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**BEFORE THE DIVISION OF CONSUMER PROTECTION  
OF THE UTAH DEPARTMENT OF COMMERCE**

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**IN THE MATTER OF:**

**PURDUE PHARMA L.P.**, a Delaware limited partnership; **PURDUE PHARMA INC.**, a New York Corporation; **THE PURDUE FREDERICK COMPANY INC.**, a Delaware corporation; **RICHARD SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities; and **KATHE SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities;

**Respondents.**

**PURDUE'S MEMORANDUM  
OPPOSING THE DIVISION'S  
MOTION FOR RESTRICTIVE  
ORDER UNDER UTAH CODE ANN.  
§ 63G-2-207**

**DCP Legal File No. CP-2019-005**

**DCP Case No. 107102**

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Respondents Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company (together, "Purdue"), by and through counsel, hereby submit their Memorandum Opposing the *Motion for Restrictive Order Under Utah Code Ann. § 63G-2-207* (the "Motion")

filed by the Utah Division of Consumer Protection (the “Division”) and request oral argument thereon.

### **SUMMARY**

On April 8, 2019, counsel for Purdue submitted a request under the Government Records Access Management Act (“GRAMA” or the “Act”), seeking various public records (the “Request,” attached hereto as Exhibit A) on behalf of Purdue. On April 22, 2019, Daniel Larsen<sup>1</sup> responded on behalf of the Division, denying the Request in full (the “Denial,” attached hereto as Exhibit B). Rather than allowing for and following the proper administrative procedure under GRAMA, three days later, on April 25, 2019, the Division filed its Motion in this proceeding, asking the Administrative Law Judge to enter an order restricting Purdue’s rights to access public records under GRAMA.<sup>2</sup> The Division made no effort to meet and confer with Purdue in an effort to resolve its claimed issues prior to filing its Motion.

The Division’s extraordinary request for an end run around the Act via this administrative proceeding is unsupported by law and contrary to the language and purpose of GRAMA. This is

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<sup>1</sup> Purdue notes that Mr. Larsen was previously designated as a presiding officer under Utah Code Ann. § 63G-4-103(h) for the purpose of signing the notice of agency action in this proceeding. (*See* Order Designating a Presiding Officer for a Limited Purpose, March 4, 2019.) Mr. Larsen also recently appeared at the hearing held in this proceeding on May 1, 2019, and identified himself as being present on behalf of the Division. Purdue therefore expresses grave concern that an individual who has been designated as a presiding officer in this proceeding is also appearing on behalf of the Division and is simultaneously the person authorized to make GRAMA determinations, here summarily denying Purdue’s access to requested records.

<sup>2</sup> In accordance with the provisions of GRAMA, Purdue has separately appealed the Division of Consumer Protection’s denial of its Request. GRAMA Appeal Letter, attached as Exhibit C. Despite the lack of any conferral efforts by the Division regarding this Motion, Purdue has made the effort to clarify and narrow its Request in the context of its appeal to the chief administrative officer.

just one more example of the Division seeking to curtail Purdue's rights and now, with only a very brief time period to conduct fact discovery before the October 15, 2019 hearing, obstruct Purdue's ability to seek information it has a statutory right to and needs for its defense in this proceeding.<sup>3</sup>

Pursuant to GRAMA, public records must be made available to members of the public unless otherwise expressly provided by statute. Purdue properly submitted its GRAMA request seeking public records. The Division has cited to *no* statutory authority why the public records requested should not be available to Purdue via GRAMA. Instead, without any effort whatsoever to confer with Purdue on its claimed issues with the Request, the Division disingenuously accuses Purdue of abusing the right to request public records as a means of "delaying or undermining litigation." That accusation is untrue; Purdue simply is using the avenues available to it to obtain needed information as expeditiously as possible in the context of this expedited proceeding. It is the Division's Motion that improperly misconstrues the procedures under GRAMA and this proceeding and its action in seeking to preclude Purdue's access to public records that is delaying the process in this administrative proceeding. Because it is unsupported by law and would unjustifiably curtail Purdue's rights, the Division's Motion should be denied.

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<sup>3</sup> Indeed, despite the fact that Purdue's GRAMA request was denied solely for lacking reasonable specificity, the Division waited until the very last day possible to provide its denial to Purdue. *See* Exs. A and B.

## ARGUMENT

### I. THE ADMINISTRATIVE LAW JUDGE SHOULD NOT ISSUE A RESTRICTIVE ORDER DENYING PURDUE ACCESS TO PUBLIC RECORDS VIA GRAMA.

#### A. GRAMA Unequivocally Grants Purdue the Right to Request and Access Public Records.

GRAMA unequivocally and unambiguously grants Purdue the right to request and access public records, and that right is not limited or restricted in any way by Purdue's status as respondent in this proceeding. Under GRAMA, "[e]very person has the right to inspect a public record free of charge." *Id.* § 63G-2-201(1). All government records are public "unless otherwise expressly provided by statute." *Id.* § 63G-2-201(2); accord *Utah Legal Clinic v. Salt Lake City Corp.*, 2019 UT App 58, ¶ 15. Government entities therefore *must* provide access to requested records if the requesting party has a right to inspect the records, identifies the records "with reasonable specificity," and pays any applicable fees. Utah Code Ann. § 63G-2-201(7). GRAMA serves the legislature's express goals of "promot[ing] the public's right of easy and reasonable access to unrestricted public records," and "favor[ing] public access when, in the application of this act, countervailing interests are of equal weight." *Id.* § 63G-2-102(3)(a), (e).

The Division has not cited to any statutory authority establishing why the public records requested should not be made available to Purdue under GRAMA. The request simply seeks existing records of prior agency citations and related proceedings which the Division itself directs members of the public to request via a GRAMA request. See <https://consumerprotection.utah.gov/actions/index.html> ("Pursuant to Utah Code 63G-4-106 and 107, all administrative disciplinary actions commenced over 10 years ago and certain actions over 5 years are not accessible online, but may be provided in response to a GRAMA request.").

Tellingly, the Division’s denial does not contend that the records are protected records that should not be available to the public under GRAMA, nor does it assert that there are extraordinary circumstances that preclude it from responding within the statutory time period. *See* Ex. B; *see also* Utah Code Ann. §§ 63G-2-201(3), 63G-2-205(5).

Instead, the Division now points to Utah Code section 63G-2-207 to argue that the Administrative Law Judge should use his inherent authority to enter a restrictive order as to Purdue’s public access rights. The only basis that the Division provides as to why the Administrative Law Judge should exercise this authority is its allegation that GRAMA cannot be used by a litigant or party to a proceeding. But the plain language of section 63G-2-207—the sole statutory provision upon which the Division relies—directly contradicts the Division’s argument and does not apply to the circumstances here. Section 63G-2-207 is entitled “Subpoenas – Court ordered disclosure for discovery” and sets forth that subpoenas and discovery requests in litigation are not considered written requests under GRAMA. *See* Utah Code Ann. § 63G-2-207(1). The provision expressly states that it “*does not limit the right to obtain* [] records through the procedures set forth in this chapter [i.e. GRAMA].” *Id.* § 63G-2-207(2)(c) (emphasis added). Accordingly, the provision *protects* a litigant’s right to access to public records via GRAMA, and does not—as the Division contends—wholesale limit access as a result of litigation, as discussed more fully below. This provision thus supports GRAMA’s overarching policy favoring access to government records.

