

FISCAL NOTE
Requested by Legislative Council
01/19/2015

Bill/Resolution No.: HB 1435

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This Attorney General may impose a civil penalty for open records and open meeting violations by repeat offenders.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

There is no significant fiscal impact associated with this bill.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

N/A

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

N/A

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

N/A

Name: Kathy Roll

Agency: Office of Attorney General

Telephone: 701-328-3622

Date Prepared: 01/23/2015

2015 HOUSE JUDICIARY

HB 1435

2015 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1435
22540

1/26/2015

☐ Subcommittee

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the imposition of a civil penalty for violations of open records and open meetings requirements; and to provide a penalty.

Minutes:

Testimony #1, 2

Chairman K.Koppelman: Opened the hearing with testimony in support.

Rep. Boehning: This bill is aimed at higher education. It does not apply to cities or counties. This has a penalty attached to it for \$500. I am thinking this should be shall. They do have one free pass so to speak. What is the time limit on this? I think it is time we do something with this. We pick up the paper and there is an open meeting violation continually. If they have to write a personal check for \$500 out of their own pocket it might help. It would have to be a personal check.

Rep. L. Klemin: How would this work on a multi member state governing board? If the Attorney General finds they violated the open meeting law are all 8 members of that body subject to the \$500 penalty?

Rep. Boehning: I think it would only apply to the ones at the meeting that violated the law. The ones that weren't there so they did not know about the open meeting violation.

Rep. L. Klemin: Let's say they decided to go into executive session and then conducted some business in executive session that they are not allowed to do in an executive session, what happens then? Is that a violation of the open meeting?

Rep. Boehning: If the Attorney General says it would be a violation of the open meetings records, yes it would; just the people participating in the meeting.

Rep. L. Klemin: What if the vote was 6 to 2 to do that and they all participated, but two of them had dissented but they were over ruled by the majority, what happens?

Rep. Boehning: They were present.

Rep. L. Klemin: The second part that has to do with an appeal using the Administrative Practices Act; 28-32? Who do you appeal that to?

Rep. Boehning: I am not sure.

Rep. L. Klemin: I am not sure whether the Attorney General is administrated under 28-32 or not, but it strikes me as interesting that the Attorney General could impose the fine; hold the hearing; uphold the penalty; and then deposit money into the Attorney General's refund fund.

Rep. Boehning: You could put it into some other fund. I do not know how it would work.

Chairman K. Koppelman: Most of us have observed the violations of open record law with no penalty. Is there any magic to the \$500 amount? If the board decides to do something is it the board's responsibility or individual? Have you thought about any of that?

Rep. Boehning: I think the \$500 penalty is a noticeable amount of money. I think it should be a personal check from a person; not out of state funds.

Chairman K.Koppelman: You mentioned earlier that this would not apply to some. Could you clarify who this would apply to and who it would not?

Rep. Boehning: It would apply to state governing boards and commissions only appointed by the governor. I don't want the cities, counties and school boards in this. The small towns usually have attorney's present to advise them.

Chairman K.Koppelman: Does the bill say that? Would it include the Industrial Commission or the Emergency Commission or the Legislature? I don't know if it is very well defined.

Rep. Boehning: My intent was boards and commissions.

Rep. Lois Delmore: Who determines the appeal if I feel that the Attorney General has wronged me as a member of the State Board of Higher Ed? What is my appeal process? Who does it go to?

Rep. Banning: We would have to go under the 28-32 under administrative rules. It would have to go to an administrative law judge that is now within the administrative rules.

Rep. Lois Delmore: Would you say it would not refer to someone like the Industrial Commission of whom the Attorney General is a member and would also have to make that recommendation?

Rep. Boehning: My intent is people that are appointed to the boards and commissions. The Industrial Commission is an elected official so it would not apply.

Rep. Lois Delmore: If they were to violate and this goes in what are the ramifications for as important of a board as this one is.

Rep. Boehning: The Attorney General would have to excuse himself from the process for the violation and if they are in violation they would have to pay the same penalty and have the same appeal process. I am not sure they are governed under that 28-32.

