

Joseph E. Hatch

ATTORNEY AT LAW
5295 SO. COMMERCE DRIVE, SUITE 200
MURRAY, UTAH 84107
TELEPHONE: 801-268-4042
FAX: 801-747-1049

July 13, 2012

Legislative Records Committee
c/o Michael E. Christensen
Utah State Capitol Complex
House Building, Suite W210
P.O. Box 145210
Salt Lake City, UT 84114-5210

**Re: Notice of Appeal to the Legislative Records Committee of the Decision on
Appeal dated June 13, 2012 by Director Christensen**

Gentlemen:

Pursuant to Section 3.2 of the Legislature's Public Records Policies, the Utah Democratic Party, by and through its attorney, Joseph E. Hatch, appeals the decision by Director Michael E. Christensen dated June 13, 2012 to deny the Utah Democratic Party a fee waiver in connection with a GRAMA request dated November 9, 2011. A true and correct copy of the Decision, less exhibits, denying the fee waiver is attached hereto as Exhibit "A".

The Petitioner with this appeal is the

Utah Democratic Party
Attn: Matt Lyon
825 North 300 West, Suite C400
Salt Lake City, UT 84103
Phone (801) 328-1212

With this Appeal, the Utah Democratic Party requests that the Legislative Records Committee waive the demanded additional sum of \$9,250.00 for the production of records and return the \$5,000.00 sum previously paid by the Utah Democratic Party.

Brief Statement of Facts and Legal Authority

One of the most significant constitutional functions of the Utah Legislature is to redistrict our legislative and congressional boundaries every ten years. This process necessarily requires the legislative branch to operate with transparency and open debate. Further, any decisions made by the Legislature on redistricting is partially restricted by United States constitutional requirements. Clearly, whatever the Legislature does, and how it does it, when redistricting Utah, is a matter of substantial public interest. The large number of media articles on redistricting referenced in the Democratic Party's request further demonstrates this interest.

The Utah Democratic Party, in our democracy and as the loyal opposition party, has the responsibility and duty to examine, inquire, explore, and criticize any actions of the Legislature in redistricting which may not be consistent with the Legislature's stated goals, may not be consistent with the Legislature's established processes, and may not be consistent with the requirements of the United States Constitution.

The only way the public can assess the redistricting process is to have total and complete access to all the relevant documents. The GRAMA request of the Democratic Party was designed to preserve, isolate and make available all the relevant documents, not already made public.¹ The requested documents will not only allow the Democratic Party to do its job, as described above, but the Democratic Party pledges to make all released documents available to the public.

It is impossible to imagine a situation which is not more compatible with the spirit of Section 2.2 (2) (a), Legislative Public Record Policy, which reads as follows:

The Legislature may fulfill a record request without charge if:
(a) the release of the record primarily benefits the public rather than the person requesting the record.

The initial detail of the request waiver was based upon the conclusion that the public was not the primary beneficiary of the requested documents. The Democratic Party disputes this conclusion and would request to present its arguments at the appropriate hearing.

The second grounds for the fee waiver request is contained in Section 2.2(2)(b) of the Legislature's Public Records Policy, which reads as follows:

The Legislature may fulfill a record request without charge if:
(b) the individual requesting the record is the subject of the record or an individual specified in Utah Code Ann. § 63[G]-2-202(1) or (2) (Supp. 2006)

It is true that the Utah Democratic Party is not an "individual" as defined by the statute, but the Party is a "person" within the meaning of the statute. The distinction of individual or person for denying a waiver of fees makes no sense unless it is the stated goal of the Legislature to deny easy access to government records by corporations, non-profits and political parties which may be subject of the records. Such a distinction could be a violation of the equal protection clause of the United States Constitution.

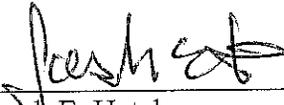
A final issue, in regards to seeking the waiver, is based upon the fact that the O.L.R.G.C. mis-represented to the Democratic Party the costs of the GRAMA request with the initial fee of \$5,000.00. The Party definitely understands that the initial fee is an estimate. However, based upon that estimate, the Party chose not to appeal the initial denial of the fee waiver request to this Legislative Record Committee. Throughout the record gathering process, the O.L.R.G.C. never

¹ The Democratic Party's request was very different from the Republican Party's GRAMA request. The Republican Party wanted limited documents on selected Democratic legislators. The Democratic Party wanted documents on all legislators involved in the process, plus staff documents.