Moreover, section 63G-2-207 applies to the circumstance where a litigant is seeking discovery of records from a government entity that are “classified private, controlled, or protected under this chapter, or otherwise restricted from access by other statutes.” *Id.* § 63G-2-207(2)(a)(i).

Here, the Division's Denial did not make any claim that the records sought by Purdue's GRAMA request are protected from disclosure in any way. Rather, the only basis for denial is that the request was not made with reasonable specificity. *See* Ex. B. Thus, the plain language of this provision demonstrates that it does not even apply to the circumstances here.

Under GRAMA, Purdue has the right to request and access public records. The Division's improper Motion should be denied.

**B. Purdue's Status as a Litigant Does Not Restrict Its Access to Public Records in Utah.**

Under Utah law, "the right to access public government records is not lost, and may not be impaired, when a citizen is involved in litigation with a governmental entity that maintains those records." *Phillips v. West Jordan Police Dep't*, No. 14-04 (Utah Records Comm. Mar. 28, 2014). The State Records Committee has repeatedly emphasized this point, refusing to allow government entities to restrict access to public records based solely on the requester's status as a litigant or respondent in litigation against the State. *See, e.g., Salt Lake City Corp. v. Salt Lake City Mayor's Records Appeals Bd.*, No. 05-02 (State Records Comm. Jan. 19, 2005); *Steed v. Duchesne Cty.*, No. 04-17 (State Records Comm. Dec. 15, 2004).

This position is in line with other jurisdictions, which have also determined "the [requesting party's] rights . . . do not depend on his or her identity [because] the Act's sole concern is with what must be made public or not made public." *North v. Walsh*, 881 F.2d 1088, 1096 (D.C. Cir. 1989) (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (discussing FOIA)); *see also id.* ("[The requesting party's] need or intended use for the documents is irrelevant to his FOIA action; his identity as the requesting party 'has no bearing on the merits of his . . . FOIA request.'") (quoting *Reporters Comm.*, 489 U.S. at

771) (ellipses in original); *Mitchell v. City of Cedar Rapids*, No. 18-0124, 2019 WL 1495945, at \*5 (Iowa Apr. 5, 2019) (“There is nothing in section 22.7 that suggests the legislature intended to limit the discovery rights of litigants in cases involving governmental entities. To the contrary, section 22.7 indicates the opposite because it allows disclosure upon a court order.”) (quotations and citations omitted); *Shlansky v. City of Burlington*, 2010 VT 90, ¶¶ 11, 13 A.3d 1075 (“While it may be that plaintiff seeks documents to use in the judicial bureau proceedings, we have previously held that the identity and motive of the requestor cannot be considered when weighing access to public documents.”).

Despite the clear language in GRAMA mandating public access and protecting litigants’ rights to access public documents, which is reaffirmed in the case law cited above, the Division nevertheless urges the Administrative Law Judge to interpret GRAMA as “expressly prevent[ing] party litigants from requesting records from a governmental entity relating to the subject matter of litigation.” (Mot. at 2.) In support of its unjustified reading of the Act, the Division relies primarily on an irrelevant statement from the legislative history that, as the Division concedes, does not reflect what was actually enacted in Utah Code Ann. § 63G-2-207. *See Graves v. N.E. Servs., Inc.*, 2015 UT 28, ¶ 64, 345 P.3d 619 (“We cannot properly invoke the legislative history in a manner overriding the terms of the statute. Legislative history is not law. It may be useful in informing our construction of ambiguities in the law. But its utility ends there.”).

The Division also cites a series of cases from other jurisdictions. (Mot. at 3.) However, not one of these cases establishes a per se rule that civil litigants cannot access public records. In fact, numerous of the Division’s cited cases stand for *the exact opposition proposition*, and in those cases the courts held that the litigants *were* permitted to access public records, subject to certain

reasonable limitations to prevent abuse. *See, e.g., MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 868 A.2d 1067, 1073–74 (N.J. App. Div. 2005) (“The fact that litigation was pending between the ABC and MAG when MAG made its public records request does not, in itself, relieve the government agency of its obligation to comply with OPRA [Open Public Records Act]. Documents that are ‘governmental records’ and subject to public access under OPRA are no less subject to public access because the requesting party is opposing the public entity in possession of material sought in collateral litigation.” (citation omitted)); *DeLia v. Kiernan*, 293 A.2d 197 (N. J. App. Div. 1972) (granting a litigant access to public records “only subject to reasonable controls as to time, place, copying, etc.”). Indeed, the Division fails to cite a single Utah case in which an administrative law judge (or any judge) imposed the complete bar to access the Division seeks to have the Administrative Law Judge impose here.

Further, if Section 63G-2-207 were to apply—which it does not—any restrictive order could only be confined to Purdue’s access to private, controlled, or protected records—not to *public* records. *See* Utah Code Ann. § 63G-2-207(2)(a)(i) (requiring the administrative law judge to follow procedures under Section 63G-2-202(7) related to a request for private, controlled, or protected records, “[e]xcept as otherwise provided in Subsection (2)(c)” governing restrictive orders). Moreover, even if Purdue were to request such protected records, they would be accounted for by the protective order in this proceeding. *Mitchell*, 2019 WL 146945, at \*5 (“[T]he confidentiality the legislature prescribed for certain government records can be safeguarded through a protective order allowing the litigants use of the records in the lawsuit while preventing disclosure to the public.”). But this is not even applicable here because the Division did not contend that the records sought by Purdue were protected from disclosure in any way. *See* Ex. B.

Accordingly, Purdue's identity as a respondent in this proceeding and its intended use of the public records do not and cannot affect its rights under GRAMA to request and access public documents. Neither do they grant the State authority to seek to block, through a restrictive order in this proceeding, Purdue's access to these or other public records, while such records remain available to the public at large. Again, this denial of access—which the Division seeks to have applied solely to Purdue and only because the Division haled Purdue into this proceeding—demonstrates the Division's continuing pattern of trying to deprive Purdue of its rights via this administrative proceeding.

In sum, the Division's Motion lacks merit. The Division seeks to restrict Purdue's access to public records on the sole basis that it is a litigant to the present proceeding. This position is contrary to the plain language of GRAMA—which expressly states that a party's status as a litigant *cannot* affect its access to public records—and contrary to State Records Committee decisions and case law. Moreover, the Division's Motion seeks the fundamentally unfair result that Purdue—and *Purdue only*—would be denied access to records that are available to any other member of the public.

**C. Purdue's GRAMA Request Is Not an Attempt to Delay or Undermine This Proceeding**

While failing to make any effort to meet and confer with Purdue regarding its claimed issues with the Request, the Division accuses Purdue of abusing GRAMA in an attempt to delay or undermine this proceeding, citing as "evidence": (1) the timing of Purdue's Request which "coincide[s] with motions briefing;" and (2) the Division's unilateral determination that the requested material is irrelevant to this proceeding.

