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10/2/03

2003 HOUSE JUDICIARY

HB 1051

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Valista Rickford

Date

10/2/03


2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1051

House Judiciary Committee

☐ Conference Committee

Hearing Date 1-8-03

Tape Number	Side A	Side B	Meter #
1	xx		11-42
Committee Clerk Signature 			

Minutes: 12 members present, 1 absent (Rep. Bernstein).

Chairman DeKrey: called the meeting to order at 9:30 a.m.

John Bjornson, LC: HB 1051 comes from the legislative audit fiscal review committee. I am one of the legal staff of LC, and I'm not here to testify for or against the bill, but to try and give you some background. As I said the bill is from the Interim Committee, and as I was informed, the bill is at present a concern to the State Auditor's office regarding the draft reports that are given to an entity. This draft is intended to be given to the governing body by the Auditor's office and is intended to be confidential until a final report is issued. This bill has a conflict in it. The Interim Committee at its last meeting made a decision that they want the draft report to be confidential and weren't quite certain about the distinction between exempt and confidential information. You can see on line 14 that confidential and exempt from Sections 44-04-18 so, to back up, confidential records cannot be released beyond the people who are intended to have them and to release that information would be a felony. An exempt record is a record required

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House Judiciary Committee

Bill/Resolution Number 1051

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by law to be open or public is not confidential, but may be open to the public entity. So, what I am trying to tell you is that you probably need to make a decision about whether that record should be confidential or exempt, but you cannot have both in that line. You should take a look at that and make a decision on exempt or confidential.

Rep. Grande: who is the chair and would he be able to clear this up.

Rep. Maragos: The former chairman was the former Senator Ken Solberg. Currently I believe the vice-chairman is Rep. Frank Wald from Dickinson, who now shares the committee. I will address some of those concerns of the committee discussion.

Rep. Klemin: John, on lines 14 and 15, where it says that it is confidential or exempt, until the final audit report is issued, does that mean that once the final audit report is issued, then the draft audit report is again open records if someone wanted to compare the differences?

J. Bjornson, LC: I believe that was the intent. There may some exceptions, working papers and draft audit reports, looking back to lines 8 and 9, working papers and draft audit report are not public records and are exempt, and which in the exempt category means that they may be released. It's a discretionary thing. They may be released at the discretion of the Auditor. They are in a category in between where they may be released by the Auditor.

Rep. Klemin: The auditor isn't the only one that has those. The reports can be given to someone else, and they don't have control over who asks. So if somebody asks the entity given the draft if they could see the draft or if they had to go back to the state auditor and say, "Well I can't let you have it unless the State Auditor says it's OK".

J. Bjornson, LC: That is where the problem stemmed from. The committee received testimony from the State Auditor's office regarding the confidentiality of draft audit report. The committee

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learned that draft audit reports are exempt from open records. however once the draft is released to an agency for comment, the exemption is lost. In order to exempt draft audit reports from the open records requirement, the legislative assembly would have to amend section 54.10.26, the word confidential would grant the discretionary issues of the draft audit report which would be exempt from the open records clause. I think they were struggling with that question. I am not sure where the committee really wanted to go with this.

Rep. Onstad: It's clarification to follow up on what Rep. Klemin discussed, lines 8 and 9.

"Working papers and draft audit reports of the state auditor are not public record". Then, we get down to line 15, it says, "the working papers of an issued audit report are public". Is that where you are talking about it should say working papers and drafts?

J. Bjornson: I don't believe that once the report has been issued that there is as much a concern as the working papers. The language on line 14 is more of a concern than calling the draft audit report confidential and exempt because those two terms are in conflict with each other. You should decide whether you want it exempt, meaning it's a discretionary issue, or confidential, meaning there is no discretion, those records are closed and unauthorized knowing release would be a violation of the law and therefore a felony.

Chairman DeKrey: Thank you. We will start with testimony for the bill 1051 now.

Jack McDonald: I am here representing the North Dakota Newspaper Association and the Broadcasters Association. (see testimony attached). There is some confusion. I would like to answer a couple questions that were raised just a few minutes ago. The confusion comes up in trying to make the bill fit before an audit is released and after an audit is released. If you look right now at the law, it says the "working papers of the state auditor are not public record". Now

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that is the working papers when he is preparing the draft, that's right now, there not at the state auditor, but the attorney general says that's for the state auditor, that's not for the person who gets it, so that when the state auditor gave this working paper or the draft before it to the Veterans Committee, the attorney general said that is an open record now, because there is no exemption for the Veterans committee. So then the Legislative Fiscal review committee said that we should stop that, we won't want that record released, so they changed by putting in line 13 and 14 that says a draft audit report released to the governing body, is now confidential too. So it is not only confidential in the auditor's office, it's now going to be confidential with the governing body. But after the audit report is released, then line 15 and 16 says the working papers of the issued audit report are public. Now once the audit is released, lines 8 and 9 are no longer valid, because then they aren't a pre-audit anymore. But John Bjornson was right, the problem is that you have done both. There are two things involved, it's either confidential which means it can't be released period. It is against law to release it or it's exempt, which means you have the discretion to release it if you want to. You don't have to release it if you don't want to, but you can release it if you want to. This bill does both. This bill says it is both confidential and exempt. In line 14 it says both. It says confidential and exempt. What I am proposing today, I think you should give the local entity some discretion. As a good example, the Veterans Home, it was a very controversial audit. There was a lot of rumors floating around Lisbon, everything about what was going on. Maybe the Veterans board would have wanted to talk to somebody else about that audit, maybe they would have wanted to talk to their legal counsel, maybe they would want to talk to the mayor, city council. I think you should leave that to the discretion of the local entity. If you leave the word confidential in, they don't have any

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discretion, they can't talk about it at all. You can't show it to anybody else; but if it is exempt, then you have the discretion. I just think you should give that local entity that discretion, so I propose the amendment to take out the word confidential and make it just exempt. But one way or another you should take out one or the other word. You should take out confidential or take out exempt. It can't be both. I am urging you to make it exempt, so that the local entity would have some discretion if they wanted to talk about it with someone else.

