

**2015 SENATE JUDICIARY**

**SB 2222**

# 2015 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Fort Lincoln Room, State Capitol

SB 2222  
1/21/2015  
22272

- Subcommittee  
 Conference Committee

Committee Clerk Signature



**Minutes:**

1,2

Sen. Tim Flakoll: Sponsor, support (see attached 1, 2).

Sen. Armstrong: Is there any way to track how many of these exceed \$5,000.00.

Sen. Tim Flakoll: We could get that information; we have some. We know there are a number of them out there. It was just a matter of how much work do we want to make them go through and do them. Often times it's not necessarily right at that break point, like Appropriations are. We don't see many appropriations for \$6,000.00. It's usually under the cap or way beyond the cap. We know the NDUS received them, DPI received them, Human Services received them; different agencies have received them but we haven't gone out through Legislative Council and said how many do you have over that amount.

Sen. Casper: Who established the \$5,000 amount; if this becomes law, who establishes when that it met or not.

Sen. Tim Flakoll: That is a really important point in this whole matter. Right now, if Joe citizen comes in and asks for copies, they tell him how much it is going to cost. They don't know exactly because they don't know how many emails and other papers might exist out there. They give the citizen an estimate and they are required to probably 1/2 or full payment up front. The agency establishes those amounts. So the agency would provide that information to Legislative Management for a legislator. If you were to go around this room and ask how many people have made open records requests, I'm guessing the number is small if not zero. But there are some that are way over that. The beauty of this, I think, is the fact that those

agencies, when you get to that threshold, they have to have their feet held to the fire as far as what they provide. They provide a written document, here's how many hours it will take, this is what it will cost for each person working on the request. I think that adds a higher level of scrutiny, because they also would have to come to that legislative management meeting and justify their numbers, so that they can't just come up with a fictional number not based on anything substantial.

Sen. Casper: So you see this as the agency function and they need to bring a report to Legislative Management to try and justify the \$5,000; whether they should do the work or not. So Legislative Management would have to make a decision whether to get the work done at all.

Sen. Tim Flakoll: Both cases, if the requestor refutes it, and says he thinks that is high, it should only be \$56,000 and not \$64,000, they can certainly make their case and then the legislative management would make a decision. In the end, all documentation would be presented to Legislative Management and approved or disapproved.

Sen. Casper: Can you give a quick overview of open record requests; the difference between legislator and citizen.

Sen. Tim Flakoll: This will not affect non-legislators at all in any way, the media or the citizen's ability to request documents. They would get one hour of search time for free, one hour of redaction time for free, the copies cost \$.25 if they have to make paper copies, which oftentimes you do because if there is a redaction involved, you can never let them have access to the originals. Then there is a charge to citizens of \$25.00 for every hour of work thereafter. Those are the ones that I've been exposed to. With this bill, it is different than that. We get, in essence, currently unlimited ability to request records with total anonymity. I think people back home, when they heard about this, want the legislators to raise your hand and say it was me.

Sen. Luick: So the only cost to the requestor is only going to be the cost of those copies. Is that correct.

Sen. Tim Flakoll: There would be no cost to legislators unless they exceeded their \$5,000.00 allocation; which if you applied that across all legislators, is over \$700,000. If they make a request and ask for every email from January 1 and 2 related to a certain topic. If they really narrow it down, these requests go down dramatically. But when it is left as an open request that I want every

email between everybody without any kind of focus on them, they get very vague, very fast. If you think of every email you get in a day, and they ask for every email related to SB 2222, that really shoots that number down dramatically. But a citizen, which this bill doesn't affect, in the general population, does not impact in one way how it is done currently for open records requests.

Sen. Luick: If a citizen comes in and just because they don't have anything else to do, or just as curious as can be, they make this request for some bogus idea they have, do they have any cost to them to do this.

Sen. Tim Flakoll: Yes they do. If they want every email, and they can't get it from me, because my email is anonymous, let's say I corresponded with the Governor's office, now they can get it, it becomes open records. They can't get it from me but they can get my email at the Governor's office. There would be the cost for the citizen if they were to make a request similar to what I talked about. The first hour is free and \$XXX amount thereafter, etc.

Sen. Grabinger: To determine the amount, is that done upfront on a request. We would be limited to \$5,000 in this bill, if I put in a request, am I notified upfront what my costs, estimated costs, going to be and whether or not it goes to legislative management for that decision at the beginning or do they proceed and then after we've gone over that amount, then we have to deal with that.

Sen. Tim Flakoll: That is done upfront, so that they have an idea of what it is going to cost. I have heard of citizens who have made very large blanket requests and they are told it is going to cost \$xxx. There have been some requests that would be over a million dollars for a citizen. Once they hear that, they pass. Sometimes they might have a \$1,000; I know even with large media conglomerates, they try to focus their request down so that they pay as little as possible. They start to get a little antsy when it gets to be over \$500.00.

Ch. Hogue: I think if you were to do your poll, I think there are very few legislators who've invoked the open records law and so that leads to my question. Is it because the legislator is in some kind of adversarial position with the agency and wants to get at their emails, I assume every legislator picks up the phone and calls the agency for a public entity and asks for the information, and then there is an exchange of information and there's not anything more than a telephone call. Those all happen without any incident.

What is it that causes legislators to invoke the open records law to request information?

Sen. Tim Flakoll: In a perfect world, there would be no retribution. But we aren't perfect. Even though it's a small number of them, they can create massive amounts of work. If you think of your own business, if all of a sudden you have something that comes to 5% of your budget to find materials that you have dig up and it really takes you off point in many respects. For example, if you have a request in for Game and Fish, that I want every email of every game warden in the state for the last six years, that open. Well, so all of these game wardens are back in their offices complying and hunting for those emails when they could be out trying to do what we would consider their job, finding poachers, etc. Open record requests are very different than if you get ahold of Eric Hardmyer at the Bank of ND, and ask for information on this loan program. That's not an open records request, that's just part of their day to day operations.

Ch. Hogue: Are there other instances where the identity of the requestor is anonymous besides the legislators.

Sen. Tim Flakoll: The document I will leave with you will explain that; we don't want to intimidate citizens to not ask.

Sen. Armstrong: Whenever we put a hard number in a law, do we need a multiplier, so we don't have to change this every six years, if copies go up to \$.35 from \$.25. Five thousand dollars today is going to be a lot more money than \$5,000 twelve years from now.

Sen. Tim Flakoll: I would rely on the wisdom of whatever the committee's wishes are. I use the \$5,000 as an example with appropriations, which has been \$5,000 in the 18 years that I've been here. That number hasn't been changed; that was my reference point.

Ch. Hogue: We've got some bad actors that are ruining it for the rest of us, is that what you are saying. Why can't we take care of this through a Senate rule or a House rule?

Sen. Tim Flakoll: You possibly could, but I don't know how much teeth that would have compared to this.

Ch. Hogue: What if we had a rule that said....

Sen. Tim Flakoll: I think we are done with rules for this session.

Ch. Hogue: What if it said that legislators who feel they need to make an open records request, who can't get it through just picking up the phone, should run those through legislative management.

Sen. Tim Flakoll: I'm really fine with a lot of small requests not going to Leg. Management with that. I think it takes a firmer stand with the citizenry if we say we passed this law to protect your interests. Just because you have a label in front of your name, you don't get special privileges. Most legislators haven't even made open record requests and don't know the parameters under which they exist. I think this is helpful. I don't think that many knew that they were shielded in essence in anonymity when they made those requests. I think this is good dialog, and gives a better understanding. We all have jobs that we want these agencies to do and sometimes these requests takes away from what their job is and what they are to accomplish. The one request was made during the week of Christmas and requested that information, over 500,000 pages by January 5 or 7<sup>th</sup>. We sometimes we have unrealistic expectations from some of our colleagues.

