

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

12886

2005 HOUSE JUDICIARY

HB 1286

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **HB 1286**

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/24/05

Tape Number	Side A	Side B	Meter #
2	xx		15-end
2		xx	0-10.1

Committee Clerk Signature



Minutes: 11 members present, 3 members absent (Rep. Maragos, Koppelman, Zaiser).

Vice Chairman Maragos: We will open the hearing on HB 1286.

Rep. Bill Devlin: I am here to introduce HB 1286, which will provide some clean-up as well as some new language for our open meeting laws. This was written as part of a year long task force. Open meeting laws are strongly supported by the citizens of our state, which they have repeatedly demonstrated in statewide and local votes. This is just a clean up bill.

Representative Maragos: Thank you.

Wayne Stenehjem, Attorney General: Explained the bill. ND has the most open and broad open meetings and open records statutes in the country and we are proud of that. We have a unique arrangement here in ND, that is because of legislation passed back in 1997, gives the AG the authority to issue opinions to private citizens; which is an exception to the general rule that the AG can only give opinions to government officials and government agencies. The one exception is in the area where there is an allegation or violation of the open meeting and open

records law and permits the AG to entertain complaints from across the state. Somebody claims that they were denied access to a record or denied access to a meeting. The statute works very well. Technology has brought another look at the open meetings/open records law because it is now possible to have a meeting, in ways other than sitting down face to face. You can do it by phone, IVN, or e-mail (instant messaging). The bill you have in front of you, represents the consensus that was reached on some of the arguments and issues that have come up. Some of them aren't too big, but are significant. For example, under the current ND law, you are allowed to charge for making copies of public records if somebody asks for them. But the statute says you have to charge the actual cost, so every agency creates a lengthy list of all kinds of consideration, ranging from amount of time, amount of salary person making the copy receives, the cost of ink.....etc and then come up with a cost for that agency. Of course, the rates vary from agency to agency. We decided to set a rate of \$.15/copy. That's one of the changes. There are also some innovative individuals who look at ways that they can benefit personally from the open meetings law. One issue that came to mind, was because you are required as a government agencies to conduct interviews for a potential employee when they are being hired by a government agency. They have to be conducted before the public. You could have, and we have had situations, where you have three or four applicants, and the 4th applicant decides he wants to sit in on the meeting where they are interviewing the other one and would have a distinct advantage when it came to his turn. There's a change in here that would allow a governing board to exclude the other applicants from a job interview situation. Perhaps one of the biggest and significant changes has to do with the time within which a person can ask for an opinion from my office. Currently that time period is 30 days. Once those 30 days are gone, if their allegation is

that they were denied access to a meeting, or were denied a copy of records, there is nothing I can do if the 30 days are gone. That creates a problem when someone claims that they were not given adequate notice of a meeting. Sometimes groups or boards only meet monthly. You may not know for over a month that there was no notice of a meeting until the next time that they actually assembled, so the change would allow 90 days to bring a complaint of not getting proper notice of a meeting.

Representative Klemin: I get e-mails of all of your opinions issued, and it seems that many of them, a majority of them have to do with this issue of violating the open meetings law. I know you have a fairly comprehensive manual on the subject, does anyone provide training to these public entities out there about how to do this right.

Wayne Stenehjem: We do training all of the time. I think we are regular, featured speakers at the ND Association of Counties, League of Cities, and regularly will conduct training.

Representative Maragos: Thank you. Further testimony in support of HB 1286.

Mary Kae Kelsch, Asst. Attorney General: (see written testimony). Section One, Section Two, Section Three, Section Four.

Representative Meyer: Up to 15 cents a page.

Marv Kae Kelsch: Yes.

Representative Klemin: On the same subject, do agencies ever give the information on a CD or disk, an electronic format, rather than paper. What do they charge for that.

Mary Kae Kelsch: Yes, they could do that. You can charge your actual costs, which would be the price of a disk.

Chairman DeKrey: We dealt with this issue two or three sessions ago for medical records, and if I remember right, we set a price on what could be charged for the copies. Did you look at any of that when you wrote this bill.

Mary Kae Kelsch: I don't know that we looked at what hospitals charge.

Chairman DeKrey: We set it in law, so people couldn't take advantage. Was any of that looked at when you came up with this bill.

Mary Kae Kelsch: I did not look at that specific statute. I did search for different statutes that set a specific fee.

Chairman DeKrey: I believe the charges for medical copies is quite a bit more.

Representative Onstad: Do you have to provide a copy.

Mary Kae Kelsch: Yes, if someone asks for a copy of a public record, you are obligated to give them a copy.

Representative Delmore: However, personal information, such as SS#'s, that kind of information would be taken off the public record.

Representative Onstad: Companies, that aren't public entities, say you can look at the information here, but you can't take copies home. Maybe that's different because it's not a public entity.

Mary Kae Kelsch: If you're not a public entity, you can put any restrictions you want on the records you have and who is allowed to look at them. If you are a public entity, if someone asks for a copy of a record, you are obligated to provide the copy. That is the law. (Continued with written testimony, Section 4, #3; Section 5, Section 6, Section 7, Section 8 and Section 9).

Representative Klemin: On line 14, pg 8, the language that's being taken out there, is that intended to be covered by new subsection 3, line 17.

Attorney General: No, they're not exactly the same. The part that is being deleted, is being deleted because there isn't necessarily an agreement, that information that we get, in the course of an investigation, there isn't an agreement to keep it confidential. The next one provides where the person gave the records, has not agreed to waive the privilege, if they waived it, of course, they don't care whether it is released or not.

Representative Klemin: In this section, we're talking about litigation and I've seen discovery agreements, where one side will only agree to produce the information if the other side agrees to keep it confidential and return it after the case.

Attorney General: We do that, but if that is the case where they've given the Attorney General a response and the information with that understanding, we may not have that same kind of agreement, we only have an arrangement to work together with other Attorney General's offices. There are agencies that will go from one state to another, to request investigative records that we have and this is kind of language that most states are adopting.

Representative Klemin: So you really want to take line 14 out.

Doug Bahr, Director, Civil Litigation, office of AG: This often doesn't happen in discovery, when it is the other party you are getting the records from. This will be on a multi-state task force, consumer protection, tobacco litigation, other types of things where there are 30-50 states involved, and through e-mail, through faxes, those states are sharing, they are not adverse parties, they have a joint interest with us, they are sharing confidential or privileged documents, legal theories, attorney work product and we are getting those, there is no agreement, we haven't asked

them through discovery, this is a friendship, a working relationship and so there are no agreements that say that "well you provide this to us and we will keep it confidential" and they say "they won't provide it unless you promise to". A lot of it is informal working groups and on the tobacco case, an issue came up six or eight months ago, where one of the tobacco companies was doing exactly what AG said, going to the states, trying to get the attorney work product from the other states, by going through these states open records. And the state started saying, if your open records let this get disclosed, we're not working with you. That obviously hinders this office's ability to participate, to get the advantages the other states AG's offices, to use them and have them freely communicate with us, because they are afraid that anything they give us would just be disclosed to someone who wants it. It's not the situation you are talking about, through actual discovery.

Representative Klemin: This would not prevent you, in an appropriate case where it is discovery against an adversary entering into those kinds of agreements, like a trade secret.

Doug Bahr: This would not prevent us from doing that, this is cooperative investigations and litigation. This really isn't adverse parties. As long as we can agree, without violating ND law, like medical records. We can routinely say we won't disclose those, they are protected under the open records law. That would not impact our ability to do that in actual discovery in any way.

Mary Kae Kelsch: (continued with Section 9, 10, 11, & 12).

