

JUDICIAL PERFORMANCE EVALUATION COMMISSION

MODIFICATIONS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd Weiler

House Sponsor: Mike K. McKell

LONG TITLE

General Description:

This bill modifies provisions related to judicial performance.

Highlighted Provisions:

This bill:

- ▶ addresses appointments to the commission;
- ▶ requires a certain number of members to vote on recommendations to retain or not retain a judge;
- ▶ amends provisions related to judicial performance evaluations;
- ▶ addresses judicial performance surveys; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

63G-2-305, as last amended by Laws of Utah 2015, Chapters 147, 283, and 411

78A-12-201, as enacted by Laws of Utah 2008, Chapter 248

78A-12-203, as last amended by Laws of Utah 2013, Chapter 209

78A-12-204, as last amended by Laws of Utah 2011, Chapter 80

29 **78A-12-206**, as last amended by Laws of Utah 2011, Chapter 80

30
31 *Be it enacted by the Legislature of the state of Utah:*

32 Section 1. Section **63G-2-305** is amended to read:

33 **63G-2-305. Protected records.**

34 The following records are protected if properly classified by a governmental entity:

35 (1) trade secrets as defined in Section **13-24-2** if the person submitting the trade secret
36 has provided the governmental entity with the information specified in Section **63G-2-309**;

37 (2) commercial information or nonindividual financial information obtained from a
38 person if:

39 (a) disclosure of the information could reasonably be expected to result in unfair
40 competitive injury to the person submitting the information or would impair the ability of the
41 governmental entity to obtain necessary information in the future;

42 (b) the person submitting the information has a greater interest in prohibiting access
43 than the public in obtaining access; and

44 (c) the person submitting the information has provided the governmental entity with
45 the information specified in Section **63G-2-309**;

46 (3) commercial or financial information acquired or prepared by a governmental entity
47 to the extent that disclosure would lead to financial speculations in currencies, securities, or
48 commodities that will interfere with a planned transaction by the governmental entity or cause
49 substantial financial injury to the governmental entity or state economy;

50 (4) records, the disclosure of which could cause commercial injury to, or confer a
51 competitive advantage upon a potential or actual competitor of, a commercial project entity as
52 defined in Subsection **11-13-103(4)**;

53 (5) test questions and answers to be used in future license, certification, registration,
54 employment, or academic examinations;

55 (6) records, the disclosure of which would impair governmental procurement

proceedings or give an unfair advantage to any person proposing to enter into a contract or agreement with a governmental entity, except, subject to Subsections (1) and (2), that this Subsection (6) does not restrict the right of a person to have access to, after the contract or grant has been awarded and signed by all parties, a bid, proposal, application, or other information submitted to or by a governmental entity in response to:

- (a) an invitation for bids;
- (b) a request for proposals;
- (c) a request for quotes;
- (d) a grant; or
- (e) other similar document;

(7) information submitted to or by a governmental entity in response to a request for information, except, subject to Subsections (1) and (2), that this Subsection (7) does not restrict the right of a person to have access to the information, after:

- (a) a contract directly relating to the subject of the request for information has been awarded and signed by all parties; or
- (b) (i) a final determination is made not to enter into a contract that relates to the subject of the request for information; and
- (ii) at least two years have passed after the day on which the request for information is issued;

(8) records that would identify real property or the appraisal or estimated value of real or personal property, including intellectual property, under consideration for public acquisition before any rights to the property are acquired unless:

- (a) public interest in obtaining access to the information is greater than or equal to the governmental entity's need to acquire the property on the best terms possible;
- (b) the information has already been disclosed to persons not employed by or under a duty of confidentiality to the entity;
- (c) in the case of records that would identify property, potential sellers of the described

property have already learned of the governmental entity's plans to acquire the property;

(d) in the case of records that would identify the appraisal or estimated value of property, the potential sellers have already learned of the governmental entity's estimated value of the property; or

(e) the property under consideration for public acquisition is a single family residence and the governmental entity seeking to acquire the property has initiated negotiations to acquire the property as required under Section 78B-6-505;

(9) records prepared in contemplation of sale, exchange, lease, rental, or other compensated transaction of real or personal property including intellectual property, which, if disclosed prior to completion of the transaction, would reveal the appraisal or estimated value of the subject property, unless:

