

2015 SENATE JUDICIARY

SB 2153

2015 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2153
1/21/2015
22273

- Subcommittee
 Conference Committee

Committee Clerk Signature *Hemrose*

Minutes:

1,2,3,4

Ch. Hogue: We will open the hearing on SB 2153.

Sen. Don Schaible: Sponsor, support (see attached #1). I am here to introduce SB 2153 at the request of the ND School Boards Association.

Ch. Hogue: You said there was an administrative side and a criminal side. If the school is working on its own administrative investigation, those records are currently closed.

Sen. Schaible: That is what I believe, yes.

Sen. Armstrong: My concern is that if that administrative file is turned over to the state's attorney, does this record really solve your problem. Once the states' attorney has the materials, it essentially becomes as open as he/she wants it to be; regardless of the school board rule. The defense attorney is going to get it, and the client's going to get it, and the states' attorney is going to have it, so at that point in time won't it be open. As a defense attorney, if I want to leak something in that file to the press, that's part of the criminal proceeding. I'm not sure that this can close that off.

Sen. Schaible: My thought is that you got a complaint in a school and you start an investigation and all of a sudden you realize that it has become criminal and report it, it's that kind of scenario where this is kind of looking to help that. I'm not sure if the district attorney gets it and things are open and leaked like you mentioned; if this is going to help or not. I think it's a process of going through a hearing or an investigation of a complaint and trying to get that done without impeding the process just by opening it up.

Ch. Hogue: Thank you.

Sen. David Rust: Sponsor, support (see attached 2).

Sen. Casper: Can you elaborate a little more, given your experience in your career when you say it's not uncommon for school districts to be sued by one of the parties. I'm trying to differentiate where this is different than maybe an individual citizen that is getting prosecuted or something for their job; you probably wouldn't want to disclose that where it's different for a teacher or a school district, because they are a different kind of entity than a private business.

Sen. Rust: In the times that I have been involved as a school administrator, anytime you have a complaint, where an individual feels that their career and reputation are at stake, it is not uncommon for them to tell you fairly quickly that they have every intention of possible litigation, taking the district to court over things you may have done improperly, or information that you may have that's not true, damaging to them. At this point in time, as it appears to me, you have a criminal complaint that's now in the district court's hands. I'm not opposed to allowing the record to be open; I think that for the period of time that the court is handling this, it would probably be best if that information that the school district may have were not an open record.

Ch. Hogue: Let's go to the types of cases that grab the headlines, where the teacher is accused of having a sexual relationship with a minor student. I assume that the minor student's identity is protected, regardless of whether this bill is passed, is that true.

Sen. Rust: Yes, that's true. The name of the student is not revealed.

Ch. Hogue: How about the alleged perpetrator, is their identity protected, is that what this bill attempts to accomplish to shield them once it's filed in district court.

Sen. Rust: I think, almost always, the alleged individual's identity is not protected. It appears that most of the time that person's name becomes public knowledge rapidly. That part of it is not going to be changed. As you're conducting investigations and it starts with the school district hearing of something. Then they commence investigation and while they are investigating, those records are closed for a period of up to 60 days. Then you have to reveal what you have there. I think the assumption is that within

the 60 days, you will have made a determination. You may have a variety of pieces of information in a file that you are investigating that may or may not be true. If that all becomes a matter of open record, imagine if you got information that's not true what it could do to someone's career and reputation.

Ch. Hogue: Thank you. Further testimony in support.

Annette Bendish, Legal Counsel for the ND School Boards Association:
Support (see attached 3).

Sen. Armstrong: Does the administrative process stop while the criminal case is pending.

Annette Bendish: That would really be a decision that the superintendent would need to make as they look at the facts and circumstances of the situation. Some of the superintendents may just say, this is a criminal matter, they turn it over to law enforcement to proceed with their investigation and the appropriate process and there may not be an ongoing administrative investigation at that point. The employee, more than likely, has been placed on leave and isn't in the school district at that time. It's going to be a superintendent decision as to how they want to proceed.