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informed the Party that its initial estimate was so grossly inadequate in order to give the Party the option of reducing the documents requested. In fact, the Party was not told of the increased costs until after the Party was prepared to pick up the documents. For this reason, if the Legislative Records Committee should grant the Party's waiver request, the Committee should also order the reimbursement of the \$5,000.00 already paid.

Respectfully submitted.



Joseph E. Hatch
Attorney of Utah Democratic Party

EXHIBIT “A”

Joseph E. Hatch, Attorney at Law
5295 So. Commerce Drive, Suite 200
Murray, Utah 84107

June 13, 2012

DECISION ON APPEAL

This Decision on Appeal relates to the appeal filed by Joseph E. Hatch on June 6, 2012, on behalf of the Utah Democratic Party.

COURSE OF PROCEEDINGS

1. On October 12, 2011, Matt Lyon and Todd Taylor, on behalf of the Utah Democratic Party, filed a public records request under the Government Records Access and Management Act (GRAMA) with the Office of Legislative Research and General Counsel (OLRGC), requesting the following:

"All communications in the past 30 days, whether paper or electronic, between members of the Utah State Legislature, their staff, and/or outside organizations, individuals, or entities that:

- 1) Contain or reference block assignment files;
- 2) Reflect, regard or reference the purported grounds or criteria discussed, referenced, considered -- officially or unofficially -- regarding proposed or adopted congressional, Utah House, or Utah Senate maps;
- 3) Consist of, regard or reference redistricting and members of the Utah State Legislature, Utah's Congressional Delegation, Utah Governor or Utah State Republican Party, including current, past, potential, and future candidates and elected officials;
- 4) Reflect, consist of, regard or reference any email sent to or from the Utah or National Republican Party, including its staff, advisors, and executive committee regarding redistricting; and/or,
- 5) Reference or include partisan data and the redistricting process."

(See the Exhibit "A.")

The Utah Democratic Party also requested a waiver of fees.

2. On October 14, 2011, the OLRGC sent a letter to Matt Lyon and Todd Taylor, indicating that additional time was needed to respond to their request and denying their request for a waiver of fees. (See Exhibit "B" (The attachments to Exhibit "B" are omitted.))

3. On October 19, 2011, John Fellows, General Counsel to the Legislature, called and left a message at the Utah Democratic Party, asking to discuss charges for the records request. A return call was not received.
4. On October 24, 2011, John Fellows, General Counsel to the Legislature, and Thomas Vaughn, Associate General Counsel to the Legislature, called Todd Taylor and explained that the fee for responding to the request would be significantly higher than \$100. Mr. Taylor informed Mr. Vaughn that he would get back to Mr. Vaughn within one and one-half hours. Mr. Taylor failed to contact Mr. Vaughn.
5. On October 25, 2011, Mr. Vaughn again called Mr. Taylor. During that telephone conversation, Mr. Taylor indicated that he had not called because he was still waiting for a decision to be made by someone within the Utah Democratic Party. Mr. Taylor also stated that it was likely that the Utah Democratic Party would be withdrawing its request and filing a very similar one. Mr. Vaughn informed him that the Legislature had already incurred expenditures in excess of \$100 and that the Legislature needed to know how to proceed. Mr. Taylor advised Mr. Vaughn to stop work on the response for a "couple of days" until the Utah Democratic Party decided what to do.
6. On October 26, 2011, Mr. Vaughn sent a letter to Mr. Taylor memorializing the events described in the preceding paragraph and informing Mr. Taylor that, based on his conversation with Mr. Taylor on October 25, 2011, Mr. Vaughn would be instructing the records officers in all legislative staff offices to cease work on the records request from the Utah Democratic Party until further notice.¹ (See Exhibit "C.")
7. On November 9, 2011, Matt Lyon and Todd Taylor, on behalf of the Utah Democratic Party, sent an amended GRAMA request to the OLRGC. This request was broader, in both the time period it covered and the scope of the records requested, than the initial request that was filed on October 14, 2011. The request sought the following records:

"All communications inclusive of the period from September 12, 2011 through October 21, 2011, whether paper or electronic, between members of the Utah State Legislature, their staff, and/or outside organizations, individuals, or entities that:

- 1) Contain or reference block assignment files;
- 2) Reflect, regard or reference the purported grounds or criteria discussed, referenced, considered -- officially or unofficially -- regarding proposed or adopted congressional, Utah House, or Utah Senate maps;

¹ After the Utah Democratic Party filed its initial records request, the Utah Republican Party filed its own request for certain redistricting-related records. The Utah Republican Party's request was significantly narrower in that it was limited to four legislators and did not include legislative staff. The Utah Republican Party agreed to pay, and did pay, the \$2,537.65 fee for responding to its request.

