

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1044

2001 HOUSE JUDICIARY

HB 1044

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1044

House Judiciary Committee

☐ Conference Committee

Hearing Date 01-16-01

Tape Number	Side A	Side B	Meter #
Tape 1	x		4629 to 6267
Tape 1		x	01 to 2618
Committee Clerk Signature <i>Joan Deers</i>			

Minutes: Chr DeKrey opened the hearing on HB 1044 and the clerk will read the title.

Rep Mahoney: Introduced the bill- from District 33 of Center North Dakota. He is a States Attorney and Chairman of the Criminal Justice Committee this last Interim. This bill came out of a study of Interstate transfer of prisoners. The title of this bill is as follows: relating to open records and parole records of the department of corrections and rehabilitation and to declare an emergency. Under current law all records are confidential, we requested an Attorney Generals opinion. Because of that we developed HB 1044. This bill deals with what records are exempt and what records are confidential, and which are open records. He then goes on to explain the difference in all of the records.

Rep Klemm: On line 13 - upon application to the district court, who are talking about doing that or applying?

Rep Mahoney: It would be a third party.

Rep Klemm: If the Department has no opposition, why go to court to do that?

Rep Mahoney: If you are talking about confidential records, or other records, it is the difference between the records. The confidential records cannot be released without a court order.

Rep Klemm: The Department could stipulate with the applicant up front, so that they would still get the court order.

Rep Mahoney: I would suspect that would be the case.

Chr DeKrey: This would only apply to adult case? ?

Rep Mahoney: Yes.

Chr DeKrey: Are there any further questions?

Vonette Richter: Legislative Council (see attached testimony)

TAPE 1 SIDE B

Vonette Richter testimony continues.

Chr DeKrey: Kyle Bell, he was under protective management so would this bill even have helped or would this give the ability for a third party to go to court to determine if the Department of Corrections was correct to have him under protective management.

Vonette Richter: That question was raised, and the answer was no.

Rep Mahoney: It would put the burden on the Department of Corrections to show why the information would not be given.

Rep Klemm: On line 20 pay 1 the word NOT (court records not under seal). Are you sure the word not should be in there?

Vonette Richter: You might want to ask the committee, this is the language they used to draft the bill. They may have a reason.

Chr DeKrey: Thank you for appearing before the committee. Is there anyone else wishing to testify?

Ken Sorenson: Assistant Attorney General (see attached testimony).

Rep Mahoney: First of all, the protective management, what criteria you have for that and number 2 - who determines that and number 3 how many people do you presently have in the system.

Ken Sorenson: I will defer those questions to Tim Schuetzle.

Tim Schuetzle: Director of Prisons for at the State of North Dakota. First of all to define, it would really depends on the situation. We have 15 to 20 in protective management. Kyle Bell is on a long term protective management.

Rep Mahoney: Protective management label, who determines this.

Tim Schuetzle: We do have a label, some people are considered PC and other are separatees, but they would fall under the same kind of issue.

Rep Mahoney: Who makes the call?

Tim Schuetzle: I do, and I have a committee that meets for separatees.

Rep Delmore: Are most sex offenders part of protective management?

Tim Schuetzle: Not necessarily.

Chr DeKrey: Are there any more questions, thank you. Is there anyone else wishing to testify on HB 1044?

Krista Andrews: Attorney with the North Dakota Department of Human services' Legal Advisory Unit. (see testimony attached)

Rep Mahoney: You are referring to sub section 3 , that you can get hold of the alcohol treatment records etc.

Krista Andrews: That is correct.

Rep Mahoney: When you look at that under current law, records may be inspected or disclosed by all these people. It was my understanding in the Interim, that it did include those records.

Krista Andrews: You are correct I think that is the clarification that they are asking for.

Chr DeKrey: If there are no other questions, thank you for appearing before the committee. Is there anyone else wishing to testify before the committee on HB 1044? We are going to have the sub committee look into the amendments for this bill. Chairman of the committee Rep Kretschmar and Rep Kingsbury and Rep Mahoney.

Jack McDonald: Appearing on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association (see testimony attached)

Chr DeKrey: Anyone else wishing to testify on HB 1044?

David Boeck: substituting for Corinne Hofmann (see testimony attached).

Chr DeKrey: Are there any questions? Is there any one else wishing to testify on HB 1044?

Thank you for appearing before this committee. We will close the hearing on HB 1044.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1044a

House Judiciary Committee

☐ Conference Committee

Hearing Date 02-07-01

Tape Number	Side A	Side B	Meter #
TAPE II	x		1027 to 2509
Committee Clerk Signature <i>Jean Decker</i>			

Minutes:Chairman DeKrey wanted to take up HB 1044.

Vice Chr Kretschmar: explains the amendments to the bill.

DISCUSSION was held on the amendments. Ken Sorenson, general council of the Attorney General Office is asked to explain the amendments.

Chairman DeKrey: are there any more questions for Mr Sorenson? If not thank you for explaining the amendments.

COMMITTEE ACTION

Vice Chr Kretschmar moved the amendments, Rep Kingsbury seconds. A voice vote was taken.

The amendments are passed.

The sub committee has no other amendments for the bill.

The committee is in recess until 3:00 pm today.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1044b

House Judiciary Committee

☐ Conference Committee

Hearing Date 02-12-01

Tape Number	Side A	Side B	Meter #
TAPE I		X	4690 to 5211
Committee Clerk Signature <i>Joan Davis</i>			

Minutes: Chairman DeKrey called the committee to order on HB 1044.

Vice Chr Kretschmar gave some additional information on the amendments

The amendments had been moved and passed.

DISCUSSION

COMMITTEE ACTION

Chairman DeKrey: what are the wishes of the committee. Vice Chr Kretschmar moved a DO PASS as amended, seconded by rep Delmore. The clerk will call the roll on a DO PASS as amended on HB 1044. The motion passes with 12 YES, 2 NO and 1 ABSENT. Carrier is Rep Mahoney.

