

GRAMA

Government Records Access and Management Act

and

BUSINESS CONFIDENTIALITY

GRAMA is about the records, documents, information we create and keep as an agency of the State of Utah.



What is a record?

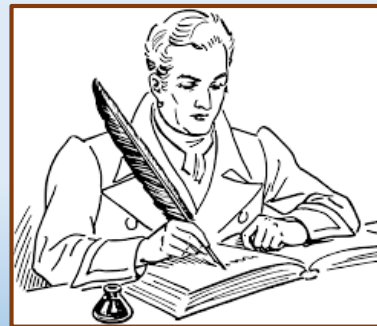
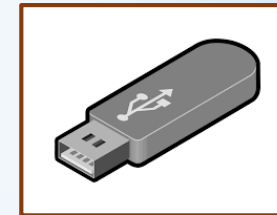
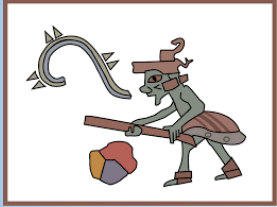
63G-2-103(22)

(a) "Record" means a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics:

(22)

- (a) "Record" means a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics:
 - (i) that is prepared, owned, received, or retained by a governmental entity or political subdivision; and
 - (ii) where all of the information in the original is reproducible by photocopy or other mechanical or electronic means.
- (b) "Record" does not mean:
 - (i) a personal note or personal communication prepared or received by an employee or officer of a governmental entity:
 - (A) in a capacity other than the employee's or officer's governmental capacity; or
 - (B) that is unrelated to the conduct of the public's business;
 - (ii) a temporary draft or similar material prepared for the originator's personal use or prepared by the originator for the personal use of an individual for whom the originator is working;
 - (iii) material that is legally owned by an individual in the individual's private capacity;
 - (iv) material to which access is limited by the laws of copyright or patent unless the copyright or patent is owned by a governmental entity or political subdivision;
 - (v) proprietary software;
 - (vi) junk mail or a commercial publication received by a governmental entity or an official or employee of a governmental entity;
 - (vii) a book that is cataloged, indexed, or inventoried and contained in the collections of a library open to the public;
 - (viii) material that is cataloged, indexed, or inventoried and contained in the collections of a library open to the public, regardless of physical form or characteristics of the material;
 - (ix) a daily calendar or other personal note prepared by the originator for the originator's personal use or for the personal use of an individual for whom the originator is working;
 - (x) a computer program that is developed or purchased by or for any governmental entity for its own use;
 - (xi) a note or internal memorandum prepared as part of the deliberative process by:
 - (A) a member of the judiciary;
 - (B) an administrative law judge;
 - (C) a member of the Board of Pardons and Parole; or
 - (D) a member of any other body, other than an association or appeals panel as defined in Section 53A-1-1601, charged by law with performing a quasi-judicial function;

What form does a record take?
How is a record received?
How is a record stored?



A record is not defined by the form in which it is created, received or stored.

A record is about the information.

**Think
function over
form**

Who must provide records in response to a GRAMA request?

All Agencies

All Groups

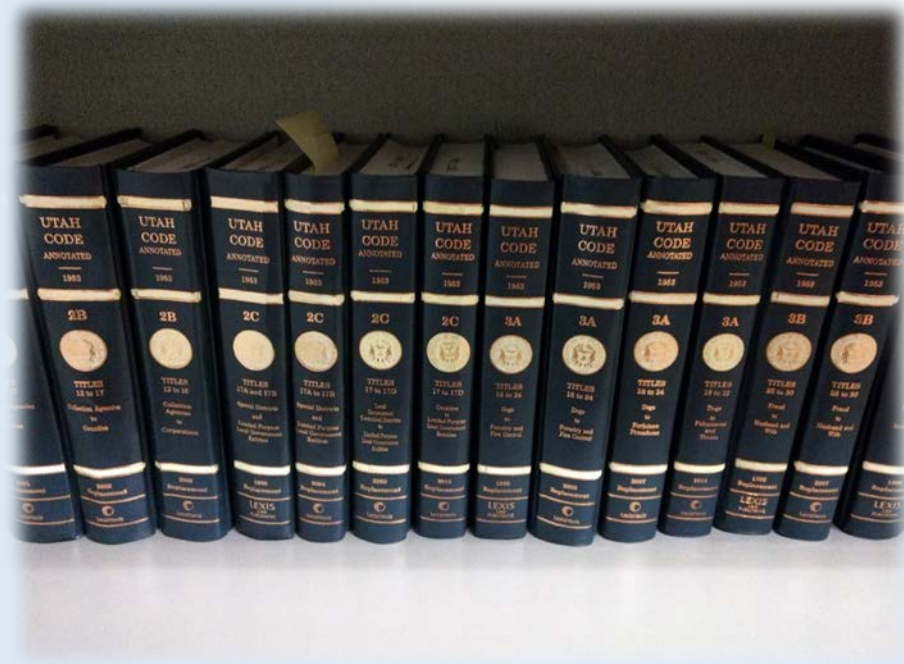
All Employees

All Volunteers

Every record (no matter the form) produced for the State of Utah by an employee (or volunteer) of the State of Utah is the property of the State of Utah.

