Testimony in Opposition to Senate Bill No. 2406
Special September Session of the 69th Legislative Assembly of North Dakota
Before the Joint Policy Committee

Chairman Klein and members of the joint policy committee:

Thank you for the opportunity to submit testimony in opposition to SB 2406. TechND represents a broad membership across North Dakota's technology and industrial base, from small IT and telecommunication firms to statewide infrastructure operators, utilities, manufacturers, and the developers and contractors who build alongside them. Our members work with public agencies on everything from routine broadband and equipment contracts to major facility siting, which is exactly why the scope of Senate Bill No. 2406 concerns such a wide swath of our membership. Our opposition rests on the practical consequences this bill would create for communities and projects across the state, the condensed timeline of the session, possible conflicts with existing state law, and the scope of the bill's core definitions. TechND respectfully asks the committee to issue a Do Not Pass recommendation for SB 2406.

A CHILLING EFFECT ON COMMUNITIES, BEFORE A PROJECT EVEN EXISTS

The noble intent behind this bill is transparency, but the practical effect of a rule this broad is the opposite: it gives every official and every organization a reason to be more reluctant to share information, not less. Long before an industrial project is formally proposed or any application is filed, developers and site selectors quietly gather facts about a community, zoning, available capacity, and local appetite. That early, informal exchange is exactly what SB 2406 will discourage.

- Because the bill reaches any "person or contractor acting on behalf of" an agency and any document tied to a project not yet built, officials and developers alike have every reason to avoid that early conversation altogether and simply wait until a permit application is unavoidable, pushing the real discussion further out of public view, not into it.
- Competitiveness. Site selection for industrial projects is a competitive process among states, many of which permit reasonable, narrowly scoped confidentiality during negotiation. Removing that tool, without regard to project scale, puts the state at a disadvantage before a project ever reaches the permitting stage, and gives a neighboring state an easy pitch to a developer deciding where to go instead.

THIS IS NOT AN APPROPRIATE MATTER FOR A SPECIAL SESSION

SB 2406 touches public records law, economic development practice, and contract enforceability across every level of state government. Changes of this scope typically move through the committee process, where affected agencies, developers, utilities, and local governments can be heard and a fiscal note can be prepared.

- A special session runs on a compressed calendar and modified committee structures that do not allow for the same level of committee vetting, stakeholder testimony, or drafting revision as a regular session or a study.
- Taking up a bill this broad on an expedited timeline increases the risk of unintended consequences that are difficult to unwind once the statute is in effect.

THE BILL MAY CONFLICT WITH EXISTING STATE LAW

Section 44-04.1-03 states that this chapter does not modify or expand the existing public records exemption in Section 44-04-18.4 and does not limit the public's existing right of access under Section 44-04-18. That is not the same as reconciling the two statutes, and as drafted, it leaves agencies holding two disclosure regimes that can point in different directions for the same record.

- Section 44-04-18.4 already allows an agency to treat certain trade secret and proprietary commercial information submitted to it as confidential. This bill voids any agreement that has the purpose or effect of designating project information confidential, with no exception for the very category of information the existing exemption was written to protect.

- An agency faced with a request for a record covering equipment specifications or proprietary site data will not know whether Section 44-04-18.4 protects it or Section 44-04.1-02 (as written in SB 2406) voids that protection outright. That is a question for a court to answer, at the agency's expense, in the middle of a live project.
- Personal exposure. Because “agency” reaches individual employees and appointed officials by name, and the civil penalty applies per violation, a single official who signs the wrong document in good faith could face repeated penalty exposure for conduct the statute never clearly told them was prohibited.
- Permit consequences. As written, the bill allows revocation or rescission of a permit already granted, which could halt or unwind a project that a community and its workforce are already depending on, over a violation that may have nothing to do with the project's actual safety, siting, or impact.

A bill that creates a new chapter without squarely addressing how it interacts with the chapters already on the books is not ready to become law. The fix is not another chapter, but amendments to the existing framework, drafted with enough specificity that an agency's attorney can give a straight answer when asked what is and is not public.

THE DEFINITION OF “AGENCY” IS TOO BROAD

Section 44-04.1-01(1) defines an agency to include the state, any political subdivision, and "a person or contractor acting on behalf of" the state or a political subdivision, as well as any employee or appointed official acting in an official capacity.

- This sweeps in private consultants, engineering firms, and outside counsel negotiating on behalf of a public entity, even when they have separate, non-governmental confidentiality obligations that have nothing to do with the public contract. No contractor working in this state today can say with certainty whether their existing agreements survive this bill.
- Individual employees and appointed officials are named directly, raising personal liability questions for the very people being asked to enforce the law, without the bill explaining how that liability is supposed to work.

THE DEFINITION OF “INDUSTRIAL PROJECT” IS TOO BROAD

Section 44-04.1-01(4) defines an industrial project as any project relating to the development of a business, industry, utility, or infrastructure. Section 44-04.1-01(2) then defines a data center as any facility housing computer and network systems. Read together, these definitions include almost any economic development project in the state.

- A hospital IT room, a bank branch's network rack, a school district's server room, a county courthouse's records system, and a grain elevator's control system all meet the data center portion of this definition exactly as written. The broader “industrial project” language sweeps in road construction, utility upgrades, manufacturing expansions, and virtually any business development, all treated identically with no floor on size, power draw, capital investment, sector, or footprint.

CONCLUSION

TechND supports transparency and shares the committee's interest in making sure North Dakota communities have accurate, timely information about projects proposed near them. Open meetings laws already prohibit an agency from making decisions in secret or through closed-door workarounds. Between the existing public records exemption and the existing open meetings requirements, our state already has a well-developed framework governing what can be kept confidential and what cannot. The problem this bill is responding to is better addressed through public education about the protections that already exist than through a new, unreconciled chapter.

SB 2406 defines its key terms too broadly, reaches private parties without clear notice, conflicts with existing law, and is being considered on a timeline that does not allow these drafting problems to be fixed. We respectfully ask the committee to issue a Do Not Pass recommendation to SB 2406.

Respectfully submitted,

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