

2015 HOUSE POLITICAL SUBDIVISIONS

HB 1465

2015 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Prairie Room, State Capitol

HB 1465
2/13/2015
23851

- Subcommittee
 Conference Committee

Annamaria Muscha

Explanation or reason for introduction of bill/resolution:

Relating to public records held by entities or agents located outside the state.

Minutes:

Testimony 1

Chairman Klemin: Opened hearing on HB 1465.

Representative Schatz: It is an open records bill and I would like if you would defer your questions to the person who wanted this bill.

Steve Cates: Testimony 1

Chairman Klemin: Did you make a request for records from an entity outside the state of North Dakota?

Steve Cates: I was poised to do that and wanted some insight from the attorney general's office and reading the code I began to wonder how do they enforce open records laws in entities external to the state so I contacted the attorney general's office to get an opinion. At the time I had not made an open request.

Chairman Klemin: So this would require a contract provision?

Steve Cates: Yes, that is the only thing approaching the afflict of that.

Chairman Klemin: How would this affect existing contracts?

Steve Cates: I have thought if that and contracts can be amended. The contract law allows amendment of existing contracts or maybe in the regulatory sense from the regulatory purview of the attorney general's office they could decide how that is done going forward. Contracts created after the implementation of the law that is beyond the purview of this. I am just saying that we need equality and I thought that was something the attorney general's office could decide.

Representative Kelsh: Would this mean that we can request records of national association of counties?

Steve Cates: It deals with the definition of a public entity and if an entity is receiving public funds and they are providing a product or a specified service that is in the contract this doesn't apply. If we are paying dues or some other non-defined purpose that goes to the support of the organization then this would apply and I could not tell how that would affect other people here. It would take an examination of the particular situation but all circling back and I reiterate, this is about parody in the way that we treat organizations and it's not a penalty on anyone. They would have to meet the criteria though. That is the other thing; the bill does not do anything else.

Chairman Klemin: An agent is one thing but public entities as defined in the North Dakota open records law, are there North Dakota public entities that are operating outside the state of North Dakota?

Steve Cates: The fine point is your term "are there North Dakota entities" are there entities operating or receiving funds in North Dakota that are head quartered, chartered, or outside of the state yes.

Representative Zubke: I am concerned and not sure what it all entitles. Move a do not pass.

Representative Kelsh: Second

Representative Beadle: I am not as familiar with when they restrict it saying that any with requirements of this chapter how strongly that can be held but I am looking for the rest of that chapter and I am seeing that it goes through language on open vote at public meetings required, open meeting notification laws, those are all subsections within 44-04. I am wondering if we could even restrict the law to that stuff if say multiple entity receives funds from multiple jurisdictions it might have conflicting laws that say we have an interstate compact or something. I don't even know if it's within our purview to restrict that and hold them to the open meeting laws.

Representative Koppelman: Wouldn't this get back to contracts? I would agree that we can't reach into another state and say what they have to do but it has to do with when an entity outside of the state would contract with an agency of government or public entity and they would have to as a condition of that agree to be bound by our public records laws.

Chairman Klemin: If this is an issue it has to be with a contract of a public entity located in this state. You can get at that information of you are going to ask the North Dakota public entity something, and I don't know that the North Dakota public entity can shield by saying that is in the hands of my agent located outside of the state. I think that is something the attorney general's office can handle.

Representative Koppelman: What was the attorney general's opinion?

Chairman Klemin: The opinion was that open records apply to public entities in North Dakota. You can't make an open request to a public entity outside the state of North Dakota.

Representative Koppelman: As more of a technical point you could make the same request through the agency involved and get the information.

Chairman Klemin: I think if we are dealing with a public entity outside the state of North Dakota we don't have jurisdiction over those outside of the state unless they are doing business here in North Dakota.

Representative Koppelman: If there is a public entity (contracting with an entity outside the state that involves the expenditure of public funds) is it your legal opinion that you could get at those open records by making the request of the North Dakota public entity?

