

2009 HOUSE JUDICIARY

HB 1220

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1220

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/20/09

Recorder Job Number: 7269

Committee Clerk Signature *W. Penrose*

Minutes:

Chairman DeKrey: We will open the hearing on HB 1220.

Rep. Mike Nathe: Sponsor, explained the bill.

Rep. Delmore: I understand the intent of the bill. However, if they would have a formal meeting, this would not affect the open meeting laws.

Rep. Nathe: This is only used in a Governor declared emergency, etc.

Rep. Zaiser: This wouldn't apply if there aren't any elected officials present.

Rep. Nathe: I'm not sure if they have to be elected officials.

Chairman DeKrey: Thank you. Further testimony in support.

Bill Wocken, Bismarck City Administrator: Support (attachment). I also have an amendment on the second page of my testimony.

Rep. Delmore: This amendment seems to be good.

Bill Wocken: We did discuss with the media as well.

Rep. Klemin: The language on line 18, "emergency operations conducted by a governing body". Looking at what happens in an emergency operations center, somebody is in charge of that, and it is usually not the city commission. It may be the commander of the fire department or the fire chief, police commander, National Guard member, or something like that. When

would you have emergency operations that are conducted by a governing body, such as a county commission or city commission? Maybe this is a little too limiting to what you're talking about.

Bill Wocken: Typically in an emergency, we will call together the appointed officials who need to be responding to the emergency, and typically the fire department takes the lead on the incident command system. They will respond to the emergency and be in the emergency operational center. At a certain point, however, the elected officials will become involved or we will ask them to become involved. That is the point the open meeting law triggers. We do not have to have an open meeting for non-elected officials. At a certain point, we expect the elected officials will come into the command center. The fact that the commissioners come down to the command center is an example of more than one commissioner being in the same room. It doesn't happen very often, but in the case of the Bismarck tornado in November a few years ago, we had four commissioners come down to the Center. If the current law had been in place, we would have been concerned that we were in violation of the open meeting laws, even though the commissioners were not discussing public business, they were helping in different aspects of the emergency, apart from each other in the same room.

Rep. Klemin: But the governing body being the city commission does not conduct emergency operations in that example.

Bill Wocken: The governing body was involved in that, but not in charge.

Rep. Klemin: I think my point is that on line 18, this only applies when the emergency operations are conducted by a governing body. The example you gave was of four commissioners happened to be present during emergency operations, they were not conducting the emergency operations, and so I'm wondering if the language that's there now, is too limiting to cover what you are talking about.

Bill Wocken: If we said present instead of conducted by. I think that would be accurate. The emergency operations aren't typically led by the governing body.

Rep. Klemin: So we would be looking at emergency operations, at which members of the governing body may be present during a disaster.

Bill Wocken: Yes. We want to care that the language in this applies to actual emergencies, not just cook up a car accident and all of a sudden the city commission would have a meeting and be in violation. We want the language to be a little restrictive.

Rep. Zaiser: What about changing the governing body to elected officials, who are pertinent, governing body?

Bill Wocken: We want to make it clear that the mere presence of the members of a governing body in the same room doesn't constitute a public meeting.

Rep. Koppelman: If this were to change to present versus conducting business, would that then preclude the commissioners from being there to advise short of going through the normal process common to a meeting.

Bill Wocken: Yes, if the governing body needs to conduct public business, if there is a majority of commissioners present, if they need to make a decision, we expect that there would have to be a public meeting. We would have to notice that and move to an area that is accessible.

Rep. Koppelman: They can conduct business, if they are conducting the business of the emergency operation. Are you concerned about the time it might take, once you call the emergency, to go through the normal steps to call a public meeting, or is it that you don't want the media there getting in the way because of the emergency.

Bill Wocken: I think probably both. There is usually a lack of time because you are in an emergency response mode and something needs to happen in quick order. The second is that

normally you are in a secure location, in the emergency operation center, and accessing that particular venue by the public is pretty difficult because the room is too small to accommodate a lot of people.

Rep. Koppelman: I know there have been a lot of interpretations and Attorney General's opinions over the years about the open meeting statute and what it really means and how it's applied. What's the current interpretation that the city of Bismarck is using; in other words, if the mayor has a Christmas party and invites all the members of the commission to his house, is that a violation.

Bill Wocken: I'm not an expert on that law. My understanding is that if you have public officials in a single location that does not constitute a public meeting conducting public business. An example would be a funeral, etc. It does put another level of supervision to control cognizance to make sure that any public officials in the same place at the same time do not talk about public business.

Chairman DeKrey: Thank you. Further testimony in support.

