

**GOVERNMENT COMPETITION WITH PRIVATE
ENTERPRISE**

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Johnny Anderson

Senate Sponsor: _____

LONG TITLE

General Description:

This bill amends and enacts provisions relating to a government entity engaging in commercial activity.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ requires a government entity to conduct a study and contact private enterprise before engaging in certain commercial activity;
- ▶ requires the Privatization Policy Board to hold a public meeting and issue an advisory opinion about a government entity's proposed commercial activity;
- ▶ grants a private enterprise a private right of action to compel compliance with requirements of the part;
- ▶ addresses attorney fees and court costs; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



28 AMENDS:

29 **63G-7-301**, as renumbered and amended by Laws of Utah 2008, Chapter 382

30 **63I-4-101**, as enacted by Laws of Utah 2008, Chapter 147

31 **63I-4-202**, as renumbered and amended by Laws of Utah 2008, Chapter 147

32 ENACTS:

33 **63I-4-401**, Utah Code Annotated 1953

34 **63I-4-402**, Utah Code Annotated 1953

35 **63I-4-403**, Utah Code Annotated 1953

36 **63I-4-404**, Utah Code Annotated 1953



38 *Be it enacted by the Legislature of the state of Utah:*

39 Section 1. Section **63G-7-301** is amended to read:

40 **63G-7-301. Waivers of immunity -- Exceptions.**

41 (1) (a) Immunity from suit of each governmental entity is waived as to any contractual
42 obligation.

43 (b) Actions arising out of contractual rights or obligations are not subject to the
44 requirements of Sections 63G-7-401, 63G-7-402, 63G-7-403, or 63G-7-601.

45 (c) The Division of Water Resources is not liable for failure to deliver water from a
46 reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development
47 Act, if the failure to deliver the contractual amount of water is due to drought, other natural
48 condition, or safety condition that causes a deficiency in the amount of available water.

49 (2) Immunity from suit of each governmental entity is waived:

50 (a) as to any action brought to recover, obtain possession of, or quiet title to real or
51 personal property;

52 (b) as to any action brought to foreclose mortgages or other liens on real or personal
53 property, to determine any adverse claim on real or personal property, or to obtain an
54 adjudication about any mortgage or other lien that the governmental entity may have or claim
55 on real or personal property;

56 (c) as to any action based on the negligent destruction, damage, or loss of goods,
57 merchandise, or other property while it is in the possession of any governmental entity or
58 employee, if the property was seized for the purpose of forfeiture under any provision of state

59 law;

60 (d) subject to Subsection 63G-7-302(1), as to any action brought under the authority of
61 Article I, Section 22, of the Utah Constitution, for the recovery of compensation from the
62 governmental entity when the governmental entity has taken or damaged private property for
63 public uses without just compensation;

64 (e) subject to Subsection 63G-7-302(2), as to any action brought to recover attorney
65 fees under Sections 63I-4-404, 63G-2-405, and 63G-2-802;

66 (f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees
67 Act; or

68 (g) as to any action brought to obtain relief from a land use regulation that imposes a
69 substantial burden on the free exercise of religion under Title 63L, Chapter 5, Utah Religious
70 Land Use Act.

71 (3) (a) Except as provided in Subsection (3)(b), immunity from suit of each
72 governmental entity is waived as to any injury caused by:

73 (i) a defective, unsafe, or dangerous condition of any highway, road, street, alley,
74 crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

75 (ii) any defective or dangerous condition of a public building, structure, dam, reservoir,
76 or other public improvement.

77 (b) Immunity from suit of each governmental entity is not waived if the injury arises
78 out of, in connection with, or results from:

79 (i) a latent dangerous or latent defective condition of any highway, road, street, alley,
80 crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

81 (ii) a latent dangerous or latent defective condition of any public building, structure,
82 dam, reservoir, or other public improvement.

83 (4) Immunity from suit of each governmental entity is waived as to any injury
84 proximately caused by a negligent act or omission of an employee committed within the scope
85 of employment.

