

# HOUSE BILL REPORT

## HB 2637

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### As Passed Legislature

**Title:** An act relating to records in a criminal case.

**Brief Description:** Concerning records in a criminal case.

**Sponsors:** By Representatives Pearson, O'Brien, Ericks, Ross and Roach; by request of Attorney General.

**Brief History:**

**Committee Activity:**

Judiciary: 1/25/08, 2/4/08 [DP].

**Floor Activity:**

Passed House: 2/13/08, 96-0.

Passed Senate: 3/5/08, 47-0.

Passed Legislature.

### Brief Summary of Bill

- Requires out-of-state recipients of Washington criminal warrants and subpoenas to produce records generally within 20 days, with limited exceptions.
- Allows a business record to be admissible without testimony of the record's custodian if the record is verified by the custodian in an affidavit, declaration, or certification.
- Provides civil and criminal immunity for compliance with a records' warrant or subpoena.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

**Staff:** Lara Zarowsky (786-7123).

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

## **Background:**

When a crime is committed in this state, witnesses or evidence related to that crime may be located outside the state. Criminal investigators, prosecutors or defense attorneys may have to employ one or more of several methods in attempting to get testimony or other evidence into the state. Warrants, summons, subpoenas, or other legal process may be issued directing an out-of-state (foreign) witness to appear in the state or a foreign entity to send or bring evidence to the state. In some instances, such legal process may be issued by a Washington court directly. In other instances, a legal process may be issued by a court in the foreign state at the request of a Washington court.

Washington has adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. This law applies reciprocally in states with similar provisions. It allows a Washington court, upon petition by either the prosecution or defense, to recommend to a foreign court that a witness be compelled to appear in a Washington grand jury proceeding or a criminal trial. While a witness is in the state under this procedure, he or she is immune from prosecution or civil or criminal process for matters that arose before his or her appearance.

Without foreign court involvement, enforcement of out-of-state orders is problematic. However, obtaining foreign court involvement may be time consuming, expensive, and difficult.

In certain kinds of criminal cases such as identity theft, it is common for relevant records to be held in a foreign state. Many entities doing business in this state may have headquarters and record-keeping facilities in another state. The foreign custodian of those records may be reluctant to comply with a Washington court's legal process for the production of such records. If the custodian is required to accompany the records in order to authenticate them, the time and expense involved may be a deterrent to cooperation.

A relevant business record is admissible in a criminal case if:

- the custodian of the record testifies to its identity and mode of preparation;
- it was made in the regular course of business at or near the time of the event in question; and
- the court determines that the record's sources, method and time of preparation justify its admission.

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## **Summary of Bill:**

Procedures are established for the production of records through search warrants, subpoenas, and any other criminal process issued by a superior court in any criminal investigation or trial.

### Applicant

A law enforcement officer, prosecutor, or defense attorney may apply to a superior court for criminal process ordering the production of records.

### Recipient

The procedures apply to records held inside or outside the state by a business that has conducted business in this state, any natural person, and where relevant, a corporation, joint stock association, or unincorporated association.

### Time to Comply

When properly served (in person or in a manner reasonably allowing for proof of delivery by the United States mail, overnight delivery service, or facsimile) the recipient of the criminal process must produce the records within 20 business days.

Compliance in less than 20 days may be required if a shorter period is indicated in the process, or if the court finds reason to suspect an adverse result, including danger to life or safety, flight from prosecution, loss of evidence, witness intimidation, jeopardy to an investigation, or undue delay.

Compliance after 20 days may be granted if a recipient requests a longer period to respond upon a showing of good cause and the court's finding that an extension would not cause an adverse result.

### Motion to Quash

A recipient's motion to quash the process must be made in the issuing court and within the time that is required for the recipient's response to the process. The court must hear and decide the motion to quash no later than five court days after the motion is filed.

### Authentication

The applicant for a criminal process may request, or the issuing court may order, that the recipient verify the authenticity of the records by providing an affidavit, declaration, or certification attesting to the following:

- that the record was made at or near the time of the event in question, or, if later, was made by a person with knowledge of the matter in question;
- that the record was made in the regular course of business; and
- that any duplicate produced is an accurate reproduction of the original.

An affidavit, declaration or certification that includes the foregoing information satisfies, without the need for testimony from the custodian of records, the requirements of RCW 5.45.020 addressing the admission of business records as evidence.

A party offering a verified record must give opposing parties sufficient notice to allow a challenge. A party may challenge the admissibility of a verified record, but only if the offering party is given sufficient notice to allow an opportunity to produce the record custodian.

### Reciprocity and Immunity

A recipient of foreign criminal process served in Washington must comply with its terms if it appears on its face to be valid criminal process.

Recipients of criminal process are granted civil and criminal immunity for complying with the process and for any failure to notify a person affected by a disclosure made by the recipient. The immunity provisions apply to foreign state recipients of Washington criminal process and Washington recipients of foreign state criminal process.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:**

(In support) This is Attorney General request legislation. In crimes like identity theft, the records relevant to the prosecutions are often out of state. Washington is a part of a uniform act to secure the presence of witnesses from out of state in a criminal proceeding. This is important because out-of-state companies are often involved.

Identity theft offenders are repeat offenders. In King County, 90 percent of those convicted had prior convictions. State wide, identity theft offenders have an offender score of 4. When given a chance they will victimize more than one citizen. Across the state, prosecutors are required to dismiss otherwise legitimate cases because it is too costly or time consuming to get the necessary out-of-state business records.

Under this bill, businesses are relieved of burden by no longer being required to appear in court to authenticate records. It impacts only businesses that have submitted themselves to Washington jurisdiction by doing business in this state. The bill sets forth guidelines by which the documents may be admitted, but courts retain authority on the ultimate question of the admissibility of the records as evidence. Defendants are given the same rights and powers as prosecutors in obtaining records necessary for their defense.

Business owners lose money by having to send employees to verify records. Organized retail theft costs \$30 billion a year, so this is a big issue. Any success this bill achieves in saving resources now going to the prosecution of identity theft offenders may free those resources up to combat retail theft.

(Opposed) None.

**Persons Testifying:** Representative Pearson, prime sponsor; Susan Storey, Law Enforcement Group Against Identity Theft, King County Prosecutors; Lisa Erwin, Washington State Attorney General's Office; Fred Jenson; and Vicki Marin, Washington Merchant's Association.

**Persons Signed In To Testify But Not Testifying:** None.