

House Bill 1166
Senate Judiciary Committee
Testimony Presented by Sara Behrens
March 11, 2025

Good morning Chair Larson, members of the committee. My name is Sara Behrens and I am a staff attorney with the State Court Administrator's Office. I am here today in opposition to House Bill 1166.

We appreciate some of the amendments made by the House Judiciary Committee removing the retroactivity clause and requiring that all charges in a case be dismissed before the case must be sealed. However, we still have concerns.

One of the amendments in the House added the sentence "A record of a closed criminal case if there was no conviction may not be remotely accessed by a name search." If this applied only to records docketed after the bill's effective date, the sentence would not be needed because the case would be sealed and no longer be accessible on the public search by name or otherwise. However, if it is meant to retroactively prohibit name searches of all cases that are currently in the court's online system as it seems was the intention, this would take an extensive amount of time for both the IT staff and clerks of court. Our current public record access system will be replaced at the end of the year and we will be moving to a new application. The new application will not have the ability to restrict the name search. While we currently have the ability to do programming to comply, it is unknown what will happen when the cases are migrated to the new application that does not have that functionality. Therefore, in order to comply with that provision, IT staff would have to run a very specific query and send reports to the clerks who would have to go into each file and change the security

setting. Our already short-staffed IT and clerks offices will be burdened with extensive work to identify which cases are subject to Section 2 of the bill. Short of disabling all remote access to court records it would be impossible for the court to comply with the bill given the emergency clause. Whether the bill remains in its current form or not, the emergency clause must be removed. Disabling all remote access would then create a high volume of work to respond to phone, email, and in-person record requests. If the sentence in lines 9-11 were removed and the application were purely prospective, the court could much more easily comply. If an individual experienced issues due to a particular case, the option already exists to petition for remote access to the record to be restricted under Admin. Rule 41(4)(a).

The constitution provides that, unless otherwise provided by law, records are open to the public. The court has provided by law, in an extensive court rule (Administrative Rule 41) governing access to court records, which records are closed to the public. The rule details the court's policy, modeled after the open records laws governing the executive branch, of having records that are public, open, and accessible for inspection. It includes a procedure for restricting access to cases which were dismissed or where the defendant was acquitted. Prior to 2020, the court rule previously contained a provision equivalent to the sentence on p. 2, lines 9-11. It should be noted, that these records were always public via the courthouse or case number. The court rewrote the rule in 2020, working towards more openness and transparency and that sentence was not included in the new rule. The rule was rewritten again in 2022 to incorporate some of the open records procedures from the Century Code.

This bill would severely restrict the policy of openness and prohibit the public from knowing what goes on in the courts of this state including which types of cases are being dismissed and why. Although the cases would be sealed, the information may still be on the internet from other sources because these cases would be public and available for copying by Google and others until an acquittal, dismissal, or pardon.

“Sealing” under ch. 12-60.1 means “to prohibit the disclosure of the existence or contents of court or prosecution records unless authorized by court order.” In addition to prohibiting access to the public, this would also prohibit access by the subject of the record, the prosecution, and law enforcement. Many job and rental applications ask about charges or arrests and not just convictions. If these records were sealed, a court order would be required to verify that information. If documentation regarding a charge is discovered through an internet search, the individual could not point to the court record showing that the case was dismissed or they were acquitted or pardoned.

The bill also appears to require the court to seal records not in its possession. It states the court shall seal “any criminal record.” “Criminal record” means both court and prosecution records.

Finally, it should be recognized that public searches on the North Dakota Supreme Court website clearly show on the search results page if a case was dismissed or the defendant found not guilty in the status column. Cases subject to a pardon display as dismissed. To see that these cases were dismissed or the defendant found not guilty would not require clicking into the case.

This bill poses multiple administrative hurdles for the court and could result in a number of unintended consequences. Due to these issues, we urge a do not pass.