

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

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ROLL NUMBER

DESCRIPTION

1036

2005 HOUSE JUDICIARY

HB 1036

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1036

House Judiciary Committee

Conference Committee

Hearing Date 1/5/05

Tape Number	Side A	Side B	Meter #
1	xx		6.3-24.6

Committee Clerk Signature



Minutes: 14 members present, 0 absent.

Chairman DeKrey: We will open the hearing on HB 1036.

Vonette Richter, LC: Introduced the bill (see report). I will distribute a portion of the final report that discussed this issue and how we arrived at this bill draft. The Interim Judicial Process Committee was assigned the study of reviewing the penalties imposed for the release of confidential information. The study arose out of the concern that certain pieces of public information, which are now considered confidential, are subject to a penalty, a Class B felony. There was a concern that that penalty may not be the appropriate penalty in all cases of release of confidential information. The committee received testimony, for the most part, that the Class C felony was a good thing, that it was a deterrent, and that there really haven't been any problems. No one was aware of any cases that had been prosecuted for the release of confidential information, and it was generally the conclusion of the committee that the penalty should stay as it is. The issue arose, however, during the study that there are a number of sections in the

Century Code that do not provide for the same penalty, as the general penalty in Title 12.1. Title 12.1-13.01 is the general penalty that says that release of confidential information is a Class C felony. We found a spattering of sections throughout the Code that had other penalties. In one case there was an infraction, several Class A misdemeanors, and so what this bill does is attempt to bring all of those sections under the same penalty, as the general penalty in 12.1-13-01.

Section 1 is a section in the Milk Stabilization Board chapter and the change is on page 2, lines 8 and 9, which right now are a violation of that section is a Class A misdemeanor. This would make that change consistent with the penalty in 12.1-13.01. Section 2 is the domestic violence or sexual assault program records confidentiality provision, again it would make the change to a consistent penalty. Section 3 is a chapter on ionizing radiation development. It would make the release of confidential information under 23-20.1-09.1 subject to that same penalty. Section 4 is a subsection of section 26.1-10-11, which is in the insurance holding company systems chapter, provides for that penalty. Section 5 is the DNA analysis chapter. Right now it is a Class A misdemeanor, it would make it the Class C felony. Section 6 is a chapter on pharmacists, making the penalty apply. Section 7 is the uniform unclaimed property act, about that penalty. Section 8, Chapter 50-06 is the general provision chapter for the Dept. of Human Services. Under that section it is a Class A misdemeanor to release information regarding a department program, that would make that penalty the Class C felony. Section 9 is maternity homes and Section 10 is the child abuse and neglect chapter. The attempt was to make all of those sections consistent. I would like to point out that there is a bill that was submitted by the Dept. Of Human Services, SB 2118 and I have a copy of that here (distributed) which is amending and essentially making that same change in Section 50-06-15, which is section 8 of your bill, they also have

additional requirements in here regarding individually identifiable information, and specifically mentions social security numbers. Depending on what each of these bills do, whether you want to amend or leave them stand as they are.

Chairman DeKrey: Do you suggest that we hang on to this bill for awhile then, to see what happens in the senate bill.

Ms. Richter: I don't know when this one is scheduled.

Chairman DeKrey: Any questions for Vonette.

Representative Maragos: Vonette, what was the rationale for, I understand the rationale for uniformity, but I don't understand the rationale for penalty. A felony seems to be a very stiff penalty for this crime. Was it discussed to make it all Class A misdemeanors at all, rather than Class C felonies.

Ms. Richter: It was, it came up, but it wasn't pursued. The Committee, I guess based on the testimony that what we have in place is working, and it hasn't been, our penitentiary's are full of people who released confidential information. It's kind of like, if it isn't broke, don't fix it.

Representative Delmore: The only thing I have a question on, is the Class A misdemeanor for the Dept. of Human Services. Is that the only exception to the rule in rewriting this as a Class C felony and why is that, why would you put that in as a misdemeanor when the rest of them are felonies, which you say are working.

Ms. Richter: There are ten different places in the code; however, the one under the department applied to all of their programs. There are a number of reasons why it may have been put in, it may have been truly discussed and felt that Class A was the more appropriate penalty or, more often than not, legislators aren't aware that there was a general penalty provision that applied.

The specific controls over the general. So in this case, right now, this would be a Class A misdemeanor even though we have the general penalty out there. The Committee wishes to make all the penalties consistent because they felt, if it's important enough to be deemed confidential, there shouldn't be different degrees of confidential.

