

1 **PROTECTION OF GOVERNMENT RECORDS**

2 2005 GENERAL SESSION

3 STATE OF UTAH

4 **Sponsor: Gregory S. Bell**

5

6 **LONG TITLE**

7 **General Description:**

8 This bill addresses the treatment of records including those related to institutions within
9 the state system of higher education.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ defines terms;
- 13 ▶ addresses protected records related to an institution within the state system of higher
14 education;
- 15 ▶ provides a process for a sponsor of research at an institution within the state system
16 of higher education to file a written claim of business confidentiality including
17 providing certain notice requirements;
- 18 ▶ addresses how business confidentiality claims are treated; and
- 19 ▶ makes technical changes.

20 **Monies Appropriated in this Bill:**

21 None

22 **Other Special Clauses:**

23 None

24 **Utah Code Sections Affected:**

25 **AMENDS:**

26 **53B-16-301**, as enacted by Chapter 280, Laws of Utah 1992

27 **53B-16-304**, as enacted by Chapter 280, Laws of Utah 1992



- 28 **63-2-103**, as last amended by Chapter 78, Laws of Utah 2002
 29 **63-2-202**, as last amended by Chapter 298, Laws of Utah 2003
 30 **63-2-304**, as last amended by Chapters 223, 299 and 358, Laws of Utah 2004
 31 **63-2-308**, as last amended by Chapter 280, Laws of Utah 1992
 32 **63-2-403**, as last amended by Chapter 245, Laws of Utah 1999

33

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

35 Section 1. Section **53B-16-301** is amended to read:

36 **53B-16-301. Definitions.**

37 As used in this part:

38 (1) "Person" means:

39 (a) a federal, state, or local governmental entity;

40 (i) that sponsors sponsored research; or

41 (ii) participates in a technology transfer;

42 (b) an individual;

43 (c) a nonprofit or profit corporation;

44 (d) a partnership;

45 (e) a sole proprietorship; or

46 (f) other type of business organization.

47 (2) "Public institution of higher education" means an institution within the state system
 48 of higher education defined in Section 53B-1-102.

49 ~~[(1)]~~ (3) "Restricted record" means a record that is restricted as provided by Section
 50 53B-16-303.

51 ~~[(2)]~~ (4) "Sponsored research" refers to ~~[basic or applied]~~ research, training, and other
 52 sponsored activities as defined by the federal Executive Office of the President, Office of
 53 Management and Budget:

54 (a) conducted by a public institution of higher education through an office responsible
 55 for sponsored projects or programs; and

56 (b) funded or otherwise supported by an external ~~[persons or entities]~~ person that is not
 57 created or controlled by the public institution of higher education.

58 ~~[(3)]~~ (5) "Technology transfer" refers to transferring information, commercializing

59 research, or providing technical assistance between a public institution of higher education and
60 external persons [~~or entities~~] for the purpose of economic development.

61 Section 2. Section **53B-16-304** is amended to read:

62 **53B-16-304. Business confidentiality claims.**

63 (1) (a) Any person who provides to [an] a public institution of higher education a
64 record that [he] the person believes should be protected under [Subsections 63-2-304(1) or (2)
65 or] a provision listed in Subsection 63-2-308(1)(b)(i), restricted under Section 53B-16-302, or
66 both protected under a provision listed in Subsection 63-2-308(1)(b)(i) and restricted under
67 Section 53B-16-302, shall provide [with the record] the public institution of higher education:

68 (i) a written claim of business confidentiality; and

69 (ii) a concise statement of reasons supporting the claim[~~, provided that~~] of business
70 confidentiality.

71 (b) The person described in Subsection (1)(a) shall make the filing at the
72 commencement of:

73 (i) the sponsored research project; or

74 (ii) the technology transfer process.

75 (c) A claim of business confidentiality submitted under this Subsection (1) shall cover
76 all protected and restricted records exchanged during the:

77 (i) sponsored research project; or

78 (ii) technology transfer process.

79 (2) The inadvertent failure to make a legally adequate claim of business confidentiality
80 at the time [the record is provided to the institution shall] required by Subsection (1) does not
81 prejudice the claimant's right to make a legally adequate claim at a [later] different time before
82 disclosure of the record.

83 Section 3. Section **63-2-103** is amended to read:

84 **63-2-103. Definitions.**

85 As used in this chapter:

86 (1) "Audit" means:

87 (a) a systematic examination of financial, management, program, and related records
88 for the purpose of determining the fair presentation of financial statements, adequacy of
89 internal controls, or compliance with laws and regulations; or

90 (b) a systematic examination of program procedures and operations for the purpose of
91 determining their effectiveness, economy, efficiency, and compliance with statutes and
92 regulations.

93 (2) "Chronological logs" mean the regular and customary summary records of law
94 enforcement agencies and other public safety agencies that show:

95 (a) the time and general nature of police, fire, and paramedic calls made to the agency;
96 and

97 (b) any arrests or jail bookings made by the agency.

98 (3) "Classification," "classify," and their derivative forms mean determining whether a
99 record series, record, or information within a record is public, private, controlled, protected, or
100 exempt from disclosure under Subsection 63-2-201(3)(b).

101 (4) (a) "Computer program" means:

102 (i) a series of instructions or statements that permit the functioning of a computer
103 system in a manner designed to provide storage, retrieval, and manipulation of data from the
104 computer system[;]; and

105 (ii) any associated documentation and source material that explain how to operate the
106 computer program.

