

HOUSE CONSUMER AND PUBLIC AFFAIRS COMMITTEE SUBSTITUTE FOR
HOUSE BILL 767

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

AN ACT

RELATING TO LAW ENFORCEMENT; CLARIFYING DISCOVERY PROCEDURES;
PROVIDING FOR CONFIDENTIALITY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 57-1-1.1 NMSA 1978 (being Laws 1979,
Chapter 374, Section 2) is amended to read:

"57-1-1.1. SHORT TITLE.--~~[Sections 57-1-1 through~~
~~57-1-15]~~ Chapter 57, Article 1 NMSA 1978 may be cited as the
"Antitrust Act"."

Section 2. Section 57-1-5 NMSA 1978 (being Laws 1979,
Chapter 374, Section 6) is amended to read:

"57-1-5. ATTORNEY GENERAL--INVESTIGATION.--

A. If the attorney general has reasonable cause to
believe that a person has information or may be in possession,
custody or control of ~~[any]~~ a document or other tangible object

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underscored material = new
[bracketed material] = delete

1 relevant to a civil investigation for violation of Section
2 57-1-1 or 57-1-2 NMSA 1978, [~~he~~] the attorney general may,
3 before bringing [~~any~~] an action, apply to the district court of
4 Santa Fe county for approval of a civil investigative demand,
5 demanding, in writing, [~~such~~] the person to appear and be
6 examined under oath, to answer written interrogatories under
7 oath or to produce the document or object for inspection and
8 copying. The following procedures shall be used:

9 (1) the demand shall:

10 [~~(1)~~] (a) be served upon the person in
11 the manner required for service of process in this state or, if
12 the person cannot be found or does not reside or maintain a
13 principal place of business within this state, in the manner
14 required for service of process in the state in which the
15 person resides, maintains a principal place of business or can
16 be found;

17 [~~(2)~~] (b) describe the nature of the
18 conduct under investigation;

19 [~~(3)~~] (c) describe the class [~~or~~
20 ~~classes~~] of documents or objects with sufficient definiteness
21 to permit them to be fairly identified if the production of
22 documents or objects is requested;

23 [~~(4)~~] (d) contain a copy of the written
24 interrogatories if answers to written interrogatories are
25 sought;

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1 ~~[(5)]~~ (e) prescribe a reasonable time at
2 which the person must appear to testify, within which to answer
3 the written interrogatories or within which the document or
4 object must be produced;

5 ~~[(6)]~~ (f) specify a place for the taking
6 of testimony or for production and designate a person who may
7 be an authorized employee of the attorney general to be
8 custodian of the document or object; and

9 ~~[(7)]~~ (g) contain a copy of Subsections
10 B, C, ~~[and]~~ D and E of this section;

11 (2) no demand to produce a document or object
12 for inspection and copying shall contain ~~[any]~~ a requirement
13 ~~[which]~~ that would be unreasonable or improper if contained in
14 a subpoena duces tecum issued in a civil proceeding by a
15 district court of this state; and

16 (3) the district court shall approve the
17 demand if it finds that the attorney general has reasonable
18 cause to believe that a person has information or may be in
19 possession, custody or control of ~~[any]~~ a document or other
20 tangible object relevant to a civil investigation for violation
21 of Section 57-1-1 or 57-1-2 NMSA 1978 and that the demand is
22 proper in form. A demand shall not be issued without approval
23 of the district court.

24 B. If a person fails to comply with the written
25 demand served upon ~~[him]~~ the person under the provisions of

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1 Subsection A of this section, the attorney general may file in
2 the district court of the county in which the person resides or
3 in which ~~he~~ the person maintains a principal place of
4 business within this state or of the county of Santa Fe if the
5 person neither resides nor has a principal place of business in
6 this state a petition for an order to enforce the demand.

