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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 28, 2014, pursuant to U.C.A. § 63G-2-101 et seq., Petitioner requested "copies of citations by the Utah Department of Commerce Division of Consumer Protection against Vapex LLC, Sinless Vapor LLC, as well as the settlement with OZN Web LLC" and "copies of consumer complaints filed against the companies" with the names of consumer complainants redacted. Respondent granted in part and denied in part Petitioner's request for records by letter dated September 3, 2014. In its response to the request, Respondent

included copies of the requested administrative citations as well as a copy of the settlement agreement with OZN Web LLC, redacting the last names of the consumer complainants and the cities in which they reside. However, Respondent denied the request to disclose consumer complaints related to the subject companies. In denying the request for the consumer complaints, Respondent indicated that the records were 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 September 29, 2014, Petitioner filed an appeal with Francine Giani, Executive Director of the Department of Commerce, on the denial of Petitioner’s request for records of consumer complaints against the subject companies. Administrative Law Judge Masuda Medcalf responded to the appeal on behalf of the Executive Director. Ms. Medcalf, on behalf of the Executive Director, denied Petitioner’s appeal. Ms. Medcalf explained that there were still two open pending enforcement proceedings against the subject companies and that releasing the complaints, even in redacted form, could reasonably be expected to interfere with the enforcement proceedings, citing U.C.A. § 63G-2-305(10).

On October 23, 2014, Petitioner filed a GRAMA Notice of Appeal to the State Records Committee. Again, Petitioner requests copies of any and all consumer complaints received by Respondent regarding the three subject companies. A hearing before the State Records Committee (“Committee”) has been scheduled for 9:00am on Thursday, December 11, 2014.

On October 14, 2014, Respondent entered into a Settlement Agreement with Vapex LLC. The Settlement Agreement with Vapex LLC is classified as a “public document” under GRAMA and will be provided to Petitioner upon request. On October 30, 2014, Respondent entered into a Settlement Agreement with Sinless Vapor, LLC. The Settlement Agreement with Sinless Vapor,

LLC is classified as a “public document” under GRAMA and will be provided to Petitioner upon request.

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). See also, U.C.A. §§ 63G-2-201(6)(a) - (b) (deferring to the other statutes, rules, or regulations).

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, Title 13, Chapter 11 of the Utah Code, the Utah Consumer Sales Practices Act (“CSPA”). With respect to enforcing the CSPA, Respondent is bound by the terms and authority granted under the CSPA. In complying with its statutorily mandated duties, Respondent shall

- a) enforce [the CSPA] throughout the state;
- b) cooperate with state and local officials, officials of other states, and officials of the federal government in the administration of comparable statutes;
- c) inform consumers and suppliers on a continuing basis of the provisions of [the CSPA] and of acts or practices that violate [the CSPA] including mailing information concerning final judgments to persons who request it, for which [Respondent] may charge a reasonable fee to cover the expense;
- d) receive and act on complaints; and
- e) 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 [Respondent] considers appropriate, assurances of voluntary compliance.

U.C.A. § 13-11-7(1). 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 “containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy” are “private”.

Additionally, U.C.A. § 63G-2-302(2)(b) provides that records “describing an individual’s finances” are “private”.

ARGUMENT:

It is important to note at the outset that all of the investigations and resulting enforcement action taken by Respondent against the three subject companies was pursuant to the CSPA. Again, with respect to enforcing the CSPA, Respondent is bound by the terms and authority granted under the CSPA. GRAMA does not require Respondent to disclose records that would violate the provisions of another State statute. U.C.A. §§ 63G-2-201(3) - 201(6)(a) - (b). 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)”). In connection with Respondent’s investigation into the three subject companies, Respondent received or obtained consumer complaints from multiple sources, including the Federal Trade Commission (“FTC”).

FTC Records

In complying with their respective official functions, Respondent and its federal counterpart, the FTC, exchange information. The FTC provides Respondent with access to consumer complaints. The exchange occurs through a shared access automated database. Information is exchanged subject to a written confidentiality and data security agreement. That agreement provides that parties participating in the information exchange “do so with the understanding that all [shared information], including all information available on [a restricted website], will be kept confidential.” The agreement provides further that “the party signing this agreement agrees not to release such information to anyone other than its employees, consultants and contractors, or bona fide law enforcement agency personnel who are bound by this agreement and have a need to know such information. The FTC reserves the right to limit or revoke access to such information by any participating agency or other entity that breaches any of the terms of this agreement.” The instituted information exchange program is consistent with the sharing provisions of GRAMA (U.C.A. § 63G-2-206) and with Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), Commission Rules 4.6, 4.10, and 4.11(c) and (d), 16 C.F.R. §§ 4.6, 4.10, and 4.11(c) and (d) (2010), and the Privacy Act of 1974, as amended, 5 U.S.C. § 552a.

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). It is clear that Respondent is prohibited from disclosing the consumer complaints received or obtained from the FTC. Disclosure of these complaints is restricted pursuant to federal law and regulation, and as a condition of Respondent’s participation in the information sharing program of their federal counterpart. Respondent would respectfully suggest that any request for such records be directed to the FTC.

Other Consumer Complaints

In addressing Petitioner’s request for these consumer complaints - complaints received, investigated and enforced through the provisions of the CSPA - we must look to Title 13, Chapter 11 of the Utah Code for guidance. 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 Respondent’s mandate to “receive and act on complaints,” the CSPA states that Respondent 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 list of documents set forth in U.C.A. § 13-11-7(1)(e) are those records which the legislature contemplated would be 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 specifically references in the previous subsection, U.C.A. § 13-11-7(1)(d)

– it would have added complaints to the list of records intended to be made available under § 13-11-7(1)(e).

In addition, the type of records requested by Petitioner are 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”. Moreover, the complaints contain records “describing an individual’s finances” and are therefore “private” pursuant to U.C.A. § 63G-2-302(2)(b).

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 3rd, day of December, 2014.

SEAN D. REYES
Attorney General



CHÉ ARGUELLO
Assistant Attorney General
Director, Commercial Enforcement Division