

**2015 SENATE JUDICIARY**

**SB 2072**

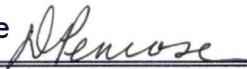
# 2015 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Fort Lincoln Room, State Capitol

SB 2072  
1/13/2015  
21894

☐ Subcommittee  
☐ Conference Committee

Committee Clerk Signature



## Minutes:

1

Ch. Hogue: We will open the hearing on SB 2072.

Cindy Marihart, Director of the Aging Services Division, Dept. of Human Services: Support (see attached 1).

Ch. Hogue: Thank you. Further testimony in support. Testimony in opposition. Neutral testimony.

Rick Clayburgh, CEO of the ND Bankers Assoc.: Neutral. We want to work with the department on page 4, subsection 2, line 3, the custodian of the records and it specifically talked about, "except as prohibited by federal law". We want to make sure that there isn't a conflict or concern between state chartered banks and federally chartered banks and how banks protect confidential information for their depositors. I want to point out that the banking community is very aware and very active and involved in preventing financial exploitation of its customers. There is a fine line when we are dealing with our ability to report and also deal with situations of protecting depositor's confidential information that we have to face under our federal and state regulators.

Ch. Hogue: When you talk about vulnerable adults and incompetent adults. How do your member banks make that determination, do they make that determination and if so, what is the consequence once they decide that somebody is not able to handle their own affairs. What do they do?

Rick Clayburgh: We have voluntary reporting. The banks have immunity in the case where they make a determination and report in the case of somebody who may have a situation that makes them unable to continue to make financial decisions on their behalf. There has been legislation in front of this legislature in past sessions that would make that mandatory. We have difficulty with that, in that we have tellers; we do provide training to try to identify the situations; but not all situations on their face may look to meet the definition of some type of exploitation, when in reality if you look at it, the depositor knew exactly what they were doing. It may meet some of the criteria but we can't create laws to protect people from themselves and we don't want to put front-line employees, in that position to make the

decision, and then put the bank into a situation of liability and litigious society that we live in now.

Ch. Hogue: You see the customer for only a very brief period of time and I suppose you have people on the front-lines that have their hunches but aren't sure of all the facts.

Rick Clayburgh: In many of the cases that our banks face, the problem is with family members involved and a lot of time you have family members that aren't in the same community that look to see what Mom or Dad might be doing and they have questions about why they are doing it. But Mom and Dad are making very rational decisions with their money that maybe the kids or other relatives don't particularly respect or appreciate or want them to do. You put our bank in a situation where they are trying to make a decision saying is something happening that the depositor had a clear mind as to what they were doing. They wouldn't appreciate their financial institution make that decision. They might say that they are going to move their business to another institution, too. It is a tricky issue.

Ch. Hogue: So your association may have an amendment.

Rick Clayburgh: We want to talk further with the department. We understand what they are trying to do and we certainly want to be helpful in those situations where they are doing the investigation but we want to make sure that we aren't creating something that would cause issues with our regulators.

Ch. Hogue: Thank you. Further testimony. We will close the hearing.

# 2015 SENATE STANDING COMMITTEE MINUTES

## Judiciary Committee

Fort Lincoln Room, State Capitol

SB 2072

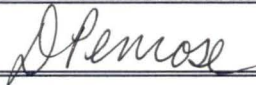
1/19/2015

22142

☐ Subcommittee

☐ Conference Committee

Committee Clerk Signature



### Minutes:

Ch. Hogue: Let's take a look at SB 2072. What are the committee's wishes? I think the main change is that it exempts law enforcement from reporting abuse and neglect primarily because they all have their own internal process, but also because if that abuser/neglector is in custody of law enforcement.

Sen. C. Nelson: I believe there were some problems between Dept of Human Services and the banks. The banks expressed some concerns on federal vs. state chartered banks.

Ch. Hogue: Let's have Rick Clayburgh come to the podium. Were the banks going to have an amendment?

Rick Clayburgh, ND Bankers Association: No, we've been in communication with the Dept. on the last page of the bill; pg. 4 lines 3-6. There is a fundamental difference between what the Dept. wants and what the Banks can provide. We offered a proposed amendment to the Dept of Human Services, but they rejected that. They brought one back to us and upon my review of it specifically creates a second section and it states "to the extent permitted by state or federal law, state or federal chartered banks shall provide access to the Dept.'s records". That goes a long way to addressing some of the issues that we would have but it still creates an interpretation issue. Our original discussion with them was just saying "as permitted by state or federal law", replacing that with "to the extent permitted by state or federal law necessary to conduct its valuation". They say that doesn't let them do what they want to do. If they want to perform an investigation they want all the records to be able to look at them. We have problems with the consent issue because North Dakota is an opt-out state; the customer has to opt-out

for consent. There are a lot of issues; this is not just a simple fix. It creates a lot of interpretation issues for the custodian of the records.

Ch. Hogue: Let's table this discussion until Wednesday afternoon to see if there are any developments between your organization and the Dept.

Sen. Armstrong: I think the law enforcement part of this should probably survive.

Rick Clayburgh: When we first looked at this, we were neutral to the bill. But the more we looked at it and thought about it, there really is a public policy and I'm referring to the records side. There is a public policy side to this. You really should have a better full understanding of this. On Wednesday, maybe the Dept. and banks should have an open discussion about exactly what they are looking for and why under current law they can't do that or get that information. Why do they want unfettered access to information that most people want protected. We're even dealing with issues regarding joint accounts. You may have consent from one but not another account holder.

Ch. Hogue: Let's try and get Ms. Marihart here on Wednesday afternoon.

Rick Clayburgh: I can't be here but Marilyn Foss will be.

Ch. Hogue: It would be helpful to hear from both interested sides before we move and act on the bill, providing she's available. We'll table it for now.

# 2015 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Fort Lincoln Room, State Capitol

SB 2072  
1/21/2015  
22453

☐ Subcommittee  
☐ Conference Committee

Committee Clerk Signature



**Minutes:**

#1

Ch. Hogue: We will take additional comments on SB 2072. We are trying to figure out, between the Dept. of Human Services and the Independent Bankers, whether there was a meeting of the minds in terms of the troublesome language in the bill on page 4. Have you reached any agreement with the Bankers Association, or that is agreeable to both of you.

Jonathan Alm, Attorney for Dept. of Human Services: We did prepare an amendment and provided that to the bankers association. They can explain their concerns.

Marilyn Foss, ND Bankers Association: ICBND is with us on this matter. I talked with Mr. Alm; he had a concern about the language of the bill at the outset, because it referred to federal law, "unless prohibited by federal law". We had a concern as it applies specifically to banks. I suggested a language change that said basically, "to the extent permitted by state and federal law"; a custodian would turn over this information. Mr. Alm got back to us and said that did not really achieve what the Dept. of Human Services was trying to achieve and proposed an amendment that would say, "that would apply to banks and credit unions" specifically and say "to the extent permitted by law, a bank or a credit union would provide this information, to the extent necessary for the Dept. to do its investigation". The original bill was drafted and had language that was applied to the general public if you were a custodian of records, that might be of interest to the Dept. and that would be well beyond banks and credit unions. My interest in this legislation over all, as it pertains to banks, was that I am talking to a bank that has a letter from the Dept. of Human Services, saying hand over your records, what is the bank supposed to do. To make it and have a clear understanding that the way I read the amendment, whether it's the way I drafted it or the way Mr. Alm drafted it, that

the perspective was that the custodian isn't going to have to figure whether it's permissible or not permissible, so "to the extent permitted by law" which I thought would enable the Dept. to show somebody on the receiving end of this where it is permitted by law, and then additionally as it pertains to banks. Banks have a specific and extensive and detailed chapter of our NDCC on how we disclose customer information and how we disclose it to state government and also we are subject to the Federal Right to Privacy Act, which is a federal law detailing how banks disclose information to government. Then also the federal Gramm-Leach-Bliley Act, which relates to consumer information, where we call, is customer information. One of the things about the Gramm-Leach-Bliley Act is that if it is not explicitly set forth that you can get it under federal law, customers either have to give consent or opt-out. Because our state law, the consent to disclosure law in ND is different than virtually any other state. We actually had proceedings through the federal office of the comptroller of the currency to determine whether or not the Gramm-Leach-Bliley Act pre-empted our law and it concluded it did not. That federal law says states may enact privacy statutes that are more stringent than the Gramm-Leach-Bliley Act, but not less stringent. The way this bill was drafted at the outset is clearly less stringent than the Gramm-Leach-Bliley Act. In my discussions with Mr. Alm, with respect to banks alone and there are similar but different issues for custodians that do not have other laws to follow. This is the amendment that was drafted by the Dept. Our comment to Mr. Alm with respect to this was we didn't particularly want to single out banks; but if we are singling out banks, the change on page 4, after line 6, where it says "insert a number subsection 3" should end after "alleged vulnerable adult" should have a period there because the custodian would have no idea if these records are necessary to conduct an investigation by the Dept. of Human Services; evaluation or assessment. That should not be a condition of turning them over. I think that issue is still in the bill under the current language that is left. With respect to this, Mr. Alm and I agree that with this amendment, the situation as it pertains to banks would be that the law would not change. The reason the law would not change is because our state law and federal law would allow a bank to disclose this information only with consent of the customer or we interpret that to mean a legal representative of the customer or subpoena. That is how we both understand the situation to be today and how it would remain if this amendment with the deleting "the necessary to evaluate" language was removed. As a more general matter, as far as the situations under which the banks' records that might be of interest to the Dept. should remain confidential or not, I guess that is a policy decision for this committee (see attached #1).