Chairman DeKrey: The 15 cents bothers me, because to change that you have to come before the Legislature and get 15 cents changed. Couldn't you come up with some kind of system where the AG can set the price, so you don't have to come back for a nickel.

Mary Kae Kelsch: I'd be happy to set it for you.

Attorney General: We went around and around. One of the options we had was to go OMB to have them set a standard rate. We decided that if we established a process, we would have to go to Administrative Rules committee and that takes a long time as well.

Representative Boehning: I have one question on page 3, section 4, #2, talking about 15 cents. Does that apply to boards and commissions.

Marv Kae Kelsch: This would apply to any public entity. Yes, if you are a city auditor, county treasurer, Governor's office, anyone.

Representative Boehning: Massage boards, those sorts of boards and commissions would fall under the 15 cents/copy.

Marv Kae Kelsch: Yes. A lot of times, entities like that that may not be used to getting requests for copies, and that's when I have people calling and saying that they were charged \$2/page. I call the entity and they have no idea they were even supposed to do an analysis, they just picked a number. This will be helpful.

Representative Klemin: On the same issue, if one public entity wants copies of something from another public entity, do they charge as well.

Marv Kae Kelsch: Usually agencies exchange information without charge. Sometimes if all you want is a page or two, they will usually just give you the copies. This comes into play when they have larger requests.

Representative Klemin: It says that they may charge up to 15 cents, so that is the maximum, they could be charging less.

Mary Kae Kelsch: Yes, but I bet they'll always charge the 15 cents, because the language says up to \$25 on the locating fee, which is already law, and I think I've had one entity in 2.5 years ever charge anything less than \$25/hr.

Chairman DeKrey: Thank you. Further testimony in support of HB 1286.

Jess Olson, Program Manager, Dept of Agriculture: (see written testimony).

Chairman DeKrey: Thank you. Further testimony in support.

Alexis Duxbury: In support of the bill, strongly supports the amendment in section 12, which would expand the time frame.

Chairman DeKrey: Thank you. Further testimony in support.

Jack McDonald, ND Newspaper Association: We support the bill (see written testimony).

Chairman DeKrey: Thank you. Further testimony in support.

Jerry Hjelmsted, ND League of Cities: We support this bill.

Chairman DeKrey: Thank you. Further testimony in support, testimony in opposition, we will close the hearing.

Representative Delmore: I move a Do Pass on HB 1286.

Representative Boehning: Second.

11 YES 0 NO 3 ABSENT DO PASS CARRIER: Rep. Onstad

FISCAL NOTE
Requested by Legislative Council
04/05/2005

Amendment to: HB 1286

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues					
Expenditures					
Appropriations					

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The portion of this bill with a fiscal impact deals with setting a fee of up to \$.25 per impression and being able to charge to excise material from a record prior to providing a copy to the requestor.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

Although this bill is expected to have a revenue impact, it is inestimable.

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Since state entities are already providing this service, an increase in expenditures is not anticipated.

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Since state entities are already providing this service, an increase in appropriations is not anticipated.

Name: Kathy Roll
Phone Number: 328-3622

Agency: Office of Attorney General
Date Prepared: 04/05/2005

FISCAL NOTE
Requested by Legislative Council
03/04/2005

Amendment to: HB 1286

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The portion of this bill with a fiscal impact deals with setting a \$1 fee for every four impressions or fraction thereof and being able to charge to excise material from a record prior to providing a copy to the requestor.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

Although this bill is expected to have a revenue impact, it is inestimable.

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Since state entities are already providing this service, an increase in expenditures is not anticipated.

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Since state entities are already providing this service, an increase in appropriations is not anticipated.

Name: Kathy Roll
Phone Number: 328-3622

Agency: Office of Attorney General
Date Prepared: 03/07/2005

FISCAL NOTE
Requested by Legislative Council
01/12/2005

Bill/Resolution No.: HB 1286

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues					
Expenditures					
Appropriations					

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

The portion of this bill with a fiscal impact deals with setting a \$.15 per copy fee and being able to charge to excise material from a record prior to providing a copy to the requestor.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

Although this bill is expected to have a revenue impact, it is inestimable.

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Since state entities are already providing this service, an increase in expenditures is not anticipated.

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Since state entities are already providing this service, an increase in appropriations is not anticipated.

Name: Kathy Roll
Phone Number: 328-3622

Agency: Office of Attorney General
Date Prepared: 01/21/2005

Date: 1/24/05
Roll Call Vote #: /

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1286

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Motion Made By

Do Pass
Rep. Delmore

Seconded By

Rep. Boehning

Representatives
Chairman DeKrey
Representative Maragos
Representative Bernstein
Representative Boehning
Representative Charging
Representative Galvin
Representative Kingsbury
Representative Klemin
Representative Koppelman
Representative Kretschmar

Yes	No
✓	
A	
✓	
✓	
✓	
✓	
✓	
✓	
A	
✓	

Representatives	Yes	No
Representative Delmore	✓	
Representative Meyer	✓	
Representative Onstad	✓	
Representative Zaiser	A	

Total (Yes)

11

No

0

Absent

3

Floor Assignment

Rep. Onstad

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

REPORT OF STANDING COMMITTEE (410)
January 24, 2005 3:42 p.m.

Module No: HR-15-0956
Carrier: Onstad
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1286: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS
(11 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1286 was placed on the
Eleventh order on the calendar.

2005 SENATE JUDICIARY

HB 1286

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1286

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 3 , 2005

Tape Number	Side A	Side B	Meter #
1	X		0.0 - 5500

Committee Clerk Signature *Maria L Solby*

Minutes: Relating to providing copies of records, fees for copies.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Rep. Bill Devlin, Dist. #23 Introduced the bill - Att. #1

Wayne Stenehjem - Attorney General (meter 148) Some of the questions that arrive due to what I think is one of the broadest open records Statutes in the nation. One of its uniqueness is that an individual citizen can ask the A. G. to issue an opinion. We do that regularly The Attorney General can only issue an opinion In the past year we have had 46 complaints on 52 violations

That is a good record. In any week we have countless, school board, city commissioner, town ship, and many other agencies in the state.

Technology has raised a few issues. Sited cases referring to a computer's "waste basket" (meter 301) The other issue is the cost. The cost of copying paper. We started stating that each organization set the amount. This was confusing so we tried to find a middle ground.. The third issue is researching the open records and the time spent on this. Fourth is the 30 time line. The last and fifth issue is our relationship to other states. Due to our openness of records, they are sometimes reluctant to share information with ND.

Sen. Trenbeath (meter 730) asked if the cost amount can be amended by the individual governmental agency or policy sub can amend in their own governing records? No this would become law for the state. Unless there was a statute specifically address; i.e. real-estate records charging \$5.

Mary Kae Kelsch - Assistant Attorney General (meter 852) Reviewed bill - Att. #2 Cost of the comp. is not to make money only cover costs. Some places are not only using this to make money but if they have a dislike for someone use it as a tool to get them.

Sen. Trenbeath sited how some of the issues in D.O.T. would become nonexistent due to them providing automatic copies. Discussed the time taken to make copies. **Senator Triplett** stated that part of her job as a county commissioner was to hire people to make copies. While part of this is in the job description, there are at times overwhelming request for large amounts of copies to be made. This takes the person away from the other parts of the job they were hired for and you are losing money-not making money. Some people make huge request to "harass" government, these are the people that concerns me. I have no problem for the basic person coming in to ask for a copy.

Jeff Olson, Program manager Dept. of Agriculture. (meter 3745) Gave Testimony - Att. #3

Wage Williams, Association of Counties - (meter 4000) Gave Testimony Att. #4 (with amendment on bottom)

Testimony in Opposition of the Bill:

Jack Mc Donald, ND Newspaper Assoc. (meter 5500) Gave Testimony - Att. # 5

Sen. Trenbeath asked what his law firm charges per copy? I usually give it to them for free.

