

HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
JANUARY 31, 2025

TESTIMONY OF CLAIRE NESS
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1505

Chairman Schauer and members of the Committee:

For the record, my name is Claire Ness. I am the Chief Deputy Attorney General, and I am here on behalf of the Attorney General's Office in support of House Bill 1505. We appreciate that the legislative leadership have come forward with this legislation, and we have considered it carefully. This testimony touches of two parts of the legislation: conflict of interest rules and confidential information.

Conflict of Interest Rules

In part, this bill would prevent criminal prosecutions of legislators who abide by their conflict of interest rules and procedures or who follow informal advice from a staff member of the Ethics Commission.

Under Article IV, Section 12 of the Constitution of North Dakota, each house of the Legislative Assembly has explicit constitutional authority to make its own rules of procedure. Under the legislative rules for conflicts of interest, a legislator must declare their potential conflict, and the full body (House or Senate) makes the decision on whether the conflict prevents the legislator from voting on a particular matter. This process is transparent to the public and removes the decision about voting from the legislator with the potential conflict. A similar procedure can be enacted in legislative committees. Without House Bill 1505, legislators may be subject to criminal prosecution even when they comply with this constitutionally authorized process.

Also, House Bill 1505 would provide a defense for legislators who rely on informal guidance from a member of the Ethics Commission's staff. Although it very likely would be a violation of the North Dakota Rules of Professional Conduct – and a conflict of interest – for the staff members to advise legislators on legal matters, it can happen. When it does, HB 1505 would protect legislators who comply with guidance they reasonably rely on to keep them from violating ethics laws and rules. According to records and testimony on the matter, a legislator was referred for prosecution – and then prosecuted – after following such guidance.

Confidential Records, Access to Legal Counsel, and Due Process

The Attorney General is responsible for providing guidance on open records laws, analyzing alleged violations of open records laws, and issuing open records opinions. The Attorney General and our staff take this responsibility very seriously and understand the necessity of clear, easily understood confidentiality statutes. State employees may be subject to prosecution for a class C felony under N.D.C.C. 12.1-13-01 if they disclose confidential records, so our confidentiality laws need to give them abundant notice of what can and what cannot be shared.

Our office represents most state agencies, departments, boards, and commissions, and our clients have told us that, when they are asked to respond to the Ethics Commission, they are scared of seeking legal advice or even trying to gather information to defend themselves because of the way the confidentiality provisions of N.D.C.C. 54-66-12 are now interpreted. The provisions in House Bill 1505 will clarify that individuals can indeed consult their attorneys and have access to information and records to protect their legal interests when they are involved in Ethics Commission matters.

Section 5 of the bill makes the following changes to accomplish that goal.

- It changes the word “information” to “records”. Our laws generally protect records, as defined in N.D.C.C. § 44-04-17.1. Using this longstanding term that is easily and commonly understood will help clarify the statute.
- It clarifies that records in the possession of the Ethics Commission – either prepared for, created by, or submitted to, the Ethics Commission – are covered by the confidentiality provisions. This provision is similar to other confidentiality provisions in state law and will allow for the normal use of records that other state entities possess for their day-to-day business.
- It will allow a member of a public entity that is a target of an Ethics Commission proceeding to discuss that proceeding with other members to the extent necessary for the public entity to carry out its duties. Essentially, this will allow individuals to appropriately recuse themselves in matters related to the Ethics Commission proceeding, declare conflicts of interest that arise due to Ethics Commission proceedings, and ensure the business of the public entity can continue uninterrupted without fear of being prosecuted for a felony. These communications may be done in closed sessions to keep the information from being made public.
- It will clarify that an individual may share otherwise confidential records and information with their legal counsel. Employees will have a statutory right to get help from an attorney when faced with Ethics Commission complaints, requests for information, requests for questioning, and other proceedings. For example, state employees have been asked to appear for recorded¹, in-person questioning by a

¹ See *Recording Acknowledgement* form, attached.

team of attorneys comprised of the Ethics Commission staff attorney, the Ethics Commission's contracted attorney, and the Ethics Commission's Executive Director (also an attorney). In cases brought to our office's attention, state employees are not told they can be represented by an attorney during the questioning, unless they specifically ask. Before the questioning, the employees are told the proceeding is confidential and are asked to sign a Confidential Information Acknowledgement notifying them of the criminal penalty for disclosing confidential information about the matter.² They could be excused for believing they might be prosecuted for seeking legal guidance. These proceedings create intimidating scenarios for state employees, especially when they know the Commission can refer them to a prosecutor for criminal charges or release the recording to law enforcement. Clarifying that state employees and officials have a right to work with legal counsel in these situations will help protect their legal rights.

