

2021 SENATE JUDICIARY

SB 2107

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2107
1/11/2021

A BILL relating to an exemption of certain internal investigation records of the department of corrections and rehabilitation.
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10:28 AM Chairman Larson called the committee to order at 10:28am, and took the roll. Senators present: Larson, Dwyer, Bakke, Fors, Heitkamp, Luick, Myrdal

Discussion Topics:

- Employee safety during investigations

Travis Engelhardt, Director of Human Resources ND Department of Corrections and Rehabilitation, introduced SB 2107 and testified in favor #380 (10:29am).

Sarah Elmquist-Squires, North Dakota Newspaper Association, provided oral testimony in opposition of SB 2107 (10:36am)

Travis Finck, Executive Director of the ND Commission on Legal Counsel for Indigents, testified neutral #408 (10:38am)

Chairwoman Larson adjourned the hearing at 10:41am

Jamal Omar, Committee Clerk

**SENATE JUDICIARY COMMITTEE
SENATOR DIANE LARSON, CHAIR
JANUARY 11, 2021**

**NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION
TRAVIS ENGELHARDT, DIRECTOR, HUMAN RESOURCES
PRESENTING TESTIMONY IN SUPPORT OF SENATE BILL 2107**

Madam Chairman Larson and members of the Judiciary Committee, my name is Travis Engelhardt, and I am the Director of Human Resources for the North Dakota Department of Corrections and Rehabilitation (DOCR). I am here to testify on behalf of the department in support of Senate Bill 2107, which enacts a new section to Chapter 54-23.3 of the North Dakota Century Code.

Senate Bill 2107 offers some confidentiality protection for a DOCR employee, victim, or witness who participates in an internal investigation of alleged misconduct and/or criminal conduct. In addition, this bill provides the same protection to inmate correctional confidential informants who provide information for an internal investigation of possible employee or inmate misconduct or potential criminal conduct. The bill classifies records that could identify the employee, a victim, a witness, or inmate correctional confidential informant as exempt, which means the DOCR has discretion whether to redact records when requested through an open records request.

The primary purpose of Senate Bill 2107 is safety. The DOCR can compel an employee to participate honestly and completely in an internal investigation or potentially face disciplinary action, up to and including termination of employment. But currently we cannot offer the employee any confidentiality, as internal investigation

reports are open records under N.D.C.C. Subsection 44-04-18.1(6) when completed or after seventy-five days, whichever is sooner. Another employee or an inmate's family member or friend could request an investigation report and relay the information to an inmate or to connections outside the facility, which could put the employee who did their job and told the truth, at risk of harm or retaliation. There are existing laws that also are designed to protect safety, including criminal laws, retaliation protections, and facility rules. Most of the time these provide sufficient protection for victims, witnesses, employees and inmates participating in internal investigations. However, Senate Bill 2107 offers an additional layer of protection in an extreme situation and preserves the DOCR's ability to investigate and find the truth about allegations of misconduct or criminal offenses.

The DOCR intends to withhold records under the new section created by Senate Bill 2107 only in rare situations in which the employee, victim, witness, or inmate providing information in an internal investigation has been threatened or believes her or his safety is in imminent danger due to participation in an internal investigation. Senate Bill 2107 is not intended to withhold records when they are requested by law enforcement, through subpoena duces tecum, or pursuant to a court order. Instead, Senate Bill 2107 offers protection to employees, victims, witnesses, and inmates, who fear for their safety because of information provided to an investigator. In the last four years, only two examples come to mind for which this exception likely would have been used.

The first example was an investigation into a DOCR employee's alleged misconduct from two years ago. While interviewing several employees, we learned through a third employee of an alleged sexual assault perpetrated by the employee being investigated against another employee. Both the employee telling us of the assault and the alleged victim, who was also an employee, were hesitant to provide information due to fear, based on prior behavior and threats.

The second example was an employee who was interviewed regarding potential criminal activity by an inmate with connections to organized crime and evidence of methods of communication and influence outside of the prison. The employee worked inside the facility and was concerned for the employee's safety if the inmate found out.

