

FISCAL NOTE
Requested by Legislative Council
01/10/2017

Bill/Resolution No.: SB 2152

- 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.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 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.*

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 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).*

There is no fiscal impact.

- 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 fiscal impact.

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.*
- 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.*
- 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.*

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2017 SENATE POLITICAL SUBDIVISIONS

SB 2152

2017 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Red River Room, State Capitol

SB 2152
1/27/2017
Job # 27534

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to public employment hiring practices and confidentiality of some applications

Minutes:

Written testimony #1 Senator Laffen
Written testimony #2 Tim O'Keefe
Written testimony #3 Steve Swiontek
Written testimony #4 McPherson & Jacobson, LLC
Written testimony #5 amendment # 17.0418.02001
Written testimony #6 Corey Steiner
Written testimony #7 Kathleen Neset
Written testimony #8 Andy Peterson
Written testimony #9 Blake Crosby
Written testimony #10 Ed Schafer
Written testimony # 11 Jack McDonald
Written testimony # 12 Steve Andrist

Chairman Burckhard opened the hearing on SB 2152. All senators are present.

.23-9.57 Senator Laffen, District 43, Written Testimony #1-5 handouts.

Senator Anderson: Do you have any information for example as you used UNI in your testimony about a competing school in a similar category to us. In other states for example are the last three, or sometimes in our law now, the last 6, become public or do they keep those confidential until an offer is made to those people? Do you have any information about that?

Senator Laffen: I don't have all of the states' various rules, but I believe the way we work here in ND is that all records are open if they are held. Every applicant is an open record. In at least 22 states I believe most of them have a process whereby you can submit your application and then it's mailed to some sort of a short list, at which point they become public.

11.35- 17.29 Mr. Cory Steiner: Superintendent of Schools at Northern Cass School District, Written testimony #6.

17.58-20.16 Rich Burgum: I wanted to talk about what happens in a business environment when a person applies for a job. I have to admit that I've never applied for a job, but I have had many employees and I know that when someone applies for a job at a different situation,

things change. You have this already gone attitude and it doesn't work very well in your business environment and I would think that it wouldn't work very well in any sort of public environment as well. You lose the respect of your supervisor and your direct reports, lose their trust in you as well. So, that's my point about that. The other thing is that in reference to an editorial this morning that the presumption is that the public can, that a candidate better than a search committees and the public. So I design a couple of search committees at the university, one for President Kelley that Tim talked about, and another one. The search committees try really hard to do a good job of vetting a candidate. So, you have that level of vetting, as well as after. In our bill, the three candidates become public, the public has a chance to vet them as well. So I think that in all the reasons that the people have talked about the unintended consequences of the open records that we have today, we have a reduction in quality, and in the number of candidates seeking this job. So, I am in favor of this legislation and want you to hopefully vote for it.

Senator Anderson: In operating as a member of one of these search committees, isn't it often necessary that contact people in the local community to find out how you're going to rank this individual and what is the risk then of them in the local community back home finding out about what goes on based on your contact with those references?

20.41 Mr. Rich Burgum: In North Dakota as soon as you apply it's public. So, when I called some fellow in Oklahoma, and talked to folks that knew him, it was well known because it was public and published. It is very public when your seeking information about people.

Senator Anderson: My point is, if it's not a public record here, how does he keep it confidential at home when he has to give you references that you can call?

Mr. Rich Burgum: He's got to have a discussion with the people that he's allowed us to call.

21.40-25.11 Kathleen Neset, Chair of the State Board of Higher Education. In support of SB 2152. Written testimony # 7.

25.21-28.52 Andy Peterson with the Greater North Dakota Chamber, in support of SB2152. Written testimony # 8.

29.13-31.11 Blake Crosby, Executive Director North Dakota League of Cities, in support of SB 2152. Written testimony # 9.

Senator Anderson: don't you think that sometimes if I thought it was a good police chief in my community but they wouldn't pay me what I wanted by applying for a different job I might convince them to raise my salary, isn't that sometimes a current holder might use?

Mr. Blake Crosby: I would certainly hope so number 1, and number 2, I wonder where they're going to look for a job next.

31.55-39.12 Ed Schafer, citizen, in support of SB 2152. Written testimony #10.

Senator Diane Larson: You had said at one point that if the person wasn't guaranteed the job, they didn't want to apply, well this doesn't guarantee that even if they are in the top 3,

then it's going to be public record, right? **Mr. Schafer** replied, yes. **Senator Diane Larson:** And so, do you think that will continue then to harm the pool of people who would apply knowing that if they're not going to make sure that they get the job, then they could just be an also ran?

Mr. Ed Schafer: Yes, well anybody would love to apply. Thinking back to that particular conversation, I think it was more like, if I apply I am going to be exposed and I want to make sure that I get the job. The reality is if I didn't pool the people, and in the case of the University of North Dakota, here with our 41 applicants, a lot of those people were dropped off the list for various reasons. One might be, a certain profile, experience, so I may be dropped off the list for more reasons about my capability and my background but this various profiling of who we want to hire. You don't know that and so all of a sudden I am going back to my university and saying shoot I can't even get a job out of 40 people at a great university. So it affects what a relationship is. If you narrow it to the finalists, then I have a position that I can take and say okay I want to be a finalist. It's a different relationship within the finalists or if I am in the cattle call and don't make it. I can make that choice, and I can say I don't want to be a finalist because I don't want to be exposed unless you guarantee me the job. I think it gives everybody the opportunity to make that choice.

Senator Kannianen: I know that UND and UNI comparison, do you happen to know, what the open records laws are in Iowa?

Mr. Ed Schafer: I don't. Although I do know that there is a mechanism there, until a finalist is chosen. I don't know if it's if you make a campus visit, or like Nebraska you have to take a campus visit, before you're exposed, some states do with meet you at the airport short list, call ins or whatever the case may be. Most states have a mechanism to sort out that large group of candidates until you get to the finalists and then the finalists are exposed.

42.48-46.33 Becky Scible: Interim Director, of Human Resource Management Services Division which is part of the office of Management and Budget. I am here to support the core concept of this bill, but I do have some concerns as to how the bill is currently worded. I will go into that today. The first part of the bill states, if a public entity receives application from 3 or more applicants for a vacant position, the public entity must designate 3 or more of the applicants as finalists for further consideration before the public entity may issue an offer of employment to fill the position. One of the foundational tenants of our state classified service is the requirement that all classified employees meet the minimum qualifications for the position classification. If an applicant does not meet the minimum qualifications as stated in the job posting, he or she is disqualified from further consideration. I ran some numbers on what our experience has been as far as the number of applicants that are disqualified for not meeting the minimum qualifications and I found out that about 20% of the applicants that apply for a job in the classified service are rejected because of that requirement. So then after the minimum qualifications screening, we move on to the preferred qualifications screening level. Preferred qualifications are simply the additional knowledge, skills and ability most desire for the position. The hiring agency assigns a point value to each of the preferred qualification criteria and generates a total score for each applicant. This final score is then totaled and the applicants are ranked and a preselected number of applicants usually 3-5, move on to be interviewed. So it's at that point that we progress to the next phase of conducting those interviews. It's only those that have the highest score of the applicants that

make them move on. My concern is that if this bill were passed as it is currently worded agencies may be required to consider applicants as finalists without any determination of whether they need to meet the state minimal qualifications or how well they meet the desired knowledge skills and abilities of the position. This is contrary to the defined objectives system we already have use for application, screening and selection. So I hope you can understand that the concern that we have as to three applicants received, three applicant finalists. The second sentence of the bill goes to the open records piece of it. That has been where most of the testimony has been this morning. The sentence reads "the applications and any records related to the application which contain information that could reasonably be used to identify an applicant or confidential except records related to the finalists, are open to the public after the finalists are designated". My concern here is not that proposal to designate the applications of confidential before they come to the final stage of the process, but rather the term, "finalist" as it relates to positions in the classified service. Within state government the term "finalist" is not commonly used in fact we have a special term we call the certificate of eligible, and that is the list of the top ranking individuals after our screening process has concluded. So, that would be the question on that second sentence, as to the definition of the finalist and how that fits into our system. So this concludes my remarks.

Senator Anderson: Could you suggest to us, the addition of some words that might, allay your concerns for example if we, on the first sentence, if we inserted 'or more qualified applicants' so that we have the qualified in there; whatever term your comfortable using. If you do that we would appreciate that.

Ms. Becky Scible: I would be happy to propose an amendment, or craft an amendment and submit it to your clerk.

Senator Judy Lee: So, we're talking about university employees here in large parts, but you have certificates of eligible for everybody for every kind of position that you have?

Ms. Becky Scible: No, this is for positions in the classified service. So, the positions within the university system, they would be separate from our process. That's what we call our finalists.

Senator Judy Lee: So I think what we need perhaps to think about is the main portion here is for applicants that are already in the Higher Ed system. So, how do we differentiate between or among the various categories of employees and admit it needs to be or maybe not, restrict it to higher education. I would be interested in input from anybody else who wants to chat about this. But, I am not interested in a bureaucratic barrier to what I think is an interesting concept for us to discuss because of the way it affects process. I think we may need to figure out how to enhance the process so we might accomplish the goal that we seek.

Ms. Becky Scible: I very much appreciate much your perspective. That is some of the feelings that I had. I understand the concept behind it, but there are implications with how the bill is currently worded and so, I would certainly be open to hearing that discussion.

Senator Diane Larson: Are there requests for information about people who have applied for your classified positions, is that something that the newspaper or the media routinely wants to know.

Ms. Becky Scible: It can happen and it does. Not very frequently, but it has happened for positions where we've received a request for information and with our current law, we had to provide the information to whom requested it.

50.14-57.51 Jack McDonald, appearing on behalf of the North Dakota Newspaper Association, in opposition to SB2152. Written testimony #11. As it is written now this legislation is one of the biggest changes in our open meeting and open record law that has ever been in the state of ND, because the corollary to creating closed records is that when you create close records then any public body, they can then close their meeting to consider closed records. So if you're going to make all applications for any public positions in the whole state of ND closed until there is a finalist, that means that every meeting of every public body is going to look at these records is going to be a closed meeting.

I attached to my testimony a bill that was considered in ND legislature in 2009. That bill was SB 2087. That bill passed the Senate and almost passed the House. I think that bill had a reasonable compromise in this situation. First of all, it was limited just to the college presidents and the commissioner of higher education. Then it kind of said on 2087 the compromise went half. When you reduce it to half, so if you have employees, you reduce it to 2, if you have 30 applications then you reduce it to 15, that doesn't mean that it cannot be any previewing. We think that a solution in the manner of SB2087, would be a reasonable compromise in this situation. I don't think that there would be the opposition that there is now to the way they will be if they close off every record of every application of every public employee in the state. We don't think that serves public transparency. I don't think there is a need to close all of these records. It is a practical matter. I don't believe that there is a lot of demand for some of the records in every single public job in ND. We would just ask that consideration be given at this time to either defeating with a Do Not Pass to 2152 or else to amend that more in the lines of SB2087, from the 2009 legislature. I understand fully the concept and the process of sitting presidents applying, I am not quite sure what the magic is in that figure. The other thing is that the matter of ambition. Everybody knows in this world that everybody wants to advance themselves, who doesn't?

Chairman Burckhard: So, you're suggesting that if this law passes in its current form that commissions, whatever would overview that ability to close meetings?

Mr. Jack McDonald: it wouldn't over use it because under state law they are required to go under close session to consider a closed meeting, so there not going to over use it. There is a tendency in closed meetings to do other things and time, time again, that yes they closed the meeting for a legitimate purpose, but then somebody says refers to an off topic, that's where the hang us is for the open meeting law.

Senator Dotzenrod: We've heard here today that we could better serve the public interest if we kept this information more restricted and less open to the public, and interest would be served in advance because we would advance the size of the pool of the people who would apply and attract a larger amount of higher quality applicants. This is mostly of what I have

heard from the proponents. Your argument that we shouldn't do that, I am trying to think of an example where the public finds out in the end who got hired and where they're from and what their background is, what is the public interest in keeping that information private until that person is hired. Once they're hired the public has the right to a lot. Can you give me an example of how we would not serve the public interest, where the public interest would be harmed, by not allowing this information to be public during the time of the hiring? I don't understand how we can advance the public interest, so there must be some reason we think that we're or others are being harmed by keeping this information quiet.

Mr. Jack McDonald: I think the public deserves a seat at the table and then looking at who is applying for these jobs, particularly these high profile jobs. Now remember this discussion started and carried out over the years when talking about things like presidents of the universities and stuff. Last session it was over superintendent of schools in towns. So, in those instances, I believe that the public should have the right to know who applied for those jobs and in some cases, they could then question why the school board turned down some of those people. In some instances, there may be some questions of why they didn't consider a certain person for this position that they knew was going to apply. But if you knew they didn't apply then you couldn't do that. There also be some consideration that everybody says about google and the internet, personal experience, I think the public can bring some information to the school board, board of higher education whomever is the applicable body about those individuals that may not be determined otherwise. The information brings the public to the table in making this selection. We just feel that the more information the public has the better off the public is served and this is cutting off some information. That's why we are opposed to it. Certainly not opposed to trying to try to make ND a better place to be, certainly not opposed to better government, but in this instance we just don't think it needs to go this far.

Senator Judy Lee: Kind of combination of two actually, you mentioned early on that the House was kind of all stirred up about the steps and it happens pretty often. But I do have a legitimate example, first of all we've had testimony about cities and schools from two who preceded you, so if we go back to the 2009 bill that you attached, that is higher education as well. I would agree it is high profile positions those are the ones most likely to get attention. But high profile in a small community may be the principal in the high school. So, that is something that we have to look, but the other thing is, I keep hearing you say that the public needs to be represented in the public needs to know, but we have citizen legislature, we have citizen boards and none of these folks are on the Board of Higher Education, or the Board of Education, in the local public school districts or the city councils or commissions, it isn't like Chicago. So, this is a republic and not a democracy, they have been elected to represent our neighbors here, and the people who serve on other public boards are the same. The folks in this room who have been or are elected with the exception of the Governor who this is a full time job when he's serving. So I think it is a little different from maybe other states sunshine laws in that many of whom are less open than ours. Because all publically elected boards are definitely members of the public, so I am just curious if you have any comments about things like the high profile person in the school or city and also how the public is not represented by the members of board that hires.

Mr. Jack McDonald: You make good points and I certainly can't contest a lot of those points, particularly about the House of Representatives. But the issue is well taken, your right that in

a sense the public is served because they have members of the board because they elected those members to the board. But at the same time, I believe that the public would have more information available to them, if they knew who was applying and in this sense there is a fact that we are going to trust you or trust our school board member to make those decisions for us. I understand that and it's not a bad thing. From this standpoint we are just kind of standing by the principle that the more information the public has the better. If the general public not just the school board, has this information it would be better. Now, I certainly agree that in most, or a majority of ND cities the school superintendent is probably the highest paid person in that community and certainly has more money to spend, more public money than anyone. There could be case made that maybe they should be included in this bill too. We are standing by the principle that the more information the public has, the better.

Senator Judy Lee: I would suggest that even for an outstanding superintendent that the decision made about how the money is spent is made by the elected board and not the appointed superintendent. Going back to the Pre-K,12 stuff, this isn't in this bill, but I just have to digress for a moment here. The fact that all the personal files for every public employee in the state are open records has bothered me for a long time. I am not opposed to having the transparency we all need. But I think that there is a point. I think we've got to have some balance between the civility that is long sense lost in many areas, with the absolute important right of the public to know what's going on and I would hope that you all in the newspaper association might be partners with us as well as the other folks who are here in favor of this law to figure out how we can proceed in some rational way to balance the needs of the citizen that I think are being abused right now with the need to be as transparent as possible. That is a toughie.

Senator Dotzenrod: do you agree with the assertion that we heard today that the open records law we have is keeping well qualified candidates away from applying for jobs in ND?

Mr. Jack McDonald: No

1.09.51 Steve Andrist, Executive Director of the North Dakota Newspaper Association, which represents the 90 daily and weekly newspapers in the state. Written testimony #12.

Senator Diane Larson: I think you were in the room when I asked Governor Schafer if having 3 people names out these would be a detriment instead of just the finalist? You say here that this is not a compromise but just a surrender to me, it seems like the surrender would be as if we all informed about who the final choice would be. Do you see it as that?

Mr. Steve Andrist: I see it as a surrender from where we are now. To me were in place of total transparency right now. In general, I think that's good. Obviously there's been some testimony to suggest that has problems as well. What we're being asked in this bill from my perspective is to go away the opposite end. There needs to be some middle ground somewhere where we can reach a compromise. I also thought when Human Resources was testifying how we use the words, as Senator Lee pointed out in identifying this, well, when we hire a road superintendent in your county, those words aren't going to be the same as when you are hiring classified personal for the state of North Dakota. By compounding every single public job in the entire state into this one thing it's going to be pretty hard to treat them all the same. It's not one size fits all.

Senator Kannianen: With SB 2087 from 2009, is that something that at the time do you know the newspaper association was opposed it or what?

Mr. Steve Andrist: That is a good question. In 2009, we were conflicted on that as well. I think we had some people who testified in favor and some who testified opposed to it. Times have changed and I think at this point our Board of Directors and our Government Relations Committee would be more open to universally accepting a compromise.

Chairman Burckhard: Closed the hearing on SB 2152.

2017 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Red River Room, State Capitol

SB 2152
2/2/2017
Job # 27788

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to public employment hiring practices and confidentiality of some applications

Minutes:

Chairman Burckhard asked the committee for discussion on SB 2152. All senators are present. This is related to public employment hiring practices and confidentiality of some applications. I am not sure we're going to find any middle ground on this one.

Senator Anderson: I think we have found middle ground already. I think we should focus this bill on the Board of Higher Education, hiring and School Superintendents. I talked to several people and I think in the newspaper, Mr. Jack McDonald indicated that they might even support that if we just narrowed it. They didn't want us to open up to everybody and I understand that. But I think if we restrict to those two, I think the superintendents would support it and so would the Board of Higher Education as well.

Chairman Burckhard: So, do we need an amendment?

Senator Judy Lee: May I add one thought? Senator Anderson would you be willing to add the Chancellor to the Board of Higher Education to the President's list? **Senator Anderson:** Yes, I think it was understood that would include the Board of Higher Education and the university system is what I would put in there. **Senator Judy Lee:** Do we want to dig deeper, than the candidates for president and the Chancellor, how do we word this so that that is what we are limited too. **Senator Anderson:** I guess if we just said the Board of Higher Education hiring practice in universities then they could use it for everybody there. Now, it is true that most universities that are going to hire a dean or an academic vice president or something else, sometimes others look at that, as if your trying to improve yourself and it's not really a black mark on your locals, because they are always looking to move up. But if we just propose that, that makes it clean for us. Now we could say, university presidents, provosts, and chancellors and school superintendents that would make it even more narrow, and might make that newspaper association even happier. But I am not opposed to that either Senator Lee.

Senator Diane Larson: My feelings on this is I wouldn't want even to amend it because I don't think that if for example your hiring a police chief, and a smaller town has a police chief

that wants to apply and they don't necessarily want their community to know that they are looking at leaving, I think the same argument for why to keep it confidential applies to a lot of different job openings. As long as it's a public entity, and they want to keep it narrowed to the finalists being public information, I personally would support the bill the way it is without the amendment. I wouldn't like having just university presidents or university system having special privacy laws for them, if it's good for them, it should be good for anybody that's a public entity in my opinion.

Senator Anderson: The only reason we're trying to make this work is to do these things incrementally to get the support for them. If you make it too broad, then there's more excuse for people to oppose it. Of course if we have other areas we want to add in future years we certainly could do that once we see that the public is not dying because of what we did pass. That's my only suggestion Senator Larson.

Senator Diane Larson: I understand that and I appreciate that. But to me it looks then like we are doing something to set them up as somebody above the rest of the entities. So that's the reason I wouldn't personally like that one.

Chairman Burckhard: We don't really have a motion that we're discussing, so do we have the motion?