VR
2/12/01
1082

HOUSE AMENDMENTS TO HB 1044 HOUSE JUDICIARY 02-13-01

Page 1, line 11, remove "not public records subject to section 44-04-18 and section 5"

Page 1, line 12, remove "of article XI of the Constitution of North Dakota and are"

Page 1, line 13, after the first "court" insert ", with service of the application on the department of corrections and rehabilitation and opportunity for the department to submit a written response" and replace "shall" with "may"

Page 1, line 16, after the underscored period insert "If the court issues an order allowing inspection, the court shall allow the department of corrections and rehabilitation to remove all identifying information that may create a risk of harm to property or to any person."

Page 1, line 20, replace "court records not under seal" with "legal files"

Page 1, line 23, after the second underscored comma insert "and"

HOUSE AMENDMENTS TO HB 1044 HOUSE JUDICIARY 02-13-01

Page 2, line 1, replace ", and federal witness protection placements where the identity" with an underscored period

Page 2, remove line 2

Page 2, line 6, remove "are not public records"

Page 2, remove line 7

Page 2, line 8, remove "Dakota" and overstrike "must be kept" and insert immediately thereafter "are"

Page 2, line 16, after "confidentiality" insert ", except for the confidentiality requirements of federal drug and alcohol treatment and rehabilitation laws"

Page 2, line 18, after "inspect" insert "case history."

HOUSE AMENDMENTS TO HB 1044 HOUSE JUDICIARY 02-13-01

Page 3, line 6, remove "l. The" and overstrike "state's attorney and" and insert immediately thereafter:

"l. The"

Page 3, line 12, remove "k. Municipal" and overstrike ", county, state, or federal law enforcement agencies" and insert immediately thereafter:

"k. A criminal justice agency as defined in section 44-04-18.7"

Page 3, line 14, replace "For purposes of this section, records" with "Records" and after the third underscored comma insert "legal files except records under court seal."

Page 3, line 16, replace "not case history, medical" with "open records."

Page 3, remove line 17

Page 3, line 30, remove "8." and overstrike "The employment status of a person in the custody of or under the supervision and"

Page 3, overstrike line 31

HOUSE AMENDMENTS TO HB 1044 HOUSE JUDICIARY 01-13-01

Page 4, line 1, overstrike "to an agency or official charged with the enforcement of child support."

Page 4, line 6, after the overstruck period insert:

- "8. Any person, organization, or agency receiving exempt or confidential records under this section shall maintain the closed or confidential nature of the records and may not redisclose the records.
9. The department of corrections and rehabilitation shall maintain the confidentiality of witness protection program records and legal files under seal.

Page 4, line 12, remove "on"

Page 4, line 13, remove "behalf of the parole board" and overstrike "are confidential and" and insert immediately thereafter "on behalf of the parole board"

Page 4, line 15, remove "subject to section 44-04-18 and section 5 of article XI of the"

Page 4, line 16, remove "Constitution of North Dakota"

Renumber accordingly

Date: 02-12-01
Roll Call Vote #: /

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1044

House JUDICIARY

Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as amended

Motion Made By Vice-Chr Kretschmar Seconded By Rep Delmore

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE CHR -- Wm E Kretschmar	✓				
Rep Curtis E Brekke	✓				
Rep Lois Delmore	✓				
Rep Rachael Disrud					
Rep Bruce Eckre		✓			
Rep April Fairfield	✓				
Rep Bette Grande		✓			
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin	✓				
Rep John Mahoney	✓				
Rep Andrew G Maragos	✓				
Rep Kenton Onstad	✓				
Rep Dwight Wrangham	✓				

Total (Yes) 12 No 2

Absent 1

Floor Assignment Rep Mahoney

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

REPORT OF STANDING COMMITTEE

HB 1044: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). HB 1044 was placed on the Sixth order on the calendar.

Page 1, line 11, remove "not public records subject to section 44-04-18 and section 5"

Page 1, line 12, remove "of article XI of the Constitution of North Dakota and are"

Page 1, line 13, after the first "court" insert ", with service of the application on the department of corrections and rehabilitation and opportunity for the department to submit a written response" and replace "shall" with "may"

Page 1, line 16, after the underscored period insert "If the court issues an order allowing inspection, the court shall allow the department of corrections and rehabilitation to remove all identifying information that may create a risk of harm to property or to any person."

Page 1, line 20, replace "court records not under seal" with "legal files"

Page 1, line 23, after the second underscored comma insert "and"

Page 2, line 1, replace ", and federal witness protection placements where the identity" with an underscored period

Page 2, remove line 2

Page 2, line 6, remove "are not public records"

Page 2, remove line 7

Page 2, line 8, remove "Dakota" and overstrike "must be kept" and insert immediately thereafter "are"

Page 2, line 16, after "confidentiality" insert ", except for the confidentiality requirements of federal drug and alcohol treatment and rehabilitation laws"

Page 2, line 18, after "inspect" insert "case history,"

Page 3, line 6, remove "L. The" and overstrike "state's attorney and" and insert immediately thereafter:

"L. The"

Page 3, line 12, remove "k. Municipal" and overstrike ", county, state, or federal law enforcement agencies" and insert immediately thereafter:

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Page 3, line 30, remove "8." and overstrike "The employment status of a person in the custody of or under the supervision and"

Page 3, overstrike line 31

Page 4, line 1, overstrike "to an agency or official charged with the enforcement of child support."

Page 4, line 6, after the overstruck period insert:

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Page 4, line 12, remove "on"

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Page 4, line 15, remove "subject to section 44-04-18 and section 5 of article XI of the"

Page 4, line 16, remove "Constitution of North Dakota"

Renumber accordingly

2001 SENATE JUDICIARY

HB 1044

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1044

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 7th, 2001

Tape Number	Side A	Side B	Meter #
1		x	9.6-21
2	x		43-48.9
Committee Clerk Signature			

Minutes: **Senator Traynor**, opened the hearing on HB 1044.

Vonette Richter, representing the legislative council. One issue was the Kyle Bell escape.

Could his location be issued to the public? All records with the department of corrections were confidential so his records couldn't be released. This allows certain records to be open or closed.

