

PRIVACY OF FINANCIAL RECORDS

1999 GENERAL SESSION

STATE OF UTAH

Sponsor: Karen Hale

AN ACT RELATING TO THE JUDICIAL CODE; AMENDING PROVISIONS RELATED TO A GOVERNMENTAL ENTITY OBTAINING FINANCIAL INFORMATION; DEFINING TERMS; ADDRESSING LIABILITIES OF FINANCIAL INSTITUTIONS; AND MAKING TECHNICAL CHANGES.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

7-1-301, as last amended by Chapter 91, Laws of Utah 1997

78-27-45, as last amended by Chapter 241, Laws of Utah 1989

78-27-46, as enacted by Chapter 143, Laws of Utah 1977

78-27-47, as enacted by Chapter 143, Laws of Utah 1977

78-27-48, as enacted by Chapter 143, Laws of Utah 1977

78-27-49, as enacted by Chapter 143, Laws of Utah 1977

78-27-50, as last amended by Chapter 316, Laws of Utah 1994

ENACTS:

78-27-50.5, Utah Code Annotated 1953

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

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

7-1-301. Powers and duties of commissioner -- Rulemaking.

Without limiting the other powers, duties, and responsibilities specified in this title, the commissioner has all the functions, powers, duties, and responsibilities with respect to institutions, persons, or businesses subject to the jurisdiction of the department contained in this title, including all of the ~~[following:]~~ functions, powers, duties, and responsibilities described in Subsections (1) through (15).

(1) The commissioner may govern the administration and operation of the department.

(2) The commissioner may supervise the conduct, operation, management, examination,

and statements and reports of examinations of financial institutions and other persons subject to the jurisdiction of the department.

(3) (a) The commissioner may authorize a state chartered depository institution to engage in any activity it could engage in, and to grant to that institution all additional rights, powers, privileges, benefits, or immunities it would possess, if it were chartered under the laws of the United States.

(b) The commissioner may authorize a depository institution chartered by this state to engage in any activity that a Utah branch of an out-of-state depository institution of the same class can engage in, and to grant to the Utah institution all additional rights, powers, privileges, benefits, or immunities it needs to engage in the activity.

(c) In granting authority under this Subsection (3), the commissioner shall consider:

(i) the need for competitive equality between institutions chartered by this state and institutions operating in this state that are chartered by another state or by the federal government; and

(ii) the adverse effect on shareholders, members, depositors, and other customers of financial institutions chartered by this state if equal power and protection of those institutions, compared with federally chartered or out-of-state institutions of the same class, are not promptly available.

(4) The commissioner may safeguard the interest of shareholders, members, depositors, and other customers of institutions and other persons subject to the jurisdiction of the department.

(5) (a) The commissioner may establish criteria consistent with this title to be applied in granting applications for approval of:

(i) a new institution;

(ii) a new branch;

(iii) the relocation of an office or branch;

(iv) a merger;

(v) a consolidation;

(vi) a change in control of an institution or other person subject to the jurisdiction of the department; and

(vii) other applications specified in this title.

(b) The criteria established under Subsection (5)(a) may not be applied to make it more difficult for a state chartered institution to obtain approval of an application than for a federally chartered institution in the same class to obtain approval from the appropriate federal regulatory agency or administrator.

(6) (a) The commissioner may protect the privacy of the records of any institution subject to the jurisdiction of the department pertaining to a particular depositor or other customer of the institution. Rules adopted under this Subsection (6) shall be consistent with federal laws and regulations applicable to the institution.

(b) Any institution that consents to produce records or that is required to produce records in compliance with a subpoena or other order of a court of competent jurisdiction or in compliance with an order obtained pursuant to Sections 78-27-45 through ~~[78-27-50]~~ 78-27-50.5 shall be reimbursed for the cost of retrieval and reproduction of the records by the party seeking the information. The commissioner may by rule establish the rates and conditions under which reimbursement is made.

(7) (a) The commissioner may classify all records kept by institutions subject to the jurisdiction of the department and to prescribe the period for which each class of records is retained. Rules adopted under this Subsection (7) for any class of financial institution shall be consistent with federal laws and regulations applicable to the class.

