

FISCAL NOTE
Requested by Legislative Council
01/20/2017

Amendment to: SB 2295

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

SB2295 exempts research information and Title IX investigation records from open records laws. No fiscal impact is anticipated.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*
- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

Name: Tammy Dolan

Agency: ND University System

Telephone: 328-4116

Date Prepared: 01/20/2017

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2017 SENATE EDUCATION

SB 2295

2017 SENATE STANDING COMMITTEE MINUTES

Education Committee
Sheyenne River Room, State Capitol

SB 2295
1/31/2017
Job Number 27638

- Subcommittee
 Conference Committee

Committee Clerk Signature

Sandy Baumgartner

Explanation or reason for introduction of bill/resolution:

Relating to the exemption of state university and college title IX record from public disclosure and relating to confidentiality of research information

Minutes:

#1, #2

Vice-Chairman Rust: Call the hearing for SB 2295 bill to order. Welcome students that are here.

Senator Schaible: District 31. Gave testimony for bill. #1.

Vice-Chairman Rust: Did you talk to the media about this?

Senator Schaible: No, I haven't. This bill was brought to me by the higher education.

Vice-Chairman Rust: Probably they have.

Other questions?

Lisa Feldner: Chief of Staff for the North Dakota University System gave testimony #2. This bill was brought forward by NDSU and UND to the attorney general open meetings, open records taskforce, which Jack MacDonald and members of the media were members of that taskforce. They approved the concept of this bill. We just didn't get it included in that larger bill which is HB 1345, because it was a little late. We didn't have all of the details worked out. They have approved the concept of this bill, with the exception of title IX, which came actually after that. They understand there is loop-hole in the law which is in regard to research records, the open records law that doesn't cover under trade secrets.

Explanation was given. We are trying to protect the intellectual property of our researchers at our research institutions. Section 9 is protecting personal information of people who volunteer as human research subjects. Other explanation of testimony.

Chairman Schaible: Were media contacted about title IX provision?

Lisa Feldner: I gave this version of the bill to Jack MacDonald, actually before it was sponsored and after that.

Senator Kannianen: Is there examples where research was being accessed and then patented by other individuals or is this a preemptive strike?

Lisa Feldner: I think this is more of a preemptive strike. Researchers at both of our campuses are doing some pretty unique things and this could happen. They just wanted to prevent it.

Chairman Schaible: It also protects a student from patenting an idea. Is that also a concern? Who owns this intellectual research and property?

Lisa Feldner: Told a personal story about her son in college concerning a snowplow project. The campus owned the patent if they were to do one.

Chairman Schaible: Other testimony if favor of, opposition to, agency? Close the hearing on SB 2295.

2017 SENATE STANDING COMMITTEE MINUTES

Education Committee
Sheyenne River Room, State Capitol

SB 2295
2/1/2017
Job Number 27723

- Subcommittee
 Conference Committee

Committee Clerk Signature

Sandy Baumgartner

Explanation or reason for introduction of bill/resolution:

Relating to the exemption of state university and college Title IX record from public disclosure and relating to confidentiality of research information

Minutes:

Chairman Schaible: Open session for SB 2295. Anything else we want to talk about on this bill? Usually the press is on top of everything and I wanted to confer with them.

Senator Oban: Because of that fact. I don't know if we should wait to make a decision because a lobbyist doesn't come in and express their opinion. Just as a member of this committee, I support Title IX language for exactly what you outlined. It protects victims and well as the accused.

I move a Do Pass on SB 2295

Senator Kannianen: I second.

Chairman Schaible: Any other discussion?

Senator Kannianen: I think it makes sense in this digitized world. It protects the university and student.

Chairman Schaible: The state has a system set up by the state with grant money. It is an idea to use data for research. It is through everything that we do. It is K-12, higher ed. and jobs.

It is a collection of data, but the biggest concern with data is that the data is actually stored in-house. Like a school district, the data is collected at the school district and stored there. But when state data system wants to do a study or research project they have to get permission to get that data to do the research. One that we just did is how effective are scholarship forgiveness programs in a certain science of a certain area. They will do research to see how much that was accomplished. How many are currently holding jobs. How many are still working in that field and did it do the thing we wanted done? So it is like a research tool. But the idea is allowing access to have the data system and not find out personal information, but be able to use the data to do research. It is a system that will become really relevant because we are starting to get enough information and get portals and useable type things to do that will make it very useful. Last session we had a lot of concerns about personal information.

Information is protected for just data research. Power School is a portal used in the school and not taken out of there unless a request is made. I am on the state board as a representative for the senate. We set policies about the use. The data shares agreements of each entity that shares. There are different levels on how you share data. The data is not stored at the state. It is stored at the local level. School boards and schools have to protect that data. No other discussion.

Roll Called: 5 yeas, 0 nays, 1 absent

Senator Schaible will carry.

Date: 2-1-17
Roll Call Vote #: 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2295

Senate Education 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 Oban Seconded By Kannianen

Senators	Yes	No	Senators	Yes	No
Chairman Schaible	✓		Senator Oban	✓	
Vice-Chairman Rust	✓				
Senator Davison	ab				
Senator Kannianen	✓				
Senator Vedaa	✓				

Total (Yes) 5 No 0

Absent 1

Floor Assignment Schaible

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

REPORT OF STANDING COMMITTEE

SB 2295: Education Committee (Sen. Schaible, Chairman) recommends DO PASS
(5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2295 was placed on the
Eleventh order on the calendar.

2017 HOUSE EDUCATION

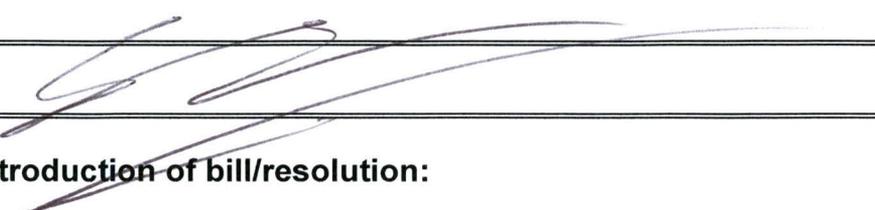
SB 2295

2017 HOUSE STANDING COMMITTEE MINUTES

Education Committee
Coteau A Room, State Capitol

SB 2295
3/7/2017
Job 28782

- Subcommittee
 Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Relating to the confidentiality of research information.

Minutes:

Attachments 1, 2, and 3.

Chairman- Mark S. Owens: opens the hearing on SB 2295.

Senator Schaible: see attachment 1 for testimony.

Chairman- Mark S. Owens: are there any questions. Senator I am curious about, and I will just start out, I have a couple of questions. Paragraph 8, this is where my world began in North Dakota was in University Research, and specifically for a governmental entity, ok. That was not open for us to hide or conceal because it was provided the government, and we had to do updates in those multiyear research projects which require reports during the year, and at the end of the year, and throughout the term, at which point the minute we provided those reports and explained everything, including the technical documents to the government it became public knowledge. I am a little at how we can say that we are going to hide or conceal the research, and I understand that the goal was to protect it while the research was still active, that is what I got from your testimony, we are not talking about after the fact, we are talking about while it was still active, but if it was a governmental entity how are we going to do that when the requirements of the research itself is, that we produce these reports, which will become public information.

Senator Schaible: it is beyond the scope of my expertise, I guess the people behind me will be able to probably answer that, my interpretation of that is if the government program, then yes you would probably be required to abide by whatever the rules and regulations of that, this might be something that is not government, that's plant technology or research that is not under some other federal regulations, maybe that pertains to that, but I guess I am not clear on that, sir.

Chairman- Mark S. Owens: I will hold my other two questions for your experts, because they deal with the institutional review board for the human activity. Are there any other questions? Anyone else in support of SB 2295.

Lisa Feldner: See attachment 2 for testimony.

Chairman- Mark S. Owens: are there any questions.

Rep. Pat D. Heinert: you say that the attorney generals task force unanimously agreed to the concept of the bill, does that mean concept of the bill means that they agreed to the thought process behind or did they actually see the language as written.

Lisa Feldner: they saw all of the language except, we hadn't finished up on subsection 10, but we had talked about it, we just did not know how to write subsection 10. We had not talked about title 9 yet. But we did, I will clarify, we had a phone call about the taskforce and went over the bill again and they agreed, but we did not have this, they had the first pages ready to go, but the taskforce did see, Mr. McDonald is here, he can fill in.

