

2009 HOUSE FINANCE AND TAXATION

HB 1088

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1088

House Finance and Taxation Committee

☐ Check here for Conference Committee

Hearing Date: January 13, 2009

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Committee Clerk Signature

Minutes:

Chairman Belter: I will open the hearing on HB 1088. Tax Department.

Donnita Wald, General Counsel for the State Tax Department: (See Testimony #1). This

bill was introduced by us using some laws from Wisconsin to address an incident which

happened last year. Apparently it caused some concern to the law enforcement community

so what we have done is propose an amendment that we hope will alleviate those concerns

and, at the same time, balance our interests. It is just a matter of competing interests. The

reason for the amendments on page 3, line 22 is that currently the law says we can't even tell

you if a return has been filed or not. What we have been doing in the past, we don't know.

When we receive these subpoenas, Dan and I file a motion to quash; we protect the

confidentiality of anything that has been filed. What we would like to do is have an opportunity

to get in front of the judge and tell him whether or not there is return information there and help

the judge decide what tax information is on that return. At the bottom of the amendment page,

if the tax commission is conducting an investigation of their own, whether civil or criminal, that

we maybe get an opportunity to tell the judge that. If the judge determines that the disclosure

to the law enforcement officer would seriously impair our investigation or our enforcement of

the tax law, the judge could deny that the information be disclosed. That is what we are

offering and we hope that this meets with your approval. If you have any questions, I would be happy to answer them.

Representative Froelich: How often does this come up in a year or a biennium?

Donnita Wald: Quarterly. As a matter of fact, I got one yesterday.

Representative Froseth: What are some of the circumstances that would require the records to be subpoenaed?

Donnita Wald: The request received yesterday was an outstanding arrest warrant for an individual. We have been involved in a state racketeering crime, we've been subpoenaed in a lawsuit that occurred between the City of Bismarck and Bismarck Airport Authority, Executive Air—all kinds of things. We've been involved in divorces, we've been involved in child support, but that is a specific exception. The legislature has determined for child support determination, we can disclose information because the legislature has determined that that is a cause important enough to open up those returns. One time in my ten years here, the issue was punitive damages and they wanted to find out how much would be punitive to this particular litigant. It has been a number of different things; we have some good information up there.

Representative Pinkerton: On the amendments on a, b, and d, you state when you have reasonable cause. Would you have a problem if you struck "reasonable" and just put "there is cause to believe"?

Donnita Wald: I guess I can't answer that unless I know whether you think that is more restrictive or less restrictive? What do you think "reasonable" is doing to that particular phrase? It is a common phrase.

Representative Pinkerton: I guess, in my feelings anyway, we want to make this information as available as possible to law enforcement. If there is cause, it certainly needs to be available. I think when it is "reasonable", it gets into judiciary discretion.

Donnita Wald: I don't do any criminal work; but in law school, I was taught to believe that if a reasonably prudent person looked at that and could say that would be needed. I think I am probably more comfortable with a judge determining that. The other thing too is while I want to cooperate with law enforcement, we also have to make sure that people keep filing returns with us. My concern is that I know of two people who won't be. I thought this was a good balance; but if you want to take that out, I would leave it up to the committee to decide.

Representative Kelsh: What is the difference between reasonable and probable? Is one more restrictive than the other? Are they both defined terms in the Century Code?

Donnita Wald: I will let the law enforcement people talk about reasonable and probable and what that means to them.

Representative Froseth: When they subpoena a record, it is just a specific record. It's not open for a period of time. Is it just one record?

Donnita Wald: It depends on the order. It depends on the number of years involved, the investigation. It can depend on a number of things. Once it is given to law enforcement, if it is used in proceedings, sometimes it can be given protection by having the report sealed or it can be introduced as evidence in that court proceeding. Again how that information would be used once you give it away is something that you could ask other people in the room today.

Representative Grande: I just wanted to make sure I am understanding the amendment usage. You have a strike on page 2, lines 3 through 25. Do you want us to take out national security?

Donnita Wald: Yes, national security.

Representative Grande: When we remove national security, are you addressing that somehow in these amendments?

Donnita Wald: I am, not in these amendments because I think these amendments are much broader. This bill, as introduced, was very limited. We can disclose to them in the situations on lines 13 through 25 and those we needed an order from the court or a subpoena. The second thing that we are proposing not getting rid of is if there is an imminent threat of injury to people, person's property, child kidnapping, infrastructure, bridges, water, dams, and those types of things—if law enforcement provides information that there is imminent danger to those items, the Tax Commissioner can disclose automatically without a court order so we are leaving that in. We are not taking on page 2 lines 26 to 31 and the top of page 3 out.

Representative Grande: Why national security? (Inaudible.)

Donnita Wald: We worked with Bob Bennett to draft these amendments so that they would contain items of the utmost importance to our civilized society and the safety of our people.

These confidentiality laws have been in place since 1923. In my 20 some years in the department, we have not had this situation arise. We were advised by the Attorney General to get the law changed so that is why we are here.

Chairman Belter: Further testimony in support of 1088? Any testimony in opposition to 1088?

Aaron Birst, Legal Counsel to North Dakota Association of Counties: (See Testimony #2.) I prepared my remarks prior to the amendment coming through and I haven't had time to get back to all of our people. In the room are Birch Burdick from the Cass County States Attorney's Office, Richard Riha from the States Attorney's Office in Burleigh County; we have the Cass County Sheriff Paul Laney and other representatives of law enforcement. They can handle the specifics of this case. However, what I wanted to testify about today is the underlying bill. I think the amendment is workable and there is a way we can come to a reasonable agreement with this; but the underlying bill was absolutely devastating for law

enforcement. Quite frankly, I believe there were some constitutional issues there too because you would be investing in a state agency particular authority which would overrule a judge's authority. I point that out in my testimony. Basically, if there was a court order, the Tax Department would not have to release the information; it was still discretionary. That is a significant concern not only for prosecutors and law enforcement, but also for lawyers in general. I believe again that we can meet in the middle somewhere on this. Because I don't know what the committee's actions are going to be on the amendment, I will testify that way. Just to answer a few questions, Representative Kelsh asked the question about reasonableness versus probable cause. Just to give the committee a little background, in any type of judicial order, the court would first have to find probable cause. You can't put a percentage on that, but basically there is a 50-51% likelihood that if there is information that could be helpful to the criminal case, under the current bill, as you saw, that would not be allowed. That is significantly a problem to law enforcement. The amendments, I believe, come out of what the federal rules are on the disclosure of federal returns. That is why I think we can kind of work with it, but I would be more than happy to answer any questions the committee may have. I would like to turn this over to the individuals particularly involved in this case.

Chairman Belter: I have been sitting on this committee since 1987 and we have had various bills dealing with the confidentiality, but this is the first time where we have seen it as a problem. Most of the bills have been to insure confidentiality because of the situations that happen (inaudible). It has been the history of this committee to be a guardian of confidentiality.

Aaron Birst: Absolutely, Mr. Chairman, and I don't want to give the wrong impression here. Confidentiality of tax returns is absolutely paramount. I am aware that there are elections that

have been affected because of the leaks of tax information. However, this is different. This isn't asking for prosecutors and law enforcement to be able to rummage through tax returns on their own. This is actually following the law, which is setting out that if there is a question, you go to a judge, the judge gives the order. There is a judicial procedure involved. We talked about subpoenaing records versus search warrants and there is a significant difference. That is why under current law, as is, it says judicial order. That is because if you have a subpoena, you can only issue a subpoena if there is a criminal case going on, meaning that you charge the person, you have a hearing, you subpoena people to the hearing. If there is no criminal case charged out, you can't use the subpoena other than maybe for a grand jury, which we hardly do in North Dakota. In those particular cases, when you are investigating something pre-charge, you have to use a search warrant. Then again that is using a judicial procedure to get that information to build the case. That is why it is vague and that's why it is called a judicial order instead of a subpoena. There is a significant distinction in that. Again, I totally agree that these need to be closely guarded, but you can't cut out the judicial process. Under the current law under this bill, as it comes in, you could have an Enron situation in North Dakota where millions of people are bilked out of their money and law enforcement would not be able to those tax returns because of the current bill. However, under current ND law, the child support enforcement can get the tax return. Here you have an awkward situation where you have potentially a million dollar fraud and not be able to get tax return information to build a criminal case. Yet you could go ahead and get someone who is \$1-2,000 delinquent on their child support. I am not saying that is bad, but I am saying you just cannot cut out the judicial part of being able to get these pieces of evidence.

Representative Winrich: I am not sure I understand your comments about reasonable and probable cause. Is there a distinction in which one is a stronger requirement?

Aaron Birst: The feds typically use that reasonable cause language. On most cases, including, I believe in ND Supreme Court, they interpret that to mean the equivalent of probable cause, which is basically the equivalent of probable cause, which again is the 50% standard.

Representative Winrich: So basically they are the same? Thank you.

Aaron Birst: Yes.

Chairman Belter: Any other questions? Any other opposition to 1088?

Paul Laney, Sheriff, Cass County: (Testimony #3) I am here in opposition to this bill.

Representative Kelsh: Have you given any consideration to the amendments and would that make the bill more palatable to you?

Aaron Birst: I like the direction we are going. Please keep in mind that this is not something personal between us and the Tax Commissioner's Office, our goal is to bring people who defy ****/***the law to justice. There are cases where that tax information will demonstrate—maybe they have stolen property and are claiming it on their taxes as depreciation. There are certain things out there that would be specific for a case and that is what we are going to look for. Any way we can work this out is why we're here. This isn't about law enforcement trying to take on the Tax Commissioner's Office. We're all on the same side and that is to serve the people so I like the direction this is going, but this initial bill was very scary to say the least.

Representative Kelsh: Are you bound by confidentiality requirements during an ongoing investigation? Do they become public once it goes to trial or are there specific situations where their confidentiality is protected?

Aaron Birst: During an ongoing investigation, we are pretty tight lipped about everything. In many cases, even though that we review the records they can order that we not discuss that (a gag order), We can be ordered not to share it; we can review it and it becomes part of the

case and then they decide how it applies to the case. That's not my realm, but could it be done? I believe that can be done, yes sir.

Vice Chairman Drovdal: I know you haven't had time to review the proposed amendments, but I would like to hear from you after you form your opinion.

Aaron Birst: I would be very happy to review it again. Like I said, we are all on the same side here. If for some reason, we became opposing forces, that's not where we need to be. That does not benefit anybody so I would gladly look at the amendments.

Representative Schmidt: Have you ever had a judge say you don't need these records?

Aaron Birst: The judges tell us if they don't believe there is merit to the case and it's done. We either have to go back or come back and reapply. The beauty of our court system is that the cops don't run the show. It should never be that way; there always has to be judicial review, but it has to work both ways. The idea that a judge would issue the court records and the Tax Department not honor it is pretty out there too. Has it ever happened? Yes.

Representative Schmidt: Can you give me an example. Does it happen 50% of the time?