107 (b) "Computer program" does not mean:

108 (i) the original data, including numbers, text, voice, graphics, and images;

109 (ii) analysis, compilation, and other manipulated forms of the original data produced by
110 use of the program; or

111 (iii) the mathematical or statistical formulas, [excluding the underlying mathematical
112 algorithms contained in the program], that would be used if the manipulated forms of the
113 original data were to be produced manually.

114 (5) (a) "Contractor" means:

115 (i) any person who contracts with a governmental entity to provide goods or services
116 directly to a governmental entity; or

117 (ii) any private, nonprofit organization that receives funds from a governmental entity.

118 (b) "Contractor" does not mean a private provider.

119 (6) "Controlled record" means a record containing data on individuals that is controlled
120 as provided by Section 63-2-303.

121 (7) "Designation," "designate," and their derivative forms mean indicating, based on a
122 governmental entity's familiarity with a record series or based on a governmental entity's
123 review of a reasonable sample of a record series, the primary classification that a majority of
124 records in a record series would be given if classified and the classification that other records
125 typically present in the record series would be given if classified.

126 (8) "Explosive" means a chemical compound, device, or mixture:

127 (a) commonly used or intended for the purpose of producing an explosion; and

128 (b) that contains oxidizing or combustive units or other ingredients in proportions,
129 quantities, or packing so that:

130 (i) an ignition by fire, friction, concussion, percussion, or detonator of any part of the
131 compound or mixture may cause a sudden generation of highly heated gases; and

132 (ii) the resultant gaseous pressures are capable of:

133 (A) producing destructive effects on contiguous objects; or

134 (B) causing death or serious bodily injury.

135 (9) "Government audit agency" means any governmental entity that conducts audits.

136 (10) (a) "Governmental entity" means:

137 (i) executive department agencies of the state, the offices of the governor, lieutenant
138 governor, state auditor, attorney general, and state treasurer, the Board of Pardons and Parole,
139 the Board of Examiners, the National Guard, the Career Service Review Board, the State Board
140 of Education, the State Board of Regents, and the State Archives;

141 (ii) the Office of the Legislative Auditor General, Office of the Legislative Fiscal
142 Analyst, Office of Legislative Research and General Counsel, the Legislature, and legislative
143 committees, except any political party, group, caucus, or rules or sifting committee of the
144 Legislature;

145 (iii) courts, the Judicial Council, the Office of the Court Administrator, and similar
146 administrative units in the judicial branch;

147 (iv) any state-funded institution of higher education or public education; or

148 (v) any political subdivision of the state, but, if a political subdivision has adopted an
149 ordinance or a policy relating to information practices pursuant to Section 63-2-701, this
150 chapter shall apply to the political subdivision to the extent specified in Section 63-2-701 or as
151 specified in any other section of this chapter that specifically refers to political subdivisions.

152 (b) "Governmental entity" also means every office, agency, board, bureau, committee,
153 department, advisory board, or commission of the entities listed in Subsection (10)(a) that is
154 funded or established by the government to carry out the public's business.

155 (11) "Gross compensation" means every form of remuneration payable for a given
156 period to an individual for services provided including salaries, commissions, vacation pay,
157 severance pay, bonuses, and any board, rent, housing, lodging, payments in kind, and any
158 similar benefit received from the individual's employer.

159 (12) "Individual" means a human being.

160 (13) (a) "Initial contact report" means an initial written or recorded report, however
161 titled, prepared by peace officers engaged in public patrol or response duties describing official
162 actions initially taken in response to either a public complaint about or the discovery of an
163 apparent violation of law, which report may describe:

164 (i) the date, time, location, and nature of the complaint, the incident, or offense;

165 (ii) names of victims;

166 (iii) the nature or general scope of the agency's initial actions taken in response to the
167 incident;

168 (iv) the general nature of any injuries or estimate of damages sustained in the incident;

169 (v) the name, address, and other identifying information about any person arrested or
170 charged in connection with the incident; or

171 (vi) the identity of the public safety personnel, except undercover personnel, or
172 prosecuting attorney involved in responding to the initial incident.

173 (b) Initial contact reports do not include follow-up or investigative reports prepared
174 after the initial contact report. However, if the information specified in Subsection (13)(a)
175 appears in follow-up or investigative reports, it may only be treated confidentially if it is
176 private, controlled, protected, or exempt from disclosure under Subsection 63-2-201(3)(b).

177 (14) "Person" means [any]:

178 (a) an individual[;];

179 (b) a nonprofit or profit corporation[;];

180 (c) a partnership[;];

181 (d) a sole proprietorship[;]; or

182 (e) other type of business organization.

183 (15) "Private provider" means any person who contracts with a governmental entity to
184 provide services directly to the public.

185 (16) "Private record" means a record containing data on individuals that is private as
186 provided by Section 63-2-302.

187 (17) "Protected record" means a record that is classified protected as provided by
188 Section 63-2-304.

189 (18) "Public record" means a record that is not private, controlled, or protected and that
190 is not exempt from disclosure as provided in Subsection 63-2-201(3)(b).

191 (19) (a) "Record" means all books, letters, documents, papers, maps, plans,
192 photographs, films, cards, tapes, recordings, electronic data, or other documentary materials
193 regardless of physical form or characteristics:

194 (i) which are prepared, owned, received, or retained by a governmental entity or
195 political subdivision; and

196 (ii) where all of the information in the original is reproducible by photocopy or other
197 mechanical or electronic means.

