

2011 HOUSE JUDICIARY

HB 1392


2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1392
January 31, 2011
13709

☐ Conference Committee

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1392.

Rep. Tom Conklin: Sponsor, support. This bill only has one change that I've requested. In line 23 I've asked the words "or one" be changed to "and all". Businesses that tape conversations at this point, only need to inform one side of the conversation, obviously their side, that the conversation is being taped. I believe that is wrong. Both parties should be informed of the taping. Unfortunately, after I had this bill drawn up, I was informed that there is a flaw in it that needs some kind of exception for emergency services. My hope is that the committee will amend the bill to exempt the necessary entities.

Rep. Steiner: Did this come from a constituent or is this a concern, how did you bring this bill forward.

Rep. Conklin: My wife works at a bank and they started recording the conversations and they don't inform you that they are being recorded. I didn't think that was right. I don't care when I'm talking to my wife, but I think when you're talking to your loan officer that you should be informed that they are taping that conversation.

Chairman DeKrey: Thank you. Further testimony in support of HB 1392. Testimony in opposition to HB 1392. We will close the hearing.

** A Do Pass was proposed and seconded, but then discovered that an amendment was necessary to exempt emergency services, and all motions were withdrawn.

Rep. Onstad was tasked with drafting the amendment and whether such a notice is already in place in state law or federal law.

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1392
February 7, 2011
14127

☐ Conference Committee

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will take a look at HB 1392. Since we heard this bill, there wasn't opposition on the day we had the hearing. But now there are all kinds of opposition. Even though they missed the hearing, I guess we'll give them an opportunity to tell us why they don't like HB 1392.

Rick Clayburgh, President & CEO of ND Bankers Association: We are opposed to this bill. I have talked with Rep. Onstad and I understand a little bit of the original purpose of this bill. The way I understand it, an individual or constituent of Rep. Conklin's was concerned that in a situation of a bank, a conversation between a loan officer and the customer may be recorded, and the individual was concerned that maybe later on, somebody in the back room at the bank or somebody else at the bank would listen to the recording and hear some of the private conversations that the loan officer is having with that individual. I could relate several examples of this where it has helped. We surveyed our bank members, and a majority of the banks don't get involved with the process of taping the recording. If you've ever called your bank or a large regional bank, you will hear a recording that says this conversation may be recorded for quality assurance. That's the knowledge that the conversation is being recorded. If you go into one of our banks, you may see a sign on the loan officer's desk that says this conversation may be recorded. It's not done for malicious reasons. It is done for the protection of the customer and the bank in situations of trades or large loan situations. I am passing out the testimony of Marilyn Foss, who planned to be here, but had family obligations to handle (see attached 1). She was actually a bank customer that benefited by the fact that the conversation was recorded on a trade and she was able to go back, had the bank listen to the recording and realized that the bank had made an error on a trade, and Marilyn was held harmless. That's the purpose of the recordings. For us in a situation to ask for consent, to have both parties consent to it; what do we do in a situation where there is a financial trade occurring or a loan, or issues that could be material in the discussion and one of the parties, the customer says that they don't want this to be recorded. It creates a situation where the bank would have to say that they aren't going to do the transaction for you. This creates more of a concern, more confusion.

The banks don't sit down and listen to these taped conversations from the day before. They are there if something occurs that is a problem, they'll listen specifically to that portion of the tape to find out what was the communication, what was the discussion. I think you are going to hear from a number of other folks, but the way this bill is written, it creates a tremendous burden from the financial services standpoint, not only from law enforcement and the other standpoints that will be testifying. We certainly respect what Rep. Conklin was doing on behalf of his constituent. We just don't think it is necessary and the ND Bankers Association would ask that you put a Do Not Pass on HB 1392. I don't believe there is any amendment that would fix this bill.

Rep. Delmore: When I call a credit card company, often times if I get a real person because it takes a while to get there, I'm told, not asked, I'm told that my conversation may be recorded. Why would that not work for the banks? Or does this bill say it has to be approved.