Aaron Birst: I couldn't give you a percentage because you have to understand that the search warrant process to us is a daily thing. Maybe in this case where Ms. Wald has never seen this process, I guess in her time in law that that is probably a good thing that we haven't had to serve that kind of search warrant on that office. But in law enforcement, especially in organizations our size, we deal with this regularly. We serve search warrants constantly. If we have information on a theft case, we go before a judge. If we don't have enough information there, he sends us away. That is how our people get very very good. We don't go to the judge until we have built the case that we feel a judge is going to sign because our professional reputation is at stake. We work hard to build a solid case before we bring it to the judge. To

go out and serve a search warrant to get medical records, to go out and get a search warrant on a theft, to go into a business and get business records—we do it all the time.

Representative Winrich: In my brief reading of the amendment here, it strikes me that one of principal differences that would occur under this amendment, if it is adopted, is that when there is some sort of investigation going on and law enforcement feels that those records are necessary to the investigation, in fact, the Tax Department would become a party to whatever judicial hearing is involved and there can be some sort of discussion of how important those records are, rather than having law enforcement go to a judge and obtain a search warrant or something which is a complete surprise to the state agency. Do you have any objection to that?

Aaron Birst: Our goal in law enforcement is to obtain the records. If we have to follow a process, that is fine. That is not a problem to us. Our goal is to obtain the records and review the records for whatever purpose we are investigating. As far as that process, I am not sure that I am the best person to ask that because that is literally at the States Attorney's level and at the attorney level as to how that proceeding would go. Our goal in law enforcement is to obtain the records. I think that question would be better placed to one of the state's attorneys that are here.

Chairman Belter: Any other questions? Any further testimony in opposition to 1088?

Burt Burdick: I did not bring a handout with me. I am the Cass County State's Attorney. I think that the Tax Department and law enforcement, at our most essential core, have the same purpose—to serve the public. I think that we can agree that we both concur, certainly I as Cass County State's Attorney, concur that there are legitimate protection reasons to keep tax records confidential. There is a legitimate protection goal here. I think almost never do we intersect with the Tax Department. I have been at this job for ten years and never once have we gone to the Tax Department. I am not aware of any time in the past

in my office (unless it happened long before I got there) where we ever requested records from the Tax Department, but we did last summer. There is almost no tension between our office and the Tax Department; but if there is an intersect, and there is some inherent tension between their purpose and ours, I think it is a matter of where the emphasis is. For the Tax Department on the legitimate protection of tax records, their focus is on protection. As a representative of law enforcement, my focus is on legitimate. I agree that tax records should be protected, but only to the extent that that protection is legitimate. I am not meaning that the Tax Department is trying to do something illegitimate, but rather that there are records that should be made available to law enforcement. I will address my comments first to the underlying bill and second to the amendments. There are times when tax records, as you might imagine, can be a reservoir of important information to solve or prove a crime. Those tax records cannot be impenetrable to us. The Tax Department, quite frankly, is not qualified to be a final arbiter of what is an appropriate record to provide to us. The reason for that is this is not their area of expertise. As Ms. Wald indicated, she doesn't practice criminal law; she is not involved in criminal law; she had a class in it when she was in law school. I understand that, but that is the reason we cannot have the Tax Department be the arbiter of those issues. They don't understand what we are trying to accomplish and the laws and why these records might be valuable to a particular investigation. The records can harbor important information, not only for the kinds of crimes you might have listed right now in the underlying bill 1088, but a host of other crimes. Some were mentioned—white collar crimes, securities crimes, ongoing drug enterprises where people are trying to hide assets. All this kind of information valuable to an ongoing investigation might be found within tax records. We can't possibly identify, as bright and capable as you are and the Tax Department is, you couldn't possibly come up with a list of all the crimes where we might need tax records so the idea that you can identify a specific list, as we have attempted in HB1088, is just not sensible and it is not workable. I think that where there is inherent tension between the concept of legitimate protection and protection of tax records that we have a mechanism in place. That place is the court system and the one that we ask to protect our most essential human rights. It is the system we turn to day in and day out, as the sheriff indicated, in obtaining search warrants. That system is in place. It has

worked every day. It is familiar with what we are trying to accomplish and how we go about accomplishing it and that is represented already in the language of the statute as it exists. The statute, without any change, refers to a judicial order. Let me provide a brief comment on something Ms. Wald said about her interaction with our office. I think Ms. Wald and I have a difference of understanding about what transpired last year. We tried through a variety of mechanisms over a course of several months to obtain tax records. We were told by the Tax Department that we could not have them essentially under any mechanism, that the word judicial order did not refer to subpoenas that we might try to get nor search warrants that we might attempt to provide. We simply could not have access; they were not available to us period and that is something we could not accept. So we tried a variety of mechanisms; and in the end, we went to a search warrant because nothing else we tried to do would satisfy. In the end, the Tax Department was able to provide us with the information we were looking for. We thank them for that, but that brought us to where we are today. As I said, not in ten years have I gone to the Tax Department looking for records. This happened once. Will it happen in the future? Absolutely. Ms. Wald indicated that she gets requests from other areas of the state. I am not sure how many prosecutorial requests she has got in the past as opposed to other civil requests, but I don't think it is often. Nonetheless, it must be available. The bill, as it is worded, is unworkable. It is incomplete and it couldn't hope to be complete in identifying the kinds of crimes and access that law enforcement may need. That will depend entirely upon the circumstances that may arise in the future. I know that Ms. Wald has provided some amendments to you and I haven't seen exactly what she passed out. I saw something yesterday afternoon, which I assume is reflective of what was passed out to you today. Is that a step in a better direction for this bill? My answer is yes, but I will tell you I don't think any change is warranted. We work every day within a system where due process is important, where people have an opportunity to be heard and that is fine. I am happy to appear in front of a court, as necessary, to represent to them why we need something or why the sheriff needs something. We do that on a daily basis. If, for some reason, we, as law enforcement, can't convince a judge that we need the records, then we probably shouldn't get the records. But that is what we do through search warrants right now. I want to make a modest amendment to

something Mr. Birst had mentioned. There is a tool under the statutes in Statute 11-16-15 that is called the States Attorney's Inquiry. Under that process, you can obtain through a subpoena power record. It is called (inaudible). You go through judicial appeal for that. Certainly in our jurisdiction, that is what we do. We get court approval for it for things that are still under investigation that have not been charged. Mr. Birst referred to subpoenas as something that had been charged. You can get them under either guise, but they are different processes. The court is involved in all of those processes. The only time we are looking for records is when we have legitimate law enforcement investigations going on. We need them for no other purpose. This bill is addressing a problem I don't think exists; but if this committee were to decide it wanted to pass on to the rest of the legislative body some bill—then the amendments Ms. Wald has offered are a step in a better direction than the original bill. I would offer this last comment on what I believe she has provided to you. I believe the second paragraph refers to a minimum 30 day time frame which the Tax Department would have to protest some request to obtain certain records. If this committee were to address that matter, it seems to me that a minimum 30 day time frame is an extensive and unwarranted period of time for due process and could severely hamper a law enforcement investigation where records might be required on a more immediate basis. Having offered those comments, I would certainly open it up to any questions you may have.

Chairman Belter: You do accept the amendments or do you prefer current law?

Bob Burdick: I believe that the law as it exists is fine. It was just that the Tax Department established a position that, as we understood it from our early conversations, the only judicial order they could essentially accept was one that they sought, rather than one that somebody else sought. That was an unworkable approach. As I indicated, we tried many mechanisms to obtain the tax records over the course of several months and were unsuccessful. This eventually led us to the search warrant approach. I don't think any change is needed to the law. If this committee nonetheless wishes to make a change to the law, then I think that the

amendments Ms. Wald has offered to this committee today are a far better step than the original bill that was presented HB1088.

Representative Grande: When you say that you feel that the current law is workable, is that with the understanding that the Tax Department now understands that the judicial order goes both ways?

Bob Burdick: I don't think there is any possible way to interpret the law to say that a search warrant is not in order. There is not anything that I am familiar in the law that would allow such an interpretation. My position is that the language, as it exists in the law, is fine. The Tax Department simply needs to recognize that a search warrant is a valid order of the court. Does that answer your question?

Representative Wrangham: First of all, when I file a tax return, it is for one purpose and that is to pay my taxes. It has very private and personal information and I agree with the efforts to protect it. I also understand the necessity to prosecute criminals. When you go to a judge wishing to obtain tax records, previous testimony almost indicated that if they thought that I was a thief, it might be a good idea to look at my tax records to see if I am depreciating anything that might be stolen material. I would like some clarification, if you can, on what information you typically have to submit to a judge to get access to my tax records. At that point, do you typically have access to all of my tax information, which would include my federal income and state income tax or does the judge typically only allow you access to the material which may be relevant to the case:

Bob Burdick: I think there are two parts to that question. What do we normally submit to the judge and what the judge allows you to do if they approve whatever it is you submit is very dependent on the facts and circumstances of your case. We typically provide to the court when a search warrant is submitted background information on who the requesting party is, what they are investigating, why we believe that certain information that might be pertinent to an investigation would be contained at one location or another, such as the Tax Department. Having provided a measure of justification as to why

we think a search warrant, under probable cause standard, cause us to believe a crime has been committed and that there are records that are pertinent to investigating that crime, we try to outline the kind of records that we want. No judge will allow unlimited access. That doesn't happen. You try and identify the kinds of records needed. You may be able to do that with greater or lesser particularity, depending upon how much information you have available to you about what you are seeking. For example, let me change it from the Tax Department to a drug investigation at somebody's home. You might be searching for certain records referred to as "payo" sheets, i.e. who paid, who owes on these drugs. They might be located in a desk, they might be located on a coffee table. You try and identify why you have reason to believe that certain things that are evidence of a crime or appropriate for investigating a crime are located in certain places. My answer to you, I am afraid, is not highly particular, but we have to submit to the judge information mainly to discern that there is a valid investigation going on, that this is an appropriate place to investigate, and the kinds of records we are searching for might contain information pertinent to that investigation. It is very variable, depending upon what you are seeking. That wasn't very helpful. Can I answer it in a better way?

Representative Wrangham: I guess I am still not clear on what degree is required for the judge to make that decision. I guess I will have to think on it. The ultimate thing I am looking for is there has to be, for lack of a better phrase, a damn good reason before anybody sees my tax records.

Bob Burdick: In all the law school classes I went to and all the cases I have read, I have never come across "damn good reason" as a phraseology.

Representative Wrangham: You cannot make that statement any longer.

Bob Burdick: You and I can agree that to the guy in the street that is a pretty good way to describe it. What is typically used as a phrase is "probable cause". That is a standard which is perhaps not acceptable of an exact definition. It is somewhat elastic, depending upon the circumstances you are trying to accommodate. That is why these things are not done as a mathematical equation. They are

placed in front of a judge who has experience to look at and or to listen to the investigating officers and what they know, what they believe they are going to find, and why it is appropriate for this judge to authorize access to those records. It changes and “damned good reason” is probably a good way to do it, but I just haven’t seen that in the cases I’ve seen.

Representative Wrangham: Can a city magistrate issue a subpoena? What level of court do you have to go to to secure these records?