Ch. Hogue: So the Dept. thinks that someone is a vulnerable adult. Can they go to one of your member banks and ask for the bank accounts for this person, who we think is a vulnerable adult.

Marilyn Foss: Yes, they can do that. If the bank asked me what their response should be to that request, my answer would be "no, do not give it to them unless they have a consent that meets the statutory requirements, which are fairly detailed and if they don't have that consent, they may produce a subpoena.

Ch. Hogue: What about a situation where the vulnerable adult has an appointed a financial Power of Attorney. That works, doesn't it?

Marilyn Foss: Under the terms of most Powers of Attorney, a broad form financial power of attorney, we would honor that as consent, if the person holding the written consent, yes; or a financial conservator, we would honor that.

Ch. Hogue: So if somebody has gone to court and been appointed as a conservator you would honor that.

Marilyn Foss: Yes.

Ch. Hogue: But if the Dept. just says "we think the person is a vulnerable adult", they haven't gone to court to establish that, haven't secured an appointment of conservator, that's when you want to say, "wait a minute", we either need consent from the customer or the issuance of a subpoena.

Marilyn Foss: That's correct.

Sen. C. Nelson: What if that is a joint account. Do you need the permission of the joint holder?

Marilyn Foss: The account agreements for most joint accounts would provide that the consent of either party to the joint account gets access to the information related to that account, but that is a matter of agreement between the bank and its customer. If there wasn't an agreement and no appointment of a conservator and consent, whatever that would be, would be highly problematic.

Sen. C. Nelson: So if it's my husband that someone thinks is vulnerable and I'm the joint account holder. Can't I veto what somebody wants?

Marilyn Foss: Again, I would say from the banks' perspective, the conditions under which it would give access and whether it would accept the consent of the joint owner would depend on the joint agreement with the bank. In it, you are saying no, we each can act with respect to this account.

Sen. C. Nelson: But if I have a power of attorney or medical power of attorney, I would have control.

Marilyn Foss: Yes.

Ch. Hogue: Thank you. We will hear from Mr. Alm on the alleged vulnerable adult language. How does somebody become identified as a vulnerable adult or not fully capable of making their own decisions or protecting themselves against some predatory person? How does the Dept. work on that issue? Do they make a formal determination that the person is a vulnerable adult?

Jonathan Alm: Upon receipt of a report or concern, the Dept. will look at the report. They will schedule a meeting to talk to that individual that is suspected of being a vulnerable adult. They will take the information that they received from that individual; talk to other concerned parties. They might be in a facility, talk to the neighbors, and gather information to determine whether or not they could be considered a vulnerable adult. Then we look to records to get that information. If the records indicate, along with our evaluation/assessment process that this individual does fit the definitions of vulnerable adult, then we have two options. We can either offer services to that individual; the individual can consent and accept or receive the services. The individual could maybe decide not to receive services, or not have capacity to accept services. In that instance, we turn to the courts. In that case, we can go and look for a guardianship or a conservatorship. We can assist families in pursuing guardianship proceedings as well.

Ch. Hogue: What I understand on page 4, line 3-6 of the amendment, is the Dept. proposing that you would have this informal report of potential abuse or a vulnerable adult, you kind of make an internal consensus or maybe you decide to get more documents to ascertain whether the person is vulnerable and one of the things you want to do is go to their bank accounts and look at the transaction history, that type of thing.

Jonathan Alm: If it is dealing with a financial exploitation, bank accounts or financial records could be involved.

Sen. Grabinger: I'm trying to grasp why if you have suspicions and suspect it is a vulnerable adult and he is having financial issues, you have the means to go to court and seek that through the court or through law enforcement. Why do you need this to allow this on your own? Why can't you utilize what's already there.

Jonathan Alm: We are proposing with the amendment and what is in the SB 2072 version, before we can conclude whether or not an individual fits the definition of vulnerable adult, to provide that service, we may need information to reach that conclusion. If we don't have information to be able to get to that conclusion, our assessment evaluation would stop. We wouldn't be able to proceed to the court, because we would have to inform the court that this individual is incapacitated and these are the reasons and why. If we don't have the information necessary to provide it, then our assessment would end.

Ch. Hogue: Thank you.

Sen. C. Nelson: Basically I have a concern about the definition of an alleged vulnerable adult. There are so many people that have Alzheimer's or diseases like that. They are under the care of their family or somebody that is trusted. To me, a lot of this is in the definition or the perception that people have. As I grow older, and my husband is 6 years older than I, I see changes. Some people might perceive that he is sight-impaired and uses a walker as being vulnerable. I just see it as part of who he is. We have to spend certain amounts of money to compensate for those health issues. I am a little leery of Big Brother coming in and telling me what is happening in my household.

Ch. Hogue: I understand. A lot of these cases are for the individual who doesn't have anyone to help them out, is elderly and has a co-called friend who is watching out for them. They are probably more vulnerable; but the question comes down to where the Dept. is saying, how do we know if they are vulnerable or being taken advantage of, if we don't see their records. The banks are saying, well you know there has to be some kind of formal process, legal process for us to start turning over information, even if it is a state agency because state agencies have subpoena authority, so they could get the information that way. So it's kind of a policy tension issues. I agree with you, I'm not inclined to say; well you can just have access to the records

because there is a report out there of a potentially vulnerable adult and you should open up the customer's records.

Sen. Casper: Is there a common law structure to determine what is and what is not a vulnerable adult. Is this language of the agency; I'm thinking it is where they are considering the totality of the circumstances.

Ch. Hogue: Maybe there is a statutory definition I don't know. Certainly it's someone with diminished mental capacity, somebody who doesn't have a family member and who has assets and may not even be aware of their assets. The counties have public administrators who are there to be appointed guardian for these people who don't have any family. You think that everybody has family, it's not the case. I suspect that there are over 500 people that absolutely do not have a sibling, a parent, maybe a nephew or niece somewhere but they don't have anything. They typically have a source of income, whether it's social security, disability, SSI, and other public assistance.

Sen. Grabinger: I see this on both sides. An example would be of a son looking after the mother and the daughter questioning and bringing issues up, family squabble and they use this as a system to make that son provide where he spent every dime. I can also see it on the side where somebody could be taken advantage of, and there is really no way to prove that without getting that information. It is a catch-22. I don't know where the happy medium is on this.

Ch. Hogue: There are other parts of the bill, but my understanding and confirming what Ms. Foss said, if we adopt this amendment it doesn't give the Dept., as a practical matter, the ability to just call up the bank and say we think this person is a vulnerable adult and we would like to see the records to substantiate that. This amendment wouldn't allow you to do that. Is that true.

J. Alm: That is correct.

Sen. Grabinger: So, what is the process if you were to seek these financial records? What is the process now that is going to be different if you do that?

J. Alm: The process to seek the financial or banking records, would be to either obtain the consent of the individual which is currently in law, which we overstruck; or we would seek a subpoena to get the records.

Sen. Grabinger: So that is current law and it would stay that way.

J. Alm: Based on this amendment, it would stay that way. It would be the other records that we would be able to get, besides the financial records.

Ch. Hogue: Can you issue a subpoena without opening up a civil action or administrative action. How do you do that?

