

**Representative Neal B. Hendrickson** proposes to substitute the following bill:

**SUBPOENA POWER AMENDMENTS**

2000 GENERAL SESSION

STATE OF UTAH

**Sponsor: Neal B. Hendrickson**

AN ACT RELATING TO THE UTAH CODE OF CRIMINAL PROCEDURE; MODIFYING THE SUBPOENA POWERS FOR AID OF CRIMINAL INVESTIGATION AND GRANTS OF IMMUNITY; AMENDING CERTAIN PROVISIONS RELATING TO THE RIGHT TO SUBPOENA WITNESSES; MODIFYING CERTAIN PROVISIONS GOVERNING DISCLOSURE OF INFORMATION; AND MAKING TECHNICAL CORRECTIONS.

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

AMENDS:

**77-22-2**, as last amended by Chapter 38, Laws of Utah 1993

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

Section 1. Section **77-22-2** is amended to read:

**77-22-2. Investigations -- Right to subpoena witnesses and require production of evidence -- Contents of subpoena -- Rights of witnesses -- Interrogation before closed court -- Disclosure of information.**

(1) As used in this section, "prosecutor" means the attorney general, county attorney, or district attorney.

~~[(1)]~~ (2) (a) In any matter involving the investigation of a crime or malfeasance in office, or any criminal conspiracy or activity, the ~~[attorney general, county attorney, or district attorney as provided under Sections 17-18-1 and 17-18-1.7]~~ prosecutor may, upon application and approval of the district court and for good cause shown, conduct a criminal investigation.

(b) The application and statement of good cause shall state whether or not any other investigative order related to the investigation at issue has been filed in another court.

26           ~~[(2)]~~ (3) (a) ~~[The attorney general, county attorney, or district attorney]~~ Subject to the  
27 conditions established in Subsection (3)(b), the prosecutor may:

28           (i) subpoena witnesses~~[-]~~;  
29           (ii) compel their attendance and testimony under oath to be recorded by a suitable  
30 electronic recording device or to be given before any certified court reporter~~[-]~~; and  
31           (iii) require the production of books, papers, documents, recordings, and any other items  
32 that constitute evidence or may be relevant to the investigation.

33           (b) The ~~[attorney general, county attorney, or district attorney]~~ prosecutor shall ~~[first]~~:  
34           (i) apply to the district court for each subpoena; and ~~[shall]~~  
35           (ii) show that the requested information is reasonably related to the criminal investigation  
36 authorized by the court.

37           ~~[(3)]~~ (4) (a) The prosecutor shall state in each subpoena:  
38           ~~[(a)]~~ (i) the time and place of the ~~[interrogation]~~ examination;  
39           ~~[(b)]~~ (ii) that the subpoena is issued in aid of a criminal investigation; and  
40           ~~[(c)]~~ (iii) the right of the person subpoenaed to have counsel present.  
41           (b) The examination may be conducted anywhere within the jurisdiction of the prosecutor  
42 issuing the subpoena.

43           (c) The subpoena need not disclose the names of possible defendants.

44           (d) Witness fees and expenses shall be paid as in a civil action.

45           ~~[(4)]~~ (5) (a) ~~[The prosecutor shall also personally inform each witness at]~~ At the beginning  
46 of each compelled interrogation, the prosecutor shall personally inform each witness:

47           ~~[(a)]~~ (i) of the general subject matter of the investigation;  
48           ~~[(b)]~~ (ii) of the privilege to, at any time during the proceeding ~~[to]~~, refuse to answer any  
49 question or produce any evidence of a communicative nature that may result in self-incrimination;  
50           ~~[(c)]~~ (iii) that any information provided may be used against the witness in a subsequent  
51 criminal proceeding; and

52           ~~[(d)]~~ (iv) of the right to have counsel present.

53           ~~[(5)]~~ (b) If the ~~[attorney general, county attorney, or district attorney]~~ prosecutor has  
54 substantial evidence that the subpoenaed witness has committed a crime that is under investigation,  
55 ~~[he]~~ the prosecutor shall:

56           (i) inform ~~[that]~~ the witness in person ~~[prior to]~~ before interrogation of that witness's target

status; and

(ii) inform the witness of the nature of the charges under consideration against [him] the witness.