Senator Judy Lee: I am kind of in between these two perspectives here because I don't think in the Higher Education system it needs to go below the university president and the chancellor. The Provost is not as public a position in any university. They don't all have them I don't think. I don't care if the Dean wants, that's part of the risk of being in that profession. But the recruitment nationally of presidents, we're not even talking about coaches here and that's a bigger deal to a lot of people than the president is and were not talking about that. It is hard to draw the line, absolutely and I understand what Senator Larson is saying that there are league positions that when the recruitment comes along again, then all of this stuff ends being a problem again to get qualified people. I understand that, but it's part of the risk of being in a public job is that you get to do that. I don't know how to fix it.

Chairman Burckhard: so we don't know how exclusive we should make it? **Senator Judy Lee:** I am reluctant to make a motion until we give some thought to where we want it to go.

Senator Kannianen: I have concerns to. It was brought up in committee about maybe the overuse of what it could bring out as the overuse of closed sessions or executive sessions at the local levels or the political sub levels. I agree with that concern. I would be hesitant to have this apply so broadly right now.

Senator Dotzenrod: At the committee hearing the case for the higher education presidents we heard was really persuasive that we are seeing some number of people we could have applying is being affected. It is affected by the law we have. I think they made a really good case and if we can't fix this or change it, you can adopt the bill as it is and I do think we should at least fix that part of it. The person that you hire at the head of a university or college has a downstream effect on so many things in all of the departments, so if it didn't apply to various department heads that might be okay. The editorial in the Grand forks paper is a good case to have this bill, it would be effective for the university presidents and were in favor like the

newspaper association being closing down everything. But, I do think if part of this we should be able to find pretty good agreement. I don't know about the whole thing. I am concerned of over use of closing meetings, but I think for the case for the Higher Education at the top of the college system and the chancellor I think that makes a good argument.

Senator Judy Lee: Let's run something up the flagpole here then. **I move that we amend 2152 to say, "that the list of applicants for the positions of chancellor of higher education, and the university and college presidents as well as public school superintendents would be closed until there was a finalist list of three was developed."** **Senator Anderson 2nd.**

Chairman Burckhard: So, amended and seconded that we make it a little narrower, more related to the state board of higher education position for president and chancellor and public school superintendents. Is that the explanation what I heard?

Senator Anderson: Might I suggest that we include, unless you want to do more than one amendment, but they suggested that if a public entity received applications for 3 or more qualified applicants... **Senator Diane Larson** added eligible, **Senator Anderson:** On the bottom line they said identify an applicant or confidential accept records related to certified or qualified eligible, so that means that those people who were not qualified in the first place, their names wouldn't be released even though they got to the end and said now there all open. Ms. Scible suggested some language that would fit better with the and maybe if we restricted to the school superintendents and university presidents and chancellors that doesn't affect them at all. So we don't have to worry about what she indicating, because it wouldn't affect any of their hires.

Chairman Burckhard: Do we want to see this amendment written up first before we actually vote on it?

Senator Judy Lee; I see that we also had a suggestion from Senator Laffen, " if a public entity receives applications from fewer than 3 applicants, those applicants records would be open to the public" so we could talk about whether or not we want to include that into the amendment as well.

Senator Dotzenrod: It does seem like we need to say something in this bill about the fewer than 3, because if we don't say something about it, then in that set of circumstances come up there is going to be some confusion as to how to handle that. What we need to somehow cover that in this bill. I think the amendment is probably good.

Senator Judy Lee: Included in my motion is a recommendation from Senator Laffen about the fact that if there are fewer than 3 candidates, that the records will be open to the public as he indicated in the proposal he provided for us.

Chairman Burckhard: I would like to hear the amendment actually written, recorded and read back to me.

Senator Dotzenrod: Did we clear up the question about if overstrike finalist, what exactly are we going to say? Are we going to use qualified applicant or what's the right term?

Senator Dotzenrod: We will continue to use the word finalist, but put eligible. I thought Ms. Scible said something about the word finalist that she didn't like. I think she wanted us to come up with something besides that finalist word.

Senator Kannianen: On line 9 the word qualify.

Senator Judy Lee: You might have several applicants but they might be some of them not qualified. So they would be sorting through that when they get to the finalists lists so I don't know and my initial impression is you probably wouldn't be qualified on that one. When we get to the finalist list that would be where they would be qualified or eligible whatever the word is.

Senator Diane Larson: Qualified would be fine.

Senator Judy Lee: Then if they are fewer than three those records would be open to the public. That would settle Senator Leffen's amendment.

Senator Diane Larson: But they would still be qualified. I mean I have qualities to be the chancellor and I am not qualified.

Senator Dotzenrod: Who would have the final say? **Senator Diane Larson:** Maybe they move on to other applicants. So I still think they would be.

Chairman Burckhard: So let's remind me of what the amendment is specifically? Can we all agree on what the amendment is, Senator Lee?

Senator Judy Lee: Can I shoot it out there and see what everybody thinks with all of this little stuff. "that the closed records be limited to applicants for chancellor of higher education, the university president, and public school superintendents. The original list of applicants would not be published, but once it has reached the finalists of three qualified applicants it would be public". Is that what we want?

Senator Diane Larson: It seems like if we would just cross off public entity, and then just define that we get you what you're going after right?

Senator Judy Lee: That would do whatever and we will figure out, how to make it right.

Senator Howard Anderson: It might be that we just let Legislative council will might need two sections when they look at this.

Senator Judy Lee: I will leave it to Ian to figure it out.

Chairman Burckhard: I would like to see that. I would like to hold the vote until we see the amendment actually written out so that we can tweak it and wordsmith it.

Senator Judy Lee: do you want to vote on the amendment? **Chairman Burckhard:** we will wait until we see it right now. **Senator Judy Lee:** I think I did say if there were fewer than 3

applicants that it would be open records. If I didn't say that, I meant to say that. **Chairman Burckhard** closed the discussion on SB 2152.

2017 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Red River Room, State Capitol

SB 2152
2/9/2017
Job # 28135

- Subcommittee
 Conference Committee

Committee Clerk Signature

M. Quacken

Explanation or reason for introduction of bill/resolution:

Relating to public employment hiring practices and confidentiality of some applications

Minutes:

Attachment #1

Chairman Burckhard came back to discuss SB2152 which we heard last week on January 27. It was introduced by Senator Laffen, with in favor by Cory Steiner, Kathy Neset, Andy Peterson, Blake Crosby, Gov. Ed Schafer, and Becky Scible of OMB Human Resources. Opposed by Jack McDonald, and Steve Andrist. All senators are present.

Senator Laffen, District 43. Amendment #17.0418.02002. this is a new amendment. When I introduced the bill I brought an amendment which was 17.0418.02001, and what that amendment did is rewritten into this one. So this is the same amendment with one new add. In that original amendment is the bottom piece page 1, line 14 and what that part of the amendment now, does is the same as before. If you remember what this bill does is says we are going to have open records after there is a finalist group of 3 or more, but no less than 3, and what the 1st amendment did is to clarify if only 3 applicants applied then they all open and we wanted to make sure that was clear. So the first amendment is included into this one. So this amendment adds one more thing and it was Becky Scible from OMB, had a concern with some language. I wasn't quite sure what she was trying to get too, so I went up and visited with Pam Sharp from OMB and Pam's concern is met in this the first two parts of this amendment, page 1 line 9 and 10. Their concern was that the finalists should not just be 3 who meet the minimum qualifications. They have a standard in there that they can throw somebody out if they don't their minimum qualifications. So that's what they wanted added. This amendment picks up both of those pieces.

Sen. Anderson: have you seen this amendment here? **Sen. Laffen:** I have not. **Sen. Anderson:** I believe that includes the amendments that you have presented here and it satisfies the newspapers a little bit and it restricts it to chancellor, higher education presidents, and superintendents of public schools. We hope that would satisfy the newspapers to a certain extent. Now there is still going to be unhappy about the superintendents to public schools but that's part of what of heard was the biggest problem here doesn't cover the police chiefs of a city or all the other people that somebody might hire.

Chairman Burckhard: Where does that say that?

Sen. Anderson: For a vacant position of commissioner of the ND university system, president of the state higher education institution and the control of the state board of higher education or superintendent of a public school. So it restricts just to those three entities. I think that solves the problem that the higher education people are having for most of their jobs. Other people don't care much about when your hiring a dean. I was hoping at least that by this one we would satisfy the newspapers to a certain extent. I think it does in the final sentence there, it has what you have on your 3rd amendment there.

Chairman Burckhard: If you want to narrow it down, as compared to the original filing which was fairly broad. **Sen. Anderson:** That narrows it down and maybe keeps both parties happy.

Sen. Lonnie Laffen: The newspapers have always fought any restriction to this. This bill was submitted almost asks the last 3 or 4 sessions to try and open this up. The goal of the bill is really to try to get a higher quality and more applicants to state positions. The group that put this together really believes this applies to everybody. There is no reason to narrow this. Yes, we know the newspapers won't like it, we all know that, but we could narrow the bill just to please that one group, but I can tell you the last 4 governors, the current governor, all really believe that this would be a good bill to be broadly opened up. It is for all state positions.

Sen. Anderson: Remember the quote from that old sage that said "never pick an argument with somebody who buys ink by the barrel", if you want to get the bill passed and make some small incremental steps because everybody has newspapers in their district.

Sen. Lonnie Laffen: I understand that. I can tell you the group that worked hard on this would like to see if we can get this passed. I think they are prepared for that challenge.

Sen. J. Dotzenrod: He referred to the hearing with Governor Ed Schafer and Kathy Neset. Most of the testimony that we got that related to actual experience in the field with the law we had related to higher education. Convincing testimony based on people who interviews with people who had applied and didn't like our open records law. The bill as amended gets at the majority of what we heard about in the hearing.

Sen. L. Laffen: The problem is trying to write a list. Which positions are important, all are important. I know what you're trying to say politically, I am saying politically we should have the will to do what's right for the state of ND.

Sen. J. Lee: Is there a level, example of dean, where if we're going to bring it all the way down to every level of public official no matter what the size of the department or community or political subdivision, is there not some divider somewhere. Sometimes incremental is better than none at all. I don't disagree, I've been unhappy with this. I think we need to do something but I think we're going to have more trouble if we have it as we do everything. If we could show that works and the public is still being protected properly, I would like to do it this way. Not sure it will be possible.

Sen. L. Laffen: We could work for that, as I think there are tiers in at least in the state has salary tiers or employ tiers. I don't know how they work. But we could look for that. I

understand the struggle, but I'm sort of struggling with the other side of it. I am struggling with the fairness of saying that a college president gets a special carve out. I struggle with the fairness of carving out the higher end salaries. But I also recognize.

Sen. J. Lee: Is there a statute that is prevalent in other states, do we know that this is common in other states?

Sen. L. Laffen: I am told that 22 states roughly do what we're doing. I don't know what the other ones do. I don't know if they are less restrictive or more restrictive.

Sen. J. Lee: I have a continuing and long term concern about the personal files of public employees being a matter of open records. (ex. cited) I don't think our legislative council staff, for example should have or anybody has the right to go in to read their personal files unless there is a concern about their performance in some way or another.

Sen. L. Laffen: I couldn't agree more. There is a line somewhere between employee's rights and the public's rights to know and we have to draw that line. That is what we are trying to do here with this bill.

Sen. J. Kannianen: If we had to choose between a couple of different watering down options, what would be your preference be? Do you want this amendment or keep a broad application to all public employees but then raise the number a little higher than 3? Keep the broader application but a lot higher number would be public.

Sen. L. Laffen: I really like to keep stuff very simple for everybody to enforce. For when we create rules I like them to be really simple for all of these agencies. I prefer it to be a number, but prefer to keep it really simple like that. I am sure that wouldn't make any difference in raising that number in this sort of idea that you have that it needs to be watered down. You would have the same issue of trying to get it passed and with newspapers and all that even if you raised the number.

Chairman Burckhard: I think the idea is to get the most qualified candidate and a lot more of them to apply for our positions.

Sen. Dotzenrod: Referred to the editorial in the Grand Forks Herald. (17.15-17.33)

Sen. L. Laffen: The newspapers are clearly trying to protect their turf, that is what they are doing. I don't think that should come into play when we are writing law.

Sen. Dotzenrod: The newspaper argument is that there is a public interest to some degree and that's why we are opening up after 3. They are using the system of open records to create news and I think there should be some level of protection for these people that are applying.

Sen. L. Laffen: I totally agree with the newspapers that there is a right to know and we need them to be able to report on whose applying and the public needs to weigh in at that point. I just know that the total open records of every applicant that we never consider is hurting our chances of getting great people. It effects every position from top to bottom.

Sen.J. Lee: Is this the perfect answer. **Sen. L. Laffen:** I think this is the perfect answer. I think the only real debatable part of what's the perfect answer is the right number.

Chairman Burckhard: Sen. Anderson what is your thought? Being a practical man, I am going to move the amendment that we have here on 2152, which I believe encompasses everything that Senator Laffen's amendment included.

Chairman Burckhard: the one that meets the minimum qualifications?

Sen. Anderson: I am going to move that amendment, but I am concerned that the newspapers may get upset across the state with the public school superintendent. We still might be at risk for not passing something. I would like to see us accomplish something for the higher education because that is the biggest concern is, but am willing to go this far because we had quite a few superintendents who talked to us about that issue. So, not because I am opposed to the idea, but because I would like to bring legislation out of the committee, I like to see it go the way we put it out.

Sen. L. Laffen: Like I said earlier, the most important position right now in ND is the new dean for UND business school. If we're going to limit it, I would like to request at least enough time to talk to OMB on those divisions and see if we can find a level that at least captures the universities provost and dean. I think that's the next level down.

Chairman Burckhard: No second yet. We can totally allow you some time to do that. Chairman Burckhard closed the discussion on SB2152.

2017 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Red River Room, State Capitol

SB 2152
2/10/2017
Job # 28201

- Subcommittee
 Conference Committee

Committee Clerk Signature

M. Grocken

Explanation or reason for introduction of bill/resolution:

Relating to public employment hiring practices and confidentiality of some applications

Minutes:

Attachment #1

Chairman Burckhard asked the committee to review the Christmas tree version of SB 2152. All senators are present.

Chairman Burckhard: Let's review the Christmas tree bill before we move anything. It does appear to be the broader concept which is what everybody wanted except the newspapers. I think we should run with that.

Sen. J. Kannianen: We talked before about all the political subs. All the other states that do have something like this, it does seem to physically apply to state agencies at the state level?

Chairman Burckhard: Well I think that Montana, South Dakota and Minnesota all have the broad version of this bill.

Sen. J. Kannianen: Is this for just state agencies not political subs? As far as the research I got back from Claire Ness and what Senator Laffen handed out this morning, it pretty much applied to.

Sen. J. Kannianen: For example, unless she just talks about, maybe I am assuming wrong.

Sen. J. Lee: Because she's saying that of the confidentiality of higher education applicants and only referring to higher education, she isn't saying they are in or out.

Chairman Burckhard: Montana does not have special rules for university applications. **Sen. D. Larson:** Then it says under state law the employee personal records; but it only relates to higher ed.

Sen. H. Anderson: When you read this thing it says you have to consider how Sen. Kannianen's question was asked. What they say is that the higher education or university presidents are treated the same as all the rest of the public employees so that means they are all closed. (reference Minn).

Sen. J. Kannianen: She just didn't mention anything but I guess it doesn't mean that don't apply to the local political subs.

Chairman Burckhard: The Governor's office is really wanting it to be as broad as possible because like Senator Laffen said, often times the person you want for this job isn't looking for a job and that would really keep that person from applying if there wasn't some privacy to it until the top 3 candidates are announced.

Sen. J. Kannianen: As far as county level or city level, I do still agree with similar concern with closed meetings, executive sessions or closed sessions where if on a city level this would apply to the city and caused a lot more closed meetings and the potential for...

Chairman Burckhard: Conducting business other than this. They would still be taking notes, so it shouldn't occur, but.

Sen. D. Larson: Example cited (4.53-5.35)

Sen. H. Anderson: I think that the law also ways your supposed to record those meetings so somebody could ask if they about something else.

Chairman Burckhard: Now is it that way in a smaller town? Same law applies, thanks.

Sen. J. Dotzenrod: Ex. cited (6.08-6.45) How did we get a closed meeting? **Sen. D. Larson:** I apologize as I misspoke. We were being accused of doing that and we didn't. We had somebody there.

Sen. H. Anderson: I believe the only time you could close such a meeting would be when they are negotiating with them for their salary. At that point you could close the meeting, that would be the only one narrow focus of when your negotiating salary. That's the only time.

Sen. H. Anderson: I think the proponents of this bill wanted us to try it in a broad respect and I don't have a particular objection to that. I am a little uncomfortable about the chances for passage once that 4th estate gets into the argument. But, if that's what they want, I'd say let's amend it like this, move it ahead and see what happens on the floor.

Sen. J. Lee: We have amendments on the floor right now as we have not voted

Chairman Burckhard: So we need a proposal to vote on the amendment.

Senator Anderson: I move the previous question on the amendment. You need a 2nd and a 2/3 majority to pass the motion for the previous question. **2nd: Sen. Judy Lee**

Sen. J. Dotzenrod asked what the committee was voting on? **Senator Anderson** replied the motion for the previous question means that the motion to end debate. If it is seconded, then it requires a 2/3 majority to end debate. Then once the debate is ended, you can move to the motion as part of the amendment.

Chairman Burckhard: I thought we were done with the debate?

Sen. Anderson: I am comfortable with you handling it anyway you feel comfortable.

Chairman Burckhard: We have I think a motion to accept the amendment.

Sen. J. Lee: No we have a motion on the floor to end debate.

Chairman Burckhard: So the motion is to end the debate. Do we need a roll call vote on that? I think you can do a voice vote. All in favor say "aye", none opposed. We are out of the debate.

Chairman Burckhard: Now do we have a motion to regarding that proposed amendment?

Sen. D. Larson: I think we already have the amendment, and lets just vote on it.

Sen. J. Lee: Larson moved and Lee 2nd the amendment, so let's just vote on it.

Chairman Burckhard: Roll call vote on the amendment: **6 Yea, 0 No, 0 Absent** passes 6-0

Chairman Burckhard: I need a motion to approve the bill as amended

Sen. Judy Lee: moved the bill as amended

2nd Sen. Diane Larson

Committee discussion followed

Roll call vote: 5 Yea, 1 No, 0 Absent

Motion passes

Carrier: Senator Diane Larson

PROPOSED AMENDMENTS TO SENATE BILL NO. 2152

Page 1, line 9, after "applicants" insert "who meet the minimum qualifications"

Page 1, line 10, after the second "the" insert "qualified"

Page 1, line 14, after the underscored period insert "If, by the close of the application period for a vacant position, a public entity receives applications from fewer than three applicants who meet the minimum qualifications, the applications and records related to the applications are open to the public."

Renumber accordingly

Date: 2.10.2017
Roll Call Vote #: 1

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2152

Senate Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider End debate on

previous question

Motion Made By Sen. Judy Lee Seconded By Sen. Anderson

Senators	Yes	No	Senators	Yes	No
Chairman Randy Burckhard			Senator Jim Dotzenrod		
Vice-Chairman Howard Anderson					
Senator Jordan Kannianen					
Senator Diane Larson					
Senator Judy Lee					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____ Unanimous voice vote

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

Date: 2.10
Roll Call Vote #: 2

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2152

Senate Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: 17.0418.02002 - Sen. Leffen Amendment

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. Larson Seconded By Sen. Lee

Senators	Yes	No	Senators	Yes	No
Chairman Randy Burckhard	✓		Senator Jim Dotzenrod	✓	
Vice-Chairman Howard Anderson	✓				
Senator Jordan Kannianen	✓				
Senator Diane Larson	✓				
Senator Judy Lee	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

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

**2015 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2152**

Senate Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: 17.0418.02003

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. Judy Lee Seconded By Sen. Diane Larson

Senators	Yes	No	Senators	Yes	No
Chairman Burckhard	x		Sen. J. Dotzenrod		x
Vice-Chairman Anderson	x				
Sen. J. Kannianen	x				
Sen. D. Larson	x				
Sen. J. Lee	x				

Total (Yes) 5 No 1

Absent 0

Floor Assignment Senator Diane Larson

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

REPORT OF STANDING COMMITTEE

SB 2152: Political Subdivisions Committee (Sen. Burckhard, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2152 was placed on the Sixth order on the calendar.

Page 1, line 9, after "applicants" insert "who meet the minimum qualifications"

Page 1, line 10, after the second "the" insert "qualified"

Page 1, line 14, after the underscored period insert "If, by the close of the application period for a vacant position, a public entity receives applications from fewer than three applicants who meet the minimum qualifications, the applications and records related to the applications are open to the public."

