MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1289

2005 HOUSE JUDICIARY

HB 1289

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1289

House Judiciary Committee

❑ Conference Committee

Hearing Date 1/24/05

Tape Number	Side A	Side B	Meter #
1	xx		41.7-end
1		xx	0-12.1
1		xx	35-37.5

Committee Clerk Signature

Minutes: 14 members present.

Chairman DeKrey: We will open the hearing on HB 1289.

Wayne Stenehjem: Explained the bill. I am here in support of HB 1289. The law provides for a treatment program that now exists at the State Hospital in Jamestown, where individuals who have done two things, have committed two precursors of criminal sexual offenses, and where at least two psychologists will testify that this person suffers from a mental disease or illness, that makes it likely for that person to commit another offense, then they can be committed to this program. I think there are about 14 individuals who have now been committed to that program in Jamestown, others are under consideration. When we enacted this statute, we made one additional change, provision, to require that all of the hearings that deal with the individuals who are subject to the commitment process are closed to the public; that is, both the hearing itself and all of the records, the petition, the documents that are filed with the court, are all closed to the public. We did that simply because we wanted to make sure that would not cause a

constitutional problem for us. Since that time, these statutes have been upheld and over the course of the last two years, I convened a task force on open meetings and open records to meet to discuss any changes that we thought were necessary to our open meetings and open records law. Two bills were introduced. One of those is the broader statute, that you will hear this afternoon (HB 1286), and the other is HB 1289; which is to provide that the hearings on commitment of dangerous sexual predators, will no longer be closed to the public, so that the public can come in and see what is happening, or if they wish to look at the petition and see what the allegations are, they will be able to do that. This bill also takes care of one omission that was contained in the statute. The states attorneys prosecute these petitions for commitment, typically within a year of release of an individual from the State Penitentiary, an assessment is conducted. Then this information is used to make a recommendation of whether someone should be committed to the program or sent to the local states attorney. They are required under the statute to notify my office if they decide they are not going to pursue a petition. The statute doesn't have a time within which they have to notify my office so that we can determine whether we want to pursue a petition if the states attorney decides not to. So the other change that this bill makes is to provide that the notification to my office comes within 60 days prior to the release of the individual from confinement. The State of MN provides that their hearings are open, so this is not unheard of or unusual. This is a little different than the typical mental health commitment process, where you have somebody who is either mentally ill or chemically addicted, in addition to have the mental illness that makes it likely that they will reoffend, it is required that you prove that they committed two criminal offenses. That's different than the other kind of commitment process.

Chairman DeKrey: Thank you. Further testimony in support of HB 1289.

Jack McDonald, ND Newspaper Association: Support (see written testimony).

Representative Delmore: Can you tell us a reason why a judge might close one of these hearings.

Jack McDonald: A judge could close a hearing, for instance, if there was a considerable amount of testimony about juvenile victims. The other most common reason, is for fairness issues. If the judge doesn't believe that the accused, or the person seeking a commitment would be getting a fair hearing. That's true now under state law.

Representative Delmore: So there is actually protections built in now.

Jack McDonald: Yes that is correct. I believe there are ample protections built in.

Chairman DeKrey: Thank you. Further testimony in support.

Jean Mullen, Asst. AG: Support (see written testimony).

Representative Meyer: The AG mentioned that they had to have two criminal offenses, is it any criminal offenses, not just a sexual offense.

Jean Mullen: It would be a sexual predatory offense that would be required, not just any criminal offense, there may be other criminal charges for the individual but there must be one predatory act or a predatory act that is sexual. Then they must also have a diagnosis of some mental disorder, so that treatment would be towards the mental disorder, because it's the mental disorder really that has to be taken care of; usually before the treatment for sexual offense can be effective.

Representative Galvin: Can you give me an example of when you would be violating the HIPAA law.

Jean Mullen: I am not the expert in that office on the HIPAA law at all, and this was drafted for me by the individual who is. My understanding of the HIPAA law is that it restricts most medical providers from releasing any confidential information about medical or psychological records, about an individual to anybody without the consent of the individual. And of course, these individuals aren't going to consent to have their records released. We have a state statute in the civil commitment one, that overrides general confidentiality statute that applied to state entity; but for private providers we don't necessarily have that override and this would make sure that private providers, without having a release of information from the individual, must release this information when they are requested to do so. It would probably be requested by the states attorney to gather information or if requested on behalf of the state hospital to do their evaluation.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

David Boeck, lawyer for Protection & Advocacy Project: Opposed (see written testimony).

Chairman DeKrey: In your example, in my dementia, I hit on a nurse at the nursing home. That's not going to become public unless I've got two convictions before that.

David Boeck: I don't think that's correct. I believe you don't have to have a conviction to be pursued under this statute. I think there only has to have been an act or an allegation of an act. There doesn't have to be a conviction. I wanted to comment on one other part. Presently the proceedings are open to anyone that has a legitimate interest in the proceeding, and that would include victims. It seems funny to change the law that we're going to admit people who don't have a legitimate interest. It won't affect the rate of people who are committed under the statute,

it won't affect the number of people who are pursued under the statute, I just don't see that we have to give up the confidential information here.

