OVERVIEW OF GRAMA

Government Records Access and Management Act (1992)
(§ 63G-2-101, *et seq.* -- Statutes to 2010)

I. GRAMA has three main elements.

A. Establishes a general rule that all government records are public, with limited exceptions.

B. Requires state and local governments to classify their documents as either public or one of three kinds of non-public records and schedule records for retention.

C. Establishes records requesting procedures, fees, and appeals.

II. General rule that all records are public.

A. Has been the law in Utah since before statehood.

B. "Public" is always the default position. §§ 63G-2-201(2); 63G-2-301(4); 63G-2-306(2).

C. Exceptions:

1. If another state statute specifically classifies a record or record series as non-public, that specific law trumps the general rule of openness (example – state law makes juvenile court records confidential). § 63G-2-201(2).

2. If there is no specific state statute, then GRAMA recognizes that a record can be kept confidential if releasing the record "constitutes a clearly unwarranted invasion of personal privacy". § 63G-2-302(2)(d).

III. What's a record?

A. Government records are subject to GRAMA regardless of format – papers, books, photographs, maps, electronic files, audio tapes, video tapes, computer data, e-mail, micro-film – as long as it is possible to make a duplicate of the record. § 63G-2-103(22)(a).

B. A document is subject to GRAMA if the government receives, owns or keeps it – it is not necessary that the document be an official government record nor that it is required by law or business practice. § 63G-2-103(22)(a)(i); Conover v. Board of Education, 267 P.2d 768 (1954).

C. GRAMA considers some materials as non-records and therefore not subject to release or classification:

1. Materials owned by an employee, temporary drafts, copyrighted materials, personal calendars or notes, proprietary computer programs, junk mail, judicial or quasi-judicial decision-makers' notes. § 63G-2-103(22)(b).

IV. Four classifications of records.

A. Public records – the majority of government records and the official default position. GRAMA lists some records that are always public:

1. Laws, public employee salaries and other job-related information, final opinions and decisions, legal opinions, open meeting minutes, land records, initial police reports, payments to contractors. § 63G-2-301(2).

2. The list of public records is obviously not exhaustive, because of the default position that everything is public, with exceptions.

3. A record that is not public can become so if the person who is the subject of the record consents in writing to public release.

B. Private records – documents containing information about a specific person, where that person retains a privacy interest. Examples specifically mentioned in GRAMA include:

1. Medical data, unemployment or welfare eligibility, Social Security numbers, library records, home addresses and other personal identifiers, financial information, any information about a person where release would constitute a "clearly unwarranted invasion of personal privacy." § 63G-2-302.

2. Home addresses and other identifiers for "at-risk" government employees (judges and law enforcement) can be made private at the request of those employees. § 63G-2-303.

C. Controlled records – documents in a very narrow category that consists of medical or mental health information where the doctor or government says, "do not release the information to the subject of the records" (the patient). § 63G-2-304.

D. Protected records – documents about governmental operations where the government retains a privacy interest. Examples specifically mentioned in GRAMA include:

1. Trade secrets, test questions and answers (such as civil service or university), real property values before a sale is completed, information that would jeopardize life or safety, attorney-client records, minutes of

closed meetings, information concerning government audit or investigation procedures, material relating to jail security. § 63G-2-305.

V. Requesting process.

A. A records request and the government's response are governed by GRAMA.

1. A local government can establish its own records request and response procedures by ordinance, but these cannot materially depart from GRAMA requirements. § 63G-2-701.

B. A requestor needs to identify with specificity the material wanted and needs to give his or her name, phone number and address. The government can require that the request be in writing. § 63G-2-204(1).

C. The government is required to respond within a specific deadline – usually within ten days after the request. § 63G-2-204(3).

1. The deadline can be shortened to five days if the requestor is a reporter and needs the record for publication. § 63G-2-204(3).

2. The deadline can be extended (but not for an unreasonable or lengthy period) if the request is for a voluminous amount of records, the records are being currently used by the government, responding to the request requires extensive editing, or legal advice is needed to respond to the request. § 63G-2-204(5).

D. The government can charge the requestor for the costs of duplication, including some employee time and indirect costs. The government can not charge if the requestor only wants to view the records or will do his or her own copying. § 63G-2-203.

E. If the records request is for material that is part public and part non-public, the government is required to grant the request and edit out materials that are non-public. § 63G-2-308.

F. If the government declines, in whole or in part, the records request, it must do so in writing, listing the reasons for non-disclosure (citing a statute) and explaining the process for appeal of that denial. § 63G-2-205.

G. Appeal goes to the county's "chief administrative officer" and then to the State Records Committee. A county can adopt an ordinance setting its own appeal process (for instance, in Salt Lake County, an appeal goes to an internal administrative board and then to the County Council). Any further appeal is to District Court. § 63G-2-401.