Sen. Armstrong: But there's nothing in law that says they have to stop while the criminal case is proceeding.

Annette Bendish: No, the statute just relates administrative investigation and we have recommended policies we provide regarding investigation protocol.

Ch. Hogue: Are you comfortable with the wording of the bill, that it makes clear what you said in your testimony, which is if there was written narrative describing the incident that gives rise to the criminal complaint, would be confidential but not the personnel records of the accused, not their employment status or routine personnel records.

Annette Bendish: I'm very comfortable with that. I think those records can remain open; it's nothing that would taint that non-renewal or the discharge process, simply to have those evaluations or other employee records that may be in that file. That wouldn't be the subject matter of a potential non-renewal or discharge hearing.

Ch. Hogue: The language of the bill uses the term, "until the complaint is resolved in district court". If the prosecutor dismisses the complaint, is that resolution and, at that point, those records can be released?

Annette Bendish: Yes, that would be a resolution.

Sen. Casper: So the justification for the law, the protection of information being let out to the public from the administrative procedure, during the investigation, based on prior testimony to not sully the investigation or sully the name of the teacher as they go through this. That leads me to a question. What's the difference here in the teacher going through an administrative investigation, personal investigation, than a different citizen who is maybe an employee of a large company that has strict human resources policies and their company would go through an internal investigation, that information being open and part of the record in a district court just the same way that this is.

Annette Bendish: I think it makes sense. The difference is that this is a public employee, and a public employee's personnel file is an open record. You asked about the purpose of this, is it to protect the teacher and the integrity of the teacher. I think it does. I also think it is a protection for our own school board members, because they are ultimately the ones who make the decision when the matter is potentially brought for a non-renewal or discharge recommendation. We want to make sure that the integrity of that process is protected as well, and that they are not coming into that non-renewal or discharge hearing with a bunch of facts and information that may or may not be evidence but it's information that they already have heard, through the media or through other sources from people that have looked at information in the personnel files.

Sen. Casper: We're certainly treating the teacher, the public employee, different that the private citizen in a situation where their personnel files and an administrative hearing may become public.

Annette Bendish: I think the law itself creates our public employees different from private employees just because of our open records laws in ND.

Sen. Grabinger: To follow up on Sen. Casper's question; so when we talk about other public employees, police officers, fire fighters, are we opening this up so that they are going to come in seeking that protection; or the city council

seeking protection. It just seems to me that this might be the precursor to doing that.

Annette Bendish: I can't speak on behalf of those groups, but I think one key difference between our public school employees and the other groups you mentioned. It is because our public school employees have a continuing contract. Basically once you are hired as a teacher, and you have that teacher contract, you're essentially entitled to that contract on a continual basis each year. There are only three ways in law for that contract to be extinguished. First, is the non-renewal process, where the superintendent would make a recommendation that the contract would not be renewed based on some certain statutory requirements? Second, there is a discharge process and there only seven reasons under law that a teacher can be discharged. That is a separate contractual process. Finally, it would be teacher resignation or retirement. I think that's probably the key difference we have, as we talk about our educational employees, our superintendents, principals or teachers compared to other public employees that don't have that continuing contract that they are entitled to under law.

Tamara Uselman, superintendent Bismarck Public Schools: Support (see attached #4).

Sen. Casper: In the story you mentioned, was that document given to your attorney and then to you, or was it given directly to you.

Tamara Uselman: Given to my attorney, as I recall.

Sen. Casper: It was given to you and the school's attorney.

Tamara Uselman: It was given as an email as a digital document, but as I recall, it was given to both of us.

Sen. Casper: So you almost got it passively then.

Tamara Uselman: I did.

Sen. Casper: One of the issues I have is the justification for doing this. One of them was for the protection of the process; keep the information private to keep the process from getting out to the public, and then it taints the jury or the people that will be hearing this case eventually down the road. To me, it gets back to Sen. Grabinger saying why don't we do this for anybody ever that

is a public employee, private employee, that's ever going to be under investigation by their employer, because if the information gets out, in any administrative hearing could possibly taint the future proceedings, so why don't we do this for everyone, if that's the justification for it.

