

2011 HOUSE POLITICAL SUBDIVISIONS

HB 1075

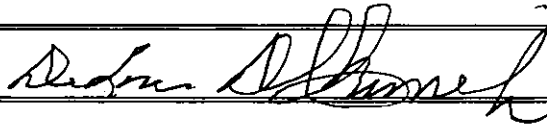
2011 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee
Prairie Room, State Capitol

HB 1075
January 13, 2011
Job # 12875

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the recovery of records.

Minutes:

Testimony 1

Chairman Johnson: Opened the hearing on HB 1075.

Ann Jenks, State Archivist, State Historical Society of ND: (See testimony #1).

Rep. Koppelman: As I look at language that is here from current law it appears this activity is already illegal so I am surprised the eBay didn't respond if you pointed out to them this is an illegal act. Other than naming an agency specifically how do you hope that this will change things? Did you contact anyone at the Attorney General's Office or anyone in law enforcement about that incident?

Ann Jenks: The county auditor did refer to their attorney for follow up on it. The Council of State Archivist is an organization of all the states and they are working with eBay and the manuscript society to get an agreement so they realize these articles are not to be put out for sale to the general public. The current law does not say what will happen if someone sold or took files when they leave office. It just says he shouldn't do that. This does have some fort of follow up to it.

Rep. Hatelstad: The word why the agency may initiate legal action; does that indicate that some are not worth recovering and therefore the law enforcement people have an option? If it is an illegal act shouldn't they initiate action?

Edward Erickson, Attorney General's Office: Just put in the word may to allow for the exercise of discretion. Prosecutor's do have the option for what cases they and do not pursue based on their resources and evidence. We don't want someone feeling they are compiled under a duty to bring an action that they do not believe they would win. They would just waste the public's time and money.

Rep. Zaiser: Do you think this is necessary or redundant legislation?

Edward Erickson: I am here to work with the State Historical Society. The Attorney General is not taking a position for or against. We saw we already have some provisions in law, but not everything to bind it together. We already have laws stating the government records; both at the state and at the local political subdivision level are government property and may only be disposed of according to law. We also have laws governing theft and as referenced in the bill we also have a chapter on claim and delivery. This was designed to bring all those pieces together and provide some direction to state agencies and political subdivisions on exactly what their duties are in relation to their records when they become aware that records are missing and inappropriately not present. We have had a number of instances as Ann Jenks was relating; we have had some instance where county records have been taken by a county employee and placed on eBay. That matter was referred back to the County Auditor and County State's Attorney for follow up and investigation.

Rep. Shirley Meyer: What constitutes a record?

Edward Erickson: The definition of record in records management is anything relating to government work. The definition for records on the open records law is not only paper records, but also encompasses electronic as well. The open records law is extremely broad based and would even include the notes you are making. The definition of records management is things used within the government itself. I don't have references here so I don't want to get into them specifically.

Rep. Beadle: Testimony that was presented by Ms. Jenks she included Chapter 54-46-07 of the Century Code has the definition for records as it pertains to statutes.

Rep. Klemin: I am getting a garage full of notes and these things from our past sessions in the legislature and I wonder if I could get the state achieve to store them for me instead of putting them in my garage? You did say my notes were public records.

Edward Erickson: They are for all my boards and all my agencies. One of the first things I tell new members is you are now working for the government and your actions on this board are public actions so the open records law apply and the open meeting laws apply. I have told them not write down something you do not want to see printed verbatim on the front page of the tribune.

Rep. Klemin: Are our notes we write down during the hearing subject to review by media?

Edward Erickson: I do not know for sure if there is an exception for the legislatures, but it is true of State agencies. I think this bill is designed toward specific records where we have a record retention requirement for example. Personal notes generally are not under a retention law. If they are just routine records and met their document disposal date then they can be thrown out in the garbage. I think the real interest in this bill is in records that under law are still required to be retained. There are different classifications and schedules on whether you keep a record or not.

Rep. Koppelman: What needs to be retained is the question. As I look at Chapter 32-07, which it references in terms of a remedy if one of those records are floating around

somewhere and the desire is to retrieve it seems to me you can send the sheriff out after it etc. Is there a criminal penalty for willfully using these records in an inappropriate way or selling or disposing of them? Looks like it is just a matter of just go and get it. Am I reading that correctly?

Edward Erickson: Existing law does address that including the theft of government records. If a person had stolen that record then the person would be charged criminally for the crime. What if that person has transferred it to a person that doesn't know that they are stolen property? We still need to retrieve those records; they are still the government's property. Maybe it would be inappropriate to charge that person with a crime if that person did not know if a crime was committed in the first place. The seller on eBay would be guilty of a crime but the purchaser would not have any reason to know that fact. Under the theft the person would not be able to be charged as accessory; they had no reason to know what they were doing was improper or even that the records were not this person's records that they could dispose of. We would go after that person that actually stole it under existing law.