Chairman DeKrey: Any further questions for Vonette.

Representative Koppelman: What is the difference between the penalties.

Representative Delmore: They usually provide us with a cheat sheet of the penalties.

Ms. Richter: I could get you a list.

Chairman DeKrey: We will have the intern put together a list.

Representative Maragos: Is there a minimum to a class C felony?

Judge Gail Hagerty: No.

Representative Maragos: So they may not do time at all.

Judge Gail Hagerty: Most people don't serve time for a first offense regardless of the classification of the offense.

Representative Maragos: Thank you very much.

Chairman DeKrey: Any other further questions. If not, we will take further testimony in support of HB 1036.

Jack McDonald, ND Newspaper Association/ND Broadcasters Assoc.: (see written testimony). If I might address Rep. Maragos' question, the standard for any violation of a criminal law is a knowing and deliberate violation. It came out during testimony in the interim that the occasional mistake, that type of thing would not fall under this necessarily because it wouldn't have been a knowing disregard of the law, the felony standard. The other issue that

came out is that, while at first blush it may seem that this is a severe standard, you also have to look at the general types of records that are being considered by the State. There are some pretty stuff here. You've got a lot of audit material, you got a lot of bank records, a lot of personal, social human services types of records, where you have treatment records, medical records, DNA records, social security. All of these issues involving identity theft and things like that, it's some pretty heavy duty stuff and so we didn't feel, at least in the testimony before the Interim Committee, that this would be the time when one of the biggest concerns we have is identify theft and the protection of personal information to be lessening the standards for the release of that. If it was a deliberate release, I think they should face a severe penalty. The felony will not affect the accidental or inadvertent release, that won't meet the standard for a felony, as it would in any crime, this included. We would respectfully urge a Do Pass on this bill.

Chairman DeKrey: Thank you for appearing. Any further testimony in support of HB 1036.

Bonnie Palecek, ND Council on Abused Women's Services and the Coalition against Sexual

Assault in North Dakota: We, too, are in support of this bill. In light of the discussion that just happened, I must say that usually we get in trouble for not releasing confidential information that other entities feel that they need; sometimes legitimately to do their jobs. It was a bill, and the discussion over the Interim that did draw our attention. For us, as you may have noticed, it is a change from an infraction to a Class C felony. So it did give us pause as Rep. Maragos has said, and caused our legislative committee to look at, because of the sweeping nature of our confidentiality requirements under the statute, which includes things like volunteer telephone numbers, it forced us to have this discussion, and say "Ok do we really want to put our money where our mouths are, and say that yes all of this information is important". Clearly

confidentiality is a core value of our organization; and the safety issues involved are paramount. Even though it will raise a significant training issue for us, for everybody involved with any of this information, we support HB 1036 and hope that you will do the same.

Chairman DeKrey: Any questions for Ms. Palecek. If not, thank you for appearing before the committee. Any further testimony in support of HB 1036. Any testimony in opposition to HB 1036. If not, we will close the hearing on HB 1036. Anybody have a motion for the chair.

Representative Kingsbury: I move a Do Pass.

Representative Zaiser: Seconded.

Chairman DeKrey: Any further discussion on HB 1036. We will call the roll on a Do Pass motion on HB 1036.

13 Yes 1 No 0 Absent

DO PASS

Carrier: Rep. Maragos

Date: 1/5/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1036

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number

Action Taken *Do Pass*

Motion Made By *Rep. Kingsbury* Seconded By *Rep. Zaiser*

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	✓				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar		✓			

Total (Yes) *13* No *1*

Absent *0*

Floor Assignment *Rep. Maragos*

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
January 5, 2005 11:00 a.m.

Module No: HR-02-0088
Carrier: Maragos
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1036: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS
(13 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1036 was placed on the
Eleventh order on the calendar.

2005 SENATE JUDICIARY

HB 1036

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1036

Senate Judiciary Committee

Conference Committee

Hearing Date March 7, 2005

Tape Number	Side A	Side B	Meter #
2	X		1000 - End

Committee Clerk Signature *Maria L. Salberg*

Minutes: Relating to the release of confidential info; penalty.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Vonnette Richter, Legislative Council Staffed the interim judicial process committee (meter 1000) Reviewed the bill and the appropriateness of the penalties in the century code for the release of confidential information. Committee received testimony that a vast majority of the penalties is a Class C Felony under Sec. 12.1-13 01. The conclusion of the committee was not to reduce the severity of the penalty, though they did wish to make the penalties consistent through out the century code. This bill identifies the sections and makes all of them a Class C. Vonnette reviewed the ten sections.