- Also, under House Bill 1505, during the course of an Ethics Commission proceeding, an individual will be able to share records and information with other people who are codefendants, who have common interests, or who possess information reasonably necessary for the individual to use in the proceeding. This will allow individuals to access the information necessary to defend themselves.

These provisions will give state officials and employees (our clients) the ability to perform their day-to-day work without fear of prosecution for a felony. The provisions also will ensure our

² See *Confidential Information Acknowledgement* form, attached. The form says that the disclosure of related information (except as specified in the form) is subject to criminal penalties, and **the authorized disclosures in the form do not include disclosure to the individual's attorney.**

clients have the ability to access legal counsel and necessary information and records to protect their legal interests or otherwise respond to Ethics Commission requests.

Thank you for your time today. The Attorney General's Office supports a "DO PASS" on House Bill 1505. I'd be happy to answer your questions.



Recording Acknowledgment

The North Dakota Ethics Commission ("Commission") records the interviews it conducts related to its investigation of complaints. The Commission records these interviews to preserve evidence and for record keeping purposes. Under N.D.C.C. § 54-66-12(1), these recordings and the information obtained during the interviews are confidential records as defined in N.D.C.C. § 44-04-17.1. The recordings are only accessible to the Commission and Commission staff during the course of the investigation. The recordings and information may only be disclosed to others as necessary for the Commission to conduct its investigation, for emergency purposes under N.D.C.C. § 44-04-18.10(6), to law enforcement under N.D.C.C. § 44-04-18.10(4), or pursuant to a subpoena or order under N.D.C.C. § 44-04-18.11.

If the Commission finds the respondent has engaged in an ethical violation, the recordings and information may become an open record pursuant to N.D.C.C. § 54-66-12(1).

By signing the below, you acknowledge the above referenced information. You also acknowledge the interview of you by Commission staff will be recorded.

Name (please print): _____

Signature: _____

Date: _____

Ethics Commission Staff Acknowledgment: _____



Confidential Information Acknowledgment

Under N.D.C.C. § 54-66-12, most information related to a complaint filed with the North Dakota Ethics Commission ("Commission") is a confidential record as defined in N.D.C.C. § 44-04-17.1. This confidential information includes: (1) information revealing the contents of a complaint; (2) information that reasonably may be used to identify an accused individual; (3) information relating to or created as part of an investigation of a complaint; (4) information identifying the complainant unless the complainant authorizes the disclosure; and (5) information revealing an informal resolution of a complaint. Unauthorized disclosure by a public servant of this confidential information may be a criminal violation under N.D.C.C. § 12.1-13-01.

The confidential information may only be disclosed to others as necessary for the Commission to conduct its investigation, for emergency purposes under N.D.C.C. § 44-04-18.10(6), to law enforcement under N.D.C.C. § 44-04-18.10(4), or pursuant to a subpoena or order under N.D.C.C. § 44-04-18.11. Confidential information authorized by law to be disclosed to another entity maintains its confidential status pursuant to N.D.C.C. § 44-04-18.10(5).

If the Commission finds the respondent has engaged in an ethical violation, the information may become an open record pursuant to N.D.C.C. § 54-66-12(1).

By signing the below, you acknowledge:

- (1) the Commission may share confidential information with you for the purpose of conducting an investigation of a complaint filed with the Commission;
- (2) you will not share this confidential information with others; and
- (3) the Commission may share any information you provide with others as the Commission is authorized to by law.

Name (please print): _____

Signature: _____

Date: _____

Ethics Commission Staff Acknowledgment: _____