



Cory Talbot

Partner  
801.799.5971  
Salt Lake City, Phoenix  
CATalbot@hollandhart.com

# Utah Care-Review Privilege

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Utah adopted a care-review privilege “to improve medical care by allowing health-care personnel to reduce morbidity or mortality and to provide information to evaluate and improve hospital and health care.”<sup>1</sup> In January, the Utah Court of Appeals gave some helpful guidance about the application of this privilege in *Vered v. Tooele Hospital Corporation*.<sup>2</sup>

## The Care-Review Privilege Generally

Before discussing the *Vered* case, we will go over a number of general background issues regarding the scope and application of the care-review privilege.

**What is the care-review privilege?** Broadly speaking, Utah's care-review privilege “authorizes, without the risk of liability, certain private medical information to be provided to select entities for the purposes of '(a) study and advancing medical research, with the purpose of reducing the incidence of disease, morbidity, or mortality; or (b) the evaluation and improvement of hospital and health care rendered by hospitals, health facilities, or health care providers.’”<sup>3</sup>

**Who is covered by the privilege?** The privilege can apply to “[a]ny person, health facility, or other organization.”<sup>4</sup>

What type of information is covered by the privilege? The privilege covers a wide variety of information: information as determined by the state registrar of vital records; “interviews”; “reports”; “statements”; “memoranda”; “familial information”; and “other data relating to the condition and treatment of any person.”<sup>5</sup> However, courts have placed an important limitation on the care-review privilege, emphasizing that it “protects only those documents prepared specifically to be submitted for review purposes. It does not extend to documents that might or could be used in the review process” because “any broader reading of the rule would permit hospitals to argue that all medical documents prepared by hospital personnel are created to improve health care rendered by a hospital and are protected by the privilege.”<sup>6</sup>

**To whom can this information be provided?** The privilege applies where the covered information is provided to any of the following: “the Utah Department of Health and local health departments; the Division of Substance Abuse and Mental Health within the Department of Human Services; scientific and health care research organizations affiliated with institutions of higher education; the Utah Medical Association or any of its allied medical societies; peer review committees; professional review organizations; professional societies and associations; and any health facility's in-house staff committee.”<sup>7</sup>

**For what purposes can the covered information be provided?** The privilege is limited to instances where the information is provided for the following purposes: “(a) study and advancing medical research, with the purpose of reducing the incidence of disease, morbidity, or mortality; or (b) the evaluation and improvement of hospital and health care rendered by hospitals, health facilities, or health care providers.”<sup>8</sup>

**What obligations does a person have who receives covered information?** Covered information that is received by a person or organization covered by the care-review privilege “shall be held in strict confidence by that person or organization, and any use, release, or publication resulting therefrom shall be made only for the purposes described” above “and shall preclude identification of any individual or individuals studied.”<sup>9</sup> However, “a summary of studies conducted in accordance with” care-review privilege “may be released by those groups for general publication.”<sup>10</sup>

**When and how does the care-review privilege apply?** The care-review privilege protects covered information from disclosure in legal proceedings: “All information, interviews, reports, statements, memoranda, or other data furnished by reason of this chapter, and any findings or conclusions resulting from those studies are privileged communications and are not subject to discovery, use, or receipt in evidence in any legal proceeding of any kind or character.”<sup>11</sup> There is a critical gap in the privilege, though: Because it is a privilege created by state law, federal courts have not recognized the care-review privilege in cases addressing federal legal questions.<sup>12</sup>

What penalties apply to misuse of privileged information? “Any use, release or publication, negligent or otherwise, contrary to the provisions of” the care-review privilege statutes “is a Class B misdemeanor.”<sup>13</sup> Also, the care-review privilege “does not relieve the person or organization responsible for such use, release, or publication from civil liability.”<sup>14</sup>

### **The *Vered* Court and Application of the Care-Review Privilege**

The *Vered* Court addressed how parties can establish the care-review privilege in court. Recognizing that the Utah Rules of Civil Procedure “begin with a presumption in favor of discovery,” the court stated that parties seeking to invoke the care-review privilege bear “the burden of providing a sufficient evidentiary basis for their assertion of the care-review privilege.”<sup>15</sup>

The *Vered* Court rejected the argument that an earlier Utah Supreme Court decision, *Allred v. Saunders*,<sup>16</sup> required parties to provide an affidavit to “provid[e] a sufficient evidentiary basis for their assertion of the care-review privilege.”<sup>17</sup> Instead, the *Vered* Court determined that “[t]his evidentiary basis could come in the form of a privilege log, . . . an affidavit, or some other way so long as the party asserting the privilege provides ‘sufficient foundational information for each withheld document or item to allow an individualized assessment as to the applicability of the claimed privilege[.]’”<sup>18</sup> Critically, though, a party cannot meet this burden by simply providing a broad descriptions of documents “such as ‘Letter re:

incomplete proctoring card'; 'Email chain re: patient issues'; or 'OB Staff Meeting Agenda'" because "[t]here is nothing in these descriptions that even hints at why the privilege might apply."<sup>19</sup>

The Court then took "a brief detour" from the specific issues of the *Vered* case "to clarify the requirements of rule 26 of the Utah Rules of Civil Procedure, especially as that rule relates to assertions of the care-review privilege."<sup>20</sup> Here is the Court's clarification:

Rule 26 provides:

If a party withholds discoverable information by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

Utah R. Civ. P. 26(b)(8)(A).