Discussion of medical records.

Jerry Hjelmstad, League of Counties. (meter 4970)

Alexis Dox Bury, private citizen (meter 5184)

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Senator John (Jack) T. Traynor, Chairman reopened the Hearing (tape 2, side 2, meter 650)

Senator Triplett sited that the 15. cent part of this bill sounded very "micro managing" the and this was a situation that the decision should be made on the local level. This bill will effect every public entity. Some copiers copy cheaper. To put a state cap on it is not good.. Many law firms charge a quarter a copy. The bankruptcy court has charged 50 cents a copy. The state does not need to micro manage every political entity at this level. I would move to do pass the

Association of Co's amendment. **Sen. Trenbeath** seconded the motion.

Senator Hacker asked why we even had to have this in statute. Sen. Trenbeath responded yes, the reasoning is a sound one, it is one of "nuisance". They get so many request for opinions based on people charging different rates. We could have it "up to \$1.00 for every one to four pages.

All members were in favor of the amendment.

Page 4

Senate Judiciary Committee

Bill/Resolution Number HB 1286

Hearing Date March ~~2~~³, 2005

Sen. Trenbeath made the motion to do pass. **Sen. Nelson** second the motion. All members were in favor and motion passes.

Carrier: Sen. Nelson

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Date: 3/2/05

Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1286

Senate Judiciary

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Assoc of Co. Amend AH #24

Motion Made By Senator Triplett Seconded By Senator Trenbeath

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator

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

Date: *3/2/05*
Roll Call Vote #: *2*

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1286

Senate **Judiciary**

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken *Do Pass As Amended AM #4*

Motion Made By Senator *Trenbeath* Seconded By Senator *Nelson*

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator *Nelson*

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

REPORT OF STANDING COMMITTEE (410)
March 3, 2005 3:46 p.m.

Module No: SR-39-4115
Carrier: Nelson
Insert LC: 58259.0101 Title: .0200

REPORT OF STANDING COMMITTEE

HB 1286: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1286 was placed on the Sixth order on the calendar.

Page 3, line 9, replace "fifteen cents per impression" with "one dollar for every four impressions or fraction thereof"

Renumber accordingly.

2005 HOUSE JUDICIARY

CONFERENCE COMMITTEE

HB 1286

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1286/A

House Judiciary Committee

XX Conference Committee

Hearing Date 3/23/05

Tape Number

Side A

Side B

Meter #

Committee Clerk Signature

Minutes: Rep. Boehning present.

Chair Boehning: Called the meeting to order. Seeing no quorum present, the conference committee will be rescheduled. Meeting adjourned.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1286

House Judiciary Committee

☒ Conference Committee

Hearing Date 3/28/05

Tape Number

1

Side A

xx

Side B

Meter #

0-22.2

Committee Clerk Signature

Dawn Plonose

Minutes: 6 members present.

Representative Boehning: Called meeting to order. Roll was taken. I guess we have one thing to hammer out on here, and that's the dollar amount of 15 cents to a \$1.00 being charged for copies. What is the Senate's reasoning for going to the \$1 for the first 4 copies.

Sen. Trenbeath: I just took a couple of minutes to review the testimony on that, and keep in mind that in our committee of 6, there are two of us that are associated with local government, myself with city government and Sen. Triplett with respect to county government. I think each of us had the same concern with the requests that we get; with the number of copies requested and the fact that in rural area I'm in, I don't have the wherewithal, to have somebody just dedicated to making copies. So I have to pull someone off the job somewhere to first search for the copies or documents, and then make the copies. So we felt that 15 cents wasn't enough. I think the Association of Counties was also in favor of looking at that closely. I know that Wade Williams of the Association of Counties presented the proposed amendment, and he thought to be fair it

should equate with what the Secretary of State charges, and that's under 54.09-04, which says that the Secretary of State, unless otherwise provided by law, shall charge and collect the following fees, for a copy of any law, resolution, record, or other document or paper on file in the Secretary of State's office, \$1 for every 4 pages or fraction thereof. That's where the language came from. I guess we thought that was, more closely came to covering the costs, especially in the smaller, rural areas.

Representative Boehning: I talked to the Secretary of State and he had showed me, that in his law, in his statute. I think one of the reasons it was brought to our attention, the Attorney General is getting a lot of questions on, because one has 15 cents, somebody had 10 cents, somebody had 25 cents. We're looking for something uniform, and I don't know if this is going to help us with the uniformity or not, we're going to have probably twice as many calls, asking why are we being charged a \$1.00 for a copy and then 25 cents after that.

Sen. Nelson: No, it's a \$1 for 4 copies.

Representative Boehning: \$1 for 4 copies and 25 cents for each copy after.

Sen. Nelson: So, it's a quarter a page.

Sen. Trenbeath: No, it's not that, it's 25 cents for each 4 copies of fraction thereof. So if you had 5 copies, it would be \$2.00. Four copies would be a \$1.00.

Representative Boehning: I guess when I read it...

Sen. Nelson: The same language is in two other GVA bills, too, that you're going to be getting, because we moved this language from the Secretary of State into the other two GVA bills.

Representative Onstad: You mentioned the research and taking time and so on, there is a second part on page 3 where it talks about so much to be allocated for doing some of this research.

Sen. Trenbeath: Yes, I did misspeak in that regard, you're right, there is a separate charge available for actually searching the record out.

Representative Onstad: If it's taking any time at all...

Representative Boehning: After the first hour, they can charge up to \$25 per hour, stated on pg. 3, line 18 and 19.

Sen. Trenbeath: Excluding the first hour.

Representative Boehning: If we're going to have five copies going to cost \$2.00, I think that's getting a little bit expensive. You can go to the local library or local print shop and get something for a dime. I checked around here in Bismarck...

But you're doing the work, and nobody else has to find anything.

Representative Boehning: I guess the way I look at it, is governments should be there to do the research for us, and we should have information then, and they're just asking for a copy, I think that's...

Sen. Trenbeath: But government is there and those records are maintained for the benefit of the population of the community, not for any particular person. If you want to access them, then you should pay the additional charge that would cover the cost of actually finding copies. You can access them also without getting copies.

Representative Boehning: And then it says, if you're on-line in the courthouse someplace that has the ability to do it, you can do the research online, and it's still going to cost you a \$1 for that first copy, even when you're doing your own research. I don't think that's quite...

Sen. Trenbeath: Let me ask you this, and maybe we can get some input from Mr. Williams, if we were to do something that said, \$1 for the first 4 pages or any portion thereof, and 25 cents for every additional page or portion thereof. Then we've got the \$2 charge for the 5 page document being \$1.25.

Representative Boehning: Personally, I think it's going to be shell shock when somebody goes in to ask for a copy and they're going to say that it's going to cost you a \$1 for the first 4 copies and 25 cents after that. I think that's getting to be a little bit high end.

Sen. Syverson: The initial copies and the first hour, let's just say for example, someone comes in and wants 3 or 4 copies of a document and the employee has to take time away from the task that they're presenting accomplishing, go do the research, find the documents, bring them out and copy them and then go back, refile them and get back to work, and pick up where they were in the task that they were working on. We have created a bit of an interruption in the continuity of that person's work. I don't think when job descriptions were initially written for most of our public employees, that they included research and copying documents. This would only be a way of providing a small charge to compensate that office for the interruption and the detraction from the job description that individual has. It most assuredly does not fully compensate the office for that disruption. The other thing is that when this goes in, it will and should be comparable to the other offices, and other bills that we've addressed, that Sen. Nelson addressed, and there should be some continuity throughout the system in that respect. For that

reason, I think is one of the reasons why two committees on the north side of the hall, have agreed on the wording that you see in front of you and felt that they were comfortable with it, and I would reemphasize that it was two different committees that settled on this language for probably five different offices. So we would most assuredly like to see that continuity prevail.