Madam Chairman Larson and members of the Judiciary Committee, I ask that you support Senate Bill 2107. I will now stand for questions.

SB 2107
Senate Judiciary Committee
January 11, 2021
Testimony of Travis W. Finck, Executive Director, NDCLCI

Madam Chair Larson, Vice Chair Dwyer, members of the Senate Judiciary Committee, my name is Travis Finck and I am the executive director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for the delivery of indigent defense in North Dakota. I rise today to provide neutral testimony on SB 2107.

Senate Bill 2107 seeks to make exempt certain records of employees for the North Dakota Department of Corrections and Rehabilitation. The only concern the Commission on Legal Counsel has is to make sure any information that may be Brady material would still be required to be disclosed to counsel, when appropriate. Brady v. Maryland, was a landmark U.S. Supreme Court case that requires a prosecutor to turn over all information that may be exculpatory to a defendant. This bill could limit that right. The most pertinent example would be in the case of an assault that occurs on DOCR property. If an inmate wants access to a correctional officer's records to determine if that officer had been investigated for overly aggressive handling of inmates, that information should be provided. If a record is exempt, it would allow the Department of Corrections to determine whether a record is potentially exculpatory.

It is my understanding the Department intends on disclosing any such material when requested by law enforcement or a party to a court action. Therefore, I would respectfully request the committee consider the concern of this bill's impact on Brady material.

Respectfully Submitted this 11th day of January 2021:



Travis W. Finck

Executive Director, NDCLCI

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2107
1/13/2021

A BILL for an Act to create and enact a new section to chapter 54-23.3 of the North Dakota Century Code, relating to an exemption of certain internal investigation records of the department of corrections and rehabilitation.

Meeting called to order, all Senators are present: **Myrdal, Luick, Dwyer, Heitkamp, Bakke, Fors, and Larson** [2:25]

Discussion Topics:

- Process of requesting state records
- Requirements for initiating a record request

Travis Engelhardt, ND Department of Corrections Proposed an Amendment
[LC 21.8103.01001] #380 [2:25]

Travis Finck, Legal Council for Indigents testimony in support #408 [2:27]

Senator Luick moved to adopt the amendment
[LC 21.8103.01001] [2:27]

Senator Myrdal seconded the motion
[2:28] Motion passed 7-0-0

Vote to Adopt Amendment	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	Y
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Senator Luick moved to DO PASS AS AMENDED
[2:28] **Senator Heitkamp** seconded the motion
[2:29] Motion passed 7-0-0

Senator Bakke carried the bill

Senators	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	Y
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Meeting Adjourned [2:30]

Clerk Signiture, Jamal Omar

January 13, 2021

SK
1/13

PROPOSED AMENDMENTS TO SENATE BILL NO. 2107

Page 1, line 8, after "44-04-18.1" insert "and except as required under subsection 1 of section 44-04-18.11"

Page 1, line 9, replace "correction" with "corrections"

Page 1, line 9, replace "the" with ":

1. The"

Page 1, line 11, after "informants" insert "; and

2. Disclosure would cause a credible threat of violence or other harm"

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2107: Judiciary Committee (Sen. Larson, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2107 was placed on the Sixth order on the calendar.

Page 1, line 8, after "44-04-18.1" insert "and except as required under subsection 1 of section 44-04-18.11"

Page 1, line 9, replace "correction" with "corrections"

Page 1, line 9, replace "the" with ":

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Page 1, line 11, after "informants" insert "; and

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**SENATE JUDICIARY COMMITTEE
SENATOR DIANE LARSON, CHAIR
JANUARY 11, 2021**

**NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION
TRAVIS ENGELHARDT, DIRECTOR, HUMAN RESOURCES
PRESENTING TESTIMONY IN SUPPORT OF SENATE BILL 2107**

Madam Chairman Larson and members of the Judiciary Committee, my name is Travis Engelhardt, and I am the Director of Human Resources for the North Dakota Department of Corrections and Rehabilitation (DOCR). I am here to testify on behalf of the department in support of Senate Bill 2107, which enacts a new section to Chapter 54-23.3 of the North Dakota Century Code.