Ch. Hogue: Thank you. Very helpful testimony. Further testimony in support. Testimony in opposition. Neutral testimony. We will close the hearing.

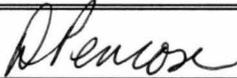
# 2015 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee  
Fort Lincoln Room, State Capitol

SB 2222  
2/10/2015  
23591

- Subcommittee  
 Conference Committee

Committee Clerk Signature



Minutes:

1,2

Ch. Hogue: Let's take a look at SB 2222. I distributed the proposed amendment to SB 2222 (see attached 1,2). This bill would change the open records law on the issue of requests made by legislators. The bill provided that the identity of the person, the legislator who makes the request is a public record. In subsection 2 of this bill you see he has a process for having the request be considered by the agency and the agency would presumably make a decision about whether it costs \$5,000 and if it cost more than \$5,000 then the legislator would have the option of either paying for it himself or going to legislative management to get the records over and above the \$5000. I was okay with subsection 1 of the bill; the amendment keeps that, but deletes the other portion. My rationale for deleting that section, I have not been able to find anybody in the ND Senate who has ever made an open records request. My initial thought was that I didn't want to fix a problem that is happening in the other House. I think it is bad policy to start putting us in conflict between the executive and legislative branches about whether this request is or is not over the \$5,000 threshold. You just create an opportunity for tension that doesn't need to be there. I really don't think it is fair to the minority party, whoever it happens to be at the time that an open records request is made. These types of requests, if there is a dispute and the party that is in control of the executive office says it is over \$5,000 and then person has to go to legislative management and that's not the same party as the person making the request, it's going to be denied. Why would we put this in code when we can do this in our Senate rules? We can control what our members can ask for and what they can do. So by putting it in the code, now you involve the other house and you involve the Governor who has to sign any bill to control how we gather information. I had a lot of trouble with subsection 2.

Sen. Casper: I move the amendment, 15.0577.01001.

Sen. Armstrong: Second the motion.

Sen. C. Nelson: I think it is absurd for some of the requests that have been made. You haven't found any in the Senate because you have sensible people in the Senate. You have some people on the House side that like notoriety but don't want the notoriety. Everybody knows who they are. When they request something, where if you had to do all the redaction, and it's going to cost you almost a half million dollars to do it, it is plain foolishness. What are they doing with the copies when they are through?

Sen. Armstrong: I agree with the amendment.

Ch. Hogue: We will take a voice vote on the amendment. Motion carried. What are the committee's wishes?

Sen. Armstrong: I move a Do Pass as amended.

Sen. Casper: Second the motion.

**6 YES 0 NO 0 ABSENT            DO PASS AS AMENDED**

**CARRIER: Ch. Hogue**

15.0577.01001  
Title.02000

Prepared by the Legislative Council staff for  
Senator Hogue

January 23, 2015

PROPOSED AMENDMENTS TO SENATE BILL NO. 2222

Page 1, line 9, remove "1."

Page 1, remove lines 12 through 24

Renumber accordingly

ND  
2/10/15

Date: 2-10-2015  
Voice Vote # 1

2015 SENATE STANDING COMMITTEE  
VOICE VOTE  
BILL/RESOLUTION NO. 2222

Senate Judiciary Committee

Subcommittee

Amendment LC# or Description: 15.0577.01001

- 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 |
|----------------|-----|----|----------------|-----|----|
| Ch. Hogue      |     |    | Sen. Grabinger |     |    |
| Sen. Armstrong |     |    | Sen. C. Nelson |     |    |
| Sen. Casper    |     |    |                |     |    |
| Sen. Luick     |     |    |                |     |    |

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

*Voice Vote. Motion Carried*

Date: 2/10/2015

Roll Call Vote #: 2

2015 SENATE STANDING COMMITTEE  
ROLL CALL VOTE

BILL/RESOLUTION NO. 2222

Senate \_\_\_\_\_ **JUDICIARY** \_\_\_\_\_ Committee

Subcommittee

Amendment LC# or Description: 15.0577.01001 02000

- 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. Armstrong    Seconded By Sen. Casper

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

Total (Yes) 6    No 0

Absent 0

Floor Assignment Sen. Hogue

**REPORT OF STANDING COMMITTEE**

**SB 2222: Judiciary Committee (Sen. Hogue, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2222 was placed on the Sixth order on the calendar.

Page 1, line 9, remove "1."

Page 1, remove lines 12 through 24

Renumber accordingly

**2015 HOUSE GOVERNMENT AND VETERANS AFFAIRS**

**SB 2222**

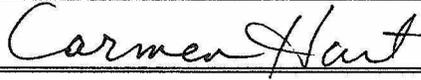
# 2015 HOUSE STANDING COMMITTEE MINUTES

## Government and Veterans Affairs Committee Fort Union, State Capitol

SB 2222  
3/26/2015  
25478

- Subcommittee  
 Conference Committee

Committee Clerk Signature



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

Relating to open records requests

### Minutes:

Attachments 1-4

**Chairman Kasper** opened the hearing on SB 2222.

**Senator Tim Flakoll**, appeared in support of SB 2222. Attachment 1. (:15- 5:57)

**Rep. Louser** Wasn't there a dollar threshold initially and if so, what happened?

**Senator Flakoll** As introduced, there was a \$5,000 threshold. That is no longer in the bill. The reason that they provided on the floor was that they felt there would be a lot of paperwork that wouldn't necessarily need to be done.

**Rep. Louser** Was that amended on the floor or in committee?

**Senator Flakoll** That was amended out in the judiciary committee on the Senate side.

**Rep. Steiner** Reading between the lines, you are thinking that you will protect taxpayers because if a legislator's name is known, they possibly wouldn't make the request?

**Senator Flakoll** Some. I think it holds accountable, because people know who is making the request, and then they will possibly have good follow up questions. It also helps protect all of us because sometimes individuals get blamed for requests that they didn't make. There are some that recently happened that have probably in the public's eye been assigned to somebody else. Based upon the request, I really doubt that person made that request.

**Rep. B. Koppelman** Are you aware of any circumstances where once the legislator was made aware of the potential cost to the agency or to the person they were requesting or the breadth of the request, were they still continued on that request path if it was an abusive amount?

**Senator Flakoll** I believe there have been requests that have been modified for both legislative and public ones. I have heard of one where a private citizen requested one that was to be in excess of \$1 million, so they said you want to narrowly define your question to what you are getting at. There certainly has been talk amongst a variety of people that we should narrow that down.

**Rep. B. Koppelman** Are you aware of any cases from the legislators who would ultimately be public record in this scenario where they have stuck to their guns though and said no, I understand we can do this for less but I insist on this arduous records request?

**Senator Flakoll** I hear of some requests but I am not privy to 5 percent of them. I have gotten a few more recently, because people know I have an interest in that. That is how I found out about some recent ones. I hear from people who have to spend their day redacting.

**Rep. M. Johnson** Was there any discussion on the Senate side about attorney-client privilege and attorney professional responsibility?

**Senator Flakoll** That really wouldn't apply here per say, because you are making a request. There is a lot of redaction that happens if you are concerned about that, so that they can't give social security numbers, all those types of things out. I will hand out a sheet in terms of if you make a request on behalf of an individual or if you introduce a bill on behalf of a constituent, you never have to tell who that is. Attachment 2.