(a) the public interest in access is greater than or equal to the interests in restricting access, including the governmental entity's interest in maximizing the financial benefit of the transaction; or

(b) when prepared by or on behalf of a governmental entity, appraisals or estimates of the value of the subject property have already been disclosed to persons not employed by or under a duty of confidentiality to the entity;

(10) records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records:

(a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;

(b) reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings;

(c) would create a danger of depriving a person of a right to a fair trial or impartial hearing;

(d) reasonably could be expected to disclose the identity of a source who is not

generally known outside of government and, in the case of a record compiled in the course of an investigation, disclose information furnished by a source not generally known outside of government if disclosure would compromise the source; or

(e) reasonably could be expected to disclose investigative or audit techniques, procedures, policies, or orders not generally known outside of government if disclosure would interfere with enforcement or audit efforts;

(11) records the disclosure of which would jeopardize the life or safety of an individual;

(12) records the disclosure of which would jeopardize the security of governmental property, governmental programs, or governmental recordkeeping systems from damage, theft, or other appropriation or use contrary to law or public policy;

(13) records that, if disclosed, would jeopardize the security or safety of a correctional facility, or records relating to incarceration, treatment, probation, or parole, that would interfere with the control and supervision of an offender's incarceration, treatment, probation, or parole;

(14) records that, if disclosed, would reveal recommendations made to the Board of Pardons and Parole by an employee of or contractor for the Department of Corrections, the Board of Pardons and Parole, or the Department of Human Services that are based on the employee's or contractor's supervision, diagnosis, or treatment of any person within the board's jurisdiction;

(15) records and audit workpapers that identify audit, collection, and operational procedures and methods used by the State Tax Commission, if disclosure would interfere with audits or collections;

(16) records of a governmental audit agency relating to an ongoing or planned audit until the final audit is released;

(17) records that are subject to the attorney client privilege;

(18) records prepared for or by an attorney, consultant, surety, indemnitor, insurer, employee, or agent of a governmental entity for, or in anticipation of, litigation or a judicial,

quasi-judicial, or administrative proceeding;

(19) (a) (i) personal files of a state legislator, including personal correspondence to or from a member of the Legislature; and

(ii) notwithstanding Subsection (19)(a)(i), correspondence that gives notice of legislative action or policy may not be classified as protected under this section; and

(b) (i) an internal communication that is part of the deliberative process in connection with the preparation of legislation between:

(A) members of a legislative body;

(B) a member of a legislative body and a member of the legislative body's staff; or

(C) members of a legislative body's staff; and

(ii) notwithstanding Subsection (19)(b)(i), a communication that gives notice of legislative action or policy may not be classified as protected under this section;

(20) (a) records in the custody or control of the Office of Legislative Research and General Counsel, that, if disclosed, would reveal a particular legislator's contemplated legislation or contemplated course of action before the legislator has elected to support the legislation or course of action, or made the legislation or course of action public; and

(b) notwithstanding Subsection (20)(a), the form to request legislation submitted to the Office of Legislative Research and General Counsel is a public document unless a legislator asks that the records requesting the legislation be maintained as protected records until such time as the legislator elects to make the legislation or course of action public;

(21) research requests from legislators to the Office of Legislative Research and General Counsel or the Office of the Legislative Fiscal Analyst and research findings prepared in response to these requests;

(22) drafts, unless otherwise classified as public;

(23) records concerning a governmental entity's strategy about:

(a) collective bargaining; or

(b) imminent or pending litigation;

164 (24) records of investigations of loss occurrences and analyses of loss occurrences that
165 may be covered by the Risk Management Fund, the Employers' Reinsurance Fund, the
166 Uninsured Employers' Fund, or similar divisions in other governmental entities;

167 (25) records, other than personnel evaluations, that contain a personal recommendation
168 concerning an individual if disclosure would constitute a clearly unwarranted invasion of
169 personal privacy, or disclosure is not in the public interest;

170 (26) records that reveal the location of historic, prehistoric, paleontological, or
171 biological resources that if known would jeopardize the security of those resources or of
172 valuable historic, scientific, educational, or cultural information;

173 (27) records of independent state agencies if the disclosure of the records would
174 conflict with the fiduciary obligations of the agency;