Chairman DeKrey: Any questions for Mr. McDonald. Thank you, Jack. Is there any more testimony for the bill.

Gordy Smith: My name is Gordy Smith, and I'm an audit manager for the State Auditor's office (see testimony attached). I would also bring to the attention of the committee as far as HB 1100, that the auditor's office has introduced involves a number of relatively minor changes but it does also pertain to language regarding draft audit report. I would assume that you would want to make sure that it's consistent with this one. We would at least want to make those two consistent. I was contacted by the Attorney General's office and they also pointed out to me that they had reviewed the bill; they pointed out the conflict on line 14, where you can't have it confidential and exempt at the same time. They suggested to me some alternative language that would accomplish what we want to have those amendments. (See amendment attached). From the auditor's office standpoint, if one of those was going to change, the auditor's office would prefer that we remove the exempt line, which is going to make the draft audit report confidential. The purpose in doing that is so that, to ensure that this document that is not a final document is not all of a sudden circulated, when it is not in effect a final document, there may be misinformation present. The auditor's office would support the amendment that we have here,

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after talking with the attorney general's office, and obviously I want to make sure it's clear that the attorney general's office gave us the choice, which do you want, to make it exempt or confidential, and the auditor's office told me to have it confidential.

Rep. Maragos: What is the distinction between a working paper and a draft audit report. Isn't a draft audit report a working paper?

G. Smith: From the auditor's office standpoint, a draft audit report would be part of our working papers. The actual other working papers, examples would be, answers to questions of internal control that we've asked, tests that we've run, determinations of what our scope is, if the agency complies with the state law, discussions of what we came up with, as far as what supports the recommendations that are in our report. From the auditor's standpoint, the draft audit report has always been considered a serious part of the working papers.

Rep. Maragos: Then somebody else has evidently has given a draft audit report a special distinction, or another definition other than a working paper, in order for them to have to include it.

G. Smith: I guess I would say, I can't speak for the attorney general's office, I think the client, the Veterans Home, asked them a number of issues. I don't think they were disputing anything, I don't think that the Veterans Home wanted to release anything, I think they were just simply asking some questions and issues and that report basically came up, because no other type of working paper in the auditor's office is just distributed to the client. Now, if the client wanted to know which ones (payroll, etc.) we would obviously give them a list of things that we tested and that kind of detail, but I think the work, the draft, is the only example of a working paper that

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routinely would be provided to a government board or to a client. That's the reason for the distinction.

Rep. Wrangham: We heard in earlier testimony that possibly there would be a problem if we used the word confidential, when that governing body received the draft audit report, that they wouldn't be able to share that with people that they indeed wanted to share it with, do you have any response to that.

G. Smith: I guess from our perspective, we are looking for the client's response to the regs. and what they are going to do. I don't know the purpose, I guess I can't imagine the purpose of what the client, let's say the Veterans Home, in this case. There were no recommendations in there or point or issues in there, where we were somehow looking for the client to do something that would affect the mayor of the community, or maybe the city council or anything else. There were things in there that honestly weren't flattering to the Veterans Home. I can't imagine the purpose of what they would want to do. From the auditor's office perspective, if there was a controversial finding in there that the Veterans Home disagreed with, and they wanted to bring it out in the open and discuss what was in the draft report, so they could put their spin on it, they would have that 2-3 week period to do that, where we wouldn't respond to it, because frankly it is a draft report. I'm not sure what would happen when a final report came out if things they were portraying as were going to be in the report, weren't in the report, because as I said there are significant changes that are made, some at the request of the client, if they provide evidence or if it is against good common sense of why things should change, we then will take that under consideration.

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Rep. Wrangham: Thank you, on another issue, I guess I am thinking about a performance audit in particular. From the standpoint from the auditor, without this confidentiality do you feel that someone conducting a performance audit may tend to not put some things in there that there not sure of, that they would put in there if it was confidential, so that can get an answer.

G. Smith: I guess I would see if my staff were looking at things or they had some doubts, or if it weren't overly persuasive. If it was where the client had the option of releasing it prior to it being final, they may be a little more hesitant to put it in; but I don't think that would end of convincing us that it would never go in the report, or result in us doing more work. Sometimes in performance audits, there is a lot of subjectivity, how to do something more efficiently or how to be more effective in accomplishing their goals, there is some subjectivity in there and that is one of the challenges of the auditor's office, is to find some measure to point out to the client, I think that if in those type of instances, I think there are instances of where we may put something in a draft, and we talked to the client long before the draft comes out with our recommendations. We will say, let's go over each of the recommendations we have, so they're not shocked by any recommendations in the draft. The draft contains all the wording, the narrative. There are instances where we say we think this is a good idea, and the client says I'm not too sure, we may put that into the draft, and at that point, when the client sees it in a draft, may be more willing either to take the time or show us that it's not a good idea, and we should take it out of the report, and that has happened. Or they may resign themselves to the fact that maybe I don't agree with it, but we're going to have to look into it more.

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Rep. Delmore: Can you tell me how and why you think it is in the public's interest for that to be kept confidential. Are the changes, are the working papers something that people are trying to change in between that draft and when the final report comes out.

G. Smith: The reason we think it is in the best interest of the public is that until we think something is factual that people shouldn't have access to it until it is factual. Once we set the work papers, and the final report is set, if people want to look at the draft, and see how that changed from the final, that is perfectly fine. We have never turned someone away. If the draft report gets out into the media, and there are things in there, whether they be unflattering, or suggestions for improvements for the agency, those get out and in the end the client comes back to us and says, we have other things and we should have made this available to you and we didn't; or we lost that report, now they find the report and something that was in the draft report is not in the final report, it was critical of the Veterans Home or somebody at the Veterans Home, now it's out and there was no basis for someone getting upset or getting it out in the public, because it wasn't what the final report was going to say.

Rep. Delmore: How many of these reports do you do, and how many real significant changes do you find?

G. Smith: For the auditor's office, for the whole year we may issue 40 agency audit reports, because overall we do about 60 agency audits, we do about 2 performance audits and 2 or 3 follow-ups a year, so as performance audits go, I guarantee there are significant changes in all of the performance audits. I just can't think of one where the client hasn't said to us, we see where you are coming from but what about this type of information. Since they are subjective, in a

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financial audit reports, I would say there are not as many significant changes, but there would be changes, the language to recommendations.

Rep. Delmore: How long between the time you give the draft audit back to them does it take for you to get to the final draft.

G. Smith: Typically, the time period we give them is 2 or 3 weeks, it's a small audit, a small number of recommendations, that's sufficient. If there is a large number of recommendations, 2 or 3 weeks, once we get that report, we might spend another week examining those recommendations and if we believe there is anything in there that we believe is misleading or inaccurate, we contact the client and give them the option of taking it out, or then we will re-respond and say this is inaccurate and here's the truth. So I would say if I do that, and then I get into typing and issue the final report, it may be a month.

Rep. Klemin: To follow up on Rep. Maragos comments, draft audit report being a part of working papers. I think in looking at this bill draft, I don't think it is written that way. I think it makes us look like draft audit reports are something in addition to working papers, because we talk about working papers and draft audit reports on line 8 and 9, we talk about working papers and draft audit reports on line 12. But on line 10, we say what working papers do include, they include records as so forth. It doesn't say that working papers include draft audit reports, which is what you said. Then we go down to the end of this bill and we talk about only working papers being covered, on lines 15, 17 and 19, nothing about draft audit reports like it says at the top of this thing. I am wondering if this will affect the bill other than the confidential vs. exempt issues. Instead of referring to draft audit reports in line 8 and 9 and line 12, we just talk about working

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papers there and, then on line 10, where it says working papers include, at that point we would say that it also includes draft audit reports. Would that be consistent with the way you do it?

G. Smith: Yes, we would have no problem with that change, and I guess the reason that it might have put that separate like that, because before when it just said working papers, we assumed that included draft audit reports, because it was not a final document until the attorney general's office tells us otherwise, which they obviously did there, that's probably why when the Legislative Audit Fiscal Review committee came up with what they did, that they included draft audit reports there. We would have no problem if the definition of working papers included draft audit reports. That's been our assumption all along.

Rep. Maragos: Are you aware of anyone with a proper definition in the statutes of working papers, that maybe we just need to include the definition.

G. Smith: Other than here, no.

Chairman DeKrey: Any other testimony in favor of HB 1051, opposition to HB 1051, now I will close the hearing of HB 1051, we will not do any work on it until we hear HB 1100.

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1051

House Judiciary Committee

☐ Conference Committee

Hearing Date 1-20-03

Tape Number	Side A	Side B	Meter #
1	xx		16-22
Committee Clerk Signature <i>J. Penrose</i>			

Minutes: 13 members present

Chairman DeKrey: We will look at HB 1051.

Rep. Klemin: Here are the amendments to HB 1051, (see attached amendment). It includes draft audit reports as part of the definition of working papers. Line 14, confidential and exempt, it has to be one or the other, not both. Changed to reflect that it is confidential. Three stages of confidentiality or exempt status.

Rep. Maragos: Does this mean that we don't have to pass the first set of proposed amendments?

Rep. Klemin: These amendments include that, what we tried to do is to get all the amendments into one document.

Chairman DeKrey: This would avoid what happened down in Lisbon. They wouldn't be running to the media.

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Bill/Resolution Number HB 1051
Hearing Date 1-20-03

Rep. Delmore: Is there a statute of penalty for someone who releases that information when it is confidential.

Rep. Grande: To have the working papers exempt, so that they could be shared during the process for questions to be answered.

Rep. Klemin: That could be. I think so.

Chairman DeKrey: They have to be exempt so they can use their discretion to go back to whoever audited them, so they can get their responses. Did you want a penalty in there, Lois. Is that what you are getting at.

Rep. Delmore: I was just curious. I don't know if this is where we would put it in anywhere.

Rep. Klemin: We have a whole chapter on open records. I move the adoption of the amendments.

Rep. Maragos: Seconded the motion.

Chairman DeKrey: Any discussion on the amendment, if not, we will take a voice vote. All those in favor, 12 yes, 0 no, 1 absent (Rep. Eckre).

Chairman DeKrey: Amendment passes. We now the bill HB 1051 before us as amended.

Rep. Wrangham: Do Pass as Amended on HB 1051.

Rep. Kingbury: Seconded.