(b) Rules made under Subsection (7)(a) shall provide that:

(i) An institution may dispose of any record after retaining it for the period prescribed by the commissioner for retention of records of its class. If an institution disposes of a record after the prescribed period, the institution has no duty to produce it in any action or proceeding and is not liable to any person by reason of that disposition.

(ii) Any institution may keep records in its custody in the form of microfilm or equivalent reproduction. Any such reproduction shall have the same force and effect as the original and shall be admissible into evidence as if it were the original.

(c) In adopting rules under this Subsection (7), the commissioner shall take into

consideration:

(i) actions at law and administrative proceedings in which the production of the records might be necessary or desirable;

(ii) state and federal statutes of limitation applicable to the actions or proceedings;

(iii) the availability from other sources of information contained in these records; and

(iv) other matters the commissioner considers pertinent in formulating rules that require institutions to retain their records for as short a period as commensurate with the interest in having the records available of:

- (A) customers, members, depositors, and shareholders of the institutions; and
- (B) the people of this state.

(8) (a) The commissioner may establish reasonable classes of depository and other financial institutions including separate classes for savings and loan associations and related institutions, banks and related institutions, credit unions, and industrial loan corporations.

(b) If the restrictions or requirements the commissioner imposes are not more stringent than those applicable under federal law or regulation to federally chartered institutions of the same class, the commissioner may establish the following for each class in a manner consistent with this title:

- (i) eligible classes and types of investments for the deposits and other funds of those financial institutions;
- (ii) minimum standards, in amounts sufficient to protect depositors and other creditors, for the amount and types of capital required to engage in the business conducted by each class or to obtain a license or to establish a branch or additional office of an institution of each class;
- (iii) eligible obligations, reserves, and other accounts to be included in the computation of capital;
- (iv) minimum liquidity requirements for financial institutions within each class in amounts sufficient to meet the demands of depositors and other creditors for liquid funds;
- (v) limitations on the amount and type of borrowings by each class of financial institution in relation to the amount of its capital and the character and condition of its assets and its deposits and other liabilities;

(vi) limitations on the amount and nature of loans and extensions of credit to any person or related persons by each class of financial institution in relation to the amount of its capital; and

(vii) limitations on the amount and nature of loans and extensions of credit by a financial institution or other person within each class to an executive officer, director, or principal shareholder of:

(A) the institution or other person;

(B) any company of which the institution or other person is a subsidiary;

(C) any subsidiary of the institution or other person;

(D) any affiliate of the institution; and

(E) a company controlled by an executive officer, director, or principal shareholder of the institution.

(9) The commissioner may define unfair trade practices of financial institutions and other persons subject to the jurisdiction of the department and to prohibit or restrict these practices.

(10) The commissioner may establish reasonable standards to promote the fair and truthful advertising of:

(a) services offered by a financial institution;

(b) the charges for the services advertised under Subsection (10)(a);

(c) the interest or other compensation to be paid on deposits or any debt instrument offered for sale by the institution;

(d) the nature and extent of any insurance on deposits, savings accounts, share accounts, certificates of deposit, time deposit accounts, NOW accounts, share draft accounts, transaction accounts, or any evidence of indebtedness issued, offered for sale, offered to sell or sold by any financial institution or other person subject to the jurisdiction of the department; and

(e) the safety or financial soundness of any financial institution or other person subject to the jurisdiction of the department.

(11) The commissioner may define what constitutes an impairment of capital for each class of financial institution or other person subject to the jurisdiction of the department.

(12) The commissioner may designate days on which depository institutions are closed in

accordance with Section 7-1-808.

(13) The commissioner may regulate the issuance, advertising, offer for sale, and sale of a security to the extent authorized by Section 7-1-503.

(14) The commissioner may require the officers of any institution or other person subject to the commissioner's jurisdiction to open and keep a standard set of books, computer records, or both for the purpose of keeping accurate and convenient records of the transactions and accounts of the institution in a manner to enable the commissioner, supervisors, and department examiners to readily ascertain the institution's true condition. These requirements shall be consistent with generally accepted accounting principles for financial institutions.

(15) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the commissioner may adopt and issue rules consistent with the purposes and provisions of this title, and may revise, amend, or repeal the rules adopted.

