

**2019 SENATE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE**

**SB 2221**

# 2019 SENATE STANDING COMMITTEE MINUTES

## Government and Veterans Affairs Committee Sheyenne River Room, State Capitol

SB2221  
2/8/20019  
# 32436

- Subcommittee  
 Conference Committee

Committee Clerk Signature : Pam Dever

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

Relating to exempting records of communication between legislators & public employees from open records laws.

### Minutes:

Att #1 – Jack McDonald

**Chairman Davison:** Attendance was taken and all were present. Let's opening the hearing on SB2221.

**Sen. Judy Lee, Dist. 13, W. Fargo:** I am here to clarify something that has been around for a long time, but it needs to be clarified. (.49) If we have communications with a department head and have an e mail conversation, that is confidential. We are working on business for legislation, etc. A few times some of us have inquired whether those communications are statutorily protected. We were told, yes. Now, John Bjornson told me he was not sure. This is to protect conversations. It may involve constituents. I don't think that all the conversations need to be open records. We are trying to interfere with the very good Sunshine Laws of N.D. They are important. This would clarify our protection. We thought we were but it is not in law and a bit unclear. (3.21) I do not want to suppress the press. They have asked me about that.

**Chairman Davison:** We are talking about e-mail, and draft documents?

**Sen. Lee:** We should not be hiding anything. Some discussions may be very preliminary that it may be misunderstood at first. We are not trying to be sneaky just want to solve a problem. I can't do everything on the phone. Impossible. E-mail can be saved and is a record for me.

**Chairman Davison:** Any more in support? Any agencies? Any against?

**Jack McDonald, North Dakota Newspapers Assoc.:** (see att #1) We normally oppose but sometimes there is need for legislative privacy. In that spirit, we would be OK if you would adopt the amendment I included in my testimony. (7.20) If you don't accept, then we oppose this bill. N.D. has some of the greatest open records laws around. We pride ourselves that private citizens can get information.

**Chairman Davison:** Can you give me an example that this bill would not allow to be an open record?

**Jack:** If some legislator was upset at something an agency was doing, and they would write an angry email about what they were doing. Kind of war with e mails. If you are at war with the tax department, that should be open records, perhaps.

**Sen. Erin Oban:** She gave a scenario of communication with a constituent contacting me privately, with an issue she had, and I encouraged her to stop e mailing from state address. Their e mails are open records, and mine are not. I shared this with Human Resources and that was private. They shared that with their boss and that boss shared with governor's office. That second, it was open record. I was fine with my name on it, but my constituent should have been confidential. Those are the things I want protected. I don't know that your amendment would do that.

**Jack:** Hard to give an opinion on the top of my head. It could raise liability on the agency. If it is a serious problem with a state agency, then it should be public. (12.30)

**Sen. Erin Oban:** I felt very strongly that the public employees should have been protected. They did not deserve to be retaliated against.

**Chairman Davison:** Any more questions?

**Sen. Richard Marcellais:** Whenever I talk to a constituent, I ask for them to sign a release form. That is confidential. Are you saying these three L's that I should be revealing outside should go to the press?

**Jack:** No, we are saying that the law already protects what you are saying. This bill was introduced to go a step further.

**Sen. Erin Oban:** Except if those constituent public employees communicated from their public e mail, correct?

**Jack:** Not sure if this goes both ways.

**Chairman Davison:** Your amendment will be considered. More testimony against? We will close this hearing. (15.11)

# 2019 SENATE STANDING COMMITTEE MINUTES

## Government and Veterans Affairs Committee Sheyenne River Room, State Capitol

SB2221  
2/14/2019  
No recording

- Subcommittee  
 Conference Committee

Committee Clerk: Pam Dever

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

Relating to exempting records of communication between legislators & public employees from open records laws.

### Minutes:

Comm. Work

**Chairman Davison:** Look at SB2221. This is dealing with open records.

**Sen. Erin Oban:** I really think that the state employee e-mailed me concerned about her boss, should have stayed confidential. This concerns me. Once it got to the governor's office it was open records. It could have ended up in the newspaper.

**Sen. Kristin Roers:** She should not have used state e-mail, for sure.

**Chairman Davison:** I like the Jack McDonald amendment he had on his testimony. It is reasonable.

**Sen. Erin Oban:** I need something dealing with HR. I feel all the conversations with HRMS are private between them and me.

**Sen. Kristin Roers:** Do you mean department and public employees and do you want another section?

**Sen. Erin Oban:** It is about the topic. I don't have to add it, if you think it will be too complicated.

**Chairman Davison:** Yes, it would be more complicated.

**Sen. Erin Oban:** The public employee should be thought of first. Her name was tied even though she went through me in confidence.

