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IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

ACLU of UTAH FOUNDATION, INC. and DISABILITY LAW CENTER, Petitioners, vs. DAVIS COUNTY, a political subdivision of the State of Utah, and the UTAH STATE RECORDS COMMITTEE, Respondents.	**PETITIONERS' MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)** Case No. 180700511 Judge David Connors

Pursuant to Rule 56(a) of the *Utah Rules of Civil Procedure*, Petitioners ACLU of Utah Foundation, Inc. ("ACLU") and Disability Law Center ("DLC," and collectively with ACLU, "Petitioners"), by and through their counsel of record, file this motion for summary judgment ("Motion").

RELIEF REQUESTED AND GROUNDS

By this Motion, Petitioners seek summary judgment in their favor as to the sole claim for relief in Petitioners' Complaint and Petition for Judicial Review under the Government Records Access and Management Act, Utah Code § 62G-3-101, *et seq.* ("GRAMA"). Specifically, Petitioners seek an order declaring that the records requested by Petitioners are public records under GRAMA and that Petitioners have a right to inspect and receive copies of those records. The grounds for relief are that there is no genuine dispute as to any material fact regarding the public nature of the records at issue. Pursuant to Utah R. Civ. P. 7(h), Petitioners respectfully request oral argument.

INTRODUCTION

Utah has the highest per capita death rate of inmates held in jails of any state in the nation.[1] That tragic distinction includes the death of 28-year old Heather Ashton Miller, who died approximately two years ago of blunt force trauma injuries suffered while she was incarcerated in the Davis County Jail.[2] Across Utah and the nation at large, the treatment of

[1] *See, e.g.*, *Mortality in Local Jails, 2000-2014 – Statistical Tables*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, December 2016, NCJ 250169, available at https://www.bjs.gov/content/pub/pdf/mlj0014st.pdf (last visited May 8, 2019).
[2] *See, e.g.*, Robert Gehrke, "If Utah's jails don't like a little transparency when inmates die, it's time they stop taking state tax dollars," *The Salt Lake Tribune*, November 4, 2018, available at https://www.sltrib.com/news/2018/11/04/gehrke-if-utahs-county/ (last visited May 8, 2019).

inmates charged to the care of the government has become an increasingly urgent issue that has rightly drawn the scrutiny of the public, who pays for the operation of correctional institutions and trusts its public officials to comply with minimum standards for the care of those who are incarcerated.

At the time of Ms. Miller's death, and for at least the prior four years, the Davis County Jail has operated and been legally governed by the Utah Jail Standards ("Jail Standards"), a set of written standards governing virtually all aspects of operations at the jail. These Standards were apparently originally written by Gary DeLand and sold by him to Davis County (the "County") (and various other counties in Utah) through either one of his companies or the Utah Sheriffs' Association. During that same period of time, the Davis County Jail has undergone at least annual audits to monitor its compliance with the Jail Standards, which have resulted in both internal self-audit documents and external final audit reports (collectively, "Audit Reports"). The Jail Standards and Audit Reports are referred to herein as the "Withheld Records."

The question of whether documents should be public if they regulate the operations of a government agency—even if they are written by an outside contractor—is not a close call. GRAMA contains multiple provisions that affirmatively classify such documents as public, which is exactly what one would expect given GRAMA's presumption of access and express goal that the public's business be conducted in the light of day. That presumption is especially important when the agency at issue is literally entrusted with the lives of Utah citizens.

Under this authority, Petitioners requested access to the Jail Standards and Audit Reports used and generated by the Davis County Jail. In denying Petitioners' request and subsequent appeal, the County has offered multiple theories for why it should not have to disclose the

records to the public. For example, the County has denied that the Jail Standards and Audit Reports constitute "records" for purposes of GRAMA because Mr. DeLand asserts that he owns the copyright in them, and therefore the records cannot be released even though they are being actively used by the Davis County Jail. But the law of copyright protects only *copying* in certain instances, not *access* to records, and even then, copyright only limits copying to the extent it constitutes infringement—which this release of public records does not.

The County also claims that the Jail Standards and Audit Reports are not "records" under GRAMA because they are only available online. But GRAMA is expressly clear that the definition of "record" is broad and includes, among other things, "electronic data, or other documentary material regardless of physical form or characteristics." Utah Code § 63G-2-103(22)(a). An agency cannot keep otherwise public information from the public simply by putting it in the cloud.

The County also claims that it signed a contract with Mr. DeLand's company that prohibits it from disclosing the Jail Standards or Audit Reports. But a governmental entity cannot waive the public's rights of access by private contract. And even if it could, the contract here does not justify the County's position.

Finally, the County has invoked sections of GRAMA that provide that certain records are "protected," citing statutory provisions dealing with "business confidentiality" and "trade secrets," as well as provisions dealing with "audit techniques" or "safety and security concerns." The assertions of confidentiality and trade secrets fail under the express terms of GRAMA—aside from the fact that Mr. DeLand voluntarily sold these records to the Davis County Jail to govern its public operations. And while safety and security are certainly valid concerns, they

would apply, if at all, only to very small portions of the records Petitioners have requested. GRAMA requires the County to redact those minimal portions and release the remainder of the records.