The Division's illusory accusation of bad faith should be dismissed outright. With regard to the "timing" of Purdue's Request, it was submitted one month after the Division filed its Notice of Agency Action. The fact that the Division's obligations under GRAMA coincide with the parties' briefing schedule is a natural and unavoidable consequence of the expedited nature of this proceeding. Critically, the Division did not deny Purdue's GRAMA request on the basis of any claim of burden due to its timing or the volume of records to be sought. Rather, it waited until the last possible day to deny the request solely based on lack of reasonable specificity. *See Ex. B.* Purdue is building its defense in this proceeding and properly seeking to do so through the avenues available to it in the limited time allowed. There is simply no basis for the Division's claim of bad faith intent to distract from or delay this proceeding, which the Division elected to bring. Indeed, it is disingenuous for the Division to assert that it requires this expedited proceeding to seek justice while simultaneously objecting to and seeking to restrict Purdue's rights to defend itself.

Neither can the Division assign any improper motive to Purdue based on the Division's own determination that the requested documents are "irrelevant." As an initial matter, a party requesting public records under GRAMA is under no obligation to explain or justify the reason for its request. Tellingly, the Division did not assert that the records were not relevant in its denial. *See Ex. B.* Further, although the relevance of the requested records bears no weight on whether Purdue is entitled to access those records, Purdue maintains the requested records are relevant to its defense in this proceeding on a number of issues already raised, including, but not limited to, due process and excessive fines. If the Division disputes the relevance of the requested public records in this proceeding, it can assert those objections if and when Purdue cites to those records

in this proceeding. But GRAMA does not permit the Division's speculation about the relevance of the requested documents as a basis to restrict access to public records.

## **II. PURDUE'S REQUEST WAS IMPROPERLY DENIED**

The Division devotes a significant portion of its Motion arguing that Purdue's Request was properly denied. This is not the appropriate forum to determine whether Purdue is entitled to the public records under GRAMA, nor is the Administrative Law Judge the proper decisionmaker. As set forth above, Purdue has a statutory right to make a request for public records under GRAMA and GRAMA provides the procedures for such records requests, including the procedures for appeals of access denials. *See, e.g.* § 63G-2-401 ("Appeal to chief administrative officer"); § 63G-2-403 ("Appeals to the records committee"); § 63G-2-404 ("Judicial review"). The Division's attempt to circumvent these procedures by arguing the substance of its denial in this proceeding should not be entertained.

Nevertheless, to the extent the Administrative Law Judge finds relevant to the present determination the question of whether the Division's Denial was improper, Purdue submits that it was and incorporates herein its arguments and responses set forth in its Appeal Letter. *See* Ex. C.

## **CONCLUSION**

It is ironic indeed that the Division claims that it is seeking justice via this expedited administrative proceeding, but now ardently seeks to prevent Purdue from its right to access the State's public records, which are expected to provide further support that Purdue's due process rights are being violated and that the Division is seeking excessive fines. Neither the plain language of GRAMA nor the decisions interpreting it permit the extraordinary and improper relief

the Division seeks here. Such relief would unjustifiably curtail Purdue's right under GRAMA to request and access public records. The Division's Motion should be denied.

DATED: May 3, 2019.

SNELL & WILMER L.L.P.

/s/ Elisabeth M. McOmber

Elisabeth M. McOmber

Katherine R. Nichols

Annika L. Jones

Will Sachse

DECHERT LLP

*Attorneys for Respondents Purdue LP, Purdue Inc.,  
and the Purdue Frederick Company*

## CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of May, 2019, I served the foregoing on the parties of record in this proceeding set forth below by delivering a copy thereof by electronic means and U.S. Mail and/or as more specifically designated below, to:

Bruce L. Dibb, Presiding Officer  
Administrative Law Judge  
Heber M. Wells Building, 2<sup>nd</sup> Floor  
160 East 300 South  
Salt Lake City, Utah 84114  
[bdibb@utah.gov](mailto:bdibb@utah.gov)

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Paul T. Moxley  
Cohne Kinghorn, P.C.  
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Utah Division of Consumer Protection  
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*/s/ Elisabeth M. McOmber*

# **EXHIBIT A**

# Prior administrative actions and policies and procedures man

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**Due**

Open Records Portal Request

Submitted 4/8/2019, 14:27  
Received

Requestor	Agency
Katherine Nichols knichols@swlaw.com 8015271542 Snell & Wilmer LLP 15 W. South Temple, Suite 1200 Salt Lake City, Utah 84101	Consumer Protection P.O. Box 146704 160 East 300 South Salt Lake City, UT 84114-6704 Shauna DeWolf Daniel O'Bannon

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## Main Request

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Pursuant to Utah Code Ann. section 63G-4-106, I request the complete records of all administrative disciplinary actions brought by or before the Division of Consumer Protection and/or the Division of Consumer Affairs, without limitation as to date.

I also request policies and procedures manuals related to the enforcement authority of the Division of Consumer Protection and/or the Division of Consumer Affairs, and related to the Utah Consumer Sales Practices Act.

## Additional Details

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Notify requester if fee is greater than \$500.00

## Log Summary

Title	Date	By
Request Submitted	4/8/2019, 14:27	Katherine Nichols
Additional Request Portion Created	4/8/2019, 14:27	System

Open Records Portal Request

Department of Commerce. Division of Consumer

Email Sent to Requester	4/8/2019, 14:27	System
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Email Sent to Rec. Officer	4/8/2019, 14:27	System
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## Log Detail

### Request Submitted

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4/8/2019, 14:27

Katherine Nichols

#### Title

Prior administrative actions and policies and procedures manuals

#### Request Text

Pursuant to Utah Code Ann. section 63G-4-106, I request the complete records of all administrative disciplinary actions brought by or before the Division of Consumer Protection and/or the Division of Consumer Affairs, without limitation as to date.

I also request policies and procedures manuals related to the enforcement authority of the Division of Consumer Protection and/or the Division of Consumer Affairs, and related to the Utah Consumer Sales Practices Act.

#### Additional Details

Notify requester if fee is greater than \$500.00

### Additional Request Portion Created

---

4/8/2019, 14:27

System

#### Title

Main Request

#### Request Text

Pursuant to Utah Code Ann. section 63G-4-106, I request the complete records of all administrative disciplinary actions brought by or before the Division of Consumer Protection and/or the Division of Consumer Affairs, without limitation as to date.

I also request policies and procedures manuals related to the enforcement authority of the Division of Consumer Protection and/or the Division of Consumer Affairs, and related to the Utah Consumer Sales Practices Act.

## Email Sent to Requester

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4/8/2019, 14:27

System

**From**

System

**To**

Katherine Nichols

**Subject**

Your records request has been submitted

**Message**

Request Title:

Prior administrative actions and policies and procedures manuals

Submitted To:

Consumer Protection

Submission Date:

04/08/2019 14:27 18

Submitted By:

Katherine Nichols

Records Officer:

Shauna DeWolf

sdewolf@utah.gov

801-530-6618

Text of Request:

\*\*\*

Please note that the time limit does not start until the records officer receives (opens) the request.

Thank you.

Open Records Portal Team  
openrecordsadmin@utah.gov  
openrecords.utah.gov

\*\*\*

Please do not respond to this email. For questions, email the Portal Administrator at openrecordsadmin@utah.gov

## Email Sent to Rec. Officer

---

4/8/2019, 14:27

System

**From**  
System

**To**  
System

**Subject**  
Request Submitted

**Message**

Division of Consumer Protection,

A request has been submitted to your agency via the Open Records Portal, and has been assigned to Shauna DeWolf.

