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May 18, 2020

**VIA EMAIL AND REGULAR MAIL**

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Dear Commissioner Ainge, Commissioner Ivie, and Commissioner Lee:

This law firm represents the News Media regarding certain important and pressing public records issues now pending in Utah County (the “County”) under the Utah Government Records Access and Management Act (GRAMA) and the constitutions of the United States and the state of Utah.

Five of our clients—*The Daily Herald*, *The Salt Lake Tribune*, *The Deseret News*, Fox 13 News, and KUTV News—have requested records showing the names of two businesses in the County that have blatantly disregarded directives and best practices designed to reduce the risk of COVID-19 infection by their employees and others. Ms Laura Mendoza of the County recently denied those records requests and our clients have appealed those denials. An additional client, the Headliners Chapter of the Society of Professional Journalists (Utah SPJ) also has a great interest in open government and records access issues.

Commissioner Tanner Ainge  
Commissioner Nathan Ivie  
Commissioner Bill Lee  
May 18, 2020  
Page 2

On May 4, 2020, the County released a statement on social media indicating that almost 70 employees of two businesses in the County tested positive for COVID-19 after the businesses instructed employees to not follow quarantine guidelines and required staff who had tested positive to report to work. *See generally* Katie McKellar, “68 got COVID-19 after Utah County businesses told sick employees to work,” May 6, 2020, *The Deseret News* (found at: <https://www.deseret.com/utah/2020/5/6/21249626/68-got-covid-19-after-utah-county-businesses-told-sick-employees-to-work>). The County’s statement appropriately concluded, “This is completely unacceptable and resulted in a temporary full closure for one business along with heightened requirements for future cleaning and inspections.” County executives criticized these businesses and others who failed to follow guidelines for “putting employees, their families and ultimately the health of the community at risk,” adding that employers that don’t follow best practices also “jeopardize Utah County efforts to reopen businesses affected by the pandemic.” Obviously, we all can agree that the conduct at issue is egregious and its possible negative impact on the County and its citizens significant and widespread.

Yet, so far the County and its health department have refused to identify the names of the two businesses that engaged in such egregious and endangering behavior. The public has reacted to this unfortunate decision with widespread surprise, concern, and disbelief. Even a cursory review of comments made on the County’s social media posts (and on news articles about the County’s decision) confirms this point. There are good and legitimate reasons for this widespread negative reaction to the County’s decision, and thus we respectfully ask that you reverse it immediately.

The poet John Donne perhaps best summarized these reasons in his 1624 poem explaining, “No man is an island.” Despite the County’s contentions to the contrary, these businesses indeed are public facing, just like any other business. No business is isolated from the public. The two involved businesses may not be store fronts or retail operations, but they likely have sales people, purchase supplies, receive/make deliveries, put their products in the stream of commerce, utilize repair/maintenance services, have business visitors, share space and common building/parking areas with others, and interact for business reasons with others. The employees of these businesses dine, shop, go home, go to church, visit with family and friends, get their hair cut, and interact with others in countless other ways. The actions of these businesses have put hundreds of persons at risk at a time when we all are called upon to protect ourselves and others from this highly contagious disease. The lack of specific information about the two offending businesses makes this task much more difficult for many people. All the other people touched—or possibly touched—by the interactions of these two businesses and their employees should know they have been in possible contact with COVID-19 hot spots so they can take appropriate steps to protect themselves and others. Our client (and your largest local newspaper) *The Daily Herald* explained all these points eloquently in the attached editorial published on May 9, 2020.

Commissioner Tanner Ainge  
Commissioner Nathan Ivie  
Commissioner Bill Lee  
May 18, 2020  
Page 3