For all of these reasons, the County has failed to carry its burden of showing that the records Petitioners have requested are non-public under GRAMA. Because there are no material facts in dispute as to those legal determinations, this Court should grant summary judgment and order release of the Withheld Records.

UNDISPUTED MATERIAL FACTS

Procedural History

1. Petitioners are both non-profit organizations that have specific interests in the civil rights and proper treatment of inmates in the State's care. [Declaration of Leah Farrell ("Farrell Decl."), attached hereto as Exhibit A, ¶ 3-4; Declaration of Aaron Kinikini ("Kinikini Decl."), attached hereto as Exhibit B, ¶ 3-6.] Access to the standards governing the operations of the Davis County Jail and records reflecting compliance with those standards is critical to furthering the missions of each of their respective organizations. [Farrell Decl., ¶ 5; Kinikini Decl., ¶ 7.] Petitioners' use of such records would be solely for nonprofit advocacy and educational purposes and not for commercial purposes. [Farrell Decl., ¶ 6; Kinikini Decl., ¶ 8.]

2. Consistent with their missions of education and advocacy about incarceration standards and compliance, on October 31, 2017, Petitioners submitted a GRAMA request seeking to inspect and/or receive copies of, in essence, two categories of documents: (1) the Jail Standards (including any related contracts and correspondence), and (2) the Audit Reports (the "GRAMA Request"). [Declaration of Jeremy M. Brodis ("Brodis Decl."), attached hereto as

Exhibit C, ¶ 3 and Ex. 1 thereto.] The GRAMA Request also sought records containing "any claims of business confidentiality (including statements of reasons) submitted to Davis County" relating to the Jail Standards, Audit Reports, or any related records. [*Id.*]

3. On December 6, 2017, the County denied access to virtually all of the requested documents (the "Denial"). [Brodis Decl., ¶ 4, and Ex. 2 thereto.] With regard to the Jail Standards, the County claimed that those Standards are "copyrighted and proprietary" because they were written by Mr. DeLand. [Brodis Decl., at Ex. 2.] The County also claimed that it does "not have a copy of these standards" because they reside online, and jail personnel must log in to see them. [*Id.*]

4. With regard to the Audit Reports, the County likewise claimed that it does "not receive an[y] inspection or audit report[s]" because they also reside online. [*Id.*] The County neither acknowledged nor provided copies of any internal self-audits. [*Id.*]

5. Finally, with regard to the few documents the County did provide, largely consisting of emails between County officials and Mr. DeLand and his associates, the County heavily redacted those emails to obscure any substantive discussion of the Jail Standards, their content, or the Davis County Jail's compliance with them. [*Id.*] The County's justifications for these redactions ran the gamut from copyright to trade secrets to security concerns. [*Id.*]

6. On January 5, 2018, Petitioners timely appealed the County's Denial to the CAO of GRAMA appeals for Davis County. [Brodis Decl., ¶ 5, and Ex. 3 thereto.]

7. On January 19, 2018, the CAO issued a "Notice of Decision Regarding GRAMA Appeal," which incorporated the justifications set forth in the Denial and claimed that the Jail

Standards and Audit Reports "are not records under GRAMA." [Brodis Decl., ¶ 6, and Ex. 4 thereto.]

8. On February 16, 2018, Petitioners timely appealed to the State Records Committee. [Brodis Decl., ¶ 7, and Ex. 5 thereto.]

9. On April 12, 2018, the Records Committee held a hearing on Petitioners' appeal. [Brodis Decl., ¶ 8.]

10. On April 23, 2018, the Records Committee issued a written Decision and Order that required the release of certain unredacted emails to Petitioners, but otherwise upheld the County's denial because it concluded (without explanation) that the Jail Standards and Audit Reports "are not the [County's] records," and the County is only required to release public records under GRAMA if it is "the owner of the records." [Brodis Decl., ¶ 9, and Ex. 6 thereto.]

11. Petitioners timely filed this petition for judicial review on May 21, 2018.

Davis County's Use of the Jail Standards and Audit Reports

12. Mr. DeLand wrote the Jail Standards and sold and/or licensed them for use by the County, either through himself or an entity that he owns or controls, in whole or in part. [Rule 30(b)(6) Deposition of Davis County ("Depo.") attached hereto as Exhibit D, at 20:7-19; 30:19-20; *Utah Jail Standards Release*, (Depo. Ex. 2), attached hereto as Exhibit E.]

13. County personnel frequently refer to and use the Jail Standards in handling operations at the Davis County Jail. [Depo., at 19:7-21.]

14. County personnel refer to and use the Jail Standards on a weekly basis to formulate policy that governs the daily operations of the Davis County Jail. [Depo., 19:11-21; 21:4-18.]