Rep. Koppelman: If someone was a page for the State Legislature 30 years ago and made some notes during a floor session about pick up corn flakes etc. that is a state record according to this definition and they are violating the law if they don't turn it over? It seems like of silly.

Edward Erickson: We would be looking at whether these were records that were subject to retention by the government. I would suspect records like that would not be.

Rep. Koppelman: Where is the schedule and how does Rep. Klemin notes fall into that? You implied you give that advice to other boards and commissions and government etc.

Edward Erickson: That is part of the difference between open record definition and record retention schedule definition. For open record pretty much anything containing information is going to be a record as long as it is still in government possession. Those types of records can be disposed of at will if they are not on a schedule there is no reason to retain them. Once they have been disposed of I don't believe we would be going after them trying to retrieve them again.

Rep. Koppelman: Maybe the intern can find where the schedule of record retention is and what it includes.

Becky Lingo, State Records Management Administrator: The records that are on retention schedules that are the definition you have provided in your testimony. If they are created or received to conduct state business they are a state record and therefore need to be addressed on a retention schedule. Every state agency in the executive branch of state government has a retention schedule in place and they are available on our website. The legislative and judicial Branches of government can chose to follow our program or ask for assistance if they desire. We do have retention schedules in place for the judicial branch of government, but we do not have anything in place for the legislative branch. We have approached them many times over the last 25 years and they are not interested in our assistance and that is their right. The difference between state records on retention

schedule and open records; they are different. Open records is much boarder. State records for retention schedule are only those records that an agency creates or receives to do their business.

Rep. Koppelman: The definition for a record; essentially anything we do in the legislature would fall under that according to how you just defined it. You said we are not on any retention schedule which means while the open records issue is still an issue perhaps, they aren't subject to any schedule and therefore disposing of them is not an issue.

Becky Lingo: That is correct.

Rep. Kretschmar: Do you have any idea of the volume of things that are out there?

Becky Lingo: I do not. I know we are seeing an increase in activity of state achieve coming upon state records that are available on eBay or coming in from private individuals.

Opposition: None

Neutral: None

Rep. Koppelman: I think we should ask our intern to do some research on the whole issue of what constitutes a record in ND because on the national level we hear all the time about Presidential Libraries that contain numerous records that administration keeps for example and we hear about personal papers from different public officials and yet we are being told today that every think we do belongs to the public and I am just not sure; and if that is accurate it might be something we might want to look at. Maybe Jessica you can determine what other states do?

Rep. Klemin: I would ask also if she finds ND statues that might apply to the legislature which would have an effect on my notes or something like that.

Chairman Johnson: I think we were told our emails were private and not subject to the open records law.

Hearing closed.

2011 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee
Prairie Room, State Capitol

HB 1075
February 4, 2011
Job # 14010

☐ Conference Committee

Committee Clerk Signature



Minutes:

Proposed amendment #1

Chairman Johnson: Reopened the hearing on HB 1075. Was the bill that talked about the records being sold on eBay and really should belong to the state or the political subdivision whoever records they are.

Rep. Koppelman: (See proposed amendment)

Motion Made by Rep. Maragos to approve the amendments. Seconded by Rep. Koppelman:

Discussion:

Rep. Koppelman: Went over the amendment.

Rep. Klemin: I think there is an error in this amendment. It really isn't amending HB 1075, but what it appears to be doing is adding a Section 2 to it. Looks like it should be Section 2 amendment? Section 1 looks like it would stay the way it is in the original bill. We were given a copy of 54-04-46 on records management. There is a section there 54-46-02 which this amendment is amending Subsection 3 define state record; Subdivision b states a record of state assembly. What this would do is say that a record is not a record of state assembly unless it is held by an agency. I think this amendment goes a little too far because all the records of the state legislative assembly would not be state records under this amendment.

Rep. Koppelman: Let me explain some of that. I discussed this after our committee hearing with Mr. Bjornson from the legislative council and tried to get at what was really intended by the bill and what some of the other ramifications might be. The section of law that the bill amends deals specifically with state records and specifically with the executive branch of government so Rep. Klemin is correct in his assumption. There is another section of code that specifically deals with records of the legislative assembly. So state records management only deals with records which are in the possession of the executive

branch of government. That is what we were trying to get at with the amendment was to clarify. I also visited with Mr. Bjornson's suggestion with Mary Kay Kelsh from the Attorney General's office and she is the expert on open meetings and records etc. She also had some concerns about the bill. They were going to get together and put something together that made sense to clarify this because she had even other concerns beyond what he was concerned about. So this ended up on my desk. I think Rep. Klemin is correct and so my suggestion is that we take this back and revisit with them and have them explain it. So I withdraw my second on the motion. Rep. Maragos withdrew his motion on the amendment.

Chairman Johnson: If 54-46 just talks about the records of the executive branch so what it is saying by this amendment. The original bill is just dealing with records of the executive branch. She also talked when she testified that political subdivisions that might have county records that are out there floating. I am a little confused. This would put it in 54-46, just with the executive branch; then the amendment would say any record of state legislative assembly held by an agency of the executive branch, which would say what we told legislatures, is not there.

