

One Utah Center, Suite 800  
201 South Main Street  
Salt Lake City, UT 84111-2221  
TEL 801.531.3000  
FAX 801.531.3001  
www.ballardspahr.com

Mark R. Gaylord  
Direct: 801.531.3070  
Fax: 801.321.9070  
gaylord@ballardspahr.com

August 22, 2014

Mr. John Dougall  
Chief Administrative Officer  
OFFICE OF THE UTAH STATE AUDITOR  
East Office Building, Suite E310  
Utah State Capitol Complex  
Salt Lake City, Utah 84114

## NOTICE OF APPEAL

Dear Mr. Dougall:

Section 401 of the Government Records Access and Management Act allows any “person aggrieved” to appeal a determination by filing a notice of appeal. UTAH CODE ANN. § 63G-2-401(1)(a),(2). As part of my appeal, I provide background, as well as reasons and legal authority in support. *Id.* at § 63G-2-401(3).

## BACKGROUND

On July 21, 2014, the Jordanelle Special Service District (the “Requester” or “JSSD”) made a request to the Office of the Utah State Auditor (your “Office”) under GRAMA. *See* GRAMA Request Form, attached as Exhibit A. The requested records included the following request:

1. Any and all documents and other records, including all communications between the Office of the Utah State Auditor (“Utah State Auditor”) and any other person, that relate to the “Standstill Agreement,” a copy of which is attached hereto as Exhibit A.

*See* GRAMA Request Form. On August 4, 2014 I received a letter from Linda Siebenhaar denying, in part, the GRAMA request. Ms. Siebenhaar explained that your Office was “unable to provide [the Requester] with any records related to [the Requester’s] request No. 1 because the records are part of an ongoing investigation by [the Auditor].” *See* Denial Letter, attached as Exhibit B. Ms. Siebenhaar went on to note that the records responsive to the request were “classifie[d] as ‘protected’ records” under Section 63G-2-305(16). That Section protects records (i) “of a governmental audit agency,” (ii) “relating to an ongoing or planned audit.”

DMWEST #11148919 v1

Upon review of the denial, as well as relevant legal authority, the decision to withhold the records was not proper. The requested records are not exempt from disclosure under GRAMA and must be disclosed.

### LEGAL AUTHORITY AND REASONING

Although not disputed by your Office, it is important to note that there is a presumption that “government records are public.” See *Southern Utah Wilderness All. v. Automated Geo. Ref. Ctr.*, 2008 UT 88, ¶ 21, 200 P.3d 643. There are of course exemptions to this presumption. UTAH CODE ANN. § 65G-2-305. The exemption claimed here protects “records of a governmental audit agency relating to an ongoing or planned audit . . .” *Id.* at § 65G-2-305(16). When construing this provision Utah law requires that you look to the provision’s plain language. *Salt Lake City Corp. v. Haik*, 2014 UT App 193, ¶ 8. This means giving the language their “plain, natural, ordinary, and commonly understood meaning.” *Gohler v. Wood*, 919 P.2d 561, 562–63 (Utah 1996).

#### ***1. The records withheld do not “relate to” an ongoing or planned “audit”***

In focusing its request solely on the Standstill Agreement, the Requester intentionally stayed away from any investigation being undertaken by the Auditor’s Office. The Standstill Agreement reflects an apparent effort between the drafter of the Agreement and the Auditor’s Office to compel JSSD to take certain action with regards to pending litigation. It has nothing to do with the Auditor’s current investigation, nor does it “relate” to an ongoing or planned “audit.”

Further, it is not clear whether your Office is conducting an “audit.” Subsection 16 protects records of a governmental audit agency “relating to an ongoing or planned *audit*.” (emphasis added). In a letter dated January 19, 2014, your Office notified the General Manager of JSSD that “[t]he Office of the State Auditor is commencing an *investigation* into the potential misuse of credit cards . . .” See Investigation Letter, attached as Exhibit C (emphasis added). Subsection 16, however, does not protect records relating to an “investigation.” There is a significant difference between the two. For one GRAMA has a specific definition of “audit.” See UTAH CODE ANN. § 63G-2-103(1). In fact, even your Office differentiates between audits and investigations. You note on your website that you conduct Financial Audits, Performance Audits, and Special Projects that include “internal control reviews, legal compliance and financial related audits, and other investigations.” *About Us*, OFFICE OF THE UTAH ST. AUDITOR (last visited Aug. 21, 2014), <http://auditor.utah.gov/about-us/>. In other words, if your Office is conducting an “investigation” then subsection 16 is not applicable and the records should be disclosed.