15. The County has agreed to be legally bound by the Jail Standards. [Depo. at 22:15-24:4; Utah Sheriffs' Association Jail Accreditation Agreement (Depo. Ex. 7), attached hereto as Exhibit F.]

16. The County conducts internal audits wherein the County seeks to monitor or evaluate its compliance with the Jail Standards. [Depo., at 19:18-21; 27:17-18; 29:4-17; 31:9-32:21.]

17. These internal self-audits generate work product that is electronically stored and can be accessed at any time by County personnel. [Depo. 32:22-33:2; 33:7-14; 60:11-24.]

18. The County is also annually audited by the Utah Sheriffs' Association to assess the Davis County Jail's compliance with the Jail Standards. [Depo., 35:13-21; 36:4-7.]

19. The external audits by the Utah Sheriffs' Association also generate work product that is electronically stored and can be accessed at any time by County personnel. [Depo. 35:22-36:13.]

20. The County has the ability to "access," "use," and "review" the Jail Standards and the work product generated as a result, including both the internal and external Audit Reports, twenty-four hours a day through an online portal. [Depo., 19:13; 21:23; 27:10-15.]

21. The County also has the ability to export to portable document format ("PDF") and print information that it accesses, uses, and reviews through the online portal, including the Jail Standards and Audit Reports. [Depo., 21:24-22:14.]

22. There is nothing unique or special about the information that happens to be stored in the online portal; the same information could be conveyed through hard copies being

physically mailed to the Davis County Jail and stored in its filing cabinets. [Depo., at 51:19-52:3; 52:20-53:1.]

23. The County is not aware of any express claim of business confidentiality that was made at the time the Utah Jail Standards were provided to the County by Mr. DeLand and/or one or more of his entities, and the County has not produced any documents reflecting such a claim in response to the GRAMA Request. [Depo., at 57:12-25; Brodis Decl., ¶¶ 10-12.]

24. Among other bases for withholding, the County has asserted that it is precluded by an End User License Agreement ("EULA") from disclosing the records requested in the GRAMA Request. [Depo., at 38:20-23; 58:16-21; End User License Agreement (Depo. Ex. 20), attached hereto as Exhibit G.]

ARGUMENT

I. LEGAL STANDARD.

"The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). "Where the moving party would bear the burden of proof at trial, the movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law…. The burden on summary judgment then shifts to the nonmoving party to identify contested material facts, or legal flaws in the application of" the movant's legal theory. *Orvis v. Johnson*, 2008 UT 2, ¶ 10, 177 P.3d 600. Where there is no genuine issue as to any material fact, the Court can determine whether a record was properly classified under GRAMA, as well as whether the public interest in disclosure outweighs the interests in

restricting access, as a matter of law. *See Deseret News Publ'g Co. v. Salt Lake Cnty.*, 2008 UT 26, ¶ 52, 182 P.3d 372.

II. THE JAIL STANDARDS AND AUDIT REPORTS ARE PUBLIC RECORDS UNDER GRAMA.

The foundation of GRAMA is its presumption of public access to government records. "A record is public unless otherwise expressly provided by statute." Utah Code § 63G-2-201(2). In enacting GRAMA, the Legislature declared its intent to "promote the public's right of easy and reasonable access to unrestricted public records;" to "specify those conditions under which the public interest in allowing restrictions on access to records may outweigh the public's interest in access;" and to "prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter…." Utah Code § 63G-2-102(3); *see also Deseret News*, 2008 UT 26, ¶ 13.

As a result, it is always the government's burden to prove that a record is non-public under GRAMA, not the other way around. *See Deseret News*, 2008 UT 26, ¶ 24 & n.4, ¶ 53; *Schroeder v. Utah Attorney Gen.'s Office*, 2015 UT 77, ¶ 27, 358 P.3d 1075.

The Utah Supreme Court has long "recognize[d] that it is the policy of this state that public records be kept open for public inspection in order to prevent secrecy in public affairs." *KUTV Inc. v. Utah State Bd. of Educ.*, 689 P.2d 1357, 1361 (Utah 1984). And it has specifically instructed governmental entities not to engage in "adversarial combat over record requests." *Deseret News*, 2008 UT 26, ¶ 25. Rather, an entity is "required to conduct a conscientious and neutral evaluation" of every GRAMA request, *id.* ¶ 24, and engage in "an impartial, rational balancing of competing interests" *id.* ¶ 25. "[T]he overriding allegiance of the governmental entity must be to the goals of GRAMA and not to its preferred record classification," *id.*, always

conscious of the "mandate that when competing interests fight to a draw, disclosure wins." *Id.* ¶ 24.

The public interest in open government and accountability for public officials is perhaps nowhere more urgent than in the conduct of the public's law enforcement officers. "Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers." *Comm'n on Peace Officer Standards and Training v. Superior Court*, 64 Cal. Rptr. 3d 661, 674 (Cal. 2007) (citation omitted).

