

1999 SENATE APPROPRIATIONS

SB 2044

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2044

Senate Appropriations Committee

Conference Committee

Hearing Date 1/25/99; 2/15/99

Tape Number	Side A	Side B	Meter #
1	X		5240-5535
2/15/99 1		x	2962-3160
Committee Clerk Signature <i>Gloria Anderson</i>			

Minutes:

SENATOR NETHING: Opened the hearing on SB 2044; a BILL for an Act to create and enact two new sections to chapter 54-35 of the North Dakota Century Code, relating to the legislative council information technology committee.

JAY BURINGRUD: OMB Staff, Information Technology Committee, reviewed SB 2044. Section 1 provides for establishment of a statutory legislative council committee. The committee would have continuing existence. Section 2 outlines the powers and duties. This is a spin-off of Oregon Statues which they call a joint legislative committee. This involves the Legislative assembly in reviewing the activities of an information technology department. (tape 5240-5286)

SENATOR SOLBERG: Senator of District 7, to testify in support of SB 2044 is a spin-off of the Oregon statues they have in their information technology. When we brought 2043 forward from the committee, I asked SB 2044 be kept alive. When we go back to 1034 of last year and look at that bill the real thrust of that bill was to hire somebody in the legislative counsel office of a technology analyst - you heard why we don't have one--availability, cost, etc. It was my feeling we keep this bill alive. Whether we incorporate it into 2043, or redo the committee, or have a standing committee, are all things that should be kept alive. This will allow the legislature to get a handle on the technology and the usage of it, the hardware and software, and the programming that brought the whole thing to a head last year in 1034. I would hope we would continue to look at 2044 to see if there is a workable means that it should be adapted or whether it should be worked in with 2033. I hope we continue to look at this in the process and send it to the subcommittee. (tape 5286-5555)

SENATOR NETHING: Closed the hearing on SB 2044.

=====
2/15/99

Tape 1, Side B, Meter 2962-3160

Page 2

Senate Appropriations Committee

Bill/Resolution Number SB 2044.lwp

Hearing Date ~~1/25/99~~ 2-15-99

SENATOR NETHING: Reopened the hearing on SB 2044.

SENATOR ST. AUBYN: Explained the bill.

SENATOR NETHING: Called for the motion on SB 2044.

SENATOR ST. AUBYN: Moved a Do Pass on SB 2044.

SENATOR ROBINSON: Seconded the motion.

ROLL CALL: 14 YEAS; 0 NAYS; 0 ABSENT & NOT VOTING.

CARRIER: SENATOR ROBINSON

SENATOR NETHING: Closed the hearing on SB 2044.

Date: 2-15-99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB ~~2043~~ 2044

Senate APPROPRIATIONS Committee

Subcommittee on _____
or
 Conference Committee

NA Legislative Council Amendment Number _____

Action Taken NO PASS

Motion Made By SENATOR ST. AUBYN Seconded By SENATOR ROBINSON

Senators	Yes	No	Senators	Yes	No
Senator Nething, Chairman	✓				
Senator Naaden, Vice Chairman	✓				
Senator Solberg	✓				
Senator Lindaas	✓				
Senator Tallackson	✓				
Senator Tomac	✓				
Senator Robinson	✓				
Senator Krauter	✓				
Senator St. Aubyn	✓				
Senator Grindberg	✓				
Senator Holmberg	✓				
Senator Kringstad	✓				
Senator Bowman	✓				
Senator Andrist	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment SENATOR ROBINSON

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 15, 1999 11:23 a.m.

Module No: SR-30-2965
Carrier: Robinson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2044: Appropriations Committee (Sen. Nething, Chairman) recommends **DO PASS**
(14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2044 was placed on the
Eleventh order on the calendar.

1999 HOUSE APPROPRIATIONS

SB 2044

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2044

House Appropriations Committee

Conference Committee

Hearing Date March 10, 1999

Tape Number	Side A	Side B	Meter #
2	x		36.8-41.2
Committee Clerk Signature			

Minutes:

A Bill for an Act to create and enact two new sections to chapter 54-35 of the North Dakota Century Code, relating to the legislative council information technology committee.

Jay Buringrud, Legislative Council Briefly discussed description of bill: creates a legislative council interim committee with the responsibility similar to the Information Technology Committee. Referred to line 19 of the bill. Committee is based on a similar one to Oregon.

General Discussion

- Committee on Committees
- Rules Committee
- Confirmation Hearings
- Delayed Bills Committee
- House Appropriations
- Senate Appropriations
- Other

Date March 24, 1999			
Tape Number	Side A	B Side	Meter #
1		x	54.0-END
2	x		0-END
Committee Clerk Signature		<i>Roxanne Kohl</i>	

Minutes:

Chairman Dalrymple opened the discussion on Senate Bill 2044.

1A: 54.2 Rep. Byerly presented amendment 90167.0202 to committee. Explanation of changes to state wide board to a interim committee. Make up of interim committee: 3 members of House, 3 members of Senate, 3 outside members appointed by committee - financial CPA, CPA well versed in Information Technology, and communications Information Technology person. Pay the outside people \$200/day to assure good people to do the job. Further went through detail of amendment.

1A: 1.3 Rep. Aarsvold asked if this proposal was presented to the interim committee. Rep. Byerly said it was not. The interim committee concentrated on an outside board.

1A: 3.9 Rep. Byerly presented amendment 90213.0402 to committee. Explanation of changes.

1A: 8.0 Rep. Gulleon asked if amendments would affect fiscal note. Rep. Byerly said there wouldn't be any fiscal impact. No additional dollars or FTEs.

1A: 9.4 Rep. Delzer asked about salary changes. Rep. Dalrymple replied there will be a change in salary regarding Chief Information Office. Rep. Delzer asked about ISD charges of \$32 and possibly having a study resolution of ISD charges and possibly privatizing. Rep. Dalrymple replied that is what the committee would do in SB 2044. They would particularly look at fair rates and ways to do things better. Rep. Byerly referred to 2044 amendment item 6, 11, and 12.

1A: 14.4 Rep. Wentz asked about the consideration of removal of Higher Ed. Rep. Byerly replied a true state wide back bone would include Higher Ed for the long range plans of the state of North Dakota. Rep. Dalrymple replied in some sense you could say they are in the network now. The indication is that they would become more so related. Jim Heck says they would consider them to be part of it right now.

1A: 17.7 Rep. Poolman asked about Bank of North Dakota and Workers Compensation getting off the system. Under this particular legislation they could get off? Rep. Dalrymple replied no. You can have the most technical system you want but just need participation in back bone. Rep. Byerly replied they can be on own mainframe but need to be on back bone.

1A: 19.2 Rep. Gulleason asked about language of top section of bill allowing for \$200 day for members appointed to committee by governor. Rep. Dalrymple replied the thinking there is regarding oversight over some \$200 million IT spending that we can identify, there is probably more. It is quite a responsibility. Legislators won't be bringing any particular expertise to this. Hate to see us save \$50 or \$100 in a situation where they are making multimillion dollar recommendations that we will follow.

1A: 21.0 Rep. Aarsvold commented what has been presented is dramatically different from interim. Would have a hard time supporting amendments. Rep. Byerly replied it is not that different just removes cities, counties, and school districts. It also changes the makeup of the board. No additional FTEs. No additional dollars. We will have more direct input into ISD.

1A: 24.1 Rep. Hoffner commented on makeup of the committee. Hopes it would be bipartisan and not one party serving on committee, it would turn into one party.

General Discussion

- Committee on Committees
- Rules Committee
- Confirmation Hearings
- Delayed Bills Committee
- House Appropriations
- Senate Appropriations
- Other

Date March 25, 1999			
Tape Number	Side A	B Side	Meter #
2	x		13.8-22.4
Committee Clerk Signature <i>Casey Davis</i>			

Minutes:

SB 2044

CHAIRMAN DALRYMPLE opened discussion on SB 2044.

2A: 13.8 REP. BYERLY moved to adopt amendments 0202. Rep. Delzer seconded the motion.

2A: 14.2 CHAIRMAN DALRYMPLE said that a committee would be created because it is the most friendly organization, and it would be the most responsive to legislative desires. The committee would consist of six legislators (most likely appropriations members), and three industry people. These would make up the Board of Directors for the CIO. The idea has been to inject the legislature into the process.

2A: 15.3 REP. HUETHER agreed. As technology advances, constituents demand access to the information the government has.

2A: 16.4 REP. DELZER said that the committee is assigned by Legislative Council, and the Governor assigns the three experts. He asked who the chair would be and how he/she is chosen. Rep. Byerly replied that under the rules, council will appoint the chairman.

2A: 17.7 REP. AARSVOLD said that through the appropriations process they can take steps to encourage the flourishing of technology across the state.

2A: 20.0 REP. CARLSON said that SB 2043 and SB 2044 are needed together to make the plan work.

2A: 20.7 A voice vote was taken and the amendments were adopted.

2A: 20.8 REP. DELZER moved for a Do Pass as amended. Rep. Carlson seconded the motion. A roll call vote was taken and the motion carried with 14 yeas, 5 nays, and 1 absent and not voting. Rep. Byerly will carry the bill to the House floor.