J. Alm: We have not, as far as I'm aware, issued an administrative subpoena for that situation. I wouldn't be able to tell you today as to the process that we would have to do. Currently, if we are unable to obtain records, we do our best to reach a conclusion as to whether or not someone is vulnerable. If we're unable to get bank records we will still go through as much as we can to either make a conclusion that they are vulnerable or not. It makes it easier with it but we understand that the laws prohibit us for right now, except for getting a subpoena or consent.

Ch. Hogue: Thank you.

# 2015 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Fort Lincoln Room, State Capitol

SB 2072

2/3/2015

23114

☐ Subcommittee  
☐ Conference Committee

Committee Clerk Signature



**Minutes:**

#1

Ch. Hogue: Let's take a look at the amendment.( #1)

Sen. C. Nelson: I move the amendment.

Sen. Grabinger: Second the motion.

Ch. Hogue: We will take a voice vote, motion carried. The amendment is adopted. We have the redefinition of what it means to be financially exploited.

Sen. C. Nelson: How often does this occur. Do we have any idea on how often this happens.

Jonathan Alm, Attorney with the Dept. of Human Services: I don't have that information, but I can get the information to you.

Sen. C. Nelson: But it does happen.

Jonathan Alm: Yes. We regularly receive reports on vulnerable adults that do an assessment with those reports.

Sen. C. Nelson: Are most of the people family members or other relatives.

Jonathan Alm: Probably a mixture; we receive some where they don't have any family members that are more or less live alone in the community. A concerned neighbor may files a report so we check up on the neighbor. Otherwise, some are from family members that are concerned. Sometimes the family members live out-of-state and are concerned about their relative.

Sen. C. Nelson: Are some of these family squabbles.

Jonathan Alm: We do receive some that are probably are from squabbles with family members and we are able to look at those and weed them out.

Ch. Hogue: Now that we adopted the amendment, so if somebody you suspect is a vulnerable adult that is being financially exploited under the statute in the bill, so logically you want to go and look at their bank records. How does the Dept. do that.

Jonathan Alm: If we are needing bank records and we don't have the consent of the individual, we would have to look at doing a subpoena to get the records.

Ch. Hogue: Can you issue one as part of initiating an administrative process.

Jonathan Alm: I do believe we have administrative subpoena powers. In this situation, we have not exercised that authority.

Ch. Hogue: How do you figure out who to issue the subpoena too. Somebody has to tell you where they bank and where the assets are.

Jonathan Alm: Normally when we receive reports or concerns regarding an individual they will indicate as to where they believe the financial exploitation is occurring.

Ch. Hogue: What are your wishes in SB 2072.

Sen. Armstrong: I move a Do Pass as amended.

Sen. Casper: Second the motion.

**6 YES 0 NO 0 ABSENT**

**DO PASS AS AMENDED**

**CARRIER: Ch. Hogue**

February 3, 2015

TD  
2/3/15

PROPOSED AMENDMENTS TO SENATE BILL NO. 2072

Page 4, line 3, replace "The" with "Except as provided in subsection 3, the"

Page 4, line 7, after "3." insert "To the extent permitted by state or federal law, state and federal chartered banks shall provide access to the department or the department's designee to all records of the alleged vulnerable adult."

4."

Page 4, line 20, replace "4." with "5."

Renumber accordingly

Date: 2/3/15  
Voice Vote # 1

2015 SENATE STANDING COMMITTEE  
VOICE VOTE  
BILL/RESOLUTION NO. 2072

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: 15.8043.01001 02000

Recommendation: ☒ Adopt Amendment

☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation

☐ As Amended ☐ Rerefer to Appropriations

☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ \_\_\_\_\_

Seconded By

Motion Made By Sen. Nelson

Sen. Grabinger

Senators	Yes	No	Senators	Yes	No
Ch. Hogue			Sen. Grabinger		
Sen. Armstrong			Sen. C. Nelson		
Sen. Casper					
Sen. Luick					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

Voice Vote: Carried

Date: 2/3/15  
Roll Call Vote #: 2

2015 SENATE STANDING COMMITTEE  
ROLL CALL VOTE  
BILL/RESOLUTION NO. 2072

Senate

**JUDICIARY**

Committee

☐ Subcommittee

Amendment LC# or  
Description:

15. 8043.01001 02000

Recommendation:

☐ Adopt Amendment

☒ Do Pass

☐ Do Not Pass

☐ Without Committee Recommendation

☒ As Amended

☐ Rerefer to Appropriations

☐ Place on Consent Calendar

Other Actions:

☐ Reconsider

☐

Motion Made By

Sen. Armstrong

Seconded By

Sen. Casper

Senators	Yes	No	Senators	Yes	No
Chairman Hogue	✓		Sen. Grabinger	✓	
Sen. Armstrong	✓		Sen. C. Nelson	✓	
Sen. Casper	✓				
Sen. Luick	✓				

Total

(Yes)

6

No

0

Absent

0

Floor

Assignment

Sen. Hogue

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

**REPORT OF STANDING COMMITTEE**

**SB 2072: Judiciary Committee (Sen. Hogue, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2072 was placed on the Sixth order on the calendar.

Page 4, line 3, replace "The" with "Except as provided in subsection 3, the"

Page 4, line 7, after "3." insert "To the extent permitted by state or federal law, state and federal chartered banks shall provide access to the department or the department's designee to all records of the alleged vulnerable adult."

4."

Page 4, line 20, replace "4." with "5."

Renumber accordingly

**2015 HOUSE JUDICIARY**

**SB 2072**

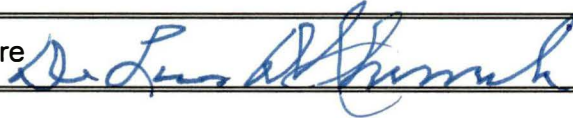
# 2015 HOUSE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Prairie Room, State Capitol

SB 2072  
3/10/2015  
24585

☐ Subcommittee  
☐ Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to the definition of financial exploitation, allegation of abuse or neglect caused by an individual in the custody of law enforcement against another individual in custody, and access to records of an alleged vulnerable adult.

## Minutes:

Testimony #1, Testimony #2

**Vice Chairman Karls:** Opened the hearing with testimony in support.

**Cindy Marihart, Director of the Aging Services Division:** (See testimony #1) (1:05-4:50)

**Rep. L. Klemin:** I have a question on page 4, subsections 2 & 3; #2 except as provided in subsection 3; that is the subsection 3 that starts on page 4, line 7? I am trying to follow this through.

**Cindy Marihart:** That page is in reference to subsection 3.

**Jonathan Olm, Attorney with the Dept. of Human Services:** the subsection 3 reference is the reference to line 7, page 4.

**Rep. L. Klemin:** On line 3 the custodian is that meant to be different than the state and federal chartered banks referred to on line 7.

**Jonathan Olm:** The custodian records could include any and all individuals that have custody of the records that deal with the alleged vulnerable adult with the exclusion that state and chartered banks if we need their information we would have to go through state law which requires the consent for the subpoena.

**Rep. L. Klemin:** What about credit unions?

**Jonathan Olm:** They might be proposing an amendment today too.

**Rep. L. Klemin:** Subsection 2 says except as provided in subsection 3 and as prohibited by federal law. What is the difference there?

**Jonathan Olm:** Originally when we discussed this with the bankers association we actually had to the extent necessary to conduct its evaluation or assessment. They said for them as long as they have the consent or subpoena it doesn't matter if it is to the extent.

**Rep. L. Klemin:** So for other custodians other than financial institutions who are we talking about?

**Jonathan Olm:** The other custodians of record could be hospitals, living facilities, family members, or a wide variety of individuals that might be holding records of an individual that we received a report on and looking at doing an evaluation or assessment.

**Rep. K. Wallman:** Who keeps track of how often this is occurring? It would be nice as a state who is as to how often this is occurring? I am looking on page 3, #5, subsection 5.

**Jonathan Olm:** Now I think law enforcement probably has records of persons who are fighting amongst each other and the custody of law enforcement. Right now the department only receives those reports if law enforcement reports them to us as mandated reporters then we would keep the records of those.

**Rep. K. Wallman:** So right now the Human Services is the receiver of the mandated report so they would have this information now. If subsection 5 goes into place there would be no central location for that information, is that right?

**Jonathan Olm:** Yes that is correct.

**Rep. G. Paur:** What are you trying to achieve here?

**Jonathan Olm:** Section 1 we want to make it the same as protection advocacy. Section 2 Section 3; we found that the law requires us to do an assessment and evaluation because we didn't have excess to records to do this.

