

**2015 HOUSE POLITICAL SUBDIVISIONS**

**HB 1337**

# 2015 HOUSE STANDING COMMITTEE MINUTES

## Political Subdivisions Committee

Prairie Room, State Capitol

HB 1337  
1/22/2015  
22387

- Subcommittee  
 Conference Committee

*Amonela Muschel*

### Explanation or reason for introduction of bill/resolution:

Relating to the regulation and enforcement of the open record and meeting laws

### Minutes:

Sandra DePountis Testimony #1

**Chairman Klemin:** opened the hearing on HB 1337

**Sandra DePountis:** (See testimony #1)

**Chairman Klemin:** History of the law is generally people trying to get around it and government plugging loopholes.

**Representative Koppelman:** When we have an open ended perimeter like the time it takes to find a record. Is there any evidence that the keepers of these records, the public entities, that of whom the requests are being made, do they get frustrated with a lot of requests? Do they charge people where they should not and are electronic advances making them quicker to find?

**Sandra DePountis:** We do see these requests being processed more quickly as people are moving towards more of an electronic data base but we do have entities in these smaller towns where they will be in a ware house or even the back of a pickup truck that they do not even know where it is. It depends on who is holding the records. We do ask that their estimates be based on something. They can't just pull a random estimate. We do allow them to work with their requester for things of that nature and our office will get involved if they have any questions for locating the records.

**Representative Koppelman:** If a member of the public was aggrieved and said I want this record from a department or this entity and they do not want to give it to them so they are bringing the cost up so much that they wouldn't want to pay them to do it? If they were to call your office for assistance with that is that your field?

**Sandra DePountis:** Yes, normally for those we look at the bulk of those requests how many records are going to be responsive, where they are located, and we help facilitate that. We do have opinion on that as well. Any person can ask for an attorney general's

opinion on violations of this law we will look into that. A lot of people do want to avoid an opinion with our office.

**Representative Beadle:** Do we define anywhere what a requester is? Editors from the same newspaper all make a request on something different but they are under the one newspaper. Do I count as one requester or are these spate requests?

**Sandra DePountis:** Each person is a separate request.

**Representative Beadle:** So even if they are coming within the same organization, because they are separate people they would count as spate requester?

**Sandra DePountis:** Yes and another good thing about that is if you do have someone requesting that normally you have those records readily available and easier to give out.

**Representative Becker:** In section 2 of your handout I think I understand why you are requesting an extension relative to an inmate can find in a jail but your last sentence, this amendment extends the protection to law enforcement officers and correctional employees. Could you define correctional employees? That is not the same as department of correction and rehabilitation people? Is it?

**Sandra DePountis:** It is not. Correctional facility staff and employees are defined in 12-44.1 as to who would be included under that.

**Representative Becker:** Correctional employees are defined as what?

**Sandra DePountis:** It includes correctional personal with titles such as jailers, deputy councilor, correctional officers, or any other titles whose duties include ongoing supervision of the inmates.

**Jack McDonald:** 12:00 On behalf of the North Dakota Newspaper Association and North Dakota Broadcast Association. We support the efforts of deterring general to kind of do these tweaks and bring the law up to date and to make it fit more of the problems exist. For Representative Beadle's question, in the Fargo Forums instance they funnel all the requests through the editor so the individual reporters don't necessarily do that. They talk it over with the editor first and he makes the decision whether to make an opinion or not. The example you gave wouldn't really occur at least in the Fargo Forum.

**Chairman Klemin:** Closed the hearing on HB 1337

**Chairman Klemin:** Reopened the hearing on HB 1337

**Representative Koppelman:** Motioned a do pass

**Representative Zubke:** Seconded the motion

**A Roll Call Vote was Taken:** Yes 13, No 0, Absent 1 (Maragos)

Do Pass

House Appropriations Committee

HB 1337

1/22/2015

Page 3

Representative Zubke will carry HB 1337

**2015 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1337**

House Political Subdivisions Committee

Subcommittee  Conference Committee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Koppelman Seconded By Zubke

Representative	Yes	No	Representative	Yes	No
Chariman Lawrence R. Klemin	X		Rep. Pamela Anderson	X	
Vice Chair Patrick R. Hatlestad	X		Rep. Jerry Kelsh	X	
Rep. Thomas Beadle	X		Rep. Kylie Oversen	X	
Rep. Rich S. Becker	X		Rep. Marie Strinden	X	
Rep. Matthew M. Klein	X				
Rep. Kim Koppelman	X				
Rep. William E. Kretschmar	X				
Rep. Andrew G. Maragos					
Rep. Nathan Toman	X				
Rep. Denton Zubke	X				

