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THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UTAH DEMOCRATIC PARTY, a political
party pursuant to U.C.A. §§ 20A-8-101, et.
seq.,

Petitioner,

vs.

LEGISLATIVE RECORDS COMMITTEE
and OFFICE OF LEGISLATIVE
RESEARCH AND GENERAL COUNSEL,
political subdivisions of the State of Utah,

Respondents.

**MOTION FOR JUDGMENT
ON THE RECORD**

Case No. 120906505

Judge L.A. Dever

This Court in its minute entry of February 1, 2013, requested that each party file cross-motions for summary judgments. Petitioner, with this motion and supported by memorandum, respectfully moves the Court, pursuant to Rule 54(c)(1), Utah Rules of Civil Procedure, for a judgment upon the entire record before the Court. This motion is broader than a motion for summary judgment as it necessitates the Court weighing the evidence contained in the record.

DATED THIS 17th of April, 2013.

/s/ Joseph E. Hatch
Joseph E. Hatch
Attorney for Petitioner

MAILING CERTIFICATE

I hereby certify that on the 17th day of April, 2013, I caused a true and correct copy of the foregoing MOTION FOR JUDGMENT ON THE RECORD to be served on each of the following people:

Person's Name and Address
(Other Party or Attorney)

Robert H. Rees
rrees@le.utah.gov

(Clerk of Court)

Third District Court – Salt Lake County

Method of Service

- Mail
- Hand Delivery
- Fax (Person agreed to service by fax.)
- Email (Person agreed to service by email.)
- Left at business (With person in charge or in receptacle for deliveries.)
- Left at home (With person of suitable age and discretion residing there.)
- Mail
- Hand Delivery
- Electronic File

/s/ Kathleen Norton
Secretary

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Respondents.

**MEMORANDUM IN SUPPORT OF UTAH
DEMOCRATIC PARTY'S MOTION FOR
JUDGMENT ON THE RECORD
and
IN OPPOSITION TO RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT**

Case No. 120906505

Judge L. A. Dever

The Utah Democratic Party, by and through its attorney of record, Joseph E. Hatch, and pursuant to this Court's minute entry and Rule 7(c), Utah Rules of Civil Procedures, files this Memorandum in Support of the Motion for Judgment On The Record and in Opposition to Respondent's Motion for Summary Judgment. This Memorandum will be divided into three

separate sections. First, there will be a description of the procedural posture of this case. Second, there will be a discussion of the facts. Third, there will be the presentation of the arguments.

PROCEDURAL POSTURE OF CASE

This case is a petition for judicial review of a decision of the Office of Legislative Research and General Counsel (hereafter “OLRGC”) to deny the request of the Utah Democratic Party (hereinafter “Party”) for a fee waiver in connection with a documents request made pursuant to Utah Code Annotative §§ 63G-2-101, et. seq., the Government Records Access and Management Act (hereinafter “GRAMA”). The decision of OLRGC was affirmed by the Legislative Records Committee (hereinafter “Committee”) when the Committee deliberately refused to render a decision.

When this Petition was filed on September 25, 2012, the Party requested three forms of relief from the Court: 1) the Party requested that OLRGC and the Committee immediately release all requested documents; 2) OLRGC repay the Party the previously tendered \$5,000.00; and 3) the Party be paid for its costs and reasonable attorney’s fees for the bringing of this Petition. On November 16, 2012, the requested documents were unilaterally released by the Legislature. This rendered moot the first request for relief.

As to the remaining two issues presented by the Petitioner, U.C.A. § 63G-2-404(7)

provides the standard by which this Court should review the petition.¹ That statute reads as follows:

- (7) The Court shall:
 - (a) make its decision de novo, but allow introduction of evidence presented to the records committee;
 - (b) determine all questions of fact and law without a jury;
 - and
 - (c) decide the issue at the earliest practical opportunity.