Rick Clayburgh: That's what is currently happening. Our members who do record, and not a lot do, provide notice on telephone conversations. There may be times, there are a handful of banks that may have recording devices in their offices, dealing with transactions. It occurs more in a securities environment when trades are occurring. There is a notice on the desk, saying that this conversation may be recorded. The whole purpose of that is for the protection of both parties when you are dealing with trades, security transactions and large loan volumes, when they are complex issues in play. That's currently occurring and happens now.

Rep. Koppelman: Did this one sneak up on you. We didn't see you on the 31st.

Rick Clayburgh: As part of the financial services industry, we took a quick look at it and it didn't register with us that it was a concern until after the hearing and then after the hearing, Jack McDonald, with the Independent Community Bankers, really brought it to our attention that we had a problem. Upon further investigation, we found out the bill was in because of a concern, not actions, but just a concern from someone saying that they didn't think it was right that somebody may be able to listen to those conversations that were not originally part of the party.

Rep. Koppelman: Does this section of law deal only with financial institutions, or is this a broad issue like the bill appears to be on recording calls in general.

Rick Clayburgh: This is the section of Code that deals with wire and oral communications. So this does impact law enforcement, and others as well. Most of the changes in here are just legislative council making their adjustments, but the heart of it is lines 23 and 24. That does impact everyone who deals with this. The purpose of the bill is because of a concern about a bank using recordings, but this impacts anyone who would be using a tape recording.

Rep. Koppelman: It appears to me as I read those very lines that you're talking about, under current law, I thought there was some protection, at least notification, with regard to recordings. Maybe it comes from the kind of incidents that we are talking about, when so often we make telephone calls to whomever, we do hear that recording that says this call may be recorded. Is there some federal law or something else that requires notification.

Rick Clayburgh: Specifically I don't know the reason that our institutions are in the practice of providing that notice. I do know that under ND law, you just need the consent of one of the parties to the communication. I understand the reason why the legislature has determined that consent or notice down the road to the other party may not make sense. If you're dealing with a situation of domestic violence, or dealing with a law enforcement issue in a drug buy, you're not going to ask for notice later or ask for notice at the time. The same occurs for us, but I just think out of standard procedure, it is the procedure of our institutions to give notice if it's occurring. It's happening now, and that's why this came forward. This individual said I saw the notice that my conversation may be recorded. I don't want them to sit and listen to it later. It wasn't that they didn't want it recorded, they just didn't want someone else to listen to it, which is why the bill said to have consent of both parties. The person could have said I don't want to consent to it, because I don't want someone else in the bank listening to my conversations.

Rep. Koppelman: Sometimes bills like this, just as you didn't see the problem when you first looked at the bill, the committee maybe hears testimony and says this is a broader area that maybe we want to think about. In current law, you can record every phone conversation you've ever had with anyone, without telling anyone, and that would be perfectly legal.

Rick Clayburgh: You could do that at home and if you're one of the parties, you can record every conversation that goes on on your phone.

Rep. Hogan: Are there any national standards or state standards regarding how that information that might be recorded can be used. Are there any limitations on the use of that information.

Rick Clayburgh: Yes there are. It falls under the confidentiality statutes, all that information that our institutions receive are protected by confidentiality and for anyone to share that information would be opening that institution to liability.

Rep. Hogan: So there is protection for the information itself.

Rick Clayburgh: Yes there is.

Chairman DeKrey: Thank you. Further testimony in opposition.