Chairman- Mark S. Owens: any further questions.

Rep. Rich S. Becker: just subsection 10, I am not sure I understand why subsections 8 and 9 do not apply to the statewide longitudinal data system, what is the reason for that.

Lisa Feldner: historically the university system has been resistant to provide data to the longitudinal data system, so when we are trying to do workforce studies to find out how many of our graduates actually do stay in the state, years ago they were resistant to providing data. Now they have to provide data, and we certainly do not want that to change, so number 10 was to make sure that that doesn't change.

Chairman- Mark S. Owens: any additional questions, the question I had about paragraph 8 was because it specifically says in conjunction with a governmental entity, and that's what set off the bells in my head, because I knew in the research I have, which was all so until to date governmental entities, there is no such thing as keeping it private, even if you wanted to, because the minute they get their hands on it it's on a website and it's public knowledge, and they are not shy about doing that, although they would not dare send our income tax return that quick, but they will publish it that quick. Section 9, what I was going to ask about the institutional review board is I am familiar with that process or used to be it has been a long time admittedly for me, but I thought as far as section 9 that was literally already covered in the process, and the requirements of having your research reviewed by the institutional board to make sure that the humans involved are not mistreated or properly taking care of, and their information is protected, and that sort of thing. So, I am curious why we need to put it in code, if the requirements already exist.

Lisa Feldner: I am looking at the attorney.

Chairman- Mark S. Owens: you know what, we can wait until they come up if they are going to talk. I am just sharing with you all my questions, and what I know. Let's move on to section 2, section 2 I have to admit and I just wanted to share this with you, the minute I read this I thought, gee why hasn't this come up before. I mean I will be honest with you, this felt like it was, lets stick this in here because they passed that law in due process for the students, it felt a little retaliatory, to me. I am not saying it was, I am just saying that was the first feeling

I had when I read it. Why have we not worried about this before, talking about if some false accusations, and all that. Because we have gone to great extremes, and you know there has been some stories of where somebody was, and later found out that they were not guilty, so that is where that due process bill came in, I believe last session, so this felt a little retaliatory when I read it to me personally, I am not speaking for anybody else in the group or on the committee, so I was just wondering why now after all this time.

Lisa Feldner: Actually it wasn't retaliatory, it came up because, it came up about a year ago at some of the campuses, the small campuses, well you can imagine that low cell count, there is not many students on those campuses, if they file a title 9 everybody knows who they are, so they do not file them, because you know they're going to, a very small campus. If you file a sexually assault claim or something, people put 2 and 2 together and they say I bet it was her or him, and they thought it was he or she who did it, and both of them are smeared whether it was true or not, and so our smaller campuses brought it up over the summer and said, you know can we put something somewhere, and frankly to be honest it fell off our radar, we forgot, and then it was we had to put it somewhere, because we forgot to put it in a pre-filed bill.

Chairman- Mark S. Owens: just to let you know, I would have felt bad if I did not ask the obvious question, so I wanted to at least ask it, and just because I did not think that was the case, but I wanted to put that to rest if anybody else felt that way the minute they read it too. Any other questions.

Rep. Pat D. Heinert: in reference to that section 2, are we eliminating the complaint totally for an exempt record, I meant the complaint part of it, not the investigation, I totally understand the investigation needs to be separate, but the initial complaint once the investigation is complete is never going to be allowed to be open record?

Lisa Feldner: we are getting onto areas of law enforcement that I am not an expert in.

Chairman- Mark S. Owens: it does say anything related to a complaint or investigation, so that sounds like to me both are exempt under that section.

Lisa Feldner: The attorney says he can talk.

Nick Vaughn: I work in the attorney general's office, I am here today speaking on behalf of the state board and university system who I represent. Rep. Pat D. Heinert to your question, section 2 relating to title 9 records, I read that as any record related to complain or investigation is confidential, so that would include the complaint.

Rep. Pat D. Heinert: So, that is even upon completion of the investigation whether there is an outcome or not, it is going to be sealed forever.

Nick Vaughn: in reading this, and excuse me Rep. Pat D. Heinert, it is an exempt record, and I don't, as it is written now I do not see any obligation to release the record after the investigation, and disposition is complete.

Rep. Pat D. Heinert: sir, so you know if the taskforce seen this specific language, and are ok with that.

Nick Vaughn: the task force did not see this prior to it becoming in bill form.

Chairman- Mark S. Owens: any further questions, seeing none thank you. Any other support for SB 2295. Before we leave support, I should have asked you before you left if you had a comment on the institutional review board, I am sorry about that.

Nick Vaughn: regarding about the personally identifiable study information, it is my understanding this came from the institutions that do a fair bit of research, and the concern was that if it isn't in the terms of the grant or whatever is governing the study, meaning that this personally identifiable information is exempt, that they wanted to make sure there was no loophole under which that information could be discoverable to an open records request, so that is why it is included in here.

Chairman- Mark S. Owens: and I may be remembering this wrong, I could have sworn that as part of the institutional review board requirements, even in federal law there was a requirement where the personal information was kept private during the process of the, but admittedly I never did any human research, I was just familiar with the process, so I could not recall, that is why I wanted to ask you.

Nick Vaughn: not being a subject matter expert on this, I am not sure, but that was the reason why it was brought forward to the system, and then to the taskforce.

Chairman- Mark S. Owens: any other questions. Additional Support for SB 2295. Opposition to SB 2295.

Jack McDonald: see attachment 3 for testimony

Chairman- Mark S. Owens: any questions.

Rep. Corey Mock: if the complaint itself were no longer an exempt record, would that include the names of the parties listed, would that be omitted from public record until the conclusion of the investigation.

Jack McDonald: I don't think so, I guess it is not considered, it is not closed in any other public complaint if the states attorney in Burleigh county brings a complaint against someone, the name of the person who its being brought against is made public, and I guess I would say that it should be public. It would be public in any other court in the country, so I am not sure why because it is at the university it should be not public. In the example that Lisa Feldner gave, and with the smaller colleges if that tribe was brought in the city of Dickenson or the city of Minot which is the smaller colleges I guess, that's public. If they brought it down to the states attorney in Ward county or Stark county brought that complaint, it would be public. So I am not sure what the difference is if they bring it in Stark county or if the bring it at the BSU office.

Chairman- Mark S. Owens: please continue.

Rep. Corey Mock: so Mr. McDonald, then to continue on that if we were to do as you consider your amendment, just says that the investigations, that has to be reported, so that is no longer exempt, so we at least know if there has been a title 9 complaint. With your original amendment it would not release the complaint, it would just simply state that yes a complaint has been filed, and is being investigated, the way you are discussing, but to also not exempt the complaint itself, will that not defeat the purpose of this section. If we have to file the complaint, or if the complaint has to be a public record, to hide the investigation I feel like it would almost risk the damaged reputations, you see the complaints you see the parties listed, you read the information, but then the investigation itself is an exempt record, so there is no way of knowing the resolution, and repairing any reputation damage if that existed, could you walk me through how having the complaint of public record would still meet the intent of section 2.

Jack McDonald: I understand what you are saying, but I got greedy in my comments after I heard Rep. Pat D. Heinert make his comments there. But the more I am thinking about it, the more it makes sense, if you liken it to any other situation, if the states attorney brings a complaint he brings it in, they might eventually be found not guilty, which often happens, but the complaint is there as a public record, so the problem you are having is a person's name, I guess that is a part of the system, that is how it goes, they said if instead of filing it with the University of North Dakota, they filed it with Grand Forks county state's attorney it would be public, so I am not sure why the mild difference between downtown states attorney and uptown University of North Dakota should make a difference as far as the complaint process.

Rep. Pat D. Heinert: I think this can be easily solved by utilizing the correct terminology, utilizing the word complaint in here means the action taken from the states attorney's office to the courts, I believe they are looking for the initial report language here of the initial filing of a report to either a college or a law enforcement entity, which has its own set of rules under the exempt status already, so I think if we change the word complaint to initial report, and follow up investigation it would probably solve a lot of issues, except for the total closure of the record.

