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2003 HOUSE JUDICIARY

HB 1051

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1051

House Judiciary Committee

Conference Committee

Hearing Date 1-8-03

Tape Number	Side A	Side B	Meter #
1	xx		11-42
Committee Clerk Signature 			

Minutes: 12 members present, 1 absent (Rep. Bernstein).

Chairman DeKrey: called the meeting to order at 9:30 a.m.

John Bjornson, LC: HB 1051 comes from the legislative audit fiscal review committee. I am one of the legal staff of LC, and I'm not here to testify for or against the bill, but to try and give you some background. As I said the bill is from the Interim Committee, and as I was informed, the bill is at present a concern to the State Auditor's office regarding the draft reports that are given to an entity. This draft is intended to be given to the governing body by the Auditor's office and is intended to be confidential until a final report is issued. This bill has a conflict in it. The Interim Committee at its last meeting made a decision that they want the draft report to be confidential and weren't quite certain about the distinction between exempt and confidential information. You can see on line 14 that confidential and exempt from Sections 44-04-18 so, to back up, confidential records cannot be released beyond the people who are intended to have them and to release that information would be a felony. An exempt record is a record required

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by law to be open or public is not confidential, but may be open to the public entity. So, what I am trying to tell you is that you probably need to make a decision about whether that record should be confidential or exempt, but you cannot have both in that line. You should take a look at that and make a decision on exempt or confidential.

Rep. Grande: who is the chair and would he be able to clear this up.

Rep. Maragos: The former chairman was the former Senator Ken Solberg. Currently I believe the vice-chairman is Rep. Frank Wald from Dickinson, who now shares the committee. I will address some of those concerns of the committee discussion.

Rep. Klemin: John, on lines 14 and 15, where it says that it is confidential or exempt, until the final audit report is issued, does that mean that once the final audit report is issued, then the draft audit report is again open records if someone wanted to compare the differences?

J. Bjornson, LC: I believe that was the intent. There may some exceptions, working papers and draft audit reports, looking back to lines 8 and 9, working papers and draft audit report are not public records and are exempt, and which in the exempt category means that they may be released. It's a discretionary thing. They may be released at the discretion of the Auditor. They are in a category in between where they may be released by the Auditor.

Rep. Klemin: The auditor isn't the only one that has those. The reports can be given to someone else, and they don't have control over who asks. So if somebody asks the entity given the draft if they could see the draft or if they had to go back to the state auditor and say, "Well I can't let you have it unless the State Auditor says it's OK".

J. Bjornson, LC: That is where the problem stemmed from. The committee received testimony from the State Auditor's office regarding the confidentiality of draft audit report. The committee

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learned that draft audit reports are exempt from open records. however once the draft is released to an agency for comment, the exemption is lost. In order to exempt draft audit reports from the open records requirement, the legislative assembly would have to amend section 54.10.26, the word confidential would grant the discretionary issues of the draft audit report which would be exempt from the open records clause. I think they were struggling with that question. I am not sure where the committee really wanted to go with this.

Rep. Onstad: It's clarification to follow up on what Rep. Klemin discussed, lines 8 and 9.

"Working papers and draft audit reports of the state auditor are not public record". Then, we get down to line 15, it says, "the working papers of an issued audit report are public". Is that where you are talking about it should say working papers and drafts?

J. Bjornson: I don't believe that once the report has been issued that there is as much a concern as the working papers. The language on line 14 is more of a concern than calling the draft audit report confidential and exempt because those two terms are in conflict with each other. You should decide whether you want it exempt, meaning it's a discretionary issue, or confidential, meaning there is no discretion, those records are closed and unauthorized knowing release would be a violation of the law and therefore a felony.

Chairman DeKrey: Thank you. We will start with testimony for the bill 1051 now.

Jack McDonald: I am here representing the North Dakota Newspaper Association and the Broadcasters Association. (see testimony attached). There is some confusion. I would like to answer a couple questions that were raised just a few minutes ago. The confusion comes up in trying to make the bill fit before an audit is released and after an audit is released. If you look right now at the law, it says the "working papers of the state auditor are not public record". Now

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that is the working papers when he is preparing the draft, that's right now, there not at the state auditor, but the attorney general says that's for the state auditor, that's not for the person who gets it, so that when the state auditor gave this working paper or the draft before it to the Veterans Committee, the attorney general said that is an open record now, because there is no exemption for the Veterans committee. So then the Legislative Fiscal review committee said that we should stop that, we won't want that record released, so they changed by putting in line 13 and 14 that says a draft audit report released to the governing body, is now confidential too. So it is not only confidential in the auditor's office, it's now going to be confidential with the governing body. But after the audit report is released, then line 15 and 16 says the working papers of the issued audit report are public. Now once the audit is released, lines 8 and 9 are no longer valid, because then they aren't a pre-audit anymore. But John Bjornson was right, the problem is that you have done both. There are two things involved, it's either confidential which means it can't be released period. It is against law to release it or it's exempt, which means you have the discretion to release it if you want to. You don't have to release it if you don't want to, but you can release it if you want to. This bill does both. This bill says it is both confidential and exempt. In line 14 it says both. It says confidential and exempt. What I am proposing today, I think you should give the local entity some discretion. As a good example, the Veterans Home, it was a very controversial audit. There was a lot of rumors floating around Lisbon, everything about what was going on. Maybe the Veterans board would have wanted to talk to somebody else about that audit, maybe they would have wanted to talk to their legal counsel, maybe they would want to talk to the mayor, city council. I think you should leave that to the discretion of the local entity. If you leave the word confidential in, they don't have any

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