11 YES 1 NO 1 ABSENT DO PASS W/AMENDMENT CARRIER: Rep. Wrangham

30176.0201
Title.0300

Prepared by the Legislative Council staff for
Representative Klemin
January 16, 2003

YK
1/20/03

HOUSE AMENDMENTS TO HOUSE BILL NO. 1051 JUD 1-21-03

Page 1, line 2, replace "exempting" with "the confidentiality of" and remove "from open records"

Page 1, line 3, remove "requirements"

Page 1, line 7, remove "~~and draft audit reports~~" and remove the overstrike over
"Confidential"

Page 1, line 8, remove "~~Exemption from open records requirements - Confidentiality~~" and
remove "~~and draft~~"

Page 1, line 9, remove "~~audit reports~~"

Page 1, line 11, after the second comma insert "draft audit reports."

Page 1, line 12, remove "~~and draft audit reports~~"

Page 1, line 14, remove "~~and exempt from section 44-04-18~~"

Renumber accordingly

Date: 1/20/03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1051

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30176.0201 .0300

Action Taken Do Pass as Amended

Motion Made By Wrangham Seconded By Kingsbury

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore		✓
Vice Chairman Maragos	✓		Rep. Eckre	AB	
Rep. Bernstein	✓		Rep. Onstad	✓	
Rep. Boehning	✓				
Rep. Galvin	✓				
Rep. Grande	✓				
Rep. Kingsbury	✓				
Rep. Klemin	✓				
Rep. Kretschmar	✓				
Rep. Wrangham	✓				

Total (Yes) 11 No 1

Absent 1

Floor Assignment Rep. Wrangham

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

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10/2/03
Date

REPORT OF STANDING COMMITTEE (410)
January 21, 2003 10:05 a.m.

Module No: HR-11-0811
Carrier: Wrangham
Insert LC: 30176.0201 Title: .0300

REPORT OF STANDING COMMITTEE

HB 1051: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1051 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "exempting" with "the confidentiality of" and remove "from open records"

Page 1, line 3, remove "requirements"

Page 1, line 7, remove "and draft audit reports" and remove the overstrike over "~~Confidential~~"

Page 1, line 8, remove "Exemption from open records requirements - Confidentiality" and remove "and draft"

Page 1, line 9, remove "audit reports"

Page 1, line 11, after the second comma insert "draft audit reports."

Page 1, line 12, remove "and draft audit reports"

Page 1, line 14, remove "and exempt from section 44-04-18"

Renumber accordingly

2003 SENATE JUDICIARY

HB 1051

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10/2/03

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1051

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 02/26/03

Tape Number	Side A	Side B	Meter #
1	X		14.2 - 39.1
Committee Clerk Signature <i>Maria L. Sallary</i>			

Minutes: Senator Stanley W. Lyson, Vice Chairman, called the meeting to order. Roll call was taken and all committee members present. Sen. Lyson requested meeting starts with testimony on the bill:

Testimony Neutral to HB 1051

Don Wolf - Legislative Council (meter 14.4) Introduced and Explained Bill. Discussed how this bill was a result of an audit of the Veterans Home. This prevents information going to the public before the audit has had a complete research and response/changes.

Senator Thomas L. Trenbeath discussed exempt vs. confidential (meter 16) discussion on line 6 and line 10 "working papers". Discussion of "Confidentiality" and how it carries a felony punishment.

Testimony in Support of HB 1051

Gordy Smith - CPA Audit Manager, Office of the State Auditor (meter 18.7) Read Testimony

Attachment 1a, Submitted Amendment - Attachment 1b.

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Senate Judiciary Committee

Bill/Resolution Number HB 1051

Hearing Date 02/26/03

Senator Dick Dever discussed (meter 23.7) what the order of the audit process and public release currently is.

Senator Thomas L. Trenbeath did not think this bill accomplished what it is intended to in the language that it is using. They discussed what a final report consisted of and who sites "uncooperative" or a the stalemate stance of an audit.

Sen. Trenbeath (meter 29) discussed line 12 and exempt Vs confidential. Further discussion on confidentiality's breach being a class C Felony.

Testimony in opposition of HB 1051

Jack McDonald - Attorney on behalf of the ND Newspaper Association and the ND Broadcasters Association. (meter 33.8) Read Attachment #2 that included amendment. Discussed how this bill prohibits an entity from seeking any advice whether legal or community leaders with out it being a felony.

Senator Carolyn Nelson stated why if discussed an Auditee can be considered a felon but the state auditor's office can't be. Discussion on the patchworkness of this bill and the redundant sentences. Discussion on changing the title of bill.

Senator Stanley W. Lyson, Vice Chairman, closed the hearing

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1051

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 03/04/03

Tape Number	Side A	Side B	Meter #
3	X		4.4 - 6.1
Committee Clerk Signature <i>Michelle L. Solberg</i>			

Minutes: Senator John T. Traynor, Chairman, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with committee work on the bill:

Reviewed original discussion on bill for Sen. Traynor.

Motion Made to DO PASS Amendment 30176.0301 on HB 1051 Sen. Trenbeath and seconded by Sen. Dever

Roll Call Vote: 5 Yes. 0 No. 1 Absent

Motion Passed

Motion Made to DO PASS Amended HB 1051 Sen. Trenbeath and seconded by Sen. Dever

Roll Call Vote: 5 Yes. 0 No. 1 Absent

Motion Passed

Floor Assignment: Sen. Trenbeath

Senator John T. Traynor, Chairman closed the hearing

30176.0301
Title.0400

Adopted by the Judiciary Committee
March 3, 2003

923
3-3-3

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1051

Page 1, line 2, remove "the confidentiality of"

Page 1, line 6, overstrike " - Confidential"

Page 1, line 12, after "body" insert "or management", replace "confidential" with "exempt", and
after "issued" insert "or work ceases on the audit"