VI. Records Retention.

A. GRAMA requires that local governments adopt a retention schedule for the various records they hold – this is used to determine when records are no longer necessary and may be destroyed. § 63G-2-701(1).

B. GRAMA does not establish any specific retention schedule requirements, but a county should retain records for a reasonable time based on business need, potential litigation, and similar considerations. (Without any specifics regarding retention in the statute, a local government would be well-advised to adopt its own retention standards.)

C. A county is required to file its retention schedules with State Archives and if the State thinks a county's retention schedule is too short, it may require the county to forward the particular record to the State for additional retention. § 63G-2-701(1)(g).

VII. Penalties and Remedies.

A. A government officer or employee may be subject to prosecution for a class B misdemeanor for intentionally disclosing confidential documents, for improperly gaining access to or using confidential documents, or for refusing to disclose a record which should be available under GRAMA. § 63G-2-801.

B. Civil enforcement of GRAMA includes injunctive relief and attorneys' fees. It is a defense to civil liability for improper release of records under GRAMA if a government employee reasonably relied on a records requestor's apparent evidence of legal authority to obtain a record. §§ 63G-2-802; 63G-2-803.

C. County employees are subject to employment disciplinary action for GRAMA violations. § 63G-2-804.

VIII. "Step Two" in the GRAMA process.

A. GRAMA specifically provides that, even if a record is legitimately classified as non-public, the government may still decide to disclose the record. § 63G-2-201(5).

B. Utah court decisions and decisions of the State Records Committee have heavily relied on this second step in the process and have held that non-public records should still be released if the public interest in disclosure outweighs the privacy interests in non-disclosure.

C. Interest from the news media, in a matter of broad public interest or controversy, may be sufficient to actually require, not just permit, disclosure of an otherwise confidential record.

D. Deseret News v. Salt Lake County, 182 P.3d 372 (2008): The Utah Supreme Court recently issued a decision which very strongly required the County to disclose records regarding an employee disciplinary matter.

1. The Court acknowledges a legislative intent that records be open and public.

2. The County should have examined the individual investigative record at issue and should have made its classification decision based on the content of that record, not a blanket classification decision, made in advance and generally applicable to all such records.

3. GRAMA requests should not be adversarial combat, but an impartial balancing of public interests. Government's goal should be to achieve the goals of GRAMA, not to support its own preference in classification.

4. Misconduct by public employees in the government workplace is a matter of strong public interest. Employees have little or no personal privacy interest in such episodes. Government accountability outweighs personal privacy interests.

GOVERNMENT IN THE SUNSHINE

UTAH CASE LAW

GRAMA

A. PRE-GRAMA DECISIONS:

1. Conover v. Board of Education: *Meeting Minutes – When is a document covered?*

A citizen requested copies of the minutes of a meeting of the Board of Education of the Nebo School District. At issue is whether the minutes were considered available to the public before they had been approved by the school board in a subsequent meeting. Held: The minutes of a board meeting may be made available to the public as soon as they are transcribed (for instance, from short-hand) and before they have been formally approved by the Board. A document might be considered open and available to the public whenever the government holds the document as a "convenient and appropriate method of discharging public duties, regardless of whether it is expressly required by a specific statute."

Conover v. Board of Education, 267 P.2d 768 (Utah 1954).

2. Redding v. Brady (Redding I): *Privacy standards for public employees – The balancing test.*

The editor of a student newspaper at Weber State University requested the names of college professors and other staff along with their specific, gross salaries. College administration offered only salary ranges. The specific salary of a public employee is a public record. While the law protects documents which involve an individual's right of privacy, a public employee waives much of that privacy by accepting employment with the government. Public interests and privacy interests need to be balanced. (This might be a constitutional right.)

Redding v. Brady, 606 P.2d 1193 (Utah 1981).

3. Redding v. Jacobsen (Redding II): *Statutory rights versus constitutional rights.*

A year later, the same student editor of a college newspaper requested specific information regarding the salaries of school staff as explained in Redding I; however, in the interim, the Utah Legislature had changed the law and adopted a statute specifically classifying professors' salaries as not public. No competent or applicable case law establishes a constitutional right for public access to government records – all prior cases on the subject have

been based on a right created by statute. The First Amendment guarantees regarding free speech and press do not grant a constitutional right to government documents; therefore, changing the statute regarding public access may effectively preclude that access. (Not a constitutional right after all.)

Redding v. Jacobsen, 638 P.2d 503 (Utah 1980).

4. **Society of Professional Journalists v. Briggs**: ***The constitutional right to records access (or maybe not).***

The lawsuit was initiated regarding alleged misconduct by Daggett County elected officials, involving interference with the county assessor's statutory duties. The parties negotiated a settlement agreement and the Society of Professional Journalists (now there's an oxymoron) sought access to the settlement document. Based on slim case law precedent, the federal district court found that there may be a constitutional right of public access to government documents. The court, however, additionally found that "the Constitution is not, however, a Freedom of Information Act," and that under some circumstances public access may be properly limited.