Chairman Klemin: I am not going to give a legal opinion on this but it seems to me that the records request could be made to the public entity located in North Dakota, which it seems to me if it has access to its own records in the hands of an agent located outside of the state of North Dakota it is the same as being in the hands of a principal, but the attorney general would have to solve that issue should it become one.

A Roll Call Vote Was Taken: Yes 8, No 5, Absent 1 (Becker)

Motion carries

Representative Maragos will carry the bill

**2015 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1465**

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 Zubke Seconded By Kelsh

Representative	Yes	No	Representative	Yes	No
Chairman 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	/		Rep. Marie Strinden		X
Rep. Matthew M. Klein		X			
Rep. Kim Koppelman		X			
Rep. William E. Kretschmar	X				
Rep. Andrew G. Maragos	X				
Rep. Nathan Toman		X			
Rep. Denton Zubke	X				

Total (Yes) 8 No 5

Absent 1

Floor Assignment Maragos

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

Motion carries

REPORT OF STANDING COMMITTEE

HB 1465: Political Subdivisions Committee (Rep. Klemin, Chairman) recommends DO NOT PASS (8 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). HB 1465 was placed on the Eleventh order on the calendar.

2015 SENATE POLITICAL SUBDIVISIONS

HB 1465

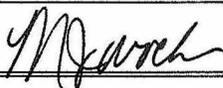
2015 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee
Red River Room, State Capitol

HB 1465
3/19/2015
Job Number 25128

Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to public records held by entities or agents located outside the state

Minutes:

Written testimony # 1 Steve Cates
Written testimony # 2 Sandra DePountis

Chairman Burckhard opened the hearing for HB 1465. All senators were present.

Steve Cates Consultant with the GEO physical researcher (1:47-3:28) appointed by former Governor Ed Schaefer to represent the state at the education commission of the states which is a national compact. I've seen a couple aspects of this. Written testimony #1.

Rep. Mike Schatz, HB 1465 is basically a simple bill intended to increase the information available to the state citizens. The more citizens know about how their money is spent the better. I feel the people of the state must be able to examine who they have been providing funds too and be able to examine who the other funders of out of state organizations. I am not an expert on this bill, I put it up on behalf of my friend Steve Cates, who is more of an expert on it and he will come forth now and explain in the further detail.

Senator Judy Lee Do you have an egregious examples of how this has been a problem?

Rep. Mike Schatz I would feel that there are three areas that we've had trouble finding information, from the Council of Chiefs, School officers, the Educational Commission for the States and the National Governors Association have a variety of funders who we don't know who they are. So, that is the issue. We'd like to know who their getting their money from.

Steve Cates (5:44-11:43) One of the criteria's is if a public offending is it's for dues or memberships. There is no product no quid pro quo, it's not like a consulting contract, we pay our dues and we're in the organization. (written testimony #1)(Open Records Law).

Senator Anderson Your definition of a public entity is what?

Steve Cates There is an area in Century Code of what a public entity is. It is in that section of code, basically in this application it is an organization or entity that receives public funds and for those public funds does not provide a quid pro quo a product or a service. Like for instance a non-profit and you are hired by the state to do a consulting study and write a report well then you're not a public entity then. If you are a contractor and hired by the state to do work, and you provide desk and tabletops and chairs, you are not a public entity because you are providing quid pro quo. The section that actually that part of the law is in 44:04 previous to this is being added on to the end 18, the definition section.

Senator Anderson Sometimes you use the language non-profits. It is my understanding that if you get a non-profit status under the Internal Revenue Service code, your finances are public. Now does that mean that its not public to the specificity you want to get, or do you just want to see their finances but you want to see who their money came from so that if I donate for example to the NDSU Development Foundation you can find out that I donated there. Is that the purpose as well as their finances have to be public or they can't get the 501 C 3 status?

Steve Cates You know the IRS 1099 form really has broad categories. You don't have a full idea, but a non-profit in ND again is subject to all types of scrutiny because they are chartered or exist in North Dakota. Organizations outside of ND do not for the simple reason that they are chartered, incorporated or exist outside of North Dakota.