Representative Delmore: I guess part of the reason that the confidentiality is coming here, the judge can still order that those individuals not be allowed. I do think there is a protection in here, but I think part of it is we want more of this information to available to the public. If nothing else, for awareness. If someone has been criminally charged, maybe that needs to be information that's shared within a community, such as mine, that did suffer the tragedy of Dru Sjodean. It's very difficult for us as legislators to say whether that could have saved somebody in the past. The past is gone, and we want to look into the future and make the very best legislation we can to make sure tragedies like that don't happen. I was proud to sign on for this bill, because I do think there is a protection in there for the individual, and I think there is also a right for the community and the press to know.

David Boeck: I don't disagree with the sentiment behind the bill. The purpose that no one disagrees with, that we want to see that more people are protected, that people who commit offenses are treated, and not let out into the community where someone might fall prey to them. I just don't see that making this information, the psychiatric information, public is going to really help that. I think when there is a criminal trial, the criminal trial is public. The public knows it's reported on, but we have always in this state, dealt with mental health issues as a confidential matter. I don't know if this could have protected someone or might protect someone in the future. If that's true, I withdraw my objection to it; but I just don't understand the connection.

Representative Boehning: I can't agree with you on your observations on this. I don't have a problem with the public attending the hearing. This is a good start.

David Boeck: This law requires sexually predatory conduct, not sexual harassment. The act has to be sexually predatory conduct.

Chairman DeKrey: Thank you. Further testimony in opposition. We will close the hearing.

(Reopened in the same session)

Chairman DeKrey: What are the committee's wishes in regard to HB 1289.

Representative Delmore: I move a Do Pass.

Representative Boehning: Second.

12 YES 0 NO 2 ABSENT DO PASS **CARRIER: Rep. Delmore**

Date: 1/24/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1289

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Rep. Delmore Seconded By Rep. Boehning

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	A	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	✓				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	A				
Representative Koppelman					
Representative Kretschmar	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Delmore

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

REPORT OF STANDING COMMITTEE

HB 1289: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1289 was placed on the Eleventh order on the calendar.

2005 SENATE JUDICIARY

HB 1289

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1289

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 16, 2005

Tape Number	Side A	Side B	Meter #
2	X		2250 - 4680

Committee Clerk Signature Mona L Shelby

Minutes: Relating to the release of evidence presented at a commitment hearing.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Rep. Dekrey, Dist. # 14 Introduced the bill. This bill was put in by the Attorney Generals office. This is the result of the public having problems with some of the hearings with the way the commitment procedures were being conducted for sexually dangerous individuals. The purpose is to open some of it up for the public to at least have some information on what the status is. In no way is this to infringe on the privacy rights of any persons with mental illness.

Jonathan Byers - Attorney Generals Office (meter 2377) Referred to Jean Mullens testimony in the House side as the drafted the changes on this legislation. This legislation is in response to an Open Meetings Task Force conducted by the Attorney Generals office over the past year. Several different proposals resulted from this. After much discussion this was the results of those

meetings. This bill will allow the public to attend meetings. In the filing of a petition for civil commitment they are not giving enough notice to the department of corrections and the Attorney Generals Office that they are actually processing the civil commitment. This gives them a 60 day notification system

Sen. Traynor questioned the protections mentioned on line 1 of page 2 referring to 10 of section 12.1-34-02 . These relate to the fair treatment of victim and witness information. (meter 2642) in reference to the privacy of the testimony. Referred to page 2 and HIPPA Law.

Sen. Trenbeath stated that the law as it presently exists, the order of committing/discharging is public record. What is the necessity of an open situation for the purposes to determine that those orders be issued? During the open records meeting I attended, the concern was the frustration of the people involved trying to get information on a case and did not find anything out until the final hearing stating the judges decree, at this point it is to late to get involved. This way they may get the results earlier-not the reason for the results. Society is more concerned in what is happening to the "commitment of sexually dangerous individuals **Sen. Trenbeath** sited his concern with the potential of public opinion to influence the judicial decision. Rather then the judicature making the decision based on the scientific evidence being presented. Many of our other court hearings are open, other than juvenile and mental health, are all open and judges deal with the pressures of the public watching during a criminal or civil case already. This is only one more area. **Sen. Trenbeath** responded that criminal cases are open for the benefit of the defendant, commitment proceedings are closed for the benefit for the person who seeking to be committed. We are crossing that line. Is there a legitimate reason for this? (meter 3100)

Discussion of public knowledge vs. committed individual. **Senator Triplett** discussed the ability for additional testimony give at the hearings.

Testimony in Opposition or Neutral of the Bill

David Boeck, State Employee and lawyer for the Protection & Advocacy Project (meter 3333)

Gave Testimony - Att. #1

Senator Triplett questioned how many total people have had hearings? 35 resulting in 28 commitments.

Mr. Boeck would like to submit an amendment to the bill at the committees request.

