

Comments of Justice Michael J Wilkins
to the GRAMA Working Group
March 31, 2011

Chairman Beattie, and members of the Committee:

I appreciate this opportunity to share my thoughts on this important task. I am also grateful to have been able to “attend” the first two meetings of the working group on line from the comfort of my home in Washington City.

As I listened to each of you identify your areas of interest and expertise, and to the comments and testimony of those who have appeared before us so far, I have been struck by one or two thoughts that I want to share. I preface these thoughts with a brief introduction to my interest and experience for those of you whom I do not yet know.

My Background

I retired from the Utah supreme court last May after just over ten years on the court. Prior to that I spent about six years on the Utah court of appeals, and twenty years in private civil law practice in Salt Lake City. I was born and raised in Salt Lake County, and have lived more than 25 years in Davis County. Diane and I moved to Washington just last fall. It is warmer here.

I am presently the chairman of the Legislative Ethics Commission, an independent constitutionally established body. I am also a member of Utah’s commission on uniform state laws and as such a member of the National Conference of Commissioners on Uniform State Laws, the people who produce recommended uniform laws for states to consider, such as the Uniform Commercial Code, the Uniform Probate Code, and others of that nature. I have taught law, written about the law, and perhaps more directly interesting to this group, I was one of the five members of the supreme court that decided both Deseret News Publishing Company v. Salt Lake County, (2008 UT 26), and Southern Utah Wilderness Alliance v. The Automated Geographic Reference Center, (2008 UT 88).

I claim no special expertise with GRAMA. Nor have I had any meaningful direct experience with seeking or supplying information under its provisions. I have, however, thought about it some, and have an idea or two that I hope may help us in our task.

Specific Suggestions

1. Our task.

While I honor the Governor, the Speaker, and the President for their initiative in forming this working group and asking us to assist in restoring public confidence in both GRAMA and in the legislative process, I am not entirely clear on what it is we are asked to do, now that HB477 has been repealed. If our job is to give political cover for the repeal, it has been accomplished. If it is to assist in review and

revision of the twenty year old GRAMA statutes, it is daunting and cannot, in my opinion, be accomplished in a few weeks and a few meetings.

I think our task should be to present the legislature, whose job it is under our constitution to enact laws and set policy, with recommendations to guide their efforts in a complete and thoughtful review of GRAMA. Government records have become more varied in form and significantly greater in volume since GRAMA was studied and enacted. The ability to create and to access those records has changed dramatically. The lines between private communications and public records have blurred considerably. A complete and careful review is due, and clarification of the statutory language is needed at the very least.

2. Data collection.

A scientist friend of mine once told me, “The plural of anecdote is not data.” His point is a significant one. The fact that many of us feel that GRAMA has defects does not tell us with any accuracy what those defects really are, nor does it tell us what impact changes will have.

Before we can make a meaningful recommendation about how costs of compliance with GRAMA ought to be allocated, we need to know with some level of confidence what those costs actually are. We need to know how compliance with request procedures impacts both requesters and responders. We need to know how much time is actually needed to respond to a typical request, what a typical request looks like, how various levels of government presently deal with those requests, and what impact changes in cost allocation will have on all concerned.

This is technical research. Those with the expertise to conduct this research, and those with the raw data to answer these questions, are not part of our committee. Some of the answers are probably available from the State Archivist and the State Records Review Committee. Some will require examination of practices in town offices, state agencies, and other governmental units included within GRAMA’s sweep. Speculation as to how cost shifting will impact citizen inquiry, or how formality impacts cost, is meaningless without data to base our evaluation on.

3. Technical scope.

I’m 63. I just learned how to text this year because my grandchildren don’t communicate any other way. I don’t “tweet” or “blog” or, as far as I know, affiliate with those who do. I don’t know how one would retain texts or tweets or other transitory electronic conversations with any reliability.

Before we can make meaningful recommendations to the Legislature about the scope of GRAMA as it applies to these newer and ever-evolving forms of communication we must understand their current workings, and their future. Again, this is expertise not all of us possess. Reliable information on how these forms of communication are currently used in creating “government records” and how they are likely to evolve in the near future is vital to our task.

Significant policy questions are created by this blurring of conversation and record creation. To what extent is a bit of information that exists only in the hands of non-governmental third parties (Facebook, Twitter, Gmail, etc.) a “governmental record” subject to the act? What obligation can or ought to be imposed on government to preserve a reliable copy of this information?

