

2009 HOUSE JUDICIARY

HB 1283

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1283

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/2/09

Recorder Job Number: 8311, 8312

Committee Clerk Signature

*DeKrey*

Minutes:

**Chairman DeKrey:** We will open the hearing on HB 1283.

**Rep. Chuck Damschen:** Sponsor, support. Our intent of the bill is to make it tougher to inadvertently violate the open meeting laws. This will help people avoid situations where three of the five members of a committee may be at the same place at the same time. In small towns especially when attending athletic events, school functions, etc. It is hard not to run into other folks. There is no reason why someone should have to cross the street if he sees some other members of the committee on the sidewalk. If someone wants to violate the law, they can do so now. I would be willing to work on amendments.

**Rep. Delmore:** There have been a lot of us that have been worried about the number of violations. I think some of the violations coming to the AG's office have been very willfully done. Your bill seems to open it up for people to manipulate the system even further. Taking the definition of a work session out of there would be if I called my meeting, I get a whole group here and I say that it's a work session, it's not subject any more to the open records. I'm not sure if that was your intent, but I think this provides a way for devious people to actually get around the law when we're already seeing violations now that we're trying to control it.

**Rep. Chuck Damschen:** Work session was added back in up in subsection a of section 1, so it's included under the definition of a meeting there. It was taken out of subsection b, and I see that there is a conflict between subsection b and subsection a in the language. My intent is not to make it easier for people to violate the laws.

**Rep. Delmore:** Right now I don't think there are any teeth in the law that would enable the AG to take action, especially with an inadvertent violation. I think they use a lot of common sense in that office, and once people are put on record that they violated it, and then they have a tendency to follow that law more carefully. What would be your justification, when there isn't really a tendency for anybody now to open this up further? We're really not punishing anybody that inadvertently forgot to publish notice of the meeting, etc. Nobody is going after them; they are just put on notice that they have to have an open meeting.

**Rep. Chuck Damschen:** I think it becomes a little bit of a hassle to have those requests coming in for determination from the AG's office. This also affects local boards when they try to adhere to the rules, then they are put on notice that even their best isn't good enough.

**Rep. Klemin:** There are a lot of smaller boards that don't have big business to do, but do deal with something that is important in the scope of the board that they are serving on. Like in your case, do you get any training about open meeting and open records laws by anyone before you start doing your duty.

**Rep. Chuck Damschen:** I don't remember getting trained. There was discussion about it because it had happened prior to my appointment to the water board in Cavalier County. I think they had been accused of violating the open meeting law, that maybe they hadn't posted it on the door or something like that. I don't know for sure.

**Rep. Klemin:** I know that the AG's office has a manual on what to do in a variety of situations and how to handle open records requests and open meetings. It just seems to me that a lot of times if the people were trained a little more, there wouldn't be these problems.

**Rep. Chuck Damschen:** I agree, training would be good.

**Chairman DeKrey:** Thank you. Further testimony in support. Testimony in opposition.

**Jack McDonald, ND Newspaper Assoc. & ND Broadcaster Assn:** Opposed (attachment).

**Chairman DeKrey:** In my township government, sometimes we have to call each other, say in a situation such as with snow removal of a certain road or something. Technically we may have violated the open meeting law.

**Jack McDonald:** I understand that happens. I just don't want to see it happen a whole lot more.

**Ch. DeKrey:** We have a remedy too, if you complain, in the next election, you're on the board.

**Rep. Koppelman:** You talked about court cases and AG opinions. There is no penalty for violation of this law, other than a remedy. Has this been tested in court, do the courts weigh in on what the law means.

**Jack McDonald:** Yes, there have some court decisions concerning the open meeting and open records laws. They mostly pertain to whether the law applies to that record. The issue of penalties is something else that is another issue that is kept separate from the open meeting and open records law. The reason that there are no penalties, is that the intent of the law was to obey the open records law or to hold open meetings. Not necessarily to bring in punishment. Most of the time, the public is better served by having those meetings open within a reasonable period of time, within a month of an AG's opinion rather than slogging through a court case that could take a year, besides there should be a penalty imposed on them. The second thing, and a more practical issue, is that a penalty would have to be

enforced by a state's attorney and in most cases, the state's attorneys for the small counties are actually advisors for most of these boards and agencies. In the bigger counties, the complaints about an open meeting on the Burleigh County Water Board would go down to the bottom of the pile on the State's Attorney's desk and I don't know that it would see the light of day. The court cases have mostly dealt with whether this is an open meeting or whether this should be an open record.