**Rep. Mary Johnson:** Page 1 line 16 the law enforcement officer shall report the information to the department; but then you are taking the 5 language which says they are not required to notify the department, but not over here?

**Jonathan Olm:** The subsection 1 of 50-25.2.03 makes the mandatory reporters. Subsection 5 we added in this bill would take them out of that mandated reporter requirement if the allegation is the abuse between two individuals within their custody.

**Rep. Mary Johnson:** It is mandatory in Section 1 to report it to the department. So it is always required.

**Jonathan Olm:** The current law reads they are required to report information to us. So the new language in number 5 to stay that if this occurs within their custody of these two individuals potentially with mental illness; you don't have to report it to us. It is an exception.

**Rep. Mary Johnson:** Why is that? You said earlier that they have their own internal method of reporting, so if they arrest somebody they don't have to report but they do?

**Jonathan Olm:** We have our internal policies and procedures to handle the situations that occur within our custody between two individuals.

**Rep. Mary Johnson:** Does that include reporting to the department?

**Jonathan Olm:** No not as far as what we do understand if we remove this they will not be reporting to us.

**Rep. Mary Johnson:** So if this is a new case of a new situation where this vulnerable adult this is the first case; and they do have the person in custody would it possible not ever get reported to the Department of Human Services because they have the person in custody...

**Jonathan Olm:** If they obtain the individual in their custody and they do determine that the individual fits the requirement of vulnerable adults they are required to make the report to us. This would not exclude that or prohibit them from doing that. This is just between two individuals within their custody so fighting with the jail inmates for example.

**Rep. Mary Johnson:** What are you trying to do here?

**Jonathan Olm:** What we are trying to look at if two individuals are in custody in a jail and fighting each other and those two individuals are mentally ill they technically fit the definition of a vulnerable adult. What we are saying is instead of reporting it; they would be the ones that would investigate it according to their policies and procedures.

**Rep. Mary Johnson:** So you are saying the vulnerable adult caused the abuse or neglect against another person they don't have to report that.

**Jonathan Olm:** They would not have to report it if they have custody of the individuals. They are in jail.

**Rep. G. Paur:** You said you carved out this exemption because you said the police requested this? What police?

**Jonathan Olm:** West Fargo Police Department.

**Rep. G. Paur:** So their policies are uniform in all law enforcement across the whole state.

**Jonathan Olm:** No I would not assume that.

**Rep. Kretschmar:** Am I correct on page 3 of the bill on lines 20-28 are taken out and then they are put back in on page 3 between lines 3-9?

**Jonathan Olm:** They were removed from lines page 3, lines 20-28. The change that we inserted on page 4 lines 3 through 9 would allow us to get the information without having the consent of the alleged vulnerable adult.

**Rep. L. Klemin:** It has changed the focus here to requiring consent to putting in that you don't need consent?

**Jonathan Olm:** That is correct.

**Rep. L. Klemin:** I think it is awkward language.

**Cindy Marihart:** I do think the Dept. of Corrections has a lot of policies and procedures in place that do address fighting of inmates within their confines so we are pretty comfortable with taking that out.

**Rick Clayburgh, President and CEO of the ND Bankers Association:** We are in support of the bill as amended. We brought an initial concern to the Senate earlier so we were basically talking about banking information. Credit Unions would have the same concerns. This is basically to protect the bankers and the information they have.

**Rep. L. Klemin:** Subsection 2 if where I am concerned. Subsection 3 is directly related to the banks. We have two accepts in subsection 2 and one of them refers to subsection 3 that says to the extent permitted.

**Rick Clayburgh:** We only focused on subsection 3. We did not look at how it tied into subsection 2. There could be some fixing there.

**Rep. L. Klemin:** I am looking at subsection 3 in which excess is prohibited or permitted or does it simply have provides. Doesn't the state or federal law require a subpoena or consent?

**Rick Clayburgh:** That is a good question. Our concern is federal law prohibited our disclosure of information or our regulators do. In state law right now if we believe there is a vulnerable adult who is being exploited we have immunity under state law to be able to provide that to the Attorney General's office.

**Rep. L. Klemin:** Does somebody have to do a lot of research on this to find out where there is a requirement?

**Rick Clayburgh:** It is the department knowing what the rules are and it is our understanding that they were required consent or subpoena?

**Rep. L. Klemin:** would it be better to just say it that way. You either want consent or a subpoena.

**Rick Clayburgh:** This was language we worked out with the department between the ND Bankers Association and the department. We are open to amendments.

**Greg Tschider: Credit Union Associations of the Dakotas:** (See testimony #2, with proposed amendment) (30:55-32:08) I think things need to be made clearer. On #3 where it talks about the bankers and hopefully the credit unions shall provide access to all records; I think the language to the extent necessary to conduct its evaluation or assessment is absolutely necessary. All financial institutions are blessed with both federal and state law regardless of how we are chartered.

**Chairman K. Koppelman:** What about your first suggestion? Did you say you were comfortable with that?

**Greg Tschider:** We will rely on the wisdom of the committee to make that decision.

**Bryan Quigley, Director of Mountrail County Social Services:** We were having trouble getting information from the Department of Human Services and we were finding that was a stumbling block so that is why. We have had wonderful cooperation across the board with bankers and credit unions.

**Rep. L. Klemin:** In Section 3 where it talks about getting the information you are not the department or are you?

**Bryan Quigley:** That is what I am saying we want to get information from the Human Service center and entities when we are doing an investigation.

Opposition: None

Hearing closed.

# 2015 HOUSE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Prairie Room, State Capitol

SB 2072  
3/24/2015  
Job # 25351

☐ Subcommittee  
☐ Conference Committee

Committee Clerk Signature



**Minutes:**

Proposed amendment #1

**Chairman K. Koppelman:** Reopened the meeting on SB 2072.

**Rep. L. Klemin:** (See proposed amendment #1) Went over the amendment.

**Chairman K. Koppelman:** If the recipient of the certification that the department would issue, objects then there are other avenues to get the documents. What's the effect of an objection? Do they have to back off or can they consider the objection and say we don't agree with this and go forward with it?

**Rep. L. Klemin:** Once they object they can't get it unless they go through the other processes.

**Chairman K. Koppelman:** The reference to chapter 608.1, what does that provide?

**Rep. L. Klemin:** It is how you get records from financial institutions. These amendments were worked out with financial institutions, credit unions, banks and so forth so this is acceptable to them.

**Chairman K. Koppelman:** In subsection 3, page 4 the concern was that before they could request these or acquire these it would have to be records that are necessary for an investigation. I assume that reference applies to that kind of thing.

**Rep. L. Klemin:** Moves the proposed amendment.

**Rep. L. Delmore:** Second.

**Voice vote:** Carries.

**Rep. L. Klemin:** Moves a do pass as amended on SB 2072.

**Rep. A. Maragos:** Second.

**Rep. G. Paur:** I'm going to vote against this; I don't think the amendments fix this bill.

**Rep. K. Wallman:** I remember what I don't like about it. Top of page 3, subsection 5 it talks about law enforcement not being required to notify if someone in the custody of law enforcement abuses a vulnerable individual who is also in the custody of law enforcement. I wonder if we shouldn't be recording a vulnerable adult.

**Rep. Mary Johnson:** I remember the discussion on what it was trying to accomplish is that every time there was a scuffle between two vulnerable adults in custody that law enforcement was called to that they don't have to report every single little scuffle to the department.

**Rep. K. Wallman:** The way I read it is if only one vulnerable adult is involved. I would request that subsection 5 be stricken from the amendment.

**Rep. D. Larson:** If they were in custody at the time another report would be made at that time. It is not that there would be no reporting done by anybody.

**Chairman K. Koppelman:** That's how I read it too. Is it an issue where agencies are tripping over each other dealing with the same circumstance.

**Rep. K. Wallman:** My concern was that Human Services doesn't know that vulnerable adults are being abused by inmates would know.

**Rep. D. Larson:** If they are going back into court for something there are other people being included and the proper people are notified. I feel confident leaving number 5 in.

**Rep. Mary Johnson:** Law enforce is required in section 1 to report to the department.

**Chairman K. Koppelman:** What would be the practical result of a report? Probably if there was a law broken Human Services would in turn report it to law enforcement. They would have to charge the person. I think the intent was to avoid the marry-go-round of government bureaucracy.

**Rep. L. Klemin:** That is exactly what was in the testimony from the Dept. of Human Services. According to the Dept. of Human Services this would reduce duplicate reporting. It is the Dept. of Human Services that requested this bill, saying don't report this to us.