Sen. Trenbeath questioned Sec. 5. (meter 1600) on legislative intent.

Bonnie Pollecheck, ND Council of Abused Women Services (meter 1682) Section two took our breath away in raising the penalty from an infraction to a Class C. We discussed this among our legislative committee the far ranging nature of the section. The releasing of shelter address to case files to ID information of volunteers and staff. Confidentiality is a big issue for us, so how can we have an issue with this legislation? We chose not to. We would have to be very careful in our training of people if they got a request for a staff member or a volunteers phone number. We looked at case files of victims who are clients who ask to see their own files and having them sign waivers. The other aspect is the potential and current conflicts with Federal laws. The most is HUD money and homeless shelters some of our domestic violence shelters fit into this category. The government requires as a condition of HUD money the Social Security # of the residence of the shelters be entered into the system. This is a struggle with our laws and ethical consideration of protecting the confidentiality. Either we take the money or be confidential. This bill does not solve this issue.

Testimony in Opposition of the Bill

None

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Sen. Nelson stated that the request for this study came out of our committee last year. It was a result of our committee saying that there were so many penalties entered for the same type of offense. **Sen. Trenbeath** sited an amendment to change the Class C felony to a Class A misdemeanor due to the stigma of a class C felony following you around the rest of your life. The difference of knowingly or not knowingly doing something and the proof of intent. **Sen. Trenbeath** sited that we have even in this session messed around with the penalty in the ID theft

Page 3

Senate Judiciary Committee

Bill/Resolution Number HB 1036

Hearing Date March 7, 2005

portion. **Senator Triplett** sited how in divorce courts release of SS # and other confidential information in a divorce filing. (meter 2300) The supreme court stated that the copies of this information is not confidential. While I support consistency, it should be at a lesser penalty. Discussion of the penalty needs to fit the crime and generally this is up to the discretion of the judge.

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1036

Senate Judiciary Committee

Conference Committee

Hearing Date March 9, 2005

Tape Number	Side A	Side B	Meter #
1	X		2690 - 3861

Committee Clerk Signature *Maria L. Salberg*

Minutes: Relating to the release of confidential info; penalty

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work

While this bill was our directive last session the committee did not think that Class C was an appropriate level for all crimes. While under the Sexual Assault of Domestic Violence program records it is appropriate but the majority of it should be a misdemeanor. **Sen. Nelson** was on the interim committee that dealt with this bill and does not recall much of the detail of its decision. The directive was to uniform all penalties and they did not want the most heinous to be only a misdemeanor. Discuss to amend except for a part of it but did not want to go through a conference committee.

Senator Triplett made the motion to DO NOT Pass and **Sen. Trenbeath** seconded the motion.

All members except for **Sen. Nelson** were in support of the motion. Motion Passes

Page 2

Senate Judiciary Committee

Bill/Resolution Number HB 1036

Hearing Date March 9, 2005

Carrier: **Sen. Trenbeath**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Date: 3/9/05

Roll Call Vote #:

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1036

Senate Judiciary

Committee

Check here for Conference Committee

Legislative Council Amendment Number

Action Taken *Do Not Pass*

Motion Made By Senator *Triplet* Seconded By Senator *Trenbeath*

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson		✓
Senator Syverson	✓		Senator Triplet	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) *56* No *1* 0

Absent 0

Floor Assignment *Sen Trenbeath*

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 9, 2005 2:00 p.m.

Module No: SR-43-4539
Carrier: Trenbeath
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1036: Judiciary Committee (Sen. Traynor, Chairman) recommends DO NOT PASS
(5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1036 was placed on the
Fourteenth order on the calendar.

2005 TESTIMONY

HB 1036

JUDICIAL PROCESS COMMITTEE

Concerns About the Appropriateness of Penalties for the Disclosure of Confidential Records

The committee received testimony that the purpose of the study is to review the penalties imposed for the release of confidential information. According to the testimony, there is a concern about the release of information that had previously been public information, such as whether legislators participate in the state health plan. The testimony indicated that the issue before the committee was not whether any records should be open or closed, as those determinations have been made by the Legislative Assembly, but rather whether the severity of the penalty for the release of information such as participation in the state health plan is appropriate for the offense. It was noted that although some information that has traditionally been open to the public and often has been provided, particularly during election season, it would now be a Class C felony for someone with that information, such as a member of the Legislative Council staff, to knowingly provide that information. According to the testimony, the problem is not whether anyone is being prosecuted for these potential felonies, such as disclosing someone's age or the fact an employee participates in the state's flexcomp program, but rather whether a Class C felony is the appropriate penalty for that offense.