All of subsection 1 is new language; case history records are exempt. (Explains the bill)

Senator Trenbeath, on section 1 in the interest of district court judges in southwest. Won't that lead to a denial of access and bring it back to courts?

Vonette Richter, if the department would deny the release of records that would be the only...

Senator Trenbeath, I guess unless there is something clearly demarcated on what is releasable and not releasable that the record keeper would hold on to them until a court order is given.

Vonette Richter, the committee wanted that in the bill.

Senator Traynor, you said the bill talks about three classification of records, could you embellish on the exempt records. How do you define it?

Vonette Richter, that would be case history.

Senator Traynor, and General Confidential records are...?

Vonette Richter, medical, psychological and treatment.

Senator Traynor, and open records?

Vonette Richter, identification and location.

Senator Nelson, so what your saying is, "open you can get with no fuss, closed are closed but no fuss, and exempt are a little harder to get.

Vonette Richter, yes.

Senator Lyson, on 12-59-04, it was not my intention to have parole records confidential. They couldn't tell someone that a person was on parole.

Vonette Richter, there is a section that deals with parole.

Senator Lyson, I think your right, we wanted to loosen up the laws.

Senator Traynor, what is the process under 12-47-36?

Senator Lyson, everything on the front page.

Ken Sorenson, Assistant Attorney General, (testimony attached).

Jack McDonald, representing the ND Newspaper Association, (testimony attached), opposes the provisions of HB 1044.

Tim Schultz, Warden of the State Penitentiary, supports the bill. We want some records open. Exempt records are case histories. He would like to inform the parents of inmates about their children. He would also like to have discretion on what he can and cannot disclose.

Senator Watne, at one time there was a discussion to put a projected date of release open to the public. What is being done about that?

Tim Schultz, nothing. We are waiting for this bill to pass.

Page 3
Senate Judiciary Committee
Bill/Resolution Number 1044
Hearing Date March 7th, 2001

Corinne Hofmann, testifying on behalf of the Protection and Advocacy Project, (testimony attached), is opposed to the bill.

Senator Traynor, closed the hearing on HB 1044.

SENATOR WATNE MOTIONED TO DO PASS, SECONDED BY SENATOR NELSON.

VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR

WATNE VOLUNTEERED TO CARRY THE BILL.

Date: 3/7/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1044

Senate	Judiciary	Committee
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☐ Subcommittee on _____
or _____

☐ Conference Committee

Legislative Council Amendment Number

Action Taken *DP*

Motion Made By Watne Seconded By Nelson

[illegible]

Total (Yes) 7 No 0

Absent

Floor Assignment Watne

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

REPORT OF STANDING COMMITTEE (410)
March 8, 2001 9:00 a.m.

Module No: SR-40-5093
Carrier: Watne
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1044, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends DO PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1044 was placed on the Fourteenth order on the calendar.

2001 TESTIMONY

HB 1044

Inmate Records

During the course of the committee's study of the interstate transfer of convicted felons, the issue of whether Kyle Bell's location following his recapture could be released was raised. North Dakota Century Code Section 12-59-04 provides that all Department of Corrections and Rehabilitation records, including preparole reports and supervision history, are confidential. A February 2000 Attorney General's opinion indicated that this section, although it was located in a chapter dealing with the Parole Board, applied to all records of the Department of Corrections and Rehabilitation and that all inmate records were confidential.

The committee considered a bill draft that would have provided that the medical, psychological, and social records of an inmate are confidential, but records with respect to an inmate's identity, location, criminal convictions, or projected date of release are open records. The bill draft also clarified that parole records of the department are confidential. Testimony regarding the bill draft indicated there are circumstances under which an inmate's identity or location should remain confidential, such as in the case of an inmate who is being held in protective custody. According to the testimony, there are situations when, because of the nature of the crime, the department is unable to keep an inmate safe in the system and for those situations, certain information regarding the inmate should be confidential. It was also noted that to allow certain inmate records to be open records could result in potential danger to the prison staff. Testimony in support of the bill draft indicated that the bill draft clarifies that records that have traditionally been closed, e.g., medical, social, and psychological records, remain confidential, but information that has traditionally been public remains public information. According to the testimony, secret prisons are not good for democracy.

The committee also considered a bill draft that created a new classification of inmate records, known as case history records, that would be considered exempt. North Dakota Century Code Section 44-04-17.1 provides that exempt records may be released at the discretion of the department. The bill draft also provided that medical, psychological, and social records are confidential. The bill draft further provided that records with respect to the person's identity, location, criminal convictions, or projected date of release, except for the records of a person who is under protective management, are open records. Finally, the bill draft clarified that parole records of the department are confidential. Testimony in support of the bill draft indicated the bill draft would allow the department to communicate with inmate families, the media, and other interested parties regarding inmate matters in which the department regards disclosure as appropriate or necessary. The committee recognized there are circumstances when certain information regarding an inmate should be confidential; however, the burden should be on the Department of Corrections and Rehabilitation to explain why the information cannot be made public.

The committee recommends House Bill No. 1044 to provide for a new classification of inmate records, known as case history records, that would be considered exempt; provides that medical, psychological, and social records are confidential; and that records with respect to the person's identity, location, criminal convictions, or projected date of release, except for the records of a person who is under protective management, are open records. The bill draft also provides that parole records of the department are confidential.

Fifty-seventh
Legislative Assembly
of North Dakota

HOUSE BILL No. 1044

BEFORE THE HOUSE JUDICIARY COMMITTEE
DUANE DEKREY, CHAIRMAN
JANUARY 16, 2001

Mr. Chairman, Members of the House Judiciary Committee:

My name is Ken Sorenson, Assistant Attorney General, and I am submitting this written testimony on behalf of the North Dakota Department of Corrections and Rehabilitation.

House Bill No. 1044 comes from the interim Criminal Justice Committee and amends N.D.C.C. § 12-47-36 relating to inmate records and amends N.D.C.C. § 12-59-04 relating to Parole Board records.