Dustin Gawrylow, ND Watchdog Network: I think there is a roll in beefing up the law because there have been repeat offenses by many local entities. I think repeat means there should be something behind the law. A lot of these boards have legal counsel and maybe they should be held to knowing then the appropriate time for allowing an executive session etc.

Rep. Lois Delmore: Open records have been important to everyone on this committee. It is hard when there are different levels and different people held. Would you put something in here about willfully?

Dustin Gawrylow: The issue is on the repeat side. There should be a process for this. If they continue doing the same thing over and over if there was a penalty there would be some changes.

Rep. L. Klemin: You heard Rep. Boehning saying this penalty would apply to each board member or commission that participated in the closed meeting. What is your opinion about the penalty applying to a person who was not previously a member of the board when it happened previously, but now is a member of the board. Maybe it is the board's second violation, but that particular individual is only her first. The mechanics seem a little difficult here.

Dustin Gawrylow: I am not opposed to levying \$100 to the board, district, or commission. The law was violated and it is costing the tax payer money and it is not enough to really matter, but the idea your actions are a deterrent to the public interest.

Rep. G. Paur: It was brought up a couple times most of these boards have legal counsel. If they say this meeting or hearing is legal and meets the requirements of the Attorney General's closed meeting law and the Attorney General say it doesn't; who is responsible? Should we be fining the attorneys instead of the board members?

Dustin Gawrylow: Maybe there is an ethical issue within the attorney situation.

Rep. D. Larson: You are supposed to schedule a meeting with the sub group of a committee. After the meeting you go over and say what date works best for everybody. If we are all meeting together to talk about something; even what date works best for everybody; do you think that is a violation of the open meeting?

Dustin Gawrylow: As long as that date and time is disclosed publicly and they are given ample notice I would say no.

Rep. D. Larson: I would agree with that, but that is not the way it was always interrupted by some people. An email and a reply to all good job; congratulations to you, is that a violation do you think of an open meeting?

Dustin Gawrylow: Would think common sense would come into play. If the reply all is discussing some other substantives piece of business then it would be a violation unless that is the way the agenda items are developed. As long as it is put on an agenda and discussed in public and not within the email that is the way the law has been interrupted.

Rep. D. Larson: I was just curious about your impression of it too. Thank you.

Rep. Mary Johnson: I think we are going backward. The Attorney General has already determined what is in violation. Whether something is or is not is not part of this. It is whether to fine them.

Chairman K. Koppelman: I keep hearing it is more and more difficult to get people to serve on these boards. You are thinking it might be appropriate to say that decision; if they make a decision that results in a slap on the hand for violating an open meeting law, that the entity might pay the fine versus the individual and then the taxpayers are on notice that these folks are costing us money because they are not operating correctly and that might be more of a deterrent than an individual writing a check.

Dustin Gawrylow: Yes it is more news worthy. If the board is forced to pay a fine make it minimal so it doesn't affect their budget.

Opposition:

Attorney General Wayne Stenehjem: ND has the most liberal and the best open government laws in America. History on how we got here. (See Testimony and handouts #1) (24:20-31:26) I suggest that you do not pass this bill. Our open meeting laws work well. When you see the number of opinions I issue each year averaging 3.4 on state level agencies and 14 per year on local agencies and you consider on any given day there are township, school board, city council; state level organizations and every committee and subcommittee that is meeting there are 100s of meetings going on across the state of ND on open meetings law is a huge success. We publish a pamphlet for open meetings and boards for government officials and provide ongoing input and education on the open meetings and education. So it does work well. The Board of Education has had many violations and we might as well say it.

Rep. Lois Delmore: I remember 1997. I think all of us have been aware of the problems. If you find that someone was in violation of the open records and they were in an executive session are they required to send you what happened and what do you do with that?

Attorney General Stenehjem: Any time you have an executive session it has to be recorded. They have to mail us the recording so we listen to the recording and follow through.

Rep. Mary Johnson: This graph; is just opinions issued whether positive or negative?

Attorney General Stenehjem: Most of them find they are violations.

Chairman K.Koppelman: You talked earlier about the prior status of open records before 1997 and you talked about a constitutional provision and someone could bring a lawsuit. Is that still a deterrent?

