

RECORDS ACCESS DISCOVERY AMENDMENTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Curtis S. Bramble

House Sponsor: Bradley M. Daw

LONG TITLE

General Description:

This bill modifies Title 53, Public Safety Code, and Title 58, Occupations and Professions, by permitting dissemination of information in the controlled substance database and criminal background checks to a defense attorney for use in a criminal case.

Highlighted Provisions:

This bill:

- ▶ permits a state or local prosecutor to provide information from the controlled substance database to a criminal defense attorney, upon request during discovery, for use in a criminal defense case;
- ▶ permits a criminal justice agency to provide information from a criminal background check to a defense attorney, upon request during discovery, for use in a criminal defense case; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:



28 **53-10-108**, as last amended by Laws of Utah 2011, Chapter 243

29 **58-37f-301**, as last amended by Laws of Utah 2011, Chapters 38, 151, and 226



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

32 Section 1. Section **53-10-108** is amended to read:

33 **53-10-108. Restrictions on access, use, and contents of division records -- Limited**
34 **use of records for employment purposes -- Challenging accuracy of records -- Usage fees**
35 **-- Missing children records -- Penalty for misuse of records.**

36 (1) Dissemination of information from a criminal history record or warrant of arrest
37 information from division files is limited to:

38 (a) criminal justice agencies for purposes of administration of criminal justice and for
39 employment screening by criminal justice agencies;

40 (b) noncriminal justice agencies or individuals for any purpose authorized by statute,
41 executive order, court rule, court order, or local ordinance;

42 (c) agencies or individuals for the purpose of obtaining required clearances connected
43 with foreign travel or obtaining citizenship;

44 (d) (i) agencies or individuals pursuant to a specific agreement with a criminal justice
45 agency to provide services required for the administration of criminal justice; and

46 (ii) the agreement shall specifically authorize access to data, limit the use of the data to
47 purposes for which given, and ensure the security and confidentiality of the data;

48 (e) agencies or individuals for the purpose of a preplacement adoptive study, in
49 accordance with the requirements of Sections 78B-6-128 and 78B-6-130;

50 (f) (i) agencies and individuals as the commissioner authorizes for the express purpose
51 of research, evaluative, or statistical activities pursuant to an agreement with a criminal justice
52 agency; and

53 (ii) private security agencies through guidelines established by the commissioner for
54 employment background checks for their own employees and prospective employees;

55 (g) a qualifying entity for employment background checks for their own employees and
56 persons who have applied for employment with the qualifying entity; and

57 (h) other agencies and individuals as the commissioner authorizes and finds necessary
58 for protection of life and property and for offender identification, apprehension, and

59 prosecution pursuant to an agreement.

60 (2) An agreement under Subsection (1)(f) or (1)(h) shall specifically authorize access
61 to data, limit the use of data to research, evaluative, or statistical purposes, preserve the
62 anonymity of individuals to whom the information relates, and ensure the confidentiality and
63 security of the data.

64 (3) (a) Before requesting information under Subsection (1)(g), a qualifying entity must
65 obtain a signed waiver from the person whose information is requested.

66 (b) The waiver must notify the signee:

67 (i) that a criminal history background check will be conducted;

68 (ii) who will see the information; and

69 (iii) how the information will be used.

70 (c) Information received by a qualifying entity under Subsection (1)(g) may only be:

71 (i) available to persons involved in the hiring or background investigation of the
72 employee; and

73 (ii) used for the purpose of assisting in making an employment or promotion decision.

74 (d) A person who disseminates or uses information obtained from the division under
75 Subsection (1)(g) for purposes other than those specified under Subsection (3)(c), in addition to
76 any penalties provided under this section, is subject to civil liability.

77 (e) A qualifying entity that obtains information under Subsection (1)(g) shall provide
78 the employee or employment applicant an opportunity to:

79 (i) review the information received as provided under Subsection (8); and

80 (ii) respond to any information received.

81 (f) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the
82 division may make rules to implement this Subsection (3).

83 (g) (i) The applicant fingerprint card fee under Subsection (1)(g) is \$20.

84 (ii) The name check fee under Subsection (1)(g) is \$15.

85 (iii) These fees remain in effect until changed by the division through the process under
86 Section 63J-1-504.

87 (iv) Funds generated under Subsections (3)(g)(i), (3)(g)(ii), and (8)(b) shall be
88 deposited in the General Fund as a dedicated credit by the department to cover the costs
89 incurred in providing the information.

90 (h) The division or its employees are not liable for defamation, invasion of privacy,
91 negligence, or any other claim in connection with the contents of information disseminated
92 under Subsection (1)(g).

93 (4) (a) Any criminal history record information obtained from division files may be
94 used only for the purposes for which it was provided and may not be further disseminated,
95 except under ~~[Subsection]~~ Subsections (4)(b) and (c).

96 (b) A criminal history provided to an agency pursuant to Subsection (1)(e) may be
97 provided by the agency to the person who is the subject of the history, another licensed
98 child-placing agency, or the attorney for the adoptive parents for the purpose of facilitating an
99 adoption.