Representative Boehning: Do you know what the bills are offhand.

Sen. Nelson: They are both in GVA.

Representative Onstad: To initially, and I can understand initially making those copies, what if they're in-depth pages, say 25 pages, and I'm not sure if you very seldom deal with those kinds of numbers or not, you know, I understand the time it takes, the man just walking in, you've got the take the time to go and find it, got to dig in the files. I can understand that, but when it gets to additional copies, you've already found those 15 pages, and you've got to run those through that copier, you're basically saying 25 cents a copy, maybe it's that initial dollar and then 15 cents after that.

Sen. Nelson: I think you're missing two other words there, it says the public entity may charge up to \$1.00 for every four impressions. They could charge 10 cents, a nickel. They're saying you can't go over that, but they are saying that you can charge up to that amount. I would think that in most counties, that if they have clerical help, they might charge less, but if it's a one man operation, they might need to charge more because there's only one person doing it. I think those two words are extremely important in that law.

Representative Boehning: I guess on the "charge up to", they're probably all going to charge it.

Sen. Trenbeath: That sounds like local control to me.

Representative Boehning: Getting back to Sen. Syverson's point, saying they'll look for the information, if I come and ask for information, and I find what I'm looking for, I can read it without any cost to me, but as soon as I want the copy, then they want to get reimbursed for their time finding it and charge for photocopies.

Sen. Trenbeath: That's why the "up to" language is there, because on the other end of the spectrum, what if the guy is bothering the county and in there constantly saying I want everything against this individual on this file, this individual on this file and anything in a case involving this individual. That's a lot of work and a lot of research and a lot of photocopies. That's the counter argument, it's the opposite end of the continuum, I understand; that's why the "up to" language is there. I mean a county or a city may well say, we've got somebody coming in to do five copies of the latest work orders that we did, sure charge us 10 cents a copy, whatever. But in instances where they want the annual salaries of police officers hired over the course of the last ten years, that's going to be different. They have the latitude to set those.

Sen. Syverson: Let's suppose that it is someone who is making a lot of copies, or who is going to make a lot of copies, they can come in and get the initial copies from the office they are seeking it from and then find a place where they can, maybe in their own office, run these copies off at a cheaper price. I don't think that our state or county, political subdivision offices, should be in the business of printing. We have commercial businesses that do that, or offices, for that reason, this would discourage someone from coming in and saying I want 50 copies of this page. I think that's a point there that should be considered as well.

Representative Boehning: Do we need to be charging \$1 for one page. I think that's quite expensive. I know the Secretary of State does it, I understand that there are a couple of other

bills out there that are doing it. I think they're trying to give us some continuity out there, but I think if we go with the higher end, I think we are going to have people complaining about it quite heavily. I don't think...I don't want to have to go to the courthouse and pay \$1 for a copy.

Sen. Trenbeath: If you're complaining about that as being onerous, then they need to go to the county commissioners, the city commission, the city council and express that; because maybe it is onerous under the situation you're speaking about. This would merely set a cap, whereas before you couldn't charge anything more than the actual costs, which is kind of floating out there. Then the Attorney General is getting comments all the time about how can you charge this, how can they charge that. Well, if he's able to say that they are able to charge that because the state set it, or the code says that they can charge up to so and so, and you're actually getting a deal. That gives a standard answer to a standard question. Whereas now you have to go through the process of proving what your costs are.

Representative Boehning: If we would leave it at that 15 cents, we wouldn't have any problems with that either.

Sen. Trenbeath: But you have public entities coming in and saying, that's not what our costs are. Our costs are higher than that.

Representative Boehning: I don't remember that being said during the testimony that I heard.

Representative Onstad: They did talk about an average, and that's what they felt the average was at, the 15 cents. So the average is in the middle, you've got prices below and above that. I think you had a good point "up to that" \$1 for the first four, if from that point on, we could settle on a lesser price for additional copies.

Representative Charging: I believe it is human nature that if it says up to a \$1, that it would automatically become the price.

Sen. Syverson: Unless, of course, as Sen. Trenbeath indicated, there is a significant resistance on the part of the public to the county commission or whomever is in charge of that particular office.

Representative Charging: I would say in most cases people who are in need of a simple service, such as this, for documents that are important, it's a lot of money to them.

Representative Boehning: I think the \$1 is too much to set. I think a per price per copy would be much easier for somebody to interpret; if it costs 25 cents or if it costs 20 cents a copy, at least they know how much it is going to be versus if you're going to go up to 3 copies, it's going to cost me a \$1, you think it shouldn't cost me a dollar, especially after we get 5, 6, 7, it could get expensive if somebody wants...

Sen. Syverson: I don't think the exchange is going anywhere that would...let me throw out some verbiage for consideration. The point would be that from 1-4 of the first impressions would cost \$1, and thereafter 15 cents per impression. That way we have accommodated to a certain extent the costs to that office of taking the person away from their job and I'd be interested in hearing from Sen. Trenbeath as to what a small office would think about that kind of wording. What you're trying to do, to a great extent also, is to discourage individuals from coming in and getting copies that are necessarily vital or critical to them, because it is so cheap that it's easier for that office to print the page out than it is to do on their printer at home, as you've indicated, if it's data they can find on the web. If you have it high enough for the first few copies, you're going to discourage that individual from stopping by the office and getting some

cheap copies. If the person needs more copies, then of course, we're looking at the value that the House is suggesting.

Sen. Nelson: The initial amendment didn't even come from our committee, the initial amendment came from the counties. The testimony in attached, that amendment was brought to us by the counties saying that different size offices require different prices and 15 cents may not be enough.

Representative Charging: Does anyone know what the library's charge.

Representative Boehning: I think a dime, and the print shops are like a dime, a nickel if you do it yourself. Another question I've got is, Sen. Trenbeath, when we're looking for public records, if it's on two different subjects, say I come in and am looking for two different things, when we're looking at this, if I want copies for both different topics, would that go \$1 for the first four each, or would it be 15 cents after that.

Sen. Trenbeath: Keep in mind that I haven't signed on to Sen. Syverson's motion. So far we're negotiating amongst ourselves. I did not have it in my mind that a person who was coming in with several things he wanted copied, that were unrelated to each other, that there would be an initial charge for each, no.

Representative Boehning: It would be just for the amount of copies. Was that a motion.

Sen. Syverson: I make that motion.

Sen. Trenbeath: Seconded. So the motion actually would be the House accedes to the Senate amendments and further amends, or Senate recedes from Senate amendments and further amends.

Representative Boehning: It would be to accede to your amendments and further amend.

Representative Onstad: Senate has to recede and further amend. The amendment is...

Sen. Syverson: It would be \$1 for up to the first four impressions inclusive, and thereafter 15 cents per impression. So it doesn't come out to be, understood that it's a dollar per impression, it's a dollar for the first four inclusive, and then 15 cents thereafter.

Discussion between seated audience and members.

Sen. Trenbeath: It says \$1 for every four impressions or fraction thereof, so if we adopted this amendment, it would be a \$1 for up to the first four and 15 cents thereafter. Actually what you're really changing is whether that fifth copy costs you another \$1 or 15 cents.

Sen. Syverson: It may not change the first part, but the additional copies, because it would be \$2 for 5 copies under the way it was written, it went over.

Representative Boehning: I think the 5th copy at the Secretary of State's office is 25 cents?

