

# Classifying Drafts

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A draft is a work in progress. Drafts can be preliminary versions of reports, letters, or other writings created as an author develops a cohesive and finished work. Drafts represent progressive versions of writing until a final product reaches some form of completion or approval. Or, a draft might be a simple sketch or drawing. It might be an outline of key points or a list of ideas. Drafts may be used to organize thoughts or to trigger memory of important information.

Within the expanse of records documenting government actions there are numerous examples and applications of the use of drafts. Field notes gathered and finalized in a subsequent report are drafts. Legislative bills in the process of being refined for presentation to the Legislative session are drafts. Email messages composed, but not yet sent are drafts.

Managing and classifying drafts requires analytical thinking. The following guidelines and legal references are designed to aid that analysis.

## FIRST CONSIDERATION: IS THE DRAFT A RECORD?

In the definitions section, the Government Records Access and Management Act (GRAMA) states that “Record’ does not mean... a temporary draft or similar material prepared for the originator’s personal use or prepared by the originator for the personal use of an individual for whom the originator is working.”<sup>1</sup> The first requirement of a determination that a draft does not meet the definition of a record under the law is that it must be temporary. Some synonyms for temporary are short-term, interim, provisional, fleeting, passing, stopgap, and nonpermanent.

The second requirement for determining that a draft is not a record is that it is created for a government employee’s personal use. This personal use is presumed to be work related. The draft is a provisional, interim, or stopgap rendition of information to be used in a work process by an individual. Some examples of temporary drafts that can be identified as “not records” include such things as field notes taken in preparation for completing a subsequent report. Notes or prompts a speaker or presenter uses during a speech or presentation could be a temporary draft, or it could be a temporary license or authorization issued as a place holder while a more permanent license or authorization is processed.

On a number of occasions governmental entities have argued the “non-record” status of temporary drafts before the State Records Committee. The Committee’s decisions in these arguments are helpful for identifying drafts that can be characterized as not records subject to GRAMA. The following table shows instances in which the State Records Committee made determinations about drafts that were claimed to be not records:

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<sup>1</sup> [Utah Code 63G-2-103\(22\)\(b\)\(ii\)](#)

**State Records Committee hearings: Drafts that are not records**

<b>Hearing</b>	<b>Description of draft claimed not to be a record</b>	<b>Committee's decision</b>
<a href="#"><u>02-08</u></a>	Photographs of tattoos used to identify gang membership of prisoners when no gang membership is identified	Affirmed that these are "temporary drafts" and are not records
<a href="#"><u>03-09</u></a>	Hand written notes created during a performance review	Notes were shared with supervisors and maintained in a way that they could be reviewed; therefore they are records
<a href="#"><u>04-06</u></a>	List of businesses and individuals who were purported to be non-responsive to a mailing	List was an ad hoc list created from other records and not required to be provided
<a href="#"><u>08-17</u></a>	Hand-written personal notes	Affirmed that these are "temporary drafts" and are not records
<a href="#"><u>09-04</u></a>	Notes, drafts, similar material regarding an affidavit	Affirmed that these are "temporary drafts" and are not records
<a href="#"><u>09-15</u></a>	Internal documents, memos, files, email	Handwritten notes are records and were not "temporary drafts"
<a href="#"><u>10-12</u></a>	Draft documents maintained in the tax appraiser's file; used by appraiser in analysis of subject property	Drafts maintained in a file are records and not "temporary drafts"
<a href="#"><u>11-12</u></a>	Copies of communications regarding a particular topic	Of numerous documents some were characterized as "temporary drafts" and therefore not records
<a href="#"><u>16-15</u></a>	Notes and scores of employment candidates in an interview	Notes were not used only for the originator's personal use; therefore they are records

## SECOND CONSIDERATION: IS THE DRAFT A PROTECTED RECORD?

If a draft is a record, it may be classified as protected. GRAMA states, “The following records are protected if properly classified...: (22) drafts, unless otherwise classified as public.”<sup>2</sup> Based on this classification statement, protected is the appropriate default classification for drafts. As a protected record a draft could be provided to the person who submitted the record, an individual who has power of attorney or notarized release from all parties whose interests are sought to be protected, or someone with a court order or legislative subpoena.<sup>3</sup>

Drafts normally are protected in order to prevent confusion and protect the decision-making processes. As updates are being made, corrections to content and editorial changes can be considered within the governmental entity while work is in progress without concern that a superseded record that was made accessible to the public will become confused with a final record. Much like an investigation or audit, the record creation process should be protected until that process is complete. The following table shows instances in which the State Records Committee made determinations that drafts are appropriately classified as protected.