Kelvin Hullet, Bismarck-Mandan Chamber of Commerce: Support. I'm here regarding 8(b)(1) of the bill dealing with a public gathering. When we have our annual meeting, there will be people from both city commissions, both county commissions, etc. That's one of the things that we have been trying to work out, if that constitutes an open meeting when we have that many of our elected officials in one place. According to this, we don't; that has been our interpretation. A better example that we run into was at the Marketplace for Entrepreneurs. I was at a reception chatting with one commissioner and another commissioner came by, saw us there and walked on by. Based on what we have seen in some rulings, there cannot be members together. We need to clarify what is and is not an open meeting in those situations.

Chairman DeKrey: Thank you. Further testimony in support.

Mary Senger, Burleigh County Emergency Manager: Support. We've been through numerous disasters. When the emergency operation center is open, there are decisions that are immediate and fast to get outside resources in. Before we can accommodate that, we usually have to have the county commissioners come together to make some decisions outside the scope of the subject and approve those extra finances.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition. Neutral testimony.

Jack McDonald, ND Newspaper Association & ND Broadcasters Association: Our association opposes any efforts to close additional records or additional meetings. However, in this case we understand that there are times when it is necessary to close some meetings and close some records. We have always taken the position that if you come in with a bill that is carefully drawn and narrow in scope, we aren't opposed to it. I think the language in the bill will work. I don't think it's going to be a major problem. The difficulty is, and there are some misconceptions about open meetings and open records. First of all, to call an emergency meeting, you have to call the commissioners to let them know of a meeting, and all he has to do is make one more phone call to call the official county newspaper. That's all the public notice you have to give. It doesn't even have to be a phone call, it can be an email, fax. Time is not a factor in calling an emergency meeting for a public meeting. You don't have to publish a notice, you don't have to put it in the newspaper, you don't have to broadcast, you just have to notify the official newspaper. The second thing is that if you run into people at social gatherings, it is just that, as long as you don't talk about public business. You can go to funerals, wedding receptions, or Christmas parties as long as you don't talk about public business. The problem comes up in social gatherings that you may mention something to the group and when you get to the next city/county meeting, the elected official makes a motion on

a matter that hasn't been heard; because it was discussed earlier at the social gathering and nobody knows what they are talking about. That's why we have the social gathering law, it does work. As long as public officials don't talk about public business, it's not a public meeting. We think that the law works just fine in that regard. We don't see this as a major change. We think this is just a clarification, so that if they are all together, somebody is not going to assume that it's a public meeting. I think that if they do decide that they need to have the commission act to make some decision, it should be a public meeting. This is the very time that you want to have public information out. If there is a natural disaster, and it is declared as such, this is the time the public wants information. This isn't the time that you want to be meeting in secret and have closed meetings. I don't think that everybody would be rushing down to city hall for a public meeting during a disaster. We don't oppose the bill, we think the amendment does sharpen and redefine what they are trying to do.

Rep. Klemin: As I understand this bill, with the amendment, that as soon as the members of the governing body decide to make a decision on some matter, then we are at the point where we have to have a public meeting and have to give notice, is that the way you read this.

Jack McDonald: Yes. Under this law the governor or mayor can declare an emergency. The city commissioners are down at the meeting room, and all of a sudden they say that they need to decide what we're going to do next. At that time, if they decide to call the meeting, all the city administrator would need to do is get word to the official county newspaper, by phone, fax or email and let them know that a meeting is set up for what day and time. That is all they have to do to meet the open meeting laws.

Rep. Klemin: Notice has to be given and from what I understand from Mary Senger, that if the commissioners needed to make a decision quickly that they would still have to give notice and

go through that formal meeting process to make a decision, even under this bill with the amendment.

Jack McDonald: Yes, but the formal process can be simply notifying the official county newspaper. I guess it's hardly a formal process. You can fax it, etc. You have to notify the commissioners to begin with and just add an additional phone call to the newspaper and you're met the requirement.

Rep. Klemin: It just seems like at least half of the Attorney General's opinions that I recall have to do with violating the open meeting law and that they didn't give the notice correctly.

Jack McDonald: Yes, because they don't do that last step. For some reason they have not followed that. You're limited when you're calling an emergency meeting to the topic about which you are calling the meeting for. You can't discuss other business, you're restricted to the object of the meeting.

Rep. Klemin: So the one telephone call that they make, who is that made to?

Jack McDonald: State law requires that you notify the official county newspaper. The legislature did not want to hinder calling emergency meetings. They didn't want to make it a complicated process. Every county has an official county newspaper in ND. It doesn't say how you notify them. The Attorney General said it can be done in any way you choose: phone call, fax, email, etc.

Chairman DeKrey: So in the case of a large county, there is probably someone at the Bismarck Tribune all the time; in smaller counties when you call the newspaper office, there isn't anybody there.

Jack McDonald: The law doesn't require that somebody be there, just that they be notified.

Chairman DeKrey: How are you going to have a record later to prove that you called the local newspaper to tell them that you are going to have an emergency meeting. If they don't have an answering machine set up.

