

Effective 5/12/2015

76-10-3107 Civil antitrust investigations -- Demand for production of documents and responses to written interrogatories -- Oral examination -- Judicial order for compliance -- Confidentiality -- Subpoenas precluded.

- (1) When the attorney general has reasonable cause to believe that any person may be in possession, custody, or control of any information, including any document, material, or testimony, relevant to a civil antitrust investigation, the attorney general may, prior to the commencement of a civil action, issue and cause to be served upon that person a written civil investigative demand requesting that person to:
 - (a) produce any document or material for inspection, copying, or reproduction by the state where the document or material is located or produced;
 - (b) give oral testimony under oath, concerning the subject of the investigation;
 - (c) respond to written interrogatories; or
 - (d) furnish any combination of these.
- (2)
 - (a) Each demand shall state:
 - (i) the nature of the activities under investigation, constituting the alleged antitrust violation, which may result in a violation of this part and the applicable provision of law;
 - (ii) that the recipient is entitled to counsel;
 - (iii) that the information received in response to the demand may be used in a civil or criminal proceeding;
 - (iv) that if the recipient does not comply with the demand, the attorney general may compel compliance by appearance, upon reasonable notice to the recipient, before the district court in the judicial district where the recipient resides or does business and only upon a showing before that district court that the requirements of Subsection (7) have been met;
 - (v) that the recipient has the right at any time before the return date of the demand, or within 30 days, whichever period is shorter, to seek a court order determining the validity of the demand; and
 - (vi) that at any time during the proceeding the person may assert any applicable privilege.
 - (b) If the demand is for production of any document or material, the demand shall also:
 - (i) describe the document or material to be produced with sufficient definiteness and certainty as to permit the document or material to be fairly identified;
 - (ii) prescribe return dates that provide a reasonable period of time within which the document or material demanded may be assembled and made available for inspection and reproduction; and
 - (iii) identify the individual at the Office of the Attorney General to whom the document or material shall be made available.
 - (c) If the demand is for the giving of oral testimony, the demand shall also:
 - (i) prescribe the date, time, and place at which oral testimony shall be commenced;
 - (ii) state that an employee of the Office of the Attorney General shall conduct the examination; and
 - (iii) state that the recording or the transcript of the examination shall be submitted to and maintained by the Office of the Attorney General.
 - (d) If the demand is for responses to written interrogatories, the demand shall also:
 - (i) state that each interrogatory shall be answered separately and fully in writing and under oath, unless the person objects to the interrogatory, in which event the reasons for objection shall be stated in lieu of an answer;

- (ii) state that the answers are to be signed by the person making them, and the objections are to be signed by the attorney making them;
 - (iii) identify by name and address the individual at the Office of the Attorney General on whom answers and objections provided under this Subsection (2)(d) are to be served; and
 - (iv) prescribe the date on or before which these answers and objections are to be served on the identified individual.
- (3) The civil investigative demand may be served upon any person who is subject to the jurisdiction of any Utah court and shall be served upon the person in the manner provided for service of a subpoena.
- (4)
- (a) Any document or material submitted in response to a demand served under this section shall be accompanied by an affidavit, in the form the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person having knowledge of the facts and circumstances relating to the production.
 - (b) The affidavit shall state that every document or material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has in good faith been produced and made available to the Office of the Attorney General.
 - (c) The affidavit shall identify any demanded document or material that is not produced and state the reason why each item was not produced.
- (5)
- (a) An examination of any person pursuant to a demand for oral testimony served under this section may only be taken before an officer authorized to administer oaths or affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. If the testimony is taken stenographically, it shall be transcribed and the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the Office of the Attorney General.
 - (b) When taking oral testimony, all persons other than personnel from the Office of the Attorney General, the witness, counsel for the witness, and the officer before whom the testimony is to be taken shall be excluded from the place where the examination is held.
 - (c) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the county where the person resides or transacts business or in any other place agreed upon by the attorney general and the person.
 - (d) When testimony is fully transcribed, the transcript shall be certified by the officer before whom the testimony was taken and submitted to the witness for examination and signing, in accordance with the Utah Rules of Civil Procedure, Rule 30(e). A copy of the deposition shall be furnished free of charge to a witness upon the witness's request.
 - (e) Any change in testimony recorded by nonstenographic means shall be made in the manner provided in the Utah Rules of Civil Procedure, Rule 30, for changing deposition testimony recorded by nonstenographic means.
 - (f) Any person compelled to appear under a demand for oral testimony under this section may be accompanied, represented, and advised by counsel. Counsel may advise the person, in confidence, either upon the request of the person or upon counsel's own initiative, with respect to any question asked of the person. The person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that the person is entitled to refuse to answer the question on grounds of any

constitutional or other legal right or privilege, including the privilege against self-incrimination. If the person refuses to answer any question, the attorney general may petition the district court for an order compelling the person to answer the question.

