



February 18, 2025

Representative Austen Schauer
Chairman, House Government and Veterans Affairs Committee
600 East Boulevard Ave
Bismarck, ND 58505
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RE: Correction of the Legislative Record for House Bills 1360 and 1505

Dear Chairman Schauer:

On January 31, 2025, the House Government and Veterans Affairs Committee ("Committee") held hearings for HB 1360 and HB 1505. The Ethics Commission ("Commission") presented testimony on both bills. The Commission appreciated the opportunity to discuss these bills with the Committee and looks forward to continuing to work with the Legislative Assembly.

During the hearings, the Office of the Attorney General presented testimony through Chief Deputy Attorney General Claire Ness. Many of the issues raised by the Office of the Attorney General are inaccurate, but the Commission did not have an opportunity to respond to them because the Commission testified first on HB 1360.

After discussions with Legislative Council, the Commission respectfully requests the Committee add this letter to the legislative record for HB 1360 and HB 1505. The Commission directed Commission staff to send this letter at its February 13, 2025 meeting. Due to the historical and interpretative value of legislative records, the Commission must request this correction of the record to preserve the Commission's integrity as a constitutional entity established in Article XIV of the North Dakota Constitution. Additionally, the Commission requests this correction to provide accurate information for those who may be tasked in the future with adjudicating matters related to the Commission's scope of authority, purpose, and procedures.

I. The Commission is not "above the other 3 branches of government."

The Office of the Attorney General stated in its testimony "one of the Commission's staff members" has, on multiple occasions, said the Commission is "above the other 3 branches of government" during educational sessions. The Office of the Attorney General provided no citation to this quote attributed to Commission staff. The Commission has been unable to substantiate the assertion based upon its review of its recorded, publicly available webinars, training sessions, and records.

The Commission clearly articulates on its website, in communications, and during educational sessions that it is an independent constitutional entity—not a branch of state government.¹ Under Article XIV of the North Dakota Constitution, the Commission does not exist in the traditional sense of checks and balances and does not review the institutional actions of the three branches. Instead, it reviews the actions of individuals and whether those actions comply with ethical obligations in state law.

II. HB 1360 removed duplicate provisions from statute in the interest of simplicity and recognition of the Commission’s constitutional authority.

The Commission focused on removing red tape from both the statutes and its rules. Currently, many of the provisions are duplicative and unnecessary. By reducing the number of laws, it makes the Commission’s process easier for all individuals to follow, specifically those navigating it without an attorney.

Throughout its testimony, the Office of the Attorney General suggests the Commission is removing due process protections and implies the Commission is moving due process protections from statute to ethics rules for nefarious reasons. This accusation is not substantiated.

Due process must be followed regardless of whether the parameters are outlined in statute or rule. The Commission has no desire for litigation on this issue and believes a regulated individual’s due process rights are paramount. Bolstering due process is a primary reason the Commission worked to propose HB 1360 with the Legislative Assembly and other stakeholders.

HB 1360 simply affirms recognition of the Commission’s constitutional authority to create rules. The Commission believes many of the procedural and due process aspects are better outlined in the Commission’s rules, similar to how the judicial branch outlines rules of procedure in court rules. For instance, the Rules of Civil Procedure, Rules of Evidence, Rules of Court, etc. are not duplicated in statute. The specific provisions referenced by the Office of the Attorney General are addressed in turn below.

- a. Formalizing notice requirements is dependent on the Commission’s budgetary request for a case management system. If the case management system is not approved, notice and service of documents will be handled through a manual process, rather than electronically. The statutory notice provision for complaints is also removed because the Commission will no longer receive complaints. Instead, in unison with Article XIV, the Commission will receive relevant information that can progress to an

¹ *E.g., Frequently Asked Questions*, N.D. Ethics Comm’n, <https://www.ethicscommission.nd.gov/frequently-asked-questions> (last visited Feb. 11, 2025) (asking “Which of the three branches of government does the Ethics Commission fall under?” and responding “None! The Ethics Commission is an independent constitutional entity and is not part of any of the three branches of our state government.”).

alleged violation. A respondent will be notified and served documentation at each step in the process either manually or electronically.

