

2019 SENATE POLITICAL SUBDIVISIONS

SB 2340

2019 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Red River Room, State Capitol

SB2340
1/31/2019
Job # 31888

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Mary Jo Wocken
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Explanation or reason for introduction of bill/resolution:

Relating to confidentiality of records regarding emergency planning and response.

Minutes:

Written attachment #1 Mr. Cody Schulz

Chairman Burckhard opened the hearing on SB2340. All senators are present.

Cody Schulz: Deputy Director of the Department of Emergency Services as well as Director of Homeland Security for the State of North Dakota (1.03-9.12) who spoke in support of SB2340. **Written attachment #1.**

Senator Anderson: You've been in this business or the agency has for quite a long time. I have three questions related to your testimony. These concerns from the federal agencies obviously have been expressed previously. Why has it taken it this long to get to this point?

Mr. Cody Schulz: I would say that the volume and type of records we are talking about really can to light during the Dakota Access Pipeline protest. That was the tipping point if you will. It hasn't been an issue in terms of type or volume in release of these documents, but, what we saw happening because of just the volume of records requests during and after the protest, specifically as it relates to the federal agency products, the FBI, and Homeland Security is why it is coming to light now.

Senator Anderson: You said you were inundated with record requests. Now I am hearing that was mostly related to the pipeline protest and so forth, is that what you're saying, or was it prior to that, and what seemed to be the purpose of the request?

Mr. Cody Schulz: Yes, inundated specifically related to the pipeline protest process and aftermath. In terms of the intent, I think it was a scatter shot approach from multiple different groups and motivations, but they were looking for documents of all types.

Senator Anderson: I see in your testimony and in the bill some indications that some of this information might be used in a criminal prosecution and so forth, maybe somebody else is here to complain about that or whatever, but my concern is whether the confidential records

impairs the defense for that case, do you see that happening or can the judge subpoena those records or how does that work?

Mr. Cody Schulz: Yes, not being a law enforcement agent or an officer of the court I believe however, that these documents would be available through regular discovery or subpoena. Our bigger concern for my perspective is the records being released during the investigative process prior to charges being brought.

Senator Dotzenrod: I noticed on page 4, line 15 you've got emergency and you added two words there, prevention, protection, litigation and then you overstruck preparation for response. Then when you go to the new language on page 10, you've got on line 16, disaster prevention, protection, litigation, and then preparation is not overstruck. It's there. Why did you overstrike preparation on line 15 of page 4?

Mr. Cody Schulz: If it's not stuck in both places that may have been an oversight of mine. The reasoning behind the change in language to the laws that exist today in comparison to the bill, is, there will be national preparedness goal that was put forth during President Bush's administration in Presidential Policy Directive 8 identifies a number of mission areas for national preparedness and those mission areas are what I had put in the bill, prevention, protection, response, recovery mitigation.

Senator Dotzenrod: My point is I can understand why the efforts, the emergency plans would be confidentiality and to me it seems to would want to include preparation as being protected of public record. But, it's overstruck so it's taken out. I thought by including these two new words you've already covered, maybe you feel preparation is a doubling up and you don't need it? But its overstruck so the preparation word is out of there on line 4. We are no longer going to protect those emergency records that involve preparation.

Mr. Cody Schulz: I understand the question more clearly now. Yes, it is my belief that the words, prevention and protection will cover the preparedness that was struck, yes.

Senator Dotzenrod: On page 10, where we have included the preparation, that's should be there? You don't want it on page 4, but you do want it on page 10?

Mr. Cody Schulz: It should read identically in both. If it does not that was an oversight on our side.

Senator Anderson: The provision where those who have the records have to refer the request back to the Federal agency who created them, is it always clear where those records came from or is that going to create a lot of confusion for the agency receiving the request?

Mr. Cody Schulz: It should generally and almost all cases be very clear. Those records will have come primarily from the federal government, Homeland Security, FBI, as it relates to our records and those that we are receiving and disseminating to local law enforcement. A vast majority will be federal government documents.