Sen. Trenbeath: \$1 for every four pages or fraction thereof. So the fifth page would cost you a \$1.

Representative Boehning: I like this one better.

Sen. Trenbeath: I'm not so sure I do anymore.

Representative Boehning: We'll take a roll call vote on that.

Sen. Nelson: This now screws up all the other bills too, our whole idea was to get consistency among the agencies, and here we are messing it up again, so I plan to vote no.

Representative Boehning: Motion fails.

Representative Onstad: You referenced that it is on several other bills, that it's \$1.

Sen. Nelson: With the 'up to' in there.

Representative Onstad: 25 cents but if you take your interpretation, is it same in those bills, that 5 copies will cost you \$2.

Sen. Trenbeath: Let me make a suggestion, why don't we take the time to reschedule this thing for another session and we'll get those other two bills and look at them.

Representative Boehning: We will adjourn and reschedule again.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1286/C

House Judiciary Committee

☒ Conference Committee

Hearing Date 3/30/05

Tape Number

1

Side A

xx

Side B

Meter #

23.9-27.2

Committee Clerk Signature

Dawn Penrose

Minutes: 6 members present.

Representative Boehning: Attendance was taken. Called the meeting to order. I guess we didn't resolve our issues the last time, I did some checking on it, most counties that I checked with, are all around that 25 cent range. Are there any motions on the floor that we could accept. I know Sen. Nelson was looking for some other...

Sen. Nelson: We came to the conclusion, that it was the Secretary of State's bill, and he can keep his consistent as he wants. So that would solve the problem.

Representative Boehning: Okay, I looked at that, and I told him that we did some research and ...

Representative Onstad: I move that the Senate recede from its amendments and we adopt "up to" and delete 15 cents and make it "25 cents per impression" of a paper copy.

Sen. Trenbeath: Seconded.

Sen. Syverson: Just for my own edification, would the proper form of the motion would have been for the Senate to recede from their amendments, and to further amend by beginning on page 3, line 9, that it would be "up to 25 cents per copy".

Sen. Trenbeath: To delete the word 15 and adding the word 25.

Representative Boehning: In looking at version .0100, pg. 3, line 9, basically changing 15 cents to 25 cents. Roll call vote taken.

6 YES 0 NO 0 ABSENT

SENATE RECEDE FROM THEIR AMENDMENTS AND FURTHER AMEND

CARRIER: Rep. Boehning and Sen. Syverson

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

Bill Number HB 1286 (, as (re)engrossed):

Date: March 28, 2005

Your Conference Committee HOUSE JUDICIARY - MOTION FAILED

For the Senate:

For the House:

	YES / NO		YES / NO
Sen. Trenbeath	x	Rep. Boehning	x
Sen. Syverson	x	Rep. Charging	x
Sen. Nelson	x	Rep. Onstad	x

recommends that the (SENATE) (RECEDE from their amendments)

the (Senate/House) amendments on (SJ/HJ) pages HJ

____, and place _____ on the Seventh order.

____, adopt (further) amendments as follows, and place HB 1286 on the
Seventh order:

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

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

DATE:

CARRIER:

LC NO. _____ of amendment

LC NO. _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment _____
=====

MOTION MADE BY: Sen. Syverson

SECONDED BY: Sen. Trenbeath

3 YES 3 NO 0 ABSENT

MOTION FAILED

58259.0102
Title.0300

Adopted by the Conference Committee
March 30, 2005

Conference Committee Amendments to HB 1286 (58259.0102) - 03/30/2005

That the Senate recede from its amendments as printed on pages 940 and 941 of the House Journal and page 702 of the Senate Journal and that House Bill No. 1286 be amended as follows:

Page 3, line 9, replace "fifteen" with "twenty-five"

Renumber accordingly

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

Bill Number HB 1286 (, as (re)engrossed):

Date: March 30, 2005

Your Conference Committee HOUSE JUDICIARY

For the Senate:

YES / NO

Sen. Trenbeath
Sen. Syverson
Sen. Nelson

x
x
x

For the House:

YES / NO

Rep. Boehning
Rep. Charging
Rep. Onstad

x
x
x

recommends that the (SENATE) (RECEDE from their amendments)

the Senate (Senate/House) amendments on (SJ/HJ) pages HJ 940-941

____, and place _____ on the Seventh order.

XXX, adopt amendments as follows, and place HB 1286 on the
Seventh order:

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

((Re)Engrossed) HB 1286 was placed on the Seventh order of business on the calendar.

DATE: 4/6/05

CARRIER: Rep. Boehning

LC NO. 58259.0102 of amendment

LC NO. _____ of engrossment

Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: Rep. Onstad
SECONDED BY: Sen. Trenbeath

6 YES 0 NO 0 ABSENT SENATE RECEDE AND ~~AMEND~~ AMEND
MOTION PASSED

REPORT OF CONFERENCE COMMITTEE

HB 1286: Your conference committee (Sens. Trenbeath, Syverson, Nelson and Reps. Boehning, Charging, Onstad) recommends that the **SENATE RECEDE** from the Senate amendments on HJ pages 940-941, adopt amendments as follows, and place HB 1286 on the Seventh order:

That the Senate recede from its amendments as printed on pages 940 and 941 of the House Journal and page 702 of the Senate Journal and that House Bill No. 1286 be amended as follows:

Page 3, line 9, replace "fifteen" with "twenty-five"

Renumber accordingly

HB 1286 was placed on the Seventh order of business on the calendar.

2005 TESTIMONY

HB 1286

Office of the Attorney General

Testimony on H.B. 1286
Before the House Judiciary Committee
January 24, 2005

Prepared by: Mary Kae Kelsch
Assistant Attorney General

SECTION ONE

This amendment addresses a conflict between two existing statutes. Section 44-04-18(5) provides that when a public entity is a party to an adversarial proceeding, the opposing party must comply with the applicable discovery rules when seeking documents. This requirement prevents parties in litigation with public entities from circumventing the rules of discovery by making open records request to public entities. Section 28-32-33 is inconsistent, and the amendment removes the language requiring the opposing party to use the open records process prior to using the discovery process.

SECTION TWO

By law, the Department of Transportation provides accident reports to any person for a fee of two dollars. In reality, people go to the local police department to get the same document. By adding the proposed language, the law enforcement agency will also be able to charge the two dollar fee.

SECTION THREE

This section amends the definition of "meeting" and is necessary because of the ever-changing demands of technology. Meetings may be held over an interactive video system, a phone system, or webcams. The taskforce did not

want the language in the open meetings law to lag behind emerging technology. The word "electronic" was inserted into the definition to clarify for public entities that regardless of how they are conducting their meeting, they will be subject to the open meetings law.

SECTION FOUR

It probably comes as no surprise that whether an entity is charging the correct amount for copies of public records is one of the most frequently asked questions by citizens. It is also not unusual for a public entity to request assistance to determine what it should be charging per copy. On page 3, lines 9-22, you will find amendments to the section of law dealing with the allowable charges for public records. Under current law a public entity may charge the actual cost of making the copy including labor, materials, postage and equipment. This results in charges ranging from 5 cents to 5 dollars a page. In order to eliminate any ambiguity about what a reasonable fee for a standard size copy is, the amended language clarifies that a public entity may charge up to 15 cents per impression of a copy. This will apply to paper of the two standard sizes 8X11 and 8X14. For copies that cannot be made on those standard sizes, such as a large map or color photos, the bill provides that the public entity may charge its actual cost of making the copy.