In this case, Petitioners seek access to documents that the County's correctional officers use to carry out their daily functions and to make policy that controls the Davis County Jail's operations. [SOF ¶¶ 13, 14.] Indeed, the County has agreed to be "legally bound" by the Jail Standards. [SOF ¶ 15.] The County is audited externally and internally for compliance with the Jail Standards, and those audits generate records, including electronic information relating to the Davis County Jail's compliance with the standards. [SOF ¶¶ 16-19.] The County has the ability to export to PDF or print any of the information stored electronically relating to the Jail Standards and the Audit Reports. [SOF ¶¶ 20-22.]

GRAMA makes clear that all government records are public unless expressly provided otherwise by statute. Neither GRAMA nor any other statute expressly classifies jail standards, audit reports, or communications about those standards or reports as private, protected, controlled, or otherwise non-public. Indeed, though public documents need not be expressly classified as public given GRAMA's bedrock presumption of access, the act does contain a non-

exhaustive list of records the Legislature unquestionably intended to be normally accessible to the public. Several of those provisions are directly applicable here:

- Section 301(3)(a) – "administrative staff manuals, instructions to staff, and statements of policy;"
- Section 301(3)(b) – "records documenting a contractor's or private provider's compliance with the terms of a contract with a governmental entity;"
- Section 301(3)(c) – "records documenting the services provided by a contractor or a private provider to the extent the records would be public if prepared by the governmental entity;"
- Section 301(3)(k) – "drafts that have never been finalized but were relied upon by the governmental entity in carrying out action or policy;" and
- Section 301(3)(q) – "final audit reports."

The Withheld Records fall squarely into these categories. The County has admitted that it uses the Jail Standards as instructions to staff and statements of its policies for the Davis County Jail. Both the Jail Standards and the Audit Reports document the services and compliance of the outside contractor(s) who provide them to the Davis County Jail. There is no question that the Jail Standards and Audit Reports, if prepared by the County itself, would be public, so their preparation by a contractor does not make them any less public. Neither does the fact that the Standards and Audit Reports may change over time, as they are still relied upon by the County on a daily basis in operating the Davis County Jail. And, finally, to state the obvious, the final Audit Reports are "final audit reports."

Ultimately, however, it is not Petitioners' burden to prove that the Withheld Records fall within any of these categories, or to otherwise establish that they are public under GRAMA. Rather, it is the County's burden to prove that they are non-public. *See Deseret News*, 2008 UT 26, ¶ 53. The County cannot carry this burden here. GRAMA makes plain that the Legislature intended for documents setting out policy and controlling operations of the public's institutions

to be public. While Mr. DeLand or the Utah Sheriffs' Association may have attempted to impose restraints and conditions on the various counties with whom they do business, no private agreement can trump GRAMA. The various justifications offered by the County are unsupported by GRAMA and do not constitute a valid basis for withholding the records.

III. THE COUNTY'S ARGUMENTS FOR WITHHOLDING THE JAIL STANDARDS AND AUDIT REPORTS FAIL AS A MATTER OF LAW.

The County has offered the following justifications for refusing to release the Withheld Records:

A) the Withheld Records are not "records" under GRAMA because they are copyrighted and because they are only available by logging in to an online portal;

B) disclosure of the Withheld Records is prohibited by the County's private software contract; and

C) the Withheld Records are properly classified as protected under GRAMA due to business confidentiality/trade secrets, audit techniques, and/or safety and security concerns.

As explained in more detail below, each of these arguments fails as a matter of law.

A. The Withheld Records Are "Records" Under GRAMA.

The County asserts that the Withheld Records are not "records" under GRAMA because they are copyrighted and because the records are only available to the County by logging into an online portal. Both arguments fail.

1. Utah Code § 63G-2-103(22)(b)(iv) Does Not Bar Access.

The County claims that because Mr. DeLand wrote the Jail Standards, he owns the copyright in them and therefore can preclude access to those documents. [SOF ¶ 3.] The County relies on Utah Code § 63G-2-103(22)(b)(iv), which excludes from the definition of "record"

"material to which access ***is limited by*** the laws of copyright or patent unless the copyright or patent is owned by a governmental entity or political subdivision." (Emphasis added).

That section does not apply to the Withheld Records for three reasons: First, copyright protects only *duplication*, not *access*. Second, it is insufficient to merely claim that the document in question is copyrighted; the question is whether the laws of copyright *limit* duplication, which requires that the requested duplication constitute *infringement* of the copyright. The release of otherwise public records for non-competitive purposes is not infringement. Third, the County is not merely in possession of a copyrighted work, as would be the case with, for example, a library. Rather, the County is *actively using* the sought-after records to fulfill core governmental functions, and is being audited against them, both internally and externally, making the records subject to public disclosure. [SOF ¶¶ 13-19.] These three issues are discussed in turn below.

First, in the context of open records statutes, the protections of copyright concern only duplication of records, not access to them. *See* 17 U.S.C. § 1 *et seq*.; *Ali v. Philadelphia City Planning Comm'n*, 125 A.3d 92, 111 n.14 (Pa. Commw. Ct. 2015) ("We emphasize . . . that where a conflict is established under [Pennsylvania's access act], the Copyright Act will limit the level of access to a public record only with respect to duplication, because ***the Copyright Act does not restrict inspection***. The public record must, therefore, still be made available for inspection under the [access act], allowing the public to scrutinize a local agency's reliance on or consideration of the copyrighted material." (emphasis added)).