This is the basic reason that businesses and persons imperiling public health, safety, and/or well-being are routinely identified to the public—not so they can be shamed, but so the members of the public can take appropriate steps to protect themselves. Restaurants and food manufacturers violating health codes are identified, even when there is no pandemic. Businesses and individuals involved in fraud or financial wrongdoing are routinely identified to the public. Companies engaging in poor safety practices that put employees or the public at risk or cause industrial accidents are routinely identified. For the same reasons, in the specific circumstances of this pandemic, residential care facilities with COVID-19 outbreaks have been identified. On May 14, 2020, the Utah Department of Health published data showing which nursing homes, senior care centers and similar facilities have COVID-19 cases. *See* Nate Carlisle, “Utah discloses which long-term care facilities have coronavirus cases,” *The Salt Lake Tribune*, May 13, 2020 (found at: <https://www.sltrib.com/news/2020/05/14/utah-discloses-which-long/>). Even a cursory review of national news reveals a long list of specifically-identified businesses who have suffered large COVID-19 outbreaks or have refused/neglected to follow safety practices. *See, e.g.* “Tyson Foods idles its largest pork plant after Iowa outbreak,” KUTV News, April 22, 2020 (found at: <https://kutv.com/news/coronavirus/tyson-foods-idles-its-largest-pork-plant-after-iowa-outbreak>).

The County seems concerned that members of the public will not responsibly use information about the names of the two businesses at issue. Besides being somewhat paternalistic, such a concern is the tail wagging the dog. In the context of the Second Amendment to the United States Constitution, many oppose gun control noting that guns do not hurt people, people hurt people. The same logic applies to the Second Amendment’s older sister, the First Amendment to the Constitution, which guarantees the right of access to government information. GRAMA notes its purpose is to protect the “constitutional right” to obtain information, see Utah Code § 63G-2-102(1). We do not ban firearms just because a few people misuse them, and we should not censor information out of a fear some few might misuse it. Laws exist to deter and hold responsible those who misuse either firearms or government information.

As for the statutes the County has identified in support of its position, they do not support the position. The County has relied primarily on Utah Code §26-6-27, but by its own express terms, that statute only applies to information about individuals and not business entities. The statute states, at Utah Code §26-6-27(1), “Information collected pursuant to this chapter in the possession of the department or local health departments relating to an individual who has or is suspected of having a disease designated by the department as a communicable or reportable disease under this chapter shall be held by the department and local health departments as strictly confidential.” (Emphasis added). A business entity can never be “an individual who has or is suspected of having a disease.” The definitions section for this part of the Utah Code confirms this point by defining the phrase “infected individual” as “an individual who harbors an infectious agent and who has manifest disease or inapparent infection. An infected individual is

Commissioner Tanner Ainge  
Commissioner Nathan Ivie  
Commissioner Bill Lee  
May 18, 2020  
Page 4

one from whom the infectious agent can be naturally acquired.” Utah Code § 26-6-2(10). Nothing in the relevant statute suggests it was intended to block the release of business entity names. Moreover, even if the businesses at issue are somehow defined as covered “individuals,” the statutory protection of confidentiality does not apply to one who “who willfully or maliciously or with reckless disregard for the welfare of others transmits a communicable or infectious disease.” Arguably, that is exactly what the rogue businesses here did. Utah Code § 26-6-30(1)(c).

If the County is concerned that some requested records that identify business names also identify the names of individual employees, GRAMA resolves that concern too. Because Utah Code § 26-6-27 protects infected individuals, and not the reckless employer who facilitated the infection, the County can protect such individuals by redacting their name(s) from any documents that show the names of the rogue businesses. Indeed, GRAMA requires that such redaction be made so that other information can be made public. Utah Code § 63G-2-308(1) states that “if a governmental entity receives a request for access to a record that contains both information that the requester is entitled to inspect and information that the requester is not entitled to inspect under this chapter” then the involved governmental entity shall “allow access to information in the record that the requester is entitled to inspect.” Citing to that very provision, the Utah Supreme Court has held that “all state agencies have an independent obligation under GRAMA to redact any personal, protected, or controlled information in a record before its release.” See *Daniel Schroeder v. Utah Attorney General’s Office and the Utah State Records Committee*, 2015 UT 77.

Redaction of the names of individual persons also resolves many of the County’s other stated legal objections, including those based on: (1) alleged unwarranted invasions of personal privacy (Utah Code § 63G-2-302(2)(d) makes private “other records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy”) or (2) release of medical information (Utah Code § 63G-2-302(1)(b) makes private “records containing data on individuals describing medical history, diagnosis, condition, treatment, evaluation, or similar medical data” and Utah Code § 63G-2-304 makes controlled “medical, psychiatric, or psychological data about an individual”). The County also cites to Utah Code § 63G-2-305(10)(a), which makes protected “records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes.” The name of an offending business is hardly going to create that level of interference, as evidenced by the fact that the County already has confirmed that it is investigating a Utah County company called Built Brands regarding COVID-19 issues. See Sydney Glenn and David Wells, “Worker sues Utah County energy bar company, claims management allowed COVID-19 to spread,” Fox13 News, May 16, 2020 (“In a response to