Request title:

Prior administrative actions and policies and procedures manuals

Requester:

Katherine Nichols

Submitted:

04/08/2019 14:27 18

You may respond to this request by logging in to the Open Records Portal at openrecords.utah.gov

Please note that all records requests must be responded to within 10 business days of receipt, or 5 business days if the requester has asked for an expedited

response (UC 63G-2-204(1)(b)).

Thank you.

Open Records Portal Team  
openrecordsadmin@utah.gov  
openrecords.utah.gov

\*\*\*

Please do not respond to this email. For questions, email the Portal Administrator at openrecordsadmin@utah.gov

# **EXHIBIT B**



GARY R. HERBERT  
Governor

SPENCER J. COX  
Lieutenant Governor

# State of Utah Department of Commerce

FRANCINE A. GIANI  
Executive Director

DANIEL O'BANNON  
Director, Division of Consumer Protection

April 22, 2019

KATHERINE NICHOLS  
SNELL & WILMER LLP  
15 W SOUTH TEMPLE STE 1200  
SALT LAKE CITY, UT 84101

## **Subject: Request for Records**

Dear Ms. Nichols:

The Utah Division of Consumer Protection has received your GRAMA request, submitted to the Utah Open Records Portal April 8, 2019 and received by the Division the same day seeking the following:

[T]he complete records of all administrative disciplinary actions brought by or before the Division of Consumer Protection and/or the Division of Consumer Affairs, without limitation as to date.

[P]olicies and procedures manuals related to the enforcement authority of the Division of Consumer Protection and/or the Division of Consumer Affairs, and related to the Utah Consumer Sales Practices Act.

Your request has been considered under the *Utah Government Records Access and Management Act* ("GRAMA"), Utah Code § 63G-2-101, *et seq.*

GRAMA requires that a person requesting a record do so with reasonable specificity. Utah Code § 63G-2-201(7)(b). The portion of your request contained in the first paragraph lacks reasonable specificity and is denied.

The portion of your request contained in the second paragraph also lacks reasonable specificity and is denied. To the extent the Division interprets your request to seek current policy and procedures manuals utilized in enforcing the *Utah Consumer Sales Practices Act*, the Division has no responsive records.

If you wish to challenge this denial, you may file a Notice of Appeal under Utah Code § 63G-2-401 with the executive director of the Utah Department of Commerce. The notice must be filed within thirty (30) days of receipt of this letter and must be addressed to Ms. Francine A. Giani, Executive Director, Utah Department of Commerce, 160 East 300



GARY R. HERBERT  
*Governor*

SPENCER J. COX  
*Lieutenant Governor*

# State of Utah Department of Commerce

FRANCINE A. GIANI  
*Executive Director*

DANIEL O'BANNON  
*Director, Division of Consumer Protection*

South, Box 146701, Salt Lake City, Utah 84114-6701. Your Notice of Appeal must contain your name, mailing address, daytime telephone number, and some indication of the relief you are seeking. You may also file a brief statement in support of your appeal.

Sincerely,

DANIEL LARSEN,  
Commerce Analyst  
Utah Division of Consumer Protection

# **EXHIBIT C**

# Snell & Wilmer

L.L.P.

LAW OFFICES

15 West South Temple  
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Gateway Tower West  
Salt Lake City, UT 84101  
801.257.1900  
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ALBUQUERQUE  
BOISE  
DENVER  
LAS VEGAS  
LOS ANGELES  
LOS CABOS  
ORANGE COUNTY  
PHOENIX  
RENO  
SALT LAKE CITY  
TUCSON  
WASHINGTON DC

May 3, 2019

## VIA U.S. MAIL AND E-MAIL

Francine A. Giani  
Executive Director  
Utah Department of Commerce  
160 East 300 South, Box 146701  
Salt Lake City, Utah 84114-6701  
fgiani@utah.gov

Re: Notice of Appeal of Denial of Request for Records

Dear Ms. Giani:

This firm represents Purdue Pharma L.P., Purdue Pharma Inc., and the Purdue Frederick Company (collectively, “Appellants”). Appellants are Respondents in an administrative proceeding currently pending before the Division of Consumer Protection and Presiding Officer and Administrative Law Judge Bruce Dibb (the “Administrative Proceeding”).

On April 8, 2019, counsel for Purdue submitted a public records request under the Government Records Access Management Act (“GRAMA”), seeking public records relevant to the Administrative Proceeding (the “Request”). On April 22, 2019, Mr. Daniel Larsen<sup>1</sup> responded on behalf of the Division of Consumer Protection (the “Division”), denying the Request in totality (the “Denial”). A copy of the Denial is attached as Exhibit A. This letter serves as a Notice of Appeal of the Denial pursuant to Utah Code Ann. § 63G-2-401(1)(a).

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<sup>1</sup> Mr. Larsen was also previously appointed as a presiding officer in the administrative proceeding and has appeared, apparently on behalf of the Division, in a hearing in the administrative proceeding. Purdue therefore has grave concerns about the impartiality of the determination of its GRAMA request.

**I. The Division Improperly Moved for a Restrictive Order in the Administrative Proceeding**

In addition to issuing its Denial, the Division—via its role as prosecutor of the Administrative Proceeding—filed a *Motion for Restrictive Order Under Utah Code Ann. § 63G-2-207* (the “Motion”). A copy of the Motion is attached as Exhibit B. In its Motion, the Division asks the Administrative Law Judge to enter an order preventing Appellants from accessing public records under GRAMA. The Motion, and its effort to block Purdue from requesting or obtaining these or other public records, violates Utah law. Accordingly, Appellants are opposing the Motion in the Administrative Proceeding.

Notwithstanding the Motion, Appellants properly submit this appeal in accordance with Utah Code Ann. § 63G-2-401 and in an effort to reach a reasonable resolution with the Division regarding the Request. However, Appellants note that the Division’s Motion filed in the Administrative Proceeding could be intended by the Division as its final agency decision by the chief administrative officer, foreclosing the necessity or availability of agency review of the Denial pursuant to Utah Code Ann. § 63G-2-401. Appellants request that the Department of Commerce advise whether it intends to further review the Request pursuant to Utah Code Ann. § 63G-2-401(1)(a). If it is the Department’s position that no further agency review will be granted and/or that agency review will take place exclusively before the Administrative Law Judge pursuant to his determination of the Division’s Motion,<sup>2</sup> Appellants request notice of this determination within three business days of this letter so that they may pursue their statutory appeal remedies via Utah Code Ann. § 63G-2-402.

**II. Appellants’ GRAMA Request and the Division’s Denial**

Pursuant to its Request, Appellants seek access to: (1) “the complete records of all administrative disciplinary actions brought by or before the Division of Consumer Protection and/or the Division of Consumer Affairs, without limitation as to date;” and (2) “policies and procedures manuals related to the enforcement authority of the Division of Consumer Protection and/or the Division of Consumer Affairs, and related to the Utah Consumer Sales Practices Act.”

In response to the Request, the Division issued a blanket Denial, stating that both portions of the Request “lack[] reasonable specificity” and citing Utah Code Ann. § 63G-2-201(7)(b). The Denial also stated that under the Division’s interpretation of the second request, there are “no responsive records” related to “current policy and procedures manuals utilized in enforcing the *Utah Consumer Sales Practices Act.*” Ex. A. For the following reasons, the Division’s Denial is improper and should be reversed.