That said, and more importantly, you must disclose records *not* “relating to” the audit or investigation. According to your Office you are investigating the “potential misuse of credit cards at the [JSSD].” See Investigation Letter. Therefore, (and assuming no other deficiencies exist in your denial), your Office can only withhold records “relating to” your audit into the “misuse of credit cards.” In contrast, our request asked for records, documents, and communications, “that relate to the ‘Standstill Agreement.’”

The Requester fails to see how the Standstill Agreement has anything to do with the “investigation” or “audit.” It does not. The Agreement has to do with a request to stand down litigation proceedings pending between third parties, which Agreement was sought under the threat of legislation being passed that would remove management and control of JSSD from Wasatch

County. Thus, to use the “investigation” as a basis for withholding otherwise public information is improper and contrary to law. *See* GRAMA Request Form. Therefore, any records that relate to the Standstill Agreement, but not to your investigation of JSSD’s credit card use, must be disclosed.

**2. Any records withheld must have been created by, or originated from, your Office**

Under subsection 16 information or documents withheld must be “records of a governmental audit agency.” (emphasis added). The word “of” here would appear to mean “originating at or from,” or “[c]aused by; resulting from.” *OF*, THEFREEDICTIONARY (last visited Aug. 21, 2014), www.thefreedictionary.com/of. In other words, subsection 16 requires that the records be created by or originated from a governmental audit agency. It is not enough that the records were provided to or received by you, held by you, or contained in your files. Indeed, where the exemptions require mere receipt or holding, they say so. *See, e.g.*, UTAH CODE ANN. § 65-2-305(50)(a) (“information or records held by the Department of Health”); *id.* at § 305(56) (“records contained in the . . . system”); *id.* at § 305(57) (records provided by or received by the Public Lands Policy Coordinating Office”) (emphases added).

Utah law requires that we “assume the legislature used each term advisedly.” *Miller v. State*, 2010 UT App 25, ¶ 12, 226 P.3d 743. If the Utah Legislature wanted to protect records simply received by your Office, it “would have been easy for the Legislature to have included such language. But the Legislature did not include such language. Utah courts would therefore “presume the Legislature intentionally omitted” such language from subsection (16). *Cf.* at ¶ 13. The Auditor may disagree that this was the Legislature’s intention. But Utah courts have said that if “interpretation [of statutory language] brings about a result contrary to the intention of the Legislature, it is a matter for the Legislature to remedy” and courts “may not do so.” *West Jordan v. Morrison*, 656 P.2d 445, 447 (Utah 1982).

In short, the GRAMA request should be granted, and the Auditor’s decision overruled to the extent that any responsive records were not created by, or originated from, your Office. This should include any and all communications with “any other person” relating to the Standstill Agreement and/or documents received in conjunction thereto.

**CONCLUSION & RELIEF SOUGHT**

For the reasons stated above, the GRAMA request is not exempted from disclosure by subsection 16, of Section 305. As a result, relief should be granted, and any and all documents, including relevant communications, that are responsive to the GRAMA request should be disclosed.

Specifically JSSD requests the following relief:

- (a) Reversal of the denial of the GRAMA request, and disclosure of any and all documents and other records, including all communications between the Office of the Utah State Auditor and any other person, that relate to the “Standstill Agreement,” which is attached hereto as Exhibit D.

Or, alternatively if (a) is denied;

- (b) Disclosure of any and all documents and other records, including all communications between the Office of the Utah State Auditor (the "Auditor") and any other person, that relate to the "Standstill Agreement" (attached as Exhibit D hereto), and which are *not* (i) records created by or originating from the Auditor, and (ii) related to an ongoing or planned audit by the Auditor into potential misuse of credit cards at the Jordanelle Special Service District.