- 3) Consist of, regard or reference redistricting and members of the Utah State Legislature, Utah's Congressional Delegation, Utah Governor, or Utah State Republican Party, including current, past, potential, and future candidates (including but not limited to Rob Bishop, Jim Matheson, Jason Chaffetz, Carl Wimmer, Dave Clark, Mia Love, David Kirkham, Cherilyn Eager, Morgan Philpot, Ken Sumsion, Chris Herrod, Dan Liljenquist, Chuck Williams, Jason Buck, Chris Stewart, Howard Wallack, John Willoughby, Rebecca Lockhart, Michael Waddoups, Jake Shannon, Casey Anderson, Craig Frank, Bill Skokos, John Valentine) and elected officials;
- 4) Reflect, consist of, regard or reference any e-mail sent to or from the Utah or National Republican Party, including its staff advisors, and executive committee regarding redistricting; and/or,
- 5) Reference or include partisan or voter participation data and the redistricting process."

(See the Exhibit "D.")

8. On November 16, 2011, Bryant Howe, Records Officer for the OLRGC, sent a letter to Matt Lyon and Todd Taylor, informing them that it would likely take at least 60 days to respond to the Utah Democratic Party's request and denying its renewed request for a waiver of fees. (See Exhibit "E" (The attachments to Exhibit "E" are omitted.)) In his letter, Mr. Howe stated that:

"The Office of Legislative Research and General Counsel alone has already spent 54.5 hours working on your initial request. At a rate of \$25 per hour, fees are already at \$1,362.50. We estimate that the charges for responding to your request (for the Senate, the House, and all legislative offices combined) will be approximately \$5,000."

9. On December 16, 2011, Joseph Hatch hand delivered a letter to OLRGC, appealing, on behalf of the Utah Democratic Party, the denial of the request for a waiver of fees and the determination that it will likely take at least 60 days to respond to their request. (See Exhibit "F" (The attachments to Exhibit "F" are omitted.))
10. On December 23, 2011, Michael Christensen, Director of the OLRGC, issued a decision upholding Mr. Howe's decision and denying the Utah Democratic Party's Appeal. (See Exhibit "G" (The attachments to Exhibit "G" are omitted.)) At the same time, the OLRGC provided to the Utah Democratic Party a free electronic copy of the documents that were provided to the Utah Republican Party in response to their request relating to redistricting.²
11. On January 23, 2012 (the first day of the 2012 General Session) the Utah Democratic Party paid \$5,000 towards its amended records request. A letter provided with the request stated:

² See footnote 1 on page 2.

"The Democratic Party certainly recognizes that, during the legislative session, time is a [sic] premier. However, by your own admission, 25% of the work has been completed. The Democratic Party will expect a partial release of the documents as they become available."

(See Exhibit "H.")

12. On January 31, 2012, the OLRGC sent a letter to Joseph Hatch, stating:

"We cannot begin the remainder of the work on the request until after the end of the general session. Please understand that the above quote [referring to the statement that 25% of the work was completed] does not mean that 25% of the records are available for disclosure. The percentage refers to the overall work completed in order to respond to your request. We will attempt to find time, during the session, to determine the classification of the documents that have been sorted thus far in order to provide some of the documents to you. But, as previously indicated, we cannot begin the remainder of the work until the general session ends."

(See Exhibit "I.")

13. On February 14, 2012, Jim Dabakis sent an email to Bryant Howe, Records Officer of the OLRGC, referring to Mr. Dabakis' letter of January 23, 2012, requesting an update on the expected time to respond to the records request from the Utah Democratic Party and inquiring as to why they had not received a partial response. (See Exhibit "J.")
14. On February 15, 2012, Bryant Howe responded to Mr. Dabakis' email and provided him a copy of the letter that was sent to Joseph Hatch on January 31, 2012. (See Exhibit "K.")
15. After the end of the 2012 General Session, Mr. Vaughn contacted Mr. Dabakis by phone and informed him that the OLRGC had a box of maps that the Utah Democratic Party could look through to determine whether they wanted copies of any of the maps in connection with their request. Matt Lyon called Mr. Vaughn to discuss this offer. As of the date of this decision, nobody from the Utah Democratic Party has come to view these maps.
16. On or about April 2, 2012, Mr. Vaughn called the Utah Democratic Party and informed them that a box of 5,000 pages of documents responding to their request was ready to pick up.
17. On or about April 17, 2012, Mr. Vaughn left a voicemail message for Matt Lyon reminding him that the box of 5,000 pages was still waiting for him to pick up and informing him that a second box of 5,000 pages was also ready for disclosure.

