

GRAMA & PRIVACY

Paul Roberts, Deputy City Attorney, South Salt Lake City

Information gathered by government

As government, we receive highly personal information to government on a daily basis:

- Contact information, SSN's
- Medical information
- Photographs and videos
- Statements regarding familial and intimate relationships
- Descriptions of traumatic incidents of crime or accident
- A sample listing types of evidence gathered by police and business licensing divisions is included in the materials

What obligation do we have as government to protect the privacy of citizens?

Utah Code Ann. § 63G-2-102(1):

In enacting this act, the Legislature recognizes two constitutional rights:

- (a) The public's right of access to information concerning the conduct of the public's business; and
- (b) The right of privacy in relation to personal data gathered by governmental entities.

Utah Code Ann. § 77-38-6:

Victim or witness of a crime is never required to divulge at any court proceeding their address, telephone number, place of employment, or other locating information.

Clearly unwarranted invasion of personal privacy - 63G-2-302(2)(d)

Among all of the specific examples listed in GRAMA, comes the flexible classification category of "other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy."

State Records Committee

The Records Committee has addressed this provision of GRAMA many times. A chart identifying those occasions and briefly describing the outcome of the ruling is included in your materials.

You should be familiar with and cite to their previous decisions. They are now citing to their own decisions as precedent.

You may want to follow their analysis in your briefing. Every opinion begins with:

- Statement of the presumption that all records are public
- General categories of non-public records
- Discussion of specific category for denial in this case
- Balancing test between privacy interest and public need (see next section)

State Case Law

Leading state decision addressing 302(2)(d) is *Deseret News v. Salt Lake County*, 2008 UT 26, 182 P.3d 372.

- Allegations of sexual harassment by a chief deputy of the clerk's office
- County had adopted a broad policy of designating all investigations of sexual harassment as private and protected
- Independent investigation substantiated the complaint
- Summary of findings was released to the public
- Reporter wanted a copy of the full investigative report
- County's position was that no one - not even the appeal authority, had to look at the report, due to its advance classification as protected and private

Supreme Court determined that a pre-conceived designation can constitute only a "prediction of how a particular investigative report would be treated" or "an important starting point"

It found that advance classification has "little or no relevance when evaluating a request for the disclosure of a single record within a record series that does not bear an express GRAMA classification."

Advance classification did not allow the entity to decline to take into account the competing interests of public access, as against the need for restriction.

As it addressed subsection 302(2)(d):

- Court agreed that a sexual harassment investigation "could by its nature be expected to invade privacy," but noted that the statute only prevented disclosure of private

documents if the request for public classification is invades personal privacy in a “clearly unwarranted” manner.

- “Section [63G-2-302(2)(d)] necessarily demands an expansive and searching evaluation of the interests that might make an invasion of personal privacy warranted.”
- Court brushed aside County’s concerns that it would be possible to ascertain the identities of thirteen otherwise unidentified individuals, which would be a breach of promised confidentiality, and expose those witnesses to unwanted attention. It also minimized the probability that the disclosure of witnesses could chill future cooperation with such investigations
- The Court held that due to taking employment with government, the three identified individuals could have no objection because the report pertains to the performance of their official duties
- The court ordered disclosure due to the significant public interest in assessing “the propriety of the manner in which Salt Lake County officials monitored their workplace and responded to evidence of sexual misconduct.”
- The report would provide a window into the conduct of public officials

Federal Case Law

There are myriad cases interpreting FOIA (Freedom of Information Act) requests.

However, use caution when citing to FOIA cases. There are two provisions which address “invasions of privacy.”

This section [stating that records are public] does not apply to matters that are--

5 U.S.C. 552(b)(6):

“personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”

5 U.S.C. 552(b)(7)(C)

“records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy”

These two sections have been treated very differently, due to the omission of the word “clearly” and the use of the phrase “could reasonably be expected” in (7)(C). “This provision is in

marked contrast to the language in Exemption 6, pertaining to ‘personnel and medical files,’” *National Archives v. Favish*, 541 U.S. 157, 165 (2004).

Two important cases interpreting (7)(C) include *Favish*, and *United States DOJ v. Reporters Comm. for Freedom Press*, 489 U.S. 749 (1989).

Interpretation of (6) includes *United States Dep’t of State v. Ray*, 502 U.S. 164 (1991). This was cited in the *Deseret News* case.

References to additional cases from the 10th Cir., compiled by our research sub-committee are included in your materials.

When citing to cases interpreting FOIA, both will be relevant, but those interpreting (6) will be more persuasive, due to the nearly identical language it shares with Utah’s GRAMA provision relating to invasion of privacy.

Backup legal arguments: privacy generally

Whether information is an invasion of privacy could be used as persuasive authority to prove that there is an invasion of privacy.

Some authority addressing privacy generally is included in your materials.

However, this authority will only be helpful to establish the first part of the test. You must still balance the privacy invasion against the need for the document to be public.

Privacy Waivers

Don’t forget that the subject of the record can waive the privacy designation of their own files. An objection from the subject of the record can go a long way – put a face with the privacy interest (see *Favish*, 541 U.S. at 167).

The Smell Test

Most of the records committee decisions and court decisions appear to boil down to this basic test, when it comes to designating a record as private:

Is the record arguably being designated private in order to shield the government or its officials from something that occurred while they acted in their official capacities?

If so, then you will most likely lose.

If the record is being withheld due to citizen privacy, then it is more likely to be upheld (but no guarantee).