Another frequently asked question is "Can I charge for locating records and for excising confidential information?" Current law allows an entity to impose a fee not exceeding \$25 per hour, excluding the initial hour, to locate records. In the

drafting of the bill we moved this existing language and it can now be found on lines 19-20 on page 3. Immediately following that language, we address the question of charging for time needed to excise confidential information from records. Currently a public entity may not charge for the time it takes to excise confidential information from a public record. For some public entities, excising confidential information is extremely time-consuming. For example, many law enforcement records contain social security numbers. Prior to release as an open record, every social security number must be crossed out before the record may be released. On lines 20 – 22, new language will allow public entities to charge up to \$25 an hour, after the first hour, for excising confidential information.

Earlier I mentioned a change to recognize the importance of technology in our sunshine laws. On page 4 you will find another example of the changing times. We are inserting a new subsection 3 to address electronically stored records. Many records are no longer kept in file cabinets or banker's boxes. Instead, they are kept on hard drives, back up drives, and servers. A member of the public may want to see a record that is only kept on a computer. Under current law, the public entity does not have to provide access to a computer terminal for the purpose of allowing the public to look through electronically stored records. However, access – just looking at a public record- is still free. The fact that a record is located on a computer does not mean it is inaccessible to the public. A member of the public may only want to look at a record located on a

computer. Practically, printing out the record may be the only way it can be reviewed. An entity cannot charge for printing the record if the purpose of printing is to allow a member of the public to see the record. However, if the person decides to take the copy with them, the entity may charge the per copy cost.

Technology has also raised the question of "when is a record gone?" As you may know, deleting a record from a computer doesn't always mean the record is gone. Deleting an email, for example, may delete it from your hard drive, but in most cases, it is transferred to a computer back up system. Records on a back up system exist, but are typically not as accessible as the records kept on the computer. Retrieving a record from a back up system may be possible, but can be extremely time consuming and costly. Many public entities can not afford to provide free access to records existing only on back up systems.

This section addresses the costs associated with retrieving electronic records by allowing a public entity to charge a reasonable fee for providing records off of a back up system.

On page 5, lines 20 – 25 new language was inserted to clarify that a public entity headed by a single individual is not required to release a draft report.

This language is consistent with existing law allowing a governing body to withhold a draft document until a final draft is provided to the governing body.

SECTION FIVE

Section 5 replaces language in subsection 2 of 44-04-18.1 that was inadvertently removed during the last session.

SECTION SIX

On page 7, a new subsection to 44-04-18.4 regarding bids has been included. Bids received by a public entity are open records. Not surprisingly, the people most interested in the bids are other bidders. There is often considerable time between when the bids are opened and when the contract is awarded. There is nothing that prevents a competitor from requesting a copy of the bid during that time. The proposed language would allow a public entity to withhold the bid until the public entity has received all the information and heard any oral testimony thereby preventing one competitor from gaining an unfair advantage over the other.

SECTION SEVEN

Section 7, on page 8, creates a new section to 44-04-18 that addresses secondary disclosure. Some statutes make records confidential and allow limited release to certain entities. However, there is no restriction that the receiving entity maintains the confidentiality. This language clarifies that when such a document is given to another entity, it still remains confidential.

SECTION EIGHT

Section 8 amends § 44-04-18.12 to make the open records exception for cooperative investigation and litigation records a little broader. This statute is used mainly by our Consumer Protection group in their multi-state consumer fraud litigation cases. In those cases, each state shares detailed case

information, but only if certain restrictions regarding access and confidentiality are maintained. We have discovered the present exception is too narrow for a number of reasons.

First, the current language only applies to "confidential," not privileged, records. Other governmental agencies will not share "privileged" records with the State if the records are subject to North Dakota's open records law. The amendments expand the exemption to include "privileged" documents.

Second, the current language only applies if an agreement is in place. Many documents are shared in an informal manner, especially when the State is working on multi-state actions. It would be an undue burden to obtain agreements from every state every time sharing of documents may occur. Privileged information is often shared by states (by fax or e-mail) to all states participating in a multi-state working group. States are starting to refuse to share this information because of concerns other states may not protect it. Other states should not lose their privilege because they assist North Dakota in legal actions. And North Dakota should not be denied the benefit of the experience and expertise of those states because North Dakota will not honor the other state's law regarding confidentiality or privilege.

Current law states that a record acquired by the Attorney General is exempt if the AG determines the record is 1) necessary to further a civil investigation, 2) can only be obtained by agreeing to keep the record confidential, and 3) is treated as confidential by the provider of the record. In order to address the concerns just discussed, the changes in section 8 add protection for

"privileged" records; allows protection for records received to monitor or enforce compliance with a law or order; and protect the records received from a provider who has not waived the privilege or confidentiality of the record.

Finally, the current exception is too narrow because it only applies to governmental agencies. This Office receives substantial information from the National Association of Attorneys General. That information should be protected. On occasion the Office also works with private firms or other non-governmental legal entities. Their privilege of work product or the confidentiality of their records should not be lost because they assist the State. Accordingly, the proposed amendment broadens the section to include non-governmental entities.

SECTION NINE

Section 9 deals with the attorney-work product exception found in N.D.C.C. § 44-04-19.1. The current exception is too narrow because it only applies if there is actual litigation or reasonably predictable litigation. Thus, both prior to and after litigation attorney-work product may not be protected. The proposed amendments address this in two ways.

First, the proposed amendments protect investigatory work. Often work is done that may lead to litigation, but cannot initial be labeled "reasonably predictable litigation". The likelihood of litigation is unknown until the monitoring or investigation is substantially complete. Similar to a criminal

investigation, see N.D.C.C. § 44-04-18.7, civil investigations should not be open to the public.

The second aspect of Section 9, found on page 10, concerns litigation files after they are closed. Currently, as a general rule, a closed litigation file is open to the public. The proposed amendment exempts from open records any attorney work product that reflects opinions regarding potential liability of a public entity. This exception is very narrow. It only applies to attorney work product, and only attorney work product that reflects opinions regarding potential liability of a public entity.

SECTION TEN

When a governing body conducts interviews in order to hire an employee, it is an open meeting. An awkward consequence of this law is that a governing body can not prevent other applicants from being present during the interviews because it is an open meeting. The last person interviewed has the advantage of hearing not only the questions, but the answers. This section proposes language that will allow a governing body to sequester the other applicants.

SECTION ELEVEN

On page 10, lines 23 & 24 we have inserted language to clarify that a request to receive notice of meetings is effective for one year. The current law provides that a public entity must furnish notice of a meeting to anyone who makes such a request. The law does not indicate how long a public entity has to continue sending the notice. This results in public entities sending notices to

people for years, even though they stopped attending meetings after a particular issue was settled.

On page 10, lines 30 & 31, language is inserted to clarify that if the public entity does not have an official newspaper, it must notify the official newspaper of the county where the entity's principal office or mailing address is located. Current law requires a public entity to notify its official newspaper of emergency or special meetings. When our office conducted research for an opinion regarding an alleged violation of this requirement, it was realized that state law does not require all public entities to have an official newspaper. This language is proposed to ensure that even if a public entity does not have an official newspaper, the media is notified of all special or emergency meetings.

SECTION 12

Currently, a member of the public must request an opinion alleging a violation of the open records and meetings law within 30 days of the violation. While this time limit works well for alleged open record violations, it does not work well for alleged violations of the open meetings law. Evidence of a secret meeting usually does not come to light within 30 days. Therefore, this bill proposes to extend the time to 90 days of the alleged violation.

Monday, January 24, 2005

HOUSE JUDICIARY COMMITTEE
HB 1286

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 support the bill and respectfully request that you give it a do pass.

We participated in the Attorney General's Task Force that drafted this bill. We believe it makes needed changes in the state's open meetings and open records laws.