Senator Anderson: Having worked with the DEA I know that sometimes they don't trust us and they are reluctant to give us stuff because they are afraid we're going to tell somebody about it. I understand that.

Mr. Cody Schulz: We have been contacted by legal at the FBI with the concerns and that's one of the reasons we brought this forward this session.

Senator Judy Lee: So we're talking about the words that mean whatever, but when we are on page 10, we have prevention and protection, right that's what you want. But we want prevention and protection but we don't need preparation. What we want to do is eliminate preparation then on page 10, is that correct?

Mr. Cody Schulz: Yes, that is correct. Prevention and protection.

Senator Dotzenrod: On page 5, I am asking a question about the existing law, so I am not really questioning what you've added. But I am a little confused on line 3 there, it says, "Unless made confidential under subsection 1, university research records are exempt" and I am wondering if that means they are exempt from protection or their exempt from being considered a public record. I am not sure what their exempted from? Are they exempted from being protected?

Mr. Cody Schulz: My understanding is they are exempted from release. The laws that exist today has two definitions of records for this purpose. They can be either confidential or exempt, in that portion of law points toward those records are exempt from release. Yes.

Senator Anderson: I can explain that a little further. If there confidential it means you don't release them under any circumstances; if they are exempt the agency gets to decide if they can release them based on the request of what's been asked for.

Senator Dotzenrod: I guess maybe I should of as more questions but I am getting the idea from this bill that what we're talking about her is there are vulnerabilities that we may have in our infrastructure system that is the way that there has been quite in the news lately. Electric lines, water supply lines, maybe other parts of our infrastructure that there is becoming an increasing awareness that those people who want to do us harm may be able to find ways to damage those parts. I think what I am reading in this bill in this new language is their trying to make information and knowledge about the details of those systems protected. Is that my correct interpretation of what's happening here on page 4, information about critical infrastructure, vulnerability, and there talking about telecommunications, electric, water, sanitary sewer storm drains, energy, fuel supply that is all part of this concern that we're becoming more aware of. Okay, I wanted to make sure I understood it.

Senator Diane Larson: I would think that there would be times that the local jurisdiction would have information on security relating to infrastructure and so on that they would be wanting to share with the federal government. So, sometimes it would be that local jurisdiction that would want their records exempt from disclosure, is that covered in this in any way?

Mr. Cody Schulz: In the specific bill before you it is not. But there are a sections of state law currently where certain records are exempt if it is related to an active investigation and security plans and other things of that nature.

Senator Judy Lee: I discovered a couple of days ago, when you pick up LAWS on your I-pad a little thing about Note which in on page 5, is blue and then you can connect to a note which says, " as provided in certain sections, this section is repealed upon the receipt by the Legislative Council of the certification by the Chief of the Environmental Health Section of the State Department of Health attesting that all necessary federal approvals have been obtained an all necessary federal and other agreements have been amended, to insure the state will continue to meet the privacy requirements of currently satisfies after the transfer of authority, powers and duties to the State Department of Health to the Department of Environmental Quality.

Chairman Burckhard: Closed the hearing on SB22340.

Senator Judy Lee: I move to amend on p10, line 16 and add that we would be overstriking the word "preparation".

2nd. Senator Diane Larson
Roll call vote: 6-0-0

Senator Judy Lee: I move do pass as amended
2nd Senator Diane Larson

Senator Dotzenrod: But on the bottom of p. 5, quite often these bills have an effective date. I assume that this bill will become effective with no reference in the bill to an effective date, but will come effective probably July 1, or August 1.

Mr. Cody Schulz: replied August 1.

Senator Dotzenrod: August 1st. So this reference again to what Senator Lee was asking about. I am not sure " Contingent effective date", is there another alternative date that comes in to play here.

Senator Judy Lee: the note when you have a chance to read it, says that it requires certification from all the necessary federal approvals have been maintained, which may not be August 1st. So my understanding of this and anther one we've run into the last week or so is that section will go away once those federal approvals have been achieved and it might not be on the date that the law would otherwise go into effective.