Renumber accordingly

2017 HOUSE POLITICAL SUBDIVISIONS

SB 2152

2017 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Prairie Room, State Capitol

SB 2152
3/10/2017
Job # 29047

- Subcommittee
 Conference Committee

Carmen Hickle

Explanation or reason for introduction of bill/resolution:

Relating to public employment hiring practices and confidentiality of some applications

Minutes:

1,2,3,4,5,6,7,8,9,10,11

Chairman Klemin: Opened the hearing on SB 2152.

Senator Lonnie Laffen: (Testimony #1 & attachment) (Time to :30 to 7:35)

Rep. Johnson: (7:54 to 9:40) I agree with Senator Laffen. Recently we went through a hiring process for our executive director, we received partial applications and were required to forward them directly to the Forum whether the applications were completed or not. We gave notice to the applicants that their applications were subject to open documents rules in North Dakota and that we would have to publish their name and gave them the opportunity to withdraw, which some did.

Rep. Ertelt: We heard of examples and that you actually had someone withdraw. The claim is that there would be repercussions from the current employers. Is there any evidence where individuals have applied, had their records open and then repercussions from their current employer?

Rep. Johnson: In our situation I cannot say that happened. I can say that individuals withdrew their applications under fear of such.

Dr. Cory Steiner, Superintendent of Schools at Northern Cass School District:
(Testimony #2) (11:00 to 17:29)

Rep. R. S. Becker: Your comments about how disappointed you were that K-12 was not included in previous legislation. Is there according to the current bill no bottom list that you would be comfortable drawing the line and saying no we don't have to have these procedures for jobs of such nature. Or are you saying every single job in the state of ND has to be on equal footing?

Dr. Steiner: We hope it would be open to all public positions in ND. I would hope that as this bill goes through the system that we can find a way to figure out what that is.

Rep. R. S. Becker: Are you saying you are most comfortable that this law only applies to higher ed and K-12? Or can you identify any position that you would be comfortable if it didn't have this protection?

Dr. Steiner: I would be most comfortable with any position and that it would be open to any public position.

Chairman Klemin: If a school district wanted to hire a 4th grade teacher this law would apply?

Dr. Steiner: It is my understanding, yes.

Steven Holen, Superintendent of Schools for McKenzie County Public School District:
(Testimony #3) (Time 20:35 to 24:40)

Rep. Ertelt: This law is currently on the books is prohibiting the best talents so the outcome if that is true is that we are hiring sub-par candidates. Is that true?

Mr. Holen: From the respect of the people we are hiring no. But from the aspect that are we missing candidates that would have been considered in the process with these hires that we are making, I would say absolutely. It's hard to quantify that when you have quality people to not have access to those in fear of this, to me that certainly diminishes the ability of a school to recruit the absolute best.

Rep. Ertelt: What I am hearing is we are not, because we are not opening it up to the best candidates.

Mr. Holen: Yes, we are not hiring the best candidates for our leadership positions.

Rep. R. S. Becker: Relative to K-12 I believe there is great merit in that we are not always attracting the best candidate. But as another large element relative to K-12, but isn't another major reason that encourages or prevents applicants from applying is pay scale? But isn't that also equally as important factor as to why there is not a free flow as much as you might like?

Mr. Holen: Absolutely depending on the position. You have the ability to negotiate.

Chairman Klemin: If a current employer finds out an employee is applying elsewhere seems to me there could be incentive for the current employer to try and keep that employee.

Mr. Holen: Absolutely then it would be up to that employee to go to their own board with that.

Dr. Thomas Jacobson: (Testimony #4) (Time 30:00 to 31:47)

Rick Burgum, on behalf of Ed Schafer, read his testimony: (Testimony # 5) (Time 32:25 to 38:15)

Jodi Uecker, Chief Operating Officer Office of the Governor: (Testimony #6) (Time 38:38 to 39:54)

Chairman Klemin: The bill provides that the public entity must designate 3 or more of the qualified applicants as finalists. Testimony that we are getting is focused on 3 but there could be more than 3 the way this bill reads is that your understanding?

Ms. Uecker: That would be fine from our point of view.

Chairman Klemin: What would prevent the public entity from designating 6 or 10 applicants as finalists?

Ms. Uecker: I don't think there would be anything that would prevent that from occurring.

Andy Peterson, Greater ND Chamber: (Testimony #7) (Time 40:58 to 44:11)

Chairman Klemin: I remember there was a situation involving confidentiality of some records with the Greater ND Association. It came up in a court case or the Attorney General's opinion, it was because of receipt of public funds by GNDA.

Mr. Peterson: There was a situation, our foundation received some public funds to do a project and there was an open records request for the full and complete financial records of the Greater North Dakota Association. It was outside of the foundation, there was a court case and we did win it.

Chairman Klemin: For purposes of this this bill we don't consider Greater ND Association to be a public entity?

Mr. Peterson: That is correct.

Becky Seibel, Interim Director of Human Resource Management Services: (Time 45:40 to 48:03). When the bill was introduced our concern was in relation to it was silent in regards to the qualification of the applicants. That went to 3 or more applicants will designated as finalists, we were pleased to see that they did amend that to include the consideration of the minimum of qualifications of the job posting and whether or not the applicants meet the criteria before being designated as a finalist. We do have exceptions built into our open record laws and in this case given the fact these applicants would not be provided publicly unless they are a finalist I understand that perspective and believe there is value to that so we would support this bill as amended.

Rep. Beadle: Based on your interpretation and how the phrase, qualified, comes in in your understanding would that make sure that we don't have a situation like happened with the UND football coach? Where an individual applied for the position citing there Madden football statistics and presented a PowerPoint presentation and it was a totally ridiculous and absurd situation and then became an internet sensation. So the, qualified, would prevent that sort of circus from happening?

Ms. Seibel: Possibly and my answer is because of two things, it is up to the agency or the hiring entity to state what the minimum qualifications would be for the position. The strength or weakness is relevant for your situation. But then it is the hiring entities responsibility to vet the candidates.

Rep. Hanson: This would not prevent the applicant from making it public.

Steve Swantec, CEO Gate Cite Bank: (Time 50:19 to 53:25) What is challenging is all the candidates that have applied the committee has to vote on them and it is open. When you have candidates internally that apply and you have staff or facility that may work with them or report to them it is an open record and you have to list how they voted. How this process will be set up is, you are forwarding the final candidates information. It is brought forth then the public can vet them and determine which candidates they have and make some comments on as well. That is also considered open records and meeting requirements. There is a number of candidates that will not apply because of that. You have to look at the candidate that applies because their current employer is going to wonder why are they are leaving and also why weren't they one of the finalists if they were doing a good job at their current position. There is difference of being a finalist and having it disclosed and not being a finalist and having it disclosed.

Kathleen Neset, SBHE: (Testimony #8 and attachment) (Time 54:07 to 59:37) Read the letter from Richard Legon. I believe in a balance in the work we do on public boards. This bill enables higher education, K-12, and also our municipalities, our communities, our counties to also hire from the broadest pool of candidates.

Rep. R. S. Becker: Is it your personal belief that in the past we have not always gotten the best pool of candidates?

Ms. Neset: We had the best individuals in every search. How can we do this better, the way as this continues to be an open process in the world of internet. That we also allow for these governing bodies to keep this open to the largest pool of candidates and encourage everybody to apply for these positions.

Blake Crosby, Executive Director of ND League of Cities: (Testimony #9) (Time 1:01:52 to 1:04:00). This bill should not be seen as opposition to the newspaper industry.

Jack McDonald, North Dakota Broadcasters Association: (Testimony #10 & attachments) (Time 1:04:50 to 1:14:34) This bill will create closed meetings. These are public jobs and we feel the public should have a right to know who is applying for these public jobs and why or why not they were chosen. We feel the HB 1333 is a better choice. We are asking that this bill be defeated and that you concur with the changes made in the Senate on 1333.

Chairman Klemm: Going back to your comment if there are 5 applicants they might only select only 1 as the finalist. The way I read this new statute it says, if there are 3 or more applicants they must designate 3 or more of them as finalist before an offer of employment can be made. It seems like if they get 3 or more applicants they have to designate 3 or more finalists. What do you think of that?

Mr. McDonald: Yes, I understand what you are saying. At the same time is the practical matter I don't know if that is going to happen if you have 4 applications or 5 applications.

Chairman Klemin: The law says it must happen before an offer of employment can be made.

Mr. McDonald: I understand what you are saying.

Chairman Klemin: In your testimony you cited 44-04-19.2 which deals with confidential or closed meetings and how those are to be conducted. I think you would agree that there is an established procedure that is required to be followed for any executive session. That would be used to determine who the finalists are. Would you agree that this whole section on setting out those procedures would have to apply to selection of finalists under this bill?

Mr. McDonald: Yes, it is not going to be a change in the state law because state law now says if you consider confidential records it has to be done in a closed meeting. This will add a lot more to areas that qualify under the closed meetings and closed records, but it is not going to change the state law on open meetings and open records.

Chairman Klemin: But it would require that committee or governing body they would first have to convene in an open session, which would be publicly noticed. So every one of these positions from every single public entity in which they get 3 or more applicants would have to go through this entire procedure. Have an open meeting first, record the executive session, keep the minutes and then provide a synapses afterwards. We have had several Attorney General's opinion on this procedure so would it be helpful at all to put in a cross reference to this session to make sure everybody knows they have to go through this whole procedure in order to maintain the integrate of the executive session and make sure there is no violation of open meetings law?

Mr. McDonald: I don't believe it would be necessary because as you quoted it is already in state law that when you are considering confidential records they need to be considered in a closed meeting. This law makes them confidential.

Chairman Klemin: There are a number of hoops the public entity has to go through under the current law dealing with executive sessions, that they don't have to go through right now when they select some of the finalists or a person selected for a particular position. Whether it be on the city, county or state level

Mr. McDonald: But the cities and counties and other public boards do understand how to operate under that law right now and they do go through those hoops for things.

Chairman Klemin: I am sure the media will be very vigilante in making sure they follow this procedure?

Mr. McDonald: We try to do that yes. The main point of my opposition is you are going to create many more of those closed meetings.

Chairman Klemin: This section talks about the governing body doing this but yet if it doesn't apply to a subcommittee that is determining applications. Shouldn't that committee, even if it's the governing body, be subject to requirements of this closed meeting?

Mr. McDonald: They are, another section of the law that says any committees formed by a public body are also subject to all these rules and regulations. If a search committee was formed they are subject to that open meeting law. They could go into executive session to consider confidential information.

Chairman Klemin: With this new statute that has been proposed for any public entity there is going to be some need for education of all of those public entities to make sure they follow these requirements.

Mr. McDonald: I know the Attorney General's office does conduct public education forums for Association of Counties and League of Cities.

Chairman Klemin: It would also apply to if someone wanted to hire a 4th grade teacher?

Mr. McDonald: That is correct. The school board hires the teachers but they don't do the interviews and don't go through the applications. They do approve the hiring.

Chairman Klemin: In this case it might be, be careful what you ask for.

Mr. McDonald: I suppose you can say that.

Steve Andrist, Executive Director, ND Newspaper Association: (Testimony #11) (Time 1:23:50 to 1:29:07)

Rep. Johnson: Could you provide a brief synapse of the origins of the phrase, public's rights to know?

Mr. Andrist: I can't give you the origins of it. But it is referenced in our Constitutions both state and federal. The work being done on behalf of the public should be available to and known to the members of the public. I refer to it as the difference between public and private. In the private industry the management is responsible to board of directors and shareholders. In the public the citizens are the shareholders.

2017 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Prairie Room, State Capitol

SB 2152

3/10/2017

Job # 29054

Subcommittee

Conference Committee

Carmen Hick

Explanation or reason for introduction of bill/resolution:

Relating to public employment hiring practices and confidentiality of some applications

1,2

Minutes:

Chairman Klemin: Opened SB 2152 for committee work. (Proposed amendment #1) He discussed the proposed amendment that was distributed.

Explained 44-04-19.2 9 (Handout #2)

Rep. Hanson: Moved a do pass motion on the amendment.

Vice Chairman Hatlestad: Second the motion.

Rep. Guggisberg: I have a question going from three to one. I do know when we had the other bill it dealt with higher education, the reason was to make sure they had three candidates. Essentially you could just pick the person and then say this is our one finalist.

Chairman Klemin: The problem with having three in all cases is when it is not an upper level position it is a waste of time to come back for an interview and have their records open to public if they are not going to be hired anyway.

Rep. Guggisberg: I think this is an important bill and could be fixed in a conference committee.

Chairman Klemin: This might go to a conference committee as there is a lot of changes from what the Senate did. I don't think they left themselves enough flexibility and what they would have to do to comply with this law.

Rep. Johnson: From a practical perspective I think this especially the first sentence resolves a lot. Delegated authority, it's imperative that this is defined because it can mean many things.

Chairman Klemin: The last sentence says it has to comply with all requirements those also include the notice requirements so that the public is aware? We don't specify that.

Rep. Johnson: We are required to post open meeting on our websites and at our office.

Rep. Hanson: I want to follow up on the concern of what Rep. Guggisberg had mentioned going from three to one person. If there is an entity that prefers to have at least three, why do they want to have at least three for those higher level positions? Could they adopt rules that say they would always have three?

Chairman Klemin: I would say it would depend on the position. Internally if they are required to have one before an offer of employment is made, they could say one is ok for the meter reader but for the city administrator we want at least three.

Rep. Pyle: The higher ed. internal policy they require three. On line 9, receives applications from three or more applicants, there is a lot of time in those small towns they can't get three.

Chairman Klemin: Lines 15-17 explains what happens if they have fewer than three.

Rep. Ertelt: Your first change does that carry over to line 10 and 11, or other person, it's enough to infer that it means that person delegated authority?

Chairman Klemin: Yes.

Rep. Ertelt: My comments are regarding the reduction from three to one. Page 1 line 12 change I understand the desire to have additional flexibility but I think what that ultimately does it makes this more restrictive for open records. If you can go down to just one finalist, then two more records are made closed.

Chairman Klemin: They are not finalist.

Rep. Longmuir: I am in favor of the amendment but I will be voting against the bill. The bill itself because it is so broad and I am not comfortable with it.

Chairman Klemin: It is broad but that is what they brought to us.

Rep. Ertelt: I was speaking about the three to one but in the case the entity does not need to designate any finalist.

Chairman Klemin: What would be the point of making the records open for someone they have decided is if they were not going to get hired?

Rep. Ertelt: The purpose of open records is to protect the public not to protect the public entity. I think the public has a right to know, if they are not going to name any there may be definitely qualified candidates within that pool. I think it is the public's interest to know there were qualified candidates and they may have been passed over.

Chairman Klemin: Isn't that why we elect people is to make those decisions?

Rep. Ertelt: If the records are not open how are you to judge their judgment? That they made good decisions if you don't also have that information available to you?

Rep. Johnson: You want to pass this to get qualified applicants so if you do because your initial records or applications are closed. Then you are probably not for reasons of not getting qualified applicants.

Rep. Ertelt: I understand the desire for good applicants and I give our public entities the benefit of the doubt. But the purpose of open meetings and open records is for the protection of the public. In the case they may be acting not in the best interest of the public, if there are no records available you have no way to determine if that is the case or not.

Rep. Simons: Getting back to Rep. Ertelt said, to be open public record for the people so the people can see who they are hiring. If that's the case, I could call and say this guy has some issues. I like that transparency.

Chairman Klemin: Once they become a finalist those records are open and you can make your comments. Just about every public entity is wanting to do criminal background checks. They are going to find out stuff before they make a person a finalist based on the background checks.

Rep. Ertelt: I am not opposed to portions of the amendment it is the provisions that allows for secrecy in applicants.

Chairman Klemin: This is a broad bill and I am not sure how to tailor it to make it narrower without extensive revision.

Voice vote on the amendment carried.

Rep. Johnson: Moved a do pass motion on amended SB 2152.

Rep. Hanson: Second the motion.

Rep. Zubke: Looking at this from a public entity standpoint, if we allow that public entity to one applicant they can go through this entire process and never declare a finalist until they have it to the person they want to issue an employment contract. Thus you have made the process totally closed.

Chairman Klemin: This designation comes after the review of the applications and before further consideration the way the bill reads on line 11. They would have to do that before they have the interview and before they offer employment.

Rep. Zubke: I agree with you. The spirit and intention is here just worried about how the public entities will read it.

Rep. Ertelt: In reference to the requirements to otherwise follow the open meeting requirements all of the applicants would be divulged during that preliminary open meeting process before they got to the closed meeting. Is that the case?

Chairman Klemin: That would take away from the whole bill if they disclose the names of the persons from a confidential application before they go into executive session. Then it would no longer be closed record.

Rep. Ertelt: We heard from multiple people who testified that they are after the best candidates and they continually refer to them as leaders. If they are good candidates that are concerned about the repercussions, they should undergo that trial to prove they have the metal to serve in the position they are seeking. My perception this bill still has a focus on higher ed. and the president said they have the best candidates in place today. It was viewed as a negative in the testimony that this would be a negative if we opened up all the records. During the hearing I thought about the other entities who may benefit by knowing who applied to these other positions. In regards to protecting the public interest, they are public for the purpose of protecting the public interest.

Chairman Klemin: Hiring people they could always google the names.

Rep. Johnson: We are trying to open up that pool of candidates. We can, what if, but the practical implications of the open documents we are not getting the best that we can. Where did this start the public's right to know? I don't think the public owns that paperwork, I think that person owns that information.

Chairman Klemin: In response to Rep. Zubke concern about the three to one, to me it didn't make sense to say that if they get three applications they must have three finalists. I think it would be best left up to the public entity to decide how many finalists they want to have. We can revisit that issue.

Rep. Zubke: Having been a part of those public entities and I agree we are forcing them to spend some additional time and money considering three but I think there is a provision. I would move an amendment that would move one back to three. It will provide us more protections.

Chairman Klemin: Rep. Johnson would have to withdraw her motion.

Rep. Johnson: Can this be amended in a conference committee?

Chairman Klemin: We don't know for certain it will go to conference committee.

Rep. Johnson: We have open documents now.

Chairman Klemin: If you do withdraw your motion and the second is withdrawn then Rep. Zubke can make his further amendment and the committee can decide if it should be one or back to three.

Chairman Klemin: You want to change it to, must designate three? Not to leave it up to the public entity to decide how many they want to designate?

Rep. Zubke: That is correct. My concern is the public entity will read this and say okay we are not going to designate a finalist until we have it at a point where we know who we want to hire. I think the public entity will take advantage of that.

Rep. Johnson: Withdraw motion.

Rep. Hanson: Withdraw the second.

Rep. Zubke: I would further amend Engrossed SB 2152 to change the word on line 10 from one back to three.

Rep. Ertelt: Second the motion.

Rep. Guggisberg: Should we add language in there that says, if there are three applicants?

Chairman Klemin: It's on line 9, if there are three applicants they must designate three finalists. If there are fewer than three, then line 16 and 17 makes all those records open to the public.

Rep. Pyle: I agree with Rep. Zubke amendment. If we can get it so we can guide these public entities to be as open once they get the finalists, I think three is a good number.

Voice vote carried

Rep. Hanson: Made a do pass as further amended motion.

Rep. Johnson: Second the motion.

Rep. Ertelt: Most of the public positions that are going to be affected by this bill, it wouldn't matter if it's open or not because in most cases they are not going to be looked at.

Rep. Beadle: I will support the bill. We have seen we have good candidates we don't always have the best candidates. I looked at HB 1333 regarding the high ed. government structure and this exact same subject and topic area we could take the model language which is cleaner and could use that in conference committee.

Vice Chairman Hatlestad: The bill is ugly and as it sits right now we have to do this for everybody. We are making a lot of work for a lot of people. After I listen to this if I applied for a job in ND and got it I would be offended, I'm a subpar candidate.

SB 2152 do pass as amended, carried. 7 yes, 5 no, 3 absent.

Rep. Johnson Will carry the bill.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2152

Page 1, line 9, after "entity" insert "or any person delegated authority by a public entity to review applications or make hiring decisions"

Page 1, line 10, after "entity" insert "or other person"

Page 1, line 10, replace "three" with "one"

Page 1, line 11, after "entity" insert "or other person"

Page 1, line 12, after the underscored period insert "However, if the public entity or other person does not wish to consider any of the applications further and decides not to make an offer of employment for the vacant position, the public entity need not designate any finalist."