GRAMA is a statutory requirement (it's the LAW).

It is not something “the legal group wants,” or “for the records group.”



All agencies are required to answer requests for records.

How does this impact SITLA's Board of Trustees (YOU)?

If you create any record while in your capacity as a board member, that record is:

Property of the State of Utah; and
Subject to the GRAMA statute.

63G-2-103 Definitions

(11)(b) "Governmental entity" also means:

(i) every office, agency, board, bureau, committee, department, advisory board, or commission of an entity listed in Subsection (11)(a) that is funded or established by the government to carry out the public's business;

What records might you create?



Right now you are creating an audio record.

When there is an appeal to the Board, you create pleadings and associated records.

You create policy records.

A presentation (such as this one), is a record.

Letters and Email that you exchange on Board business are all records.



You have
been busy.

What happens to those records?

We've got you covered.

The Board Secretary is the custodian of the audio tapes, minutes, exhibits, agendas, and other materials created for a board meeting.

Appeals to the Board (Adjudications) are treated like court proceedings. The Board Secretary acts as the clerk of the court, the Records Manager acts as the court filing clerk. Those records become part of the official SITLA records.

Policies, letters, and other records are also managed by the Board Secretary.



WHAT HAPPENS WHEN SITLA RECEIVES A GRAMA REQUEST?

All requests are referred to and handled by the Legal Group.

The details of the request are sent to all agency employees with a request to produce all responsive documents.

The Legal Group reviews every record to make sure it:

1. Falls within the request;
2. Is or is not protected;
3. Is a SITLA record.

The records are sorted, reviewed again, and Bates numbered.

PRODUCTION LOG
GRAMA REQUEST

Bates	Number	Range	Description	Notes and Code	Produced
D216 AA	0001 - 0003		Email 2012-09-08, multiple parties	Redaction of cultural resource locations, attachment not produced due to cultural resource locations / 63G-2-305(26)	Partial
D216 AA	0004 - 0004		Attachment to D216AA 0001-0003, Archeological Mitigation Plan	Cultural resource locations / 63G-2-305(26)	No
D216 AA	0005 - 0005		Photo of site locations	Cultural resource locations / 63G-2-305(26)	No
D216 AA	0006 - 0010		Email 2012-09-08, multiple parties, attached 2012-09-03 letter from Irene Barrow (mentioned in D216AA-0001-0003)	Redaction of cultural resource locations / 63G-2-305(26)	Partial
D216 AA	0011 - 0018		Email 2012-08-22, multiple parties, attached Wintch letter 2012-08-22 re Cultural Affiliation, attached 2012-08 Past Peoples Consulting report	Sketch map D216AA 0019 not produced	Yes
D216 AA	0019 - 0019		Sketch map of burial from D216AA 0011-0018	Cultural resource locations / 63G-2-305(26)	No
D216 AA	0020 - 0029		Email 2012-08-22, multiple parties, attached 2011-04-22 Native American Agreement for Treatment of Human Remains	Redaction of cultural resource locations / 63G-2-305(26) and 16 U.S.C. 470hh Section 9(a); removal of map and legal description	Partial
D216 AA	0030 - 0031		Map and legal description from Native American Agreement for Treatment of Human Remains, attachments to D216AA 0020-0029	Cultural resource locations / 63G-2-305(26)	No
D216 AA	0032 - 0033		Email 2012-08-14, various parties, meeting		Yes

All records, whether produced or not, are placed on a production log. Records not produced are identified and the statutory reason for withholding the record is on the production log.

Digital copies of the records and the production log are produced.

A seemingly simple GRAMA request can cost the agency in time and resources.

This is a request SITLA worked on recently:

“In the interest of efficiency and out of respect for government time we would like to reduce our request to copies of all records and other documents referring or relating to the following issues:

1. The Northern Corridor and/or Washington Parkway.
2. SITLA lands in the proposed Zone 6, including but not limited to—
 - a. meeting minutes/communications regarding the Sept. 2017 follow up meeting to the “Storming and Norming” meeting of May 2017;
 - b. any expressions of interest, proposals, options, or offers to buy or develop the SITLA land; and
 - c. records indicating whether BLM and SITLA have considered any potential land exchanges.