Rep. Koppelman: You are correct. That is the intent. That section of code deals with the executive branch and there is a different section that deals with the legislative branch and there is also a policy on how those records are dealt with. The executive branch of legislative policy only relates to those records that are in the possession of those in the executive branch even though they might be legislative related. It should try to govern what council does with the records on our branch of government.

Rep. Klemin: the concern is what about our personnel notes? Does this address that?

Rep. Koppelman: Yes it does indirectly. I am told by legislative council the way our records are maintained in the legislative branch of government is governed by that other chapter in law.

Hearing closed.

2011 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee Prairie Room, State Capitol

HB 1075
February 10, 2011
Job # 14341

☐ Conference Committee

Committee Clerk Signature



Minutes:

Proposed amendment #1

Chairman Johnson: Reopened the hearing on HB 1075. This is talking about documents that are property of state officials and state records. Rep. Koppelman did some work on this.

Rep. Koppelman: (See proposed amendment) We can dispose of the prior proposed amendments because this second one does replace it. It was introduced at the request of the State Historical Society and it had to do with record retention and destruction and misuse and all that sort of thing. It related to the eBay story. The question that came up was in regard to legislative records. This section of law does not deal with legislative records. It deals with the executive branch agencies. It does site legislative records; however and that is why the amendment you see under Item b we want to add the words held by an agency. This would further clarify that those records are being retained here. The protections we discussed are in place for the legislature so what you have in front of you and you take it home and throw it away; that is just fine because it is your notes etc.. Went over the amendment.

Motion Made by Rep. Koppelman to move the 01002 amendment; Seconded by Rep. Beadle.

Chairman Johnson: I will read it starting on the end of line 10 it would state agency and political subdivision of this state shall notify the state records management administrator unlawful actions affecting records. Public records that have been unlawfully removed must be returned to the office of origin or to the state archivist.

Rep. Shirley Meyer: Say I return them and I have unlawfully removed them, can I be criminally prosecuted for doing that?

Rep. Koppelman: I am not sure. If you can be you can be under current law. They mainly want the records back.

Rep. Mock: Having in law was enough for the state archivist to reproach eBay or on line auction and say this is being sold and it is against the law we need this off the listing. I think that is all we really needed was the law so they have the authority to request eBay to pull the listing and try to get the material back.

House Political Subdivisions Committee

HB 1075

February 10, 2011

Page 2

Voice Vote Carried.

Do Pass As Amended Motion Made by Rep. Koppelman: Seconded by Rep. Heilman:

Discussion: None

Vote: 14 Yes 0 No 0 Absent Carrier: Rep. Koppelman:

Hearing closed.

#1

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1075

Page 1, line 1, after "reenact" insert "subdivision b of subsection 3 of section 54-46-02 and"

Page 1, after line 3, insert:

"SECTION 1. AMENDMENT. Subdivision b of subsection 3 of section 54-46-02 of the North Dakota Century Code is amended and reenacted as follows:

- b. A record of the state legislative assembly held by an agency."

Renumber accordingly

Date: 2-11-11
Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1075

House Political Subdivisions Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt
Amendment

☐ Rerefer to Appropriations ☐ Reconsider _____

Motion Made By Rep. Maragos Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson			Rep. Kilichowski		
Vice Chairman Hatelstad			Rep. Shirley Meyer		
Rep. Beadle			Rep. Mock		
Rep. Devlin			Rep. Zaiser		
Rep. Heilman					
Rep. Klemin					
Rep. Koppelman					
Rep. Kretschmar					
Rep. Maragos					
Rep. Pietsch					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Withdrawn

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1075

Page 1, line 1, after "reenact" insert "subdivision b of subsection 3 of section 54-46-02 and"

Page 1, line 2, after "to" insert "the definition of records and"

Page 1, after line 3, insert:

"SECTION 1. AMENDMENT. Subdivision b of subsection 3 of section 54-46-02
of the North Dakota Century Code is amended and reenacted as follows:

b. A record of the state legislative assembly held by an agency."

Page 1, line 12, remove "The state agency or political subdivision may"

Page 1, remove line 13

Page 1, line 14, replace "possession of any public" with "Public"

Page 1, line 14, replace "which" with "that"

Page 1, line 14, remove "in violation of this"

Page 1, line 15, remove "section. These records"

Renumber accordingly

Date: 2-18-11
Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1075

House Political Subdivisions Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 11.8029.01002

Action Taken ☐ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt
Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Koppelman Seconded By Rep. Beadle

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson			Rep. Kilichowski		
Vice Chairman Hatelstad			Rep. Shirley Meyer		
Rep. Beadle			Rep. Mock		
Rep. Devlin			Rep. Zaiser		
Rep. Heilman					
Rep. Klemin					
Rep. Koppelman					
Rep. Kretschmar					
Rep. Maragos					
Rep. Pietsch					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