Society of Professional Journalists v. Briggs, 675 F.Supp. 1308 (D.Utah 1987).

5. **Barnard v. Utah State Bar**: ***What's a state agency for public records access?***

A member of the Utah bar requested specific salary and benefits information regarding named bar employees. The bar offered salary ranges and a description of fringe benefits. Any right of access to documents depends on whether the agency at issue is a "public office" or "state agency" within the meaning of applicable statutory terms. Those terms do not include the Utah State Bar and it is not a public or state agency subject to public records requests. The mere fact that an organization is officially recognized by state statute does not make it a state agency.

Barnard v. Utah State Bar, 804 P.2d 526 (Utah 1991).

6. **State v. Archuleta**: ***Constitutional right to public access – Limited by criminal defendant's right to a fair trial.***

Archuleta was charged and prosecuted for a gruesome torture homicide in which the court, upon the prosecution's motion, sealed all records at the pre-trial stage. The Society of Professional Journalists and Deseret News intervened claiming access. The court found that there might be a constitutional right to public access where there has been (1) a tradition of access in the past and (2) public access plays a significant positive role in the government process. This constitutional right is not, however, absolute and may be limited by a criminal

defendant's right to a fair trial. The court found that the two conditions are met regarding public access to criminal preliminary hearings but found that the documents at issue were so sensitive and sensational that public release might affect the defendant's rights. Further, the information presented in the preliminary hearing may later be found inaccurate or inadmissible. There is no right to public access regarding objects, tangible items or similar materials – only documentary materials are covered.

State v. Archuleta, 852 P.2d 234 (Utah 1993).

B. GRAMA RECORDS DECISIONS:

1. Graham v. Davis County Solid Waste Management District: *Charging fees for GRAMA requests.*

Residents of Davis County requested information regarding a contract between the district and a private provider; the district told Graham that the request would require significant work to reply and would generate charges of $280. Graham brought suit regarding the fees. The court found that GRAMA balances the public's right to access against "the government's interest in operating free from unreasonable and burdensome records requests." Further, the law protects government agencies from overwhelming requests by allowing reasonable fees which reflect the government's cost and inconvenience in responding to the request. When a request requires a government to collect and assemble numerous documents from various sources and put those documents in order, the government is entitled to charge a fee to "compile a record in a form other than that normally maintained by the government entity" (63G-2-203(2)). Fees must be reasonable and the government cannot charge to simply retrieve a single document out of a filing cabinet. The government has the burden to show that fees are reasonable. It is good policy for the government to explain fees beforehand so a requestor can modify or withdraw the request. The court found the $20 per hour fee charged was reasonable.

Graham v. Davis County Solid Waste Management District, 979 P.2d 363 (Utah App. 1999).

2. State v. Spry: *Prosecutor's duties in criminal discovery.*

Spry was charged with unlawful possession of a controlled substance. Her motor vehicle, after being impounded by the police, was destroyed by fire. Based on this and allegations that she was "roughed up," the police department Internal Affairs Division held a hearing regarding her complaint. The defendant maintained that during the discovery phase of her criminal prosecution, the prosecutor should have given her access to records regarding the Internal Affairs' investigation and the prosecutor should have recovered those documents from the police department pursuant to GRAMA. The court held that such disclosure is not the prosecutor's responsibility under the rules governing criminal discovery.

State v. Spry, 21 P.3d 675 (Utah App. 2001).

3. **Young v. Salt Lake County**: ***GRAMA appeal period – Court's jurisdiction – The effect of a more specific records statute.***

Young was terminated from employment with the sheriff's office and, in preparation for a grievance appeal, he requested the county provide records of other disciplinary actions regarding other deputies who had been investigated or disciplined for similar misconduct. The sheriff initially failed to respond timely to Young's records request and the county argued that his 30-day appeal period had lapsed; however, the sheriff finally answered the records request late, with a written denial. The court found that the appeal period ran from the late answer, not from the original "request-deemed-denied" date. It is not a violation of GRAMA for the government to make a late response to a records request. When a court reviews a record pursuant to a GRAMA appeal, the court is not bound by GRAMA's limitations and balancing requirements which apply when a court considers a subpoena for releasing non-public records under Section 63G-2-207. When a more specific statute regarding access to a specific type of government record prohibits or limits disclosure, that specific statute prevails, trumps GRAMA, and the GRAMA "balancing test" is not required.

Young v. Salt Lake County, 53 P.3d 1240 (Utah 2002).

4. **State v. Maestas**: ***A more specific records statute trumps GRAMA – Subpoenas under GRAMA.***

The defendant in an aggravated robbery prosecution was retried and the prosecutor sought to admit the pre-sentence reports prepared for the first trial as evidence of the defendant's guilt in the retrial. The statutes governing the public nature of a pre-sentence report establish specific limits regarding public release but also classify such reports as "protected" under GRAMA. The court examined the five statutory conditions under which a court may release a protected record pursuant to a subpoena and found that, in this case, not all five requirements or conditions were satisfied. Therefore, the court was not permitted to release the pre-sentence report and the prosecutor could not use it as evidence in the retrial.