This GRAMA Request is not meant to be exclusive of any other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.”

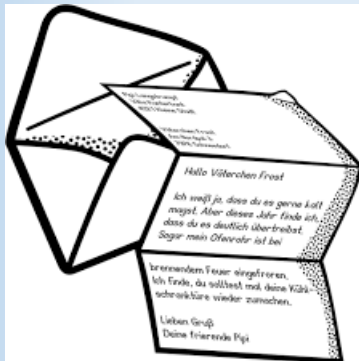
The time consuming phrase is “**all records and other documents . . .**” A variation of this wording appears in more than 90% of GRAMA requests received by SITLA.

Why is this a problem?

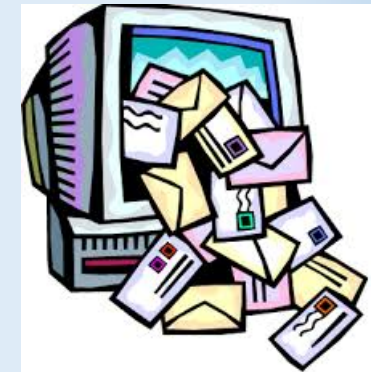
Records and documents include email.

Collecting and reviewing email requires many hours of staff time. Lots of staff time.

We have made efforts to reduce this time, but so much business now takes place via email, that we generate a large number of records.



Email chains are easier to produce than letter chains. As a result, we have far more correspondence to review.



The GRAMA statute allows agencies to charge for records produced.

Previously, SITLA charged between 10¢ and 40¢ per page for records produced.

However, the statute also allows agencies to charge for employee time, Section 63G-2-203.

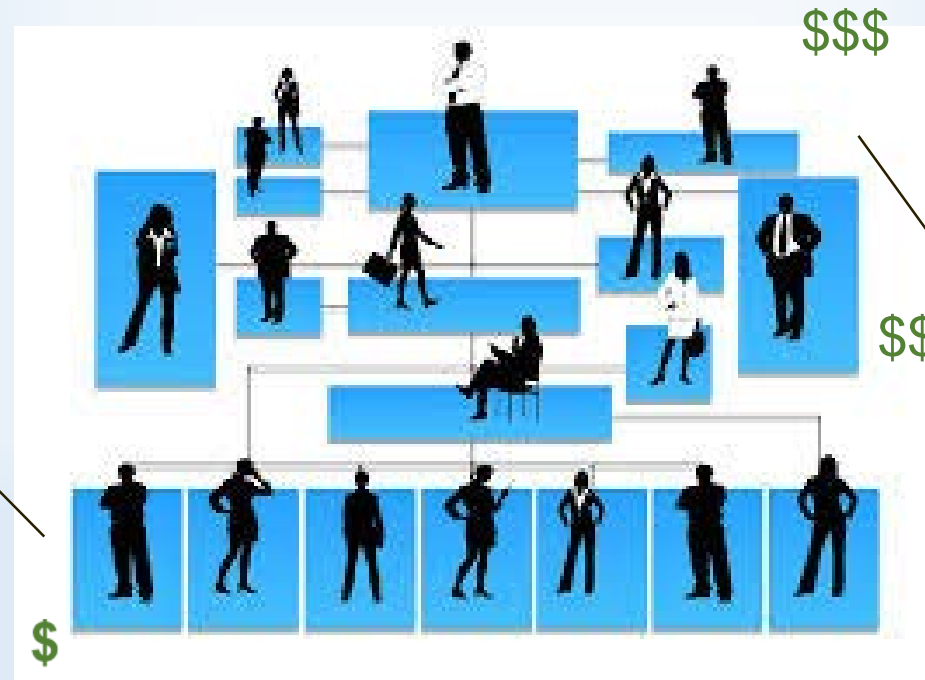
When Mike Johnson came onboard as Chief Legal Counsel, and I took over all GRAMA work, we reviewed the fees for GRAMA requests and made the decision to charge for staff hours spent responding to requests.



The statute states that: *an hourly charge may not exceed the salary of the lowest paid employee who has the skill to perform the request.* Which means:

General records for the group should be compiled by the staff member with the lowest salary who can do the work.

For example: Kim would not gather the sales records, it would be done by Diane or Linda, and we will charge at that rate.



Each person's individual records and email will need to be compiled by that person.