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1289

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 22, 2005

Tape Number	Side A	Side B	Meter #
1	x		3982 - end
1		x	0 - 506
1		x	4437 - 4791

Committee Clerk Signature

Minutes:

Chairman Traynor opened the discussion on HB 1289. All members were present.

David Boeck distributed proposed amendments to HB 1289. (attached) The legislative intern made copies for the committee.

David Boeck discussed the proposed amendments. (meter 4708) The amendments would keep the privacy of commitment proceedings for sex offenders under chapter 25-03.02 confidential. It would open up the decision by the states attorney to proceed or not proceed with commitment so the public would be aware of what was being done. Commitment status would also be made available to the public which would include whether or not a petition has been filed and the outcome including if the individual was found not to be commitable. The second document, the supplementary amendment, would allow a judge to decide, after the proceeding, only for committed individuals, what part of the proceedings would be made public and the individual would be allowed a hearing on that issue.

Senator Traynor asked what portion of the record could be considered to be disclosable.

Mr. Broek said that would be up to the judge.

Senator Traynor said such as.

Mr. Broek said the petition, the report from either examining expert, transcripts of the testimony, if the judge decided that would be appropriate to serve the purposes of the chapter. Dave Peske asked for a copy of the amendments and met informally with a group of psychiatrists from the Psychiatric Association on Friday night. They did not take an official position but their sentiment was in support of these amendments and in opposition to HB 1289 as written. Mr. Peske spoke with Senator Trenbeath this morning.

Senator Trenbeath said Mr. Peske spoke with him this morning.

Senator Nelson said basically he is leaving sections 1, 2, 3 alone, let them stand as they are now and remove sections 4 and 5, it goes back to the way it was in the code and hog housing this to add sections 6, 7, and 8.

Senator Triplett asked if Mr. Broek has reviewed this with the Attorney General's office.

Mr. Broek said no, Assistant Attorney General Mullen received the amendments a few moments ago. Mr. Broek noted he is also removing section 1, the only section that would remain intact is section 2 with an addition allowing the notice to the Attorney General would be a public record.

Chairman Traynor asked for comments from the Attorney General's staff. (meter 5480)

Assistant Attorney General Mullen said the attorney general had a task force and spent much of the interim period going over all the open records and meetings laws and determining what changes should be made. She was involved with the initial documents for HB 1289, she was not a member of the task force, and she offered the task force many different alternatives. The task

force was a cross section of states attorneys, legislators, public, press, county and city attorneys and all sorts of people subject to the open records law and they went over it and their final determination was the proceedings and records should be open. It was done because they believe an informed public is a protected public. They thought it through, they had other alternatives and she knows the amendments Mr. Broek is proposing are opposed by the Attorney General and would be opposed by all the members of the task force.

Senator Trenbeath said save one, himself.

Ms. Mullen said all the various alternatives she presented were voted down and the decision was made that this was the way to go.

Senator Triplett said the reason the committee was interested in the amendments was the concern that for people who had a commitment hearing and the judge determined they would not be committed, that their records would be open. How is that fair to them.

Ms. Mullen said 7 individuals were evaluated and no commitment was done, only one even got to the court. There are 2 evaluators at the state hospital that must complete a full evaluation and if either of them decides the individual does not meet the criteria, the case would not go to court. This happened in 6 of the 7 cases. Only one case made it to court, he was found not to meet the criteria and he is now back in the penitentiary because he attacked his girlfriend.

Senator Trenbeath asked what that has to do with it.

Ms. Mullen said it could mean the court was wrong.

Senator Trenbeath said that doesn't matter, they could have been right too.

Senator Triplett said isn't one one too many. Isn't just one set of records being laid out to the public when they are determined not to be subjected to commitment one too many.

Ms. Mullen said what records is she talking about.

Senator Triplett said all of their mental health records.

Ms. Mullen said it is not the mental health records that become public. The records are not made public per se. The records are sent to the states attorney. The states attorney gives the records to the individual or the individual's attorney, and to the state hospital and to the evaluator. What is sent to the court is a report, not one record attached to it.

Senator Triplett asked if the report is based on the record.

Ms. Mullen said it is based on the record. It does not have anything irrevalent. They would also testify about their report.

Senator Trenbeath said there are things disclosed to the public that would not be disclosed were it not a commitment hearing for an allegedly sexually dangerous person.

Ms. Mullen said yes, there would be things that would not otherwise be disclosed. A lot of it would go to why they meet the actuarial tests. Many of these things are in the public domain already, what kind of crime did they commit, how many times did they commit it. If you go on the web page there is information on high risk sexual offenders that are not committed. Much of it is very similar. What is not there is an actual diagnosis.

Senator Trenbeath asked then why is this bill is necessary.

Ms. Mullen said because civil commitment is for the worst of the worst. They are different. It is important to know what is going on in these proceedings. It is all being done in secrecy, how is anyone to know if the commitment process is being appropriately applied.

Senator Trenbeath asked why we don't throw open all commitment proceedings.

Ms. Mullen said most people in a civil commitment hearings are a danger to themselves.

Senator Trenbeath said the criteria is a danger to yourself or others.