**Chairman Davison:** Maybe employees need more training and understand what is open records and what is not.

**Sen. Erin Oban:** The standard communication is O.K. She was just complaining about her boss.

**Chairman Davison:** I think that is open records then.

**Sen. Erin Oban:** I think we should make it like Jack's amendment. Here is an example. If a legislator does not like what a state employee or department head is doing, shouldn't that be open records?

**Chairman Davison:** Page 1, line 21, we insert the three 'L's.

**Sen. Erin Oban:** So if we do Jack's amendment, that would limit the communication to closed records with the litigation, legislation, and liability? If it is not involved, it is open records?

**Chairman Davison:** I will visit outside of this committee to see how they see it. The House will deal with this also.

**Sen. Erin Oban:** I think we need an amendment.

done

# 2019 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee  
Sheyenne River Room, State Capitol

SB2221  
2/15/2019  
# 32833

- Subcommittee  
 Conference Committee

Committee Clerk: Pam Dever

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

Relating to exempting records of communication between legislators & public employees from open records laws.

## Minutes:

Att #1 – Sen. Oban

**Chairman Davison:** Let's look at SB2221.

**Sen. Erin Oban:** I have the amendment 19.0021.01001. (see att# 1) Pretty simple.

**Chairman Davison:** Any discussion?

**Sen. Erin Oban:** I move to adopt the amendment.      **Sen. Richard Marcellais:** I second

**Chairman Davison:** Any discussion? Call the roll. **YES -- 7    NO -- 0    -0-absent**  
**AMENDMENT passed.**

**Sen. Erin Oban:** I move a DO PASS as AMENDED.      **Sen. Richard Marcellais:** I second.

**Chairman Davison:** Any discussion. Call the roll: **YES -- 7    NO -- 0    -0-absent**  
**PASSED as AMENDED.    Sen. Erin Oban: will carry the bill.**

(end 3.06)

February 15, 2019

2/15  
SKW

PROPOSED AMENDMENTS TO SENATE BILL NO. 2221

Page 1, line 20, replace "a" with ":

a. A"

Page 1, line 21, after "assembly" insert an underscored semicolon

Page 1, line 21, replace "by any" with:

"b. Any"

Page 1, line 21, after "employee" insert "if the record concerns litigation, legislation, or liability involving the public employee or a public entity"

Renumber accordingly

2-15-19

Date:  
Roll Call Vote #: /

2019 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2221

Senate Government and Veterans Affairs Committee

Subcommittee

Amendment LC# or Description: 19.0021.01007

Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar  
Other Actions:  Reconsider     \_\_\_\_\_

Motion Made By Sen. Oban Seconded By Sen. Marcellais

Senators	Yes	No	Senators	Yes	No
Chairman Davison	/		Sen. Oban	/	
Vice Chair Meyer	/		Sen. Marcellais	/	
Sen. Elkin	/				
Sen. K. Roers	/				
Sen. Vedaa	/				

Total (Yes) 7 No 0

Absent \_\_\_\_\_

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

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

*Amend. passed*

2-15-19  
Date:  
Roll Call Vote #: 2

2019 SENATE STANDING COMMITTEE  
ROLL CALL VOTES SB 2221  
BILL/RESOLUTION NO.

Senate Government and Veterans Affairs Committee

Subcommittee

Amendment LC# or Description: 19.0021.01001

Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Place on Consent Calendar  
Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Sen. Oban Seconded By Sen. Marcellais

Senators	Yes	No	Senators	Yes	No
Chair Davison	/		Sen. Oban	/	
Vice Chair Meyer	/		Sen. Marcellais	/	
Sen. Elkin	/				
Sen. K. Roers	/				
Sen. Vedaa	/				

Total (Yes) 7 No 0  
Absent -0-  
Floor Assignment Sen. Oban

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

**REPORT OF STANDING COMMITTEE**

**SB 2221: Government and Veterans Affairs Committee (Sen. Davison, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2221 was placed on the Sixth order on the calendar.

Page 1, line 20, replace "a" with ":

a. A"

Page 1, line 21, after "assembly" insert an underscored semicolon

Page 1, line 21, replace "by any" with:

"b. Any"

Page 1, line 21, after "employee" insert "if the record concerns litigation, legislation, or liability involving the public employee or a public entity"

Renumber accordingly

**2019 HOUSE GOVERNMENT AND VETERANS AFFAIRS**

**SB 2221**

# 2019 HOUSE STANDING COMMITTEE MINUTES

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

SB 2221  
3/8/2019  
33466

- Subcommittee  
 Conference Committee

Committee Clerk: Carmen Hart

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

Relating to exempting records of communications between legislators and public employees from open records laws

### Minutes:

Attachments 1-4

**Chairman Kasper** opened the hearing on SB 2221.

**Senator Curt Kreun** appeared in support. He was speaking for Senator Judy Lee. Attachment 1. Attachment 2 was a copy of the original bill. (:31-4:34)

**Vice Chair Steiner:** I have a question on the word liability on Line 23, Page 1. Sometimes there is political liability. Let's say we are seeking records on the governor's plane, and he says no, he doesn't want the highway patrol release those records of who rode in the plane and when they rode in the plane, and he has a political liability. Now are those records exempt under this if we pass this?