Total (Yes) 13 No 0

Absent 1 (Maragos)

Floor Assignment Representative Zubke

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

**REPORT OF STANDING COMMITTEE**

**HB 1337: Political Subdivisions Committee (Rep. Klemin, Chairman) recommends DO PASS (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1337 was placed on the Eleventh order on the calendar.**

**2015 SENATE POLITICAL SUBDIVISIONS**

**HB 1337**

# 2015 SENATE STANDING COMMITTEE MINUTES

## Political Subdivisions Committee

Red River Room, State Capitol

HB 1337

3/6/2015

Job Number 24452

Subcommittee

Conference Committee

Committee Clerk Signature



### Explanation or reason for introduction of bill/resolution:

Relating to the regulation and enforcement of the open record and meeting laws

### Minutes:

Written testimony # 1 Sandra De Pountis

**Chairman Burckhard** opened the hearing on HB 1337. All senators were present.

**Rep. Bill Devlin** introduced HB 1337 on behalf of the Attorney General's office. It is basically a clean-up law that clarifies current sections of the open meetings and records law. It closes some loopholes that the Attorney General felt was being exploited. The section by section analysis will be done by their representatives from that office.

**Sandra DePountis:** Assistant Attorney General with the State of North Dakota. I hold the open records and meeting portfolio. Written testimony #1 (1:42-6:14).

**Senator Bekkedahl** On your 2<sup>nd</sup> page, line 2-5, where you have the 5 or more requests which I agree with by the way. I am assuming with the seven days, it means seven calendar days or it is seven business days.

**Sandra DePountis** Seven calendar days. **Senator Bekkedahl** Because I've seen other areas where they talk about business days where the cities are open Monday thru Friday. Was that discussed or why the selection of that seven calendar days?

**Sandra DePountis** We kind of didn't go with just the business days. I know that when you're dealing with the court they kind of gotten away from those business days so it is kind of following along with those rules. We figured a week time line was going to be kind of what we are going with.

**Chairman Burckhard** Who gets to decide whether it is one request or five separate requests, is that your call right?

**Sandra DePountis** That is kind of our gray area that we're trying to attempt to look at here. Recently we've seen this increase where they are requesting the same record, but

attempting to say each e-mail is a separate request. So, we do have an opinion that just got issued about this because they were sending 3 or 4 emails a day, every single day, all relating to the same thing. We made the determination that says at your discretion that this would be treated then as one request, especially, because you're going to be responding to this request with one response. So, it is kind of a gray area and that's kind of what we're hoping to close here. It is showing that each email even though they try to say that it is a separate request they are all kind of related to the same subject matter they are now going to be treated as one request.

**Chairman Burckhard** It is \$25 an hour, is that enough? **Sandra DePountis** That is a good question. We have people complaining about that \$25 per hour and Wayne Stenehjem has said that we're going to be putting together a task force at the end of the session before the next session to be looking at some of those things because we do have people complaining about that \$25. It is just not enough.

**Senator Grabinger** On page 2, I am not seeing where they have to be similar requests, or the same subject. Where is that in here? I see the same requestor, but not the same issue. When we write up laws they have to be germane to the subject or we can't change it. Is there something we need to have in here that would pertain to being germane with each request?

**Sandra DePountis** We did look at that. We wondered if we needed to put something in there, saying that they all had to be similar requests. However, we state this being exploited, so there are some requestors for example were requests investigation records from the police department and they may not look at the same exact subject matter, but it is the same requestor, putting in these requests multiple times a day, seven days a week, and inundating our public entities. So, this was really designed to alleviate that. So even if it's not going to be the same subject matter, it is going to be the timing, so you're inundating this public entity with this many requests within a week, they get to treat it as one request.

**Senator Bekkedahl** On the \$25 per hour fee structure. When it comes to excising confidential or closed material, we're generally involving our attorney's at that point. We pay about \$200 an hour for our attorney time. Could you just have that for discussion with the Attorney General?

**Senator Dotzenrod** Reading section 4, I am getting the impression that the effect of this section is to make the record more open rather than trying to restrict it. Is that what I am getting out of that?

**Sandra DePoutis** With Section 4, what this was really designed to protect is there is an exemption for attorney-work product, but that is only if there is going to be reasonably predictable litigation. There is a time sometimes with some of these entities, before they even know whether there is reasonably predictable litigation and so they have to do that investigation. So it was really meant to just kind of close up that investigation that is going to happen before it gets to that point. Investigations have been hampered by people asking for some of these records before it even gets to that point. So that is what this is really designed to protect and I think the clarification will prevent those entities who have been trying to use this for things they are not supposed to. So I do think that a lot of people won't

be relying on this as much because it will be clearer, about what specifically is going to be protected. Does that answer your question?

