigations, litigation documents not available through discovery, privileged communications from the agency's attorney, drafts, minutes, and notes of closed meetings, and other documents that may compromise a legitimate state interest.¹⁸

Business confidentiality: If a record provided by a business to an agency is desired to be protected, the business must provide a claim of confidentiality and state the reasons for the restricted access. The agency can still classify the record as public if it notifies the business. Remember it is the business, not the local government, that originates the idea that the documents provided to the government entity ought to be confidential.¹⁹

Not a public record: (and thus not required to be disclosed to the public) temporary drafts, privately owned documents; calendars and notes; records of closed meetings by local bodies and attorney-client documents, for example. There are more, but the long list is beyond the scope of this short discussion. Check the statute on-line for details.²⁰

Denial: If access is denied, the agency shall provide a notice of denial, including a description of the record or portion of record to which access is denied, citation to the statute allowing the denial, and a description of the process to appeal the denial. Failure to respond is deemed a denial.²¹

Destruction: If access to a record is denied, that record is not to be destroyed or given to another agency before the appeal period has passed.²²

Other agencies: Even if a record is not available to the public, that same record can be provided to another governmental agency if that agency enforces, litigates, or investigates civil, criminal or administrative law and in other instances.²³

Appeals: Any appeal must be filed within thirty days of a denial of access or other determination. File a notice of appeal to the chief administrative officer of the agency if such an appeal is allowed under the local ordinances.²⁴ The local appeal decision may then be reviewed by the State Records Committee or the district court.²⁵ The State Records Committee is a panel of seven individuals, including one citizen and one representative from the news media, which hears appeals and make decisions in implementing GRAMA.

Penalties: It is a class B misdemeanor to knowingly disclose records that should not be disclosed, or to gain access to records that should not be disclosed by false pretenses, bribery, or theft, or to intentionally refuse to release a record which is legally required to be released.²⁶

Attorney's fees: can be ordered against the agency if a person who appeals a denial of access substantially prevails in legal action.²⁷

Form: A form that can be used to make a GRAMA request is often available from the local governmental entity involved. If one is not available, a sample is included with this publication that can be used under most circumstances. Just copy it, fill in the blanks, and submit it to the governmental entity involved. You may also wish to copy the summary of GRAMA rules on the back of the document provided so the governmental entity to which you submit it has a copy of the statute handy for reference.

Questions: GRAMA issues and disputes are most commonly routed to State Archives in the Department of Administrative Services, which provides staff support to the State Records Committee. The current contact number for the Records Ombudsman at State Archives as of the date of these materials is (801) 538-3858. You may also get information on the internet at <http://archives.utah.gov>.

1 Utah Code Ann. §63G-2-102(3).

2 Utah Code Ann. §63G-2-102(1).

3 Utah Code Ann. §63G-2-102(2).

4 Utah Code Ann. §63G-2-201(2).

5 *Dairy Products v Wellsville*, 2000 UT 81, ¶¶48-49.

6 Delaney, Abrans and Schinidman, *Land Use Practice & Forms: Handling the Land Use Case*, § 5:11 (2nd Ed., 2003 Update). See also Zizka, Hollister, Larsen and Curtin, *State and Local Land Use Liability*, § 5:13 (1997, 2003 Update).

7 *McElhaney v. Moab*, 2017 UT 65, ¶26.

8 Utah Code Ann. §§63G-2-201(1)(a), 63G-2-203.

9 Utah Code Ann. §63G-2-201(1)(a).

10 Utah Code Ann. §63G-2-203(5).

11 Utah Code Ann. §63G-2-203(4).

12 *Graham v. Davis County Solid Waste Dist.*, 1999 UT App. 136, 979 P. 2d 363

13 Utah Code Ann. §63G-2-204(4)(b).

14 Utah Code Ann. §63G-2-204(4)(b).

15 Utah Code Ann. §63G-2-201(2).

- 16 Utah Code Ann. §63G-2-302.
- 17 Utah Code Ann. §63G-2-304.
- 18 Utah Code Ann. §63G-2-305.
- 19 Utah Code Ann. §63G-2-309.
- 20 Utah Code Ann. §63G-2-305 includes a list which, at this printing, has 83 separate subsections describing protected records. All state statutes are available on-line at www.le.utah.gov/xcode/code.html. Specifics on the law can be found at <http://archives.utah.gov/recmanag/govlaw.htm>. A records ombudsman also is available at archives.utah.gov to assist both the public and those charged with records management.
- 21 Utah Code Ann. §63G-2-205.
- 22 Utah Code Ann. §63G-2-205(3).
- 23 Utah Code Ann. §63G-2-206(1).
- 24 Utah Code Ann. §63G-2-401.
- 25 Utah Code Ann. §63G-2-402.
- 26 Utah Code Ann. §63G-2-801.
- 27 Utah Code Ann. §63G-2-802.