Ms. Mullen said that is correct but the sexual offenders are mostly a danger to others and to children.

Senator Traynor asked if the Attorney General opposes Mr. Boeck's amendments.

Ms. Mullen said yes. He has one amendment that deals with the section deals with HIPA and he deletes that amendment and she doesn't know the reason for it. This clarifies a provider can release information without worrying about HIPA.

Senator Traynor does not understand why the Attorney General opposes Mr. Broek's amendments.

Ms. Mullen said it is because the Attorney General thinks the records should be open.

Senator Traynor said this would tighten it up.

Ms. Mullen said the Attorney General and the task force believe the proceedings with regards to commitment of sexually dangerous individuals should be open and Mr. Boeck's amendments have eliminated the task force's amendments and put it back to how it was before.

Senator Triplett asked if Judge Haggerty has an opinion.

Judge Haggerty said she has no opinion.

Chairman Traynor said the committee will not take action at this time.

Chairman Traynor opened the discussion on HB 1289. (meter 4437, side B)

Chairman Traynor asked if the committee wants to take action on the amendments proposed by Mr. Boeck.

Senator Nelson said on page 3 of the original bill, they deleted the sentence that allowed anyone in the room, she is not sure why they all have to be in the room, she would rather keep that sentence in.

Senator Hacker said he agrees.

Senator Triplett said the basis of the change is trying to make the process more open by the Attorney General's office. She likes the notion included in the amendments that people are entitled to know when this is happening and are entitled to know the results but she doesn't see the public interest in being in attendance during these hearings.

Senator Traynor asked if she thinks we should consider the amendments.

Senator Triplett said she does.

Chairman Traynor said he would like to appoint a subcommittee of Senator Triplett and Senator Trenbeath to meet with the Attorney General and Mr. Boeck and come up with some wise counsel by tomorrow.

Ms. Tabor said the Attorney General will be in town tomorrow.

Senators Triplett and Trenbeath said they are willing to serve.

Chairman Traynor closed the discussion on HB 1289.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1289

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 23, 2005

Tape Number	Side A	Side B	Meter #
2	X		400- End

Committee Clerk Signature Maria L Lilleys

Minutes: Relating to the release of evidence presented at a commitment hearing.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

Jean from Legislative Council explained the agreement between the subcommittee and the Attorney Generals office was that in an effort to protect the individuals who have not been committed /evaluated yet, the petition submitted to the court would be closed, the preliminary hearing or probable cause hearing would be closed (within 72 hr. after petition filed). After the individual has been to the state hospital and have had two evaluators determine that the individual meets the criteria and are prepared to testify to that. At this time the commitment hearing would be open with the exception of an individual who has not had a conviction they do not have to have an open hearing. Continued with the original bill.

Sen. Trenbeath stated that these changes do not completely satisfy the committee but as a compromise it is better then it was. This is a middle ground for two opposing forces Jean responded.

Sen. Trenbeath made the motion to do pass the amendment seconded by **Senator Hacker** All members except for **Sen. Nelson** were in favor.

Sen. Trenbeath made the motion to do pass as amended seconded by **Senator Hacker** All members except for **Sen. Nelson** were in favor and motion passes

Carrier: **Sen. Trenbeath**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1289

Page 1, line 15, after "~~the~~", insert "The", remove the overstrike over "petition and" and insert immediately thereafter "any proceeding under section 25-03.3-11", and remove the overstrike over "~~are~~"

Page 1, remove the overstrike over lines 16 through 21

Page 1, line 22, remove the overstrike over "governmental duties" and insert immediately thereafter an underscored period

Page 1, line 23, replace "this chapter" with "section 25-03.3-13" and remove "or considered by"

Page 1, line 24, after "public," insert "with the exception of a proceeding involving an individual who has not been convicted of a sexual act as defined in section 25-03.3-01(6)." and remove "except that"

Page 2, line 1, replace "the" with "The"

Renumber accordingly

Date: 3/22/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1289

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Move Amend - Do Pass as

Motion Made By Senator Trenbeath Seconded By Senator Hacker

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett		✓
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 5 6 No 1 0

Absent 0

Floor Assignment Sen Trenbeath.

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

Date: 3/23/05
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1289

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass As Amended

Motion Made By Senator Trenbeath Seconded By Senator Hacker

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett		✓
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 5 6 No 1 0

Absent 0

Floor Assignment Senator Trenbeath

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

REPORT OF STANDING COMMITTEE

HB 1289: Judiciary Committee (Sen. Traynor, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1289 was placed on the Sixth order on the calendar.

Page 1, line 15, after "~~the~~" insert "The", remove the overstrike over "pctition and", after "~~chapter~~" insert "any proceeding under section 25-03.3-11", and remove the overstrike over "~~are~~"

Page 1, remove the overstrike over lines 16 through 21

Page 1, line 22, remove the overstrike over "governmental dutics" and insert immediately thereafter an underscored period

Page 1, line 23, replace "this chapter" with "section 25-03.3-13" and remove "or considered by"

Page 1, line 24, replace "except that" with "with the exception of a proceeding involving an individual who has not been convicted of a sexual act as defined in section 25-03.3-01. The"

Page 2, line 1, remove "the"

Renumber accordingly

2005 TESTIMONY

HB 1289

Monday, January 24, 2005

HOUSE JUDICIARY COMMITTEE
HB 1289

CHAIRMAN DEKREY AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We support the bill and respectfully request that you give it a do pass.