Roll call vote: 6-0-0 Motion passes.
Carrier: Senator Anderson

19.1138.01001
Title.02000

Adopted by the Political Subdivisions
Committee

January 31, 2019

all
1501

PROPOSED AMENDMENTS TO SENATE BILL NO. 2340

Page 10, line 16, remove "preparation."

Renumber accordingly

Date: 1.31.2019
Roll Call Vote #: /

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2340

Senate Political Subdivisions

Committee

☐ Subcommittee

Amendment LC# or Description: p. 10 line 16 - remove prepare on p. 10 line 16

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. D. Larson

Senators	Yes	No	Senators	Yes	No
Chair Randy Burkhard	X		Sen. Jim Dotzenrod		
Vice chair Howard Anderson	X				
Sen. Diane Larson	X				
Sen. Judy Lee	X				
Sen. Jordan Kannianen	X				

Total (Yes)

6

No

0

Absent

Floor Assignment

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

Date: 1-31-2019
Roll Call Vote #: 2

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2340

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 ☐ _____

Motion Made By Sen. Judy Lee Seconded By Sen. D. Larson

Senators	Yes	No	Senators	Yes	No
Chair Randy Burkhard	X		Sen. Jim Dotzenrod	X	
Vice chair Howard Anderson	X				
Sen. Diane Larson	X				
Sen. Judy Lee	X				
Sen. Jordan Kannianen	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Anderson

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

REPORT OF STANDING COMMITTEE

SB 2340: Political Subdivisions Committee (Sen. Burckhard, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2340 was placed on the Sixth order on the calendar.

Page 10, line 16, remove "preparation."

Renumber accordingly

2019 HOUSE POLITICAL SUBDIVISIONS

SB 2340

2019 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee

Prairie Room, State Capitol

SB 2340
3/7/2019
Job #33405

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Carmen Hickle
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Explanation or reason for introduction of bill/resolution:

Relating to protection of records shared for emergency purposes; relating to confidentiality of records regarding emergency planning and response

Minutes:

1,2

Chairman J. Dockter: Opened the hearing on SB 2340.

Cody Schulz: Deputy Director, Department of Emergency Services, Director, Division of Homeland Security. (Handout #1,2). Introduced the bill by reading his testimony.

Rep K. Koppelman: Legislative Council frowns on the word, entity, is there a definition of public entity in state law? Or might a different term be appropriate here?

Mr. Schulz: I would defer to the Attorney General's office but the change was made at their request.

Rep. Toman: Why not confidential records instead of exempt records?

Mr. Schulz: As I understand the difference between exempt and confidential is the agency that has those records, if they are exempt then they have the discretion to disclose them if it is in the public interest. Whereas, if it is confidential they must be retained and not disclosed.

Rep. Toman: So in terms of cyber security they shouldn't be at the discretion to disclose those to the public ever. What is your opinion?

Mr. Schulz: I would expect there to be a small percentage of cases where that would be the case. But the likelihood it would be something we would not disclose. As it relates to cyber security and security plans in general there are separate sections of law that address security plans specifically.

Rep K. Koppelman: It's not just disclosure to the public but disclosure to anyone, so if you wanted to disclose the record to a different department of state government if it's confidential you couldn't.

Mr. Schulz: One of the missions of our agency is to gather intelligence, analyze it and get it to the operators that actually act on that.

Sandra DePountis: Assistant Attorney General. Public entity is defined under 44.04.17.1 subsection 13. in our open records law.

Chairman J. Dockter: Closed the hearing.

Rep. Longmuir: Made a do pass motion on proposed amendment. (Handout #2).

Rep. Hatlestad: Second the motion.

Voice vote carried.

Rep. Longmuir: Made a do pass as amended motion.

Rep K. Koppelman: Second the motion.

Vote yes 11, no 2, absent 1.

Rep. Longmuir: Will carry the bill.