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<sup>2</sup> As set forth in its Response in Opposition to the Division’s Motion, Purdue’s position is that the Administrative Law Judge does not have the authority under the circumstances here to circumvent GRAMA’s procedures and preclude Purdue from accessing public records.

**III. Appellants' Request Was Improperly Denied**

**A. The Requested Materials Are Public Records**

The requested materials are expressly designated by statute as public records. Records of administrative disciplinary actions are public records under GRAMA, unless a specific exception applies. *See id.* § 63G-2-301(2)(c) (designating as public “final opinions . . . and orders that are made by a governmental entity in an administrative . . . proceeding except [where] the proceedings were properly closed to the public”); *id.* § 63G-2-301(3)(t) (designating as public “a notice of violation, a notice of agency action under Section 63G-4-201, or similar records used to initiate proceedings for discipline or sanctions against persons regulated by a governmental entity,” unless “expressly exempt from disclosure”); *see also id.* § 63G-2-201(2) (“A record is public unless otherwise expressly provided by statute.”).

Furthermore, both the Utah Administrative Procedures Act (“UAPA”) and the Division’s own website invite GRAMA requests for public administrative records related to enforcement proceedings brought by the Division. Presently, the Division’s website contains certain records that go back only as far as January 1, 2015. *See* <https://dcp.utah.gov/actions/index.html>. The website specifically provides, “[p]ursuant to Utah Code 63G-4-106 and 107, all administrative disciplinary actions commenced over 10 years ago and certain actions over 5 years are not accessible online, *but may be provided in response to a GRAMA request.*”<sup>3</sup> *Id.* (emphasis added). Under the UAPA, any records of administrative disciplinary actions “shall maintain [their] record classification” when removed from state-controlled websites; “a person may make a request for

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<sup>3</sup> Curiously, the Division’s website was changed sometime between the date of the Division’s Denial (April 22, 2019) and its Motion (April 26, 2019). As of April 22, 2019, the website read:

Pursuant to Utah Code 63G-4-106 and 107, all administrative disciplinary actions commenced over 10 years ago and certain actions over 5 years are not accessible online, but may be provided in response to a GRAMA request.

In addition to the language cited above, the website now includes the following language:

Legal Actions are added to this search upon conclusion of the action. To receive public legal documents related to Division actions that are still ongoing, please file a GRAMA request. Please note that this search does not contain documents from Agency Review, District Court Proceedings, or Multistate Actions the Division has participated in.

In any event, it is clear that the Division’s own website directs members of the public seeking access to records of its legal proceedings either past or ongoing to submit a GRAMA request in order to obtain those records.

the record of administrative disciplinary action in accordance with [GRAMA].” Utah Code Ann. § 63G-4-106(3).

As for Appellants’ second request for “policies and procedures manuals related to the enforcement authority of the Division . . . related to the Utah Consumer Sales Practices Act,” those records are also public. GRAMA designates “administrative staff manuals, instructions to staff, and statements of policy” as public records. *Id.* § 63G-2-301(3)(a); *see also id.* § 63G-2-301(2)(d) (designating as public “final interpretations of statutes or rules by a governmental entity unless [otherwise] classified”).

Under GRAMA, “[e]very person has the right to inspect a public record free of charge.” *Id.* § 63G-2-201(1). All government records are public “unless otherwise expressly provided by statute.” *Id.* § 63G-2-201(2). The Division must provide access to requested records when the requesting party has a right to inspect the records, identifies the records “with reasonable specificity,” and pays any applicable fees. *Id.* § 63G-2-201(7). GRAMA serves the legislature’s express goals of “promot[ing] the public’s right of easy and reasonable access to unrestricted public records,” and “favor[ing] public access when, in the application of this act, countervailing interests are of equal weight.” *Id.* § 63G-2-102(3)(a), (e).

## **B. The Requests Are Reasonably Specific**

The sole basis for the Division’s denial of Appellants’ first request is that it “lacks reasonable specificity.” Ex. A. The Division also denied the second request for lack of specificity. *Id.* With regard to both requests, the Division’s denial on that basis is improper.

A request is reasonably specific if “a reasonable person can understand what records are being requested.” *Redd v. Utah Atty Gen. Office*, Case No. 16-08 (Utah State Records Comm., Feb. 23, 2016). Appellants’ request for records of “all administrative disciplinary actions brought by or before the Division of Consumer Protection and/or the Division of Consumer Affairs, without limitation as to date,” clearly meets this standard. As set forth in the citation included with the Request, the language of the Request utilizes the specific language of the UAPA in asking for “administrative disciplinary actions” and records relating to such administrative actions. These terms are expressly defined in the UAPA. The UAPA defines “administrative disciplinary actions” as “state agency action against the interest of an individual that affects a legal right, duty, privilege, immunity, or other legal interest of an individual, including agency action to deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license” Utah Code Ann. § 63G-4-106(1)(a). Likewise, the UAPA defines “record of administrative action” as “a notice, request, complaint, report, order, or other information related to an administrative disciplinary action.” *Id.* § 63G-4-106(1)(b).

Use of the State’s own statutory definitional language constitutes sufficient specificity. To be clear and in the context of seeking a reasonable resolution with the Division via this appeal, Appellants are seeking the complete, non-privileged records of disciplinary actions brought by the

Division via an Administrative Citation and/or Notice of Agency Action asserting violations of the Consumer Sales Practices Act to include “a notice, request, complaint, report, or other information related to an administrative disciplinary action.” This would reasonably include, but not be limited to, administrative citations, notices of agency action (with citations incorporated therewith), discovery-related documents, documents presented at administrative hearings, decisions in administrative proceedings, and, for the actions currently available on the Division’s website, any and all documents that are not available electronically via the website. In addition, Appellants will agree to limit their request to records of actions in a ten-year time period, i.e. from 2009 to the present. Further, Appellants are not seeking records of complaints brought by members of the public, only administrative actions brought by the Division claiming violations of the Utah Consumer Sales Practices Act.

Appellants’ second request, for “policies and procedures manuals related to the enforcement authority of the Division . . . related to the [UCSPA]” is also reasonably specific in its identification of the requested records. First, the Division’s own Retention and Classification Report demonstrates that the Division maintains a separate category of documents entitled “policies and procedures manuals,” which are defined to be “[p]olicies and procedures that govern the operation and administration of various programs within the organization. [https://axaemarchives.utah.gov/cgi-bin/pdfreport.cgi?agency=00212&INCLUDE\\_CLOSED=N&A=B](https://axaemarchives.utah.gov/cgi-bin/pdfreport.cgi?agency=00212&INCLUDE_CLOSED=N&A=B). And such documents have a primary designation of “[p]ublic.” *Id.*; see also Glossary of Records and Information Management Terms, Utah Division of Archives and Records Service, <https://archives.utah.gov/rim/glossary.html> (defining “policy manual” as “[a] publication that states the course of action to be followed by an organization, unit, or department in conducting its activities”). Second, the Denial itself demonstrates that the Division understood what records were being requested—in the Division’s own words, “policy and procedures manuals utilized in enforcing the [UCSPA].” Ex. A at 1. However, in responding to Appellants’ Request, the Division construed it narrowly to pertain only to *current* policies and procedures, which it claims not to have. Appellants’ Request was not limited to only *current* policies or procedures manuals, but included any *current or prior* policies and procedures manuals. Accordingly, Appellants request that the Division be required to provide any prior policies and procedures manuals utilized or applicable in any way to the Division’s enforcement of the UCSPA.