*Vote
Carried*

VK
2/11/11

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1075

Page 1, line 1, after "reenact" insert "subdivision b of subsection 3 of section 54-46-02 and"

Page 1, line 2, after "to" insert "the definition of records and"

Page 1, after line 3, insert:

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Page 1, remove line 13

Page 1, line 14, replace "possession of any public" with "Public"

Page 1, line 14, replace "which" with "that"

Page 1, line 14, remove "in violation of this"

Page 1, line 15, remove "section. These records"

Renumber accordingly

Date: 2-10-11
Roll Call Vote #: 2

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1075

House Political Subdivisions Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt
Amendment

☐ Rerefer to Appropriations ☐ Reconsider _____

Motion Made By Rep. Koppelman Seconded By Rep. Heilman

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson	✓		Rep. Kilichowski	✓	
Vice Chairman Hatelstad	✓		Rep. Shirley Meyer	✓	
Rep. Beadle	✓		Rep. Mock	✓	
Rep. Devlin	✓		Rep. Zaiser	✓	
Rep. Heilman	✓				
Rep. Klemin	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Pietsch	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Koppelman

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

REPORT OF STANDING COMMITTEE

HB 1075: Political Subdivisions Committee (Rep. N. Johnson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1075 was placed on the Sixth order on the calendar.

Page 1, line 1, after "reenact" insert "subdivision b of subsection 3 of section 54-46-02 and"

Page 1, line 2, after "to" insert "the definition of records and"

Page 1, after line 3, insert:

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Page 1, line 14, replace "which" with "that"

Page 1, line 14, remove "in violation of this"

Page 1, line 15, remove "section. These records"

Renumber accordingly

2011 SENATE POLITICAL SUBDIVISIONS

HB 1075

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee Red River Room, State Capitol

HB 1075
March 14, 2011
15224

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the definition of record and the recovery of records.

Minutes:

You may make reference to "attached testimony."

Chairman Andrist opened the committee hearing for HB 1075, relating to the definition of records and the recovery of records.

Ann Jenks, State Archivist at the State Historical Society. Support of HB 1075. See written testimony.

Senator Andrist: It is almost impossible to stop people from destroying old records, but if there moving them and you find out about them, this would give you a means to recover them, is that what I am understanding? **Ann Jenks:** It would give us a means to recover them but more importantly it would give Becky the state records administrator more ability to say to the clerks and recorders, auditors and treasurers, state agency officials that with these records, there is a certain set of rules you are supposed to follow. The records go from the governmental entity either to destruction or to the State Archives and that they don't go home and go to the garage sale and e-bay.

Chairman Andrist: So what you would do is mostly through contacts with county auditors and people like this? You would apprise them of the rule and if we pass this, it has some teeth in it because you have the right to reclaim them. Is that right? **Ann Jenks:** That's right.

Senator Olafson: Some of the records that would be affected by this are records that are maintained in private homes. Example cited of a township clerks records. These records would be affected by that and they are kept in his office in his home. That is a concern for me. What happens if he passes away and the family doesn't know these records should be maintained? There is concern they may not be properly redirected, so how do you see the education process working to educate the general public on some of those types of records? **Ann Jenks:** We have picked up township records from family members of township commissioners or clerks that recognize the value of them and they called us. I think it says in the Century Code in the township section that there is a list of the records that when they are no longer of use to the township they are supposed to contact the State

Archives and offer them to us. It is more our duty to inform the officials and the general public because when records go from the county courthouse to the local museum or Historical Society, it was simply because the auditor or treasurer or commissioners did not understand that wasn't the way it was supposed to go. But I do think that just by speaking to the North Dakota Township Officers Association. It would go a long way towards making them aware of the value of the records.

Chairman Andrist: So your intent is to find a way to preserve the valuable records? Can you elaborate on this just a bit more? What kind of records are you specifically losing that you're concerned with? Example shared of published newspaper keeping old photographs and eventually throwing some of them. So probably a lot of people aren't aware that there might be something out there that you would want to have.

Ann Jenks: That is a whole another area we are interested in historical photographs and manuscripts at the State Historical Society, but those don't fall under the government pervue so, that wouldn't pertain to this bill at all. It is just the records that are created during the course of business.

Chairman Andrist: Would you like to look at old photographs before I would throw them away? **Ann Jenks:** We do and we've had some success in putting scans of photos on our digital horizons website and then members of the public will email and let us know who the people are in the picture.

Senator Olafson: I don't see there is any penalty provided in chapter 54; neither in the bill or anywhere on the rest of the chapter you provided. So is there a penalty that could be applied for someone who would knowingly put these records on e-bay for public auction?

Ann Jenks: When we submitted the bill originally in the House, it did have some language that was removed about a section in the century code where we could recover these items and Edward Erickson of the Attorney Generals' office looked at the change that was made in the bill he said that it didn't concern him that same code section could be used to recover records.

Senator Olafson: The section of code provides that records can be recovered but it doesn't provide for a penalty for someone who is knowingly put those records out there for sale. That is two different things. Is there is a penalty put in place for this?