All the evidence presented before the Committee is in the record of this Court.² Although this Court may accept more evidence, the Party is comfortable relying upon the record presented to the Committee, subject to a couple of exceptions. First, I am sure that both parties agree that the disputed documents were released to the public on November 16, 2012. A copy of the letter signed by the Legislative leadership including all four (4) of the members of the Committee, which was referred to on page 7 of the Respondent's Memorandum In Support of Motion for Summary Judgment, is attached hereto as Exhibit "A".

Second, following release of the documents to the public, two members of the Committee made comments to the Salt Lake Tribune reported on November 17, 2012, that the documents released were public documents and their release was in the public interest. Additionally, the

¹ The Legislature by policy states that U.C.A. § 63-2-404(3) through (8) apply. That statute has been renumbered as U.C.A. § 63G-2-404(3)-(8).

² The record is contained in three parts. First, there is the record of documents. This record will be defined as R_____ in this memo. Second, there is the transcript of August 6, 2012 hearing. This record will be identified as TrI _____ in this memo. Finally, there is the transcript of August 20, 2012. This record will be identified as TrII _____ in this memo.

members of the Committee were concerned about additional costs of litigation. The Party has requested that this information be a part of the record by way of a Request for Admissions.

Since this Court's review of the record is de novo, the Court is not bound by either the factual findings or, certainly not bound, by the legal conclusions of OLRGC or the Committee. See Deseret News Publishing Company v. Salt Lake County, 182 P. 3d 372 (Utah 2008).

The Court should weigh the facts as the Court's own independent judgment dictates. The Party maintains that the clear weight of the facts in the record demonstrate that the Party's request for documents under GRAMA was primarily in the public's interest and with the release of the documents to the public, the Party has prevailed in this matter.

THE FACTS

The underlying facts in this case are, surprisingly, not much in dispute. The undisputed facts listed in Respondent's Memorandum In Support Of Motion For Summary Judgment dated January 31, 2013 demonstrate that the procedural aspects of this case are not disputed. However, there is one factual issue which is extremely disputed: Was the Party's GRAMA request "primarily to benefit the public rather than the person requesting the record"? The Party answers this question by asserting that the GRAMA request was clearly and primarily in the public interest. The OLRGC answered the question by alleging that the request was primarily in the interest of the Party. This section of the Memorandum will focus on the facts in the record which can be used by this Court to answer this question.

No one disputes that the documents requested by the Party were in the "public interest".

(TrII 17). The central factual dispute is whether the release of the public documents was primarily in the public interest. The OLRGC made its very specific findings on this point in the Decision on Appeal which are stated on pages 221-223 of the record. This Decision is what the Committee affirmed by not ruling.

The essence of the Decision is that, because the Party was going to examine the records for determination of whether or not to pursue litigation, the request for documents must be primarily in the Party's interest not primarily in the public interest. The gravamen of the Decision is stated as follows:

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." 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.

(R. 222).

The OLRGC choose not to present any evidence to the Committee on this point other than the statements made in its decision. (TrI 9-12). The Party presented a great deal of evidence to support its contention that the GRAMA request was primarily in the public interest.

1. The central premise as to why this GRAMA request is stated in the Party's Notice of Appeal when the Party stated the following:

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.

(R. 195). The OLRGC never dispute this statement in the record.

2. The media interest was overwhelming on the issue of redistricting. Over a hundred media articles were referenced by the Party in its GRAMA request. (R. 241-265).

3. The Party maintains that one of its significant functions is to serve as the loyal opposition to the Republican's Party control of legislative redistricting processes. As such, the Party stated further in its Notice of Appeal:

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 Legislation's established processes, and may not be consistent with the requirements of the United States Constitution.

(R. 196)

4. The Republican Party in testimony stated that its GRAMA request primarily benefited the public. (TrI 24-25).

5. Media organizations have filed GRAMA requests for the exactly same documents which the Party had requested and asked for a fee waiver under the exact same criteria as the Party. After the filing of this lawsuit was filed, the Legislature granted this request. (Exhibit "A")

6. The attorney for the OLRGC was willing to stipulate that every witness from academia and the press would testify that the requested documents were primarily in the public interest. (TrI 11). In fact, every witness from the press and academia testified that the Party's GRAMA request was primarily in the public interest.

