

2025 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1505

2025 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Pioneer Room, State Capitol

HB 1505
1/31/2025

Relating to immunity and an affirmative defense for individuals voting on legislation and closure of matters by the ethics commission; and relating to immunity from criminal prosecution, individuals' rights to appeals, confidential information, and conflicts of interest; and to declare an emergency.

10:20 a.m. Chairman Schauer opened the hearing.

Members present: Chairman Schauer, Vice Chairman Satrom, Representatives Bahl, Brown, Christy, Grindberg, Karls, McLeod, Rohr, Schneider, Steiner, VanWinkle, Vetter, Wolff

Discussion Topics:

- Clarity and fairness
- Proposed amendments for immunity of legislators.

10:21 a.m. House Leader Lefor, District 37, introduced the bill and submitted testimony, #33212.

10:29 a.m. Emily Thompson, Legislative Counsel, introduced proposed amendments #33213, LC#25.1244.01004.

10:48 a.m. Claire Ness, Chief Deputy Attorney General, testified in favor and submitted testimony, #33223.

10:58 a.m. Rebecca Brinstock, Executive Director of the North Dakota ethics commission, testified in opposition and submitted testimony, #33117.

11:06 a.m. Lanny Kenner testified in opposition.

Additional written testimony:

Mike Lee submitted testimony in opposition, #31801.

Susan Dingle submitted testimony in favor, #32274.

Ladd Erikson, McLean County State's Attorney, submitted testimony in favor, #33153.

11:04 a.m. Chairman Schauer closed the hearing.

Jackson Toman, Committee Clerk

Testimony in Opposition to HB 1505

To the committee of House Government and Veterans Affairs, and all members of Legislature.

My name is Mike Lee and I reside in Rural Grand Forks County. As a former law enforcement officer, I find it appalling that any legislator would draft a bill and add an immunity clause against prosecution if an illegal act was committed during the legislative session. There are so many flaws with HB 1505 I find it repugnant. Representative Lefor and Senator Hogue should be ashamed to put their names on this bill, and it would appear to me they are involved in unethical and criminal acts already to even bring forth this bill. I oppose this bill and ask for a "DO NOT PASS"

Respectfully,

Mike Lee
724 27th street NE
Northwood, ND 58267
218-791-7309

Please vote YES and DO Pass on HB 1505. The ND Ethics Commission needs authority to act, and legislators need to take seriously complaints about conflicts of interest or other concerning behavior. Legislators are not above the law, and they cannot always self-regulate effectively and transparently. That is why the Ethics Commission was created and why it got voter support on the citizen-initiated referendum that added it to state law. There have been a couple of high-profile cases recently where legislative misbehavior and conflicts of interest were publicly reported and verified but the legislature did not see any violation or cause for complaint—when the violation [e.g., using state funds for private travel, using state funds to help fund a private business] was clearly such, and the legislators involved need to be disciplined not only under law but by the legislature itself. PASS HB 1505

Susan Dingle, District 35, a voter in every election



North Dakota Ethics Commission
House Bill 1505
Testimony presented by
Rebecca Binstock, Executive Director
Before the House Government and Veterans Affairs Committee
January 31, 2025

Good morning, Mr. Chair and Committee members, my name is Rebecca Binstock. I serve as the Executive Director of the North Dakota Ethics Commission.

North Dakota citizens created the Ethics Commission in 2018 by passing an initiated measure which created Article XIV of the North Dakota Constitution. The Ethics Commission ("Commission"), an independent constitutional entity, consists of five commissioners:

- Chair Dave Anderson (Bismarck)
- Vice-Chair Ward Koeser (Williston)
- Dr. Cynthia Lindquist (Grand Forks)
- Ron Goodman (Oakes)
- Murray Sagsveen (Bismarck)

HB 1505

HB 1505 addresses immunity for legislators under certain circumstances and amends the several provisions of the Commission's complaint process. While the Commission opposes the bill with its current language, it believes these concerns can be eased with an amendment to the bill.

The Commission's concerns arise in Sections 2, 3, and 5 of HB 1505.

SECTION 2 creates general immunity from criminal prosecution for legislators when they disclosure a personal or private interest. Section 2 also creates an affirmative defense in a criminal proceeding when the legislator adheres to "informal advice from a staff member of the ethics commission."