**Rep. M. Johnson** No, that is not what I meant. Legislative council, of course, is made up of attorneys. We are their clients. That is the attorney-client relationship. I was wondering if there was discussion of that?

**Senator Flakoll** I don't serve on that committee, so I can't say if they did or if they didn't. In talking with the legislative council and the attorney general's office, that wouldn't change those various relationships that we have now.

**Rep. Mooney** One of the things that I had heard is that one of the reasons that we as legislators would want to retain anonymity in our request is for the protection of constituents who might have initiated a request. Do you see any concerns with that?

**Senator Flakoll** I believe what I just handed out provides for that. He read Attachment 2. (12:18-12:45)

**Rep. B. Koppelman** If your bill is passed in its current form, I could go to legislative council for a constituent that asked me to look into this, and I would essentially do what we do now. Only it would just be a roundabout way of doing it. Isn't that what this is saying then?

**Senator Flakoll** You would only divulge that constituent if you chose to divulge that constituent. If you make that request as a legislator, you do not have to divulge who you are asking on behalf of in either case.

**Rep. B. Koppelman** I am not going to divulge the name, but presumably I am doing it on behalf of a constituent either specifically or collectively if there was more than one. If I go through the loop of legislative council and do it, then it is going to be, you might say, privileged or not a public record. If I go directly to DOT and save a step and be a little more efficient with everybody's time, then it has to be a public record.

**Senator Flakoll** It is about emails, correspondence, and those kinds of things. In your scenario if you would ask them as a legislator directly to DOT, then maybe a charge is associated with it, because you are asking in essence as perceived as a citizen. If you go through legislative council, it is perceived you are asking in your official capacity.

**Rep. B. Koppelman** In that official capacity, there would be no public record of me making that request?

**Senator Flakoll** On which scenario?

**Rep. B. Koppelman** If I am doing it in official capacity and going through council, that is what the presumed official capacity would be. Then that privilege would be there according to Mr. Trenbeath's email (Attachment 2), and there would be no public record that I made the request.

**Chairman Kasper** That is incorrect. The bill makes it a public record. The request is public. All the documentation is public. The name of the constituent would be private.

**Rep. B. Koppelman** Either way it would be a public record if I went through council or went directly to DOT in both cases saying I am a legislator doing this on behalf of a constituent.

**Senator Flakoll** Where some of these become public documents is much like what Mr. Trenbeath sent to me. It is not a public record on my end, but it is public at his end. When he sent it to me, you could go and say I would like every email that Senator Flakoll sent between March 5 and Day 55. You can ask it at that end which sometimes happens.

**Chairman Kasper** Have you ever made a public records request?

**Senator Flakoll** I don't really remember any time where I have asked for emails. Generally, when I make requests for information, I will get hold of Brady at legislative council and say "Brady, I want to find out about something about a student loan program through the Bank of North Dakota." I will say "Go ahead and tell Eric he can give me a call if he wants." Not that are not open.

**Chairman Kasper** If you made the request through Brady, it would be a closed record.

**Senator Flakoll** The one I made to Brady is not really an open records request, but they can ask for information from BNC...

**Chairman Kasper** I am asking if you have ever made an open records request yourself?

**Senator Flakoll** Yes, I have asked people for information.

**Chairman Kasper** In your testimony you indicated that there had been a large open records request just recently. Do you care to name the individual that you were discussing?

**Senator Flakoll** I have no idea. I am guessing, though, it is not you, even though you are probably getting blamed for it.

**Chairman Kasper** Let me reveal the name of the legislator that you were talking about, because I have the testimony in the Senate, and that was this chairman.

**Senator Flakoll** I respectfully disagree. The one I just talked about recently was the one on the 18<sup>th</sup>.

**Chairman Kasper** I was asking if you are aware of a large open records request that you were referring to in your testimony?

**Senator Flakoll** In this testimony I have no idea. What you did would not even pertain to this, because you stated your name for that purpose. You stood up and raised your hand and said I am making this open records request. You did kind of what would be required under this law.

**Chairman Kasper** Correct, but I was just wondering if you were aware of an open records request that was quite large, and I should have said as outlined in your testimony in the Senate?

**Senator Flakoll** Yes.

**Chairman Kasper** Would you care to name who that was regarding?

**Senator Flakoll** We all know.

**Chairman Kasper** It was me, Rep. Kasper.

**Senator Flakoll** We are trying to not make this about people. We are trying to make this about policy.

**Chairman Kasper** I understand, Senator Flakoll. However, ...

**Senator Flakoll** I did not mention anyone's name in that nor in this request nor the one I referenced in terms of the large request which took about 12 months for redaction.

**Chairman Kasper** Let me set the record straight so the public knows and the committee knows. On December 17 I made a request of DPI that was very voluminous. It happened to be asking about 26 different points of information from DPI. The reason that was requested was because I had become frustrated in trying to obtain additional information from DPI that was not forthcoming. When the session convened on January 6, I had a meeting in legislative council's office with three attorneys, Kirsten Baesler and Bob Christman of DPI, and Rep. Becker. We discussed my open records request, and in the

course of that discussion, it was revealed to me that this was a huge cost to the department, and that was the first time it was revealed to me what the cost might be. I said, "I certainly do not wish for the department to spend that type of money." Kirsten Baesler asked me, "Rep. Kasper, what would you like to receive from our department?" I said, "I would like to get the answers to the cost of dollars that have been spent." She said, "I would be happy to provide that to you." At that point, I said, "I will withdraw my open records request." A January 14 email from Senator Flakoll was read. It is Superintendent Baesler on Senator Flakoll's email letterhead. "I understand from media reports that Rep. Kasper made some massive open records requests to the department. I understand that you have pulled together significant information on the cost of those record requests. Therefore, I would ask that you send the cost of these requests since December 15 until January 14 plus any related correspondence." The request was made from Senator Flakoll about my open records request that had been withdrawn. Of course, he was provided information which came up to a total of several hundred thousands of dollars which I again will provide for the committee. When you made that request in writing on your letterhead, which you said you hadn't done before, were you aware that I had withdrawn my request?

**Senator Flakoll** I don't remember. It wasn't that important.

**Chairman Kasper** Maybe not to you.

**Senator Flakoll** It is important in the context, though, that some of these are very voluminous and they take away from the productive time of people we have expected to do productive work, and we talk about education costs and other areas. It is really tough on an agency whether it is game and fish or anywhere else that they have unexpected expenses where it takes a lot of FTE time.

**Rep. Al Carlson** appeared in support. You have to go to the bill before you and decide whether it is good public policy or not good public policy. This bill in essence carves out one area. The rest of our protection still exists, but it says that if we make an open records request, that request would be the person who asked for that request whose name would be released. If he asked for his buddy next door, it is not. As legislators, we need information to make good decisions, so it is not beyond our realm of authority to ask for information. For example, if Rep. Kasper made a phone call and said I want this information, would have it been treated differently as far as releasing his name or if he put it on his email and said "I Rep. Kasper want this information"? If you check with council, the answer is yes. The bill reads any record of the legislative council. I have asked for tons of information from council, but I have never had an open records request that I can remember. Should I have the authority and the opportunity to do that? I think I should. Would I be afraid of having my name released? No. All other correspondence that we do as legislators is private. The first one that kicked this off was the great big request at NDSU for all the emails at NDSU. We have another one just as recent as last week that requested legislative council on behalf of an unidentified legislator seeking all emails to and from Kelly Rusch, vice president for research and creative activity. I can't imagine that this is an inexpensive deal. Should that person's name be public that asked for it or not? You have to make that decision. You have to leave all the personalities out of this, and you have to decide whether it is good public policy or not. Make sure you stick to the issue-- should it be required that name be released or not be released. It is not about the money

so much as it is about whether or not we as legislators deserve that that protection should be extended to us in all cases. If you do that, then you did good work as a committee in my opinion.