Senate Bill 2107 offers some confidentiality protection for a DOCR employee, victim, or witness who participates in an internal investigation of alleged misconduct and/or criminal conduct. In addition, this bill provides the same protection to inmate correctional confidential informants who provide information for an internal investigation of possible employee or inmate misconduct or potential criminal conduct. The bill classifies records that could identify the employee, a victim, a witness, or inmate correctional confidential informant as exempt, which means the DOCR has discretion whether to redact records when requested through an open records request.

The primary purpose of Senate Bill 2107 is safety. The DOCR can compel an employee to participate honestly and completely in an internal investigation or potentially face disciplinary action, up to and including termination of employment. But currently we cannot offer the employee any confidentiality, as internal investigation

reports are open records under N.D.C.C. Subsection 44-04-18.1(6) when completed or after seventy-five days, whichever is sooner. Another employee or an inmate's family member or friend could request an investigation report and relay the information to an inmate or to connections outside the facility, which could put the employee who did their job and told the truth, at risk of harm or retaliation. There are existing laws that also are designed to protect safety, including criminal laws, retaliation protections, and facility rules. Most of the time these provide sufficient protection for victims, witnesses, employees and inmates participating in internal investigations. However, Senate Bill 2107 offers an additional layer of protection in an extreme situation and preserves the DOCR's ability to investigate and find the truth about allegations of misconduct or criminal offenses.

The DOCR intends to withhold records under the new section created by Senate Bill 2107 only in rare situations in which the employee, victim, witness, or inmate providing information in an internal investigation has been threatened or believes her or his safety is in imminent danger due to participation in an internal investigation. Senate Bill 2107 is not intended to withhold records when they are requested by law enforcement, through subpoena duces tecum, or pursuant to a court order. Instead, Senate Bill 2107 offers protection to employees, victims, witnesses, and inmates, who fear for their safety because of information provided to an investigator. In the last four years, only two examples come to mind for which this exception likely would have been used.

The first example was an investigation into a DOCR employee's alleged misconduct from two years ago. While interviewing several employees, we learned through a third employee of an alleged sexual assault perpetrated by the employee being investigated against another employee. Both the employee telling us of the assault and the alleged victim, who was also an employee, were hesitant to provide information due to fear, based on prior behavior and threats.

The second example was an employee who was interviewed regarding potential criminal activity by an inmate with connections to organized crime and evidence of methods of communication and influence outside of the prison. The employee worked inside the facility and was concerned for the employee's safety if the inmate found out.

Madam Chairman Larson and members of the Judiciary Committee, I ask that you support Senate Bill 2107. I will now stand for questions.

SB 2107
Senate Judiciary Committee
January 11, 2021
Testimony of Travis W. Finck, Executive Director, NDCLCI

Madam Chair Larson, Vice Chair Dwyer, members of the Senate Judiciary Committee, my name is Travis Finck and I am the executive director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for the delivery of indigent defense in North Dakota. I rise today to provide neutral testimony on SB 2107.

Senate Bill 2107 seeks to make exempt certain records of employees for the North Dakota Department of Corrections and Rehabilitation. The only concern the Commission on Legal Counsel has is to make sure any information that may be Brady material would still be required to be disclosed to counsel, when appropriate. Brady v. Maryland, was a landmark U.S. Supreme Court case that requires a prosecutor to turn over all information that may be exculpatory to a defendant. This bill could limit that right. The most pertinent example would be in the case of an assault that occurs on DOCR property. If an inmate wants access to a correctional officer's records to determine if that officer had been investigated for overly aggressive handling of inmates, that information should be provided. If a record is exempt, it would allow the Department of Corrections to determine whether a record is potentially exculpatory.

It is my understanding the Department intends on disclosing any such material when requested by law enforcement or a party to a court action. Therefore, I would respectfully request the committee consider the concern of this bill's impact on Brady material.

Respectfully Submitted this 11th day of January 2021:



Travis W. Finck

Executive Director, NDCLCI

2021 HOUSE JUDICIARY

SB 2107

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary

Room JW327B, State Capitol

SB 2107
3/10/2021

Relating to an exemption of certain internal investigation records of the department of corrections and rehabilitation.