175 (28) records of an institution within the state system of higher education defined in
176 Section 53B-1-102 regarding tenure evaluations, appointments, applications for admissions,
177 retention decisions, and promotions, which could be properly discussed in a meeting closed in
178 accordance with Title 52, Chapter 4, Open and Public Meetings Act, provided that records of
179 the final decisions about tenure, appointments, retention, promotions, or those students
180 admitted, may not be classified as protected under this section;

181 (29) records of the governor's office, including budget recommendations, legislative
182 proposals, and policy statements, that if disclosed would reveal the governor's contemplated
183 policies or contemplated courses of action before the governor has implemented or rejected
184 those policies or courses of action or made them public;

185 (30) records of the Office of the Legislative Fiscal Analyst relating to budget analysis,
186 revenue estimates, and fiscal notes of proposed legislation before issuance of the final
187 recommendations in these areas;

188 (31) records provided by the United States or by a government entity outside the state
189 that are given to the governmental entity with a requirement that they be managed as protected
190 records if the providing entity certifies that the record would not be subject to public disclosure

191 if retained by it;

192 (32) transcripts, minutes, or reports of the closed portion of a meeting of a public body
193 except as provided in Section 52-4-206;

194 (33) records that would reveal the contents of settlement negotiations but not including
195 final settlements or empirical data to the extent that they are not otherwise exempt from
196 disclosure;

197 (34) memoranda prepared by staff and used in the decision-making process by an
198 administrative law judge, a member of the Board of Pardons and Parole, or a member of any
199 other body charged by law with performing a quasi-judicial function;

200 (35) records that would reveal negotiations regarding assistance or incentives offered
201 by or requested from a governmental entity for the purpose of encouraging a person to expand
202 or locate a business in Utah, but only if disclosure would result in actual economic harm to the
203 person or place the governmental entity at a competitive disadvantage, but this section may not
204 be used to restrict access to a record evidencing a final contract;

205 (36) materials to which access must be limited for purposes of securing or maintaining
206 the governmental entity's proprietary protection of intellectual property rights including patents,
207 copyrights, and trade secrets;

208 (37) the name of a donor or a prospective donor to a governmental entity, including an
209 institution within the state system of higher education defined in Section 53B-1-102, and other
210 information concerning the donation that could reasonably be expected to reveal the identity of
211 the donor, provided that:

212 (a) the donor requests anonymity in writing;

213 (b) any terms, conditions, restrictions, or privileges relating to the donation may not be
214 classified protected by the governmental entity under this Subsection (37); and

215 (c) except for an institution within the state system of higher education defined in
216 Section 53B-1-102, the governmental unit to which the donation is made is primarily engaged
217 in educational, charitable, or artistic endeavors, and has no regulatory or legislative authority

over the donor, a member of the donor's immediate family, or any entity owned or controlled by the donor or the donor's immediate family;

(38) accident reports, except as provided in Sections 41-6a-404, 41-12a-202, and 73-18-13;

(39) a notification of workers' compensation insurance coverage described in Section 34A-2-205;

(40) (a) the following records of an institution within the state system of higher education defined in Section 53B-1-102, which have been developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution:

(i) unpublished lecture notes;

(ii) unpublished notes, data, and information:

(A) relating to research; and

(B) of:

(I) the institution within the state system of higher education defined in Section 53B-1-102; or

(II) a sponsor of sponsored research;

(iii) unpublished manuscripts;

(iv) creative works in process;

(v) scholarly correspondence; and

(vi) confidential information contained in research proposals;

(b) Subsection (40)(a) may not be construed to prohibit disclosure of public information required pursuant to Subsection 53B-16-302(2)(a) or (b); and

(c) Subsection (40)(a) may not be construed to affect the ownership of a record;

(41) (a) records in the custody or control of the Office of Legislative Auditor General that would reveal the name of a particular legislator who requests a legislative audit prior to the date that audit is completed and made public; and

(b) notwithstanding Subsection (41)(a), a request for a legislative audit submitted to the

Office of the Legislative Auditor General is a public document unless the legislator asks that the records in the custody or control of the Office of Legislative Auditor General that would reveal the name of a particular legislator who requests a legislative audit be maintained as protected records until the audit is completed and made public;