**Senator Dotzenrod** I think so. Like with the Pesticide Division. There is an example in your explanation of the pesticide division, when they conduct an investigation they change their policies now so that starting about 6 months ago, that once that investigation is complete, they are not going to send in any one part any benefit to the person who filed the complaint. The person who filed the complaint will get a cover letter and basically the letter will explain what the report concluded and it will include the facts and findings portion that is what they concluded, but as far as the report goes all the work they did and the photographs and testimony they took and the witness accounts and all that will be protected and will be under a judge. The judge will have the right to allow anyone who wants to see it. It seems to me that this section doesn't really change anything there, but it does mean that if someone wanted to interfere with this new policy, and wanted to get information before or in addition to what they are allowing the facts and findings but no more. Is that what this does, it says that they can't come in and make a request to that agency for that information. If they want that information they will have to go to a judge to get it?

**Sandra DePountis** I think your question is two-fold. The thing is going to be this investigatory work product is only going to be applicable during that investigation. Once that investigation is closed all that stuff is going to be open unless it is now protected somewhere else. Example cited. (13:57- 14:10). Once it is opened there will be no protection for it.

**Jack McDonald** appearing here today on behalf of the North Dakota Newspaper Association, and the North Dakota Broadcasters Association. We work closely with the Attorney General over the years on the open meeting open record law, and some of these problems that they are attempting to fix came up through our organization. So we're in favor of the bill as is and strongly urge you to give it a do pass. The Attorney General has mentioned several times, that he is going to create another task force. The open meeting open records law was a result of a huge task force that was created many years ago in 1997 by the Attorney General at that time and it represented news media, law enforcement, sheriffs, police departments, everybody that had any interest in this was on that task force. That is what the Attorney General wants to do again. I think it would be a good idea to take care of these things. I might just mention just one aspect you've got to watch that idea of the costs that Senator Bekkedahl brought up because you don't want to price ordinary people out of getting these records. Even at \$25 per hour, the cost escalates pretty rapidly. I understand some of the people use their attorneys to do that, but other ones don't but the matter of the cost has to be looked at because you don't want to deprive an ordinary citizens asking for records of the Pesticide Division. You don't want to have the response that it is going to cost you \$550 dollars to get those records. So, just be careful about the cost. But this bill in itself, is a good bill and I sure hope you give it a do pass.

**Senator Anderson** My experience in answering some of these open records requests is many times a call to the requestor to say what do you really want pares down considerably what information you need to find for them because they ask for all this stuff and they really don't want and they don't want to have to look through it themselves. But if you pare it down you can easily stay within the \$25 most of the time.

Senate Political Subdivisions Committee

HB 1337

March 6, 2015

Page 4

**Jack McDonald** In response, under the law you can either ask for the records in writing or just ask for the records. I always recommend that they do so in writing because then you can be very specific. People when they start writing things they tend to be more specific so instead of saying I want all the records you have concerning XYZ and they don't want it all when they write it down I just want the records between A-B. In writing they get more specific.

**Terry Traynor** Association of Counties. I just want to express our support for HB 1337. I think it is good changes.

**Chairman Burckhard** closed the hearing on HB1337.

**Senator Grabinger** moved do pass on HB1337.

2<sup>nd</sup> Senator Bekkedahl

Roll call vote 6-0-0

Carrier: Senator Anderson



**REPORT OF STANDING COMMITTEE**

**HB 1337: Political Subdivisions Committee (Sen. Burckhard, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1337 was placed on the Fourteenth order on the calendar.**

**2015 TESTIMONY**

**HB 1337**

Office of Attorney General

Testimony on H. B. 1337  
Before the Political Subdivision Committee  
January 22, 2015

Prepared by Sandra DePountis  
Assistant Attorney General

**SECTION ONE**

N.D.C.C. § 44-04-18(2) allows a public entity to obtain payment for requested records before locating, redacting, or producing the records. The amendment allows a public entity to withhold records if a requester has an outstanding balance for prior requests.

Under N.D.C.C. § 44-04-18(2) a public entity may charge \$25 per hour, per request, for locating a record, after the first hour. Additionally, a public entity may also charge \$25 per hour, per request, excluding the initial hour, for excising confidential or closed material from records. Recently requestors have been attempting to exploit this "free hour per request." For example, a requestor will send several emails to a public entity in a week, sometimes in a day, requesting records all relating to the same subject matter, but claiming each email is a "separate request." By doing this, arguably the public entity never goes over that initial free hour in locating the records responsive to one email. However, the public entity will spend many hours responding to all the requests received within that week. Open record laws recognize that the public entity should be compensated for the time spent in responding to those more complex and time consuming requests.

