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IN THE FOURTH JUDICIAL DISTRICT  
UTAH COUNTY, UTAH

BONNEVILLE INTERNATIONAL	)	MEMORANDUM OF THE UTAH
CORPORATION dba KSL-TV,	)	HEADLINERS CHAPTER OF THE
	)	SOCIETY OF PROFESSIONAL
Plaintiff,	)	JOURNALISTS, THE UTAH PRESS
	)	ASSOCIATION, KSTU-TV FOX 13,
v.	)	THE DESERET NEWS, THE SALT
	)	LAKE TRIBUNE, AND THE HERALD
UTAH COUNTY, UTAH COUNTY	)	JOURNAL AS <i>AMICUS CURIAE</i>
BOARD OF COUNTY	)	IN SUPPORT OF KSL-TV'S MOTION
COMMISSIONERS, and	)	FOR JUDGMENT ON THE
UTAH COUNTY HEALTH	)	PLEADINGS
DEPARTMENT,	)	
	)	Case No. 200400766
Defendants.	)	
	)	Judge Christine Johnson
	)	

The Utah Headliners Chapter of the Society of Professional Journalists, the Utah Press Association, KSTU-TV FOX 13, the *Deseret News*, *The Salt Lake Tribune*, and the *Herald Journal* (collectively, "*Amici*") respectfully submit this Memorandum in support of KSL-TV's Motion for Judgment on the Pleadings.

### **INTEREST OF AMICI**

The Utah Headliners Chapter of the Society of Professional Journalists is an association of Utah journalists that has been a leader for decades in advocating for open government in Utah. The Utah Press Association functions as a collective voice and legislative watch for all Utah member newspapers. The Utah Press Association was formed in 1893. KSTU-TV FOX 13 is owned and operated by Scripps Media, Inc., and is the FOX broadcasting affiliate in Salt Lake City. The *Deseret News* offers news, information, commentary, and analysis from an award-winning team of reporters, editors, columnists, and bloggers. *The Salt Lake Tribune* is a newspaper published daily in the state of Utah and is owned by The Salt Lake Tribune, Inc., a non-profit corporation. The *Herald Journal* is published three times each week and serves the Cache Valley area of northern Utah as well as southeastern Idaho.

*Amici* are journalists and news organizations engaged in the independent gathering and dissemination of news and information to the public. *Amici* have a direct interest in the adjudication of this dispute because the information the County seeks to keep secret directly relates to the ongoing transmission of a highly infectious and lethal virus throughout the community. Issues relating to COVID-19, including those in this case, are of significant public interest and concern. Further, the information sought will shine sunlight on the conduct of Utah County officials in responding to and investigating the

COVID-19 outbreaks at these businesses, promoting transparency and accountability in the conduct of the public's business.

### **INTRODUCTION**

For the reasons set forth in KSL-TV's Motion for Judgment on the Pleadings, none of the statutory provisions relied upon by the County to conceal the names of the two businesses apply here, and thus the Court should order release of the names forthwith, while the information is still of use and benefit to the public during this pandemic. Because the information sought is not protected by GRAMA or any other statute, there is no need for the Court to balance the competing interests for and against disclosure. The information is public and must be released.

If, however, the Court determines (or assumes for the sake of the balancing analysis) that the names of the businesses are properly classified as private, protected or controlled under GRAMA, then balancing the competing interests for and against disclosure would be appropriate. In that case, *Amici* believe the public has a compelling interest in disclosure of the two businesses' names that greatly outweighs the County's interest, if any, in keeping the identities secret. *Amici* do not advocate for release of the identities of any individuals, and that is not the focus of this case despite the County's efforts to conflate the two issues. As required under GRAMA, government entities routinely redact non-public information in response to GRAMA requests, and *Amici* are confident that Utah County is fully capable of

releasing only the public portion of the requested records—including the identity of the two businesses—while redacting the non-public portions of those records.

### **ARGUMENT**

#### **I. THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS OR, AT MINIMUM, IS EQUAL TO THE INTERESTS IN NON-DISCLOSURE.**

The Legislature’s intent in adopting GRAMA was to “prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided” and to “promote the public’s right of easy and reasonable access to unrestricted public records.” Utah Code Ann. §§ 63G-2-102(3)(a), (c). Given that KSL-TV seeks only the identities of the two businesses, while GRAMA and the Health Code exceptions relied upon by the County restrict only public-health information relating to individuals, the resolution appears simple. The Court should order the County to release the identity of the businesses while allowing the County to continue to protect the identity of individuals. Utah Code Ann. §§ 63G-2-201(1) (“... [A] person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours....”).

