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Susan Mumford
State Records Committee
346 S. Rio Grande
Salt Lake City, UT 84101-1106

Dear Ms. Mumford:

In accordance with Utah State Records Committee policies, I am submitting a statement of facts and argument in my Utah Government Records Access and Management Act appeal. I am seeking city of Bluffdale records of water consumed by the National Security Agency's Utah Data Center. Also, I seek a waiving or reduction of $767.45 in fees Bluffdale says it is owed.

BACKGROUND REGARDING FEE APPEAL

The Utah Data Center resides on real estate within the boundaries of the city of Bluffdale. The city sells water to the Utah Data Center. Bluffdale City Council meeting minutes from Oct. 2, 2010, suggest the Utah Data Center plans to consume 1.2 million gallons per day.

On May 1, 2013, I submitted, on behalf of *The Salt Lake Tribune*, a GRAMA request to the city of Bluffdale.[1] It's important to note that discussion of this records request applies to the discussion of the fee waiver. I am not appealing any of the denials or redactions associated with this records request. However, there is some overlap of the two issues.

The request sought:

- All emails to or from the "nsa.gov" domain
- Correspondence, including emails, with Harvey Davis and/or Scott Olsen
- Any information provided to the National Security Agency to encourage it to build a data center in Utah.

Bluffdale acknowledged receipt the following day with an email from city attorney Vaughn Pickell.[2] Mr. Pickell's email said "Much of what you request is a protected record for security reasons." He said he would review the documents for what the city would consider public, but added: "I am the only person employed by the City qualified to make that determination. As such, and pursuant to Utah Code Ann. §63G-2-203, I will have to charge my hourly rate to do

1 See attachment labeled May 1, 2013, request.
2 See attachment labeled May 2013 emails.

this work, which is approximately $45 per hour."[1]

Mr. Pickell and I continued to exchange emails regarding whether he was the lowest-paid qualified person to review the records. Mr. Pickell held firm to his position. On May 21, I received an email from Mr. Pickell saying he searched his computer for responsive documents for 1.5 hours and accumulated a bill of $67.50.[2] That was the last discussion Mr. Pickell and I had about cost until Nov. 22. [3] On Dec. 17, Mr. Pickell informed me in an email that $767.45 was due to Bluffdale.[4]

Mr. Pickell also informed me *The Tribune* could not have a copy of the updated contract between Bluffdale and the National Security Agency until that amount was paid. The contract is related to a Dec. 13 GRAMA request I filed and will discuss later in this appeal.

ARGUMENT REGARDING FEES

The Tribune is not completely unwilling to pay fees, but it believes the fees in this case are excessive. Bluffdale assigned an attorney to review the records rather than a clerk or a lower-paid employee with expertise in the areas for which Bluffdale expressed concern.

For example, in a May 3 email, Mr. Pickell expressed concern the records could compromise security measures and security plans as well as public works designs. Yet there's no indication Bluffdale assigned an engineer or security professional to review these records.[5] The city assigned its attorney to review the records.

Also, GRAMA specifies in §63G-2-203(5) that an agency may not charge a fee for reviewing a record to determine if it can be released. The statute reads:

A governmental entity may not charge a fee for:
a) reviewing a record to determine whether it is subject to disclosure, except as permitted by Subsection (2)(a)(ii); or
(b) inspecting a record.

The exception noted in the statute is for search, retrieval and other direct administrative costs. It does not reverse the policy that an agency can't charge for reviewing a record to determine whether it is public.

The review of the records was further complicated, and thus the fees accumulated unnecessarily, by Bluffdale deciding it was going to honor the wishes of the NSA to not release records and by Bluffdale incorrectly following §63G-2-305(31). This point will be elaborated upon in the discussion of the denial of the water records.

Further, Bluffdale did not give a reasonable notice of how fees had accumulated. There was no discussion of cost between May 21 and Nov. 22. On the latter date, Mr. Pickell said only that he was calculating fees. It was not until a Dec. 17 email from Mr. Pickell that I learned fees increased by $700.