18. On May 7, 2012, representatives of the Utah Democratic Party arrived and picked up the first box. At that time, Mr. Vaughn informed them that the remainder of the documents would be provided to them upon payment of the additional amount owed.
19. On May 7, 2012, Mr. Howe sent a letter to Mr. Dabakis and Mr. Lyon, responding to the Utah Democratic Party's amended records request. (See Exhibit "L.") In the letter, Mr. Howe indicated that the Legislature had approximately 16,000 pages to release in response to the request and that the total charge for responding to the request would be \$14,250 (leaving \$9,250 due and payable). Mr. Howe further indicated that the remaining 11,000 pages would be provided upon receipt of the amount that the Utah Democratic Party still owed.
20. On June 6, 2012, the OLRGC received a letter (dated June 5, 2012), addressed to Michael Christensen, appealing the additional fees charged for responding to the Utah Democratic Party's amended request and requesting return of the \$5,000 already paid by the Utah Democratic Party. (See Exhibit "M" (The attachments to Exhibit "M" are omitted.))

DISCUSSION

I. The Utah Democratic Party is Not Entitled to a Waiver of Fees for its Records Request.

The Utah Democratic Party cannot challenge the denial of its fee waiver request, because the deadline for challenging the denial has passed. Further, even if the Utah Democratic Party was not barred from challenging the denial of its fee waiver request, its request was properly denied.

A. The Decision on Appeal to Uphold Denial of the Fee Waiver Request is Final Because the Deadline for the Utah Democratic Party to Appeal the Denial Has Passed.

The Utah Democratic Party requested a waiver of fees when it submitted its amended request on November 9, 2011. The request for a waiver of fees was denied on November 16, 2011. The Utah Democratic Party appealed the denial on December 16, 2011. The decision to deny the request for a waiver of fees was upheld on appeal on December 23, 2011. The Utah Democratic Party failed to appeal this decision, and it became final at the end of the day on January 22, 2011.

Because the time for appealing the decision to uphold the denial of a fee waiver has passed, the Utah Democratic Party can no longer challenge this decision on appeal. The only issue relating to fees that the Utah Democratic Party may now appeal is the amount of the fee that exceeds the \$5,000 estimated amount that the party already paid.

In its notice of appeal filed on June 6, 2012, the Utah Democratic Party claims that if it had "known that the OLRGC had so grossly underestimated the time involved to gather the requested documents, the Democratic Party would have utilized its appeal rights." (Exhibit "M" (The attachments to Exhibit "M" are omitted.)) While the assertion that the Utah Democratic Party was surprised by the final amount charged may be the reason it is challenging the total amount

charged, it does not justify the party's failure to timely challenge the ruling that it is not entitled to a waiver of fees.

The amended records request filed by the Utah Democratic Party may well be the largest records request filed with the Utah State Legislature in its entire history. Estimating the amount of time required to respond to such a voluminous request is extremely difficult. It was impossible to know how many records that were responsive to the request existed until a significant amount of the work was completed. In a letter, dated November 16, 2011, Bryant Howe stated that "[w]e estimate that the charges for responding to your request (for the Senate, the House, and all legislative offices combined) will be approximately \$5,000." (Exhibit "E" (The attachments to Exhibit "E" are omitted.)) Because this amount was stated to be only an estimate, the Utah Democratic Party was put on notice that the actual charges could be higher. Moreover, based on the extremely broad nature of its request, the Utah Democratic Party should have known that the amount of time necessary to respond to its request could be much higher than originally anticipated.

There is no provision in the Government Records Access and Management Act, or in the appeals process outlined in Part 3 of the Utah Legislative Policies and Procedures for Handling Records Requests, that allows a party to appeal the denial of a fee waiver request after the deadline when the estimated fee amount is higher than anticipated. Because the Utah Democratic Party did not timely appeal this issue, it is foreclosed from raising it in this appeal. The only issue related to fees that the Utah Democratic Party may appeal at this time is the amount of the fee that exceeds the \$5,000 estimate originally charged.

B. Even if the Utah Democratic Party Was Not Foreclosed From Raising the Fee Waiver Issue on Appeal, the Request for a Waiver of Fees was Properly Denied.

The Utah Democratic Party concedes that Mr. Howe has the discretion on whether or not to grant a fee waiver. (Exhibit "M", p. 2 (The attachments to Exhibit "M" are omitted.)) However, the party asserts that Mr. Howe abused his discretion. A review of the record indicates that this is not the case.