Senator Judy Lee Every not for profit is required to fill a 990 with the exception of churches who also ought to have to but don't, because of separation of church and state. So if you want to find out how much the Boys Scouts spend on the administration you can get it, because it is public record. So, you are using it sounds to me when I am listening to not for profit and public entity is interchangeable and I am not quite sure that is where we should go. So can you briefly elaborate on what the difference is in your mind or do you see them as the same?

Steve Cates This actually deals significantly with non-profits. There are other entities beyond, besides non-profits that this is applicable to. But, because of the structure and the particular application this applies in North Dakota almost strictly too non-profits. Now, if you review the IRS 1099 form, you will find that. **Senator Judy Lee** it's not 1099, its 990. 1099 is what a self-appointed person is. That is income that comes from another than an employee relationship. I am talking about a 990 form. **Steve Cates** The form that is filed by non- profits or entities it only lists funding in broad categories, I don't believe it is the specifics. **Senator Judy Lee** So you want to know is Senator Anderson gave money to the NDSU Development Foundation or not or if I did or anybody else in this room? You want to know there were x dollars from private parties that came in, let's just say there is a local fundraiser for the Bismarck Zoo that all of us really cared about they had a fundraiser and we all donated to it. So you want to know, that's what I am hearing you say you want to know if all of us here wrote a check, you don't just care that there was income from private contributions at the fundraiser for the Bismarck Zoo? **Steve Cates** Under the right circumstances you have the right under North Dakota open records laws to look at those things. If they receive public funds and they are a public entity, by definition this section of the law then yes, you do have the ability to do that, if they are chartered or exists in or incorporated in North Dakota. The difference here is I believe it's fair to ask identical

treatment for entities incorporated chartered or existing external to North Dakota. This is parity, equal treatment under the law of organizations. I think that is an important concept and I think actually the Bismarck Tribune said it today, the more transparent governance is, and the inter play between governance and non-governmental agencies is probably the better. I believe that is probably true.

Chairman Burckhard Does this bill seem confusing to you at all or does it seem clear?

Steve Cates It seems pretty clear to me. It just says since we do not have enforcement authority outside of North Dakota for entities that are public entities, that are exactly equivalent to North Dakota agencies or entities that under this proposed law they would be subject to contractual relationship that delineates that they must adhere to North Dakota open records laws.

Steve Cates I respectfully ask for a do pass on HB 1465 for clarity, transparency in open records and treat external entities just like you treat North Dakota entities.

Senator Dotzenrod On line 6 from the location outside the state, are we going to have trouble enforcing North Dakota law, on somebody that is operating outside of our state. Can we say according to our law you have to give us your records and they say well that's fine for your people that live over there, but I live in Wisconsin and I don't have to follow your laws, I follow Wisconsin laws.

Steve Cates That actually is the point of this is that we cannot treat these entities like North Dakota entities now because they are outside of jurisdiction. The intent is that in agreements in exchange of funds prior to the exchange of funds there would just be a part of the agreement that the entity adheres to North Dakota Open Records laws and I would think it would actually be in the judgment and the discretion of the Attorney General's office which it is now, and that can be a condition prior to receiving funds or perhaps a clause that would say, if the attorney general decides that you're not following open records laws you need to refund the money that you obtained from the state tax payers.

Senator Dotzenrod I think I follow your saying, that next sentence says " that there will be some agreement that is going to get signed that says they agree to do that".

Senator Anderson If we are trying to drill down to what you really trying to get at here and is what you're saying, that if I pay my dues to an out of state organization because I am a politician and I am, that makes them a public entity is that what you're saying?

Steve Cates A public entity is an entity that receives public funds from ND taxpayers. **Senator Anderson** Wouldn't that be my dues if I pay it as a Senator? **Steve Cates** There is another criteria and that is does this entity receive this money for no quid pro quo reason? No, I don't get a product we don't exchange money for product. **Senator Anderson** And membership is that a product? **Steve Cates** Actually dues and memberships is one of the specific criteria and is also currently delineated in several attorney general opinions regarding how North Dakota entities are treated under the open records law.