Tamara Uselman: I believe so. My main reason for supporting this bill, is because of the information that would become public under this Sunshine Law isn't necessarily information that I have collected. In this case, it was information given to me that I think that intentionally puts the alleged student victims in a bad light. I do think it is my job to protect students, so that's the difference for me in this case.

Ch. Hogue: I am wondering if the Pandora's box wasn't open when we allowed you to protect the records under your administrative investigation, because it seems to me that this bill makes sense if you accept that you should keep those records confidential, because why should the records be able to come out if you can keep them confidential under your administrative process, but they come out any way under the criminal investigation and we haven't really kept the information confidential.

Tamara Uselman: The administrative records are kept sealed until it is resolved or 60 days, whichever comes first.

Ch. Hogue: How is it that those records are confidential?

Tamara Uselman: Under the law, I believe they are confidential. I don't know how that was created.

Sen. Armstrong: I guess if this law would pass, does the person, who is the subject to the internal investigation, still have unfettered access to his file.

Tamara Uselman: The person who is the subject of the investigation, the defendant, has access to their file now.

Sen. Armstrong: If this law would pass, would they? If it becomes sealed...

Tamara Uselman: They would have access to their file. The way I understand this, they wouldn't have access to this information until it was resolved in district court.

Sen. Armstrong: So if the defendant thinks that there is something in his personnel file that would be "exculpatory" or "good news for him" he would have to go to the court and get a subpoena and fight to get access to that file before he would have it available to him/her in the criminal case.

Tamara Uselman: I would have to refer to the school board association. I don't have a background in law on that.

Ch. Hogue: Thank you. Further testimony in support of SB 2153.

Annette Bendish: To answer your question (directed to Sen. Armstrong), I would think that, as you know through the course of the criminal proceeding that the individual's criminal attorney could obtain access to those documents through the subpoena process. But I don't think this law specifically speaks to your question.

Sen. Armstrong: Without this law, he gets it just because he wants it. If this law would pass, he may have to go fight about whether or not he gets it.

Annette Bendish: I think it would and I think, in light of your question, it's not something we had considered and perhaps there does need to be an exception written into the changed statute.

Ch. Hogue: Thank you. Further testimony in support. Testimony in opposition.

Jack MacDonald, ND Newspaper Association and ND Broadcaster's Association: We strongly oppose this bill and would ask that you give it Do Not Pass. A lot of the questioning I think has brought up a lot of problems on this bill, and I think we are also losing track of the timing of this matter. If you look at the bill, SB 2153, it says that on line 11, it talks about the administrative investigation. There is nothing that says that administrative investigation was the same subject as the criminal complaint. That just says that if there is an administrative review of an entirely process, a different subject. That administrative review has an ending date, 60 days. Frankly, when that administrative review law was put into place, we objected to that as well. We don't think that's necessarily a good rule either, but now we're stuck with it, but at least that has a 60 day limit. There are a lot of problems with this bill. First, before an individual is indicted or charged with a crime, there is a considerable amount of investigation being done by the state's attorney. So the state's attorney, before the indictment, before they are charged with a

