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IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY, STATE OF UTAH

UTAH DEMOCRATIC PARTY, Petitioner, vs. LEGISLATIVE RECORDS COMMITTEE, and OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL, Respondents.	RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OPPOSING PETITIONER'S MOTION FOR JUDGMENT ON THE RECORD Case No: 120906505 Judge L.A. Dever

Respondents Legislative Records Committee ("Committee") and the Office of Legislative Research and General Counsel ("Office"), by and through their counsel Robert H. Rees and RuthAnne Frost, submit this reply memorandum in support of their motion for summary judgment and opposing the motion of petitioner Utah Democratic Party ("petitioner") for judgment on the record.[1]

[1]Although petitioner filed a memorandum in support of a "motion for judgment on the record," it appears that no such motion has been filed.

ARGUMENT

POINT I

THE COURT LACKS SUBJECT MATTER JURISDICTION

In Respondents' Revised Memorandum in Support of Motion for Summary Judgment ("respondents' main memorandum"), respondents argue that the court lacks subject matter jurisdiction in this case because, among other reasons, there is no statutory or other provision permitting an appeal of the Legislature's denial of a fee waiver request. The Utah Legislature Policies and Procedures for Handling Records Requests ("Policies") provide for an appeal only of "a legislative office's *access determination*." Policies, Section 3.1(1)(a) (emphasis added). Despite that limited scope of appeal -- and despite the fact that the appeal provisions of the Government Records Access and Management Act ("GRAMA"), Utah Code Ann. § 63G-2-101 to -901 (2011 & Supp. 2012), explicitly do not apply to the Legislature[2] -- petitioner argues that jurisdiction is established in Utah Code Ann. § 63G-2-703(4) (2011).[3] That provision, however, has nothing to do with jurisdiction.

Section 63G-2-703(4) refers to policies that the Legislature is required to establish under the preceding Subsection (3) of that section. Under Subsection (3), the Legislature is required "to

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[2]"The Legislature and its staff offices are not subject to . . . Part 4, Appeals. . . ." Utah Code Ann. § 63G-2-703(2)(a) (2011). *See* respondents' main memorandum, p. 2.

[3]Petitioner's Memorandum in Support of Utah Democratic Party's Motion for Judgment on the Record and in Opposition to Respondent's [sic] Motion for Summary Judgment ("petitioner's memorandum"), p. 9.

establish policies to handle . . . fees, access, denials, . . . [and] appeals. . . ." Utah Code Ann. § 63G-2-703(3)(a) (2011). Section 63G-2-703(4) merely requires any policies adopted by the Legislature under Subsection (3) to include "reasonable time limits for appeals." It does not establish an appeal right or grant jurisdiction to hear an appeal.

Petitioner also relies on Section 3.3 of the Policies to argue that the court has jurisdiction. That section likewise does not support jurisdiction. Although that section allows a party to a proceeding before the Legislative Records Committee to petition for judicial review of the Committee's order, that language cannot be read in isolation. To get to the Legislative Records Committee review level to begin with, the appeal must be an appeal of "a legislative office's *access determination*." Policies, Section 3.1(1)(a) (emphasis added). Section 3.3 cannot be read as expanding the scope of an appeal the scope of which is explicitly stated in Section 3.1(1)(a).[4] The subject of petitioner's petition -- the denial of a fee waiver request -- is not the appeal of a legislative office's access determination and is not within the scope of appeals allowed under the Policies.

Even if the court determines that the Policies provide for an appeal of a fee waiver denial, the court lacks jurisdiction because petitioner failed to file a timely appeal of Christensen's

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[4]It is true that Michael E. Christensen ("Christensen"), the legislative officer designated to hear an appeal of a decision of the records officer, Bryant R. Howe ("Howe"), and the Committee both considered petitioner's appeal of the denial of petitioner's fee waiver request even though the appeal was not of a legislative office's access determination. However, their voluntarily giving petitioner greater appeal process than the Policies provide for does not change the scope of appeals allowed under Section 3.1(1)(a) of the Policies.

decision upholding the denial of petitioner's request to waive the $5,000 fee. Petitioner argues, however, that the court should overlook the failure to file a notice of appeal because petitioner was later told -- months after the time for filing an appeal on the $5,000 fee had passed -- that the amount of the fee charged for the records request was higher than originally estimated. Petitioner's memorandum, p. 10-11. Petitioner cites no authority to support its argument. In any event, the logic behind petitioner's argument is flawed. The deadline for filing an appeal of the denial of petitioner's request to waive the $5,000 fee was January 22, 2012. *See* respondents' main memorandum, p. 11. Petitioner learned on May 7, 2012 (petitioner's memorandum, p. 9) that the fee would actually be $9,250 higher than the original estimate. The higher amount of the fee could not possibly have factored into petitioner's decision in January 2012 whether to appeal the denial of its request to waive the $5,000 fee, and any issue about a waiver of the $9,250 portion of the fee is now moot because all the records for which the fee was being charged have been made publicly available. Petitioner failed to file a timely notice of appeal from the decision to uphold the denial of petitioner's request to waive the $5,000 fee, and its failure to file a timely notice of appeal cannot be excused simply because petitioner later learned that an additional amount, now moot, was also being charged.