7. One of the reasons the Party made its GRAMA request was to consider whether or not litigation would be appropriate. (TrI 21-22). It is this reason for the request that the OLRGC found that the Party's request was not primarily in the public interest. (R. 221-223). However, no evidence was presented by OLRGC that litigation on redistricting issues is not in the public interest.

8. Every witness, independent of the Party or the Republican Party, testified that release of the documents would be in the public interest.

9. The Chairman of the Republican Party testified that the request was in the "political interest" of the Party. (TrII 23).

A secondary dispute between the parties in this case is whether or not the Party has waived its right to appeal this matter to this Court because the Party did not appeal the Decision on Appeal dated December 23, 2011, (R. 45-53), and instead paid \$5,000.00 to the OLRGC on January 23, 2012. (R. 167-168). The facts involving this issue are also not greatly disputed by the parties; however, the weight this Court is to give the following facts is of great dispute.

1. In the initial denial of the fee waiver, the OLRGC stated as follows:

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 \$5,000.00. Please notify us immediately if you are willing to expend this amount or if you desire to narrow the scope of your request in order to lower the cost. (R. 125-126).

2 On January 23, 2012, when the Party delivered the \$5,000.00 to the OLRGC, counsel for the Party wrote as follows:

My client, the Utah State Democratic Party, has asked my opinion as to whether or not to appeal your decision on the Democrats' GRAMA request to the Legislative Records Committee. I have advised the Democratic Party that it has a very good appeal, but not to expect a favorable outcome from the Legislative Records Committee. Instead, the issues raised with the appeal would not be fairly heard and addressed except in District Court. My client, quite wisely, does not want to spend that kind of time on appeal and delay the release of the requested documents. (R. 167).

3. In the same letter, counsel for the Party wrote in response to the OLRGC's assertion that the Party's GRAMA request was not primarily in the public interest by stating:

Although you have stated on several occasions that this request is primarily to benefit the Democratic Party and not the general public, I am not sure that a significant portion of the general public will view any unreasonable delays in the same light.

(R. 168).

4. The OLRGC choose not to release any documents to the Party until after all the documents had been gathered and were available for distribution on May 7, 2012. (R. 205).³

5. When the Party went to pick up the documents from the OLRGC, the Party was told for the first time that it could only take one box of documents. The Party was told for the first time that there was going to be an additional charge for the other documents. The additional

³ The OLRGC stated that they called the Party in April 2012 to inform the Party they could pick-up 5,000 pages of documents. (R. 204). However, the Party maintains that it was not until they went to pick-up all the documents that it was informed that only some documents would be released. (TrI 201-21)

charge was not disclosed. The Party was given no choice in what documents it could pick up. (TrI 21).

6. The documents which were contained in the box pickup by the Party had mostly been previously made public. (TrII 24-25).

7. On May 7, 2012, OLRGC sent a letter to the Party demanding an additional \$9,250 for release of the remaining documents. (R 205, 309-314).

8. It is this letter that caused the Party to proceed with its appeal. (R. 195-197).

ARGUMENT

POINT I: THIS COURT HAS SUBJECT MATTER JURISDICTION

Both in Respondent's Answer and in their Motion for Summary Judgment dated January 31, 2013⁴, the Respondents allege that this Court lacks jurisdiction to hear this petition. The Respondents state three (3) specific reasons as to why this Court lacks jurisdiction. This Memorandum will address each one.

A. U.C.A. § 63G-2-703 grants jurisdiction.

U.C.A. § 63G-2-703(4) specifically states:

Policies shall include reasonable times for responding to access requests consistent with the provisions of Part 2, Access to Records, fees, and reasonable time limits for appeals. [Emphasis added]

Pursuant to this statute, the Utah Legislature established the Utah Legislature Policies and Procedures for Handling Records Request. A true copy of which is attached to Respondent's

⁴ In this Memorandum, the Party will only utilize the "Revised" Memorandum in support of Motion for Summary Judgment dated March 26, 2013.