Bob Burdick: Let me give you an example of what we are doing in Cass County. Typically we have two approaches. One is a search warrant and the other is an investigative subpoena. The search warrant is a process where we go to the district judges, there are 42 of them in the state, we go to the judges and we ask for their input. If we come to Tax Department, I think that what we did, in this case, was we went to a judge in Burleigh County to obtain their authorization. Usually I search for approval to do a search warrant from a judge whose arms are wrapped around the area from which I am trying to get records or information. So that is what we did in this case. The alternative approach is under the States Attorney’s inquiry, where you can get subpoenas sometimes for people and sometimes a subpoena for records. Those are usually done through the district judges in my jurisdiction; I typically use those to obtain records from telephone companies who might do service in ND, but whose offices are located in Denver, for example, or bank records or tax records.

Chairman Belter: I guess I am having a little difficulty in understanding how we have not seen or heard of this problem before. What was unique about this situation that all of a sudden caused a problem?

Bob Burdick: Let me try to answer that this way. When I have a pending matter, as a matter of policy and as a matter of good sense, I try not to get into that matter publicly while that matter is pending.

Once that matter is resolved, I may become more open to commentary on it. We are in a public setting.

I don’t want to get into detail on a particular case here. Let me answer your question in this way. As we

grow more sophisticated or technological, we continue our work on the internet and more and more information becomes available to people. We seem to be seeing more white collar crime. As we do that and as we conduct investigations, it may become apparent to us that there are certain records that might be available at the Tax Department or elsewhere that can help us appropriate and legitimately investigate those crimes. I think, as the sheriff earlier indicated, his reference was to white collar crime, I think it is certainly that and a variety of things found in tax records that may be of interest. We have been able to conduct our investigations, without requesting those records in the past. Here was a case we felt would be appropriate for further investigation through tax records. Will it happen tomorrow or the next day? Probably not. Will it happen again next year or three years from now? Perhaps. I wouldn't be able to give you an idea of how often it is going to occur or exactly why it is going to occur. It has recently occurred. It hasn't occurred in the past and that is about all I can tell you except that as white collar crime grows, tax records may be more interesting.

Representative Pinkerton: Do you have a choice where you could ask for federal returns or state returns? At this point, you must have asked for state returns.

Bob Burdick: In this case we were looking for state returns. We believe that there was information there that could be valuable. Could we conceivably go and search for federal returns? Perhaps we might need to, but I don't know that we have had to do that in the past. It might be necessary to go through federal court in order to do that, but I don't know that for sure. Those records are conceivably located in Washington and it made more sense to look for those records here in our own back yard, rather than travelling to the east coast to get them. My understanding is that the feds do this with some regularity. On Friday a new judge sworn in in Cass County, who was elected last fall. While there, I happened to be talking to our federal district judge because he attended the reception. I posed to him this issue because I had just seen Bill 1088 to which he said, "What the heck? We do that all the time in the federal system. U.S. attorneys ask for these all the time, which among other things, was part of why we

were looking to provide some perspective for you, as well as for ourselves on how frequent and how necessary these kinds of investigative tools can be. I think one way they often use it in the federal system is to investigate drug enterprises.

Representative Headland: In a case where you are not able to find information you are looking for, does that have to be disclosed to the citizen that you have subpoenaed his tax record or is that something that the average citizen would never find out?

Bob Burdick: I don't think that there is anything in our existing laws that require that the average citizen find out that we have done that, but I am not fully familiar with all the tax code in ND. Whether the Tax Department somehow needs to notify them of that, I am not sure. It would become a little problematic if it was necessary to identify to a taxpayer when you did it because if you were investigating a crime and at that moment you are not ready to have them understand that they are under investigation, it would be a tip of the hat. Obviously they couldn't do much about pulling in the tax records that they had already submitted to the Tax Department. Those are already on file there, but it may have a significant impact on what they are doing in their day to day activities. I don't know, for example, at federal level, but there were 43 pages of law I printed out and I didn't get through all 43 pages last night. There are disclosure standards at the federal level. As to how you obtain those records, disclosure from the federal government to law enforcement and what is done with those records afterwards, I didn't spend a lot of time focusing on it, but they were discouraging letting the taxpayer know that, at least up front or until some time that they were charged.

Representative Wrangham: Could my records be subpoenaed while I am under investigation for criminal activity or do I have to be charged before those records can be subpoenaed?

Bob Burdick: Just so we don't have multiple terms going on which are getting interconnected. There are search warrants and subpoenas. Both can be appropriate mechanisms for obtaining records for any kind of evidence of crimes. Typically a search warrant is used, not exclusively but often, before

somebody is charged in order to obtain information. Let's say, for example, there is a drug crime going on. We find out through a confidential informant that Joe Blow has got records at their house; they also have three pounds of marijuana, two pounds of meth and a whole lot of pipes and weighing equipment for drugs, and hundreds of baggies they use to sell drugs. If we have suitable information, we may go to a judge and ask for a search warrant to go to Joe Blow's home to search for evidence of a crime. They would then serve that search warrant and obtain that information. Upon finding that evidence, they would arrest that person and process as a defendant instead of a mere suspect in a criminal case. It could also happen afterwards, after you charge somebody, you find out that there is more information needed. If somebody else has it, you could obtain a search warrant to do that as well.

Chairman Belter: Any further testimony on 1088?

Mike Reitan, Assistant Chief of Police at West Fargo Police Department: I oppose HB 1088 and ask that you strike the bill and retain current language in the century code dealing with this matter.

Frequently as the sheriff indicated, we do request search warrants for information relating to a criminal case. Search warrants are starting points for our cases. We develop as much information and evidence as we can at the beginning of the investigation, identify what we need for further investigation; and then seek a search warrant. And as Representative Wrangham indicated, develop a damn good reason to look at their stuff. We limit our investigation to that information. While the case that we are referring to that originated out of West Fargo is still ongoing and I cannot discuss the details, the current legislation proposal would restrict us from investigating an individual who may steal equipment and materials to conduct a business, reek income from that business, and then profit from the victims of his theft and those he worked for. Being able to have all of the avenues available to investigate that money flow, money laundering, drug trafficking, theft would be severely curtailed by HB1088 as it is currently written. I would ask that you strike it down and retain current language in the law.

Representative Kelsh: Can you say that in this case that access to the tax records helped you build a case?

Mike Reitan: Yes I believe they did

Chairman Belter: Any other questions? Further testimony on HB1088?

Representative Froseth: Mr. Chairman, can I ask Donnita Wald a question?

Donnita Wald: The law as it currently is, do you know of any cases where it has caused undue hardship or damage to a reputation to anyone on whom you released records?

Donnita Wald: No, I can't say that or know that for fact. The only thing we came close to knowing what people were upset about was when Commissioner Hanson published lien information in 1985. That was something, but in respect to tax information, I don't recall anybody being embarrassed. What usually happens is that we ask the person requesting information to get a Form 500, which is our release disclose information, have the taxpayer sign and give it to us so we can release information. That is probably how the majority of cases end up where the taxpayer themselves authorize disclosures to the person asking for it.

Representative Froseth: So in most cases, the taxpayer is aware that his records are being accessed?

Donnita Wald: In most situations, yes.

Chairman Belter: If there is no further testimony, I will close the hearing on HB1088. I will ask that the Tax Department, the states attorneys, and law enforcement look at these amendments and see if you can come up with some language that would be acceptable to all parties. We will close the hearing on HB1088 and we will not be acting on that.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1088**

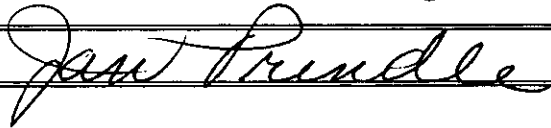
House Finance and Taxation Committee

☐ Check here for Conference Committee

Hearing Date: January 28, 2009

Recorder Job Number: 8074

Committee Clerk Signature



Minutes:

Chairman Belter: Committee, shall we deal with this today? Have there been any amendments drafted?

Donnita Wald, Tax Department: That 30 days. I don't have them with me, Mr. Chairman. I redrafted those and gave them a formal number. On page 2 of the amendments in this big paragraph, the second line says there must be a hearing on the application no earlier than 30 days. What I did was change that to no later than ten days because they were concerned about the long time frame. The law enforcement community is concerned that time may be of the essence. The application must be held no later than ten days after we are served the order.

Chairman Belter: That is in addition to?

Donnita Wald: I am changing these amendments. I can bring them down, but it changes to no earlier than 30 days and no later than ten days so we will be in court any time from day one to day nine.

Chairman Belter: That is the only change you made?

Donnita Wald: That is the only change I made on first page. One is the sales tax and one is the income tax. The reason I picked the ten days is when we were served the

we had ten days. It wasn't that they were going to go in and start rifling through our records; but the search warrant said you have ten days to get this information. The sheriff will be back in ten days to get the records and I thought it was a good time frame.

Chairman Belter: Is everybody comfortable with the changes made here? Do you want act on it? I have a motion to **move the amendments from Representative Winrich and a second from Representative Pinkerton.** Any discussion? **The motion carried.** I have a motion for a **"do pass as amended"** from Representative Wrangham and a second from Representative Schmidt. **A roll call vote resulted in 10 yeas, 2 nays, and 1 absent/not voting (Froelich). Representative Winrich will carry the bill.**

January 28, 2009

VR
2/2/09
1082

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1088

Page 1, line 7, after "1." insert "a."

Page 2, replace lines 3 through 25 with:

- "b. The commissioner shall disclose state tax return information pursuant to an order or subpoena issued by a court of competent jurisdiction upon application by a local, state, or federal law enforcement official if the court determines on the basis of the facts submitted by the applicant that:
- (1) There is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
 - (2) There is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act;
 - (3) The return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
 - (4) The information sought to be disclosed cannot reasonably be obtained under the circumstances, from another source.
- c. The application provided for under subdivision b must be served on the tax commissioner and a hearing on the application must be held no later than ten days from the date the tax commissioner received the application. The tax commissioner may appear at the hearing and provide the court information relating to the information contained on the return, and whether the application meets paragraphs 1 through 4 of subdivision b.
- d."

Page 3, line 15, after "1." insert "a."

Page 3, line 22 , replace "Except as provided in this section, returns and return information are" with:

- "b. The commissioner shall disclose state tax return information pursuant to an order or subpoena issued by a court of competent jurisdiction upon application by a local, state, or federal law enforcement official if the court determines on the basis of the facts submitted by the applicant that:
- (1) There is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;

- (2) There is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act;
- (3) The return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
- (4) The information sought to be disclosed cannot reasonably be obtained under the circumstances, from another source.

c. The application provided for under subdivision b must be served on the tax commissioner and a hearing on the application must be held no later than ten days from the date the tax commissioner received the application. The tax commissioner may appear at the hearing and provide the court information relating to the information contained on the return, and whether the application meets paragraphs 1 through 4 of subdivision b.

d."

Page 3, remove lines 23 through 31

Page 4, remove lines 1 through 13

Renumber accordingly

Amendments presented by Honnita
Wall of Tax Department

Date: 1/28/09

Roll Call Vote #: 2

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1088

House FINANCE AND TAXATION Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☒ Do Pass ☐ Do Not Pass ☒ Amended

Motion Made By Wrangham Seconded By Schmidt

Representatives	Yes	No	Representatives	Yes	No
Chairman Wesley R. Belter	/		Representative Froelich		
Vice Chairman David Drovdal	/		Representative Kelsh		/
Representative Brandenburg	/		Representative Pinkerton	/	
Representative Froseth	/		Representative Schmidt	/	
Representative Grande		/	Representative Winrich	/	
Representative Headland	/				
Representative Weiler	/				
Representative Wrangham	/				

Total (Yes) 10 No 2

Absent 1 (Froelich)

Floor Assignment Representative Winrich

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

REPORT OF STANDING COMMITTEE

HB 1088: Finance and Taxation Committee (Rep. Belter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). HB 1088 was placed on the Sixth order on the calendar.