- b. The statutory provisions for responding to a complaint are removed because the Commission will no longer receive complaints. The proposed ethics rules allow a respondent to respond multiple times throughout the process including: (1) at any time the respondent wishes to settle and receive education; (2) in writing before a finding of reasonable cause is issued; (3) in writing to the investigation report and recommendation; (4) in person at the formal hearing; (5) in writing in a request for hearing; and (6) if a rehearing is granted, in writing and in person at the rehearing.
- c. The statement that a respondent is entitled to be represented by counsel during a Commission investigation is moved from statute to the Commission's rules. Regardless of a statement in statute or rules, an individual can always be represented in any matter to protect his or her legal interests. This is a basic tenant of law, as eloquently explained by Ms. Thompson during the legislative hearing.
- d. The Commission does not have authority to remove public officials from office. The North Dakota Constitution specifically empowers the Legislative Assembly to expel its members and remove other public officials from office through impeachment.²
- e. Similarly, the Commission does not have the power to overturn administrative and quasi-judicial decisions of executive branch agencies. The current statute stating so is unnecessary. The Commission is not a court exercising judicial review of government action. Instead, the constitution gives the Commission authority to investigate whether *individuals* violated ethical obligations. Any underlying decision, vote, or action stands regardless of whether the Commission determines the public official acted unethically when making it.

III. Article XIV empowers the Commission to enforce ethics law.

Article XIV directs the Commission to "adopt ethics rules related to transparency, corruption, elections, and lobbying" and to "investigate alleged violations" of the Commission's rules, Article XIV, and state laws related to transparency, corruption, elections, and lobbying.³ The constitution specifically gives the Commission this investigative authority to ensure ethics laws are enforced.

² N.D. CONST. art. IV, §§ 7, 9, 10, 12; N.D. CONST. art. XI, §§ 8-15.

³ N.D. CONST. art. XIV, § 3(2).

The Commission's rulemaking authority under Article XIV can include provisions on how those rules are enforced. Legislation is not needed for the Commission to exercise the authority granted to it by the constitution to make ethics law as Article XIV is self-executing.⁴ The Legislative Assembly recognized this fact in 2019, as confirmed by the legislative record for HB 1521.⁵

The term "enforcement action" means the investigation and the proceeding before the Commission related to that investigation. The word proceeding refers to the respondent's multiple opportunities to respond to the Commission's investigation as outlined above. The outcome of the process is the same as what is currently in the complaint process. The Commission will make a finding of whether someone violated an ethics law, and, if so, whether the law authorizes a penalty. If another entity must enforce the penalty by law, the Commission can make the referral to that entity with its findings. This principle is already in statute with the current complaint process. Section 54-66-09(2), N.D.C.C., explicitly states, "If the commission determined a violation occurred, the commission may impose a penalty authorized by law for the violation or refer the matter to the agency with enforcement authority over the violation."

Alternatively, the Commission could conduct its investigations like audits, legislative studies, or other investigations and give the respondent an opportunity to respond when the investigation findings are made public. A process like this does not serve the interests of respondents, and the Commission wants respondents to have the opportunity to respond throughout the investigation.

The Office of the Attorney General seemed to indicate other agencies are more appropriate enforcement entities. It appears the enforcement mechanism the Office of the Attorney General references is litigation and/or criminalization of ethics related conduct. The Commission believes a litigious approach does not serve the state well. Additionally, the Legislative Assembly and the Commission both recognize the majority of ethics issues should move away from the criminal realm. The Commission believes the educational enforcement process in HB 1360 will benefit everyone involved in the process by focusing on corrective rather than punitive action.

IV. HB 1360 renamed "accused individual" to "regulated individual" but did not change the substance of the definition.

In an apparent attempt to claim HB 1360 expands the Commission's authority, the Office of the Attorney General took issue with the term "regulated individual." HB 1360 does not expand the Commission's authority over any individuals. The bill uses the current definition of "accused individual" but instead renames this person as the "regulated individual." The definition itself has not changed and still means "a lobbyist, public official, candidate for public office, political committee, or contributor." Currently, the Commission uses the campaign finance definition for "political committee" in N.D.C.C. ch. 16.1-08.1 and the plain language definition of contributor. If

⁴ N.D. CONST. art. XIV, § 4(1).