Senator Anderson If somebody for example buys advertising from an out of state organization in North Dakota, their purchasing something here in order to purchase something here, they don't have to be registered with the Secretary of State, anything else, they just buy it. So, how do we get a record of them and require that they make this agreement if they are supporting for example some initiated measure in ND and they are buying advertising here? How do we get their contract with them if all their doing is buying advertising for example?

Steve Cates Are they receiving public funds and are they doing either a quasi- governmental activity like you get money from the government to (the state) to administer a program. It's like a government program then your open to open records laws or if you receive public funds and those public funds are just no quid pro quo. You are just paying membership, dues and that is actually specified in one of the 3 major decisions that have to do with this aspect of open records laws. So, any asking to clarify, all this comes down to is should ND public entities under the exact same criteria be treated differently than entities external to the state. For the purposes of government as you well know there is a lot of involvement in ND public policy from entities external to the state.

Opposition

Sandra De Pountis (25:33-) Assistant General for the State of North Dakota and I hold the open records and meeting portfolio. Written testimony # 2. Not in support of HB 1465.

Senator Anderson It seems to me that these people are trying to get something that they feel they can't get under the current law. Now it's possible that they are going about it wrong and their not amending the right section of the law but do you know of any instances where people have attempted to get things from somebody that they can't get under the current law?

Sandra DePountis Nobody has come to me with anything specific. There has been lots of examples that we made opinions on whether they are subject to the open records law and its gone both ways. We do this analysis to see if they are an agent or if their supported and if they are yes, they have to turn over their records. But no I've never had anybody come and complain that under our open records law they haven't been able to get records that they feel they should be entitled too.

Senator Anderson Two examples come to mind. The National Council of State Legislators and CSP or Council of State Government, the state pays our dues to, can we get open records from those organizations?

Sandra DePountis I am not personally familiar with these organizations. What I would do is an analysis. Now membership dues paid to an organization most of the time you get services in exchange for that. That goes with that fair market value so that national organization would not now be subject. If however, we somehow say that those national organization are supported are agents of our state, we would only get records involving our public funds and then acting in their agency capacity for the State of North Dakota. It would not open up the entire national network. It follows those public funds.

Senator Anderson So that if the Coke Brothers sponsor their national meeting and North Dakota is paying them dues for 100 of us to go there, then we couldn't necessarily get to the fact that California people are paying for meeting and we could get what they got from us and what they spent of the money that they got from us, that would be it.

Sandra DePountis Correct. **Senator Anderson** Okay and you don't see this changes that. **Sandra DePountis** It does not. I think there would have to be a huge overhaul in the open records law for us to even attempt to approach something like that.

Chairman Burckhard Mr. Cates we have a message on the grease board in red! Thank you! He didn't pay up because he didn't have change. I will catch him later.

Senator Dotzenrod When it comes to initiated measures, and the people who from outside of North Dakota who may be contributing to either help pass or defeat some initiated measure, that I think there is a process in place where the Secretary of State has a record keeping and then there is some requirements I think, so, that wouldn't be a factor in this I don't think, is it? I am thinking of like the Measure 5, the outdoor Heritage Fund, there was some controversy around that people said well some people that were supporting it were from the Sierra Club or some other environmental group and so there was some questions about that, but that really isn't what this about. There is a separate section of law that deals with how we keep track and get that information. There has never been from your point of view an open records issue related to something that involved a matter that was on the ballot. **Sandra DePountis** I completely agree.

Senator Grabinger The testimony you heard before you seemed to indicate that our groups are being treated differently in North Dakota than the out of state groups. Do you agree with that portion or it or not.