198 (b) "Record" does not mean:

199 (i) temporary drafts or similar materials prepared for the originator's personal use or
200 prepared by the originator for the personal use of an individual for whom ~~he~~ the originator is
201 working;

202 (ii) materials that are legally owned by an individual in ~~his~~ the individual's private
203 capacity;

204 (iii) materials to which access is limited by the laws of copyright or patent unless the
205 copyright or patent is owned by a governmental entity or political subdivision;

206 (iv) proprietary software;

207 (v) junk mail or commercial publications received by a governmental entity or an
208 official or employee of a governmental entity;

209 (vi) books and other materials that are cataloged, indexed, or inventoried and contained
210 in the collections of libraries open to the public, regardless of physical form or characteristics
211 of the material;

212 (vii) daily calendars and other personal notes prepared by the originator for the
213 originator's personal use or for the personal use of an individual for whom ~~he~~ the originator is

214 working;

215 (viii) computer programs as defined in Subsection (4) that are developed or purchased
216 by or for any governmental entity for its own use; or

217 (ix) notes or internal memoranda prepared as part of the deliberative process by a
218 member of the judiciary, an administrative law judge, a member of the Board of Pardons and
219 Parole, or a member of any other body charged by law with performing a quasi-judicial
220 function.

221 (20) "Record series" means a group of records that may be treated as a unit for
222 purposes of designation, description, management, or disposition.

223 (21) "Records committee" means the State Records Committee created in Section
224 63-2-501.

225 (22) "Records officer" means the individual appointed by the chief administrative
226 officer of each governmental entity, or the political subdivision to work with state archives in
227 the care, maintenance, scheduling, designation, classification, disposal, and preservation of
228 records.

229 (23) "Schedule," "scheduling," and their derivative forms mean the process of
230 specifying the length of time each record series should be retained by a governmental entity for
231 administrative, legal, fiscal, or historical purposes and when each record series should be
232 transferred to the state archives or destroyed.

233 (24) "Sponsored research" means research, training, and other sponsored activities as
234 defined by the federal Executive Office of the President, Office of Management and Budget:

235 (a) conducted:

236 (i) by an institution within the state system of higher education defined in Section
237 53B-1-102; and

238 (ii) through an office responsible for sponsored projects or programs; and

239 (b) funded or otherwise supported by an external:

240 (i) person that is not created or controlled by the institution within the state system of
241 higher education; or

242 (ii) federal, state, or local governmental entity.

243 [~~24~~] (25) "State archives" means the Division of Archives and Records Service
244 created in Section 63-2-901.

245 [~~(25)~~] (26) "State archivist" means the director of the state archives.

246 [~~(26)~~] (27) "Summary data" means statistical records and compilations that contain
247 data derived from private, controlled, or protected information but that do not disclose private,
248 controlled, or protected information.

249 Section 4. Section **63-2-202** is amended to read:

250 **63-2-202. Access to private, controlled, and protected documents.**

251 (1) Upon request, a governmental entity shall disclose a private record to:

252 (a) the subject of the record;

253 (b) the parent or legal guardian of an unemancipated minor who is the subject of the
254 record;

255 (c) the legal guardian of a legally incapacitated individual who is the subject of the
256 record;

257 (d) any other individual who:

258 (i) has a power of attorney from the subject of the record;

259 (ii) submits a notarized release from the subject of the record or his legal representative
260 dated no more than 90 days before the date the request is made; or

261 (iii) if the record is a medical record described in Subsection 63-2-302(1)(b), is a health
262 care provider, as defined in Section 26-33a-102, if releasing the record or information in the
263 record is consistent with normal professional practice and medical ethics; or

264 (e) any person to whom the record must be provided pursuant to:

265 (i) court order as provided in Subsection (7); or

266 (ii) a legislative subpoena as provided in Title 36, Chapter 14.

267 (2) (a) Upon request, a governmental entity shall disclose a controlled record to:

268 (i) a physician, psychologist, certified social worker, insurance provider or producer, or
269 a government public health agency upon submission of:

270 (A) a release from the subject of the record that is dated no more than 90 days prior to
271 the date the request is made; and

272 (B) a signed acknowledgment of the terms of disclosure of controlled information as
273 provided by Subsection (2)(b); and

274 (ii) any person to whom the record must be disclosed pursuant to:

275 (A) a court order as provided in Subsection (7); or

276 (B) a legislative subpoena as provided in Title 36, Chapter 14.

277 (b) A person who receives a record from a governmental entity in accordance with
278 Subsection (2)(a)(i) may not disclose controlled information from that record to any person,
279 including the subject of the record.

280 (3) If there is more than one subject of a private or controlled record, the portion of the
281 record that pertains to another subject shall be segregated from the portion that the requester is
282 entitled to inspect.

283 (4) Upon request, a governmental entity shall disclose a protected record to:

284 (a) the person who submitted the record;

285 (b) any other individual who:

286 (i) has a power of attorney from all persons, governmental entities, or political
287 subdivisions whose interests were sought to be protected by the protected classification; or

288 (ii) submits a notarized release from all persons, governmental entities, or political
289 subdivisions whose interests were sought to be protected by the protected classification or from
290 their legal representatives dated no more than 90 days prior to the date the request is made;

291 (c) any person to whom the record must be provided pursuant to:

292 (i) a court order as provided in Subsection (7); or

293 (ii) a legislative subpoena as provided in Title 36, Chapter 14; or

294 (d) the owner of a mobile home park, subject to the conditions of Subsection
295 41-1a-116(5).