The Legislative Assembly first addressed the matter of inmate records in 1987 when it enacted N.D.C.C. § 12-47-36. The prison's filing system for inmate records initially included what staff called a "social file", which had started out as a treatment file in which confidential records were kept, and an open record file, called the "legal file", in which conviction history information was included. In time, the "social file" began to include medical, behavioral, and law enforcement records, and the staff generally assumed this was confidential. The 1987 law incorporated this assumption into the statute and included the term "social file" in the statute.

The 1987 statute was a Penitentiary statute and the creation of the DOCR resulted in some problems with the statute. In 1989, the Legislative Assembly established a Department of Corrections and Rehabilitation (DOCR) within the Director of Institutions,

and in 1991, made it a separate state agency. In 1993, the Legislative Assembly transferred the administration of the Crime Victims Compensation Fund from the Workers Compensation Bureau to the DOCR's Division of Adult Services. The DOCR includes the central office, adult institutional facilities, prison industries, parole and probation (now referred to as Field Services), and the Division of Juvenile Services, which includes the North Dakota Youth Correctional Center.

After the Legislative Assembly created the DOCR, N.D.C.C. § 12-47-36 began to show some limitations when considering the scope of the DOCR, the services it provided, the need for the employees in its different divisions to be able to cooperate with each other, and also the need for the DOCR to disclose information to persons, institutions, and agencies involved in the criminal justice system, in treatment programs, or in defending the state against claims arising out of DOCR operations. In 1997, the DOCR asked the Legislative Assembly to amend the statute so that it would still maintain the confidentiality of its records, but allow the transfer of information to other persons, agencies, and institutions that needed the information to perform their statutory and professional functions. These persons, agencies, and institutions included criminal justice agencies, the courts, the parole board and pardon advisory board, other persons and divisions in the DOCR, medical and treatment providers, the Department of Human Services, and the Attorney General, and the Risk Management Fund for investigating incidents at the Penitentiary such as a custodial death or other serious situation that may present a potential liability to the state.

Last winter, questions were raised about what the "social file" meant and what type of inmate information should be available as an open record. The Attorney General

ultimately answered this by stating that all DOCR records were confidential based on the language of N.D.C.C. § 12-59-04. The records were still subject to the 1997 amendments to N.D.C.C. § 12-47-36. It was neither the DOCR's intention, nor the 1997 Senate and House Judiciary Committee's intention, to have ended up with such a restrictive interpretation. It also became apparent in this process that there was certain information the DOCR had, such as the inmate's identity, criminal conviction, placement, and projected release date, that should be available to the public.

The interim Criminal Justice Committee addressed the complications facing the DOCR regarding its records with House Bill No. 1044. House Bill No. 1044 continues to maintain the confidentiality of inmate medical, psychological, and treatment records. The bill makes it clear that records such as an inmate's identity, placement, criminal conviction, and projected release date are open records. Then, it renames the "social file", which is currently a confidential record that may not be disclosed, a case management file, and makes it an "exempt" record as defined in N.D.C.C. § 44-04-17.1. Instead of these records being confidential, House Bill 1044 gives the DOCR the discretion to disclose inmate information to the media, to discuss an inmate's situation to family members, and to provide inmate information to other persons or agencies who may have a legitimate interest in inmate matters, subject to safety and security concerns for staff, peace officers, other inmates, and members of the public.

The following is a synopsis of House Bill No. 1044:

1. Subsection 1 of N.D.C.C. § 12-47-36 removes social records from the category of confidential records and replaces the term "social records" with the term "case history" records. This change is proposed because of earlier strained attempts to reconcile the

dictionary definition and commonly understood meaning of the word "social" with the way it has been used to classify one category of inmate records. Then, Section 1 provides that the case history records are exempt records as defined under N.D.C.C. § 44-04-17.1. As an exempt record, the records are not open records, nor are they confidential records. Instead, the records become open at the discretion of the DOCR. This will allow the DOCR to communicate with inmate families, the media, and other interested parties regarding inmate matters where the DOCR regards disclosure as appropriate or necessary.

The exempt category also includes records regarding inmates who the DOCR has to protect. Instead of using the term "protective custody", the term "protective management" is used to refer to those cases where it may be necessary to protect an inmate, including concealing the inmate's location or identity. Again, that is an exempt record, as opposed to a confidential record, and the DOCR will have the discretion when to disclose such information.

This section excludes from exempt records medical, psychological, and treatment records and court records under seal, which the DOCR experiences from time to time.

2 The DOCR's Division of Adult Services is mentioned in Subsection 2 of N.D.C.C. § 12-47-36 to clarify that this statute does not apply to the DOCR's Division of Juvenile Services. The Attorney General's February, 2000, letter opinion stating that all DOCR records are confidential has been applied to include the records of the Division of Juvenile Services. The Division of Juvenile Services has its own agency bill pending, Senate Bill No. 2105, to deal with its juvenile case files and open records and confidentiality concerns.

3. Subsection 3 of N.D.C.C. § 12-47-36, while it reorganizes the statute, still reflects the current provisions of N.D.C.C. § 12-47-36, but adds the Social Security Administration and the Veterans Administration as entities that may receive NDSP confidential records. The DOCR receives regular requests from these agencies for inmate records.

The definition of an exempt record affords the DOCR the discretion to disclose exempt information to the persons or organizations listed in Subsection 2. The definition will also allow the DOCR to provide access to records without requiring a court order as is presently required in many situations.

While the statute purports to abrogate confidentiality, the DOCR is cognizant of the provisions of federal law regarding drug and alcohol treatment and rehabilitation records and still requires an inmate to sign an authorization that conforms with the federal regulations (42 CFR Part 2, Subchapter A) before it will release inmate drug and alcohol treatment and rehabilitation information, subject to the federal exceptions for reporting child abuse and so on.

