

**Senator Curtis S. Bramble** proposes the following substitute bill:

**EDUCATIONAL RECORDS PROTECTION AMENDMENTS**

2016 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Craig Hall**

Senate Sponsor: Todd Weiler

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**LONG TITLE**

**General Description:**

This bill amends provisions related to education records and other records.

**Highlighted Provisions:**

This bill:

- ▶ amends provisions related to the annual training of a records officer;
- ▶ amends provisions related to education records as defined under federal law;
- ▶ amends provisions related to the review of disputed records; and
- ▶ makes technical and conforming changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**63G-2-108**, as enacted by Laws of Utah 2012, Chapter 377

**63G-2-201**, as last amended by Laws of Utah 2013, Chapter 445

**63G-2-403**, as last amended by Laws of Utah 2015, Chapter 335

**63G-2-404**, as last amended by Laws of Utah 2015, Chapter 335



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

Section 1. Section **63G-2-108** is amended to read:

**63G-2-108. Certification of records officer.**

(1) Each records officer of a governmental entity or political subdivision shall, on an annual basis, successfully complete online training and obtain certification from state archives in accordance with Section [63A-12-110](#).

(2) A governmental entity that is subject to the Family Educational Rights and Privacy Act, 20 U.S.C. Sec. 1232g, shall require the governmental entity's records officer to successfully complete training, in addition to the training described in Subsection (1), on the provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. Sec. 1232g.

Section 2. Section **63G-2-201** is amended to read:

**63G-2-201. Right to inspect records and receive copies of records.**

(1) Every person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours, subject to Sections [63G-2-203](#) and [63G-2-204](#).

(2) A record is public unless otherwise expressly provided by statute.

(3) The following records are not public:

(a) a record that is private, controlled, or protected under Sections [63G-2-302](#), [63G-2-303](#), [63G-2-304](#), and [63G-2-305](#); and

(b) a record to which access is restricted pursuant to court rule, another state statute, federal statute, or federal regulation, including records for which access is governed or restricted as a condition of participation in a state or federal program or for receiving state or federal funds.

(4) Only a record specified in Section [63G-2-302](#), [63G-2-303](#), [63G-2-304](#), or [63G-2-305](#) may be classified private, controlled, or protected.

(5) (a) A governmental entity may not disclose a record that is private, controlled, or protected to any person except as provided in Subsection (5)(b), Subsection (5)(c), Section [63G-2-202](#), [63G-2-206](#), or [63G-2-303](#).

(b) A governmental entity may disclose a record that is private under Subsection [63G-2-302](#)(2) or protected under Section [63G-2-305](#) to persons other than those specified in

57 Section 63G-2-202 or 63G-2-206 if the head of a governmental entity, or a designee,  
58 determines that:

- 59 (i) there is no interest in restricting access to the record; or
- 60 (ii) the interests favoring access are greater than or equal to the interest favoring  
61 restriction of access.

62 (c) In addition to the disclosure under Subsection (5)(b), a governmental entity may  
63 disclose a record that is protected under Subsection 63G-2-305(51) if:

64 (i) the head of the governmental entity, or a designee, determines that the disclosure:

65 (A) is mutually beneficial to:

- 66 (I) the subject of the record;
- 67 (II) the governmental entity; and
- 68 (III) the public; and

69 (B) serves a public purpose related to:

- 70 (I) public safety; or
- 71 (II) consumer protection; and

72 (ii) the person who receives the record from the governmental entity agrees not to use  
73 or allow the use of the record for advertising or solicitation purposes.

74 (6) (a) The disclosure of a record to which access is governed or limited pursuant to  
75 court rule, another state statute, federal statute, or federal regulation, including a record for  
76 which access is governed or limited as a condition of participation in a state or federal program  
77 or for receiving state or federal funds, and including an education record as defined in the  
78 Family Educational Rights and Privacy Act, 20 U.S.C. Sec. 1232g, is governed by the specific  
79 provisions of that statute, rule, or regulation.

80 (b) This chapter applies to records described in Subsection (6)(a) insofar as this chapter  
81 is not inconsistent with the statute, rule, or regulation.

82 (7) A governmental entity shall provide a person with a certified copy of a record if:

- 83 (a) the person requesting the record has a right to inspect it;
- 84 (b) the person identifies the record with reasonable specificity; and
- 85 (c) the person pays the lawful fees.