Page 1, line 15, after the underscored period insert "The public entity or other person reviewing applications on behalf of the public entity shall comply with all requirements for an executive session to discuss confidential applications."

Renumber accordingly

3/10/17 DJH

17.0418.03002
Title.04000

Adopted by the House Political Subdivisions
Committee

March 10, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2152

Page 1, line 9, after "entity" insert "or any person delegated authority by a public entity to review applications or make hiring decisions"

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Renumber accordingly

Date: 3-10-17
Roll Call Vote: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2152

House Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: 17.0418.03001

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 Rep. Hanson Seconded By Rep. Hatlestad

Representatives	Yes	No	Representatives	Yes	No
Chairman Klemin			Rep. Guggisberg		
Vice Chairman Hatlestad			Rep. Hanson		
Rep. Beadle					
Rep. Becker					
Rep. Ertelt					
Rep. Johnson					
Rep. Koppelman					
Rep. Longmuir					
Rep. Maragos					
Rep. Pyle					
Rep. Simons					
Rep. Toman					
Rep. Zubke					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice Vote Carried

Date: 3-10-17
Roll Call Vote: 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2152

House Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: Zubke amendment
change line 10 from one back to three

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 Rep. Zubke Seconded By Rep. Ertelt

Representatives	Yes	No	Representatives	Yes	No
Chairman Klemin			Rep. Guggisberg		
Vice Chairman Hatlestad			Rep. Hanson		
Rep. Beadle					
Rep. Becker					
Rep. Ertelt					
Rep. Johnson					
Rep. Koppelman					
Rep. Longmuir					
Rep. Maragos					
Rep. Pyle					
Rep. Simons					
Rep. Toman					
Rep. Zubke					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice Vote Carried

Date: 3-10-17
Roll Call Vote: 3

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2152

House Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: _____

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 Rep. Hanson Seconded By Rep. Johnson

Representatives	Yes	No	Representatives	Yes	No
Chairman Klemin	/		Rep. Guggisberg	/	
Vice Chairman Hatlestad		/	Rep. Hanson	/	
Rep. Beadle	/				
Rep. Becker	—				
Rep. Ertelt		/			
Rep. Johnson	/				
Rep. Koppelman	—				
Rep. Longmuir		/			
Rep. Maragos	—				
Rep. Pyle	/				
Rep. Simons		/			
Rep. Toman		/			
Rep. Zubke	/				

Total (Yes) 7 No 5

Absent 3

Floor Assignment Rep. Johnson

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

REPORT OF STANDING COMMITTEE

SB 2152, as engrossed: Political Subdivisions Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 5 NAYS, 3 ABSENT AND NOT VOTING). Engrossed SB 2152 was placed on the Sixth order on the calendar.

Page 1, line 9, after "entity" insert "or any person delegated authority by a public entity to review applications or make hiring decisions"

Page 1, line 10, replace "shall" with "or other person shall"

Page 1, line 11, after "entity" insert "or other person"

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Page 1, line 15, after the underscored period insert "The public entity or other person reviewing applications on behalf of the public entity shall comply with all requirements for an executive session to discuss confidential applications."

Renumber accordingly

2017 TESTIMONY

SB 2152

#1
SB2152
1.27.17
pg 1/4

TO: North Dakota State Senate
Political Subdivisions Committee
Senator Randall Burckhard, Chairman

FROM: Lonnie J. Laffen, District 43

RE: SB 2152

Chairman Burckhard & members of the Senate Political Subdivisions Committee. North Dakota has excellent open records laws. Possibly the most stringent in the USA. This is a good thing as I am a strong believer in government transparency. But Mr. Chairman, I have come to understand that in one area, such transparency is causing us a problem. Our strict "every record is an open record" is hindering our ability to attract the very best talent to public employment positions here in ND. SB 2152 would allow applications for all public positions to remain closed until a group of no less than three finalists is selected - at which point the records become open.

Mr. Chairman - I started a company in 1989 and like most people who do so - was a control freak at my firm. When we reached 20 people I became a huge bottleneck and quickly realized that the only way we could get better was for me to let go and allow the company to grow beyond my control. I then realized we could only be as good as the people we hired and became 100% focused on hiring the very best talent. Mr. Chairman, my firm competes on national scale, as does the state of ND, and if all the people who were to consider working for us had to inform their employer that they were applying elsewhere, my talent level would be severely diminished. Especially if this rule were strictly limited to my office in ND. I can tell you that my Sioux Falls office would quickly become my largest office as applicants would simply quit applying to ND. Mr. Chairman - I know that people are not applying for our public positions here in North Dakota because they are afraid of repercussions from their employer when they find out they have applied.

It used to be that an open application record for say a position in Dickinson might get published in the Dickinson newspaper and that was a risk that applicants were willing to take. But Mr. Chairman, Google changed the world. That application now is posted online and in one second goes around the world. I am told that

employers set "google alerts" for every employee, partly to monitor what they might be saying on social media. If an employee applies for a position in ND - their employer knows about it seconds later - no matter where or how far away they are coming from.

Mr. Chairman, our ability to reinvent government isn't going to come from the legislature - it's going to come from hiring fantastic people. People who can work smarter, better, faster & cheaper. As much as we wish - we are not in control and nothing will improve our ability to deliver public services to the citizens of ND better, than hiring the very best people. We are not 20 people - we are 20,000 people.

Mr. Chairman - the newspapers are going to hate this bill. They will tell us there are going to be hundreds of meetings that are not public. I would suggest that is going to be true. But the purpose of these meetings will be to make our state a better place and I'm willing to give our agencies that tool and trust that they will use it appropriately. And I believe the reward outweighs the risk.

And Mr. Chairman - people have rights too. People should have the right to better their future without jeopardizing their current job. We want people to advance in their careers and to be all that they can be. Is it really necessary that an application, which we never considered, must be a public record? I don't think so. Once we accept an application and put it on our list to be considered - that application should then be considered open to the public. In short - we only need to know who is being considered.

Mr. Chairman - Recently UND & UNI recently held searches for their top spot - the college president. UNI had five sitting college presidents apply. UND initially had none. After the application deadline UND went out and recruited to get two. I have no proof, but have been told, that the UNI pool was asked why they did not apply to UND - they said it was because of our unique policy on open records.

SB2152 will give us the best of both worlds. It will help stimulate interest in these open positions while still allowing the public to know who is being considered for the job.

Mr. Chairman: There are a lot of people with more experience in this area than I that want to testify. Some couldn't be here so I would like to submit four letters:

The first is from Tim O'Keefe, CEO Emeritus of the UND Alumni Association & Foundation. His letter is short and I'd like to read it.

The second is from Steve Swiontek of Fargo. Mr. Swiontek was chair of the NDSU search committee that hired the current NDSU president. Steve's letter points out that the search firm they hired believes additional qualified applicants would have been received if not for North Dakota's open records laws.

A third letter is from the Association of Governing Boards of Universities and Colleges states that ***"while respecting the essence of openness, the greater cause, is stimulating interest among the best candidates"***.

And a fourth letter is from McPherson & Jacobson, an executive recruitment & Development firm. They state that ***"sitting superintendents interested in exploring another position are reluctant to have their names made public with only a chance of successfully winning the appointment. In contrast many states offer much greater protections to prospective candidates. This could create a competitive disadvantage for North Dakota. With a strong and more diverse candidate pool, the real winners would be the children in the school district."***

And lastly Mr. Chairman - I have a proposed amendment which comes from discussions with the North Dakota School Boards Association. The amendment makes it clear that if you receive less than three applicants - then all applicants become an open record. For many of our public positions - we do not receive more than three. We want to make it clear that they do not have to go out and find more applicants. If three or less apply - they simply all become an open record.

Thank you.

SB2152

2.9.17

#1

p.4

Sixty-fifth
Legislative Assembly
of North Dakota

PROPOSED AMENDMENT TO SB 2152

Introduced by

Senators Laffen, Hogue, Poolman

Representatives Kasper, Nathe, Delomere

A BILL for an Act to create and enact a new section to chapter 44-04 of the North Dakota Century Code, relating to public employment hiring practices and confidentiality of some applications.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 44-04 of the North Dakota Century Code is created and enacted as follows:

Applications for public employment - Hiring process - Confidential records and open records.

If a public entity receives applications from three or more applicants for a vacant position of commissioner of the North Dakota university system, president of a state higher education institution under the control of the state board of higher education, or superintendent of a public school, the public entity must designate three or more of the applicants as finalists for further consideration before the public entity may issue an offer of employment to fill the position. The applications and any records related to the applications which contain information that could reasonably be used to identify an applicant are confidential, except records related to finalists are open to the public after the finalists are designated. If a public entity receives applications from fewer than three applicants by the close of the application period for a vacant position, the applications and records related to the applications are open to the public.

SB 2152
1-27-17
Written Testimony
2
p. 1-2

To: North Dakota State Senate
Political Subdivisions Committee
Senator Randall Burckhard, Chairman

Re: SB 2152

Dear Senator Burckhard:

From 2002 -2014 I served as the CEO of the UND Alumni Association & Foundation. During my tenure, I was a member of the President's Cabinet, in a position to observe several high level searches conducted at UND in various key leadership roles. In addition, I was a member of the Presidential Selection Committee in 2007/08 charged with forwarding three names as finalists to the State Board of Higher Education to select the next President of UND succeeding Dr. Charles Kupchella.

This committee and selection process gained some notoriety, in that the Committee only forwarded the name of Dr. Robert Kelley, as collectively the rest of the semifinalists did not garner enough votes to meet the agreed upon minimum standard to forward their name. We did not have a single sitting President to consider in that process, nor did we in the recent eventual selection of President Kennedy, until after applications were closed and President Shirley and President Lindquist from within the NDUS system were essentially recruited late into the field. Post process exit interviews with AGB Search firm charged with recruiting talent into these processes have made it perfectly clear the issue in recruiting lies in our current open record law.

There is no question Google search has changed the world we live in. The minute someone applies for a position at our Universities, they are not just exposed within the borders of our State; rather their name is immediately spread on a global basis for all to see. I have witnessed firsthand the consequence of this, in personally making calls to recruit candidates of high regard and potential. It is virtually impossible to recruit someone to our open professional roles, as they are immediately exposed to their current employer and colleagues within, for a considerable time as the governance associated with the public protocol is long. By my experience, over and over the message is the same - - "I'm very interested, but can't afford to risk my relationships and credibility with my colleagues and current employer/University".

I want an optimal process for not only my University and all of the North Dakota University System, but for every public position available in North Dakota. Allowing exemption until three or more finalists are named does not diminish critical transparency of the applicants, rather it allows for search firms and others to recruit the best prospects to our state.

I strongly support SB 2152, and ask your committee to enthusiastically forward the bill to the entire Senate for passage.

Sincerely,

Tim O'Keefe CEO Emeritus UND Alumni Association & Foundation

2

Laffen, Lonnie J.

#3
SB 2152
1-27-17

From: Steve Swiontek <SteveSwiontek@gatecitybank.com>
Sent: Thursday, January 26, 2017 11:15 AM
To: Laffen, Lonnie J.
Subject: SB 2152

CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

Good morning Senator Laffen. I want to thank you for sponsoring SB 2152 regarding the employment hiring practices of public employees. I was the Chair of the search committee for the hiring of the current President at NDSU. At that time, there were over 30+ applicants for the position and according to the search firm that was hired, more qualified applicants would have applied if only the finalists had been required to publicly disclose information regarding their background, experience and etc. Candidates are hesitant to submit their names because the perception by others is why weren't they a finalist even if they were performing exceptionally well in their current position.

Currently, if references are being completed by more than 1 member of the committee, it is considered an open meeting and you have to disclose which reference will be called, the time and date. This also creates a challenge for individuals who are references for the candidates. I would have been more than willing to testify on your bill but unfortunately I will be out of state tomorrow.

Having served in the legislature for 8 years, I know how much time you spend and the dedication that is required to complete the job in a timely manner. Thank you for your time. If you would like to visit at any time for additional information, please feel free to call me on my cell at : 701-361-9392. Steve

Steve Swiontek
Chairman, President, & CEO
Gate City Bank, For a Better Way of Life
701.293.2530
steveswiontek@gatecitybank.com

 Please consider the environment before printing this email



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#4
SB2152
1.27.17

MCPHERSON & JACOBSON, LLC

EXECUTIVE RECRUITMENT & DEVELOPMENT

7905 L STREET, SUITE 310 ♦ OMAHA, NEBRASKA 68127 ♦ 402-991-7031/888-375-4814
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January 19, 2017

North Dakota State Senate
Political Subdivisions Committee
Senator Randall Burckhard, Chairman

This letter is submitted in support of Bill Number SB2152

McPherson & Jacobson is a leading national firm specializing in Executive Recruitment. During our twenty-five years in business we have conducted over 650 administrative searches for public educators, including over 20 in North Dakota.

The current open meeting law in place in North Dakota inhibits our ability to attract and recruit quality individuals for executive positions in public education. Sitting superintendents interested in exploring another position are reluctant to have their names made public with only a chance of successfully winning the appointment. In contrast, many states offer much greater protections to prospective candidates. This could create a competitive disadvantage for North Dakota.

McPherson & Jacobson has a twenty-five-year history of promoting transparency in public education searches. We believe that the business of public education should be conducted in public. We have developed a protocol that calls for high involvement of stakeholders in the search process, while keeping the final decision of selection with the governing board.

McPherson & Jacobson also respects the rights of individuals for data privacy in states which allow for that. In states that allow candidates' names to remain confidential, we inform candidates that their names will remain confidential until they are named a finalist for the position they have applied at that time their name will become public. In states that allow for confidentiality of applicants we receive between 30 and 40 percent more applicants. That allows for a stronger pool of candidates and gives districts a strong candidate pool. With a strong and more diverse candidate pool, the real winners are the children in the school district.

Thomas Jacobson Ph.D.
CEO/Owner

17.0418.02001
Title.

Prepared by the Legislative Council staff for
Senator Laffen

January 23, 2017

#5
SB2152
1.27.17

PROPOSED AMENDMENTS TO SENATE BILL NO. 2152

Page 1, line 14, after the underscored period insert "If a public entity receives applications from fewer than three applicants by the close of the application period for a vacant position, the applications and records related to the applications are open to the public."

Renumber accordingly

SB 2152
1-27-17

Written testimony
#6
P. 1/1

My name is Dr. Cory J. Steiner and I'm the Superintendent of Schools at Northern Cass School District in Hunter, North Dakota. We are a PK-12 district with 600 students located 25 miles northwest of Fargo I'm testifying in support of this bill. I'm here to share a different perspective on this bill and the current law.

In PK-12 education, we have been tasked to prepare students to be productive members of society. We have been asked to prepare students for college and career. We are asked to prepare the students of today for jobs that don't yet exist. We are asked to develop 21st century skills such as collaboration, communication, creativity, and critical thinking. We must develop academic, social, and emotional skills while making sure to develop long-lasting relationships in a safe environment. The list of important things to do and accomplish is never-ending. It takes a dedicated, passionate, and innovative leader to make these tasks a reality in our schools.

Our schools in North Dakota produce a high quality product due to the dedicated and passionate educators throughout our state. I'm proud of our state, our educational system, and our students, but I worry about our future.

I'm not sure we can achieve greatness without changing a law which limits our district's ability to recruit candidates from throughout our state, region, and on a national level.

This bill can't be about politics. It should be about students. This bill would allow districts throughout our state to increase the candidate pool for potential openings. It would allow districts to have choices on who can lead their district in a direction which achieves greatness. At this time, our current law discourages people from applying for jobs where their name will be reported publicly. I'm not talking about the candidates who are not ready or worthy of positions. I'm talking about the candidates who have an interest in something different or new. They are thoughtful, reflective, and purposeful in their decisions. I was recently told if a candidate doesn't want their name in the paper, they should not apply. This is a glass half full outlook. Please remember that every organization is ran by people just like you and me. They are human and with that comes great emotion. When organizations see a leader who they value and who is considering other options, there are repercussions. Even if not intended, these candidates now suffer when

SB2152
1.27.17
#6
pg.2/2

they return to their home district. People begin to wonder when they will leave or if they lack commitment. In most instances, neither of these apply. I was recently told our current law encourages transparency. I'm not against being transparent. It is why this bill requires the finalists to be recognized publicly. My thought is transparency at what cost. I would ask the committee to reflect. Do you want North Dakota to be a leader or follower in education? Do you want North Dakota to do the 'great' things or start the 'great' things in education? We must change our perspective on the current law and look from a completely different frame. We have great people, within our state and outside, who can lead organizations which will have a tremendous impact on our current students and the future of our state. We owe it to our future to not limit one single candidate from applying for a job for fear of their name being in the press. We never know if that one candidate may change the direction of our state, a district, and more importantly, a student. I ask all members of this committee to recommend a 'Do Pass' and do so knowing it will provide every student with a path towards success.

SB 2152

Senate Political Subdivisions
January 27, 2017
Kathleen Neset, SBHE Chair
701.328.2960 | k.neset@ndus.edu

Chair and Committee Members: I am Kathleen Neset and I'm here today in support S2152. The bill would allow us more confidentiality of applicants as they apply to our searches for leaders within our academic community.

We have had tremendously successful chancellor and president searches in the past. However, we want to continue to improve our effort to gain and attract the absolute best candidates in the nation for our North Dakota institutions.

We remain committed to transparency, but we know that this bill would allow us the flexibility to keep a level of anonymity for people who want to apply at our institutions and then open it up to the public once the search is narrowed down to final applicants. Doing our searches in this way would help us attract the best talent to North Dakota while allowing the potential applicants to have personal knowledge that their name and identity wouldn't be accessible until we have narrowed the search and they have the time to notify their current employer.

Circumstances for individuals continue to change. The competitive nature of higher education talent search is changing. We are now in a more competitive environment for the very best of the best talent. North Dakota must recognize this change and must step-up our methods of search in accordance to the changing environment. We need to have the same edge as other states do when attracting that talent to educate our students to be successful. A large part of that mission is allowing that special person who may be a great fit for ND higher education – to quietly forward their name to our search efforts. This method allows them to step out of their realm and into the world of ND higher education – without jeopardizing their current position. This will attract the candidate who may connect with our state and bring in their knowledge base and experience to lead – instead of continuing an environment of “don't try.”

If the financial situation continues to deteriorate, we need to position ourselves for success in that changing environment. We need to be deliberate in the decisions we make, and ultimately timely in those decisions for the outcomes to effectively impact our higher education institutions positively. We need to take initiative to have the right leaders at the right institutions at the right time. If we can gain some flexibility on our decision making when hiring, it would be a step forward in getting the strongest candidates for our institutions.

I ask for a do pass on SB2152 and am available to answer your questions. Thank you.

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1.27.17



**Testimony of Andy Peterson
Greater North Dakota Chamber of Commerce
SB 2152
Senate Political Subdivisions
Honorable Randall Burckhard - Chair
January 27, 2017**

Mr. Chairman and members of the committee, my name is Andy Peterson and I am here today representing the Greater ND Chamber, local chambers of commerce, and other business associations throughout North Dakota. Some members of the media describe the GNDC as the most prominent business organization in North Dakota. We stand in support of SB 2152 and ask for a “do pass” recommendation.

One of the business community’s greatest challenges is recruitment of workforce. There are numerous traditions and nuances in the hiring process; this includes the concept of confidentiality. Without it businesses would not be able to have discussions with well qualified candidates, and the process of recruiting the best candidates would be fatally altered.

We know employees look around from time to time. Sometimes they are serious and at other times they are simply testing the market or practicing their interviewing skills for a position they might really want in the near future. For whatever the reason; confidentiality goes along with the process. Even if there were no issues with a lack of confidentiality – which might include the erosion in current job stature or in the worst case scenario the elimination of a current position – private business would not likely operate well in a system where these kinds of negotiations were subject to open meeting laws.

Besides the erosion or elimination of jobs in a situation like this employers and employees would no longer be able to negotiate new employment agreements without being subject to new dynamics, and those dynamics would likely not be positive for the employer or employee.