Despite some suggestion in the briefs to the contrary, this requirement to specifically identify and describe withheld documents when a privilege is claimed is not new. And the use of a privilege log to comply with this requirement did not originate with *Allred*. Indeed, the *Allred* court acknowledged, "Parties routinely provide privilege logs when asserting that particular documents are privileged from discovery." *Allred*, 2014 UT 43, ¶ 26. And while *Allred* considered whether the privilege log provided in that case was sufficient, it made no pronouncement regarding what form a privilege log must take. Rather, what is required is a description of "the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim." Utah R. Civ. P. 26(b)(8)(A). What form a privilege log takes is immaterial, so long as the required information is, in fact, provided. See *Allred*, 2014 UT 43, ¶ 28 (requiring that "parties seeking to withhold arguably privileged material from discovery *must create* a privilege log identifying each document or item withheld from production" but making no mention of what form a privilege log must take (emphasis added)).<sup>21</sup>

### What *Vered* Means Going Forward

Anybody seeking to invoke the care-review privilege should give careful consideration to *Vered*. The case provides a number of lessons:

- To begin, parties "must create a privilege log identifying each document or item withheld from production."<sup>22</sup>
- In doing so, parties should avoid generic descriptions of the privileged documents or items that do not inform other parties as to why the care-review privilege is being invoked.
- Instead, parties should be careful to describe the nature of the document or item in a manner that will enable other parties to evaluate whether the privilege is applicable.

- Because such descriptions will vary from item to item, parties must take the time to ensure that sufficient information is set out in a meaningful way without disclosing the privileged information itself.
- Given the potential civil and criminal misdemeanor penalties for improper disclosure of items protected by the care-review privilege, parties should engage legal counsel and thoroughly comply with the procedures necessary to invoke the care-review privilege in any legal proceedings.

*Vered* is a critical reminder that parties must act carefully and thoroughly to invoke Utah's care-review privilege.

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For questions regarding this update, please contact:

Cory Talbot

Holland & Hart, 222 S Main Street, Suite 2200, Salt Lake City, UT 84101

email: [catalbot@hollandhart.com](mailto:catalbot@hollandhart.com), phone: 801-799-5971

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<sup>1</sup>*Benson ex rel. Benson v. I.H.C. Hospitals, Inc.*, 866 P.2d 537, 539 (Utah 1993) (internal quotations omitted).

<sup>2</sup>2018 UT App 15, ¶ 18.

<sup>3</sup>*Id.* ¶ 18 (quoting Utah Code Ann. § 26-25-1(3)). The care-review privilege should not be confused with the somewhat similar peer-review privilege, which protects reviews undertaken “for the purpose of evaluating any health care provider regarding (a) professional ethics, (b) medical competence, (c) moral turpitude, or (d) substance abuse.” Utah Code Ann. § 58-13-5(7).

<sup>4</sup>Utah Code Ann. § 26-25-1(1).

<sup>5</sup>*Id.* § 26-25-1(1)(a-g).

<sup>6</sup>*Wilson v. IHC Hospitals, Inc.*, 2012 UT 43, ¶ 114, 289 P.3d 369 (citations & internal quotation marks omitted).

<sup>7</sup>Utah Code Ann. § 26-25-1(2).

<sup>8</sup>*Id.* § 26-25-1(3); see also *Id.* § 26-25-2(2) (allowing the use of covered information “for the purpose of study and advancing medical research or medical education in the interest of reducing the incidence of disease, morbidity, or mortality”).

<sup>9</sup>*Id.* § 26-25-4(1).

<sup>10</sup>*Id.* § 26-25-2(2).

<sup>11</sup>*Id.* § 26-25-3.

<sup>12</sup>See *P.J. ex rel. Jensen v. Utah*, 247 F.R.D. 664, 671 (D. Utah 2007).

However, the care-review privilege will apply in federal courts in cases addressing Utah state law questions. See *Smith v. Terumo Cardiovascular Systems Corp.*, 2015 WL 4728492, \*2 (D. Utah Aug. 10, 2015); Fed. R.

Evid. 501 (recognizing that “state law governs privilege regarding a claim or defense for which state law supplies the rule of decision”).

<sup>13</sup>Utah Code Ann. § 26-25-5(1).

<sup>14</sup>*Id.* § 26-25-5(2).

<sup>15</sup>*Vered*, 2018 UT App 15, ¶ 28.

<sup>16</sup>2014 UT 43, 342 P.3d 204.

<sup>17</sup>*Vered*, 2018 UT App 15, ¶ 28.

<sup>18</sup>*Id.* (footnote omitted).

<sup>19</sup>*Id.* ¶ 27.

*Id.* ¶ 30.

<sup>21</sup>*Id.* ¶¶ 30 & 31.

<sup>22</sup>*Id.* ¶ 31 (quoting *Allred v. Saunders*, 2014 UT 43, ¶ 28, 342 P.3d 204).

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