Releasing the identity of the businesses would not result in individuals being identified because—according to Utah County’s own public statements—there were 68 total individuals diagnosed with COVID-19 between the two businesses and the business

with the highest percentage of positive infections had only 48 percent. Even if the business name is publicly disclosed, the number of positively diagnosed individuals is too high for anyone to be singled out. At the same time, the percentage in the businesses is too low for the public to reasonably assume that all or nearly all the employees were positively diagnosed. The County's argument otherwise rests on pure speculation.

To the extent the Court believes that releasing the identity of the businesses might implicate the legitimate interest of an individual whose information is part of a private, protected or controlled record, the proper approach is to follow GRAMA's "guidelines for both disclosure and restrictions on access to government records, which are based on the equitable weighing of the pertinent interests and which are consistent with nationwide standards of information practices." Utah Code Ann. § 63G-2-102(3)(d). *See also* Utah Code Ann. § 63G-2-404(7). After addressing both the weighing of interests and the nationwide standards of information practices, *Amici* contend disclosure is warranted.

#### **A. Weighing of Interests**

To the extent balancing of interests is necessary in this case, GRAMA provides direction for the Court. The Court should consider "the various interests and public policies" and then "order the disclosure of information properly classified as private, controlled, or protected if the interest favoring access is greater than or equal to the interest favoring restriction of access." Utah Code Ann. § 63G-2-404(7)(a).

The public interest in disclosure in this case is particularly strong for three reasons. **First**, it was Utah County’s own public statements that raised the public alarm about these two businesses, causing intense local interest in knowing the businesses’ identities. Therefore, public policies for government transparency and accountability weigh heavily in favor of disclosure. **Second**, the residents of Utah, like those of other states and other nations, are living through a truly unprecedented public-health crisis in which reliable information is crucial and can even be a matter of life or death. **Third**, the disclosure of the business names poses no credible risk of identifying specific individuals, especially where Utah County says it already has engaged in contact tracing by communicating with known associates of employees at the two businesses who were positively diagnosed with COVID-19.

**1. The Public Has a Compelling Interest in Understanding the County’s Response to and Investigation of COVID-19 Outbreaks at the Businesses, Particularly in Light of the Contradictory Statements the County Has Made.**

The Utah County Commission’s May 4, 2020 Facebook post, followed two days later by the Utah County Health Department’s Twitter thread, set off alarm bells not just in Utah but nationwide. News outlets across the country, along with their readers and viewers, were shocked and concerned that—in the County Commission’s words—“these business instructed employees to not follow quarantine guidelines after exposure to a confirmed case at work and required employees with a confirmed COVID-19 diagnosis to

still report to work.” The acute public interest that followed the initial Facebook post led to the Utah County Health Department’s Twitter thread on May 6, 2020 and the Utah County Attorney’s press conference on May 26, 2020.

In that press conference, Utah County Attorney David Leavitt acknowledged that the County Commission’s Facebook post on May 4, 2020 “created not only statewide but it also created national news and headlines when the public and the media were shocked and outraged that businesses would have such insensitivity to require such a thing of its employees during such a lethal time in our history.” *KSL-TV Complaint and Petition for Judicial Review*, ¶ 26. However, Mr. Leavitt then stated that he and the County Commission determined not to release the identities of the businesses because the Utah County Health Department’s assertions about the businesses’ conduct were “allegations and were not substantiated” even though Mr. Leavitt also admitted that the County Health Department derived those allegations from its supposedly reliable contact tracing process. *Id.*

Mr. Leavitt continued at his press conference by saying that in meeting with the Health Department representatives, he learned “that the original communication from the health department wasn’t accurate” and “there were not two businesses who were forcing employees to work.” *Id.* As a result, Mr. Leavitt said, he declined to pursue any further investigation for possible criminal prosecution. In response to a clarifying question at the

press conference, Mr. Leavitt acknowledged that the businesses had COVID-19 outbreaks and that the business leaders told their sick employees to “Go home if you’re sick” but “[p]lease don’t noise it around that you were sick.” *Id.* ¶ 29. Mr. Leavitt further complicated the issue by stating that he did not know if the businesses were in “strict compliance with all the health department guidelines.” *Id.* ¶ 31. Mr. Leavitt then proceeded to acknowledge that there was “still substantial public interest” in knowing the identities of the businesses but said he had concluded that state law precluded disclosure.