Commissioner Tanner Ainge  
Commissioner Nathan Ivie  
Commissioner Bill Lee  
May 18, 2020  
Page 5

records requests from FOX 13 News, the Utah County Attorney's Office confirmed there is an ongoing epidemiological investigation into Built Brands involving county and state agencies.")(<https://www.fox13now.com/news/coronavirus/local-coronavirus-news/worker-sues-utah-county-energy-bar-company-claims-management-allowed-covid-19-to-spread>).

Our clients believe the issues raised in this letter and by their GRAMA requests are quite significant, and thus we intend to pursue our clients' record request appeals to the fullest extent possible to resolve this dispute and to set precedent for future similar circumstances. Yet, during this time of struggle and uncertainty, it also is true that there may be better and more constructive ways for all of us to spend our valuable time and energy than in litigation. For that reason, we earnestly ask you to reconsider the County's position on this issue and to stop protecting the businesses who did so little to help—and possibly so much to hurt—all of the rest of us.

Please contact me if you have any questions. Thank you for your consideration in this matter.

Very truly yours,

JONES WALDO HOLBROOK & MCDONOUGH PC

*/s/ Michael Patrick O'Brien*

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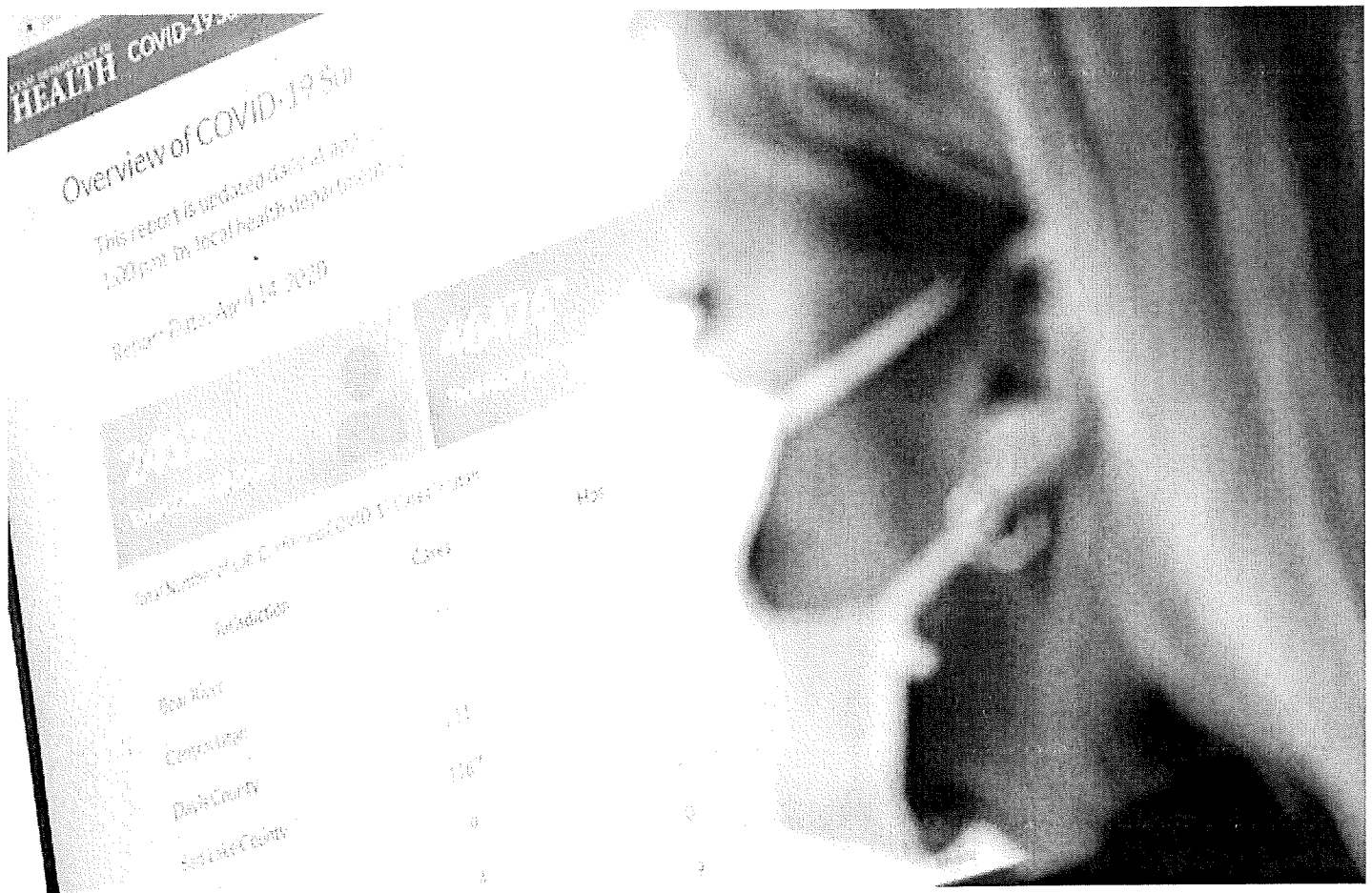
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FEATURED