March 7, 2019

DE 3/7/19

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2340

Page 4, line 17, replace "political subdivision" with "public entity"

Page 4, line 25, replace "a political subdivision" with "other public entity"

Page 4, line 27, after "originated" insert "to submit an application under the applicable federal laws or rules"

Page 9, line 1, replace "political subdivision" with "public entity"

Page 9, line 9, replace "a political subdivision" with "other public entity"

Page 9, line 11, after "originated" insert "to submit an application under the applicable federal laws or rules"

Renumber accordingly

Date: 3-7-19
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2340

House Political Subdivisions Committee

☐ Subcommittee

Amendment LC# or Description: See below

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. Longmuir Seconded By Rep. Hatlestad

Representatives	Yes	No	Representatives	Yes	No
Chairman J. Dockter:					
Vice Chairman Pyle:					
Rep. Ertelt:					
Rep. Fegley:					
Rep. Hatlestad:					
Rep. Johnson					
Rep K. Koppelman:					
Rep. Longmuir					
Rep. Magrum:					
Rep. Simons:					
Rep. Toman:					
Rep. Strinden:					
Rep. Adams:					
Rep. Guggisberg					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Page 4 Line 17 - Page 4 Line 25
Page 9 Line 1 - Page 9 Line 9
Replace Political Subdivision with
Public Entity.
Page 4 Line 25 - Page 9 Line 11 - after applicable
originated insert to make application under the rules or
bedrock rules

Date: 3-7-19
Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2340

House Political Subdivisions Committee

☐ Subcommittee

Amendment LC# or Description: 19.1138.02001

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. Longmuir seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Chairman J. Dockter:	/				
Vice Chairman Pyle:	/				
Rep. Ertelt:	/				
Rep. Fegley:	/				
Rep. Hatlestad:	/				
Rep. Johnson	/				
Rep K. Koppelman:	/				
Rep. Longmuir	/				
Rep. Magrum:		/			
Rep. Simons:		/			
Rep. Toman:	/				
Rep. Strinden:	/				
Rep. Adams:	/				
Rep. Guggisberg	/				

Total (Yes) 11 No 2

Absent 1

Floor Assignment Rep. Longmuir

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

REPORT OF STANDING COMMITTEE

SB 2340, as engrossed: Political Subdivisions Committee (Rep. Dockter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2340 was placed on the Sixth order on the calendar.

Page 4, line 17, replace "political subdivision" with "public entity"

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Page 9, line 11, after "originated" insert "to submit an application under the applicable federal laws or rules"

Renumber accordingly

2019 TESTIMONY

SB 2340

SB 2340
1.31.2019
Written Testimony #1
p.1

Testimony – SB 2340
Senate Political Subdivisions Committee
January 30, 2019
By Cody Schulz
Deputy Director, Department of Emergency Services
Director, Division of Homeland Security

Chairman Burckhard and members of the Senate Political Subdivisions Committee, my name is Cody Schulz. I am the Deputy Director of the Department of Emergency Services (DES) and Director of the Homeland Security Division. I offer this testimony in support of SB 2340.

This bill addresses public safety and law enforcement open records exemptions that affect three primary partners of the Department of Emergency Services (DES) and the State and Local Intelligence Center (SLIC).

1. Federal Public Safety and Law Enforcement Agencies – FBI, HLS, etc.
2. Local Law Enforcement Agencies – Sheriffs and Police Departments
3. Cybersecurity Task Force Members – Private and Public Sector Partners

Currently, by law, records related to disaster mitigation, response, recovery, and cyber threat are exempt when in the possession of DES or the SLIC. However, because part of the mission of both of these entities is to coordinate and disseminate information, it is necessary to ensure that the exemption is retained when we share these documents with state and local law enforcement, public safety agencies, and our other public and private sector partners.

