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| IN THE FOURTH JUDICIAL DISTRICT COURT  UTAH COUNTY, STATE OF UTAH | |
| STATE OF UTAH,  Plaintiff,  v.  JANE DOE,  Defendant. | REPLY TO DIVISION’S MEMORANDUM OPPOSING DEFENDANT’S MOTION  FOR COURT ORDER FOR DCFS  RECORDS PURSUANT TO  THE GOVERNMENT  RECORDS ACCESS  MANAGEMENT ACT  Case No. 000000000  Judge XXXXX |

Defendant JANE DOE (“Ms. Doe”), by and through her attorney of record, BENJAMIN R. ALDANA, hereby replies to the Division’s Memorandum Opposing Defendant’s Motion for Court Order for DCFS Records Pursuant to the Government Records Access Management Act (“DCFS’s Opposition”).

On June 29, 2021, Ms. Doe filed a Motion for Court Order to Obtain DCFS Records Pursuant to the GRAMA (“Ms. Doe’s Motion”). On July 12, 2021, DCFS’s Opposition was filed. The following is Ms. Doe’s Reply to DCFS’s Opposition.

**MS. DOE’S REQUEST FOR ACCESS TO THE RECORDS SHE SEEKS FROM**

**DCFS SHOULD BE GRANTED BECAUSE UTAH CODE § 63G-2-202(7)**

***—NOT RULE 14 OF THE UTAH RULES OF CRIMINAL PROCEDURE—***

**GOVERNS ACCESS TO THE RECORDS AND *IN CAMERA***

**REVIEW OF THE RECORDS IS NOT APPROPRIATE**

Unless “otherwise provided” for under Title 62A, Chapter 4a, the records sought in Ms. Doe’s Motion are classified as private, protected, or controlled records under GRAMA. *See* §62A-4a-412 (stating that “[r]eports, information, and referrals” are confidential and classified as “private, protected, or controlled records” under GRAMA); *see also* §62A-4a-1003(1)(b)(i) (explaining that DCFS’s records held within the “Management Information System” are “protected records”). In other words, DCFS’s records are non-public records, and access to them is governed by GRAMA.

Here, DCFS makes the leap from “non-public” to “privileged” without providing a valid legal basis for the Court to do the same. It is true that DCFS’s records—as well as *all* other records classified under GRAMA, including police reports—are “privileged from discovery,” under GRAMA, “[u]ntil [a] court . . . orders disclosure.” *See* § 63G-2-207(2)(a)(ii). But § 63G-2-207 is nothing more than a shield from subpoenas until a court goes through the § 63G-2-202(7) analysis. § 63G-2-207 is simply a gatekeeping tool to protect government agencies from being harassed by litigants in cases unrelated to the records sought, or from being required to comply with every subpoena they receive unless a “court has considered the merits of” a party’s “request for access to [a] record.” § 63G-2-202(7)(b). Once a court has considered the merits of a request for access to records and concluded that “the interests favoring access” to “private, controlled, or protected” records “are greater than or equal to the interests favoring restriction of access,” then issuing an order for disclosure of the records is appropriate. § 63G-2-202(7)(d). Thus, if the Court orders disclosure of the records sought in Ms. Doe’s Motion pursuant to § 63G-2-202(7), there is no valid privilege that DCFS can claim with respect to its records. Nothing in § 63G-2-202(7) permits an *in camera* review of government records sought under § 63G-2-202(7) because such a review is not necessary to making the required determination; the main analysis that is necessary under § 63G-2-202(7) is whether “the *interests* favoring access” to a “private, controlled, or protected” record “are greater than or equal to the *interests* favoring restriction of access.” § 63G-2-202(7)(d) (emphasis added). The main things to be considered are the competing *interests* involved, rather than the *content* of the government records being sought. Simply put, once information is put into a government record—even if that information was at some point privileged—it is no longer privileged. It is classified under GRAMA. And access to that information is then governed by GRAMA.

Ms. Doe concedes that the privacy interests involved in a record classified under GRAMA may vary depending on the precise content of the particular record. Thus, in certain cases, *in camera* review of records in dispute may be necessary before a court can engage in a proper analysis under § 63G-2-202(7). But this is not such a case. This case involves an allegation of class A misdemeanor child abuse. Ms. Doe had custody of the Alleged Victim for several years prior to the allegation in this case being made. And even if Ms. Doe is convicted of what she has been accused of in this case, if Ms. Doe complies with whatever condition(s) are ordered by the Court as a result of the conviction, she will eventually regain custody of the Alleged Victim, which will likely provide Ms. Doe with the ability to gain unfettered access to the records at issue in this Motion. Additionally, it is likely that the “medical” information referenced in DCFS’s Opposition has already been turned over as discovery, given the fact that the allegation in this case is that Ms. Doe physically abused the Alleged Victim, after which a medical examination of the Alleged Victim was performed. *See DCFS’s Opposition*, at 5.

Given the explicit classification of the records that Ms. Doe seeks as being “private, protected, or controlled records,” *see* § 62A-4a-412, access to the records is clearly governed by GRAMA, not Rule 14. And because Ms. Doe is explicitly listed in listed in § 62A-4a-412(1)[[1]](#footnote-1) as a person who may have access to the records, but DCFS has nevertheless refused to provide them,[[2]](#footnote-2) a court order issued under § 63G-2-202(7) is the only way in which Ms. Doe will gain access to those records. Under the logic provided in DCFS’s Opposition, *every government record* containing any information regarding a victim or an alleged victim of a crime—even a police report—would become a “privileged” record, simply because they are non-public records classified under GRAMA, which would make them inaccessible unless the Rule 14 burden could be met. This cannot be the case. GRAMA governs—not Rule 14.