Attorney General Stenehjem: A person does not have to bring their complaint to the Attorney General's office. They could proceed right into court. No one does that because this is simpler and it is free. A person could go directly into court if they wish to; but I have not seen that happen since 1997.

Chairman K.Koppelman: Do you see where there is no penalty is not a deterrent and therefore people just thumb their nose at it and say well thanks for your opinion. We will just keep doing what we have been doing.

Attorney General Stenehjem: They have several days to comply and if they don't within that time period a person can go to court and order a judicial determination and those cases you have to pay attorney's fees, but I am not aware of any case where there hasn't been compliance with one of the opinions we have issued.

Chairman K.Koppelman: Does your office have standing to go into court if they don't do what they are supposed to do in seven days?

Attorney General Stenehjem: I don't know. It has never come up.

Steve Andrist, Executive Director of North Dakota Newspaper Association: We agree that the laws we operate under now are very good and strong. We think they are the best in the country. We believe it is worth some consideration of some teeth to provide some penalty. There is perhaps a better option that could be found. We believe we should have a taskforce after the session that would look at the various issues that all of you have brought up today. Perhaps there is a better option that could be found.

Rep. Lois Delmore: What would you think if we did a study resolution or if the Attorney General goes that route who would you put on this commission to take a look at these? What would be your recommendation?

Steve Andrist: I do believe if I were choosing I would include members of the public, media, local governments and state governments and maybe there are other special interest groups as well.

Murry Sagsveen, Chief of State for the ND Chancellor's office: See attachment #2. I am here recommending a do not pass. Last year Attorney General Stenehjem twice there were two violations on the open meetings laws. (43:14-50:30)

Rep. Mary Johnson: I read this as the Attorney General not imposing a civil penalty when he may find a violation and on appeal I assume that is the case as well.

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Murray Sagsveen: I have worked closely with Attorney General Stenehjem and I am convinced he would not. But I don't know who the next attorney general might be.

Neutral: None

Hearing closed.

2015 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1435
2/4/2015
23258

☐ Subcommittee

☐ Conference Committee

Committee Clerk Signature



Minutes:

Chairman K. Koppelman: Opened the meeting on HB 1435. This bill dealt with a proposed penalty for violation of open records open meetings law. Rep. Boehning approached me and he wanted to turn this into a study, but that has been almost two weeks ago and we have not seen anything.

Vice Chairman Karls: He would offer an amendment to change the fines on the open record violations, remove the fines from the individual board members and place it upon the board in total.

Chairman K. Koppelman: Seeing none we have the bill before us. What are the wishes of the committee?

Rep. Lois Delmore: The Attorney General has a way to handle this if we have no study resolution. I think he still has time if he wants to turn in the study resolution.

Do Not Pass Motion Made by Rep. Lois Delmore: Seconded by Rep. K. Hawken:

Chairman K. Koppelman: Attorney General Stenehjem mentioned to me that there is a task force that looks at these issues. He would be willing to take this issue up with the task force.

Roll Call Vote: 13 Yes 0 No 0 Rep. K. Hawken:

**2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL NO. HB 1435**

House JUDICIARY Committee

☐ Subcommittee ☐ Conference Committee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☐ Do Pass ☒ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Lois Delmore:: Seconded By Rep. Hawken

Representative	Yes	No	Representative	Yes	No
Chairman K. Koppelman	x		Rep. Pamela Anderson	X	
Vice Chairman Karls	X		Rep. Delmore	X	
Rep. Brabandt	X		Rep. K. Wallman	X	
Rep. Hawken	X				
Rep. Mary Johnson	X				
Rep. Klemin	X				
Rep. Kretschmar	X				
Rep. D. Larson	X				
Rep. Maragos	X				
Rep. Paur	X				

Total (Yes) 13 No 0

Absent 0

Floor Assignment: Rep. K. Hawken:

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

REPORT OF STANDING COMMITTEE

HB 1435: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **DO NOT PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1435 was placed on the Eleventh order on the calendar.