86 (5) Immunity from suit of each governmental entity is not waived under Subsections
87 (3) and (4) if the injury arises out of, in connection with, or results from:

88 (a) the exercise or performance, or the failure to exercise or perform, a discretionary
89 function, whether or not the discretion is abused;

90 (b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional
91 trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of
92 mental anguish, or violation of civil rights;

93 (c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to
94 issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar
95 authorization;

96 (d) a failure to make an inspection or by making an inadequate or negligent inspection;

97 (e) the institution or prosecution of any judicial or administrative proceeding, even if
98 malicious or without probable cause;

99 (f) a misrepresentation by an employee whether or not it is negligent or intentional;

100 (g) riots, unlawful assemblies, public demonstrations, mob violence, and civil
101 disturbances;

102 (h) the collection of and assessment of taxes;

103 (i) the activities of the Utah National Guard;

104 (j) the incarceration of any person in any state prison, county or city jail, or other place
105 of legal confinement;

106 (k) any natural condition on publicly owned or controlled lands;

107 (l) any condition existing in connection with an abandoned mine or mining operation;

108 (m) any activity authorized by the School and Institutional Trust Lands Administration
109 or the Division of Forestry, Fire, and State Lands;

110 (n) the operation or existence of a pedestrian or equestrian trail that is along a ditch,
111 canal, stream, or river, regardless of ownership or operation of the ditch, canal, stream, or river,
112 if:

113 (i) the trail is designated under a general plan adopted by a municipality under Section
114 10-9a-401 or by a county under Section 17-27a-401;

115 (ii) the trail right-of-way or the right-of-way where the trail is located is open to public
116 use as evidenced by a written agreement between the owner or operator of the trail
117 right-of-way, or of the right-of-way where the trail is located, and the municipality or county
118 where the trail is located; and

119 (iii) the written agreement:

120 (A) contains a plan for operation and maintenance of the trail; and

121 (B) provides that an owner or operator of the trail right-of-way or of the right-of-way
122 where the trail is located has, at minimum, the same level of immunity from suit as the
123 governmental entity in connection with or resulting from the use of the trail[-];

124 (o) research or implementation of cloud management or seeding for the clearing of fog;

125 (p) the management of flood waters, earthquakes, or natural disasters;

126 (q) the construction, repair, or operation of flood or storm systems;

127 (r) the operation of an emergency vehicle, while being driven in accordance with the
128 requirements of Section 41-6a-212;

129 (s) the activities of:

130 (i) providing emergency medical assistance;

131 (ii) fighting fire;

132 (iii) regulating, mitigating, or handling hazardous materials or hazardous wastes;

133 (iv) emergency evacuations;

134 (v) transporting or removing injured persons to a place where emergency medical
135 assistance can be rendered or where the person can be transported by a licensed ambulance
136 service; or

137 (vi) intervening during dam emergencies;

138 (t) the exercise or performance, or the failure to exercise or perform, any function
139 pursuant to Title 73, Chapter 10, Board of Water Resources - Division of Water Resources; or

140 (u) unauthorized access to government records, data, or electronic information systems
141 by any person or entity.

142 Section 2. Section **63I-4-101** is amended to read:

143 **CHAPTER 4. PRIVATIZATION POLICY AND GOVERNMENT**

144 **COMPETITION WITH PRIVATE ENTERPRISE**

145 **63I-4-101. Title.**

146 This chapter is known as ~~[the]~~ "Privatization Policy [~~Board Act]~~ and Government
147 Competition with Private Enterprise."

148 Section 3. Section **63I-4-202** is amended to read:

149 **63I-4-202. Privatization Policy Board -- Duties.**

150 (1) The board shall:

151 (a) review whether or not a good or service provided by an agency could be privatized

152 to provide the same types and quality of a good or service that would result in cost savings;
153 (b) review privatization of a good or service at the request of:
154 (i) an agency; or
155 (ii) a private enterprise;
156 (c) review issues concerning agency competition with one or more private enterprises
157 to determine:
158 (i) whether privatization:
159 (A) would be feasible;
160 (B) would result in cost savings; and
161 (C) would result in equal or better quality of a good or service; and
162 (ii) ways to eliminate any unfair competition with a private enterprise;
163 (d) in accordance with Section 63I-4-403:
164 (i) conduct a public meeting to hear a study by a government entity; and
165 (ii) issue an advisory opinion;
166 [~~(d)~~] (e) recommend privatization to an agency if a proposed privatization is
167 demonstrated to provide a more cost efficient and effective manner of providing a good or
168 service;
169 [~~(e)~~] (f) comply with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, in
170 making rules establishing privatization standards, procedures, and requirements;
171 [~~(f)~~] (g) maintain communication with and access information from, other entities
172 promoting privatization;
173 [~~(g)~~] (h) comply with Part 3, Commercial Activities Inventory and Review; and
174 [~~(h)~~] (i) (i) prepare an annual report for each calendar year that contains:
175 (A) information about the board's activities;
176 (B) recommendations on privatizing a good or service provided by an agency; and
177 (C) the status of the inventory created under Part 3, Commercial Activities Inventory
178 and Review;
179 (ii) submit the annual report to the Legislature and the governor by no later than
180 January 15 immediately following the calendar year for which the report is made; and
181 (iii) provide each interim an oral report to the Government Operations Interim
182 Committee.