crime, is going to have access to this whole file, because it is going to be open. He'll have complete access to that information; it will be available to the state's attorney. He/she will look it over, review it and determine whether they are going to make a criminal charge. So all that information is out. If you are allegedly protecting the teacher, you're not protecting the teacher because that information has already been given to the people who are going after them. There is no protection of the teacher involved here. Secondly, once the indictment is brought, and a charge is filed, the criminal complaint is usually very, very detailed. It doesn't just say that you violated 12.1-04-03. It says why you violated that section, whatever the section it is. If you read the indictment and the materials accompanying the indictment, which are public records; public court file records. They explain in great detail and in an instance like this, they are going to recite everything that was in the file that led them to that indictment. So that information is going to be out again, so what protection is there? Thirdly, there is a little bit of trouble with the language of the bill. It says on line 18, "which pertains to the subject of the criminal complaint". Is the subject of the criminal complaint the teacher or is the subject the violation. Anything that he/she did that violated that rule or is the subject the teacher itself. I think everyone is assuming it's the teacher itself, that the language is not really clear. Fourth, it says it will be closed until the criminal complaint is resolved. That's a long time. If you know the criminal process, if you follow that through, those cases are not resolved in 25 days, 30 days, or 60 days. Because of the court's scheduling it can go on for a year or more. You'll see cases in the newspaper, all the time that the case has been going on for 1, 2 or 3 years. That means that these records are going to be closed until it is resolved in district court. That's not a readily available date. Fifth, I think as parents/constituents of these schools, I think the parents would like to know what's going on. Yet the school is going to let everything else going on, but the schools want to keep information from the parents. Sixth, if there is some concern that something in the file is not true, it's in the file already. It's in the file before the criminal complaint is even brought forward. So, again, you're not protecting anybody. Seventh, as Sen. Armstrong said, the prosecuting attorney is going to have all this information, the defense attorney is going to have all this information; they are going to be filing discovery requests for materials they don't have, and again, those are all part of the public process in the criminal trial. First of all, the prosecutors that I'm aware of and most states attorneys think long and hard before they charge somebody with a criminal complaint. That's a big deal, you don't want to make a wrong decision, because of all the reasons you've heard here today. They just don't file these criminal complaints on a whim; they've gone through and put in a lot of careful consideration before they take action. Eighth, I'm

not quite sure why there is such a great concern that the school district has to have so much concern about protecting the privacy of the person that has been charged with a public crime. For these different reasons, we think that the law should be defeated. It's unnecessary and adds a level of secrecy, just one more closed record and our organizations have always resisted any efforts to close records that are now public. Basically this is what this bill does.

Sen. Armstrong: Let's take this to a really small community where if something like this happens, there is a real concern about a jury pool issue, smaller county, smaller community. If a judge ordered a gag order in those cases, and they don't take those lightly either, could they apply that to this kind of file to, in your opinion? I know that you don't like them in general, but if they did, could they apply it to this case.

Jack MacDonald: The gag orders usually go to the defense or by the prosecuting attorneys. I guess I've never heard them going to records, but I suppose they could do that. It's not beyond the realm of possibility. It's usually, the gag order, is directed to the defense attorneys making statements, or any attorneys making statements; it could.

Ch. Hogue: On the administrative side, there is a 60 day outer deadline that, after that, the records are not protected. Was that a result of the original way that the law was passed, or was that a compromise between the school board administrators and your group?

Jack MacDonald: My recollection of this matter when it came about, it came about some time ago now; it was a little bit of a compromise. Frankly we weren't all that crazy about closing those records in the first place. We would like to get rid of the whole law. At least in that case, they put in a cap of 60 day limit. We're certainly not endorsing that closure at all here. If there is anything good about that, the 60 days are better than nothing.

Ch. Hogue: I assume you would still stand in opposition to the bill, even if we amended this bill to add an outer limit for the criminal process as well, and not just the time that the complaint is resolved.

Jack MacDonald: Yes, we would still oppose it, that would ease some of our concern, to at least put a cap on it again because as the attorneys in the room know, that these things take a long, long time. These could be closed for two years. The issue in West Fargo, which is obviously the impetus for this bill, is

still going on, with starting the preliminary hearings, discovery hearings are going to take a long time.

Sen. Casper: Do you think the groups you represent, the Newspapers and the Broadcasters are going to stop writing or broadcasting about this if they found an instance that they found of interest if this were passed and they weren't given access to the administrative files.

Jack MacDonald: No. It's just that if we had access to the records, we would be able to perhaps verify what's been said and write a better story.

Sen. Casper: Then you have access to the facts, and not innuendo.