1 See May 2013 emails.
2 See May 2013 emails.
3 Bluffdale was not working on my requests for the entirety of that six months. For much of that span in the summer and fall, Bluffdale was waiting on responses from the NSA as to whether it would consent to the release of the records. Mr. Pickell has relayed that NSA attorneys were slow to respond or out of contact due to other burdens and the federal government shutdown.
4 See attachment labeled December 2013 emails.
5 See May 2013 emails.

Finally, the disclosure of the records in question were in the public interest. The records discussed and will discuss the relationship between Bluffdale and the NSA. The records have already shown how Bluffdale negotiated an agreement with the NSA that sells water to the Utah Data Center at a discount compared to users of similar volume.[1] While *The Tribune* is not making a judgment on the appropriateness of that agreement, the agreement does seem something that the residents of Bluffdale and perhaps Utah should have known.[2]

BACKGROUND REGARDING WATER USAGE RECORDS

As mentioned earlier, I emailed Bluffdale a GRAMA request, on behalf of The Tribune , Dec. 13.[3] That request sought:

- A complete copy of the agreement for Bluffdale to provide water to the National Security Agency and/or the Utah Data Center
- Records of water daily usage at the Utah Data Center from inception to date. If daily water usage is not available, please provide monthly water usage statistics

Mr. Pickell's Dec. 17 letter agrees to provide the water contract at a cost of $49.95.[4] As for the water usage records, Mr. Pickell denied access to those records, citing §63G-2-305(31) and 63G-2-305(12).

Statute §63G-2-305(12) lists as protected:

"records the disclosure of which would jeopardize the security of governmental property, governmental programs, or governmental recordkeeping systems from damage, theft, or other appropriation or use contrary to law or public policy."

Statute §63G-2-305(31) lists as protected:

"records provided by the United States or by a government entity outside the state that <u>are given</u> to the governmental entity with a requirement that they be managed as protected records if the providing entity <u>certifies</u> that the record would not be subject to public disclosure if retained by it."[5]

Further, Mr. Pickell pointed to documents Bluffdale sent me pursuant to the May 1 records request. Bluffdale sent those documents to the NSA for approval prior to release and the NSA redacted water usage records and wrote next to the redaction: "Figures redacted per NSA Act section 6." [6]

I appealed both the denial of the water records and the fees in a letter dated Jan. 16, 2014, and sent to Bluffdale City Manager Mark Reid.[7] Mr. Reid denied my appeal in a letter dated the same day.[8]

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1 See attachment labeled NSA Contract. Also, see *The Salt Lake Tribune* article "Utah town gave NSA a deal on water" by Nate Carlisle, Nov. 28, 2013.
2 The rate agreement and Bluffdale's rationale for it will be discussed later in this appeal.
3 See December 2013 emails.
4 See attachment labeled Pickell letter. The charges listed are part of the aforementioned $767.46. That contract has not been provided due to the fee dispute.
5 Underline added for emphasis.
6 See page 16 in the attachment labeled NSA Contract.
7 See attachment labeled Bluffdale Appeal.
8 See attachment labeled Bluffdale Denial.

ARGUMENT REGARDING WATER USAGE RECORDS

Utah Code Annotated §63G-2-201(2) says, "A record is public unless otherwise expressly provided by statute."

To Bluffdale's credit, it is not claiming all water usage records or even swaths of such records are exempt from disclosure. Bluffdale is only arguing water usage records cannot be released in this circumstance. Indeed, water usage records are routinely available from cities or water districts in Utah.

Statute §63G-2-305(31) is inapplicable.

The records do not and never have belonged to the NSA.

The water originated in Utah. Bluffdale acquired the water through its infrastructure. Bluffdale then sold the water to the NSA and piped the water to the Utah Data Center through Bluffdale's infrastructure.

Bluffdale — not the NSA — generated the records.

Even if the statute is applicable, neither Bluffdale nor the NSA followed its provisions.

The statute describes the providing entity — in this case the NSA — must provide something at the time the records are given. Yet Mr. Pickell, in an email dated May 7, stated:

"In the past, the representatives from the federal government have requested that all communications, documents, contracts, designs, etc., remain private. I am sure you can understand that this project involves national security, which they do not wish to jeopardize by disclosing the information to a newspaper. They will provide a written statement regarding their desire."[1]

It is not clear if when Mr. Pickell typed the word "private" he was using the layman's definition or the definition in GRAMA. His citations have described the documents as "protected" rather than "private."