296 (5) A governmental entity may disclose a private, controlled, or protected record to
297 another governmental entity, political subdivision, another state, the United States, or a foreign
298 government only as provided by Section 63-2-206.

299 (6) Before releasing a private, controlled, or protected record, the governmental entity
300 shall obtain evidence of the requester's identity.

301 (7) A governmental entity shall disclose a record pursuant to the terms of a court order
302 signed by a judge from a court of competent jurisdiction, provided that:

303 (a) the record deals with a matter in controversy over which the court has jurisdiction;

304 (b) the court has considered the merits of the request for access to the record; and

305 (c) the court has considered and, where appropriate, limited the requester's use and
306 further disclosure of the record in order to protect;

307 (i) privacy interests in the case of private or controlled records[;];
308 (ii) business confidentiality interests in the case of records protected under
309 [Subsections] Subsection 63-2-304(1) [~~and~~], (2), (40)(a)(ii), or (40)(a)(vi); and
310 (iii) privacy interests or the public interest in the case of other protected records;
311 (d) to the extent the record is properly classified private, controlled, or protected, the
312 interests favoring access, considering limitations thereon, outweigh the interests favoring
313 restriction of access; and
314 (e) where access is restricted by a rule, statute, or regulation referred to in Subsection
315 63-2-201(3)(b), the court has authority independent of this chapter to order disclosure.
316 (8) (a) A governmental entity may disclose or authorize disclosure of private or
317 controlled records for research purposes if the governmental entity:
318 (i) determines that the research purpose cannot reasonably be accomplished without
319 use or disclosure of the information to the researcher in individually identifiable form;
320 (ii) determines that:
321 (A) the proposed research is bona fide[;]; and [~~that~~]
322 (B) the value of the research outweighs the infringement upon personal privacy;
323 (iii) (A) requires the researcher to assure the integrity, confidentiality, and security of
324 the records; and
325 (B) requires the removal or destruction of the individual identifiers associated with the
326 records as soon as the purpose of the research project has been accomplished;
327 (iv) prohibits the researcher from:
328 (A) disclosing the record in individually identifiable form, except as provided in
329 Subsection (8)(b)[;]; or [~~from~~]
330 (B) using the record for purposes other than the research approved by the governmental
331 entity; and
332 (v) secures from the researcher a written statement of [~~his~~] the researcher's
333 understanding of and agreement to the conditions of this Subsection (8) and [~~his~~] the
334 researcher's understanding that violation of the terms of this Subsection (8) may subject [~~him~~]
335 the researcher to criminal prosecution under Section 63-2-801.
336 (b) A researcher may disclose a record in individually identifiable form if the record is
337 disclosed for the purpose of auditing or evaluating the research program and no subsequent use

338 or disclosure of the record in individually identifiable form will be made by the auditor or
339 evaluator except as provided by this section.

340 (c) A governmental entity may require indemnification as a condition of permitting
341 research under this Subsection (8).

342 (9) (a) Under Subsections 63-2-201(5)(b) and 63-2-401(6), a governmental entity may
343 disclose to persons other than those specified in this section records that are:

344 (i) private under Section 63-2-302[;]; or

345 (ii) protected under Section 63-2-304 [~~to persons other than those specified in this~~
346 ~~section]~~ subject to Section 63-2-308 if a claim for business confidentiality has been made under
347 Section 63-2-308.

348 (b) Under Subsection 63-2-403(11)(b), the [~~Records Committee]~~ records committee
349 may require the disclosure to persons other than those specified in this section of records that
350 are:

351 (i) private under Section 63-2-302[;];

352 (ii) controlled under Section 63-2-303[;]; or

353 (iii) protected under Section 63-2-304 [~~to persons other than those specified in this~~
354 ~~section]~~ subject to Section 63-2-308 if a claim for business confidentiality has been made under
355 Section 63-2-308.

356 (c) Under Subsection 63-2-404(8), the court may require the disclosure of records that
357 are private under Section 63-2-302, controlled under Section 63-2-303, or protected under
358 Section 63-2-304 to persons other than those specified in this section.

359 Section 5. Section **63-2-304** is amended to read:

360 **63-2-304. Protected records.**

361 The following records are protected if properly classified by a governmental entity:

362 (1) trade secrets as defined in Section 13-24-2 if the person submitting the trade secret
363 has provided the governmental entity with the information specified in Section 63-2-308;

364 (2) commercial information or nonindividual financial information obtained from a
365 person if:

366 (a) disclosure of the information could reasonably be expected to result in unfair
367 competitive injury to the person submitting the information or would impair the ability of the
368 governmental entity to obtain necessary information in the future;

369 (b) the person submitting the information has a greater interest in prohibiting access
370 than the public in obtaining access; and

371 (c) the person submitting the information has provided the governmental entity with
372 the information specified in Section 63-2-308;

373 (3) commercial or financial information acquired or prepared by a governmental entity
374 to the extent that disclosure would lead to financial speculations in currencies, securities, or
375 commodities that will interfere with a planned transaction by the governmental entity or cause
376 substantial financial injury to the governmental entity or state economy;

377 (4) records the disclosure of which could cause commercial injury to, or confer a
378 competitive advantage upon a potential or actual competitor of, a commercial project entity as
379 defined in Subsection 11-13-103(4);