Page 1, line 7, after "1." insert "a."

Page 2, replace lines 3 through 25 with:

"b. The commissioner shall disclose state tax return information pursuant to an order or subpoena issued by a court of competent jurisdiction upon application by a local, state, or federal law enforcement official if the court determines on the basis of the facts submitted by the applicant that:

- (1) There is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
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- d."

Page 3, remove lines 23 through 31

Page 4, remove lines 1 through 13

Renumber accordingly

2009 SENATE FINANCE AND TAXATION

HB 1088

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1088

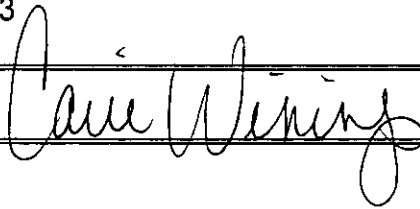
Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Hearing Date: 03/11/2009

Recorder Job Number: 10703

Committee Clerk Signature



Minutes:

Chairman Cook: Opened the hearing on HB 1088.

Cory Fong, State of North Dakota Tax Commissioner: Introduced the bill and gave a brief statement on the tax department's privacy policy. (See Attachment # 3 for copy of talking points)

Chairman Cook: Is it an assumption then that as talks continue at some point here there could be some changes recommended.

Cory Fong: Yes, absolutely that is what I am saying.

4.50 Donnita Wald, General Council, State Tax Department: See Attachment #1 for testimony in support of the bill.

10.30 Chairman Cook: What is the penalty if you give my tax records to somebody that you shouldn't have?

Donnita Wald: That is a Class A Felony, and there could be some penalty to Tax Commissioner, agents or employees. That is at the state level, we are also subject to federal penalties if we disclose federally provided information.

Chairman Cook: So if I look at subsection D where it allows the Tax Commissioner to share confidential information under certain circumstances, what if all of the sudden it's proven that the circumstances never existed, does the tax payer have recourse then?

Donnita Wald: The tax payer always has recourse.

12.11 **Senator Hogue:** Can you give us an estimate of how often you get subpoenas either in criminal or civil matters asking for tax returns?

Donnita Wald: Quarterly, and in the last three months four times.

Senator Hogue: Does the department also disclose the federal return as part of the state return because it is part of the state return?

Donnita Wald: Yes.

Senator Hogue: What would happen if you get a subpoena from a federal judge and he asked you for the records and you said that a hearing had to occur?

Donnita Wald: I would probably give them up if a judge demanded it. In the past when we have received such subpoenas, we have filed motions to quash and in federal and state court. The result of those is that usually the person seeking the returns has stopped. The other thing that has occurred and we suggest, this happens 99% of the time, is that we have them go to the tax payer and get them to obtain a release of information. The other thing we do is ask the court for a protective order asking to protect the Tax Commissioner and the employees who disclose.

Vice Chairman Miller: Do you have to inform the tax payer that you are disclosing their records?

Donnita Wald: We don't know. We didn't in the search warrant situation and probably wouldn't because we didn't want to impede a criminal investigation. It is a question because they are their records.

Senator Triplett: Can you explain why the procedures that you have just described, the use of the motion to quash or requesting protection for your employees, are not enough? Why do you need this in addition to those tools you already have available and have used?

Donnita Wald: Because we thought the search warrant was kind of extreme, we have never been served a search warrant before. We were advised by the state's Attorney General that maybe we should come in and see if we can get this changed in the law to identify when returns should be given up.

Senator Triplett: As you know, when you get a subpoena, you have those other opportunities to respond before giving up the information. But, when you are served with a warrant, wouldn't you assume if the process is working correctly that all of these things have already been considered by the judge?

Donnita Wald: That is possible. Those were some of the things that we discussed with the law enforcement yesterday. Is this the proper way to do it, maybe, maybe not? In the House there were some issues raised and it was suggested that we use this language. It makes sense, if it is good enough for the law enforcement for the federal tax returns and it does a good balance of protecting the confidentiality of returns and that it is only given up if they cannot get information another way. Usually a tax return is a compilation of a lot of other business records that may have been available.

Senator Triplett: On page 1 is that intended to make a technical change or a grammar change?

Donnita Wald: It is intended to make a technical change. Since I have been in the department, and prior to that, that language has been interpreted by tax department attorneys that the judicial order applies only when the tax return is at issue or to accentuate the other

exceptions in the statute. That has been how we interpret it, and we have been told that is what that means. It is an ambiguous language. We are trying to clarify what the order is.

Senator Triplett: What do you think it means now with this change?

Donnita Wald: It means what is stated on page 2 of the bill. It is not just law enforcement. In the last year we were subpoenaed in a civil proceeding between two private litigants. What we are trying to say that we are trying to allow a situation for law enforcement officials and to make it clear that we don't want to be involved in private issues between two people, two companies, divorce situations, support situations, etc. Get rid of civil stuff and give it to law enforcement.

Chairman Cook: Do you ever recall a time where someone has successfully sued the tax department for not protecting the confidentiality of their records.

Donnita Wald: No, because we haven't disclosed without a protective order. It is something we take very seriously. I always interpret the statutes that in a manner that they don't allow disclosure.

Chairman Cook: I think that taxpayers would be happy to know that the degree of confidentiality is truly protected in your department.

21.30 **Senator Hogue:** Lots of different entities have confidential information about all of us that we as members of the public want to keep confidential and the process to get that information has always been done with subpoenas. This seems to vary that rule and require more than that. Why do you as a tax department need more stringent regulations?

Donnita Wald: I think that goes to the heart of what a state has the power to do. We don't mind disclosing that information, but we would like you to tell us when you want us to do that. I agree that the subpoena process gives us the opportunity to make our case. In this last situation we had discussed the use of a subpoena but that was not satisfactory. It is important

that we get direction from the committee to find balance and common ground with law enforcement.

Vice Chairman Miller: Who sees the tax documents when they are disclosed?

Donnita Wald: When it is used for evidence, I do not know. We discussed that yesterday.

Personally if it is used in evidence I think the legislature has to decide that. I am confident that when we find a solution that the law enforcement will do the right thing and not blast it all over.

Senator Dotzenrod: I always assumed that if you have the forms you have right to use that information, can you think of some examples of information that the tax department cannot use?

Donnita Wald: We are talking about two different things here. We do have an information exchange agreement with the federal government. We use that all the time. This has to do with using information for things other than between the federal government and us.

29.20 **Paul D. Laney, Sheriff, Cass County Government:** See Attachment #2 for testimony in opposition to the bill.

33.45 **Senator Anderson:** You did mention HIPPA, what is that?

Paul D. Laney: It is the federal regulation that guides medical facilities and what information they can give. We don't violate HIPPA because they will bite. We utilize HIPPA in a number of cases where we need to obtain medical records. We cannot just walk in and say we want them. We have to present a specific reason before the court as to why we need them.

Vice Chairman Miller: I have one thing that I keep thinking about, let's say that someone is being investigated and has plotted against the government and someone subpoenas the tax department on the information. Is there protection to that information?

Paul D. Laney: Many times when we obtain record they can and are sealed. The information is protected as much as possible. It does come out as evidence in the trial if necessary.

Senator Triplett: On subsection D, it refers to law enforcement specifically; it says that they will disclose the information without a court order at all. That concerns me more than some of the other stuff. How easy would it be for someone to come up with a claim and get information? Not even a requirement of probable cause here. How do you react to that section?

Paul D. Laney: That part of the bill has been there from the beginning. Maybe legal council could answer that.

Senator Triplett: You are saying that you would not use this subsection. In my office I think we would go through the subpoena.

41.30 Ladd Erickson, Mclean County State's Attorney: Testified in opposition to the bill. I oppose the bill on a number of grounds. I thank the Tax Commissioner for our discussions yesterday. When you eliminate the ability to get a judicial order to get information, that is a significant issue. To say that under all time and circumstances that that information does not have to be turned over to a court, I think that needs to be thought through. We have judges for a reason. If that is only way to get the numbers from the tax department, it is important that we can do that. I am not sure there is actually a problem here. I don't know if this originated from a onetime incident or came from a pattern. This incident went on a period of weeks and months with discussions and meetings with the Attorney General about getting these records. The underlying case was a \$700,000 racketeering case where construction equipment was being stolen at the direction of a head person and then stolen from other people and then depreciated off of tax returns. When we look at this bill we look at how our current system works. Currently tax returns are confidential with some notable exceptions. (Gives example of child support form and requests for information, WSI and state lottery) The bill is deficient in securing information once law enforcement gets it. We don't have a dispute with that and we

actually suggested some language on that. I don't see any purpose of the amendments that Senator Triplett highlighted. This bill is a bunch of federal grand jury law; they use different definitions and terms than we do in state court. We don't use those kinds of processes in North Dakota. To get a court order we use probable cause not reasonable cause. We are concerned about having processes that cause us to have our investigations put under unnecessary hearing because some of the people under investigation might be connected to the tax department. We don't see any reason to have a hearing where there is fighting between the tax department legal counsel and our legal council before the judge. You don't want two executive branch prosecution types fighting over a warrant. You have to be very careful about eliminating people's ability to get records through court orders, and creating burdens that don't really relate to the way the North Dakota search and seizure process works.

It is possible to get on one page; the bill would have to radically different from this.

51.40 Chairman Cook: Comment

Vice Chairman Miller: Is there any other state that we can use as some sort of example that has some sort of law that would be similar to this?

Ladd Erickson: I don't know specifically. I am sure there is a process to obtain records across the board.

Senator Hogue: Can you expand on the conversations that you have had regarding this. I wonder if Section 2 is even constitutional. It seems to me that for the legislature or the tax commissioner to presume to tell a federal judge what he needs to consider in order to issue a subpoena strikes me as pilotive of the supremacy clause. The other concern I have is the constitutional concern of the separation of powers. In my experience we do not typically give that right? Was that part of the discussions?

Ladd Erickson: Your concerns are valid. We did not discuss that yesterday.

Senator Dotzenrod: If for some reason we did not pass this bill, do you think there is something that we have left exposed in this as far as the privacy of records?

Ladd Erickson: I am not concerned. The state's attorneys do a lot to keep privacy protection. This area is not the problem in privacy laws, it is in other areas.

Senator Triplett: Regarding Page 1, Lines 7 and 8 and the interpretation of the change, personally I do not think that this change does what the tax department is intending. What do you think this line means if it were put into law?

Ladd Erickson: That was my first concern. If you take out the words that are there, and then if you go to page 2 lines 3-6, only a law enforcement officer either state, local or federal are the ones that can apply for a subpoena. So therefore my concern is that that is a significant change. Civil attorneys are not law enforcement; therefore they can't get the information.

