

SUBPOENA POWER AMENDMENTS

2001 GENERAL SESSION

STATE OF UTAH

Sponsor: Neal B. Hendrickson

This act modifies the Utah Code of Criminal Procedure by allowing prosecutors to subpoena witnesses at any time during a criminal investigation. This act also provides for notice to the defendant's attorney and opportunity for participation in an examination of a witness if it occurs after the filing of an indictment or information.

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

AMENDS:

77-22-2, as last amended by Chapter 223, Laws of Utah 2000

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.

(2) (a) In any matter involving the investigation of a crime or malfeasance in office, or any criminal conspiracy or activity, the 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.

(3) (a) Subject to the conditions established in Subsection (3)(b), the prosecutor may:

(i) subpoena witnesses before or after an indictment or information is filed;

(ii) compel their attendance and testimony under oath to be recorded by a suitable electronic recording device or to be given before any certified court reporter; and

28 (iii) require the production of books, papers, documents, recordings, and any other items
29 that constitute evidence or may be relevant to the investigation.

30 (b) The prosecutor shall:

31 (i) apply to the district court for each subpoena; and

32 (ii) show that the requested information is reasonably related to the criminal investigation
33 authorized by the court.

34 (c) In the case of an examination occurring after the filing of an indictment or information,
35 the prosecutor shall give reasonable notice of the examination to the attorney for the defendant.

36 The attorney for the defendant may attend the examination, cross-examine the witness and
37 examine documents or other items produced at the examination. Within five days after the
38 examination or before testimony given at trial by a witness who was the subject of the
39 examination, whichever is first, the prosecutor shall give to the attorney for the defendant a copy
40 of the recording or transcription of the examination.

41 (4) (a) The prosecutor shall state in each subpoena:

42 (i) the time and place of the examination;

43 (ii) that the subpoena is issued in aid of a criminal investigation; and

44 (iii) the right of the person subpoenaed to have counsel present.

45 (b) The examination may be conducted anywhere within the jurisdiction of the prosecutor
46 issuing the subpoena.

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

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

49 (5) (a) At the beginning of each compelled interrogation, the prosecutor shall personally
50 inform each witness:

51 (i) of the general subject matter of the investigation;

52 (ii) of the privilege to, at any time during the proceeding, refuse to answer any question
53 or produce any evidence of a communicative nature that may result in self-incrimination;

54 (iii) that any information provided may be used against the witness in a subsequent
55 criminal proceeding; and

56 (iv) of the right to have counsel present.

57 (b) If the prosecutor has substantial evidence that the subpoenaed witness has committed
58 a crime that is under investigation, the prosecutor shall:

59 (i) inform the witness in person before interrogation of that witness's target status; and
60 (ii) inform the witness of the nature of the charges under consideration against the witness.

61 (6) (a) (i) The prosecutor may make written application to any district court showing a
62 reasonable likelihood that publicly releasing information about the identity of a witness or the
63 substance of the evidence resulting from a subpoena or interrogation would pose a threat of harm
64 to a person or otherwise impede the investigation.

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

66 (A) interrogation of a witness be held in secret;

67 (B) occurrence of the interrogation and other subpoenaing of evidence, the identity of the
68 person subpoenaed, and the substance of the evidence obtained be kept secret; and

69 (C) record of testimony and other subpoenaed evidence be kept secret unless the court for
70 good cause otherwise orders.

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

73 (i) the attorneys representing the state and members of their staffs;

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

76 (iii) the court reporter or operator of the electronic recording device; and

77 (iv) the attorney for the witness.

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

81 (d) (i) If a secrecy order has been granted by the court regarding the interrogation or
82 disclosure of evidence by a witness under this subsection, and if the court finds a further restriction
83 on the witness is appropriate, the court may order the witness not to disclose the substance of the
84 witness's testimony or evidence given by the witness to others.

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

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

89 (iv) Any order under this Subsection (6)(d) must be based upon a finding by the court that

90 one or more of the following risks exist:

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

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

93 (C) disclosure by the witness to a target of the investigation would result in flight or other

94 conduct to avoid prosecution;

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

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

97 (e) (i) If the court imposes an order under Subsection (6)(d) authorizing an instruction to

98 a witness not to disclose the substance of testimony or evidence provided and the prosecuting

99 agency proves by a preponderance of the evidence that a witness has violated that order, the court

100 may hold the witness in contempt.

101 (ii) An order of secrecy imposed on a witness under this Subsection (6)(e) may not infringe

102 on the attorney-client relationship between the witness and his attorney or on any other legally

103 recognized privileged relationship.

104 (7) (a) (i) The prosecutor may submit to any district court a separate written request that

105 the application, statement of good cause, and the court's order authorizing the investigation be kept

106 secret.

107 (ii) The request for secrecy is a public record under Title 63, Chapter 2, Government

108 Records Access and Management Act, but need not contain any information that would

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

110 (b) With the court's permission, the prosecutor may submit to the court, in camera, any

111 additional information to support the request for secrecy if necessary to avoid compromising the

112 interests listed in Subsection (7)(c).

113 (c) The court shall consider all information in the application and order authorizing the

114 investigation and any information received in camera and shall order that all information be placed

115 in the public file except information that, if disclosed, would pose:

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

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

118 (iii) a serious impediment to the investigation.

119 (d) Before granting an order keeping secret documents and other information received

120 under this section, the court shall narrow the secrecy order as much as reasonably possible in order

121 to preserve the openness of court records while protecting the interests listed in Subsection (7)(c).

Legislative Review Note
as of 11-22-00 1:54 PM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel