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BEFORE THE UTAH STATE RECORDS COMMITTEE

TRUTH IN ADVERTISING, INC., Petitioner, vs. STATE OF UTAH DEPARTMENT OF COMMERCE, DIVISION OF CONSUMER PROTECTION, Respondent.	RESPONDENT'S STATEMENT OF FACTS, REASONS AND LEGAL AUTHORITY FOR DENIAL

Comes now the Utah Department of Commerce, Division of Consumer Protection ("Respondent"), by and through counsel, Ché Arguello, Assistant Attorney General, pursuant to U.C.A. § 63G-2-403(5)(a), and hereby states the following:

STATEMENT OF FACTS

By letter dated August 18, 2014 (received by Respondent on August 22, 2014), pursuant to U.C.A. § 63G-2-101 et seq., Petitioner requested "an opportunity to inspect or obtain copies of public records regarding any investigations and consumer complaints relating to" a Utah company named Wake Up Now. Respondent denied Petitioner's request for records by letter dated August 22, 2014. In its response to the request, Respondent would not "confirm or deny whether the Division [had] received any complaints against Wake Up Now." Rather,

Respondent simply indicated that it had not "taken any disciplinary action, either administrative or legal, against Wake Up Now." Further, Respondent indicated that complaints and investigative records received by Respondent are classified under the Government Records Access and Management Act ("GRAMA") as "protected" pursuant to U.C.A. § 63G-2-305(10) and "private" pursuant to U.C.A. § 63G-2-302(2)(d).

By letter dated August 27, 2014 (received by Respondent on September 2, 2014), Petitioner filed an appeal with Francine Giani, Executive Director of the Department of Commerce, on the denial of Petitioner's request for records. Administrative Law Judge Masuda Medcalf responded to the appeal on behalf of the Executive Director. In addition to again citing U.C.A. §§ 63G-2-305(10) and -302(2)(d) regarding Respondent's general practice of classifying complaints and investigative records, and in an attempt to explain why Respondent would neither confirm or deny the existence of any records, Ms. Medcalf referred Petitioner to the Utah Consumer Sales Practices Act, U.C.A. § 13-11-7(2) . The Utah Consumer Sale Practices Act ("CSPA") mandates that Respondent "may not publicly disclose the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure." U.C.A. § 13-11-7(2). Ms. Medcalf, on behalf of the Executive Director, denied Petitioner's appeal.

On or about September 23, 2014, Petitioner filed a GRAMA Notice of Appeal to the State Records Committee. A hearing before the State Records Committee ("Committee") has been scheduled for 9:00am on Thursday, November 13, 2014. In its appeal, Petitioner modifies its request, seeking "copies of any and all complaints the State of Utah Department of Commerce, Division of Consumer Protection has received relating to Wake Up Now, a Utah company, with personal identifying information of the complainant(s) redacted." More

specifically, in its letter accompanying the GRAMA Notice of Appeal to State Records Committee form, Petitioner makes clear they are seeking only redacted copies of "consumer complaints".

REASONS AND LEGAL AUTHORITY FOR DENIAL

THE LAW:

U.C.A § 63G-2-201(3) sets forth certain categories of records that are "not public". Included are records "to which access is restricted pursuant to court rule, *another state statute*, federal statute, or federal regulation, including records for which access is governed or restricted as a condition of participation in a state or federal program or for receiving state or federal funds." U.C.A. § 63G-2-201(3)(b) (emphasis added).

The Director of the Division of Consumer Protection has authority to "investigate the activities of any business governed by the laws administered and enforced" by Respondent. U.C.A. § 13-2-5(2). Respondent is charged with administering and enforcing various State Acts including, but not limited to, Chapter 11 of the Utah Code, the Utah Consumer Sales Practices Act. In complying with its statutorily mandated duties, Respondent shall "receive and act on complaints." U.C.A. § 13-11-7(1)(d). Additionally, "[i]n carrying out his duties, [Respondent] may not publicly disclose the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure." U.C.A. § 13-11-7(2).

U.C.A. § 63G-2-305(10) provides that "records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes" are "protected" if release of the records reasonably *could*

be expected to interfere with investigations undertaken for specified purposes. See, U.C.A. § 63G-2-305(10)(a) through (e).

U.C.A. § 63G-2-302(2)(d) provides that records are "private" if they "[contain] data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy."