Senator Triplett: I think you can read it differently than that. I think that you could argue that the word specifically does not limit it to reference back to that page but it could mean as provided by law as it exists elsewhere in the code or rules. You think she is right is how she is interpreting the language then?

Ladd Erickson: No, I am not here on that issue really.

59.15 Richard Riha, Burleigh County State's Attorney: Testified in opposition to the bill. I think this was a big reaction to an individual situation. I don't think this is necessary. The ten day period jumped out at me as a problem. When you are acting under a court order you are virtually bullet proof. There are dangers in not complying with a court order or subpoena. These safeguards are already in the system.

1.00.58 Chairman Cook: Further testimony? (no) Closed hearing.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1088

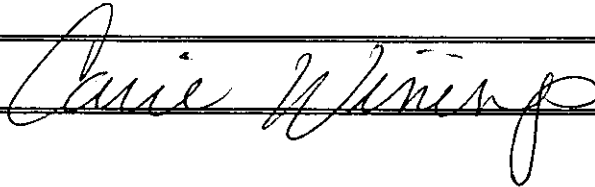
Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Hearing Date: 03/24/2009

Recorder Job Number: 11459

Committee Clerk Signature



Minutes:

Chairman Cook: Reopened discussion on HB 1088.

Donnita Wald, Legal Council, Tax Department: See Attachment #1 for amendment proposed. (Explained the amendments)

Committee: The committee asked some questions as Donnita Wald proceeded through the amendments and clarified certain points.

10.25 **Senator Hogue:** Could you explain what happened in that case in Cass County that caused this bill to be created?

Donnita Wald: Explained that the States Attorney contacted us how they should proceed. I don't know what their discussions were that lead to the search warrant instead of a subpoena. It is still a pending matter in Cass County. We were not sure what we could do to protect the taxpayer and our office.

Chairman Cook: In short, there was confusion in how the law was interpreted and this is what we are being asked to clear up.

Donnita Wald: This is your job. We want it to be clarified for our office.

13.45 (Continues to go through amendment)

Chairman Cook: Asked Aaron Birst if they were comfortable with the amendments.

Aaron Birst: Yes, I have a copy of the Reengrossed HB 1088.

Donnita Wald: That does not include the new subdivision e.

Chairman Cook: We will get that information put in and revisit Reengrossed HB 1088 this afternoon.

Chairman Cook: Closed the discussion.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1088

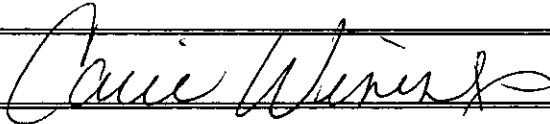
Senate Finance and Taxation Committee

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Hearing Date: 03/24/2009

Recorder Job Number: 11461

Committee Clerk Signature



Minutes:

Chairman Cook: Reopened the discussion on HB 1088.

Donnita Wald, Legal Council, Tax Department: See Attachment #1 for copy of engrossed bill with proposed amendments applied.

4.43 **Senator Hogue:** What do you do when you get a civil subpoena?

Donnita Wald: In that situation, we would probably disclose. We are getting a court order. It would be difficult to disobey that order. In that situation, in a civil situation that has occurred, we have asked for a protective order from (??). It would be pretty bad for me to say that I will not obey that order.

Vice Chairman Miller: How often do you have requests for sales and use tax records?

Donnita Wald: Not as often as we do for income tax return information. The sales and used tax records usually aren't requested.

Vice Chairman Miller: Is it really necessary to give local law enforcement or state any latitude in being able to get access without a court order or a subpoena for sales and use tax information. That is proprietary information. I wonder why we need to have that in there. I would say that we need to remove this.

Donnita Wald: I think that the proprietary information concern that you have applies to both kinds of taxes (income tax and sales and use taxes). In the imminent situation where there is a national security thing in addition to gross receipts, we have other information that we have on record besides line items. We do not have a problem with that section being taken out.

9.14 **Senator Hogue:** There is no intent to alter the way civil cases may obtain information from your office. Is that true?

Donnita Wald: I am not trying to prevent that. If they want to file a subpoena statement with us we will receive it and do what we need to do to get that situation resolved. Yes, I am not trying to change anything.

Senator Hogue: Why do you feel the need to file a motion to quash?

Donnita Wald: I am not so sure we would with this. We need to make sure that information is protected once it leaves our hands. I need a method to get into the court and that is the only procedure that I know how to get in front of a judge. That would be our only reason and the only way to do that.

11.22 **Senator Dotzenrod:** Clarified the sections.

Donnita Wald: Gives an example to clarify section 5.

13.23 **Senator Triplett:** My notes say that this was a technical change requested by the tax department which is not part of your controversy with law enforcement.

Donnita Wald: That is correct.

Senator Triplett: Could we just remove section d?

Donnita Wald: Yes.

Senator Triplett: Regarding sub-section c, how do you think you are going to work that in real life? Where is the enforcement piece in this?

Donnita Wald: We haven't thought that through. I would have to assume the department is doing what they are doing in good faith. At one point in our discussion, I believe in writing was required. Or we could call them back, as was just suggested.

Senator Triplett: On section e, what would be the mechanics of that to keep the information protected?

Donnita Wald: No we have not thought that through procedurally. I cannot guarantee that. Hopefully this provision that it will be kept confidential will do that.

Chairman Cook: It takes you off the hook and passes the blame on them if it doesn't.

Senator Triplett: The key is for it to not happen.

Donnita Wald: We deal with this every day. We do our best.

18.53 **Senator Oehlke:** Section d, is there somewhere else that addresses those issues of National security or the kidnapping or abduction? I would suspect that tax information might be important for that.

Donnita Wald: I don't anticipate that being often or at all. If a situation arises, I would hate to not be able to provide the information.

Senator Hogue: Would you object to a general statement in 1. b and section 2, 1.b something along the line, "The following procedures apply if local, state, or federal law enforcement officials request state tax return information."

Donnita Wald: That would be lead in information?

Senator Hogue: I would like to have this not include civil cases.

Donnita Wald: I don't see that it would hurt. I would not object to that.

Chairman Cook: Further questions? My thought is that everyone express what they want including Mr. Birst, and then if there are committee members that would like to make

suggested changes, you work with Donnita and Aaron and make sure everyone is still on board.

Senator Dotzenrod: summarized the way he would see things playing out in order. The first thing that would occur is that they will get a phone call or written letter under c asking if they did or didn't file returns. If they need more information, they would have to go to the court and get a subpoena, and the judge would have to decide whether or not to issue the subpoena and he would look at subsection 1, 2 or 3. You'll make copies of what they ask for in some form.

Donnita Wald: I anticipate that we would be printing that out and giving it to them. We will do our best to protect the information. We deal with this daily. I want to assure this will not change that.

Senator Hogue: asked a question on sub. 3, "The information sought to be disclosed cannot reasonably be obtained under the circumstances from another source;," I would have thought that for tax evasion cases they want a certified copy from the tax department to demonstrate that this is in fact the return that was filed. Isn't that a necessary element?

Donnita Wald: This does not apply to tax fraud cases. We would be prosecuting those ourselves. We could end up being witnesses in court.

Aaron Birst, Association of Counties: Testified in support of the amendments and the bill. Our intent was to clarify this issue. All we want to do is be able to obtain information that we need.

28.11 **Chairman Cook:** I think this will be around a while.

Senator Triplett: Gives an example of a problem that was encountered in her area regarding her concerns.

Chairman Cook: Closed the discussion.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1088

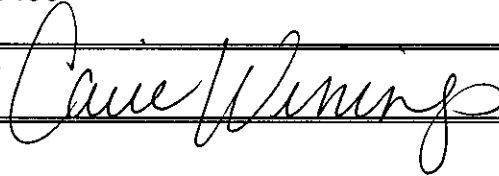
Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Hearing Date: 03/24/2009

Recorder Job Number: 11493

Committee Clerk Signature



Minutes:

Chairman Cook: Reopened discussion on HB 1088.

Donnita Wald, Tax Department: See attachment #1 and #2 for the newest amendments and the re-engrossed version of the bill for review.

Discussion: A discussion occurred between all of the committee members to clarify all of the changes and make sure that everyone was comfortable with them. Senator Triplett mentioned that Page 3, lines 1 and 2 needed to be deleted as well.

Senator Triplett: Moved the amendments 98119.02TX and page 3, lines 1 and 2 removed.

Senator Hogue: Seconded.

A Voice vote was taken: Yea 7, Nay 0, Absent 0.

Motion passed.

Vice Chairman Miller: Moved a Do Pass As Amended.

Senator Dotzenrod: Seconded.

A Roll Call vote was taken: Yea 6, Nay 1, Absent 0.

Senator Hogue will carry the bill.

March 23, 2009

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1088

Page 2, replace lines 3 through 6 with:

"b. A court of competent jurisdiction may issue an order or subpoena directing the tax commissioner to disclose state tax return information to a local, state, or federal law enforcement official conducting a criminal investigation if the court determines that the facts submitted by the applicant satisfy the following:"

Page 2, line 7, replace "reasonable" with "probable" and remove ", based upon information believed"

Page 2, line 8, remove "to be reliable," and after "committed" insert "and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense"

Page 2, line 9, remove "There is reasonable cause to believe that the return or return"

Page 2, remove lines 10 through 11

Page 2, line 12, remove "(3)"

Page 2, line 14, replace "(4)" with "(3)"

Page 2, line 16, replace "The application provided for under subdivision b must be served on the tax" with "Prior to obtaining an order under this subdivision, a law enforcement official may request information from the tax commissioner as to whether a taxpayer, who is the subject of a criminal investigation for which return or return information is or maybe relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements."

Page 2, remove lines 17 through 21

Page 2, line 22, replace "If a federal, state, or local law enforcement agency provides written" with "Except as required during court proceedings, tax return information disclosed to law enforcement under this section shall remain confidential both during an active criminal investigation and after such investigation, prosecution concludes or the time period for appeals has expired, whichever is later."

Page 2, remove lines 23 through 31

Page 3, replace lines 20 through 23 with:

"b. A court of competent jurisdiction may issue an order or subpoena directing the tax commissioner to disclose state tax return information to a local, state, or federal law enforcement official conducting a criminal investigation if the court determines that the facts submitted by the applicant satisfy the following:"

Page 3, line 24, replace "reasonable" with "probable" and remove ", based upon information believed"

Page 3, line 25, remove "to be reliable," and after "committed" insert "and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense"

Page 3, line 26, remove "There is reasonable cause to believe that the return or return"

Page 3, remove lines 27 through 28

Page 3, line 29, remove "(3)"

Page 4, line 1, replace "(4)" with "(3)"

Page 4, line 3, replace "The application provided for under subdivision b must be served on the tax" with "Prior to obtaining an order under this subdivision, a law enforcement official may request information from the tax commissioner as to whether a taxpayer, who is the subject of a criminal investigation for which return or return information is or maybe relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements."

Page 4, remove lines 4 through 8

Page 4, line 9, replace "If a federal, state, or local law enforcement agency provides written" with "Except as required during court proceedings, tax return information disclosed to law enforcement under this section shall remain confidential both during an active criminal investigation and after such investigation, prosecution concludes or the time period for appeals has expired, whichever is later."

