



North Dakota House of Representatives

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360

#19238



Representative Corey Mock

District 18
P.O. Box 12542
Grand Forks, ND 58208-2542
C: 701-732-0085
crmock@ndlegis.gov

COMMITTEES:
Appropriations

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Chairman Scott Louser and House Industry, Business and Labor Committee
North Dakota State Capitol – Room 327C
Testimony in Support of HB 1528 – Retention of Email and Review of Records

Chairman Louser and Member of the House IBL Committee,

We are nearly one month away from the News Leaders Association annual Sunshine Week – March 12-18, 2023 – which is an initiative to promote open government.

Open records are anything but a foreign concept to the state of North Dakota. Our constitution enshrines the right in Article XI, Section 6:

“Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state... shall be public records, open and accessible for inspection during reasonable office hours.”

North Dakota Century Code expounds on this right within § 44-04-18: defining “reasonable office hours” as all regular office hours; requiring the name and contact information of a responsible person if regular office hours do not exist; limiting costs that may be charged for open records requests; explicitly stating the “[a]utomation of public records must not erode the right of access of those records”; etc.

Our commitment to openness, transparency, and proper accounting of records are features that highlight the strength of our democracy. Decades – if not generations – have passed with the public maintaining relative confidence that our laws and policies preserve public records and ensure unabridged public access.

It took the untimely death of one man – an institution upon himself – to expose a microscopic opening in our laws that would rupture into a chasm of confusion once exploited.

On the morning of Friday, January 28, 2022, North Dakota's longest tenured Attorney General, Wayne Stenehjem, was found unconscious in his home. By that evening, worry turned to sorrow as news spread that our widely beloved, lifelong public servant, colleague, and friend had passed away.

Little did we realize how much would be lost with his passing – especially in the days that followed.

Attached to my testimony is a timeline of events, assembled by the office of the Attorney General, and published as part of an ongoing investigation from Rob Port and Forum Communications.

This document illustrates the efforts and lengths of one staff member to systematically conceal and destroy all messages, documents, memories, and institutional context that was amassed over 7,697 days in office.

In late March, it was announced that Troy Seibel would be replaced as Deputy Attorney General which led to Mr. Seibel's resignation. On April 27th, Mr. Seibel's email account was transferred to another employee's computer and, approximately one month later, all items associated with Mr. Seibel's account were ordered to be deleted without clear authorization.

Around July 5, 2022, the individual who coordinated and ordered final destruction of all messages and files on accounts of Mr. Stenehjem and Mr. Seibel confirmed her actions and was unable to articulate any authority for the most recent disposition of accounts. She resigned on July 15, 2022; no charges for criminal Tampering with Public Records (or other potential criminal violations) have been filed by the Burleigh County States Attorney.

There is no debate regarding the impropriety of these actions. They are counter to the public's interest, erode trust in our government institutions, and tarnish the epilogue of a public official following his 44 years of legislative and executive service.

The question of legality, however, remains open and seemingly unanswered.

We cannot change the past. Despite admirable efforts, lost messages and files are beyond recovery. But with the wisdom of hindsight, we can remove ambiguity for the future.

HB 1528 – which will require amendments from its introduced version – seeks to:

- Codify and clarify existing definitions of “records” as they related to email;
- Permit our records management administrator to refer findings of noncompliance to the state auditor or attorney general, (when needed);
- Require agency heads to cooperate with our records management program and resolve findings of noncompliance as indicated in policy evaluations;
- Require agencies to retain email and files stored on affiliated storage programs for at least one year;
- Require policies and outline foundational actions that must be taken to review and retain records upon certain triggering events of state employees, agency heads, and public officials.

Attached to my testimony is a draft amendment in context (**23.1015.02002 draft**) with HB 1528 as filed. **These amendments are not final**; they require additional refinement and review by Legislative Council. North Dakota Information Technology Department (NDIT), the Office of the Attorney General (AG), and Human Resource Management Services (HRMS) have been consulted and continue to contribute to the final product of this legislation to ensure any statutory changes are primed for implementation and success.

I will walk through each section as outlined in the draft amendment:

Section 1

Updated our legal definition of “record” to include any electronic mail or communication that includes official business “**activities, policies, or decisions that provide administrative, operational, fiscal, historical, audit, or business value.**” This also clarifies that “**nonbusiness related or draft electronic messages**” are not considered records.

Under current law, email is not considered a record, but information contained in an email may be classified as a record if it contains information in connection with the transaction of official business. This affirms that email is a record and subject to applicable record retention policies if it contains information related to official business.

Section 2

Updates the duties of our records management program administrator by removing “paperwork” as an operational qualifier and allows the administrator discretion to report noncompliance to the state auditor and/or attorney general, if necessary.

Section 3

Updates statutory duties of an agency head to include cooperation with the records management program administrator regarding noncompliance findings.

Section 4

54-46-08(2) contains draft language to require each agency to maintain a default backup of email (e.g. Outlook) and files stored on an affiliated storage system (e.g. OneDrive) for at least one year. This archival storage solution is provided by our existing office productivity vendor (Microsoft) and the intent of this default backup setting is attainable within our licensing parameters.

A default backup of one year is specifically required for all users with supervisory or management responsibilities. This does not preclude agency or IT policies from expanding the service to all employees; intended to provide risk-tolerant flexibility for employees with minimal IT product needs.

Language on page 3 lines 23-25 is ***not intended*** to serve as an alternative method of records retention, nor a replacement of existing records management practices. Records – including email containing official business information as defined in Section 1 – are always to be processed and retained as required by law and policy. An extended backup of our cloud-based email solution provides added insurance against mishandled records or prematurely deleted files.

Additional note: proposed language was added as NDCC § 54-46-08(2) because it governs records management for all executive branch offices and agencies. NDCC § 54-59 – NDIT governing statutes – may also be amended for this provision, but the attorney general's office and ND University System are exempt from using NDIT as an email service provider.

Struck-through language in red beginning on page 3 line 25 and ending on page 4 line 5 remove original language in HB 1528. Further consultations have rendered this language unnecessary as we are accomplishing the intent of the bill with new language proposed by the amendment.

Administrative hold standards begin on page 4 line 6.

Administrative hold, as used in HB 1528, means the indefinite retention of all records, accounts, messages, documents, files, or other material assigned to that employee until proper review, processing, and retention (as necessary) is completed.

54-46-08(3a)

- Requires agencies to develop policies that outline who assume ownership of any employee account upon their departure.
- Requires agencies to place accounts of employees in a supervisory position or above on an administrative hold upon a triggering event:
 - Termination;
 - Administrative leave;
 - Resignation / separation without notice;
 - Death;
 - Other event deemed necessary by that agency

54-46-08(3b)

- Requires administrative holds for supervisory employees to remain in place until accounts and files have been reviewed and processed by the agency head or the agency's designated records manager.

54-46-08(3c)

- Requires administrative holds for agency heads, state officers appointed by the governor, or elected members of the executive branch (temporarily omitted from this draft) to remain in place until accounts are reviewed by the state archivist (for historical preservation purposes outlined in 54-46-08.1) and the appointed successor.

54-46-08(3d)

- Employee account is defined as physical and electronic files, communications, attachments, and other information stored in an employee email or digital storage account.
- Successor may not be interpreted as an individual acting in the successor's position temporarily before an appointment has been made per 44-02-03.