⁵ See generally *Hearings on H.B. 1521 Before the H. and S. Ethics Comms.*, 66th Legis. Assemb., Reg. Sess. (N.D. 2019).

the Legislative Assembly wishes to define "contributor" it is also an undefined term in N.D.C.C. ch. 16.1-08.1 and would likely need a definition there as well.

V. The First Amendment demands the ability for respondents to speak publicly about an investigation against them. The Commission recognized this constitutional requirement in HB 1360.

The Commission believes any respondent should be able to defend him or herself publicly—the First Amendment demands it. HB 1360 addresses this issue by allowing a respondent to share the information related to the enforcement action openly and publicly, if the respondent chooses. The proposal in HB 1360 was the result of many hours of legal research, discussion, information gathering, and years of the Commission working on complaints.

The Commission's concerns regarding the First Amendment were not addressed in the confidentiality provision in HB 1505, which the Office of the Attorney General supported. If unaddressed and left in its current form, the Commission believes that statute could open the Commission to legal liability.

The Office of the Attorney General raised issues that individuals or potential witnesses are hesitant to share information related to complaints with the Office of the Attorney General due to the confidential nature of complaints. The Commission has never read the confidentiality provisions in this way. The definition of "confidential" in N.D.C.C. § 44-04-17.1 means the record is prohibited from being open to the public, not that a public servant is precluded from discussing that confidential information with an attorney. While likely unnecessary, the Commission believes a simple amendment to the proposal in HB 1360 would ease this worry. The amendment could state, "An individual contacted by the commission regarding an enforcement action may share information related to the enforcement action with an attorney representing the individual or the individual's employer."

VI. A respondent or witness may always bring legal counsel with to Commission interviews.

As noted above, it is a basic tenant of law that an individual can always be represented by an attorney in any matter to protect his or her legal interests. Currently, the confidentiality statute does not recognize a right for a witness to have an attorney during a Commission interview. However, the Commission absolutely recognizes individuals are entitled to bring legal representation with them to protect their legal interests. The Commission has no objection to provisions in statute asserting respondents may be represented by an attorney. If included, the Commission recommends expanding it by stating witnesses may also be represented. However, the Commission believes any such statute should clearly state the attorney is at the witness' or respondent's own cost.

As a matter of practice, the Commission does not advise witnesses or respondents on who to bring with them to interviews. That is not the role of the Commission. Further, because the Commission is not a criminal law enforcement agency and does not arrest people it does not have a constitutional duty to "Mirandize" people and advise they can seek the assistance of counsel. The Office of the Attorney General's suggestion that the Commission should be held to this standard is not the norm of any investigation. A large number of state agencies conduct civil investigations. To the Commission's knowledge, there is no other state law that requires these agencies to notify witnesses or respondents to seek counsel.

Additionally, the Commission's acknowledgment forms referenced by the Office of the Attorney General give a witness or a respondent notice of the current confidentiality statute and that the interview is recorded. It is an acknowledgment of the statute, and that is why it makes no mention that a witness or respondent can bring an attorney to the interview. Notably, the Office of the Attorney General did not assert that any information presented on the forms is inaccurate. If the Office of the Attorney General wanted the Commission to add such notice to the forms, it could have contacted the Commission well before the legislative hearings to articulate any concerns.

VII. The Office of the Attorney General did not discuss HB 1360 or HB 1505 with the Commission before the hearings.

The Commission was not made aware of these concerns from the Office of the Attorney General until the hearings. In response to an open records request, the Commission provided draft language of HB 1360 to the Office of the Attorney General in October 2024. Attorneys in the Office of the Attorney General contacted the Commission's staff with questions about different proposed legislation, but not HB 1360 or HB 1505. Having not heard from anyone in their office and after discussions with a legislator indicating the Office of the Attorney General had concerns, Executive Director Binstock reached out to an assistant attorney general days before the hearing to discuss the bill in general. The assistant attorney general did not raise any of the concerns to which the Office of the Attorney General testified at the hearing. Had the Commission learned of concerns earlier, the Commission would have welcomed them and been able to alleviate those concerns through discussions.

In conclusion, the Commission looks forward to continuing the discussion on these important matters and would be happy to answer any additional questions.

Sincerely,



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CC: Rebecca Binstock, Executive Director, North Dakota Ethics Commission
Dave Anderson, Chair, North Dakota Ethics Commission
John Bjornson, Director, North Dakota Legislative Council