7 Notice of hearing the petition and a copy of the petition shall
8 be served upon the person, who may appear in opposition to the
9 petition. If the court finds that the demand is proper in form
10 and there is reasonable cause to believe that the person has
11 information or may be in possession, custody or control of
12 ~~any~~ a document or other tangible object relevant to a civil
13 investigation for violation of Section 57-1-1 or 57-1-2 NMSA
14 1978, the court shall order the person to comply with the
15 demand, subject to ~~any~~ modification that the court may
16 prescribe. Upon motion by the person and for good cause shown,
17 the court may make any further protective order in the
18 proceedings that justice requires.

19 C. ~~[Prior to the filing of an action under the~~
20 ~~provisions of the Antitrust Act for the violation under~~
21 ~~investigation, any]~~ Testimony taken or material produced
22 ~~[under]~~ by compulsory process pursuant to this section shall be
23 kept confidential by the attorney general unless
24 confidentiality is waived by the person being investigated and
25 the person who has testified, answered interrogatories or

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1 produced material, or disclosure is authorized by the court.
2 All court records, including docket, application, petitions,
3 motions and other papers filed under this section shall be open
4 to inspection only to the attorney general and the person upon
5 whom the demand for which inspection is sought has been served,
6 unless otherwise ordered by the court. Prior to voluntary
7 testimony or production of material in lieu of compulsory
8 process, the person testifying or producing material shall be
9 afforded the opportunity to request in writing confidentiality
10 for the testimony taken or the material produced or both and
11 such request shall be honored pursuant to the terms of this
12 subsection.

13 D. Any material produced by a federal agency or an
14 agency of another state, which material is identified by the
15 producing agency as confidential or otherwise access-restricted
16 under federal or state law, shall be maintained with the same
17 degree of confidentiality as would be required pursuant to the
18 provisions of those laws. The producing agency shall identify
19 the statutory or regulatory basis for such confidentiality.

20 E. It is the duty of the attorney general to
21 maintain the confidentiality of all evidence, testimony,
22 documents, work product or other results of an investigation
23 pursuant to this section. The attorney general may exchange
24 information obtained by a civil investigative demand with
25 comparable authorities of other states or the federal

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1 government. Information acquired by the attorney general
2 through a response to a civil investigative demand or by
3 exchange with other states or the federal government shall be
4 exempt from inspection pursuant to the Inspection of Public
5 Records Act. Another state or a federal authority that
6 receives confidential information from the attorney general
7 shall be subject to the nondisclosure requirements of this
8 section. A written, signed confidentiality agreement between
9 the attorney general and the other state or federal authority
10 shall be sufficient to subject the other state or federal
11 authority to the nondisclosure requirements of this section.

12 [D. ~~Any~~] F. A person compelled to appear under
13 this section and required to testify under oath may be
14 accompanied, represented and advised by counsel. An objection
15 may properly be made, received and entered upon the record when
16 it is claimed that [~~such~~] the person is entitled to refuse to
17 answer the question on grounds of [~~any~~] a constitutional or
18 other legal right or privilege."

19 Section 3. Section 57-12-12 NMSA 1978 (being Laws 1967,
20 Chapter 268, Section 10) is amended to read:

21 "57-12-12. CIVIL INVESTIGATIVE DEMAND.--

22 A. Whenever the attorney general has reason to
23 believe that [~~any~~] a person may be in possession, custody or
24 control of an original or copy of [~~any~~] a book, record, report,
25 memorandum, paper, communication, tabulation, map, chart,

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1 photograph, mechanical transcription, ~~[or]~~ other tangible
 2 document or recording ~~[which he]~~ or any other information that
 3 the attorney general believes to be relevant to the subject
 4 matter of an investigation of a probable violation of the
 5 Unfair Practices Act, ~~[he]~~ the attorney general may, prior to
 6 the institution of a civil proceeding, execute in writing and
 7 cause to be served upon the person a civil investigative demand
 8 requiring ~~[such]~~ the person to produce documentary material and
 9 permit the inspection and copying of the material. The demand
 10 of the attorney general shall not be a matter of public record
 11 and shall not be published by ~~[him]~~ the attorney general except
 12 by order of the court.