**Rep. Koppelman:** The point that two people who serve on a board together, and know each other socially, shouldn't be accused of having a meeting. So in essence if two people meet it's not a meeting but if three people out of a five member board are together, then it's a meeting. Is context an issue.

**Jack McDonald:** The law as it now reads, is actually designed to protect these people in the small boards from the violations. It's not a public meeting if you don't discuss public business. We recognize that, especially in the smaller communities, and at public events, all five city commissioners, etc. could be at a party and as long as they don't discuss public business, there is nothing wrong with that. I think this bill would question that a little bit, and that involves a quorum. The AG has also said that 2 out of 5 is not a meeting.

**Rep. Koppelman:** What is really meant by discussing public business, what is meant by that.

**Jack McDonald:** I understand that it happens a lot of the time, but we don't want to encourage it. You don't discuss business anywhere except that in a public meeting that is open to the meeting.

**Rep. Delmore:** Right now, if someone doesn't hear about a meeting and no one reports it, it's not a violation unless it's been turned in.

**Jack McDonald:** Technically it's a violation, yes, whether anyone reports it or not is another matter. I understand that those things happen.

**Rep. Zaiser:** At what point in time that you think there has been a violation, do you need to report it, before it can't be reported at all, because the time limit has expired.

**Jack McDonald:** To get an AG's opinion, you have 30 days to report an alleged open records violation and 60 days for an alleged open meeting violation.

**Rep. Zaiser:** How do you feel about those time limits, should they be shorter or a longer time period.

**Jack McDonald:** We feel that it would be ideal if there weren't a time period limit at all. The problem is that if you start complaining about a meeting that occurred back a year ago, the facts, the situation is a year old. The AG's office would have a hard time tracking down any information from that time period. The 30 day and 60 day time limit is only applied to the request to get an AG's opinion. It would not apply if someone wanted to bring a private cause of action. So if an individual wanted to sue the Cass County Commission for continuing violations of the open meeting law, they should bring that action in a district court, regardless of the 30 or 60 days. They would just have to prove when the violations occurred, what date they occurred. The 30 or 60 day time limit is in there to allow the AG to act on it in a relatively quick period of time and to hopefully bring about a solution to the problem in a short period of time.

**Rep. Zaiser:** The discovery of the violation, how do you feel about that time frame.

**Jack McDonald:** Discovery applies more to open meetings than open records. If you ask for an open record, and are denied it, you can get an opinion right away. I think 60 days is a good compromise for a violation of the open meeting law, 60 days from when you become aware of the violation.

**Rep. Zaiser:** The violation time period is 30 days.

**Jack McDonald:** It is 30 days for a record and 60 days for a meeting.

**Chairman DeKrey:** Thank you. Further testimony in opposition.

**Dustin Gawrylow, Executive Director, ND Taxpayer's Association:** Opposed

(attachment).

**Chairman DeKrey:** Thank you. Further testimony in opposition.

**Mary Kay Kelsch, Assistant Attorney General:** Opposed. This bill doesn't add anything to the law and only makes it muddier. We are going to do another Open Records/Open Meetings Task Force during the Interim to look at the whole law. In 1997 they did a great job, but from 1997 to now technology has changed so drastically, that I think we need to update it. If there is any confusion out there, we certainly do want to hear about it. I do offer training to groups or whoever needs it. The ND Assoc of Counties and ND League of Cities also do training in their groups. The time period is 90 days to keep the meeting secret, not 60 days. That is a long time to keep a secret. It's hard for people to keep a secret. We have caught some people who violated this because of the longer period, and that has helped.