**Rep. K. Wallman:** I withdraw my request.

**Vote:** Yes 11, No 2, Absent 0

**Rep. D. Larson:** Carrier

**Chairman K. Koppelman:** Closes hearing.

SK  
3/24/15

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2072

Page 4, line 3, remove "Except as provided in subsection 3, the custodian of records of an alleged vulnerable"

Page 4, replace lines 4 through 9 with: "To obtain access to records under the control of a custodian other than a financial institution, the department or its designee shall certify in writing to the custodian that access to specifically described records is necessary to the evaluation or assessment of a report and that the custodian's release of the records to the department or its designee without consent of each person to whom a record pertains is not prohibited by state or federal law. A custodian that receives a written certification from the department or its designee shall give the department or its designee reasonable access to the requested records or, within ten business days of receipt of the certification, shall object to the department or its designee in writing and state the reasons for the objection. The department or its designee may use the records only for the purpose of the evaluation or assessment of a report."

3. To obtain access to financial institution records, the department or its designee shall comply with the requirements of chapter 6-08.1 and applicable federal law."

Renumber accordingly

Date: 3-24-15  
Roll Call Vote #: 1

2015 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2072

House JUDICIARY Committee

☐ Subcommittee ☐ Conference Committee

Amendment LC# or Description: 15. 8043. 02001

Recommendation: ☒ Adopt Amendment  
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation  
☐ As Amended ☐ Rerefer to Appropriations  
Other Actions: ☐ Reconsider ☐ \_\_\_\_\_

Motion Made By Rep. Klemin Seconded By Rep. Anderson

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

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

Date: 3-24-15  
Roll Call Vote #: 2

2015 HOUSE STANDING COMMITTEE

ROLL CALL VOTES  
BILL/RESOLUTION NO. 5B2072

House JUDICIARY

Committee

☐ Subcommittee

☐ Conference Committee

Amendment LC# or Description: 15. 8043. 02001

Recommendation: ☐ Adopt Amendment

☒ Do Pass

☐ Do Not Pass

☐ Without Committee Recommendation

☒ As Amended

☐ Rerefer to Appropriations

Other Actions: ☐ Reconsider

☐

Motion Made By Rep. Klemin Seconded By Rep. Maragos

Representative	Yes	No	Representative	Yes	No
Chairman K. Koppelman	<input checked="" type="checkbox"/>		Rep. Pamela Anderson	<input checked="" type="checkbox"/>	
Vice Chairman Karls	<input checked="" type="checkbox"/>		Rep. Delmore	<input checked="" type="checkbox"/>	
Rep. Brabandt	<input checked="" type="checkbox"/>		Rep. K. Wallman		<input checked="" type="checkbox"/>
Rep. Hawken	<input checked="" type="checkbox"/>				
Rep. Mary Johnson	<input checked="" type="checkbox"/>				
Rep. Klemin	<input checked="" type="checkbox"/>				
Rep. Kretschmar	<input checked="" type="checkbox"/>				
Rep. D. Larson	<input checked="" type="checkbox"/>				
Rep. Maragos	<input checked="" type="checkbox"/>				
Rep. Paur		<input checked="" type="checkbox"/>			

Total (Yes) 11 No 2

Absent 0

Floor Assignment Rep. Larson

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

**REPORT OF STANDING COMMITTEE**

**SB 2072, as engrossed: Judiciary Committee (Rep. K. Koppelman, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2072 was placed on the Sixth order on the calendar.

Page 4, line 3, remove "Except as provided in subsection 3, the custodian of records of an alleged vulnerable"

Page 4, replace lines 4 through 9 with: "To obtain access to records under the control of a custodian other than a financial institution, the department or its designee shall certify in writing to the custodian that access to specifically described records is necessary to the evaluation or assessment of a report and that the custodian's release of the records to the department or its designee without consent of each person to whom a record pertains is not prohibited by state or federal law. A custodian that receives a written certification from the department or its designee shall give the department or its designee reasonable access to the requested records or, within ten business days of receipt of the certification, shall object to the department or its designee in writing and state the reasons for the objection. The department or its designee may use the records only for the purpose of the evaluation or assessment of a report.

3. To obtain access to financial institution records, the department or its designee shall comply with the requirements of chapter 6-08.1 and applicable federal law."

Renumber accordingly

**2015 CONFERENCE COMMITTEE**

**SB 2072**

# 2015 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Fort Lincoln Room, State Capitol

SB 2072

4/7/2015

25858

☐ Subcommittee  
☒ Conference Committee

Committee Clerk Signature



**Minutes:**

1

Sen. Casper: Called to order the Conference Committee for SB 2072. All members present. Please explain your amendments to the committee.

Rep. Klemin: Explained the amendment (see attached #1). The bill as it came to us had deleted the requirement for the Department to get consent to obtain records held by a custodian. Also, some additional language was deleted; instead put in language that basically said that the custodian of the records is to provide those to the Dept. upon request. A custodian could be an individual, a hospital, some other entity and some of them have their own rules on this and so we thought that it wasn't exactly due process of law for a state agency simply to demand that records be provided and not give the other side an opportunity to even to object. The amendment that we had put together in the House, actually divided it into two parts. They wanted records from banks and other financial institutions. There are already legal provisions on how a government agency gets records from a financial institution and those are set out in chapter 06-08.1. There is a specific section even in that chapter about government access to the records of a financial institution. With respect to financial institutions, the House amendment said that if they want those records they have to comply with chapter 06-08.1. It sets out exactly how they have to go about getting records from a financial institution. You either get the consent of the customer or they go through valid legal process; which could be either a judicial or administrative subpoena duces tecum served on the financial institution. They could also do it pursuant to a search warrant if appropriate. That's already in the law, as to how you get from financial institutions. We simply referenced that in subsection 3.

Sen. Casper: You are saying subsection 3 of...

Rep. Klemin: I believe it is on page 4.

Sen. Casper: Subsection 3 of the bill; it says to obtain access to financial institution's records; the Dept or its designee shall apply requirements of 06-08.1 and applicable federal laws. Is the bottom line that you are asking the Dept. to get a subpoena every time they want a record?

Rep. Klemin: Or consent. They have the authority to issue an administrative subpoena, so they don't have to go to court to subpoena the records unless the financial institution would object to the administrative subpoena. Then we have to go to court and the court would make a decision. That's the way it's done with regular subpoenas. Any case under rule 45, of the rules of civil procedure, can issue a subpoena; the Dept. can issue a subpoena. The party receiving the subpoena has the opportunity to object. In fact, the rule requires that you say that right on the subpoena; that you can object and then a court will decide whether you are to appear or the documents are to be produced or whatever was asked for. That's well established law. That would also be the procedure for what would happen for an administrative subpoena, which the Dept. has the authority to issue. They don't have to go to an attorney outside of the Dept or the court to issue an administrative subpoena, they can just do it. It's provided in chapter 6-08.1 already. Chapter 06-08.1-05, a government agency may obtain customer information from a financial institution pursuant to an administrative subpoena duces tecum served on the financial institution. That takes care of that, that's already been agreed on between the government and financial institutions some time ago as to how that works. The other part though is dealing with custodians other than financial institutions. We thought that due process of law would be required so that they would either have to get the consent of the individual who had the records or the consent of the person whose records they were; or that person's legal guardian. If they couldn't, then they would have to give a notice to the other custodian, it might be a hospital for instance. It might be an individual that they wanted the records and then just like in a subpoena that custodian gets a request from the Dept. would have 10 days to object. I'm not sure under what circumstances they would object but I guess we would leave it up to that entity. Now, in reading this over again, I'm looking at proposing an amendment that I handed out which would revise that second part on the custodian, other than a financial institution.

Sen. Casper: Can you speak to the ability of the vulnerable adult to give consent. What do you think about that? We're asking the vulnerable adult to

consent, correct. That would be one way to get around the subpoena or the challenge of the subpoena.