Very truly yours,

BALLARD SPAHR LLP



Mark R. Gaylord

MRG/ZAS/mjg  
Enclosure

cc: Paul Tonks, Esq.  
Leslie Larsen  
Linda Siebenhaar  
Dan Matthews  
Randall Larsen, Esq.

**EXHIBIT A**

GRAMA REQUEST FORM

One Utah Center, Suite 800  
201 South Main Street  
Salt Lake City, UT 84111-2271  
TEL 801.331.3000  
FAX 801.331.3001  
www.ballardspahr.com

Mark R. Gaylord  
Direct: 801.531.3070  
Fax: 801.321.9070  
gaylord@ballardspahr.com

July 21, 2014

**By Hand Delivery**

Office of the Utah State Auditor  
East Office Building, Suite E310  
Utah State Capitol Complex  
Salt Lake City, Utah 84114

Re: **Request for Records Pursuant to Utah's Government Records Access and Management Act**

Dear Sir/Madam:

We are counsel for Jordanelle Special Service District ("JSSD"). On behalf of our client, we are submitting the enclosed "GRAMA Request Form" pursuant to Utah's Government Records Access and Management Act, Utah Code §§ 63G-2-101 *et seq.*

Please feel free to contact me if you have any questions regarding this request.

Very truly yours,



Mark R. Gaylord

MRG/lhb  
Enclosure

cc: Paul Tonks, Esq. (via email)  
Leslie Larsen (via email)  
Dan Matthews (via email)  
Randall Larsen, Esq. (via email)

DMWEST #10720996 v1

## GRAMA Request Form

**Note:** Utah Code § 63G-2-204 (GRAMA) requires a person making a records request furnish the governmental entity with a written request containing the requester's name, mailing address, daytime telephone number (if available); and a description of the record requested that identifies the record with reasonable specificity.

### Requester's information

Name: Mark R. Gaylord, as attorney for Jordanelle Special Service District

Address: Ballard Spahr LLP, 201 South Main St., Suite 800

City/State/zip: Salt Lake City, Utah 84111

Daytime telephone number: (801) 531-3070

### Request made to

Government agency or office: Office of the Utah State Auditor

Address: East Office Building, Suite E310, Utah State Capitol Complex

City/State/zip: Salt Lake City, Utah 84114

### Records requested

**Note:** The more specific and narrow the request, the easier it will be for an agency or office to respond to the request. If you are unsure about the records' description, contact the agency or office records officer.

**Note:** Government keeps records in "series" or groups of records. To find out what series an agency or office maintains, visit the Archives' website, <http://archives.utah.gov>. The record series retention schedules on the Archives' website include relevant descriptions.

Title or series number of records (if known): \_\_\_\_\_

Description of records including all relevant information—location of event(s) described in records, city, county, address; date range of the records; names of the person(s); and subject of the request.

1. Any and all documents and other records, including all communications between the Office of the Utah State Auditor ("Utah State Auditor") and any other person, that relate to the "Standstill Agreement," a copy of which is attached hereto as Exhibit A;
2. Any and all documents and other records, including all communications between the Utah State Auditor and any other person, regarding or relating to the Utah State Auditor's authorization to include his name in the Standstill Agreement.
3. Any and all documents and other records, including all communications between the Utah State Auditor and any other person, wherein the Utah State Auditor disseminated copies of the Standstill Agreement to persons outside the office of the Utah State Auditor after March 14, 2014.

\*\*For purposes of this request, the term "documents and other records" includes any and all information reduced to written or printed form whether stored in hard copy or in any electronic or digital format, including but not limited to emails.\*\*

Note: If the record has a restricted access, GRAMA provides that certain individuals may still receive access.