Renumber accordingly

Date: March 4, 2003
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1051

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30176.0301

Action Taken DO PASS Amendment

Motion Made By Sen. Trenbeath Seconded By Sen. Dever

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	X		Sen. Dennis Bercier	A	A
Sen. Stanley Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) FIVE (5) No ZERO (0)

Absent ONE (1)

Floor Assignment _____

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

Date: March 4, 2003
Roll Call Vote #: 2

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1051

Senate JUDICIARY Committee

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Legislative Council Amendment Number 30176.0301

Action Taken DO PASS Engrossed HB as Amendment

Motion Made By Sen. Trenbeath Seconded By Sen. Dever

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	X		Sen. Dennis Bercier	A	A
Sen. Stanley Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) FIVE (5) No ZERO (0)

Absent ONE (1)

Floor Assignment Sen. Trenbeath

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

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Operator's Signature

Salvatore Riccardi

Date

10/2/03

REPORT OF STANDING COMMITTEE (410)
March 4, 2003 8:21 a.m.

Module No: SR-38-3817
Carrier: Trenbeath
Insert LC: 30176.0301 Title: .0400

REPORT OF STANDING COMMITTEE

HB 1051, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1051 was placed on the Sixth order on the calendar.

Page 1, line 2, remove "the confidentiality of"

Page 1, line 6, overstrike " - Confidential"

Page 1, line 12, after "body" insert "or management", replace "confidential" with " exempt", and after "issued" insert "or work ceases on the audit"

Renumber accordingly

2003 HOUSE JUDICIARY

CONFERENCE COMMITTEE

HB 1051

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Operator's Signature

Valista Rickford

Date

10/2/03

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1051

House Judiciary Committee

☒ Conference Committee / House and Senate Judiciary Committees

Hearing Date 4-1-03

Tape Number	Side A	Side B	Meter #
1	xx		8.7-21.5
Committee Clerk Signature <i>A. Penrose</i>			

Minutes: 6 members present: Sens. Trenbeath, Traynor, Bercier, Reps. Klemin, Kretschmar, and Delmore.

Chairman Klemin: Called the Conference Committee meeting to order. There is a quorum present. HB 1051 relates to draft audit reports prepared by the State Auditor and House has refused to concur with the Senate amendments that were made to this bill. Perhaps we could start with the Senators providing us with their rationale for their amendments.

Sen. Trenbeath: It seemed to us, and this came out of the Legislative Audit and Fiscal Review Committee, as you see I was a member of that; and of course, it stemmed from the Soldier's Home audit where the draft audit report was released as public record and caused some turmoil. We didn't have any problem with it being confidential, but it struck us as being too limiting and that it ought to be exempt in the hands of the auditors as to whom it is disclosed to. So that they could disclose it to the governing body or management of the entity so that they might have a

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House Judiciary Committee
Bill/Resolution Number HB 1051
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chance to maybe make some corrections before the final one came out, and then, of course, it is an open record once the final audit is out.

Rep. Klemin: I noticed in looking through here, when the bill went over to the Senate, the auditor's office made a couple of other recommendations for some amendments. Maybe this one that you are talking about seems to be doing that. I guess I would point out that, when we had it over in the House, it was the Auditor's recommendation, first they said it was confidential or exempt, the way the original bill read. So there was a conflict there. So it was recommended by the State Auditor's office that it be made confidential instead of exempt, so that is the primary reason we did it that way. The concern as I recall that they didn't want the governing body, of this audited entity, to be releasing the information when it was still in the draft form because it was subject to change for various other reasons. It sounds to me like, from what you are saying, is that the decision on whether it should be disclosed once it has been released to the governing body still remains in the State Auditor's office.

Sen. Trenbeath: That would be my interpretation. In other words, I think the State Auditor under the Senate amendment would be able to put that draft audit report in the hands of the governing body or management and restricts its further use.

Rep. Klemin: I guess that is my question in looking at this. What in here would restrict the governing body from releasing it.

Sen. Trenbeath: I think what it says is that the Auditor is the boss in this instance. It is exempt in his hands, and he would be able to put it in the governing body or the management of the audited entities hands, and not to disclose any further.

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House Judiciary Committee
Bill/Resolution Number HB 1051
Hearing Date 4/1/03

Rep. Klemin: I just looked back at the statute here, and I looked at that when we talked about exempt records. It means that it may be open in the discretion of the public entity, and in this case, when it is released to that governing body, it is also a public entity. Are we likely to leave some room for interpretation as to which public entity is going to make the decision as to whether it should be open or not.

Sen. Trenbeath: There may be. I know one of the motivating factors was, if you look at the first part of the bill, what came out of the house had read that first two sentences, working papers of the state auditor are not public records, and are exempt. Working papers included, at that point, because of the additional language, draft audit reports. At that point, they are working papers and are exempt. And then we come back down here and say, but the draft audit report is confidential. We thought that to interpret the two together, that they should be consistent, one or the other. It seemed to us to logically make them exempt. Give the auditor some flexibility.

Rep. Klemin: Of course, it was the State Auditor that asked for it to be confidential.

Sen. Trenbeath: And I see someone who might have an opinion on that regard. Often times, I certainly don't mean to ascribe this to the auditor's office. We found that a lot of times we get confused on confidential or exempt.

Rep. Klemin: Do you have any comments, Gordy.