2015 TESTIMONY

HB 1435

Testimony on H. B. 1435
Before the Judiciary Committee
January 26, 2015

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1-26-15
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N.D.C.C. § 44-04-21.1 gives the Office of Attorney General the authority to issue opinions on whether a public entity has violated open records or meetings law. If public entities are found to be in violation, the Attorney General can direct the entities to remedy the violations through various means. For example, the office has required entities to recreate meetings improperly closed to the public, to receive training on the law, or produce documents improperly withheld. The system, for the most part, works. The required actions to remedy any violations, coupled with the ensuing public and press scrutiny occurring after an opinion is issued, usually acts as a deterrent for repeat violations and prompts entities to become better informed and abiding of the open records and meetings law.

Although rare, this does not work for every entity. There are some repeat violators that blatantly violate the law, despite training, warnings, and multiple opinions issued against them. I continually meet with staff from my office, along with other members of the public including lawyers and members of the press, who share these concerns, to come up with ideas on how to address these repeat offenders. While I agree that harsher penalties may be helpful, I have concerns with some aspects of H.B. 1435.

The way the bill is currently written, the civil fine would be imposed upon a "member of a state governing body who has been found in more than one opinion" to violate certain provisions of the open meetings law. Opinions issued by the Attorney General's office under N.D.C.C. § 44-04-21.1 are issued against the public entity or the

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governing body of the public entity, not particular members. It would be difficult to assess who, individually, perpetrated the violation, and who therefore should bear this fine. In most instances, it is the collective action of the entire governing body that is responsible for the violation, not just one member. Other times, for example, a secretary of a board is directed by the governing body. It would seem unfair for such person to bear responsibility of the penalty, even if they technically made the error.

In addition, under N.D.C.C. § 44-04-21.1, opinions must be based on the facts given by the public entity. If we start making members individually liable, we risk not getting forthright and accurate information from these entities. There would be a chilling effect on members of governing bodies to be open and honest in responding to requests for information from our office on allegations because the members would be fearful of being fined.

Finally, the way the bill is currently written, there is no mandate in place that this fine must be paid out of the personal pocket of the violating member, rather than just using state funds. This would allow governing bodies to merely use public funds to pay for these fines.

As a side note, and for this committee's information, I will be appointing a task force after session to take a close look into the open meeting and record laws and make necessary revisions. Looking into penalties for violations of these laws is one topic this task force will address. I would therefore recommend a do not pass on this bill, and allow the task force do the necessary research on appropriate remedies for violations of these laws.

OPEN RECORDS AND MEETINGS LAW

Office of Attorney General, 600 E. Boulevard Avenue, Bismarck, ND 58505

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1-22-13 (2014)
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The public has the right to know how state and local government functions are performed and how public funds are spent. North Dakota has “sunshine laws,” which provide that all government records and meetings must be open to the public unless a specific law authorizes a record or meeting to be closed.

ALL PUBLIC ENTITIES ARE SUBJECT TO OPEN RECORDS AND MEETINGS LAW.

Public entity includes: *state and local government agencies, rural fire and ambulance districts, 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 rather than providing services to that entity.* Courts are not subject to open records and meetings law.

Anyone has the right to attend meetings of a public entity or to access and obtain copies of the entity's records, regardless of where they live. Before a public entity may deny access to a record or meeting, it first has to explain which law closes the record or meeting.

- To deny access to records, the public entity must explain, within a reasonable time, the *legal authority* (the specific law) for denying the request. If asked, the entity must put the denial and explanation in writing.
- To deny access to a meeting, the public entity must identify the topics to be considered and the legal authority for closing a meeting before asking the public to leave the meeting room.

Opinion Requests

Anyone may ask the Attorney General to issue an opinion regarding an alleged violation of open records or meetings law. The request must be made within 90 days of an alleged meeting held without notice or within 30 days for other violations of open meetings law or of any open records law (regardless of the date on which the requester became aware of the violation). There is no charge for the opinion, which is issued to the public entity with a copy to the requester.

If the Attorney General finds a violation, the entity has seven days to take the corrective action required by the opinion. Even if the opinion finds that the public entity violated the law, the opinion cannot change, void, or overrule a decision of, or action taken by, the public entity.