Jack MacDonald: Well, yes. I'm just using hypotheticals now, let's just say for example, that this teacher was charged with a crime, and we're always assuming that it is going to be a crime involving sex with a student. It may be a crime of stealing money from the school district; maybe he/she was embezzling money somehow over the years and they finally found out about it. It may not always involve a victim, like horsing around with a girl, that's what we are assuming. If that was the case, I guess, one of the things we would see in this file, has there been evidence that this has gone on before. Were there warnings in the file that say, we've had a complaint two years ago, from this teacher and this one parent was very concerned about it, but it didn't rise to the level that caused any administrative hearings; it's just in the file. That's one of the things we'd find out if we looked in the file, which we won't be able to do with this bill. We would have the criminal complaint but we wouldn't see other things.

Sen. Casper: The point of the question was to ask whether your groups would still write about these matters, especially in the smaller communities. I think having access to the administrative report gave more light to them to be able to write a more accurate depiction of what took place.

Jack MacDonald: Exactly right. I know a lot of people don't believe that, but when newspapers print stories, they want to get it right. We're subject to lawsuits like everybody else is, just like the school districts are. We face criminal libel and criminal slander lawsuits as well. We want to be as accurate as we can. One of the ways we can get accuracy is by getting to the facts, not just listening to rumors.

Ch. Hogue: If your timelines are right, you say that it takes a couple of years for the criminal process to unfold, but we've got the outer limit of 60 days on the administrative side, what's the harm to this bill, because your clients are going to get that information 60 days out. They are going to get it a lot sooner rather than later.

Jack MacDonald: Only if you are assuming that there was an administrative review first of all and that the administrative review is of the same subject. It may not have been. The administrative review is not tied in, necessarily, to this criminal complaint. The administrative review can be of anything.

Ch. Hogue: I am assuming that for the most egregious cases, the sexual cases, the embezzlement, there is going to be some administrative review, isn't there.

Jack MacDonald: Well, that's true. I don't know all the ins and outs of how the schools operate. Let's just say that there is an administrative review and it's concluded for whatever reason, then that administrative review goes someplace. It doesn't sit in a separate file because I think there is a law that says that they only have to have one personnel file. You can't have teacher files all over the place. Then that administrative review is going to go into this file which is going to be closed. So the answer to the question would be that you wouldn't have access to it. We would have access to it before the criminal complaint is filed, I guess. In reality, you probably wouldn't know about it until the criminal complaint is filed in the first place, in most instances.

Sen. C. Nelson: You just said that the newspapers have a code of ethics, and that's fine. But you're not the only source of media and having read some blogs and some of the stuff that's out on the internet, they don't care who they skewer, quite frankly. This doesn't restrict it just to the newspaper. This opens it up, I mean, if our bloggers want to go in and get it, they can do whatever they want and then you start worrying about the jury pool in the small county, etc. We're getting to be a very litigious society that has a lot of different lawsuits thrown here and there. I think we're also becoming very detached and don't care what is said or who gets hurt.

Jack MacDonald: I understand your thoughts on that. First of all, the courts have ways of dealing with a jury pool and remember when we start talking about a jury pool; first of all there may not be a jury, it might be a trial to the court, there isn't always a jury. There are ways of dealing with the jury pool. One of the things is that it takes a lot time between when these indictments

are brought forward and when the case is finally tried. Sometimes that is a year or two away. Secondly, the jury only has to not have made a decision or opinion; it doesn't have to be ignorant about the case. They can have heard about those charges, but an opinion hasn't been reached. Third, I look back because I was a parent of six children and frankly if something was going on in a school where my kids were going, I would like to know something about it myself about what is going on over there. I don't want the school then to just close up everything and say that they're not going to talk about it.

Ch. Hogue: Thank you. Further testimony in opposition. Any neutral testimony. We will close the hearing.

2015 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2153
2/10/2015
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- Subcommittee
 Conference Committee

Committee Clerk Signature



Minutes:

Ch. Hogue: Let's take a look at SB 2153.

Sen. Casper: I am not in favor of keeping information from the press.

Sen. Armstrong: I think from a practical nature, it talks about when the criminal complaint is filed, that's when the record gets sealed. You could be well into your 60 days or a serious criminal case this could be 18-24 months before the case is resolved. That is a very long time to have something sealed. On the front end, an active criminal investigation could go on for 5-6 months before a complaint is filed. I'm not sure if it accomplishes what they are trying to do. I think there are a lot of problems with it.

