

SB0133S02 compared with SB0133S01

~~deleted text~~ shows text that was in SB0133S01 but was deleted in SB0133S02.

inserted text shows text that was not in SB0133S01 but was inserted into SB0133S02.

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Representative Kay L. McIff proposes the following substitute bill:

GRAND JURY AMENDMENTS

2011 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: John L. Valentine

House Sponsor: Kay L. McIff

LONG TITLE

General Description:

This bill amends the provision regarding subpoenaing witnesses and written requests for a grand jury.

Highlighted Provisions:

This bill:

- ▶ provides that a written certification requesting a grand jury may be submitted to the supervising judge of a grand jury panel at any time; ~~and~~
- ▶ provides that a grand jury panel shall consider a written certification requesting a grand jury within a reasonable time~~;~~ and
- ▶ requires that a minor who is a victim of a crime be given 72 hours notice before being required to testify.

Money Appropriated in this Bill:

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None

Other Special Clauses:

This bill provides revisor instructions for a future effective date for Section 77-10a-2.

Utah Code Sections Affected:

AMENDS:

77-10a-2, as last amended by Laws of Utah 2010, Chapters 34 and 96

77-10a-13, as last amended by Laws of Utah 1997, Chapter 372

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

Section 1. Section **77-10a-2** is amended to read:

77-10a-2. Panel of judges -- Appointment -- Membership -- Ordering of grand jury.

(1) (a) The presiding officer of the Judicial Council shall appoint a panel of five judges from the district courts of the state to hear in secret all persons claiming to have information that would justify the calling of a grand jury. The presiding officer may appoint senior status district court judges to the panel. The presiding officer shall designate one member of the panel as supervising judge to serve at the pleasure of the presiding officer. The panel has the authority of the district court.

(b) To ensure geographical diversity on the panel one judge shall be appointed from the first or second district for a five-year term, one judge shall be appointed from the third district for a four-year term, one judge shall be appointed from the fourth district for a three-year term, one judge shall be appointed from the fifth, sixth, seventh, or eighth districts for a two-year term, and one judge shall be appointed from the third district for a one-year term. Following the first term, all terms on the panel are for five years.

(c) The panel shall schedule hearings in each judicial district at least once every three years and may meet at any location within the state. Three members of the panel constitute a quorum for the transaction of panel business. The panel shall act by the concurrence of a majority of members present and may act through the supervising judge or managing judge. The schedule for the hearings shall be set by the panel and published by the Office of the Court Administrator. Persons who desire to appear before the panel shall schedule an appointment with the Office of the Court Administrator at least 10 days in advance. If no appointments are

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scheduled, the hearing may be canceled. Persons appearing before the panel shall be placed under oath and examined by the judges conducting the hearings. Hearsay evidence may be presented at the hearings only under the same provisions and limitations that apply to preliminary hearings.

(2) (a) If the panel finds good cause to believe a grand jury is necessary, the panel shall make its findings in writing and may order a grand jury to be summoned.

(b) The panel may refer a matter to the attorney general, county attorney, district attorney, or city attorney for investigation and prosecution. The referral shall contain as much of the information presented to the panel as the panel determines relevant. The attorney general, county attorney, district attorney, or city attorney shall report to the panel the results of any investigation and whether the matter will be prosecuted by a prosecutor's information. The report shall be filed with the panel within 120 days after the referral unless the panel provides for a different amount of time. If the panel is not satisfied with the action of the attorney general, county attorney, district attorney, or city attorney, the panel may order a grand jury to be summoned.

(3) When the attorney general, a county attorney, a district attorney, municipal attorney, or a special prosecutor appointed under Section 77-10a-12 certifies in writing to the supervising judge that in his judgment a grand jury is necessary because of criminal activity in the state, the panel shall order a grand jury to be summoned [~~if~~] unless the panel finds good cause [~~exists~~] does not exist.

(4) In determining [~~whether~~] good cause [~~exists~~] under Subsection (3), the panel shall consider, among other factors, whether a grand jury is needed to help maintain public confidence in the impartiality of the criminal justice process. A written certification under Subsection (3) may be submitted to the supervising judge at any time. The panel shall consider the certification within a reasonable time.

(5) A written certification under Subsection (3) shall contain a statement that in the prosecutor's judgement a grand jury is necessary, but the certification need not contain any information which if disclosed may create a risk of:

- (a) destruction or tainting of evidence;
- (b) flight or other conduct by the subject of the investigation to avoid prosecution;
- (c) damage to a person's reputation or privacy;

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(d) harm to any person; or

(e) a serious impediment to the investigation.