86 (8) (a) In response to a request, a governmental entity is not required to:

- 87 (i) create a record;

- 88 (ii) compile, format, manipulate, package, summarize, or tailor information;
- 89 (iii) provide a record in a particular format, medium, or program not currently
- 90 maintained by the governmental entity;
- 91 (iv) fulfill a person's records request if the request unreasonably duplicates prior
- 92 records requests from that person; or
- 93 (v) fill a person's records request if:
- 94 (A) the record requested is accessible in the identical physical form and content in a
- 95 public publication or product produced by the governmental entity receiving the request;
- 96 (B) the governmental entity provides the person requesting the record with the public
- 97 publication or product; and
- 98 (C) the governmental entity specifies where the record can be found in the public
- 99 publication or product.
- 100 (b) Upon request, a governmental entity may provide a record in a particular form
- 101 under Subsection (8)(a)(ii) or (iii) if:
- 102 (i) the governmental entity determines it is able to do so without unreasonably
- 103 interfering with the governmental entity's duties and responsibilities; and
- 104 (ii) the requester agrees to pay the governmental entity for providing the record in the
- 105 requested form in accordance with Section [63G-2-203](#).
- 106 (9) (a) A governmental entity may allow a person requesting more than 50 pages of
- 107 records to copy the records if:
- 108 (i) the records are contained in files that do not contain records that are exempt from
- 109 disclosure, or the records may be segregated to remove private, protected, or controlled
- 110 information from disclosure; and
- 111 (ii) the governmental entity provides reasonable safeguards to protect the public from
- 112 the potential for loss of a public record.
- 113 (b) When the requirements of Subsection (9)(a) are met, the governmental entity may:
- 114 (i) provide the requester with the facilities for copying the requested records and
- 115 require that the requester make the copies; or
- 116 (ii) allow the requester to provide the requester's own copying facilities and personnel
- 117 to make the copies at the governmental entity's offices and waive the fees for copying the
- 118 records.

119 (10) (a) A governmental entity that owns an intellectual property right and that offers  
120 the intellectual property right for sale or license may control by ordinance or policy the  
121 duplication and distribution of the material based on terms the governmental entity considers to  
122 be in the public interest.

123 (b) Nothing in this chapter shall be construed to limit or impair the rights or protections  
124 granted to the governmental entity under federal copyright or patent law as a result of its  
125 ownership of the intellectual property right.

126 (11) A governmental entity may not use the physical form, electronic or otherwise, in  
127 which a record is stored to deny, or unreasonably hinder the rights of a person to inspect and  
128 receive a copy of a record under this chapter.

129 (12) Subject to the requirements of Subsection (8), a governmental entity shall provide  
130 access to an electronic copy of a record in lieu of providing access to its paper equivalent if:

131 (a) the person making the request requests or states a preference for an electronic copy;

132 (b) the governmental entity currently maintains the record in an electronic format that  
133 is reproducible and may be provided without reformatting or conversion; and

134 (c) the electronic copy of the record:

135 (i) does not disclose other records that are exempt from disclosure; or

136 (ii) may be segregated to protect private, protected, or controlled information from  
137 disclosure without the undue expenditure of public resources or funds.

138 Section 3. Section **63G-2-403** is amended to read:

139 **63G-2-403. Appeals to the records committee.**

140 (1) (a) A records committee appellant appeals to the records committee by filing a  
141 notice of appeal with the executive secretary of the records committee no later than 30 days  
142 after the date of issuance of the decision being appealed.

143 (b) Notwithstanding Subsection (1)(a), a requester may file a notice of appeal with the  
144 executive secretary of the records committee no later than 45 days after the day on which the  
145 record request is made if:

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

147 (ii) the chief administrative officer fails to make a decision under Section **63G-2-401**.

148 (2) The notice of appeal shall:

149 (a) contain the name, mailing address, and daytime telephone number of the records

150 committee appellant;

151 (b) be accompanied by a copy of the decision being appealed; and

152 (c) state the relief sought.

153 (3) The records committee appellant:

154 (a) shall, on the day on which the notice of appeal is filed with the records committee,  
155 serve a copy of the notice of appeal on:

156 (i) the governmental entity whose access denial is the subject of the appeal, if the  
157 records committee appellant is a requester or interested party; or

158 (ii) the requester or interested party who is a party to the local appeals board  
159 proceeding that resulted in the decision that the political subdivision is appealing to the records  
160 committee, if the records committee appellant is a political subdivision; and

161 (b) may file a short statement of facts, reasons, and legal authority in support of the  
162 appeal.

163 (4) (a) Except as provided in Subsections (4)(b) and (c), no later than seven business  
164 days after receiving a notice of appeal, the executive secretary of the records committee shall:

165 (i) schedule a hearing for the records committee to discuss the appeal at the next  
166 regularly scheduled committee meeting falling at least 16 days after the date the notice of  
167 appeal is filed but no longer than 64 calendar days after the date the notice of appeal was filed  
168 except that the records committee may schedule an expedited hearing upon application of the  
169 records committee appellant and good cause shown;

170 (ii) send a copy of the notice of hearing to the records committee appellant; and

171 (iii) send a copy of the notice of appeal, supporting statement, and a notice of hearing  
172 to:

173 (A) each member of the records committee;

174 (B) the records officer and the chief administrative officer of the governmental entity  
175 whose access denial is the subject of the appeal, if the records committee appellant is a  
176 requester or interested party;

177 (C) any person who made a business confidentiality claim under Section [63G-2-309](#) for  
178 a record that is the subject of the appeal; and

179 (D) all persons who participated in the proceedings before the governmental entity's  
180 chief administrative officer, if the appeal is of the chief administrative officer's decision

181 affirming an access denial.