In both its Requests, Purdue used the State’s own statutory language to specify the records it sought. Having used the State’s own definitions, the Division cannot now contend that the requests are not reasonably specific and that it cannot identify the requested public records. Further, in the context of seeking appeal and in an effort to reach a reasonable resolution with the Division, Appellants have further clarified the nature and scope of their request. The Division’s denial was improper and the Department, via the chief administrative officer, should direct the Division to provide Appellants the requested documents.

**C. The Division’s Arguments Raised in its Motion for Restrictive Order**

In contrast to its bare bones Denial containing two short paragraphs of analysis, the Division’s Motion includes four pages of argument as to why the Denial was proper. *See* Ex. B at 5–8. As noted above and in Appellants’ Response filed in the Administrative Proceeding, the Division’s Motion is not the appropriate vehicle for determining whether Purdue is entitled to the requested records, nor is Judge Dibb the proper authority to make that decision. Rather, statutory authority is granted in the first instance to the chief administrative officer to address an appeal of the Division’s GRAMA denial. Utah Code Ann. § 63G-2-401. From there, authority to further review a GRAMA denial lies with either the records committee or a district court judge. *Id.* § 63G-2-402, -403, -404. Nothing in GRAMA contemplates appellate agency review by an administrative law judge in the context of an ongoing administrative proceeding.

However, to the extent the Department considers the arguments raised in the Division’s Motion, those arguments fail to articulate a proper basis for denying Appellants’ Request.

In its Motion, the Division argues the Request is improper because it does not seek “specific, identified records.” Ex. B at 5. To the contrary, the Request seeks “records of all administrative disciplinary actions” brought by [the Division] or the Division of Consumer Affairs.” The Division protests that it does know what records Appellants seek—for example, the Division queries, do Appellants seek “investigators’ notes, materials obtained in discovery, and the like?” *Id.* From this query, it seems apparent that the Division is well-aware of the categories of documents maintained in administrative actions. To the extent the Division is genuinely unclear on this point, Appellants respond that they seek those public documents that fall within the defined term “record of administrative disciplinary action” included in Section 63G-4-106(b): “a notice, request, complaint, report, order, or other information related to an administrative disciplinary action.” To the extent the Division maintains the statutorily-defined term does not allow it to know what records Appellants seek, as indicated above, Appellants seek the records maintained in administrative disciplinary actions, including, but not limited to, administrative citations, notices of agency action (with citations incorporated therewith), discovery-related documents, documents presented at administrative hearings, decisions in administrative proceedings, and, for the actions currently available on the Division’s website, any and all documents that are not available electronically via the website. Appellants do not require the Division to reproduce documents already made available on its website for the past four years, but do seek any records related to those actions that are not available via the website.

In its Motion, the Division argues for the first time that it denied the Request because it is too broad, and that the issue is the “lack of specificity regarding the *scope* of the request.” (Mot. at 7). GRAMA does not authorize the Division to deny a request based on the number of responsive records. Section 63G-2-204(5)(e) allows the Division to *delay* its response due to extraordinary circumstances including a request for a “voluminous quantity of records,” but it does not allow the Division to deny on that basis. Indeed, the Division did not claim extraordinary circumstances in its denial, only lack of reasonable specificity, which has now been further addressed and clarified

via this appeal. Further, the sole case the Division cites as support for a denial based on the volume of documents involved a request “that yield[ed] more than 450K documents”—here, by the Division’s own account, the Request sweeps in “potentially tens of thousands of pages of documents.” (Mot. at 7) (citing *Empey v. Box Elder Cty.* No. 18-20 (State Records Comm. June 25, 2018)). Moreover, as indicated above, Appellants have clarified and narrowed their Request such that it would not include as many documents as the Division believes.

The Division also argues in its Motion that the Request is overbroad because it includes records of 450 actions available publicly on the Division’s website and previously reviewed by Appellants. As indicated above, Appellants clarify that they are not seeking duplicate production of these documents, only any documents related to the electronically available files that are not maintained in electronic form and publicly available.

Finally, the Division argues without further explanation that the Request “appears to seek a variety of materials that are protected from disclosures under Utah law.” (Mot. at 8). Again, this was not claimed in the Division’s denial as it must be. If the Division purports to deny the Request on this basis, the Division is required by law to provide the “citations to the provisions of [GRAMA], court rule or order, another state statute, federal statute, or federal regulation that exempt the record or portions of the record from disclosure.” Utah Code Ann. § 63G-2-205(2)(b). The Division cited no such provisions, and vague references to “Utah law” cannot restrict disclosure of public records under GRAMA.

#### IV. CONCLUSION

For the reasons set forth above, Appellants are entitled under GRAMA to the records set forth in their Request. The Division’s only claimed basis for denial—lack of specificity—is untenable in light of the fact that Appellants’ Request is not only clear, concise, and understandable on its face, but actually uses the precise language and defined terms of the UAPA. The Division’s additional reasons not set forth in the Denial but claimed in the Division’s Motion are likewise unsupported and without merit. Accordingly, Appellants’ appeal should be granted and the Department, via the chief administrative officer, should direct the Division to produce the requested records.

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Consistent with Utah Code Ann. § 63G-2-401(2)(a), my contact information is as follows:

Elisabeth McOmber  
Snell & Wilmer L.L.P.  
15 W South Temple, Suite 1200  
Salt Lake City, Utah 84101-1547  
801-257-1880  
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# Snell & Wilmer

L.L.P.

Francine A. Giani

May 3, 2019

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In relation to this appeal and as set forth in their Request, Appellants are willing to pay reasonable reproduction expenses up to \$500.00. If this appeal is granted, Appellants request that the Division notify me if it is anticipated that the fee will exceed this amount and provide the anticipated amount in excess of \$500.00 so that Appellants may consider whether to agree to paying additional fees. Please feel free to contact me if you have any questions. Thank you for your consideration and cooperation.

Sincerely,

Snell & Wilmer

*/s/ Elisabeth M. McOmer*

Elisabeth M. McOmer

Attachments

# **EXHIBIT A**



GARY R. HERBERT  
Governor

SPENCER J. COX  
Lieutenant Governor

# State of Utah Department of Commerce

FRANCINE A. GIANI  
Executive Director

DANIEL O'BANNON  
Director, Division of Consumer Protection

April 22, 2019

KATHERINE NICHOLS  
SNELL & WILMER LLP  
15 W SOUTH TEMPLE STE 1200  
SALT LAKE CITY, UT 84101

## **Subject: Request for Records**

Dear Ms. Nichols:

The Utah Division of Consumer Protection has received your GRAMA request, submitted to the Utah Open Records Portal April 8, 2019 and received by the Division the same day seeking the following:

[T]he complete records of all administrative disciplinary actions brought by or before the Division of Consumer Protection and/or the Division of Consumer Affairs, without limitation as to date.

[P]olicies and procedures manuals related to the enforcement authority of the Division of Consumer Protection and/or the Division of Consumer Affairs, and related to the Utah Consumer Sales Practices Act.