(6) A written certification under Subsection (3) shall be accompanied by a statement of facts in support of the need for a grand jury.

(7) The supervising judge shall seal any written statement of facts submitted under Subsection (6).

(8) The supervising judge may at the time the grand jury is summoned:

(a) order that it be drawn from the state at large as provided in this chapter or from any district within the state; and

(b) retain authority to supervise the grand jury or delegate the supervision of the grand jury to any judge of any district court within the state.

(9) If after the certification under Subsection (3) the panel does not order the summoning of a grand jury or the grand jury does not return an indictment regarding the subject matter of the certification, the prosecuting attorney may release to the public a copy of the written certification if in the prosecutor's judgment the release does not create a risk as described in Subsection (5).

Section 2. Section 77-10a-13 is amended to read:

77-10a-13. Location -- Who may be present -- Witnesses -- Witnesses who are subjects -- Evidence -- Contempt -- Notice -- Record of proceedings -- Disclosure.

(1) The managing judge shall designate the place where the grand jury meets. The grand jury may, upon request and with the permission of the managing judge, meet and conduct business any place within the state. Subject to the approval of the managing judge the grand jury shall determine the times at which it meets.

(2) (a) Attorneys representing the state, special prosecutors appointed under Section 77-10a-12, the witness under examination, interpreters when needed, counsel for a witness, and a court reporter or operator of a recording device to record the proceedings may be present while the grand jury is in session.

(b) No person other than the jurors may be present while the grand jury is deliberating.

(3) (a) The attorneys representing the state and the special prosecutors may subpoena witnesses to appear before the grand jury and may subpoena evidence in the name of the grand jury without the prior approval or consent of the grand jury or the court. The jury may request

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that other witnesses or evidence be subpoenaed.

(b) Subpoenas may be issued in the name of the grand jury to any person located within the state and for any evidence located within the state or as otherwise provided by law.

(c) Except as provided in Subsection (3)(d), a subpoena requiring a minor, who is a victim of a crime, to testify before a grand jury may not be served less than 72 hours before the minor is required to testify.

(d) A subpoena may be served upon a minor less than 72 hours before the minor is required to testify if the managing judge finds that the minor was intentionally concealed to prevent service or that a shorter period is reasonably necessary to prevent:

(i) a risk to the minor's safety;

(ii) the concealment or removal of the minor from the jurisdiction;

(iii) intimidation or coercion of the minor or a family member of the minor; or

(iv) undue influence on the minor regarding the minor's testimony.

(e) The service requirement in Subsection (3)(c) may be asserted only by or on behalf of the minor and is not a basis for invalidation of the minor's testimony or any indictment issued by the grand jury.

~~(e)~~ (f) The managing judge may enter any order necessary to secure compliance with any subpoena issued in the name of the grand jury.

(4) (a) Any witness who appears before the grand jury shall be advised, by the attorney for the state or the special prosecutor, of his right to be represented by counsel.

(b) A witness who is also a subject as defined in Section 77-10a-1 shall at the time he appears as a witness be advised:

(i) of his right to be represented by counsel;

(ii) that he is a subject;

(iii) that he may claim his privilege against self-incrimination; and

(iv) of the general scope of the grand jury's investigation.

(c) A witness who is also a target as defined in Section 77-10a-1 shall at the time he appears as a witness, be advised:

(i) of his right to be represented by counsel;

(ii) that he is a target;

(iii) that he may claim his privilege against self-incrimination;

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(iv) that the attorney for the state, the special prosecutor, or the grand jury is in possession of substantial evidence linking him to the commission of a crime for which he could be charged; and

(v) of the general nature of that charge and of the evidence that would support the charge.

(d) This subsection does not require the attorney for the state, the special prosecutor, or the grand jury to disclose to any subject or target the names or identities of witnesses, sources of information, or informants, or disclose information in detail or in a fashion that would jeopardize or compromise any ongoing criminal investigation or endanger any person or the community.

(5) (a) The grand jury shall receive evidence without regard for the formal rules of evidence, except the grand jury may receive hearsay evidence only under the same provisions and limitations that apply to preliminary hearings.

(b) Any person, including a witness who has previously testified or produced books, records, documents, or other evidence, may present exculpatory evidence to the attorney representing the state or the special prosecutor and request that it be presented to the grand jury, or request to appear personally before the grand jury to testify or present evidence to that body. The attorney for the state or the special prosecutor shall forward the request to the grand jury.

(c) When the attorney for the state or the special prosecutor is personally aware of substantial and competent evidence negating the guilt of a subject or target that might reasonably be expected to lead the grand jury not to indict, he shall present or otherwise disclose the evidence to the grand jury before the grand jury is asked to indict that person.