It is clear there is a public right to know when it comes to government operations. However, the current practice goes too far. We should protect potential candidates until which time they become a finalist for the job. In my own



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Bismarck, ND 58502 F: 701-222-1611

situation, both the GNDC and I kept the process confidential until which time I was a finalist. At that point I revealed my intent to the Chamber of Commerce where I was currently employed. This allowed the GNDC to conduct background checks, openly call references, and so forth. I also felt it the right thing to do in the situation. The choice to enlarge the circle of knowledge was mine. I'd like to think it also allowed the GNDC to choose the best candidate at the end of the day.

Again, we are not supporting a closed system of hiring at state government. Rather, we think there are positions where confidentiality matters in the hiring practice and support limited protection for candidates until which time they become a finalist for a position.

SB 2152

1-27-17

Written testimony
#9

January 27, 2017

Senate Political Subdivisions

SB 2152

Sen. Burckhard, Chair

For the record, I am Blake Crosby, Executive Director of the North Dakota League of Cities, representing the 357 incorporated cities across the state. Approximately 77% of the population of North Dakota lives in those cities.

I am here in support of SB 2152. I believe there is logic in the argument that we are losing good, qualified candidates for positions such as Police Chief, Fire Chief, City Administrator, etc. because interested applicants do not want to put their current employment position in jeopardy. We have been fortunate up to this point that we have been able to hire qualified candidates internally. It would not be smart business to presume that will continue to happen.

I ask for a DO-PASS on SB 2152.

THANK YOU FOR YOUR TIME AND CONSIDERATION. I will try to answer any questions.

Senate Political Subdivisions Committee
10:00 am, Friday January 27th
Red River Room
SB 2152
Testimony: Ed Schafer

SB 2152
1.27.17
Written
testimony #10
pg. 1-3

Mr. Chairman; members of the committee—thank you for allowing me to appear before you and the people of North Dakota to support Senate Bill 2152.

I have been thinking back to a time when I was privileged to represent the people and remembering an incident that shaped my testimony today. We were in need of hiring a head psychiatrist at the state hospital. A person had been recommended and I was asked to try to recruit them for this important job for our state government. When I visited with him, he asked if I could guarantee him the job if he applied. Of course I said no, but pledged to give him due consideration.

He liked his job and wasn't looking to move, but was intrigued with a new opportunity. However, he was worried that if he didn't get the job, he would ruin his relationship with his employer and lose trust with the Board of Trustees.

I heard of similar situations around the state in following years but really didn't contemplate the impact that barriers to applicants can have.

Fast forward to last spring when I was appointed to the Interim President at the University of North Dakota. One of the people who greeted me was the new President of Dickinson State University. I was happy to have a fellow newbie in the system!

Later I was told that five exit interviews from that presidential search were granted to applicants who didn't get the job. All five said they wouldn't apply again if given the opportunity.

You see, the problem was not about getting or not getting the job, it was the information based technology we have today that made life difficult for these folks.

Maybe 20 years ago one might be able to apply to a school in Dickinson, North Dakota and no one would even know. But today, as soon as a name is posted on the internet, it pops up virtually all over the world.

It is pretty easy for an employer to have employees' names on Google-alert and be notified within minutes if someone receives an award, is charged with a crime, or stops for lunch with a competitor.

And with our state's open records laws, anyone applying for job will be instantly exposed.

Now the news media likes that, so they can write stories about who applied and what their background and qualifications are. But what about the privacy of the applicant?

How does it help them if they apply and don't make the cut? Will their employer write them off as a short-timer? Will their direct reports think they don't have to worry about performance because they are working for someone who probably isn't going to be there comes to job evaluation time anyway?

And let me ask you this: If someone applies for a job and isn't exposed to the media in the first go-around, is there harm to the people of North Dakota?

I was serving as interim president of UND because we were in the midst of a presidential search. There were 41 applicants and I was surprised there was not one sitting president who applied.

Our flagship university, one of a small number of liberal arts research universities around the country with a medical school, law school and over 15,000 students---didn't have even one president who applied when the time period closed.

We were fortunate that the UND search yielded a super capable new president but contrast our results with a recent presidential search at the University of Northern Iowa where there are around 11,000 students, no law school or med school and 5 sitting presidents sought the job.

Don't we want to attract experienced, capable people to leadership positions in our state government? I personally talked to a North Dakotan who graduated from one of our state's institutions, left the state to seek fame and fortune and was eventually named president of a university in the Midwest.

I asked him to apply for the UND position and while he was yearning to come home and apply his skills and experiences to better higher education here, he could not apply---would not apply because he was concerned that if he was not successful in his bid, he would damage his standing with his current employment.

I have to tell you, that conversation bothered me because I believe we owe it to the people of our state to remove barriers to people coming home and to strive to hire the best educated, experienced and backgrounded people possible.

I believe in openness and sunshine and as your Governor I fought to expose our budgets and governance policies because the people have a right to know. But I also believe in personal privacy and doing everything we can to attract the best leadership that we can.

I would note that last session a bill was introduced in the House of Representatives that that narrowly excluded certain higher education hires from our open records laws but was defeated. A similar one is being heard now on the other side of the legislature.

Jack McDonald, a lobbyist for the Newspaper Association and Broadcasters Association is with us today, I suspect in opposition to this important piece of legislation. His testimony on the House side included the comment "I think that the taxpayer deserves to know who is applying for those positions, or just as important, who isn't applying for those positions."

And isn't that what this is all about? People are not applying for leadership positions in North Dakota because of our laws regarding open records!

Our taxpayers deserve laws that encourage the best possible managers and operators we can give them.

I ask for your vote for Senate Bill 2152!

It will help create a brighter future for North Dakota!

Friday, January 27, 2017

SENATE POLITICAL SUBDIVISIONS COMMITTEE
SB 2152

CHAIRMAN BURKHARD AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We oppose SB 2152.

This bill represents the single largest assault on the state's open meetings and open records laws since they were initiated even before statehood. This bill, in effect, creates thousands of additional closed records and closed meetings for every single public entity in North Dakota.

In this era of demand for public transparency and open government, we don't think this is what North Dakotans want.

While there may be some need for some closed meetings and closed records in instances of high profile positions, such as college presidents as indicated is SB 2087 from the 2009 Legislative Assembly that is attached, there is not a need to close these records and meetings for every single public employee in North Dakota.

Remember, a public entity must meet in closed session to consider closed records.

We respectfully request that the committee either give SB 2152 a do not pass or amend the bill in conformance with the attached SB 2087.

Thank you for your time and consideration. I'd be happy to answer any questions.

SB 2152
1.27.2017
Written testimony
11
Pg. 2

Introduced by

Education Committee

(At the request of the State Board of Higher Education)

1 A BILL for an Act to create and enact a new section to chapter 15-10 of the North Dakota
2 Century Code, relating to exempting information regarding individuals applying for certain
3 university system positions from open records requirements.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** A new section to chapter 15-10 of the North Dakota Century Code is
6 created and enacted as follows:

7 **Commissioner and higher education institution president employment**
8 **applications - Exempt records.**

- 9 1. Except as otherwise provided in this section, a record that would identify an
10 individual applying for or under consideration for employment or appointment as
11 the commissioner of higher education or president of an institution under the
12 control of the state board of higher education is an exempt record as defined in
13 section 44-04-17.1. The board or a board search committee, upon request, shall
14 disclose information regarding the number of applicants or candidates for a
15 position covered by this section.
- 16 2. Once the board or board search committee reduces the number of applicants or
17 candidates by fifty percent from the total number of applicants or candidates for a
18 position, the board or board search committee shall notify each applicant or
19 candidate remaining under consideration that any record relating to the applicant
20 or candidate will become an open record within two weeks unless the applicant or
21 candidate elects to withdraw from consideration for the position. If the total
22 number of applicants or candidates for the position is six or fewer, however, the
23 board or board search committee shall notify each applicant or candidate who will
24 be interviewed for the position that any record relating to the applicant or candidate

- 1 will become an open record within two weeks unless the applicant or candidate
2 elects to withdraw from consideration for the position. If an applicant or candidate
3 elects to withdraw from consideration for the position, any record relating to that
4 individual remains an exempt record.
- 5 3. If the board or board search committee considers a new applicant or candidate
6 after the initial reduction in the number of applicants or candidates, any record
7 relating to the new applicant or candidate is an open record.
- 8 4. The board or board search committee may enter an executive session under
9 section 44-04-19.2 to consider or discuss an exempt record or the identity of an
10 applicant or candidate whose records are exempt under this section.

SB 2152
1-27-17
#12

Testimony of Steve Andrist
Executive Director, North Dakota Newspaper Association
Before the North Dakota Senate Political Subdivisions Committee
In Opposition to SB 2152

Chairman Burkhard and members of the committee, my name is Steve Andrist and I'm the executive director of the North Dakota Newspaper Association, which represents the state's 90 daily and weekly newspapers.

The issue before you today in SB 2152 is one the NDNA board of directors has struggled with for more than 10 years. Our current board members come from newspapers in Minnewaukan, Crosby, Dickinson, Garrison, Steele, Fargo and Linton, and they are unanimous in their belief that the public's business ought to be done in public.

But understanding the realities of politics and talent attraction, they have struggled over whether to accept a level of compromise, and with reluctance I believe they have concluded that some level of compromise might be appropriate. Regrettably, SB 2152 doesn't ask us to compromise as much as it does to surrender. We believe it simply goes way to far in sacrificing government transparency.

Any time we ask the citizens of this great state to forfeit the right to know something that is being done on their behalf, especially in the realm of higher education, it must be done with great reluctance and caution, if at all.

SB 2152 asks North Dakotans to give up their right to know who is applying for every public job in every political subdivision. They would have no way of knowing who is being considered for college president, county road superintendent, or township dog catcher -- or who is being eliminated from consideration, until the field has been narrowed to three finalists. That's asking way too much. Plus, it implies the system we've had in place all these years isn't working. I can think of any number of employees at our universities, in our schools, in cities and counties who have been tremendous public servants after being selected without any restrictions on transparency.

It's the way of the world for people to pursue upward mobility, and at some point it becomes an expectation that they will seek other jobs. And there is seldom any retaliation against those who apply elsewhere but don't get hired.

Perhaps something much less dramatic reduction in public transparency could be justified, but SB 2152 asks the people to sacrifice in order to extend convenience to prospects. In our view this bill asks way to much of the people, and we ask that you give it a don not pass.

Thank you.

Testimony SB 2152
January 27, 2017

Good morning, Chairman Burckhard and members of the Senate Political Subdivisions Committee. I am Becky Sicble, Interim Director of Human Resource Management Services (HRMS), a division of the Office of Management and Budget. I am here to testify in support of the core intent of the bill; however I have concerns with how it is currently written.

The first part of the bill states:

“If a public entity receives applications from three or more applicants for a vacant position, the public entity must designate three or more of the applicants as finalists for further consideration before the public entity may issue an offer of employment to fill the position.”

One of the foundational tenants of our state’s classified service is the requirement that all classified employees meet the minimum qualifications for the position’s classification. If an applicant does not meet the minimum qualifications as stated on the job posting, he / she is disqualified from further consideration. About 20% of all submitted applications are rejected due to not meeting the required minimum qualifications of the position’s classification.

After the minimum qualification screening, the preferred qualification screening follows. Preferred qualifications are simply the additional knowledge, skills, and abilities most desired for a position. The hiring agency assigns a point value to each of the identified preferred qualification criteria and generates a total score for each applicant. The final scores are then ranked and a preselected number, usually from three to five, of top-scoring applicants move on to be interviewed.

My concern is that, if this bill is passed as currently written, agencies may be required to consider applicants as “finalists” without any determination of whether they meet the stated minimum qualifications or how well they meet the desired knowledge skills, and abilities of the position. This is contrary to the defined, objective system we already use for application screening and selection.

The second sentence of the bill states:

“The applications and any records related to the applications which contain information that could reasonably be used to identify an applicant are confidential, except records related to finalists are open to the public after the finalists are designated.”

My concern here is not the proposal to designate applications as confidential for non-finalist candidates, but rather the use of the term “finalist” as it related to positions in the classified service. Within state government, the term “finalists” is not commonly used in our hiring process. Instead, "Certificate of Eligibles" is what we call the ranked list of the top qualified applicants who are selected to be interviewed.

This concludes my remarks. I would be happy to answer any questions at this time.

17.0418.02000

Sixty-fifth
Legislative Assembly
of North Dakota

SENATE BILL NO. 2152

Introduced by
Senators Laffen, Hogue, Poolman

Representatives Kasper, Nathe, Delmore

A BILL for an Act to create and enact a new section to chapter 44-04 of the North Dakota Century Code, relating to public employment hiring practices and confidentiality of some applications.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 44-04 of the North Dakota Century Code is created and enacted as follows:

Applications for public employment - Hiring process - Confidential records and open records.

~~If a public entity receives applications from three or more applicants for a vacant position, the public entity must designate three or more of the applicants as finalists for further consideration before the public entity may issue an offer of employment to fill the position. The applications and any records related to the applications which contain information that could reasonably be used to identify an applicant are confidential, except records related to the top qualified candidates or finalists in the hiring process are open to the public after they have been identified finalists are designated.~~

17.0418.02002
Title.

Prepared by the Legislative Council staff for
Senator Laffen

February 9, 2017

SB 2152
2.9.17
Attachment #
1

PROPOSED AMENDMENTS TO SENATE BILL NO. 2152

Page 1, line 9, after "applicants" insert "who meet the minimum qualifications"

Page 1, line 10, after the second "the" insert "qualified"

Page 1, line 14, after the underscored period insert "If, by the close of the application period for a vacant position, a public entity receives applications from fewer than three applicants who meet the minimum qualifications, the applications and records related to the applications are open to the public."

Renumber accordingly

Laffen, Lonnie J.

From: Kannianen, Jordan L.
Sent: Thursday, February 9, 2017 4:34 PM
To: Laffen, Lonnie J.
Subject: Fw: confidentiality of higher ed applicants' materials

----- Original message-----

From: Ness, Claire J.
Date: Thu, Feb 9, 2017 1:12 PM
To: Kannianen, Jordan L.;
Cc:
Subject: confidentiality of higher ed applicants' materials

Sen. Kannianen,

I listened to your voicemail, and here is some information I had already prepared on that issue. Please let me know if you need anything else.

Various reports suggest approximately 22 states have laws protecting some information about applicants to high-level positions at state universities and colleges. Several of those states' laws seem to protect the information temporarily, often until a candidate is chosen as a finalist for the open position. Others do not specifically refer to candidates for positions in higher education but provide some protections to application materials from all candidates for state employment. Here are some examples:

- Minnesota – Minnesota treats university president applicants the same as other applicants for state employment. The state's Data Practices Act (open records law) applies to documents related to university president searches. That act says the name of an applicant for employment by any state agency is private unless and until the applicant becomes a finalist for an open position. A finalist is defined as an "individual who is selected to be interviewed by the appointing authority prior to selection."
- South Dakota – South Dakota also treats university president applications the same as applications for other state jobs. Under the state's laws, employment applications and related materials are exempt from disclosure (which means state agencies may release them but do not have to), but the applications and related materials for individuals hired into executive or policy-making positions become open records. This most likely would mean a university president's application materials would become open to the public after the president is hired, unless the hiring entity chooses to release them sooner.
- Montana – Montana also does not have special rules for university president applicants. Under the state's laws, state employee personnel records, including "pre-employment information", are not open records. Pre-employment information is defined to include resumes, references, interview questions, and other information. The law is not clear about whether a candidate's name can be released publicly. There is a good argument the name may be released during the search, however. The rule protecting personnel records (which include pre-employment information) specifically says an employee's name is not protected information.
- Wisconsin – Public university search committee records are open records in Wisconsin. A candidate may ask a search committee, in writing, to keep the candidate's name confidential, however. If a search committee receives that request, the committee may keep the candidate's name confidential unless and until the candidate agrees to become a finalist.

- Florida – Under Florida law, a university search committee’s records are open.
- Iowa, Massachusetts and Texas – I have not researched these states extensively, but it appears they may keep candidate’s names confidential unless and until the candidates become finalists.

Thank you,
Claire

Claire J. Ness
Counsel
Legislative Council
600 East Boulevard Avenue
Bismarck, ND 58505
(701) 328-3208

SB 2152
2.10.2017
test. #1

Sixty-fifth
Legislative Assembly
of North Dakota

PROPOSED AMENDMENT TO SB 2152

Introduced by

Senators Laffen, Hogue, Poolman

Representatives Kasper, Nathe, Delomere

A BILL for an Act to create and enact a new section to chapter 44-04 of the North Dakota Century Code, relating to public employment hiring practices and confidentiality of some applications.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 44-04 of the North Dakota Century Code is created and enacted as follows:

Applications for public employment - Hiring process - Confidential records and open records.

If a public entity receives applications from three or more applicants who meet the minimum qualifications for a vacant position, the public entity must designate three or more of the qualified applicants as finalists for further consideration before the public entity may issue an offer of employment to fill the position. The applications and any records related to the applications which contain information that could reasonably be used to identify an applicant are confidential, except records related to finalists are open to the public after the finalists are designated. If, by the close of the application period for a vacant position, a public entity receives applications from fewer than three applications who meet the minimum qualifications, the applications and records related to the applications are open to the public.



*SB2152
2.10.17
Written
Testimony #1*

Policies and Procedures

Broadband Job Classifications

Broadbanding is an approach to job classification and compensation that takes into consideration content and scope of a job; employee knowledge, skills and abilities; the job market; and employee performance.

Broadbanding groups similar jobs together using a few, wide salary bands defined by the U.S. Department of Education. Within those bands, positions with similar skill requirements are grouped into job families. Job family titles are used on all payroll records, budget documents, personnel files and other official records. The hiring institutions may assign functional titles for other uses.

Broadbanding policies, band descriptions, functional title suggestions, pay policy and forms can be found in the [NDUS Human Resource Policy Manual](#).

Placement of a position within a job band is based on the position description. The position description also is used to determine fair market value for each position. The market rate is used in making salary decisions. Other salary-setting considerations are job performance, level of responsibility, directly related experience and internal equity.

Job bands in the University System are managed by the NDUS Human Resource Council. If an employee or employee's supervisor is dissatisfied with a job band or job family assignment, the assignment may be appealed within 30 days from the date the band/job family assignment was mailed. Appeals are filed with the human resource offices of the hiring institutions.

[<< return](#)

SUBJECT: 0000 BAND:
Executive/Administrative

Section: 0000.1 Band Description with Sub Band Descriptions and Job Family Numbers

Requires designation by the campus president to be excluded from the broadbanding system.

SUB BAND: 100 Executive/Administrative Staff
JOB FAMILIES:

- 105 Executive
- 110 Dean
- 115 Officer
- 120 Non-banded Administrator
- 123 Non-banded EERC
- 195 NDUS Administrative

SUB BAND: 200 Non-employee Payroll Service
JOB FAMILIES:

March 10, 2017

3-10-17 #1

SB 2152

TO: North Dakota House of Representatives
Political Subdivisions Committee
Representative Larry Klemin, Chairman

FROM: Lonnie J. Laffen, Senator, District 43

RE: SB 2152

Chairman Klemin & members of the House Political Subdivisions Committee. North Dakota has excellent open records laws. Possibly the most stringent in the USA. This is a good thing as I am a strong believer in government transparency. But Mr. Chairman, I have come to understand that in one area, such transparency is causing us a problem. Our interpretation of open records is hindering our ability to attract the very best talent to public employment positions here in ND. SB 2152 would allow applications for all public positions to remain closed until a group of no less than three finalists is selected - at which point the records become open.

Mr. Chairman - I know that people are not applying for public positions here in North Dakota because they are afraid of repercussions from their employer when they find out they have applied.

When open records rules were put in place by then Attorney General Heidi Heitkamp - they were never intended to be so open that they infringed on our ability to attract good talent.

And it wasn't the same problem then as it is today. It used to be that an open application record for say a position in Williston might get published in the Williston newspaper and that was a risk that applicants were willing to take. But Mr. Chairman, Google changed the world. That application now is posted online and in one second goes around the world. Employers set "google alerts" for every employee, partly to monitor what they might be saying on social media. If an employee applies for a position in ND - their employer knows about it seconds later - no matter where or how far away they are coming from.

Mr. Chairman, we have put North Dakota at a serious disadvantage. Almost all states operate in the fashion that this bill proposes. As an example:

Montana: State employee personnel records, including "pre-employment information", are not open records.

