

## State Records Committee Appeal 2010-11

**BEFORE THE STATE RECORDS COMMITTEE OF THE STATE OF UTAH**

**ERIC PETERSON, REPORTER FOR THE CITY WEEKLY, Petitioner, vs.**

**UTAH ATTORNEY GENERAL'S OFFICE, Respondent.**

### **DECISION AND ORDER**

#### **Case No. 10-11**

By this appeal, Petitioner, Eric Peterson, a reporter for the Salt Lake City Weekly ("Peterson"), seeks access to the following: "all documents including emails and other correspondence, regarding TMI, LLC or TMI Enterprises, Tim Lawson or Jeremy Johnson, separately and/or together, for a period extending from January 1, 2008 through November 12, 2009." Mr. Peterson also appeals the denial of a "waiver" of the fees assessed by the Utah Attorney General's Office for its actual costs of providing Mr. Peterson the records responsive to his request.

### **FACTS**

On or about November 12, 2009, Mr. Peterson submitted a request for records to the Utah Attorney General's Office ("AG") asking for the above-referenced documents. Paul Murphy, Public Information Officer for the AG's Office, reviewed Mr. Peterson's request and determined that due to the nature and complexity of the request, the AG's Office would require "a deposit of future estimated fees" totaling \$240.00 to be paid before processing the request. Mr. Murphy notified Mr. Peterson of the deposit requirement via email on or about November 19, 2009. The same day, Mr. Peterson responded and inquired as to whether refining the scope of his request would reduce the fee assessed to which the AG's office replied that the estimated deposit was conservative and would not be waived.

On or about November 25, 2009, a "fee waiver" was requested by the City Weekly which was denied by Mr. Murphy on December 1, 2009. This denial contained a notice of the 30 day deadline to appeal the denial of the fee waiver. While there was email correspondence between City

Weekly and the AG's office, no appeal of the denial of the fee waiver was made until March 9, 2010 after Mr. Murphy notified Mr. Peterson that his request had been processed and an additional fee of \$600.51 would be needed to complete the response.

After receiving payment from Mr. Peterson and the City Weekly, the AG's Office responded to his request on February 17, 2010, by emailing two PDF files containing records responsive to Mr. Peterson's request. In addition, as part of this response, Mr. Murphy also sent a notice wherein he indicated that portions of Mr. Peterson's request were being denied by the AG's office because the records were classified as either "private" and or "protected." Mr. Peterson's March 19, 2010 appeal to Chief Deputy Attorney General, Kirk Torgensen also included an appeal of Mr. Murphy's access denial. On April 8, 2010 Mr. Torgensen denied Mr. Peterson's appeal reaffirming the basis cited in the previous denial.

Mr. Peterson filed a notice of appeal to the State Records Committee ("Committee") and an initial hearing was held on May 13, 2010. At the hearing, oral arguments were heard from the parties and certain documents were submitted by the AG's Office for an in camera review by the Committee. The hearing was continued to allow a complete review of the documents. See, Peterson v. Utah Attorney Gen.'s Office, State Records Committee Order No. 10-10. At a hearing held on May 24, 2010, the Committee completed its in camera review of the documents, ruled upon all remaining issues, and now issues the following Decision and Order.

#### **STATEMENT OF REASONSE FOR DECISION**

1. The Government Records Access and Management Act ("GRAMA") specifies that "all records are public unless otherwise expressly provided by statute." Utah Code Ann. § 63G-2-201(2). Records that are not public are designated as either "private," "protected," or "controlled." See, Utah Code Ann. §§ 63G-2-302, -303, -304 and -305.
2. A governmental entity may charge a reasonable fee to cover the governmental entity's actual cost of providing a record. Utah Code Ann. § 63G-2-203. A person who believes that there has been an unreasonable denial of a fee waiver may appeal the denial in the same manner as a person appeals when inspection of a public record is denied Section -203(6)(a). The adjudicative body hearing the appeal has the same authority when a fee waiver or reduction is denied as it has when the inspection of a public record is denied. Section -203(6)(b).
3. At the hearing, the AG's Office moved for dismissal of Mr. Peterson's appeal with regard to the fee waiver based on its position that the appeal of the denial of a "fee waiver" was untimely made to the head of the governmental agency, Kirk Torgensen. After hearing the arguments of the parties and based upon a preponderance of the evidence, the Committee is convinced that Mr. Peterson failed to submit a timely appeal. The denial of the waiver was made on December 1, 2009. However, Mr. Peterson and City Weekly did not appeal this denial until March 9, 2010, well after the 30 day deadline imposed by Utah Code Ann. § 63G-2-401(1)(a).

4. Records prepared by or on behalf of a governmental entity solely in anticipation of litigation that are not available under the rules of discovery, or records disclosing an attorney's work product, including the mental impressions or legal theories of an attorney or other representative of a governmental entity concerning litigation, are considered protected records if properly classified by governmental entity. Utah Code Ann. § 63G-2-305(16) and (17); Southern Utah Wilderness Alliance v. Automated Geographic Reference Ctr, 2008 UT 88, 200 P.3d 643, ¶¶25-29. The party asserting work-product protection must demonstrate that the documents were created to assist in pending or impending litigation, and a blanket assertion that the work-product doctrine applies is insufficient to meet that burden. Id. at ¶ 29.