# Herald editorial: Names of businesses that violate pandemic guidelines should be released

Daily Herald Editorial Board  
May 9, 2020



Coronavirus statistics from the Utah Department of Health’s website are displayed at the Utah County Health Department’s COVID-19 call center Tuesday, April 14, 2020, in Provo. Isaac Hale, Daily Herald  
Isaac Hale, Daily Herald

Sometimes rules are not made to be broken.

A statement was released this week by members of the Utah County Commission, and signed by the mayors of each community within the county, notifying the public that two local businesses did not follow COVID-19 guidelines. That decision led to 68 new cases in Utah County.

Contact tracing revealed that these businesses allegedly instructed employees not to follow quarantine guidelines after exposure to a confirmed case and required employees with COVID-19 to still report to work.

That is quite problematic.

It's reasonable to think it's impossible to completely eliminate the risk of COVID-19 exposure in the workplace. Actively encouraging employees to ignore well-intended guidelines is another matter.

These guidelines, which include teleworking when possible, wearing a mask in public settings and monitoring the workforce for symptoms, seem achievable and easily enforceable by most companies in the near term.

Given that we're dealing with a global pandemic, we can all endure a little more frustration to pave the way for a safe return to normalcy.

In the midst of these cases in Utah County is a deafening silence by county and city officials. They seem to perceive themselves as unable to name the companies ignoring these guidelines. It struck many as odd.

The Utah County Health Department attempted to explain the decision to forgo naming the businesses in a string of tweets on May 6.

"Only the information that will help a member of the public know whether or not an exposure may have occurred will be disclosed. Disclosing the identity of either the case or the contact:

"Unnecessarily puts the privacy of that individual at risk; in turn, Potentially puts the case into danger of receiving ridicule or rejection, having a reputation destroyed, or even bodily harm from others in the public."

This is a generous interpretation of state law while also being a rather uncharitable interpretation of the public's sentiment.

While it's reasonable to think that epidemiologists at the state and county level have carefully considered the public's risk of exposure as a result of these COVID-19 cases, it's also reasonable to think it is impossible to know through contact tracing just how many members of the public were exposed as a result of these companies' decisions.

With more than 33 million Americans losing their jobs as a result of some of these health guidelines, and the rest of us frustrated by the interruption to our lives, it's fair to say that many members of the public want to assess whether they were exposed and what steps they should take to protect themselves and their families.

A discussion needs to be had at the state level to revise some of the conditions, and clarify certain language in Utah code, to bring greater transparency during pandemic situations in particular. Part of that should include releasing the names of businesses that encourage their employees to actively ignore certain health guidelines.

If the state is going to limit a company's legal liability for problems resulting from COVID-19 exposure, the least legislators can do is provide the names of those companies so the public can make quality decisions. This would be no different from notifying the public during hepatitis or other contagious disease exposures.

As for the letter released by county and city officials in Utah County, the attempt to show frustration with the companies while also complying with a generous interpretation of state law is palpable.

Local officials should start the discussion by voluntarily releasing the names of these companies, letting the public use that information to their advantage and beginning work to lobby elected representatives at the state level to revise Utah code.

Situations like those cited in the county's letter are generally avoidable. Let's make that clear so that when another pandemic arises, we have a better framework for decision making.