~~[(6) (a) The subpoena need not disclose the names of possible defendants but shall state the time and place of the examination, which may be conducted anywhere within the jurisdiction of the prosecutor issuing the subpoena.]~~

~~[(b) Witness fees and expenses shall be paid as in a civil action.]~~

~~[(7)]~~ (6) (a) (i) The [attorney general, county attorney, or district attorney] prosecutor may make written application to any district court showing a reasonable likelihood that publicly releasing information about the identity of a witness or the substance of the evidence resulting from a subpoena or interrogation would pose a threat of harm to a person or otherwise impede the investigation.

(ii) Upon a finding of reasonable likelihood, the court may order the:

~~[(i)]~~ (A) interrogation of a witness be held in secret;

~~[(ii)]~~ (B) occurrence of the interrogation and other subpoenaing of evidence, the identity of the person subpoenaed, and the substance of the evidence obtained be kept secret; and

~~[(iii)]~~ (C) record of testimony and other subpoenaed evidence be kept secret unless the court for good cause otherwise orders.

(b) After application, the court may by order exclude from any investigative hearing or proceeding any persons except:

(i) the attorneys representing the state[,], and members of their staffs[,];

(ii) persons who, in the judgment of the attorneys representing the state, are reasonably necessary to assist in the investigative process[,];

(iii) the court reporter or operator of the electronic recording device[,]; and

(iv) the attorney for the witness.

(c) This chapter does not prevent attorneys representing the state or members of their staff from disclosing information obtained pursuant to this chapter for the purpose of furthering any official governmental investigation.

(d) (i) If a secrecy order has been granted by the court regarding the interrogation or disclosure of evidence by a witness under this subsection, and if the court finds a further restriction on the witness is appropriate, the court may order the witness not to disclose the substance of the

witness's testimony or evidence given by the witness to others.

(ii) Any order to not disclose made under this subsection shall be served with the subpoena.

(iii) In an appropriate circumstance the court may order that the witness not disclose the existence of the investigation to others.

(iv) Any order under this Subsection (6)(d) must be based upon a finding by the court that one or more of the following risks exist:

(i) (A) disclosure by the witness would cause destruction of evidence;

(ii) (B) disclosure by the witness would taint the evidence provided by other witnesses;

(iii) (C) disclosure by the witness to a target of the investigation would result in flight or other conduct to avoid prosecution;

(iv) (D) disclosure by the witness would damage a person's reputation; or

(v) (E) disclosure by the witness would cause a threat of harm to any person.

(e) (i) If the court imposes an order under Subsection (6)(d) authorizing an instruction to a witness not to disclose the substance of testimony or evidence provided and the prosecuting agency proves by a preponderance of the evidence that a witness has violated that order, the court may hold the witness in contempt.

(ii) An order of secrecy imposed on a witness under this Subsection (6)(e) may not infringe on the attorney-client relationship between the witness and his attorney or on any other legally recognized privileged relationship.

~~[(8) If the state's application and good cause showing for the order authorizing the investigation and the order itself contain the identities of witnesses and targets of the investigation, the attorney general, county attorney, or district attorney]~~

~~(7) (a) (i) The prosecutor may submit [an application] to any district court [showing a reasonable likelihood that publicly releasing information about those identities would pose a threat of harm to a person or otherwise impede the investigation. The court may order that the application, for good cause shown, and order for the entire investigation be kept secret unless the court for good cause otherwise orders.] a separate written request that the application, statement of good cause, and the court's order authorizing the investigation be kept secret.~~

~~(ii) The request for secrecy is a public record under Title 63, Chapter 2, Government Records Access and Management Act, but need not contain any information that would~~

119 compromise any of the interest listed in Subsection (7)(c).

120 (b) With the court's permission, the prosecutor may submit to the court, in camera, any  
121 additional information to support the request for secrecy if necessary to avoid compromising the  
122 interests listed in Subsection (7)(c).

123 (c) The court shall consider all information in the application and order authorizing the  
124 investigation and any information received in camera and shall order that all information be placed  
125 in the public file except information that, if disclosed, would pose:

126 (i) a substantial risk of harm to a person's safety;

127 (ii) a clearly unwarranted invasion of or harm to a person's reputation or privacy; or

128 (iii) a serious impediment to the investigation.

129 (d) Before granting an order keeping secret documents and other information received  
130 under this section, the court shall narrow the secrecy order as much as reasonably possible in order  
131 to preserve the openness of court records while protecting the interests listed in Subsection (7)(c).