Given the conflicting statements among the Facebook post, the Twitter thread and the County Attorney’s press conference, the public has heightened interest in knowing whom to believe and what to believe about the businesses’ identity and behavior and Utah County’s response. Without disclosure of the business identities, members of the public are left to speculate—as they have done extensively on social media—whether the businesses are so politically connected that they can somehow achieve the secrecy protection that other businesses and residential care facilities have not. While those speculations may be unfounded, *Amici* and the public will not know for sure until the names of the businesses are disclosed in accordance with the dictates of GRAMA, which seeks to avoid the very type of confusion and obfuscation that are present in this case.

Having opened the door and generated the public interest, the County cannot now avoid the reality of the situation it created. That reality involves intense public interest in



knowing the identity of the businesses that the County singled out. Before denying KSL-TV's request, Utah County should have taken this context into account because "the balancing analysis under GRAMA must be tethered to the specific interests of the parties and the particularized application of the relevant public policies at issue." *Schroeder v. Utah Attorney General's Office*, 2015 UT 77, ¶ 51. In this case, then, the proper analysis is not simply to weigh the interest in public disclosure of a business name against the County's interest in keeping the name secret. Instead, the proper analysis is to weigh the public interest in disclosure in light of the fact that the County itself created an intense amount of local, statewide and even nationwide interest to know the business names. *Id.* ¶ 56 (reviewing various provisions of GRAMA that require not just balancing general policy interests but rather balancing specific competing interests in particularized circumstances).

## **2. Disclosure of Public Health Information is Critical for the Public's Health and Well-Being During the Current Pandemic.**

The importance of timely and accurate public information during the COVID-19 pandemic cannot be overstated. The State of Utah created multiple new approaches, including a website, daily press conferences and a color-coded system indicating risk levels, to communicate information to the public. Many of the public information resources are collected at <https://coronavirus.utah.gov/>. In the high risk (red) and

moderate risk (orange) phases of the “Utah Leads Together” plan, Utahns were directed or encouraged to work from home; avoid or take precautions in restaurants, retail establishments and hotels; and practice social distancing or other measures in a variety of business settings, including daycares, construction sites, fitness gyms, personal service providers and entertainment venues. See <https://coronavirus.utah.gov/utah-leads-together/>. In summary, Utah has created an information-dependent environment in which individuals need to know what hot spots to avoid, among other things.

The public interest in the activities and identities of businesses during the COVID-19 pandemic is highlighted by the State of Utah’s Coronavirus web page for businesses, which the Utah County Health Department’s own website links to:

The highest priority of any business is to protect the health, safety, and life of employees and clients. Every decision emanates from that single objective, including guidelines employees have within their places of business, the flexibility and encouragement they are given to attend to their own health needs — as well as those of their families — and a supportive workplace environment that has considered and prepared for disruptions in services, manufacturing, marketing, sales, and supply chains.

“Workplace Resources,” at <https://coronavirus.utah.gov/business/workplace-resources/>.

The state and county health departments have been commanded by the Legislature to “identify the major risk factors contributing to injury, sickness, death, and disability within the state and . . . educate the public regarding these risk factors. . . .” Utah Code Ann. § 26-7-1. Given the recent COVID-19 outbreaks at meat-packing plants in northern

Utah, among other businesses, it appears that one of the key risk factors in the current pandemic is going to work. This case presents Utah County with the opportunity to educate the public by disclosing the business identities and directing the public more clearly than it has done so far about what lessons can be learned from the outbreaks at those two locations.

The disclosure of the business names in the current environment remains as relevant and important as ever, both to ensure government accountability and to give members of the public the information they need to make decisions about health and well-being. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (“Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.”). The U.S. Supreme Court has said the right of the press to publish information in public records is of “critical importance” to a government system in which people are sovereign. *Id.*

### **3. Disclosure of the Business Names Does Not Equate to Disclosure of the Identities of Individuals.**

In completing its “impartial, rational balance of competing interests[,]” *Deseret News Pub. Co. v. Salt Lake County*, 182 P.3d 372, 379 (Utah 2008), Utah County should have taken (and the Court should now take) into account the fact that disclosing the names of the businesses will not result in any particular coronavirus patient or former

patient being identified. The County’s June 19, 2020 Opposition, in ¶ 2 of the section titled “Statement of Additional Material Facts,” states that Utah County conducts “contact tracing and an epidemiological investigation” into every positive case of COVID-19. As part of that work, County Health employees contact everyone “the positive individual has come in contact with,” according to ¶ 3 of the same section of that document.