4. Subsection 4 provides that information regarding an inmate's identity, location, criminal conviction, and projected release date is open record information. However, it does exclude protective management information. The prison setting requires that certain information not be disclosed for safety and security purposes. For example, protective management information should not be disclosed in order to protect the safety of an inmate who will be subject to threats and assaults on account of the inmate's offense if the inmate's identity and placement is known. Also, there are times when an inmate is put into protective management in order that the inmate's identity and placement not be

disclosed for safety and security purposes because the inmate has been or will be a witness in a criminal prosecution.

5. Subsections 5,6,7,and 8 on page 3 of House Bill No. 1044 contain the same provisions as the current statute, but the Legislative Council staff have reorganized them as part of the Criminal Justice Committee bill.

6. Section 2 of House Bill No. 1044 amends N.D.C.C. § 12-59-04 and provides that parole board records confidential, yet are still subject to N.D.C.C. § 12-47-36. This may have the have the ambiguous effect of making records that are exempt or open under N.D.C.C. § 12-47-36 confidential records under N.D.C.C. § 12-59-04. This is part of the problem that House Bill No. 1044 is supposed to resolve. This may be resolved by striking the words "are confidential and", thereby providing that open records will stay continue to be open records and exempt records will continue as exempt records under N.D.C.C. § 12-47-36. . A proposed amendment is attached.

7. Section 3 of House Bill 1044 includes an emergency measure clause in order to resolve in inmate records issues as soon as possible.

**TESTIMONY BEFORE THE
HOUSE JUDICIARY COMMITTEE
REGARDING
HOUSE BILL NO. 1044
JANUARY 18, 2001**

Chairman DeKrey and members of the Committee, my name is Krista Andrews, and I am an attorney with the North Dakota Department of Human Services' Legal Advisory Unit. I am here to comment on subsection 3 of House Bill No. 1044, and its relation to 42 CFR Part 2, Subpart A.

House Bill No. 1044 allows various persons, organizations, or agencies, without prior application to the court, to inspect medical, psychological, or treatment records of persons in the custody or under the supervision and management of the division of adult services of the department of corrections and rehabilitation, notwithstanding any other provisions of law relating to privilege or confidentiality. However, the federal law addressing disclosure of drug and alcohol treatment records, found at 42 CFR Part 2, Subpart A, is very restrictive regarding when the drug and alcohol treatment records of a patient may be released.

Absent client consent, drug and alcohol treatment records may only be released, essentially, in a few situations: 1) to medical personnel for a medical emergency; 2) to qualified personnel to conduct scientific research, to conduct audits, or to conduct program evaluations; or 3) if authorized by a court order after a showing of good cause. Furthermore, 42 CFR §2.20 provides that although state law may be more restrictive than the federal law, "no State law may either authorize or compel any disclosure prohibited by these regulations." According to the current language of House Bill No. 1044, it could be argued that the bill is less

restriotive than 42 CFR, and attempts to supersede all other provisions of law.

Although the Department of Corrections and Rehabilitation recognizes the provisions of federal law, and requires inmates to sign an authorization that conforms with the federal regulations before it will release inmate drug and alcohol treatment information, the Department of Human Services would recommend clarifying the provisions of House Bill No. 1044, so that it clearly states that the bill does not attempt to curtail the provisions of federal law.

I would be happy to answer any questions the Committee may have.

Presented by:

Krista Andrews
Attorney, Legal Advisory Unit
ND Department of Human Services

January 16, 2001

HOUSE JUDICIARY COMMITTEE
HB 1044

REPRESENTATIVE DEKREY AND COMMITTEE MEMBERS:

My name is Jack McDonald. I am appearing today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We oppose the provisions of HB 1044 on page one, lines 1 through 16, which makes the case history records of the Corrections Department open only in the discretion of the department.

This really turns state law and state constitutional provisions completely around. State law now says that all records are open unless there's a law that says otherwise. This provision says they are all closed unless the department of corrections says otherwise.

We understand that in some instances there will be a need for some of the information to be confidential. However, we believe that the law should basically keep most of this information open, and then the law should provide for a method for the department to protect specifically what is necessary to be confidential.

Under current state law, all records are open unless there is a specific law that closes those records. If a record custodian denies access to certain records, he or she must cite the legal reason for doing so. If the person requesting the records believes the denial is improper, they can request a review by the Attorney General. Perhaps this standard could be used in this bill.

The records would be open, but the department could deny access by a "proper and legitimate reason" as this bill says. Then, if there is a question if the reason is "proper and legitimate," it could be reviewed by the Attorney General.

We think something like this could work to the satisfaction of all parties concerned. We'd like to work with a subcommittee of this committee to come up with some proposed amendments similar to those below that would work this out.

If you have any questions, I'd be glad to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

PROPOSED AMENDMENTS TO SENATE BILL NO. 1044

Page 1, line 11, delete "not"

Page 1, line 12, delete "are exempt records as defined"

Page 1, line 13, delete the entire line

Page 1, line 14, delete "the inspection of a case history record"

Renumber accordingly

**TESTIMONY ON PROPOSED AMENDMENT TO
HOUSE BILL 1044**

**BEFORE THE
JUDICIARY COMMITTEE
JANUARY 16, 2001**

**CORINNE HOFMANN
PROTECTION AND ADVOCACY**

Chairman Dekrey and Members of the Committee, my name is Corinne Hofmann and I am testifying on behalf of the Protection and Advocacy Project. We are proposing an amendment to House Bill 1044. Our proposed amendment will ensure that these sections of the North Dakota Century Code are consistent with other state and federal laws that allow the Protection and Advocacy Project to access confidential records.

The Protection and Advocacy Project [the Project] is a state agency. The Project is granted authority under federal and state laws to advocate for and protect people with developmental disabilities, mental illness, and other disabilities. The Project is authorized to pursue legal, administrative and other appropriate remedies and approaches to achieve this purpose. Federal and state laws also grants authority to the Project to access the records of individuals we serve. Obtaining records is a necessary and integral component in the process we use to assist individuals with disabilities.

Section 12-47-36, in its current form, provides that records can be released by order of a court after a showing that there is a proper and legitimate purpose for inspecting the records. The law then includes a fairly lengthy list of exceptions to this requirement. The Protection and Advocacy Project is not included in this list. This creates unnecessary confusion regarding the Project's right to access records of the Department of Corrections.