Jack McDonald, Independent Community Banks of ND, State Bar Association, and ND Newspapers and Broadcasters: Opposed. They all in different ways make use of the statute. This has been the law for many, many years in ND. Mr. Clayburgh just mentioned about how the banks use this. They should probably use it a lot more because one of the real problems with conversations with customers, is two areas: 1) you made a commitment, and sometimes the loan officer will be talking to someone and then the customer will go out and make a commitment to buy some land, etc. based on a loan. Two or three days later, the bank turned down the loan, and the customer comes back and says you made a commitment, your loan officer made a commitment to me for this loan. The loan officer says no I didn't. So we don't have any way of showing that unless we had it recorded; and 2) discrimination purposes, I was denied a loan because of one of the discriminatory reasons, I was a woman, I was Native American, I was older, etc. That's a self-protection. Newspaper reporters, broadcasters, when they are doing investigative stories, they very often record the conversations they are having. People may not be talking to them if they had to get the consent. Then you will hear from the law enforcement people, but in my law practice, if I have a divorce client or a person under some abuse situations, they come to me and say we need to go to court because my ex-spouse, ex-boyfriend is harassing me, violating the court order, doing whatever, the first thing is we need some evidence. So you have to record those telephone conversations where he is accusing you of things, or threatening you and doing that sort of thing. Under this bill, that would not be possible, because as soon as you told the person that's being recorded, they would hang up. I think that for a lot of different reasons we just ask that you give a Do Not Pass to this bill. One other thing, and I would venture to answer one of the questions that Rep. Koppelman asked, under the Federal Communications Commission rules, which govern radio and TV broadcasting, you cannot record someone and use them on the air unless they consent to that. So if you call a call-in show, they have to tell you that it's being recorded and that your voice will be on the air, if it's going to be on the air. If a newspaper reporter or TV reporter just calls you, no, they don't need to tell you, but if they are going to use it on air, they've got to notify you.

Rep. Delmore: Do I always have the right to record a conversation as a private citizen; if I'm in a situation, be it a bank or whatever, do I have to tell someone that I'm recording this, if I go in there.

Jack McDonald: No. This is a provision of law that says that you can record the conversation. Many people do, in fact your telephone answering machines are kind of that way right now. I guess you know it, nobody asks you for consent, but leave a message and you are recording the telephone conversation, you didn't consent to it, but you're doing it.

Rep. Delmore: They can be used in a court of law.

Jack McDonald: That depends on the authenticity of it. Sometimes they can be used to show something, if you substantiate that with an affidavit, or if the person is

there to authenticate it. There are some questions about whether they were ginned up or made up those recordings. That's a matter before you can get them into evidence, but you have to have them first. Often times, they are not necessarily used for evidence, but used to back up a person filing a complaint.

Rep. Koppelman: What is the legal definition of the term "wire" communication.

Jack McDonald: That's an old definition. I'm not so sure if it is a wire definition. At one time it was meant to include electronic transmissions. Any kind of transmission over a literal wire. Whether it is a telephone line or some other line. It has been used now to cover digital non-wire type of communications but it probably is a definition that needs some updating, it's been around for a long time.

Rep. Koppelman: I suspected that was the case. We use all kinds of electronic communications these days and it talks about oral communication and then talks about wire communication as another type. It would appear to me that if that definition has been applied broadly as you suggest, perhaps emails could be considered wire communication. If that's true, would it be the case under this statute as it currently exists, that there would have to be some consent given by at least one of the people involved in an email before an email could be disseminated without their permission.

Jack McDonald: It could be, I'd have to look into that definition, in that section of criminal laws. There are all kinds of new communication devices, between the Facebook, Twitters, etc.

Chairman DeKrey: Thank you. Further testimony.

Aaron Birst, Association of Counties, speaking for our States Attorney members: I would turn it over to Rosa Larson. I was just thinking if that hearing was on the 31st, if it happened to be the blackout day.

Rosa Larson, President of the ND States Attorneys Association, and Ward County states' attorney: I am here to speak against this bill as it is. The one party consent is something that we use countless times in the prosecution of cases, anywhere from domestic violence to drug cases to gross sexual imposition to you name it. It is one of the most powerful tools our victims have out there, is recording conversations from their perpetrators. A prime example, about 12 years ago, we had a victim of GSI from her uncle. She called her uncle and that conversation was recorded. As you know, in many of those cases, we simply have a he said, she said. You don't have much, if any, physical evidence. Thank goodness, because of that phone conversation we were able to get a jury verdict of guilty on him. There are countless other times like that. In domestic violence cases, a violation of protection order cases, the domestic violence centers actually have recorders that are given to victims, also some law enforcement centers as well. That will help corroborate that the orders are being violated. Again, a lot of those are he said, she said situations.