On appeal, the Utah Democratic Party mischaracterizes Mr. Howe's decision as being based on a "finding that 'it is unfair to taxpayers that they should have the burden of paying for the staff time responding to your [request]'" and an alleged assumption that the request "will result in an inappropriate use of taxpayer resources." (Exhibit "M", pp. 2-3 (The attachments to Exhibit "M" are omitted.)) Mr. Howe's statement regarding the burden placed on taxpayers was stated as an additional reason for his exercise of discretion, separate and distinct from the primary reason for denial. Moreover, Mr. Howe never stated an assumption that the request by the Utah Democratic Party would result in an inappropriate use of taxpayer resources. Rather, he simply expressed his opinion that it would be unfair to impose on taxpayers the burden of responding to the Utah Democratic Party's request without requiring reimbursement.

The Utah Democratic Party claims that the denial of its request for a waiver of fees violates Utah Code Section 63G-2-203. The party asserts this claim despite the fact that, in response to its first

appeal, the party was informed that the Legislature is expressly exempt from Utah Code Section 63G-2-203. (Exhibit "G", p. 5 (The attachments to Exhibit "G" are omitted.)) Utah Code Subsection 63G-2-703(2)(a) states as follows:

"The Legislature and its staff offices are not subject to Section 63G-2-203 or to Part 4, Appeals, 5, State Records Committee, or 6, Collection of Information and Accuracy of Records."

Utah Code Subsection 63G-2-703(3) provides that:

- "(3) The Legislature, through the Legislative Management Committee:
- (a) shall establish policies to handle requests for classification, designation, fees, access, denials, segregation, appeals, management, retention, and amendment of records; and
 - (b) may establish an appellate board to hear appeals from denials of access."

The Legislative Management Committee has complied with its statutory duty and adopted the following fee policy:

"Section 2.2. Fees for records requests.

- (1) The Legislature may charge a fee to obtain a record as provided under these Policies and Procedures as attached in Appendix B.
- (2) The Legislature may fulfill a record request without charge if:
 - (a) the release of the record primarily benefits the public rather than the person requesting the record; or
 - (b) the individual requesting the record is the subject of the record or an individual specified in Utah Code Ann. § 63[G]-2-202(1) or (2) (Supp. 2006)."

(Policies of the Legislative Management Committee, Utah State Legislature, June 14, 2011, page 34.)

In denying the Utah Democratic Party's initial request for a fee waiver, Mr. Howe found that, even if the Utah Democratic Party is correct that release of the records is in the public interest, the *primary* benefit of releasing the records would be to the party. Mr. Howe based this finding on the following:

"You have previously indicated that you may be litigating issues relating to the redistricting process. Some or all of the records you have requested may relate to that potential litigation and to the records described in your letter of October 3, 2011, where you request that we retain records pending potential litigation. Further, in your amended request, you indicate that '[t]he Utah Democratic Party may be a party to litigation on the subject of the information requested.'"

(Exhibit "E" (The attachments to Exhibit "E" are omitted.))

The Utah Democratic Party asserts that “just because litigation may be involved, does not mean that the requested information is not primarily in the public interest.” (Exhibit “G” (The attachments to Exhibit “G” are omitted.)) However, it may also be stated that just because the public has an interest in the records that the Utah Democratic Party has requested does not mean that release of the records is not *primarily* in the interest of the Utah Democratic Party. Based on a totality of the circumstances, including the facts below, Mr. Howe’s finding that release of the records that the Utah Democratic Party has requested will primarily benefit the Utah Democratic Party is correct and not an abuse of discretion:

1. Statements made in the amended request indicate that the Utah Democratic Party is seeking the records primarily for its own interests as a private political organization. For example:
 - While the amended request is broad enough to cover documents in the possession of members of the Utah Democratic Party, it primarily focuses on members of the Republican Party and on “the Utah or National Republican Party, including its staff advisors, and executive committee.” (Exhibit “D.”)
 - The amended request further demonstrates that the Utah Democratic Party is requesting the records for its own use when it states that the Utah Democratic Party needs “accurate information to provide substantial and accurate testimony to legislators when there is pending official action by policy making bodies.” (Exhibit “D.”)
2. On October 3, 2011, Jim Dabakis, on behalf of the Utah Democratic Party, sent a letter to John Fellows, General Counsel to the Legislature, requesting that the Legislature preserve records related to redistricting in anticipation of possible litigation by the Utah Democratic Party. (See “Exhibit “N.”) Some or all of the records that the Utah Democratic Party has requested may relate to that potential litigation.
3. In the Utah Democratic Party’s amended request, the Utah Democratic Party indicates that “[t]he Utah Democratic Party may be a party to litigation on the subject of the information requested.” (Exhibit “D.”)
4. In its initial appeal, the Utah Democratic Party again indicated that the “Democratic Party is considering litigation over redistricting issues . . .” (Exhibit “F”, p. 2 (The attachments to Exhibit “F” are omitted.))
5. Statements made in the media by representatives of the Utah Democratic Party indicate that the records request is made primarily for the Utah Democratic Party’s own interests, including its interests in litigation related to the redistricting process. For example, in a story published by the Salt Lake Tribune on December 2, 2011, Utah Democratic Party Chairman Jim Dabakis is quoted as saying, “They know we need those records to file a lawsuit on redistricting, so I think they are acting in a

partisan way to make it hard. . . . We had another meeting with lawyers last night getting ready for a lawsuit. But it is difficult without those documents.”

6. In its most recent appeal, the Utah Democratic Party again states that the “Democratic Party is considering litigation over redistricting issues . . .” (Exhibit “M”, p. 3 (The attachments to Exhibit “M” are omitted.))

The Utah Democratic Party also claims that it is entitled to a fee waiver based on its assertion that the party should be considered to be an individual who is the subject of the record, as provided in Utah Code Subsection 63G-2-203(4). As indicated above, the Utah Democratic Party erroneously relies on Utah Code Subsection 63G-2-203(4), from which the Legislature and its staff offices are expressly exempt. The Legislative Management Policy does, however, contain a similar provision. That provision permits the Legislature to fulfill a records request without charge if, “the individual requesting the record is the subject of the record³ or an individual specified in Utah Code Ann. § 63[G]-2-202(1) or (2)” (Supp. 2006).⁴ (Policies of the Legislative

³ The Utah Democratic Party claims that Mr. Howe misreads the fee provision by ignoring the word “or” in the statutory fee provision of Utah Code Section 63G-2-203. Though that provision does not apply to the Legislature, it is clear that Mr. Howe did not ignore a similar provision in the Policies of the Legislative Management Committee. Rather, he addressed this provision separately and properly concluded that it is not applicable to the Utah Democratic Party.

⁴ Utah Code Subsections 63G-2-202(1) and (2) provide as follows and are not applicable to this matter:

- “(1) Upon request, and except as provided in Subsection (1)(a), a governmental entity shall disclose a private record to:
- (a) the subject of the record;
 - (b) the parent or legal guardian of an unemancipated minor who is the subject of the record;
 - (c) the legal guardian of a legally incapacitated individual who is the subject of the record;
 - (d) any other individual who:
 - (i) has a power of attorney from the subject of the record;
 - (ii) submits a notarized release from the subject of the record or the individual's legal representative dated no more than 90 days before the date the request is made; or
 - (iii) if the record is a medical record described in Subsection 63G-2-302(1)(b), is a health care provider, as defined in Section 26-33a-102, if releasing the record or information in the record is consistent with normal professional practice and medical ethics; or
 - (e) any person to whom the record must be provided pursuant to:
 - (i) court order as provided in Subsection (7); or
 - (ii) a legislative subpoena as provided in Title 36, Chapter 14, Legislative Subpoena Powers.
- (2) (a) Upon request, a governmental entity shall disclose a controlled record to:
- (i) a physician, psychologist, certified social worker, insurance provider or producer, or a government public health agency upon submission of:
 - (A) a release from the subject of the record that is dated no more than 90 days prior to the date the request is made; and
 - (B) a signed acknowledgment of the terms of disclosure of controlled information as provided by Subsection (2)(b); and
 - (ii) any person to whom the record must be disclosed pursuant to:
 - (A) a court order as provided in Subsection (7); or
 - (B) a legislative subpoena as provided in Title 36, Chapter 14, Legislative Subpoena Powers.
- (b) A person who receives a record from a governmental entity in accordance with Subsection (2)(a)(i) may not disclose controlled information from that record to any person, including the subject of the record.”

Management Committee, Utah State Legislature, June 14, 2011, page 34). The Utah Democratic Party contends that “[t]he real issue is whether the legislature, by using the term ‘individual,’ desired to exclude legal entities from utilizing this section of the statute.” (Exhibit “M”, p. 3 (The attachments to Exhibit “M” are omitted.)) The Legislature has expressed its clear intent to exclude legal entities from utilizing this provision. Utah Code Subsection 63G-2-103(13) expressly defines “individual” for purposes of GRAMA as “a human being.” The Utah Democratic Party is not “a human being” and, therefore, is not covered by this provision.⁵

Based on the foregoing discussion, I hold that even if the Utah Democratic Party was not foreclosed from raising the fee waiver issue on appeal its request for a waiver of fees was properly denied.