Sen. C. Nelson: I have mixed emotions on this bill. I've seen people crucified, in some instances it's the student and sometimes it's the person that supposedly did something. I like open records laws up to a point, but I don't like the way sometimes the media attacks that person just because they can. It is becoming more and more prevalent with Facebook and all of those innuendos that are made that just basically ruin a person for life. I have problems with that.

Sen. Casper: I think you're touching on my concern. This type of case happened in my home town to one of my favorite high school teachers. I think that things are flying around on Facebook and innuendos and conversations and if we seal for a period of 12-18-24 months, what was officially done by the school, sometimes that is where the real clarity is because the people are approaching it from a different place than the community at large is. I think we're more likely to see innuendo and Facebook resolved in the smearing of someone without some kind of official administrative process that is brought to

light. Otherwise the press is left with publishing the innuendo and not the facts.

Sen. C. Nelson: I just see some pros and cons here. It's a difficult bill.

Sen. Armstrong: In the serious cases whether it's the defendant or the victim there is going to be a companion criminal case and information is going to be covered and written about. I think the greatest benefit of this bill is that it is going to protect the school board, because they will be the only ones not part of this, because this law will keep them from having to be a part of it. It's not like it is going away, just because they seal this; on the cases we're talking about every one of the court dates was covered and every time there was a motion written or someone made a statement it was in the papers.

Ch. Hogue: Keep in mind that Mr. MacDonald made a valid point on this bill which is we in the committee were questioning. We always assume that the criminal activity that relates to something that the defendant did at the school or with a student but that's not necessarily the case. The teacher or the employee of the school district might have committed some crime that has nothing to do with their service in the school. This bill would allow them not to permit the school to have to disclose that information. If somebody was of a mind to amend this bill to make that distinction between those two fact patterns, that might be something I could support. This is a tough bill.

Sen. Casper: I move a Do Not Pass.

Sen. Armstrong: Second the motion.

4 YES 2 NO 0 ABSENT DO NOT PASS CARRIER: Sen. Casper

Date: 2/10/15

Roll Call Vote #: 1

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTE

BILL/RESOLUTION NO. 2153

Senate JUDICIARY 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. Casper Seconded By Sen. Armstrong

Senators	Yes	No	Senators	Yes	No
Chairman Hogue	✓		Sen. Grabinger		✓
Sen. Armstrong	✓		Sen. C. Nelson		✓
Sen. Casper	✓				
Sen. Luick	✓				

Total (Yes) 4 No 2

Absent ∅

Floor Assignment Sen. Casper

REPORT OF STANDING COMMITTEE

SB 2153: Judiciary Committee (Sen. Hogue, Chairman) recommends DO NOT PASS
(4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2153 was placed on the
Eleventh order on the calendar.

2015 TESTIMONY

SB 2153

SB 2153 January 21, 2015

Good morning Chairman Hogue and the Senate Judiciary Committee,

For the record, I am Senator Donald Schaible, representing district 31. I am here to introduce SB 2152 at the request of the North Dakota School Board Association.

Current law allows records to be closed during an administrative investigation of a complaint concerning a school district employee. But when the matter becomes criminal and is handled by law enforcement, the employee record is open, and possibly allowing information to be reported in the press and thus potentially tainting both the criminal investigation process, and a later administrative investigation.

I am not for closing records, but if the process is impeded by the records being open, I think it is reasonable to close them temporarily until the process is complete and then making them open.

Chairman Hogue and committee that concludes my testimony and I would be happy to answer questions if I can.

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Mr. Chairman and Members of the Committee:

For the record I am David Rust, Senator from District 2 in NW ND.

I am here in support of SB 2153 which provides that any record or document in the possession of the school district pertaining to a criminal complaint is confidential and not subject to the open records law, " if a criminal complaint is filed in district court concerning a school district employee."