Victims can get beaten down, not only by their perpetrators but also through the system, when time and time again of things being dismissed because of lack of evidence, this helps bring evidence to light. That helps them have the support to give them the strength to go forward in jury trial cases. In other cases, such as drug cases, a lot of the controlled buys are set up by pre-recorded phone calls of hey, you got an ounce for me, etc. Of course, CI's are wired for their protection as well as to get the transaction recorded by them. Every phone call that is made into the Minot Police Dept. is recorded, both for interview purposes and for security purposes to play back if somebody said they called in and filed a complaint, well then there is a record of it. Every phone call that is made into the Ward County Jail is recorded. In that instance, the inmates do know that their phone conversation are being recorded, and sometimes we listen to them, not on a regular basis, but if we do have some pretty bad guys being held without bond in jail, I listen to those. You hear this conversation is being recorded so be careful what you say and sometimes they are and sometimes they aren't. There's nothing better than hearing a suspect in jail say to a victim, how do you like that broken arm, and you deserved it. It helps me get an easier conviction. I can relate countless numbers of situations. The Association's position is that you kill the bill, because one party consent is a tremendous tool that are victim's need in their arsenal.

Rep. Boehning: Going back to the jail, you said you record all conversations coming in and out with an inmate.

Rosa Larson: The jail does, and there is a sign stating that the conversations are being recorded. That's allowed by federal law as well, because it is a security interest that the jail has on that. There's nobody sitting there listening to all those conversations day in and day out; but if we have one of particular interest that we're watching to see if there is something going on or who their other contacts are, if there are other suspects out there. We will have someone take a listen to them to see what's going on.

Rep. Boehning: So you're recording everything that goes on between the attorney and suspect.

Rosa Larson: No, absolutely not. We have an agreement with them, we know all the attorneys' numbers and so they are there, but we do not listen to those and all of our attorneys know that we do not listen to those, and if there was ever a violation I certainly would be in a whole lot more trouble than just talking to you about it, I would lose my license and I would face prosecution. We do not violate the attorney client privilege, because when the numbers come up, and we know the defense attorneys' numbers and we know that we don't listen to them. We usually know who their contacts are that we are most interested in anyway.

Rep. Koppelman: Is there anything in law that restricts in anyway the ability to record conversations that aren't telephone conversations. So if someone hides a

recording device on their person, in a purse or briefcase, and records a verbal exchange.

Rosa Larson: Currently this law says oral communication as well. In another situation, in other investigations, if I'm a victim or we have a victim and they have somebody in the room, so they put it on speakerphone. The other person in the room that's hearing that conversation, obviously they become a witness to what they've actually heard. The issue could be that they are eavesdropping. I can give you another situation, in a training video that I've seen in a domestic case, where a little child actually had his little play recorder, and it recorded Mom and Dad fighting, and Mom getting killed.

Rep. Koppelman: So the restrictions on disclosing information, I assume you're talking about subsection b here, so there is a restriction on disclosing that information would be the same whether you are recording with a tape recorder without someone's knowledge or recording over a telephone line.

Rosa Larson: Correct. If you overheard someone being threatened, you would be committing a crime if you passed that along to somebody. Currently we have the situation right now under investigation; hopefully leading to an arrest soon.

Rep. Onstad: When the bill says "it is a defense when the actor was authorized by law to intercept".

Rosa Larson: A lot of times, especially in domestic violence situations, you aren't preauthorized by law to intercept those calls, you're doing that to help and support yourself, so you are recording these conversations that are taking place because there has been a violation of a protection order or because they want to go in and get a protection order, so they recorded something to bring it in, they aren't acting under the direction of law enforcement at that point. They are acting under the direction of their own self-protection.

Rep. Klemin: If I have a recording device in my pocket and I am recording a face-to-face conversation with someone, how am I intentionally intercepting an oral communication.

Rosa Larson: It would be the disclosure of that communication that makes this a violation, if you intentionally disclose this to any person or intentionally uses the contents.