Page 4, remove lines 10 through 20

Renumber accordingly

Date: 03/24/09

Roll Call Vote #: 2

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. : 1088

Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken ☒ Do Pass ☐ Do Not Pass ☒ Amended AS

Motion Made By Senator Miller Seconded By Senator Dotzenrod

Senators	Yes	No	Senators	Yes	No
Sen. Dwight Cook - Chairman	✓		Sen. Arden Anderson	✓	
Sen. Joe Miller - Vice Chairman	✓		Sen. Jim Dotzenrod	✓	
Sen. David Hogue	✓		Sen. Constance Triplett		✓
Sen. Dave Oehlke	✓				

Total: Yes 6 No 1

Absent 0

Floor Assignment Senator Hogue

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

REPORT OF STANDING COMMITTEE

HB 1088, as engrossed: Finance and Taxation Committee (Sen. Cook, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1088 was placed on the Sixth order on the calendar.

Page 2, replace lines 3 through 6 with:

- "b. A court of competent jurisdiction may issue an order or subpoena directing the tax commissioner to disclose state tax return information to a local, state, or federal law enforcement official conducting a criminal investigation if the court determines that the facts submitted by the applicant satisfy the following:"

Page 2, line 7, replace "reasonable" with "probable" and remove ", based upon information believed"

Page 2, line 8, remove "to be reliable," and after "committed" insert "and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense"

Page 2, line 9, remove "There is reasonable cause to believe that the return or return"

Page 2, remove lines 10 and 11

Page 2, line 12, remove "(3)"

Page 2, line 14, replace "(4)" with "(3)"

Page 2, replace lines 16 through 31 with:

- "c. Before obtaining an order under this subsection, a law enforcement official may request information from the tax commissioner as to whether a taxpayer, which is the subject of a criminal investigation for which a return or return information is or may be relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements.
- d. Except as required during court proceedings, tax return information disclosed to law enforcement under this section remains confidential during an active criminal investigation, after the investigation, after prosecution concludes, or until the time period for appeals has expired, whichever is later."

Page 3, remove lines 1 and 2

Page 3, replace lines 20 through 23 with:

- "b. A court of competent jurisdiction may issue an order or subpoena directing the tax commissioner to disclose state tax return information to a local, state, or federal law enforcement official conducting a criminal investigation if the court determines that the facts submitted by the applicant satisfy the following:"

Page 3, line 24, replace "reasonable" with "probable" and remove ", based upon information believed"

Page 3, line 25, remove "to be reliable," and after "committed" insert "and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense"

Page 3, line 26, remove "There is reasonable cause to believe that the return or return"

Page 3, remove lines 27 and 28

Page 3, line 29, remove "(3)"

Page 4, line 1, replace "(4)" with "(3)"

Page 4, replace lines 3 through 20 with:

- "c. Before obtaining an order under this subsection, a law enforcement official may request information from the tax commissioner as to whether a taxpayer, which is the subject of a criminal investigation for which a return or return information is or may be relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements.
- d. Except as required during court proceedings, tax return information disclosed to law enforcement under this section remains confidential during an active criminal investigation, after the investigation, after prosecution concludes, or until the time period for appeals has expired, whichever is later.

Renumber accordingly

2009 TESTIMONY

HB 1088

Testimony #1

TESTIMONY BEFORE THE HOUSE FINANCE AND TAXATION COMMITTEE

HOUSE BILL 1088

January 12¹³, 2009

Chairman Belter, members of the House Finance and Taxation Committee, my name is Donnita Wald, General Counsel to the North Dakota Office of State Tax Commissioner, and I am here to today in support of House Bill 1088.

BACKGROUND

Since 1923, when the first state-administered income tax was first enacted, our State's tax statutes have contained provisions protecting the confidentiality of information filed with the Tax Commissioner's office. Legislators over the years have maintained that strong stand. Confidentiality statutes are essential to North Dakota's voluntary tax system. We rely completely on taxpayer's voluntarily providing our office their sensitive personal and financial information.

Confidentiality statutes are the Legislature's promise to the taxpayers that if you provide personal information to the state, we will insure that it will not be disclosed for any purpose that the Legislature has not specifically approved. This is a long-standing promise which we at the Tax Department feel is our duty to vigilantly enforce.

In my tenure with the Tax Department, this duty to uphold the state's confidentiality statutes and those of law enforcement have, at times, conflicted. It was one of these situations that recently occurred that prompted the Tax Commissioner to propose HB 1088.

EXPLANATION OF BILL PROVISIONS

USE OF INFORMATION FOR TAX COMPLIANCE PURPOSES. The first proposed change I want to discuss today is contained on Page 3, lines 6 through 12 and is a change to the income tax confidentiality statute.

The Tax Department is proposing changes that will allow the use of information filed by a fiduciary and subchapter S corporation to be used by the Tax Department for compliance and audit activity related to individual income tax

filers. These changes would be consistent with the current law that allows the Tax Department to use information from partnership returns to pursue compliance issues we may have with the partners of that partnership and to use information filed by employers, for example the W-2 form, for individual income tax compliance purposes.

USE OF INFORMATION FOR LAW ENFORCEMENT PURPOSES. The second proposal in the bill as introduced provides an exception to the confidentiality laws for income taxes, and sales and use taxes in circumstances involving the investigation or threat of a felony offense involving violence or injury to persons or property, kidnapping of a child, and national security (Page 2, lines 3, through 25; and Page 3, lines 22 through Page 4, line 13).

The proposal also allows confidential tax information to be disclosed without a court order if the threat was imminent and likely to occur if immediate disclosure is not made. (Page 2, line 26; Page 4, line 14)

The bill before you today was the Department's first attempt to balance the interests of law enforcement and the voluntary tax system. Because tax compliance and the confidentiality laws are at the heart of what we do, we drafted the bill to allow disclosure in the most limited of circumstances. We have since heard from many in the law enforcement community about this position. As a result, we drafted an amendment to House Bill 1088. This amendment allows disclosure to law enforcement if a court determines that all four of the following conditions are met:

1. there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
2. there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act;
3. the return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
4. the information sought to be disclosed cannot reasonably be obtained under the circumstances, from another source.

We are providing these amendments today to address the concerns of our fellow law enforcement officers. We believe it is up to you, the Legislature, to

balance the interests of law enforcement with the Tax Department's interest in preserving the voluntary tax system.

Thank you for your consideration.

PROPOSED AMENDMENTS TO HOUSE BILL 1088

Page 2, replace lines 3 through 25 with:

"The commissioner shall disclose state tax return information pursuant to an order or subpoena issued by a court of competent jurisdiction upon application by a local, state, or federal law enforcement official if the court determines on the basis of the facts submitted by the applicant that:

- a. there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
- b. there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act;
- c. the return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
- d. the information sought to be disclosed cannot reasonably be obtained under the circumstances, from another source.

The application must be served on the tax commissioner and a hearing on the application must be held no earlier than thirty days from the date the tax commissioner received the application. The tax commissioner may appear at the hearing and provide the court information relating to whether the application meets subdivision a through d of this subsection. The court shall consider the impact disclosure may have on any civil or criminal investigation or audit being conducted by the tax commissioner with regard to the return or return information sought. If the court determines disclosure will seriously impair or impede the tax commissioner's investigation, the court shall issue an order denying the application."

Page 3, line 22, replace "Except as provided in this section, returns and return information are" with "The commissioner shall disclose state tax return information pursuant to an order or subpoena issued by a court of competent jurisdiction upon application by a local, state, or federal law enforcement official if the court determines on the basis of the facts submitted by the applicant that:

- a. there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
- b. there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act;
- c. the return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
- d. the information sought to be disclosed cannot reasonably be obtained under the circumstances, from another source.

The application must be served on the tax commissioner and a hearing on the application must be held no earlier than thirty days from the date the tax commissioner received the application. The tax commissioner may appear at the hearing and provide the court information relating to whether the application meets subdivision a through d of this subsection. The court shall consider the impact disclosure may have on any civil or criminal investigation or audit being conducted by the tax commissioner with regard to the return or return information sought. If the court determines disclosure will seriously impair or impede the tax commissioner's investigation, the court shall issue an order denying the application."

Page 3, remove lines 23 through 31

Page 4, remove lines 1 through 13

Renumber accordingly

*Same as.
testimony*

January 26, 2009

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1088

Page 2, replace lines 3 through 25 with:

"The commissioner shall disclose state tax return information pursuant to an order or subpoena issued by a court of competent jurisdiction upon application by a local, state, or federal law enforcement official if the court determines on the basis of the facts submitted by the applicant that:

- a. there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
- b. there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act;
- c. the return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
- d. the information sought to be disclosed cannot reasonably be obtained under the circumstances, from another source.

The application must be served on the tax commissioner and a hearing on the application must be held no later than ten days from the date the tax commissioner received the application. The tax commissioner may appear at the hearing and provide the court information relating to the information contained on the return, and whether the application meets subdivisions a through d of this subsection."

Page 3, line 22 , replace "Except as provided in this section, returns and return information are" with:

"The commissioner shall disclose state tax return information pursuant to an order or subpoena issued by a court of competent jurisdiction upon application by a local, state, or federal law enforcement official if the court determines on the basis of the facts submitted by the applicant that:

- a. there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
- b. there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act;
- c. the return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
- d. the information sought to be disclosed cannot reasonably be obtained under the circumstances, from another source.

The application must be served on the tax commissioner and a hearing on the application must be held no later than ten days from the date the tax commissioner received the application. The tax commissioner may appear at the hearing and provide

the court information relating to the information contained on the return, and whether the application meets subdivisions a through d of this subsection."

Page 3, remove lines 23 through 31

Page 4, remove lines 1 through 13

--

Renumber accordingly

Testimony 2

Testimony to the
HOUSE FINANCE AND TAXATION
Prepared January 13, 2009 by the North Dakota Association of Counties
Aaron Birst, Legal Counsel

CONCERNING HOUSE BILL 1088

Chairman Belter and members of the Committee, the North Dakota States Attorneys Association is here today to strongly oppose House Bill 1088.

In its efforts to make tax returns more confidential, HB 1088 significantly interferes with legitimate criminal investigations and subverts judicial procedure by giving the tax commissioner absolute authority over their discloser. An example of this absolute authority can be found on page 2 line 9 - 12, which states the commissioner MAY disclose returns even when ordered or pursuant to subpoena by a court of competent jurisdiction.

This authority even exceeds the authority of the IRS which MUST disclose tax returns if a court determines there is reasonable cause to believe a specific criminal act has been committed and there is reasonable cause to believe the return information is or may be relevant the criminal matter. See 26 USC § 6103(i)(1)(B). If HB 1088 were to pass, a Federal Law Enforcement agent could receive a Federal District Judge's approval for the disclosure of Federal Tax returns but the agent or any State agents could not also access State tax returns.

Certainly, tax returns are very personal and should be closely guarded which is why multiple sections of NDCC consider returns secret. Under current law, these sections do exactly what they are suppose to do which is balance the secrecy of personal information versus the ability to pierce that secrecy by court order. Having the legislature insulate an executive branch of government from judicial process creates a dangerous precedence and hampers the pursuit of justice.