ARGUMENT:

It is clear that Respondent is prohibited by Title 13 of the Utah Code from confirming or denying the existence of the requested records. U.C.A. § 13-11-7(2). GRAMA does not require Respondent to confirm the existence of records, let alone disclose any records, that would violate the confidentiality provisions of another State statute. U.C.A. § 63G-2-201(3); See also, U.C.A. § 63G-2-205 (indicating the governmental entity need not in its notice of denial disclose "private, controlled, or protected information, or information exempt from disclosure under Subsection 63G-2-201(3)(b) . . . ."). To order Respondent to confirm or deny the existence of responsive records, or to disclose any records which may exist, would place Respondent in the untenable position of violating another provision of Utah State law. Respondent "may not publicly disclose the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure." U.C.A. § 13-11-7(2). As indicated in its responses, Respondent has confirmed that there has been no enforcement proceeding against Wake Up Now. Nor has Wake Up Now consented to public disclosure of any records to the extent they exist. If Respondent were to indicate that it had received consumer complaints against Wake Up Now, it would be violating Title 13 by disclosing the identity of the subject of the investigation, Wake Up Now, when there has been no enforcement proceeding or consent to disclose.

Petitioner argues that it is not asking Respondent to disclose whether or not Wake Up Now is under investigation. Rather, Petitioner is "simply requesting copies of any consumer complaints the Division has received regarding Wake Up Now" in redacted form. Petitioner goes on to state "[t]he existence of consumer complaints against a company, such as Wake Up Now, alone does not mean the company is under investigation by the [Respondent]; it simply means the company has somehow frustrated consumers who then decide to notify the [Respondent]." Petitioner is wrong. Neither the CSPA nor the Division contemplates a separation between a consumer complaint and an investigation. A complaint is nothing less than the initial step of an investigation. As noted above, Respondent is obligated to "receive *and act*" on consumer complaints. U.C.A. § 13-11-7(1)(d) (emphasis added). To act on a consumer complaint means to, in some manner, investigate it. Were it not for the Division's mandate to investigate, there would be no purpose for the Division to receive consumer complaints. Consumer complaints are, thus, inseparable from investigations. Some complaints received will result in some form of public enforcement action and others will be closed without public action. But under no circumstances would the Respondent receive a complaint and not evaluate or "investigate" it.

Certainly, the general public would not see the distinction Petitioner attempts to make. A member of the public deciding whether to utilize the services of Wake Up Now who was made aware that complaint(s) had been lodged against the company would certainly believe Wake Up Now had been "investigated" and factor that into their decision making process.

The content and structure of the CSPA clearly show that complaints were not intended to be disseminated, but only final judgments and other similar records. Immediately after referencing the Division's mandate to "receive and act on complaints," the CSPA states that the

Division is to, "maintain a *public file of final judgments* rendered under this chapter that have been either reported officially or made available for public dissemination under Subsection (1)(c), *final consent judgments*, and to the extent the enforcing authority considers appropriate, *assurances of voluntary compliance*." U.C.A. § 13-11-7(1)(e) (emphasis added). Consistent with U.C.A. § 13-11-7(2) quoted above, the documents are records that are made public after identities have been made a matter of public record and after appropriate legal process. If the legislature had contemplated the disclosure of consumer complaints under the CSPA – complaints it had referenced in the previous subsection – it would have added complaints to the list of records intended to be made available under § 13-11-7(1)(e).

There are sound public policy reasons behind the confidentiality provision set forth in Title 13 of the Utah Code. And the Utah Legislature "recognizes a public policy interest in allowing a government to restrict access to certain records, as specified in this chapter, for the public good." U.C.A. § 63G-2-102(2). Prohibiting Respondent from disclosing the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure serves both "public policy" and "the public good." In addition to frustrating the investigative process, public disclosure of a complaint filed with Respondent, founded or unfounded, and upon which Respondent is obligated to investigate (See, U.C.A. § 13-11-7(1)(d)) could cause significant and irreparable harm to the subject of the complaint. Additionally, knowledge of a complaint filed with Respondent prior to a public enforcement proceeding or consent to disclose could result in significant and irreparable harm to complainant in the form of retribution or retaliation. For good reason, the Utah Legislature did not want complaints and investigations made public unless they were substantiated by sufficient

evidence warranting an enforcement proceeding or by consent of the party which is subject to the complaint.

In addition, the type of records requested by Petitioner would be created and maintained for investigation purposes and which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. U.C.A. §§ 63G-2-305(10) and -302(2)(d). Redaction of the names of any complainant would not remedy the problem, as oftentimes the substance of the complaint is as revealing as the name filled into the space on the complaint form provided for "complainant" or "victim".

WHEREFORE, for the reasons set forth above, the request for records was properly denied by Respondent. Respondent respectfully request that Petitioner's appeal on the denial of its request be summarily denied in its entirety.

DATED this 7th, day of November, 2014.

SEAN D. REYES
Attorney General

CHÉ ARGUELLO
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Director, Commercial Enforcement Division