

**FOURTH ANNUAL GOVERNMENT &
ADMINISTRATIVE LAW CLE
GRAMA Update
By Austin J. Riter, Parr Brown Gee & Loveless
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First Principles

- 1) GRAMA is Fundamental to Self Government
 - a. Transparency
 - b. Empowerment
 - c. Accountability
 - d. Public trust
- 2) "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."
 - a. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 2825 (1980)
- 3) "Openness safeguards our democratic institutions. Secrecy breeds mistrust and abuse."
 - a. United States District Judge David K. Winder
 - b. Soc'y of Prof'l Journalists v. Sec'y of Labor, 616 F. Supp. 569, 576 (D. Utah 1985)
- 4) GRAMA is a Balancing Act
 - a. The statute reflects a careful balancing of competing interests – public access and accountability vs. privacy, commercial, public safety, government process, and other interests
- 5) Legislative intent:
 - a. Right of access to information concerning the conduct of the public's business
 - b. Right of privacy in relation to personal data gathered by government
 - c. Easy and reasonable access to public records
 - d. Exceptions to access must be specified
 - e. Favor public access when interests for and against of access are of equal weight
- 6) The public cares about GRAMA a lot!
- 7) Mea Culpa
 - a. Governor Calls Special Session
 - b. Legislature Repeals HB 477

Practice Tips

- 8) Practice Tips
 - a. Compliance
 - b. Transparency and accountability
 - c. Minimize disputes
- 9) No. 1: Make it Easy on Yourself
 - a. Clarify ambiguous requests
 - b. Discuss format
 - c. Must provide the record in electronic format upon request if:
 - i. Maintained that way and is reproducible
 - ii. Any non-public information can be redacted without undue expenditure (§ 201(12)).
 - d. Refer the requester to your website
 - e. Discuss fees
- 10) No. 2: Require Reasonable Specificity
 - a. "Reasonable specificity" required (§ 204(1)(b))
 - b. Example:
 - i. "All emails concerning the new Salt Lake City parking meters between 2012 to date."
 - ii. "All records, including emails, documenting complaints from users and others about the new Salt Lake City parking meters from their installation to date."
- 11) No. 3: Remember Redaction
 - a. Government has a duty to segregate public and non-public information in a record (§ 308)

- b. Examples:
 - i. Police reports
 - ii. Investigative reports
 - iii. Contracts
 - c. Don't Get Carried Away
- 12) No. 4: Dealing with Denial
- a. Denials (§ 205)
 - i. Describe the records or portions of records to which access was denied
 - ii. Citations to the specific statute, rule or regulation that exempt the record from disclosure
 - iii. Description of appeal procedure
 - b. Failure to respond within the statutory response time can be treated as a denial
 - i. 10 business days after receipt of written request
 - ii. 5 business days for public interest requests (journalists)
 - iii. Deadline may be extended for voluminous requests, segregation, legal review
- 13) No. 5: It's all About the Balance
- a. A government entity may release a record properly classified as private or protected if the interests favoring access are equal to or greater than those favoring restriction of access (§ 201(5)(b)).
 - b. Orem City manager case
 - i. Six finalists
 - ii. Names and resumes properly classified as private but public interest favored release
- 14) No. 6: Content is King
- a. Public access depends on the content, not form, of the record or where the record resides
 - b. Record means "electronic data . . . that is prepared, owned, received or retained by a governmental entity" and is reproducible. (§ 103(22)).
 - c. Government may "not use the physical form, electronic or otherwise, in which a record is stored to deny . . . the rights of a person to inspect and receive a copy of a record under this chapter." (§ 201(11))
 - d. Emails, text messages, and other forms of electronic communications are subject to GRAMA
 - e. Maine Bans Texting to Conduct State Business
 - i. Former state employee testified she was encouraged to use texting to communicate about state business because the messages were harder to access under Maine's open records law
 - ii. Governor Paul LePage enacted ban on state employees using text messaging and personal email accounts to conduct state business
- 15) No. 7: Presume Access
- a. Remember the presumption of access to records
 - b. All government records are presumed to be public unless expressly provided otherwise by statute (§ 201(2))
 - i. Presumption of access applies at all levels of appellate review, i.e., administrative and judicial (*Deseret News v. Salt Lake County*)
 - ii. If interests favoring and disfavoring access are of equal weight, tie goes to access (*Id.*)
- 16) *Deseret News v. Salt Lake County* (Utah Supreme Court 2008)
- a. DA commissions independent investigative report of alleged sexual harassment by a county official
 - b. Alleged victim files federal lawsuit
 - c. County official resigns days before report submitted
 - d. DA refuses to allow GRAMA appeal bodies to review the investigative report
 - e. District Court: County properly classified report as private and protected
 - f. Supreme Court: Reversed. Held:
 - g. Investigative report is a public record
 - h. Presumption of Public Access: Burden on governmental entity to demonstrate record is not public
 - i. "When competing interests fight to a draw, disclosure wins"
 - j. Administrative Reviews: default classification entitled to no deference
 - k. Must consider changed factual circumstances, such as whether information is in the public domain
 - l. Administrative Appeals:
 - i. "Conscientious and Neutral Evaluation"