- (g) If any person compelled to appear under a demand for oral testimony or other information pursuant to this section refuses to answer any questions or produce information on grounds of the privilege against self-incrimination, the testimony of that person may be compelled as in criminal cases.
 - (h) Any person appearing for oral examination pursuant to a demand served under this section is entitled to the same fees and mileage which are paid to witnesses in the district courts of the state of Utah. Witness fees and expenses shall be tendered and paid as in any civil action.
- (6) The providing of any information in response to a civil investigative demand issued pursuant to the provisions of this part shall be considered part of an official proceeding as defined in Section 76-8-501.
- (7)
- (a) If a person fails to comply with the demand served upon him under this section, the attorney general may file in the district court of the county in which the person resides, is found, or does business, a petition for an order compelling compliance with the demand. Notice of hearing of the petition and a copy of the petition shall be served upon the person, who may appear in opposition to the petition. If the court finds that the demand is proper, that there is reasonable cause to believe there has been a violation of this part, and that the information sought is relevant to the violation, it shall order the person to comply with the demand, subject to modifications the court may prescribe.
 - (b)
 - (i) At any time before the return date specified in a demand or within 30 days after the demand has been served, whichever period is shorter, the person who has been served may file a petition for an order modifying or setting aside the demand. This petition shall be filed in the district court in the county of the person's residence, principal office, or place of business, or in the district court in Salt Lake County. The petition shall specify each ground upon which the petitioner relies in seeking the relief sought. The petition may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the petitioner. The petitioner shall serve notice of hearing of the petition and a copy of the petition upon the attorney general. The attorney general may submit an answer to the petition within 30 days after receipt of the petition.
 - (ii) After a hearing on the petition described in Subsection (7)(b)(i), and for good cause shown, the court may make any further order in the proceedings that justice requires to protect the person from unreasonable annoyance, embarrassment, oppression, burden, or expense. At any hearing pursuant to this section it is the attorney general's burden to establish that the demand is proper, that there is reasonable cause to believe that there has been a violation of this part, and that the information sought is relevant to the violation.
- (8)
- (a) The attorney general may enter into a confidentiality agreement in lieu of, or in addition to, issuing a civil investigative demand, when the attorney general has reasonable cause to believe that any person may be in possession, custody, or control of any information relevant to a civil antitrust investigation or civil antitrust action.
 - (b) In any civil antitrust action, the court may issue a confidentiality order, which may incorporate a confidentiality agreement.
 - (c) The confidentiality agreement or confidentiality order may address any procedure, testimony taken, or document or material produced under this section. The agreement or order may

define to whom access will be given, the conditions and the restrictions to the access, and how the testimony, document, or material will be safeguarded. The agreement or order may require that documentation of testimony and any other document or material:

- (i) be returned to the designated person; or
 - (ii) notwithstanding the provisions of Section 63A-12-105 and any retention schedule promulgated pursuant to Section 63G-2-604, be destroyed by the attorney general at a designated time, in which case this requirement is binding upon the attorney general.
- (9)
- (a) Any procedure, testimony taken, or document or material produced under this section, whether produced pursuant to a civil investigative demand, confidentiality agreement, or confidentiality order, shall be kept confidential by the attorney general unless confidentiality is waived in writing by the person who has testified, or produced a document or material.
 - (b) Any testimony taken or document or material produced under this section may be used in a civil antitrust action, provided that the use is not restricted or prohibited under a confidentiality agreement or confidentiality order, unless that restriction or prohibition is waived by the person from whom the information was obtained.
 - (c) Notwithstanding any other provision of this section, the attorney general may disclose testimony taken or a document or material obtained under this section, without either the consent of the person from whom it was received or the person being investigated, to:
 - (i) any grand jury; and
 - (ii) officers and employees of federal or state law enforcement agencies, provided the person from whom the information was obtained is notified 20 days prior to disclosure, and the federal or state law enforcement agency certifies that the information will be:
 - (A) maintained in confidence, as required by Subsection (9)(a); and
 - (B) used only for official law enforcement purposes.
- (10) Use of a civil investigative demand under this action precludes the invocation by the attorney general of Section 77-22-2.

Amended by Chapter 140, 2015 General Session