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

Roger Johnson
Agriculture Commissioner
www.agdepartment.com



Phone (701) 328-2231
Toll Free (800) 242-7535
Fax (701) 328-4567

600 E Boulevard Ave., Dept. 602
Bismarck, ND 58505-0020

Testimony of Jeff Olson, Program Manager

House Bill ~~1227~~ 1286

January 21, 2005

9:30 a.m.

House ~~Transportation~~ ^{Judiciary} Committee
Felt Teller Room

Chairman DeKrey and members of the Judiciary Committee, my name is Jeff Olson. I am a Program Manager in the Department of Agriculture. I am here to testify in support of House Bill 1286.

The North Dakota Agriculture Commissioner is charged with enforcement in a number of statutes relating to food and human safety and safety to the environment. The enforcement activities could lead to administrative enforcement action against violators. Under the current law, information gathered during an administrative investigation is not considered confidential, except for confidential business information (sales records, financial records, etc.).

This past year, the Commissioner of Agriculture conducted a number of pesticide misuse investigations. Of these investigations, two cases were high profile cases that had caught the attention of the media. While trying to conduct these two investigations, we received requests for information that was vital to our case. In one case, the media was closely following a case while we were still determining what sort of violation may have occurred and attempting to identify who may

have committed a violation. In the second case, vital information was requested that made our investigation more complicated and required increased resources. Both cases received a lot of attention from the media.

The Commissioner is not opposed to providing information to the media. However, information critical to building a potential case during an investigation should be considered confidential until a final decision has been made regarding either administrative or civil action under state law. This ability would be available with the new language in NDCC 44-04-19.1, 3 and 6.

Thank you for your consideration of HB 1286.

Att #1

Good morning Chairman Traynor and members of the Senate Judiciary Committee. It is a pleasure to appear before this esteemed committee today.

For the record I am Rep. Bill Devlin, District 23 from Finley.

I am here today to introduce HB 1286 which provides some cleanup as well as some new language for our open meeting laws.

The changes in our open meeting law that appear in HB 1286 were written as part of the efforts of a year long task force heading by Attorney General Wayne Stenehjem. The task force contained officials from the League of Cities, Association of Counties and other public entities as well as the state newspaper association, North Dakota broadcasters and legislators.

Representatives of the those groups as well as people from the Attorney General's Office will be here today to walk you through the changes and answer any questions.

The open meeting laws in North Dakota are strongly supported by the citizens of our state as they have repeatedly demonstrated in statewide and local votes. From time to time we need to go in an update language in our laws and that is being done in this bill. However, nothing we do should ever threaten the rights of the people of our state to know what their elected officials and boards are doing on their behalf.

Chairman Traynor and members of the committee I thank you for the time you have allowed me this afternoon. I can certainly try to answer and questions you might have but the experts, including Attorney General Wayne Stenehjem, who will follow me will give you all the information you need to fully understand the changes proposed in this bill. I urge a do pass recommendation

Thank you.

Office of the Attorney General

Testimony on H.B. 1286
Before the Senate Judiciary Committee
March 2, 2005

Prepared by: Mary Kae Kelsch
Assistant Attorney General

SECTION ONE

This amendment addresses a conflict between two existing statutes. Section 44-04-18(5) provides that when a public entity is a party to an adversarial proceeding, the opposing party must comply with the applicable discovery rules when seeking documents. This requirement prevents parties in litigation with public entities from circumventing the rules of discovery by making open records request to public entities. Section 28-32-33 is inconsistent, and the amendment removes the language requiring the opposing party to use the open records process prior to using the discovery process.

SECTION TWO

By law, the Department of Transportation provides accident reports to any person for a fee of two dollars. In reality, people go to the local police department to get the same document. By adding the proposed language, the law enforcement agency will also be able to charge the two dollar fee.

SECTION THREE

This section amends the definition of "meeting" and is necessary because of the ever-changing demands of technology. Meetings may be held over an interactive video system, a phone system, or webcams. The taskforce did not

want the language in the open meetings law to lag behind emerging technology. The word "electronic" was inserted into the definition to clarify for public entities that regardless of how they are conducting their meeting, they will be subject to the open meetings law.

SECTION FOUR

It probably comes as no surprise that whether an entity is charging the correct amount for copies of public records is one of the most frequently asked questions by citizens. It is also not unusual for a public entity to request assistance to determine what it should be charging per copy. On page 3, lines 9-22, you will find amendments to the section of law dealing with the allowable charges for public records. Under current law a public entity may charge the actual cost of making the copy including labor, materials, postage and equipment. This results in charges ranging from 5 cents to 5 dollars a page. In order to eliminate any ambiguity about what a reasonable fee for a standard size copy is, the amended language clarifies that a public entity may charge up to 15 cents per impression of a copy. This will apply to paper of the two standard sizes 8X11 and 8X14. For copies that cannot be made on those standard sizes, such as a large map or color photos, the bill provides that the public entity may charge its actual cost of making the copy.

Another frequently asked question is "Can I charge for locating records and for excising confidential information?" Current law allows an entity to impose a fee not exceeding \$25 per hour, excluding the initial hour, to locate records. In the

drafting of the bill we moved this existing language and it can now be found on lines 19-20 on page 3. Immediately following that language, we address the question of charging for time needed to excise confidential information from records. Currently a public entity may not charge for the time it takes to excise confidential information from a public record. For some public entities, excising confidential information is extremely time-consuming. For example, many law enforcement records contain social security numbers. Prior to release as an open record, every social security number must be crossed out before the record may be released. On lines 20 – 22, new language will allow public entities to charge up to \$25 an hour, after the first hour, for excising confidential information.

Earlier I mentioned a change to recognize the importance of technology in our sunshine laws. On page 4 you will find another example of the changing times. We are inserting a new subsection 3 to address electronically stored records. Many records are no longer kept in file cabinets or banker's boxes. Instead, they are kept on hard drives, back up drives, and servers. A member of the public may want to see a record that is only kept on a computer. Under current law, the public entity does not have to provide access to a computer terminal for the purpose of allowing the public to look through electronically stored records. However, access – just looking at a public record- is still free. The fact that a record is located on a computer does not mean it is inaccessible to the public. A member of the public may only want to look at a record located on a

computer. Practically, printing out the record may be the only way it can be reviewed. An entity cannot charge for printing the record if the purpose of printing is to allow a member of the public to see the record. However, if the person decides to take the copy with them, the entity may charge the per copy cost.

Technology has also raised the question of "when is a record gone?" As you may know, deleting a record from a computer doesn't always mean the record is gone. Deleting an email, for example, may delete it from your hard drive, but in most cases, it is transferred to a computer back up system. Records on a back up system exist, but are typically not as accessible as the records kept on the computer. Retrieving a record from a back up system may be possible, but can be extremely time consuming and costly. Many public entities can not afford to provide free access to records existing only on back up systems. This section addresses the costs associated with retrieving electronic records by allowing a public entity to charge a reasonable fee for providing records off of a back up system.

On page 5, lines 20 – 25 new language was inserted to clarify that a public entity headed by a single individual is not required to release a draft report. This language is consistent with existing law allowing a governing body to withhold a draft document until a final draft is provided to the governing body.

SECTION FIVE

Section 5 replaces language in subsection 2 of 44-04-18.1 that was inadvertently removed during the last session.

SECTION SIX

On page 7, a new subsection to 44-04-18.4 regarding bids has been included. Bids received by a public entity are open records. Not surprisingly, the people most interested in the bids are other bidders. There is often considerable time between when the bids are opened and when the contract is awarded. There is nothing that prevents a competitor from requesting a copy of the bid during that time. The proposed language would allow a public entity to withhold the bid until the public entity has received all the information and heard any oral testimony thereby preventing one competitor from gaining an unfair advantage over the other.