Sandra DePountis I don't agree with that. The testimony that Mr. Cates provided and with me back when I had an easier last name to pronounce as I got married 4 months ago, so now its DePountis, but there was more context to these couple of sentences that what you're seeing here today. There was a background conversation with Mr. Cates and from what I remember granted this was about a year ago, and maybe I misunderstood the question that he asked me, but the question that I felt like I was responding to was a non-profit in a different state that had no nexus to North Dakota. So I said no we would have no jurisdiction over them because there is no nexus. But if we had that nexus that they are either an agent of a public entity a North Dakota public entity or supported by our North Dakota Public Funds there is that nexus and we would treat them the same as we would any other non-profit, for profit, in North Dakota, out of North Dakota, yes we would treat them the same.

Dee Wald spoke in neutral testimony. (34:16- 36:58) General Council for the Office of State Tax Commissioner. I just wanted to let the committee know that to kind of supplement Sandy's testimony that all of the entities or organizations that our office participates in or pays fees or dues to , have understand that they must comply with North Dakota open records law in addition they have their own open records and meetings law. So, in some instances that are probably more consistent, they are more broader than ours as they probably open up more records and also have more time lines and I would say more restrictive open meeting requirements. So, I too while appear in a neutral testimony and kind

of believe that the law already provides for this and everybody we participate with or in, understands our laws and understand that government agencies and what they do public funds should be open. I believe in the Sunshine Laws.

Senator Anderson If I am registered with the Secretary of State as a North Dakotan non-profit, and then obviously your office doesn't collect any taxes from me, because I am exempt from that. But, what information can you get from that non-profit if you want it, about finances?

Dee Wald If we were going to go in and audit an non-profit, we can get all of their records. However, all the records we get are confidential under our state confidentiality laws so the only people that would have access to that information would be the auditors and probably that is about it because in the department itself we have a need to know policy. If you don't need to know it we're not going to let you know it.

Senator Anderson My understanding is a non-profit maybe it's not the same under the North Dakota code, but under the federal code, your records as Senator Lee and I have indicated are open, your finances are open. It is part of your status as a non-profit. Now isn't that also true with North Dakota?

Dee Wald I can't speak to the 990 and information that is open on those particular documents. What I am speaking to is the non-profit 501C3 has to file a return with us. It is an information only return because there are instances where a 501C3 may have unrelated business income. Rarely do they have to pay taxes to us, but none of that is open record in our office.

Chairman Burckhard closed the hearing on HB 1465.

Committee Discussion

Senator Judy Lee moved a do not pass on HB 1465.

2nd Senator Anderson

Senator Dotzenrod Under committee discussion, it does appear that this is something that is a matter of obtaining information that some person might want to get that if there's legitimate reason to have that record be available that it probably is available. It appears that way. If you took this law and passed it would we essentially have the duplication or a sense of confusion by having something like this on the books? I mean I guess I am prepared to vote for the motion for do not pass. But I am just wondering is the effect of this to be a asking us to do something we are already doing or to create some confusion about what we consider to be the right thing to do as we do now. I am unclear on this.

Chairman Burckhard My personal opinion is this is somewhat confusing that we've already got it but that is just my own personal opinion.

Senator Judy Lee The information that was provided for us by Sandra DePountis also talks about the fact that because of its inconflusing in its application and can be interpreted to be in conflict with open records laws, that it actually looks to me like it would create more harm han

good. I also don't believe that we have the ability to control out of state entities as has been brought up before as well. I think having appropriate information available we've already got covered and it has been mentioned by a couple of people whom I trust as to provide with good information from the tax department and the Attorney Generals' office. I am quite comfortable with not making it more complicated and confusing and open to interpretation that will just lead to issues further on.

Senator Anderson I agree with the statement we can't control out of state entities. However, I think that they are subject to the same open records laws that North Dakota entities are if the same criteria apply. So, I am not saying were un-control of them but if there a public entity here as far as the definition is concerned and I think we have that in the law books here, we can get information from them just as well as we can from somebody who is in North Dakota.

Senator Dotzenrod I would add to that to it, that over the course of the hearing we failed to get any really good concrete significant example of a legitimate situations where they was a public good that could be served by getting some information and they could not get that because the current law would not allow it. It seems to me that if we don't have that, it's kind of hard to pass this, that is my comment.