For example: Alexa would not transfer Kyle's email to Legal for review, Kyle would, and we will charge at Kyle's hourly rate for his work.

Responding to the request mentioned above took 81.75 staff hours.

The total cost of staff time was \$2,660.00.

The production log contained 648 records, all of which were complied by agency staff and reviewed by legal staff. Of those records, 28 pages were withheld as protected documents.

Had we charged per page at 10¢ per page, we would have collected only \$62.00 for more than 80 hours of staff time.

We are working on ways to further reduce the staff time and resources spent responding to GRAMA requests while still providing the public with access to records.

The screenshot shows the Trust Lands Administration website. The header includes the logo and name, a search bar, and a navigation menu with items like 'OUR AGENCY AND MISSION', 'BUSINESS GROUPS', 'POLICIES / RULES', 'COMMUNITY / STEWARDSHIP', 'RESOURCES', 'GRAMA', 'CONTACT US', and 'MAKE A PAYMENT'. The left sidebar lists 'RESOURCES' such as 'Compliance', 'Forms and Applications', 'Land & Lease Records', 'Maps (GIS)', and 'Fee Schedule'. The main content area is titled 'LAND & LEASE RECORDS' and contains text about searching for leases, a link for 'Trouble Viewing PDFs', and two columns: 'CONTRACT MODULE' with a list of 4 steps, and 'OWNERSHIP MODULE' with a list of 4 steps. Each module column includes a small image of a document or map.

SITLA's website provides the public access to Land & Lease Records.

We are moving to a new records management system that will allow better, faster, easier organization of our records.

We continue to work on ways to organize and retrieve email.

Transparency in government is important. However, the way the public uses GRAMA, it comes at a significant cost to agencies. We are making efforts to keep those costs from impacting our beneficiaries.

Another aspect of GRAMA concerns claims of business confidentiality.



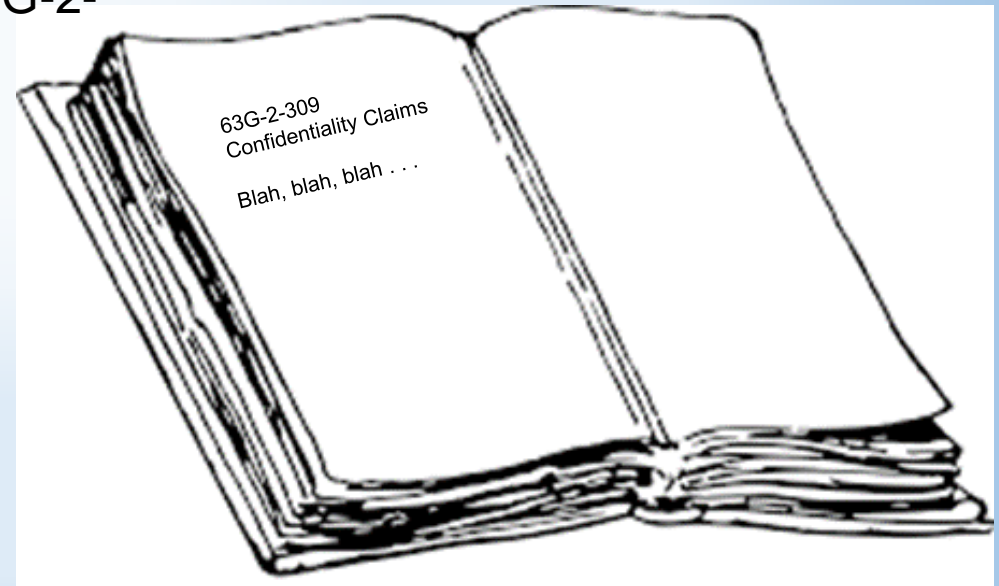
Lessees sometimes request that we keep certain records confidential.

At times, lessees assume that records are confidential.

Utah Code addresses business confidentiality claims:

63G-2-309 Confidentiality claims.

- (1)
 - (a)
 - (i) Any person who provides to a governmental entity a record that the person believes should be protected under Subsection 63G-2-305(1) or (2) or both Subsections 63G-2-305(1) and (2) shall provide with the record:
 - (A) a written claim of business confidentiality; and
 - (B) a concise statement of reasons supporting the claim of business confidentiality.

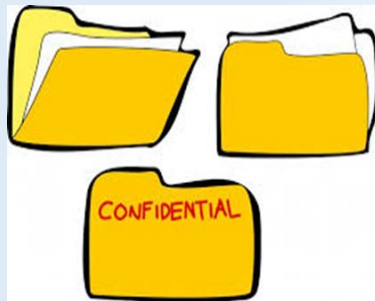


First, some things to unlearn.