**Rep. Koppelman:** I'm curious, you mentioned some court cases and of course, the AG's office issues opinions on this frequently. Have there been any cases that were tested from a freedom of speech perspective, where 3 members of a water board would get together and say, that Paul didn't do a good job last night at the meeting, is that a public meeting now, because 3 out of the 5 were talking.

**Mary Kay Kelsch:** Most of those cases in the Supreme Court are issued regarding records. There is only a small amount of opinions for meetings. I don't believe that any of them dealt with free speech. Currently if two people meet from a board, it can be considered a committee, then the committee goes and does a lot of work, now there may be a violation.

**Chairman DeKrey:** Thank you. Further testimony in opposition. We will close the hearing. We will take a look at HB 1283. What are the committee's wishes.

**Rep. Koppelman:** I move a Do Not Pass.

**Rep. Delmore:** Second.

**Chairman DeKrey:** Further discussion. Call the roll.

**12 YES 1 NO 0 ABSENT**

**DO NOT PASS**

**CARRIER: Rep. Wolf**

Date: 2/2/09  
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1283

**HOUSE JUDICIARY COMMITTEE**

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Legislative Council Amendment Number \_\_\_\_\_

Action Taken  DP  DNP  DP AS AMEND  DNP AS AMEND

Motion Made By Rep. Koppelman Seconded By Rep. Delmore

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey		✓	Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Vig	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Hatlestad	✓		Rep. Zaiser	✓	
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 12 No 1

Absent 0

Floor Carrier: Rep. Wolf

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

REPORT OF STANDING COMMITTEE (410)  
February 2, 2009 3:51 p.m.

Module No: HR-20-1434  
Carrier: Wolf  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**HB 1283: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS**  
(12 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1283 was placed on the  
Eleventh order on the calendar.

2009 TESTIMONY

HB 1283

# North Dakota Taxpayers' Association - PAC

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Monday, February 2<sup>nd</sup>, 2009

## HB 1283

Mr. Chairman, and Members of the Committee,

House Bill 1283 seeks to change the definition of a meeting. It seems that every couple weeks we heard about the Attorney General's office issuing an opinion that says some local body of government, or advisory board, broke the state's open-meeting laws. While these opinions are rarely followed up with charges, it is important that the strength of these laws remain intact.

HB 1283 would allow a quorum of board, commission, or council members to meet in a closed-meeting so long as no vote is taken.

Open meeting laws are specifically designed to give the public the ability to view the discussions where no vote is taken. Elected officials that are subject to open-meeting laws are expected to hold their conversation with each other to the appropriate time.

It seems that the difficulty of some boards, councils, and commissions has convinced some that instead of working on compliance of current law they will just change the law.

There is no reason to enact legislation that would weaken those open-meetings laws, even it is as an unintended consequence.

There is simply no reason to return government to the days of the "smokey backroom."

**-Dustin Gawrylow, Executive Director (Lobbyist # 198)**

February 2, 2009

HOUSE JUDICIARY COMMITTEE  
HB 1283

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 oppose this bill. It creates confusion and attempts to weaken the state's open meeting law in two ways.

First, on line 15, it deletes the phrase "work session" from the definition of a meeting, thereby indicating that these so-called "work sessions" are not public meetings. This is the most dangerous part of this bill.

There is no definition of a work session, but generally public bodies interpret this to mean sessions where either no votes or final action is taken, or where no minutes are taken. These are precisely the meetings that need to be open to the public. These are the sessions where issues are discussed, testimony taken and the shape of the entity's final decision is created. Allowing this would mean that the regular meetings would be nothing but a meaningless recitation of roll call votes with no discussions.

There is no question in my mind that if this bill passed, about 75% of public meetings would suddenly become "work sessions," thus depriving the public of vital information. People are seeking more transparency in government, not less.

Secondly, at lines 19-21, it seems to allow public business to be discussed at a chance social gathering of less than a quorum of a public body. This is the law now. However, the passage of this bill will encourage public bodies to further discuss public business at chance social gatherings whether there is a quorum or not.

This will just muddy the situation and create more confusion.

We ask that you keep public meetings public and respectfully request a DO NOT PASS. If you have any questions, I will be happy to try to answer them.

THANK YOU FOR YOUR TIME AND CONSIDERATION.