

## House Education Committee

SB 2343 Hearing

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Chair Heinert and members of the House Education Committee. My name is Nick Hacker and I am finishing my eighth year and second term as a member of the North Dakota State Board of Higher Education (SBHE). I also served as chair of the board from 2019-2021. I am here today on behalf of the SBHE in opposition to SB 2343, which relates to board communications and the release of closed, exempt, confidential, or other related records. The Board rarely takes official positions on legislation. At the February 23rd meeting it voted 6-2 to oppose SB 2343.

This bill is in front of you today is from a single grievance from a member of the SBHE. The board member requested access to an exempt record of an executive session that occurred **prior** to the member taking their seat on the board when they were a member of the public.

Current state law limits access to exempt records created by any public board across North Dakota because exempt records typically contain sensitive information ranging from the hiring of campus presidents and their contract renewals to financial matters and cybersecurity protocols.

There is a clear distinction between information and an exempt record. The board members are provided with ample information related to all matters that came before the board prior to their service. The only thing that is not provided is who specifically said what during the sensitive discussions in executive session.

NDCC 44-04-19.2, provides governing bodies like the SBHE with the ability to hold an executive session to consider closed, exempt, or confidential records. Executive sessions must be recorded and can only be released pursuant to court order or to the Attorney General for administrative review. The law further provides governing body with the discretion to disclose the recording “upon majority vote of the governing body unless the executive session was required to be confidential.”

In compliance with Century Code and SBHE policy 311(10)(a)(i), a member requested to review and listen to executive sessions prior to their service on the board. The request was brought before the SBHE on September 30, 2021. After a motion, a second, and discussion, the SBHE voted 7-1 to deny access to the exempt records that were requested. Reasons for the denial included the precedent that would be set for opening exempt records and potential litigation risks.

Sections 2 and 3 of SB2343, the most concerning part of the bill, would eliminate the authority of all public entities or governing bodies, such as the SBHE and local school boards, to control access to closed, exempt, confidential records.

I can tell you firsthand that executive session is narrowly defined and used sparingly by the board. It represents just a sliver – albeit an important sliver – of the volume of information that is provided to existing board members and incoming board members.

Over eight years I have witnessed the SBHE use great discretion and exercise self-restraint in limiting the disclosure of sensitive information to protect students, faculty, academic candidates, and financial assets of the state of North Dakota. I have seen multiple situations wherein with a majority vote, the Board has limited the disclosure of sensitive information to members of itself, out of an abundance of caution, to protect candidates, the financial health of institutions, or cyber security information, to name just a few. The SBHE also used this discretion to allow this same board member, before being appointed to the board, to participate in a May 27, 2021, executive session.

This concludes my testimony related to SB2343. I respectfully request a **Do Not Pass** because current law and Board policies already provide for the issues contained in the bill. I will stand for questions from Committee members.