Rep. Klemin: Is that recording it on a face-to-face conversation considered an interception.

Rosa Larson: It would seem to be according to this. If you're recording it and then turn around and disclose that conversation to someone else. If you don't do anything with it, I don't know who would know that you are recording it. I think the

essence of this law is that you are listening to something and then you're disclosing that information. You're having your own personal conversation with someone.

Rep. Klemin: It says knowing that the information was being obtained through the interception. That seems to indicate to me that you have to be doing something to take a conversation between two other people to intercept it. If it is your own conversation, in a face-to-face meeting, I'm not quite sure how that's an interception.

Rosa Larson: I would think that that is the whole purpose of this is that right now you can do that, but the proposed changes in the law say that you can't do that without the other party's consent.

Chairman DeKrey: Thank you. Further testimony. I think the committee has got it pretty well.

Robyn Schmalenberger, Warden of State Pen, ND DOCR: Opposed (see attached 2).

Chairman DeKrey: Thank you. Further testimony.

Julie Lawyer, Prosecutor with the Attorney General's Office: We are here in opposition to HB 1392 for the same reasons that have already been mentioned. I just want to add one more comment in regard to victim communication with their perpetrators, or the person stalking or harassing them. As indicated there are some victim groups that do provide recording devices to victims, in case they do have contact with their perpetrator. In those instances, there are some situations where there is face-to-face contact and if a victim of domestic violence were to tell the perpetrator that they were being recorded and if they had to ask for their permission to record the call, you can all understand where that conversation would then go.

Chairman DeKrey: Thank you. Further testimony.

John Olson, ND Peace Officers Association: We are opposed as well.

Chairman DeKrey: Thank you. Further testimony.

Jeff Olson, Credit Union Association of the Dakotas: We are opposed.

Chairman DeKrey: Thank you. Further testimony.

Janelle Moos, Executive Director for the ND Council on Abused Women's' Services: We are opposed. We represent the victims in the 21 domestic violence/rape crisis centers and obviously echo all the concerns already addressed by the earlier testifiers.

Chairman DeKrey: Thank you. We will close the hearing. We will take up the bill. What are the committee's wishes in regard to HB 1392?

Rep. Hogan: I move a Do Not Pass.

Rep. Beadle: Second the motion.

14 YES 0 NO 0 ABSENT DO NOT PASS

CARRIER: Rep. Steiner

Date: 2/7/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1392

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☒ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Hogan Seconded By Rep. Beadle

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Guggisberg	✓	
Rep. Beadle	✓		Rep. Hogan	✓	
Rep. Boehning	✓		Rep. Onstad	✓	
Rep. Brabandt	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Steiner	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Steiner

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

REPORT OF STANDING COMMITTEE

HB 1392: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO NOT PASS**
(14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1392 was placed on the
Eleventh order on the calendar.

2011 TESTIMONY

HB 1392

1

TESTIMONY OF MARILYN FOSS
NORTH DAKOTA BANKERS ASSOCIATION
HB 1392

Mr. Chairman, members of the Judiciary Committee, I am Marilyn Foss, general counsel for the North Dakota Bankers Association. I am appearing this morning to oppose HB 1392 which requires all parties to a conversation to consent to recordation of the conversation. Current North Dakota law permits a conversation to be recorded with the consent of any party to the conversation. This is consistent with federal law and the laws of most states.

Most banks do not routinely record either face to face or telephone conversations. However, some do. Why? Because having a recording of what was said and who said it, usually eliminates those pesky, "he said/she said" sorts of problems. That can be extremely helpful when there is a disagreement as to what was said, what wasn't said, what was agreed, what was disagreed, what was left open and, last but not least, what a reasonable person would make of a conversation. Without recording, ordinary persons, including bankers, forget, parse, selectively remember, etc. With a recording, most questions are eliminated. Without a recording, the official "business record" of a conversation will most likely be a file memo that is written by the business and from the perspective of the business. Business records carry weight because businesses want their records to be accurate. But, accurate as they are, they are not transcripts. Recording can provide a perfect and verbatim record. That's why many court proceedings are now recorded, rather than transcribed.