Chairman Burckhard

Roll call vote
6-0-0 do not pass
Carrier Sen. Judy Lee

Date: 3.19.15
Roll Call Vote: /

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1465

Senate Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar

Other Actions: Reconsider _____

Motion Made By Sen. Judy Lee Seconded By Senator Anderson

Senators	Yes	No	Senators	Yes	No
Chairman Burckhard	X				
Senator Anderson	X		Senator Dotzenrod	X	
Senator Bekkedahl	X		Senator Grabinger	X	
Senator Judy Lee	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Judy Lee

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

REPORT OF STANDING COMMITTEE

HB 1465: Political Subdivisions Committee (Sen. Burckhard, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1465 was placed on the Fourteenth order on the calendar.

2015 TESTIMONY

HB 1465

HB 1465
2/13/2015
1.1

Testimony in Support of the Increased Transparency of Open Records

HB 1465

Subsequent to inquiry it was explained by the North Dakota Attorney General's office that while private or non-profit organizations are subject under specific conditions to open records laws under North Dakota Century Code Chapter 44-04, those that are located outside of the state are beyond the enforcement jurisdiction of the state of North Dakota.

Specifically, from the July 16, 2014 email response from the North Dakota Attorney General's office to a telephone query:

"As per your request, I provide you with the following guidance.

The North Dakota open records law only applies to "public entities" in North Dakota. You may make an open records request to any "public entity" in the State of North Dakota pursuant to N.D.C.C. chap. 44-04. North Dakota does not have any enforcement over non-profits outside of the state of North Dakota.

Thanks,

Sandra Voller
Assistant Attorney General
State of North Dakota"

What this bill does:

Allows the citizens of North Dakota equivalent oversight of organizations located outside of the state that meet 44-04-17.1 criteria designation of "Public entity" by making those organizations subject, under a different enforcement mechanism, to exactly the same laws as like organizations located within the state.

What this bill does not do:

Anything else.

Please endorse open records equivalence by an affirmative "Due Pass" for HB 1465

Steve Cates

As a citizen and taxpayer, you are entitled to know how state and local government functions are performed and how public funds are spent.

Like other states, North Dakota has "sunshine laws" which provide that all government records and meetings must be open to the public unless a specific statute requires or authorizes a meeting or record to be closed.

The open records and meetings laws make an incredible amount of information available at your request. A key to exercising your rights under these laws is knowing what to expect when you request government records or want to attend a meeting of a governmental body. My office has prepared this brochure to help you understand and exercise those rights.

Wayne Stenehjem
Attorney General

For additional copies, contact:
Office of Attorney General
600 East Boulevard Avenue, Dept. 125
Bismarck, ND 58505
(701) 328-2210
(TTY) 1-800-366-6888

Opinions and other information relating to the Open Records and Open Meetings laws can be accessed on the Attorney General's website, at:

www.ag.state.nd.us

A Citizen's Guide to

North Dakota's Open Records



and Open Meetings Laws



Office of Attorney General



AT A GLANCE

- * A statute may declare certain records to be exempt or confidential. If a record is **exempt**, a public entity may release it at its discretion. If the entity decides not to release an exempt record, that information is closed. If a record is **confidential**, the public entity either cannot release it or must cross out the confidential information first.
- * **Anyone** has the right to attend meetings of a public entity or access and obtain copies of the entity's records, **regardless** of where they live.
- * A governing body can close a meeting to talk with its attorney if the discussion pertains to the attorney's advice regarding a pending or reasonably predictable lawsuit involving the public entity.
- * Courts are not subject to the open records and meetings laws.
- * Economic development information identifying the name, nature, and potential location of a business considering relocating or expanding within the state can be closed until the business announces its intentions.
- * Public employee salary and job performance information is open, but certain personal information may be exempt or confidential.
- * Confidentiality clauses in a settlement agreement involving a public entity are against public policy and are declared void by state law.
- * Although there are laws throughout the Century Code regarding open meetings and open records, the basic laws are found from Sections 44-04-17.1 through 44-04-31.

INFORMATION

Who is subject to the Open Records and Meetings Laws?