Rep. Klemin: The consent would only be valid if the person was competent. If that person is incompetent, then you may have a legal guardian appointed, in which case it is the job of the guardian. I looked this over again and I was thinking that this could be written a little more clearly than the way it was in here, so I proposed this amendment. This amendment is borrowed from a couple of different places. It's borrowed from the chapter 28-32, which is the administrative agency practices act; borrowed also from section here on government access to records for financial institutions. Under this amendment, the Dept. could obtain records under the control of a custodian, other than a financial institution either with consent of the vulnerable adult; vulnerable adults can consent if they aren't incompetent. Or the legal guardian of that vulnerable adult or through an administrative subpoena so they would be able to do an administrative subpoena on a custodian other than the financial institution in the same manner that they can now legally do in existing law on a financial institution. Then I put in the provision from chapter 28-32 that says if they object to that subpoena, which they can do under 45, the subpoena may be enforced by applying to a judge of the district court for an order requiring production of the records described in the subpoena. That's out of 28-32. That is existing administrative law and practice. That part about failure of the custodian to comply with the order of the district court is contempt of court, punishable by the district court upon application. That's right in the Administrative Agency Practices Act already. The judge may award attorney fees; we should probably include costs to the prevailing party on an application under this subsection. That's also right out of 28-32. In fact, that section is 28-32-33. I think this provides for a due process of law procedure to allow the Dept. to get those records and it also gives the party who is the custodian the opportunity to object the same way they can, under other administrative subpoenas or under Rule 45 of the rules of civil procedure; those rules are mentioned often in chapter 28-32. It also provides some consistency with existing law. It's consistent with due process of law and I guess the one concern I have, though, upon reviewing this again, we always say the Dept. of it designee throughout this subject. I'm concerned about the designee being able to issue an administrative subpoena because the designee would be, for example, Burleigh County Social Services, who might be doing an investigation. I'm not sure but I think that issuing the subpoena ought to be left up to the Dept. and not to its designee.

Sen. Casper: The chair appreciates the work of Rep. Klemin on this. Since this is a Dept. bill I would be interested in hearing from Jonathan Alm.

Jonathan Alm: I'm an attorney with the Dept of Human Services. I received the paperwork this morning and kind of went through it, listening to Rep. Klemin give an explanation. One of the items that kind of stands out for me, from my perspective, is that when we currently perform an investigation into vulnerable adult protective services or doing an evaluation and an assessment, there is no pending administrative law case, underneath the Administrative Practice act. It's not like an appeal of a Medicaid case or SNAP case; usually that falls underneath that chapter. There isn't a district court proceeding that has occurred yet. We receive the concern from either a mandatory reporter or someone who voluntarily can report. We contact the alleged vulnerable adult. We meet with that individual where we determine that more needs to be done. We try to seek out records and get those records to make a determination of whether or not they are vulnerable. If they are vulnerable we either need to have the consent of that person to be able to provide protective services, if that individual doesn't give consent, then we have to look at if we are going to proceed to court. If we determine that we want to seek a guardian or a conservator that the individual needs it, we will proceed with that function. The difficulty is that we need to get those records to review those records before we take the next step, before we determine are you vulnerable. If you are, do you need a service; are you going to deny that service or request for us to provide service or do we need to take it to the court. That's where I see the biggest challenge with the proposed language is how we actually implement it with the current process and structure that is in place, and what current law is in place.

Sen. Casper: Wouldn't you be able to get access based on what Rep. Klemin said by issuing a subpoena and your Dept. can do that without going to court, correct.

Jonathan Alm: That is correct. We can issue an administrative subpoena. Right now there is nothing set forth as to if somebody does object to that subpoena, what the next step or basis would be, since there isn't a pending action.

Sen. Casper: So that's where you are getting to the "no pending administrative action", someone objects, what's the next step for you if you want to get to the information.

Jonathan Alm: That is correct.

Sen. Casper: Do you have any suggestions since this is what you are an expert on this subject.

Jonathan Alm: I approached this initially when I looked at the law and then drafted it, what we had was the challenge of making a determination as to does somebody fit that vulnerable adult definition. We looked at the child abuse and neglect laws; a similar type of investigation you receive a mandatory report or concern. We go out and investigate, do an assessment as to what has been reported. In that type of situation we also ask for records and obtain records. That's kind of the same procedure that we're looking at this aspect as well. I don't know what a solution could be through the use of a subpoena. I think individuals that we're investigating that or alleged to have abuse and neglect of the individual that may be in their care in their home, is going to object to disclosing the records if they have that option.

Rep. Larsen: It sounds to me like if you have no process right now if someone does object, it would be good to clarify what the process can be.

Jonathan Alm: Right now, when they do request the records, the records are given to us. Under current law we are able to get the records with the consent; if the individual is not able to give consent we are able to get the records; that is if they are a vulnerable adult. The difficulty we had was whether or not they fit in that gray area. Do we determine that they are vulnerable adult or they may be alleged to be a vulnerable adult? Can we get those records without their consent? That is what this law was trying to address, like that gray area, if they are alleged to be vulnerable but we don't have the necessary records to determine if they are vulnerable, can we get those records.

Rep. Klemin: The way I read the bill that was sent over to the House it said that you don't need consent. Is that your interpretation of it?

Jonathan Alm: When we introduced the bill, we removed, on page 3, version 3000, lines 20-28. That is the discussion regarding the consent. If the vulnerable adult because of substantial functional or mental impairment, and is able to authorize the Dept.

Sen. Casper: What page was that?

Jonathan Alm: Page 3, then we can obtain the records.

Rep. Klemin: I guess you deleted all of that.

Jonathan Alm: Correct.

Rep. Klemin: Instead you put on page 4, lines 3-6; they shall provide access to the Dept. Basically, since you are deleting the requirement for consent and saying that they shall provide access to the Dept. that means that you don't need consent. Is that correct.

Jonathan Alm: Yes, that is correct.

Rep. Klemin: I guess I would submit that's not due process of law.

Sen. Casper: Thank you. Would anyone from the Banker's Association like to come and talk?

Marilyn Foss, ND Bankers Association: My purpose in being here this morning is to make sure that subsection 3, which talks about financial institutions to address issues that might arise with respect to that. Although I think it has been explained and understood, honestly where the language is different, the provision, with respect to financial institutions, the words are different, but it states the understanding we made with the Dept. at the hearing before the Senate committee as well. We thought the language was a bit awkward and changed it to make it clearer. With respect to custodians other than financial institutions, this is not an issue of the ND Bankers Association, per se. One of the reasons we wanted to keep our statutes applicable and intact because they do provide process. When there is a question, I think that's the foundation of our entire system of individual relationships with the government. When you have government taking action with respect to anybody, making you give information and that is a concern because was there due process of law. I think one of the distinctions that really aren't being made apparent in this is that as I was discussing it with the Dept. before the hearing, mostly they are trying to get records, as I understand it from Michelle, not from individual's custodians but from hospital and whatever. Hospitals that have access to counsel and may get access to counsel who can give them an evaluation of what is permitted under other federal law and state law. I have to say we're interested in due process even though we think that this bill as it now stands provides a system of process for financial institutions. Those would be my only comments.

Sen. Casper: We will table this now and meet again.

Rep. Klemin: While we are reviewing this, I think it would be helpful to focus on some of the other parts of the statute that is being amended that already are part of the law. If you went into the next section after this amendment, if the report alleges a violation of a criminal statute or imminent danger, serious or physical injury or death to a vulnerable adult. There is already a process in place where law enforcement can investigate and take immediate steps if necessary. Below that, another subsection if the alleged vulnerable adult or caregiver does not consent, a search warrant may be issued by a magistrate issued on showing probable cause. That's constitutional law now. Even in a situation involving imminent danger, a law enforcement officer can make a reasonable entry of the premises without a search warrant, if there is probable cause to believe there is immediate danger of serious physical injury or death. I think the concerns about the harm to the vulnerable adult by the caregiver or custodian are already addressed in the existing law.

Sen. Casper: We will table the conference committee for now. Watch the schedule for the next meeting.

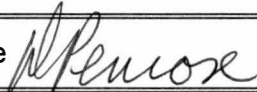
# 2015 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Fort Lincoln Room, State Capitol

SB 2072  
4/10/2015  
26020

☐ Subcommittee  
☒ Conference Committee

Committee Clerk Signature



**Minutes:**

1,2,3

Sen. Casper: We will open the conference committee on SB 2072. All members present. Rep. Klemin put together materials and an amendment.