380 (5) test questions and answers to be used in future license, certification, registration,
381 employment, or academic examinations;

382 (6) records the disclosure of which would impair governmental procurement
383 proceedings or give an unfair advantage to any person proposing to enter into a contract or
384 agreement with a governmental entity, except that this Subsection (6) does not restrict the right
385 of a person to see bids submitted to or by a governmental entity after bidding has closed;

386 (7) records that would identify real property or the appraisal or estimated value of real
387 or personal property, including intellectual property, under consideration for public acquisition
388 before any rights to the property are acquired unless:

389 (a) public interest in obtaining access to the information outweighs the governmental
390 entity's need to acquire the property on the best terms possible;

391 (b) the information has already been disclosed to persons not employed by or under a
392 duty of confidentiality to the entity;

393 (c) in the case of records that would identify property, potential sellers of the described
394 property have already learned of the governmental entity's plans to acquire the property;

395 (d) in the case of records that would identify the appraisal or estimated value of
396 property, the potential sellers have already learned of the governmental entity's estimated value
397 of the property; or

398 (e) the property under consideration for public acquisition is a single family residence
399 and the governmental entity seeking to acquire the property has initiated negotiations to acquire

400 the property as required under Section 78-34-4.5;

401 (8) records prepared in contemplation of sale, exchange, lease, rental, or other
402 compensated transaction of real or personal property including intellectual property, which, if
403 disclosed prior to completion of the transaction, would reveal the appraisal or estimated value
404 of the subject property, unless:

405 (a) the public interest in access outweighs the interests in restricting access, including
406 the governmental entity's interest in maximizing the financial benefit of the transaction; or

407 (b) when prepared by or on behalf of a governmental entity, appraisals or estimates of
408 the value of the subject property have already been disclosed to persons not employed by or
409 under a duty of confidentiality to the entity;

410 (9) records created or maintained for civil, criminal, or administrative enforcement
411 purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if
412 release of the records:

413 (a) reasonably could be expected to interfere with investigations undertaken for
414 enforcement, discipline, licensing, certification, or registration purposes;

415 (b) reasonably could be expected to interfere with audits, disciplinary, or enforcement
416 proceedings;

417 (c) would create a danger of depriving a person of a right to a fair trial or impartial
418 hearing;

419 (d) reasonably could be expected to disclose the identity of a source who is not
420 generally known outside of government and, in the case of a record compiled in the course of
421 an investigation, disclose information furnished by a source not generally known outside of
422 government if disclosure would compromise the source; or

423 (e) reasonably could be expected to disclose investigative or audit techniques,
424 procedures, policies, or orders not generally known outside of government if disclosure would
425 interfere with enforcement or audit efforts;

426 (10) records the disclosure of which would jeopardize the life or safety of an
427 individual;

428 (11) records the disclosure of which would jeopardize the security of governmental
429 property, governmental programs, or governmental recordkeeping systems from damage, theft,
430 or other appropriation or use contrary to law or public policy;

431 (12) records that, if disclosed, would jeopardize the security or safety of a correctional
432 facility, or records relating to incarceration, treatment, probation, or parole, that would interfere
433 with the control and supervision of an offender's incarceration, treatment, probation, or parole;

434 (13) records that, if disclosed, would reveal recommendations made to the Board of
435 Pardons and Parole by an employee of or contractor for the Department of Corrections, the
436 Board of Pardons and Parole, or the Department of Human Services that are based on the
437 employee's or contractor's supervision, diagnosis, or treatment of any person within the board's
438 jurisdiction;

439 (14) records and audit workpapers that identify audit, collection, and operational
440 procedures and methods used by the State Tax Commission, if disclosure would interfere with
441 audits or collections;

442 (15) records of a governmental audit agency relating to an ongoing or planned audit
443 until the final audit is released;

444 (16) records prepared by or on behalf of a governmental entity solely in anticipation of
445 litigation that are not available under the rules of discovery;

446 (17) records disclosing an attorney's work product, including the mental impressions or
447 legal theories of an attorney or other representative of a governmental entity concerning
448 litigation;

449 (18) records of communications between a governmental entity and an attorney
450 representing, retained, or employed by the governmental entity if the communications would be
451 privileged as provided in Section 78-24-8;

452 (19) personal files of a legislator, including personal correspondence to or from a
453 member of the Legislature, provided that correspondence that gives notice of legislative action
454 or policy may not be classified as protected under this section;

455 (20) (a) records in the custody or control of the Office of Legislative Research and
456 General Counsel, that, if disclosed, would reveal a particular legislator's contemplated
457 legislation or contemplated course of action before the legislator has elected to support the
458 legislation or course of action, or made the legislation or course of action public; and

459 (b) notwithstanding Subsection (20)(a), the form to request legislation submitted to the
460 Office of Legislative Research and General Counsel is a public document unless a legislator
461 asks that the records requesting the legislation be maintained as protected records until such

462 time as the legislator elects to make the legislation or course of action public;

463 (21) research requests from legislators to the Office of Legislative Research and
464 General Counsel or the Office of the Legislative Fiscal Analyst and research findings prepared
465 in response to these requests;

466 (22) drafts, unless otherwise classified as public;

467 (23) records concerning a governmental entity's strategy about collective bargaining or
468 pending litigation;