Iowa & Wisconsin: The laws in these two states are that public searches are in fact open records. However, a candidate can request in writing that their name remain confidential until the candidate agrees to become a finalist.

South Dakota: Treats all state applicants the same. Employment applications and related materials are exempt from disclosure. In SD this means the state agencies may release them but do not have to.

Minnesota: Again, treats all applicants for state employment the same. The states "Data Practices Act" says the name of an applicant for employment by any state agency is private unless and until the applicant becomes a finalist for an open position. A finalist is defined as an "individual who is selected to be interviewed by the appointing authority prior to selection".

I would ask, Mr. Chairman, why would anyone apply to North Dakota when they can apply at any of these states and not risk repercussions from their present employment? We have put North Dakota at a serious disadvantage

The newspapers will not like this bill. They will tell us there are going to be meetings that are not public, and maybe that is true. But the purpose of these meetings will be to make our state a better place and I'm willing to give our agencies that tool and trust that they will use it appropriately. The reward outweighs the risk.

An article that ran in the Fargo FORUM and the Grand Forks HERALD on Feb. 25th quoted Mark Anfinson, a lawyer for the Minnesota Newspaper Association. Mr. Anfinson states "The MN law works pretty well overall, It's not a perfect world and there's no perfect mechanism." This is the **attorney** for the **MN Newspaper Association** making this statement about their law which is exactly what this bill proposes.

Mr. Chairman, our ability to reinvent government isn't going to come from the legislature - it's going to come from hiring fantastic people. People who can work smarter, better, faster & cheaper. As much as we wish - we are not in control and nothing will improve our ability to deliver public services to the citizens of ND better, then hiring the very best people.

And Mr. Chairman - people have rights too. People should have the right to better their future without jeopardizing their current job. Is it necessary that an application, which we never considered, must be a public record? Once we accept an application and put it on our list to be considered - that application should then be open to the public. In short - we only need to know who is being considered.

Recently UND & UNI held searches for their top spot - the college president. UNI had five sitting college presidents apply. UND had none. I have been told, that the UNI pool was asked why they did not apply to UND - they said it was because of our "unique" policy on open records.

In fact, as far as I can research, UND hasn't had a sitting president apply in any of its presidential searches since at least 1954. It may in fact be never, but I can't find records dating before that time.

Mr. Chairman: I believe this change will give us the best of both worlds. It will help stimulate interest in our open positions, allow the public to know who is being considered for the job and will even the playing field in the competitive market for attracting the best talent. I ask that you give SB2152 your favorable consideration.

Thank you.

NORTHERN VIEW



ANDREW HAFFNER
On Campus

Dean a finalist for spot at Texas Tech

Hesham El-Rewini, dean of the UND College of Engineering and Mines, has been selected as one of three finalists for the position of provost and senior vice president at Texas Tech University.



El-Rewini

According to student media and a posting from the university president's office, El-Rewini will be in Lubbock, Texas, for a March 8-10

campus visit and interview process. During that time, he'll be meeting with institutional stakeholders, presenting his vision for the university and being for a public question and answer session.

El-Rewini is scheduled to be the last candidate to visit campus. Texas Tech student media previously reported that a university search committee announced an intent to produce an absolute finalist and preferred hire by the end of the

FROM COMBAT BO TO HIGH HE

GF woman enters pageant to shine light on



SB 2152

#2

3-10-17

House Political Subdivisions Committee

9:30 AM – Friday, March 10, 2017

Prairie Room

SB 2152

Testimony: Dr. Cory Steiner

Mr. Chairman and members of the committee. It is my privilege and honor to stand before you today and ask for your support and a do pass recommendation on Senate Bill 2152.

My name is Dr. Cory J. Steiner and I'm the Superintendent of Schools at Northern Cass School District in Hunter, North Dakota. We are a PK-12 district with 600 students located 25 miles northwest of Fargo. I'm here to share a perspective from PK-12 on this bill and the current law.

In PK-12 education, we have been tasked to prepare students to be productive members of society. We have been asked to prepare students for college and career. We are asked to prepare the students of today for jobs that don't yet exist. We are asked to develop 21st century skills such as collaboration, communication, creativity, and critical thinking. We must develop academic, social, and emotional skills while making sure to develop long-lasting relationships in a safe environment. The list of important things to do and accomplish is never-ending. Nothing of significance can be accomplished without a dedicated, passionate, and innovative leader. Our schools in North Dakota produce a high quality product due to the dedicated and passionate teachers and administrators throughout our state. I'm proud of our state, our educational system, and our students, but I worry about our future. The issues in education our profound, but more importantly, urgent.

We will never achieve greatness and be a leader nationally without changing a law which limits our district's ability to recruit candidates from throughout our state, region, and nation.

This bill can't be about politics. It is not about what the newspapers throughout our state want. It should be about what is best for our students. This bill would allow districts throughout our state to increase the candidate pool for potential openings. It would allow districts to have choices on who can lead their

organization towards greatness. At this time, our current law discourages people from applying for jobs where their name will be reported publicly. I'm not talking about the candidates who are not ready or worthy of positions. I'm talking about the candidates who have an interest in something different or new. They are thoughtful, reflective, and purposeful in their decisions. When discussing this bill with a colleague, I was told if a candidate doesn't want their name in the paper, they should not apply. This is a glass half full outlook. Please remember that every organization is ran by people just like you and me. They are human beings and with that comes great emotion. When organizations see a leader who they value and who is considering other options, there are repercussions. Even if not intended, these candidates now suffer when they return to their home district. People begin to wonder when they will leave or if they lack commitment. In most instances, neither of these apply. In my own career, my name was listed as an applicant for a job in a neighboring community. It would have been a move up in title. I spent considerable time talking with my family and reflecting on whether to apply. I faced repercussions and questions of loyalty when the information was released I had applied. I had yet to interview, but already was dealing with unintended consequences. I eventually became a finalist and that is when my name should have been made public. In the past year, a close friend of mine applied for a job in a neighboring community. They live in a very rural part of North Dakota. It would have been a significant move up in their career. Their name was released in a local county newspaper after they applied. They were shunned in a community where they had lived their whole life. Situations like this are avoidable. However, this is the stark reality of what happens in a small state like North Dakota.

In North Dakota, we have three district leaders in the eastern part of our state who are nearing the age of retirement. Over 30,000 students attend in these districts. The new leaders will play a pivotal role in shaping education for nearly 1/3 of the students in North Dakota. We owe it to our students, our communities, and our state to make sure we receive the pool of applicants necessary to hire great leaders.

I respect the bill moved forward from the house. However, I'm disappointed that K-12 is not included in this legislation. We have over 100,000 students who we lead each and every day. The very future of our state relies on what we do. By not including K-12 in this bill, we are treating leaders of these organizations as a step

below those at the university level. This is bad practice in a state which relies so heavily on collaboration between K-12 and higher education. The partnership between these two must be seen as equal in importance. As a state, it is essential to correct this potential mistake.

It was shared with me our current law encourages transparency. I'm not against being transparent. It is why this bill requires the finalists to be recognized publicly. My thought is transparency at what cost. I would ask the committee to reflect. Do you want North Dakota to be a leader or follower in education? Do you want North Dakota to do the 'great' things or start the 'great' things in education? We must change our perspective on the current law and look from a completely different frame. We have great people, within our state and outside, who can lead organizations which will have a tremendous impact on our current students and the future of our state. We owe it to our future to not limit one single candidate from applying for a job for fear of their name being released to the press. We never know if that one candidate may change the direction of our state, a district, and more importantly, a student. I ask all members of the committee to recommend a 'Do Pass' and do so knowing it will provide every student with a path towards success.

SB 2152
House Political Subdivisions Committee
Chairman Klemin
March 10th, 2017

3-10-17

Good morning. Chairman Klemin, members of the House Political Subdivisions committee. For the record, my name is Steven Holen and I currently serve as the Superintendent of Schools for the McKenzie County Public School District #1 in Watford City. I am here today to testify in support of SB 2152.

As a school superintendent and in addressing the dramatic hiring needs of our school district over the past 6 years due to student enrollment growth, I am fully aware of the challenges pertaining to finding quality employees to fill positions and in particular crucial leadership positions. It is imperative to the operations of a school district to receive the best applicants possible for important leadership positions, especially considering the shortage of qualified individuals for these critical positions. The prospect of an applicant being subjected to public notification prior to finalist determination limits and undermines the ability of professionals to consider advancements or changes to their career environments in a low risk manner. The challenges related to local dynamics and community perceptions in consideration of career advancement or other employment options can be very delicate when working with local Boards and citizens. Looking to advance professionally is usually not a reflection on the current political subdivision or community, but it can often be an emotional situation and a distinct challenge when working with employees, Boards, and communities. The risk of jeopardizing current employment by simply inquiring about other professional opportunities limits quality individuals from applying for open positions. It is common for applicants seeking leadership positions to apply only to see what may be available and to learn more about opportunities in the profession without serious consideration being taken or announcements made to their current employer or Board. To diminish this ability with the threat of open records requests and publication limits the capacity of a potential employer to have initial conversations with applicants, with no risk to current employment, that may turn into serious consideration, withdrawal of application, or eventually employment through the formal interview process.

Working as a public school district employee, I am fully aware of the importance of transparency and open records in terms of informing stakeholders of all actions related to school district business and use of taxpayer dollars. However, I am also aware of the unintended consequences of open records requests when used for efforts that do not promote the welfare of the public entity or its mission in working with public funding. The intent of public information and open records requests should be for the benefit of the citizens and taxpayers by providing valuable information regarding the public entities ability to serve in its capacity. I do not believe it is in the best interests of the public and communities in general to be provided information related to all applications for a position before the political

subdivision and the prospective employee are fully aware of the circumstances and have committed to a formal selection or interview process. The public has a right to know the choices for such important positions, however, I see no value in the public being informed of applicants that were not seriously considered or withdrew from the process prior to final consideration. This can only create issues for the applicant without providing any additional value to the political subdivision or the citizens its represents.

Please consider support for SB 2152 and its protections for job applicants that allows for political subdivisions to discuss feasibility and the matching of leader skillsets with candidates as part of initial application discussions but prior to public notification and information availability that should follow during formal interview selection processes such as the determination of finalists.

Thank you. I would be happy to answer any questions.

Dr. Steven Holen
Superintendent of Schools
McKenzie County Public School District #1 – Watford City

SB 2152

#4

3-10-17

Members of the Committee

My name is Dr. Thomas Jacobson. I am the confounder and owner of McPherson & Jacobson, Executive Recruitment and Development. McPherson & Jacobson has conducted 675 searches in 38 states, plus the District of Colombia, that includes 21 searches including the great state of North Dakota. We are one of the top national firms that specialize in conducting searches for public school superintendents.

One of the hallmarks of McPherson & Jacobson is our commitment to a transparent search process. We believe that the public business should be done in public. We encourage Boards to allow for involvement of stakeholder groups during the process.

However, when it comes to applicants, we believe that the applicants have some a right privacy. Our belief, in states where it is allowed, is the name of applicant be held in confidence, until the Board choses their final candidates, at which time those names should to be made public. Even in states where boards are permitted to conduct the selection and interviews in closed session we recommend the finalists for the position be announced.

We find, as we work across the country, states that have open meeting laws that require the release of the names of everybody who applies, do not get the same number or quality of candidates, as those states that allow the names of applicants to remain confidential. I believe the reason for that is that, seated, experienced superintendents are not going to put their name into a search unless they believe that they have a reasonable chance that they will be named a finalist for the position, they cannot risk their names being in public if they are not going to give serious consideration.

I believe if you acknowledge an individual's right to privacy, and allow them to remain confidential, you will receive a better slate of candidates, both in number and quality. I strongly support making the names of the final candidates' public.

SB2152

#5

3-10-17

House Political Subdivisions Committee
9:30 AM – Friday, March 10, 2017
Prairie Room
SB 2152
Testimony: Ed Schafer

Mr. Chairman, members of the committee—Thank you for allowing my testimony in absentia. I regret I cannot be with you today in the Capitol.

I write to support SB 2152 regarding privacy for applicants for public positions in North Dakota. My testimony is shaped by the many experiences I have had with hiring public employees directly or by direction. Many times I have heard comments from people who are not comfortable with applying for public jobs because of their exposure in doing so. They fear if their employers and constituents know they are looking, they can lose support and damage relationships with colleagues and direct reports. They like their current positions, but might be intrigued with a new opportunity or advancement. Some just want the chance to move back to North Dakota.

Consider a recent hire for Dickinson State University. Five exit interviews from that presidential search were granted to applicants who didn't get the job. Four out of the five said they wouldn't apply again if given the opportunity. You see, the problem was not about getting or not getting the job; it was the information based technology we have today that made life difficult for these folks.

Maybe 20 years ago, one could apply for a position in Dickinson, North Dakota and no one would even know. But today, as soon as a name is posted on the internet, it pops up virtually all over the world. It is pretty easy for an employer to have key employees' names on Google-alert and be notified within minutes if someone receives an award, is charged with a crime, or stops for lunch with a competitor.

With our state's open records laws, anyone applying for job will be instantly exposed. Now the news media likes that so they can write stories about who applied and what their background and qualifications are. But what about the privacy of the applicant? How does it help them if they apply and don't make the cut? Will their employer write them off as a short-timer? Will their direct reports think they don't have to worry about performance because they are working for someone who probably isn't going to be there comes to job evaluation time anyway?

And let me ask you this: If someone applies for a job and isn't exposed to the media in the first go-around, what is the harm to the people of North Dakota? SB 2152 assures that citizens will have full access to all the information regarding candidates who might be selected for these jobs!

Last year I served as interim president of UND because we were in the midst of a presidential search. There were 41 applicants, and I was surprised there was not one sitting president who applied. Our flagship university -- one of a small number of liberal arts research universities around the country with a medical school, law school and over 15,000 students -- didn't have even one president who applied when the time period closed. We were fortunate that the UND search yielded a super capable new president, but contrast our results with a recent presidential search at the University of Northern Iowa where there are around 11,000 students, no law school or med school and 5 sitting presidents sought the job.

I believe in openness and sunshine and, as your governor, I fought to expose our budgets and governance policies because the people have a right to know. But I also believe in personal privacy and doing everything we can to attract experienced, capable people to leadership positions in our state government?

I note your committee recently heard HB 1333 relating to exempting information regarding individuals applying for certain positions under the authority of the State Board of Higher Education.

Interestingly, this proposed legislation has been supported by the media. A Fargo FORUM editorial favors keeping confidential the list of initial applicants for college presidents and chancellors of the University System and supports the concept that "once the list has been culled to select finalists, those names would become public." But I find that discriminatory against other public employees by saying they should not be afforded the same treatment. Why would we put a university president in a different category than a police chief in West Fargo or Watford City? Do we set aside as elite a chancellor because the position commands more salary than a county administrator? SB 2152 corrects this situation by granting privacy protection equally to all public position applicants and also presents the public access to all the information about people who are actually being considered for jobs in the public sector.

I must point out one more thing: The North Dakota Newspaper Association has been flooding Legislators' mailboxes with handwringing about how SB 2152 would expand executive sessions and cause a proliferation of closed meetings. This is, unfortunately, false narrative. In fact, Jack McDonald, the professional lobbyist for the media's special interest groups, admitted in a Senate Committee hearing that this proposed

legislation in no way alters or changes the executive session laws that already exist.

Our taxpayers deserve laws that encourage the best possible managers and operators we can give them.

I ask you for a "do pass" recommendation for Senate Bill 2152!

You will help create a brighter future for North Dakota!

3-10-17

SB 2152 - Testimony in Support – Jodi Uecker, COO – Office of the Governor

- Mr. Chairman and members of the committee, my name is Jodi Uecker and I serve in Governor Burgum's office as Chief Operating Officer
- I am here today to testify in support of SB 2152, "A bill for an Act to create and enact a new section to chapter 44-04 of the ND Century Code, relating to public employment hiring practices and confidentiality of some applications."
- The Governor supports the legislation as written, and believes its size and scope is appropriate to help attract and retain talented individuals for positions across our state's government.
- What is a good hiring practice in one area is also a good hiring practice in others. Talent recruitment for each agency and government entity is vital, any during times of budget contraction, we need to give ourselves the best ability to attract applicants when we are unable to increase pay and benefits. This bill has no cost, and does just that.
- We fully support an open hiring process, and believe strongly that the final 3 individuals being considered for a job must be open records, but any further than point is truly not being considered, and does not play a role in the decision-making process.
- We need to maintain any and all resources and abilities to recruit talent to our government jobs. We ask that you support SB 2152 and I'd be happy to stand for any questions.

SB 2152

#7

3-10-17



Testimony of Andy Peterson
Greater North Dakota Chamber of Commerce
SB 2152
House Political Subdivisions
Honorable Lawrence Klemin - Chair
March 10, 2017

Mr. Chairman and members of the committee, my name is Andy Peterson and I am here today representing the Greater ND Chamber, local chambers of commerce, and other business associations throughout North Dakota. Some members of the media describe the GNDC as the most prominent business organization in North Dakota. We stand in support of SB 2152 and ask for a “do pass” recommendation.

One of the business community’s greatest challenges is recruitment of workforce. There are numerous traditions and nuances in the hiring process; this includes the concept of confidentiality. Without it businesses would not be able to have discussions with well qualified candidates, and the process of recruiting the best candidates would be fatally altered.

We know employees look around from time to time. Sometimes they are serious and at other times they are simply testing the market or practicing their interviewing skills for a position they might really want in the near future. For whatever the reason; confidentiality goes along with the process. Even if there were no issues with a lack of confidentiality – which might include the erosion in current job stature or in the worst case scenario the elimination of a current position – private business would not likely operate well in a system where these kinds of negotiations were subject to open meeting laws.

Besides the erosion or elimination of jobs in a situation like this employers and employees would no longer be able to negotiate new employment agreements without being subject to new dynamics, and those dynamics would likely not be positive for the employer or employee.



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It is clear there is a public right to know when it comes to government operations. However, the current practice goes too far. We should protect potential candidates until which time they become a finalist for the job. In my own situation, both the GNDC and I kept the process confidential until which time I was a finalist. At that point I revealed my intent to the Chamber of Commerce where I was currently employed. This allowed the GNDC to conduct background checks, openly call references, and so forth. I also felt it the right thing to do in the situation. The choice to enlarge the circle of knowledge was mine. I'd like to think it also allowed the GNDC to choose the best candidate at the end of the day.

Again, we are not supporting a closed system of hiring at state government. Rather, we think there are positions where confidentiality matters in the hiring practice and support limited protection for candidates until which time they become a finalist for a position.

Again, we support SB 2152 and ask the committee to recommend a "do pass."

SB 2152

House Political Subdivisions
March 10, 2017
Kathleen Neset, SBHE Chair
701.328.2960 | k.neset@ndus.edu

Chair and Committee Members: I am Kathleen Neset and I'm here today in support SB 2152. The bill would allow us more confidentiality of applicants as they apply to our searches for leaders within our academic community.

We have had successful chancellor and president searches in the past. However, we want to continue to improve our effort to gain and attract the absolute best candidates in the nation for our North Dakota institutions.

We remain committed to transparency, but we know that this bill would allow us the flexibility to keep a level of anonymity for people who want to apply at our institutions and then open it up to the public once the search is narrowed down to final applicants. Doing our searches in this way would help us attract the best talent to North Dakota while allowing the potential applicants to have personal knowledge that their name and identity wouldn't be accessible until we have narrowed the search and they have the time to notify their current employer.

Circumstances for individuals continue to change. The competitive nature of higher education talent search is changing. We are now in a more competitive environment for the very best of the best talent. North Dakota must recognize this change and must step-up our methods of search in accordance to the changing environment. We need to have the same edge as other states do when attracting that talent to educate our students to be successful. A large part of that mission is allowing that special person who may be a great fit for ND higher education – to quietly forward their name to our search efforts. This method allows them to step out of their realm and into the world of ND higher education – without jeopardizing their current position. This will attract the candidate who may connect with our state and bring in their knowledge base and experience to lead – instead of continuing an environment of “don't try.”

If the financial situation continues to deteriorate, we need to position ourselves for success in that changing environment. We need to be deliberate in the decisions we make, and ultimately timely in those decisions for the outcomes to effectively impact our higher education institutions positively. We need to take initiative to have the right leaders at the right institutions at the right time. If we can gain some flexibility on our decision making when hiring, it would be a step forward in getting the strongest candidates for our institutions.