The amendment allows a public entity to treat multiple requests received by the same requester as one request if the public entity receives five or more requests from the same requester within seven days.

## **SECTION TWO**

Currently, N.D.C.C. § 44-04-18.3(1) protects the personnel records of an employee of the Department of Corrections and Rehabilitation from an inmate confined in a jail, prison, or other correctional facility. This amendment extends this protection to law enforcement officers and correctional employees.

## **SECTION THREE**

Currently, N.D.C.C. § 44-04-18.20 exempts the identifying information of a victim or alleged victim of domestic violence. This amendment extends this protection to victims or alleged victims of sexual assault, victims or alleged victims of sexual performances by a child, and victims or alleged victims of human trafficking.

## **SECTION FOUR**

N.D.C.C. § 44-04-19.1(7) protects records of a public entity conducting an investigation. In order for the exemption to apply, the public entity must be charged by law or statute with monitoring and enforcing some law or rule. For example, N.D.C.C. ch. 4-35 charges the Pesticide Control Board and Agriculture Commissioner to monitor and enforce the pesticide act. Any investigatory records created during an investigations

performed by the Pesticide Control Board pursuant to the statutory authority to enforce the pesticide act are protected under "investigatory work product."

This office has seen an increase in public entities attempting to use this provision to protect any internal "investigation" they perform. Most common is an attempt by a public entity to protect employment records, which are generally open records. Public entities argue they are "investigating" employees while enforcing "employment law" and therefore they can protect these records. The amendment will clarify the language in N.D.C.C. § 44-04-19.1(7) so that it cannot be used to close what would otherwise be public records.

*H.B. 1337  
3.6.15  
#1*

Office of Attorney General

Testimony on H. B. 1337  
Before the Political Subdivision Committee  
March 6, 2015

Prepared by Sandra DePountis  
Assistant Attorney General

## **SECTION ONE**

N.D.C.C. § 44-04-18(2) allows a public entity to obtain payment for requested records before locating, redacting, or producing the records. The amendment allows a public entity to withhold records if a requester has an outstanding balance for prior requests.

Under N.D.C.C. § 44-04-18(2) a public entity may charge \$25 per hour, per request, for locating a record, after the first hour. Additionally, a public entity may also charge \$25 per hour, per request, excluding the initial hour, for excising confidential or closed material from records. Recently requestors have been attempting to exploit this "free hour per request." For example, a requestor will send several emails to a public entity in a week, sometimes in a day, requesting records all relating to the same subject matter, but claiming each email is a "separate request." By doing this, arguably the public entity never goes over that initial free hour in locating the records responsive to one email. However, the public entity will spend many hours responding to all the requests received within that week. Open record laws recognize that the public entity should be compensated for the time spent in responding to those more complex and time consuming requests.

The amendment allows a public entity to treat multiple requests received by the same requester as one request if the public entity receives five or more requests from the same requester within seven days.

## **SECTION TWO**

Currently, N.D.C.C. § 44-04-18.3(1) protects the personnel records of an employee of the Department of Corrections and Rehabilitation from an inmate confined in a jail, prison, or other correctional facility. This amendment extends this protection to law enforcement officers and correctional employees.

## **SECTION THREE**

Currently, N.D.C.C. § 44-04-18.20 exempts the identifying information of a victim or alleged victim of domestic violence. This amendment extends this protection to victims or alleged victims of sexual assault, victims or alleged victims of sexual performances by a child, and victims or alleged victims of human trafficking.

## **SECTION FOUR**

N.D.C.C. § 44-04-19.1(7) protects records of a public entity conducting an investigation. In order for the exemption to apply, the public entity must be charged by law or statute with monitoring and enforcing some law or rule. For example, N.D.C.C. ch. 4-35 charges the Pesticide Control Board and Agriculture Commissioner to monitor and enforce the pesticide act. Any investigatory records created during an investigations

L. B. 1337  
3.6.15

performed by the Pesticide Control Board pursuant to the statutory authority to enforce the pesticide act are protected under "investigatory work product."

This office has seen an increase in public entities attempting to use this provision to protect any internal "investigation" they perform. Most common is an attempt by a public entity to protect employment records, which are generally open records. Public entities argue they are "investigating" employees while enforcing "employment law" and therefore they can protect these records. The amendment will clarify the language in N.D.C.C. § 44-04-19.1(7) so that it cannot be used to close what would otherwise be public records.