100 (c) A criminal history of a defendant provided to a criminal justice agency under
101 Subsection (1)(a) may also be provided by the prosecutor to a defendant's defense counsel,
102 upon request during the discovery process, for the purpose of establishing a defense in a
103 criminal case.

104 (5) If an individual has no prior criminal convictions, criminal history record
105 information contained in the division's computerized criminal history files may not include
106 arrest or disposition data concerning an individual who has been acquitted, the person's charges
107 dismissed, or when no complaint against the person has been filed.

108 (6) (a) This section does not preclude the use of the division's central computing
109 facilities for the storage and retrieval of criminal history record information.

110 (b) This information shall be stored so it cannot be modified, destroyed, or accessed by
111 unauthorized agencies or individuals.

112 (7) Direct access through remote computer terminals to criminal history record
113 information in the division's files is limited to those agencies authorized by the commissioner
114 under procedures designed to prevent unauthorized access to this information.

115 (8) (a) The commissioner shall establish procedures to allow an individual right of
116 access to review and receive a copy of the individual's criminal history report.

117 (b) A processing fee for the right of access service, including obtaining a copy of the
118 individual's criminal history report under Subsection (8)(a) is \$15. This fee remains in effect
119 until changed by the commissioner through the process under Section 63J-1-504.

120 (c) (i) The commissioner shall establish procedures for an individual to challenge the

121 completeness and accuracy of criminal history record information contained in the division's
122 computerized criminal history files regarding that individual.

123 (ii) These procedures shall include provisions for amending any information found to
124 be inaccurate or incomplete.

125 (9) The private security agencies as provided in Subsection (1)(f)(ii):

126 (a) shall be charged for access; and

127 (b) shall be registered with the division according to rules made by the division under
128 Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

129 (10) Before providing information requested under this section, the division shall give
130 priority to criminal justice agencies needs.

131 (11) (a) It is a class B misdemeanor for a person to knowingly or intentionally access,
132 use, disclose, or disseminate a record created, maintained, or to which access is granted by the
133 division or any information contained in a record created, maintained, or to which access is
134 granted by the division for a purpose prohibited or not permitted by statute, rule, regulation, or
135 policy of a governmental entity.

136 (b) A person who discovers or becomes aware of any unauthorized use of records
137 created or maintained, or to which access is granted by the division shall inform the
138 commissioner and the director of the Utah Bureau of Criminal Identification of the
139 unauthorized use.

140 Section 2. Section **58-37f-301** is amended to read:

141 **58-37f-301. Access to database.**

142 (1) The division shall make rules, in accordance with Title 63G, Chapter 3, Utah
143 Administrative Rulemaking Act, to:

144 (a) effectively enforce the limitations on access to the database as described in this
145 part; and

146 (b) establish standards and procedures to ensure accurate identification of individuals
147 requesting information or receiving information without request from the database.

148 (2) The division shall make information in the database available only to the following
149 individuals, in accordance with the requirements of this chapter and division rules:

150 (a) personnel of the division specifically assigned to conduct investigations related to
151 controlled substance laws under the jurisdiction of the division;

152 (b) authorized division personnel engaged in analysis of controlled substance
153 prescription information as a part of the assigned duties and responsibilities of their
154 employment;

155 (c) in accordance with a written agreement entered into with the department,
156 employees of the Department of Health:

157 (i) whom the director of the Department of Health assigns to conduct scientific studies
158 regarding the use or abuse of controlled substances, provided that the identity of the individuals
159 and pharmacies in the database are confidential and are not disclosed in any manner to any
160 individual who is not directly involved in the scientific studies; or

161 (ii) when the information is requested by the Department of Health in relation to a
162 person or provider whom the Department of Health suspects may be improperly obtaining or
163 providing a controlled substance;

164 (d) a licensed practitioner having authority to prescribe controlled substances, to the
165 extent the information:

166 (i) (A) relates specifically to a current or prospective patient of the practitioner; and
167 (B) is sought by the practitioner for the purpose of:

168 (I) prescribing or considering prescribing any controlled substance to the current or
169 prospective patient;

170 (II) diagnosing the current or prospective patient;

171 (III) providing medical treatment or medical advice to the current or prospective
172 patient; or

173 (IV) determining whether the current or prospective patient:

174 (Aa) is attempting to fraudulently obtain a controlled substance from the practitioner;

175 or

176 (Bb) has fraudulently obtained, or attempted to fraudulently obtain, a controlled
177 substance from the practitioner;

178 (ii) (A) relates specifically to a former patient of the practitioner; and

179 (B) is sought by the practitioner for the purpose of determining whether the former
180 patient has fraudulently obtained, or has attempted to fraudulently obtain, a controlled
181 substance from the practitioner;

182 (iii) relates specifically to an individual who has access to the practitioner's Drug

183 Enforcement Administration identification number, and the practitioner suspects that the
184 individual may have used the practitioner's Drug Enforcement Administration identification
185 number to fraudulently acquire or prescribe a controlled substance;

186 (iv) relates to the practitioner's own prescribing practices, except when specifically
187 prohibited by the division by administrative rule;