State v. Maestas, 63 P.3d 621 (Utah 2002).

5. **Utah Department of Public Safety v. Robot Aided Manufacturing Center**: ***A more specific records statute trumps GRAMA.***

A private business sought access to records regarding all Utah drivers who had received moving vehicle citations during each month; this information would then be provided to insurance companies. The Driver's License Division declined to provide the records as requested due to classification under applicable driver license statutes. The court examined the interplay between GRAMA and a more specific statute and found that the GRAMA rule of openness is always trumped by a more specific statute that limits public access to a government record. In some cases, the GRAMA rule of openness can be reconciled with another statute;

however, when that is not possible, the other specific statute controls. It is not necessary that the other applicable statute specifically state it trumps GRAMA.

Utah Department of Public Safety, Drivers' License Division v. Robot Aided Manufacturing Center, Inc., 113 P.3d 1014 (Utah App. 2005).

6. **Jensen v. Utah:** ***The federal courts will give deference to GRAMA.***

In examining a subpoena regarding discovery in the Parker Jensen chemotherapy case, the U.S. Magistrate (Paul Warner) gave deference to Utah's GRAMA and held that the federal court would not grant a subpoena seeking documents classified as non-public under GRAMA until it had gone through the subpoena standards and limitations set out in GRAMA Section 63G-2-207.

Jensen v. Utah, 247 F.R.D. 664 (D.Utah 2007).

7. **Deseret News v. Salt Lake County:** ***GRAMA purpose clause and balancing test – Invasion of privacy – Privacy standard for public employees.***

The county hired outside attorneys to conduct an investigation regarding allegations of sexual harassment and management cover-up in the county clerk's office. The attorneys conducted interviews and prepared an extensive report regarding their findings; pursuant to county personnel policies, such reports were generically classified as either protected or private records. The court examined GRAMA's provisions regarding public policy and legislative intent and found a strong acknowledgment of a right to public access and the balancing of interests favoring open disclosure of a document compared to interests which favor that document's confidentiality. The court found that the county should have examined the individual investigative report and made a GRAMA classification decision based on that report's content, not based on the generic classification in the personnel policies. The government's response to a GRAMA request should not be "adversarial combat;" rather, the government's goal should be to achieve GRAMA's purpose of open and public information and balancing of public interests. While sexual matters often involve a strong expectation of privacy, misconduct by public employees in a government workplace is a matter of public interest in which employees have no significant personal privacy interests. Government accountability, especially where there are allegations of a management cover-up, outweigh personal privacy interests.

Deseret News v. Salt Lake County, 182 P.3d 372 (Utah 2008).

8. **Southern Utah Wilderness Alliance v. The AGRC**: ***Records are presumptively public – discussion of GRAMA's application to attorney work product and attorney-client privilege – GRAMA "drafts."***

SUWA requested records from the AGRC regarding the status of R.S.2477 roads kept on AGRC's GIS system. The state refused to release the records based on attorney-client privileges and other reasons. In requiring the state to release the records, the court rejected the state's argument that statutes relating to AGRC records do not specifically provide that those records will be considered "public" under GRAMA; the court responded with the GRAMA general rule that all records are presumptively public and this presumption is trumped by a specific state statute which provides that a record is not public. Regarding attorney work product, the court held that, in accordance with the rules of civil procedure and evidence, materials protected under this exception must have been prepared solely for litigation and not in the ordinary course of business. Further, to be protected, the record must contain "core" mental impressions or legal theories. The R.S.2477 data, though used by the AG for litigation purposes, was not prepared solely for litigation but in the ordinary course of business based on the AGRC enabling legislation. In regards to the attorney-client privilege, the court recognized that simply having an attorney-client relationship, by itself, is not sufficient to invoke the privilege. Rather, the information is given to the attorney by the client in order to secure legal advice and is given in confidence; the court found these two requirements were not met because GIS files were received from a variety of parties and were created for broad use by many agencies and private parties, not just for the AG. Lastly, the court held that the GIS records were not GRAMA "drafts," as they were treated as "records" by the AGRC statute and had been circulated broadly beyond just the originators and their supervisors. The GRAMA basis for denial based on duplicate records requests applies only to requests made to the same government agency, not to a different agency.

Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, 200 P.3d 643 (Utah 2008).