- The basic open records and meeting laws are found in Chapter 44-04 of the North Dakota Century Code (N.D.C.C.), beginning at Section 44-04-17.1.

QUICK TIPS

- Generally, a public entity cannot ask why the records are requested, ask for identification, or require a request be made in writing (or in person).
- A request for *information* is not a request for a *record*. A public entity has no obligation to respond to questions about its duties and functions, or to explain the content of any of its records.
- A statute may declare certain records to be exempt or confidential. If a record is exempt, a public entity may release it or withhold it, at its discretion. If a record is confidential, the public entity either cannot release it or first must redact the confidential information.
- A member of the public does not have the right to *speak* to the governing body at an open meeting, only the right to see and hear what happens at the meeting and to record or broadcast those observations.
- Generally, there is no requirement that a meeting notice be *published* in the newspaper.
- Draft minutes should be made available to anyone who requests them, even if the minutes have not been approved.
- Economic development information identifying the name, nature and potential location of a business considering relocating or expanding within the state can be closed until the business announces its intentions.
- Public employee salary and job performance is open but certain personal and payroll information is exempt or confidential. Generally, a public entity may *not* close a meeting to discuss salary issues or employee job performance.
- A governing body may close a meeting to talk with its attorney *if* the discussion pertains to the attorney's advice regarding a “pending or reasonably predictable” lawsuit involving the public entity.
- Confidentiality clauses in a contract or settlement agreement involving a public entity are against public policy and are declared *void* by state law.

OPEN MEETINGS

"Meeting" means *any gathering of a quorum of the members of a governing body of a public entity regarding public business, and includes committees and subcommittees, informal gatherings or work sessions, and discussions where a quorum of members are participating by phone, e-mail, or any other electronic communication (either at the same time or in a series of individual contacts).*

If a governing body delegates any authority or assigns a portfolio to two or more people, the newly formed committee also is subject to open records and meetings law.

- The *only* time a gathering of a quorum of members is not a meeting is if it is a purely social gathering—as soon as any public business is discussed, it becomes a "meeting."

Prior written notice is required for all meetings of a public entity. The notice must include the date, time and location of the meeting and the agenda topics the governing body expects to address during the meeting. Regular meeting agendas may be altered at the time of the meeting. For special or emergency meetings, however, *only* the specific topics included in the notice may be discussed.

Generally, there is ***no minimum advance notice period*** for public meetings. Notice must be posted, filed at the central location (or on the entity's website), *and* given to anyone who has requested it, *at the same time* the members of the governing body are notified of the meeting.

Meeting notices must be filed with the Secretary of State (state agencies), the City Auditor (city-level entities) or the County Auditor (all other entities) ***OR*** the public entity may choose to post the meeting schedules and notices on its official website. The meeting notice *also* must be posted in the entity's main office, if it has one, and if the meeting is held elsewhere, at the location of the meeting on the day of the meeting.

Additionally, notice of special or emergency meetings must be given to the entity's official newspaper and any media representatives who ask for notice of special or emergency meetings. Copies of meeting notices can be obtained from the appropriate office. If asked, a public entity must provide a requester with personal notice of its meetings.

Before a governing body may close a portion of its meeting, it first must convene in a properly noticed open meeting. Next, it has to announce the legal authority to close the meeting and the topics to be considered during the closed portion of the meeting. Unless the law *requires* a closed meeting, the governing body must vote on whether to close the meeting.

Any executive session must be tape recorded. Final action on the topics considered in the executive session must be taken during the open portion of the meeting. All substantive votes must be recorded by roll call. ❖

OPEN RECORDS

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"Record" includes *all recorded information regardless of physical form (e.g. paper, e-mail, computer file, photograph, audiotape or recording, video, text message, etc.) that has connection with how public funds are spent or with the public entity's performance of its governmental functions or its public business.*

Anyone has the right to view or get a copy of public records, regardless of the reason. However, a request must reasonably identify existing records. A request for *information* is not a request for a record under open records law.