**Rep. Steiner** Earlier this session I put in a bill I was considering. About a week later I had a senator in front of me asking me if I was actually getting the signatures on that bill. My assumption was that legislative council is open. I didn't even know that if I asked for this that it wasn't open. On legislative council work, is that council work product confidential?

**Rep. Carlson** That information is supposed to be kept secret. How that got out, you and I will probably never know. Their job is to keep that information quiet as we are working on a bill.

**Rep. Wallman** I am going to ask your opinion. When I was running for school board in Fargo, I made an open record request. It was for information regarding how our funds were being spent, recovery funds, and I was stonewalled. I didn't know I could go to my local legislator and asked them to ask legislative council and then actually get some information. Do you feel it is appropriate for me to have gone to a legislator?

**Rep. Carlson** This is a detailed question, because you are taking from state information to local information, and I don't know the flow of the law there.

**Rep. Wallman** As a citizen?

**Rep. Carlson** If we didn't have anything to do with the making of the law, I am not sure that we can go out and request a local school board to give us their information. I can't answer that because I don't know. I have never heard of it done.

**Chairman Kasper** Rep. Wallman was a constituent in a legislative district at the time of her discussion. She had every right from my perspective to contact you or me or any legislator and ask to have that information obtained for her, because under North Dakota open records law, they are open records. As indicated very similar to what I said earlier, she was being stonewalled. I believe that is a legitimate responsibility of any legislator to follow up on their constituent's request and try to get information for them that they have requested. Are you saying that would not have applied?

**Rep. Carlson** I would ask council whether or not that the state can go back and request that information and have it right with that enmity to get that from a legislator back into a local district. I don't know whether we have the statutory right to do that. I don't know that answer. Would I do it if I could? Sure I would. I am not sure. I have never been asked that, and I don't know if you can do it.

**Chairman Kasper** I would assume that under our current law if you or I or any legislator goes to legislative council and ask to obtain this open record, they would do it.

**Rep. Carlson** If I asked, I would do it.

**Chairman Kasper** Rep. Wallman was frustrated as was I, not getting the answer you like and go to another source. If my name would be revealed through this bill, certainly people are going to know who requested it, and I am trying to maintain my secrecy as a constituent. Is that right to do?

**Rep. Carlson** I think it is different whether you are a legislator or whether you are a citizen Joe on the street. I think when you take that office, you have different responsibilities, and those responsibilities are to the public as well as to yourself. Personally, I would not be afraid to put my name on it if I am making a request. You decide what you will. Is it good public policy? Do you want the door all the way closed, or do you want the door open a little bit?

**Chairman Kasper** Do you believe in attorney-client privilege?

**Rep. Carlson** Yes, absolutely, but I am not sure you can relate this directly to that.

**Chairman Kasper** Line 9 of the bill--you said there is a potential problem in the bill with the words, "any record of the legislative council." Would you care to elaborate on what you mean, where you see a potential problem?

**Rep. Carlson** I am saying what does a record mean? I would assume that is something in writing. If I have a verbal application to you or if I type it under email, is it treated differently? That is my only point there. I would recommend that you bring Jon Bjornson in from council and ask what his interpretation of the bill is as written.

**Rep. M. Johnson** We all have an attorney-client relationship with the attorneys in legislative council. If this vote passes and I vote no on the floor, does the majority speak for the minority? The request for them to possibly violate the rule of ethics as attorneys, do we relinquish that by this bill? Can the majority of this body speak for the minority that votes no should this bill pass?

**Rep. Carlson** I think we do on every bill we pass. I think the majority always speaks for everybody when a bill passes. As far as the attorney-client privilege we have in our special relationship with legislators to our staff, this is a carve out from that. Everything else stays the same. This is the one thing that is different. I don't believe it violates that, because the rest of those privileges are there. We make the laws. The attorneys enforce. I think it is a different relationship.

**Rep. M. Johnson** Attorneys have a rule of professional responsibility, and the attorney-client privilege is the basis of the advocacy process. We have that relationship with those attorneys. Now you are going to overrule the code of professional conduct of attorneys. You know what I am getting at? You are going to say the majority of this body can rule out the rule of ethics on attorney-client privilege, but I don't want it to say assume, and I vote no on the floor. I am voting to maintain my attorney-client privilege as provided in the code of professional conduct, and you are going to say no, you can't have that anymore. The majority says.

**Rep. Mooney** This bill is very specific in relating to the request for public records which is vastly different than all the other work that we do with legislative council?

**Rep. Carlson** Absolutely.

**Chairman Kasper** "Relating to a request for public records," now becomes an open record. I contact legislative council and want an open records request directly to the governor's office and outline specifically the request I would like to have, what part of that transaction is an open record with this bill?

**Rep. Carlson** You better get Mr. Bjornson down here, but I would say whatever you asked for in that request. Only the documents that are considered to be public documents would even fall under the category. I am not an attorney, so I am not here to give you an attorney side of this. I am here to give you the side of the issue that says is it good public policy? This says do you want your name out there or don't you?

**Chairman Kasper** It is more than a name. In the example I just cited to you, in the email that would be sent to the governor's office, it would outline my request for the records I am asking for, and, therefore, that is a public record, I believe, according to the intent of this bill. This means you as a legislator are now an open record because your desire to learn this information says something which could reveal some type of bill you are working on but you are trying to keep confidential, but all of a sudden it is now open to the public which says you know what, I was working on this thing. Now the public is after me. These reporters in the room want to talk to me. I am trying to do something for a constituent or what I think is good for the people of North Dakota, but it is now an open record and I just can't continue with my duties that I believe are appropriate as a legislator.

**Rep. Carlson** I suppose you can look at it this way. You want an open record, but not on record. You have to make that decision. I am telling you I think that we have special privileges and should this be one of them or shouldn't it be?

**Rep. B. Koppelman** It seems a little bit of a camel's nose type argument. There are probably some members of the media that would love to have our emails and all of the rest of it too at times. Is this just going to start down that process? Is this going to really turn into a scorecard where the person who does the most work on behalf of their constituents is now going to be the guy who wasted the most taxpayers' money in some people's eyes?

**Rep. Carlson** You are going to have 900 opportunities to have a scorecard. Every time you push that button, you have a scorecard. Again, don't lose sight of what it is doing. Do you want the name out there when you ask for it or don't you?

**Chairman Kasper** From my perspective, it is a whole lot more than that. I appreciate Rep. Koppelman's question to you, because I think that goes to the nuts of the problem which helps to potentially label legislators because of this information that is being put out there when you are trying to do work for your constituents and the people that you represent.

**Jack McDonald**, North Dakota Newspaper Association and the North Dakota Broadcasters Association, appeared in support. Attachment 3. (48:38-50:24)

**Rep. Steiner** What does that name mean to the press?

**Jack McDonald** From our standpoint, it would mean it is just another news item. We would like more information for the newspaper story. We are not out to do any vindictiveness. We are not out to pick on any particular person.