Ann Jenks: I don't believe the wording had a criminal penalty attached to it.

Senator Judy Lee: As far as the definition of public records go; just tax statements and so forth? I am assuming this language in here says even though it doesn't say anything here about electronics records that it covers emails or does it and it should if it doesn't or should it if it doesn't? **Ann Jenks:** Yes, the language does.

Becky Engle, State Records Management Administrator: The definition basically is any records created to do official business for that entity, whether that's a county, city, state agency. It does include all formats of records, whether its' electronic, paper, videos, any type of format it does not matter. **Senator Judy Lee:** What obligation do we as legislators

have to make our files available to you? **Becky Engle:** That I am not sure of. I had asked Edward that question yesterday for the State Records Management program. The statute applies to the Executive Branch of state government. They have to follow the state records management program. The Judicial Branch and Legislative Branch may follow it if they chose too, and the Judicial Branch has chosen to follow our program, the Legislative Branch has not. But as far as the members of the Legislative Assembly versus the officers and employees of Legislative Assembly, I am not sure of the record ramifications for the members of the Legislative Assembly.

Senator Judy Lee: I would understand that the minutes and documentation and the testimony the clerks have would be a part of it; but there are things that we may have in our personal files that I am not really crazy about sharing. **Becky Engle:** Well I think that's why when the bill left the House, they added that Section 1 amendment, which says the record of the state Legislative Assembly held by an agency. I think basically they are removing legislators from that coverage. **Senator Judy Lee:** I don't have anything insulting to anybody, its just I think all of us have messages that come from constituents with information that may not be accurate.

Senator Judy Lee: We would treat things differently if there were things that we needed to save and leave with you, and yet there are things we file on certain bills that are of particular importance or I think will be important to constituents in the next two years and I do take those bill files home. **Becky Engle:** We're not looking to limit the business that you do. Not everything that is traded has historical value. We haven't addressed the Legislative Assembly records.

Chairman Andrist asked for anyone to testify in support of this bill, in opposition to this bill, neutral information.

Hearing Closed on HB 1075.

Short Committee Discussion

Moved for Do Pass : Senator Olafson

2nd: Senator Laffen

Role Call Vote:

Carrier: Senator Laffen

Date: 3/10/2011
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1075

Senate Political Subdivisions Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator Laffen

Senators	Yes	No	Senators	Yes	No
Senator John Andrist	✓		Senator Curtis Olafson	✓	
Senator Lonnie Laffen	✓				
Senator Judy Lee	✓		Senator Jim Dotzenrod	✓	

Total (Yes) 5 No 0

Absent 0

Floor Assignment Senator Laffen

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

REPORT OF STANDING COMMITTEE

HB 1075, as engrossed: Political Subdivisions Committee (Sen. Andrist, Chairman)
recommends **DO PASS** (5 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed HB 1075 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

HB 1075

#1

Political Subdivisions Committee
January 13, 2011

Testimony by Ann Jenks, State Archivist
State Historical Society of North Dakota

Chairman Johnson and members of the Political Subdivisions Committee, my name is Ann Jenks and I am the Director of the State Archives for the State Historical Society of North Dakota. I am here today to present testimony on revision of Chapter 54-46-07 of the Century Code, Records not to be damaged or destroyed.

The Explanation:

The State Archives is concerned about the loss of historical records from the public arena to private collections, sometimes outside the state. These are often county, municipal and township records that have appeared for sale on eBay, in rare book catalogs, and in used book stores. The Archives has record of 34 local government records received from private individuals who purchased them at garage sales or came upon them in some other manner. Fortunately we have friends who when they find government records, purchase them and bring them to us, but this is not always the case.

In July 2008 over 40 county documents appeared in an eBay auction. I wrote to Ebay pointing out that these records belonged to the state of North Dakota and asked that the auction be halted. Ebay replied that they would tell the seller what I had said, but that I would not be informed of the outcome. I also contacted the county who referred the matter to the States Attorney. Without a law in place to recover records there was really no recourse.

The State Archives has recovered records that state officials had taken with them upon leaving office. Some individuals have the impression that records they create belong to them which needs to be corrected through education, to ensure records remain accessible to the public. Records Management and the State Archives reinforce this issue on a regular basis through presentations to groups such as the State Clerks Association and the League of Cities.

Chapter 54-46-02 of the Century Code defines a record as a: "document, book, paper, photograph, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business."

Creation of state and local government records is paid for by the citizens of North Dakota and should be available to them so they can understand and be aware of the actions of their government and the history of their state.

The State Records Administrator administers a records management program, which provides guidance for proper handling of state and local government records from creation to final disposition. Retention schedules are created for each government entity outlining how long each record in the office needs to be maintained. When the time for holding the record ends it is either destroyed or sent to the Archives. Records destruction is supposed to occur only through the operation of an approved retention schedule.