Memorandum. Section 3.3 of said policy is entitled “Judicial Review” and reads, in part, as follows:

- 1) (a) Any party to a proceeding before the Legislative Records Committee may petition for judicial review by the district court of the Legislative Records Committee’s order.
(b) The petition described in Subsection (1)(a) shall be filed no later than 30 calendar days after the date of the Legislative Records Committee’s order.

This policy (or rule) adopted by the Legislature does not limit judicial reviews of the Committee’s orders. The order that was appealed to the Committee was an order denying the Party’s fee waiver request. The Order, which the Party seeks review by this Court, was an order denying the waiver request. Had the Legislature desired to limit judicial review of Committee orders, the Legislature could have adopted a policy which read “Any party to a proceeding before the Legislative Records Committee may petition for judicial review by the district court of the Legislative Records Committee’s order, except orders denying fee waivers. Said orders are not subject to judicial review”. The Legislature adopted no such policy. The Legislature deliberately granted broad authority for judicial review of Committee orders.

B. Failure to appeal the December 23, 2011 Decision.

The record is very clear that only written decision dated December 23, 2011 is the OLRGC’s denial of the fee waiver which set a \$5,000.00 initial fee. That letter specifically said “Please notify us immediately if you are willing to expend this amount, or if you desire to narrow the scope of your request in order to lower the cost”. (R. 126). The Party responded that, although it disagreed with the decision on the fee waiver, it was willing to pay \$5,000.00 to get all the documents it requested timely. (R. 167). It is clear from the record that the OLRGC did

not honor its commitment of its December 23, 2011 letter. It did not inform the Party that the OLRGC cost estimates were wrong. It did not give the Party an opportunity to narrow the GRAMA request. It did not give the Party a choice as to which box of documents it could take. The OLRGC admitted it had made an error but, it also argues that it is the burden of the Party to accept that error. What would have happened had the OLRGC estimated the fees to be \$14,250.00 on December 23, 2012? The record is clear that the Party would have appealed the denial of the fee waiver. For the OLRGC to misrepresent the fees for which the Party was requesting a waiver and then relying upon that misrepresentation to deny the Party an appeal is inappropriate.⁵

C. Separation of Powers.

Separation of power principles are extremely important. The Party does not dispute that Legislature has the constitutional authority, to reserve for itself, to set rules and interpret those rules for matters which are purely legislative in nature. One of the best cases on the law of separation of powers in Utah can be found in Timpanogas Planning v. Central Utah Water Conservancy District, 690 P. 2d 562 (Utah 1984).

Release of public documents to the public is not a legislative function. It does not involve the legislative powers; it is primarily an administrative function. In fact, the Committee did not sit in its legislative capacity, but it sat in a quasi-judicial capacity.

⁵ The Respondent argues in footnote 14 of its Memorandum that the Party got the benefit of the \$5,000.00 paid is wrong. First, the \$5,000.00 was paid as the costs for all documents. Second, the documents delivered had already been made public.

The Legislature clearly recognized this fact when it expressly granted judicial review authority to the district courts. There simply is no separation of powers issue with this review.

POINT II: PRIMARILY IN THE INTEREST OF PUBLIC

The OLRGC presented only one argument and no evidence that the Party's GRAMA request was primarily done in the Party's own interest and not in the primary interest of the public. This argument was that, since the Party wanted to review the documents to consider litigation, the request was primarily in the interest of the Party. There are numerous mistakes with this argument.

First, the argument ignores all the other reasons advanced by the Party for the waiver of the fees. The argument ignores that the media has had a great interest in redistricting issues and these documents. The argument ignores that academia places a high value on transparency and disclosure of these documents. The argument ignores that public interest groups who were involved in the redistricting process wanted these documents released because they could not afford the fees or an appeal. And, the arguments ignore the role of the Party as the loyal opposition party in our democracy under which the Party has the responsibility to educate and contrast the Republican Party's goals of redistricting with the reality.