- I am the subject of the record
- I am the authorized representative of the subject of the record
- I provided the information in the record

**Considerations about the desired response**

I would like to:

- View or inspect the records only
- Receive a copy of the records and pay associated fees. Please notify me if the amount will exceed \$ 100.00
- Receive a copy of the records and request a fee waiver. According to Utah Code § 63G-2-203,
  - Releasing the record primarily benefits the public
  - I am the subject, or authorized representative, of the record
  - My legal rights are directly implicated by the information of the record because \_\_\_\_\_, and I am impecunious
- Receive an expedited response (5 days) because releasing the record benefits the public; I request the information for a story or report for publication or broadcast to the general public



**Agency use only**

Date request received: \_\_\_\_\_ Time limit for response: \_\_\_\_\_

**Classification of records (check all that apply):**

- Public, records provided (date) \_\_\_\_\_
- Private, legal citation § § 63G-2-302 or 303 \_\_\_\_\_
- Controlled, legal citation § 63G-2-304 \_\_\_\_\_
- Protected, legal citation § 63G-2-305 \_\_\_\_\_
- Governed by court rule, another state statute, federal statute, or federal regulation \_\_\_\_\_
- \_\_\_\_\_
- Not a record

**Disclosure of restricted records:**

Is access authorized?

- Private:**
  - Requester is the subject of the record
  - Requester is authorized pursuant to Utah Code § 63G-2-202(1) and has supplied required documentation
  - Requester is not authorized to have access
- Controlled:**
  - Requester is authorized pursuant to Utah Code § 63G-2-202(2) and has supplied required documentation
  - Requester is not authorized to have access
- Protected:**
  - Requester submitted the record
  - Requester is authorized pursuant Utah Code § 63G-2-202(4) and has supplied required documentation
  - Requester is not authorized to have access

Identification provided: \_\_\_\_\_

**Response:**

- Approved, requester notified on \_\_\_\_\_
- Denied, written denial sent on \_\_\_\_\_
- Requester notified agency does not maintain record on \_\_\_\_\_
- Extraordinary circumstances invoked, legal citation \_\_\_\_\_

Consequent arrangements and time limits \_\_\_\_\_

Fee: \_\_\_\_\_

If waived, fee waiver approved by: \_\_\_\_\_

**Note:** Please refer to GRAMA Classification form and GRAMA Fee form for assistance. If access to records is denied in part or in whole, please use the GRAMA Notice of Denial form.

# **EXHIBIT A**

At the request of the Office of the Governor of the State of Utah and the State Auditor, the undersigned parties understand and agree as follows:

1. **The Governor:**
  - a. intends to call the legislature into special session on or before June 1, 2014;
  - b. encourages the parties to meet and confer to discuss potential solutions to resolve matters of significance among them that could be resolved without state intervention.
2. **Wasatch County and the Jordanelle Special Service District will:**
  - a. confirm that it has not alienated title to foreclosed property within the [SSD 2005-2 Assessment Area];
  - b. convene an executive session on the week of March 20, 2014 to consider action to place three [SSD] managerial employees on administrative leave before the term of an investigation by the State Auditor. Their action does not express prejudgment on the character or fitness of the managerial employees;
  - c. cooperate fully with the State Auditor;
  - d. meet and confer with representatives of the parties to explore alternatives to state intervention;
  - e. from this date until June 1, 2014:
    - i. not arbitrarily withhold any zoning or entitlement;
    - ii. not sell, alienate or further encumber title to foreclosed properties unless otherwise compelled by bondholders;
    - iii. conduct all pending litigation among bondholders to be resolved at a special session of the legislature. Wasatch County and [SSD] will immediately request continuation of any hearings or briefings already scheduled, and will continue to comply with all court orders issued in response to such requests, unless contested by the bondholders;
    - iv. refrain from pursuing additional foreclosure of assessed properties located in the [SSD 2005-2 Assessment Area] unless compelled by bondholders.
3. **The parties agree to:**
  - a. from this date until June 1, 2014 stand still on a pending litigation among them;
  - b. meet and confer with representatives of the parties to explore alternatives to state intervention;
  - c. pursue their claims against bondholders only through the judicial system.
4. **Waiver of standing:** The parties agreed under Rule 17(b) to waive their

  
Mike Kohler, Wasatch County Councilmember, JSSD Boardmember

  
Jay Price, Wasatch County Councilmember, JSSD Boardmember

  
Steve Capson, Wasatch County Councilmember, JSSD Boardmember

FOR THE LANDOWNERS OF VICTORY RANCH:

VR Acquisitions LLC, by Matt Menna its managing member

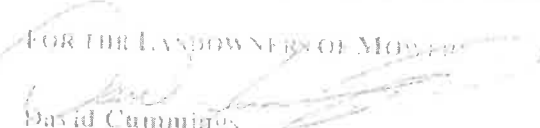
FOR THE LANDOWNERS OF ASPENS TALISMAN:

BY Jordanelle LLC by Cortney Liddiard

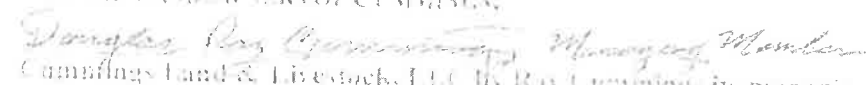
FOR THE LANDOWNERS OF J.R. CHRISTIANSON HIGHLANDS:

Jordanelle Holdings, LLC, by Brad Myler

FOR THE LANDOWNERS OF MOONBURN:

  
David Cummings

FOR THE LANDOWNERS OF CUMMINGS:

  
Douglas Ray Cummings, Managing Member  
Cummings Land & Livestock, LLC by Ray Cummings, its managing member

**EXHIBIT B**

DENIAL LETTER



OFFICE OF THE  
UTAH STATE AUDITOR

RECEIVED

AUG 04 2014

Ballard Spahr

August 1, 2014

Mark R. Gaylord  
Ballard Spahr, LLP  
One Utah Center, Suite 800  
201 South Main Street  
Salt Lake City, Utah 84111-2221

Dear Mr. Gaylord:

This letter is in response to your GRAMA request dated July 21, 2014 in which you requested the following records:

1. Any and all documents and other records, including all communications between the Office of the Utah State Auditor ("Utah State Auditor") and any other person, that relate to the "Standstill Agreement."
2. Any and all documents and other records, including all communications between the Utah State Auditor and any other person, regarding or relating to the Utah State Auditor's authorization to include his name in the Standstill Agreement.
3. Any and all documents and other records, including all communications between the Utah State Auditor and any other person, wherein the Utah State Auditor disseminated copies of the Standstill Agreement to persons outside the Office of the Utah State Auditor after March 14, 2014.

1. We are unable to provide you with any records related to your request No. 1 because the records are part of an ongoing investigation by the Office of the Utah State Auditor. Utah Code § 63G-2-305(16) classifies as "protected" "records of a governmental audit agency relating to an ongoing or planned audit until the final audit is released." You may submit a request for documents related to our investigation of the Jordanelle Special Service District once we have finished our investigation.
2. We are unable to provide you with any records related to your request No. 2 because the Utah State Auditor never gave authorization to have his name included in the "Standstill Agreement" and, as such, there is no such documentation.
3. We are unable to provide you with any records related to your request No. 3 because no person in the Office of the Utah State Auditor has disseminated copies of the Standstill Agreement to persons outside the office of the Utah State Auditor and, as such, there is no such documentation.

Pursuant to Utah Code § 63G-2-401, you have the right to appeal the denial of this request to the chief administrative officer, John Dugall, Utah State Auditor. Your notice of appeal must be submitted within 30 days of the above denial date and must include your name, mailing address, daytime telephone number, and an explanation of the relief sought. You may also include any supporting information with your notice of appeal. Your appeal may be submitted at the address listed below.

Please be aware that all GRAMA requests are posted on our website as a matter of office practice. We do this to provide transparency and accountability to the public at large.

Sincerely,

Linda Siebenhaar, Records Officer

**EXHIBIT C**

INVESTIGATION LETTER



STATE OF UTAH  
OFFICE OF THE STATE AUDITOR

January 29, 2014

Dan Matthews, General Manager  
Jordanelle Special Service District  
P.O. Box 519  
Heber City, UT 84032

Dear Mr. Matthews:

The Office of the State Auditor is commencing an investigation into potential misuse of credit cards at the Jordanelle Special Service District (JSSD). In order to investigate these allegations, we are requesting the following JSSD records:

- All original credit card statements and original supporting receipts or other supporting documentation for the period January 2008 through December 2013.
- Evidence of JSSD Board approval of credit card expenditures for the period January 2008 through December 2013.
- A copy of JSSD's financial policies and procedures manual.