**Senator Kreun:** The way I would interpret that is all liability. Is your suggestion to make it a specific liability? Okay.

**Chairman Kasper:** Senator Lee is asking that the bill in front of us which was sent to us by the senate is not at all meeting her expectations or her intent. She wants us to amend the bill back to the original bill that she introduced in the senate?

**Senator Kreun:** Correct.

**Chairman Kasper:** This is just dealing with communication between public employees and legislators and adding that as a protected correspondence.

**Senator Kreun:** Yes, just adding that particular portion. is correct.

Attachment 3 was handed out by the law intern.

Opposition:

Attachment 4 was emailed by Carel Two-Eagle in opposition.

**Chairman Kasper** closed the hearing.

**Chairman Kasper:** In Senator Lee's discussion with legislative council, she found that the current law does not exempt our communication with public employees from open records. Her wishes are to amend the bill back to the original that she introduced.

**Rep. P. Anderson:** I would oppose to putting it back to the original bill. I think open and transparent with legislators and public employees should be there.

**Rep. B. Koppelman:** I don't know what the purpose in not passing a version of this bill that seeks the intent of Senator Lee would be. Is it our purpose to strip away the confidentiality of constituents that happen to be state employees as well? This goes far beyond email, and I think we need to do something to firm this up.

**Rep. Laning:** This topic was discussed a few sessions ago. One of the concerns for it was in conversations between legislators and state employees or legislators to legislators the ability to actually name names. If that was open to public record, it could stifle conversations and restrict actually getting to a resolution of a problem. In some form this is a necessary thing.

**Rep. C. Johnson:** What does the open records laws refer to? Does it refer to minutes from committee hearings or is it all communications?

**Chairman Kasper** told him to refer to Attachment 3.

# 2019 HOUSE STANDING COMMITTEE MINUTES

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

SB 2221  
3/22/2019  
#34173

- Subcommittee  
 Conference Committee

Committee Clerk: Carmen Hart

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

Relating to exempting records of communications between legislators and public employees from open records laws.

### Minutes:

**Chairman Kasper** opened the meeting on SB 2221. This bill deals with the communication that we have with various entities as legislators and privacy. The intent of the original version of the bill (01 version) was exempting records of communications between legislators and public employees from open records laws. Line 8 tells what are not subject to open records. It describes what closed records are. The amendment added by the bill sponsors includes: the exceptions in subdivision C of subsection 1, which is a record that reveals the content of communication between a member of the legislative assembly and any person. That applies to records possessed by a member of the legislative assembly or any other public officer or employee. (line 20) The intent of the bill was to close the records that we have with a member of the legislative assembly or by any other public officer or employee. It was amended by the Senate. Line 20 – the exception in subdivision C of subsection 1 above applies to records possessed by a member of the legislative assembly or any other public officer or employee if the record concerns litigation, legislation, or a liability involving the public employee or public entity. This adds protection for open records to those areas of litigation, legislation, or liability, but it keeps open other communication that we have. That narrows it. **Senator Judy Lee** asked us to go back to the original bill because the amendment destroys the original intent of the bill.

**Rep. Schauer:** What problem are we trying to fix?

**Chairman Kasper:** The thought was for years, that our e-mail discussions were private and not open to public records. It was found that it is unclear if our e-mails are private. The bill was introduced to make them private. Now, the amended bill says that all e-mails are open except those that deal with litigation, legislation, or liability. All others will now be public record. It means that a request from anyone to look at your e-mail account within the state of North Dakota e-mail system will be will be given, except those involving litigation, legislation, or liability. I support the original bill. I do not support the amended bill.

**Vice Chair Steiner moved an amendment to move the Senate version back to the original bill. (19.0021.02001)**  
**Rep. Rohr seconded the motion.**

**Rep. P. Anderson:** I thought what we have now, made it private between legislators and constituents, but not public employees. This would say it is not open records for public employees. I am going to resist the bill.

**Chairman Kasper:** Senator Lee, who looked into this, said, "Legislators have thought that our e-mails with various offices and executive departments were exempt from open records requests. That is not accurate. Although I have inquired several times over the years and been insured that communications were confidential, my inquiry a few months ago confirmed that there is no such protection in statute." The original version of her bill was to make our e-mail records private, like most of us thought they were.

**Rep. Schneider:** It seems like the initial version is really broad. Is it exempting all e-mails of public officers or employees, all state employee e-mail?

**Chairman Kasper:** That is what it does.

**Rep. Rohr:** Pointed out Article 11 in the Constitution that clarifies what is and is not exempt.

**Voice vote taken on amendment. Uncertain. A roll call vote was taken. 9-3, 2 absent**  
**The motion carried.**

**Rep. Schneider:** It appears now that government employee records are open and accessible. Are we making them an exception? Now we are putting them in the exception, so that all government employees now have closed, private records? Do we really want to be doing this?

**Rep. Laning:** I think that paragraph 2 refers back to subparagraph C above, which states it's between a member of the legislature and any person.

**Rep. Schneider:** So, our communications with an employee is what the committee is really concerned with. Looking at 2 and C together, those would be private. Now, let's see if we have made that broader.

**Rep. Louser:** Maybe Section 2 suggests that if the public employee has the record from the legislator, it is not subject to a request.

**Rep. Schneider:** I hope that is the legislative intent of this. I can see that interpretation. It is only our communications, whether it is on the end of the employee or the end of the legislature. Is that your understanding?

**Chairman Kasper:** Yes

**Vice Chair Steiner:** On C it is bringing together another group of people who might have e-mail from us.

**Chairman Kasper:** Yes. If we as legislators are communicating with a citizen and send it to Legislative Council, that is protected. We can vote on this, and I will hold it. I am going to have Legislative Council clarify that. If it is not that way, we will take it back up for reconsideration.

**Rep. Steiner moved as DO PASS as amended.**  
**Rep. Laning seconded the motion.**

**Rep. Schneider:** My notes show no testimony in opposition to this. Is that correct?

**Chairman Kasper:** Yes.

**A roll call vote was taken on SB 2221 as amended.**  
**Yes 11 No 1 Absent 2**  
**Rep. Steiner will carry SB 2221.**

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2221

Page 1, line 20, remove the underscored colon

Page 1, line 21, replace "a. A" with "a"

Page 1, line 21, remove the underscored semicolon

Page 1, line 22, replace "b. Any" with "by any"

Page 1, line 22, remove "if the record concerns litigation, legislation,"

Page 1, line 23, remove "or liability involving the public employee or a public entity"

Renumber accordingly

Date: 3-22-19  
 Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2221**

House Government and Veterans Affairs Committee

Subcommittee

Amendment LC# or Description: 19.0021.0 2001

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 Steiner Seconded By Rep Rohr

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper	X		Rep. Pamela Anderson		X
Vice Chair Vicky Steiner	X		Rep. Mary Schneider		X
Rep. Jeff Hoverson	X				
Rep. Craig Johnson	X				
Rep. Daniel Johnston	X				
Rep. Karen Karls	X				
Rep. Ben Koppelman	X				
Rep. Vernon Laning	X				
Rep. Scott Louser	X				
Rep. Karen Rohr	X				
Rep. Austen Schauer	X				
Rep. Steve Vetter		X			

*Motion Carries*

Total (Yes) 9 No 3

Absent 2

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

If the vote is on an amendment, briefly indicate intent:  
Amend 02 to original version which was

Date: 3-22-19  
 Roll Call Vote #: 2

**2019 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2221**

House Government and Veterans Affairs Committee

Subcommittee

Amendment LC# or Description: 19.00 21, 0 2001

- 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. Steiner Seconded By Rep. Laning

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper	X		Rep. Pamela Anderson		X
Vice Chair Vicky Steiner	X		Rep. Mary Schneider	X	
Rep. Jeff Hoverson	A				
Rep. Craig Johnson	X				
Rep. Daniel Johnston	X				
Rep. Karen Karls	X				
Rep. Ben Koppelman	A				
Rep. Vernon Laning	X				
Rep. Scott Louser	X				
Rep. Karen Rohr	X				
Rep. Austen Schauer	X				
Rep. Steve Vetter	X				

Total (Yes) 11 No 1

Absent 2

Floor Assignment Rep. Steiner

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

**REPORT OF STANDING COMMITTEE**

**SB 2221, as engrossed: Government and Veterans Affairs Committee (Rep. Kasper, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 1 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2221 was placed on the Sixth order on the calendar.

Page 1, line 20, remove the underscored colon

Page 1, line 21, replace "a. A" with "a"

Page 1, line 21, remove the underscored semicolon

Page 1, line 22, replace "b. Any" with "by any"

Page 1, line 22, remove "if the record concerns litigation, legislation,"

Page 1, line 23, remove "or liability involving the public employee or a public entity"

Renumber accordingly

**2019 CONFERENCE COMMITTEE**

**SB 2221**

# 2019 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee  
Sheyenne River Room, State Capitol

SB2221  
4/11/2019  
# 34698

- Subcommittee  
 Conference Committee

Committee Clerk: Pam Dever

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

Relating to exempting records of communication between legislators and public employees from open records laws.

## Minutes:

PRESENT: **Sen. K Roers (chair), Sen. Meyer, Sen. Oban  
Rep. Steiner (chair), Rep. Rohr, Rep. Laning**

**Sen. K Roers:** We had amended this from its original version. It looks like the House put it back to original form. Can the House explain?

**Rep. Steiner:** Correct. We had testimony on House side from the sponsor of the bill that said by doing what the Senate amendments do, it essentially took the integrity of the bill away. That the filters will be too difficult to remember or follow. When you send a record of private information of a constituent to say department of health, that is exempt. (1.27) Not confidential, but exempt. You can release it if you want to, but if the newspaper says they want to put that on front page of newspaper, you can decline. When the employee responds back in an e-mail, that is not exempt. You have that thread coming back. That could be on the front page of newspaper. The sponsor of the bill was not sure how much of our written communication is exempt. We all try to protect privacy of our constituents, and we assume our e-mails are exempt. (2.17) The original bill covers public employees, public officers, attorney general. The senate put in the three L's. That is very difficult for part-time citizens who are busy to filter your communications that come back and forth and see if they fit one of the three L's. I bet 90 House members will forget this after session ends. We need to exempt both ways, like the original version says. If you do it by phone, it does not matter because you take your own notes which would be exempt. If we don't pass the bill at all, then you would rather have the person call you back. (4.40)

**Sen. Kristin Roers:** As I was reading through the minutes from our discussion our amendment, Sen. Erin Oban, you were concerned about HR. Do you want to share? (5.00)

**Sen. Erin Oban:** There are times when it makes sense to have exempt records and then times when there shouldn't be exempt records. I always think before hand, if this gets to the

press, will I be embarrassed. (5.26) The example I gave in committee, became a very public situation. A public employee reached out to me about concerns about their boss. My immediate response was don't send me anything. That will be open record. I will take care of it from here, and it will be in my name and not the employees. I don't know if that situation would fall within the three L's. There may be language in between the House and Senate version. We don't want everything exempt. I understand the wishes of the sponsor, but there are limitations we can put on it.

**Rep. Laning:** I have the same concern. There are communications between legislators and staff from capitol and may spill over into person likes and dislikes. With the three L's in there, it could be embarrassing to have it revealed in the press. There are times it should be released to the press. (7.52) We don't want to stifle communications between staff and legislators and information you may want. If we can find a middle of the road, fine.

**Rep. Rohr:** I concur with our chair on the House side. What kind of filter, Sen. Erin Oban, and how would it happen and operationalize that? (9.02) What you talked about would not fall within the three L's.

**Sen. Erin Oban:** There has to be already some system in place. If the press were to request a record, it should go through some sort of system. I see a member of the press sitting here. It must go through some sort of clearing house to say it is exempt or here is the information. I don't think these open records requests are that frequent and substantial. I don't think we have anything to worry about. We need to be transparent as possible. (10.20)

**Rep. Steiner:** My concern is that when we e-mail, it is a conversation. If we have a conversation in the hall, it is two people talking. The only way the press would get that is if they were close and listening, and we did not know. I feel e-mail back and forth is communication. I don't understand why the press feels they are entitled to that conversation. Does it have to be filtered coming back. If it does not fit the three L's you have to pick up the phone and take your own notes. This is difficult for part-time citizens to remember that. I love getting a written e-mail.

**Sen. Kristin Roers:** (12.12) The other side of that argument, is in a business world, as a supervisor, I was always told to document an e-mail. This was a paper trail. I think an e-mail has a different component to it. It has a date and time stamp on it. You can trace and see it came from the right person. An e-mail has a standing in a court of law. It creates proof. Jack, can you come up. I need an education on press. If the press wanted something, would they put a request in? Who do you submit it to?

**Jack MacDonald:** Technically, we don't have freedom of information. That is the national one. You direct the request for the record to the person who keeps the record. It could be the head of an agency or head of a division. There are a number of exceptions to the open records law already concerning personal information, financial information, telephone numbers, bank accounts, medical information are all not available under public records laws. If you sent an e-mail to department of human services, and asked what their position on SB2535, that would be a public record. To me, an e-mail is the same as a letter. You need to know it exists before you ask for it. It still needs to be there, also.

**Sen. Kristin Roers:** I am not the best at filing all my e-mails.

**Jack:** A member of the Burleigh County commission, just yesterday, said she deletes everything after she reads it. If Sen. Hoeven sent an e-mail to the head of Human Services, that would be an open record. (16.00)

**Sen. Kristin Roers:** You as a member of the press, put in a request (FOIA), to Chris Jones, Dept. of Human Services. Does he have to make his own judgement. There is no department of open records?

**Jack:** No, there is not. Some bigger agencies have people that review all the requests automatically. Some smaller ones, do not.

**Sen. Erin Oban:** The bill does provide more protection or privacy if it involves legislation or the other two L's. (17.49) Can you give us an example where it does not fall under those?

**Jack:** If a member of legislator sent a scorching e-mail to chairman Chris Jones, saying you are a big SOB and why did you do that. Or say you are not doing a good job. That happens. It would not fit within the three L's. That should be open for people to know about. The three L's provide a lot of wiggle room. I feel the legislators would still have lots of protection under the three L's.

**Rep. Steiner:** What about the personal information of a constituent? The constituent can release their own information and not held by this since they are not a legislator or public official. When they come to us and have a problem, they are not expecting this to be in the newspaper. (19.37) Let's say that Chris Jones does not do anything. So it upsets you as a legislator. You may send a hot e-mail saying my constituent is still waiting to hear from you on whatever.... I don't believe the press has the right to take that constituents information to the front page of the paper even though part of the e-mail was nasty. It is not any of the three L's.

**Jack:** It could be within the three L's. If the constituent was sending information to Chris Jones to begin with, that is public.

**Sen. Kristin Roers:** But her example was the legislator was the intermediary there. It made it foggier then.

**Sen. Oban:** How would you feel if we added to the three L's, constituent services?

**Jack:** I don't think that would be a problem. I know that is a great concern. (21.26)

**Sen. Erin Oban:** Frankly, constituent services is what I was doing in the Dept. of Commerce. That is a big part of our job, I feel. (21.51)

**Jack:** I thought a lot of constituent services could fit in the three L's. I have no objection.

**Rep. Rohr:** My concern is also every time we get an e-mail from someone, we have to think what is the potential liability. It does need another filter. When you say you can go in and delete it, nothing is truly deleted in electronics. (22.29)

**Jack:** Yes, I understand that. Technically, you don't have the record any more. In the state system, you can go back for years to find something.

**Rep. Rohr:** I know what will happen is a constituent will be concerned about that and will give me a letter. Maybe tear it up once you have read it. (23.52)

**Jack:** I believe that Sen. Oban's suggestion is a good one. That would cover 99% of your concerns in this area. (24.08)

**Sen. Kristin Roers:** I knew we were not going to come to a decision today. I adjourn but please think about alternate language to find a middle ground. Until we meet again.

**Rep. Rohr:** You will have to have a definition of 'constituent'.

Done (24.55)

# 2019 SENATE STANDING COMMITTEE MINUTES

## Government and Veterans Affairs Committee Sheyenne River Room, State Capitol

SB2221  
4/17/2019  
#34814

- Subcommittee  
 Conference Committee

Committee Clerk: Pam Dever

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

Relating to exempting records of communication between legislators and public employees from open records laws.

### Minutes:

Att # 1 – Sen. Oban

PRESENT: Sen. K Roers (chair), Sen. Meyer, Sen. Oban  
Rep. Steiner (chair), Rep. Rohr, Rep. Laning

**Sen. Roers:** Attendance was taken and all were present. This conference is on SB2221.

**Sen. Erin Oban:** I will pass this out for you to look at. (see att #1) It is hard to limit what is open records and what is not. I do believe there should be limitations. To return to one of the three L's, I hope this helps. We were trying to avoid using the word constituents because there is no definition.

**Rep. Steiner:** (2.24) I have concerns about filters. The original bill appeals to me the best. I feel it accomplishes what we intend. The situation may not happen very often, so we should go with what we have. If we see problems, then we may have to add filters in next session. I really like the original and goes with what the sponsor wanted. We always felt we were exempt going back and forth with our communication. I resist this amendment at this time. Maybe in the future. (4.05)

**Sen. Erin Oban:** I have never assumed that my communication was exempt. It is hard to undo Pandora's box and it will be harder to come back later. This is a small change.

**Rep. Rohr:** I concur with Rep. Steiner. (5.03)

**Sen. Kristin Roers:** We all understand the spirit of our intentions but it is hard to find the right words.

**Sen. Meyer:** I agree as well. As a part time legislature it is hard to understand what fits with the three L's. (5.50)

Senate Government and Veterans Affairs Committee

SB2221

4-17-19

Page 2

**Sen. Meyer:** I move that the Senate accede to House amendments.

**Rep. Laning:** I second.

**Sen. K Roers:** Discussion? Take roll: **YES -- 5 NO -- 1 -0-absent.**

**Conference Committee passed. Sen. K Roers will carry and Rep. Steiner will carry.**

Done (6.21)



**REPORT OF CONFERENCE COMMITTEE**

**SB 2221, as engrossed:** Your conference committee (Sens. K. Roers, Meyer, Oban and Reps. Steiner, Rohr, Laning) recommends that the **SENATE ACCEDE** to the House amendments as printed on SJ page 1166 and place SB 2221 on the Seventh order.

Engrossed SB 2221 was placed on the Seventh order of business on the calendar.

**2019 TESTIMONY**

**SB 2221**

Friday, February 8, 2019

SB 2221  
2-8-19  
AH #1  
PS1

Senate Government & Veteran Affairs Committee  
SB 2221

CHAIRMAN DAVISON AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing on behalf of the North Dakota Newspaper Association (NDNA) and the North Dakota Broadcasters Association (NDBA).

We normally oppose any legislation that closes what should be public records. However, we also recognize the need for some – just a little bit – of legislative privacy. This is usually in matters concerning correspondence with constituents.

In that spirit, we would take a neutral position on SB 2221 if the amendments below were adopted. If not, then we would oppose this bill.

North Dakota has some of the best open meetings and open records laws in the nation. North Dakota has always prided itself on citizen access to government information. You should be proud of the role the North Dakota Legislature has played in making North Dakota so transparent and open to your constituents.

SB 2221, as introduced, would make this transparency a bit more opaque. And who wants to be in favor of opaqueness?

We respectfully request that you adopt the amendment set out below. If you do not wish to adopt the amendment, then we ask that you give this bill a **DO NOT PASS**. Thank you for your time and consideration. I'd be happy to answer any questions.

#### PROPOSED AMENDMENTS TO SB 2221

On page 1, line 21, after the word "employee" insert "that concern litigation, legislation or liability involving the public employee or public entity"

Renumber accordingly

*original*

19.0021.01001  
Title.

Prepared by the Legislative Council staff for  
Senator Oban  
February 14, 2019

SB 2221  
2-15-19  
Att #1  
PS

PROPOSED AMENDMENTS TO SENATE BILL NO. 2221

Page 1, line 21, after "employee" insert "which concern litigation, legislation, or liability involving the public employee or a public entity"

Renumber accordingly

#1  
SB 2221  
3-8-19

**Senate Bill 2221**

**House Government and Veterans Affairs Committee**

**Senator Judy Lee**

**March 8, 2019**

SB 2221 is intended to put in statute something that legislators have long thought was true, but it was not in law.

Legislators have thought that our emails with various offices and executive departments were exempt from open records requests, but that is not accurate. Although I have inquired several times over the years, and I have been assured that those communications were confidential, my inquiry a few months ago confirmed that there is no such protection in statute.

I had assumed that any communications I have had with the Department of Human Services or Workforce Safety, for example, were all private. Sometimes they deal with questions about issues brought to me by citizens, and the details of their questions have been discussed as we worked towards solutions.

SB 2221 as it was originally drafted made records possessed by a member of the legislative assembly or any other public officer or employer exempt from open records requests. The Senate Government and Veterans Affairs Committee, in response to the newspaper representatives' requests, amended it to say that it only applies, if the record concerns litigation, legislation or liability involving the public employee or a public entity. That destroys the original purpose of the bill.

It is reasonable to expect that all of our communications with public employees are private. There are many messages exchanged about a wide variety of subjects, and to have to sort out of those discussions those which are protected is unrealistic.

It is important to be able to document the discussions, so this protection for those messages is important. The alternative is to only discuss issues in telephone calls. Messages between legislators are protected, as well as those with citizens, but those with public employees are not.

I encourage the House GVA committee to give favorable consideration to SB 2221 and to restore the original language to keep the broader protections in place.

#2  
SB 2221  
3-8-19

Introduced by

Senators J. Lee, Kreun, Mathern

Representatives Roers Jones, Schatz

1 A BILL for an Act to amend and reenact section 44-04-18.6 of the North Dakota Century Code,  
2 relating to exempting records of communications between legislators and public employees  
3 from open records laws.

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

5 **SECTION 1. AMENDMENT.** Section 44-04-18.6 of the North Dakota Century Code is  
6 amended and reenacted as follows:

7 **44-04-18.6. Access to legislative records and information.**

8 1. The following records, regardless of form or characteristic, of or relating to the  
9 legislative council, the legislative management, the legislative assembly, the house of  
10 representatives, the senate, or a member of the legislative assembly are not subject to  
11 section 44-04-18 and section 6 of article XI of the Constitution of North Dakota: a

12 a. A record of a purely personal or private nature;~~a;~~

13 b. A record that is legislative council work product or is legislative council-client  
14 communication;~~a;~~

15 c. A record that reveals the content of private communications between a member  
16 of the legislative assembly and any person;~~i~~ and;~~except~~

17 d. Except with respect to a governmental entity determining the proper use of  
18 telephone service, a record of telephone usage which identifies the parties or lists  
19 the telephone numbers of the parties involved.