Chairman- Mark S. Owens: that is an interesting thought, but the way I am reading this Rep. Pat D. Heinert and committee, is any record related to a complaint or an investigation under title 9 of the education amendment, meaning if there is a complaint actually filed with the district attorney or the states attorney, whoever, with the police that is going to be public record. This only relates to a complaint filed with the university under title 9 of the education amendments of the act of 1972 is the way I am reading it. So if a complaint is filed with law enforcement, it is still public knowledge is the way I am reading this.

Jack McDonald: I would think at a minimum, I would like the to see the committee consider the fact that a complaint, the title 9 action whether it be a complaint or not have been filed should be a public record, that they know that there has been a complaint filed against whatever. And I think Rep. Pat D. Heinert is correct, there might be just some wording might need to be changed to make sure that everybody understands what we are talking about in that situation.

Rep. Mary Johnson: last session the due process rights for students still may have or may have not required title 9 investigation to be stalled until a criminal investigation was completed, does anybody else remember that? Let hold that bill, because we really need to read it in conjunction.

Rep. Corey Mock: what is the process, so if there is a title 9 report or complaint filed with the university, and there is, the conclusion is there is criminal wrong doing, but the individual themselves the victim, the party does not file a complaint with the states attorney or with law enforcement, does the university follow up, do they file a complaint on behalf of the victim. Under the presumption that the investigation concluded someone was found to have potentially been guilty of a criminal act. Is that filed on behalf of the victim, or not. I am looking for a process, and since we are talking about two different institutions, and types of complaints.

Nick Vaughn: title 9 requires institutions of higher education to investigate gender based harassment in any form, so whether they are expressly made aware of a complaint through a victim coming forward or constructively through witnesses or video, anything like that they have an obligation to investigate, so they have to do that internally. To Rep. Mary Johnson question, I do not believe a due process bill required the pausing of a campuses investigation responsibility, but they certainly have under title 9 federal law, and guidance. They are encouraged to wait until the criminal process is complete, and then they can follow up with the investigation, that doesn't mean that it exolves them of having to do an investigation at the campus level if the criminal process is just rocked or follow through. The federal guidelines require the institutions to follow through on complaints of gender based harassment.

Rep. Corey Mock: they are required federally under title 9, are they required to file a criminal complaint if either during the investigation or is that up to the individual.

Nick Vaughn: that is up to the individual, the institution has an obligation to pursue a complaint on behalf of the individual.

Rep. Corey Mock: just to make sure that everybody is on the same page, a title 9 complaint can be anything from harassment to assault, is this correct. So if there was a sexual assault on a campus that would be a title 9 complaint.

Nick Vaughn: that is correct.

Chairman- Mark S. Owens: Mr. McDonald, do you have anything else to add, does anybody have any questions for Mr. McDonald. Any additional questions, seeing none thank you. Anyone else in opposition to SB 2295. Any neutral testimony to SB 2295.

Rep. Corey Mock: I am wondering, what percentage of title 9 complaints filed with the university system become criminal investigations, criminal complaints. That might not be a question we can answer right now, but I would be interested to know as there are title 9 complaints brought forward to the institution, how many of them become criminally investigated through the states attorney's office.

Chairman- Mark S. Owens: we can see if we can get an answer to that question, I don't know that we can.

Katie Fitsimmons: offering testimony, I would like to offer a couple of clarification regarding this. So if these records were to become closed, what that helps us is it will expand and provide more opportunities for students, faculty, or staff to file complaints. If they know these records are going to be open, even if you are at a larger city like Fargo, but when you are in a smaller town when your name is in the paper and that is going to be a barrier to reporting, and that alone to us is plenty cause for these records to be closed, and to be exempt from open records request. Again this is more of an issue of privacy, this isn't about an issue of protecting information that we don't want necessarily out there, but we want to protect those victims, and all of those complaints that are involved in cases. If you are an 18-year-old that has been raped by your professor and you don't know if your case is going to be found, if that person responsible is going to be found responsible, and now your name is in the paper, and your classmates start to project their own judgement on you, and just think she was asking for it, this is what happened, you heard all of the rape culture speak before. Think of what that's going to do to your possibility to stay enrolled in any North Dakota university system school or anywhere in the state. So we would encourage, I know this is not as neutral as I wanted it to be, but we would encourage that this language be upheld in this bill to protect all victims. I do work directly with our title 9 taskforce, which has over 50 representatives across our 11 universities in the state. We work with ongoing education for our title 9 investigators and coordinators at each of our campuses as federal regulation and requirements are constantly changing and evolving, and of course as best practices are always being discovered and evolving too. Whether you are talking about trauma informed interviewing, or working with the complainants or respondents we want to be open to all parties involved, that they are treated fairly throughout the process.

Chairman- Mark S. Owens: understand, any questions.

Rep. Denton Zubke: presently is it open from the beginning, the complaint is filed: names, addresses, everything?

Katie Fitsimmons: yes. To the extent of FERPA, that FERPA regulations allow.

Rep. Dennis Johnson: so what you are saying is that, if it is a title 9 action the victim's name is published by the university?

Katie Fitsimmons: only in the case of an open records request.

Rep. Mary Johnson: does Marcie's law bar any of that.

Katie Fitsimmons: Marcie's law would not apply, because these would not be criminal charges that are filed, this is all within the university system, but if they were to file charges, I suppose. But at that point that investigation from the universities perspective would not be protected.

Rep. Bill Oliver: but you are saying now that Marcie's law would, if they filed a criminal complaint.

Katie Fitsimmons: those records would probably be sealed, but as far as any records that would be on the title 9 in the university system, those would not be protected by Marcie's law, from what I understand. I did not go to law school.

Rep. Bill Oliver: one short comment, from what I understand about Marcie's law from what we have learned this first half, and from events that have happened in the news media, it would be affected by a criminal complaint, and if you are talking about a situation of rape, then at that point it has to be a criminal complaint, I am sorry, I grew up in a different place, and I can guarantee you that the states attorneys where I grew up will automatically file a criminal complaint against the supposed perpetrator of that. My last comment, this section 2, it seems to me like it does not need to be in this bill, it needs to be somewhere else, but not in this bill. That is my opinion.

Rep. Pat D. Heinert: if we were to do a justice bill, and say that the initial report, and the following investigation conducted by the university system is a closed record, until the investigation is complete, would that solve some of the issue for the university that they are looking at that in this.

Katie Fitsimmons: I am not exactly sure, but I will have our attorneys speak.

Chairman- Mark S. Owens: Ms. Fitsimmons don't go anywhere.

Chris Petski: not speaking on behalf of the board of the university system, but to answer some questions I represent 7 of the 11 institutions. I think one of the fundamental issues that may answer a lot of the questions, a criminal investigation and a title 9 investigation are independent. They do not have anything to do with each other necessarily. The university does not file complaints with law enforcement on behalf of victims in a title 9 investigation. The theory behind that from a federal title 9 guidance perspective is, it's the individual's choice, they may choose to file a title 9 complaint because they want it to be confidential, if they file something criminally it is going to be an open record. So that's one of the fundamental issues that answers a lot of the questions, is they are separate, and they are treated separately because title 9 investigations in the university system is not a court of law, different rules apply, and it has different guiding principles. So are there any specific questions stemming from that.

Rep. Mary Johnson: sir there is nothing in title 9 that prohibits the state or because it is federal, the state can do this without violating any title 9 provision, exempt records without violating the title.

Chris Petski: yes, from my understanding from title 9, that covers federal. Also FERPA would to the extent of the student is involved, there would be educational records, protects those records as well. Also title 9 applies to faculty and staff, it doesn't just involve students.

Chairman- Mark S. Owens: Any further questions.

Rep. Corey Mock: criminal code, the penalties are pretty well spelled out. Adjudicated to the judicial system, but with title 9, because it is independently run, and it is up to the

discussion of whoever is conducting the investigation at the university. If a person is found to have been guilty or the accusations were correct through the investigation, what range of disciplinary actions may exist through a title 9 complaint, again I understand it's a wide range, but just so we are all aware of what the disciplinary actions may look like at the conclusion of a title 9 complaint.

Chris Petski: anything from a censure or dismissal, anything in-between of prohibiting someone from campus or from campus events or from campus property or from property events on the control of the state board of higher education. So if it's an allegation against a faculty or staff member, dismissal and basically prohibition from the campus would probably be the largest extent. When there are involved with a title 9 investigation, maybe a more systematic look at departmental procedures and things like that. It's not just necessarily investigation, did this happen, what should happen to the perpetrator it could be more of a holistic view as well.