C. STATE RECORDS COMMITTEE DECISIONS:

(www.archives.utah.gov/src/srcappeals-1992-1994.html)

1. **Chamber of Commerce v. Utah Attorney General**: ***Balancing test – Release even when properly classified as confidential.***

The U.S. Chamber of Commerce and others requested that the attorney general provide information regarding the AG's process for selecting outside counsel to assist the State regarding the tobacco litigation and settlement. The attorney general had classified these documents as protected under both the "impair governmental procurement proceedings" and attorney/client provisions of GRAMA. The committee found some of the documents were properly classified as protected while others were not properly classified. Regardless of the propriety of the classification, the state records committee applied the GRAMA balancing test and found that the public interest in the matter was so broad and significant that it outweighed any interests

favoring restriction of access, and ordered disclosure. This decision may rest partly on the fact that much of the tobacco litigation and settlement process was no longer pending.

U.S. Chamber of Commerce v. Utah Attorney General's Office, State Records Committee Appeal 01-06 (July 2001).

2. **Mr. Pooperscooper v. Murray City:** ***Government mandates regarding personal information – Privacy interests.***

The president of Mr. Pooperscooper, Inc., relied on lists of dog license owners supplied by the county and various municipalities for generating customer lists for commercial solicitation purposes. The records committee found that such lists were properly classified as "private" and the cities could, therefore, deny the request. The committee was, apparently, influenced by the fact that dog owners must provide their home address and other identifying information to city and county animal control under penalty of law.

Mr. Pooperscooper, Inc. v. Murray City, State Records Committee Appeal 02-06 (May 2002).

3. **Brent Poll v. South Weber City:** ***Attorney/client confidence.***

Mr. Poll requested certain information of South Weber City, including access to legal opinions which the city attorney had prepared regarding a planning and zoning matter. The committee found that GRAMA's attorney/client privileges are designed to encourage candor between a government's representatives and its attorney and is the oldest of the common law privileges recognized as legally confidential. The committee reviewed the opinions in camera and found that they fit within the definition of attorney/client confidence. Public interest in disclosure did not outweigh the government's interest favoring restriction of access.

Brent Poll v. South Weber City, State Records Committee Appeal 02-07 (July 2002).

4. **SUWA v. Utah Attorney General:** ***Protected records – Balancing test – Release even when properly classified as confidential.***

The Southern Utah Wilderness Alliance requested information from the attorney general regarding applications for recordable disclaimers of interest regarding R.S. 2477 rights-of-way. The records committee found that the attorney general's office had properly classified the requested records as "protected" under those provisions of GRAMA protecting attorney/client confidences and work product (as well as other GRAMA sections). Notwithstanding, the records committee was persuaded that the public interest favoring access outweighed the interest favoring confidentiality, at least regarding several of the documents requested. Those documents were ordered released.

Southern Utah Wilderness Alliance v. Utah State Attorney General, State Records Committee Appeal 04-04 (May 2004).

5. **Steed v. Duchesne County**: ***Filing a local ordinance with the SRC – Disclosure regarding on-going litigation.***

Steed sought a variety of records from the county dealing with a then pending federal lawsuit against the county. The county attorney responded that access to the requested records should be subject to civil discovery and the Federal Rules of Civil Procedure. The committee noted that during a time when the federal court had issued a discovery stay order, the county was justified in not responding to the GRAMA request for any information which would have reasonably been covered by the court's discovery stay order. However, once the stay had been lifted, the committee found that disclosure under GRAMA is not trumped by the fact that information requested might also be governed by civil discovery in litigation. "The Committee concludes that the right to access public government records is not lost, and may not be impaired, when a citizen files a lawsuit against the governmental entity . . .." See also, Committee Decisions 05-01, Ostler v. State of Utah, and 05-02, Salt Lake City v. SLC Mayor's Records Appeals Board, for similar holdings regarding GRAMA access in lieu of or in addition to civil discovery in pending litigation, including the application of discovery stay orders.

Joseph Steed v. Duchesne County, State Records Committee Appeal 04-17 (Dec. 2004).

6. **Schwarz v. University of Utah**: ***Broad records request and reasonable specificity requirement.***

Schwarz had filed with the University of Utah a records request for any and all records regarding herself (including misspelled as Schwartz); records regarding Mark C. Rathbun (including under his alias "Mark deRothschild"); any records regarding the Church of Scientology; any records regarding scientology founder L.R. Hubbard; and any records regarding former President Dwight David Eisenhower. Further she requested that the search be conducted "in all your university components, all divisions and all offices, in all your records systems from present time as far back as you can." The committee found that -- considering the breadth of the requests and the vast quantities of records held by university administration and its various departments -- the records request failed to comply with GRAMA's requirement that a record request be made with "reasonable specificity." The committee found that the requestor had not described the records sought with specific detail.

Barbara Schwarz v. University of Utah, State Records Committee Appeal 05-04 (Feb. 2005).