The above-quoted language is overly broad and could create evidentiary issues during a criminal trial. The Commission believes the protections afforded in Section 2 will work to promote proactive management of potential conflicts of interest and encourage disclosure of potential conflicts of interest. However, the current language places no parameters on how the advice is sought, provided, or documented. Therefore, the Commission recommends the language be amended to outline clear parameters that require a legislator rely on informal, written guidance issued by the executive director pursuant to Commission rules.

SECTION 3 of HB 1505 allows the executive director to close a matter at any time during an enforcement process. The language of Section 3 is similar to language included in the Commission's proposed enforcement rules to transition from the complaint process to an enforcement process. However, the Commission's rule vests that authority with the Commission, not the executive director. The authority to close a matter during the enforcement action should lie with the Commission (those appointed by the senate majority leader, senate minority leader, and the governor), not the executive director. The current language simply gives the executive director too much unilateral authority to dismiss an enforcement action.

Instead, the Commission recommends the language be amended to allow the Commission to settle or close a matter at any time during the enforcement action. Doing so places the authority to manage enforcement actions where it belongs, with the five commissioners.

SECTION 5 amends the confidentiality of the enforcement process, limiting the confidentiality of the information related to complaints or enforcement actions to apply only "when [it is] in the possession of the commission" and outlines specific disclosure provisions for state employees in subsections 5, 6, and 7. The Commission is concerned that under this language, as soon as records are no longer in the possession of the Commission, public servants (i.e. state employees) can disclose that information once it leaves the possession of the Commission. Under the current law, this is not permitted.

For example, during its investigations, the Commission frequently requests information in possession of other state offices. Under the current language of HB 1505, those requests for information are not in the possession of the commission and would no longer be confidential, effectively making information related to enforcement actions/complaints "open."

This structure is problematic. Nonetheless, there are needed changes to the confidentiality of information related to complaints/enforcement actions as the Commission has acknowledged in its testimony on HB 1360. The Commission recommends amending Section 5 to align with the language presented in HB 1360 to comply with First Amendment dictates while supporting the State's interest in ensuring the confidentiality of the complaint process/enforcement action.

The Commission must oppose the bill in its current form and supports an amendment addressing the Commission's concerns as outlined above.

Mr. Chair, that concludes my testimony, and I will gladly stand for any questions you may have.



A Proud Past – A Promising Future
McLean County
STATE OF NORTH DAKOTA

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Mr. Chairman and Members of the Committee:

My name is Ladd Erickson and I am the McLean County State's Attorney. I support the sections in HB1505 that address criminal law, and defer my opinion on the rest of the bill for want of expertise in those sections.

In November 2023, I was appointed as a special outside prosecutor by the Burleigh County State's Attorney, who had a conflict-of-interest in handling a complaint she had received from the North Dakota Ethics Commission regarding Representative Jason Dockter. The nature of the complaint dealt with a building project Rep. Dockter had a financial interest in as a private businessman but had also voted to appropriate money for the project while serving as a legislator - and the Ethic's Commission was mandated by statute to refer the matter to the Burleigh County State's Attorney.

An important role of an outside prosecutor is to ensure that the integrity of the entities involved is maintained and free of public concern that special treatment was given to those entities in the application of law. The entity in need of protection from public scrutiny in the Dockter case was the institution of the North Dakota Legislature. That's on one hand.

On the other hand, with a part-time citizen legislature, clarity is needed in conflict-of-interest laws and rules so people from all walks of life in North Dakota are willing to serve as legislators. To resolve this tension between the two hands in the Dockter case, I decided to add a defense to the charging

document (see attached) that required me to prove to the jury beyond a reasonable doubt that not only were the essential elements of offense violated, but also the conflict-of-interest rules of the North Dakota House of Representatives.

While the criminal provisions in HB1505 would not have changed how the Dockter case was charged or the jury verdict, because it's the same operative law that was used in that case, the bill does provide the necessary clarity to conflict-of-interest law so people have assurance that they will not have legal jeopardy when serving in the legislature if they follow the legislature's conflict-of-interest rules. Therefore, this is a good bill I respectfully request that you support.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota,

Plaintiff,

vs.

Jason Dean Dockter,

Defendant.

CRIMINAL COMPLAINT

Burleigh County Cr. #08-2023-CR-03618

The undersigned complainant, being first duly sworn, charges that on or before the 1st day of May, 2023, in Burleigh County, North Dakota, the above-named Defendant committed the offense of:

SPECULATING OR WAGERING ON OFFICIAL ACTION OR INFORMATION,
in violation of N.D.C.C. § 12.1-13-02 by then and there:

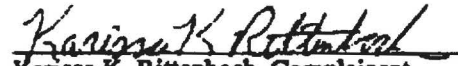
(1) A person is guilty of a class A misdemeanor if during employment as a public servant, or within one year thereafter, in contemplation of official action by himself as a public servant or by a government agency with which he is or has been associated as a public servant, or in reliance on information to which he has or had access only in his capacity as a public servant, he: (a) Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; (b) Speculates or wagers on the basis of such information or official action; or (c) Aids another to do any of the foregoing.