We participated in the Attorney General's Task Force that drafted this bill. We believe it will bring much needed public information about this process and will reassure the public that state officials are taking the necessary steps to enforce these laws.

There are ample protections built into the bill and state judicial rules always give judges the authority to close a hearing if needed.

Therefore, we respectfully request your favorable consideration. If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

House Judiciary Committee
Fifty-ninth Legislative Assembly of North Dakota
House Bill No. 1289
January 24, 2005

Good day, Chairman DeKrey, and Members of the House Judiciary Committee. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project. The Protection & Advocacy Project advocates on behalf of people with disabilities.

This morning I spoke up on HB 1289, without have planned to testify. This is a more polished version of my testimony.

I have not proposed that the Legislature coddle sexually dangerous individuals or give them any breaks. P&A supports efforts to identify sexually dangerous individuals, protect all potential victims from them, prosecute them for their crimes, punish them for those crimes, commit them for treatment, and provide treatment to them as best possible under chapter 25-03.3.

The context of my remarks should begin with the recognition that individuals with disabilities are especially vulnerable to sexually dangerous individuals. It is most important that the Legislature effectively protect individuals with disabilities from sexual predators. I do not wish to compromise that principal.

I also recognize that an individual with a disability might unfairly be subject to a chapter 25-03.3 commitment proceeding. I learned today that

the State has been unsuccessful in its efforts to commit seven individuals under chapter 25-03.3. This is nearly 20 percent of all chapter 25-03.3 commitment proceedings.

If HB 1289 had been law, these seven individuals would be living where the public knows intimate details of their psychiatric histories. Seven is a small number but each deserves the confidentiality of their mental health records.

Enactment of HB 1289 would not help us to (a) identify more sexual predators, (b) more reliably identify sexual predators, (c) better protect potential victims, (d) protect more potential victims, (e) make the criminal process more effective or more efficient, or (f) facilitate effective treatment of sexual predators.

Several more moderate alternatives might better protect privacy while still providing more information to the public.

One alternative would be to tell the public that a commitment proceeding is underway against a specific individual. This is not done now. This would publicize the individual's name but continue to protect the privacy of medical and psychiatric records. At the conclusion of a commitment proceeding, the State could notify the public of the outcome.

A second alternative would be to give the District Court discretion to disclose psychiatric information at the conclusion of a successful

commitment proceeding. The District Court could make this decision in order to achieve the goals of chapter 25-03.3. Under this alternative, psychiatric information would not be disclosed if the individual were not committed.

I did not mention this morning section 3 of HB 1289. This provision would establish that disclosure of "individually identifiable health information" in the context of a chapter 25-03.3 commitment proceeding is a disclosure for "treatment." This is inconsistent with the term "treatment" as used in the federal Health Insurance Portability and Accountability Act (HIPAA). See 45 C.F.R. § 164.504. The disclosures would already be permitted by HIPAA because they would be "required by law." See 45 C.F.R. § 164.512 (a) and (e).

If the commitment proceeding were public as proposed by HB 1289, any disclosure in open court would also have to comply with HIPAA. Following my interpretation above, an additional amendment would appear unnecessary under the terms of 45 C.F.R. § 164.512 (a) and (e). If my interpretation is mistaken, you may need to consider HIPAA's effect on disclosure of medical records in open court.

Current law allows a court to admit an individual with a "legitimate interest" into a confidential commitment proceeding. Sections 4 and 5 of HB 1289 offer "technical" amendments to delete this provision, assuming the

hearing becomes open to the public. Because this law deals with the privacy of medical records, it would be imprudent to allow everyone into a chapter 25-03.3 proceeding. The term "legitimate interest" gives the District Court adequate discretion to make reasonable decisions over who may attend a hearing under current law.

If the Committee accepts the amendments proposed in Sections 1, 4, and 5, I recommend that it include additional provisions in sections 4 and 5. These provisions should acknowledge the court's authority to close the hearing or to receive some evidence in camera (outside the public hearing), to not disclose it in the public hearing, and to seal that evidence as confidential in the court file. Otherwise, HB 1289 may lead courts to believe the Legislature intends that all hearings be open.

I offer to draft amendments to this bill if you wish.

Thank you.

TESTIMONY OF THE OFFICE OF ATTORNEY GENERAL
ON H.B. 1289
AMENDMENTS TO THE STATUTE PROVIDING FOR
CIVIL COMMITMENT OF SEXUAL PREDATORS

BEFORE THE
HOUSE JUDICIARY COMMITTEE
JANUARY 24, 2005

JEAN R. MULLEN
ASSISTANT ATTORNEY GENERAL
OFFICE OF ATTORNEY GENERAL

Chairman DeKrey and Members of the Committee, I am pleased to be here to testify about H.B. 1289, amendments to Chapter 25-03.3 of the North Dakota Century Code. Chapter 25-03.3 is the statute that provides for the civil commitment for treatment of sexual predators.