7. **Salt Lake Tribune v. Utah Dept. of Transportation**: ***Personal notes and communications on government emails are protected from disclosure.***

The Tribune filed a request with UDOT for records regarding I-15 construction contracts, including requests for phone, text and email messages to and from UDOT's executive director and other employees. UDOT provided some of the information requested but refused to disclose certain text and email messages which it characterized as personal notes or private

communications. The records committee was not persuaded by the Tribune's argument that personal or private communications sent through a government owned computer or telephone system and regarding a matter of great public interest negated a personal expectation of privacy. Rather, the committee observed that, based on GRAMA's definitions, such information is not even considered a "record" pursuant to GRAMA definition.

Salt Lake Tribune v. Utah Dept of Transportation, State Records Committee Appeal 10-23(Jan. 2011)

UAC GRAMA Training

Status of GRAMA: - post HB477 and the GRAMA Working Group

August 10, 2011

I. HB477 – background & brief history

A. HB 477, Government Records Amendments, sponsored by John Dougall, was introduced in the Legislature on March 1 and passed March 4, 2011. While the bill made many changes, some only technical, the critical changes to the law and the speed with which it passed set off public protest. Some of the changes included:
   a. Eliminating the intent language;
   b. Modifying the definition of a record to exclude voice mail, instant messages, video chats, and text messages;
   c. Modifying the Protected record status of a variety of records, such as communications between legislators and staff, records being prepared by a legislator, and personal email addresses.

B. Some of the reasons listed for the bill the Senate's website: (condensed from http://www.senatesite.com/home/hb477/, go to the site for a complete list):

- GRAMA has been used as a tool for fishing expeditions.
- GRAMA was written into Utah Code twenty years ago - it's not up to date on electronic communications.
- GRAMA requests are too broad: one city had a request for the entire parking enforcement data base since 2000 – more than a million lines of data – looking for information on one vehicle.
- GRAMA requests can be time-consuming.
- As GRAMA requests increase in scope they get more expensive.
- GRAMA does not protect the privacy of constituents. People write their legislator and often disclose personal information in confidence, not knowing that GRAMA allows anyone to access that information.
- GRAMA does not protect personal email addresses or other online identifiers a person may want to keep private.

The response from the House's website, Vox Populi, http://www.utahreps.net/uncategorized/house-bill-477

C. On March 25, 2011, in a special session, the Legislature passed HB 1001 which repealed HB 477.

D. **INTENT LANGUAGE TO H.B. 1001 (bill that repealed HB477)**

On motion of Representative Christensen, the House voted to print the following intent language in the House Journal.

"The intent of the Utah House of Representatives in voting to repeal former HB 477 is to allow a working group that has been formed to meet and study and hold public hearings over a fixed time period and then recommend to the Utah Legislature those changes in current statute that will result in the best public policy for our state. Those committee members consist of assigned Legislators, business, media and community leaders and other respected professionals and members of the public all of whom have significant backgrounds and experience in the matters encompassed within the current code known as "GRAMA". (63G–2–101 et. sec.)

Of great concern to the House is the current lack of sufficient express recognition and protection in statute for the reasonable privacy and confidentiality interests of individual citizens and constituents who communicate with and share their personal concerns and circumstances with their elected representatives.

The vote to repeal former HB 477 and the formation of the working group and the further dialogue and the ability to reconvene if needed in a later special session as may be called by the Governor with the benefit of such added deliberations are desired by the House to ensure that the interests of all citizens are fully considered and protected through the legislative process."

**NOTE: This information was presented by Rep. Christensen at the last meeting of the GRAMA Working Group.

II. GRAMA Working Group

A. Creation: Legislative leaders announced on March 21st the creation of a working group charged with bringing Utah's open records law into the 21st Century. Their first meeting was Wednesday, March 23rd. Their last meeting was June 22, 2011.

B. Working Group Members

House of Representatives:
John Dougall, R-Highland
Holly Richardson, R-Pleasant Grove
Brian King, D-Salt Lake City
Steve Handy, R-Layton

Senate:
Steve Urquhart, R-St. George
Curt Bramble, R-Provo
Stuart Adams, R-Layton
Patricia Jones, D-Salt Lake City

Governor's Office:
John Pearce – General Counsel

Attorney General's Office:
Laura Lockhart – Assistant Attorney General

League of Cities and Towns:
Mark Johnson – Ogden City

Traditional Media:
Randy Wright – Daily Herald
Linda Peterson – Valley Journals

Geoff Liesik – Uintah Basin Standard
Paul Edwards – Deseret Media Group
Jeff Hunt – Utah Media Coalition

New Media:

Jason Williams – KVNU-FTP host and blogger
Jesse Stay – Social media technologies consultant
LaVarr Webb – Utah Policy Daily

Public Members:

Michael Wilkins – Former Supreme Court Justice
Janet Frank – Utah Valley Regional Medical Center
Liu Vakapuna – SLCC Student Body President
David Kirkham – Tea Party Leader
Phil Windley – Web & Technology Pioneer
Lane Beattie – Salt Lake Chamber

C. 36 Policy Questions

1. Is there any reasonable expectation of privacy for an elected official? If yes, what should be private? What should be public?