Recordings help consumers. Let me share my own experience with a recorded telephone call. A few years ago I called a brokerage office and spoke to a person who was not my broker, but who was authorized to accept orders for trades. I directed the trade, noted when I received the confirmation (but did not check it) and went on about my business. Sometime later I was working on my taxes and I discovered the trade was not made. When I

called the brokerage firm, the initial reaction was to suggest that I wasn't recalling things accurately. I responded, "wasn't the call recorded?" To make a longish story short, the brokerage firm reimbursed me fully. That may have occurred even if the telephone call wasn't recorded, but it would have required me to convince them that the error was theirs, not mine. The recording made things a lot easier for me and for them.

I understand privacy concerns have been raised about business recordings of customer conversations. Under North Dakota and federal laws and regulations, a financial institution tape of a customer conversation is protected "customer information" just as are other types of bank records. As such the tape is protected from public disclosure without the customer's written consent. A financial institution that does not follow the state and federal laws for protecting records from disclosure may be fined, may be sued for money damages and may be required to pay the customer's attorneys fees.

North Dakota's current law is appropriate, realistic, and practical. For that reason we urge you to maintain it and recommend a DNP for HB 1392.

HOUSE JUDICIARY COMMITTEE
DUANE DEKREY, CHAIRMAN
February 7, 2011

ROBYN SCHMALENBERGER, NORTH DAKOTA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
PRESENTING TESTIMONY RE: HB 1392

Good afternoon Mr. Chairman and members of the House Judiciary Committee. For the record my name is Robyn Schmalenberger and I am the Warden of the North Dakota State Penitentiary. I am testifying in opposition to HB 1392.

The current language in NDCC 12.1-15-02 allows the interception of any wire or oral communication by use of any electronic, mechanical, or other device if the actor was a party to the communication or one of the parties to the communication had given prior consent to such interception. This allows the Department of Corrections and Rehabilitation to monitor and record inmate telephone calls without obtaining consent of all parties to the communication. The proposed amendment to 12.1-15-02 subsection 3 (c) will require the Department of Corrections and Rehabilitation to obtain consent from the party the inmate is calling prior to recording the telephone call.

The DOCR currently records all inmate telephone calls, excluding telephone calls with attorneys. Prior to starting the phone conversation all parties are notified the call is being monitored, but consent is not obtained from the party the inmate is calling. The ability to monitor all inmate telephone calls is imperative to the security and safety of correctional facilities and to the safety of the public.

The DOCR is responsible for the safety of inmates placed in our custody. Staff members have been alerted to inmates experiencing personal issues, inmates in crisis, and inmates planning suicide attempts by monitoring telephone calls. The early intervention made possible by the information obtained in the telephone calls has very likely saved lives.

Many inmates have restrictions on contact with certain individuals including juveniles and victims. The DOCR has a legal obligation to enforce orders restricting contact. Through the monitoring of telephone calls we have intervened on telephone contact between offenders and victims, and telephone contact between sex offenders attempting to establish relationships with minors. Requiring consent of all parties to the communication will limit our ability to verify with whom the inmate is talking. Inmates will easily violate court orders without detection.

Some inmates continue to engage in criminal behavior while incarcerated and solicit the assistance of people in the community to smuggle contraband into the institutions or plan escape attempts. The introduction of contraband including drugs and weapons to correctional institutions is a major breach in security and places inmates, staff, and the public in danger. The ability to monitor inmate telephone calls has allowed the DOCR to identify people trafficking contraband into the institutions, and prevent the contraband from getting to inmates. Escapes have also been thwarted through information obtained by our ability to monitor and record telephone calls. This bill will give inmates an open and uncensored line of communication to the outside, providing them a huge advantage when planning criminal acts. We are currently able to avoid many risks due to our success with phone monitoring.

House Bill 1392 will take away a critical information gathering tool used daily by correctional employees. This will impact public safety and the security and safety of correctional institutions. Please consider a due not pass recommendation of HB 1392.