Rep. Corey Mock: in the event of a disciplinary action specifically of a dismissal of an employee, even with this language would that dismissal and the grounds for that dismissal be an open record.

Chris Petski: it would depend on the, there may be a document at the end of the investigation that is an official dismissal to the faculty member or staff member that may not state the reasons the dismissal, if you understand what I am saying. So that could be determined to not be a document related to title 9 investigation, but like with most legal questions it depends, but something could be crafted conceivably that would be a personnel record of the faculty member or the staff member, but not relate back to the title 9 investigation

Chairman- Mark S. Owens: any other questions, seeing none thank you. Ms. Fitsimmons, I had not got to my questions yet. This is all about title 9, so somebody makes a complaint, and according to this everything is exempt from the time it starts to the time it's over and there is no record that it ever happened that's public based on the way this is written right now. Do you still report to the federal government under title 9 that there was x number of complaints, and what they were in reference to?

Katie Fitsimmons: there is other acts that require certain kinds of reporting, the Cleary Act which reports all of our sexual assaults, stocking cases, different discrimination cases that occur on campuses, and then as far as what gets reported on up to the federal level I am not exactly sure, most of the things do stay within house, and all those records are kept under 2 locked doors, and are certainly kept within the universities knowledge, and history.

Chairman- Mark S. Owens: the reason I am asking specifically to your position in student affairs, and I was going to ask Ms. Feldner, but then you stepped up, so she saved you. I was going to ask about this, do you not, you and the university system do you not believe you have a responsibility to inform parents of such events so that they know whether or not they want to send their child to that college or university, because one particular college is having more problems than another.

Katie Fitsimmons: that is the purpose of the Cleary act, and so then those are statistics that are available, they are on university websites, and are accessible by the public at all times.

And that reports the number of sexual assaults that have happened on campus or I don't know if it shows the reporting numbers, it shows them by location what campuses they happened on.

Chairman- Mark S. Owens: complaints or investigations or both.

Katie Fitsimmons: that would show complaints that ended up with a responsible party, that someone was found responsible of the sexual assaults.

Chairman- Mark S. Owens: any other questions.

Rep. Pat D. Heinert: Ms. Fitsimmons if you are reporting the location of a sexual act on a college campus, and it is a closed record, how are you doing that.

Katie Fitsimmons: by location you mean it shows that it has happened on which campus, and I am a little confused on the question.

Rep. Pat D. Heinert: my question is that we are closing the record, as your request. That means no information is allowed outside of that record.

Katie Fitsimmons: there would still be reporting requirements through the Cleary act, so this wouldn't necessarily show that it was a title 9 case, or it wouldn't have anything to do with what parties, if it was faculty, students, or staff involved. It would just show through the Cleary act, how many sexual assaults, stalking cases, burglary cases, and I forget about 9 to 10 things on the Cleary Act that have to be reported to the public. That just shows a straight number, doesn't release any names, doesn't release any other information that shows which campus it happened on.

Rep. Pat D. Heinert: I agree with that 100 percent, but if we say those records are closed for any reasons you cannot.

Katie Fitsimmons: this would be a separate form of reporting, I see what you asking, but this is a separate, somebody has already reported, and I don't know if I would consider those open records, it's just numbers that are reported.

Rep. Pat D. Heinert: but it is part of the record system, that is what I am getting at. What you are going to do, is if we allow this to go though the way it reads right now, is we are going to create the media to go to the attorney general's office and ask for an opinion, and we are going to live by that opinion, up until next session. And I think the opinion is going to go against you.

Katie Fitsimmons: Mr. Chair I don't know if I can have Nick Vaughn from the attorney general's office explain that a little bit better than I could.

Chairman- Mark S. Owens: well he is a regular now, he is more than welcomed to step up and talk to us again.

Nick Vaughn: the bill before you I believe makes this an exempt record, and not confidential, meaning it is strictly confidential, you cannot disclose, this is exempt, and as Ms. Fitsimmons was saying this is really data from those complaints that would then be reported to Cleary as part of the Cleary Act, that doesn't have any identifiable information as part of it. So in my view as an individual attorney I don't see it violating the exempt record provision.

Rep. Corey Mock: since you brought up that, and we have had the discussion about the importance of language, words have meaning and especially in statute. We may not all fully know the different levels of closed or would you mind just for the interest of the committee explaining the different terminology regarding closing or opening of certain records, and what those words would mean.

Nick Vaughn: members of the committee if I could have Sandy Apontas from our office, she is the open records expert who could explain this a little better, if you allow.

Sandy Apontas: exempt vs confidential, ok so exempt is sometimes called closed, they mean the same thing. If you have an exempt record, the public entity who has it, has the discretion on whether they want to disclose it, and they do not have to justify their decision, maybe there are entities that do want to give out the records, and there are entities that don't. And that discretion lies completely with them. Not the same with confidential, so a confidential records you have to be able to point to a law, that allows you to get those records, so for example our law enforcement has a statute out there that basically says, they get access to confidential information if they need to, to discharge their duties. So they point to that law, and I get to have that confidential information, much like the federal law I am guessing here, they can point to that and say we get access to any confidential information. But again here it is only exempt, so they have a discretion on whether to give it out.

Chairman- Mark S. Owens: any questions.

Rep. Pat D. Heinert: ma'am, so if we have a sexual imposition case that was identified earlier between a student and a professor, and the colleges did their investigation under title 9, and the victim decided to file a law enforcement report, and the law enforcement entity asked for the information from the college, under this exempt record, the college would be able to decide whether they gave that to law enforcement or not.

Sandy Apontas: they probably would in any events, the law enforcement has a law that says, you don't really get the discretion, I get those records, they can point to that law.

Rep. Pat D. Heinert: can I carry that one step further then, because I am also concerned about that professor going on to another college in another state and doing another crime to another victim, so the college would then have the exemption possibility of telling another school that they are not telling you about that.

Sandy Apontas: they would have that discretion, on whether they wanted to release that information to that other school, at that point, correct.

Chairman- Mark S. Owens: any other questions. Ms. Fitsimmons welcome back.

Rep. Corey Mock: Mr. McDonald had proposed an amendment that would simply add language that the fact that an investigation would not be exempt, in your neutral position would you have any opposition to the consideration of language like that.

Katie Fitsimmons: I am not familiar with the amendment; do you have it handy Jack? It is satisfactory to us.

Chairman- Mark S. Owens: any further questions, seeing none. Any more neutral testimony, closing the hearing on SB 2295.

2017 HOUSE STANDING COMMITTEE MINUTES

Education Committee
Coteau A Room, State Capitol

SB 2295
3/7/2017
Job 28834

- Subcommittee
 Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to confidentiality of research information.

Minutes:

No attachments.

Chairman- Mark S. Owens: What is the committees wishes.

Rep. Mary Johnson: I recommend a do pass on SB 2295.

Rep. Dennis Johnson: there is amendments, do we consider them?

Chairman- Mark S. Owens: oh, that's right, and talking to somebody with the audience they had no problem with those amendments.

Vice Chairman- Cynthia Schreiber-Beck: proposed amendments those are from Jack.

Chairman- Mark S. Owens: before we get a second on your motion let's consider the amendments.

Rep. Mary Johnson: can I get a read.

Chairman- Mark S. Owens: a read?

Rep. Mary Johnson: do you read it like I do, just the fact that the university says yes a complaint has been filed, and there is an investigation, and that's it.

Rep. Longmuir: if I can ask Rep. Pat D. Heinert, remember we got into the discussion between complaint and report, and we were talking about whether the word report would be better here than complaint, because a complaint is the names are revealed to the public.

Rep. Pat D. Heinert: I brought that up simply because a complaint can be used as the initial incident report as well, but typically most people look at is the complaint as the order issued by the states attorney as the order issued by the states attorney to the judge to sign initiating

the official charge, I just thought it would be easier to put in the initial report for distinct clarification.

Rep. Longmuir: thank you.

Chairman- Mark S. Owens: I appreciate that point, but I believe under 9 they actually reference complaint as part of title 9, and we would need to investigate that to make sure, but that terminology is actually used in title 9 as the initiation under title 9, which is separate from the criminal, but I can't categorically answer that question, so we are not going to finish this bill today, that's ok.