188 (v) relates to the use of the controlled substance database by an employee of the
189 practitioner, described in Subsection (2)(e); or

190 (vi) relates to any use of the practitioner's Drug Enforcement Administration
191 identification number to obtain, attempt to obtain, prescribe, or attempt to prescribe, a
192 controlled substance;

193 (e) in accordance with Subsection (3)(a), an employee of a practitioner described in
194 Subsection (2)(d), for a purpose described in Subsection (2)(d)(i) or (ii), if:

195 (i) the employee is designated by the practitioner as an individual authorized to access
196 the information on behalf of the practitioner;

197 (ii) the practitioner provides written notice to the division of the identity of the
198 employee; and

199 (iii) the division:

200 (A) grants the employee access to the database; and

201 (B) provides the employee with a password that is unique to that employee to access
202 the database in order to permit the division to comply with the requirements of Subsection
203 58-37f-203(3)(b) with respect to the employee;

204 (f) a licensed pharmacist having authority to dispense a controlled substance to the
205 extent the information is sought for the purpose of:

206 (i) dispensing or considering dispensing any controlled substance; or

207 (ii) determining whether a person:

208 (A) is attempting to fraudulently obtain a controlled substance from the pharmacist; or

209 (B) has fraudulently obtained, or attempted to fraudulently obtain, a controlled
210 substance from the pharmacist;

211 (g) federal, state, and local law enforcement authorities, and state and local
212 prosecutors, engaged as a specified duty of their employment in enforcing laws:

213 (i) regulating controlled substances; [or]

- 214 (ii) investigating insurance fraud, Medicaid fraud, or Medicare fraud; or
- 215 (iii) providing information about a criminal defendant to defense counsel, upon request
- 216 during the discovery process, for the purpose of establishing a defense in a criminal case;
- 217 (h) employees of the Office of Internal Audit and Program Integrity within the
- 218 Department of Health who are engaged in their specified duty of ensuring Medicaid program
- 219 integrity under Section 26-18-2.3;
- 220 (i) a mental health therapist, if:
- 221 (i) the information relates to a patient who is:
- 222 (A) enrolled in a licensed substance abuse treatment program; and
- 223 (B) receiving treatment from, or under the direction of, the mental health therapist as
- 224 part of the patient's participation in the licensed substance abuse treatment program described
- 225 in Subsection (2)(i)(i)(A);
- 226 (ii) the information is sought for the purpose of determining whether the patient is
- 227 using a controlled substance while the patient is enrolled in the licensed substance abuse
- 228 treatment program described in Subsection (2)(i)(i)(A); and
- 229 (iii) the licensed substance abuse treatment program described in Subsection
- 230 (2)(i)(i)(A) is associated with a practitioner who:
- 231 (A) is a physician, a physician assistant, an advance practice registered nurse, or a
- 232 pharmacist; and
- 233 (B) is available to consult with the mental health therapist regarding the information
- 234 obtained by the mental health therapist, under this Subsection (2)(i), from the database;
- 235 (j) an individual who is the recipient of a controlled substance prescription entered into
- 236 the database, upon providing evidence satisfactory to the division that the individual requesting
- 237 the information is in fact the individual about whom the data entry was made;
- 238 (k) the inspector general, or a designee of the inspector general, of the Office of
- 239 Inspector General of Medicaid Services, for the purpose of fulfilling the duties described in
- 240 Title 63J, Chapter 4a, Part 2, Office Duties and Powers; and
- 241 (l) the following licensed physicians for the purpose of reviewing and offering an
- 242 opinion on an individual's request for workers' compensation benefits under Title 34A, Chapter
- 243 2, Workers' Compensation Act, or Title 34A, Chapter 3, Utah Occupational Disease Act:
- 244 (i) a member of the medical panel described in Section 34A-2-601; or

245 (ii) a physician offering a second opinion regarding treatment.

246 (3) (a) A practitioner described in Subsection (2)(d) may designate up to three
247 employees to access information from the database under Subsection (2)(e).

248 (b) The division shall make rules, in accordance with Title 63G, Chapter 3, Utah
249 Administrative Rulemaking Act, to establish background check procedures to determine
250 whether an employee designated under Subsection (2)(e)(i) should be granted access to the
251 database.

252 (c) The division shall grant an employee designated under Subsection (2)(e)(i) access
253 to the database, unless the division determines, based on a background check, that the
254 employee poses a security risk to the information contained in the database.

255 (d) The division may impose a fee, in accordance with Section 63J-1-504, on a
256 practitioner who designates an employee under Subsection (2)(e)(i), to pay for the costs
257 incurred by the division to conduct the background check and make the determination
258 described in Subsection (3)(b).

259 (4) (a) An individual who is granted access to the database based on the fact that the
260 individual is a licensed practitioner or a mental health therapist shall be denied access to the
261 database when the individual is no longer licensed.

262 (b) An individual who is granted access to the database based on the fact that the
263 individual is a designated employee of a licensed practitioner shall be denied access to the
264 database when the practitioner is no longer licensed.

Legislative Review Note
as of 2-3-12 11:29 AM

Office of Legislative Research and General Counsel