**Chairman Kasper** Let me respond to your statement. What dawned me as I heard your comment was that if legislators whose names are revealed when we would like them confidential and now the newspapers have the name, if we as legislators had the same opportunity in the newspapers to respond to what the newspapers write particularly in their editorials, then I would not see a problem with this bill. I can tell you from first-hand information that when an editor or a newspaper decides that they are going to go on a crusade against one or more legislators, they can do it with tons of ink and day after day and they won't print your response in most cases. There are two sides of that issue to open records, Mr. McDonald.

No opposition or neutral.

The hearing was closed.

Attachment 4 was handed out to the committee.

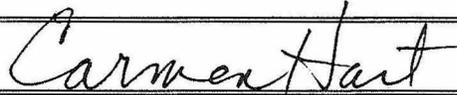
# 2015 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee  
Fort Union, State Capitol

SB 2222  
3/27/2015  
25561

- Subcommittee  
 Conference Committee

Committee Clerk Signature



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

Relating to open records requests

## Minutes:

"Click to enter attachment information."

**Chairman Kasper** opened the meeting on SB 2222.

**Rep. Dockter** made a motion for a DO NOT PASS.

**Rep. B. Koppelman** seconded the motion.

**Rep. Dockter** I can see their point. Once you start opening things up, it is going to start opening up more and more.

**Rep. Wallman** I think that everything else is already open. I don't really see what else it is going to open up. Yesterday I made a comment about open records request and that I had been stonewalled. I am not sure the answer is for me to go to a legislator and have them secretly ask for that. I think the idea would be that it would be better enforced that we do have access to things as the public. I am afraid I have to resist the motion. It is the moving parts to this that are not clear cut.

**Rep. Amerman** I am still not sure which way to vote on this. It is poorly written. All you need to do is make a call and it still is the way it is. We are all for transparency.

**Chairman Kasper** The term "any record" interpreted by legislative council is a written request. It is not a phone call. To keep a request by a legislator confidential through legislative council, all you do is make a phone call. Remember, we as legislators have a choice on how we request an open record. In my case, I sent the request through my personal email, so that was a public record. I believe when we do constituent work, there are times where those things should be confidential. The idea about the cost of the open records that was amended out of here I think is a courtesy to any legislator. When you have an open records request, the department you are requesting it from should give you very quickly the cost estimate so that you are aware of that.

**Rep. B. Koppelman** Sometimes when we think of ourselves as legislators, we think about our ability to make law and come up with policy decisions and things like that. There were some comparisons yesterday about statewide officials and whether or not theirs would be public if they made a records request. Legislators are advocates for the populous in a way that statewide elected officials are not. Our emails are not subject to public records requests the same as let's say the superintendent of public instruction, and I don't want to get there, because the constituent connections that we have are much different often times than what a statewide office holder has. Understanding that difference that we are advocates for those people justifies not supporting this bill, and I plan to vote for the do not pass.

**Rep. M. Johnson** I am going to resist passing this bill. Now you are going to get a flood of requests into legislative council by phone or walking up there and asking them to look into this. Guess what, they are so flooded that they are going to have to write them down. Guess what, written record, so that is open now. It is so unworkable as is.

**Rep. Louser** If this were to pass, would this allow for a legislator to make a request for another legislator's legislation that is being proposed or written by legislative council? Could I as a legislator make a request of legislative council to find out what other legislators are working on prior to the session if this bill were to pass? I got the impression yesterday that yes in fact, they could. It doesn't seem right.

**Rep. Wallman** Can't you do that now, Rep. Louser?

**Rep. Louser** No.

**Rep. Wallman** Making it transparent who is making an open record request? To the way I read it, this doesn't impact whose records you can request which is what I think you are saying.

**Rep. Louser** I probably wouldn't have gone down that line of thinking except I heard it in testimony yesterday. I don't know if it is germane.

**Rep. Schneider** Even with its flaws, it does promote sunshine and it does promote transparency. Generally, I don't want us to be above the laws we apply to others, and I certainly want to be able to use again in the future Rep. Carlson's quote that "lawmakers should not be afraid of more sunshine," so I am going to resist the motion.

**Rep. M. Johnson** I don't believe that the legislature can carve out on their own the code of professional responsibility of attorneys.

A roll call vote was taken. 11 Yeas, 2 Nays, 1 Absent.

**Rep. M. Johnson** will carry the bill.

Date: 3-27-15  
 Roll Call Vote #: 1

**2015 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2222**

House Government and Veterans Affairs 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 Dockter Seconded By B. Koppelman

| Representatives       | Yes | No | Representatives     | Yes | No |
|-----------------------|-----|----|---------------------|-----|----|
| Chairman Jim Kasper   | X   |    | Rep. Bill Amerman   | X   |    |
| Vice Chair Karen Rohr | X   |    | Rep. Gail Mooney    |     |    |
| Rep. Jason Dockter    | X   |    | Rep. Mary Schneider |     | X  |
| Rep. Mary C. Johnson  | X   |    | Rep. Kris Wallman   |     | X  |
| Rep. Karen Karls      | X   |    |                     |     |    |
| Rep. Ben Koppelman    | X   |    |                     |     |    |
| Rep. Vernon Laning    | X   |    |                     |     |    |
| Rep. Scott Louser     | X   |    |                     |     |    |
| Rep. Jay Seibel       | X   |    |                     |     |    |
| Rep. Vicky Steiner    | X   |    |                     |     |    |
|                       |     |    |                     |     |    |
|                       |     |    |                     |     |    |
|                       |     |    |                     |     |    |
|                       |     |    |                     |     |    |

Total (Yes) 11 No 2

Absent 1

Floor Assignment M. Johnson

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

**REPORT OF STANDING COMMITTEE**

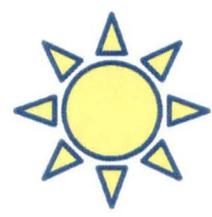
**SB 2222, as engrossed: Government and Veterans Affairs Committee (Rep. Kasper, Chairman) recommends DO NOT PASS (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING).** Engrossed SB 2222 was placed on the Fourteenth order on the calendar.

**2015 TESTIMONY**

**SB 2222**

# 1-1  
1/21/15

*SB 2222*  
*Open Records Transparency and  
Accountability*  
*Senator Tim Flakoll*



Chairman Hogue and members of the Senate Judiciary Committee. For the record I am Senator Tim Flakoll of District 44 in Fargo and I am here today to provide you with rational reasons as to why you should support SB 2222.

SB 2222 is a bi-partisan bill that will provide a higher level of **transparency and accountability** related to the activities of Legislators as it pertains to open records requests.

It would end anonymity for lawmakers' open records requests and bring the sunshine to the work done by Legislators.

**Transparency**

The bill has two components. The first is that it would require Legislators to be **transparent** in their requests for open records. Currently we as Legislators can make a request through Legislative Council and it is treated as a blind request where only the requestor and Legislative Council know who made the request. SB 2222 is about allowing us to say "go ahead and make the request, but we want the taxpayers to know who is making the requests."

**Accountability - with a base allowance**

The second thing the legislation proposes is to provide a base allowance of \$5,000 in open records for each individual Legislator per biennium. If an individual Legislators chooses to make over \$5,000 in requests in a biennium that they have two choices:

- 1) They can go to Legislative Management (a group of our Legislative colleagues who we elect from within) and make a request to Legislative Management for funding to pay for what they think is a valuable request. If

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SB2222  
1/2/15

that group feels that it is a good use of taxpayer funds they can vote to carry out the open records request.