Jack McDonald: Two ways, you could do it by fax or by email and get confirmation that way. Secondly, the open meeting law provides that if there is a complaint, the word of the official is considered to be true. The AG doesn't have the time to investigate and do a thorough investigation of every single complaint. We try to make it as easy as possible to call an emergency meeting.

Rep. Kingsbury: If you email the time of the meeting, you can print out your message for a record.

Rep. Zaiser: Another aspect of special meetings that is often overlooked is the Minutes. In Fargo, the situation arose where a meeting was called that was unannounced, that since nobody asked for the minutes or challenged the fact that there was this meeting until after the 18 days, they should have to produce the minutes of who was there, what they accomplished, what business was transacted. Are there some requirements for a special meeting in regard to that.

Jack McDonald: Yes there are. State law does require that any time there is a meeting, minutes are to be kept. I'm not entirely familiar with the situation you state, but the AG has almost always has ruled that you have to produce minutes, if you didn't write anything down, you would have to recreate the meeting to see if it were a legal meeting or not. Sometimes if the issue is kind of moot, he doesn't say that but, almost all the meetings require minutes. Then you do have to make a complaint in 30 days.

Rep. Koppelman: There aren't any penalties, solution or remedy. How well does this law work, is there a lack of understanding, is there a penalty.

Jack McDonald: Yes, I think the current system works very well. The law was revised in 1997 with major revisions. At that time, there was a lot of discussion among the AG, staff, etc. whether to have a penalty or not; except for repeat, serial offenders. The law does provide that the AG's office, may if there have been several violations, ask the state's attorney for a criminal sanction against that person. Otherwise, the object of the law was to promote enforcement of the law. Most of the object was to obtain those minutes. We believe that is the object of the law, and that it works very well. The AG's office can operate within a few days if necessary. The AG's office, in some situations, can even contact the parties to the dispute. Most violations are not deliberate and frankly, the state's attorneys are overburdened.

Rep. Koppelman: The one call to the official newspaper about a meeting, is that the newspaper of the governing body or the county. Does the newspaper contact the media.

Jack McDonald: I'd have to take a look at the law. I believe it says the official county newspaper. There is no requirement to contact others, because the reason they chose the newspaper is because there is an official county newspaper for every county.

Chairman DeKrey: Thank you. Further testimony on HB 1220.

Mary Kay Kelsch, AAG: We take no official position. I don't have too many concerns. I think it is going to be manageable. I think there may be a lot of changes that may be necessary.

Chairman DeKrey: Thank you. We will close the hearing. What are the committee's wishes in regard to HB 1220.

Rep. Klemin: I move to amend line 18, page 1, delete the words "conducted by a governing body" and then on page 1, line 20, insert the amendment proposed by Bill Wocken.

Rep. Delmore: Second.

Chairman DeKrey: Voice vote, motion carried. We now have the bill before us as amended.

Rep. Delmore: I move a Do Pass as amended.

Rep. Koppelman: Second.

12 YES 0 NO 1 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Klemin

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1220

Page 1, line 20, after "ordinance" insert "if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group"

Renumber accordingly

VR
1/20/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1220

Page 1, line 18, remove "conducted by a governing body"

Page 1, line 20, after "ordinance" insert "if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group"

Renumber accordingly

Date: 1/20/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1220

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep. Delmore Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Vig	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Hatlestad	✓		Rep. Zaiser		
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 12 No 0

Absent 1

Floor Carrier: Rep. Klemin

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

REPORT OF STANDING COMMITTEE

HB 1220: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1220 was placed on the Sixth order on the calendar.

Page 1, line 18, remove "conducted by a governing body"

Page 1, line 20, after "ordinance" insert "if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group"

Renumber accordingly

2009 SENATE GOVERNMENT AND VETERANS AFFAIRS

HB 1220

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No.1220

Senate Government and Veterans Affairs Committee

Check here for Conference Committee

Hearing Date: 03/06/09

Recorder Job Number: 10412

Committee Clerk Signature

Kate Oliver

Minutes:

Chairman Dever opened the public hearing on HB1220. Representative Mike Nathe from District 30 was there to introduce the bill.

Representative Nathe: Mike Nathe, District 30 in Bismarck. This bill clarifies the definition of meetings in times of disaster and emergency. During a disaster, local officials may be involved in working in the emergency operations center and working the problem. You may have one commissioner working on logistics, one commissioner working on personnel, and one commissioner working with the press to get the word out. According to North Dakota state law they are in violation of an open meeting law. What this does is exclude them from that in those instances. It must be a governor declared emergency in order for this statute to take place.

Senator Dever: This just sets aside the requirements for open meeting notification in the case of an emergency.

Bill Wocken: City Administrator for the City of Bismarck. See attached testimony #1.

Senator Horne: An emergency needs to be declared by a government official. Correct?