The intent of this bill is to protect the citizens' access to the records of their government. A law stating that at no point in the life cycle of a government record, can it fall into private hands or be sold, would assist in protecting that access.

This concludes my testimony. I would be happy to answer any questions you may have.

CHAPTER 54-46

RECORDS MANAGEMENT

54-46-01. Short title. This chapter must be known as the Records Management Act.

54-46-02. Definitions. As used in this chapter, unless the context or subject matter otherwise requires:

1. "Agency" means any department, office, commission, board, or other unit, however designated, of the executive branch of state government.
2. "Record" means document, book, paper, photograph, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of records as used in this chapter.
3. "State record" means:
 - a. A record of a department, office, commission, board, or other agency, however designated, of the state government.
 - b. A record of the state legislative assembly.
 - c. A record of any court of record, whether of statewide or local jurisdiction.
 - d. Any other record designated or treated as a state record under state law.

54-46-03. State records administrator. The chief information officer of the state or an individual designated by the chief information officer shall serve as the state records administrator, in this chapter referred to as the administrator. The administrator shall establish and administer in the executive branch of state government a records management program, which will apply efficient and economical management methods to the creation, utilization, maintenance, retention, and final disposition of state records.

54-46-03.1. Transfer of records management functions authorized. Repealed by S.L. 1985, ch. 82, § 162.

54-46-04. Duties of administrator. The administrator shall, with due regard for the functions of the agencies concerned:

1. Establish standards, procedures, and techniques for effective management of records.
2. Make continuing surveys of paperwork operations and recommend improvements in current records management practices including the use of space, equipment, and supplies employed in creating, maintaining, storing, and servicing records.
3. Establish standards for the preparation of schedules providing for the retention of state records of continuing value and for the final disposition of state records no longer possessing administrative, legal, or fiscal value.
4. Obtain reports from agencies as are required for the administration of the program.

54-46-05. Duties of agency heads. The head of each agency shall:

1. Establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.
2. Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities.
3. Submit to the administrator, in accordance with the standards adopted by the administrator, schedules proposing the length of time each state record series warrants retention for administrative, legal, or fiscal purposes after it has been received by the agency.
4. Submit to the administrator lists of state records in the custody of the agency which are not needed in the transaction of current business and which do not have administrative, legal, or fiscal value.
5. Cooperate with the administrator in the conduct of surveys made by the administrator pursuant to this chapter.
6. Comply with the rules, standards, and procedures adopted by the administrator.

54-46-06. Assistance to legislative and judicial branches. Upon request, the administrator shall assist and advise in the establishment of records management programs in the legislative and judicial branches of state government and shall, as required by them, provide program services similar to those available to the executive branch of state government pursuant to the provisions of this chapter.

54-46-07. Records not to be damaged or destroyed. All records made or received by or under the authority of or coming into the custody, control, or possession of public officials of this state in the course of their public duties are the property of the state and may not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of, in whole or in part, except as provided by law.

54-46-08. Determination necessary for final disposition of records. Prior to the final disposition of any type or class of record, the administrator, after consultation with the official or department head concerned, the attorney general, the state auditor, and the state archivist, shall determine that the type or class of record has no further administrative, legal, or fiscal value and is subject to final disposition under section 54-46-08.1 or section 54-46-09. If a statute requiring retention of a record does not either provide a specific retention period or specifically provide that the record be permanently retained, the administrator, after completing the consultation required by this section, shall establish a specific retention period for the record. The administrator shall annually survey the state agencies and shall order final disposition under section 54-46-08.1 or section 54-46-09 of any records which have been determined to have no further administrative, legal, or fiscal value pursuant to this section.

54-46-08.1. Preservation of records found to be archival resources. The official or department head concerned and the state archivist shall review any records determined to be subject to final disposition under section 54-46-08. Any records found to be of permanent value for research, reference, or other use appropriate to document the organization, function, policies, and transactions of government must be transferred to the state archivist for preservation as archival resources.

54-46-09. Destruction of nonrecord materials and nonarchival resources. Nonrecord materials or materials not included within the definition of records as contained in this chapter may, if not otherwise prohibited by law, be destroyed at any time by the agency in possession of such materials without the prior approval of the administrator. The administrator may formulate procedures and interpretation to guide in the disposition of nonrecord materials. Records determined to be subject to final disposition under section 54-46-08 and not found to be

of value as archival resources under section 54-46-08.1 must be destroyed by any suitable means as determined by the administrator.

54-46-10. Rules and regulations. The administrator shall promulgate such rules and regulations as are necessary or proper to effectuate the purposes of this chapter.

54-46-11. Annual report. The annual report of the information technology department made in accordance with section 54-59-19 must describe the status and progress of programs established pursuant to this chapter and must include the recommendations of the administrator for improvements in the management of records in the state government.

54-46-12. County, city, and park district records - Uniform system established by administrator. The administrator shall adopt rules in accordance with chapter 28-32 consistent with specific requirements of state law for a uniform system of cataloging, reproduction, retention, and final disposition of county, city, and park district records. Upon adoption of the rules all county, city, and park district offices, departments, and agencies may establish and maintain the uniform system prescribed by the administrator.