Section 2. Section **78-27-45** is amended to read:

78-27-45. Financial information privacy -- Written consent or court order for disclosure by financial institution -- Exception.

(1) As used in Sections 78-27-45 through 78-27-50.5:

(a) "Financial institution" means:

(i) a financial institution as defined in Section 7-1-103; or

(ii) a depository institution as defined in Section 7-1-103.

(b) "Governmental entity" means:

(i) the state, including all departments, institutions, boards, divisions, bureaus, offices, commissions, committees, and elected officials; and

(ii) any political subdivision of the state, including any county, city, town, school district, public transit district, redevelopment agency, special improvement, or taxing district.

(c) "Nonprotected record" means a record maintained by the financial institution to facilitate the conduct of its business regarding a person or account, including:

(i) the existence of an account;

(ii) the opening and closing dates of an account;

- (iii) the name under which an account is held; and
- (iv) the name, address, and telephone number of an account holder.
- (d) "Protected record" means a record not defined as a nonprotected record; and
- (e) "Record" means information that is:
 - (i) prepared, owned, received, or retained by a financial institution;
 - (ii) (A) inscribed on a tangible medium; or
 - (B) stored in an electronic or other medium; and
 - (iii) retrievable in perceivable form.

~~[(1) A person]~~ (2) Except as provided in Section 78-27-50, an individual acting in behalf of ~~[the state, or any agency, office, department, bureau, or political subdivision of the state]~~ a governmental entity may not request ~~[or]~~, obtain by subpoena, or otherwise obtain information from a state or federally chartered financial institution ~~[regarding the financial transactions or other records]~~ that constitutes a record reflecting the financial condition of any person without first obtaining:

- (a) written permission from the person [whose financial transactions or other records of financial condition are] that is named or referenced in the record to be examined[-]; or [obtaining]
- (b) an order from a court of competent jurisdiction permitting access to the [information] record.

~~[(2)]~~ (3) This section does not apply to:

- (a) [reviews] a review made by the commissioner of financial institutions to determine whether a financial institution is operating in accordance with law; or
- (b) [reports] a report filed as required by Section 76-10-1906.

~~[(3) As used in this section, "person" includes an individual, corporation, partnership, or association.]~~

Section 3. Section **78-27-46** is amended to read:

78-27-46. Financial information privacy -- Notice to person about whom information sought.

- (1) [In the event] (a) If a court order is obtained pursuant to Section 78-27-45, ~~[notice thereof]~~

~~shall be given to]~~ the governmental entity that obtained the order shall notify the person about whom information is sought that a court order has been obtained:

(i) within three days of the day on which service of the order is made upon the financial institution~~[-but]; and~~

(ii) no later than seven days before the day fixed in the order as the day upon which the records are to be produced or examined.

(b) The notice required by Subsection (1)(a) shall be accompanied by:

(i) a copy of the order ~~[which]~~ that has been served upon the financial institution ~~[and];~~

(ii) a copy of the motion or application upon which ~~[it]~~ the order is based; and ~~[shall be accompanied by]~~

(iii) a statement setting forth the rights of the person under Section 78-27-47.

(2) (a) The notice shall be sufficient if, on or before the third day after issuance of the order, notice is:

(i) served in the manner provided in Rule 4(e), Utah Rules of Civil Procedure, upon the person entitled to notice~~[-];~~ or ~~[is]~~

(ii) mailed by certified or registered mail to the last-known address of the person~~[-In the event the]~~ entitled to notice.

(b) Notwithstanding Subsection (2)(a), if the person entitled to notice is deceased or under legal disability, notice shall be served upon or mailed to the last-known address of [such] that person's executor, administrator, guardian, or other fiduciary.

Section 4. Section **78-27-47** is amended to read:

78-27-47. Financial information privacy -- Intervention to challenge or stay order -- Burden on governmental entity.

(1) Notwithstanding any other law or rule of law, any person who is entitled to notice of a court order under Section 78-27-46 shall have the right to intervene in any proceeding with respect to enforcement of the order to:

(a) challenge the issuance of the order; or ~~[to]~~

(b) stay compliance ~~[therewith]~~ with the order.