Bill Wocken: What we are attempting to deal with is the response after the emergency has been declared.

Senator Nelson: What is the definition of work session/gathering and a meeting?

Bill Wocken: Any time commissioners are getting together to take cooperative action it is an open meeting.

Senator Cook: Would there be any time where an emergency is declared and the press would not be accessible to what they are doing?

Bill Wocken: I think that when they are operating as individuals working with various parts of an emergency I think those would be times in which the press would not have access to the deliberations, because of emergency situation. When they take action we have to find a location to accommodate the public.

Senator Cook: If you have 3 commissioners, and someone from the press came, would they have the authority to not be let in?

Bill Wocken: We have a responsibility as elected officials to have an open meeting. Sometimes it's easy to blur that line. We have had that situation occur where we have the opportunity to close a meeting to the press. We do take a look at those proceedings.

Senator Horne: This is designed to define public notice when leaders gather during an emergency.

Bill Wocken: We are trying to look ahead. The more rules the better prepared we are.

Senator Nelson: What constitutes public notice in an emergency?

Bill Wocken: I think that the statute requires that we notify the newspaper before the meeting happens.

Senator Nelson: If the dyke breaks in front of my house and there is no time for notice, there is an exception for things like that?

Bill Wocken: I think what would happen in that case, and I can only speculate, is that the Fargo city commission would notify the press.

Jerry Hjelmstad: North Dakota League of Cities. Support the bill.

Jack MacDonald: North Dakota Newspaper/Broadcasters Association. It tries to be specific enough, and while we oppose closure of general open meetings. Not entirely convinced that this will be a real problem, but narrow enough that it won't be a major difficulty. Right now the state law at present, an emergency meeting a public entity has to notify the members of the public body of the meeting. Instead, when they made the phone call they make a call to the newspaper or press as it relates, it is not adding extra burden on public bodies. Not convinced in the state of an emergency that the first thing on people's mind is getting to the public meeting. The other thing, is the law now states that public official's quorum cannot get together to discuss public business. There is no provision of all 5 getting together as long as they don't discuss the business of the public. Bismarck City Commission has bent over backwards to do this.

Senator Oehlke: In my experience, city and county commissions they provide policy; those are the people that handle disasters. People that are in that status are inadequately prepared to handle an emergency, but the people that they appoint are.

Jack MacDonald: That is somewhat my feeling. It is a good attempt to do something. These don't come up every day my only concern is the access to the meeting.

Senator Dever: Would this also apply to the school board?

Jack MacDonald: I am not sure but I think that you are right; most of the time I think that there would not be a state-wide emergency meeting for the school board.

Chairman Dever closed the public hearing on HB1220.

Senator Cook made a motion to do a do pass with a second by Senator Horne. There was no discussion and roll was taken and the motion passed 5-0 with Senator Horne carrying the bill to the floor.

REPORT OF STANDING COMMITTEE (410)
March 6, 2009 1:27 p.m.

Module No: SR-41-4232
Carrier: Horne
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1220, as engrossed: Government and Veterans Affairs Committee (Sen. Dever, Chairman) recommends **DO PASS** (5 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1220 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

HB 1220

Testimony on House Bill 1220
January 20, 2009
by Bill Wocken for the City of Bismarck

Mr. Chairman and Committee Members,

House Bill 1220 was introduced by Representative Nathe to attempt to clarify current statutes about when an open meeting occurs during response to a disaster emergency; or more to the point of the bill, when an open meeting does not occur.

Let me say from the outset that the City of Bismarck is very careful to follow the open meetings law. This desire has, in fact, led us to ask the questions that occasion this bill. We want to be sure we can meet the intent of the open meetings statute and provide quality response to emergencies. We felt the best answer was to clarify the occurrence of a meeting during a disaster before the situation arises.

Just as having a majority of the governing body present at a funeral does not violate the open meetings statute, we hope to make clear that having a majority of the governing body in an Emergency Operations Center during a disaster response also does not automatically violate the statute. However, just as those same elected officials cannot get together at the funeral dinner to discuss public business so also would elected officials dealing with an emergency need to call a public meeting if they discuss public business together.

To further clarify this principle we are introducing an amendment to Page 1, Line 20 of the bill. After "ordinance" and before the period this amendment would add "if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group".

We trust that House Bill 1220 will, with this amendment, address two important concerns of local government; timely and appropriate response to emergency situations and adherence to the principles of the open meeting laws of this state.

Thank you for allowing me the opportunity to address this issue. I would be happy to answer any questions you might have at this time.

Testimony on Engrossed House Bill 1220
Senate Government and Veterans Affairs Committee
March 6, 2009
Bill Wocken for the City of Bismarck

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We think Engrossed House Bill 1220 addresses two important concerns of local government; timely and appropriate response to emergency situations and adherence to the principles of the open meeting laws of this state.