There has been considerable resistance on the part of the Department of Corrections to honoring the Project's authority under other state and federal laws. We have been denied access to individuals requesting our services and access to records of individuals we are attempting to serve. Amending this bill will eliminate confusion and possible conflict with other state and federal laws.

The amendment will also eliminate the need for the Project to seek a court order when we require access to records of the Department of Corrections. It is a waste of state resources for the Department of Corrections to require the Project to resort to litigation. This wastes state resources entrusted to the Department of Corrections and the Project, while imposing additional burdens on an already busy judicial system.

We ask that the Judiciary Committee approve and include our proposed amendment in House Bill 1044.

I thank the Committee for your time and would be happy to answer any questions you may have.

PROPOSED AMENDMENT TO HOUSE BILL 1044

Page 3, line 12, remove "or"

Page 3, line 13, replace the period after "administration" with ";or"

Page 3, after line 13 Insert:

- m. The protection and advocacy project, acting under authority of state or federal law.

Renumber accordingly

Proposed Amendments to House Bill No. 1044

Page 1, line 11, remove "not public records subject to section 44-04-18 and section 5"

Page 1, line 11, remove "of article XI of the Constitution of North Dakota and are"

the first word

Page 1, line 13, after "court," insert: "with service of the application on the department of corrections and rehabilitation and opportunity for the department of corrections and rehabilitation to submit a written response"

Page 1, line 13, replace "shall" with "may"

Page 1, line 16, after "record," insert: "If the district court issues an order allowing inspection, the district court shall allow the department of corrections and rehabilitation to remove all identifying information that may create a risk of harm to property or to any person"

Page 1, Line 20, replace "court records not under seal" with "legal files"

Page 1, line 23, after "12-48-15," insert: "and"

Page 2, line 1, remove the comma after "cases" and remove "and federal witness protection placements where the identity"

Page 2, remove line 2

Page 2, line 6, remove "not public records"

Page 2, remove line 7

Page 2, line 8, remove "Dakota, and overstrike "must be kept"

Page 2, line 16, after "confidentiality," insert: "except for the confidentiality requirements of federal drug and alcohol treatment and rehabilitation laws"

Page 2, line 18, after "inspect" insert: "case history,"

Page 3, line 6, overstrike "state's attorney and"

Page 3, line 12, remove "Municipal" and overstrike "county, state, or federal law enforcement agencies" and insert: "A criminal justice agency as defined in section 44-04-18.7"

Page 3, line 14, replace "For purposes of this section, records," with "Records"

Page 3, line 14, after "location," insert: "legal files except records under court seal,"

Page 3, line 16, replace "not case history, medical" with "open records,"

Page 3, remove line 17

Page 3, line 30, overstrike "The employment status of a person in the custody of or under the supervision and"

Page 3, overstrike line 31

Page 4, line 1, overstrike "to an agency or official charged with the enforcement of child support."

Page 4, line 6, after "rehabilitation:" insert: A person, organization or agency receiving exempt or confidential records under this section shall maintain the closed or confidential nature of the records and may not redisclose the records.

Page 4, after line 6, insert: 2. The department of corrections and rehabilitation shall maintain the confidentiality of witness protection program records and legal files under seal.

Page 4, line 13, overstrike "are confidential and"

Page 4, line 15, remove "subject to section 44-04-18 and section 5 of article XI of the"

Page 4, remove line 16

Renumber accordingly

MARCH 7, 2001

SENATE JUDICIARY COMMITTEE
HB 1044

SENATOR TRAYNOR AND COMMITTEE MEMBERS:

My name is Jack McDonald. I am appearing today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We would like oppose the provisions of HB 1044 on page one, lines 1 through 16, which makes the case history records of the Corrections Department open only in the discretion of the department.

This really turns state law and state constitutional provisions completely around. State law now says that all records are open unless there's a law that says otherwise. This provision says they are all closed unless the department of corrections says otherwise.

However, we don't know of any other language that could be used at this time that could meet the needs of the penitentiary regarding inmate access to these records and the public's right to know. And, the bill does make some information available that is now confidential.

We understand the need for some of the information to be confidential. However, we'd like to see provisions that basically keep most of this information open, and then provide for a method for the department to protect specifically what is necessary to be confidential. We just don't know how to do this.

Under current state law, all records are open unless there is a specific law that closes those records. If a record custodian denies access to certain records, he or she must cite the legal reason for doing so. If the person requesting the records believes the denial is improper, they can request a review by the Attorney General. This might be a standard could be used in this bill.

The records would be open, but the department could deny access for a "proper and legitimate reason" as this bill says. Then, if there is a question if the reason is "proper and legitimate," it could be reviewed by the Attorney General.

Maybe something like this could work to the satisfaction of all parties concerned. We'd like to work with a subcommittee of this committee to come up with some proposed amendments if this is what the committee wishes. If you have any questions, I'd be glad to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

ENGROSSED HOUSE BILL No. 1044

BEFORE THE SENATE JUDICIARY COMMITTEE
JACK TRAYNOR, CHAIRMAN
MARCH 7, 2001

Mr. Chairman, Members of the Senate Judiciary Committee:

My name is Ken Sorenson, Assistant Attorney General, and I am submitting this written testimony on behalf of the North Dakota Department of Corrections and Rehabilitation.

Engrossed House Bill No. 1044 comes from the interim Criminal Justice Committee and amends N.D.C.C. § 12-47-36 relating to inmate records and amends N.D.C.C. § 12-59-04 relating to Parole Board records.

The Legislative Assembly first addressed the matter of inmate records in 1987 when it enacted N.D.C.C. § 12-47-36. The prison's filing system for inmate records initially included what staff called a "social file", which had started out as a treatment file in which confidential records were kept, and an open record file, called the "legal file", in which conviction history information was included. In time, the "social file" began to include medical, behavioral, and law enforcement records, and the staff generally assumed this was confidential. The 1987 law incorporated this assumption into the statute and included the term "social file" in the statute.