II. The Amount Charged for Responding to the Request by the Utah Democratic Party is in Accordance With the Requirements of Law.

The Utah Democratic Party is barred on appeal from challenging, or seeking the return of, the initial \$5,000 fee amount, because the deadline for appealing this initial amount has passed. Also, the initial fee amount and the additional charge of \$9,250 is supported by the facts and is in accordance with the requirements of law.

A. The Decision on Appeal to Uphold the Initial \$5,000 Fee Amount is Final Because the Time for the Utah Democratic Party to Appeal the Denial Has Passed.

The Utah Democratic Party appealed the estimated \$5,000 fee amount on December 16, 2011. This estimated fee amount was upheld on appeal on December 23, 2011. The Utah Democratic Party failed to appeal this decision, and it became final at the end of the day on January 22, 2011.

Because the time for appealing the decision to uphold the initial estimated \$5,000 fee amount has passed, the Utah Democratic Party can no longer challenge this decision on appeal. The only issue relating to fees that the Utah Democratic Party may now appeal is the amount of the fee that exceeds the \$5,000 it already paid.

B. The Decision to Charge \$9,250 in Fees, in Addition to the \$5,000 Originally Charged, Complies With the Requirements of Law.

On appeal, the Utah Democratic Party asserts that “the additional \$9,250 fee request violates U.C.A. §63G-2-203.”⁶ However, the party does not state how charging the additional amount

⁵ The Utah Democratic Party also claims that “[n]o one disputes that the Democratic Party and its members are a subject of many of the records requested.” (Exhibit “M”, p. 3 (The attachments to Exhibit “M” are omitted.)) This claim is without basis. While a few of the records may mention a legislator who happens to be a Democrat (for example as a sender or recipient of an email), it is a far stretch to claim that the Democratic Party and its members are the *subject* of even a small part of the records requested.

⁶ The Utah Democratic Party also asserts that Michael Christensen stated in his December 23, 2011, decision denying its appeal that “the production could be completed in less than 60 days following the end of the

allegedly violates that section of code. Further, as discussed above, Utah Code Section 63G-2-203 does not apply to the Legislature or its staff offices. (See Utah Code Subsection 63G-2-703(2)(a).)

The Utah Democratic Party also asserts, based on a statement in the December 23, 2011, decision, that the OLRGC had “already performed about 25% of the work necessary to respond to the request” (Exhibit “G”, p. 8 (the attachments to Exhibit “G” are omitted)), the total charge should not have exceeded \$5,450. (Exhibit “M”, p. 1 (The attachments to Exhibit “M” are omitted.)) This statement was based on the following statement in the November 16, 2011, letter from Bryant Howe that required payment of the \$5,000 estimated fee⁷:

“The Office of Legislative Research and General Counsel alone has already spent 54.5 hours working on your initial request. At a rate of \$25 per hour, fees are already at \$1,362.50. We estimate that the charges for responding to your request (for the Senate, the House, and all legislative staff offices combined) will be approximately \$5,000.”⁸

(Exhibit “E”, pp. 3-4 (The attachments to Exhibit “E” are omitted.))

As indicated in the above statement, the \$5,000 was only an estimate. Further, the statement clearly indicates that the 54.5 hours of work that had been completed as of the date of that letter was only in relation to the Utah Democratic Party’s *initial* request. The amended request, sent to the OLRGC on November 9, 2011, was broader in both the time period it covered and in its scope. This required the OLRGC to search, sort, and classify a larger number of records and to conduct a second search of records that had already been combed through in relation to the Utah Democratic Party’s initial request. Finally, the \$1,362.50 referred to in the above statement only related to the hours spent working on the request. It did not include the ten cents per copy charge for records provided in response to the request.

Mr. Howe’s letter, dated May 7, 2012, indicated that:

“We now have approximately 16,000 pages ready to respond to your request. We have spent 506 hours during and after the general session in order to respond to your request. This does not include any of the time we spent before the session to respond to your request. As you are aware, we only charge \$25 per hour for work on a request, though the actual cost to taxpayers is much higher. At a rate of \$25 an hour, the amount due for staff time is \$12,650. We are prepared to release approximately 16,000 pages. At ten cents per copy, the charge for copies is

legislature.” (Exhibit “M” (The attachments to Exhibit “M” are omitted.)) That assertion is incorrect. The statement made in that decision actually reads as follows: “OLRGC could likely respond in less than 60 days if it had no work to do other than respond to the request.” (Exhibit “G”, p. 8, fn. 3 (The attachments to Exhibit “G” are omitted.))