Date: 3-25-99

Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2044

House Appropriations Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number 0202

Action Taken Do Pass as Amended

Motion Made By Delzer Seconded By Carlson

Representatives	Yes	No	Representatives	Yes	No
Chairman Dalrymple	✓		Nichols	✓	
Vice-Chairman Byerly	✓		Poolman	✓	
Aarsvold		✓	Svedjan		
Bernstein	✓		Timm	✓	
Boehm	✓		Tollefson	✓	
Carlson	✓		Wentz		✓
Carlisle	✓				
Delzer	✓				
Gulleson		✓			
Hoffner		✓			
Huether	✓				
Kerzman		✓			
Lloyd	✓				
Monson	✓				

Total (Yes) 14 No 5

Absent 1

Floor Assignment Byerly

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2044: Appropriations Committee (Rep. Dalrymple, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). SB 2044 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "two" with "three"

Page 1, line 2, after "committee" insert "; and to provide an expiration date"

Page 1, line 8, after the period insert "The council shall appoint three members of the house of representatives and three members of the senate to the committee. The governor shall appoint one member who is a certified public accountant whose experience includes responsibility for financial audits, one member who is a certified public accountant whose experience includes responsibility related to information systems, and one member who has education, experience, and other qualifications in information technology communications. The members appointed by the governor serve three-year terms, with one term expiring each year. Each initial appointee of the governor shall serve either a one-year, two-year, or three-year term as determined by the governor to provide for the staggered terms. The chief information officer of the state is an ex officio, nonvoting member of the committee. The appointees of the governor are entitled to be compensated for time spent in attendance at meetings of the committee and for other travel as approved by the chairman of the committee at the rate of two hundred dollars per day and are entitled to reimbursement for their actual and necessary expenses incurred in the same manner as other state officials as appropriate."

Page 1, replace lines 16 through 21 with:

1. Meet at least once each calendar quarter.
2. Receive a report from the chief information officer of the state at each meeting.
3. Approve the business plan of the information technology department.
4. Address macro-level operational questions relating to the information technology department.
5. Review the activities of the information technology department.
6. Establish goals and policy regarding information systems and technology, including telecommunications, used by state agencies, including institutions under the control of the board of higher education.
7. Review and approve statewide information technology standards.
8. Review and approve the statewide information technology plan.
9. Conduct studies of information technology efficiency and security.
10. Make recommendations regarding established or proposed information technology programs and information technology acquisition by the executive and judicial branches.
11. Review and approve the cost-benefit analysis of any major information technology project of an executive or judicial branch agency. A major

project is a project with a cost of two hundred fifty thousand dollars or more in one biennium or a total cost of five hundred thousand dollars or more. An agency must obtain approval of the cost-benefit analysis before the information technology project can be initiated or proceed beyond the development of the cost-benefit analysis.

12. Perform periodic reviews to ensure that a major information technology project is on its projected schedule and within its cost projections.

SECTION 3. A new section to chapter 54-35 of the North Dakota Century Code is created and enacted as follows:

Information technology project quality assurance - Information technology committee review - Budget section approval - Suspension of funds. The information technology committee may review any information technology project or information technology plan and redirect an agency's project or plan if the committee determines that the project or plan is at risk of failing to achieve its intended results, the moneys appropriated for the project or plan are not adequate to complete the project or plan, or the project or plan does not comply with standards approved by the committee. If the committee recommends suspension of the expenditure of moneys appropriated for a project or plan, the committee shall submit its recommendation to the budget section of the legislative council for review and approval of the recommended suspension. The budget section shall review and approve or reject the recommendation of the committee. If the budget section approves the recommendation, the budget section shall notify the office of management and budget with respect to its recommended suspension of expenditure authority. The office of management and budget shall suspend the expenditure authority until otherwise requested by the information technology committee.

SECTION 4. EXPIRATION DATE. This Act is effective through June 30, 2003, and after that date is ineffective."

Renumber accordingly

1999 SENATE APPROPRIATIONS

CONFERENCE COMMITTEE

SB 2044

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2043/2044C

Senate Appropriations Committee

✓ Conference Committee

Hearing Date 4/7/99; 4/8/99; 4/9/99; 4/12/99; 4/13/99; 4/14/99.

Tape Number		Side A	Side B	Meter #
4-7-99	3	4710-end	0-4295	
4-8-99	2	1385-5068		
4-9-99	2	375-4030		

Committee Clerk Signature: **Minutes transcribed by other clerks.** *Kathleen C. Kottelerock*

Minutes:

SENATOR ST. AUBYN opened the Conference Committee hearing on SB 2043 and SB 2044. We are going to be running these two bills together since they are so interrelated. Ever time I will run both of those together.

Senator St. Aubyn, Senator Solberg, Senator Robinson, Representative Byerly, Representative Dalrymple, and Representative Huether were present.

REPRESENTATIVE BYERLY presented and explained the rationale of the House amendments. As a package, we agree that the Legislature and especially the Appropriations Committees have to have some feeling of security that the money we are expending is being used widely. that is the premise that we started from based on the bills that came from the Senate. In SB 2043, the bast majority of the bill is still the same bill. The movement of ISD out from underneath OMB and up to a department level which was in your bill is still in 2043. The two changes we made in 2043 is the mandatory language as it relates to cities, counties and school districts on the statewide area network. We made permissive for this next biennium with the Legislative intent that tin the next biennium they should expect to start moving onto the statewide area network. Our reasoning was that we are not sure that the state of North Dakota and the state agencies are going to be able to end up with the wide area network up and operational without some teething things. The other change that we made was to remove the board that existed out there as an entity outside of the Legislature. We felt the main purpose for having the oversight was a legislative oversight function so what we did was removed all of those duties of that board into 2044 and created a statutory information technology committee with some teeth. We had the makeup of the board of the information technology committee be three from the House and three from the Senate, appointed by the Council and augmented that with three non-Legislative positions on the board appointed by the Governor. The one thing that presented controversy on

our side is that we specified that those people, that one of them be a financial auditor, one an information technology auditor and the other one would be a computer technical person. That board was given the powers of the board that you had in 2043 along with some of the normal duties that interim technology committees have. There was a tie in there that between this Interim Technology Committee and the budget section so that if this Interim Technology Committee finds that these agencies are not doing what we wanted them to do, this committee has the ability to go to the budget section and the budget section can either slow or redirect the financial end of it. We put one other change in 2043 that does require in the information technology plan supporting information.

REPRESENTATIVE DALRYMPLE stated that he would have liked an amendment that would absolutely mandate that the technology plan be tied out dollar for dollar with the Governor's budget. We found that may be mechanically feasible. This was the best we could do mandating them to describe in detail and recommendation. Any changes must include corresponding changes to the plan.

SENATOR ST. AUBYN asked that you took out the mandated situation with the counties, cities or school districts and you said that you left it as permissive. Where in the bill it says they can even be part of the plan.

REPRESENTATIVE BERG stated Section 16. Jim Heck was involved in this process with us. It may be under the existing code.

REPRESENTATIVE DALRYMPLE stated there is actually two parts to it. The reengrossed bill Section 7 says that the agencies that desires access shall obtain it from the department. That would be the DPI end of it. The other language in section 16 on the blue slips says by December 1, 2002, the information technology department shall develop a plan for use of statewide area network services by the counties, cities, and school districts in this state. That is a clear statement of intent that we would like to move in the direction of participation by everybody on this network at some point in the future.

REPRESENTATIVE HUETHER On page 4, line 9, defines the process of unshared counties, cities and school districts received maximum benefits of the statewide network.

REPRESENTATIVE BYERLY It still implies that they can come on. We currently do have some people on the statewide area network. Perhaps Mr. Heck could answer that.

SENATOR ST. AUBYN Are there other entities, schools, cities, counties that are allowed on this network?

JIM HECK Today we do provide services to counties. County governments decide from those offices that participate in the state application money for social service work. We do provide for 33 to 38 counties to date. We are in the process of hooking up school net which connects 100 schools to our network access. We do have two libraries - Mandan Public and Bismarck Public. If they want to pay the fee we charge state agencies.

SENATOR SOLBERG If we're doing this, there should be some language in here that specifically states other entities outside the state government. It seems in section 11, page 5.

SENATOR ST. AUBYN That language was part of the original bill.

REPRESENTATIVE BYERLY That way if they do go on the system they do have to conform to the standards of the state. It was not our intention to exclude them.

SENATOR SOLBERG We had worried about quality assurance in the original bill. It is a pretty important factor. Was that area taken out? Maybe we could look at quality assurance.

REPRESENTATIVE BYERLY We took all of the duties of that board and put it into SB 2044 so there is a good possibility that what you are asking about is on page 2 of SB 2044. We didn't delete any of those functions.

SENATOR ST. AUBYN Senator Solberg is referring to the old section 8.

REPRESENTATIVE BYERLY Those are in 2044 as items starting with #3.

SENATOR ST. AUBYN I'm not sure the faulty assurance is addressed. In the old bill it is on page 7, section 14.

REPRESENTATIVE BYERLY In 2044 the quality assurance process ended up.

REPRESENTATIVE DALRYMPLE Even though the title refers to quality assurance there really isn't much language in that paragraph having to do with quality assurance. It doesn't really specify what it is. We were trying to define in 2043 the size of the project that would be considered by this committee. Once you get past that determination you'll find the language the same. It does appear that there should be an opening sentence in that paragraph seeing that we would establish a quality assurance process.

SENATOR SOLBERG There has got to be some language that spells out the quality assurance process. That would establish some of these standards.

SENATOR ST. AUBYN On 2043, the new engrossed version of the House amendments, on page 7, section 16, we've already referred to "by December 2002 the department shall propose a plan" Why the date that you established?

REPRESENTATIVE DALRYMPLE It's through another legislative session and into the following December. That would give folks a chance to unhook themselves to previous contractual agreements. Most of them were of a 3, 4, or 5 year duration and any we were able to find out about would be up for renewal by December 2002.

SENATOR ST. AUBYN What's to keep someone from entering into another contractual obligation between now and then?

REPRESENTATIVE DALRYMPLE We've required them to be included in the statewide plan in the other amendment. They will be aware that they are being looked at and we're putting them on notice that they need to put some consideration in their future planning.

SENATOR ST. AUBYN After that they'll have to be part of the statewide network?

REPRESENTATIVE DALRYMPLE No, but we're saying the plan needs to be complete by that time and will need to be ready for consideration during the 2003 Legislative session.

SENATOR ST. AUBYN There's nothing to prevent them from entering into a new contract.

REPRESENTATIVE DALRYMPLE You're right.

SENATOR ST. AUBYN On 2044, did you committee explore the legality of the duties as assigned to this new committee?

REPRESENTATIVE DALRYMPLE We compared this to what we do with our budget section. This is a continuation of that concept. We've delegated authority to this committee. Legislative Council has said this is the same as the Budget Section.