Again, I see the necessary underlying information as not immediately available to us. Expertise surely exists, as does the likelihood of differences of opinion on these technical matters among the experts. Policy choices regarding these newer forms of communication, particularly their fit as records subject to GRAMA, require a clear understanding of the scope and practices involved.

4. Privacy rights.

The right to privacy, such as it may be, is a creature of law. Legislatures enact laws. Ergo, if the Legislature says citizens have certain rights to privacy in their communications, they do. Moreover, certain privacy rights already exist as a matter of law. The United States Supreme Court has identified certain privacy rights as a consequence of reading our national constitution. Only action by the people to amend the national constitution can reduce those rights. The Congress has enacted certain statutory rights to privacy, such as with respect to educational or medical records. States cannot diminish those rights by legislative action. And state courts have identified privacy rights under our state constitution. Again, those rights can only be diminished by amendment of the state constitution by the people.

The other side of this same legal coin is the scope to which constitutional protections do not extend. For example, notwithstanding the First Amendment right to political free speech, Utah judges are prohibited by law from expressing political views, contributing to political candidates, or supporting political causes. This is one of the “costs” of accepting the job. Other public officers and employees also pay a price for accepting public positions. Certain ordinary protections are lost. Public officials are given less protection from false claims against them, particularly those that would be actionable defamation if made about a private citizen. Public officials are subject to greater disclosure of private and personal information, as well as greater public scrutiny, as a consequence of placing themselves in the public arena.

However, the right to conduct one’s private affairs in private is not usually forfeit by election. Conversely, review by an official’s staff of the official’s emails to determine those subject to a GRAMA request is not a Fourth Amendment issue.

A clear and thorough understanding of state and federal law on these issues is critical to our work. Although we have a number of able law trained members of the committee, it would be useful to have an expert with no agenda examine the issue and supply us with that analysis prior to our final report.

5. Central questions.

To me, there are only three central policy questions that we need answer to make our report:

- a. In what specific ways does the existing GRAMA require change?
- b. What communications ought to be “government records” subject to the Act?
- c. What incentives, and disincentives, should the Act provide?

Allow me to expand briefly on each one. First, in what specific ways does the existing GRAMA require change? To answer this question we need to know what problems exist, and to what extent. Assuming that the formality and legal review of information requests have become impediments to making information available to the public, perhaps a form of sanctioned informal process, with safe harbor provisions to protect public workers from undue personal risk when acting in good faith, would encourage easier access at less cost to all concerned and with less court involvement. If the cost of the outlier requests is a significant problem, a more tailored process for complex or extensive or voluminous requests may make a positive difference. Importantly, until we can identify what problems actually exist we cannot address questions of how best to correct the problems.

Second, what communications ought to be “government records” subject to the Act? Much of the current motivation for amendment of GRAMA appears to have come from requests for email and other forms of information not commonly used when the Act was first proposed. The ever changing digital

universe is likely to continue to expand (absent a huge magnetic storm from the Sun in 2012). Consequently, careful thought must be given to how these bits of data are categorized. The content of these bits seems more important than the source device or the location of storage. If the text or tweet is in the nature of “conversation” perhaps it is best to simply leave it out of the Act. On the other hand, if an email is clearly a substitute for a letter expressing views relating to government tasks, perhaps it should be copied electronically to a central governmental warehouse for storage and retrieval.

Finally, what incentives, and disincentives, should the Act provide? Clearly, the Act should encourage the retention and availability of information generated in the usual course of government operations that may be of use to the citizens. In the process, it should encourage efficient and cost effective methods for retention and retrieval, such as electronic storage and delivery of information, informal processes, and safe harbor provisions to minimize legal review and court review of individual requests. It should encourage making records available in self-help formats where possible, and centralized storage and legal reviews to minimize overall cost to taxpayers at all levels. One significant disincentive must be avoided: the Act must not discourage good people from being willing to serve in public positions. While our focus has been on legislators, the same rules apply to cemetery boards, town councils, school superintendents, and others. Many citizens serve in public positions with no compensation, and often at great personal sacrifice. The strength of our society depends on good people being willing to serve, at least for a season. You are a prime example of this strength.

Conclusions.

Our purpose ought to be to make policy recommendations to the Legislature, whose job it is to fashion legislation. To make meaningful policy recommendations we need facts, not just feelings. If GRAMA is to be updated, careful consideration must be given to not only the scope of its provisions, but also to the consequences of those provisions on public and private citizens. The “government” is not an entity. It is us. If we speak clearly, we can make the retention and access to governmental information easier and more useful.