All "public entities." This includes:

- State agencies;
- Political subdivisions;
- Private organizations or non-profit organizations that are supported by public funds or are expending public funds;
- Contractors—if the contractor is providing services **in place of** a public entity rather than simply providing services to that entity.

Access to records and meetings.

The terms "record" and "meeting" are defined broadly. Before a public entity can deny you access to a record or meeting, it first has to tell you which law closes the record or meeting.

- To deny access to records, the public entity must explain to you **within a reasonable time** the legal authority for denying your request. You may ask for a written denial.
- To deny access to a meeting, the public entity must identify the topics to be considered and the legal authority for closing a meeting **before** asking you to leave the meeting room.

What can I do if I think a public entity has violated the law?

You can ask the Attorney General to issue an advisory opinion regarding an alleged violation of the open records and meetings laws. You have only **90 days** after an alleged violation of the open meetings law and **30 days** after an alleged violation of the open records laws to request an opinion. There is no charge for the opinion, which will be issued to the public entity. You will receive a copy of the opinion.

If the Attorney General finds that there was a violation, the public entity will have seven days to take corrective action.

OPEN RECORDS AND MEETINGS LAW

Office of Attorney General, 600 E. Boulevard Avenue, Bismarck, ND 58505

Tel: (701) 328-2210. Website: www.ag.nd.gov

All public entities in North Dakota are subject to open records and open meetings law. "Public entity" includes state and local government agencies, rural fire and ambulance districts, public schools, private businesses or non-profit organizations that are supported by or expending public funds, and contractors, if the contractor is providing services in place of a public entity. The courts are not subject to open records and open meetings law.

MEETINGS

All meetings of a public entity are open unless a specific exception applies to permit the entity to close a portion of the meeting or hold an executive session. *Anyone*, regardless of where they live, has the right to attend and record meetings of a public entity. A member of the public does not have the right to *speak* at an open meeting. As a general rule, there is *no* minimum or mandatory advance notice period for public meetings.

MEETINGS A "meeting" means *any* gathering of a quorum of the members of a governing body of a public entity regarding public business, and includes: committees and subcommittees, informal gatherings or work sessions, and discussions where a quorum of members are participating by phone, e-mail or other electronic format (either at the same time or in a series of individual contacts). Even e-mails or text messages between members of a committee or subcommittee regarding public business may constitute a meeting.

- A gathering of a quorum of members is not a meeting if it is a purely social gathering, or if the members are present but are not discussing public business; however, as soon *any* as public business is discussed, it is a "meeting."
- Before a governing body can close a portion of its meeting, it first must convene in a properly noticed open meeting. Next, it has to announce the legal authority to close the meeting and the topics to be considered during the closed portion of the meeting. Unless the law requires a closed meeting, the governing body must vote on whether to close the meeting. Any executive session must be tape recorded.
- All substantive votes must be recorded by roll call.

COMMITTEES If a governing body delegates any authority to two or more people, the newly formed committee is subject to the open meetings law, even if the committee does not have final authority or is just fact-finding. What it is called does not matter, it is still a committee. Committee and subcommittee meetings must be noticed.

- Portfolios are a committee of the governing body if more than one commissioner holds the portfolio.

NOTICES Prior written notice is required for all meetings, including committee and sub-committee meetings.

- The notice must include, at a minimum, the date, time and location of the meeting and the agenda topics the governing body expects to address during the meeting. Regular meeting agendas may be altered or added to at the time of the meeting. For special or emergency meetings, *only* the specific topics included in the notice may be discussed.
- If an executive session is anticipated, the meeting notice also must include the executive session as an agenda item, along with the subject matter and the legal authority for the executive session.
- Meeting schedules and notices must be filed with the Secretary of State (for state agencies), the City Auditor (city level entities), or the County Auditor (all other entities); *alternatively*, the public entity may choose to post the meeting schedules and meeting notices on its official website.
- The notice must be posted in the entity's main office, if it has one, and at the location of the meeting (if the meeting is held elsewhere), filed at the appropriate central location (or the entity's website), and given to anyone who has requested it—at the same time the governing body is notified of the meeting.
- Notice of special or emergency meetings also must be given to the entity's official newspaper, as well as to any media representatives or members of the public who have asked to be notified of meetings.