469 (24) records of investigations of loss occurrences and analyses of loss occurrences that
470 may be covered by the Risk Management Fund, the Employers' Reinsurance Fund, the
471 Uninsured Employers' Fund, or similar divisions in other governmental entities;

472 (25) records, other than personnel evaluations, that contain a personal recommendation
473 concerning an individual if disclosure would constitute a clearly unwarranted invasion of
474 personal privacy, or disclosure is not in the public interest;

475 (26) records that reveal the location of historic, prehistoric, paleontological, or
476 biological resources that if known would jeopardize the security of those resources or of
477 valuable historic, scientific, educational, or cultural information;

478 (27) records of independent state agencies if the disclosure of the records would
479 conflict with the fiduciary obligations of the agency;

480 (28) records of [~~a public institution of higher education~~] an institution within the state
481 system of higher education defined in Section 53B-1-102 regarding tenure evaluations,
482 appointments, applications for admissions, retention decisions, and promotions, which could be
483 properly discussed in a meeting closed in accordance with Title 52, Chapter 4, Open and Public
484 Meetings, provided that records of the final decisions about tenure, appointments, retention,
485 promotions, or those students admitted, may not be classified as protected under this section;

486 (29) records of the governor's office, including budget recommendations, legislative
487 proposals, and policy statements, that if disclosed would reveal the governor's contemplated
488 policies or contemplated courses of action before the governor has implemented or rejected
489 those policies or courses of action or made them public;

490 (30) records of the Office of the Legislative Fiscal Analyst relating to budget analysis,
491 revenue estimates, and fiscal notes of proposed legislation before issuance of the final
492 recommendations in these areas;

493 (31) records provided by the United States or by a government entity outside the state
494 that are given to the governmental entity with a requirement that they be managed as protected
495 records if the providing entity certifies that the record would not be subject to public disclosure
496 if retained by it;

497 (32) transcripts, minutes, or reports of the closed portion of a meeting of a public body
498 except as provided in Section 52-4-7;

499 (33) records that would reveal the contents of settlement negotiations but not including
500 final settlements or empirical data to the extent that they are not otherwise exempt from
501 disclosure;

502 (34) memoranda prepared by staff and used in the decision-making process by an
503 administrative law judge, a member of the Board of Pardons and Parole, or a member of any
504 other body charged by law with performing a quasi-judicial function;

505 (35) records that would reveal negotiations regarding assistance or incentives offered
506 by or requested from a governmental entity for the purpose of encouraging a person to expand
507 or locate a business in Utah, but only if disclosure would result in actual economic harm to the
508 person or place the governmental entity at a competitive disadvantage, but this section may not
509 be used to restrict access to a record evidencing a final contract;

510 (36) materials to which access must be limited for purposes of securing or maintaining
511 the governmental entity's proprietary protection of intellectual property rights including patents,
512 copyrights, and trade secrets;

513 (37) the name of a donor or a prospective donor to a governmental entity, including [~~a~~
514 ~~public institution of higher education~~] an institution within the state system of higher education
515 defined in Section 53B-1-102, and other information concerning the donation that could
516 reasonably be expected to reveal the identity of the donor, provided that:

517 (a) the donor requests anonymity in writing;

518 (b) any terms, conditions, restrictions, or privileges relating to the donation may not be
519 classified protected by the governmental entity under this Subsection (37); and

520 (c) except for [~~public institutions of higher education~~] an institution within the state
521 system of higher education defined in Section 53B-1-102, the governmental unit to which the
522 donation is made is primarily engaged in educational, charitable, or artistic endeavors, and has
523 no regulatory or legislative authority over the donor, a member of [~~his~~] the donor's immediate

524 family, or any entity owned or controlled by the donor or ~~[his]~~ the donor's immediate family;

525 (38) accident reports, except as provided in Sections 41-6-40, 41-12a-202, and
526 73-18-13;

527 (39) a notification of workers' compensation insurance coverage described in Section
528 34A-2-205;

529 (40) (a) the following records of ~~[a public institution of education]~~ an institution within
530 the state system of higher education defined in Section 53B-1-102, which have been developed,
531 discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of
532 the institution:

533 (i) unpublished lecture notes;

534 (ii) unpublished ~~[research]~~ notes ~~[and]~~, data, and information:

535 (A) relating to sponsored research; and

536 (B) of:

537 (I) the institution within the state system of higher education defined in Section
538 53B-1-102; or

539 (II) a sponsor of sponsored research;

540 (iii) unpublished manuscripts;

541 (iv) creative works in process;

542 (v) scholarly correspondence; and

543 (vi) confidential information contained in research proposals; and

544 (b) Subsection (40)(a) may not be construed to affect the ownership of a record;

545 (41) (a) records in the custody or control of the Office of Legislative Auditor General
546 that would reveal the name of a particular legislator who requests a legislative audit prior to the
547 date that audit is completed and made public; and

548 (b) notwithstanding Subsection (41)(a), a request for a legislative audit submitted to the
549 Office of the Legislative Auditor General is a public document unless the legislator asks that
550 the records in the custody or control of the Office of Legislative Auditor General that would
551 reveal the name of a particular legislator who requests a legislative audit be maintained as
552 protected records until the audit is completed and made public;

553 (42) records that provide detail as to the location of an explosive, including a map or
554 other document that indicates the location of:

- 555 (a) a production facility; or
 556 (b) a magazine;
 557 (43) information contained in the database described in Section 62A-3-311.1;
 558 (44) information contained in the Management Information System and Licensing
 559 Information System described in Title 62A, Chapter 4a, Child and Family Services;
 560 (45) information regarding National Guard operations or activities in support of the
 561 National Guard's federal mission;
 562 (46) records provided by any pawnbroker or pawnshop to a law enforcement agency in
 563 compliance with Title 13, Chapter 32a, Pawnshop Transaction Information Act; and
 564 (47) information regarding food security, risk, and vulnerability assessments performed
 565 by the Department of Agriculture and Food.

