



North Dakota House of Representatives

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COMMITTEES:

Appropriations

March 23, 2023

Chair Kristin Roers and Senate State and Local Government Committee
North Dakota State Capitol – Room JW216
Testimony in Support of HB 1528 (Email Retention)

Chair Roers and Members of the Senate State & Local Government Committee,

Last week was national Sunshine Week, an annual initiative to promote open government organized by the News Leaders Association.

Open records are anything but a foreign concept to the state of North Dakota. In fact, 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 was the untimely death of one man – an institution upon himself – that exposed 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.

We are still realizing the consequences of those events. (For example: an extended, separate conversation can and should be had about succession planning at all levels of government.)

One discovery that emerged was the apparent ability for email – along with any information and broader context for past and current state business – to be erased. Because email itself is not classified as a “record,” any statutory obligations to review or retain items of this nature are ambiguous, at best.

Worsening the perception of these events was the fact that orders to dispose of email were given without clear or validated authority. Those complying with these requests were right to do so; challenging or refusing these work orders could be interpreted as insubordination.

Was the bulk disposition of email and other electronic files a legal action? That question remains open and seemingly unanswered. Moreover, any ability to assuage concerns of misconduct were lost when Mr. Stenehjem’s user accounts were deleted on Monday, January 31, 2022 (and unrecoverable 30-days later.)

We cannot change the past. But we have the ability and responsibility to learn from our experiences. HB 1528 is our opportunity to remove ambiguity and hopefully prevent similar circumstances from ever happening again.

Before I walk through the bill, I want to express my gratitude for several agencies (and notable staff members within each) who continue to hone HB 1528. Responsible public policy is a team effort; the work of those MVPs and their respective teams deserve to be acknowledged:

North Dakota Information Technology Department: Greg Hoffman, Craig Felche, Aimee Bader

Human Resource Management Services / OMB: Molly Herrington, Lynn Hart, Hannah Wolf

Office of the Attorney General: Mary Kae Kelsch, Claire Ness

Legislative Council: Levi Kinnischtzke, Liz Fordahl

Amendments for HB 1528 have been drafted and submitted with my testimony. For the purposes of this walkthrough I will be referencing version 23.1015.03001m.

Generally speaking, HB 1528 seeks to:

- Codify and clarify existing definitions of “records” as they relate to email;
- Permit our records management administrator to refer findings of noncompliance to HR, state auditor, or attorney general (when applicable);
- Require agency heads to cooperate with our records management program and resolve findings of noncompliance, as indicated in policy evaluations;
- Require agencies to retain a retrievable version of email and cloud-based enterprise files for a minimum of two years;
- Codify the existence of records management training programs;
- Require automatic “freezing” of records, files, and artifacts for the purposes of review and management upon certain triggering events of supervisory positions, agency heads, and elected officials.

Section 1

Updates our legal definition of “record” to include 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 section codifies existing record management policies and removes ambiguity within statute.

Section 2

Updates duties of our records management program administrator. This section requires that all state agencies maintain data contained in email and files managed in our cloud-based, office productivity software (our current vendor / product is Microsoft Office 365) for at least two years.

Additionally, the records management program administrator shall develop a records management training program, which currently exists. This codifies an existing program.

If noncompliance is found, changes proposed give the records administrator the ability to report findings with recommended actions to

- The agency itself;
- HRMS for review of any further disciplinary or corrective action;
- State auditor, which may include noncompliance findings in the agency's audit or provide in a report to LAFRC;
- Attorney general, to determine appropriate action, including prosecution or referral to HR for noncriminal action

Section 3

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

Section 4

Requires each agency to maintain a default backup of email (e.g. Outlook) and files stored on an affiliated cloud-based storage system (e.g. OneDrive) for at least two years. This is statutorily consistent with email retention requirements of nonstudent accounts within the ND University System (NDCC 15-10-44). This archival storage solution is an existing feature provided by our current office productivity vendor (Microsoft) and is attainable with our current licenses.

A default backup of two years is specifically required for all users with supervisory responsibilities. This does not preclude agency or IT policies from expanding that requirement to all employees.

Keep in mind: this is not an alternative to records retention policies. A two-year default archive ensures retrievability, if needed. All existing records management policies, including record retention schedules, must still be followed.

Beginning on line 11 of page 4:

- Each agency must develop a custody of ownership policy upon employee departure.
- For employees with supervisory responsibilities, all accounts associated with that employee must be placed on hold (defined on line 7 page 5) if one of the following actions occurs:
 - employee is involuntarily terminated;
 - employee is placed on administrative leave;
 - employee resigns or departs without notice;
 - employee passes away; or
 - other event(s) specified by the agency

- Accounts of supervisory employees that are on hold must be reviewed by head of their agency, a records manager, or other designated employee (e.g. direct supervisor).
- If a hold is triggered for an agency head, appointed official, or state elected official, accounts are on hold until they can be reviewed by the appointed successor and state archivist (consistent with 54-46-08.1).
- Terms for employee account, employee's successor, and "on hold" are defined on the top of page 5.

House Industry Business and Labor committee felt it was necessary for these changes to go into effect upon enrollment. Understanding the work needed to implement some policies, Section 5 was added to delay the effective date until the beginning of the fiscal year (July 1, 2023.)

There may be additional requests for archival exemptions related to email that contain malicious or highly sensitive content. We are exploring those considerations with agency partners; if language can be developed that is consistent with the intent of HB 1528 and logistically feasible, I will be glad to work with the committee to develop that amendment.

Thank you for your time, effort, and attention.