MINUTES The minutes of meetings are public records and must be provided to anyone upon request. Draft minutes should be made available to the public even if the minutes have not been approved. Some public entities are required by law to provide minutes to the official newspaper.

- Minutes must include, at a minimum, the names of the members attending the meeting; the date and time the meeting was called to order and adjourned; a list of topics discussed regarding public business; a description of each motion made at the meeting and whether the motion was seconded; the results of every vote taken at the meeting; and the vote of each member on every recorded roll call vote. This requirement applies to all governing bodies, including committees and subcommittees.

L.B. 1445
3.19.15
#1

Testimony in Support of the Increased Transparency of Open Records

HB 1465

Subsequent to inquiry it was explained by the North Dakota Attorney General's office that while private or non-profit organizations are subject under specific conditions to open records laws under North Dakota Century Code Chapter 44-04, those that are located outside of the state are beyond the enforcement jurisdiction of the state of North Dakota.

Specifically, from the July 16, 2014 email response from the North Dakota Attorney General's office to a telephone query:

"As per your request, I provide you with the following guidance.

The North Dakota open records law only applies to "public entities" in North Dakota. You may make an open records request to any "public entity" in the State of North Dakota pursuant to N.D.C.C. chap. 44-04. North Dakota does not have any enforcement over non-profits outside of the state of North Dakota.

Thanks,

Sandra Voller
Assistant Attorney General
State of North Dakota"

What this bill does:

Allows the citizens of North Dakota equivalent oversight of organizations located outside of the state that meet 44-04-17.1 criteria designation of "Public entity" by making those organizations subject, under a different enforcement mechanism, to exactly the same laws as like organizations located within the state.

What this bill does not do:

Anything else.

Please endorse open records equivalence by an affirmative "Due Pass" for HB 1465

Steve Cates

H.B. 1465
3.19.15
#2

Office of Attorney General

Testimony of H.B. 1465
Before the Political Subdivision Committee
March 19, 2015

Prepared by Sandra DePountis
Assistant Attorney General

The Office of Attorney General would like to clarify the application of open record laws to entities doing business with the State of North Dakota.

There seems to be a misunderstanding that the open records law does not apply to nongovernmental organizations operating outside of the State of North Dakota that are "supported" by North Dakota public funds or are "agents" of North Dakota public entities. That is inaccurate. Under the North Dakota open records law, any entity, nonprofit or for profit, whether in North Dakota or in some other jurisdiction, that is either (a) an "agent" of a North Dakota public entity performing a governmental function or (b) "supported" by public funds, is subject to open record laws. It is in the definition of "record" that recorded information regarding public business which is in the possession or control of an "agent" of a public entity is an open record. See North Dakota Century Code 44-04-17.1(16) (definition of "record"). This is already in the law and therefore if that is what the bill is designed to accomplish, it is unnecessary.

The other confusion surrounding this bill is the belief that this will open up the entire checkbook of companies that receive any public funds from the State of North Dakota. This is also inaccurate. The open record law applies to organizations that are "supported" by public funds and not every organization that receives public funds is considered to be "supported" by public funds. If a public entity contracts with an organization and pays fair market value for goods or services rendered, this is not considered "supporting" an organization. For example, a public entity buys a computer from Best Buy in exchange for the fair market value of the computer. Best Buy would not be considered to be "supported" by public funds and Best Buy would not now be subject to open record laws. However, you can go to the public entity that did the purchasing, and request public records related to the public funds it spent in acquiring the computer.

In summation, the bill is confusing as to its application and can be interpreted to be in conflict with the State's open records law. There is already a statute that allows for review of public records in the hands of an "agent" of a public entity and therefore the bill is unnecessary. Based on all the misunderstanding already surrounding the bill, we would not support HB 1465.