Vice Chairman- Cynthia Schreiber-Beck: going back to Rep. Corey Mock question which the proposed amendment that Jack McDonald has would have the names revealed, correct?

Chairman- Mark S. Owens: I did not read it that way.

Vice Chairman- Cynthia Schreiber-Beck: you asked if the names would be included, and McDonald answered yes.

Chairman- Mark S. Owens: I thought it was in reference to something else though.

Vice Chairman- Cynthia Schreiber-Beck: nope, names included.

Chairman- Mark S. Owens: that is not way I understood this, and I thought your question Rep. Corey Mock dealt with something else.

Vice Chairman- Cynthia Schreiber-Beck: I think that needs to be determined, and if the committee should look at this again.

Chairman- Mark S. Owens: we will, we will verify that, and we will verify complaint under title 9 before we do anything with this bill.

Rep. Mary Johnson: so I have to withdraw my motion, it was never seconded.

Chairman- Mark S. Owens: it was never seconded, right. So that is all the bills we got.

2017 HOUSE STANDING COMMITTEE MINUTES

Education Committee
Coteau A Room, State Capitol

SB 2295
3/13/2017
Job 29109

- Subcommittee
 Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Relating to confidentiality of research information

Minutes:

Attachment 1.

Chairman- Mark S. Owens: you have in front of you some information that Rep. Longmuir brought to you, and I believe that Rep. Corey Mock, if you like to take a moment to read that, because all of our discussion about the title 9 aspect, everybody appears to be happy with the universities keeping everything secret, just kidding. On the research there are things that they can't keep secret, and there are other things that they can. This should help with research by private organizations, and companies and whatnot. As far as the amendment to title 9, we will let Rep. Corey Mock explain that in a minute, I was wondering if perhaps Rep. Longmuir might like to share what he learned first, before we consider the amendment.

Rep. Longmuir: this was the e-mail I received back from the attorney general's office that was here, and listen to this. You can see how it goes through there, and I think it will fall in line with the amendment Rep. Corey Mock is proposing, it seems to be a real grey area no matter what. Even on the federal level, there is some issues. I believe with the amendments that Rep. Corey Mock is presenting, we will probably cover ourselves. Thank you Mr. Chairman.

Chairman- Mark S. Owens: thank you Rep. Longmuir. Rep. Corey Mock would you like to explain your amendment.

Rep. Corey Mock: so there was considerable discussion, there was also a lot of follow up following the meeting where some members had visited with bill sponsors, and those that had worked or supporters and those who were here in an informational capacity, just to really dig in and find out what was intended with the section 2 of this bill regarding title 9 complaints or records, and whether they are an exempt or public record. The takeaway from the committee's discussion is that there is a level of discomfort that any title 9 complaint would be closed, sealed record, indefinitely, in perpetuity, and whether it's for purposes of reporting or just knowing there was an incident, one of the issues was a parent or a student's right to know whether or not title 9 incidents have occurred on campuses, we found out that some states like Minnesota for example has had language, and rulings regarding title 9, and

confidentiality of records, and what they had concluded or what some other states have added was further defining what personally identifiable information is, so the way as we are working through section 2 and the title 9 complaints, the way the bill is now, any complaint, title 9 complaint that is filed with the institution is an exempt record, which means if there is an investigation, a criminal investigation or if there is a notice, one of the parties named is looking for another job, and has a background check, that it will be the discretion of the university to disclose the records within this exempt record, within that title 9 complaint. They are not required to, but they would have the ability to, that is what exempt is. We also found out that any title 9 complaints regarding two students, if all parties involved are students, because of FERPA, they would not be allowed to release any information that was personally identifiable in nature, but if a complaint involves a faculty member or a staff as the party, then the record can be disclosed and that person's identity can be shared. The concern was if there was a complaint against a faculty or staff member, because it could be shared publically that individuals may not be willing to report, or make a title 9 complaint out of fear of reputation, or other consequences. So what we thought is the FERPA was really what was the saving point with all students as the parties, because of FERPA, personally identifiable information must be omitted even after the record, or the investigation is closed. This might be a good opportunity for us to include that language, we can include FERPA language in this, but we can take the intent of what FERPA really protects, so council drafted this amendment, and you will see that the language states any record related to a complaint or investigation under title 9 at an institution under the control of the state board of higher education would then read, which contains personally identifiable information about a party to a complaint is an exempt record. The next sentence which is the second part of the amendment would add the language, for the purposes of this section a personally identifiable information means information that clearly identifies an individual, and information that alone or in combination with other information is linked or linkable to an individual, and would allow a reasonable person who lacks knowledge of the relevant circumstances to identify the individual. So if there was a request of title 9 complaints or an investigation even after it has been closed, that any information that could, a reasonable person could then surmise or infer that the identity of one of the parties would then be redacted. Names of buildings, names of parties not named in the complaint, but otherwise in the report regard as witnesses or others involved, all of that would be redacted so that the only information that would be public in an open records request would be generic information regarding the complaint itself, but not identifiable or tied to any party names, so therefore faculty and staff members would have the same protections in a title 9 complaint that currently students are offered through FERPA. We think that this would be a good amendment that would ensure that there is no real concern that a student or faculty member who files a title 9 complaint would be named in an open records request, make sure that the public can be informed whether or not there have been title 9 complaints in an institution, and then ultimately if there is any further investigation beyond the universities jurisdiction, it would be subject to other laws regarding criminal code, criminal litigation, but we think this really meets the expectation, while protecting the identity of parties named. With that I would move the amendment. Attachment 1.

Chairman- Mark S. Owens: so we have a motion for an amendment, and a second from Rep. Matthew Ruby. Discussion.

Vice Chairman- Cynthia Schreiber-Beck: did the higher ed people involved, were they able to review this as well. Thank you.

Rep. Corey Mock: yes, we visited with the individuals here, the attorneys that were here on behalf of the university system, and they felt that this would be an appropriate change.

Chairman- Mark S. Owens: any further discussion, questions. I am looking to my left. We have a motion before us, all those in favor say I, all those oppose same sign. We have an amended bill. What is the committees.

Vice Chairman- Cynthia Schreiber-Beck: I move a Do pass on SB 2295 as amended.

Chairman- Mark S. Owens: do I have a second. Seconded by Rep. Matthew Ruby. Ok, any discussion, seeing none I will invite the clerk to call the roll for a do pass as amended for SB 2295. 12-0-2, and Rep. Corey Mock will carry this bill.

2017 HOUSE STANDING COMMITTEE MINUTES

Education Committee
Coteau A Room, State Capitol

SB 2295
3/20/2017
Job 29463

- Subcommittee
 Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to confidentiality of research information.

Minutes:

No attachments.

Chairman- Mark S. Owens: opens the hearing on SB 2295. Rep. Ron Guggisberg do you know where Rep. Corey Mock is?

Rep. Ron Guggisberg: no I don't.

Chairman- Mark S. Owens: I would really like him here for this, he was the carrier, if you pull out SB 2295 please. That was the confidentiality of research and the title 9. Did it disappear for everybody. I was hoping that you would be here Rep. Corey Mock, because I wanted to get your opinion on what happened Friday.

Rep. Corey Mock: do you want an on the record opinion or off the record opinion.

Chairman- Mark S. Owens: yes, you can give me off the record later, but. Alright, committee members, Friday after we left there was a flurry of e-mails while we were driving back and forth Rep. Corey Mock and Representative Koppelman, and legislative council, and a name I did not recognize. We are going back and forth, and back and forth, and back and forth, there was a lot of discussion on SB 2295, and on the part of exempt records. I would like to at this point invite Rep. Corey Mock to share his views and opinions and what he came up with, I did Rep. Corey Mock pass out a very simple amendment that looks like it solves the problem quite frankly, it solves the problem with exempt records as far as legislative council is concerned, because the way it rewords it, but I invite your comments please.