SENATOR ST. AUBYN I'd requested that the Council research that. I had some real concerns about a Legislative committee having the authority to stop an appropriation that we've already made to another agency. You can't really delegate those duties to a committee. The memo I received from Legislative Council is that it would be very questionable and constitutional. We'd be exposing ourselves to a lot more problems the way it is written right now. I'll provide that for the committee. It identifies a lot of areas within that. You can't delegate authority to a Legislative committee to approve a policy decision. The full legislature could do that but we can't delegate that to a committee.

REPRESENTATIVE DALRYMPLE I agree but the question is are things being stopped or delayed. That is the point at which the committee would actually be interfering with what would otherwise take place. The language on page 3, on SB 2044 the language is pretty carefully drafted. The committee is first recommending, not mandating, the suspension of expenditures. They submit a recommendation to the budget section, then the budget section moves it along and if it accepts the recommendation it notifies OMB. Ultimately, the action is taken by OMB.

SENATOR ST. AUBYN I'm not aware any section where we have that authority to recommend the suspension of any budget.

REPRESENTATIVE BYERLY We do have some of that in Legislative audit and fiscal review and also in our administrative rules committee. We have the ability to do what some people might feel is outside of the bound of the Legislative process such as when we requested Legislative Council have OMB suspend payments to Lewis and Clark regional development

group. Those monies were appropriated but because of some problems in those areas we were able to do that.

SENATOR ST. AUBYN That wasn't a direct appropriation to those councils.

REPRESENTATIVE BYERLY Neither are these appropriations for technology.

SENATOR ST. AUBYN There is no direct appropriations to those planning councils. With these, those are grants from some of the other agencies. These are the direct appropriations to a particular agency.

SENATOR SOLBERG I don't know if I'll agree with that. We do appropriate the money in DD and F for those grants and regional councils. I would define them as a direct appropriation.

SENATOR ST. AUBYN It is not a direct appropriation to the planning council. You're not removing the authority for them to spend their money. You're saying you don't want them to distribute those in a grant form to another deal. Here, you're suspending their appropriation authority.

SENATOR SOLBERG They're requested that no state money, appropriated or anything else, would go to these funds. Any money this body sees is an appropriation.

SENATOR ST. AUBYN I'd like to call on Senator Robinson to give reasons why this bill was done this way.

SENATOR ROBINSON To the best of my recollection, the bill was a spin-off of HB 1034 from the last legislative session. Over the last number of years the proliferation of computers and technology and state government has been a real concern on the part of the Legislature. On one hand, we see tremendous benefit and we've been able to create some real efficiencies. On the other hand, the absence of a comprehensive plan has drawn the Legislature to the conclusion that planning is of real importance. Whether dollars are spent locally or in Bismarck and various state agencies, they're all tax dollars and it is overwhelming. We need to be good stewards of those dollars. Our committee felt if we had a state system, we could leverage a tremendous amount of buying power. If we could bring into play a RFP, an access to private sector, and build upon a structure already in place and provide a backbone and through a system of charge facts to the users we can finance that system. We found in the area of schools, we have a number of situations, schools have embarked on their own because we haven't had this system in place. There are a number of schools in partnerships working together and doing a very good job in this area right now. We did hear from schools that want to move beyond the internet. Other schools are not certain how long they can afford their system. Even other schools felt if we could achieve provisions as in SB 2043 all would benefit. The price we needed to pay is to leverage the whole school system but phase it in to allow schools that had contractual obligations. We felt the Technology Board could work through the transition. We don't feel there is one entity in the state that could provide service of this magnitude.

SENATOR ST. AUBYN As 2043 came back from the House, what do we have that we don't have right now? In section 16, we talk about December 1, 2002 and developing a plan but yet it doesn't mandate anything that we're going to do anything with it once we have it. I question what we are going to gain by this version.

SENATOR ROBINSON We still have fragmentation but not a buying power of a statewide system that I think is going to be essential if we're going to leverage any type of scale in terms of a cost. In the absence of that, we risk having even more entities.

REPRESENTATIVE DALRYMPLE First, it envisions the role of the Chief Information Officer as being quite a bit more than the prior job description as the director of ISB. This is a true CEO in charge of pulling together the policy. Second, the tie back between the oversight and fiscal reporting is an important part of the bill. Third, we're putting everyone on notice that this is the way the state should go. The bill is useful in pointing a director.

SENATOR ST. AUBYN It is not your intent to have cities, counties, and schools on board?

REPRESENTATIVE DALRYMPLE I can't say but I would hope the wide area network would entice those entities. I would hope it would become statewide.

SENATOR ST. AUBYN If you're going to offer RFP, they need to know where it's going.

SENATOR ROBINSON 51% of K-12 currently have facilities - we need to allow them credits and time.

SENATOR ST. AUBYN Would it be possible to delay to get inventory, identify users, etc? Then prepare RFP and it goes out. For the organizational session, we receive the results and review it and see if there is an economic advantage to doing it. It would give the Legislature the opportunity to study and refine it.

✓ **Hearing Date 4-8-99**

St. Aubyn - handed out material referenced which included reference to constitutionality of 2044.

Last refers to power delegation. Implementation for 8 months, second section. Set up board, establish the standards, in effect still mandate all parties to part of the program. The difference is March 1, correct inventory to decide rfp. presented in December and would allow the Legislature the opportunity whether there are advantages or disadvantages, gives all opportunity to know all unknowns. That would give us time to adjust the plan during session.

4-8-99

Rep. Dalrymple - Specific section, you're referring to in terms of implementation.

St. Aubyn - Section 36, gave the board authority to not extend beyond June 30. That would provide us time to modify and perhaps even network startup.

Sen. Robinson - I think that would be advantageous. New schools coming on would benefit. A lot of merit, 100 plus schools coming on board. Real potential.

Rep. Dalrymple - I'm not totally convinced that we need a hard deadline. Aug. 1, 2001, target date, would be caught in between. Main thing allow a full legislative session to take place and people could react to any adjustment that were to be made.

St. Aubyn - Think about the logistics. Who will want these services? You have to have some date for RFP and services.

Sen. Robinson - Growth in technology and demand for services. The longer we wait, the more networks and contracts that well develop and hard to build statewide system. A survey would provide needed information. Delay will add to confusion, schools who have had to move on their own.

St. Aubyn- Contracts are a valid point. I think we need to allow for those entities that are already in a current contract.

Rep. Dalrymple - Most contracts would have escape clause for date or federal laws. Should have all purpose, for right to make exception. I doubt 9 months going to change their perspective. We want to move it forward yet we want to be able to change course.

St. Aubyn - Change to July, so you wouldn't need emergency clause?

Sen. Solberg - A difference in House/Senate, is who not when, or, are we going to go ahead with whole load. If just state agencies, Higher Ed and those we have a say in, we can set earlier date.

St. Aubyn - My plan is that everyone going on but after RFP you can modify plan. May have to identify RFP's. you have date established by statute, all entities and state agencies allow them to drift. When we did infrastructure inventory we had different lines, even with State agencies.

Sen. Robinson - Based on past work, I'd hope and expect that becomes vehicle to move in that direction. School, cities, counties, I see as another phase.

St. Aubyn - I agree, but Jan 2, 2001, if not in place, what are we going to work on? I don't know how you will stage. The RFP has to be encompassing.

Sen Solberg - In my area, there's enough fiber optic structure to carry whole state. It seems we could bid in stages.

St. Aubyn - What would you propose ?

Sen. Solberg - Get state agencies up and running by July 2001. State agencies as early as possible, others later. From the looks of the bills I don't think either is going to get what they want.

Rep. Dalrymple - July 1, 2000, all state stuff and Aug. 1, 2001 the rest. Large companies know they're taking risk with government. It seems as though we're going around on dates, Could we get draft amendment. the way worded will be important power of exception of committee.

JAY - Do you want me to put together something together?

Hearing Date April 13, 1999

CONFERENCE COMMITTEE

SENATOR ST. AUBYN reopened the hearing on SB2043/2044 with all members present, and handed out a proposed amendment.

JAY: The only change on the amendments viewed yesterday was to delete the expiration date clause on page 2.

SENATOR ROBINSON: On page 4 of SB2043, we referenced the Commissioner of Higher Education and I think it wise if we would say "and his or her designee", he or she might be represented by one of the staff people there.

SEN. ST. AUBYN: We did not want to have designees on this when it was a governing board. Now that it is an advisory board, I don't think that is so significant.

REP. DALRYMPLE: Is there something in the statute that implies you can send a designee.

JAY: Yes, normally an officer can appoint a designee to represent that person on the board. The reason designee was not put in before was these people should not delegate the responsibilities to make decisions to a designee, whether it is a deputy or information technology coordinator or whomever.

SEN. ROBINSON: On page 5, line 30 regarding budget requests, we've discussed regarding the reporting requirements in the area of local funds in higher education. What are our expectations.

SEN. ST. AUBYN: You are talking about page 6, line 29 regarding budgeting. Are you talking about the local funds and whether or not that applies.

SEN. SOLBERG: Are you talking higher education.

SEN. ROBINSON: The question is how much are we going to ask those people at the local level.

REP. DALRYMPLE: I have gone over this with Rod Backman and what is expected. This is a part of the formation of the Governor's budget. It's nothing more than what they are already

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collecting. We are only interested in the technology within that that we be informed of what that portion is and if they are not collecting that information, then we are not going to ask for them to go further.

SEN. ST. AUBYN: When we were going through our budget for higher education, it would have been helpful to be able to track this. When we went through to try and identify what was actually funded and what was submitted, it was impossible to tell.

REP. DALRYMPLE: The amendment refers to the information technology plan. We are asking for whatever detail is available, and the detail is not that extensive. We have a \$250,000 guideline for the review process.

SEN. ST. AUBYN: Do you think there is any need to do an amendment to clarify that. Jay, do you have a suggestion.

JAY: No, I don't. It is something the IT committee could be looking at.