The committee also received testimony from the Attorney General's office regarding the appropriateness of penalties for the disclosure of confidential information. According to the testimony, the Attorney General's office receives few complaints or concerns about the penalties for a "knowing" violation of the confidential records laws. A representative of the Attorney General's office said public servants are very conservative when it comes to releasing confidential information and the penalties currently in place act as a deterrent.

The testimony indicated that the Attorney General issued 22 opinions in 2003 which dealt with open records or open meetings. The testimony indicated that many of the calls received regarding open records or open meetings are handled informally. It was noted that often when it is explained to a caller that a certain record is an open record, the agency will release the record. According to the testimony, some callers want the explanation in writing while others want the violation recorded in order to create a record of repeat violations. The testimony indicated that the Attorney General's office provides training to various agencies and organizations regarding the state's open records laws. The Attorney General's office also provides other sources of open records and open meetings information such as brochures, manuals, and online information.

The committee also received testimony regarding the impact of HIPAA on the state's open records laws. According to the testimony, there are a number of state and federal laws that provide for civil and criminal penalties for the release of confidential information. The Act contains provisions that provide for defenses or limitations for imposing penalties. The Act provides that if a party does not know or after exercising reasonable diligence was unaware that

the party's actions were in violation of the privacy rules, there are steps the party can take to be excused from paying the civil penalty. Under HIPAA, no penalty may be imposed if the failure to comply was not willful neglect. The Act allows for a correction of a violation if the mistake is corrected within 30 days. The Act also allows for extensions and allows for an agency to ask the Department of Health and Human Services for technical assistance to come into compliance with HIPAA.

The opinion was expressed that because the Class C felony for the release of confidential information acts as a deterrent, the general penalty should not be changed. It was recommended, however, that the Legislative Assembly may want to take the approach to debate the penalty provisions for new confidential provisions that may be proposed rather than revisit the penalty provisions already in place. The opinion was expressed that the reason there have not been more prosecutions for the release of confidential information is because the penalty has served as a deterrent and not because the penalty is too severe that no one is being prosecuted. It also was noted that the grading of penalties would be difficult. According to the testimony, private information may mean different things to different people. It was noted there have been more instances in which public entities have refused to release information that is open than there have been instances in which public entities have released confidential information. It was speculated that prosecutions for the release of confidential information may not be a priority for prosecutors.

The committee also received testimony regarding the penalties of other states for the release of certain information. The information compared the penalties of North Dakota with those of Minnesota, South Dakota, Nebraska, Iowa, and Wisconsin. The information indicated that the penalties in these states for the release of information relating to a state employee's or official's participation in the state's health insurance, flexcomp program, or retirement program ranged from no penalty to a simple misdemeanor. Several states provided for civil remedies in the form of an injunction or damages, but none of the neighboring states make disclosure of this kind of information a felony, which is the law in North Dakota.

Policies of State Agencies and the Judicial Branch Regarding Confidential Information

The committee received testimony from the Department of Human Services, Department of Transportation, and Game and Fish Department regarding each agency's protocol for handling and releasing confidential information. The committee also received testimony from the Supreme Court regarding the open records policies of the state's judicial branch.

According to the Department of Human Services, state and federal laws and regulations prohibit the department from releasing records unless certain conditions are met. State law makes confidential all department records regarding clients or applicants. Federal law and regulations further restrict the disclosure of substance abuse treatment records. Department of Human Services employees attend training sessions regarding the release of information and employees are advised of the penalties for the release of confidential information. It was noted the department's policy on the release of confidential information is very restrictive. According to the testimony, confidential client records may be released under certain circumstances, such as client consent, records used for a civil commitment proceeding, or by court order. North Dakota

Century Code Section 50-06-15 makes it a Class A misdemeanor for the Department of Human Services to disclose confidential information.

A representative of the Department of Transportation presented testimony that the department starts with the premise that the department's records are open. Any release of information is based upon statute. According to the testimony, most information regarding driver's license and vehicle registration is open. Driver's license pictures, which are now digitized, are not open records. It was noted that except for when a driver's record is requested by a court or by law enforcement, the driver is notified of requests made for information. The testimony indicated that the department no longer sells mailing lists and that the department tends to err on the side of not releasing information.