In either case, it is clear the NSA should have conveyed any desire for secrecy in writing at the time any records were provided. The root of "certifies" is "certify."

The chapters of Utah law cited do not define "certify." Webster's II New College Dictionary, Third Edition, lists "certify" as a verb. Definition 1a is: "To confirm formally as true, accurate, or genuine, esp. in writing."

Definition 1b is: "To guarantee as meeting a standard." Definition 2 is: "To acknowledge in writing on the face of (a check) that the signature of the maker is genuine and that the depositor has sufficient funds on deposit for its payment."

There is a third definition related to declaring one in need of psychiatric treatment, a fourth saying the word means to make certain and a fifth definition related to the issuing of a license. As a verbal illustration, Webster's lists: "To testify."

1 See May 2013 emails.

All these definitions describe producing something in writing and/or due diligence to affirm something is true. Yet Mr. Pickell's May 21 email implies the NSA requests for secrecy lacked this standard. To date, the only written documentation I have received of the NSA's desire for secrecy is the aforementioned citation of Section 6 of the NSA Act. That redaction and citation was given to me on Nov. 22 — long after Bluffdale would have started generating water usage records for the Utah Data Center.

The NSA did not follow precedent regarding Section 6.

Even if the Records Committee decides §63G-2-305(31) is applicable, and even if it decides Bluffdale and the NSA followed its provisions, the NSA did not give proper affirmation of the records importance under the act it cited.

Section 6 of the National Security Agency Act provides that: "nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, [or] of any information with respect to the activities thereof . . . ." [1]

The precedent regarding Section 6 is Hayden v. National Security Agency, United States Court of Appeals for the District of Columbia. In that case, the appellant filed Freedom of Information Act requests with the NSA for all documents pertaining to them. The courts ruled against the appellants and in favor of the NSA's denial of the FOIA request after the NSA filed a 20-page affidavit explaining how any such documents would disclose NSA activities.

Nothing resembling such an affidavit has been filed in conjunction with *The Tribune 's* current GRAMA request. Even if the NSA were to submit some filing pursuant to the Record Committee hearing, the NSA and Bluffdale would be hard pressed to explain how water usage records would disclose NSA *activities* to the standard in Hayden v. National Security Agency or meet the definition in §63G-2-305(12).

The records do not jeopardize security or public policy.

The Tribune has requested water usage records from a political subdivision of the state of Utah. The newspaper has not requested documents generated by the NSA or documents describing any employee's job duties, nor has it requested codes or passwords or records showing points of access into the facility. It is not reasonable to believe a water usage record can — to quote from §63G-2-305(12) — "jeopardize the security of" the Utah Data Center.

Bluffdale or third parties may attempt to argue any disclosure of water usage would reveal the computing capacity of the Utah Data Center and thus harm "public policy." *The Tribune* encourages the Records Committee to probe such an argument thoroughly and require Bluffdale or any third party to state in specifics what the water usage records would reveal, how and why it would be harmful. The newspaper is confident such a vetting will lead to the Records Committee rejecting such concerns.

First, the NSA is purchasing culinary water from Bluffdale. Culinary water can be used for anything, from cooling to bathing to drinking. Of the gallons of water entering the Utah Data Center we do not know — and *The Tribune* has not requested to know — how many of those gallons are used as a coolant and how many are used for watering lawns, washing cars, flushing toilets and urinals or any other purpose.

Second, if one was to assume every drop of water the NSA purchased from Bluffdale went

1 Pub. L. No. 86–36, § 6(a), 73 Stat. 63, 64 (1959)

toward cooling, it's unreasonable to assume that would describe the computing capacity of the Utah Data Center. We would not know, for example, the water efficiency of the cooling equipment or the temperatures generated inside the facility.