54-46-13. Rules for state and county social service records - Administrator to adopt. The administrator shall adopt rules in accordance with chapter 28-32 for state and county social service records. The rules adopted by the administrator must be consistent with records retention requirements imposed by federal law with respect to those records. The administrator, prior to adoption, amendment, or repeal of rules concerning state and county social service records, shall consult with the executive director of the department of human services.

54-46-14. Continued confidentiality of records. The head of an agency may provide, and the administrator may receive, any record necessary to effect the purposes of this chapter without regard to the confidential or secret nature of the information in the record. However, the administrator and agents or employees of the administrator involved with records management under this chapter are subject to the same restrictions and penalties regarding the dissemination of the information as are the personnel of the agency involved.

OPEN RECORDS SUMMARY

10/2010

ALL records of a public entity are open unless a specific statute makes a record or part of a record confidential or exempt. "Public entities" includes state agencies, political subdivisions, public schools, private businesses or non-profit organizations that are supported by or expending public funds, and contractors, if the contractor is providing services in place of a public entity. The courts are not subject to the open records laws.

Everyone has the right to access and obtain copies of public records. Access to public records is always free. A public entity may charge for finding or redacting records (after the first hour) and for making copies of requested records, but not for time spent copying records. A public entity cannot require a request be made in writing, ask the identity of the requester, or inquire about the reason for the request. The entity does not have to respond to questions about public records or compile a record that does not exist. Confidential records **must not** be released. Exempt records **may** be released but it does **not** violate the law if an entity refuses to provide these records. A public entity cannot refuse to provide an otherwise open record simply because it contains some confidential or exempt information; rather, that information must be redacted and the record provided (N.D.C.C. § 44-04-18.10) within a reasonable time (hours or a few days). An entity **must** provide the statutory reason for denying all or part of a record, and must put the denial in writing if requested (§ 44-04-18(7)).

OPEN RECORDS/ INFORMATION (MUST be released)

- Any communication with a public entity or official relating to public business, including minutes, memos, reports, outlines, notes, and other information kept for or relating to official business or public funds, regardless of format or location, including video & audiotape, computer data, e-mails, and photographs;
- Personnel records relating to salary and job performance;
- Financial records, telephone records, and travel vouchers of the public entity.

EXEMPT RECORDS/ INFORMATION (MAY be withheld at the discretion of the public entity)

- Personal information (address, phone number, driver's license number, DOB, dependent information and emergency contact) of public employees (§ 44-04-18.1(2)) or individuals licensed by a state occupational/professional board, association, agency, or commission (§ 44-04-18.1(4));
- The work schedule of employees of a law enforcement agency (44-04-18.3(3));
- Personal financial information of public employees used for payroll purposes (§ 44-04-18.1);
- Active criminal intelligence and criminal investigative information (§ 44-04-18.7);
- Attorney work product (§ 44-04-19.1(1));
- Financial account numbers (§ 44-04-18.9);
- Security system plans (§ 44-04-24);
- Critical infrastructure information vital to maintaining public safety, security, or health 44-04-24);
- Bids/proposals in response to an RFP; once all proposals received and opened or all presentations are heard, the information is open (§ 44-04-18.4(6));
- Identifying information (name/address/phone) that could be used to find a victim of domestic violence (§ 44-04-18.20);
- Public health, public security and threat response plans (§ 44-04-24, 44-04-25);
- Personal information of applicants/recipients of economic assistance programs administered under division of community services or a community action agency (§ 44-04-18.19);
- Fire department/rural fire protection district operating procedures/infrastructure plans (§ 44-04-30);
- E-mail address/phone number of an individual provided for purposes of communicating with a public entity, except that it may not be withheld to shield the person's identity (§ 44-04-18.21);
- Risk Management records of claims against the state/employee (§ 32-12.2-11(1)).

CONFIDENTIAL RECORDS AND INFORMATION (CANNOT be released)

* federal law (HIPAA)
may prohibit release
of health information
from other sources.