(2) A person is guilty of a class A misdemeanor if as a public servant he takes official action which is likely to benefit him as a result of an acquisition of a pecuniary interest in any property, transaction, or enterprise, or of a speculation or wager, which he made, or caused or aided another to make, in contemplation of such official action.

To-wit: As a member of the North Dakota House of Representatives, the defendant did the official action, as defined in N.D.C.C. § 12.1-01-04(20), of voting on legislative bills appropriating money to pay for property he had acquired a pecuniary interest in, and did so in violation of this section and the rules of the North Dakota Legislature.

Penalty Section: N.D.C.C. § 12.1-13-02
Class A Misdemeanor

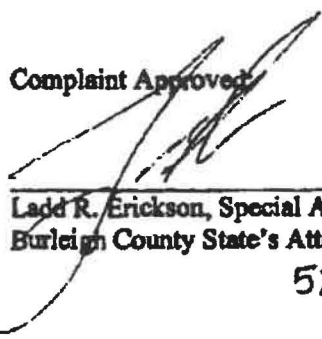
All of this against the peace and dignity of the State of North Dakota.


Karissa K. Rittenbach, Complainant


District Judge

12/21/2023

Complaint Approved


Ladd R. Erickson, Special Assistant
Burleigh County State's Attorney

5220

P.C. found based
upon testimony of
R. Binstock.

Representative Mike Lefor

HB 1505 Testimony

Good morning, Chairman Schauer and members of the House Government and Veterans Affairs committee, my name is Mike Lefor, and I represent District 37 – Dickinson in the House of Representatives. Today, I bring HB 1505 to you for your consideration.

When individuals run for election to the legislative assembly, they do so with the full realization they are giving up time with their family, friends and their businesses. We do so with the idea that we come to Bismarck to provide the best public policy and smart budgetary decisions.

We are a citizen legislature. The citizens of our state voted to create an Ethics Commission which was placed into our state's constitution. During that time, there has been confusion on behalf of many legislators as to who constitutes and what does not constitute a conflict of interest.

In answer to those questions, working with House rules and the wording contained in HB 1505, it creates a path for due diligence, clarity and a system of fairness.

In House rules, we created a method by which a legislator can stand up on the floor to declare a potential conflict of interest, the House floor then debates the issue serving as a “neutral reviewer” of the facts of the situation to determine whether there is a true conflict or not.

If the floor determines it is a conflict, the legislator does not vote on the bill. If the floor determines it is not a conflict the legislator may either vote on the bill or abstain from the vote.

HB 1505 takes over from there. I will go through the bill with you. On page 1, it largely changes the wording to the word “individual” for consistency in code. Beginning on page 2, line 3, it details the fact that an individual is immune from prosecution if they are a member of the legislative assembly when the official action was taken, it was a measure in front of either the House or the Senate and third, the individual adhered to legislative rules disclosing a personal or private interest to the members respective chamber or, if they did not recognize a potential conflict and voted on the measure, they need to notify the speaker of the House or president of the Senate.

Moving forward from there, it again states the individual is immune from criminal prosecution if they adhere to legislative rules or informal advice from a staff member of the ethics commission.

On page 2, beginning on line 29, it states that upon the completion of an informal investigation, the executive director shall close the matter or prepare a request to the commission to issue an alleged violation. Further, the executive director may close the matter at any time during the enforcement action.

This provides the executive director with the flexibility to move forward with the closing of cases which they do not have currently in code. On page 3, beginning on line 3, it gives flexibility as to where the appeal may be heard.

Section 5 was changed in some areas from "information" to "records," under state law "records" and not "information" can be made confidential under our open records laws. "Records" is defined in century code and state employees are familiar with it.

Section 5 gives more clarity into what confidential information through this process is. It states that the following is confidential information when in the possession of the commission. Most of our records laws say that records are confidential "in the possession" of an entity. For example, when someone gives a record to the commission, copies of the record may exist. The copy may be needed by another agency for normal work.