566 Section 6. Section **63-2-308** is amended to read:

567 **63-2-308. Confidentiality claims.**

568 (1) (a) (i) Any person who provides to a governmental entity a record that ~~he~~ the
 569 person believes should be protected under Subsection 63-2-304 (1) or (2) or both Subsections
 570 63-2-304(1) and (2) shall provide with the record;

571 (A) a written claim of business confidentiality; and

572 (B) a concise statement of reasons supporting the claim of business confidentiality.

573 (ii) Any of the following who provides to an institution within the state system of
 574 higher education defined in Section 53B-1-102 a record that the person or governmental entity
 575 believes should be protected under Subsection 63-2-304(40)(a)(ii) or (vi) or both Subsections
 576 63-2-304(40)(a)(ii) and (vi) shall provide the institution within the state system of higher
 577 education a written claim of business confidentiality in accordance with Section 53B-16-304:

578 (A) a person;

579 (B) a federal governmental entity;

580 (C) a state governmental entity; or

581 (D) a local governmental entity.

582 (b) ~~[The claimant]~~ A person or governmental entity who complies with this Subsection
 583 (1) shall be notified by the governmental entity to whom the request for a record is made if:

584 (i) a record claimed to be protected under ~~[Subsection 63-2-304 (1) or (2)]~~ one of the
 585 following is classified public ~~[or if]:~~

- 586 (A) Subsection 63-2-304(1);
587 (B) Subsection 63-2-304(2);
588 (C) Subsection 63-2-304(40)(a)(ii);
589 (D) Subsection 63-2-304(40)(a)(vi); or
590 (E) a combination of the provisions described in Subsections (1)(b)(i)(A) through (D);

591 or

592 (ii) the governmental entity to whom the request for a record is made determines that
593 the record claimed to be protected under a provision listed in Subsection (1)(b)(i) should be
594 released after balancing interests under Subsection 63-2-201(5)(b) or Subsection 63-2-401(6).

595 (2) Except as provided by court order, the governmental entity to whom the request for
596 a record is made may not disclose [~~records~~] a record claimed to be protected under [~~Subsection~~
597 ~~63-2-304 (1) or (2)~~] a provision listed in Subsection (1)(b)(i) but which [it] the governmental
598 entity or records committee determines should be [~~classified public~~] disclosed until the period
599 in which to bring an appeal expires or the end of the appeals process, including judicial appeal.
600 This Subsection (2) does not apply where the claimant, after notice, has waived the claim by
601 not appealing or intervening before the records committee.

602 (3) Disclosure or acquisition of information under this chapter does not constitute
603 misappropriation under Subsection 13-24-2(2).

604 Section 7. Section **63-2-403** is amended to read:

605 **63-2-403. Appeals to the records committee.**

606 (1) A petitioner, including an aggrieved person who did not participate in the appeal to
607 the governmental entity's chief administrative officer, may appeal to the records committee by
608 filing a notice of appeal with the executive secretary no later than:

609 (a) 30 days after the chief administrative officer of the governmental entity has granted
610 or denied the records request in whole or in part, including a denial under Subsection
611 63-2-204(7);

612 (b) 45 days after the original request for records if:

613 (i) the circumstances described in Subsection 63-2-401(1)(b) occur; and

614 (ii) the chief administrative officer failed to make a determination under Section
615 63-2-401.

616 (2) The notice of appeal shall contain the following information:

- 617 (a) the petitioner's name, mailing address, and daytime telephone number;
- 618 (b) a copy of any denial of the records request; and
- 619 (c) the relief sought.
- 620 (3) The petitioner may file a short statement of facts, reasons, and legal authority in
- 621 support of the appeal.
- 622 (4) (a) Except as provided in Subsection (4)(b), no later than three business days after
- 623 receiving a notice of appeal, the executive secretary of the records committee shall:
- 624 (i) schedule a hearing for the records committee to discuss the appeal at the next
- 625 regularly scheduled committee meeting falling at least 14 days after the date the notice of
- 626 appeal is filed but no longer than 45 days after the date the notice of appeal was filed
- 627 [~~provided, however,~~] except that the records committee may schedule an expedited hearing
- 628 upon application of the petitioner and good cause shown;
- 629 (ii) send a copy of the notice of hearing to the petitioner; and
- 630 (iii) send a copy of the notice of appeal, supporting statement, and a notice of hearing
- 631 to:
- 632 (A) each member of the records committee;
- 633 (B) the records officer and the chief administrative officer of the governmental entity
- 634 from which the appeal originated;
- 635 (C) any person who made a business confidentiality claim under Section 63-2-308 for a
- 636 record that is the subject of the appeal; and
- 637 (D) all persons who participated in the proceedings before the governmental entity's
- 638 chief administrative officer.
- 639 (b) (i) The executive secretary of the records committee may decline to schedule a
- 640 hearing if the record series that is the subject of the appeal has been found by the committee in
- 641 a previous hearing involving the same government entity to be appropriately classified as
- 642 private, controlled, or protected.
- 643 (ii) (A) If the executive secretary of the records committee declines to schedule a
- 644 hearing, the executive secretary of the records committee shall send a notice to the petitioner
- 645 indicating that the request for hearing has been denied and the reason for the denial.
- 646 (B) The committee shall make rules to implement this section as provided by Title 63,
- 647 Chapter 46a, Utah Administrative Rulemaking Act.