20 2. The exception in subdivision c of subsection 1 applies to records possessed by a  
21 member of the legislative assembly or by any other public officer or employee.

22 3. This section does not apply to any record distributed at a meeting subject to section  
23 44-04-19 and section 5 of article XI of the Constitution of North Dakota.

#3  
SB 2221  
3-8-19

**ARTICLE XI**  
**GENERAL PROVISIONS**

**Section 1.** The name of this state shall be "North Dakota." The state of North Dakota shall consist of all the territory included within the following boundary, to wit: Commencing at a point in the main channel of the Red River of the North, where the forty-ninth degree of north latitude crosses the same; thence south up the main channel of the same and along the boundary line of the state of Minnesota to a point where the seventh standard parallel intersects the same; thence west along said seventh standard parallel produced due west to a point where it intersects the twenty-seventh meridian of longitude west from Washington; thence north on said meridian to a point where it intersects the forty-ninth degree of north latitude; thence east along said line to place of beginning.

**Section 2.** The following described seal is hereby declared to be and hereby constituted the great seal of the state of North Dakota, to wit: A tree in the open field, the trunk of which is surrounded by three bundles of wheat; on the right a plow, anvil and sledge; on the left, a bow crossed with three arrows, and an Indian on horseback pursuing a buffalo toward the setting sun; the foliage of the tree arched by a half circle of forty-two stars, surrounded by the motto "Liberty and Union Now and Forever, One and Inseparable"; the words "Great Seal" at the top; the words "State of North Dakota" at the bottom; "October 1st" on the left and "1889" on the right. The seal to be two and one-half inches in diameter.

**Section 3.** All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.

**Section 4.** Members of the legislative assembly and the executive and judicial branches, except such inferior officers as may be by law exempted, before they enter on the duties of their respective offices, shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm as the case may be) that I will support the Constitution of the United States and the Constitution of the State of North Dakota; and that I will faithfully discharge the duties of the office of \_\_\_\_\_ according to the best of my ability, so help me God" (if an oath), (under pains and penalties of perjury) if an affirmation, and any other oath, declaration, or test may not be required as a qualification for any office or public trust.

**Section 5.** Unless otherwise provided by law, all meetings of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public.

**Section 6.** Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

**Section 7.** The legislative assembly, in order to ensure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for ensuring the continuity of governmental operations including, but not limited to,

#4  
SB 2221  
3-8-19

**NDLA, H GVA - Hart, Carmen**

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**From:** Pahinh Winh <onedakotawoman@gmail.com>  
**Sent:** Monday, March 11, 2019 11:57 AM  
**To:** NDLA, H GVA - Hart, Carmen  
**Subject:** Testimony on SB 2221  
**Attachments:** TESTIMONY ON SB2221 03082019.docx

**CAUTION:** This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

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Hanh! Please find testimony on SB 2221 attached. I would appreciate it if you would include it in the record and give each committee member a copy. Thank you! Carel Two-Eagle

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What have you done, today, to help heal the Sacred Hoop - of which you, too, are a part?  
I am woman - I am invincible - I am tired!

#4  
SB 2221  
3-8-19

TESTIMONY ON SB2221

CAREL TWO-EAGLE, PK, PB

March 8, 2019

Hanh Chairman Kasper and Members of House GVA Committee. For the record, my name is Carel Two-Eagle & I stand in opposition to SB2221.

SB2221 is a direct assault on sunshine laws and on the First Amendment, insofar as the media and the People's right to know are concerned. We the People, who vote and who fund all aspects of government, have a **right**, not a privilege to know what our elected people are doing, saying, and thinking – in every situation.

Those of you who run or own businesses expect to know what your help is doing, saying, and thinking within the context of their work, including as it applies when they are away from work but their speech or actions impact your business. Government is similar – except that an elected official is never “off duty” for the term of his/her election. Everything an elected official does has some impact, and often, those impacts increase over time. No one can foresee the future..

I have no doubt that every kind of media is against SB2221. I know that as a voting person, and a business person, I am staunchly against SB2221 for the reasons I have stated.

Give SB2221 a unanimous DO NOT PASS and protect the Constitution and the First Amendment. Thank you for hearing me in a good way now.

PROPOSED AMENDMENTS TO THE FIRST ENGROSSMENT  
WITH HOUSE AMENDMENTS OF  
ENGROSSED SENATE BILL NO. 2221 (Version .03000)

OBAN

SB 2221  
4-17-19  
att #1  
pg 1

On page 1, line 21, after the word "employee" but before the period  
insert "if the record contains correspondence about legislation or a  
concern of a North Dakota resident"

Renumber accordingly