There is nothing in the Copyright Act that restricts inspection of copyrighted documents. Indeed, most copyright registrants must lodge their works with the Copyright Office to obtain a

registration. GRAMA likewise does not require a governmental entity to duplicate a record in response to a request; it preserves the right of the public "to inspect a public record free of charge" instead of receiving a copy. Utah Code § 63G-2-201(1). Petitioners requested the opportunity to "inspect and/or receive copies" of the Jail Standards. [SOF ¶ 2.] At a bare minimum, even if the County's copyright argument were valid (and it is not, for the reasons set forth below), the County must allow Petitioners to inspect the Jail Standards and Audit Reports.

Second, with respect to duplication, it is not the law that simply because a private person creates a record, and thus owns the copyright in it, the government is powerless to release that record. If that were the case, no record created and provided to the government by a private individual would ever be subject to release under GRAMA. That interpretation of the law would radically undermine GRAMA's presumption of access, putting off limits scores of records created by private individuals and sent to the government, from business proposals to bids to emails to government officials. The statutory scheme of GRAMA is exactly the opposite, providing *extremely limited* circumstances in which those doing business with the government can subsequently restrict release of such records, none of which turn on the minimal fact that a person owns a copyright merely because he wrote the document. *See, e.g.*, Utah Code § 63G-2-305(1), (2).

It is only when duplication of information subject to a copyright claim would constitute *infringement* that the governmental entity may be restricted from duplicating that information for another person. And an infringing use typically requires that the person seeking a copy of the work use it in a way that is competitive with the original author's use. *See* 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work, including such use by reproduction in copies …, for

purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."). When a requestor seeks to use a copyrighted work for a different or transformative purpose, and in a way that does not economically compete with the author, that use is fair use, not infringement. *See Diversey v. Schmidly*, 738 F.3d 1196, 1203 (10th Cir. 2013) (A use that furthers a "non-commercial, educational purpose [is] at the heart of the protection for fair use."); *Zellner v. Cedarburg Sch. Dist.*, 731 N.W.2d 240, 246-47 (Wis. 2007) (release of copyrighted records for non-commercial purpose not restricted by Copyright Act). Petitioners are not in the business of selling standards to jails to compete with Mr. DeLand, but instead seek the Jail Standards for the purpose of education and advocacy. Duplication of the Jail Standards for release to them is therefore not restricted by the Copyright Act. [SOF ¶ 1.]

Third, the County's argument ignores the fact that the County is not merely in *possession* of a copyrighted work, like a library, but is *actively using that work* to fulfill its core governmental functions. [SOF ¶¶ 13-19.] Even more, the County has agreed to be "legally bound" by the Jail Standards and the results of audits regarding compliance. [SOF ¶ 15.] Because such records document the services provided by a government contractor and would unquestionably be public if prepared by the County itself, GRAMA classifies such records as public. *See* Utah Code § 63G-2-301(3)(c) (classifying as public "records documenting the services provided by a contractor or a private provider to the extent the records would be public if prepared by the governmental entity"). And thus, even if the Jail Standards at one time could have been seen as a privately-held copyrighted work, they are no longer so. They are in essence

governing regulations for the Davis County Jail, which are unquestionably public under GRAMA. *See* Utah Code § 63G-2-301(3)(a).[3]

2. "The Records are Only Online" Is Not a Basis for Withholding the Records.

Equally unavailing is the County's assertion that it "has no records" because the Jail Standards and Audit Reports have to be accessed online, even while admitting that numerous personnel have login credentials to access them. [SOF ¶ 7.] That is like arguing that an entity has no responsive emails because those messages are stored on a remote email server or in the cloud and require a password to access. GRAMA expressly prohibits an entity from refusing to provide access to records based on such assertions:

> A governmental entity may not use the physical form, electronic or otherwise, in which a record is stored to deny, or unreasonably hinder the rights of a person to inspect and receive a copy of a record under this chapter.

Utah Code § 63G-2-201(12); *see also id.* § 63G-2-103(22)(a) ("'Record' means a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material ***regardless of physical form or characteristics***[.]" (emphasis added)).

Under GRAMA's express terms, "record" includes information "that is prepared, owned, received, **or** retained by a governmental entity." Utah Code § 63G-2-103(22)(a)(i) (emphasis

[3] The County has made references in its discovery responses to the fact that it is withholding the Withheld Records because the Jail Standards purportedly "do not create constitutional minima," and because compliance with them is purportedly "voluntary." The County did not preserve these bases for withholding below, and so is precluded from invoking them now. *See Salt Lake City Corp. v. Jordan River Restoration Network*, 2018 UT 62, --- P.3d ---, ¶¶ 36-38. In any event, whether or not the standards create constitutional minima or whether they are voluntarily adopted or not is simply irrelevant. The fact that the County makes regular use of the Jail Standards in the operation of a public facility, whether or not required by law, means that the public is entitled to see those records.

added). Although it may occur electronically in this case, the County unquestionably both "receive[s]," and "retain[s]" the Withheld Records, and arguably "owns" them too (at least constructively) because it has the contractual right to (and on a weekly basis, in fact, does), among other things, "access," "use," and "review" the records. [SOF ¶¶ 13, 14, 20].