I ask for a do pass on SB 2152 and am available to answer your questions. Thank you.

NORTH DAKOTA STATE SENATE
POLITICAL SUBDIVISIONS COMMITTEE
SENATOR RANDALL BURCKHARD, CHAIRMAN
FRIDAY, JANUARY 27, 2017

Senate Bill 2152 -- Relating to Open Records, Meetings and Searches
Letter of Concern

Richard D. Legon
President, Association of Governing Boards of Universities and Colleges

On behalf of the Association of Governing Boards of Universities and Colleges (AGB), I am pleased to provide this letter in support of Senate Bill 2152 (SB 2152), which would allow the North Dakota University System (NDUS) to maintain the confidentiality of candidates who apply for chancellor/president positions, except those confirmed as finalists.

Established in 1921, AGB's mission is educate the governing bodies of some 2000 institutions. We work with institution and state system leadership and their board members, providing education and counsel to over 37,000 leaders across higher education. AGB has helped to shape best practices in institution and board governance with a primary focus on institution mission achievement. AGB's board of directors, most of whom serve as college and university board members is committed to advancing policies that strengthen and improve governance and leadership, and SB 2152 is one such piece of legislation.

In today's higher education environment, the selection of a chief executive of a college, university, or university system is among the paramount responsibilities for which a governing body assumes responsibility. To meet this fundamental responsibility, boards (and search committees) must have confidence that their search is well positioned to attract the best pool of candidates possible. Current state law requires that the names of all candidates who apply for a presidency in the system will be made public—on websites associated with the search and in public meetings. While the appeal of a fully open process is understood, the reality is that such a process can chill the overall quality of the pool of candidates. The competition for quality leadership is intense across all of higher education; the mandate that all candidates shall commit to initial exposure as candidates, does have the unintended risk of limiting the overall quality of the candidate pool.

AGB recognizes that the State Board of Higher Education is appropriately concerned about current search practices within the System and that it supports SB 2152—demonstrating its understanding of the importance and strategic significance of some level of confidentiality in executive searches. The challenges assigned to institution leaders, including ensuring accessible and affordable education, increased retention and completion rates, a viable and sustainable financing model, innovation and knowledge creation, and an ability to educate a diverse population, mandate strong and visionary leadership. A search process should facilitate the ability to attract those skills that are needed to meet the profile of leadership. While respecting the essence of openness, the greater cause, in my

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opinion, is stimulating interest among the best candidates. Both objectives can be met by SB 2152. Many of the best higher education leaders may think twice before entering the search process knowing the risks to their current professional circumstances and their reputation, should they not move to finalist status.

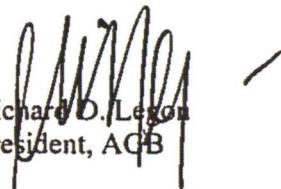
If enacted, SB 2152 would require that only the names of the top three finalists be announced, which is in line with 35 other public higher education systems across the country. To be clear, the majority of states have thus far retained their commitment to full disclosure of all candidates in a search pool. We think that North Dakota has the opportunity to join the 22 states plus the District of Columbia that have come to recognize the need for some protections for candidates while balancing the commitment to the public's interests. The proposed legislation allows for transparency regarding the search, yet does not provide unintended consequences for candidates or the search committee.

Further, it is our understanding that open-meeting requirements would not be affected as a result of SB 2152.

It is noteworthy that all eight members of the State Board of Higher Education were nominated by the governor and confirmed by the legislature. As the governing body with fiduciary authority over NDUS and the responsibility to ensure institution independence, the board's judgment and support of SB 2152 should be valued and taken into consideration.

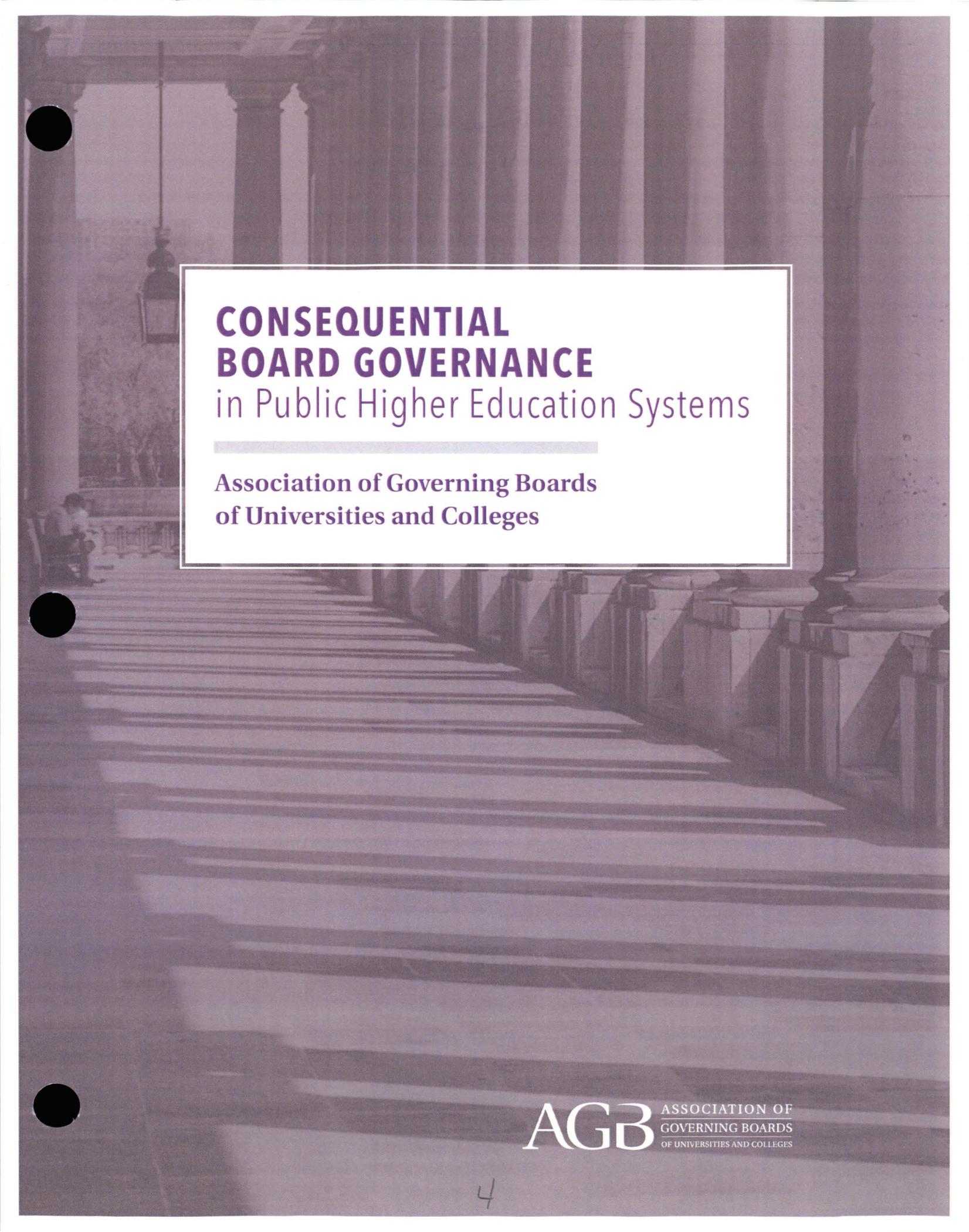
In my role as CEO of the Association of Governing Boards of Universities and Colleges, I am pleased to represent the association's endorsement of SB 2152, a bill that if passed will help to ensure that the state's higher education sector can continue to advance the state's priorities. I am available to answer any questions related to this endorsement. Please do not hesitate to contact me at rlegon@agb.org or 703-505-6916.

Respectfully submitted,



Richard D. Legon
President, AGB

Enclosure: *Consequential Board Governance in Public Higher Education Systems*



**CONSEQUENTIAL
BOARD GOVERNANCE**
in Public Higher Education Systems

**Association of Governing Boards
of Universities and Colleges**

ABOUT AGB

Since 1921, the Association of Governing Boards of Universities and Colleges (AGB) has had one mission: to strengthen and protect this country's unique form of institutional governance through its research, services, and advocacy. Serving more than 1,300 member boards, 1,900 institutions, and 38,000 individuals, AGB is the only national organization providing university and college presidents, board chairs, trustees, and board professionals of both public and private institutions and systems and institutionally related foundations with resources that enhance their effectiveness.

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FOREWORD

In November 2014, AGB's National Commission on College and University Board Governance issued its report, *Consequential Boards: Adding Value Where it Matters Most*. The Commission, chaired by former Tennessee Governor Philip Bredesen, noted that a majority of postsecondary students in the United States attend a college or university that is part of a public system structure. As a result, and given the complexities of a governing body that bears responsibility for a structure of multiple institutions, the Commission urged further exploration of these boards—their structure, engagement, and oversight.

In August 2015, AGB assembled a Task Force on System Board Governance to further study the question of how to ensure effective board governance across the nation's approximately 55 public higher education systems. Kevin Reilly, president emeritus of the University of Wisconsin System, chaired the task force, which, in collaboration with the leadership and board of the National Association of System Heads (NASH) and its chair, Nancy Zimpher, chancellor of the State University of New York, produced a set of specific recommendations, included herein and geared toward system governing boards, system chief executives, and policy leaders. Each of these groups shares responsibility for ensuring that governance of public higher education systems works well.

AGB is grateful to Kevin Reilly and the members of the task force (listed in the back of this document), whose input, experience, and wisdom resulted in a clear set of important and applicable recommendations.

OVERVIEW

American higher education is under immense public pressure. As a central component of the sector, public higher education systems enroll more than half of all postsecondary students in the United States—upwards of 10 million students each year. These systems are essential drivers of state and national economies and of our democracy. The vastness of their reach also means they hold enormous responsibility. Governing boards, state officials, and system chief executives (“system heads”) are each responsible for upholding public trust and advancing the performance of the system; it is difficult to overstate the importance of that work. High-performing public systems alone will not achieve society’s hopes for American higher education, but the sector cannot make necessary strides without them. Getting governance right in these complex settings is imperative.

The majority of American public post-secondary institutions are part of public college and university systems, or as some prefer to call them, public multi-campus systems. Most of these systems were created by state governments in the 1950s, 60s, and 70s in order to achieve economies of scope and scale and to focus the strengths of distinct campuses toward a shared public agenda. Today, systems are on the front lines of efforts to raise college completion rates nationwide, especially given systems’ robust public access missions and the increased frequency with which students transfer, or “swirl,” among multiple campuses.

The differences among systems are significant, if not self-evident. Many systems are the result of mergers of pre-existing institutions or small systems that were mandated by the legislature. These systems are commonly called “consolidated” systems. “Segmental” systems govern institutions that have similar missions and purposes, most commonly regional comprehensive universities or former teacher-training institutions. Community college systems are segmental in that they oversee only traditional two-year colleges. Other systems evolved from a single institution, usually the state’s

flagship university. Systems also differ in the types and number of institutions they oversee, as well as in the size of student enrollments. The Task Force on System Board Governance encouraged AGB to focus attention on the several similarities and commonalities among systems—a system being defined as multiple, separately accredited institutions overseen by a single governing board. Nevertheless, it is important to recognize that systems are by no means created equal in state laws and constitutions.

The governing boards of public college and university systems have responsibilities similar to— but also, in many ways, significantly different from— those of governing boards of single institutions. Foremost, a system board must balance the demands of several institutions’ interests while presenting a unified voice to policymakers, the media, and the public. It should also represent the collective interests of all citizens of the state or community, and the interests of all system institutions equitably. Working with and through the system head, the board must lead and monitor multiple institutions while simultaneously advancing the system as a whole with its plans and agendas for improvement or sustained excellence.¹

Public college and university system boards and their individual members are subject to some of the same barriers to effective governance that boards of single campuses encounter, such as unclear or conflicting expectations, inadequate orientation to responsibilities, and a lack of opportunities for continuing education and improvement. System boards also face impediments unique to system governance. A hurdle for systems and system governance to overcome is the fact that they are commonly misunderstood by and off the radar of the general public. Systems are not an organizational concept that resonates with average citizens, or even with most students and faculty. Systems have no campus, students, or alumni; they conduct no research and have no athletic teams.

¹ See “*The Leadership Dynamic in Public College and University Systems*,” (2009), a joint paper of the Association of Governing Boards of Universities and Colleges (AGB), National Association of System Heads (NASH), and American Association of State Colleges and Universities (AASCU).

GOVERNANCE FOR CHANGE

Through the impediments and misunderstandings—and despite occasionally successful political efforts to restructure or eliminate them—multi-campus systems have remained a viable and desirable means by which to oversee public higher education for generations. They now number some 55 that oversee mostly four-year public institutions, and some 30 that oversee two-year institutions. Systems exist in various forms in all but a handful of states. They enjoy support because they provide a coherent entity for public colleges and universities to efficiently address public needs while minimizing, if not eliminating, unhealthy and costly competition among member institutions. Systems can create conditions that allow institutions of different sizes and missions to thrive and succeed. They have been successful, by and large, at doing what they were created to do.

But to be more successful and viable for the foreseeable future, a growing number of scholars and practitioners, as well as the AGB Task Force, see the necessity for significant change in the focus and direction of systems—a belief that systems must evolve and adapt to new realities and new demands. A 2013 publication by the State University of New York, “Higher Education Systems 3.0: Harnessing Systemness, Delivering Performance,” explores several aspects of this change in focus and direction—primarily the promotion and coordination of more efficient and productive institutions that benefit states, communities, and the nation.

The consensus is that many public multi-campus systems must be more effective than they currently are to meet the challenges and demands of today and the future. In order to do so, multi-campus systems must be unified, cohesive, integrated, intentional, modern, and entrepreneurial. To lead necessary change, many system governing boards must exhibit new behaviors and skill sets, perform at higher levels, and be more engaged on a wide array of issues. Many system governing boards need greater authority—or to use the authority that they currently possess—to craft the necessary policies, allocate scarce resources, provide incentives, ensure accountability, and reward behaviors that are essential if colleges and universities are to better serve their states, communities, and the nation.



CHALLENGES FACING PUBLIC HIGHER EDUCATION SYSTEMS

The greatest challenge facing multi-campus systems differs little from that facing public higher education generally: the delivery of quality education despite uncertain or declining resources and state disinvestment (a challenge that, for many, is compounded by declining enrollments). Similar to individual campuses, systems function in an environment of heightened public concern over price, debt, and employment opportunities for college graduates. In earlier decades, policymakers commonly provided sufficient resources and investments to systems as a matter of course. Today, system leaders must find ways to lead effectively in a climate of greater criticism, skepticism, and at times even hostility than ever before, but unlike their single-campus peers, they must do so on behalf of not one but multiple campuses. Regardless of the environment, it is imperative for college and university systems to realize their full potential for change and impact.

Colleges and universities are being called upon to address numerous challenges facing the nation. As identified by the National Commission on College and University Board Governance and others, they include:

- Changing demographics, large educational achievement gaps between differing economic and ethnic groups, and inefficient student transfer (“swirl”);
- Decline in certificate and degree-attainment rates among the general population compared to other developed countries; and
- Concerns among the American public about whether the nation has the ingenuity, entrepreneurship, and innovative skills necessary to drive a modern economy or address critical social and environmental problems.

Many educators and policymakers believe that systems can play a significant role in addressing these challenges because of their ability to pool capacity and leverage change across multiple institutions. Take, for example, the college participation and completion gap for low-income students, a key area in which systems must perform better. It is critically important that system leaders

are successful in seeing gains in participation and in degree and certificate completion for these students; nationally, increased degree attainment creates a more educated citizenry and bolsters the economy.

AGB’s National Commission on College and University Board Governance recommended that “Boards must improve value in their institutions and lead a restoration of public trust in higher education itself.” This admonishment should resonate most especially with public college and university system governing boards because these institutions predominate in the American higher education system.

The successes or shortcomings of public college and university systems reverberate through all of higher education and society. If there is a need to improve value and restore public trust in higher education’s quality and affordability or its ability to fulfill its social and economic purposes, then public systems have a responsibility to make a significant contribution. Multi-campus systems were created for several reasons, but above all, to ensure a positive future for their respective states and to improve the quality of life for their citizens. For American higher education to thrive and for the nation to prosper, systems—and therefore system governance—must become far more effective. By their sheer size and reach, individually and collectively, systems are too big to fail.

For public college and university systems to be more unified, cohesive, intentional, modern, and entrepreneurial, they will need leadership from their governing boards.

High-performing boards are fully engaged on the issues of consequence, non-partisan, and free from ideology; act in cooperation with, yet distinct from, government and appointing authorities; and are focused on the challenges facing their states, communities, and the nation.

A WAY FORWARD

System chief executives, state elected officials, and governing boards themselves share responsibility for developing the high-performing boards that public higher education systems need. The recommendations and best practices within this document are tailored in recognition of the unique and important contributions of each group to that endeavor. Overarching aims for all parties should include improving governing board focus, capacity, and independence.

Focus. The main business of the system board is to uphold the integrity of the enterprise. That is, it must oversee strategies of scope and scale that effectively leverage the entire system to meet the needs of diverse citizens. Some of the board's most essential work includes balancing educational quality assurance with increased degree-completion rates.

Capacity. In order to perform well, boards require highly cultivated human capital and thoughtful approaches to their work. Board-member appointing authorities must spend time learning and thinking about their boards' needs. Officials who appoint board members often have extraordinarily large candidate pools to choose from, so there should be every opportunity to appoint the most capable, engaged, and committed members who will approach the task with the appropriate gravity and enthusiasm; there is no excuse for appointing members who are disruptive or will not take their positions seriously. Board education, meeting constructs, and the level of discussion should reflect the system's highest aspirations. How the board is deployed outside of meetings should demonstrate the board and system head's collective sense of the board as a highly capable asset.

Independence. In order to operate at a level of excellence, a system board must act as a single, independent body. It must listen attentively but remain free from external influences and political intrusion. It must recognize that its responsibility is to the broad public, not to any one elected official or small group of them. While the board should certainly support its system head, it should also, in private, be her or his most constructive critic, with the abiding goal of helping that person be as successful as possible in the position. Maintaining an independent stance is a continuous challenge for even the most capable and focused boards, and state leaders and system heads must do all they can to support boards' fundamental independence. Boards must also acknowledge the reality that policymakers are often more willing to extend greater discretion to boards whose systems and institutions show progress in meeting the particular challenges of their state and region.

IN CLOSING

Public higher education systems hold immense promise as engines of state and national prosperity. As the following recommendations suggest, much can and must be done to ensure public system governing boards are prepared to lead well in the face of a skeptical and demanding public. The challenges facing higher education are matched only by the tools at our disposal to meet them.

Fiduciary responsibilities of the system

1. Ensure the system's pursuit of a strategic or public agenda derived from the system's essential public purpose. The agenda, whether developed by the system governing board or a properly charged state coordinating board, should include a set of specific deliverables for the social, educational, and economic future of the state and its communities. To help carry out this duty, boards should have broad knowledge about campus-level programs, research capacities, faculty strengths, and strategic issues.
2. Make it the board's business to understand the scope and limits of the governing board's authority and responsibilities. Boards must ask whether their bylaws and policies accurately reflect the authority that the board legally possesses, and whether they are using that authority effectively. In all but a few states, system governing boards are codified in state law as independent fiduciary bodies. Where they are not, boards should nonetheless uphold the highest fiduciary ethics of care, loyalty, and obedience on behalf of the institution and the public.
3. Demonstrate commitment to improved board performance. System governing boards should implement confidential board member and board chair assessments, which constitute fulfillment of regional accrediting standards. Additionally, board members should be asked annually to review and sign a statement of board member expectations.

Shared governance

4. Ensure that system-wide organizations of faculty, staff, and students are used effectively. These organizations may have prescribed or limited policymaking authority, but board bylaws should treat these standing advisory committees as vehicles for adequate communication channels among the system governing board, the system head, the faculty, staff, and students to help move the system in needed directions.

Leadership

5. Hire system leaders who will lead inclusively and employ tools of influence and incentive. People of many backgrounds other than higher education—for example, business, military, public office—may prove capable of effective and lasting leadership of public systems.