A request for public records can be made in any manner - in person, by mail, e-mail, fax, or by phone. The entity must respond to the request within a reasonable time, either by providing the requested record or by explaining the legal authority for denying all or part of the request. Generally, a "reasonable time" is measured in hours or a few days, but depending on the amount and type of records requested and various other factors, it may be several days or weeks.

A public entity may only deny access to or a copy of a record for which there is a specific statute closing all or part of the information. The remaining information is open to the public and must be provided. If a request for records is denied, the entity must explain what specific federal or state law makes all or part of the record closed. If asked, the entity must put the reason for the denial in writing.

- An entity does not have to convert its records to another format, create or compile records that do not exist, or obtain records originating from another public entity that it does not have in its possession.

Access to records is generally free. An entity may charge up to 25¢ a page for copies on standard letter or legal size paper. For other records (photos, maps, etc.), the entity may charge the actual cost of making the copy, including labor, materials and equipment. The entity should inform you if other statutes authorize a different fee.

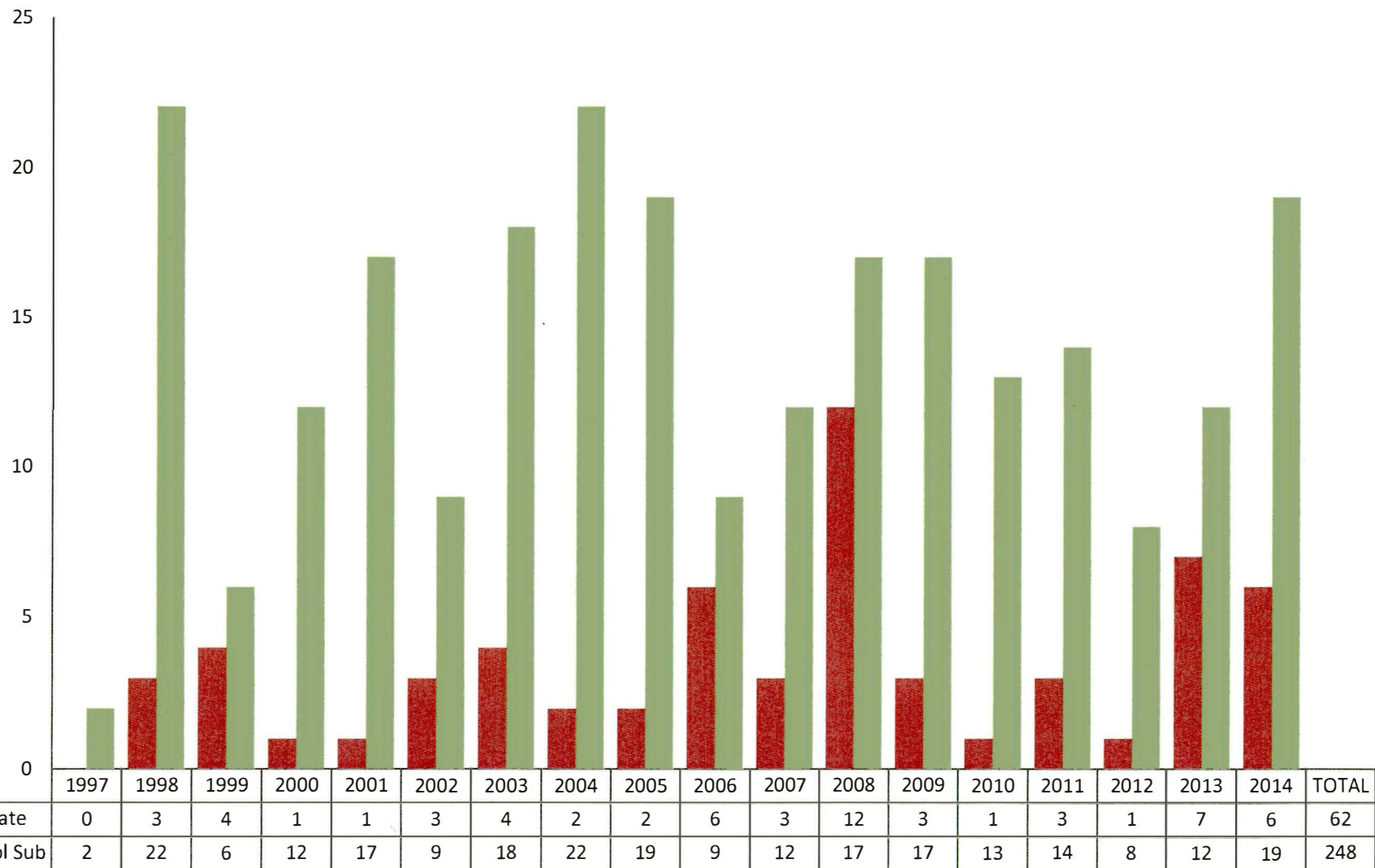
The first hour of locating requested records (including electronic records) is free. After the first hour, the entity may charge up to \$25/hr for locating records. An entity also may charge up to \$25/hr (after the first hour) for the time it takes to redact any exempt or confidential information.