As many governmental entities migrate their records to electronic storage locations, often not on site, it would gut GRAMA to carve such a broad swath of records out from the public's right of access. As the California Supreme Court explained in *City of San Jose v. Superior Court*, 389 P.3d 848 (Cal. 2017), the fact that public records may be stored online does not mean they are not public records: "Appellate courts have generally concluded records related to public business are subject to disclosure if they are in an agency's actual or constructive possession. '[A]n agency has constructive possession of records if it has the right to control the records, either directly or through another person.'" *Id.* at 857 (citations omitted). The court added that "a document's status as public or confidential does not turn on the arbitrary circumstance of where the document is located." *Id.* at 858.

Moreover, the assertion that the records are not subject to GRAMA because they cannot be provided to Petitioners in paper form is both legally and factually wrong. It is legally wrong because GRAMA expressly includes in its definition of records information that "is reproducible by … electronic means." Utah Code § 63G-2-103(22)(a)(ii). It is factually wrong because the County has admitted that it has the capability to print out or save PDFs of the Jail Standards and Audit Reports and provide them to Petitioners. [SOF ¶ 21.] The County has also admitted that there is no difference in the *substance* of the records at issue: the Jail Standards and Audit Reports could be printed by the County and stored in its filing cabinet. [SOF ¶ 22.]

In short, the fact that the records may be stored in an electronic form is irrelevant to the GRAMA inquiry—the Withheld Records are still "records" for purposes of GRAMA. If this were not the case, all a governmental entity would have to do to skirt GRAMA would be to put its records online. The drafters of GRAMA did not intend for the statute to be so easily defeated, and thus expressly provided that a record is a record, ***regardless of physical form or characteristics***. Utah Code § 63G-2-103(22)(a).

B. The County Cannot Avoid Its GRAMA Obligations By Private Contract.

The County has asserted that it cannot release the Withheld Records because it signed a private software contract (EULA) relating to the online portal that prohibits release of the Jail Standards and Audit Reports. [SOF ¶ 24.] This argument likewise fails.

First, and decisively, the County cannot make an enforceable private agreement not to comply with its GRAMA disclosure obligations. In other words, even assuming the EULA expressly prohibited disclosure of the Withheld Records, such a provision would be void and unenforceable because "a public agency may not circumvent the statutory disclosure requirements by agreeing to keep [information] confidential." *Anchorage Sch. Dist. v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989). Such an attempted "confidentiality provision . . . is unenforceable because it violates the public records disclosure statutes." *Id.*; *see also Picton v. Anderson Union High Sch. Dist.*, 50 Cal. App. 4th 726, 735 (1996); *State ex rel. Dwyer v. City of Middletown*, 557 N.E.2d 788, 793 (Ohio Ct. App. 1988) ("Since it was a public record[,]… the agreement … to refuse to disclose the substance of these materials was an illegal contractual provision."), *on reconsideration*, No. 87-10-139, 1988 WL 89617 (Ohio Ct. App. Aug. 29, 1988). A government entity's contractual promise to keep information confidential that

would otherwise be subject to GRAMA is "troublesome because the custodian making the pledge is purporting to grant an exception to the public records law." *Journal/Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood*, 521 N.W.2d 165, 172 (Wis. Ct. App. 1994).

In any event, the EULA does not purport to prohibit the County from complying with GRAMA. The EULA contains no confidentiality provision, no non-disclosure provision, and no prohibition on the County complying with Utah's open records statutes. As a result, even if it were legally binding, the EULA poses no obstacle to the County complying with Utah law.

C. The Withheld Records (or at Least Vast Portions of Them) Were Not Properly Classified as Protected.

The County classified the Withheld Records as protected under GRAMA, citing the following statutory sections: (1) Utah Code §§ 63G-2-305(1) and (2) (dealing with business confidentiality and trade secrets); (2) Utah Code § 63G-2-301(3)(q) (dealing with audit techniques, procedures, policies, or orders); and Utah Code §§ 63G-2-305(11), (12), and (13) (dealing with safety and security issues). Those classifications were largely, if not entirely, improper, as explained below.

1. Business Confidentiality/Trade Secrets.

The County seeks to withhold the Jail Standards and justify its redactions of emails as "protected" on the basis of two sections in GRAMA that allow a private individual to assert a claim of "business confidentiality" under very limited circumstances. See Utah Code §§ 63G-2-305(1), (2). This argument also fails.