Second, the argument of the OLRGC presumes that the potential for litigation can never be primarily in the interest of the public. The OLRGC presented no evidence to support this assumption, an assumption which is clearly wrong. The Legislature has over the years funded litigation which it deems to be in the public interest. The big tobacco litigation, rural roads litigation, college football play-off anti-trust litigation, and anti-abortion litigation. The fact of

the matter is that this very case is in the public interest because, by reason of this case, the public will know more about what GRAMA is and is not, as it pertains to legislative documents and records.

The Party's GRAMA request is primarily in the interest of the public.

POINT III: THE COMMITTEE'S DISCRETION

The OLRGC's fall-back argument is that, even if you assume that the Party's GRAMA request was primarily in the interest of the public, the OLRGC and the Committee have discretion on whether or not to grant the fee waiver. This argument is based upon Section 2.2 (2) of the Utah Legislative Policies and Procedures for Handling Record Requests which reads in part as follows:

The Legislature may fulfill a record request without charge if:
[Emphasis added]

The OLRGC argues that the use of the word "may" means that the OLRGC and the Committee have discretion on whether or not to grant the fee waiver to the Party even if the GRAMMA request is primarily in the public interest. This argument misinterprets the word "may".

U.C.A. § 68-3-12 (g) defines the word "may" as used in statute as follows:

"May" means that an action is authorized or permissive.

In this rule, as announced by the Legislature, the context requires that the meaning of "may" should be "authorized" rather than "permissive". This has been the law of statutory or

rule construction for years in Utah. Chief Justice Hansen of the Utah Supreme Court wrote in 1937 relying upon the treatise Words and Phrases Judicially Defined as follows:

The word 'may' in a statute will be construed to mean 'shall' whenever the rights of the public or third persons depend on the exercise of the power or the performance of the duty to which it refers, and such is its meaning in all cases where the public interests and rights are concerned, or a duty is imposed on public officers, and the public or third persons have a claim de jure that the power shall be exercised. * * *

The true rule of construction is that the word 'may' as used in a statute, 'is to be taken as meaning "must" or "shall" only in cases where the public interest and rights are considered, and where the public or third persons have claimed de jure that the right shall be exercised. In other cases the enactment is not imperative, but left to sound discretion.' * 5 Words and Phrases Judicially Defined, First Series, p. 4421.

Cardisco v. Davis, 64 P. 2d 216, 226 (Utah 1937)

There are comments in the record from a member of the Committee that the Committee had already decided not to exercise any discretion for any GRAMA document request. (TrI 29-30). Such lack of use of "discretion" reinforces the wise words of Justice Hansen and gives weight to the definition of "may" found in the statute. The policy, as written, is that, if the GRAMA request is primarily in the public interest, a fee waiver must be granted.

Interestingly, should the OLRGC be correct in its interpretation of the use of the word "may" then it would mean that this Court has discretion, free of the conclusions of the OLRGC and the Committee, to grant a fee waiver.

POINT IV: ATTORNEY'S FEES

Whether or not the Party is entitled to its attorney fees is governed by U.C.A. § 63G-2-802(2) which reads as follows:

(2)(a) A district court may assess against any governmental entity or political subdivision reasonable attorney fees and other litigation costs reasonably incurred in connection with a judicial appeal of a denial of a records request if the requester substantially prevails.

(b) In determining whether to award attorneys' fees under this Section, the court shall consider:

- (i) the public benefit derived from the case;
- (ii) the nature of the requester's interest in the records; and
- (iii) whether the governmental entity's or political subdivision's actions had a reasonable basis.

(c) Attorney fees shall not ordinarily be awarded if the purpose of the litigation is primarily to benefit the requester's financial or commercial interest.

Because of the U.C.A. § 63G-2-802(3), had the OLRGC or the Committee released the documents prior to the Party filing this Petition, there would have been no petition and no award of attorney's fees. The Party admits such at the hearing before the Committee. (TrII 24).

However, the Party had to file the Petition to get the documents. The documents were not released to the public until November 16, 2012, after the time under which the Respondents were originally required to file their Answer to this Petition. The documents were released without discussion, input, or acquiescence of the Party. The Legislature did this unilaterally after it was faced with this litigation.