The 1987 version of N.D.C.C. § 12-47-36 was a Penitentiary statute and the creation of the DOCR in 1989 resulted in some problems with the statute. In

1989, the Legislative Assembly established a Department of Corrections and Rehabilitation (DOCR) within the Director of Institutions, and in 1991, made it a separate state agency. In 1993, the Legislative Assembly transferred the administration of the Crime Victims Compensation Fund from the Workers Compensation Bureau to the DOCR's Division of Adult Services. The DOCR includes the central office, adult institutional facilities, prison industries, parole and probation (now referred to as Field Services), and the Division of Juvenile Services, which includes the North Dakota Youth Correctional Center.

After the Legislative Assembly created the DOCR, N.D.C.C. § 12-47-36 began to show some limitations when considering the scope of the DOCR, the services it provided, the need for the employees in its different divisions to be able to cooperate with each other, and also the need for the DOCR to disclose information to persons, institutions, and agencies involved in the criminal justice system, in treatment programs, or in defending the state against claims arising out of DOCR operations. In 1997, the DOCR asked the Legislative Assembly to amend the statute so that it would still maintain the confidentiality of its records, but allow the transfer of information to other persons, agencies, and institutions that needed the information to perform their statutory and professional functions. These persons, agencies, and institutions included criminal justice agencies, the courts, the parole board and pardon advisory board, other persons and divisions in the DOCR, medical and treatment providers, the Department of Human Services, the Attorney General, and the Risk Management Fund for investigating incidents at the Penitentiary such as a custodial death or other serious situation

that may present a potential liability to the state.

Last year, questions were raised about what the "social file" meant and what type of inmate information should be available as an open record. The Attorney General ultimately answered this by stating that all DOCR records were confidential based on the language of N.D.C.C. § 12-59-04. The records were still subject to the 1997 amendments to N.D.C.C. § 12-47-36. It was neither the DOCR's intention, nor the 1997 Senate and House Judiciary Committee's intention, to have ended up with such a restrictive interpretation. It also became apparent in this process that there was certain information the DOCR maintained, such as the inmate's identity, criminal conviction, placement, and projected release date, that should be available to the public.

The Interim Criminal Justice Committee addressed the complications facing the DOCR regarding its records through a bill draft to amend N.D.C.C. §§ 12-47-36 and 12-59-04. The bill draft underwent a number of amendments in the House Judiciary Committee, several being substantive amendments, but in large part to make technical corrections and provide some clarification.

Engrossed House Bill No. 1044 establishes three different categories of records, namely open records, exempt records, and confidential records. Records relating to an inmate's identity, placement, criminal conviction, projected release date, and legal file are open records, except for sealed court files and protective management records. The current statutory reference to a "social file", which is a confidential record under the current statute, is renamed as a case management file, and it is designated as an "exempt" record as defined in

N.D.C.C. § 44-04-17.1. When a record is an exempt record, an agency has the discretion whether or not to disclose the record. Confidential records include medical, psychological, treatment records, and witness protection program records and legal files under seal.

The following is a synopsis of Engrossed House Bill No. 1044:

1. Subsections 1 and 2 include a reference to the DOCR'S Division of Adult Services to assure that this statute does not apply to its Division of Juvenile Services. The Attorney General's February, 2000, letter opinion stating that all DOCR records are confidential has been applied to include the records of the Division of Juvenile Services. The Division of Juvenile Services has its own agency bill pending, Senate Bill No. 2105, to deal with its juvenile case files and open records and confidentiality concerns.

2. Subsection 1 of N.D.C.C. § 12-47-36 removes social records from the category of confidential records and replaces the term "social records" with the term "case history" records. This change is made because of earlier strained attempts to reconcile the dictionary definition and commonly understood meaning of the word "social" with the way Penitentiary staff has classified this category of inmate records. Subsection 1 provides that the case history records are exempt records as defined under N.D.C.C. § 44-04-17.1. As an exempt record, the records are not open records, nor are they confidential records. Instead, the records become open at the discretion of the DOCR. This will allow the DOCR to communicate with inmate families, the media, and other interested parties regarding inmate matters where the DOCR regards disclosure as appropriate or

necessary. Subsection 1 does not allow complete discretion to the DOCR in deciding whether or not to disclose an exempt record. This subsection does allow for court intervention when the DOCR has denied access to exempt records and the DOCR will have to show a legitimate and proper purpose for denying inspection of the case history file. If the court does require the DOCR to provide disclosure, the court is required to allow the DOCR to remove identifying information that may present a risk of harm to property or any person.

The exempt category also includes records regarding inmates who the DOCR has to protect. Instead of using the term "protective custody", the term "protective management" is used to refer to those cases where it may be necessary to protect an inmate, including concealing the inmate's location or identity. Again, that is an exempt record, as opposed to a confidential record, and the DOCR will have the discretion when to disclose such information. This subsection excludes medical, psychological, and treatment records from the category of exempt records.

3. Subsection 2 of the proposed amendments to N.D.C.C. § 12-47-36 provides that the medical, psychological, and treatment records relating to persons in the custody of or under the supervision and management of the DOCR are confidential. This subsection reflects the current statutory provisions of N.D.C.C. § 12-47-36 relating to confidential records, including access to the records by way of an application to the district court.

4. Subsection 3 of the proposed amendments to N.D.C.C. § 12-47-36 reorganizes the current statutory provisions, but it still reflects the current

provisions of N.D.C.C. § 12-47-36 allowing access to confidential records by various persons, organizations or agencies that have regular need for access to inmate records. Under the current statute, a states attorney and federal, state, county, and municipal law enforcement offices are separately mentioned. The amendments consolidate these agencies into a criminal justice agency as defined under the open records-open meetings laws in N.D.C.C. chapter 44-18. The amendments also add the Social Security Administration and the Veterans Administration as entities that may receive NDSP confidential records. The DOCR receives regular requests from these agencies for inmate records. The definition of an exempt record affords the DOCR the discretion to disclose exempt information to the persons or organizations listed in Subsection 2. The definition will also allow the DOCR to provide access to records without requiring a court order as is presently required in many situations.