First, Sections -305(1) (dealing with trade secrets) and -305(2) (dealing with certain types of "commercial information") can only be invoked if the person who submitted the information at issue has made an express claim—in writing, at the time of providing the record, and with a

statement of reasons—of "business confidentiality." Utah Code § 63G-2-309. In the absence of such a concurrent and express claim, the government need not protect the purported interests of a third party, and indeed cannot do so under GRAMA's express statutory language.

The County has produced no documentation showing that anyone ever made such an express and concurrent claim of business confidentiality for either the Jail Standards or Audit Reports. Indeed, in the underlying GRAMA Request, Petitioners directly requested that the County produce any such express claim of business confidentiality relating to the Jail Standards, Audit Reports, or any related records. [SOF ¶ 2.] The county produced none. [SOF ¶ 23.] And when the County was deposed, it likewise could not identify any such claim ever having been made. [SOF ¶ 23.]

Second, even if Mr. DeLand and/or his entity had made a concurrent and express claim of business confidentiality, the Jail Standards and Audit Reports fit within neither section. They do not meet the narrow definition of a "trade secret" under Utah law, Utah Code § 13-24-2(4), because, among other things, they are not kept secret. Mr. DeLand has apparently sold the Standards to dozens of jails in Utah and around the country, where they are now used by hundreds of personnel, and he has lodged at least one version with the Copyright Office. [DeLand Copyright Registration, attached hereto as Exhibit H.] The County testified that it was not aware of any nondisclosure agreement that was made with respect to the Withheld Records. [SOF ¶ 23.] And there is nothing about the Audit Reports' content regarding compliance with the standards that would meet the strict requirements of Utah trade secret law. Discriminating amongst whom you provide certain information, especially when those to whom you provide it

are governmental entities with statutory disclosure obligations, is not the same as taking reasonable measures to promote secrecy.

Nor do the Jail Standards or Audit Reports constitute "commercial information," as required by Section -305(2). To the contrary, they deal only with the operation of *governmental* entities. Most states who are not in business with Mr. DeLand post such standards on their jail websites or readily provide them as public records.[4] The fact that Mr. DeLand has sought to profit on the outsourcing of government functions does not mean that the subject matter of government regulations somehow becomes "commercial." And regardless, the County cannot satisfy the independent requirement of this section that whatever interest Mr. DeLand might still have in the Jail Standards or Audit Reports outweighs the substantial public interest in governmental transparency. *See* Utah Code §§ 63G-2-305(2)(b) and -404(7)(a).

For these reasons, Sections -305(1) and (2) justify neither the withholding of the Jail Standards and Audit Reports nor the County's redactions.

2. The County Has Not Substantiated Any Withholding Based on Audit Techniques.

GRAMA expressly classifies "final audit reports" as public. Utah Code § 63G-2-301(3)(q). The County has refused to produce the Audit Reports based on the assertion that it

[4] *See, e.g.*, National Institute of Corrections, *State Jail Standards*, https://nicic.gov/state-jail-standards (Oct. 5, 2017) (providing electronically accessible standards for detention facilities in 18 states); State of California, Board of State & Community Corrections, *Minimum Standards for Local Detention Facilities*, tit. 15, Div. I, Ch. 1, Subch. 4, *available at* http://www.bscc.ca.gov/downloads/Adult%20Titles%2015%20-%20Effect%204%201%2017.pdf; Idaho Sheriffs' Association, *Idaho Jail Standards: Standards for Detention Facilities*, *available at* https://docs.wixstatic.com/ugd/6d68b4_d0440d6e92164b6b8fb4b886137cec98.pdf; 210 IND. ADMIN. CODE Art. 3-1-1, *et seq.*, (2018), *available at* www.in.gov/legislative/iac/T02100/A00030.PDF; State of Maine, Department of Corrections, *Detention and Correctional Standards for Maine Counties and Municipalities* (Sep. 2005), *available at* https://www.maine.gov/corrections/jjag/cmon/Statutory%20Requirements/State/Maine%20Detention%20Standards.pdf.

has no physical records, an argument that fails for the reasons set forth above. But it has also redacted various emails discussing these audits as "protected" on the basis of Utah Code § 63G-2-305(10)(e), which covers certain audit records if disclosure "reasonably could be expected to disclose investigative or audit techniques, procedures, policies, or orders not generally known outside of government if disclosure would interfere with enforcement or audit efforts."

The County's argument satisfies none of the requirements of this section. The Audit Reports detail the findings of the Utah Sheriffs' Association audits, not their particular "techniques." Those are different concepts, as the GRAMA mandate of making "final audit reports" public demonstrates. Moreover, the techniques that the Sheriffs' Association uses for its audits are known outside of government because the Sheriffs' Association is not a governmental entity. And, finally, the County has made no attempt to show that even if those audit techniques were disclosed, they would somehow "interfere with" audits of the Davis County Jail.