5. Records created or maintained for civil, criminal, or administrative enforcement purposes that (1) could reasonably be expected to interfere with enforcement proceedings; (2) could reasonably be expected to interfere with investigations; or (3) would create a danger of depriving a person of a right to a fair trial or impartial hearing, are protected records if properly classified pursuant to Utah Code Ann. § 63G-2-305(9).

6. Records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy are private if properly classified. Utah Code Ann. § 63G-2-302(2)(d).

7. Based upon a preponderance of the evidence including the arguments of the parties and a review of the documents submitted by the AG's Office in camera, the Committee finds the remaining records submitted by the AG's Office contain public, private and protected records, and that the private/protected records include: (1) Records disclosing an attorney's work product, including the mental impressions or legal theories of an attorney or other representative of a governmental entity concerning litigation pursuant to Utah Code Ann. § 63G-2-305(17); (2) Drafts pursuant to Utah Code Ann. § 63G-2-305(22); (3) Records created or maintained for civil, criminal, or administrative enforcement purposes that could reasonably be expected to interfere with enforcement proceedings, ongoing investigations, or would create a danger of depriving a person of a right to a fair trial or impartial hearing are protected pursuant to Utah Code Ann. § 63G-2-305(9); and (4) Records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy are private if properly classified. Utah Code Ann. § 63G-2-302(2)(d). The table below adopted by the Committee specifically identifies each of the remaining documents submitted by the AG's Office and the Committee's classification determination for each document:

<b>BATES STAMP</b>	<b>DOCUMENT IDENTIFICATION</b>	<b>CLASSIFICATION OF DOCUMENT AS DETERMINED BY THE COMMITTEE</b>

Johnson, 1-43	Various emails, dated March 10, through April 29, 2010	<b>Drafts</b> Utah Code Ann. § 63G-2-305(22). <b>Public</b> Only the actual draft is not public. All documents, including e-mail comments that accompany the drafts are public.
Johnson, 44-55	E-mail dated April 30, 2010	<b>Attorney work product</b> Utah Code Ann. § 63G-2-305(17)
Johnson, 46	E-mail dated November 4, 2009	<b>Attorney work product</b> Utah Code Ann. § 63G-2-305(17)
Johnson, 47-49	E-mail dated July 30, 2009	<b>Public</b>
Johnson, 50	E-mail dated August 13, 2009	<b>Public</b>
Johnson, 51-53	E-mail dated September 29, 2009	<b>Public</b>
Johnson, 54-56	E-mail dated September 25, 2009	<b>Private</b> Utah Code Ann. § 63G-2-302(2)(d)
Johnson, 57-61	E-mail dated September 29, through November 13, 2009	<b>Protected</b> Utah Code Ann. § 63G-2-305(9)
Lawson, 1-16	E-mails dated January 28, through February 2, 2009	<b>Public NOTE:</b> Any Private information pursuant to Section – 305(9) contained within these e-mail documents must be redacted prior to disclosure of the documents.
Lawson, 17-81	Memo and attachments, dated February 10, 2009	<b>Public NOTE:</b> Any Private information, including financial data in Bates Lawson 38-47, pursuant to –305(9) contained within these e-mail documents must be redacted prior to disclosure of the documents.
Lawson, 82-83	E-mails dated February 23 and 24, 2009	<b>Public</b>
Lawson, 84-87	E-mail dated March 10, 2009	<b>Public</b>
Lawson, 88-90	E-mail dated March 10, 2009	<b>Drafts</b> Utah Code Ann. § 63G-2-305(22).

Lawson, 91-92	E-mail May 13, 2009	<b>Public NOTE:</b> Any Private information pursuant to Section – 305(9) contained within these e-mail documents must be redacted prior to disclosure of the documents. 305(17), (18) and (23)  <b>Private</b> Utah Code Ann. § 63G-2-302(2)(d)
Lawson, 93	E-mail dated October 16, 2009	

**ORDER**

THEREFORE, IT IS ORDERED THAT: the appeal of Eric Peterson is (1) dismissed as to his appeal for a "fee waiver" as being untimely made; (2) the appeal of Eric Peterson is denied as to the documents identified as private and/or protected records in the above table, and the classification of the Utah Attorney General's Office is upheld; and (3) the appeal of Eric Peterson is upheld as it pertains to the documents identified as public records in the above table and the Utah Attorney General's Office is hereby ordered to provide said public records to Mr. Peterson within ten (10) days.

**RIGHT TO APPEAL**

Either party may appeal this Decision and Order to the District Court. The petition for review must be filed no later than thirty (30) days after the date of this order. The petition for judicial review must be a complaint. The complaint and the appeals process are governed by the Utah Rules of Civil Procedure and Utah Code Ann. § 63G-2-404. The court is required to make its decision de novo. In order to protect its rights on appeal, a party may wish to seek advice from an attorney.

**PENALTY NOTICE**

Pursuant to Utah Code Ann. § 63G-2-403(14)(d), the governmental entity herein shall comply with the order of the Committee and, if records are ordered to be produced, file: (1) a notice of compliance with the Committee upon production of the records; or (2) a notice of intent to appeal. If the governmental entity fails to file a notice of compliance or a notice of intent to appeal, the Committee may do either or both of the following: (1) impose a civil penalty of up to \$500 for each day of continuing noncompliance; or (2) send written notice of the entity's noncompliance to the Governor for executive branch entities, to the Legislative Management Committee for legislative branch entities, and to the Judicial Council for judicial branch agencies' entities.

Dated this 1st day of June 2010.

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SCOTT WHITTAKER, Chairman  
State Records Committee

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