Generally, electronic records are provided at no cost. However, if providing electronic records takes more than one hour, in addition to charges for locating and redacting, the entity may charge the *actual cost* incurred by Information Technology resources to access and copy the records.

The entity may charge for postage to mail the records (a, will need a name and address for mailing purposes). The entity can require payment of estimated costs before copying or releasing the requested records. ❖

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Open Record & Open Meeting Opinions Issued, 1997-2014



HB 1435

House Judiciary Committee

January 26, 2015

Murray G. Sagsveen, Chief of Staff

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I am Murray Sagsveen, chief of staff in the office of the chancellor, North Dakota University System. On behalf of the State Board of Higher Education, I am urging a "do not pass" on House Bill 1435.

Last year, Attorney General Stenehjem twice opined that the State Board of Higher Education violated the open meetings laws.

In late April 2014, an advisory team appointed by the Higher Learning Commission conducted a series of interviews regarding institutional practices of the North Dakota University System and the governance of the State Board of Higher Education. During that process, the advisory team interviewed the Board. In anticipation of the interview, the chancellor's office staff posted notices on the University System's web page, at the NDUS main office, on the doors of the various meeting rooms on the day of the meetings, and sent to all those subscribing to the University System's communications listserv. In his opinion (opinion 2014-O-13), the attorney general concluded that the interviews should have been noticed as a "special meeting." Also, he concluded: "The notice contained an extensive list of those to be interviewed along with the interview schedule but failed to sufficiently specify the topics to be considered and discussed during the interviews." The attorney general required that minutes of the special meeting be prepared and posted, which was promptly accomplished.

In late July 2014, during a board retreat, the chair of the board requested staff to leave the room so that a consultant could have a very frank discussion with the board members – but she did clearly state "you have the right to stay if you like." Only office staff and institution president were asked to leave; there were no members of the general public present. The attorney general concluded (opinion 2014-O-19) that when the board chair "requested that any person who was not a board member leave, she closed the meeting without statutory authority."

These opinions did not involve a governing board slinking away to conduct public business in secret. Instead, they involved an incorrectly worded notice posted by staff and a chair's request that staff temporarily step into another room during a board meeting.

Using these two opinions as examples, should the attorney general have the statutory authority to fine the chair of the State Board of Higher Education, or possibly all members of the Board (who are compensated \$14.80 per hour for their public service), \$500 because the staff posted an incorrectly worded notice?

The attorney general is the legal advisor for state boards, commissions, and officials. This bill would create an inappropriate adversarial relationship between the legal advisor and the client. The bill states the lawyer may fine the client if the lawyer determines the client has violated the open meetings or

records law. If the client refuses to pay the fine, can the lawyer take legal steps to collect the fine, such as sue the client or somehow garnish the public official's compensation for public services?

Next, the bill simply states that the "attorney general may impose a civil penalty of five hundred dollars upon a member of a state governing body..." There are no due process provisions in the bill. There are no exceptions for situations in which the governing board may have been advised by an assistant attorney general or special assistant attorney general. And, there are no remedies except for an appeal process which would require a member of a state governing body to apparently retain a personal attorney for representation in a state district court.

For these reasons, the committee should vote a "do not pass" recommendation for this bill.