Subsection 3 of the proposed amendments to N.D.C.C. § 12-47-36 includes language recognizing federal law regarding drug and alcohol treatment and rehabilitation records. Disclosure of this information will still require a separate inmate authorization that conforms with the federal regulations (42 CFR Part 2, Subchapter A) before the DOCR may release inmate drug and alcohol treatment and rehabilitation information.

4. Subsection 4 of the proposed amendments to N.D.C.C. § 12-47-36 provides that information regarding an inmate's identity, location, criminal conviction, projected release date, and legal files are open records. However, it does exclude protective management information and sealed legal files from

being open records. The prison setting requires that certain information not be disclosed for safety and security purposes. For example, protective management information should not be disclosed in order to protect the safety of an inmate who will be subject to threats and assaults on account of the inmate's offense if the inmate's identity and placement is known. Also, there are times when an inmate is put into protective management in order that the inmate's identity and placement not be disclosed for safety and security purposes because the inmate has been or will be a witness in a criminal prosecution. A court may seal a legal file for a number of reasons such as the file may contain confidential or privileged information and the information cannot be made public.

5. Subsections 5,6, and 7 of the proposed amendments to N.D.C.C. § 12-47- contain the same provisions as the current statute, but the Legislative Council staff has reorganized them as part of the Interim Criminal Justice Committee bill draft. The language regarding a person's employment status is deleted because it will be an exempt record and the DOCR will be able to provide disclosure for child support enforcement.

6. Subsection 8 of the proposed amendments to N.D.C.C. § 12-47-36 prohibits redisclosure of confidential records that have been released under this statute.

7. Subsection 9 separately sets out witness protection records and court records under seal as confidential records that are not subject to disclosure by the DOCR.

8. Section 2 of Engrossed House Bill No. 1044 amends N.D.C.C. § 12-59-04

and provides that Parole Board records will be subject to N.D.C.C. § 12-47-36, thereby providing that open records, exempt records, and confidential records will continue to be open records, exempt records, and confidential records under 12-59-04. The parole application and the Parole Board decision will remain open records.

9. Section 3 of Engrossed House Bill 1044 includes an emergency measure clause in order to resolve inmate records issues as soon as possible.

Last summer, the United States Department of Justice, through the National Institute of Corrections, sponsored a conference for legal counsel for state Departments of Corrections. The conference included topics such as managing inmate litigation, problems with supervision of parolees and probationers under the Interstate Compact, sexual misconduct in prisons, and inmates with serious medical conditions, oftentimes inmates in the end stage of illnesses brought on by needle injection of methamphetamine or other drugs, and by sexually transmitted disease. In the course of discussions at the conference, a number of counsel commented that their state's record laws compound their inmate management problems. House Bill No. 1044 will assist the DOCR in the management of its inmate records and correspondingly in the management of its growing inmate population.

HOUSE BILL No. 1044

**BEFORE THE
SENATE JUDICIARY COMMITTEE
MARCH 7, 2001**

**CORINNE HOFMANN
PROTECTION AND ADVOCACY**

Chairman Traynor and Members of the Committee, my name is Corinne Hofmann and I am testifying on behalf of the Protection and Advocacy Project. The Protection and Advocacy Project [the Project] is a state agency. The Project has authority under federal and state laws to advocate for and protect people with developmental disabilities, mental illness, and other disabilities. The Project is authorized to pursue legal, administrative and other appropriate remedies to achieve this purpose.

House Bill 1044, if passed, would conflict with state and federal laws that grant the Project authority to access records. Therefore, the Project is opposed to House Bill 1044 in its current form, but would support the bill if amended. A copy of the Project's proposed amendment is attached to my testimony.

The Project must access records to properly serve clients. A review of records allows us to verify eligibility, objectively analyze the legitimacy of the concerns brought to us, and determine an appropriate course of action. Problems reported might be directly related to the incarceration or they may relate to other

issues that have followed the individual into the state penitentiary. Many times the issues relate to a need for adequate, disability-related treatment and support.

Chapter 25-01.3 of the North Dakota Century Code outlines the authority granted to the Project regarding individuals with developmental disabilities and mental illness. The Project's authority under state law is based on federal laws that authorize and fund the Project's programs. The Project's right to access records under state law is patterned after applicable federal law.

Since the passage of Chapter 25-01.3, additional federal laws have been passed. The Project has been given authority to serve individuals with other disabilities and our authority to serve individuals with mental illness has been expanded. Federal laws governing these changes give the Project authority to access the records of individuals served under the provisions.

Federal law allows the state to give the Project greater authority than granted under federal law, but does not allow the state to restrict that authority. To the extent that state law conflicts with federal law, state law is preempted.

House Bill 1044 requires the Project to obtain a court order to access records. This is more restrictive than the federal laws governing the Project's access and this requirement would be preempted.

While the Project's right to access records remains intact because of federal preemption, the bill perpetrates confusion and creates practical barriers to

obtaining access. Department of Correction staff cannot rely on this bill for proper guidance when the Project requests access to records. The Department of Corrections and the Project will be required to expend unnecessary administrative and legal resources to resolve conflicts created by this bill.

Mutual understanding and agreement may occur over the apparent conflicts in the laws, but this will have to be revisited again and again with staff turnover. This could be quite costly when viewed as a whole, over time. Amending the bill will avoid unnecessary expenditures of time and resources.

We ask that the Judiciary Committee approve and include our proposed amendment in House Bill 1044.

Thank you for your time. I would be happy to answer any questions you may have.

PROPOSED AMENDMENT TO ENGROSSED
HOUSE BILL 1044

Page 3, after line 24 insert:

"6. Records shall be disclosed to the extent necessary to comply with chapter 25-01.3 and related federal statutes and regulations."

Page 3, line 25, replace "6" with "7"

Page 3, line 28, replace "7" with "8"

Page 4, line 7, replace "8" with "9"

Page 4, line 10, replace "9" with "10"

Renumber accordingly