Your request has been considered under the *Utah Government Records Access and Management Act* ("GRAMA"), Utah Code § 63G-2-101, *et seq.*

GRAMA requires that a person requesting a record do so with reasonable specificity. Utah Code § 63G-2-201(7)(b). The portion of your request contained in the first paragraph lacks reasonable specificity and is denied.

The portion of your request contained in the second paragraph also lacks reasonable specificity and is denied. To the extent the Division interprets your request to seek current policy and procedures manuals utilized in enforcing the *Utah Consumer Sales Practices Act*, the Division has no responsive records.

If you wish to challenge this denial, you may file a Notice of Appeal under Utah Code § 63G-2-401 with the executive director of the Utah Department of Commerce. The notice must be filed within thirty (30) days of receipt of this letter and must be addressed to Ms. Francine A. Giani, Executive Director, Utah Department of Commerce, 160 East 300



GARY R. HERBERT  
*Governor*

SPENCER J. COX  
*Lieutenant Governor*

# State of Utah Department of Commerce

FRANCINE A. GIANI  
*Executive Director*

DANIEL O'BANNON  
*Director, Division of Consumer Protection*

South, Box 146701, Salt Lake City, Utah 84114-6701. Your Notice of Appeal must contain your name, mailing address, daytime telephone number, and some indication of the relief you are seeking. You may also file a brief statement in support of your appeal.

Sincerely,

DANIEL LARSEN,  
Commerce Analyst  
Utah Division of Consumer Protection

# **EXHIBIT B**

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*Attorneys for the Utah Division of Consumer Protection*

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**BEFORE THE DIVISION OF CONSUMER PROTECTION  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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**IN THE MATTER OF:**

**PURDUE PHARMA L.P.**, a Delaware limited partnership; **PURDUE PHARMA INC.**, a New York Corporation; **THE PURDUE FREDERICK COMPANY**, a Delaware corporation; **RICHARD SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities; and **KATHE SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities;

**Respondents.**

**MOTION FOR RESTRICTIVE ORDER  
UNDER UTAH CODE ANN. § 63g-2-207**

**DCP Legal File No. CP-2019-005**

**DCP Case No. 107102**

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The Utah Division of Consumer Protection (“Division”) respectfully submits the following Motion for Restrictive Order Under Utah Code Ann. § 63G-2-207. The Presiding Officer has both statutory and inherent authority to prevent parties from using public records requests under the Government Records Access Management Act (“GRAMA”) as a means to

create distraction from or delay in administrative proceedings. Counsel for Pharma L.P., Purdue Pharma Inc., The Purdue Frederick Company (collectively, “Purdue”) has done just that, submitting a vague request including, but not limited to, all records of all administrative disciplinary actions of the Division of Consumer Protection and the Division of Consumer Affairs for an unlimited period of time. For the reasons that follow, the Division respectfully requests that the Court exercise that authority here.

**I. Both GRAMA and Inherent Authority Provide for Restrictive Orders to Prevent Distraction and Delay.**

GRAMA requests and discovery are two different things, and the former was not intended as an end-run around the latter. *See* Utah Code Ann. § 63G-2-207(1) (“Subpoenas and other methods of discovery under the state or federal statutes or rules of civil, criminal, administrative, or legislative procedure are not written requests under Section 63G-2-204”). Accordingly, GRAMA’s legislative history reflects a proposal to expressly prevent party litigants from requesting records from a governmental entity relating to the subject matter of litigation. *See* H.B.400 submitted by Rep. Marty Stephens in 1992, footnote 11. Chapter 280, Laws of Utah (1992) (proposing the addition of “a new Section 63-2-207” which would provide that “[a] request by a party litigant against the state, a political subdivision, or other governmental entity for records related to the subject matter of the litigation shall not be subject to Sections 63-2-201 through 206 . . . .”). Ultimately, a new Section 63G-2-207 was added, which, among other things, provided that a litigant’s right to obtain records is not limited thereunder “[u]nless a court or administrative law judge imposes limitations in a restrictive order[.]” Utah Code Ann. § 63G-2-207(2)(c). Thus, the statute contemplates that administrative law judges may impose restrictive orders where appropriate in the proceedings before them.

In addition, elsewhere, courts have recognized inherent authority to prevent the use of public records requests as a means of delaying or undermining litigation. See *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546, 868 A.2d 1067, 1074 (App. Div. 2005) (“inspection [of public records] is subject to reasonable controls, and courts have inherent power to prevent abuse and protect the public officials involved”); *DeLia v. Kiernan*, 119 N.J. Super. 581, 585, 293 A.2d 197, 199 (App. Div. 1972) (same); compare *United States v. U.S. Dist. Court, Cent. Dist. of Cal., Los Angeles, Cal.*, 717 F.2d 478, 479–82 (9th Cir. 1983) (concluding that the court’s “intervention is necessary to insure the orderly and efficient operation of the criminal justice system in this circuit, and that “[t]he harm to the Government in allowing FOIA discovery to override Rule 16 would be substantial in this case and in all later criminal cases.”); *United States v. Murdock*, 548 F.2d 599, 602 (5th Cir.1977) (“FOIA was not intended as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure.”). The potential for abuse is readily apparent. By way of example, “a party in litigation with the Government may disrupt the Government counsel’s trial preparation by seeking, perhaps on the eve of the trial or hearing, the release under the FOIA of records in the Government’s litigation files.” Administrative Conference of the United States, *The Use of the Freedom of Information Act for Discovery Purposes* (Dec. 16, 1983), <https://www.acus.gov/recommendation/use-freedom-information-act-discovery-purposes> (explaining that “[i]n these cases, the Government counsel must divert attention from trial preparation in order to prevent a FOIA release to an opposing party of sensitive, nondisclosable records”).

## **II. A Restrictive Order is Warranted in this Action.**

### **A. Purdue Timed A GRAMA Request to Exactly Coincide with Motions Briefing.**

That potential has become real here. The Division initially filed an Administration Citation against Respondents, including Purdue on January 30, 2019. Though on notice of the action and the Division's intent to proceed in this forum for approximately two and half months, Purdue took no action under GRAMA for most of that time. On April 8, 2019, the same day its response to the Administrative Citation was due, Purdue submitted a GRAMA request to the Department of Commerce.<sup>1</sup> Purdue's April 9, 2019 Motion to dismiss concedes that it has already perused ten years' worth of public records, which the Division makes publicly available online. *See* Purdue MTD at 10 & n.6. Yet, Purdue seeks these same materials, as well as vaguely identified, but likely voluminous records dating back to the inception of the Division of Consumer Protection and the Division of Consumer Affairs through a GRAMA request. *See* Purdue GRAMA Request, attached as Ex. A. Although Purdue indicates that it made its GRAMA request for the purpose of citing responsive information in its Motion to Dismiss, Purdue, as described above, declined to make the request *before* the anticipated due date for its motion. Instead, it waited such that the 10-day period for the division to respond to its motion is completely subsumed by the 14-day period to respond to the GRAMA request.