⁷ This letter contains the decision from which the Utah Democratic Party made its first appeal.

⁸ From this statement, the Utah Democratic Party extrapolated that the OLRGC had “already done about 25% of the work.” (Exhibit “F”, p. 3 (The attachments to Exhibit “F” are omitted.))

\$1,600. Thus, the total amount attributable to the request is \$14,250. The Utah Democratic Party has already paid \$5,000, so the amount left owing is \$9,250.”

The Utah Democratic Party has not disputed on appeal the number of hours worked, the number of pages produced, the \$25 per hour charge, or the ten cents per copy charge. Rather, the party’s complaint appears to relate to the fact that responding took more work, and produced more pages, than either the party or the Legislature anticipated. Neither the Government Records Access and Management Act, nor the Utah Legislative Policies and Procedures for Handling Records Requests, provide that a fee amount may be challenged on the basis that responding to a request ended up costing more than anticipated.

For a request as broad and far-reaching as the one filed by the Utah Democratic Party, it is impossible to estimate with any degree of accuracy what the final cost might be. As discussed above, the party’s request may be the largest records request ever submitted to the Legislature. With no other requests to compare it to, the difficulty in predicting the final cost was substantial. Further, the amended request expressly sought an unknown quantity of records by seeking “[a]ll communications inclusive of the period from September 12, 2011 through October 21, 2011, whether paper or electronic, between members of the Utah State Legislature, their staff, and/or outside organizations, individuals, or entities” that related to several people, entities, and topics. (Exhibit “D.”) Due to the fact that all 104 legislators, multiple staff members, and large numbers of the public were interested and involved in the redistricting process, the Utah Democratic Party should have foreseen that the number of records that were responsive to its request was likely to be very large and difficult to predict. Moreover, after being informed that its original request would result in a substantial expense, the Utah Democratic Party, rather than limiting the scope of its request, filed a request that was broader in time and scope, practically guaranteeing that the expense would increase. Based on its actions, the Utah Democratic Party cannot now complain that they got what they asked for.

The Utah Democratic Party also complains that the additional sum of \$9,250 was demanded “without prior consultation or notification.” (Exhibit “M”, p. 2 (The attachments to Exhibit “M” are omitted.)) While the Legislature attempts to keep a requestor informed of increasing costs relating to a records request, doing so proved difficult due to the size and complexity of the Utah Democratic Party’s amended request. In an attempt to finally get out from under the extreme burden of the request, the OLRGC assigned almost all of its staff to work on the request during a one-week period. During this time, individual employees kept a running tab of the time expended working on the request. Under these circumstances, it was difficult to keep track of the total time being expended and the OLRGC was, frankly, surprised by the final number of hours and pages.

Regardless of whether the Utah Democratic Party or the OLRGC was surprised by the final result, the party cannot now claim that it is being treated unfairly. As discussed above, the Legislature produced approximately 16,000 pages in response to the request. The Utah Democratic Party has paid approximately one-third of the total cost and has received approximately one-third of the records. Moreover, the Legislature has not demanded that the additional \$9,250 dollars be paid. Rather, the Legislature is only requiring that the additional amount be paid if the Utah Democratic Party wants the remainder of the records that it requested.

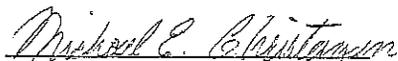
This puts the Utah Democratic Party in the same position it would have been in had the Legislature informed it that the cost would be more than anticipated and asked whether the party wanted the Legislature to continue working on the request.

Based on the foregoing discussion, I find that the amount charged for responding to the Utah Democratic Party's amended request is reasonable and in accordance with the requirements of law.

CONCLUSION

Based on the foregoing discussion, I uphold Mr. Howe's findings and actions with respect to the amended request by the Utah Democratic Party. The Utah Democratic Party's appeal is denied.

The Utah Democratic Party may appeal this decision to the Legislative Records Committee by filing a notice of appeal with me (at the Utah State Capitol Complex, House Building, Suite W210, P.O. Box 145210, Salt Lake City, Utah, 84114-5210), no later than 30 calendar days after the date of this decision.



Michael E. Christensen

Director

Office of Legislative Research and General Counsel