

1 **CRIMINAL PROCEDURE - INVESTIGATION**

2 **AMENDMENTS**

3 2009 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Paul Ray**

6 Senate Sponsor: Daniel R. Liljenquist

7

8 **LONG TITLE**

9 **General Description:**

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

12 **Highlighted Provisions:**

13 This bill:

14 ▶ adds municipal attorneys to the definition of prosecutor for investigations within
15 the Code of Criminal Procedure.

16 **Monies Appropriated in this Bill:**

17 None

18 **Other Special Clauses:**

19 This bill provides an immediate effective date.

20 **Utah Code Sections Affected:**

21 AMENDS:

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

23

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

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

26 **77-22-2. Investigations -- Right to subpoena witnesses and require production of**
27 **evidence -- Contents of subpoena -- Rights of witnesses -- Interrogation before closed**
28 **court -- Disclosure of information.**

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

30 [~~or~~] district attorney, or municipal attorney.

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

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

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

37 (i) subpoena witnesses;

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

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

42 (b) The prosecutor shall:

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

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

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

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

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

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

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

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

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

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

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

57 (ii) of the privilege to, at any time during the proceeding, refuse to answer any

58 question or produce any evidence of a communicative nature that may result in
59 self-incrimination;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

84 (iv) the attorney for the witness.

85 (c) This chapter does not prevent attorneys representing the state or members of their

86 staff from disclosing information obtained pursuant to this chapter for the purpose of
87 furthering any official governmental investigation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

130 **Section 2. Effective date.**

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