- 2) As a second option, the Legislator can opt to pay for it themselves in a similar fashion that the citizens they represent have to do.

Mr. Chairman, open records requests seem to me to be the only place where one Legislator can expend hundreds of thousands of dollars, or with a recent stories of requests, in or around a million dollars for what can unfortunately be a fishing expedition.

This legislation requires a system of **accountability** with a broader approach of support when high levels of funds are expended. Where does the \$5,000 trigger threshold come from? It mirrors the amount that gets a bill sent to appropriations so that a larger audience can review the value of the expenditure.

**It is this transparency and accountability that has led the North Dakota Newspaper Association to support this bill.**

Chairman Hogue, about 8 years ago I was doing a radio interview and while on break the host told me a story about a Legislator who had conducted an open records request for an agency, I think it was either the ND Game and Fish Department or the ND Water Commission. Anyway, this Legislator brought in about 10 banker's boxes full of papers to the radio host and told the host "here you can read these if you want, but I have not went through them, I only made the request to stick it to the agency." This was my initial exposure to this type of activity.

"Lawmakers should not be afraid of more sunshine." Rep. Al Carlson, sponsor of SB 2222

In recent years there have been requests that have cost taxpayers excessive amounts of money (some reportedly over \$100,000) each. Again I am referencing the actual costs of requests not the limits established in law which are often below the actual costs of the work.

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### A recent example of a large request

Recently, a Legislator made a request for every piece of correspondence (email and physical papers/letters) from every person in an agency with more than 100 employees for a five (5) year period and between and among 14 different groups that they have regular correspondence with. The emails from the more than 100 employees for a five (5) year period would also take a great deal of effort by employees and IT staff to pull from original sources (reported to be 1,500 files). Generally when an open record request is made, there is an IT hold put on emails to prevent deletion of emails until after the issue is resolved.

For this request the email portion is reported to be **381,000 pages** of emails. **Plus 115,000 pages of paper copies for a total of right at 500,000 pages.** At 100 pages per hour, it is estimated to take 5,000 hours for redaction (removing such things as minor's names, social security numbers, HIPAA - medical information, FERPA - Family Educational and Privacy Act, and others as required by law). Redaction would need to be done by a professional and it is not something a \$12/hour intern can do because of the delicate nature of some emails and the high level of training required to know the legal parameters regarding what is protected and what is not protected.

Redaction costs by a trained person at \$50/hour (salary and benefits) could be estimated to be **\$250,000 for this one request.**

With 500,000 pages of materials and if you can find one page every 15 seconds it would take 2,083 hours to find that tremendous amount of pages. Then run the math and 2,083 hours times \$25/hour adds another **\$52,083 on to the tab.**

Printing costs for the redacted pages would be an estimated **\$124,000.** That is \$95,250 for printed copies of emails and \$28,750 for copies of paper pages.

**Total thus far \$426,000 (this same individual made another request the same week from another agency who we are told was equal to or greater than this actual request.**

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Chairman Hogue, we don't want our colleagues to not ask for open records. And very seldom will it cost the state that much money where they would need to seek oversight approval. But in some cases I think we can all agree that we have better use of taxpayer dollars.

**Paper portion of the request**

Now for that is simply addresses the email portion of the request. Next we have to go to the paper files that this agency had both in the capitol and their off-site storage site (since it covered 5 years, they would have to go to their off-site storage location). They would need to go through virtually every file in order to visually ensure compliance.

In that you<sup>v</sup> searching for paper copies would take more time you would have a much higher cost to recover the paper documents than for emails.

Again noting that this single request that was made to the agency would encompass another 115,000 pages of documents.

Mr. Chairman this bill will add a higher level of transparency and accountability to the work we do on behalf of the citizens in this state. It will earn a higher level of trust with those we serve. I think it helps protect the taxpayer's interest and I ask for your support of SB 2222.

Remember that when a request is made between two individuals and entities the individuals and agencies have to provide all emails from a thread. A VERY simple example:

Original email from John - "When can you do lunch"

Reply #1 from Sally - "Not this week but how does the week of February 9<sup>th</sup>?"

Reply #2 from John - "Can't do the week of February 9<sup>th</sup> as I am in Florida for meetings."

Reply #3 from Sally - "Lucky you, good time to be there."

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Reply #4 from Sally - "How does the week of February 16<sup>th</sup> look?"

Reply #5 from John - "looks good, I will have my assistant Jerry make a reservation at the Peacock." (Jerry the Assistant is now on the email thread as a cc and has to also turn over his emails in the request).

Reply #6 from Sally (cc Jerry) - "Can we do 11:30 a.m.?"

Reply # 7 from John (also cc Jerry) - "How about 11:45 as I have a meeting till 11:30 a.m.?"

Reply #8 from Sally (cc Jerry) - Sounds great, here is my assistant Kathy's number (Kathy is now part of the thread) 701-555-1111

Reply #9 from John (also cc Jerry and Kathy) "See you then."

**27 total emails** that have to be found, redacted and turned over to the requestor.

Members of Legislative Management from 2013-2015 interim: Holmberg, Carlson, Damschen, Devlin, Heller, Marvin Nelson, Onstad, Owens, Schmidt, Heckaman, Oehlke, Robinson, M. Schneider, Sorvaag and Wardner.

Members of the Legislative Management from 2011-2013 interim: Carlson, Wardner, Damschen, Drovdal, J. Kelsch, S. Meyer, Onstad, Ruby, Vigesaa, Weisz, Erbele, Holmberg, G. Lee, Robinson and Taylor.

*"He said there have been too many anonymous records requests that have forced state agencies to do a lot of work, "and it really doesn't amount to anything."*

# 2-1 (2014)  
SB2222  
1/21/15

# 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](http://www.ag.nd.gov)

The public has the right to know how state and local government functions are performed and how public funds are spent. North Dakota has “sunshine laws,” which provide that all government records and meetings must be open to the public unless a specific law authorizes a record or meeting to be closed.

## ALL PUBLIC ENTITIES ARE SUBJECT TO OPEN RECORDS AND 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 rather than providing services to that entity.* Courts are not subject to open records and meetings law.

Anyone has the right to attend meetings of a public entity or to access and obtain copies of the entity's records, regardless of where they live. Before a public entity may deny access to a record or meeting, it first has to explain which law closes the record or meeting.

- To deny access to records, the public entity must explain, within a reasonable time, the *legal authority* (the specific law) for denying the request. If asked, the entity must put the denial and explanation in writing.
- 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 the public to leave the meeting room.

## Opinion Requests

Anyone may ask the Attorney General to issue an opinion regarding an alleged violation of open records or meetings law. The request must be made within 90 days of an alleged meeting held without notice or within 30 days for other violations of open meetings law or of any open records law (regardless of the date on which the requester became aware of the violation). There is no charge for the opinion, which is issued to the public entity with a copy to the requester.

If the Attorney General finds a violation, the entity has seven days to take the corrective action required by the opinion. Even if the opinion finds that the public entity violated the law, the opinion cannot change, void, or overrule a decision of, or action taken by, the public entity.

- The basic open records and meeting laws are found in Chapter 44-04 of the North Dakota Century Code (N.D.C.C.), beginning at Section 44-04-17.1.