Because petitioner's petition seeks only review of the denial of a fee waiver request and does not seek review of a legislative office's access determination, it is beyond the scope of permissible appeals under Section 3.1(1)(a) of the Policies and outside this court's jurisdiction.

Even if the court determines that an appeal of the denial of a fee waiver request is allowed under the Policies, petitioner failed to file a timely notice of appeal, depriving the court of any jurisdiction. The court should grant petitioners' motion for summary judgment.

POINT II

EVEN IF THE COURT DETERMINES IT HAS JURISDICTION, THE COURT SHOULD GRANT RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENY PETITIONER'S MOTION FOR JUDGMENT ON THE RECORD BECAUSE THE DENIAL OF PETITIONER'S FEE WAIVER REQUEST WAS PROPER

The court lacks subject matter jurisdiction and should grant respondents' motion for summary judgment dismissing petitioner's petition. The court need not -- and, indeed, should not -- even get to the issue that petitioner treats as the central issue in this case, namely, whether Howe should have waived the $5,000 fee charged for responding to petitioner's expansive GRAMA request. Even if the court does find that it has jurisdiction and addresses the waiver issue, the court should uphold the denial of petitioner's request to waive the $5,000 fee and deny petitioner's motion for judgment on the record.

Petitioner argues that Section 2.2(2) of the Policies does not really mean what it says. Petitioner argues that the language, "[t]he Legislature *may* fulfill a record request without charge," Policies, Section 2.2(2) (emphasis added), really means that the Legislature *shall* fulfill a record request without charge. Petitioner's argument is without merit.

In support of its argument, petitioner cites Utah Code Ann. § 68-3-12, which defines

"may" to mean "that an action is authorized or permissive." Utah Code Ann. § 68-3-12(1)(g).[5] Petitioner then seeks to draw some distinction between "authorized" and "permissive" and suggests that the context requires the use of "authorized" rather than "permissive." But whether an action is "authorized" or "permissive," it is still not mandatory. Both "authorized" and "permissive" incorporate the concept of discretion as to whether to perform the action.

Petitioner's argument is also undermined by additional language in the very code section petitioner cites in support of its argument. Section 68-3-12, which petitioner relies on, includes a definition of "may," but it also defines the term "shall" to mean "that an action is required or mandatory." Utah Code Ann. § 68-3-12(1)(j). Had the Legislature really meant to make the fulfilling a records request without charge mandatory, it could have easily replaced the word "may" with "shall," thereby making it very clear that fulfilling a request without charge under the specified circumstances is required. It did not. "May" really means may, and not shall.[6] Fulfilling a record request without charge is discretionary, not mandatory.

Howe exercised the discretion granted under Section 2.2(2) of the Policies and denied petitioner's request to waive the $5,000 fee. Petitioner has failed to demonstrate any abuse of

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[5]Section 68-3-12 does not technically apply in this situation. Section 68-3-12 applies to "the construction of a statute in the Utah Code." Utah Code Ann. § 68-3-12(1) (2010). The provision in question is contained in the Policies, not statute.

[6]Petitioner also cites a concurring minority opinion in support of its argument that "may" really means "shall." That opinion is inconclusive, at best, on the issue for which it is cited, and, as a concurring opinion, has no precedential value in any event.

that discretion. Howe's decision denying petitioner's fee waiver request should be upheld.

Even accepting petitioner's argument that Section 2.2(2) imposed a requirement rather than discretion to fulfill the records request without charge, the denial of petitioner's request to waive the $5,000 fee should nevertheless be upheld. Petitioner failed to carry its burden of showing that "the release of the record[s] primarily benefits the public rather than" petitioner.

Relying on testimony in the record,[7] petitioner argues that "the media has had a great interest in redistricting issues and these documents," "academia places a high value on transparency and disclosure of these documents," "public interest groups . . . wanted these documents released," petitioner plays a role as "the loyal opposition party in our democracy," and litigation can "be primarily in the interest of the public." Petitioner's memorandum, p. 12. In essence, the testimony that petitioner produced stands for the rather unremarkable proposition that releasing public records on a matter of interest to the public is in the public interest. But that is not the test. Section 2.2(2) allows the Legislature to fulfill a record request without charge if "the release of the record primarily benefits the public *rather than* the person requesting the record." Policies, Section 2.2(2) (emphasis added). It is not enough to show that the subject matter of the records is of interest to the public, that others want to see the records, or even that

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[7]The testimony is not factual at all. It does not address whether the release of the records primarily benefits the public rather than the petitioner. It is opinion testimony essentially discussing the value of the public having access to public records relating to a topic of public interest and, in the case of one witness, making suggestions "for exercising valuable discretion in cases such as that before [the Committee]". Testimony of Professor Huefner, TrII p. 9.

releasing public records would be in the public interest. Petitioner must show that the release of the records pursuant to petitioner's specific request *primarily* benefits the public *rather than* petitioner. The record includes numerous statements from petitioner's representatives indicating that the purpose of the GRAMA request was for petitioner to determine whether to pursue a lawsuit over redistricting. TrII p. 18. It is not unreasonable to conclude that petitioner's own political gain was a primary motivator of the GRAMA request[8] and that, although release of the records might also benefit the public, the release of the records pursuant to petitioner's GRAMA request would primarily benefit petitioner, not the public.

Petitioner has failed to demonstrate that Howe abused his discretion in denying petitioner's request to waive the $5,000 fee. Even if Howe had no discretion, petitioner has failed to carry its burden to show that release of the records would primarily benefit the public rather than petitioner. Petitioner's motion for judgment on the record should be denied, and respondents' motion for summary judgment dismissing petitioner's petition should be granted.

POINT III

PETITIONER IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES

Petitioner is not entitled to an award of attorney fees, even if petitioner prevails on any of its claims, because Utah Code Ann. § 63G-2-802(2), upon which petitioner relies for its claim of attorney fees, applies only "in connection with a judicial appeal of a denial of a records request."

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[8] *See* testimony of Thomas Wright, chair of the Utah Republican Party. TrII p. 21-23.

See respondents' main memorandum, p. 14-17. Petitioner's petition is not an appeal of a denial of a records request but an appeal of a denial of a fee waiver request. The court should grant respondents' motion for summary judgment and deny petitioner's motion for judgment on the record with respect to petitioner's claim for attorney fees.

Despite the language of Section 63G-2-802(2) limiting attorney fee claims to judicial appeals involving the denial of a records request, petitioner pursues a claim for attorney fees, relying on its alleged status as prevailing party. Petitioner claims to be the prevailing party because, as petitioner claims, the records for which petitioner was being charged a fee were made publicly available after petitioner filed its petition and because of the petition. Petitioner's memorandum, at 15-16. Even if Section 63G-2-802(2) provided for attorney fees in this case -- which it does not -- petitioner's argument that it is the prevailing party is without merit.

This case is not an action to seek the release of records that a governmental entity is claiming are protected or otherwise not subject to release.[9] This is an action concerning the

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[9]Petitioner seeks to frame one aspect of its petition as a request "that [the Office] and the Committee immediately release all requested documents." Petitioner's memorandum, p. 2. But that characterization is not accurate. In its petition, "Petitioner requests that the Respondents release the requested documents to the Petitioner *without the payment of the requested $14,250.00, or in the alternative, without the payment of an additional $9,250.00*." Petition, p. 2, ¶ 4 (emphasis added). That is a request for a fee waiver, not a stand alone request for the release of records that are being withheld because they are claimed to be protected or otherwise not subject to disclosure. Regardless of how petitioner seeks to frame this action, it is clear that the action is about a denial of a fee waiver request, not about whether records should be released. The records for which a fee was charged are public records subject to disclosure, and respondents have never claimed otherwise.

denial of petitioner's request to waive the $5,000 fee for records that petitioner requested. Petitioner does not attain prevailing party status simply because those records are separately released to the public. Prevailing party status in a case concerning a denial of a fee waiver request comes only if petitioner succeeds in having the fee waiver denial overturned.[10]

Petitioner is not the prevailing party in this case. Even if it were, Section 63G-2-802(2) allows the court to award attorney fees only if they are "incurred in connection with a judicial appeal of a denial of a records request." This case is not an appeal of a denial of a records request. The court should grant respondents' motion for summary judgment and deny petitioner's motion for judgment on the record with respect to the issue of petitioner's claim for attorney fees.

CONCLUSION

For the forgoing reasons, and for the reasons set forth in respondents' main memorandum, respondents respectfully request the court to grant their motion for summary judgment, deny petitioner's motion for judgment on the record, and dismiss petitioner's petition.

Respectfully submitted this 16th day of April, 2013.

/s/ Robert H. Rees
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[10]And even then, as explained *supra*, petitioner would still not be entitled to an award of attorney fees because Section 63G-2-802(2) allows for attorney fees only if they are incurred in a judicial appeal of a denial of a records request.

CERTIFICATE OF SERVICE

I certify that on April 16, 2013, a true and correct copy of the foregoing Respondents' Reply Memorandum in Support of Motion for Summary Judgment and Memorandum Opposing Petitioner's Motion for Judgment on the Record was served on the following by having been submitted for electronic filing, and was also emailed to the following:

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