**B. The Requested Material Is Irrelevant to, Yet Sought Only for, This Proceeding.**

Purdue made its GRAMA request ostensibly to gather documents for use in connection with its motion to dismiss. Such materials, however, are neither relevant nor permitted to be considered in this context. It is black-letter law that materials outside the pleadings cannot be considered on a motion to dismiss. *See, e.g., Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101,

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<sup>1</sup> Also on April 8, 2019, Richard Sackler and Kathe Sacker (the "Sackler Respondents") requested permission to make certain filings under seal, and the Presiding Officer granted a one-day extension of time to file Responses and Motions to Dismiss to accommodate this request. All Respondents ultimately filed Responses and Motions to Dismiss on April 9, 2019.

¶ 12, 104 P.3d 1226, 1231. Further, Purdue’s motion suggests that only reason it seeks documents concerning other actions against other respondents is to compare the amount of penalties sought or assessed there to those that might be imposed in a second phase of this action if Purdue is found liable. The Division will eschew arguing points that may be raised in response to the motion to dismiss, but notes that information about other misconduct by other respondents is simply a red herring with no bearing on Purdue’s due process argument.

### **C. Purdue’s Request Is Outside GRAMA’s Bounds in Any Event.**

Not only did Purdue time an irrelevant GRAMA request to coincide, precisely, with the Division’s response period to a motion to dismiss, it failed to comply with GRAMA in making the request. Public records requests are available for *specific, identified records*, not a broad search for information the requestor desires the agency to compile. The State Records Committee has agreed, for example, that “a records request that yields more than 450K documents is not reasonably specific as required by Utah Code § 63G-2-201(7). Decision and Order, *Empty v. Box Elder County*, Case No. 18-20 ¶ 3. Here, Purdue’s request includes “complete records of all administrative disciplinary actions brought by or before the Division of Consumer Protection and/or the Division of Consumer Affairs, without limitation as to date.” See Exhibit A. This request does not seek any specific information or identify any disciplinary action concerning which records are sought. Rather, it assumes the agency will identify the relevant actions. Even then, it is unclear which records are sought. Does Purdue seek for example, only the disposition of the action? Would the request include transcripts of proceedings? Does Purdue seek any document related at all to any administrative disciplinary actions, including for example, investigators’ notes, materials obtained in discovery, and the like? The request for various policies and procedures manuals is similarly vague.

Where, as here a requestor fails to provide a “legally sufficient description of the records” sought, the request fails to comply with Utah Code Ann. 63-2-205(1). Decision and Order, *Schwarz v. University of Utah*, Case no. 05-04 (State Records Committee) (finding a request seeking “all records on me, Barbara Schwartz, and also the often misspelled version of my name, Schwartz,” “[a]ny records on Mark C. Rathburn, and also the name Mark de Rothschild,” “[a]ny records on Scientology, or Church of Scientology,” “[a]ny records on deceased Scientology founder L. Ron Hubbard,” “[a]ny records of the former president Dwight David Eisenhower” was not “specific enough that a records manager who is familiar with the agency’s records would understand which records are being sought” and that the requestor “ha[d] not described the records she [sought] with sufficient detail”).

Utah law is consistent with that of other states recognizing that a public records request “is not intended as a research tool litigants may use to force government officials to identify and siphon useful information.” *MAG Entm’t, LLC*, 868 A.2d at 1074 (explaining that a state public records law did “not countenance open-ended searches of an agency’s files” or encompass “[w]holesale requests for general information to be analyzed, collated and compiled by the responding government entity”). Rather, a “proper request . . . must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency’s documents.” *MAG Entm’t, LLC*, 868 A.2d at 1074-75 (emphasis in original and internal quotation marks omitted); *Hangartner v. City of Seattle*, 151 Wash.2d 439, 90 P.3d 26, 28 (2004) (finding request for “all books, records, [and] documents of every kind” related to a specific public transportation project improper under Washington’s public records law).

Requests have therefore been denied, for example, when “the commission would have to go through every employee's file and compile the information.” *Gannett Co. v. James*, 86 A.D.2d 744, 745, 447 N.Y.S.2d 781, 783 (1982); *accord Brown v. King Cty.*, 100 F. App'x 655, 656 (9th Cir. 2004) (concluding that a request stating: “[i]f any other files or documents regarding Lisa Brown are maintained, indicate the existence of these documents, the locations of the documents and the custodian of the documents in your response” “was not for a particular public record” and “did not describe a document in a manner that would assist the person searching for the record” but rather impermissibly “asked for information about possible documents”); *Bader v. Bove*, 273 A.D.2d 466, 467, 710 N.Y.S.2d 379, 379 (2000) (notwithstanding obligation to “‘reasonably describe’ the documents requested” petitioners made requests that would have required “the one full-time employee of the Village Clerk's office would have to manually search through every document filed with the Village going back over 45 years”); *Capitol Info. Ass'n v. Ann Arbor Police*, 138 Mich. App. 655, 656–59, 360 N.W.2d 262, 263–64 (1984) (“Plaintiff's request here was absurdly overbroad. Compliance would require defendants to search their files for correspondence with a wide spectrum of federal agencies dealing with any of more than 100,000 persons during an extensive period of time. The Legislature clearly intended M.C.L. § 15.233(1); M.S.A. § 4.1801(3)(1) to relieve public bodies from the intolerable administrative burdens which would result if such wholesale requests had to be fulfilled. Plaintiff had to request specific identifiable records; it failed to do so here.”).

Here, the Division's Records Officer estimates that Purdue's GRAMA request sweeps in potentially tens of thousands of pages of documents. *See* Pierson Decl. ¶ 15 (attached as Ex. A). The lack of specificity regarding the scope of the request prevents the Division from making a detailed estimate of the time needed to pull, redact, and provide the records sought. *See id.* ¶ 16

(attached as Ex. A). It is clear, however, that it would take months of the Records Officer's time if he were to process the request alone. *See id.* ¶ 14. Each of the certified officers at the Division with the training to handle GRAMA requests, of which there are only two, have other job responsibilities that would be delayed if their time were consumed by responding to GRAMA requests. *See id.*

Purdue in effect is seeking to conduct discovery through the GRAMA process, without the limitations, most notably relevance, in the discovery rules, and while also ignoring GRAMA's strictures, which are not designed for, and do not lend themselves too, vague and ambiguous demands such as Purdue's. Further, in addition to this overarching and fundamental flaw, Purdue's request, though ambiguous, appears to seek a variety of materials that are protected from disclosure under Utah law. An agency may also decline to "fulfill a person's records request if the request unreasonably duplicates prior records requests from that person." Utah Code Ann. § 63G-2-201(8)(iv). Here, although it did not make a prior GRAMA request, Purdue's request ask the agency to reproduce to it records of 450 actions Purdue concedes it already has and has reviewed. *See Purdue MTD at 10.* Purdue will have ample opportunity to seek relevant discovery under the supervision of this tribunal and governing rules of procedure. Otherwise, the Department and its divisions may face a long stream of GRAMA requests intended to divert the State's resources, become reason to delay the case (until GRAMA requests are satisfied or separately litigated), and unilaterally develop materials not permitted as discovery as the action proceeds).

WHEREFORE, the Division respectfully requests that the Presiding Officer grant its Motion for Restrictive Order Under Utah Code Ann. § 63G-2-207.

DATED this 25th day of April, 2019.

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**CERTIFICATE OF SERVICE**

I certify that I have served or will serve the foregoing document on the parties of record in this proceeding set forth below:

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