(42) records that provide detail as to the location of an explosive, including a map or other document that indicates the location of:

(a) a production facility; or

(b) a magazine;

(43) information:

(a) contained in the statewide database of the Division of Aging and Adult Services created by Section 62A-3-311.1; or

(b) received or maintained in relation to the Identity Theft Reporting Information System (IRIS) established under Section 67-5-22;

(44) information contained in the Management Information System and Licensing Information System described in Title 62A, Chapter 4a, Child and Family Services;

(45) information regarding National Guard operations or activities in support of the National Guard's federal mission;

(46) records provided by any pawn or secondhand business to a law enforcement agency or to the central database in compliance with Title 13, Chapter 32a, Pawnshop and Secondhand Merchandise Transaction Information Act;

(47) information regarding food security, risk, and vulnerability assessments performed by the Department of Agriculture and Food;

(48) except to the extent that the record is exempt from this chapter pursuant to Section 63G-2-106, records related to an emergency plan or program, a copy of which is provided to or prepared or maintained by the Division of Emergency Management, and the disclosure of which would jeopardize:

(a) the safety of the general public; or

(b) the security of:

(i) governmental property;

(ii) governmental programs; or

(iii) the property of a private person who provides the Division of Emergency

Management information;

(49) records of the Department of Agriculture and Food that provides for the identification, tracing, or control of livestock diseases, including any program established under Title 4, Chapter 24, Utah Livestock Brand and Anti-Theft Act or Title 4, Chapter 31, Control of Animal Disease;

(50) as provided in Section 26-39-501:

(a) information or records held by the Department of Health related to a complaint regarding a child care program or residential child care which the department is unable to substantiate; and

(b) information or records related to a complaint received by the Department of Health from an anonymous complainant regarding a child care program or residential child care;

(51) unless otherwise classified as public under Section 63G-2-301 and except as provided under Section 41-1a-116, an individual's home address, home telephone number, or personal mobile phone number, if:

(a) the individual is required to provide the information in order to comply with a law, ordinance, rule, or order of a government entity; and

(b) the subject of the record has a reasonable expectation that this information will be kept confidential due to:

(i) the nature of the law, ordinance, rule, or order; and

(ii) the individual complying with the law, ordinance, rule, or order;

(52) the name, home address, work addresses, and telephone numbers of an individual that is engaged in, or that provides goods or services for, medical or scientific research that is:

(a) conducted within the state system of higher education, as defined in Section

299 [53B-1-102](#); and
300 (b) conducted using animals;
301 (53) an initial proposal under Title 63N, Chapter 13, Part 2, Government Procurement
302 Private Proposal Program, to the extent not made public by rules made under that chapter;
303 (54) in accordance with Section [78A-12-203](#), any record of the Judicial Performance
304 Evaluation Commission concerning an individual commissioner's vote on whether or not to
305 recommend that the voters retain a judge including information disclosed under Subsection
306 [78A-12-203\(5\)\(e\)](#);
307 (55) information collected and a report prepared by the Judicial Performance
308 Evaluation Commission concerning a judge, unless Section [20A-7-702](#) or Title 78A, Chapter
309 12, Judicial Performance Evaluation Commission Act, requires disclosure of, or makes public,
310 the information or report;
311 (56) records contained in the Management Information System created in Section
312 [62A-4a-1003](#);
313 (57) records provided or received by the Public Lands Policy Coordinating Office in
314 furtherance of any contract or other agreement made in accordance with Section [63J-4-603](#);
315 (58) information requested by and provided to the 911 Division under Section
316 [63H-7a-302](#);
317 (59) in accordance with Section [73-10-33](#):
318 (a) a management plan for a water conveyance facility in the possession of the Division
319 of Water Resources or the Board of Water Resources; or
320 (b) an outline of an emergency response plan in possession of the state or a county or
321 municipality;
322 (60) the following records in the custody or control of the Office of Inspector General
323 of Medicaid Services, created in Section [63A-13-201](#):
324 (a) records that would disclose information relating to allegations of personal
325 misconduct, gross mismanagement, or illegal activity of a person if the information or

allegation cannot be corroborated by the Office of Inspector General of Medicaid Services through other documents or evidence, and the records relating to the allegation are not relied upon by the Office of Inspector General of Medicaid Services in preparing a final investigation report or final audit report;

