

GRAMA Working Group
Statutory Definitions Subcommittee

Legislative Intent Section

Policy Options:

Policy Option 1:

Remove GRAMA's legislative intent section, Utah Code Sec. 63G-2-102.

Rationale: Standard drafting policy discourages enacting legislative intent in the code. When codified intent language exists, members of the executive branch or judges may ignore the plain language of the statute and rely instead on legislative intent. This dilutes the Legislature's power to perform its core function – making public policy.

In *Deseret News Publishing Co. v. Salt Lake County*, 2008 UT 26, 182 P.3d 372, the Utah Supreme Court observed in a footnote that the policy of favoring disclosure of a record when “countervailing interests are of equal weight,” found in GRAMA’s statement of legislative intent, Utah Code Sec. 63-2-102(3)(e), conflicts with the standard to be applied by courts when determining whether to allow access to a record properly classified as non-public. *Deseret News*, 2008 UT 26 ¶ 24 & n.3.

Under the balancing test, a court may order disclosure on a record classified as non-public “if the interest favoring access outweighs the interest favoring restriction of access.” *Id.* Sec. 63-2-404(8)(a). The Supreme Court held that the conflicting “outweighs” standard “must yield to the clear and preeminent expression of legislative intent.” *Deseret News*, 2008 UT 26, ¶ 24 & n.3

By applying legislative intent language in this fashion, the Supreme Court has ignored the plain language of the statute, which clearly and unambiguously requires the interests favoring disclosure to “*outweigh*” the interests favoring nondisclosure before permitting access to a record properly classified as nonpublic.

In addition, the legislative intent section recognizes two “constitutional rights” – the public’s right of access to information concerning the conduct of the public’s business and the right of privacy in relation to personal information gathered by government entities. These two rights are not directly expressed in the language of the United States or Utah Constitutions. Moreover, constitutional rights cannot be established by statute.

Policy Option 2:

Retain GRAMA's legislative intent section, Utah Code Sec. 63G-2-102.

Rationale: GRAMA's legislative intent section is a critical expression of the Legislature's intent in enacting GRAMA and the public policies to be furthered by the statute. The Legislature wisely included a legislative intent section to guide government agencies, political subdivisions, and the courts in interpreting and applying GRAMA's many complex provisions. For nearly 20 years, government employees, the State Records Committee and the courts, have relied upon this language to guide and inform their decisions about the proper classification of government records, access decisions, fee waivers, and other records management decisions. Repealing this language would remove a valuable lodestar for interpreting and applying GRAMA's provisions in a manner consistent with the Legislature's expressed intent and declaration of public policy.

Removing GRAMA's legislative intent section will not eliminate the need to determine the Legislature's intent when applying provisions of the statute that conflict, are ambiguous, or permit discretion in application. No matter how clearly drafted, the meaning of words or the intent of statutory provisions is often unclear. GRAMA is no different. If the legislative intent section of GRAMA is removed, records requesters, government agencies, the State Records Committee, and courts will just resort to less reliable sources of legislative intent, such as legislative floor debates, committee hearings, etc., to determine the meaning and intent of conflicting, unclear, or ambiguous provisions in GRAMA. Using the Legislature's own expressed intent and declaration of public policy – as reflected in the legislative intent section – is a much more reliable and accurate means of interpreting and applying GRAMA's statutory provisions consistent with the Legislature's intent.

In the *Deseret News* case, the Utah Supreme Court correctly observed that the legislative intent language favoring access when “countervailing interests are of equal weight,” conflicted with the “outweighs” standard in the balancing test set forth in Section 404(8)(a) of GRAMA. The Supreme Court resolved this conflict in favor of the standard set forth by the Legislature in the legislative intent section. As a matter of statutory construction, this is neither unusual nor surprising. As a matter of public policy, it was the right choice. In the words of the Supreme Court, as a matter of public policy, the Legislature has determined that when “competing interests fight to a draw, disclosures wins.” *Deseret News*, 2008 UT 26, ¶ 24. The public policy in Utah has always favored a presumption of public access to government records. The *Deseret News* decision is entirely consistent with that policy and with the Legislature's expressed intent in GRAMA.