The testimony of the Game and Fish Department indicated that state law requires the use of Social Security numbers on all game and fish licenses. The law was passed at the request of the Department of Human Services as part of that department's child support enforcement efforts. The law provides that individuals who are in arrears on child support payments are denied participation in hunting license lotteries. According to the testimony, the department is required to collect Social Security numbers from customers but has taken steps to minimize misuse of the numbers. It was noted that the department does not include the Social Security number in any request for open records information and does not print Social Security numbers on any hunter lists or on any license tags.

According to a representative of the Supreme Court, North Dakota Supreme Court Administrative Rule 41 provides for the open records policy for the state's courts. The policy operates on the presumption that judicial records are generally open to the public for examination, inspection, and copying. The rule provides for procedures for identifying certain records as exempt from disclosure. The rule also provides for a procedure for sealing records. A party may petition the court to have a record or a portion of a record sealed. It was noted that only a judge can seal a court record. The record may be sealed based upon a motion of a party, or the court may make the decision to seal a record on its own accord. According to the testimony, the Supreme Court is in the process of revising Rule 41 to make certain information in court records, such as Social Security numbers and credit card numbers, confidential.

Several committee members expressed concern that there are a number of sections in the North Dakota Century Code which provide for a penalty that is different from the general penalty in Section 12.1-13-01, a Class C felony. For example, Section 50-06-15 makes it a Class A misdemeanor for the Department of Human Services to release confidential information. The committee considered a bill draft that makes the penalty for the release of any confidential information a Class C felony for all instances throughout the North Dakota Century Code.

Recommendations

The committee recommends House Bill No. 1036 to make the penalty for the release of any confidential information a Class C felony consistent throughout the North Dakota Century Code by changing those sections of the Century Code which provide for a penalty that is different from the general penalty contained in Section 12.1-13-01.

SENATE BILL NO. 2118

Introduced by

Human Services Committee

(At the request of the Department of Human Services)

1 A BILL for an Act to amend and reenact section 50-06-15 of the North Dakota Century Code,
2 relating to confidentiality of information contained in department of human services records; and
3 to provide a penalty.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Section 50-06-15 of the North Dakota Century Code is
6 amended and reenacted as follows:

7 **50-06-15. Disclosure Confidentiality of information contained in records -**

8 **Penalty.** It is a class A misdemeanor for any person to disclose, authorize, or knowingly
9 permit, participate in, or acquiesce in the disclosure of any records or

10 1. Individually identifiable information concerning ~~persons~~ an individual applying for or
11 receiving assistance or services under any program administered by or under the
12 supervision and direction of the department when such information is derived
13 directly or indirectly from records, papers, files, or communications received in the
14 course of the administration of any such program or in the performance of official
15 ~~duties~~ is confidential, except that any such records and information, including an
16 individual's social security number, may be used in and disclosed:

- 17 a. In the administration of any such program ~~and so~~;
- 18 b. As specifically authorized by the rules and regulations of the department; or
- 19 c. As permitted or required by other law.

20 2. A vendor, agent, or contractor of the department must agree to maintain the
21 confidentiality of individually identifiable information disclosed to that person by the
22 department or by any individual applying for or receiving assistance or services
23 and may use and disclose confidential information only to the extent that person's

- 1 agreement with the department permits the use and disclosure of any such
2 information.
- 3 3. As used in this section, "individually identifiable information" means information,
4 including an individual's name, address, telephone number, facsimile number,
5 social security number, electronic mail address, program identification number, or
6 any other unique identifying number, characteristic, or code, as well as
7 demographic information collected from an individual, that:
- 8 a. Is created or received by the department; and
9 b. Relates to the past, present, or future assistance or services applied for or
10 received by an individual under any program administered by or under the
11 supervision and direction of the department that identifies the individual or
12 with respect to which there is a reasonable basis to believe the information
13 can be used to identify the individual.
- 14 4. Any person who discloses, authorizes, or knowingly permits, participates in, or
15 acquiesces in the disclosure of any information described in this section is subject
16 to the penalty provided in section 12.1-13-01.

January 5, 2005

HOUSE JUDICIARY COMMITTEE
HB 1036

CHAIRMAN DEKREY AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We followed this bill during the interim study and support it. It brings some uniformity to the state's open meetings and open records laws.

In keeping with our generally positive outlook on legislation before your committee, we respectfully urge a DO PASS.

If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.