Continued on next page

## QUICK TIPS

- Generally, a public entity cannot ask why the records are requested, ask for identification, or require a request be made in writing (or in person).
- A request for *information* is not a request for a *record*. A public entity has no obligation to respond to questions about its duties and functions, or to explain the content of any of its records.
- A statute may declare certain records to be exempt or confidential. If a record is exempt, a public entity may release it or withhold it, at its discretion. If a record is confidential, the public entity either cannot release it or first must redact the confidential information.
- A member of the public does not have the right to *speak* to the governing body at an open meeting, only the right to see and hear what happens at the meeting and to record or broadcast those observations.
- Generally, there is no requirement that a meeting notice be *published* in the newspaper.
- Draft minutes should be made available to anyone who requests them, even if the minutes have not been approved.
- 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 is open but certain personal and payroll information is exempt or confidential. Generally, a public entity may *not* close a meeting to discuss salary issues or employee job performance.
- A governing body may 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.
- Confidentiality clauses in a contract or settlement agreement involving a public entity are against public policy and are declared *void* by state law.

## OPEN MEETINGS

"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 any other electronic communication (either at the same time or in a series of individual contacts).*

If a governing body delegates any authority or assigns a portfolio to two or more people, the newly formed committee also is subject to open records and meetings law.

- The *only* time a gathering of a quorum of members is not a meeting is if it is a purely social gathering—as soon as any public business is discussed, it becomes a "meeting."

Prior written notice is required for all meetings of a public entity. The notice must include 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 at the time of the meeting. For special or emergency meetings, however, *only* the specific topics included in the notice may be discussed.

Generally, there is ***no minimum advance notice period*** for public meetings. Notice must be posted, filed at the central location (or on the entity's website), *and* given to anyone who has requested it, *at the same time* the members of the governing body are notified of the meeting.

Meeting notices must be filed with the Secretary of State (state agencies), the City Auditor (city-level entities) or the County Auditor (all other entities) **OR** the public entity may choose to post the meeting schedules and notices on its official website. The meeting notice *also* must be posted in the entity's main office, if it has one, and if the meeting is held elsewhere, at the location of the meeting on the day of the meeting.

Additionally, notice of special or emergency meetings must be given to the entity's official newspaper and any media representatives who ask for notice of special or emergency meetings. Copies of meeting notices can be obtained from the appropriate office. If asked, a public entity must provide a requester with personal notice of its meetings.

*Before* a governing body may 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. Final action on the topics considered in the executive session must be taken during the open portion of the meeting. All substantive votes must be recorded by roll call. ❖

## OPEN RECORDS

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SB2222  
4/21/15

"Record" includes *all recorded information regardless of physical form (e.g. paper, e-mail, computer file, photograph, audiotape or recording, video, text message, etc.) that has a connection with how public funds are spent or with the public entity's performance of its governmental functions or its public business.*

*Anyone* has the right to view or get a copy of public records, regardless of the reason. However, a request must reasonably identify existing records. A request for *information* is not a request for a record under open records law.

A request for public records can be made in any manner - in person, by mail, e-mail, fax, or by phone. The entity must respond to the request within a reasonable time, either by providing the requested record or by explaining the legal authority for denying all or part of the request. Generally, a "reasonable time" is measured in hours or a few days, but depending on the amount and type of records requested and various other factors, it may be several days or weeks.

A public entity may only deny access to or a copy of a record for which there is a specific statute closing all or part of the information. The remaining information is open to the public and must be provided. If a request for records is denied, the entity must explain what specific federal or state law makes all or part of the record closed. If asked, the entity must put the reason for the denial in writing.

- An entity does not have to convert its records to another format, create or compile records that do not exist, or obtain records originating from another public entity that it does not have in its possession.

Access to records is generally free. An entity may charge up to 25¢ a page for copies on standard letter or legal size paper. For other records (photos, maps, etc.), the entity may charge the actual cost of making the copy, including labor, materials and equipment. The entity should inform you if other statutes authorize a different fee.

The first hour of locating requested records (including electronic records) is free. After the first hour, the entity may charge up to \$25/hr for locating records. An entity also may charge up to \$25/hr (after the first hour) for the time it takes to redact any exempt or confidential information.

Generally, electronic records are provided at no cost. However, if providing electronic records takes more than one hour, in addition to charges for locating and redacting, the entity may charge the *actual cost* incurred by Information Technology resources to access and copy the records.

The entity may charge for postage to mail the records (and will need a name and address for mailing purposes). The entity can require payment of estimated costs before copying or releasing the requested records. ❖

15.0577.01001  
Title.

Prepared by the Legislative Council staff for  
Senator Hogue

January 23, 2015

# 1-1  
2-10-15

PROPOSED AMENDMENTS TO SENATE BILL NO. 2222

Page 1, line 9, remove "1."

Page 1, remove lines 12 through 24

Renumber accordingly

Sixty-fourth  
Legislative Assembly  
of North Dakota

**SENATE BILL NO. 2222**

Introduced by

Senators Flakoll, Schneider, Wardner

Representatives Beadle, Carlson, Nathe

1 A BILL for an Act to create and enact a new section to chapter 44-04 of the North Dakota  
2 Century Code, relating to open records requests submitted by members of the legislative  
3 assembly and the legislative council.

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

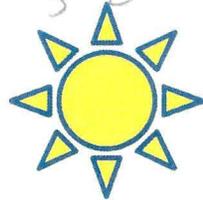
5 **SECTION 1.** A new section to chapter 44-04 of the North Dakota Century Code is created  
6 and enacted as follows:

7 **Requests for records by members of the legislative assembly and the legislative**  
8 **council.**

9 1. Notwithstanding section 44-04-18.6, any record of the legislative council relating to a  
10 request for public records made by the legislative council on behalf of a member of the  
11 legislative assembly is a public record.

12 ~~2. Each public entity that receives a request for public records from a member of the~~  
13 ~~legislative assembly shall forward to the legislative council a description of the request,~~  
14 ~~the name of the requestor, and an estimate of the total cost of complying with the~~  
15 ~~request if the public agency would be authorized to charge for locating and copying~~  
16 ~~the records under section 44-04-18. A public entity that receives a request for public~~  
17 ~~records from the legislative council shall forward to the legislative council an estimate~~  
18 ~~of the total cost of complying with the request if the public agency would be authorized~~  
19 ~~to charge for locating and copying the records under section 44-04-18 during any~~  
20 ~~biennium. If the cumulative total cost of public records requests by and on behalf of a~~  
21 ~~member of the legislative assembly exceeds five thousand dollars during a biennium,~~  
22 ~~the member may pay any excess amount charged through nonpublic funds or request~~  
23 ~~the legislative management to direct the legislative council to obtain the records at no~~  
24 ~~charge.~~

#1 2222  
3-26-15



*SB 2222*  
*Open Records Transparency Bill*  
*Senator Tim Flakoll*

Chairman Kasper and members of the Government and Veteran's Affairs Committee. For the record I am Senator Tim Flakoll of District 44 in Fargo and I am here today to provide you with rational reasons as to why you should support SB 2222.

SB 2222 is a simple and bi-partisan bill that will provide a higher level of **transparency and accountability** related to the activities of Legislators as it pertains to open records requests. This bill does not change or affect open meeting laws in our state.

Also to be clear, this reform bill would not restrict or limit open records requests.

Currently Legislators can make open records requests without having to acknowledge that they were the responsible party. This is a provision not afforded to other public servants including the Governor.

This bill would end the anonymity for lawmakers' open records requests and bring the sunshine to the work done by Legislators. Open records request are those requests where someone asks for documents that have already been generated and sent by email or by traditional mail. **Public Record:** "includes any writing containing information relating to the conduct of the public's business, prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."