Gordy Smith, State Auditor's Office: What we always assumed was exempt in our hands, that if we gave it to a governing board, for the 25+ years I have worked here, we thought that if we gave it to a governing board or management, that the exemption went along with it. But the Attorney General's office gave us an opinion to us during the Veterans Home, that once the auditor's had that, it was exempt in their hands, but once we give the draft to a governing body or

Yalosta Rickford
Operator's Signature

10/2/03
Date

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management, our exemption doesn't last to cover them. So at the Veterans Home, actually, if anyone would have asked the Board, or Commandant, for that draft, he would have been required to have given it to them. As it stands, the way we understand it, in talking to Bob Latham, from the AG's office, as this bill was amended by the Senate, both our office and the Veterans Home, they, with the exemption, have discretion. So the Veterans Home, they got the report, they could have refused somebody who asked for it. If the newspaper asked for it, they could have refused it and say, "No, it is exempt under the open records law", but if they wanted to release it, and wanted to give it to the newspaper or give it to anybody else, they could. That's the part where the Auditor's office, if we had our preference, we would have it be confidential so they wouldn't have a choice, they couldn't give it out to anybody.

Rep. Klemin: But once the final audit was completed, or you ceased work on the audit, then the confidential provision would cease.

Mr. Smith: Right, they could have the draft if someone wanted to compare a draft to the final document, they could have that and see what changed and why it changed.

Rep. Klemin: At that point, everything becomes an open record.

Mr. Smith: The only way that it wouldn't, once the audit is completed is if the State Auditor has a section in the law that says that if he wants to declare some of the work papers confidential, like say they would work at the tax department, and if they looked at tax ID numbers or something with names, we would declare that confidential so that couldn't be released. If we survey employees, we tell the employees that we will keep that information confidential so an employer couldn't do something against them. But, otherwise, in a typical situation, yes, as soon as that draft audit is in the final product, then the draft audit report itself is an open record.

Yolanda Rickford
Operator's Signature

10/2/03
Date

Page 5
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Sen. Trenbeath: Let me ask you this question, it also says the issued audit report is public information. The working papers of an issued audit report are public information; however, at the discretion of the Auditor, the working papers are confidential.

Mr. Smith: In certain circumstances, the State Auditor has the right, if he wants to make a declaration, and in talking with the Attorney General's office, they told us that that declaration has to be in advance. If we're looking at a performance audit, we would survey all of the employees. We tell the employees that this survey is going to be confidential. So, at the beginning of the audit, the audit says that all of the working papers that deal specifically with those employee surveys, when the employee returns it, those records be confidential for ten years. So that way, every other working paper is open as soon as the audit report is issued; but those employees' names on there would be confidential. If you looked at tax documents, it would say that we're not including any tax documents in anybody's request for working papers. We block all of that out.

Sen. Trenbeath: We could take those, and I realize it is getting away from the language in the quote, you could take those two sentences and say that the issued audit report is public information, other than those portions declared to be confidential by the auditor.

Mr. Smith: The issued audit report would always be public. The working papers, right, would be public except for those that are blocked.

Sen. Trenbeath: Right, that is what I am saying.

Mr. Smith: Yes. Right.

Sen. Trenbeath: The working papers of an issued audit report are public other than those declared to be confidential by the State Auditor.

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House Judiciary Committee
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Hearing Date 4/1/03

Rep. Klemin: How does that figure in to line 12 then, where it says that the draft audit report is exempt. I guess I don't see where we are resolving that. So it seems to me that we either have to say that the draft audit is confidential until the final audit report is released, etc. or we have to put in language so that the exempt discretion is clearly only that of the State Auditor and not the other public entity.

Sen. Trenbeath: I see what you mean.

Rep. Klemin: I think the confidential provision that you were talking about, wasn't that your preference to have it that way.

Mr. Smith: Yes, our preference would be that it would be confidential and then basically that the management of the entity wouldn't have any discretion until the audit is done.

Sen. Trenbeath: You are talking about exempt in the hands of the Auditor, but confidential in the hands of the audited entity.

Mr. Smith: Yes.

Rep. Klemin: Well if it were confidential, you couldn't release it either until the final audit report was issued.

Mr. Smith: Right, from our perspective, that would be fine with us.

Rep. Klemin: Well, for discussion purposes, would you have a problem changing the word exempt to confidential, it would only be a temporary confidential...

Rep. Kretschmar: On line 12?

Sen. Traynor: On line 12.

Sen. Trenbeath: Myself, I don't have any problem with that.

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House Judiciary Committee
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Sen. Traynor: No, I don't have a problem with that. I see it a little clearer now in the House version, and also we left it in the Senate version, on line 7 the word exempt is used, and that's to allow the Auditor to release it in his discretion. But now we're talking about changing it back to confidential on line 12.

Sen. Trenbeath: Maybe it would be nice to see the legislative history of this thing, because it looks like to me that it has been cobbled together over..., there seems to be so many inconsistencies in it. You talk about the working papers being exempt, and then you say that the working papers, may be at the discretion of the State Auditor, and unless otherwise favored by law, made available for inspection, which is surplusage at that point. And then we go back in and declare it confidential in the hands of the governing body or the management of audited entity.

Sen. Traynor: I wonder, on line 6, it is a little confusing to leave the word confidential in, because in the body of the bill it talks about exempt and confidential. Maybe we would be better off without that.

Rep. Klemin: We would leave the word confidential out on line 6, but put it in on line 12. OK.

Sen. Trenbeath: Because the caption wouldn't be law anyway.

Rep. Klemin: So what we would be talking about then is just changing the word exempt on line 12 to confidential, and otherwise everything would stay the same.

Sen. Trenbeath: Unless you wanted to delete line 10 beginning the word working and the balance of the sentence. It doesn't seem to add anything to it.

Rep. Klemin: Well, it seems to me that the less we do, that's current law.

Rep. Kretschmar: Yes, it is.

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House Judiciary Committee
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Sen. Trenbeath: It seems to be redundant.