(b) records and audit workpapers to the extent they would disclose the identity of a person who, during the course of an investigation or audit, communicated the existence of any Medicaid fraud, waste, or abuse, or a violation or suspected violation of a law, rule, or regulation adopted under the laws of this state, a political subdivision of the state, or any recognized entity of the United States, if the information was disclosed on the condition that the identity of the person be protected;

(c) before the time that an investigation or audit is completed and the final investigation or final audit report is released, records or drafts circulated to a person who is not an employee or head of a governmental entity for the person's response or information;

(d) records that would disclose an outline or part of any investigation, audit survey plan, or audit program; or

(e) requests for an investigation or audit, if disclosure would risk circumvention of an investigation or audit;

(61) records that reveal methods used by the Office of Inspector General of Medicaid Services, the fraud unit, or the Department of Health, to discover Medicaid fraud, waste, or abuse;

(62) information provided to the Department of Health or the Division of Occupational and Professional Licensing under Subsection 58-68-304(3) or (4);

(63) a record described in Section 63G-12-210;

(64) captured plate data that is obtained through an automatic license plate reader system used by a governmental entity as authorized in Section 41-6a-2003; and

(65) any record in the custody of the Utah Office for Victims of Crime relating to a victim, including:

(a) a victim's application or request for benefits;
(b) a victim's receipt or denial of benefits; and
(c) any administrative notes or records made or created for the purpose of, or used to, evaluate or communicate a victim's eligibility for or denial of benefits from the Crime Victim Reparations Fund.

Section 2. Section **78A-12-201** is amended to read:

**78A-12-201. Judicial Performance Evaluation Commission -- Creation --
Membership.**

(1) There is created an independent commission called the Judicial Performance Evaluation Commission consisting of 13 members, as follows:

(a) two members appointed by the president of the Senate, only one of whom may be a member of the Utah State Bar;

(b) two members appointed by the speaker of the House of Representatives, only one of whom may be a member of the Utah State Bar;

(c) four members appointed by the members of the Supreme Court, at least one of whom, but not more than two of whom, may be a member of the Utah State Bar;

(d) four members appointed by the governor, at least one of whom, but not more than two of whom, may be a member of the Utah State Bar; and

(e) the executive director of the Commission on Criminal and Juvenile Justice.

(2) (a) The president of the Senate and the speaker of the House of Representatives shall confer when appointing members under Subsections (1)(a) and (b) to ensure that there is at least one member from among their four appointees who is a member of the Utah State Bar.

(b) Each of the appointing authorities may appoint no more than half of the appointing authority's members from the same political party.

(c) A sitting legislator or a sitting judge may not serve as a commission member.

(3) (a) A member appointed under Subsection (1) shall be appointed for a four-year term.

(b) A member may serve no more than three consecutive terms.

(4) At the time of appointment, the terms of commission members shall be staggered so that approximately half of commission members' terms expire every two years.

(5) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term by the same appointing authority that appointed the member creating the vacancy.

(6) (a) Eight members of the commission constitute a quorum.

(b) The action of a majority of the quorum constitutes the action of the commission, except that a decision of the commission to recommend that a judge be retained or not be retained may not be made except by a vote of at least six members. If because of absences the commission is unable to have at least six votes recommending that a judge be retained or not retained, the commission may meet a second time to consider whether to recommend that the judge be retained or not retained.

(c) If a vote on the question of whether to recommend a judge be retained or not be retained ends in a tie or if a decision does not have six votes required by Subsection (6)(b), the commission may make no recommendation concerning the judge's retention.

Section 3. Section **78A-12-203** is amended to read:

78A-12-203. Judicial performance evaluations.

(1) Beginning with the 2012 judicial retention elections, the commission shall prepare a performance evaluation for:

(a) each judge in the third and fifth year of the judge's term if the judge is not a justice of the Supreme Court; and

(b) each justice of the Supreme Court in the third, seventh, and ninth year of the justice's term.