183 (2) In addition to filing a copy of recommendations for privatization with an agency
184 head, the board shall file a copy of its recommendations for privatization with:

185 (a) the governor's office; and

186 (b) the Office of Legislative Fiscal Analyst for submission to the relevant legislative
187 appropriation subcommittee.

188 (3) (a) The board may appoint advisory groups to conduct studies, research, or
189 analyses, and make reports and recommendations with respect to a matter within the
190 jurisdiction of the board.

191 (b) At least one member of the board shall serve on each advisory group.

192 (4) (a) Subject to Subsection (4)(b), this chapter does not preclude an agency from
193 privatizing the provision of a good or service independent of the board.

194 (b) If an agency privatizes the provision of a good or service, the agency shall include
195 as part of the contract that privatizes the provision of the good or service that any contractor
196 assumes all liability to provide the good or service.

197 (5) The board may review upon the request of a local entity a matter relevant to:

198 (a) (i) privatization; or

199 (ii) unfair competition with one or more private enterprises; and

200 (b) an activity or proposed activity of the local entity.

201 Section 4. Section **63I-4-401** is enacted to read:

202 **Part 4. Government Competition with Private Enterprise**

203 **63I-4-401. Title.**

204 This part is known as "Government Competition with Private Enterprise."

205 Section 5. Section **63I-4-402** is enacted to read:

206 **63I-4-402. Definitions.**

207 As used in this part:

208 (1) "Commercial activity" is as defined in Section 63I-4-102 except commercial

209 activity does not include an activity by an institution of higher education related to technology
210 transfer, as defined in Section 53B-16-301.

211 (2) "Government entity" means:

212 (a) the state;

213 (b) an entity of the state, including a branch, department, office, division, authority,

214 commission, or board;

215 (c) an independent entity; or

216 (d) a political subdivision.

217 Section 6. Section **63I-4-403** is enacted to read:

218 **63I-4-403. Study required for certain commercial activity.**

219 (1) A government entity shall conduct a study, contact private enterprise, and receive
220 an advisory opinion from the board before engaging in commercial activity or contracting with
221 a person to engage in a commercial activity that:

222 (a) generates revenue for the government entity from a person who is not a government
223 entity; and

224 (b) the government entity has not engaged in or contracted with a person to engage in
225 before July 1, 2012.

226 (2) The study shall:

227 (a) identify the government entity's purposes for engaging in the commercial activity;

228 (b) identify whether the commercial activity is needed by a person who is not a
229 government entity;

230 (c) identify each private enterprise that offers the commercial activity within the
231 geographic area in which the government entity would engage in the commercial activity;

232 (d) evaluate the impact the commercial activity would have on a private enterprise; and

233 (e) evaluate the feasibility of cooperating with private enterprise to accomplish the
234 purposes identified in Subsection (2)(a) without the government entity engaging in the
235 commercial activity.

236 (3) The government entity shall contact a private enterprise identified under Subsection
237 (2)(c) to make the evaluations required by Subsections (2)(d) and (e).

238 (4) (a) The government entity shall present the study to the board in a public meeting.

239 (b) The board shall issue an advisory opinion to the government entity that:

240 (i) (A) recommends the government entity engage in the commercial activity; or

241 (B) recommends the government entity does not engage in the commercial activity; and

242 (ii) identifies potential negative impacts, if any, on private enterprise.

243 Section 7. Section **63I-4-404** is enacted to read:

244 **63I-4-404. Enforcement -- Private right of action.**

245 (1) A private enterprise that engages in a commercial activity within the geographic
246 area in which the government entity engages in the commercial activity described in Subsection
247 63I-4-403(1) has a private right of action to file an action for:

248 (a) a writ of mandamus to compel a noncompliant government entity to comply with
249 Section 63I-4-403; and

250 (b) an injunction to enjoin the government entity from engaging in the commercial
251 activity until the government entity complies with Section 63I-4-403.

252 (2) (a) If the private enterprise prevails in an action brought under this section, the
253 court may order that the government entity pay the reasonable attorney fees and court costs of
254 the private enterprise.

255 (b) A claim for attorney fees as provided in this section is subject to Title 63G, Chapter
256 7, Governmental Immunity Act of Utah.

Legislative Review Note
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Office of Legislative Research and General Counsel