SEN. ST. AUBYN: We are not concerned about the area of the local funds. On that IT plan it did give the details of all of the costs that's involved with that and where do you draw the line on some of that. Maybe there are other agencies faced with the same thing.

REP. DALRYMPLE: It may be possible to go too far with the plan. This group of legislators are very much at the center, and they are the ones who are reviewing the information and creating the expectations what the Legislature will want. The committee should be able to determine what they want to see and hear. It will be an ongoing policy question. Do we want to see less or more.

SEN. SOLBERG: There is no continuity between campuses whatsoever. The CIO will have to decide once he has got the plans on file, he may want every bit of it on file, but then submit what

really goes into the operation. Campuses are all different. There needs to be a standardization of how IT plans are reported.

SEN. ST. AUBYN: Rep. Dalrymple, do you see it more as the CIO identify this one, he is asking for the information to the plans.

REP. DALRYMPLE: I would see this as a close relationship between the CIO and OMB. The CIO is going to be working day by day with its plan and OMB has the responsibility to put this in a budget. I think they would like to be able to do just what we are saying here. I think we are doing only what we would like to see happen. In talking it over with OMB, we understand the limitations of this. We receive budget rules. All we are asking how much is technology in other areas. If a particular project together and they come with a project budget of say 2 million dollars, what we are asking for within that 2 million dollars, how much of that amount is salary, how much is hardware, software, etc. When you get to the salary line, that is where you know there are limits to what you can identify. The agency that created the 2 million dollar budget should have some rationale how they arrived at the salary component of that. We have duty to find out whatever rationale is available.

SEN. ST. AUBYN: Based on Sen. Robinson's statement, do we really need all that detail on the local fund part of that because all we are going to get is the line item for total local funds or however we decide that.

REP. DALRYMPLE: I don't see that as a component but there is always an exception.

SEN. ST. AUBYN: Maybe that is something that the IT committee will be developing guidelines for the future.

SEN. DALRYMPLE: The committee are the ones who will determine what they expect to see in the statewide plans. That should be the group that will know that.

REP. BYERLY: Until we get through the first cycle, we won't even know the answer to it ourselves. After one Legislative cycle, we will see how OMB is able to tie this to the actual budget that comes in.

SEN. ST. AUBYN: Did everyone get copies of the Workers Comp amendments. On the first page of the amendment, it says page 2, line 11.

REP. BYERLY: Where he is intending page 2, line 11, it is in our amendment as item #5. He is referring to item #5 where it would read "review the activities and Information Technology Department to insure the, etc."

REP. BYERLY: Part of the review of the IT Department is to see that the needs of the agencies in satisfying their customer requirements which are part of the responsibilities of that IT Department.

REP. DALRYMPLE: In SB2043 in section 2 we create the department, and if we want to make a statement about how they conduct themselves and that they are supposed to serve their customers, I would think that would be the place to say that.

JAY: Section 2 is really identification of divisions of the department without calling them divisions. That came out as the structure of the department. The theory towards the end of section 2 is really the division without saying that they are the division to allow some flexibility, but if you are interested in saying that this is how the department should operate to be efficient, maybe it could be added to section 6 of the business plan. If you think that you need to have a statement saying that we should operate efficiently.

REP. BYERLY: I don't believe that the amendment that he had shown us for SB2044 is necessary. The one that he showed us for SB2043 is basically the same wording as in SB2044 and all he is shooting for there is just to insure that whoever becomes the CIO recognizes that

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each division in department and agency has a unique mission and that unique mission has to be respected when he or she, the CIO is dealing with the agencies. The first sentence that he wants to insert in there deals with the CIO has to take these agencies' individual needs into account. I'm not talking about the review part at all.

SEN. ST. AUBYN: Section 16 goes back to our other thing about our ability to review anyway.

Page 3 has to do with the section on confidentiality.

JAY: With may in there, the department is probably going to refer a request anyway. With shall, the department has to refer a request, and there may be some instances where the department is the originator on record.

PAT TRAYNOR: Our concern is that we have to guarantee the integrity of our files. Medical records are private. We recognize that we don't want a singular exemption.

REP. BYERLY: Can we come up with something in that paragraph that addresses that problem, such as changing the may to shall.

SEN. ST. AUBYN: Isn't there a current statute that already identifies some of these records are confidential anyway.

JAY: There is nothing in there now.

REP. BYERLY: They are protected anyway because they are confidential.

SEN. ST. AUBYN: What are the committee's wishes.

REP. BYERLY: Let's try shall. We can find out if it is a burden on these agencies and make the corrections.

SEN. ROBINSON: On SB2043 we did insert some language on page 4, section 6, item 4. We should focus on the tribally controlled colleges. Sen. Bercier asked if we could build language in

regarding this. We did refer to Indian tribes but no reference to the tribally controlled colleges.

He asked for more clarity there.

SEN. SOLBERG: I don't know how much flexibility we have in ISD right now as far as dollars.

SEN. ST. AUBYN adjourned the committee.

Hearing Date April 9, 1999

SEN. ST. AUBYN opened the conference committee on SB2043 and SB2044 with roll call indicating all members present.

SEN. ST. AUBYN: We discussed the possibility of doing the RFP in 2 phases and we would have the State go into effect July 1, 2000; then all other entities go into effect August 1, 2001, or July 1, 2001. The question was whether or not that would be workable. Sen. Robinson is to talk with a consultant about problems that would occur if we had 2 separate RFP's and 2 different phase-in times.

SEN. ROBINSON: I visited with Mr. Pope, our consultant, and we found it would be possible. There would be 1 RFP with 2 different phase-in dates and given that, it would position those that would be interested in submitting an RFP. They would know what they are looking at. One would be July, 2000 and whatever is included in phase 2 would be August, 2001.

SEN. SOLBERG: What would happen if counties wanted July 1, 2000, or others that want to get on early.

SEN. ST. AUBYN: Would you need to do an inventory or ask everyone who would like to be part of the network operation right away, or how would this work.

MR. POPE: The department would be studying this the first year, do inventory and as part of the research find out which ones would want to be a voluntary part of that.

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REP. BYERLY: That's never been a point of contention about the voluntary joining of the networks between the House and Senate. It is the mandatory that has been the bone of contention. It has been our intention that anyone that voluntarily wants to come on has to meet the same criteria.

SEN. ROBINSON: Jim Heck, you referenced that the ND school net in the next number of weeks is looking at working with ISD. What does that mean.

JIM HECK: ND school net is an organization to provide consulting support and assistance to schools in technology planning and installation. They will provide a gathering point for those schools to connect to for internet access. What we would be doing is taking that gathering point and instead of pointing it to a circuit that they now lease, we would point that gathering point to the State's internet access because the capacity we have is much greater and they would not have the full response. That is what they are buying from us. Instead of having their own access they would point it to our access. Once they are on that, they can also access state agencies, but that is secondary.

SEN. ROBINSON: Will they be able to access in addition to basic internet, voice, video data or will that be forthcoming.

JIM HECK: Those are separate services, voice today is under a contract for long distance that the State has and is available to those schools that they can have the same rates that we have. There are various flavors of video. Video today is primarily what is in higher education, but there is all of those clusters that got created as a result of the education telecommunications council out there. Some of those schools when they created these clusters and the connections between the schools are carrying some voice along with their video and some data with their video. It is on a case-by-case-basis today, it is not universal.

REP. DALRYMPLE: Jay, did you have anything for us to look at in the way of further amendments.

JAY: I gave copies to Sen. St. Aubyn last night.

REP. BYERLY: The House's position is not one of competing anyone that wants to be on voluntarily. We don't have a particular problem with picking a date at some point in time where all state agencies have to be on. It is fundamental that all state agencies have to be on. Our concern is that the State get its own house in order before we start forcing anybody else to leap into this water, also.

SEN. ST. AUBYN: I have the amendments.

REP. BYERLY: These amendments were developed as per the Senate version of the bill. Can some methodology be used to apply this to the House version of the bill. I want to make sure that we are still speaking generically as far as the committee is concerned, because the House has not receded from its amendments. We have not made any commitment to that at this point in time.

JAY: The last paragraph on the page is phased in and is added to the effective date of the bill, and that is on page 21 of the engrossed bill and basically adding these 2 sentences to the bill. Section 35 is the repealer and repeals ISD. Notwithstanding the repealer, the agencies and institutions shall continue to receive wider services before the effective date. Section 9 takes effect July 1, 2000 for state agencies. Cities, counties and school districts take effect August 1, 2001. It is a phase-in approach. Section 35 is effective on August 1 of this year so every city doesn't run out and get its own wide-area network services because there is a void between August 1 of this year and July 1, 2000. You continue what you are doing until July 1, 2000.

SEN. ST. AUBYN: Are school districts, counties and cities all considered political subdivisions.

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JAY: Yes.

SEN. ST. AUBYN: In regards to that, may not extend, renew that contract beyond that date.

What if the contract already goes beyond that.

JAY: Then the board accepts that from it. What that last sentence does is if your contract expires July 1, 2001, you do not get to stay in another 4 years. You don't renew that contract, you come in under the State.

SEN. ST. AUBYN: Based on the original Senate engrossed bill, that wouldn't change in this bill if they have another one that is more cost effective.

JAY: That still remains as amended by the Senate, but not as amended by the House.

SEN. ST. AUBYN: Assuming if we adopted these amendments to the engrossed Senate bill, if we had a school or political subdivision that had a better deal, the board probably would exempt or accept them before we are done with that inventory, where the consultants or whoever does the inventory try to identify, so for the most part they would have already known that and accepted them, right.

JAY: If they are going to do this inventory, they need to know what counties, cities or schools want to come in as of July 1. As part of that, they will also know what school is under contract and what those terms are. The inventory will take care of this.

REP. DALRYMPLE: Going back to the bill itself, most of our amendments have to do with the board going away and being replaced by a committee. That seems to be the number 1 question as far as wrapping this up.