"Lawmakers should not be afraid of more sunshine." Rep. Al Carlson, sponsor of SB 2222

**Transparency and Accountability**

SB 2222 would require Legislators to be **transparent** in their requests for open records. Currently we as Legislators can make a request through Legislative Council

and it is treated as a blind request where only the requestor and Legislative Council know who made the request. SB 2222 is about allowing us to say "go ahead and make the request, but we want the taxpayers to know who is making the requests and having them paid for with taxpayer dollars."

**It is this transparency and accountability that has led the North Dakota Newspaper Association to support this bill.**

Mr. Chairman, open records requests seem to me to be the only place where one Legislator can expend hundreds of thousands of dollars without getting buy-in by folks such as the appropriations committee, full assembly of the House and Senate or approval by the budget section.

Chairman Kasper, about 8 years ago I was doing a radio interview and while on break the host told me a story about a Legislator who had conducted an open records request for an agency, I think it was either the ND Game and Fish Department or the ND Water Commission. Anyway, this Legislator brought in about 10 banker's boxes full of papers to the radio host and told the host "here you can read these if you want, but I have not went through them, I only made the request to stick it to the agency." This was my initial exposure to this type of activity.

In recent years there have been requests that have cost taxpayers large amounts of money (some reportedly over \$100,000) each. Again I am referencing the actual costs of requests not the limits established in law which are often below the actual costs of the work. Just this past week there was a Legislator request to an agency that included 30,373 emails and 100,000 pages and would require an estimated 1,000 hours of attorney time (0.5 FTE) for redaction.

This bill in no way prohibits Legislators from seeking out open records requests, it just simply requires that this information is publically available.

Mr. Chairman this bill will add a higher level of transparency and accountability to the work we do on behalf of the citizens in this state. It will earn a higher level of trust with those we serve. I think it helps protect the taxpayer's interest and I ask for your support of SB 2222.

**### End ###**

## Quick Facts - from the Office of the North Dakota Attorney General (06/05)

### What is a "record."

The definition of a "record" includes all recorded information, regardless of physical form (paper, email, computer file photographs, audiotape or videotape) that has a connection with how public funds are spent or with the public entity's performance of its governmental functions.

### How do I request records?

You can make a request in person, by mail or by telephone. A public entity cannot require you to make a request in a specific manner.

The entity cannot:

Ask why you want the records.

Ask for identification.

Require the request to be made in person - or in writing.

The open records law only entitles you to review and receive a copy of open records. It does not require a public entity to respond to your questions, or to create a record that does not exist.

Is there a fee for getting the records I requested?

Access to records is generally free. For copies of records on 8 ½ x 11" or 8 ½ x 14" paper, the entity can charge up to \$0.25 per page. For any other kind of copy (including photos, maps, computer records, etc) the entity can charge the actual cost of making the copy, including labor, materials and equipment. The entity must inform you if the statutes authorize a different fee.

The first hour of locating the records is free. After the first hour, the entity can charge up to \$25 per hour for locating the records.

The entity can also charge up to \$25 per hour for the time it takes to review the records and cross out exempt or confidential information from the open records; however the first hour is free.

**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;

**Access to public 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 is 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 written denial.

**Other information from the internet.**

**Declared legal intention**

While the law does not have a clearly defined legal intention, it does state that "all records of a public entity are public records, open and accessible for inspection during reasonable office hours."<sup>[10]</sup>

**What records are covered?**

North Dakota law defines records as, "recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business."<sup>[11]</sup>

*North Dakota Statute 44-04-18*

North Dakota Statute 44.04, 17.15

# 2 2222  
3-26-15

**Flakoll, Tim**

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**From:** Trenbeath, Thomas L.  
**Sent:** Wednesday, March 25, 2015 5:01 PM  
**To:** Flakoll, Tim  
**Subject:** Engrossed SB 2222

Senator Flakoll:

In response to your inquiry concerning Engrossed SB 2222, I can tell you that under the language of the bill any Legislator may make a request for information or records from or through Legislative Council and on behalf of a constituent (or any other interested party) and will be under no obligation, whatsoever, to divulge the name of the constituent.

Tom Trenbeath

#3 2222  
3-26-15

Thursday, March 26, 2015

|  |
|--|
| HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE<br>SB 2222 |
|--|

CHAIRMAN KASPER AND COMMITTEE MEMBERS:

My name is Jack McDonald. I am appearing today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We support SB 2222 since it will provide additional information about open records requests.

If any other elected or appointed public official in North Dakota makes an open records request, from an Ops Township supervisor in Walsh County to Gov. Jack Dalrymple, his or her name would be a public record. We don't see any reason why legislators should be an exception.

It is really something of an oxymoron to say that a legislator making an open records request can keep the record of that request closed.

SB 2222 will result in greater governmental transparency. We respectfully request that you give this bill a DO PASS.

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

#4  
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3-26-15

the interest or intent of the business or industry to locate in, relocate within, expand within this state, or partner with a public entity to conduct research or to license a discovery or innovation. This exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.

- b. Trade secrets and proprietary, commercial, or financial information received from a person that is interested in applying for or receiving financing, technical assistance, or other forms of business assistance.
- 6. Unless made confidential under subsection 1 or made exempt under subsection 5, bids or proposals received by a public entity in response to a request for proposals by the public entity are exempt until all of the proposals have been received and opened by the public entity or until all oral presentations regarding the proposals, if any, have been heard by the public entity. Records included with any bid or proposal naming and generally describing the entity submitting the proposal are open.
- 7. Unless made confidential under subsection 1, records received by the state department of emergency services under chapter 37-17.1 from the federal government and any public or private agency or entity for disaster mitigation, preparation, response, and recovery are exempt.

**44-04-18.5. Computer software programs exempt.**

Any computer software program or component of a computer software program contracted, developed, or acquired by a public entity or state agency, institution, department, or board and for which the public entity or state agency, institution, department, or board acquires a license, copyright, or patent is exempt from section 44-04-18 and section 6 of article XI of the Constitution of North Dakota. After receiving written approval from the governor, a state agency, institution, department, or board may enter into agreements for the sale, licensing, and distribution of its contracted, licensed, patented, or copyrighted computer software programs. A state agency, institution, department or board may take any needed action, including legal action, to protect the state's interest in the computer software against improper or unlawful use or infringement and may collect and enforce the collection of any sums due for the licensing or sale of the computer software. A public entity may enter into agreements for the sale, licensing, and distribution of its licensed, patented, or copyrighted computer software programs.

**44-04-18.6. Access to legislative records and information.**

The following records, regardless of form or characteristic, of or relating to the legislative council, the legislative management, the legislative assembly, the house of representatives, the senate, or a member of the legislative assembly are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota: a record of a purely personal or private nature, a record that is legislative council work product or is legislative council-client communication, a record that reveals the content of private communications between a member of the legislative assembly and any person, and, except with respect to a governmental entity determining the proper use of telephone service, a record of telephone usage which identifies the parties or lists the telephone numbers of the parties involved. This section does not apply to any record distributed at a meeting subject to section 44-04-19 and section 5 of article XI of the Constitution of North Dakota.

**44-04-18.7. Criminal intelligence information and criminal investigative information - Non-disclosure. Record of information maintained.**

- 1. Active criminal intelligence information and active criminal investigative information are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota. A criminal justice agency shall maintain a list of all files containing active criminal intelligence and investigative information which have been in existence for more than one year. With respect to each file, the list must contain the file's number or other identifying characteristic and the date the file was established. The list required