BACKGROUND OF CHAPTER 25-03.3

Chapter 25-03.3 establishes a judicial procedure for commitment of sexually dangerous predators, similar to the procedure for commitment of mentally ill individuals. Under the chapter, the state's attorney, as petitioner, must show the individual has engaged in sexually predatory conduct and has a mental disorder that makes the individual likely to engage in further acts of sexually predatory conduct, thus making the individual a danger to the physical or mental health or safety of others. A respondent is committed to the care, custody, and control of the executive director of the Department of Human Services for treatment in the least restrictive environment. The commitment is until the individual is considered safe to be in the community.

The Attorney General's Office, which originally initiated the commitment legislation, has continued to be involved in the implementation of the statute,

working with state's attorneys and the Department of Human Services, most specifically the State Hospital staff, to address concerns that have arisen since the statute's enactment in 1997. In 2001, the Attorney General's Office, along with a coalition composed of Department staff, treatment professionals, and advocates for the disabled, worked on amendments to fine tune the statute and to include the commitment of sexual predators with mental retardation, a group of predators that had been omitted from the original statute. In adopting this amendment, numerous additional amendments were developed and adopted to protect the procedural rights of this group of disabled individuals.

H.B. 1289 AMENDMENTS

Section 1 of H.B. 1289: Open records.

In 2004, a taskforce comprised of representatives of the Legislature, the media, law enforcement, higher education and political subdivisions met numerous times to review the status of the open records/open meetings laws. The members of the taskforce examined many different open records and meeting issues and worked hard to find reasonable and practicable solutions that were consistent with the original spirit and intent of the law.

Included in the open records laws reviewed was the statute providing for civil commitment of sexual predators. The current status of the law is that the proceedings for civil commitment and the evidence used in a proceeding are confidential and not available to the public. See N.D.C.C. § 25-03.3-03(2). The only open record that is available is the fact that an individual has been committed for treatment as a sexual predator and, when released from the State Hospital, the

fact of the release. The task force concluded that this limited information failed to properly inform the public about these dangerous individuals.

Section 1 of H.B. 1289 amends section 25-03.3-03 to require that all such proceedings and evidence are open records and available to the public. In reviewing the civil commitment law for sexual predators in light of the Dru Sjodin case, the members of the taskforce were of one mind that the public should be informed that individuals were being referred for civil commitment and that state's attorneys were taking necessary steps to petition for civil commitment, when appropriate. Further, the taskforce members believe that the evidence that supports such civil commitments should be available to the public. This amendment will accomplish those objectives.

Section 2: Notification of Attorney General's office.

Currently, when a sexual predator/inmate has a release date from incarceration within the following year, the treatment department at the North Dakota State Penitentiary conducts a review and makes a determination if the inmate should be considered for civil commitment. The treatment department reviews the inmate's prior sexual crimes, behavior while incarcerated, compliance with sexual offender treatment programs, and completes an actuarial assessment of these factors, among other things. If the treatment department decides the inmate should be considered for civil commitment, they advise the appropriate state's attorney of the release date and recommend that the state's attorney review the inmate's record for possible civil commitment. If the state's attorney decides that he does not intend to petition for civil commitment, the

Attorney General's Office has the option of reviewing the case to see whether it should proceed with a petition for commitment. The current law requires the state's attorneys to advise the Attorney General's Office of their intention not to petition for civil commitment, however, there is no specific time at which this needs to be done. This amendment requires that it be done at least 60 days before the release date. This will provide the Attorney General's Office sufficient time to review the case and, if the Office decides to proceed with civil commitment, to file a petition to detain the inmate before the inmate is released into the community.

Section 3: HIPAA Conforming Requirement.

This is primarily a clean-up amendment to ensure consistency with the federal and state HIPAA (Health Insurance Portability and Accountability Act) requirements. It eliminates any confusion that otherwise confidential psychological and medical information of an individual being considered for civil commitment as a sexual predator can be made available to those involved in civil commitment proceedings, including the courts, state's attorneys, other counsel, the state hospital, and reviewing experts.

Section 4 and 5 of H.B. 1289: Open Records/Open proceedings.

These sections provide amendments to the sections in the civil commitment statute that provide for the preliminary hearing and the commitment hearing to conform these statutory sections to the open records requirement in Section 1 of H.B. 1289, discussed above. Those sections currently require a

court to exclude all unnecessary individuals from the hearings. The amendments merely strike the sentence that includes that requirement.

Thank you for providing me an opportunity to discuss the amendments to the North Dakota statute for civil commitment of sexual predators contained in H.B. 1289.

No Name Available
Did not testify.

TESTIMONEY
BEFORE THE JUDICIARY COMMITTEE

SEXUALLY DANGEROUS INDIVIDUALS

Monday, January 24, 2005

Good morning members of the Committee. I am a concerned citizen.

