

**2021 HOUSE POLITICAL SUBDIVISIONS**

**HB 1305**

# 2021 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee  
Room JW327B, State Capitol

HB 1305  
2/11/2021

## Relating to the duties of the attorney general

**Chairman Dockter: (4:44).** Opened the hearing.

Representatives	
Representative Jason Dockter	P
Representative Brandy Pyle	P
Representative Mary Adams	P
Representative Claire Cory	P
Representative Sebastian Ertelt	P
Representative Clayton Fegley	P
Representative Patrick Hatlestad	P
Representative Mary Johnson	P
Representative Lawrence R. Klemin	P
Representative Donald Longmuir	P
Representative Dave Nehring	P
Representative Marvin E. Nelson	P
Representative Luke Simons	P
Representative Nathan Toman	P

### Discussion Topics:

- Mandatory duty
- Written requests

**Rep. B. Koppleman:** Introduced the bill. Testimony #6469.

**Tony Gehrig:** In favor, testimony #6297.

**Mary Kae Kelsch, Assistant Attorney General:** In opposition, testimony #6377.

**Erik Johnson, City Attorney for Fargo:** In opposition, testimony #6431.

### Additional written testimony:

**Dwayne McDevitt #5905.**

Chairman Dockter:(5:28). Closed the hearing.

*Carmen Hickle, Committee Clerk*

**CHAPTER 54-12**  
**ATTORNEY GENERAL**

**54-12-01. Attorney general - Duties.**

The attorney general shall:

1. Appear for and represent the state before the supreme court in all cases in which the state is interested as a party.
2. Institute and prosecute all actions and proceedings in favor or for the use of the state which may be necessary in the execution of the duties of any state officer.
3. Appear and defend all actions and proceedings against any state officer in the attorney general's official capacity in any of the courts of this state or of the United States. If both parties to an action are state officers, the attorney general may determine which officer the attorney general will represent and the other officer may employ counsel to represent that other officer.
4. Consult with and advise the several state's attorneys in matters relating to the duties of their office.
5. Attend the trial of any party accused of crime and assist in the prosecution when in the attorney general's judgment the interests of the state require it.
6. Consult with and advise the governor and all other state officers and when requested give written opinions on all legal or constitutional questions relating to the duties of such officers respectively.
7. Prepare, when necessary, proper drafts for contracts and other writings relating to subjects in which the state is interested.
8. Give written opinions, when requested by either branch of the legislative assembly, upon legal questions.
9. Enforce the proper application of funds appropriated to the public institutions of the state and prosecute breaches of trust in the administration of such funds.
10. Prosecute corporations and limited liability companies, when necessary, for failure or refusal to make the reports required by law.
11. Keep in proper books a register of all cases prosecuted or defended by the attorney general or the attorney general's assistants, in behalf of this state or its officers, and of all proceedings had in relation thereto, including a record of all actions wherein the state is a party, or is interested, prosecuted by the state's attorneys of the several counties and reported to the attorney general as provided by law, and deliver the same to the attorney general's successor in office.
12. Keep in the attorney general's office a book in which the attorney general shall record all the official opinions given by the attorney general during the attorney general's term of office, such book to be delivered by the attorney general to the attorney general's successor in office.
13. Pay into the state treasury all moneys received by the attorney general for the use of the state.
14. Serve as superintendent of the bureau of criminal investigation and perform all duties incident to the proper and efficient conduct of that office.
15. Attend to and perform any other duties which from time to time may be required by law.
16. Appoint the state fire marshal and supervise the operation of the state fire marshal department.
17. Give written opinions, when requested by the governing body or city attorney of a city in the state of North Dakota.
18. Repealed by S.L. 1991, ch. 637, § 9.
19. Give written opinions to public entities as defined in subdivision a or b of subsection 13 of section 44-04-17.1, when requested by an interested person under section 44-04-21.1.

## Koppelman, Ben

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**From:** Kramer, Samantha E.  
**Sent:** Friday, January 15, 2021 10:54 AM  
**To:** Koppelman, Ben  
**Subject:** "Shall"

Good Morning Representative Koppelman,

I asked one of the interns to do some research and she came up with the following information.

The use of the word 'shall' in statute generally indicates a mandatory duty." 1999 N.D. Op. Atty. Gen. L-89. Thus, if a statute contains the word "shall," then it requires something as opposed to merely allowing something. *Id.* However, the word "shall" can be construed to the word "may" when it is "necessary to effect the legislative intent." *Id.* (quoting *Solen Pub. Sch. Dist. v. Heisler*, 381 N.W.2d 201, 203 (1986)). Furthermore, "[w]ords used in any statute are to be understood in their ordinary sense[.]" 1993 N.D. Op. Atty. Gen. L-228. According to Black's Law Dictionary (11<sup>th</sup> ed. 2019), "shall" is a verb that means "[h]as a duty to; more broadly, is required to."

The North Dakota Supreme Court has interpreted the word "shall" in accordance with its ordinary meaning. *Sweeny v. Sweeny*, 2002 ND 206, ¶ 18, 654 N.W.2d 407, 413. "Shall" is "generally imperative or mandatory ... excluding the idea of discretion, and ... operating to impose a duty." *Id.* at ¶ 17.

Opinions of both the North Dakota Attorney General and the North Dakota Supreme Court accord with the Legislative Council's 2021 drafting manual's section on "shall," which can be found on page 92.

Please let me know if our office can provide additional information.

### **Samantha E. Kramer**

Senior Counsel  
Legislative Council  
600 East Boulevard Ave  
Bismarck, ND 58505  
(701)328-2916  
[sekramer@nd.gov](mailto:sekramer@nd.gov)

**Subject:** Shall/Must/May Language

**Date:** Friday, January 8, 2021 at 5:21:33 PM Central Standard Time

**From:** Grossman, Jill A.

**To:** Koppelman, Ben

Representative Koppelman,

Per our [Legislative Drafting Manual](#) on pages 92-93:

## USE OF SHALL, MUST, MAY, MAY NOT, AND IS ENTITLED TO

### SHALL

**Shall** is used to qualify an active verb. Use **shall** when you are imposing a duty on a person or body that is the subject in the sentence. Use **shall** in a mandatory or imperative sense. Example:

"The **teacher shall** give the parent a copy of the signed report."

### MUST

**Must** is used to qualify an inactive verb or an active verb in the passive voice. Use **must** in reference to a thing, rather than a person, and to express status requirements (i.e., statements about what people or things **must be** rather than what they must do). Examples:

"The **report must** contain a signature line."

"A **student must be** a resident of the county."

### MAY

Use **may** to confer a power, privilege, or right. Examples:

"The applicant **may demand** (power) an extension of time."

"The applicant **may renew** (privilege) the application."

"The applicant **may appeal** (right) the decision."

### MAY NOT

Whenever possible an obligation or discretion to act should be positively stated. However, if a right, privilege, or power is intended to be denied, **may not** should be used. Example:

"The applicant **may not submit** (active voice) more than one application."

### SHALL NOT

Avoid use of **shall not** and **no person shall** because these phrases mean that **no one is required** to act. A statute that includes one of these phrases negates the obligation but not the permission to act. **A person may not** negates the permission to act and functions correctly as a complete prohibition.

### CANNOT

Avoid use of **cannot** because **cannot** means the person referred to does not have the ability or capacity to act.

### Will, Should, and Ought

Avoid using hortatory qualifiers, such as **will**, **should**, and **ought**, in the text of an Act. These terms may be more appropriate in a resolution instead of a bill.

**Entitled To**

Use **is entitled to** when describing a benefit or right a person may claim or exercise. Example:

"A state employee is entitled to expense reimbursement."

In these instances, using **shall receive** or similar mandatory phrasing would negate the option of not claiming or exercising a benefit or right.

*Jill Grossman*

Counsel

Legislative Council

600 East Boulevard Ave

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Wayne Stenehjem  
ATTORNEY GENERAL

STATE OF NORTH DAKOTA  
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL  
600 E BOULEVARD AVE DEPT 125  
BISMARCK, ND 58505-0040  
(701) 328-2210  
www.attorneygeneral.nd.gov

received  
7-30-2020

July 28, 2020

Erik R. Johnson  
Fargo City Attorney  
505 Broadway Street North #206  
Fargo ND 58102

Dear Mr. Johnson:

I am responding on behalf of the Attorney General to your recent letter requesting an opinion on the restrictions contained in one of the City's zoning ordinances.

Your letter included a research memorandum and legal advice to the city commission on the existing ordinance and proposed changes, and minutes of the June 15, 2020, meeting at which the commission heard public comment in support and opposition of the existing ordinance. The minutes indicate you advised the commission that you do not believe there are any statutory or constitutional concerns with the existing ordinance and you also provided commentary on the proposed amendments before the commission. From the other materials included with your letter, it appears to us that you have researched the issue and advised the city at length on its options and the legal positions. The Commission decided not to take final action but instead voted to request an Attorney General Opinion.

There are some situations that are unsuited for an opinion, including when the question calls for interpreting a local ordinance. The city attorney continues to be ultimately responsible for interpreting city ordinances and advising city officials on legal issues.

While we appreciate the deliberation involved in submitting the request, in view of the foregoing, I am sure you will understand why we must decline to provide an opinion on this issue.

Sincerely,

A handwritten signature in blue ink, appearing to read "Troy Seibel".

Troy Seibel  
Chief Deputy Attorney General



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Wayne Stenehjem  
ATTORNEY GENERAL

January 5, 2021

Rep. Ben Koppelman  
District 16  
2223 10<sup>th</sup> Court West  
West Fargo ND 58078

Dear Representative Koppelman:

I am responding on behalf of the Attorney General to your December 31, 2020, request for an opinion. You indicate that a resident of the city of Fargo has attempted to obtain a federal firearm license from the ATF in order to process internet firearm sales from his residence in Fargo. The city of Fargo issued a decision in 2016 to Mr. Curtis that selling firearms out of his residence would violate the city's zoning ordinance. You ask this office to determine whether the city's municipal code violates state law.

Although a legislator may request an opinion from this office, there are several situations that are unsuited for an opinion. These include when the question presented calls for interpreting a local ordinance, and when the matter should be, or already has been, addressed by the political subdivision's legal advisor.

We are aware that this issue has been before the City of Fargo for several months, and that local city residents have protested both the existing zoning ordinance and, conversely, making any changes to the existing ordinance. A city attorney has a statutory duty to advise city officials on legal matters. The Fargo City Attorney conducted extensive legal research on the issue before the city commission and has provided a comprehensive legal analysis of the pros and cons of the existing ordinance and of proposed changes. We had an opportunity to review this legal research and analysis, and did not disagree with it.

Ultimately, however, it is up to the governing body to make a decision, not this office. State law already provides a method by which residents who disagree with a city's zoning decision or who may be affected by a city's zoning ordinance can challenge it, administratively or through the civil court process. As it appears that Mr. Curtis has been pursuing this issue against the city of Fargo for several years, he may wish now to consult an attorney in private practice who can advise him on his civil options.

In view of the foregoing, we must respectfully decline to issue an opinion on whether the Fargo Municipal Code Ordinance § 20-0403(C)(5)(e) violates state law.

Sincerely,

A handwritten signature in blue ink, appearing to read "Troy Seibel".

Troy Seibel  
Chief Deputy

All,

My name is Tony Gehrig, I am writing in support of HB1305. In addition to this letter I would also enjoy the opportunity to speak with you virtually during your committee hearing.

Although I am a Fargo City Commissioner, I do not represent the other commissioners today. I am writing as a single commissioner who believes strongly that any elected official should have access to the AG's office and ask for an opinion from the AG when we believe our laws conflict with the state's laws.

I would appreciate just a few minutes of your time to explain why I feel this is important.

Thank you.

Tony Gehrig

701 367 8013

HOUSE POLITICAL SUBDIVISIONS  
FEBRUARY 11, 2021

TESTIMONY OF MARY KAE KELSCH  
OFFICE OF ATTORNEY GENERAL  
HOUSE BILL NO. 1305

Mr. Chairman, members of the Committee.

My name is Mary Kae Kelsch, and I am an Assistant Attorney General. I appear on behalf of the Attorney General in opposition to House Bill 1322. I am the division director for the State and Local Division of the office which, among other things, has the responsibility of writing the majority of the opinions.

There are two kinds of opinions: legal opinions and opinions regarding open record and meeting laws. Any person may request an opinion regarding an alleged violation of the open record and meeting laws, but the other kind of opinions may only be requested if there is statutory authority to do so.

For example, by statute, the Attorney General issues opinions to the Governor, state officers related to the duties of such offices, and to either branch of the legislative assembly.

There is also statutory authority for the governing body of a city or a city attorney to request an opinion. It is this authority that HB 1305 attempts to broaden. Currently, the governing body votes to ask our office for an opinion. The opinion is issued to the governing body and its attorney. No opinions issued by this office are issued to anyone in their personal capacity.

By law, it is the responsibility of the city attorney to give legal advice to the governing body of the city. N.D.C.C. § 40-20-01. Very often a city attorney reaches out to our office and asks for guidance and we provide any help that is appropriate. But it is ultimately their job to give the advice to their client. This bill would lead to attorney shopping by all city council/commission members who disagree with their attorneys.

According to the North Dakota League of Cities website, North Dakota has 357 incorporated cities. I would bet that at any given time, of those 357 cities, there are plenty of members of city councils/commissions who do not agree with their city attorneys. This bill will allow them, against the wishes of the full council/commission, to ask our office for an opinion. Currently, I have one attorney who has the political subdivision portfolio in addition to her other 19 clients. If even a quarter of the 357 cities have this situation arise, it could mean almost 90 opinion requests. This is a volume of requests our office cannot handle.

Passage of this bill would inappropriately insert the Attorney General's office into local politics. The Attorney General's office prefers to help city attorneys rather than be put in a position where we appear to second guess them.




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**Office of the City Attorney**

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**City Attorney**  
Erik R. Johnson

**Assistant City Attorney**  
Nancy J. Morris

**Testimony of Erik Johnson  
Fargo City Attorney**

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

Mr. Chairman and Members of the Committee,

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

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

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

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



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

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

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

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

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

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

To the North Dakota State Legislature:

I believe the North Dakota Attorney General should be more available and answerable to this state's governing bodies, to this state's counties, and to this state's cities, when a request has been made.

YES on 1305.

Thank you, Dwayne McDevitt

# 2021 HOUSE STANDING COMMITTEE MINUTES

## Political Subdivisions Committee Room JW327B, State Capitol

HB 1305  
2/18/2021

Relating to the duties of the attorney general

**Chairman Dockter: (10:36).** Opens for committee work

<b>Representatives</b>	
Representative Jason Dockter	P
Representative Brandy Pyle	P
Representative Mary Adams	P
Representative Claire Cory	P
Representative Sebastian Ertelt	P
Representative Clayton Fegley	P
Representative Patrick Hatlestad	P
Representative Mary Johnson	P
Representative Lawrence R. Klemin	P
Representative Donald Longmuir	P
Representative Dave Nehring	P
Representative Marvin E. Nelson	A
Representative Luke Simons	P
Representative Nathan Toman	P

### Discussion Topics:

- Proposed amendment

**Rep. Ertelt:** Explained proposed amendment 21.0126.01001. Testimony #6936. Made a motion to accept.

**Rep. Johnson:** Second the motion.

Voice vote carried.

**Rep. Ertelt:** Made a do pass as amended motion.

**Rep. Johnson:** Second the motion.

<b>Representatives</b>	<b>Vote</b>
Representative Jason Dockter	N
Representative Brandy Pyle	N
Representative Mary Adams	N
Representative Claire Cory	N

Representative Sebastian Ertelt	Y
Representative Clayton Fegley	N
Representative Patrick Hatlestad	Y
Representative Mary Johnson	Y
Representative Lawrence R. Klemin	N
Representative Donald Longmuir	N
Representative Dave Nehring	Y
Representative Marvin E. Nelson	A
Representative Luke Simons	Y
Representative Nathan Toman	Y

**6-7-1 failed.**

**Rep. Adams:** Made a do not pass as amended motion.

**Rep. Klemin:** Second the motion.

<b>Representatives</b>	<b>Vote</b>
Representative Jason Dockter	Y
Representative Brandy Pyle	Y
Representative Mary Adams	Y
Representative Claire Cory	Y
Representative Sebastian Ertelt	N
Representative Clayton Fegley	Y
Representative Patrick Hatlestad	N
Representative Mary Johnson	N
Representative Lawrence R. Klemin	Y
Representative Donald Longmuir	Y
Representative Dave Nehring	N
Representative Marvin E. Nelson	A
Representative Luke Simons	N
Representative Nathan Toman	N

**7-6-1 carried.**

**Rep. Longmuir:** Will carry the bill.

**Chairman Dockter: (10:54).** Closed committee work.

*Carmen Hickle, Committee Clerk*

  
2/11/21

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1305

Page 1, line 1, replace "subsection" with "subsections 8 and"

Page 1, after line 3, insert:

**"SECTION 1. AMENDMENT.** Subsection 8 of section 54-12-01 of the North Dakota Century Code is amended and reenacted as follows:

8. Give written opinions, when requested by ~~either branch~~ any member of the legislative assembly, upon legal questions."

Renumber accordingly

**REPORT OF STANDING COMMITTEE**

**HB 1305: Political Subdivisions Committee (Rep. Dockter, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (7 YEAS, 6 NAYS, 1 ABSENT AND NOT VOTING). HB 1305 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "subsection" with "subsections 8 and"

Page 1, after line 3, insert:

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Renumber accordingly

21.0126.01001  
Title.

Prepared by the Legislative Council staff for  
Representative B. Koppelman  
February 11, 2021

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