Rep. Corey Mock: I carry bill all session, and I can't even make that easy, this is a, I appreciate the chairman and every else's work, but the confusion if you recall from Friday's floor discussion was over section 2 of the bill, and the records related to a title 9 complaint at an institution of higher education. The concern was the way the bill was written as it says a record may and then continues on, inferring to someone who maybe reads it at first glance that any record would be exempt if it contains any of this information, however we consulted with the attorney general's office, with legislative council, we found other sections of code

that relate directly to other records where a portion of a record maybe exempt, but reads that it is, that a record is exempt. One of the example that I would give is, in chapter 6 of the North Dakota century code regarding public finance authorities, it goes in and in states the commercial or financial information of a contracting party provided to the public finance authority as part of any qualified small issue bonds or municipal industrial revenue bonds purchased or issued by the public finance authority whether obtained directly or indirectly are confidential records. So now the way that reads and there is others, and I should mention that there is a handful of other examples that I received from legislative council, where a record is specifically mentioned, and that a portion of that record would be exempt if it meets certain criteria, but that does not mean that all records or the entire document can be exempt. There is also a flurry of case law that the attorney general's office was able to point to, because often times someone may challenge the openness of records, stating that it states that the entire record is exempt, if this contains this information, and the attorney general's office along with the courts have rules that that is not the case, only the specific information that must be exempt or confidential is the information that is exempt or confidential that all other information must be released as the law requires. Mr. Chairman and members of the committee I feel that the attorney general's office has truly answered the question of whether or not the bill as we passed out was written correctly, they believe it is. My only concern and what we could do Mr. Chairman is you are correct, that you do have an amendment that would address any of the concerns, the only reason I would be reluctant or hesitant to support the amendment is making sure that we are not creating inconsistencies in century code, because we are talking about exempt records in one category, if we are being more, if there is more clarity in this section, does that create confusion over another section that says a record is exempt if, and then states the criteria, I think it is important that we rely upon case law, other statutes that exist regarding open records, and that we maintain consistency in the code. Mr. Chairman if I may one last definition that I want to, I did double check because the question did arise, was the definition of an exempt record. It's 44-04-17.1 subsection 5, and it says that an exempt meeting or exempt record means all or part of a record or meeting that is nearly required by law to be open to the public, know it's confidential, but maybe open in the discretion of the public entity. So I believe the definition of exempt record along with the definition of record thoroughly answers the questions that were brought up during the floor discussion.

Chairman- Mark S. Owens: thank you Rep. Corey Mock, I do share your concern about if we change where it says exempt record, if we highlight that anymore that it does, it would, I do share your concern about it highlighting something else within the code, and causing problems elsewhere in the code. That's why when I saw this amendment here it completely rewrites it, and removes that exempt record portion just as this information is exempt, it altered the way it read, so I think this amendment eliminates that problem, but I do agree with you, that we don't have to do anything. That the bill the way it is written is fine, and there is nothing wrong with it, so I have passed out just everybody has a copy of that amendment, and all that amendment does is change it from the way it reads now, to saying that a portion of any of that is exempt, and it removes the word record. So, I will leave it to the committee. So I will leave it up to this committee on what your pleasure is Rep. Corey Mock.

Rep. Corey Mock: I see Rep. Pat D. Heinert, I just wanted to make sure that we are clear. Have we accepted the bill as re-referred back to committee, or.

Chairman- Mark S. Owens: no, we have not done anything, I am trying to get the mood of the committee on what you all want to do right now.

Rep. Corey Mock: it's not even in our possession at the moment.

Chairman- Mark S. Owens: we have asked it to be re-referred back to education committee, we have not made a motion to reconsider our actions yet. So, any discussion.

Rep. Pat D. Heinert: I think with legislative council support, and with the attorney general's support we send the bill back to the floor the way it came back to us, we send it back as originally drafted.

Chairman- Mark S. Owens: comments

Rep. Corey Mock: I agree with Rep. Pat D. Heinert with this one, for the purpose of discussion I will make the motion that we reconsider our actions, and if the motion fails, the bill will go back to the floor as originally passed out. So I move that we reconsider our actions where as we passed SB 2295 as amended.

Chairman- Mark S. Owens: ok, I have a motion to reconsider our actions on SB 2295, is there a second. Seeing none, the motion fails for lack of a second. Well then we can't reconsider, and we will send it back to the floor as is.

3/13/17 DPA

17.0969.01001
Title.02000

Prepared by the Legislative Council staff for
Representative Mock
March 13, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2295

Page 5, line 14, after "education" insert "which contains personally identifiable information about a party to the complaint"

Page 5, line 14, after the underscored period insert "For purposes of this section, "personally identifiable information" means information that directly identifies an individual, and information that, alone or in combination with other information, is linked or linkable to an individual and would allow a reasonable person who lacks knowledge of the relevant circumstances to identify the individual."

Renumber accordingly

Date: 3/13/17

Roll Call Vote # 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2295

House Education Committee

Subcommittee

Amendment LC# or Description: 17.0969.01001

- 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 Rep. Mock Seconded By Rep. Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman- Mark S. Owens			Rep. Andrew Marschall		
Vice Chairman- Cynthia Schreiber-Beck			Rep. Bill Oliver		
Rep. Rich S. Becker			Rep. Brandy Pyle		
Rep. Pat D. Heinert			Rep. Matthew Ruby		
Rep. Dennis Johnson			Rep. Denton Zubke		
Rep. Mary Johnson			Rep. Ron Guggisberg		
Rep. Donald W. Longmuir			Rep. Corey Mock		

Total (Yes) _____ No _____

Absent _____

Floor Assignment Rep. _____

If the vote is on an amendment, briefly indicate intent:
voice vote. motion passed

Date: 3/13/17

Roll Call Vote # 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2295

House Education 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 Rep. ^{Vice Chair} Schreiber-Beck Seconded By Rep. Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman- Mark S. Owens	✓		Rep. Andrew Marschall	✓	
Vice Chairman- Cynthia Schreiber-Beck	✓		Rep. Bill Oliver	✓	
Rep. Rich S. Becker	✓		Rep. Brandy Pyle	✓	
Rep. Pat D. Heinert	✓		Rep. Matthew Ruby	✓	
Rep. Dennis Johnson	AB		Rep. Denton Zubke	AB	
Rep. Mary Johnson	✓		Rep. Ron Guggisberg	✓	
Rep. Donald W. Longmuir	✓		Rep. Corey Mock	✓	
	6			6	

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Mock

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

REPORT OF STANDING COMMITTEE

SB 2295: Education Committee (Rep. Owens, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2295 was placed on the Sixth order on the calendar.

Page 5, line 14, after "education" insert "which contains personally identifiable information about a party to the complaint"

Page 5, line 14, after the underscored period insert "For purposes of this section, "personally identifiable information" means information that directly identifies an individual, and information that, alone or in combination with other information, is linked or linkable to an individual and would allow a reasonable person who lacks knowledge of the relevant circumstances to identify the individual."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2295, as amended: Education Committee (Rep. Owens, Chairman) recommends DO PASS (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2295, as amended, was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

SB 2295

1-31-17
SB 2295
H 1 p. 1

SB 2195

Good morning Chairman Rust and Education Committee members. For the record I am Senator Donald Schaible, representing district 31. There are a couple of proposed changes section 44-04 of the century code. In Section 1 sub section 8 the proposed language exempts research data from public records requests, until the data is published or patented. This language makes it clear that non-research data associated with grants/contracts are a public record. The current language in law only protects intellectual property provided to universities by 3rd parties, not material generated by institutional researchers. Legally speaking, there is no clear and unambiguous language protection research data created by institutional researchers. It takes years for research projects to reach the stage of being eligible to receive patents or plant protection. During that time, the research data may be vulnerable to open records request. If the information would be turned over, then the requester might be able to legally file for a patent or plant protection prior to the institutional researcher thereby destroying all commercial value to the university and state. The Attorney General's task force unanimously agreed to the concept of this bill.

The change request in sub section 9 is intended to protect the personal information of people who volunteer as human research subjects. There are federal laws which may play a part in these studies, but there may be a possibility that a participant might not qualify depending on the circumstances. Current language does not provide clear and unambiguous language protecting the personal information of people who volunteer as human research subjects. This language in sub section 9 would offer that protection.

Sub section 10 clarifies that this information under sub section 8 and 9 should still be accessible to the statewide longitudinal data system, for that system already provides protection from individual identifiable data.