182 (b) (i) The executive secretary of the records committee may decline to schedule a  
183 hearing if the record series that is the subject of the appeal has been found by the committee in  
184 a previous hearing involving the same governmental entity to be appropriately classified as  
185 private, controlled, or protected.

186 (ii) (A) If the executive secretary of the records committee declines to schedule a  
187 hearing, the executive secretary of the records committee shall send a notice to the records  
188 committee appellant indicating that the request for hearing has been denied and the reason for  
189 the denial.

190 (B) The committee shall make rules to implement this section as provided by Title  
191 63G, Chapter 3, Utah Administrative Rulemaking Act.

192 (c) The executive secretary of the records committee may schedule a hearing on an  
193 appeal to the records committee at a regularly scheduled records committee meeting that is  
194 later than the period described in Subsection (4)(a)(i) if that records committee meeting is the  
195 first regularly scheduled records committee meeting at which there are fewer than 10 appeals  
196 scheduled to be heard.

197 (5) (a) No later than five business days before the hearing, a governmental entity shall  
198 submit to the executive secretary of the records committee a written statement of facts, reasons,  
199 and legal authority in support of the governmental entity's position.

200 (b) The governmental entity shall send a copy of the written statement by first class  
201 mail, postage prepaid, to the requester or interested party involved in the appeal. The executive  
202 secretary shall forward a copy of the written statement to each member of the records  
203 committee.

204 (6) (a) No later than 10 business days after the notice of appeal is sent by the executive  
205 secretary, a person whose legal interests may be substantially affected by the proceeding may  
206 file a request for intervention before the records committee.

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

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

211 (7) The records committee shall hold a hearing within the period of time described in

212 Subsection (4).

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

216 (9) (a) (i) The records committee:

217 (A) may review the disputed records; and

218 (B) shall review the disputed records, if the committee is weighing the various interests  
219 under Subsection (11).

220 (ii) A review of the disputed records under Subsection (9)(a)(i) shall be in camera.

221 (iii) When submitting the disputed records for in camera review, a governmental entity  
222 claiming that a disputed record is subject to Subsection 63G-2-201(6) shall clearly label the  
223 disputed record with the statement: "This record is believed to be subject to Subsection  
224 63G-2-201(6)."

225 (iv) When submitting the disputed records for in camera review, a governmental entity  
226 that is subject to the Family Educational Rights and Privacy Act, 20 U.S.C. Sec. 1232g, that  
227 claims that a disputed record is an education record subject to the Family Educational Rights  
228 and Privacy Act, 20 U.S.C. Sec. 1232g, shall clearly label the disputed record with the  
229 statement: "This record is believed to be an education record subject to the Family Educational  
230 Rights and Privacy Act."

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

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

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

239 (c) (i) The records committee's review shall be de novo, if the appeal is an appeal from  
240 a decision of a chief administrative officer:

241 (A) issued under Section 63G-2-401; or

242 (B) issued by a chief administrative officer of a political subdivision that has not



243 established a local appeals board.

244 (ii) For an appeal from a decision of a local appeals board, the records committee shall  
245 review and consider the decision of the local appeals board.

246 (11) (a) No later than seven business days after the hearing, the records committee shall  
247 issue a signed order:

248 (i) granting the relief sought, in whole or in part; or

249 (ii) upholding the governmental entity's access denial, in whole or in part.

250 (b) Except as provided in Section [63G-2-406](#), the records committee may, upon  
251 consideration and weighing of the various interests and public policies pertinent to the  
252 classification and disclosure or nondisclosure, order the disclosure of information properly  
253 classified as private, controlled, or protected if the public interest favoring access is greater  
254 than or equal to the interest favoring restriction of access.

255 (c) In making a determination under Subsection (11)(b), the records committee shall  
256 consider and, where appropriate, limit the requester's or interested party's use and further  
257 disclosure of the record in order to protect:

258 (i) privacy interests in the case of a private or controlled record;

259 (ii) business confidentiality interests in the case of a record protected under Subsection  
260 [63G-2-305](#)(1), (2), (40)(a)(ii), or (40)(a)(vi); and

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

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

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

266 (b) a description of the record or portions of the record to which access was ordered or  
267 denied, if the description does not disclose private, controlled, or protected information or  
268 information exempt from disclosure under Subsection [63G-2-201](#)(3)(b);

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

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

274 (13) If the records committee fails to issue a decision within 73 calendar days of the  
275 filing of the notice of appeal, that failure is the equivalent of an order denying the appeal. A  
276 records committee appellant shall notify the records committee in writing if the records  
277 committee appellant considers the appeal denied.