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<sup>2</sup> [Utah Code 63G-2-305\(22\)](#)

<sup>3</sup> [Utah Code 63G-2-202\(4\)](#)

**State Records Committee hearings: Drafts that are protected**

<b>Hearing</b>	<b>Description of draft claimed to be protected because of status as a draft.</b>	<b>Committee's decision</b>
<a href="#"><u>03-04</u></a>	Draft of settlement decree and draft of press release	Properly classified as protected
<a href="#"><u>04-14</u></a>	Draft planning-commission minutes	Properly classified as protected; were not relied on to carry out any action or policy
<a href="#"><u>06-06</u></a>	Draft dismissal letter	Properly classified as protected.
<a href="#"><u>09-12</u></a>	Drafts, notes and similar materials associated with evaluating a policy or plan	Properly classified as protected because it is a draft
<a href="#"><u>09-15</u></a>	Drafts of pleadings	Properly classified as protected
<a href="#"><u>10-12</u></a>	Draft documents maintained in the tax appraiser's file; used by appraiser in analysis of subject property	Drafts should be classified as public records because records regarding tax status of real property are public
<a href="#"><u>10-11</u></a>	Email (some among many)	Properly classified as protected because it is a draft.
<a href="#"><u>11-12</u></a>	Copies of communications regarding a particular topic	Of numerous documents some were properly classified as protected because they were drafts
<a href="#"><u>14-16</u></a>	External auditor's draft report	Because draft was not circulated or finalized or relied on to carry out any action or policy its classification is protected
<a href="#"><u>15-16</u></a>	Draft of investigation report	Properly classified as protected

### **THIRD CONSIDERATION: IS THE DRAFT A PUBLIC RECORD?**

Not all drafts are protected. GRAMA specifies certain conditions which raise a draft to the level of a public record. As outlined in the list of normally public records, drafts that should be classified as public include:

1. Empirical data contained in drafts if that data is not reasonably available elsewhere in a similar form and the governmental entity is given a reasonable opportunity to correct errors or make non-substantive changes.<sup>4</sup>
2. Drafts that were circulated to anyone outside of the governmental entity and other entities, such as contractors, with which the entity is directly working.<sup>5</sup>
3. Drafts that have not been finalized, but which were relied upon to carry out an action or policy.<sup>6</sup>

In the first instance, “empirical data” is based on experimentation or quantifiable experience. It can be thought of as research evidence supporting or countering a particular conclusion. For example, if the Governor’s Office of Energy Development has empirical data about the effectiveness of mining in the Uinta Basin as an energy resource for the state, and that information is not available elsewhere, it should be public information even if it is only contained within a draft. As stated in the code, the governmental entity must be given a reasonable opportunity to correct errors and make non-substantive changes.

In the second instance, when drafts are circulated outside of the creating entity or group, they effectively become public records. A parallel example is that when an attorney or client discloses information that normally is protected under attorney-client privilege, then that record loses its privileged or protected classification.

Also, when a draft is relied upon to carry out an action or implement a policy, interest in government transparency overrides the protected status of the draft. Citizens and decision makers have an interest in understanding how a policy was implemented or why an action was taken.

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<sup>4</sup> [Utah Code 63G-2-301\(3\)\(i\)](#)

<sup>5</sup> [Utah Code 63G-2-301\(3\)\(j\)](#)

<sup>6</sup> [Utah Code 63G-2-301\(3\)\(k\)](#)

When no other exemption applies and there is a compelling interest in restricting access to records, a court may order confidential treatment of records. If the court-restricted record is a draft, the restriction must be based on the underlying information and not on the deliberative nature of drafts as a record.<sup>7</sup>

### **FINAL CONSIDERATION: DOES ANOTHER STATUTE GOVERN ACCESS?**

In every records access situation, GRAMA provides that when access to a record is governed or limited by some other statute, rule, or regulation, then access must be provided according to the specific requirements of that governing statute, rule, or regulation and the provisions of GRAMA apply only to the extent that they are not inconsistent with the alternate provision.<sup>8</sup> In the case of drafts, the Open and Public Meetings Act (OPMA) provides instruction for providing access to unapproved minutes. This statute governs access to draft minutes of open and public meetings.

In the Open and Public Meetings Act, “pending minutes” are defined as written minutes of open meetings that are in draft form. Since they have not been approved, they are subject to change. Pending minutes are declared to be public records with the additional requirement that, upon release, they must be marked with a clear label indicating that they are drafts not yet approved by the public body.<sup>9</sup>

Possibly, other rules or statutes govern drafts in other specific circumstances. In all circumstances, it may be a good idea to follow the model of the OPMA and clearly label any draft that is released.

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<sup>7</sup> [Utah Code 63G-2-405](#)

<sup>8</sup> [Utah Code 63G-2-201\(3\)\(b\)](#)

<sup>9</sup> [Utah Code 52-4-203\(4\)\(a\)\(b\)\(c\)](#)