SEN. ST. AUBYN: I worry about the constitutionality issue but I also have some of the same concerns that the House has. You are going to have State agencies that we are appropriating money for, some of the technology projects. Their budget request has to be submitted tying

these technology programs based on the amendments we had here and based on what the House had on their bill. The agencies would be submitting these for approval to our board that we had established in SB2043, they approve the technology plans, they amend the technology plans. Those proposals would be run by this information technology committee. The ITC would basically make recommendations and this list would be submitted to appropriations committee, or whatever, for the next Legislative Session. I envision the appropriations process still having control over some of these projects and the growth of technology.

SEN. ROBINSON: I envision the ITC continuing with an active role to what we did during the last interm meeting every number of weeks whereas I see the ITC board actively engaged on an on-going basis in the process.

SEN. ST. AUBYN: We need to look at the responsibilities of the board and approving the business plan of the ITC department. We still have control oversight in terms of if they approve a technology plan, the Legislature is the one that funds them. This board doesn't decide any of that. The control should be at the funding aspect. Is the Legislature the one that is going to go through the business plan or the standards they are going to do. I don't see where that is a legislative duty.

REP. DALRYMPLE: What is necessary for the new CIO is to gather enough information from enough different places so that we can come to the policymakers with a recommendation. Does he need a board to gather the information. I see no reason why. The CIO can charge the IT department for investigating, that's his job.

SEN. ST. AUBYN: The concern that we were hearing and the development of this, people feared if you gave all the power to the CIO that we have this technology czar out there that is going to mandate and dictate everything and then people feel like they have no control

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Senate Appropriations Committee

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whatsoever. If we say this board of directors is going to be a Legislative committee, that is where we run into the constitutional problem, because you can't have a board of directors actually approving all of these things, you cannot delegate that authority from the Legislature. It is presumed to be constitutional unless it is challenged.

REP. DALRYMPLE: This bill does not allow them to make Legislative decisions.

SEN. ST. AUBYN: Baloney. The Legislative committee cannot say definitely no, they can only give their best advice. From what I read, their best advice is it leaves it very questionable whether this is constitutional.

JAY: Our purpose is to raise the issues for you so that you understand it. It takes 4 Justices of the Supreme Court and it only takes 1 District Judge.

SEN. ST. AUBYN: The conference committee is adjourned.

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2043/2044C

Senate Appropriations Committee

✓ Conference Committee

Hearing Date 4/7/99; 4/8/99; 4/9/99; 4/12/99; 4/13/99; 4/14/99.

Apr/10

Tape Number		Side A	Side B	Meter #
4-12-99	3	401-3646		
4-13-99	1	1-1583	2423-end	
4-14-99	1	2513-3682		

Committee Clerk Signature: **Minutes transcribed by other clerks.**

Kathleen C. Kottelrock

Minutes:

SENATOR ST. AUBYN opened the conference committee on SB 2043. Roll call: SENATOR SOLBERG, SENATOR ST. AUBYN, SENATOR ROBINSON, REPRESENTATIVE BYERLY, REPRESENTATIVE HUETHER, REPRESENTATIVE DALRYMPLE had to go out of town, but said to proceed; but would we will not finalize until he has a chance to review it.

SENATOR ST. AUBYN: Rep. Dalrymple indicated possible revisions. the House concerns of 2043 include the Board structure is a true government board. One of the suggestions was given the CIO the responsibility and the board be more of an advisory board. Information Technology Board is primarily approval process and that is the problem because you can't have an interim committee as an approval process but could be a review process. Suspension of funding would be limited to the recommendation of OMB. The other thing we talked about was the make-up of

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the committee. The House version calls for some legislators, CPA's, and specialists. My concern is that we have just a regular interim committee, but the difference is that we have the authority to hire technical staff with the expertise, rather than have a CPA on the committee.

REPRESENTATIVE BYERLY: Are you proposing that the committee be made up of a like number of senators and representatives and remove the three outside people, put in some money for a consultant for whatever size of this committee, but are you still proposing that this board have some teeth to it as opposed to just a study committee like the last interim committee.

SENATOR ST. AUBYN: We have to be careful when we say we have a committee that has some teeth into it, because we may get into the problem of improper delegation by the legislature but also we have a Board that is administering basically executive branch agencies and we really don't have that authority constitutionally. REPRESENTATIVE BYERLY: I'm paraphrasing

what Jay said; it is constitutional until any judge says it is unconstitutional. SENATOR ST. AUBYN: If I were to sake an attorney, it would be safe to say they would tell us no. The point is we can still have whatever process - just reporting from CIO and an advisory Board or just the CIO - as long as we inform them of what projects are coming down the line, any equipment that departments are going to be submitting for budgets. That board would also review the progress of that and evaluate how they are progressing on these technologies. Rep. Dalrymple didn't disagree with this concept. He just wanted something in there where suspension of funding would be limited to recommendation of OMB. JAY stated that using a recommendation approach is a way to avoid direct constitution challenges right away. SENATOR ST. AUBYN:

Can OMB legally suspend an appropriation? JAY: If you have the ground work for it. They have the authority for reductions if there is not enough money for it. SENATOR ST. AUBYN:

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Do you think if we did it that way of changing it to review would be on firmer ground. JAY:

For a direct answer, yes. Needs to be some standards involved which was in that quality

assurance section. SENATOR SOLBERG: Reading from the Oregon law: Joint Legislative

Committee on Information Management and Technology. Four House Members and three

Senators serve on the committee. The purpose tells agencies when and how to request an

appearance before them and they even tell them when and how to appear - a procedure on how.

It documents information systems projects and activities subject to that committee review. When

to use: the agency shall request an appearance before the joint committee 1) before asking for an

expenditure increase in the emergency board which would be our budget section or emergency

commission. The fund project that has a substantial requirement for information technology 2)

before initiating new information technology projects or major enhancements that affects service

to the public or constituent agencies or organizations 3) before initiating major information

technology projects which affects staffing, facilities and space, or other information technology

resources or when an agency wishes to make a presentation or inform the committee on subject

matter involving information systems. They make that recommendation the joint committee

reports to the appropriation process. This is what I'm looking for. We can find countless

number of technology projects that have been funded with little or no legislative approval. We

need to get a handle on that some way. SENATOR ST. AUBYN: If SB2043 and 2044 were in

place, Roughriders would have had to come in with a technology plan. SENATOR SOLBERG:

I don't disagree with that whatsoever. There has to be some authority to stop an agency. I don't

think any agency should be allowed to make a major purchase outside of appropriations.

SENATOR ST. AUBYN: I don't know how that would affect them. They would need to go to

the CIO and their advisory committee would be involved and the Information Technology Committee would be consulted. I'm not sure that the technology plan can authorize them to proceed to amend their appropriation. That is unclear. This is talking appropriations and they just changed their plans. SENATOR SOLBERG: Now, in Oregon, anything that would change that plan would come to this committee. SENATOR ST. AUBYN: I would suggest that that should happen here, too. JAY: 2044 as introduced would give you the same authority as Oregon would have. REPRESENTATIVE BYERLY: I changed 2044. I got rid of all the stuff that has to do with the Governor's appointees. I changed it so there would be 4 members from House and 3 members from the Senate and legislative council determines all rules that we go by. On the second page where we had put in powers and duties #3 instead of approved says reviewed the business plan. #7-8, I took out and approved #11 I took out and approved and the last sentence. Last page line 4 - period after the first word plan and crossed out and redirected agency project of plan. Capitalize the I on If, cross out last part of sentence and all of next sentence. line 7, The committee can recommend to OMB the suspension of the expenditure of money appropriated for a project of plan. Rest of that sentence is crossed out, 9, 10, 11, 12 and 13 through the first period.

That is all the stuff dealing with the budget section. I think that would satisfy the Senate's concern about constitutionality and it also satisfies the House concerns that in the original 2044 there was not a delineation of duties nor were there any teeth. We would be able to have a record of action. Whether OMB pursues that action is an executive decision. SENATOR ST. AUBYN: I think that is a lot better. I would like a response from you, Jay. REPRESENTATIVE BYERLY: It looks like quite a bit of the constitutional questions are resolved. But, this also

seems to address some of the consenting values here. Can you respond to that? JAY: It looks

like quite a bit of the issue is resolved. Are you still looking at keeping them a Maco level

operation? SENATOR ST. AUBYN: Well, I think that REPRESENTATIVE BYERLY:

What is the difference between reviewing the operations of the department and addressing Maco

operational questions. SENATOR ST. AUBYN: You mean more like reviewing macro level

operational questions. REPRESENTATIVE BYERLY: I would hesitate to strike that because

the legislature sets the agenda and to me, that is the macro level, where is the state headed as far

as informational technology is concerned. That is basically what that means. SENATOR ST.

AUBYN: I think you get the point when you say that the legislature does this and not an interim

committee. REPRESENTATIVE BYERLY: by using the word address, you are not altering or

anything like that, the CIO would come with his recommendations and you would listen to them

and through an exchange of the members, you would talk through this stuff. Everything that we

do influences, want the committee to get an overview of how all of this stuff is supposed to fit

together. Part of the process involves how all this stuff fits together and ultimately what you are

doing you are influencing from that level and I will bet you that if you look at the one from

Oregon, you will wonder were we are going with all this stuff, that's what that is. ST. AUBYN: I

think that we have a comment. SENATOR BYERLY: Assuming that this IT committee

addresses macro economical operational questions, what happens when this committee says one

thing and a different committee says another, who controls. It should be this committee who

controls according to IT rather than the budget section as a example. This committee

recommends that something is done differently because something has to go to the budget

committee or what ever, then what is the relationship. Relationships between investors and the

State of Oregon and appropriations, if the Oregon committee said no to a project, there is no end run for the appropriations committee to get a yes cause the first time that happens, you have just destroyed the integrity of that committee. REPRESENTATIVE BYERLY: Most of the members on this IT committee will probably be from Appropriations Committee. JAY: You are tying yourself if you say 4 representatives and 3 senators. Maybe there are 5 representatives and 2 senators. REPRESENTATIVE BYERLY: Well, Mr. Chairman, I picked what Oregon had but I think you have to designate something like that. This committee is different than a normal interim committee. Duties will have bigger effect on the state of ND. SENATOR ST. AUBYN: Is Oregon a citizens legislature or full time? (No one was sure). SENATOR ROBINSON: I think this has potential. We will have a CIO and a statewide plan. There is some structure here; checks and balances. I would like to see the changes in writing. There is real merit here. JIM HUCK: I think the changes are good. Concern is section 6 establishes goals and policies regarding information technology and it may conflict with the responsibility we have with the statewide plan. If it could be reworded to include the statewide plan to have input into the plan for statewide goals. JAY: Because of #8 I don't think we need 6. BOB: This direction is very favorable for the process. There are a lot of safeguards put into it. The one comment I have is Page 2, line 9 #4, It sounded like items of more strategic instead of operational. More appropriate word. REPRESENTATIVE BYERLY: The "buzzz" word that gets put in there is OK either operational or strategic. JIM: Macro operational and strategic are the same. SENATOR ST. AUBYN: We'll leave the wording to Jay. REPRESENTATIVE BYERLY: I see this committee as a referee. It will allow this to go forward. JAY: The Board will now be an

advisory board. By doing that you have two advisory boards. SENATOR ST. AUBYN: Try it without the Board. We'll check it over. The meeting is adjourned.