SECTION SEVEN

Section 7, on page 8, creates a new section to 44-04-18 that addresses secondary disclosure. Some statutes make records confidential and allow limited release to certain entities. However, there is no restriction that the receiving entity maintains the confidentiality. This language clarifies that when such a document is given to another entity, it still remains confidential.

SECTION EIGHT

Section 8 amends § 44-04-18.12 to make the open records exception for cooperative investigation and litigation records a little broader. This statute is

used mainly by our Consumer Protection group in their multi-state consumer fraud litigation cases. In those cases, each state shares detailed case information, but only if certain restrictions regarding access and confidentiality are maintained. We have discovered the present exception is too narrow for a number of reasons.

First, the current language only applies to "confidential," not privileged, records. Other governmental agencies will not share "privileged" records with the State if the records are subject to North Dakota's open records law. The amendments expand the exemption to include "privileged" documents.

Second, the current language only applies if an agreement is in place. Many documents are shared in an informal manner, especially when the State is working on multi-state actions. It would be an undue burden to obtain agreements from every state every time sharing of documents may occur. Privileged information is often shared by states (by fax or e-mail) to all states participating in a multi-state working group. States are starting to refuse to share this information because of concerns other states may not protect it. Other states should not lose their privilege because they assist North Dakota in legal actions. And North Dakota should not be denied the benefit of the experience and expertise of those states because North Dakota will not honor the other state's law regarding confidentiality or privilege.

Current law states that a record acquired by the Attorney General is exempt if the AG determines the record is 1) necessary to further a civil investigation, 2) can only be obtained by agreeing to keep the record confidential, and 3) is

treated as confidential by the provider of the record. In order to address the concerns just discussed, the changes in section 8 add protection for "privileged" records; allows protection for records received to monitor or enforce compliance with a law or order; and protect the records received from a provider who has not waived the privilege or confidentiality of the record.

Finally, the current exception is too narrow because it only applies to governmental agencies. This Office receives substantial information from the National Association of Attorneys General. That information should be protected. On occasion the Office also works with private firms or other non-governmental legal entities. Their privilege of work product or the confidentiality of their records should not be lost because they assist the State. Accordingly, the proposed amendment broadens the section to include non-governmental entities.

SECTION NINE

Section 9 deals with the attorney-work product exception found in N.D.C.C. § 44-04-19.1. The current exception is too narrow because it only applies if there is actual litigation or reasonably predictable litigation. Thus, both prior to and after litigation attorney-work product may not be protected. The proposed amendments address this in two ways.

First, the proposed amendments protect investigatory work. Often work is done that may lead to litigation, but cannot initial be labeled "reasonably predictable litigation". The likelihood of litigation is unknown until the

monitoring or investigation is substantially complete. Similar to a criminal investigation, see N.D.C.C. § 44-04-18.7, civil investigations should not be open to the public.

The second aspect of Section 9, found on page 10, concerns litigation files after they are closed. Currently, as a general rule, a closed litigation file is open to the public. The proposed amendment exempts from open records any attorney work product that reflects opinions regarding potential liability of a public entity. This exception is very narrow. It only applies to attorney work product, and only attorney work product that reflects opinions regarding potential liability of a public entity.

SECTION TEN

When a governing body conducts interviews in order to hire an employee, it is an open meeting. An awkward consequence of this law is that a governing body can not prevent other applicants from being present during the interviews because it is an open meeting. The last person interviewed has the advantage of hearing not only the questions, but the answers. This section proposes language that will allow a governing body to sequester the other applicants.

SECTION ELEVEN

On page 10, lines 23 & 24 we have inserted language to clarify that a request to receive notice of meetings is effective for one year. The current law provides that a public entity must furnish notice of a meeting to anyone who makes such a request. The law does not indicate how long a public entity has to continue sending the notice. This results in public entities sending notices to

people for years, even though they stopped attending meetings after a particular issue was settled.

On page 10, lines 30 & 31, language is inserted to clarify that if the public entity does not have an official newspaper, it must notify the official newspaper of the county where the entity's principal office or mailing address is located. Current law requires a public entity to notify its official newspaper of emergency or special meetings. When our office conducted research for an opinion regarding an alleged violation of this requirement, it was realized that state law does not require all public entities to have an official newspaper. This language is proposed to ensure that even if a public entity does not have an official newspaper, the media is notified of all special or emergency meetings.

SECTION 12

Currently, a member of the public must request an opinion alleging a violation of the open records and meetings law within 30 days of the violation. While this time limit works well for alleged open record violations, it does not work well for alleged violations of the open meetings law. Evidence of a secret meeting usually does not come to light within 30 days. Therefore, this bill proposes to extend the time to 90 days of the alleged violation.



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Testimony of Jeff Olson, Program Manager
House Bill 1286
March 2, 2005
Senate Judicial Committee
Fort Lincoln Room

Chairman Traynor and members of the Judiciary Committee, my name is Jeff Olson. I am a Program Manager in the Department of Agriculture. I am here to testify in support of House Bill 1286.

The North Dakota Agriculture Commissioner is charged with enforcement of a number of statutes relating to food and human safety and safety to the environment. The enforcement activities could lead to administrative enforcement action against violators. Under the current law, information gathered during an administrative investigation is not considered confidential, except for confidential business information (sales records, financial records, etc.).

This past year, the Commissioner of Agriculture conducted a number of pesticide misuse investigations. Of these investigations, two cases were high profile cases that had caught the attention of the media. While trying to conduct these two investigations, we received requests for information that was vital to our case. In one case, the media was closely following a case while we were still determining what sort of violations may have occurred and attempting to identify who

may have committed a violation. In the second case, vital information was requested that made our investigation more complicated and required increased resources. Both cases received a lot of attention from the media.

The Commissioner is not opposed to providing information to the media. However, information critical to building a potential case during an investigation should be considered confidential until a final decision has been made regarding either administrative or civil action under state law. This ability would be available with the new language in NDCC 44-04-19.1, 3 and 6.

Thank you for your consideration of HB 1286.

Att #4

Testimony To The
SENATE JUDICIARY COMMITTEE
Prepared March 2, 2005 by the
North Dakota Association of Counties

Wade Williams

CONCERNING HOUSE BILL 1286

Chairman Traynor and members of the Senate Judiciary Committee, counties generally support the common-sense changes to the open-records, open-meetings laws proposed in HB1286. We were very appreciative of the process used – involving all parties with ample opportunity to discuss and debate each point.

One element of the bill however did not find universal support among the counties. While generally county officials agree with establishing a standard maximum “copy fee” to avoid disagreement, the fee included in the bill is believed by many counties to be too low.

A 15-cent per page fee, may be very appropriate for larger local governments with higher volumes and (more importantly) easy access to equipment maintenance and repair staff. Those smaller counties that are further from these services (and therefore pay a higher cost for them) felt that a slightly higher copy fee would be justified.

We looked around and found NDCC 54-09-04, which states: “1. For a copy of any law, resolution, record, or other document or paper on file in the secretary of state’s office, one dollar for every four pages or fraction thereof.” This language seems to establish a more appropriate maximum cost.

Attached are amendments that would incorporate this language into HB1286, but retain the words “up-to” making it clear that a lower fee can be charged. Thank you for your consideration of this amendment and our support of the bill.

Proposed Amendments to House Bill No. 1286

Page 3, line 9, replace “fifteen cents per impression” with “one dollar for every four impressions or fraction thereof”

Renumber accordingly

Att 5

March 2, 2005

SENATE JUDICIARY COMMITTEE
HB 1286

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 support the bill and respectfully request that you give it a do pass.

We participated in the Attorney General's Task Force that drafted this bill. We believe it makes needed changes in the state's open meetings and open records laws.

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