1. Writing, typing, or stamping a document “confidential” does not make it confidential.



2. Placing a document in a file marked “confidential”, or including it with a group of records that are confidential, does not make that document confidential.



3. No special marking, wording, or phrase on the document makes it confidential for GRAMA purposes.



This is not to say that it is a bad idea to write “confidential” on a document, it is just that more is required.

63G-2-305(1) and (2).

No. 1 TRADE SECRETS

63G-2-305 Protected records.

The following records are protected if properly classified by a governmental entity:

- (1) trade secrets as defined in Section 13-24-2 if the person submitting the trade secret has provided the governmental entity with the information specified in Section 63G-2-309;

No. 2 UNFAIR COMPETITIVE INJURY

63G-2-305 Protected records.

The following records are protected if properly classified by a governmental entity:

- (2) commercial information or nonindividual financial information obtained from a person if:
 - (a) disclosure of the information could **reasonably be expected to result in unfair competitive injury** to the person submitting the information or would impair the ability of the governmental entity to obtain necessary information in the future;
 - (b) the person submitting the information has a greater interest in prohibiting access than the public in obtaining access; and
 - (c) the person submitting the information has provided the governmental entity with the information specified in Section 63G-2-309;



All three parts, a, b, and c, must be met under 63G-2-305(2) when seeking protection of records.

Both 63G-2-305 (1) and (2) refer to 63G-2-309,
which is where we started.



63G-2-305 (1) and (2) tell us WHAT can be protected.

63G-2-309 tells us HOW to protect it.

THINGS TO REMEMBER:

A written claim must be submitted with each and every record/document submitted that claims confidentiality.

The written claim must be submitted at the same time as, and attached to, the record/document.

The claim must be made according to 63G-2-305 and 63G-2-309.

The claim cannot be frivolous.

The claim must be specific as to why it is confidential.

Let's look at a sample request.

SAMPLE

CLAIM FOR BUSINESS CONFIDENTIALITY

LESSEE NAME: Budd's Boulder Busting Business

Clearly state it is a claim for business confidentiality.

Lessee's name or business

LEASE NUMBER: ML99999

The lease, contract, or event related to the record/document.

RECORD/DOCUMENT: Production Report

The type of record and/or the title.

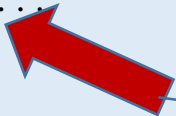
DATE: January 29, 2018

Date of submission of record with claim for confidentiality.

To the Director
State of Utah, School and Institutional Trust Lands Administration

I am making a claim for business confidentiality pursuant to U.C.A. §63G-2-309, for the attached document.

I make this claim based upon U.C.A. §63G-2-305(2)(a): disclosure of the production information contained in the attached document/report would result in unfair competitive injury to my company because . . .



The "because" is critical. If it is frivolous, we will not be able to protect the record. SITLA is bound by the statutory requirement to provide records.

. . . because . . .

I know you are waiting for the wording to follow “because”. You are not getting it.



Because . . .

We (anyone at SITLA) can't tell the lessee what to put for “because”, that would be giving legal advice.

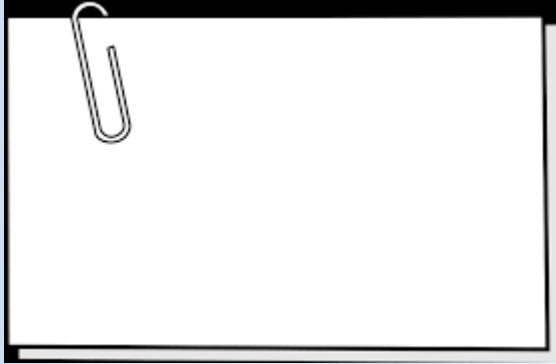


Another consideration: the protection might not be permanent. Some protection stops when a contract is signed.

Certain financial records can be protected under 63G-2-305.



Records may be protected by different statutes. The Legal team helps the lease managers determine what documents are considered confidential.



Keep the Claim for Business
Confidentiality attached to the document.

GRAMA requests can come years after a record is submitted and the best way for those of us currently working here and our future replacements to know what has been requested, is to have the actual Claim with the actual record.



SITLA will follow the statute regarding requests for business confidentiality.

We will notify anyone making a GRAMA request if there is business confidentiality protection on a record.

However, as with any GRAMA request, the person making the request can appeal our decision to withhold a record. Ultimately, the records might be produced after a records committee or court ruling.

The legal group and the records officers at SITLA are working to provide training on all these issues for all employees.