** criminal history re-
cords may be ob-
tained only from the
BCI. There is a statu-
tory fee for this infor-
mation.

- Social Security numbers (§ 44-04-28);
- Address & home phone of an employee of a law enforcement agency (§ 44-04-18.3);
- Any information that would reveal the identity of an undercover law enforcement officer (§ 44-04-18.3);
- Public employee medical treatment records (§ 54-52.1-12, § 44-04-18.1(1), Ch. 23-01.3);
- Employee Assistance program records (§ 44-04-18.1(1));
- Patient records at university system medical centers or public health authority* (§ 44-04-18.16);
- Criminal history records (§§ 12-60-16.5, 12-60-16.6);**
- Identifying information of a living child victim or witness of a crime, except in the case of traffic accident or victim of fire (§ 12.1-35-03);
- Names of persons injured or deceased, but only until law enforcement has notified the next of kin or for 24 hours, whichever occurs first; after that, the information is open (§ 39-08-10.1);
- Income tax and sales & use tax returns and information (§ 57-38-57), (§ 57-39.2-23);
- Autopsy photographs, images, and audio/video recordings, working papers & notes except the final report of death, which is open (§ 44-04-18.18), (§ 23-01-05.5);
- Electronic (computer or telecommunication) security codes and/or passwords (§ 44-04-27);
- Fire investigations until the investigation is completed, then the information is open (§ 44-04-30);
- WSI employer files, except a Safety Grant recipient's name and the amount awarded is open (§ 65-04-15);
- Law enforcement and correctional facility records of delinquent, unruly, or deprived child (§ 27-20-52(1)).

Political Subdivisions Committee
March 10, 2011

Testimony by Ann Jenks, State Archivist
State Historical Society of North Dakota

Chairman Andrist and members of the Political Subdivisions Committee, my name is Ann Jenks and I am the Director of the State Archives for the State Historical Society of North Dakota. I am here today to present testimony on revision of Chapter 54-46-07 of the Century Code, Records not to be damaged or destroyed.

The Explanation:

The State Archives is concerned about the loss of historical records from the public arena to private collections, sometimes outside the state. These are often county, municipal and township records that have appeared for sale on eBay, in rare book catalogs, and in used book stores. The Archives has record of 34 local government records received from private individuals who purchased them at garage sales or came upon them in some other manner. Fortunately we have friends who when they find government records, purchase them and bring them to us, but this is not always the case.

In July 2008 over 40 county documents appeared in an eBay auction. I wrote to Ebay pointing out that these records belonged to the state of North Dakota and asked that the auction be halted. Ebay replied that they would tell the seller what I had said, but that I would not be informed of the outcome. I also contacted the county who referred the matter to the States Attorney. Without a law in place to recover records there was really no recourse.

The State Archives has recovered records that state officials had taken with them upon leaving office. Some individuals have the impression that records they create belong to them which needs to be corrected through education, to ensure records remain accessible to the public. Records Management and the State Archives reinforce this issue on a regular basis through presentations to groups such as the State Clerks Association and the League of Cities.

Chapter 54-46-02 of the Century Code defines a record as a: "document, book, paper, photograph, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business." This language is similar to those describing a record in the laws of all 50 states.

Creation of state and local government records is paid for by the citizens of North Dakota. Public records should be available to them so they can understand and be aware of the actions of their government and the history of their state.

The State Records Administrator administers a records management program, which provides guidance for proper handling of state and local government records from creation to final disposition. Retention schedules are created for each government entity in the Executive Branch outlining how long each record in the office needs to be maintained. When the time for holding the record ends it is either destroyed or sent to the Archives. Records destruction is supposed to occur only through the operation of an approved retention schedule.

The intent of this bill is to protect the citizens' access to the records of their government. A law stating that at no point in the life cycle of a government record, can it fall into private hands or be sold, would assist in protecting that access.

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3. "State record" means:
 - a. A record of a department, office, commission, board, or other agency, however designated, of the state government.
 - b. A record of the state legislative assembly.
 - c. A record of any court of record, whether of statewide or local jurisdiction.
 - d. Any other record designated or treated as a state record under state law.

54-46-03. State records administrator. The chief information officer of the state or an individual designated by the chief information officer shall serve as the state records administrator, in this chapter referred to as the administrator. The administrator shall establish and administer in the executive branch of state government a records management program, which will apply efficient and economical management methods to the creation, utilization, maintenance, retention, and final disposition of state records.

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3. Establish standards for the preparation of schedules providing for the retention of state records of continuing value and for the final disposition of state records no longer possessing administrative, legal, or fiscal value.
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2. Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities.
3. Submit to the administrator, in accordance with the standards adopted by the administrator, schedules proposing the length of time each state record series warrants retention for administrative, legal, or fiscal purposes after it has been received by the agency.
4. Submit to the administrator lists of state records in the custody of the agency which are not needed in the transaction of current business and which do not have administrative, legal, or fiscal value.
5. Cooperate with the administrator in the conduct of surveys made by the administrator pursuant to this chapter.
6. Comply with the rules, standards, and procedures adopted by the administrator.

54-46-06. Assistance to legislative and judicial branches. Upon request, the administrator shall assist and advise in the establishment of records management programs in the legislative and judicial branches of state government and shall, as required by them, provide program services similar to those available to the executive branch of state government pursuant to the provisions of this chapter.

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of value as archival resources under section 54-46-08.1 must be destroyed by any suitable means as determined by the administrator.

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54-46-14. Continued confidentiality of records. The head of an agency may provide, and the administrator may receive, any record necessary to effect the purposes of this chapter without regard to the confidential or secret nature of the information in the record. However, the administrator and agents or employees of the administrator involved with records management under this chapter are subject to the same restrictions and penalties regarding the dissemination of the information as are the personnel of the agency involved.