(6) (a) The managing judge has the contempt power and authority inherent in the court over which he presides and as provided by statute.

(b) When a witness in any proceeding before or ancillary to any grand jury appearance refuses to comply with an order from the managing judge to testify or provide other information, including any book, paper, document, record, recording, or other material without having a recognized privilege, the attorney for the state or special prosecutor may apply to the managing judge for an order directing the witness to show cause why he should not be held in contempt.

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(c) After submission of the application and a hearing at which the witness is entitled to be represented by counsel, the managing judge may hold the witness in contempt and order that he be confined, upon a finding that the refusal was not privileged.

(d) A hearing may not be held under this part unless 72 hours notice is given to the witness who has refused to comply with the order to testify or provide other information, except a witness may be given a shorter notice if the managing judge upon a showing of special need so orders.

(e) Any confinement for refusal to comply with an order to testify or produce other information shall continue until the witness is willing to give the testimony or provide the information. A period of confinement may not exceed the term of the grand jury, including extensions, before which the refusal to comply with the order occurred. In any event the confinement may not exceed one year.

(f) A person confined under this subsection for refusal to testify or provide other information concerning any transaction, set of transactions, event, or events may not be again confined under this subsection or for criminal contempt for a subsequent refusal to testify or provide other information concerning the same transaction, set of transactions, event, or events.

(g) Any person confined under this section may be admitted to bail or released in accordance with local procedures pending the determination of an appeal taken by him from the order of his confinement unless the appeal affirmatively appears to be frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, pursuant to an expedited schedule and in no event more than 30 days from the filing of the appeal.

(7) (a) All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding does not affect the validity of any prosecution or indictment. The recording or reporter's notes or any transcript prepared from them shall remain in the custody or control of the attorney for the state or the special prosecutor unless otherwise ordered by the managing judge in a particular case.

(b) A grand juror, an interpreter, a court reporter, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the state or special prosecutor, or any person to whom disclosure is made under the provisions of this section may not disclose

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matters occurring before the grand jury except as otherwise provided in this section. A knowing violation of this provision may be punished as a contempt of court.

(c) Disclosure otherwise prohibited by this section of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to:

(i) an attorney for the state or a special prosecutor for use in the performance of that attorney's duty; and

(ii) government personnel, including those of state, local, and federal entities and agencies, as are considered necessary by the attorney for the state or special prosecutor to assist him in the performance of his duty to enforce the state's criminal laws.

(d) Any person to whom matters are disclosed under this section may not utilize that grand jury material for any purpose other than assisting the attorney for the state or the special prosecutor in performance of that attorney's duty to enforce the state's criminal laws. An attorney for the state or the special prosecutor shall promptly provide the managing judge with the names of the persons to whom the disclosure has been made and shall certify that the attorney has advised the person of his obligation of secrecy under this section.

(e) Disclosure otherwise prohibited by this section of matters occurring before the grand jury may also be made when:

(i) directed by the managing judge or by any court before which the indictment that involves matters occurring before the grand jury that are subject to disclosure is to be tried, preliminary to or in connection with a judicial proceeding;

(ii) permitted by the managing judge at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) the disclosure is made by an attorney for the state or the special prosecutor to another state or local grand jury or a federal grand jury;

(iv) permitted by the managing judge at the request of an attorney for the state or the special prosecutor, upon a showing that the matters may disclose a violation of federal criminal law, to an appropriate official of the federal government for the purpose of enforcing federal law; or

(v) showing of special need is made and the managing judge is satisfied that disclosure of the information or matters is essential for the preparation of a defense.

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(f) When the matters are transcripts of testimony given by witnesses, the state or special prosecutor intends to call in the state's case in chief in any trial upon an indictment returned by the grand jury before which the witnesses testified, the attorney for the state or the special prosecutor shall, no later than 30 days before trial, provide the defendant with access to the transcripts. The attorney for the state or the special prosecutor shall at the same time provide the defendant with access to all exculpatory evidence presented to the grand jury prior to indictment.

(g) When the managing judge orders disclosure of matters occurring before the grand jury, disclosure shall be made in a manner, at a time, and under conditions the managing judge directs.

(h) A petition for disclosure made under Subsection (7)(e)(ii) shall be filed with the managing judge. Unless the hearing is ex parte, the petitioner shall serve written notice upon the attorney for the state or the special prosecutor, the parties to the judicial proceeding if disclosure is sought in connection with the proceeding, and other persons as the managing judge directs. The managing judge shall afford those persons a reasonable opportunity to appear and be heard.

