

BEFORE THE STATE RECORDS COMMITTEE OF THE
STATE OF UTAH

KEN CROMAR ,

Petitioner,

vs.

CITY OF CEDAR HILLS,

Respondent.

DECISION AND ORDER

Case No. 12-19

By this appeal, Petitioner, Ken Cromar, on behalf of Cedar Hills Citizens for Responsible Government, seeks to appeal the denial of his fee waiver request for the costs to provide access to emails to and/or from certain members of the City of Cedar Hills governing body. Mr. Cromar also seeks the imposition of a civil penalty subsequent to *Cromar v. Cedar Hills*, State Records Committee Case. No. 12-11 (June 26, 2012), pursuant to Utah Code § 63G-2-403(14)(d).

FACTS

On March 5, 2012 Mr. Cromar, on behalf of Cedar Hills Citizens for Responsible Government, made a records request to the City of Cedar Hills (“the City”). At that time the City provided some records responsive to Mr. Cromar’s request. However, the City indicated that it would need to search, retrieve and compile the additional records, and would require a prepayment of fees before beginning work on the request. Mr. Cromar appealed the City’s decision to the State

Records Committee (“Committee”) on June 15, 2012. The Committee’s order stated the following:

(1) Because the requested e-mails are not normally maintained in the format being requested, Cedar Hills may charge for search and compilation to locate and make the documents available to Mr. Cromar; (2) Since the estimated cost of fulfilling Mr. Cromar’s remaining request would exceed \$50.00, Cedar Hills may require prepayment of its estimated fees pursuant to Utah Code § 63G-2-203(8); (3) After paying said fees, Mr. Cromar is entitled to receive public records from Cedar Hills of all correspondence between Konrad Hildebrandt and Eric Richardson and/or to any member of the City Council, using whatever e-mail address, since March 5, 2011; and (4) that after providing a reasonable estimate and collection of a pre-payment of estimated fees, Mr. Cromar should be allowed to view the records relevant to his request or receive paper copies of the records at Mr. Cromar’s discretion. [*Cromar v. Cedar Hills*, State Records Committee Case. No. 12-11, ¶ 7]

Mr. Cromar paid the fee requested by the City and received the records with the last group of records being provided to Mr. Cromar on or about September 12, 2012. Mr. Cromar asked for a fee waiver after paying the required amount, indicating that he believed his request primarily benefited the public pursuant to Utah Code § 63G-2-203(4) . His request for a waiver of fees was denied by the City.

Mr. Cromar now appeals the City’s denial of a fee waiver and seeks the imposition of a civil penalty pursuant to Utah Code § 63G-2-403(14)(d) because he believes the City is using the appeals process to delay providing him the records he seeks and/or to prevent him from receiving records. The Committee having reviewed the submissions of the parties and having heard oral argument and testimony on September 13, 2012, now issues the following Decision and Order:

STATEMENT OF REASONS FOR DECISION

1. The Government Records Access and Management Act (“GRAMA”) specifies that “all records are public unless otherwise expressly provided by statute.” Utah Code § 63G-2-201(2). Records that are not public are designated as either “private,” “protected,” or “controlled.” See, Utah Code §§ 63G-2-302, -303, -304 and -305.
2. A governmental entity may fulfill a record request without charge and is encouraged to do so when it determines that releasing the record primarily benefits the public rather than a person. See Utah Code § 63G-2-203(4)(a). GRAMA defines a “person” as an individual, a nonprofit or profit corporation, a partnership, a sole proprietorship, other type of business organization, or any combination acting in concert with one another. Utah Code § 63G-2-103(17).
3. Unless a notice of intent to appeal is filed, each party to a proceeding before the Committee shall comply with the order of the Committee. Utah Code § 63G-2-403(14)(a). If the Committee orders the governmental entity to produce a record and no appeal is filed, or as a result of the appeal, the governmental entity is required to produce a record, the governmental entity shall produce the record and file a notice of compliance with the Committee. Utah Code § 63G-2-403(14)(c).
4. If the governmental entity fails to file a notice of compliance or a notice of intent to appeal, the Committee may do either or both of the following: (1) impose a civil penalty of up to

\$500 for each day of continuing noncompliance; or (2) send written notice of the entity's noncompliance to the Governor for executive branch entities, to the Legislative Management Committee for legislative branch entities, and to the Judicial Council for judicial branch agencies' entities. Utah Code § 63G-2-403(14)(d)(i). In imposing a civil penalty the records committee shall consider the gravity and circumstances of the violation, including whether the failure to comply was due to neglect or was willful or intentional. Utah Code § 63G-2-403(14)(d)(ii).