Rep. Klemin: I handed out a couple of sections of law. The first handout on (1,2,3) 6-08.1-05 on Government access to financial records; this would be the procedure that the Dept. would follow if it wanted to get records from a financial institution. Basically, the procedure they would follow in this proposed amendment would be the same for anybody else. They either get consent or they have valid legal process. If they already have to do that for banks, I don't know why they shouldn't have to do that for everybody else, as well. I understand that sometimes they may be trying to get medical records; they can either do that with consent or through a subpoena or if there are a lot of other kinds of records that might be in the hands of the custodian that they might want to see, especially those that might be other than medical matters, such as accounting records in the hands of a CPA, attorney might have some records that they want for some reason, or just company records, personnel records, university/school records, somebody holding a power of attorney, land records, assets other than money, which they would get from a financial institution, stocks, personal property records, etc. I think it just makes good sense and it would be consistent with due process of law that they either get consent or they get a subpoena. This amendment allows them to issue an administrative subpoena. I don't think it would be a great hardship for the Dept. to open an administrative file so that if they needed an order from someone in the Dept. to issue a subpoena that they should be able to do that internally. Then if the person does object to furnishing it even after subpoena, that's the right that people have under the rules of civil procedure right now. They have the opportunity to object and then we let a court decide or perhaps an administrative law judge that might decide. That's essentially the

amendment. For the other section of law that I passed out is from the Administrative Practices Act on Adjudicative proceedings related to subpoenas and if you look at the bottom on subsection 4, about subpoenas that can be enforced by applying to any judge of the district court for an order requiring the production of documents described on the subpoena. Failure of a witness or other person to comply with the order of the court is in contempt of court, punishable by the district court, upon application. That's the same language I put in this proposed amendment. This is completely consistent with existing law.

Rep. Larson: I move that the House recede from their amendments and be further amended as on 15.8043.02003.

Sen. Luick: Second the motion.

Sen. Casper: In reviewing the .03000 version to the current amendment before us, the 10 day period was removed and also any requirement, they would have to certify the legality of the request. There was a violation of some other part of the code or federal law was also removed.

Rep. Klemin: Correct.

**6 YES 0 NO 0 ABSENT**

**HOUSE RECEDE FROM THEIR AMENDMENTS AND FURTHER AMEND**

**CARRIER: Sen. Casper**

**CARRIER: Rep. Larson**

4-10-15

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2072

That the House recede from its amendments as printed on pages 1015 and 1016 of the Senate Journal and pages 1135 and 1136 of the House Journal and that Engrossed Senate Bill No. 2072 be amended as follows:

Page 4, line 3, remove "Except as provided in subsection 3, the custodian of records of an alleged vulnerable"

Page 4, replace lines 4 through 9 with "The department may obtain records under the control of a custodian other than a financial institution with the consent of the vulnerable adult or the legal guardian of the vulnerable adult or pursuant to an administrative subpoena duces tecum served on the custodian in accordance with rule 45 of the North Dakota rules of civil procedure. The subpoena may be enforced by applying to any judge of the district court for an order requiring the production of the records described in the subpoena. Failure of a custodian to comply with the order of the district court is contempt of court, which is punishable by the district court upon application. The judge may award attorney's fees and costs to the prevailing party in an application under this subsection. The department or its designee may use the records only for the purpose of the evaluation or assessment of a report.

3. To obtain access to financial institution records, the department or its designee shall comply with the requirements of chapter 6-08.1 and applicable federal law."

Renumber accordingly

Date: 4/10/15  
Roll Call Vote #: 1

## 2015 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2072 as (re) engrossed

### Senate Judiciary Committee

- Action Taken
- ☐ SENATE accede to House Amendments
  - ☐ SENATE accede to House Amendments and further amend
  - ☐ HOUSE recede from House amendments
  - ☒ HOUSE recede from House amendments and amend as follows
  - ☐ Unable to agree, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Rep Larson Seconded by: Sen Luick

Senators	4/7	4/10		Yes	No	Representatives	4/7	4/10		Yes	No
<u>Sens. Casper</u>	✓	✓		✓		<u>Reps. Klemm</u>	✓	✓		✓	
<u>Luick</u>	✓	✓		✓		<u>D. Larson</u>	✓	✓		✓	
<u>Nelson</u>	✓	✓		✓		<u>P. Anderson</u>	✓	✓		✓	
Total Senate Vote						Total Rep. Vote					

Vote Count Yes: 6 No: 0 Absent: 0

Senate Carrier Sen. Casper House Carrier Rep. Klemm

LC Number 15.8043.02003 . 04000 of amendment

LC Number \_\_\_\_\_ of engrossment

Emergency clause added or deleted: \_\_\_\_\_

Statement of purpose of amendment: \_\_\_\_\_

**REPORT OF CONFERENCE COMMITTEE**

**SB 2072, as engrossed:** Your conference committee (Sens. Casper, Luick, Nelson and Reps. Klemin, Larson, P. Anderson) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ pages 1015-1016, adopt amendments as follows, and place SB 2072 on the Seventh order:

That the House recede from its amendments as printed on pages 1015 and 1016 of the Senate Journal and pages 1135 and 1136 of the House Journal and that Engrossed Senate Bill No. 2072 be amended as follows:

Page 4, line 3, remove "Except as provided in subsection 3, the custodian of records of an alleged vulnerable"

Page 4, replace lines 4 through 9 with "The department may obtain records under the control of a custodian other than a financial institution with the consent of the vulnerable adult or the legal guardian of the vulnerable adult or pursuant to an administrative subpoena duces tecum served on the custodian in accordance with rule 45 of the North Dakota rules of civil procedure. The subpoena may be enforced by applying to any judge of the district court for an order requiring the production of the records described in the subpoena. Failure of a custodian to comply with the order of the district court is contempt of court, which is punishable by the district court upon application. The judge may award attorney's fees and costs to the prevailing party in an application under this subsection. The department or its designee may use the records only for the purpose of the evaluation or assessment of a report."

3. To obtain access to financial institution records, the department or its designee shall comply with the requirements of chapter 6-08.1 and applicable federal law."

Renumber accordingly

Engrossed SB 2072 was placed on the Seventh order of business on the calendar.

**2015 TESTIMONY**

**SB 2072**

**Testimony**  
**Senate Bill 2072 - Department of Human Services**  
**Senate Judiciary Committee**  
**Senator David Hogue, Chairman**  
**January 13, 2015**

Chairman Hogue, and members of the Senate Judiciary Committee, I am Cindy Marihart, Director of the Aging Services Division, for the Department of Human Services (Department). I am here to testify in support of Senate Bill 2072, which was introduced at the request of the Department.

Section 1 of the Bill amends N.D.C.C. section 50-25.2-01 to create consistency; the proposed language reflects what Protection and Advocacy uses for a definition of exploitation.

Section 2 of the Bill amends N.D.C.C. section 50-25.2-03 to exempt law enforcement officers and agencies from being required to notify the Department of alleged abuse or neglect of a vulnerable adult if an individual in the custody of law enforcement is alleged to have caused the abuse or neglect of another individual in the custody of law enforcement. Currently, the statute requires law enforcement to report these allegations to Vulnerable Adult Protective Services; however, law enforcement agencies have their own internal review process in place to address allegations of abuse between people in their custody. This change would allow law enforcement agencies to use their existing review process without having to duplicate efforts by also reporting under section 50-25.2-03.

Section 3 of the Bill amends N.D.C.C. section 50-25.2-05 to allow the Department to obtain records of an alleged vulnerable adult, without consent, to conduct an evaluation or assessment. For a vulnerable adult protective service worker to determine if a person is truly a vulnerable adult, the worker must have access to the records the worker determines appropriate. The records continue to remain confidential under N.D.C.C. sections 50-06-15 and 50-25.2-12.

This concludes my testimony and I would be happy to answer any questions.

#1-1  
1/21/2015

PROPOSED AMENDMENTS TO SENATE BILL NO. 2072

Page 4, line 3, replace "The" with "Except as provided in subsection 3, the"

Page 4, after line 6, insert

"3.    To the extent permitted by state or federal law, state and federal chartered banks shall provide access to the department or the department's designee to all records of the alleged vulnerable adult necessary to conduct its evaluation or assessment."

Page 4, line 7, replace "3." with "4."

Page 4, line 20, replace "4." with "5."

Renumber accordingly

February 3, 2015

PROPOSED AMENDMENTS TO SENATE BILL NO. 2072

Page 4, line 3, replace "The" with "Except as provided in subsection 3, the"

Page 4, after line 6, insert:

"3. To the extent permitted by state or federal law, state and federal chartered banks shall provide access to the department or the department's designee to all records of the alleged vulnerable adult."

Page 4, line 7, replace "3." with "4."

Page 4, line 20, replace "4." with "5."