Finally on this point, even if the water usage records were to reveal the computing capacity, so what? That still would not tell us how the computers are being used. And it's more likely the use fits the definition of "governmental program," to quote again from §63G-2-305(12). As it is, the water usage records would, at most, tell us about a government building. We still would not know what is occurring inside the building, thus there would be no harm to "public policy."

There is no precedent for denying water usage records.

While Bluffdale feels the water usage records are expressly prohibited from release by §63G-2-305(12), the city has, in fact, cited a vague statute that has never been applied in the way Bluffdale is applying it. A search of previous Records Committee cases reveals the committee has only considered this statute in the context of prison records.[1] Nor is there any Utah judicial precedence calling water usage records a jeopardy to security or public policy.

The Tribune was not able to find any case in which the Records Committee has addressed §63G-2-305(31) and is unaware of a relevant judicial precedent. The Records Committee has addressed the issue of federal law application to GRAMA. The Records Committee ruled in Case Nos: 09-03 and 12-21 that federal laws or regulations did not prohibit the disclosure of documents under GRAMA and ruled in favor of petitioners who were seeking records regarding a financial settlement from the University of Utah and records of a Granite School District investigation, respectively. In case No. 10-8, the Records Committee ruled against the petitioner due in part to federal law or regulation, however the issue there was the Sevier School District records in question were classified as "private" because they concerned a third-party individual who supplied her personal income and other financial information.

Also, it should be noted the Utah Data Center is not as new a facility as some parties may claim. The facility's arrival has been known since Congress approved its funding in 2009. That was plenty of time for the Utah Legislature to create a provision in GRAMA or elsewhere in state law to exempt water usage records such as these from disclosure. Yet the Legislature passed no such law.

For that matter, the Utah Data Center is not the first Department of Defense facility in the state of Utah. Again, the Utah Legislature has not passed any law specifically addressing water usage at military or intelligence installations. Congress, too, could have passed such a law.

There is a public interest in disclosing the records.

As stated earlier, water usage records are routinely available in Utah. It's reasonable to assume that is because Utah has decided, specifically or intuitively, water is a precious commodity that demands accounting and transparency.

Indeed, Utah has multiple mechanisms to account for water. Usage records are public in Utah. The state tracks water rights holders and has administrative and judicial mechanisms to challenge or affirm those rights. State, federal and local agencies all disclose snowpack and reservoir levels.

Accounting for the water entering the Utah Data Center — in amounts already disclosed to

1 See State Records Committee Case Nos.: 12-4; 12-10 and 12-25.

exceed in excess of 1 million gallons per day — is congruent with these previous public policy decisions. The taxpayers also have an interest in disclosure.

Bluffdale is selling water to the NSA at rates discounted from what users at the Utah Data Center's expected levels would normally pay.[2] While Mr. Reid has explained Bluffdale did this to make an investment in its infrastructure, an accurate judgment of the deal cannot be made without knowing how much NSA has paid the city, a figure which will be shown through the water usage records.

Upholding the denial would contradict public policy decisions.

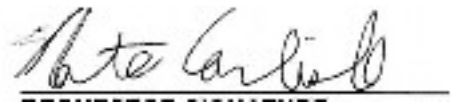
The Utah Data Center is not the only facility, federal or otherwise, which purchases water from a political subdivision of the state of Utah. If the Records Committee decides the Bluffdale water usage records should not be disclosed, it could have a detrimental effect on the transparency of water usage.

It is not difficult to imagine another government installation wanting to protect its water records under the auspices of security even when, for reasons outlined earlier and even more in the case of your average government buildings, the records would pose no threat. An adverse ruling from the Records Committee could open the door to the government hiding water records for no *real* reason than it is embarrassed at how much water it uses or other political calculations. Power plants, which use large amounts of water, could cite §63G-2-305(12), too, and so could any private business that contracts with the government.

CONCLUSION

For the reasons stated above, and arguments I reserve to make at a hearing, I request a fee waiver or reduction in fees and for the Records Committee to order Bluffdale to provide the water usage records described in my appeal. Thank you for you time in this matter.

Sincerely,



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2 See attachment labeled NSA Contract. Also, see *The Salt Lake Tribune* article "Utah town gave NSA a deal on water" by Nate Carlisle, Nov. 28, 2013.