3. The County Has Not Substantiated Wholesale Withholding Based on Safety and Security.

The last category of justifications offered by the County concerns three sections of GRAMA designed to protect safety and security. Utah Code §§ 63G-2-305(11), (12), (13). These sections are variously directed at the safety of individuals, governmental programs, and correctional facilities and inmates. Petitioners do not dispute that these are legitimate concerns; indeed, the safety and security of correctional institutions is the reason that secrecy in these matters is contrary to the public interest. It may be that some small part of the Jail Standards, and even more improbably the Audit Reports, has some type of information in it, such as the location of the safe where firearms are stored, that may properly be withheld as protected. But there are vast portions of both categories of documents that do not implicate this concern at all,

such as standards for medical care, food and food safety, mental health policies, hygiene, cell dimension requirements, overcrowding, inmate segregation, and any number of other routine guidelines that govern the everyday operation of the Jail.

It is noteworthy that Sections -305(11), (12), and (13) each use the phrase "would jeopardize." This is a noticeably higher standard than surrounding GRAMA provisions, which require only that release of records "reasonably could be expected to" have some detrimental effect on an interest. *Compare* Utah Code § 63G-2-305(11) *with id.* § 63G-2-305(10); *see also Outfront Media, LLC v. Salt Lake City Corp.*, 2017 UT 74, ¶ 31, 416 P.3d 389 ("[D]ifferent words used in … a similar[ ] statute … are assigned different meanings whenever possible."). The "would jeopardize" language found in subsections (11), (12), and (13) is an indication that the Legislature intended for there to be a higher bar when withholding documents based on these sections—only when disclosure *would jeopardize* safety should access be denied. Speculative concerns, in other words, are insufficient.

Even then, GRAMA does not allow an entity to withhold an entire record just because some part of it may properly be classified as non-public. Rather, GRAMA imposes an affirmative obligation on the entity to segregate and redact such information, and release the remainder to the public. *See* Utah Code § 63G-2-308.

The question, then, is whether releasing portions of the Withheld Records "would jeopardize" safety. The Jail Standards, as Petitioners understand them, are written generally to be applicable to all jail facilities, and do not contain the kinds of specifics that are barred from disclosure by subsections (11), (12), or (13). Petitioners do not believe that the Audit Reports contain such a granular level of detail about the security or safety measures of the Davis County

Jail that disclosure would jeopardize safety, and the County has not offered information showing otherwise. To the extent there is any information that *would* jeopardize the security or safety of persons or property if released, Petitioners respectfully request that the Court conduct an in camera review of the documents at issue, which GRAMA expressly authorizes, and order redaction of any portions of the records the Court concludes meet this high standard. *See* Utah Code § 63G-2-404(5) ("The district court may review the disputed records. The review shall be in camera.").[5]

D. Even If the Withheld Records Were Properly Classified As Protected, the Public Interest in Disclosure Outweighs Any Interests in Secrecy.

As detailed above, and for many reasons that go beyond just the events in Davis County, the legitimate public interest in the standards that govern Utah's jails is significant. Jails perform a public function carried out by public officials who are charged with a weighty public duty of caring for those whose liberty has been taken away—many of whom are pretrial detainees who have not been convicted of any crime. The public interest in ensuring that the County is discharging this duty appropriately is hindered by moving the process behind a veil of secrecy, depriving the public of knowing not only whether jails are living up to the standards they have set for themselves, but even what those standards are in the first place. Secrecy in this situation

[5] The County has also asserted in its discovery responses that Utah Code 63G-2-106 (the "Security Measures" statute) precludes disclosure of the Withheld Records. This argument was not preserved by the County at any stage of the proceedings below, either during its responses to the GRAMA Request or in its arguments to the State Records Committee, and so it is precluding from raising it here. The doctrine of preservation precludes the County's attempt to raise this issue for the first time during judicial review. *See Salt Lake City Corp.*, 2018 UT 62, ¶¶ 36-38. Even if it were preserved, this argument still fails for the reasons stated herein; namely, because Petitioners are not seeking the kind of information contemplated by the Security Measures statute, such as the combination to the firearms locker. To the extent such information is contained in the Withheld Records, this Court should review the records in camera, make any appropriate redactions, and release the remainder.

benefits no one—not the jails that are acting properly, and not the inmates who are harmed by those jails that are not.

Weighed against this substantial public interest in disclosure are the justifications by the County addressed above, which largely boil down to protecting Mr. DeLand's ability to profit from the government while keeping rules regarding official conduct secret. That interest is not legitimate, but even if it were, it is substantially outweighed by the public's right to know.

Consequently, even if the Withheld Records are properly classified as non-public under GRAMA, this Court should release the records under Utah Code section 63G-2-404(7)(a) because "the interest favoring access is greater than or equal to the interest favoring restriction of access." *Id.*

CONCLUSION

For the foregoing reasons, Petitioners' Motion should be granted, and the Court should enter an order declaring that the records requested by Petitioners are public records under GRAMA and ordering the County to release them.

RESPECTFULLY SUBMITTED this 20th day of May 2019.

PARR BROWN GEE & LOVELESS, P.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May 2019, I electronically filed the foregoing **PETITIONERS' MOTION FOR SUMMARY JUDGMENT**, which served the following:

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