1-31-17
SB 2295
#1 p.2

Section 2

Title IX. Title IX requires educational entities to investigate allegations of sexual discrimination which also includes sexual assault. Any school that receives a complaint of sexual assault or discrimination must perform its own investigation regardless if there is a separate investigation by law enforcement. The problem is the privacy of the victim and the accused. Many victims hesitate to come forward with a report of sexual assault if they know their name will be plastered in the newspaper as will that of the accused. Additionally, there are false claims that can equally damage reputations. There have been instances of people filing a Title IX complaint against a professor in retribution for getting a bad grade. Even though the investigation cleared the professor, his reputation was still ruined. Similarly, it can impact investigators of a particular complaint as they may be hesitant to include details in their documentation knowing that the allegations will be subject to disclosure. In short, the exemption would protect the effectiveness and integrity of the campuses' Title IX function.

I would be happy to try to answer your questions.

SB 2295

Senate Education

January 31, 2017

Lisa Feldner, Chief of Staff

701.3281510 | lisa.feldner@ndus.edu

Chair and Committee Members: I am Lisa Feldner, Chief of Staff for the North Dakota University System and I'm here today in support of SB 2295.

This bill adds two subsections to the section of ND Century Code that exempts trade secrets and other proprietary information from public records requests. Subsections 8 and 9 add research records to the code. The Attorney General's task force unanimously agreed to the concept of this bill which borrows heavily from an Ohio law relating to the same topic. However, the task force wanted language added to ensure that it wouldn't impact the Statewide Longitudinal Data System (SLDS). Because this matter came to the task force late, there wasn't time to modify the language and include it in the Task Force's main bill, HB 1345. Both UND and NDSU worked collaboratively on the development of this bill.

Subsection 8 is designed to protect research data created by institutional researchers until that data is published or patented.

- It can take years for research projects to reach the stage of being eligible to receive patent or plant protection. During that time, the research data may be vulnerable to open record requests.
- If the material would be released before it is published or patented, the requester might be able to legally file for a patent/plant protection instead of the institutional researcher thereby destroying all commercial value to the university and state.
- The proposed language makes it clear that non-research data associated with grants/contracts is still a public record and not subject to this protection (*e.g.*, financial and administrative records relating to the grant/contract).
- Example: a faculty member is working on the development of a new biomedical device; a device which is considered novel and thus has inherent intellectual property. If the research data associated with the development of this device is made public via a public records request, the faculty member [and associated institution] quite potentially would lose the opportunity to protect this intellectual property (IP) through the patenting process. Without the IP protection, commercialization of the new device could be greatly impacted. Sometimes it takes years to gather the needed and necessary data before a patent application can be filed [even a provisional one].

Subsection 9 is designed to protect the personal information of people who volunteer as human research subjects.

- There are a variety of federal laws which may play a part in these studies (e.g., FERPA, HIPAA, etc.), but there may be a possibility that a participant might not qualify depending upon the circumstances. This would ensure to these participants their data will be kept confidential if they don't fall under other protections.

Subsection 10 states that Subsections 8 and 9 do not apply to the Statewide Longitudinal Data System.

Section 2, on Title IX investigations, was added after the Attorney General's Task Force completed its work, however, the language was written by attorneys from the Attorney General's office.

Title IX requires educational entities to investigate allegations of sexual discrimination which also include sexual assault. This requirement extends to students, faculty, and staff. Any school that receives a complaint of sexual assault or discrimination must perform its own investigation even if there is a separate investigation by law enforcement. The problem is the privacy of both the victim and the accused. Many victims hesitate to come forward with a report of sexual assault if they know their name will be mentioned in media as will that of the accused. Additionally, there have been frivolous claims that can equally damage reputations.

The primary reason to exempt Title IX records is that disclosure of those records can have a "chilling" effect on victims/complainants from bringing their concerns forward (i.e. will someone submit a complaint regarding sexual assault or harassment if there is the possibility that those details may be publicly available?). Similarly, it can impact investigators of a particular complaint as they may be hesitant to include details in their documentation knowing that the allegations will be subject to disclosure. In short, the exemption would protect the effectiveness and integrity of the campuses' Title IX function. Additionally, many of our campuses are so small that even if the name of the victim/accused are not released but the investigation is, it is fairly easy narrow down the possibilities and figure out who the individuals are.

In closing, I ask for a do pass on SB 2295 and am available to answer your questions. Thank you.

Attachment 1

SB 2295

3/7/17

SB 2295

Good morning Chairman Owens and the House Education Committee, for the record I am Senator Don Schaible representing District 31

SB 2295 requests a couple of changes in section 44-04 of the century code. In Section 1 sub section 8 the proposed language exempts research data from public records requests, until the data is published or patented. This language makes it clear that non-research data associated with grants/contracts are a public record. The current language in law only protects intellectual property provided to universities by 3rd parties, not material generated by institutional researchers. Legally speaking, there is no clear language protecting research data created by institutional researchers. It takes years for research projects to reach the stage of being eligible to receive patents or plant protection. During that time, the research data may be vulnerable to open records request. If the information would be turned over, then the requester might be able to legally file for a patent or plant protection prior to the institutional researcher thereby destroying all commercial value to the university and state. The Attorney General's task force unanimously agreed to the concept of this bill.

The change request in sub section 9 is intended to protect the personal information of people who volunteer as human research subjects. There are federal laws which may play a part in these studies, but there may be a possibility that a participant might not qualify depending on the circumstances. Here again current language does not provide clear language protecting the personal information of people who volunteer as human research subjects. This language is sub section 9 would offer that protection.

Sub section 10 clarifies that this information under sub section 8 and 9 should still be accessible to the statewide longitudinal data system, for that system already provides protection from individual identifiable data.

Section 2

Title IX requires educational entities to investigate allegations of sexual discrimination which also includes sexual assault. Any school that receives a complaint of sexual assault or discrimination must perform its own investigation regardless if there is a separate investigation by law enforcement. The problem is the privacy of the victim and the accused. Many victims hesitate to come forward with a report of sexual assault if they know their name will be plastered in the newspaper as will that of the accused. Additionally, there are false claims that can equally damage reputations. There have been instances of people filing a Title IX complaint against a professor in retribution for getting a bad grade. Even though the investigation cleared the professor, his reputation was still ruined. Similarly, it can impact investigators of a particular complaint as they may be hesitant to include details in their documentation knowing that the allegations will be subject to disclosure. In short, the exemption would protect the effectiveness and integrity of the campuses' Title IX function.

I would be happy to try to answer any questions that you may have.

SB 2295

House Education

March 7, 2017

Lisa Feldner, Chief of Staff

701.3281510 | lisa.feldner@ndus.edu

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The primary reason to exempt Title IX records is that disclosure of those records can have a "chilling" effect on victims/complainants from bringing their concerns forward (i.e. will someone submit a complaint regarding sexual assault or harassment if there is the possibility that those details may be publicly available?). Similarly, it can impact investigators of a particular complaint as they may be hesitant to include details in their documentation knowing that the allegations will be subject to disclosure. In short, the exemption would protect the effectiveness and integrity of the campuses' Title IX function. Additionally, many of our campuses are so small that even if the name of the victim/accused are not released but the investigation is, it is fairly easy narrow down the possibilities and figure out who the individuals are.

In closing, I ask for a do pass on SB 2295 and am available to answer your questions. Thank you.

Tuesday, March 07, 2017

3/7/17

HOUSE EDUCATION COMMITTEE
SB 2295

CHAIRMAN OWENS AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We respectfully **oppose just 46 teensy words of SB 2295** because of their effect on the state's open records laws and ask that you consider our amendment.

The Attorney General assembled a Task Force over the interim to review needed changes in the state's open meeting and open records laws. The result of that Task Force's work was HB 1345 that the House passed 91-0 on Feb. 13.

The ND University System, at the Task Force's last meeting, said it wanted to include language concerning university research, but said it didn't have the language finalized. The Task Force had no opposition to the research proposal, but said it would have to be a separate bill. That proposal had no provisions concerning Title IX records.

That proposal became SB 2295, but – lo and behold – Section 2 on page 5 mysteriously appeared protecting all Title IX records and complaints. This has nothing to do with university research, but has a lot to do with protecting a university's public image by hiding any claims of assault or discrimination against women.

The current language could be interpreted to mean any information concerning Title IX complaints, including the fact a complaint was filed, would be confidential. Information about the students involved is already confidential as student records. As shown in the U.S. Department of Education press release attached to my testimony, the fact that complaints are filed are not confidential under Federal law.