There can be no dispute, that with the release of the documents, the Party is the prevailing party. The Party recovered the vast majority of what it sought with the Petition. However, the OLRGC argues that the Party is not the prevailing party because the judicial appeal was not an appeal of a "denial of a records request". This is also a misreading of the law.

There are three ways a state agency could effectively deny a requesting party documents. First, the government body could mischaracterize the document as private or protected. This is not such a case. Second, the agency could set fees that are totally unreasonable such as charging a \$100 per hour for labor or \$10 per page copying charges. This is also not the case. Third, the government body could set a deposit fee or a charge for a request, which would ordinarily be appropriate for a fee waiver, to discourage or make extremely difficult the ability to access public documents. This is what happened in this case.

The ORLGC have always maintained that the Party's GRAMA request was not primarily in the public interest. After the Party was forced to file its Petition, the Legislature changed its mind and released the documents. This change of mind was the direct result of litigation. The Party is entitled to an award of attorney's fees.⁶

CONCLUSION

This Court has jurisdiction to hear this appeal. The Respondents should not be permitted to benefit from their admitted error on estimating that the documents would be released for \$5,000.00. The GRAMA request was primarily in the public interest. A fee waiver should have been granted. Since the Party was the prevailing Party, it is entitled to an award of its attorney's fees.

⁶ Should this Court determine that an award of attorney's fees is appropriate, the Party will cause to be filed the appropriate Affidavit of Fees for this Court's review.

WHEREFORE, the Party respectfully requests an order awarding a return of the \$5,000.00 paid and its reasonable attorney fees.

Respectfully submitted this 2nd day of April, 2013.



Joseph E. Hatch
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2013, a true and correct copy of the foregoing Memorandum In Support Of Utah Democratic Party's Motion For Judgment On the Record and In Opposition To Respondent's Motion for Summary Judgment was emailed to the following:

Robert H. Rees

Ruth Anne Frost

Attorneys for Respondents

EMAIL ADDRESS: rrees@le.utah.gov

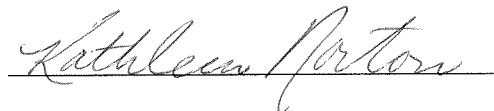
A handwritten signature in cursive script, reading "Kathleen Porton", is written over a horizontal line.

EXHIBIT “A”



UTAH STATE LEGISLATURE

STATE CAPITOL • SALT LAKE CITY, UTAH 84114

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The request made by the Utah Democratic Party and others under the Government Records Access and Management Act for records related to redistricting, and the cost associated with responding to that request, have been an ongoing subject of discussion and debate.

Legislative staff has devoted hundreds of hours of work to produce 16,000 pages of records in response to the request. The first box of records gathered was provided in exchange for \$5,000 and the remaining boxes were made available for disclosure (in accordance with the Legislature's fee policy) upon payment of an additional \$9,250. The Legislature's position has always been that the records in the remaining boxes are public records.

The only reason that the records have not previously been released is that the cost for responding to the request has not been paid. For several months, the Legislature was ready to release the records immediately upon payment the remaining \$9,250 in costs.

One reason expressed by the records officer for denying the Utah Democratic Party's request for a waiver of fees was to protect Utah taxpayers from bearing the cost of the request that was not solely in the public's interest. Unfortunately, the cost to taxpayers continues to grow due to continued appeals including the cost associated with litigation. In order to avoid the expenditure of additional taxpayer funds, we have decided to release the remainder of the records (along with those already provided to the Utah Democratic Party) directly to the public who paid for them.

While we realize that this will also give access to the records to the Utah Democratic Party without requiring them to pay the additional amount owed, we believe that, based on circumstances unique to this situation, it is in the best interest of Utah taxpayers that we do so.

Michael Waddoups
President of the Senate

Rebecca Lockhart
Speaker of the House

Scott Jenkins
Senate Majority Leader

Brad Dee
House Majority Leader

Ross Romero
Senate Minority Leader

David Litvack
House Minority Leader