

Testimony of Erik Johnson
Fargo City Attorney

February 11, 2021
House Political Subdivision Committee
HB 1305
Rep. Jason Dockter, Chair

Mr. Chairman and Members of the Committee,

My name is Erik Johnson and I am appearing on behalf of the City of Fargo as its City Attorney.

EXECUTIVE SUMMARY. The City of Fargo is opposed to this bill because it will authorize an individual governing body member—presumably a member in the minority on the particular issue at hand—to use the Attorney General’s office to privately undertake “opinion shopping”. There is considerable risk of harm that can come to a city—being led by decisions of the majority—if such “request power” by an individual member of the governing body were allowed.

House Bill 1305 would allow any city or county governing body member to use the Attorney General’s office as his or her own personal legal advisor. Perhaps more accurately, said individual governing body member will think that they can use the Attorney General’s office as their personal legal advisor whenever they choose.

As a starting point, it is important to recognize that North Dakota state law already provides an appropriate structure by which cities obtain legal opinions and legal advice. For example, pursuant to Section 40-20-01 of the Century Code, one the city attorney’s duties is the duty to “... furnish written opinions, when requested, upon all questions submitted to the city

attorney by the governing body or any of the departments of the city." N.D.C.C. §40-20-01 Subd. 2. The Attorney General also has a duty to provide opinions to cities upon request by either the governing body or by the city's attorney but it is fairly limited in scope--the AG will interpret state statutes upon request of a city. It is important for you to know that the Attorney General will not give North Dakota cities opinions about any question of any type. For example, the Attorney General does not interpret city ordinances, does not interpret contracts between the city and other parties, does not undertake the analysis of facts or "situations", and does not develop legal strategies to solve the city's problem. In other words, the Attorney General is not the city's legal counsel. He does not represent the city and he is not tasked with looking out for the city's best interests. Therefore, existing state law creates an appropriate framework within which cities can obtain all the legal advice that they need and the Attorney General already has an appropriately limited, but very helpful, role in that process.

I believe that giving any single governing body member the right to request an Attorney General opinion could create a very disruptive, if not very damaging, result to North Dakota's cities and it could place the Attorney General's office in a very awkward and rather impossible position. Let me provide some context:

- The individual governing body member can request the AG opinion "privately" and he or she is not required to disclose his/her request for an AG opinion.
- The individual governing body member could ask the Attorney General for an opinion even before the City Attorney has been consulted about the matter in question. (And I might add that when AG opinions are sought by city attorneys and by city councils and commissions, it is customary for the city's attorney to provide at least some preliminary analysis to assist the Attorney General in understanding the background and the precise nature of the legal question being asked.)
- An AG opinion has great value in the proper circumstance. It may very well be helpful for a city to obtain an AG opinion—an interpretation of state law—as

part of the city's approach to a situation but the value of the Attorney General's opinion depends upon the precise question being asked. The city's attorney is usually in the best position to identify the problem and, more importantly, to identify the question to be asked of the Attorney General.

- Here is what I think is the biggest concern—the biggest potential danger. There may be a number of situations that could occur where a single governing body member could compromise the leadership of a city as determined by the majority of the governing body members. I won't attempt to list the possibilities; simply put, giving a single governing body member the power to request an AG opinion could give that single individual an unfair or inappropriate advantage over the "majority"—the majority of the other governing body members. It may result in giving the individual member the ability to wield the privately-obtained AG opinion over the heads of the "majority", thus giving that individual a sort of veto power.
- From the perspective of the city's attorney, who is tasked with the job of representing the city's legal interests and, at times, of protecting the city from legal harm, giving individual governing body members unfettered and private rights to seek AG opinions could disrupt legal strategy and could do harm to the legal position taken by the city and could compromise the ability of its city attorney to defend that position.

CONCLUSION. For the reasons as described, the City of Fargo OPPOSES House Bill 1305 and respectfully urges a **DO NOT PASS** recommendation.