Chairman Klemin called the hearing to order at 8:30 AM.

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, and Vetter. Absent: Satrom

Discussion Topics:

- Exception lists
- Family safety

Travis Engelhardt, Director, Human Resources, DOCR: Testimony #7562 8:32

Chairman Klemin closed the hearing at 8:40.

Rep. Roers Jones: Do Pass Motion

Rep. Karls: Seconded

Todd Ewell: ND Commission for Indigents. Verbal testimony - Neutral

Roll Call Vote:

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	Y
Rep B. Satrom	A
Rep Vetter	Y
Rep Buffalo	N
Rep K. Hanson	Y

12-1-1 Motion carried - Carrier: Rep. Roers Jones

Chairman Klemin stopped 8:45

DeLores D. Shimek, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2107, as engrossed: Judiciary Committee (Rep. Klemin, Chairman) recommends **DO PASS** (12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). Engrossed SB 2107 was placed on the Fourteenth order on the calendar.

**HOUSE JUDICIARY COMMITTEE
REPRESENTATIVE LAWRENCE R. KLEMIN, CHAIR
MARCH 10, 2021**

**NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION
TRAVIS ENGELHARDT, DIRECTOR, HUMAN RESOURCES
PRESENTING TESTIMONY IN SUPPORT OF SENATE BILL 2107**

Mister Chairman Klemin and members of the Judiciary Committee, my name is Travis Engelhardt, and I am the Director of Human Resources for the North Dakota Department of Corrections and Rehabilitation (DOCR). I am here to testify on behalf of the department in support of Senate Bill 2107, which enacts a new section to Chapter 54-23.3 of the North Dakota Century Code.

Senate Bill 2107 offers some confidentiality protection for a DOCR employee, victim, witness, or correctional confidential informant who participates in an internal investigation of alleged misconduct and/or criminal conduct if disclosure of the records or a portion of the records pursuant to an open records request would reveal the individual's identity and cause a credible threat of violence or other harm. The bill classifies internal investigation records under these circumstances as exempt, which means the DOCR has discretion whether to redact records when requested through an open records request.

The primary purpose of Senate Bill 2107 is safety. The DOCR can compel an employee to participate honestly and completely in an internal investigation or potentially face disciplinary action, up to and including termination of employment. But currently we cannot offer the employee any confidentiality with regard to the content of

the investigation, as internal investigation reports are open records under N.D.C.C. Subsection 44-04-18.1(6) when completed or after seventy-five days, whichever is sooner. Another employee or an inmate's family member or friend could request an investigation report and relay the information to an inmate or to connections outside the facility, which could put the employee who did their job and told the truth, at risk of harm or retaliation. There are existing laws that also are designed to protect safety, including criminal laws, retaliation protections, and facility rules. Most of the time these provide sufficient protection for victims, witnesses, employees and inmates participating in internal investigations. However, Senate Bill 2107 offers an additional layer of protection in an extreme situation where there is a credible threat of violence or other harm and preserves the DOCR's ability to investigate and find the truth about allegations of misconduct or criminal offenses.

The DOCR intends to withhold relevant parts of records under the new section created by Senate Bill 2107 only in rare situations in which the employee, victim, witness, or inmate providing information in an internal investigation has been threatened or believes her or his safety is in imminent danger due to participation in an internal investigation. Senate Bill 2107 is not intended to withhold records when they are requested by law enforcement, through a subpoena duces tecum, or pursuant to a court order. Instead, Senate Bill 2107 offers protection to employees, victims, witnesses, and inmates, who fear for their safety because of information provided to an investigator when the information is requested through an open records request. In the last four years, only two examples come to mind for which this exception likely would have been used.

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The second example was an employee who was interviewed regarding potential criminal activity by an inmate with connections to organized crime. The employee worked inside the facility and was concerned for her safety if the inmate found out about the information she provided. There also was credible evidence of the inmate's methods of communication and influence outside of the prison, so there was reasonable fear for the safety of the employee in the community.

Mister Chairman Klemin and members of the Judiciary Committee, I ask that you support Senate Bill 2107. I will now stand for questions.