Rep. Klemin: I guess that may be, but for our purposes, if we're just looking at line 12, all we have to do is change one word and it would be done.

Sen. Traynor: With the Senate amendments.

Rep. Klemin: Right.

Rep. Kretschmar: Let me try that in a motion. I move that the House would accede to the Senate amendments to HB 1051, and then that the conference committee further amends by line 12, deleting exempt, and inserting confidential.

Sen. Trenbeath: Seconded.

Voice vote: Carried.

Rep. Klemin: Do we need a formal roll call vote on this. Let's take a roll call vote.

6 YES 0 NO 0 ABSENT MOTION PASSES

CORRECTION:

It was determined by Legislative Council that the above motion was incorrect. The motion should have reflected that the Senate recedes from Senate amendments found on HJ pages 818 and adopt further amendments as follows, line 12 deleting the word "exempt" and inserting "confidential". HB 1051 was placed on the 7th order of business on the calendar.
LC Amendment No. 30176.0302, title .0500.

30176.0302
Title.0500

Adopted by the Judiciary Committee
April 1, 2003

Conference Committee Amendments to Engrossed HB 1051 - 04/01/2003

That the Senate recede from its amendments as printed on page 818 of the House Journal and page 646 of the Senate Journal and that Engrossed House Bill No. 1051 be amended as follows:

Page 1, line 2, remove "the confidentiality of"

Page 1, line 6, overstrike "- Confidential"

Page 1, line 12, after "body" insert "or management" and after "issued" insert "or work ceases on the audit"

Renumber accordingly

**REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)**

Bill Number HB 1051 (, as (re)engrossed):

Your Conference Committee *House + Senate Judiciary*

For the Senate:

For the House:

Sen. Trenbeath	<i>yes</i>	Rep. Klemm	<i>yes</i>
Sen. Traynor	<i>yes</i>	Rep. Kretschmar	<i>yes</i>
Sen. Bercier	<i>yes</i>	Rep. Delmore	<i>yes</i>

recommends that the ~~(SENATE/HOUSE)~~ (ACCEDE to) ~~(RECEDE from)~~

the ~~(Senate/House)~~ amendments on (SJ/HJ) page(s) 818 --

and place _____ on the Seventh order.

X, adopt (further) amendments as follows, and place 1051 on the Seventh order:

having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) 1051 was placed on the Seventh order of business on the calendar.

DATE: 4/1/03

CARRIER: *Klemm*

LC NO. of amendment	<i>90176.0302</i>	<i>0500</i>
LC NO. of engrossment		
Emergency clause added or deleted		
Statement of purpose of amendment		

Yalosta Rickford
Operator's Signature

10/2/03
Date

REPORT OF CONFERENCE COMMITTEE (420)
April 10, 2003 2:56 p.m.

Module No: HR-65-7367

Insert LC: 30176.0302

REPORT OF CONFERENCE COMMITTEE

HB 1051, as engrossed: Your conference committee (Sens. Trenbeath, Traynor, Bercler and Reps. Klemin, Kretschmar, Delmore) recommends that the **SENATE RECEDE** from the Senate amendments on HJ page 818, adopt amendments as follows, and place HB 1051 on the Seventh order:

That the Senate recede from its amendments as printed on page 818 of the House Journal and page 646 of the Senate Journal and that Engrossed House Bill No. 1051 be amended as follows:

Page 1, line 2, remove "the confidentiality of"

Page 1, line 6, overstrike "- Confidential"

Page 1, line 12, after "body" insert "or management" and after "issued" insert "or work ceases on the audit"

Renumber accordingly

Engrossed HB 1051 was placed on the Seventh order of business on the calendar.

2003 TESTIMONY

HB 1051

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Valista Rickford

Date

10/2/03

January 8, 2003

HOUSE JUDICIARY COMMITTEE
HB 1051

CHAIRMAN DEKREY AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We oppose the bill in its current format and respectfully request that you consider an amendment.

This bill absolutely prohibits the disclosure of a preliminary report to anyone other than the governing board of the audited entity. This was spawned by a controversy at the ND Veterans Home. There were many rumors floating around the town and the state about the situation. It would have helped if the governing body could have discussed the audit with interested persons and community leaders. However, this bill prevents that.

Rather than make the report confidential, we think it should be "exempt." This means it would not be an open record, but the local entity would have the discretion to reveal it to others. This would let the governing bodies exercise their judgment regarding consulting with others about the preliminary audit. They may need to talk to others about the preliminary audit, but this bill prevents that.

Therefore, we respectfully request your favorable consideration of the amendment listed below. If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

PROPOSED AMENDMENTS TO HB 1051

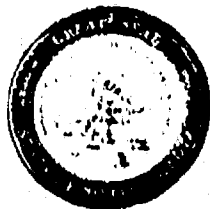
Page 1, line 14, remove "confidential and"

Renumber accordingly

Yalosta Rickford
Operator's Signature

10/2/03
Date

STATE AUDITOR
ROBERT R. PETERSON



STATE OF NORTH DAKOTA
OFFICE OF THE STATE AUDITOR
STATE CAPITOL
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**TESTIMONY BEFORE THE
HOUSE JUDICIARY COMMITTEE**
January 8, 2003

House Bill No. 1051

Testimony - Presented by Gordy Smith, CPA
Audit Manager

Chairman DeKrey, members of the House Judiciary Committee, my name is Gordy Smith. I'm an audit manager with the North Dakota State Auditor's Office. I'm here to testify in support of House Bill No. 1051.