I am concerned regarding HB 1289 - Making evidence presented at a commitment hearing, preliminary hearing, or commitment proceedings of a sexually dangerous individual open, notice to attorney general and release of medical ID health information. What happened to these peoples' civil rights? Where is their right to privacy? These people are not being given a chance to get a place to live or a job to become a productive member of society.

Please don't become like Minnesota, paranoid and turning their back on an individual who is trying to get his life back together.

Please don't let our State regress back to the San Haven-Grafton days when the mentally ill were civilly committed because no one wanted them in their community. It took the ARC to get these individuals back in the community. What group will come forward for these people to help them become productive individuals in the community rather than a drain on the state's economy?

#1

Senate Judiciary Committee
Fifty-ninth Legislative Assembly of North Dakota
House Bill No. 1289
March 16, 2005

Chairman Traynor and Members of the Senate Judiciary Committee, I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project. The Protection & Advocacy Project advocates on behalf of people with disabilities.

Individuals with disabilities are especially vulnerable to sexually dangerous individuals and it is important to effectively protect them from sexual predators. As well, an individual with a disability might be subject to a chapter 25-03.3 commitment proceeding.

I learned recently that the State has been unsuccessful in its efforts to commit seven individuals under chapter 25-03.3. This is nearly 20 percent of all chapter 25-03.3 commitment proceedings. In its current form, HB 1289 would have made the private medical and psychiatric information of each of these seven individuals available to everyone -- even though none of the seven met the standards for commitment.

In its present form, if HB 1289 were law, every person subject to a commitment proceeding would lose. That is, even though there was a judicial decision that an individual cannot be committed under chapter 25-03.3, the public would have the intimate details of that individual's medical and psychiatric health and history. This consequence would be the

unjustifiable and widespread publication of the most private information of individuals who legally are not "sexually dangerous."

Every commitment proceeding under chapter 25-03.3 would invite an atmosphere hostile to justice and treatment concerns. Open proceedings would invite sensationalist news coverage that would frustrate the purpose of the commitment proceeding.

Enactment of HB 1289, as written, would not help us to (a) identify more sexual predators, (b) more reliably identify sexual predators, (c) better protect potential victims, (d) protect more potential victims, (e) make the criminal process more effective or more efficient, or (f) facilitate effective treatment of sexual predators.

Under current law, the public has sufficient opportunity to acquire information to effectively protect potential victims. Information becomes public from initial crime reports, investigation of the crime, identification of suspects, the narrowed list of suspects, the search for suspects, apprehension of suspects, initial court appearances, arraignment, preliminary hearing, criminal trial, witness testimony, forensic evidence, opening and closing arguments of the prosecutor and defense counsel, the conviction, a hearing for sentencing, the online list of registered sex offenders, announcements at the release of an offender from prison, and ongoing reports of the offender's residences.

Those proceedings are separate from the commitment's focus on treatment. It would not facilitate the process to allow all comers, regardless of purpose, to attend a commitment and treatment proceeding.

Mental health commitment proceedings and now sex offender commitment proceedings have always been open only to those with a legitimate purpose in attending. These include expert mental health examiners, fact witnesses, a judge, a lawyer that advocates for commitment, the respondent, and respondent's lawyer. It serves no one to invite everyone into a commitment proceeding.

Under current law, the district court has adequate discretion to permit someone with a term "legitimate interest" to attend a hearing under current law. It is unclear why the law should permit attendance by those without legitimate interests.

HB 1289 states that the disclosure of intimate medical and psychiatric information is a disclosure for "treatment" when disclosure is to a court, a state's attorney, the respondent's lawyer, and any mental health professional. As written, a disclosure would be for "treatment" even though the mental health professional had no connection to the respondent or to testimony for the petitioner or for the respondent.

This provision apparently is to satisfy the provisions of the federal HIPAA privacy laws. It is a long stretch to fit these disclosures into HIPAA's definition of treatment,

> "the provision, coordination, or management of health care and related services by one or more health care providers, including the coordination or management of health care by a health care provider with a third party; consultation between health care providers relating to a patient; or the referral of a patient for health care from one health care provider to another."

HB 1289 does not address HIPAA provisions as they govern disclosure of medical and psychiatric information to the media or to the general public who might choose to attend a chapter 25-03.3 commitment proceeding. This omission invites wasteful litigation.

Several moderate alternatives might provide useful information to the public.

One alternative would be to tell the public that a commitment proceeding is underway against a specific individual. This is not done now. This would publicize the individual's name but continue to protect the privacy of medical and psychiatric records. At the conclusion of a commitment proceeding, the State could notify the public of the outcome.

A second alternative would be to give the District Court discretion to disclose psychiatric information at the conclusion of a successful commitment proceeding. The District Court could make this decision in order to achieve the goals of chapter 25-03.3. Under this alternative, psychiatric information would not be disclosed if the individual were not committed.

If the Committee accepts the amendments proposed in Sections 1, 4, and 5, I recommend that it include additional provisions in sections 4 and 5. These provisions should acknowledge the court's authority to close the hearing or to receive some evidence in camera (outside the public hearing), to not disclose it in the public hearing, and to seal that evidence as confidential in the court file.