2. Does it make a difference if an elected official uses a publicly funded or a privately funded device?

3. When are the personal notes of a government official public records?

4. What personal records of an elected official should be protected, and what should be public? Should a government official be required to release personal notes created solely for his or her own use? If so, what constitutes a personal note? Does the form matter (handwritten, diaries, appointment books, computer files)? Does it matter if those notes are or are not related to policy or government duties?

5. Is there a difference between a digital conversation and a digital record? How should channels of communication like text messages, IMs, Email, video chat, Twitter DMs, Facebook Messages and voice mail be considered under the GRAMA statute?

6. How should we categorize the increasing new channels of electronic communication as they arise?

7. Who owns the records? The elected official, the elected body, or the company that provides the electronic forum? I.e. Facebook, Twitter? Who should archive these records?

8. Who should pay the real costs for searching and producing these records?

9. Does a citizen have an expectation of privacy when they contact their elected official?

10. Should records that contain information about a person's health be protected?

11. Should personal Email addresses be classified as protected records?

12. Should a lobbyist have any expectation of privacy when they contact an elected official?

13. The more complicated the rules for privacy become, the more complex and expensive the legal review in responding to records requests will be. Who should pay these costs?

14. Should the GRAMA statute contain intent language? If so, should the intent language be allowed to trump the actual text of the code?

15. Currently, GRAMA does not address which party has the burden of proof on an appeal to show that the public interest in disclosing a record outweighs the record's private or protected status. Who should bear this burden of proof?

16. What protections should be afforded to the internal and deliberative processes in the three different branches of government?

17. Is there any situation in which a deliberative process should be protected? Should private creative brainstorming play any role in the policy-making process?

18. Should the governor & legislature be allowed to discuss policy issues with staff in private before they take a public policy position? After a bill is passed or policy is made public, does this protection remain or open up retroactively?

19. Should elected officials' discussions with their staff be presumed to be protected or presumed to be open? Under what conditions should elected officials' communications with staff be presumed to be private?

20. Is there a time-frame equation that could be useful in making information public? I.e. records presumed protected for a certain amount of time, then presumed public.

21. Should any person or organization be given a special exemption from fees associated with a GRAMA request?

22. If the request requires the review or search of a large number of records, extensive redacting or other work, legal review, or technical expertise, who should be required to cover the cost of the request?

23. Should we revise the current GRAMA policy of not charging for the first 15 minutes spent to fulfill a request?

24. Should the wise use of taxpayers' funds be part of the assessment equation when assessing fees? In other words, should governments have the ability to waive fees if it is in the public's best interest?

25. Should the audit records of the State Auditor and Legislative Auditor General be protected if their disclosure would interfere with an audit, investigation, or internal procedures?

26. Should attorneys representing a taxpayer-funded government entity have the same protections as attorneys representing private entities when creating documents or having communication about reasonably anticipated litigation?

27. Should records relating to fiscal notes on legislation be protected until the legislation has passed or the session has ended?

28. What role does private communication among elected officials, constituents, and interested parties play in formulating good policy? What effect would classifying a record public or private records have on the legislative process?

29. What role should our legislature's part time status play in the classification of information?

30. Looking forward, how can we automate the legislative process of archiving records and properly making them available?

31. How does the decentralized and geographically dispersed structure of the legislative branch affect record production and storage of records?

32. Is there a defining line or equation we could use to discern between the private life and public life of a elected official? Is there a same or similar line that would also work for a governor, citizen, activist, lobbyist, media representative or a government employee?

33. Is there a role for confidential discussions in the deliberative process in the different branches of the government?

34. Given recent advances in technology we have experienced an exponential increase in the volume of potential records available, and a concurrent increase in demand for those records. Given the reality of limited government resources, how should this workload be managed?

35. What technological advances do you foresee over the next 10 years that will effect how we might archive and access public records?

36. What further policy questions should we consider as we bring GRAMA into the next century?

III. Sub Committee Recommendations (with links to content)

- Statutory Definitions Findings: http://www.gramarevisited.com/wp-content/uploads/Statutory-Definitions.pdf (This subcommittee referenced their recommendations with exhibits that are included in this pdf.)
- Emerging Technology Findings: http://www.gramarevisited.com/wp-content/uploads/Emerging-Tech.pdf
- Cost and Timeliness Findings: http://www.gramarevisited.com/wp-content/uploads/CostTimeliness.pdf
- Simplification & Centralization Findings: http://www.gramarevisited.com/wp-content/uploads/Simplification.pdf

IV. & Summary and Assessment (summarized by Salt Lake County Records Management Archives.)

Emerging Technology Subcommittee

- Definition of a Record: clarify it by adding "Where the record was created in pursuit of a legal obligation or in the transaction of public business".
- Text messages: IF a text message (SMS message) is a record, it should be classified as transitory, meaning only keep it for as long as an administrative reason exists. However, text messages may not be able to be reproduced by the government agency, in which case it's not a record.
- Personal notes: personal notes or communications prepared in a private capacity should remain non-records, regardless of the technology used to create them (referencing texts, emails, etc).
- Record series: There are 15,000 record series the state archives has identified as Public; these records should be classified upon creation and when final made immediately available to the public.
- Record Series: The public finds it confusing to get access to documents from various jurisdictions (state and local). Since the state has identified over 25,000 retention schedules, consistency in how records are managed and classified should be established.