During our recent performance audit of the North Dakota Veterans' Home, the client posed some questions to the Attorney General's Office. One of the issues addressed by the Attorney General's Office involved the draft audit report. The Attorney General's Office indicated that as the law is currently written, as long as the draft audit report is in the hands of the State Auditor's Office it is exempt from the open records law. However once the draft audit report is given to a client, this exemption is lost and the client must provide it to anyone who requests it.

Draft audit reports are provided to clients for a number of reasons. One of the most important is that the client is to formally respond to recommendations contained in the audit report. Their response provides balance to the report and enables the client to formally state what action will be taken to address the recommendations. In order to do this, the client needs to see the related commentary and the recommendations in the draft audit report. Reviewing the draft report also provides the client with a final opportunity to correct any misunderstandings relating to the issues in the report.

In over 25 years of working with the State Auditor's Office I have seldom witnessed draft reports that have not changed in some manner after the client has had an opportunity to review them. Requiring draft audit reports to be provided to the public or the media is unreasonable since they are not a final product and may significantly change prior to finalization. Allowing access to a draft audit report is essentially unfair to the client and the State Auditor's Office, since work on the document is not complete. Therefore I would urge you to pass House Bill 1051 which makes the draft audit report confidential until it is finalized.

Page 1 of 2

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Yalosta Rickford

10/2/03

Date

I would also like to point out to the committee that House Bill 1100 is being introduced this legislative session at the request of our office. The bill contains some "house keeping" changes, but also contains language relating to draft audit reports that is similar to what appears in this bill.

Page 2 of 2

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Yolanda Rickford
Operator's Signature

10/2/03
Date

STATE AUDITOR
ROBERT A. PETERSON



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**TESTIMONY BEFORE THE
SENATE JUDICIARY COMMITTEE**
February 26, 2003

Engrossed House Bill No. 1051

Testimony - Presented by Gordy Smith, CPA
Audit Manager

Chairman Traynor, members of the Senate Judiciary Committee, I am here to testify in favor of Engrossed House Bill No. 1051.

During a recent performance audit, the issue of open records and our draft audit reports was addressed by the Attorney General's Office. The Attorney General's Office indicated that as the law is currently written, a draft audit report in the hands of the State Auditor's Office is exempt from the open records law. However, once the draft audit report is given to a client, this exemption is lost and the client must provide it to anyone who requests it.

Draft audit reports are provided to agencies for several reasons. Perhaps the most important reason is to obtain the client's formal response to any audit findings and recommendations in the report. Their response provides balance to the audit report and enables the client to formally indicate what action will be taken to address the recommendations. In order to provide a response, the client needs to see the recommendations and related commentary in the draft audit report. Reviewing the draft audit report also provides the client with an opportunity to point out any inaccuracies or misunderstandings relating to issues presented in the report.

Requiring that draft audit reports be provided to the public or the media is unreasonable, since they are not a final product and may significantly change prior to finalization. Allowing access to a draft audit report is essentially unfair to the client and to the State Auditor's Office since work on the document is not complete. In the 25+ years I've worked for the State Auditor's Office, I have seldom witnessed an occasion where no changes have been made to a draft audit report after the client had an opportunity to review them.

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Operator's Signature

Gordy Smith

Date

10/2/03

42

We are asking that Engrossed HB 1051 be amended to also provide confidentiality to draft audit reports given to those entities that do not have a governing board. While virtually all political subdivisions have a governing body, most state agencies do not have a governing board. Examples include the Department of Human Services, the Highway Patrol Department, and the offices of elected state officials. The amendment provides the same confidentiality to the draft audit report when it is in the hands of the management of state entities that do not have a governing board.

The second part of our amendment makes it clear the draft report is confidential only until the final audit report is issued or until work ceases on the audit. This language was suggested to us by our representative at the North Dakota Attorney General's Office.

We ask that you give favorable consideration to this bill and our attached amendment.

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Yalosta Rickford
Operator's Signature

10/2/03
Date

STATE AUDITOR
ROBERT H. PETERSON



STATE OF NORTH DAKOTA
OFFICE OF THE STATE AUDITOR
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800 E. BOULEVARD AVE. - DEPT. 117
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PROPOSED AMENDMENT TO ENGROSSED HOUSE BILL NO. 1051

Page 1, line 12, after "body" insert "or management"

Page 1, line 12, after "issued" insert "or work ceases on the audit"

Renumber accordingly

Title: Strike Confidentiality
line 2
line 6

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10/2/03
Date

Att #2

Wednesday, February 26, 2003

SENATE JUDICIARY COMMITTEE
HB 1051

CHAIRMAN TRAYNOR AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We oppose the bill in its current format and respectfully ask you to consider a teensy amendment.

This bill absolutely prohibits the disclosure of a draft audit to anyone other than the governing board of the audited entity. This was spawned by a controversy at the ND Veterans Home. There were many rumors floating around the town and the state about the situation. It would have helped if the governing body could have discussed the audit with interested persons and community leaders, including their local legislators. This bill prevents that.

Rather than make the report confidential, we think it should be "exempt." This means it would not be an open record, but the local entity would have the discretion to reveal it to others. This would let the governing bodies exercise their judgment regarding consulting with others about the preliminary audit.

For example, just to pick some random state agencies, if the School for the Deaf, UND-Lake Region, NDSU, UND-Williston, Bismarck State University, the Pembina County Court or the Indian Affairs Commission, wanted to discuss a draft audit with their local Senators, or their attorneys or civic leaders, before responding to the State Auditor, they could not do so under this bill.

Therefore, we respectfully request your favorable consideration of the amendment listed below. If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL 1051

Page 1, line 12, remove "confidential" and insert "exempt"

Renumber accordingly