6. Protect the governing board's integrity and that of the system head as nonpartisan authorities separate from the state's political infrastructure. Boards should conduct elections, searches, and hiring processes in demonstrably nonpartisan ways, and clarify expectations for the board chair and system head to conduct their work in a nonpartisan manner. Boards should focus on the long-term success of the system, not partisan expediency.

Containing costs while adding value

7. Unless justified by documented need (for example, population growth, workforce development, success with related programs, etc.), approach changes to an institution's academic mission with caution. Identifying problems of academic redundancy within the system and making hard decisions about the scope of each institution's contributions to the public good require deliberative attention by the governing board.
8. Work with the system head to increase the number of credentials the system awards by a specific number, by a specific date. This goal should align with national and state needs.

Advocacy

9. When appropriate, be a willing advocate for the system, particularly for the resources necessary to achieve the system's long-term strategic or public agenda. Many board members have useful contacts with members of the legislature, local government, and the governor's office. These are too often underutilized. Advocacy efforts must be coordinated by the system head and board leadership on behalf of all system institutions.
10. Work with state leaders to ensure the governing board holds the authority necessary to do its job. The work of the board includes: setting tuition policy; developing, allocating, and administering annual operating budgets; carrying over surpluses into succeeding fiscal years; managing capital financing and debt; entering into public-private partnerships; approving group purchasing and services; hiring, evaluating, and terminating system and campus chief executives; and censuring or removing board members for cause. Boards without such authority face disadvantages in ensuring the fiscal stability of their systems and in raising the performance of their systems.

Fiduciary responsibilities for the system

1. Develop a plan to get maximum value added from the system's governing body. Begin with a meaningful orientation to board responsibilities, and continue with robust board education on topics of strategic importance to the system and its campuses. The system head should encourage the board to ask questions and debate issues to the fullest extent, respectfully challenging the system head to provide the highest level of executive leadership possible. Importantly, the system head should ensure the governing board is central to the crafting of a strategic or public agenda.

Leveraging campus heads

2. Work with the system governing board to recruit, hire, charge, and develop talented campus heads. A campus head must not only be adept at serving as chief executive of a single institution, she or he also needs to assert leadership within the system on system issues and on her or his institution's responsibility for pursuit of the system's strategic agenda.
3. Oversee the work of campus heads and ensure they interact with the governing board as a part of the system's administrative team. System heads have central responsibility for developing administrative talent and ensuring the system builds leadership from within. They should also ensure this talent contributes to board effectiveness by establishing meaningful roles for campus heads and system senior staff vis-à-vis the board.

Advocacy

4. Proclaim the value of the system as an irreplaceable asset to the state, and develop and execute a sound system advocacy strategy. Be fully open with elected leaders regarding what the state should expect of the system and its institutions, and welcome elected leaders who expect more of the system. Seek alliances with them to move the system forward.
5. Be an advocate, with appointing authorities, for the governing board that is needed in order to fulfill the expectations of the state and its citizens. Make recommendations to appointing authorities that focus on board appointees with complementary skillsets, board structures (for example, board size, length of service, board meeting regulations), and board authority (for example, tuition authority, budget authority, authority to censure or remove board members for cause). Reiterate that board member expectations should be communicated to prospective board members early in the vetting process.
6. Develop system governing board members as valuable assets in the state capital and in public forums. Collaborate with the system governing board on development of a comprehensive system advocacy strategy, and direct the execution of that plan, including the coordination of board member deployment and messaging.

1. Ensure system governing boards hold financial control commensurate with high expectations for system leadership.

- In many cases, greater fiscal authority and flexibility should be vested in the system governing board in areas such as: tuition-setting authority, tuition retention, group purchasing, carrying over budget surpluses, tax-exempt debt issuance, and the ability to enter into public-private partnerships. If enhanced authority and flexibility are granted to governing boards, then clear expectations for accountability in order to demonstrate and document the positive benefits to students and citizens of the state should be attached.

2. Exercise great care in shaping governing boards, with the primary goal of enabling effective decision making.

- Develop a set of clearly written qualifications and criteria for system board member selection. As many states have done, consider creating a non-partisan screening committee to help determine appointments.
- Promptly appoint and confirm people of stature who are capable of discussing difficult topics in open meetings and maintaining focus amid potential pressure from internal and external stakeholders.
- Some system governing boards are currently too small to accomplish the necessary work and should consider increasing in size to roughly 12-20 members. A change in the number of system governing board members can only be accomplished by a change in state law. State officials should come together across party lines to ensure system governing boards have the capacity to do the job.

3. Prepare system governing board members to provide informed and diligent public service.

- Appointing authorities should explicitly entrust individuals selected for system governing boards with the responsibility to make decisions that are in the best interests of the system and the citizens of the state. Prospective board members should be fully informed of expectations early in the vetting process, and appointing authorities should ensure the board retains discretion in the selection of board leadership. Elected officials and members of their staffs should not be concurrently eligible for board service.
- All state officials should reinforce the expectation that individual system governing board members will: represent all of the system's institutions equally, be accountable to all of the state's citizens (and not any subset or special interest), and be held accountable by one another for performance and behavior. Legal requirements for regional representation on the board encourage provincialism and should be reconsidered.
- In states where system governing-board member orientation and ongoing education are not currently a requirement of service, state officials should codify these best practices.

AGB-NASH SYSTEM BOARD GOVERNANCE
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SB 2152 #9

3-10-17

March 10, 2017
House Political Subdivisions
SB 2152
Rep. Klemin, Chair

For the record, I am Blake Crosby, Executive Director of the North Dakota League of Cities, representing the 357 incorporated cities across the state. Approximately 77% of the population of North Dakota lives in those cities.

I am here in support of SB 2152. I believe there is logic in the argument that we are losing good, qualified candidates for positions such as Police Chief, Fire Chief, City Administrator, etc. because interested applicants do not want to put their current employment position in jeopardy. We have been fortunate up to this point that we have been able to hire qualified candidates internally. It would not be smart business to presume that will continue to happen.

I ask for a DO-PASS on SB 2152.

THANK YOU FOR YOUR TIME AND CONSIDERATION. I will try to answer any questions.

SB 2152 #10

3-10-17

Friday, March 10, 2017

HOUSE POLITICAL SUBDIVISIONS COMMITTEE
SB 2152

CHAIRMAN KLEMIN AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We oppose SB 2152.

This bill represents the single largest assault on the state's open meetings and open records laws since they were initiated even before statehood. This bill, in effect, creates thousands of additional closed records and closed meetings for every single public entity in North Dakota.

In this era of demand for public transparency and open government, we don't think this is what North Dakotans want.

While there may be some need for some closed meetings and closed records in instances of high profile positions, such as college presidents as indicated is SB 2087 from the 2009 Legislative Assembly that is attached, there is not a need to close these records and meetings for every single public employee in North Dakota.

Roughly a month ago, on February 9, 2017, the House passed HB 1333, sponsored by your own Rep. Rich Becker that was very similar to the 2009 legislation I just mentioned.

Remember, a public entity must meet in closed session to consider closed records. State law, Section 44-04-19.2 (1), requires that.

We respectfully request that the committee give SB 2152 a do not pass and allow HB 1333 to take precedence in this case.

Thank you for your time and consideration. I'd be happy to answer any questions.

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OUR OPINION

Bill would invite secrecy

2/14/2017

North Dakota has a proud tradition of supporting open government. We have strong laws to protect the public's right to know by mandating open records and open meetings. These laws serve to keep government transparent and accountable.

Today's issue:

A bill would exempt hiring of all state and local government employees from open records and open meetings laws.

Our position:

SB 2152, which would gut North Dakota's open records and open meetings laws, must be rejected.

open records and open meetings laws got a favorable reception in

They help to guard against government actions that are excessive or ill considered. They've become part of the political culture at the state and local levels of government - levels of government that are closest to the people they serve. And they've worked well.

But open government is under assault in North Dakota. Legislation that would gut North Dakota's

a hearing before a committee, where most bad legislation dies a deserved death. Senate Bill 2152, introduced by Sen. Lonnie Laffen, R-Grand Forks, would make secret the applications of every person seeking a public job in the state, until finalists are named. Any job - teacher, county road superintendent, superintendent of schools or president of a public college or university. Government is run by people, and maintaining an open hiring process is critical to keeping government exposed to sunlight.

The effect of SB 2152 would be to close hundreds of records that now are open and accessible. It's even worse than that. Discussion of closed records can happen behind closed doors in executive session, causing a proliferation of closed meetings. As we've already noted, The Forum favors keeping confidential *only* the list of applicants for college president or chancellor of the university system. Supporters of that approach argue that North Dakota is missing out on top talent because of the state's open records laws.

The lists of applicants for college president are usually quite long. But once the list has been culled to select finalists, those names would become public. House Bill 1333, which has passed the House, would do just that. It takes a more reasonable, targeted approach, unlike the indiscriminate shotgun blast that would be delivered by SB 2152. The House bill sensibly defines a finalist as anyone who has been invited for an interview.

There is no reason to gut North Dakota's time-honored and effective open records and open meetings laws, as SB 2152 would do. It's been advocated by a few government insiders, who would like to keep more of their actions free of public scrutiny. That's bad advice, and North Dakota legislators should reject it. There's an old saying: Sunlight is the best disinfectant. Let's keep North Dakota a place where the sun shines on government.

Editorials represent the views of Forum management and the Editorial Board.

Sixty-first
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2087

Introduced by

Education Committee

(At the request of the State Board of Higher Education)

1 A BILL for an Act to create and enact a new section to chapter 15-10 of the North Dakota
2 Century Code, relating to exempting information regarding individuals applying for certain
3 university system positions from open records requirements.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** A new section to chapter 15-10 of the North Dakota Century Code is
6 created and enacted as follows:

7 **Commissioner and higher education institution president employment**
8 **applications - Exempt records.**

- 9 1. Except as otherwise provided in this section, a record that would identify an
10 individual applying for or under consideration for employment or appointment as
11 the commissioner of higher education or president of an institution under the
12 control of the state board of higher education is an exempt record as defined in
13 section 44-04-17.1. The board or a board search committee, upon request, shall
14 disclose information regarding the number of applicants or candidates for a
15 position covered by this section.
- 16 2. Once the board or board search committee reduces the number of applicants or
17 candidates by fifty percent from the total number of applicants or candidates for a
18 position, the board or board search committee shall notify each applicant or
19 candidate remaining under consideration that any record relating to the applicant
20 or candidate will become an open record within two weeks unless the applicant or
21 candidate elects to withdraw from consideration for the position. If the total
22 number of applicants or candidates for the position is six or fewer, however, the
23 board or board search committee shall notify each applicant or candidate who will
24 be interviewed for the position that any record relating to the applicant or candidate

- 1 will become an open record within two weeks unless the applicant or candidate
2 elects to withdraw from consideration for the position. If an applicant or candidate
3 elects to withdraw from consideration for the position, any record relating to that
4 individual remains an exempt record.
- 5 3. If the board or board search committee considers a new applicant or candidate
6 after the initial reduction in the number of applicants or candidates, any record
7 relating to the new applicant or candidate is an open record.
- 8 4. The board or board search committee may enter an executive session under
9 section 44-04-19.2 to consider or discuss an exempt record or the identity of an
10 applicant or candidate whose records are exempt under this section.

Sixty-fifth
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1333

Introduced by

Representatives Rich S. Becker, Delmore, Guggisberg, M. Johnson, Longmuir, McWilliams
Senators Campbell, Krebsbach, Kreun, J. Lee

1 A BILL for an Act to create and enact a new section to chapter 44-04 of the North Dakota
2 Century Code, relating to exempting information regarding individuals applying for certain
3 positions under the authority of the state board of higher education.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** A new section to chapter 44-04 of the North Dakota Century Code is created
6 and enacted as follows:

7 **Certain higher education employment applications - Confidential records.**

- 8 1. As used in this section, unless context otherwise requires:
- 9 a. "Hiring authority" means the individual or group of individuals with the authority to
10 hire or screen applicants or candidates for the position of commissioner of higher
11 education or president of an institution under the control of the state board of
12 higher education.
- 13 b. "Finalist" means an applicant or candidate for the position of commissioner of
14 higher education or president of an institution under the control of the state board
15 of higher education who is selected to be interviewed and agrees to be
16 interviewed by the hiring authority prior to the selection of the commissioner or
17 president.
- 18 2. A record that would identify an individual applying for or under consideration for
19 employment or appointment as the commissioner of higher education or president of
20 an institution under the control of the state board of higher education is a confidential
21 record until the individual becomes a finalist. The hiring authority shall disclose the
22 number of applicants or candidates for a position covered by this section.

Sixty-fifth
Legislative Assembly

- 1 3. A hiring authority that is a public entity may enter an executive session under section
2 44-04-19.2 to consider or discuss the application or candidacy of an applicant or
3 candidate whose records are confidential under this section.

SB 2152

#11

3-10-17



Testimony of Steve Andrist
Executive Director, North Dakota Newspaper Association
Before the North Dakota House Political Subdivisions Committee
In Opposition to SB 2152

Chairman Klemin and members of the committee, my name is Steve Andrist and I'm the executive director of the North Dakota Newspaper Association, which represents the state's 90 daily and weekly newspapers.

Today we are talking about records that belong to the people of North Dakota. They are in the custody of the State Board of Higher Education, or a county, or a city, but they belong to the people.

And the issue before you today in SB 2152 comes down to a very basic question: when is it appropriate to tell the people of North Dakota that they can't see records that belong to them? Our members believe the question has a one-word answer: "rarely." Asking the citizens of this great state to forfeit the right to know something that is being done on their behalf should be done rarely. And reluctantly.

But understanding the realities of politics and talent attraction, our board members have struggled over this question for 10 years now, and with reluctance they have concluded that some level of compromise might be appropriate. Regrettably, SB 2152 doesn't ask for compromise, it seeks surrender. We believe it simply goes way too far in sacrificing government transparency.

Over those 10 years -- and today -- we have heard arguments that our higher education institutions aren't getting top candidates for top jobs. There is no data to prove that point, just gut feeling and some anecdotal evidence -- perhaps enough to consider allowing confidentiality for people seeking jobs like chancellor or university president.

But SB 2152 asks North Dakotans to give up their right to know who is applying for every public job in every political subdivision in the state. They would have no way of knowing who is being considered for college president, county road superintendent, or township dog catcher, until the field has been narrowed to three finalists. They would never know who was eliminated from consideration. That's asking way too much, especially when the system we have in place has resulted in the hiring of hundreds of thousands of quality, conscientious public employees in our state and its counties, cities and school districts.

We're convinced that even if you pass this bill there will still be some bad hires in the public arena. We're NOT convinced that bringing confidentiality to the hiring process will noticeably improve the quality of the public workforce.

If you disagree, we would suggest that a more measured approach, such as that provided in HB 1333, would be more appropriate, because Senate Bill 2152 asks the people to sacrifice way too much in order to extend convenience to job applicants. We ask that you defer to the people to whom these records belong by voting "do not pass" on SB 2152.

Thank you.

17.0418.03001
Title.

Prepared by the Legislative Council staff for
Representative Klemin
March 10, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2152

Page 1, line 9, after "entity" insert "or any person delegated authority by a public entity to review applications or make hiring decisions"

Page 1, line 10, after "entity" insert "or other person"

Page 1, line 10, replace "three" with "one"

Page 1, line 11, after "entity" insert "or other person"

Page 1, line 12, after the underscored period insert "However, if the public entity or other person does not wish to consider any of the applications further and decides not to make an offer of employment for the vacant position, the public entity need not designate any finalist."

Page 1, line 15, after the underscored period insert "The public entity or other person reviewing applications on behalf of the public entity shall comply with all requirements for an executive session to discuss confidential applications."

Renumber accordingly

- participation of an attorney at a meeting is not sufficient to constitute attorney consultation.
6. "Attorney work product" means any document or record that:
 - a. Was prepared by an attorney representing a public entity or prepared at such an attorney's express direction;
 - b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and
 - c. Was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, or in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings.
 7. "Investigatory work product" means records obtained, compiled, or prepared by a public entity in an effort to monitor and enforce compliance with the law or an order. Investigatory work product must be considered active as long as it is related to monitoring and enforcement activity conducted with a reasonable good-faith belief that it will lead to enforcement of the law or an order the public entity is charged by statute or other law with monitoring and enforcing.
 8. Following the final completion of the civil or criminal litigation or the adversarial administrative proceeding, including the exhaustion of all appellate remedies, attorney work product must be made available for public disclosure by the public entity, unless another exception to section 44-04-18 applies or if disclosure would have an adverse fiscal effect on the conduct or settlement of other pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings, or the attorney work product reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity.
 9. A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity.
 10. Nothing in this section may be construed to waive any attorney-client privilege of a public entity as defined in subdivision c of subsection 13 of section 44-04-17.1 regarding matters that do not pertain to public business.

44-04-19.2. Confidential or closed meetings.

1. A governing body may hold an executive session to consider or discuss closed or confidential records.
2. Unless a different procedure is provided by law, an executive session that is authorized by law may be held if:
 - a. The governing body first convenes in an open session and, unless a confidential meeting is required, passes a motion to hold an executive session;
 - b. The governing body announces during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics;
 - c. The executive session is recorded under subsection 5;
 - d. The topics discussed or considered during the executive session are limited to those for which an executive session is authorized by law and that have been previously announced under this subsection; and
 - e. Final action concerning the topics discussed or considered during the executive session is taken at a meeting open to the public, unless final action is otherwise required by law to be taken during a closed or confidential meeting. For purposes of this subsection, "final action" means a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy, but does not include guidance given by members of the

- governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.
3. The remainder of a meeting during which an executive session is held is an open meeting unless a specific exemption is otherwise applicable.
 4. The minutes of an open meeting during which an executive session is held must indicate the names of the members attending the executive session, the date and time the executive session was called to order and adjourned, a summary of the general topics that were discussed or considered that does not disclose any closed or confidential information, and the legal authority for holding the executive session.
 5. All meetings of the governing body of a public entity that are not open to the public must be recorded electronically or on audiotape or videotape. The recording must be disclosed pursuant to court order under subsection 2 of section 44-04-18.11 or to the attorney general for the purpose of administrative review under section 44-04-21.1. The attorney general may not disclose to the public any recording received under this subsection and must return the recording to the governing body upon completion of the administrative review. The recording may be disclosed upon majority vote of the governing body unless the executive session was required to be confidential. Disclosure of the recording by a public servant except as provided in this subsection is a violation of section 12.1-13-01. All recordings under this subsection must be retained for a minimum of six months after the executive session that is the subject of the recording.
 6. A public entity may sequester all competitors in a competitive selection or hiring process from that portion of a public meeting wherein presentations are heard or interviews are conducted.

44-04-19.3. Open meetings exemption - Legislative caucuses.

A caucus of members of either house of the legislative assembly may meet in an executive session that is not subject to section 44-04-19.2 if the meeting is not held on public property.

44-04-20. Notice of public meetings required - Exceptions - Schedule set by statute, ordinance, or resolution.

1. Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity as defined in section 44-04-17.1, including executive sessions, conference call meetings, and videoconferences. Unless otherwise specified by law, resolution, or ordinance, or as decided by the public entity, notices required by this section need not be published.
2. The notice required in this section must contain the date, time, and location of the meeting and, if practicable, the topics to be considered. However, the lack of an agenda in the notice, or a departure from, or an addition to, the agenda at a meeting, does not affect the validity of the meeting or the actions taken thereat. The notice must also contain the general subject matter of any executive session expected to be held during the meeting. For meetings to be held by telephone or videoconference, or other electronic means, the location of the meeting and the place the meeting is held is the location of a speakerphone or monitor as required under section 44-04-19.
3. If the governing body holds regularly scheduled meetings, the schedule of these meetings, including the aforementioned notice information, if available, must be filed annually in January with the secretary of state for state-level bodies or for public entities defined in subdivision c of subsection 13 of section 44-04-17.1, the city auditor or designee of the city for city-level bodies, and the county auditor or designee of the county for all other bodies or the schedule must be posted on the public entity's website. This schedule must be furnished to anyone who requests the information. When reasonable and practicable, a governing body of a public entity should attempt to set a regular schedule for its meetings by statute, ordinance, or resolution. This subsection does not apply to meetings of the legislative assembly or any committee thereof.