Pursuant to *Utah Code* 63A-12-105 2(a), all records created or maintained by a political subdivision of the State of Utah, other than records which constitute a valuable intellectual property, are the property of the State. Further, *Utah Code* 67-3-1(11) allows the State Auditor to initiate audits or investigations of any political subdivision that are necessary to determine honesty and integrity in fiscal affairs, accuracy and reliability of financial statements, effectiveness, and adequacy of financial controls and compliance with the law.

Representatives from the Office of the State Auditor will obtain the above-stated records from the JSSD offices on Thursday January 30, 2014 at 3:00 p.m.

The Office of the State Auditor will then review the records, along with information gathered from other pertinent sources, and will determine whether to proceed with a further investigation. Your cooperation will be integral in making this determination.

If you have any questions or concerns, please contact me at 801-808-0379.

Sincerely,

Leslie Larsen, CPA, CFE  
Audit Supervisor  
leslielarsen@utah.gov



**EXHIBIT D**

STANDSTILL AGREEMENT

At the request of the Office of the Governor of the State of Utah and the State Auditor, the undersigned parties understand and agree as follows:

1. The Governor:
  - a. intends to call the legislature into special session on or before June 1, 2014;
  - b. encourages the parties to meet and confer to discuss potential solutions to resolve matters of significance among them that could be resolved without state intervention.
2. Wasatch County and the Jordanelle Special Service District will:
  - a. confirm that it has not alienated title to foreclosed property within the JSSD 2005-2 Assessment Area
  - b. convene an executive session in the week of March 20, 2014 to consider action to place three JSSD managerial employees on administrative leave during the term of an investigation by the State Auditor. Their action does not express prejudgment on the character or fitness of the managerial employees;
  - c. cooperate fully with the State Auditor;
  - d. meet and confer with representatives of the parties to explore alternatives to state intervention;
  - e. from this date until June 1, 2014:
    - i. not arbitrarily withhold any zoning or entitlement;
    - ii. not sell, alienate or further encumber title to foreclosed properties unless otherwise compelled by bondholders;
    - iii. stand still on all pending litigation among them that could be resolved in a special session of the legislature. Wasatch County and JSSD will immediately request a continuance of any hearings or briefings already scheduled and will stipulate to comply with all court orders issued in response to such requests, unless contested by the bondholders.
    - iv. refrain from pursuing additional foreclosure of assessed properties within the JSSD 2005-2 Assessment Area unless compelled by bondholders.
3. The property owners will:
  - a. from this date until June 1, 2014 stand still on all pending litigation among them;
  - b. meet and confer with representatives of the parties to explore alternatives to state intervention;
  - c. pursue commitments from bondholders to accept 100% of principal repayment in exchange of a full release of Wasatch County entities.
4. This understanding shall be governed under Rule of Evidence 408.

Dated this 13<sup>th</sup> day of March, 2014

  
Mike Kohler, Wasatch County Councilmember, JSSD Boardmember

  
Jay Price, Wasatch County Councilmember, JSSD Boardmember

  
Steve Capson, Wasatch County Councilmember, JSSD Boardmember

FOR THE LANDOWNERS OF VICTORY RANCH:

VR Acquisitions LLC, by Matt Menna its managing member


FOR THE LANDOWNERS OF ASPENS/TALISMAN:

BV Jordanelle LLC by Cortney Liddiard

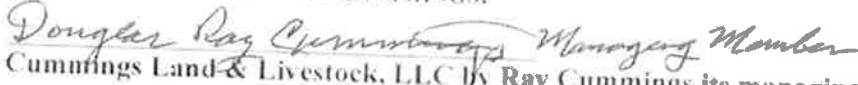
FOR THE LANDOWNERS OF J.R. CHRISTIANSON/HIGHLANDS:

Jordanelle Holdings, LLC, by Brad Myler

FOR THE LANDOWNERS OF MOWER:

  
David Cummings

FOR THE LANDOWNERS OF CUMMINGS:

  
Cummings Land & Livestock, LLC by Ray Cummings its managing member