For the following reasons I ask that you do not support House Bill 1088.
Thank you.

Testimony 3

TO: HOUSE FINANCE AND TAXATION COMMITTEE
FROM: Paul D. Laney, Sheriff, Cass County Government
RE: HB 1088--Confidentiality of income tax & sales & use tax returns and return Information
Date: Tuesday January 13, 2009

Good Morning Mr. Chairman and Representatives of the House Finance and Taxation Committee. I am Paul D. Laney and I am the Sheriff of Cass County and I am here to oppose this bill.

As a law enforcement officer sworn to uphold and protect the Constitution of the United States and the Constitution of the State of North Dakota, I take great pride in pursuing and bringing to justice those who defy the laws of this great state. I do so within the confines and parameters set forth by the legislative and judicial processes of the State of North Dakota.

When a crime is identified we apply accepted investigative techniques to solve these crimes. They involve process of the crime scene(s), interview/interrogation of person(s) involved and the obtaining of all records involved with the case. The goal is to bring a solid case before the courts to bring successful prosecution to those who defy the laws of this state.

When met with a situation where we must ask another party, organization or agency, whether private or public, to turn over documents to us, we do not enter the premises and demand the records. Instead, we follow the core values of our criminal justice process and we present our case before the courts and ask for a judicial subpoena or search warrant be issued to us outlining the specific records, items, property that we need to investigate that particular case. If the courts find merit in our request, they issue the appropriate subpoena or warrant and we then serve the subpoena or warrant and obtain the documents we need for the investigation. It is the foundation of how law enforcement operates and judicial review through our court system is the appropriate legal process.

This bill however would deny that process. This bill would allow a state agency, the Office of the North Dakota Tax Commissioner to be exempt from judicial review unless in specific situations such as Violence, Kidnapping or National Defense. I have never seen a case where we would need tax records to prove kidnapping, but I know of cases where tax records will demonstrate on-going criminal enterprise.

This bill is a bad bill for North Dakota and it literally puts handcuffs on law enforcements ability to utilize the judicial process to obtain records pertinent to a specific case. I am recommending this bill be defeated.



STATE OF NORTH DAKOTA
OFFICE OF STATE TAX COMMISSIONER
Cory Fong, Commissioner

**TESTIMONY BEFORE THE
SENATE FINANCE AND TAXATION COMMITTEE
ENGROSSED HOUSE BILL 1088
March 11, 2009**

Chairman Cook, members of the Senate Finance and Taxation Committee, my name is Donnita Wald, General Counsel to the North Dakota Office of State Tax Commissioner, and I am here to today in support of Engrossed House Bill 1088.

BACKGROUND

Since 1923, when the first state-administered income tax was first enacted, our State's tax statutes have contained provisions protecting the confidentiality of information filed with the Tax Commissioner's office. Legislators over the years have maintained that strong stand. Confidentiality statutes are essential to North Dakota's voluntary tax system. We rely completely on taxpayer's voluntarily providing our office their sensitive personal and financial information.

Confidentiality statutes are the Legislature's promise to the taxpayers that if you provide personal information to the state, we will insure that it will not be disclosed for any purpose that the Legislature has not specifically approved. This is a long-standing promise which we at the Tax Department feel is our duty to vigilantly enforce.

In my tenure with the Tax Department, this duty to uphold the state's confidentiality statutes and those of law enforcement have, at times, conflicted. It was one of these situations that recently occurred that prompted the Tax Commissioner to propose HB 1088.

EXPLANATION OF BILL PROVISIONS

USE OF CONFIDENTIAL INFORMATION FOR TAX COMPLIANCE PURPOSES.

The first proposed change is contained on Page 3, lines 3 through 9 and is a proposed change to subsection 5 of N.D.C.C. § 57-38-57, the income tax confidentiality statute.

Currently, this provision allows the Tax Department to use information from partnership returns to pursue compliance issues we may have with the partners of that partnership, and to use information filed by employers, for example the W-2 form, for individual income tax compliance purposes. The changes we propose today will allow the Tax Department to use information filed by a fiduciary and by a subchapter S corporation for individual income tax compliance purposes.

In other words, this will allow the Department to make sure that the beneficiaries of a trust and the shareholders of a subchapter S corporation are complying with the income tax laws.

USE OF CONFIDENTIAL INFORMATION FOR LAW ENFORCEMENT PURPOSES.

The second proposal contained in Engrossed House Bill 1088 creates new subsections to the confidentiality statutes for income taxes and sales and use taxes (Sections 1 and 2 of the Bill, respectively). These new subsections create an exception to these laws by allowing the Tax Commissioner's office to disclose confidential tax information to law enforcement officials if a court determines that all four of the following conditions are met:

1. there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
2. there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act;
3. the return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
4. the information sought to be disclosed cannot reasonably be obtained under the circumstances from another source.

These four factors are mirrored after the Internal Revenue Code provisions that allow disclosure of federal tax return information for federal law enforcement purposes.

The Tax Department is also proposing that 10 days notice before the hearing on the application be provided to the Tax Commissioner, giving the Department an opportunity to appear before the court. We believe this provision serves two purposes. First, it maintains the procedure that historically has been used to obtain sensitive tax information – the subpoena duces tecum. This procedure gave the Tax Department the opportunity to appear before a court and explain why the returns should not be disclosed, for example, we were conducting our own investigation. The second reason is that we believe our staff would be able to provide the court unbiased, explanatory information with respect to the information contained on the return and the underlying tax provisions. This will be particularly important when the return was electronically filed because the information will not be provided in a manner that is easily understandable by either the court or law enforcement officials.

The final change we are asking be made to the confidentiality laws relates to disclosure of information in “emergency situations.” This new exception to the confidentiality statutes will allow the disclosure of confidential tax information without a court order in circumstances

involving national security, imminent threats of injury to a persons or property, or to prevent the kidnapping, abduction or removal of a child from the state in violation of a custody order.

We understand the law enforcement community is concerned that having a court hearing with Tax Department participation will impede their ability to investigate crimes. Please be assured that the intent of this proposal is not to impede law enforcement, but rather is the Tax Department's attempt to balance the State's interest in maintaining the integrity of its voluntary tax system and the legislature's contract with its citizens that disclosure is only made in limited circumstances.

We believe Engrossed House Bill 1088 fairly balances the interests of law enforcement with the State's interest in preserving the voluntary tax system.

The Tax Commissioner respectfully requests that the Committee give this proposal favorable consideration.

#2

TO: SENATE FINANCE AND TAXATION COMMITTEE

FROM: Paul D. Laney, Sheriff, Cass County Government

RE: HB 1088--Confidentiality of income tax & sales & use tax returns and return information

Date: Wednesday March 11, 2009

Good Morning Mr. Chairman and Senators of the Finance and Taxation Committee. I am Paul D. Laney and I am the Sheriff of Cass County and I am here to oppose this bill.

As a law enforcement officer sworn to uphold and protect the Constitution of the United States and the Constitution of the State of North Dakota, I take great pride in pursuing and bringing to justice those who defy the laws of this great state. I do so within the confines and parameters set forth by the legislative and judicial processes of the State of North Dakota.

When a crime is identified we apply accepted investigative techniques to solve these crimes. They involve process of the crime scene(s), interview/interrogation of person(s) involved and the obtaining of all records involved with the case. The goal is to bring a solid case before the courts to bring successful prosecution to those who defy the laws of this state.

When met with a situation where we must ask another party, organization or agency, whether private or public, to turn over documents to us, we do not enter the premises and demand the records. Instead, we follow the core values of our criminal justice process and we present our case before the courts and ask for a judicial order, in most cases a search warrant, to be issued to us outlining the specific records, items, and/or property we need to investigate a particular case.

If the courts find merit in our request, they issue the appropriate court order and we then serve the order and obtain the documents we need for the investigation. An example of when we apply this process is the obtaining of files/documents from private businesses, phone records from phone companies, and medical records from hospitals where they are governed by federal HIPPA regulations. We can only obtain these records if they are directly tied to a criminal investigation and we can demonstrate to the court why these records pertain to the successful conclusion of our case. It is the foundation of how law enforcement operates and judicial review through our court

system is the appropriate legal process. This system is tried, true and proven many times over.

This bill however would deny that process. This bill would allow a state agency, the Office of the North Dakota Tax Commissioner, to be exempt from honoring the court order unless a hearing is held within 10 days. This hearing could compromise confidential information because we would have to divulge what evidence we have that caused us to apply for the search warrant in the first place and possibly hinder or delay our investigation while we explain why we need the information. This "hearing" has already been conducted before the courts when we applied for the warrant. We are required to have a higher standard of proof to obtain the warrant than a subpoena process and we would not have been given the warrant unless the judge concurs that the request is a valid request.

The system and the process are fine the way it is. It is not broken and to put a process into place that hinders criminal investigations to appease one specific state agency is setting a bad precedent. This bill is a bad bill for North Dakota and it literally puts handcuffs on law enforcements ability to utilize the judicial process to obtain records pertinent to a specific case.

While progress has been made in discussions with the Office of the Tax Commissioner and his legal counsel, it is hard to compromise on a bill that changes the dynamics of how crimes are investigated and information obtained. If an acceptable agreement cannot be reached, then I strongly recommend this bill be defeated.

3
Comments from Tax Commissioner Cory Fong on HB 1088

As you know from your work on the Finance and Tax Committee, preserving the confidentiality of taxpayer information is at the heart of what we do.

The state's strict confidentiality laws, laws that this legislature has enacted over the years, are fundamental to our individual income tax system and voluntary compliance. We require taxpayers to file with us their personal information, along with an accurate accounting of their sources of income and the associated tax due, so that we can do our job of collecting those taxes from them.

This exchange of information, this relationship, establishes a contract – a contract between the taxpayer and the Tax Department that requires the department to preserve the confidentiality of taxpayers private information.

Last fall the Tax Dept was served by law enforcement with a search warrant for a taxpayer's income tax return. Law enforcement was seeking the information as a part of an on-going criminal investigation. Due to the way search warrants are carried out, the Tax Department did not have the chance to make the case before a judge that the information being sought by law enforcement was protected under the confidentiality provisions, which as you know are so fundamental to our state's system of taxation.

HB 1088 is the result of this specific situation and is intended to strike a balance between the duties and responsibilities of the Tax Department to preserve taxpayer confidentiality and the need of law enforcement to gain access to this information under limited circumstances to advance a criminal investigation.

The bill has seen changes since its introduction. Many of those changes were aimed at addressing concerns that were offered by the law enforcement community on the House side.

However, I understand the law enforcement community continues to have serious concerns about the current form of the legislation. They are here today to outline those concerns.

Yesterday, our department had a lengthy and productive discussion with those representing parts of the law enforcement community, the State's Attorneys Assn and the Sheriffs. I believe we made progress in better understanding one another's perspective on this issue and we discussed several ideas that may address the needs of the Tax Department and the law enforcement community.

We look forward to working with this committee, as we do throughout the session, the law enforcement community, and other interested parties, to refine these ideas into workable solutions that strike a balance between our needs.

One thing that we know we agree on - the Tax Department and the state's law enforcement community are on the same side. We want people to comply with the laws of the state.