(2) Except as provided in Subsection (3), the performance evaluation for a judge under Subsection (1) shall consider only the following information but shall give primary emphasis to the information that is gathered and relates to the performance of the judge during the period

subsequent to the last judicial retention election of that judge or if the judge has not had a judicial retention election, during the period applicable to the first judicial retention election:

(a) the results of the judge's most recent judicial performance survey that is conducted by a third party in accordance with Section 78A-12-204;

(b) information concerning the judge's compliance with minimum performance standards established in accordance with Section 78A-12-205;

(c) courtroom observation;

(d) the judge's judicial disciplinary record, if any;

(e) public comment solicited by the commission;

(f) information from an earlier judicial performance evaluation concerning the judge except that the commission shall give primary emphasis to information gathered subsequent to the last judicial retention election; and

(g) any other factor that the commission:

(i) considers relevant to evaluating the judge's performance for the purpose of a retention election; and

(ii) establishes by rule.

(3) The commission shall make rules concerning the conduct of courtroom observation under Subsection (2), which shall include the following:

(a) an indication of who may perform the courtroom observation;

(b) a determination of whether the courtroom observation shall be made in person or may be made by electronic means; and

(c) a list of principles and standards used to evaluate the behavior observed.

(4) (a) As part of the evaluation conducted under this section, the commission shall determine whether to recommend that the voters retain the judge.

(b) (i) If a judge meets the minimum performance standards established in accordance with Section 78A-12-205, there is a rebuttable presumption that the commission will recommend the voters retain the judge.

(ii) If a judge fails to meet the minimum performance standards established in accordance with Section 78A-12-205, there is a rebuttable presumption that the commission will recommend the voters not retain the judge.

(c) The commission may elect to make no recommendation on whether the voters should retain a judge if the commission determines that the information concerning the judge is insufficient to make a recommendation.

(d) (i) If the commission deviates from a presumption for or against recommending the voters retain a judge or elects to make no recommendation on whether the voters should retain a judge, the commission shall provide a detailed explanation of the reason for that deviation or election in the commission's report under Section 78A-12-206.

(ii) If the commission makes no recommendation because of a tie vote, the commission shall note that fact in the commission's report.

(5) (a) The commission shall allow a judge who is the subject of a judicial performance retention evaluation and who has not passed one or more of the minimum performance standards on the midterm evaluation or on the retention evaluation to appear and speak at any commission meeting, except a closed meeting, during which the judge's judicial performance evaluation is considered.

(b) The commission may invite any judge to appear before the commission to discuss concerns about the judge's judicial performance.

(c) (i) The commission may meet in a closed meeting to discuss a judge's judicial performance evaluation by complying with Title 52, Chapter 4, Open and Public Meetings Act.

(ii) The commission may meet in an electronic meeting by complying with Title 52, Chapter 4, Open and Public Meetings Act.

(d) Any record of an individual commissioner's vote on whether or not to recommend that the voters retain a judge is a protected record under Title 63G, Chapter 2, Government Records Access and Management Act.

(e) (i) A member of the commission, including a member of the Utah State Bar, may

not be disqualified from voting on whether to recommend that the voters retain a judge solely because the member appears before the judge as an attorney, a fact witness, or an expert, so long as the member is not a litigant in a case pending before the judge.

(ii) Notwithstanding Subsection (5)(e)(i), a member of the commission shall disclose any conflicts of interest with the judge being reviewed to the other members of the commission before the deliberation and vote of whether to recommend that a judge be retained or not be retained.

(iii) Information disclosed under this Subsection (5)(e) is a protected record under Title 63G, Chapter 2, Government Records Access and Management Act.

~~[(e)]~~ (f) The commission may only disclose the final commission vote on whether or not to recommend that the voters retain a judge.

(6) (a) The commission shall compile a midterm report of its judicial performance evaluation of a judge.

(b) The midterm report of a judicial performance evaluation shall include information that the commission considers appropriate for purposes of judicial self-improvement.

(c) The report shall be provided to the evaluated judge ~~[and]~~, the presiding judge of the district in which the evaluated judge serves, and the Judicial Council. If the evaluated judge is the presiding judge, the midterm report shall be provided to the chair of the board of judges for the court level on which the evaluated judge serves.

(d) (i) The commission may provide a partial midterm evaluation to a judge whose appointment date precludes the collection of complete midterm evaluation data.