(2) Upon intervention, the burden shall be ~~[upon]~~ on the ~~[state, agency, officer, department, bureau or political subdivision]~~ governmental entity obtaining the order to show that there is reasonable cause for the issuance of the order ~~[and that the information sought may further the investigation].~~

Section 5. Section **78-27-48** is amended to read:

78-27-48. Financial information privacy -- Reimbursement of financial institution for costs of obtaining information.

~~[Any]~~ (1) A financial institution ~~[which produced records pursuant to permission or in compliance with an order obtained under this act]~~ shall be entitled to reimbursement by the ~~[party or parties]~~ governmental entity seeking the information, for costs reasonably and directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be produced if the financial institution produces the record:

(a) pursuant to permission by the person named or referenced in the record in accordance with Section 78-27-45;

(b) in compliance with an order obtained under Section 78-27-45 through 78-27-50.5; or

(c) in compliance with an order of a court or administrative body of competent jurisdiction.

(2) The commissioner of financial institutions shall by ~~[regulation]~~ rule establish the rates and conditions under which reimbursement shall be made.

Section 6. Section **78-27-49** is amended to read:

78-27-49. Financial information privacy -- Admissibility of information restricted.

~~[No information]~~ (1) Information obtained directly or indirectly from a financial institution in violation of ~~[the provisions of this act shall]~~ Sections 78-27-45 through 78-27-47 may not be admissible in any court of this state against the person entitled to notice.

(2) This section does not apply in any action:

(a) between the financial institution and the person otherwise entitled to notice; or [in any action]

(b) in which it is claimed that the financial institution has been the victim of fraud, embezzlement or any other criminal act committed by the person otherwise entitled to notice.

Section 7. Section **78-27-50** is amended to read:

78-27-50. Financial information privacy -- Inapplicable to certain official investigations.

(1) ~~[This chapter shall]~~ Sections 78-27-45 through 78-27-47 do not apply [where] when an examination of records is a part of an official investigation by [any]:

- (a) a local police[;];
- (b) a sheriff[;];
- (c) a peace officer[;];
- (d) a city attorney[;];
- (e) a county attorney[;];
- (f) a district attorney[;];
- (g) the attorney general[;];
- (h) the Department of Public Safety[;];
- (i) the Office of Recovery Services of the Department of Human Services[;];
- (j) the Insurance Department[~~-or~~];
- (k) the Department of Commerce; or
- (l) the state auditor.

~~[(2) Any financial institution or its agent or employee making a disclosure of financial records pursuant to any court order, subpoena, administrative subpoena, or other legal process, is not liable to the customer for disclosure.]~~

(2) Except for the Office of Recovery Services, if a governmental entity listed in Subsection (1) seeks a record, the entity shall obtain the record as follows:

- (a) if the record is a nonprotected record, by request in writing that:
 - (i) certifies that an official investigation is being conducted; and
 - (ii) is signed by a representative of the governmental entity that is conducting the official investigation; or
- (b) if the record is a protected record, by obtaining:
 - (i) a subpoena authorized by statute; or

(ii) other legal process:

(A) ordered by a court of competent jurisdiction; and

(B) served upon the financial institution.

(3) If the Office of Recovery Services seeks a record, it shall obtain the record pursuant to:

(a) Subsection 62A-11-104(8);

(b) Section 62A-11-304.1;

(c) Section 62A-11-304.5; or

(d) Title IV, Part D of the Social Security Act as codified in 42 U.S.C. 651 et seq.

(4) A financial institution may not give notice to any person named or referenced within the record disclosed pursuant to Subsection (2)(a).

(5) In accordance with Section 78-27-48, the agency conducting the official investigation that obtains a record from a financial institution under this section shall reimburse the financial institution for costs reasonably and directly incurred by the financial institution.

Section 8. Section **78-27-50.5** is enacted to read:

78-27-50.5. Liability of financial institutions.

A financial institution is not liable to any person named or referenced within a record:

(1) for any disclosure that is the result of a subpoena, order, or request made pursuant to Sections 78-27-45 through 78-27-50 if the financial institution reasonably believes that the subpoena, order, or request is properly made under Sections 78-27-45 through 78-27-50; or

(2) for any disclosure or action taken in good faith pursuant to a data match or administrative subpoena provided for by the statutes listed in Subsection 78-27-50(3).