(8) Records, orders, and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and so long as necessary to prevent disclosure of matters occurring before the grand jury other than as provided in this section.

(9) Subject to any right to an open hearing in contempt proceedings, the managing judge shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

Section ~~{2}~~3. **Revisor instructions to create a future version of Section 77-10a-2.**

It is the intent of the Legislature that, in preparing the Utah Code database for publication, the Office of Legislative Research and General Counsel shall prepare a future version of Section 77-10a-2, to take effect on July 1, 2016, that reads as follows:

"77-10a-2. Panel of judges -- Appointment -- Membership -- Ordering of grand jury.

(1) (a) The presiding officer of the Judicial Council shall appoint a panel of five judges from the district courts of the state to hear in secret all persons claiming to have information that would justify the calling of a grand jury. The presiding officer may appoint senior status

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district court judges to the panel. The presiding officer shall designate one member of the panel as supervising judge to serve at the pleasure of the presiding officer. The panel has the authority of the district court.

(b) To ensure geographical diversity on the panel one judge shall be appointed from the first or second district for a five-year term, one judge shall be appointed from the third district for a four-year term, one judge shall be appointed from the fourth district for a three-year term, one judge shall be appointed from the fifth, sixth, seventh, or eighth districts for a two-year term, and one judge shall be appointed from the third district for a one-year term. Following the first term, all terms on the panel are for five years.

(c) The panel shall schedule hearings in each judicial district at least once every three years and may meet at any location within the state. Three members of the panel constitute a quorum for the transaction of panel business. The panel shall act by the concurrence of a majority of members present and may act through the supervising judge or managing judge. The schedule for the hearings shall be set by the panel and published by the Office of the Court Administrator. Persons who desire to appear before the panel shall schedule an appointment with the Office of the Court Administrator at least 10 days in advance. If no appointments are scheduled, the hearing may be canceled. Persons appearing before the panel shall be placed under oath and examined by the judges conducting the hearings. Hearsay evidence may be presented at the hearings only under the same provisions and limitations that apply to preliminary hearings.

(2) (a) If the panel finds good cause to believe a grand jury is necessary, the panel shall make its findings in writing and may order a grand jury to be summoned.

(b) The panel may refer a matter to the attorney general, county attorney, district attorney, or city attorney for investigation and prosecution. The referral shall contain as much of the information presented to the panel as the panel determines relevant. The attorney general, county attorney, district attorney, or city attorney shall report to the panel the results of any investigation and whether the matter will be prosecuted by a prosecutor's information. The report shall be filed with the panel within 120 days after the referral unless the panel provides for a different amount of time. If the panel is not satisfied with the action of the attorney general, county attorney, district attorney, or city attorney, the panel may order a grand jury to be summoned.

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(3) When the attorney general, a county attorney, a district attorney, municipal attorney, or a special prosecutor appointed under Section 77-10a-12 certifies in writing to the supervising judge that in his judgment a grand jury is necessary because of criminal activity in the state, the panel shall order a grand jury to be summoned if the panel finds good cause exists.

(4) In determining [~~whether~~] good cause [~~exists~~] under Subsection (3), the panel shall consider, among other factors, whether a grand jury is needed to help maintain public confidence in the impartiality of the criminal justice process. A written certification under Subsection (3) may be submitted to the supervising judge at any time. The panel shall consider the certification within a reasonable time.

(5) A written certification under Subsection (3) shall contain a statement that in the prosecutor's judgement a grand jury is necessary, but the certification need not contain any information which if disclosed may create a risk of:

- (a) destruction or tainting of evidence;
- (b) flight or other conduct by the subject of the investigation to avoid prosecution;
- (c) damage to a person's reputation or privacy;
- (d) harm to any person; or
- (e) a serious impediment to the investigation.

(6) A written certification under Subsection (3) shall be accompanied by a statement of facts in support of the need for a grand jury.

(7) The supervising judge shall seal any written statement of facts submitted under Subsection (6).

(8) The supervising judge may at the time the grand jury is summoned:

(a) order that it be drawn from the state at large as provided in this chapter or from any district within the state; and

(b) retain authority to supervise the grand jury or delegate the supervision of the grand jury to any judge of any district court within the state.

(9) If after the certification under Subsection (3) the panel does not order the summoning of a grand jury or the grand jury does not return an indictment regarding the subject matter of the certification, the prosecuting attorney may release to the public a copy of the written certification if in the prosecutor's judgment the release does not create a risk as

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described in Subsection (5)."