(ii) For a newly appointed judge, a midterm evaluation is considered partial when the midterm evaluation is missing a respondent group, including attorneys, court staff, court room observers, or intercept survey respondents.

(iii) A judge who receives partial midterm evaluation data may receive a statement in acknowledgment of that fact on the judge's voter information pamphlet page.

(iv) On or before the beginning of the retention evaluation cycle, the commission shall

inform the Judicial Council of the name of any judge who receives a partial midterm evaluation.

(7) The commission shall identify a judge whose midterm evaluation:

(a) fails to meet minimum performance standards in accordance with Section 78A-12-205 or as established by rule; or

(b) otherwise demonstrates to the commission that the judge's performance would be of such concern if the performance occurred in a retention evaluation that the judge would be invited to appear before the commission in accordance with Subsection (5)(b).

~~[(7)]~~ (8) The commission may make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, as necessary to administer the evaluation required by this section.

Section 4. Section 78A-12-204 is amended to read:

78A-12-204. Judicial performance survey.

(1) The judicial performance survey required by Section 78A-12-203 concerning a judge who is subject to a retention election shall be conducted on an ongoing basis during the judge's term in office by a third party under contract to the commission.

(2) (a) The judicial performance survey shall include as respondents a sample of each of the following groups as applicable:

~~[(a)]~~ (i) attorneys who have appeared before the judge as counsel;

~~[(b)]~~ (ii) jurors who have served in a case before the judge; and

~~[(c)]~~ (iii) court staff who have worked with the judge.

(b) Only a respondent under Subsection (2)(a)(i) who is admitted to practice law in the state and in good standing with the Utah State Bar may evaluate a judge's legal ability under Subsection (7)(a).

(3) The commission may include an additional classification of respondents if the commission:

(a) considers a survey of that classification of respondents helpful to voters in

determining whether to vote to retain a judge; and

(b) establishes the additional classification of respondents by rule.

(4) All survey responses are anonymous, including comments included with a survey response.

(5) If the commission provides any information to a judge or the Judicial Council, the information shall be provided in such a way as to protect the confidentiality of a survey respondent.

(6) A survey shall be provided to a potential survey respondent within 30 days of the day on which the case in which the person appears in the judge's court is closed, exclusive of any appeal, except for court staff and attorneys, who may be surveyed at any time during the survey period.

(7) Survey categories shall include questions concerning a judge's:

(a) legal ability, including the following:

(i) demonstration of understanding of the substantive law and any relevant rules of procedure and evidence;

(ii) attentiveness to factual and legal issues before the court;

(iii) adherence to precedent and ability to clearly explain departures from precedent;

(iv) grasp of the practical impact on the parties of the judge's rulings, including the effect of delay and increased litigation expense;

(v) ability to write clear judicial opinions; and

(vi) ability to clearly explain the legal basis for judicial opinions;

(b) judicial temperament and integrity, including the following:

(i) demonstration of courtesy toward attorneys, court staff, and others in the judge's court;

(ii) maintenance of decorum in the courtroom;

(iii) demonstration of judicial demeanor and personal attributes that promote public trust and confidence in the judicial system;

- 542 (iv) preparedness for oral argument;
- 543 (v) avoidance of impropriety or the appearance of impropriety;
- 544 (vi) display of fairness and impartiality toward all parties; and
- 545 (vii) ability to clearly communicate, including the ability to explain the basis for
- 546 written rulings, court procedures, and decisions; and
- 547 (c) administrative performance, including the following:
- 548 (i) management of workload;
- 549 (ii) sharing proportionally the workload within the court or district; and
- 550 (iii) issuance of opinions and orders without unnecessary delay.
- 551 (8) If the commission determines that a certain survey question or category of
- 552 questions is not appropriate for a respondent group, the commission may omit that question or
- 553 category of questions from the survey provided to that respondent group.
- 554 (9) (a) The survey shall allow respondents to indicate responses in a manner
- 555 determined by the commission, which shall be:
- 556 (i) on a numerical scale from one to five, with one representing inadequate
- 557 performance and five representing outstanding performance; or
- 558 (ii) in the affirmative or negative, with an option to indicate the respondent's inability
- 559 to respond in the affirmative or negative.
- 560 (b) (i) To supplement the responses to questions on either a numerical scale or in the
- 561 affirmative or negative, the commission may allow respondents to provide written comments.
- 562 (ii) The executive director may not provide the commission a comment that would be
- 563 prohibited in relation to taking an employment action under federal or state law.
- 564 (10) The commission shall compile and make available to each judge that judge's
- 565 survey results with each of the judge's judicial performance evaluations.
- 566 (11) The commission may make rules in accordance with Title 63G, Chapter 3, Utah
- 567 Administrative Rulemaking Act, as necessary to administer the judicial performance survey.
- 568 Section 5. Section **78A-12-206** is amended to read:

78A-12-206. Publication of the judicial performance evaluation -- Response by judge.

(1) (a) The commission shall compile a retention report of its judicial performance evaluation of a judge.

(b) The report of a judicial performance evaluation nearest the judge's next scheduled retention election shall be provided to the judge at least 45 days before the last day on which the judge may file a declaration of the judge's candidacy in the retention election.

(c) A report prepared in accordance with Subsection (1)(b) and information obtained in connection with the evaluation becomes a public record under Title 63G, Chapter 2, Government Records Access and Management Act, on the day following the last day on which the judge who is the subject of the report may file a declaration of the judge's candidacy in the judge's scheduled retention election if the judge declares the judge's candidacy for the retention election.

(d) Information collected and a report that is not public under Subsection (1)(c) is a protected record under Title 63G, Chapter 2, Government Records Access and Management Act.

(2) Within 15 days of receiving a copy of the commission's report under Subsection (1)(b):

(a) a judge who is the subject of an unfavorable retention recommendation under this section may:

(i) provide a written response to the commission about the report; and

(ii) request an interview with the commission for the purpose of addressing the report; and

(b) a judge who is the subject of a favorable retention recommendation under this section may provide a written response to the commission about the commission's report.

(3) (a) After receiving a response from a judge in any form allowed by Subsection (2), the commission may meet and reconsider its decision to recommend the judge not be retained.

(b) If the commission does not change its decision to recommend the judge not be retained, the judge may provide a written statement, not to exceed 100 words, that shall be included in the commission's report.

(4) The retention report of a judicial performance evaluation shall include:

(a) the results of the judicial performance survey, in both raw and summary form;

(b) information concerning the judge's compliance with the minimum performance standards, including stating how many of the minimum performance standards the judge met;

(c) information concerning any public discipline that a judge has received that is not subject to restrictions on disclosure under Title 78A, Chapter 11, Judicial Conduct Commission;

(d) a narrative concerning the judge's performance;

(e) the commission's recommendation concerning whether the judge should be retained, or the statement required of the commission if it declines to make a recommendation;

(f) the number of votes for and against the commission's recommendation; and

(g) any other information the commission considers ~~[appropriate]~~ necessary to include in the report to explain the performance standards and the recommendation made.

(5) (a) The commission may not include in its retention report specific information concerning an earlier judicial performance evaluation.

(b) The commission may refer to information from an earlier judicial performance evaluation concerning the judge in the commission's report only if ~~[the reference is in general terms]~~ necessary to explain performance in the current reporting period and giving primary emphasis to the information gathered during the current reporting period.

(6) The retention report of the commission's judicial performance evaluation shall be made publicly available on an Internet website.

(7) The commission may make the report of the judicial performance evaluation immediately preceding the judge's retention election publicly available through other means within budgetary constraints.

623 (8) The commission shall provide a summary of the judicial performance evaluation
624 for each judge to the lieutenant governor for publication in the voter information pamphlet in
625 the manner required by Title 20A, Chapter 7, Issues Submitted to the Voters.

626 ~~[(9) The commission may also provide any information collected during the course of a~~
627 ~~judge's judicial performance evaluation immediately preceding the judge's retention election to~~
628 ~~the public to the extent that information is not otherwise subject to restrictions on disclosure.]~~

629 ~~[(10)]~~ (9) The commission shall provide the Judicial Council with:

630 (a) the judicial performance survey results for each judge; and

631 (b) a copy of the retention report of each judicial performance evaluation.

632 ~~[(11)]~~ (10) The Judicial Council shall provide information obtained concerning a judge
633 under Subsection ~~[(10)]~~ (9) to the subject judge's presiding judge, if any.