Aside from the fact that GRAMA clearly governs access to the records sought in Ms. Doe’s Motion, Rule 14 pertains only to *privileged* records. And as explained above, no privileged records are at issue; DCFS’s records do not become “privileged” simply because they are private, protected, or controlled records. Nor do government records classified under GRAMA—like DCFS records—become privileged by virtue of the fact that they might contain information which at some point may have been privileged, but for the fact that the information has been furnished to the government. § 63G-2-202(7) provides the appropriate process by which a party to a judicial proceeding may request and obtain private, protected, or controlled government records—including DCFS records. And § 63G-2-202(7)(c) allows the Court to put safeguards in place to prevent any inappropriate use of the records.

**BECAUSE RULE 14 IS NOT RELEVANT TO THE WAY IN WHICH MS. DOE**

**IS REQUIRED TO OBTAIN THE RECORDS AT ISSUE IN HER MOTION**

**THE ALLEGED VICTIM DOES NOT HAVE A RIGHT TO BE HEARD**

**WITH RESPECT TO MS. DOE’S MOTION**

With respect to the argument made on pages 5–6 of DCFS’s Opposition, DCFS seems to be presuming that Ms. Doe is seeking the records at issue in in her Motion for confrontation purposes. *See DCFS’s Opposition*, at 5–6 (“a defendant’s Sixth Amendment right to confront . . . ‘is not without limitation’”). Perhaps confrontation will end up being one of the uses of those records. But that is not why they have been sought. As stated in Ms. Doe’s Motion, the records are being sought because Ms. Doe has the right to have her attorney “adequately investigate the underlying facts of [her] case.” *State v. Templin*, 805 P.2d 182, 188 (Utah 1990); *see Ms. Doe’s Motion*, at 4–5. Without a proper defense investigation into the underlying facts, “counsel’s performance cannot fall within the ‘wide range of reasonable professional assistance.’” *Templin*, 805 P.2d at 188 (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). In other words, were the records at issue in Ms. Doe’s Motion not being sought, her defense could constitute ineffective assistance of counsel. So, while Ms. Doe agrees that the records may be relevant to confrontation, that is by no means the only purpose for which they are being sought.

And because Rule 14 is not the law which governs access to the records sought in Ms. Doe’s Motion, the Alleged Victim doesn’t have a right to become involved in the dispute between Ms. Doe and DCFS. Nor does the Alleged Victim having a right to notice of Ms. Doe seeking the DCFS records: the Alleged Victim is not a party to this case. The Alleged Victim has “limited-purpose party” status in this case, which affords her standing to become involved in the case only in limited circumstances. *See State v. Brown*, 2014 UT 48, ¶¶ 19–20, 342 P.3d 239 (“victims . . . possess the status of a limited-purpose party”). Limited-purpose standing does not grant the Alleged Victim a right to become involved in every aspect of this case.

In *State v. Brown*, after the defendant had been sentenced, the victim filed a “notice of claim for restitution.” *Id.* ¶ 6. The defendant objected to the victim’s request, arguing that she did not have “standing to file such a pleading in a criminal action.” *Id.* ¶ 7. Ultimately, the district court in *Brown* held “that crime victims are not parties to criminal proceedings and thus lack standing to file pleadings, including requests for restitution.” *Id.* ¶ 9. The victim in *Brown* appealed that decision and the Utah Supreme Court decided otherwise, holding that the victim could “intervene for the *limited purpose* of filing a notice of claim for restitution.” *Id.* ¶ 12 (emphasis added). The *Brown* Court authorized this limited-party action by the victim in *Brown* because “[i]mportant criminal justice hearing,” as defined in § 77-38-2(5)(f) “includes court proceedings involving restitution.” *Brown*, 2014 UT 48, ¶ 13.

But § 77-38-2(5) does not give the Alleged Victim in this matter any similar standing to object to or respond in any way to Ms. Doe’s Motion requesting the production of DCFS records pursuant to GRAMA.

**CONCLUSION**

Ms. Doe has the right to have her attorney fully investigate the underlying facts of this case, and access to the records sought in her Motion is the only way in which a full investigation into the underlying facts can occur. DCFS is simply attempting to make the issue raised in Ms. Doe’s Motion and the process associated with it more complicated and onerous than the law actually makes it. § 63G-2-202(7) is what governs access to the records sought in Ms. Doe’s Motion, and that is the law the Court should apply. The Court should grant the request made in Ms. Doe’s Motion.

DATED this 19th day of July, 2021.

*/s/ Benjamin R. Aldana*

Benjamin R. Aldana

Attorney for Ms. Doe

CERTIFICATE OF SERVICE

Via the court’s electronic filing system a copy of the foregoing was sent to the Utah County Attorney’s Office, this 19th day of July, 2021.

Additionally, the following individual was served by email:

Assistant Attorney General

Attorney for DCFS

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|  |  | */s/ Benjamin R. Aldana* |

1. §62A-4a-412(1)(k) specifies that “any individual identified in the report as a perpetrator or possible perpetrator of abuse” may have access to records such as those being sought in Ms. Doe’s Motion. [↑](#footnote-ref-1)
2. *See DCFS’s Opposition*, at 2 (stating that Ms. Doe “requested the records in August 2020 and on August 31, 2020,” she “was sent a denial letter based on Rule 14 of the Utah Rules of Criminal Procedure.”). [↑](#footnote-ref-2)