Cost & Timeliness Subcommittee

- Public Records: Public records that are clearly public should be made available immediately at no cost, and each government entity should be required by statute to identify public records and make them available in a centralized, searchable online database. The database should be created by the state.
- Public records that require time and effort to make available: Establish a standard fee formula by statute for state and local governments to use. It would include full employee labor costs (including benefits), overhead and administration. Each government would use this to establish their fees. Fees should be published so they are available and provide more guidance on when/how to apply a fee waiver.
- Training: require online or in-person GRAMA training or certification.
- Using GRAMA: Provide easy online access and information on how to use GRAMA and publicize this information:

Simplification & Centralization Subcommittee

- Training: records officers for state and local government should be required to take GRAMA training on an annual basis to be certified. The training should be provided by the State Archives.
- Records officers/contacts: State Archives should provide a statewide list of every records officer on their website with training certifications.
- GRAMA Ombudsman: This person or office should be established in the State archives and be a resource to requestors and responders; help inexperienced requestors, have authority to mediate disputes, etc. This person should also have legal training, would be appointed by the state (director of administrative services), and have to file an annual report to the Legislature.

Statutory Definitions Subcommittee

- Attorney Privileges: The exceptions in GRAMA for record subject to attorney-client privilege and work product should be made consistent. This would change the language in GRAMA to state that Protected records are those subject to attorney client privilege and those prepared for or by an attorney.
- Legislative Intent language and balancing test: They recommend GRAMA's legislative intent language should stay and should be made consistent throughout GRAMA by incorporating the legislative intent language everywhere the balancing test language is used in GRAMADefinition of a Record: the committee could not agree on whether texts, instant messages, video chat or other means of communication/social media was a record or not. They did recommend that the section on personal communications prepared by a government employee in their private capacity be more clearly defined. Service of Notice of Appeal: they recommend that the party who appeals to the State Records Committee also be required to serve notice to the government agency
- Constituent correspondence: this issue concerns disclosing emails and other records sent by constituents to state legislators; the subcommittee could not agree whether these records should be disclosed.

V. What's next?

A. The chair of the GRAMA Working Group, Lane Beattie, should report the group's findings to the Legislature, the Government Operations and Political Subdivisions Interim Committee. He last reported an update to them in May; the next scheduled meeting of the Interim Committee is set for September 21, 2011 at 9:00 am.

B. It will be up to special interest groups, professional association, legislators or other interested parties to draft legislation for the 2012 session to change GRAMA. Any new legislation could include some of the Work Group's recommendations, all of them, or some we haven't yet imagined!

VI. More Information on the GRAMA Working Group

http://www.gramarevisited.com/

VII. Contact information:

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Salt Lake County
records management
& ARCHIVES

Check out our blog @ http://www.slcoarchives.wordpress.com

GAVIN ANDERSON'S PERSONNEL RECORD

Anderson's obnoxious neighbor (mother-in-law, creditors, paternity suit plaintiff, whatever) comes into the Personnel Office and wants the following information on Gavin. Mark in the blank "P" for public information available to anyone and "C" for confidential information. Reference GRAMA Sections 63G-2-301(2)(b); 63G-2-301(3)(o) and (t); 63G-2-302(1)(a), (b), (c) and (f); 63G-2-302(2)(a), (b) (d).

_____ 1. Name
_____ 2. Gender
_____ 3. Unemployment Eligibility
_____ 4. Prior Jobs before the County
_____ 5. Medical History
_____ 6. Salary Range
_____ 7. Exact Salary
_____ 8. Job Title & Description
_____ 9. Library Card
_____ 10. Business Address & Phone
_____ 11. Home Address & Phone
_____ 12. Social Security Number
_____ 13. Educational Background
_____ 14. Insurance
_____ 15. Marital Status
_____ 16. Payroll Deductions
17. Disciplinary Action/Grievances:
_____ a. Commenced but not yet resolved
_____ b. Resolved in Gavin's favor
_____ c. Resolved against Gavin
_____ 18. Personnel Record in general
_____ 19. Performance Evaluations
_____ 20. Hours Worked
_____ 21. Dates of Employment
_____ 22. Race
_____ 23. Religion
_____ 24. Disabilities
_____ 25. Personal Recommendations
_____ 26. Records where disclosure would constitute an unwarranted invasion of personal privacy