648 (5) (a) A written statement of facts, reasons, and legal authority in support of the
649 governmental entity's position must be submitted to the executive secretary of the records
650 committee not later than five business days before the hearing.

651 (b) The governmental entity shall send a copy of the written statement to the petitioner
652 by first class mail, postage prepaid. The executive secretary shall forward a copy of the written
653 statement to each member of the records committee.

654 (6) (a) No later than ten business days after the notice of appeal is sent by the executive
655 secretary, a person whose legal interests may be substantially affected by the proceeding may
656 file a request for intervention before the records committee.

657 (b) Any written statement of facts, reasons, and legal authority in support of the
658 intervenor's position shall be filed with the request for intervention.

659 (c) The person seeking intervention shall provide copies of the statement described in
660 Subsection (6)(b) to all parties to the proceedings before the records committee.

661 (7) The records committee shall hold a hearing within the period of time described in
662 Subsection (4).

663 (8) At the hearing, the records committee shall allow the parties to testify, present
664 evidence, and comment on the issues. The records committee may allow other interested
665 persons to comment on the issues.

666 (9) (a) The records committee may review the disputed records. However, if the
667 committee is weighing the various interests under Subsection (11), the committee must review
668 the disputed records. The review shall be in camera.

669 (b) Members of the records committee may not disclose any information or record
670 reviewed by the committee in camera unless the disclosure is otherwise authorized by this
671 chapter.

672 (10) (a) Discovery is prohibited, but the records committee may issue subpoenas or
673 other orders to compel production of necessary evidence.

674 (b) When the subject of a records committee subpoena disobeys or fails to comply with
675 the subpoena, the records committee may file a motion for an order to compel obedience to the
676 subpoena with the district court.

677 (c) The records committee's review shall be de novo.

678 (11) (a) No later than three business days after the hearing, the records committee shall

679 issue a signed order either granting the petition in whole or in part or upholding the
680 determination of the governmental entity in whole or in part.

681 (b) The records committee may, upon consideration and weighing of the various
682 interests and public policies pertinent to the classification and disclosure or nondisclosure,
683 order the disclosure of information properly classified as private, controlled, or protected if the
684 public interest favoring access outweighs the interest favoring restriction of access.

685 (c) In making a determination under Subsection (11)(b), the records committee shall
686 consider and, where appropriate, limit the requester's use and further disclosure of the record in
687 order to protect:

688 (i) privacy interests in the case of private or controlled records[;];

689 (ii) business confidentiality interests in the case of records protected under
690 [Subsections] Subsection 63-2-304(1) [and], (2), (40)(a)(ii), or (40)(a)(vi); and

691 (iii) privacy interests or the public interest in the case of other protected records.

692 (12) The order of the records committee shall include:

693 (a) a statement of reasons for the decision, including citations to this chapter, court rule
694 or order, another state statute, federal statute, or federal regulation that governs disclosure of
695 the record, provided that the citations do not disclose private, controlled, or protected
696 information;

697 (b) a description of the record or portions of the record to which access was ordered or
698 denied, provided that the description does not disclose private, controlled, or protected
699 information or information exempt from disclosure under Subsection 63-2-201(3)(b);

700 (c) a statement that any party to the proceeding before the records committee may
701 appeal the records committee's decision to district court; and

702 (d) a brief summary of the appeals process, the time limits for filing an appeal, and a
703 notice that in order to protect its rights on appeal, the party may wish to seek advice from an
704 attorney.

705 (13) If the records committee fails to issue a decision within 35 days of the filing of the
706 notice of appeal, that failure shall be considered the equivalent of an order denying the appeal.
707 The petitioner shall notify the records committee in writing if [he] the petitioner considers the
708 appeal denied.

709 (14) (a) Each government entity shall comply with the order of the records committee

710 and, if records are ordered to be produced, file:
711 (i) a notice of compliance with the records committee upon production of the records;
712 or
713 (ii) a notice of intent to appeal.
714 (b) (i) If the government entity fails to file a notice of compliance or a notice of intent
715 to appeal, the records committee may do either or both of the following:
716 (A) impose a civil penalty of up to \$500 for each day of continuing noncompliance; or
717 (B) send written notice of the entity's noncompliance to:
718 (I) the governor for executive branch entities~~[-, to]~~;
719 (II) the Legislative Management Committee for legislative branch entities~~[-]~~; and ~~[to]~~
720 (III) the Judicial Council for judicial branch agencies entities.
721 (ii) In imposing a civil penalty, the records committee shall consider the gravity and
722 circumstances of the violation, including whether the failure to comply was due to neglect or
723 was willful or intentional.

Legislative Review Note
as of 2-7-05 4:18 PM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

Fiscal Note
Bill Number SB0179

Protection of Government Records

10-Feb-05

1:50 PM

State Impact

No Fiscal Impact

Individual and Business Impact

No Fiscal Impact

Office of the Legislative Fiscal Analyst