5. At the hearing, Mr. Cromar argued that pursuant to the Committee's previous order, he should be able to review the records and receive them in either paper or electronic format at his discretion. Mr. Cromar argued that the City had intentionally chosen to provide paper records because it was more costly and the City had been stalling and using the format of the records among other things to delay and/or hinder his access to the records. Mr. Cromar argued the costs to him would have been minimal if the records would have been provided in an electronic format.
6. Counsel for the City indicated the City had thoroughly reviewed Mr. Cromar's request before making its decision to deny Mr. Cromar's request for a fee waiver. Further, Counsel argued that the waiver of fees was discretionary pursuant to Utah Code § 63G-2-203(4)(a), and that even if the City was inclined to grant Mr. Cromar a fee waiver, it could not because it was the City's belief that Mr. Cromar's request did not primarily benefit the public rather

than a person. The City argued that it believed Mr. Cromar requested the records to further his private political activities and that the City was precluded from “subsidizing the political motivations of others”.

7. Counsel for the City argued and testimony was presented indicating that the City did not have control of all the records responsive to Mr. Cromar’s request and the City had not filed a Notice of Compliance because it had just produced the records the day before the hearing. Counsel assured the Committee that the City had not purposefully delayed its response to Mr. Cromar and it had diligently worked to produce the records requested by the Petitioner.
8. After hearing the arguments of the parties, and having reviewed their submissions, the Committee finds that pursuant to Utah Code § 63G-2-203(6) the City’s denial of Mr. Cromar’s request for a fee waiver was not unreasonable. The statute is permissive in that the City is encouraged but not required to waive fees if it determines that releasing the record primarily benefits the public rather than a person. The Committee does not conclude that the City’s decision was an “unreasonable denial of a fee waiver.” Also, the Committee is not convinced the City failed to comply with a Committee decision, or even if there was a failure, that it was due to neglect or was willful or intentional pursuant to Utah Code 63G-2-403(14)(d). Therefore, the Committee finds no basis for the imposition of a civil penalty.

ORDER

THEREFORE, IT IS ORDERED THAT the appeal of Petitioner, Ken Cromar is DENIED.

RIGHT TO APPEAL

Either party may appeal this Decision and Order to the District Court. The petition for review must be filed no later than thirty (30) days after the date of this order. The petition for judicial review must be a complaint. The complaint and the appeals process are governed by the Utah Rules of Civil Procedure and Utah Code § 63G-2-404. The court is required to make its decision *de novo*. In order to protect its rights on appeal, a party may wish to seek advice from an attorney.¹

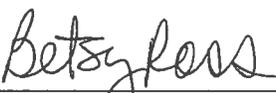
¹This notice is required by Utah Code § 63G-2-403(12)(d).

PENALTY NOTICE

Pursuant to Utah Code § 63G-2-403(14)(d), the government entity herein shall comply with the order of the Committee and, if records are ordered to be produced, file: (1) a notice of compliance with the records committee upon production of the records; or (2) a notice of intent to appeal. If the government entity fails to file a notice of compliance or a notice of intent to appeal, the Committee may do either or both of the following: (1) impose a civil penalty of up to \$500 for each day of continuing noncompliance; or (2) send written notice of the entity's noncompliance to the Governor for executive branch entities, to the Legislative Management Committee for legislative branch entities, and to the Judicial Council for judicial branch agencies' entities.

Entered this 24th day of September, 2012.

BY THE STATE RECORDS COMMITTEE



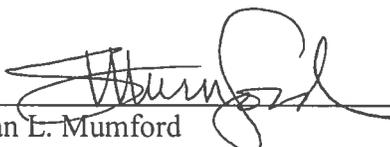
BETSY ROSS, Chairperson
State Records Committee

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Decision and Order, postage prepaid, this 24th day of September 2012, to the following:

Ken Cromar
Cedar Hills Citizens for Responsible Government
9870 North Meadow Drive
Cedar Hills, Utah 84062

Eric Todd Johnson
Attorney for the City of Cedar Hills
3925 West Cedar Hills Drive
Cedar Hills, UT 84062



Susan L. Mumford
Executive Secretary