Our proposed amendments make that clear under North Dakota law as well. We respectfully request that you adopt our attached amendments.

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

PROPOSED AMENDMENTS TO SB 2295

On page 5, line 14, after "record." Insert "However, the fact that a Title IX complaint has been filed, or an investigation commenced, shall not be exempt and shall be disclosed by a university or college."

Renumber accordingly

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ARCHIVED INFORMATION

U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations

MAY 1, 2014

Contact: Press Office, (202) 401-1576, press@ed.gov (<mailto:press@ed.gov>)

The U.S. Department of Education's Office for Civil Rights (OCR) released today a list of the higher education institutions under investigation for possible violations of federal law over the handling of sexual violence and harassment complaints.

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in all education programs or activities that receive federal financial assistance. In the past, Department officials confirmed individual Title IX investigations at institutions, but today's list is the first comprehensive look at which campuses are under review by OCR for possible violations of the law's requirements around sexual violence.

"We are making this list available in an effort to bring more transparency to our enforcement work and to foster better public awareness of civil rights," Assistant Secretary for Civil Rights Catherine E. Lhamon said. "We hope this increased transparency will spur community dialogue about this important issue. I also want to make it clear that a college or university's appearance on this list and being the subject of a Title IX investigation in no way indicates at this stage that the college or university is violating or has violated the law."

As with all OCR investigations, the primary goal of a Title IX investigation is to ensure that the campus is in compliance with federal law, which demands that students are not denied the ability to participate fully in educational and other opportunities due to sex.

The Department will not disclose any case-specific facts or details about the institutions under investigation. The list includes investigations opened because of complaints received by OCR and those initiated by OCR as compliance reviews. When an investigation concludes, the Department will disclose, upon request, whether OCR has entered into a resolution agreement to address compliance concerns at a particular campus or found insufficient evidence of a Title IX violation there.

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The list of institutions under investigation for Title IX sexual violence issues will be updated regularly and made available to the public upon request by contacting OCR (<https://wdcrocolp01.ed.gov/CFAPPS/OCR/contactus.cfm>) or to media by contacting the Press Office at press@ed.gov (<mailto:press@ed.gov>).

Releasing this list advances a key goal of President Obama's White House Task Force to Protect Students from Sexual Assault to bring more transparency to the federal government's enforcement activities around this issue. The Obama administration is committed to putting an end to sexual violence—particularly on college campuses. That's why the President established the Task Force earlier this year with a mandate to strengthen federal enforcement efforts and provide schools with additional tools to combat sexual assault on their campuses.

As part of that work, the Education Department released updated guidance (<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>) earlier this week describing the responsibilities of colleges, universities and schools receiving federal funds to address sexual violence and other forms of sex discrimination under Title IX. The guidelines provide greater clarity about the requirements of the law around sexual violence—as requested by institutions and students.

All colleges, and universities and K-12 schools receiving federal funds must comply with Title IX. Schools that violate the law and refuse to address the problems identified by OCR can lose federal funding or be referred to the U.S. Department of Justice for further action.

Under federal law, sexual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent -- including rape, sexual assault, sexual battery, sexual abuse and sexual coercion.

OCR's mission is to ensure equal access to education and promote educational excellence throughout the nation through the vigorous enforcement of civil rights. OCR is responsible for enforcing federal civil rights laws that prohibit discrimination by educational institutions on the basis of disability, race, color, national origin, sex, and age, as well as the Boy Scouts of America Equal Access Act of 2001. Additional information about the office is available at <http://www2.ed.gov/about/offices/list/ocr/index.html> (<http://www2.ed.gov/about/offices/list/ocr/index.html>).

This list reflects investigations open as of May 1, 2014. Schools are listed alphabetically by state.

State	Institution
AZ	Arizona State University
CA	Butte-Glen Community College District
CA	Occidental College
CA	University of California-Berkeley
CA	University of Southern California
CO	Regis University
CO	University of Colorado at Boulder
CO	University of Colorado at Denver
CO	University of Denver
CT	University of Connecticut
DC	Catholic University of America

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FL	Florida State University
GA	Emory University
HI	University of Hawaii at Manoa
ID	University of Idaho
IL	Knox College
IL	University of Chicago
IN	Indiana University-Bloomington
IN	Vincennes University
MA	Amherst College
MA	Boston University
MA	Emerson College
MA	Harvard College
MA	Harvard University—Law School
MA	University of Massachusetts-Amherst
MD	Frostburg State University
MI	Michigan State University
MI	University of Michigan-Ann Arbor
NC	Guilford College
NC	University of North Carolina at Chapel Hill
ND	Minot State University
NH	Dartmouth College
NJ	Princeton University
NY	Cuny Hunter College
NY	Hobart and William Smith Colleges
NY	Sarah Lawrence College
NY	Suny at Binghamton
OH	Denison University
OH	Ohio State University
OH	Wittenberg University
OK	Oklahoma State University
PA	Carnegie Mellon University
PA	Franklin and Marshall College
PA	Pennsylvania State University
PA	Swarthmore College
PA	Temple University
TN	Vanderbilt University
TX	Southern Methodist University
TX	The University of Texas-Pan American
VA	College of William and Mary
VA	University of Virginia
WA	Washington State University
WI	University of Wisconsin-Whitewater
WV	Bethany College
WV	West Virginia School of Osteopathic Medicine

Longmuir, Donald

From: Vaughn, Nick
Sent: Wednesday, March 8, 2017 2:37 PM
To: Longmuir, Donald
Cc: Fitzsimmons, Katie
Subject: Follow up

Representative Longmuir,

To follow up on our conversation yesterday afternoon regarding SB 2295 and the exemption of Title IX records from the open records law, I looked into how Title IX "complaints" and "final reports" have been defined by the U.S. Department of Education's Office of Civil Rights ("OCR"). With respect to "complaints," the key factor is notice. Specifically, a school has an actionable complaint when it has notice of gender-based harassment, including sexual violence. OCR has described situations where a school has received sufficient notice as follows:

Some examples of notice include: a student may have filed a grievance with or otherwise informed the school's Title IX coordinator; a student, parent, friend, or other individual may have reported an incident to a teacher, principal, campus law enforcement, staff in the office of student affairs, or other responsible employee; or a teacher or dean may have witnessed the sexual violence.

The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents. For example, if school officials receive a credible report that a student has perpetrated several acts of sexual violence against different students, that pattern of conduct should trigger an inquiry as to whether other students have been subjected to sexual violence by that student. In other cases, the pervasiveness of the sexual violence may be widespread, openly practiced, or well-known among students or employees. In those cases, OCR may conclude that the school should have known of the hostile environment. In other words, if the school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry. A school's failure to take prompt and effective corrective action in such cases (as described in questions G-1 to G-3 and H-1 to H-3) would violate Title IX even if the student did not use the school's grievance procedures or otherwise inform the school of the sexual violence.

As you can see from the above, there are many situations where a school has notice of a Title IX concern and must take action.

"Final report" similarly does not have a simple, straightforward definition with respect to Title IX investigations. However, Title IX does require that schools, following an investigation into a complaint, notify both parties about the outcome in writing and provide information regarding an appeal. The written notice must inform the complainant as to (1) whether or not the school found that the alleged conduct occurred, (2) any individual remedies offered or provided to the complainant, (3) any sanctions imposed on the respondent that directly relate to the complainant, and (4) other steps that the school has taken to eliminate the hostile environment (if the school finds one to exist) and prevent recurrence. The written notice must inform the respondent as to (1) whether or not the school found that the alleged conduct occurred and (2) any sanctions imposed on the respondent.

Please let me know if you have any questions or if you would like to discuss further.

Best,

Nick Vaughn
Assistant Attorney General
701.328.3611

17.0969.01001
Title.

Prepared by the Legislative Council staff for
Representative Mock
March 7, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2295

Page 5, line 14, after "education" insert "which contains personally identifiable information about a party to the complaint"

Page 5, line 14, after the underscored period insert "For purposes of this section, "personally identifiable information" means information that directly identifies an individual, and information that, alone or in combination with other information, is linked or linkable to an individual and would allow a reasonable person who lacks knowledge of the relevant circumstances to identify the individual."

Renumber accordingly