The benefits of this provision in the law include:

- 1) We must remember that the employee is "innocent until proven guilty" by the courts. That individual's rights must be protected.
- 2) It prevents a "trial in the court of public opinion."
- 3) It is possible that the criminal complaint could be withdrawn.
- 4) It's possible that the documents in the school district's possession could include here-say statements that could be damaging to one's career or reputation if they are not later substantiated.
- 5) It is not uncommon for the school district to be sued by one of the parties. This should provide some protection to the school district.

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- 6) If there is a victim, he or she could be spared additional trauma by having the complaint handled by the courts, not the media or others.

Again, I urge you to give this a "Do Pass" and will try to answer any questions you may have.

Thank you.

Senate Bill 2153

Senate Judiciary

January 21, 2015, 9:45 a.m.

Chairman Houge and members of the Senate Judiciary Committee, I am Annette Bendish, Legal Counsel for the North Dakota School Boards Association. I am testifying in support of this bill.

Senate Bill 2153 would prohibit the release of information from a school district personnel file when a criminal complaint is pending in district court until the complaint is resolved. NDSBA feels that this is an important protection because the school board serves as the decision making body for all contract nonrenewal and discharge proceedings as prescribed by North Dakota Century Code. Allowing board members to review documentation in the file in advance of these proceedings, to read information in the media, or receive information other sources regarding the employee in question would taint this process, bias board members, and thereby potentially prohibit an employee from receiving appropriate and adequate due process regarding their continuing contract with the school district. It is NDSBA's position that the changes proposed by this bill will help preserve the integrity of the nonrenewal or discharge process.

It is important to note that these records will not be sealed forever, just until the time that the criminal complaint is resolved. By that time the school district should complete the statutorily required process for contract termination of the employee if such termination is necessary based on the facts and circumstances of the employees conduct.

It is also important to note that this exception does not apply to the entire contents of the personnel file, just those documents that pertain to the subject matter of the criminal complaint. The rest of the personnel file remains an open record.

While it can be argued that the information in the court file itself is an open record, the court file is not readily accessible to school district employees or school board members. An employee personnel file is very accessible to anyone that requests it.

It is not our intent to support a mechanism for cover up of personnel related incidents that may occur in our schools, but we do support protection until proven guilty. As I recently had a superintendent say to me, when something happens everyone wants to know the gossip, but people are rarely concerned with the facts that resolve the issue.

This completes my testimony, I would be happy to answer any questions that you may have.

Testimony in support of Senate Bill 2153

January 21, 2015

My name is Tamara Uselman. I am the superintendent of Bismarck Public Schools. I offer testimony in support of Senate Bill 2153.

It is wise to allow the records or documents pertaining to a criminal complaint of a school district employee to remain confidential until the criminal complaint is resolved in court. This is very limited in scope and protects not only the employee's rights to a fair trial but also in the case where the alleged victim is a child, it would better protect the child from being intimidated or having his or her character smeared.

Keeping records confidential best protects the rights of the employee to a fair trial, rather than a trial through the court of public opinion. In addition, there is a more complex and extraordinarily important protection offered the victim(s) in SB 2153.

Currently, the Sunshine law creates conditions where a school district may be misused as a conduit for information. For example, in my school, an attorney defending an employee against crimes against child(ren) worked with the employee's employment attorney to develop a written document and put it into my hands. This document included a story where the student victim(s) characters were maligned. Then, as I recall, the defense attorney called the press to tell them to request from me, under the Sunshine law, this piece "information". The defense attorney essentially put the School District in an untenable position. As superintendent, I had the choice to break the law by not sharing the document or to break an educator code of ethics by sharing it and thus, sharing untruths that would likely be printed and frighten the students from testifying. It felt to me like my office and the school district was being used to intimidate potential student witnesses in order for the attorneys to best position their criminal case.

This would never be an issue if school records were kept confidential until the criminal case were solved.

I support the Sunshine law but ask that this amendment be made. Once the case is settled, the public's right to know will be met.

I urge you to support Senate Bill 2153.