13 B. Each demand shall:

14 (1) state the general subject matter of the
 15 investigation;

16 (2) describe the classes of documentary
 17 material to be produced with reasonable certainty;

18 (3) prescribe the return date within which the
 19 documentary material is to be produced, which in no case shall
 20 be less than ten days after the date of service; and

21 (4) identify the members of the attorney
 22 general's staff to whom ~~[such]~~ the documentary material is to
 23 be made available for inspection and copying.

24 C. No demand shall:

25 (1) contain ~~[any]~~ a requirement ~~[which]~~ that

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1 would be unreasonable or improper if contained in a subpoena
2 duces tecum issued by a court of this state; ~~[or]~~

3 (2) require the disclosure of any documentary
4 material ~~[which]~~ that would be privileged or ~~[which]~~ that for
5 any other reason would not be required by a subpoena duces
6 tecum issued by a court of this state; or

7 (3) require the removal of any documentary
8 material from the custody of the person upon whom the demand is
9 served except in accordance with the provisions of Subsection E
10 of this section.

11 D. Service of the demand may be made by:

12 (1) delivering a duly executed copy ~~[thereof]~~
13 to the person to be served or, if the person is not a natural
14 person, to the statutory agent for the person or to ~~[any]~~ an
15 officer of the person to be served; ~~[or]~~

16 (2) delivering a duly executed copy ~~[thereof]~~
17 to the principal place of business in this state of the person
18 to be served; or

19 (3) mailing by registered or certified mail a
20 duly executed copy of the demand addressed to the person to be
21 served at ~~[his]~~ the person's principal place of business in
22 this state or, if the person has no place of business in this
23 state, to ~~[his]~~ the person's principal office or place of
24 business.

25 E. Documentary material demanded pursuant to the

1 provisions of this section shall be produced for inspection and
2 copying during normal business hours at the principal office or
3 place of business of the person served or may be inspected and
4 copied at such other times and places as may be agreed upon by
5 the person served and the attorney general.

6 F. No documentary material produced pursuant to a
7 demand, or copies thereof, shall, unless otherwise ordered by
8 the district court in the county in which the person resides or
9 has ~~[his]~~ the person's principal place of business or is about
10 to perform or is performing the practice ~~[which]~~ that is
11 alleged to be unlawful under the Unfair Practices Act, for good
12 cause shown, be produced for inspection or copying by anyone
13 other than an authorized employee or agent of the attorney
14 general nor shall the contents ~~[thereof]~~ be disclosed to anyone
15 other than an authorized employee or agent of the attorney
16 general or in court in an action relating to a violation of the
17 Unfair Practices Act. The attorney general may exchange
18 information obtained by a civil investigative demand with
19 comparable authorities of other states or the federal
20 government. Information acquired by the attorney general
21 through a response to a civil investigative demand or by
22 exchange with other states or the federal government shall be
23 exempt from inspection pursuant to the Inspection of Public
24 Records Act. Another state or a federal authority that
25 receives confidential information from the attorney general

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1 shall be subject to the nondisclosure requirements of this
2 section. A written, signed confidentiality agreement between
3 the attorney general and the other state or federal authority
4 shall be sufficient to subject the other state or federal
5 authority to the nondisclosure requirements of this section.

6 G. At any time before the return date of the
7 demand, a petition to set aside the demand, modify the demand
8 or extend the return date [~~thereon~~] on the demand may be filed
9 in the district court in the county in which the person resides
10 or has [~~his~~] the person's principal place of business or is
11 about to perform or is performing the practice [~~which~~] that is
12 alleged to be unlawful under the Unfair Practices Act, and the
13 court upon a showing of good cause may set aside the demand,
14 modify it or extend the return date of the demand.

15 H. After service of the investigative demand upon
16 [~~him~~] the person, if [~~any~~] the person neglects or refuses to
17 comply with the demand, the attorney general may invoke the aid
18 of the court in the enforcement of the demand. In appropriate
19 cases, the court shall issue its order requiring the person to
20 appear and produce the documentary material required in the
21 demand and may, upon failure of the person to comply with the
22 order, punish the person for contempt.

23 I. This section shall not be applicable to criminal
24 prosecutions."