#1
98119.0200

FIRST ENGROSSMENT

Sixty-first
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1088

Introduced by

Finance and Taxation Committee
(At the request of the Tax Commissioner)

A BILL for an Act to amend and reenact subsections 1 and 5 of section 57-38-57 and subsection 1 of section 57-39.2-23 of the North Dakota Century Code, relating to the confidentiality of income tax and sales and use tax returns and return information.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsections 1 and 5 of section 57-38-57 of the North Dakota Century Code are amended and reenacted as follows:

1. a. Except ~~when otherwise directed by judicial order, or~~ as is otherwise specifically provided by law, the tax commissioner, the tax commissioner's deputies, agents, clerks, and other officers and employees, may not divulge nor make known, in any manner, whether or not any report or return required under this chapter has been filed, the amount of income, or any particulars set forth or disclosed in any report or return required under this chapter, including the copy or any portion thereof or information reflected in the taxpayer's federal income tax return that the tax commissioner may require to be attached to, furnished with, or included in the taxpayer's state income tax return. This provision may not be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof, or the inspection by the attorney general or other legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or any penalty imposed by this chapter. This section does not prohibit disclosure of the fact that a report or return required under this chapter has not been filed if the disclosure is made to further a tax investigation being conducted by the tax commissioner. Reports and returns must be preserved for three years and thereafter until the tax commissioner orders them to be destroyed.
- b. The commissioner shall disclose state tax return information pursuant to an order or subpoena issued by a court of competent jurisdiction upon application by a local, state, or federal law enforcement official if the court determines on the basis of the facts submitted by the applicant that:
 - (1) There is probable cause to believe that a specific criminal act has been committed and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense.

- (2) The return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act;
 - (3) The information sought to be disclosed cannot reasonably be obtained under the circumstances from another source; and
 - c. Prior to obtaining an order under this subdivision, a law enforcement official may request information from the tax commissioner as to whether a taxpayer, who is the subject of a criminal investigation for which return or return information is or maybe relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements.
 - d. If a federal, state, or local law enforcement agency provides written verification to the commissioner that disclosure of the return information is necessary for the purpose of national security or to prevent or to protect against a felony offense involving physical injury to a person; damage to an inhabited structure or vital public facility as defined in section 12.1-21-08; substantial interruption or impairment of public communications, transportation, or supply of water, gas, power, or other public service; or kidnapping, abduction, or removal of a child from this state in violation of a custody order, which is imminent and would be likely to occur if immediate disclosure is not made to the requesting law enforcement agency, the commissioner may disclose the necessary information without first receiving a court order or subpoena.
 - e. Except as required during court proceedings, tax return information disclosed to law enforcement under this subdivision shall remain confidential during an active criminal investigation, after such investigation or prosecution concludes, or after the time period for appeals has expired, whichever is later.
- 5. Notwithstanding any other provision of law relating to confidentiality of information contained on returns, the tax commissioner may use information for income and withholding tax compliance purposes contained on any federal form W-2, or federal form 1099 filed under subsection 3 or 4 of section 57-38-60, a fiduciary return filed under section 57-38-07, a return filed by a subchapter S corporation under section 57-38-32, or a an information at the source return filed under section 57-38-42.

SECTION 2. AMENDMENT. Subsection 1 of section 57-39.2-23 of the North Dakota Century Code is amended and reenacted as follows:

- 1. a. The commissioner or an individual having an administrative duty under this chapter may not divulge or make known in any manner whatever the business affairs, operations, or information obtained from any person under any reporting requirement of this chapter, or by an investigation of any person in the discharge of official duty, or the amount or sources of income, profits, losses, expenditures, or any particulars set forth or disclosed in any return, or permit any return or copy or any book containing any abstract of particulars to be seen or examined by any individual.

- b. The commissioner shall disclose state tax return information pursuant to an order or subpoena issued by a court of competent jurisdiction upon application by a local, state, or federal law enforcement official if the court determines on the basis of the facts submitted by the applicant that:
- (1) There is probable cause to believe that a specific criminal act has been committed and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense;
 - (2) The return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act;
 - (3) The information sought to be disclosed cannot reasonably be obtained under the circumstances from another source; and
- c. Prior to obtaining an order under this subdivision, a law enforcement official may request information from the tax commissioner as to whether a taxpayer, who is the subject of a criminal investigation for which return or return information is or may be relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements.
- d. If a federal, state, or local law enforcement agency provides written verification to the commissioner that disclosure of the return information is necessary for the purpose of national security or to prevent or to protect against a felony offense involving physical injury to a person; damage to an inhabited structure or vital public facility as defined in section 12.1-21-08; substantial interruption or impairment of public communications, transportation, or supply of water, gas, power, or other public service; or kidnapping, abduction, or removal of a child from this state in violation of a custody order; which is imminent and would be likely to occur if immediate disclosure is not made to the requesting law enforcement agency, the commissioner may disclose the necessary information without first receiving a court order or subpoena.
- e. Except as required during court proceedings, tax return information disclosed to law enforcement under this subdivision shall remain confidential during an active criminal investigation, after such investigation or prosecution concludes, or after the time period for appeals has expired, whichever is later.

Sixty-first
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1088

Introduced by

Finance and Taxation Committee
(At the request of the Tax Commissioner)

A BILL for an Act to amend and reenact subsections 1 and 5 of section 57-38-57 and subsection 1 of section 57-39.2-23 of the North Dakota Century Code, relating to the confidentiality of income tax and sales and use tax returns and return information.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:
SECTION 1. AMENDMENT. Subsections 1 and 5 of section 57-38-57 of the North Dakota Century Code are amended and reenacted as follows:

1. a. ~~Except when otherwise directed by judicial order, or as is otherwise specifically~~ provided by law, the tax commissioner, the tax commissioner's deputies, agents, clerks, and other officers and employees, may not divulge nor make known, in any manner, whether or not any report or return required under this chapter has been filed, the amount of income, or any particulars set forth or disclosed in any report or return required under this chapter, including the copy or any portion thereof or information reflected in the taxpayer's federal income tax return that the tax commissioner may require to be attached to, furnished with, or included in the taxpayer's state income tax return. This provision may not be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof, or the inspection by the attorney general or other legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or any penalty imposed by this chapter. This section does not prohibit disclosure of the fact that a report or return required under this chapter has not been filed if the disclosure is made to further a tax investigation being conducted by the tax commissioner. Reports and returns must be preserved for three years and thereafter until the tax commissioner orders them to be destroyed.
- b. A court of competent jurisdiction may issue an order or subpoena directing the tax commissioner to disclose state tax return information to a local, state, or federal law enforcement official conducting a criminal investigation if the court determines that the facts submitted by the applicant satisfy the following:
 - (1) There is probable cause to believe that a specific criminal act has been committed and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense;

- (2) The return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
 - (3) The information sought to be disclosed cannot reasonably be obtained under the circumstances from another source.
 - c. Prior to obtaining an order under this subdivision, a law enforcement official may request information from the tax commissioner as to whether a taxpayer, who is the subject of a criminal investigation for which return or return information is or may be relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements.
 - d. Except as required during court proceedings, tax return information disclosed to law enforcement under this subdivision shall remain confidential during an active criminal investigation, after such investigation or prosecution concludes, or after the time period for appeals has expired, whichever is later.
- 5. Notwithstanding any other provision of law relating to confidentiality of information contained on returns, the tax commissioner may use information for income and withholding tax compliance purposes contained on any federal form W-2, or federal form 1099 filed under subsection 3 or 4 of section 57-38-60, a fiduciary return filed under section 57-38-07, a return filed by a subchapter S corporation under section 57-38-32, or a an information at the source return filed under section 57-38-42.

SECTION 2. AMENDMENT. Subsection 1 of section 57-39.2-23 of the North Dakota Century Code is amended and reenacted as follows:

- 1. a. The commissioner or an individual having an administrative duty under this chapter may not divulge or make known in any manner whatever the business affairs, operations, or information obtained from any person under any reporting requirement of this chapter, or by an investigation of any person in the discharge of official duty, or the amount or sources of income, profits, losses, expenditures, or any particulars set forth or disclosed in any return, or permit any return or copy or any book containing any abstract of particulars to be seen or examined by any individual.
- b. A court of competent jurisdiction may issue an order or subpoena directing the tax commissioner to disclose state tax return information to a local, state, or federal law enforcement official conducting a criminal investigation if the court determines that the facts submitted by the applicant satisfy the following:
 - (1) There is probable cause to believe that a specific criminal act has been committed and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense;
 - (2) The return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such act; and
 - (3) The information sought to be disclosed cannot reasonably be obtained under the circumstances from another source.

- c. Prior to obtaining an order under this subdivision, a law enforcement official may request information from the tax commissioner as to whether a taxpayer, who is the subject of a criminal investigation for which return or return information is or may be relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements.
- d. Except as required during court proceedings, tax return information disclosed to law enforcement under this subdivision shall remain confidential during an active criminal investigation, after such investigation or prosecution concludes, or after the time period for appeals has expired, whichever is later.

March 23, 2009

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1088

Page 2, line 7, replace "reasonable" with "probable" and remove ", based upon information believed"

Page 2, line 8, remove "to be reliable," and after "committed" insert "and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense"

Page 2, line 9, remove "There is reasonable cause to believe that the return or return"

Page 2, remove lines 10 through 11

Page 2, line 12, remove "(3)"

Page 2, line 14, replace "(4)" with "(3)"

Page 2, line 16, replace "The application provided for under subdivision b must be served on the tax" with "Prior to obtaining an order under this subdivision, a law enforcement official may request information from the tax commissioner as to whether a taxpayer, who is the subject of a criminal investigation for which return or return information is or maybe relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements."

Page 2, remove lines 17 through 21

Page 3, after line 2, insert:

"e. Except as required during court proceedings, tax return information disclosed to law enforcement under this section shall remain confidential both during an active criminal investigation and after such investigation, prosecution concludes or the time period for appeals has expired, whichever is later."

Page 3, line 24, replace "reasonable" with "probable" and remove ", based upon information believed"

Page 3, line 25, remove "to be reliable," and after "committed" insert "and that the return or return information constitutes evidence of a criminal offense or may be relevant to a matter relating to the commission of the criminal offense"

Page 3, line 26, remove "There is reasonable cause to believe that the return or return"

Page 3, remove lines 27 through 28

Page 3, line 29, remove "(3)"

Page 4, line 1, replace "(4)" with "(3)"

Page 4, line 3, replace "The application provided for under subdivision b must be served on the tax" with "Prior to obtaining an order under this subdivision, a law enforcement official"

may request information from the tax commissioner as to whether a taxpayer, who is the subject of a criminal investigation for which return or return information is or maybe relevant to the commission of a criminal offense, has complied with the requirements of this chapter. For purposes of this request, the tax commissioner is limited to stating that the taxpayer has or has not complied with these requirements."

Page 4, remove lines 4 through 8

Page 4, after line 20, insert:

"e. Except as required during court proceedings, tax return information disclosed to law enforcement under this section shall remain confidential both during an active criminal investigation and after such investigation, prosecution concludes or the time period for appeals has expired, whichever is later."

Renumber accordingly