



September 23, 2014

VIA EMAIL

Nova Dubovik
State Records Committee
346 Sout Rio Grande
Salt Lake City, UT 84101
ndubovik@utah.gov

Re: Appeal of Denial of Request for Records Regarding Wake Up Now

Dear Records Committee:

I write on behalf of Truth in Advertising, Inc. (“TINA.org”)¹ in order to appeal the decision of the State of Utah Department of Commerce, Division of Consumer Protection (“the Division”) to withhold records regarding consumer complaints relating to Wake Up Now, a Utah company.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, TINA.org made a request for such records on August 18, 2014.² See Aug. 18, 2014 ltr from F. Silverman to Utah Division of Consumer Protection, attached hereto as Exhibit A. The Division denied the request on August 22, 2014, citing two reasons for the denial: first, such records are classified as protected records under Utah Code Ann. § 63G-2-305(10), and second, such records are classified as private records under Utah Code Ann. §

¹ TINA.org is a 501(c)(3) nonprofit organization that strives to educate consumers about false and deceptive marketing. TINA.org achieves this goal primarily through investigative journalism and advocacy. The organization is independently funded and does not accept any advertising dollars to support its work.

² In its original request, TINA.org also requested copies of public records regarding any investigations relating to Wake Up Now. We understand such records do not exist as investigative records are private until and unless there is an enforcement action against a company, which, as the Division has informed us, has not happened in the case of Wake Up Now. Accordingly, this appeal pertains only to TINA.org’s request for copies of consumer complaints about the company.

63G-2-302(2)(d). *See* Aug. 22, 2014 ltr from D. Pierson to F. Silverman, attached hereto as Exhibit B.

On August 27, 2014, TINA.org appealed this decision, explaining that, to the extent any responsive records contain personal identifying information of complaining consumers, such information could be redacted from the records (instead of wholly barring the disclosure of the responsive documents) so that the release of such records would not violate regulations prohibiting the disclosure of such personal information. *See* Aug. 27, 2014 ltr from L. Smith to F. Giani, attached hereto as Exhibit C.

On September 10, 2014, Administrative Law Judge Masuda Medcalf notified TINA.org that its appeal had been denied. The stated reason for the denial is that the disclosure of the requested records, whether redacted or not, would violate Utah Consumer Sales Practices Act § 13-11-7(2), which prohibits the disclosure of “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 the public disclosure,” because no disciplinary action has been taken against Wake Up Now by the Division. *See* Sept. 10, 2014 ltr from M. Medcalf to L. Smith, attached hereto as Exhibit D.

Respectfully, this statute – Utah Consumer Sales Practices Act § 13-11-7(2) – does not provide a basis for denying TINA.org’s request for redacted copies of consumer complaints. Section 13-11-7(2) bars the Division from telling TINA.org whether or not Wake Up Now is under investigation or providing any documents that may divulge this information. This is not what TINA.org is requesting, however. Rather, TINA.org is simply requesting copies of any consumer complaints the Division has received regarding Wake Up Now (with the name and any other personal identifying information of the complainant(s) redacted so that the release of such records does not violate the Utah Government Records Access and Management Act). The existence of consumer complaints against a company, such as Wake Up Now, alone does not mean the company is under investigation by the Division; it simply means the company has somehow frustrated consumers who then decided to notify the Division.

In short, neither the Utah Consumer Sales Practices Act § 13-11-7(2), nor the Utah Government Records Access and Management Act, prohibit the release of information regarding complaints received by the Division about a company, so long as personal identifying information of the complainant is redacted.

As such, TINA.org appeals the Division’s decision and respectfully requests copies of any and all complaints the Division has received relating to Wake Up Now, with personal identifying information of the complainant(s) redacted.

Please let me know if you need any other information to process this appeal and renewed request. Thank you for your assistance and your attention to this matter.

Sincerely,



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CC: Masuda Medcalf, Administrative Law Judge
David J. Pierson, Records Officer, Utah Division of Consumer Protection
Rosemary Cundiff, Government Records Ombudsman