First, I would like to discuss how this bill would ensure a full partnership among federal, state, and local public safety and law enforcement agencies. The SLIC gathers, evaluates, analyzes and disseminates information and intelligence data (records) on crimes, both real and suspected, to the law enforcement community, government entities and private industry concerning dangerous drugs, fraud, organized crime, terrorism, cyber, and other criminal activity for the purposes of decision making, public safety and proactive law enforcement while ensuring the rights and privacy of citizens. Much of the data (records) comes from the federal government and has specific labels and handling protocols that are below the classified level. These includes but are not limited to:

- **For Official Use Only (FOUO)** – The term used within the federal Department of Homeland Security (DHS) to identify unclassified information of a sensitive nature, not otherwise categorized by statute or regulation, the unauthorized disclosure of which could adversely impact a person's privacy or welfare, the conduct of Federal programs, or other programs or operations essential to the national interest
- **Law Enforcement Sensitive (LES)** – Unclassified Information originated by federal agencies with law enforcement missions that may be used in criminal prosecution and requires protection against unauthorized disclosure to protect sources and methods, investigative activity evidence, or the integrity of pre-trial investigative reports
- **DEA Sensitive (DSEN)** - Unclassified information originated by Drug Enforcement Administration (DEA) that requires protection against unauthorized disclosure to protect sources and methods of investigative activity, evidence, and the integrity of pretrial investigative reports

SB2340
1.31.2019
att #1
p.2

During the Dakota Access Pipeline (DAPL) unlawful assembly, many open records requests were made to state and local agencies. Sensitive public and private sector information and intelligence was released in response to these requests because of a lack adequate safe guards. The information and intelligence were concerning and included:

- Daily construction operations (location, number of staff, etc....)
- Coordination with law enforcement
- Personal Identifying Information (PII) of private and public sector employees
- Federal government information and intelligence, concerning this incident and other non-related investigations (FOUO and LES)

Due to the release of this information, our long standing partnership with federal agencies such as the FBI and DHS became strained because our handling protocols had the potential to put safety and operations at risk.

Second, I would like to touch on how this bill ensures a full partnership among federal, state, and local governments, as well as the private sector for a statewide cybersecurity and critical infrastructure protection strategy.

In late 2017, Governor Burgum created a cybersecurity taskforce co-chaired by staff from DES and ITD that are assigned to the SLIC. The taskforce is made up of private sector business representatives from critical infrastructure industries such as energy, finance, healthcare, etc. Currently, the private sector members of the taskforce have been reluctant to share cyber and critical infrastructure information because they fear sensitive information may become public. Full sharing among private and public sector entities is essential because of the interconnectivity of the cyber environment. One irony of the current law that this bill would fix is: if a record is in the possession of an ITD Information Security Systems Analyst assigned to the SLIC, the record is exempt. However, if that Analyst shares the record with his boss, the ITD Chief Information Security Officer, the record in his possession is not exempt.

We believe that this bill strikes a great balance between public safety and transparency. Federal government and private sector partners can feel assured that sensitive information shared with North Dakota State and local public safety agencies remains exempt from public dissemination. Transparency is maintained because this bill would require that agencies that receive a request for the exempt records must refer the requester to the federal agency or private entity where the record originated, and the originating agency would release the record based on their protocols.

On behalf of the Department of Emergency Services, I recommend SB 2340 receive a Do Pass.

Thank you for your time; I will do my best to answer any questions you may have.

#1

Testimony – SB 2340
House Political Subdivisions Committee
March 7, 2019
By Cody Schulz
Deputy Director, Department of Emergency Services
Director, Division of Homeland Security

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- #1
SB 2340
3-7-19
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We believe that this bill strikes a great balance between public safety and transparency. Federal government and private sector partners can feel assured that sensitive information shared with North Dakota State and local public safety agencies remains exempt from public dissemination. Transparency is maintained because this bill would require that agencies that receive a request for the exempt records must refer the requester to the federal agency or private entity where the record originated, and the originating agency would release the record based on their protocols.

Finally, please note that I have also distributed a proposed amendment. This amendment is being offered after consultation with the Attorney General's Office. First, it replaces the term "political subdivision" with "public entity" because the legal definition of political subdivision does not include state government and the intent of this bill is to treat all government entities the same. Secondly, the amendment adds language to clarify that an individual that requests a record that originated at a federal agency would have to request that record from the federal agency according to federal law and rules.

On behalf of the Department of Emergency Services, I recommend SB 2340 receive a Do Pass.

Thank you for your time; I will do my best to answer any questions you may have.

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