4/12/99 TAPE 3, SIDE A, METER 401

SENATOR ST. AUBYN called the committee to order. All members were present; SENATOR SOLBERG was at another conference committee; would be present shortly. SENATOR ST.

AUBYN passed out amendments on 2043/2044. JAY: 2044 concerns are basically taken care of in Rep. Byerly's proposed amendments. It provided for members to be 4 from the House, 3 from the Senate, it basically takes off the citizen members. The membership is comparable to

Employee Benefit Programs Committee. Administrative Rules Committee is not required to have a specific number. Committees range from 2-1 ratio to even ratio, depending on interest in the committee. It may be best to have not a specific number in the statute. REPRESENTATIVE

BYERLY: The reason for this proposal is as such the same as Oregon. Most members will be on the Appropriations Committee and I think we should be able to find 4 that are interested.

JAY: The CIO would be an ex-officio member of committee. Duties are 11 as discussed on Saturday. Line 16-21 approval requirements eliminated, review the same. Information Project Quality Assurance section was revised to be pretty wide open standard. This committee, page 2, would make a recommendation to OMB and they may suspend the appropriation. Section 4 is the expiration date; four years from now. REPRESENTATIVE BYERLY: Sunset because

duties were a little different, approval capability. In addition, I see this Board acting as a referee. This is a place of a neutral party; any problems dealing with each other. It is not the

same as other amendments; this wording is kind of the intent. JAY: The current #9 allows for that. OK.

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REPRESENTATIVE DALRYMPLE: When we have a recommendation does it go to OMB?

REPRESENTATIVE BYERLY: Under this it would go to the CIO officer. JAY: Can be handled like Oregon does, under 9, that committee can determine what is the review standard.

SENATOR ST. AUBYN: Expiration date; we can eliminate that. I'm not sure of the named number of committee members. Do we want to leave this up to LC? REPRESENTATIVE

BYERLY: I would hope we wouldn't allow the committee to get too big. Can't get anything accomplished. SENATOR ST. AUBYN: I worry about the attendance. Too few people making major recommendations. JAY: Requires a report to be given in August and August is notorious for not being able to get a committee together. REPRESENTATIVE HUETHER: Our Electric Utilities did not have one absent on any meeting we had. SENATOR ST. AUBYN: I don't have a problem this. Any feelings about expiration date? REPRESENTATIVE BYERLY: We can

certainly drop the sunset clause. REPRESENTATIVE DALRYMPLE: Did you discuss how you are going to bring expertise technical people into the committee other than just ask the IT director his opinion. SENATOR ST. AUBYN: One of the concepts was that there may be some program or major purchases that we may want the advise of consultants. JAY: Our budget has funding for consultants. REPRESENTATIVE DALRYMPLE: My only concern is this is the type of area where the advise is going to be more expensive and more extensive than most things and I could see \$25,000 this biennium. JAY: There is money. I visited with the LC staff and there is money.

SENATOR ST. AUBYN: Let's proceed to SB2043. JAY: These are the House amendments and changes. Section 1: Definition of Board is deleted. Section 7: Establish Statewide Area Network Advisory Committee. Section 6, #4: Recognize Indian Tribes and nonprofit

Open 12th

organizations. Section 7: Duties are on page 2 of amendments to advise committee. Eliminated Section 8. Subject to contract expiration. SENATOR ST. AUBYN asked about the use of exception instead of exemption. JAY: Exemption should be used. Page 6: The Information Technology Plan is about agencies budget request. Page 17, Section 14, eliminated. Reappears is 2044. Section 15: Last sentence non compliance to be reported to LC and probably delegated to IT Committee. Section 16: Eliminated. Transition clause modified to take effect August 1, 1999 in Section 20. Section 23 state forms manager assigned to CIO. Page 21: Effective date clause; sections 2 & 8 take effect as provided in the section; otherwise entire bill takes effect August 1, 1999. SENATOR ST. AUBYN: Covered a lot of concerns. To some degree duplication of wide area network. This is at the request of the schools, cities, counties that they still have some involvement. SENATOR SOLBERG: Page 9 under confidentiality, line 4, May shall be changed to shall. SENATOR ST. AUBYN: I have amendments and Workers' Comp was concerned and wanted that changed. JAY: All telephone records are available; any inquiry can be traced. IT would have to refer back to the Dept. but it is available. SENATOR ST. AUBYN: The meeting was adjourned until call of the chair.

4-13-99

CONFERENCE COMMITTEE

SENATOR ST. AUBYN reopened the hearing on SB2043/2044 with all members present, and handed out a proposed amendment.

JAY: The only change on the amendments viewed yesterday was to delete the expiration date clause on page 2.

appropriate
4-13-99

SENATOR ROBINSON: On page 4 of SB2043, we referenced the Commissioner of Higher Education and I think it wise if we would say "and his or her designee", he or she might be represented by one of the staff people there.

SEN. ST. AUBYN: We did not want to have designees on this when it was a governing board. Now that it is an advisory board, I don't think that is so significant.

REP. DALRYMPLE: Is there something in the statute that implies you can send a designee.

JAY: Yes, normally an officer can appoint a designee to represent that person on the board. The reason designee was not put in before was these people should not delegate the responsibilities to make decisions to a designee, whether it is a deputy or information technology coordinator or whomever.

SEN. ROBINSON: On page 5, line 30 regarding budget requests, we've discussed regarding the reporting requirements in the area of local funds in higher education. What are our expectations.

SEN. ST. AUBYN: You are talking about page 6, line 29 regarding budgeting. Are you talking about the local funds and whether or not that applies.

SEN. SOLBERG: Are you talking higher education.

SEN. ROBINSON: The question is how much are we going to ask those people at the local level.

REP. DALRYMPLE: I have gone over this with Rod Backman and what is expected. This is a part of the formation of the Governor's budget. It's nothing more than what they are already collecting. We are only interested in the technology within that that we be informed of what that portion is and if they are not collecting that information, then we are not going to ask for them to go further.

SEN. ST. AUBYN: When we were going through our budget for higher education, it would have been helpful to be able to track this. When we went through to try and identify what was actually funded and what was submitted, it was impossible to tell.

REP. DALRYMPLE: The amendment refers to the information technology plan. We are asking for whatever detail is available, and the detail is not that extensive. We have a \$250,000 guideline for the review process.

SEN. ST. AUBYN: Do you think there is any need to do an amendment to clarify that. Jay, do you have a suggestion.

JAY: No, I don't. It is something the IT committee could be looking at.

SEN. ST. AUBYN: We are not concerned about the area of the local funds. On that IT plan it did give the details of all of the costs that's involved with that and where do you draw the line on some of that. Maybe there are other agencies faced with the same thing.

REP. DALRYMPLE: It may be possible to go too far with the plan. This group of legislators are very much at the center, and they are the ones who are reviewing the information and creating the expectations what the Legislature will want. The committee should be able to determine what they want to see and hear. It will be an ongoing policy question. Do we want to see less or more.

SEN. SOLBERG: There is no continuity between campuses whatsoever. The CIO will have to decide once he has got the plans on file, he may want every bit of it on file, but then submit what really goes into the operation. Campuses are all different. There needs to be a standardization of how IT plans are reported.

SEN. ST. AUBYN: Rep. Dalrymple, do you see it more as the CIO identify this one, he is asking for the information to the plans.

REP. DALRYMPLE: I would see this as a close relationship between the CIO and OMB. The CIO is going to be working day by day with its plan and OMB has the responsibility to put this in a budget. I think they would like to be able to do just what we are saying here. I think we are doing only what we would like to see happen. In talking it over with OMB, we understand the limitations of this. We receive budget rules. All we are asking how much is technology in other areas. If a particular project together and they come with a project budget of say 2 million dollars, what we are asking for within that 2 million dollars, how much of that amount is salary, how much is hardware, software, etc. When you get to the salary line, that is where you know there are limits to what you can identify. The agency that created the 2 million dollar budget should have some rationale how they arrived at the salary component of that. We have duty to find out whatever rationale is available.

SEN. ST. AUBYN: Based on Sen. Robinson's statement, do we really need all that detail on the local fund part of that because all we are going to get is the line item for total local funds or however we decide that.

REP. DALRYMPLE: I don't see that as a component but there is always an exception.

SEN. ST. AUBYN: Maybe that is something that the IT committee will be developing guidelines for the future.

SEN. DALRYMPLE: The committee are the ones who will determine what they expect to see in the statewide plans. That should be the group that will know that.

REP. BYERLY: Until we get through the first cycle, we won't even know the answer to it ourselves. After one Legislative cycle, we will see how OMB is able to tie this to the actual budget that comes in.

SEN. ST. AUBYN: Did everyone get copies of the Workers Comp amendments. On the first page of the amendment, it says page 2, line 11.