- ii. “GRAMA does not contemplate adversarial combat over records requests. Instead it envisions an impartial, rational balancing of competing interests.” – Justice Nehring
 - m. Private Records (“clearly unwarranted invasion of personal privacy” - § 302(2)(d)).
 - i. Requires balancing of privacy interests with interests favoring disclosure
 - ii. Disclosure of intimate, embarrassing and humiliating information is not determinative – must be clearly unwarranted
 - iii. Information already in the public record is relevant
 - n. Protected Records (investigations exception - § 305(10))
 - i. No categorical application
 - ii. Requires fact-specific review
 - iii. Requires ongoing investigation and showing of interference
 - o. Even if a record is properly classified as private or protected, may still obtain access “if the interests favoring access are greater than or equal to the interests favoring restriction of access.” (§ 402(6)).
 - p. “When competing interests fight to a draw, disclosure wins.”
- 17) No. 8: Things you don’t have to do!
 - a. Create a record
 - b. Compile, format, manipulate, package, summarize, or tailor information
 - c. Provide record in particular, unmaintained format
 - d. Fulfill unreasonably duplicative requests from the same person
 - e. Fulfill a request for information available on a government website or publication
- 18) No. 9: A Word About Fees
 - a. May charge a reasonable fee to cover “actual cost” of providing the record (§ 203(1))
 - b. May charge search, retrieval, and direct administrative costs if request is for records compiled in a form other than that normally maintained by the entity
 - c. No charge for first 15 minutes of staff time
- 19) No. 10: Some Things Really Are Free
 - a. No charge for inspection (§ 203(5))
 - b. No charge for reviewing record to determine whether it is subject to disclosure. (*Id.*)
 - c. Fee waivers encouraged for public interest requests (journalists) (§ 203(4)(a))
 - d. May (or sometimes must) provide electronic copy in lieu of paper (§ 201(12))
 - e. May allow requester to make own copies (50 pages or less) (§ 201(9)(a))
- 20) No. 11: Make Your Appeals Appealing
 - a. *Deseret News v. Salt Lake County*:
 - i. No deference to non-public classification: “It would be incompatible with a governmental entity’s responsibilities under GRAMA to apply to a record request a review methodology which presumes that a requested record has been properly classified and then proceed to canvass GRAMA for statutory language that confirms its designation.”
 - ii. No rubber-stamp administrative review: “Here, the County was required to conduct a conscientious and neutral evaluation of the report’s GRAMA status without regard to existing designations or classifications.”
 - b. Appeal to Court or State Records Committee
 - i. Following exhaustion of administrative appeals, requester may appeal to State Records Committee or Court (§ 402)
 - ii. Political subdivisions may provide a right of appeal to court only
 - iii. State Records Committee: Hearing; no discovery; Committee may subpoena witnesses or documents; decision within 5 days
 - c. *Schroeder v. Utah Attorney General* (Utah Supreme Court)
 - i. Access to bank records of Envision Ogden
 - ii. District Court: public release of bank records obtained pursuant to a lawful subpoena would constitute unreasonable search and seizure under Utah Constitution
 - iii. Utah Supreme Court: there is no constitutional right to privacy that categorically exempts bank records from GRAMA