As a result, none of the 68 individuals who tested positive for COVID-19 around the time of Utah County’s May 2, 2020 Facebook post and May 4, 2020 Twitter thread are at risk of having their identities disclosed at this point to any close contacts who do not already know of the positive diagnosis. In any case, disclosing the business names to the public will not identify any specific individual. The County claims that the businesses do not “significantly interact with the public.” If that is true, then disclosing the names of those businesses publicly is unlikely to cause the general public to engage in any type of behavior that would impact those businesses negatively. The minimal risk of incursion on the businesses’ activity is far outweighed by the public interest in disclosure. *See Deseret News Pub. Co.*, 182 P.3d at 381 (noting that only “clearly unwarranted” invasions of personal privacy, not all incursions on privacy, justify withholding a record from public disclosure).

## **B. Nationwide Standards of Information Practices**

In 2017, the U.S. Centers for Disease Control and Prevention issued a series of

recommendations in a document titled “Community Mitigation Guidelines to Prevent Pandemic Influenza,” which is available at <https://www.cdc.gov/mmwr/volumes/66/rr/rr6601a1.htm>. The CDC reported on a Harvard Opinion Research Program poll concluding that 74 percent of 1,057 businesses surveyed offered paid sick leave for their employees, but only 35 percent offered paid leave for employees to take care of ill family members and just 21 percent would pay workers to take care of their children at home if schools or daycares were to close. The report further noted the importance of local government entities collaborating with businesses and engaging in “transparent communication with the public” in order to implement a rapid-response strategy to a pandemic. Finally, the CDC concluded that one of the key factors in achieving public acceptance of non-pharmaceutical interventions during a pandemic is the following: “Identifying key personnel to disseminate emergency information (e.g., alerts, warnings, and notifications) and establishing communication channels that enable members of the public to ask questions and express concerns (e.g., call centers or social media sites).” (emphasis added).

This case, then, must be decided against the backdrop of a nationwide standard of information practice for pandemics that asks local governments to interact with businesses to prevent virus spread and to give the general public as much information, and the opportunity to ask as many questions, as possible. Yet Utah County in this case

has achieved the opposite by raising public alarm about two supposedly careless businesses causing outbreaks and then refusing to communicate further details that would assuage public fears and ensure future compliance with public-health guidelines. The Court can remedy this failure by granting KSL-TV's Motion for Judgment on the Pleadings.

Further evidence of nationwide standards of information practices during the current pandemic can be found in the Department of Justice Office of Information Policy's May 28, 2020 "Guidance for Agency FOIA Administration in Light of COVID-19 Impacts," available at <https://www.justice.gov/oip/guidance-agency-foia-administration-light-covid-19-impacts>. The DOJ Office of Information Policy stated that public records access is more important than ever during the COVID-19 pandemic and, therefore, agencies of the federal government should continue providing records to the public because "[t]he law remains an important tool for the public to gain access to government information to stay informed about government activities." Further, the Office of Information Policy advised the following:

- Statutory deadlines to respond to open-records requests remain in force during COVID-19;
- Agencies of the government should always engage in "clear and effective communication with requesters[,]" and that same mandate is "particularly

important during these unprecedented times”;

- Rather than seeking to put up obstacles to public records access, government agencies should reach out to requesters to help reformulate or narrowly tailor requests so they can be processed more efficiently, and agencies should make interim and partial disclosures even when not able to fully provide requested information; and
- Government agencies should proactively disclose government records, without waiting for requests, when those records are likely to be of substantial public interest.

The DOJ Guidance and the CDC Guidelines are in tandem with respect to the increased need for government records disclosure during a pandemic. While Utah County acts as if COVID-19 is reason to clam up and hide its work from the public, the nationwide standards of information practices indicate the opposite should be the case. Utah County should have been looking for opportunities to inform the public and gain public trust by disclosing as much information as possible, including identities, about the two businesses in which outbreaks occurred. It appears that Utah County began with that inclination, based on its Facebook and Twitter posts, but then stopped short of providing what the balance of interests under GRAMA requires and what nationwide standards also indicate is appropriate.

### **CONCLUSION**

In accordance with the foregoing, the *Amici* urge the Court to grant KSL-TV's Motion for Judgment on the Pleadings and thereby serve the public interests in monitoring government and giving members of the public all the information they need to make decisions about their own health and well-being during the COVID-19 pandemic.

RESPECTFULLY SUBMITTED this 23rd day of June, 2020.

\_\_\_\_\_  
/s/ Edward L. Carter

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**CERTIFICATE OF SERVICE**

I hereby certify, under the penalty of perjury, that I filed the foregoing  
Memorandum via the Court's electronic filing system, this 23rd day of June, 2020, and  
thereby served the following:

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