REP. BYERLY: Where he is intending page 2, line 11, it is in our amendment as item #5. He is referring to item #5 where it would read "review the activities and Information Technology Department to insure the, etc."

REP. BYERLY: Part of the review of the IT Department is to see that the needs of the agencies in satisfying their customer requirements which are part of the responsibilities of that IT Department.

REP. DALRYMPLE: In SB2043 in section 2 we create the department, and if we want to make a statement about how they conduct themselves and that they are supposed to serve their customers, I would think that would be the place to say that.

JAY: Section 2 is really identification of divisions of the department without calling them divisions. That came out as the structure of the department. The theory towards the end of section 2 is really the division without saying that they are the division to allow some flexibility, but if you are interested in saying that this is how the department should operate to be efficient, maybe it could be added to section 6 of the business plan. If you think that you need to have a statement saying that we should operate efficiently.

REP. BYERLY: I don't believe that the amendment that he had shown us for SB2044 is necessary. The one that he showed us for SB2043 is basically the same wording as in SB2044

and all he is shooting for there is just to insure that whoever becomes the CIO recognizes that each division in department and agency has a unique mission and that unique mission has to be respected when he or she, the CIO is dealing with the agencies. The first sentence that he wants to insert in there deals with the CIO has to take these agencies' individual needs into account. I'm not talking about the review part at all.

SEN. ST. AUBYN: Section 16 goes back to our other thing about our ability to review anyway. Page 3 has to do with the section on confidentiality.

JAY: With may in there, the department is probably going to refer a request anyway. With shall, the department has to refer a request, and there may be some instances where the department is the originator on record.

PAT TRAYNOR: Our concern is that we have to guarantee the integrity of our files. Medical records are private. We recognize that we don't want a singular exemption.

REP. BYERLY: Can we come up with something in that paragraph that addresses that problem, such as changing the may to shall.

SEN. ST. AUBYN: Isn't there a current statute that already identifies some of these records are confidential anyway.

JAY: There is nothing in there now.

REP. BYERLY: They are protected anyway because they are confidential.

SEN. ST. AUBYN: What are the committee's wishes.

REP. BYERLY: Let's try shall. We can find out if it is a burden on these agencies and make the corrections.

SEN. ROBINSON: On SB2043 we did insert some language on page 4, section 6, item 4. We should focus on the tribally controlled colleges. Sen. Bercier asked if we could build language in regarding this. We did refer to Indian tribes but no reference to the tribally controlled colleges. He asked for more clarity there.

SEN. SOLBERG: I don't know how much flexibility we have in ISD right now as far as dollars.

SEN. ST. AUBYN adjourned the committee.

4-14-99

Senator St. Aubyn reopened the conference committee on SB 2043/2044.

All committee members were present.

Amendments were handed out on SB 2043 and discussed.

Representative Dalrymple: The only thing that I thought the discretion was with the new position would come in with the approval of the emergency position.

Jay: That was what the discussion was and I talked with Chet and the fiscal staff and the emergency commission relates to the old thinking or something that you need to go to the emergency commission and get FTE as long as the legislature is in session, the legislature should make the decision.

Representative Dalrymple: You are saying you need this guy to well do what exactly?

Jim Heck: What we were looking at in SB 2043 was the preparation of a business plan, preparation of RFP to meet the July 2000 implementation date for state government agencies and in RFP or the implementation of cities, counties, and school districts with a date of August 2001.

We need someone to act as a product manager for those activities, we today are an operational

organization that basically provides services and we don't have any one that would be in the area of providing the administrative support for these two activities.

Representative Dalrymple: You would envision paying for this guy out of your budget revenues?

Jim Heck: The original fiscal note had those funds coming from the general fund, and at this time we have been trying to put some thought into that this morning. I don't think we have it all put together yet to be honest with you to be part of 2043 at this time. Probably just take the position out.

Representative Dalrymple: I think that's the problem with envisioning a new position on the fly, you kind of soon get into the question of the funding and job description and things that just haven't been thought out to the extent that they should have.

Senator St. Aubyn: I disagree there, in the original plan and in the information we have had there are certain positions that were going to be required and funding level that we were going to provide and appropriation and an ISD for that. I wouldn't say necessarily that it wasn't planned, I am assuming this individual would also be responsible for doing inventory to try to find out what all is going to be involved for the RFP.

Jim Heck: That is correct. Yesterday there was some question about what that individual would do beyond this biennium and if it was just a temporary position. If schools, counties, and cities go through and are mandated to be in the bill does call for them to submit technology plans in regard to state network activities and I say that position continuing to address those technology plans as they were submitted and prepare them in response to the total state wide plan. And again the original bill and the fiscal note attached had two planning positions for that activity.

Senator St. Aubyn: Representative Dalrymple was it your idea that they had existing staff that could do all of that?

Representative Dalrymple: As Jim said he had not finished working with OMB on this conditioning a possible amendment to the OMB budget particularly if we are talking about general funds.

Senator St. Aubyn: Would that be your preference, do that there then?

Representative Dalrymple: I would think so yes because OMB is not here apparently they haven't decided on a salary level for the source of funding. I would think it would be better not to flow these bills down with just that one item.

Senator Robinson: If we could have some assurance that we in fact would do that I could live with that and I can appreciate Representative Dalrymple concern. I would mention that during the course of the interim we had extensive discussion about the role and the importance of this agency and the need to really come to grips with all the issues that Jim and Bob and others have shared with the committee and as we uncovered in many meetings. I think there has been sufficient discussion and justification that there will need to be some additional effort put forth in this area if in fact we are going to have a system that is going to be a good system, a quality system that is accepted on a broad base by users and I think we need to get off to a good start here and not sell ourselves short. But if the decision is to address it on the OMB budget I could live with that but I still say there is a need, and I'm not in a position to what Jim can or cannot do within his available resources within the department, but this effort is going to be substantial when you talk about cities and counties and school districts the inventory, we are talking a significant project.

Representative Dalrymple: I don't have any problem with having section 35, I think if you want to authorize this position in affect endorse it a little bit here that's all right with me. That would be a worse case scenario, but I'm just we're going to go further than that add general fund dollars I would rather have OMB.

Senator Solberg: I move that the House recede from their set of amendments and further amend SB 2043 version .0406.

Representative Huether seconded.

Motion passed. (6-0)

Representative Byerly made the motion that the House recede from it's amendments and further amend with version .0204.

Senator Solberg seconded.

Motion passed. (6-0)

(Bill Number) SB ~~2044~~ 2044 (, as (re)engrossed):

Your Conference Committee

Attendance	SENATORS	Vote
	St. Aubyn	Y
	Solberg	Y
	Robinson	Y

Attendance	REPRESENTATIVES	Vote
	Byerly	Y
	Saizymbile	Y
	Huetter	Y

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)
the (Senate/House) amendments on (S/H) page(s) 939 - 941

and place _____ on the Seventh order.

, adopt (further) amendments as follows, and place _____ on the Seventh order:

having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) _____ was placed on the Seventh order of business on the calendar.

DATE: 4, 14, 99

CARRIER: _____

LC NO. _____ . .0204 of amendment

LC NO. _____ . _____ of engrossment

Emergency clause added or deleted _____

Statement of purpose of amendment _____

(1) LC (2) LC (3) DESK (4) COMM.

REPORT OF CONFERENCE COMMITTEE

SB 2044: Your conference committee (Sens. St. Aubyn, Solberg, Robinson and Reps. Byerly, Dalrymple, Huether) recommends that the **HOUSE RECEDE** from the House amendments on SJ pages 939-941, adopt amendments as follows, and place SB 2044 on the Seventh order:

That the House recede from its amendments as printed on pages 939-941 of the Senate Journal and pages 1033 and 1034 of the House Journal and that Senate Bill No. 2044 be amended as follows:

Page 1, line 1, replace "two" with "three"

Page 1, line 8, after the period insert "The council shall appoint four members of the house of representatives and three members of the senate to the committee. The chief information officer of the state is an ex officio, nonvoting member of the committee."

Page 1, replace lines 16 through 21 with:

- "1. Meet at least once each calendar quarter.
2. Receive a report from the chief information officer of the state at each meeting.
3. Review the business plan of the information technology department.
4. Address macro-level questions relating to the information technology department.
5. Review the activities of the information technology department.
6. Review statewide information technology standards.
7. Review the statewide information technology plan.
8. Conduct studies of information technology efficiency and security.
9. Make recommendations regarding established or proposed information technology programs and information technology acquisition by the executive and judicial branches.
10. Review the cost-benefit analysis of any major information technology project of an executive or judicial branch agency. A major project is a project with a cost of two hundred fifty thousand dollars or more in one biennium or a total cost of five hundred thousand dollars or more.
11. Perform periodic reviews to ensure that a major information technology project is on its projected schedule and within its cost projections.

SECTION 3. A new section to chapter 54-35 of the North Dakota Century Code is created and enacted as follows:

Information technology project quality assurance - Information technology committee review - Suspension of funds. The information technology committee may review any information technology project or information technology plan. If the committee determines that the project or plan is at risk of failing to achieve its intended results, the committee may recommend to the office of management and budget the suspension of the expenditure of moneys appropriated for a project or plan.

The office of management and budget may suspend the expenditure authority if the office of management and budget agrees with the recommendation of the committee."

Renumber accordingly

SB 2044 was placed on the Seventh order of business on the calendar.

1999 TESTIMONY

SB 2044

GARY J. NELSON
State Senator
Chairman

JOHN D. OLSRUD
Director

JAY E. BURINGRUD
Assistant Director

CHESTER E. NELSON, Jr.
Legislative Budget
Analyst & Auditor

JOHN WALSTAD
Code Revisor

North Dakota Legislative Council

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April 5, 1999

Honorable Rod St. Aubyn
State Senator
State Capitol
Bismarck, ND 58505

Dear Senator St. Aubyn:

You have requested information concerning potential constitutional problems that might be raised by the House amendments to Senate Bill No. 2044, which would create a Legislative Council Information Technology Committee. We believe the most serious constitutional issues raised by this legislation are separation of powers questions.

