

CRIMINAL PROCEDURE - INVESTIGATION

AMENDMENTS

2009 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Paul Ray

Senate Sponsor: Daniel R. Liljenquist

LONG TITLE

Committee Note:

The Law Enforcement and Criminal Justice Interim Committee recommended this bill.

General Description:

This bill includes municipal attorneys under the definition of prosecutor in the Code of Criminal Procedure.

Highlighted Provisions:

This bill:

- adds municipal attorneys to the definition of prosecutor for investigations within the Code of Criminal Procedure.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.

Utah Code Sections Affected:

AMENDS:

77-22-2, as last amended by Laws of Utah 2008, Chapter 382

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

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

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28 **77-22-2. Investigations -- Right to subpoena witnesses and require production of**
29 **evidence -- Contents of subpoena -- Rights of witnesses -- Interrogation before closed**
30 **court -- Disclosure of information.**

31 (1) As used in this section, "prosecutor" means the attorney general, county attorney,
32 [~~or~~] district attorney, or municipal attorney.

33 (2) (a) In any matter involving the investigation of a crime or malfeasance in office, or
34 any criminal conspiracy or activity, the prosecutor may, upon application and approval of the
35 district court and for good cause shown, conduct a criminal investigation.

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

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

39 (i) subpoena witnesses;

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

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

44 (b) The prosecutor shall:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

66 (i) inform the witness in person before interrogation of that witness's target status; and

67 (ii) inform the witness of the nature of the charges under consideration against the
68 witness.

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

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

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

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

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

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

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

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

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

85 (iv) the attorney for the witness.

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

89 (d) (i) If a secrecy order has been granted by the court regarding the interrogation or

90 disclosure of evidence by a witness under this subsection, and if the court finds a further
91 restriction on the witness is appropriate, the court may order the witness not to disclose the
92 substance of the witness's testimony or evidence given by the witness to others.

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

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

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

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

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

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

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

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

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

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

112 (7) (a) (i) The prosecutor may submit to any district court a separate written request
113 that the application, statement of good cause, and the court's order authorizing the investigation
114 be kept secret.

115 (ii) The request for secrecy is a public record under Title 63G, Chapter 2, Government
116 Records Access and Management Act, but need not contain any information that would
117 compromise any of the interest listed in Subsection (7)(c).

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

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

- 124 (i) a substantial risk of harm to a person's safety;
- 125 (ii) a clearly unwarranted invasion of or harm to a person's reputation or privacy; or
- 126 (iii) a serious impediment to the investigation.

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

131 Section 2. **Effective date.**

132 If approved by two-thirds of all the members elected to each house, this bill takes effect
133 upon approval by the governor, or the day following the constitutional time limit of Utah
134 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,
135 the date of veto override.

Legislative Review Note
as of 11-13-08 11:25 AM

Office of Legislative Research and General Counsel

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Fiscal Note

2009 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.