I support the amendment offered in section 2, which would require a state's attorney to give at least 60 days notice to the attorney general before release of a criminal after referral for commitment as sexually dangerous.

I offer to draft amendments to this bill if you wish.

Thank you.

distributed 3/22/05 by David Brock

Proposed Amendments to House Bill 1289

Page 1, line 1, remove "section 25-03.3-03,"

Page 1, line 2, remove the first comma and replace "sections 25-03.3-05, 25-03.3-11, and 25-03.3-13" with "section 25-03.3-15"

Page 1, lines 3 and 4, remove "making evidence presented at a commitment hearing, preliminary hearing, or commitment proceeding of a sexually dangerous individual open,"

Page 1, line 4, after the second comma, insert "and"

Page 1, line 5, remove the comma and replace "release of medically identifiable health information" with "public"

Page 1, lines 7, through page 2, line 2, remove Section 1

Page 2, line 7, after the period insert "A state's attorney's decision to pursue or not to pursue commitment under this chapter, following the receipt of a referral, must be made available for public disclosure."

Page 2, lines 8 through 28, remove Section 3

Page 2, line 29 through page 3 line 22, remove Section 4

Page 3, line 23 through Page 4, line 19, remove Section 5

Page 4, after line 19, insert

Section 6. Amendment. A new subdivision of subsection 1 of section 12.1-32-15 of the North Dakota Century Code is created and enacted as follows:

"Commitment status" means the condition of a sexual offender for purposes of chapter 25-03.3 commitment processes as not having been the respondent in a commitment proceeding, as being the respondent in a pending commitment proceeding, as being a committed individual as a result of a commitment proceeding, as

as having been found not committable by a court in a commitment proceeding.

Section 7. Amendment. Subsection 13 of section 12.1-32-15 is amended and reenacted as follows:

"13. Relevant and necessary conviction information, ~~and~~ registration information, or commitment status must be disclosed to the public by a law enforcement agency if the individual is a moderate or high-risk and the agency determines that disclosure of the conviction information, ~~and~~ registration information, or commitment status is necessary for public protection. The attorney general shall develop guidelines for public disclosure of offender registration information. Public disclosure may include internet access if the offender:

"a. Is required to register for a lifetime under subsection 8;

"b. Has been determined to be a high risk to the public by the department, the Attorney General, or the courts, according to guidelines developed by those agencies; or

"c. Has been determined to be a high risk to the public by an agency of another state or the federal government.

"If the offender has been determined to be a moderate risk, public disclosure must include, at a minimum, notification to the victim of the offense and to any agency, civic organization, or group of persons who have characteristics similar to those of a victim of the offender. Upon request, law enforcement agencies may release conviction and registration information regarding lower risk, moderate risk, or high-risk offenders."

Renumber accordingly

Proposed Amendment to House Bill 1289

Page 4, after line 19, insert:

"Section 8. Amendment. A new subsection 3 of section 25-03.3-03 is created and enacted as follows:

"3. Notwithstanding the provisions of subsection 2, upon commitment of a respondent under this chapter, the district court may order the disclosure of any **part** of the petition and any evidence from the commitment proceeding after having determined that its disclosure ~~**will**~~ **would** serve the purposes of **this** chapter ~~**25-03.3**~~. The committed individual is entitled to a hearing on disclosure before the information is disclosed."

Renumber accordingly

Traynor, John T.

From: David Boeck [dboeck@pioneer.state.nd.us]
Sent: Thursday, March 17, 2005 2:52 PM
To: Trenbeath, Thomas L.; Nelson, Carolyn C.; Triplett, Constance T.; Syverson, John O.; Traynor, John T.; Hacker, Nicholas P.
Cc: s_jud_ndla@state.nd.us
Subject: HB 1289 Amendments
Sensitivity: Confidential

TO: The Honorable John T. Traynor, Senator and Chairman
The Honorable John Syverson, Senator and Vice Chairman
The Honorable Nicholas Hacker, Senator
The Honorable Thomas Trenbeath, Senator
The Honorable Carolyn Nelson, Senator
The Honorable Constance Triplett, Senator

Attached are proposed amendments to HB 1289.

This set of amendments would allow public disclosure of an offender's status under chapter 25-03.3. This includes the status of never having been subject to a chapter 25-03.3 proceeding, as being the subject of a current proceeding, as having been committed, as having completed treatment subsequent to commitment, and having been found not committable in a chapter 25-03.3 proceeding. This information is status with regard to the commitment law, not "individually identifiable health information." HIPAA would not apply.

This set of amendments would retain the confidentiality of commitment evidence and hearings ... except that those with legitimate interests (as determined by the district judge) could attend hearings and observe the evidence.

This set of amendments would preserve the confidentiality of medical and treatment information, while disclosing to the public all useful information.

I will draft an additional amendment that would permit the District Court to disclose medical and treatment information to the public only for offenders who had been committed.

Please let me know if you have questions or if you would like me to draft changes to these amendments or to draft new amendments. Thank you.

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