The Legislative Council Information Technology Committee, as established under the House amendments to Senate Bill No. 2044, would have several powers and duties, some of which are traditional study committee responsibilities and some of which appear to include administrative power. There is no question that legislative committees may receive reports, review activities of agencies of all three branches of state government, conduct studies, and make recommendations. Questions of appropriate separation of powers arise when legislation provides that a legislative committee has authority to make administrative decisions. Constitutional questions are raised by subsections 3, 4, 6, 7, 8, and 11 of Section 2 of Senate Bill No. 2044, which provide that the Information Technology Committee would have authority to approve business plans, address macro level operational questions, establish technology goals and policy to be used by state agencies, approve technology standards, approve technology plans, and approve cost-benefit analysis for major information technology projects. Subsection 11 further provides that an agency would have to obtain approval of the cost-benefit analysis before an information technology project could be initiated or proceed beyond the development of the cost-benefit analysis. Section 3 of Senate Bill No. 2044 provides that the Information Technology Committee could redirect an agency's project or plan under certain circumstances. The Budget Section could approve or reject recommendations of the committee and expenditure authority would be suspended upon recommendation of the Budget Section.

Each of these powers appear to be administrative powers that raise separation of powers questions. The constitutions of North Dakota and of the United States provide for three branches of government-- legislative, executive, and judicial. As stated by the North Dakota Supreme Court in *State v. Kromarek*, 78 N.D. 769, 52 N.W.2d 713 (1952), each of these three branches has powers separate and distinct and, as far as practical, independent of each other. A statement of general distribution of powers was added to the state constitution in 1982 with the following sentence in Section 26 of Article XI: "The legislative, executive, and judicial branches are coequal branches of government."

The North Dakota Supreme Court, in *Verry v. Trenbeath*, 148 N.W.2d 567 (N.D. 1967), described the allocation of powers to the three branches as follows:

The legislative branch deliberates upon and decides the policies and principles to be adopted for the future and enacts them into law. The executive branch administers the law so enacted. The judicial branch construes the law, passes on its constitutionality, and determines, in accordance with the law, the rights and interests of the individual citizen.

This tripartite division of powers is a fundamental theory in State and Federal government. . . .

The North Dakota Supreme Court spelled out the distinctions between the three branches of government in the case of *State ex rel. Spaeth v. Meiers*, 403 N.W.2d 392 (N.D. 1987), in which the court said:

The legislative, executive, and judicial branches are coequal branches of government, and each branch is supreme in its own sphere. Art. XI, § 26, N.D. Const.; *State ex rel. Mason v. Baker*, 69 N.D. 488, 288 N.W. 202 (1939). This court has long recognized that the creation of the three branches of government by our constitution operates as an apportionment of the different classes of power **whereby there is an implied exclusion of each branch from the exercise of the functions of the others.** (emphasis supplied)

In any discussion of the separation of powers doctrine, an understanding of the constitutional relationship between the branches of government is essential. The North Dakota Supreme Court, in *State ex rel. Johnson v. Baker*, 74 N.D. 244, 21 N.W.2d 355 (1945), said all governmental sovereign power is vested in the Legislative Assembly, except such as is granted to the other departments of government or expressly withheld from the Legislative Assembly by constitutional restrictions. The court further said constitutional provisions are in the nature of grants of powers to the executive and judiciary, but are limitations upon the power of the Legislative Assembly. In *State ex rel. Agnew v. Schneider*, 253 N.W.2d 184 (N.D. 1977), the court said the Legislative Assembly has plenary powers except as limited by the state constitution, the United States Constitution, and congressional Acts in matters in which the federal government is supreme. This principle was reiterated in *State v. Anderson*, 427 N.W.2d 316 (N.D. 1988), and in *State v. Ertelt*, 548 N.W.2d 775 (N.D. 1996), in which cases the court also contrasted the state and federal constitutions and noted the latter is an instrument of grants of authority.

Therefore, the Legislative Assembly has plenary powers and is limited only by two qualifications: the legislative branch is limited by constitutional restrictions (powers expressly withheld from the legislative branch) and by powers granted to the other branches of government. The question raised by providing decisionmaking power to committees (whether the Information Technology Committee or the Budget Section) within the legislative branch which limits administrative powers of the other branches is whether that power infringes on powers that under the Constitution of North Dakota are granted to the other branches of government.

In *Ex parte Corliss*, 16 N.D. 470, 114 N.W. 962 (1907), the North Dakota Supreme Court said that because the Constitution of North Dakota provides for the election of a Governor and an Attorney General, “[i]t seems too obvious for discussion that the framers of the Constitution, in providing for the election of these officers by the people, thereby reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided.” In *State v. Erickson*, 72 N.D. 417, 7 N.W.2d 865 (1943), the North Dakota Supreme Court quoted this language and found that the Legislative Assembly had no constitutional power to abridge the inherent powers of the Attorney General.

North Dakota is not unique in separating the powers of the three branches of government and in prohibiting the legislative branch from encroaching upon the powers of the other branches of state government. There are at least two cases in which the United States Supreme Court has found unconstitutional congressional actions that infringed upon the role of the executive branch. In *I.N.S. v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), the United States Supreme Court found unconstitutional a section of the Immigration and Nationality Act which authorized one house of Congress, by resolution, to invalidate decisions of the executive branch of the federal government relating to certain immigration matters. In that case, the Court said legislative action must be performed by the constitutional requirements of passage of a measure by a majority of both houses and presentation to the President for possible veto. The significance of this case is that it stands for the proposition that legislative power can only be exercised by the entire legislature, not by some portion of that branch, such as a committee or one house of a bicameral legislature.

Perhaps the most significant United States Supreme Court case regarding this issue is *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986). That case involved the legislation popularly known as the Gramm-Rudman-Hollings Act, which was intended to eliminate the federal budget deficit. The legislation required certain across-the-board budget cuts if the federal deficit exceeded certain maximums allowed by the law. The legislation gave considerable authority to the Comptroller General, an official nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President Pro Tempore of the Senate and confirmed by the Senate. However, the Comptroller General was removable only at the initiative of Congress. The Court said:

To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . . The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

The United States Supreme Court concluded that, because Congress had retained removal authority over the Comptroller General, that official could not be entrusted with executive powers. The Court said Congress could control the execution of its enactment by passing new legislation, but Congress could not retain control over the execution of the legislation passed by Congress and therefore Congress had intruded into the executive function. The significance of this case is that it stands for the proposition that execution of the laws is an executive branch function and cannot be performed by personnel in the legislative branch.

The separation of powers doctrine is well established in other jurisdictions as well. An example is the case of *People v. Tremaine*, 168 N.E. 817 (N.Y. 1929). In this case, portions of the executive budget were passed and approved in lump sum form by the legislature, with the provision that the Governor and the chairmen of the legislative finance committees would act in approving segregation of the lump sums within certain departments. The action was brought to prevent expenditure of funds segregated without approval of legislators. In striking down the segregation provisions of the Act requiring approval by the chairmen of the legislative finance committees, the Court of Appeals of New York said that while the legislature is supreme in the appropriation of money, it cannot appoint two of its members to carry out the law. The court said that this was a clear attempt by the legislature to confer administrative power upon two of its members and thus usurp the executive power by indirection. Thus, the court held that while the legislature has the power to appropriate money, the executive has the power to administer and spend the money appropriated, except as to legislative and judicial appropriations.

All of these decisions make it clear that if an activity is a legislative activity in which policy decisions are made, only the Legislative Assembly can make those decisions and legislative action cannot be delegated to a legislative committee. On the other hand, if an activity is found to be an administrative activity in which

the function is to carry out or execute the laws, then that is an appropriate action of the executive branch of state government and cannot be delegated to a legislative committee.

Although there are no North Dakota cases directly in point concerning whether authority granted to a legislative committee is appropriate, in a 1987 letter to Mr. Richard L. Rayl, Director of the Office of Management and Budget, the Attorney General reviewed some of the same court decisions mentioned in this letter and concluded that "there exists a substantial question whether the role reserved by the legislature in executing North Dakota Century Code Section 54-44.1-13.1 impermissibly usurps executive functions and violates the fundamental separation of powers principles." That statute grants the Budget Section authority to approve budget allotments made by the director of the budget.

Although this letter notes that the proposal under consideration raises serious constitutional questions, it should be noted that there is a presumption of constitutionality that applies to all enactments of the Legislative Assembly. See *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979). In describing the presumption of constitutionality which applies to every legislative Act, the North Dakota Supreme Court, in *Menz v. Coyle*, 117 N.W.2d 290 (N.D. 1962), said every legislative enactment is presumed constitutional and will be upheld unless it is manifestly in violation of the state or federal constitution. The court further said that the presumption is conclusive unless the statute is clearly shown to contravene some provision of the state or federal constitution. Citing previous cases, the court said that the courts will not declare a statute void unless its invalidity is, in the judgment of the court, beyond a reasonable doubt. Thus, the burden would be on anyone challenging the constitutionality of actions of the Legislative Assembly. Also, a legislative enactment may not be declared unconstitutional unless at least four of the five members of the Supreme Court agree that the enactment violates the constitution. See Section 4 of Article VI of the Constitution of North Dakota.

In conclusion, it appears that any legislation that would give a legislative committee authority to make administrative decisions raises serious constitutional separation of powers questions. As is evident from the above-cited court decisions, even if an argument could be made that some of those duties were policymaking or legislative functions, then only the constitutionally mandated method of carrying out a legislative function--action by both houses of the Legislative Assembly and submission to the Governor for veto--would withstand the constitutional test. However, any legislation enacted by the Legislative Assembly is presumed constitutional, and the Constitution of North Dakota requires that four of the five members of the Supreme Court must decide that an enactment violates the constitution in order to invalidate it.

We hope this information is of assistance. Please feel free to contact this office if you have further questions.

Sincerely,



John D. Olsrud
Director

JDO/LMM