Renumber accordingly

#1  
SB2072  
3-10-15

**Testimony**  
**Engrossed Senate Bill 2072 - Department of Human Services**  
**House Judiciary Committee**  
**March 10, 2015**

Chairman Koppelman, and members of the House Judiciary Committee, I am Cindy Marihart, Director of the Aging Services Division, for the Department of Human Services (Department). I am here to testify in support of Engrossed Senate Bill 2072, which was introduced at the request of the Department and was amended to address the North Dakota Banker's Association's concerns regarding section 3 of the Bill.

Section 1 of the Bill amends N.D.C.C. section 50-25.2-01 to create consistency; the proposed language reflects what Protection and Advocacy uses for a definition of "exploitation."

Section 2 of the Bill amends N.D.C.C. section 50-25.2-03 to exempt law enforcement officers and agencies from being required to notify the Department of alleged abuse or neglect of a vulnerable adult if an individual in the custody of law enforcement is alleged to have caused the abuse or neglect of another individual in the custody of law enforcement. Currently, the statute requires law enforcement to report these allegations to Vulnerable Adult Protective Services; however, law enforcement agencies have their own internal review process in place to address allegations of abuse between people in their custody. This change would allow law enforcement agencies to use their existing review process without having to duplicate efforts by also reporting under section 50-25.2-03.

Currently, the Department can access all the records of the vulnerable adult either with the consent of the vulnerable adult or the caregiver or legal representative of the vulnerable adult, or without consent if the vulnerable adult lacks capacity to consent and does not have a legal guardian or other legal representative. Section 3 of the Bill amends N.D.C.C. section 50-25.2-05 to allow the Department to obtain records from the custodian of records of an alleged vulnerable adult, without consent, to conduct an evaluation or assessment. For a vulnerable adult protective service worker to determine if a person is truly a vulnerable adult, the worker must have access to the records the worker determines appropriate. The records continue to remain confidential under N.D.C.C. sections 50-06-15 and 50-25.2-12.

The amendment adopted by the Senate requires state and federal chartered banks to provide access to the department or the department's designee to all records of an alleged vulnerable adult to the extent permitted by state or federal law. State and federal law permit the Department to obtain records from state and federal chartered banks with a consent or subpoena.

This concludes my testimony and I would be happy to answer any questions.

#2  
SB2072  
3-18-15

# TESTIMONY IN REGARDS TO SENATE BILL NO. 2072

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GREGORY W. TSCHIDER, JR., CREDIT UNION ASSOCIATION  
OF THE DAKOTAS

Mr. Chairman and Members of the House Judiciary Committee, I am Greg Tschider and I represent the Credit Union Association of the Dakotas.

Credit Unions do not object to Senate Bill No. 2072 if the Bill is amended to include the amendment submitted by the Credit Union Association to the Committee.

On page 4, line 7, the bill includes the following language: "To the extent permitted by state or federal law, state and federal chartered banks shall . . ." As financial institutions, state and federally chartered credit unions are subject to the same laws relating to consumer's records as banks. Therefore, it is submitted that this section should be amended to include credit unions to provide continuity between financial institutions in regards to mutually applicable laws.

I apologize for any inconvenience that this may cause the committee since this matter should have been addressed in the Senate, however, due to an oversight, it was missed.

Thank you.

**PROPOSED AMENDMENT TO SENATE BILL NO. 2072**

Page 4, line 7, after "banks" insert "and credit unions."

Renumber accordingly

Submitted by

Credit Union Association of the Dakotas

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2072

Page 4, line 3, remove "Except as provided in subsection 3, the custodian of records of an alleged vulnerable"

Page 4, replace lines 4 through 9 with: "To obtain access to records under the control of a custodian other than a financial institution, the department or its designee shall certify in writing to the custodian that access to specifically described records is necessary to the evaluation or assessment of a report and that the custodian's release of the records to the department or its designee without consent of each person to whom a record pertains is not prohibited by state or federal law. A custodian that receives a written certification from the department or its designee shall give the department or its designee reasonable access to the requested records or, within ten business days of receipt of the certification, shall object to the department or its designee in writing and state the reasons for the objection. The department or its designee may use the records only for the purpose of the evaluation or assessment of a report."

3. To obtain access to financial institution records, the department or its designee shall comply with the requirements of chapter 6-08.1 and applicable federal law."

Renumber accordingly

Prepared by Rep. Klemin  
April 7, 2015

PROPOSED AMENDMENTS TO FIRST ENGROSSMENT WITH HOUSE  
AMENDMENTS TO ENGROSSED SENATE BILL NO. 2072

On page 4, line 3, remove "To obtain access to records under the control of a custodian other than a financial"

On page 4, remove lines 4 through 11

On page 4, line 12, replace "reasons for the objection" with "The department or its designee may obtain records under the control of a custodian other than a financial institution with the consent of the vulnerable adult or the legal guardian of the vulnerable adult or pursuant to an administrative subpoena duces tecum served on the custodian in accordance with rule 45 of the North Dakota rules of civil procedure. The subpoena may be enforced by applying to any judge of the district court for an order requiring the production of the records described in the subpoena. Failure of a custodian to comply with the order of the district court is contempt of court which is punishable by the district court upon application. The judge may award attorney's fees to the prevailing party in an application under this subsection"

and costs

# 1-1  
4/10/15

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2072

That the House recede from its amendments as printed on pages 1015 and 1016 of the Senate Journal and pages 1135 and 1136 of the House Journal and that Engrossed Senate Bill No. 2072 be amended as follows:

Page 4, line 3, remove "Except as provided in subsection 3, the custodian of records of an alleged vulnerable"

Page 4, replace lines 4 through 9 with "The department may obtain records under the control of a custodian other than a financial institution with the consent of the vulnerable adult or the legal guardian of the vulnerable adult or pursuant to an administrative subpoena duces tecum served on the custodian in accordance with rule 45 of the North Dakota rules of civil procedure. The subpoena may be enforced by applying to any judge of the district court for an order requiring the production of the records described in the subpoena. Failure of a custodian to comply with the order of the district court is contempt of court which is punishable by the district court upon application. The judge may award attorney's fees and costs to the prevailing party in an application under this subsection. The department or its designee may use the records only for the purpose of the evaluation or assessment of a report."

3. To obtain access to financial institution records, the department or its designee shall comply with the requirements of chapter 6-08.1 and applicable federal law."

Renumber accordingly

# 2-1  
4/10/15  
SB 2072

**6-08.1-05. Government access.**

1. A governmental agency or law enforcement agency may obtain customer information from a financial institution pursuant to either of the following:

a. The consent of the customer, in accordance with this chapter.

b. Valid legal process, in accordance with this section.

2. A governmental agency or law enforcement agency may obtain customer information from a financial institution pursuant to a judicial or administrative subpoena duces tecum served on the financial institution, if there is reason to believe that the customer information sought is relevant to a proper law enforcement objective or is otherwise authorized by law.

3. A governmental agency or law enforcement agency may obtain customer information from a financial institution pursuant to a search warrant if it obtains the search warrant pursuant to the rules of criminal procedure of this state. Examination of the customer information may occur as soon as it is reasonably practicable after the warrant is served on the financial institution.

# 3-1  
4/10/15  
# SB2072

### **28-32-33. Adjudicative proceedings — Subpoenas — Discovery — Protective orders.**

1. In an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure.

2. In any adjudicative proceeding, upon the request or motion of any party to the proceeding or upon the hearing officer's own motion on behalf of the agency, a hearing officer may issue subpoenas, discovery orders, and protective orders in accordance with the North Dakota Rules of Civil Procedure. A motion to quash or modify, or any other motion relating to subpoenas, discovery, or protective orders must be made to the hearing officer. The hearing officer's rulings on these motions may be appealed under section 28-32-42 after issuance of the final order by the agency. The cost of issuing and serving a subpoena in any adjudicative proceeding must be paid by the person or agency requesting it.

3. Any witness who is subpoenaed under the provisions of this section and who appears at a hearing or other part of an adjudicative proceeding, or whose deposition is taken, shall receive the same fees and mileage as a witness in a civil case in the district court. Witness fees and mileage shall be paid by the party or agency at whose instance the witness appears. Any hearing officer may order the payment of witness fees or mileage by the appropriate party or agency.

4. Subpoenas, discovery orders, protective orders, and other orders issued under this section may be enforced by applying to any judge of the district court for an order requiring the attendance of a witness, the production of all documents and objects described in the subpoena, or otherwise enforcing an order. Failure of a witness or other person to comply with the order of the district court is contempt of court which is punishable by the district court, upon application. The judge may award attorney's fees to the prevailing party in an application under this subsection.