278 (14) A party to a proceeding before the records committee may seek judicial review in  
279 district court of a records committee order by filing a petition for review of the records  
280 committee order as provided in Section 63G-2-404.

281 (15) (a) Unless a notice of intent to appeal is filed under Subsection (15)(b), each party  
282 to the proceeding shall comply with the order of the records committee.

283 (b) If a party disagrees with the order of the records committee, that party may file a  
284 notice of intent to appeal the order of the records committee.

285 (c) If the records committee orders the governmental entity to produce a record and no  
286 appeal is filed, or if, as a result of the appeal, the governmental entity is required to produce a  
287 record, the governmental entity shall:

288 (i) produce the record; and

289 (ii) file a notice of compliance with the records committee.

290 (d) (i) If the governmental entity that is ordered to produce a record fails to file a notice  
291 of compliance or a notice of intent to appeal, the records committee may do either or both of  
292 the following:

293 (A) impose a civil penalty of up to \$500 for each day of continuing noncompliance; or

294 (B) send written notice of the governmental entity's noncompliance to:

295 (I) the governor for executive branch entities;

296 (II) the Legislative Management Committee for legislative branch entities; and

297 (III) the Judicial Council for judicial branch agencies entities.

298 (ii) In imposing a civil penalty, the records committee shall consider the gravity and  
299 circumstances of the violation, including whether the failure to comply was due to neglect or  
300 was willful or intentional.

301 Section 4. Section 63G-2-404 is amended to read:

302 **63G-2-404. Judicial review.**

303 (1) (a) A petition for judicial review of an order or decision, as allowed under this part  
304 or in Subsection 63G-2-701(6)(a)(ii), shall be filed no later than 30 days after the date of the

305 order or decision.

306 (b) The records committee is a necessary party to a petition for judicial review of a  
307 records committee order.

308 (c) The executive secretary of the records committee shall be served with notice of a  
309 petition for judicial review of a records committee order, in accordance with the Utah Rules of  
310 Civil Procedure.

311 (2) A petition for judicial review is a complaint governed by the Utah Rules of Civil  
312 Procedure and shall contain:

313 (a) the petitioner's name and mailing address;

314 (b) a copy of the records committee order from which the appeal is taken, if the  
315 petitioner is seeking judicial review of an order of the records committee;

316 (c) the name and mailing address of the governmental entity that issued the initial  
317 determination with a copy of that determination;

318 (d) a request for relief specifying the type and extent of relief requested; and

319 (e) a statement of the reasons why the petitioner is entitled to relief.

320 (3) If the appeal is based on the denial of access to a protected record based on a claim  
321 of business confidentiality, the court shall allow the claimant of business confidentiality to  
322 provide to the court the reasons for the claim of business confidentiality.

323 (4) All additional pleadings and proceedings in the district court are governed by the  
324 Utah Rules of Civil Procedure.

325 (5) (a) The district court may review the disputed records.

326 (b) The review of the disputed records shall be in camera.

327 (c) When submitting the disputed records for in camera review, a governmental entity  
328 claiming that a disputed record is subject to Subsection 63G-2-201(6) shall clearly label the  
329 disputed record with the statement: "This record is believed to be subject to Subsection  
330 63G-2-201(6)."

331 (d) When submitting the disputed records for in camera review, a governmental entity  
332 that is subject to the Family Educational Rights and Privacy Act, 20 U.S.C. Sec. 1232g, that  
333 claims that a disputed record is an education record subject to the Family Educational Rights  
334 and Privacy Act, 20 U.S.C. Sec. 1232g, shall clearly label the disputed record with the  
335 statement: "This record is believed to be an education record subject to the Family Educational

336 Rights and Privacy Act."

337 (6) The court shall:

338 (a) make its decision de novo, but, for a petition seeking judicial review of a records  
339 committee order, allow introduction of evidence presented to the records committee;

340 (b) determine all questions of fact and law without a jury; and

341 (c) decide the issue at the earliest practical opportunity.

342 (7) (a) Except as provided in Section 63G-2-406, the court may, upon consideration  
343 and weighing of the various interests and public policies pertinent to the classification and  
344 disclosure or nondisclosure, order the disclosure of information properly classified as private,  
345 controlled, or protected if the interest favoring access is greater than or equal to the interest  
346 favoring restriction of access.

347 (b) The court shall consider and, where appropriate, limit the requester's use and  
348 further disclosure of the record in order to protect privacy interests in the case of private or  
349 controlled records, business confidentiality interests in the case of records protected under  
350 Subsections 63G-2-305(1) and (2), and privacy interests or the public interest in the case of  
351 other protected records.