Under this bill, people could use those copies without being subject to prosecution. The bill further allows members of agencies, boards, commissions, to talk to each other about commission matters to the extent reasonably necessary to carry out their duties. For example, if one or more members are involved in an Ethics Commission investigation and must recuse themselves from something, they can now tell each other why and discuss how to manage the matter.

HB 1505 lets people talk to and share records with their lawyers about commission matters. This provides much needed clarity. Further, the bill lets people talk to and share records with - co-defendants, individuals with common interests, and individuals with relevant information about commission matters without risking prosecution for a felony.

It allows an individual to disclose a record or other information to their legal counsel, whether in the individual's personal or official capacity and to legal counsel for any department, board, agency, commission or other public entity to

which the individual belongs or in which the individual is employed. HB 1505 is about fairness, clarity, flexibility and transparency which is needed to ensure a fair process.

Members of the House Government and Veterans affairs committee HB 1505 is needed to provide proper due diligence procedures and the ability to vote on legislation without fear of criminal prosecution.

That completes my testimony and I would urge a "do pass" recommendation to the House of Representatives.

House Bill No. 1505

Amendment 25.1244.01004

Section 1

- (12.1-13-02) Speculating or wagering on official action or information.
 - Section 1 of the bill relates to the criminal offense for a public servant speculating or wagering on official action and gaining a benefit.
 - The bill provides criminal immunity to a legislator who discloses his or her conflict of interest before voting on a measure.

Section 2

- (New Section of Law) Voting on legislation - Immunity - Affirmative defense.
 - Section 2 provides broad criminal immunity for any charge that might be brought because a legislator voted on a measure if the legislator:
 - Discloses a conflict of interest;
 - Relies on the informal advice of the Ethics Commission Executive Director; or
 - Relies on the written guidance of the Ethics Commission.

Section 3

- (New Section of Law) Issuance of alleged violation - Closure of the matter.
 - This section relates to an enforcement action by the Ethics Commission.
 - Once an informal investigation is over, the Executive Director will provide a report to the Ethics Commission. The Ethics Commission will then:
 - Issue an alleged violation*,
 - Require more information, or
 - Close the matter.
 - Closing the matter may be accompanied by the issuance of an advisory opinion or informal guidance.
 - The Ethics Commission may close the matter at any time.

* An alleged violation leads to a formal investigation, hearing, and possibly a commission order that may include sanctions.

Section 4

- (54-66-10) Appeals.
 - Section 8 gives the accused individual more courts in which to appeal a final commission order
 - The section also sets a deadline of 30 days in which to make an appeal.

Section 5

- (54-66-12) Confidential information.
 - This section applies to confidentiality.
 - Before a final commission order has been issued, the information related to the investigation, including the identity of the respondent (accused individual), is confidential.
 - This section provides an exception to the confidentiality provision if the respondent (accused individual) agrees the information may be shared.
 - However, information identifying the individual who provided the information to the Ethics Commission is confidential. The respondent (accused individual) may not decide whether to share this information. Only the individual who provided information to the Ethics Commission may waive confidentiality in regard to disclosure of their identity.

Section 6

- (54-66-18) Conflicts of interest - Legislative assembly.
 - This section removes "direct" and "substantial" from the interests that must be disclosed by a legislator.
 - "Direct" was removed because it might be too broad (for instance: every legislator who owns property is directly receiving a property tax credit)
 - "Substantial" was removed because it might violate the Constitution of North Dakota. (Equal Protection dictates legislators may not be divided into different classes due to the amount of an interest)
 - The section retains the requirement for a legislator to disclose an "individual" and "unique" interest.
 - "Individual" means for a reason other than belonging to a group, including as a member of a profession, occupation, industry, region, or the general public.
 - "Unique" means in a way that is distinct from the public.

Section 7

- Emergency clause.

PROPOSED AMENDMENTS TO

HOUSE BILL NO. 1505

Introduced by

Representative Lefor

Senator Hogue

1 A BILL for an Act to create and enact a new section to chapter 54-03 and a new section to
2 chapter 54-66 of the North Dakota Century Code, relating to immunity and an affirmative
3 defense for individuals voting on legislation and closure of matters by the ethics commission; to
4 amend and reenact sections 12.1-13-02, 54-66-10, 54-66-12, and 54-66-18 of the North Dakota
5 Century Code, relating to immunity from criminal prosecution, individuals' rights to appeals,
6 confidential information, and conflicts of interest; and to declare an emergency.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 **SECTION 1. AMENDMENT.** Section 12.1-13-02 of the North Dakota Century Code is
9 amended and reenacted as follows:

10 **12.1-13-02. Speculating or wagering on official action or information.**

- 11 1. ~~A person~~An individual is guilty of a class A misdemeanor if during employment as a
12 public servant, or within one year thereafter, in contemplation of official action by
13 ~~himself~~the individual as a public servant or by a government agency with which ~~he~~the
14 individual is or has been associated as a public servant, or in reliance on information
15 to which ~~he~~the individual has or had access only in ~~his~~the individual's capacity as a
16 public servant, ~~he~~the individual:
- 17 a. Acquires a pecuniary interest in any property, transaction, or enterprise which
18 may be affected by ~~such~~the information or official action;
- 19 b. Speculates or wagers on the basis of ~~such~~the information or official action; or
- 20 c. Aids another individual to do any of the foregoing.

2. ~~A person~~An individual is guilty of a class A misdemeanor if as a public servant ~~he~~the individual takes official action which is likely to benefit ~~him~~the individual as a result of an acquisition of a pecuniary interest in any property, transaction, or enterprise, or of a speculation or wager, which ~~he~~the individual made, or caused or aided another to make, in contemplation of ~~such~~the official action.

3. An individual is immune from prosecution under this section if:

a. The individual was a member of the legislative assembly at the time the official action was taken;

b. The official action was a vote on a measure in the senate or house of representatives or a legislative committee; and

c. The individual adhered to ~~legislative rules~~section 54-66-18 requiring an individual to disclose a ~~personal or private~~potential conflict of interest to the member's respective chamber of the legislative assembly, legislative committee, the president of the senate, or the speaker of the house.

SECTION 2. A new section to chapter 54-03 of the North Dakota Century Code is created and enacted as follows:

Voting on legislation - Immunity - Affirmative defense.

If an individual who is a member of the legislative assembly adheres to:

1. ~~Legislative rules~~Section 54-66-18 requiring an individual to disclose a ~~personal or private~~potential conflict of interest to the member's respective chamber of the legislative assembly, a legislative committee, the president of the senate, or the speaker of the house, the individual is immune from criminal prosecution under the laws of this state for an offense arising from the individual voting on a measure in a legislative committee, the senate, or the house of representatives.

2. Informal ~~advice~~guidance from a ~~staff member~~the executive director of the ethics commission, reliance on the ~~advice~~informal guidance is an affirmative defense in a prosecution for an offense arising from the individual voting on a measure in a legislative committee, the senate, or the house of representatives, if:

a. The individual acts in good faith; and

b. The material facts surrounding the conduct are substantially the same as the conduct presented in the informal guidance.

1 3. Written guidance from the executive director of the ethics commission issued under
2 the rules of the ethics commission, reliance on the written guidance is an affirmative
3 defense in a prosecution for an offense arising from the individual voting on a measure
4 in a legislative committee, the senate, or the house of representatives.

5 **SECTION 3.** A new section to chapter 54-66 of the North Dakota Century Code is created
6 and enacted as follows:

7 **Issuance of alleged violation - Closure of the matter.**

8 Upon completion of an informal investigation, the executive director shall prepare a report
9 and recommendation to the commission to close the matter or ~~prepare a request to the~~
10 ~~commission to issue an alleged violation.~~ The ~~executive director~~commission may issue an
11 alleged violation, require additional informal investigation, or close the matter ~~at~~. At any time
12 during the enforcement action, the commission may settle and close the matter. A settlement
13 may include the issuance of an advisory opinion pursuant to section 54-66-04.2 or informal
14 guidance pursuant to the rules of the commission.

15 **SECTION 4. AMENDMENT.** Section 54-66-10 of the North Dakota Century Code is
16 amended and reenacted as follows:

17 **54-66-10. Appeals.**

18 An accused individual may appeal a ~~finding of the ethics commission~~ order to the district
19 court of the county where the accused individual resides, the district court in Burleigh County, or
20 a district court of the county in which a substantial part of the subject matter of the alleged
21 violation occurred within thirty days after notice of the commission order.

22 **SECTION 5. AMENDMENT.** Section 54-66-12 of the North Dakota Century Code is
23 amended and reenacted as follows:

24 **54-66-12. Confidential information.**

- 25 1. The following information is ~~are~~ confidential record as defined in ~~records under~~
26 section 44-04-17.1 ~~when in the possession of the commission,~~ unless the commission
27 has determined the accused individual violated article XIV of the Constitution of North
28 Dakota, this chapter, or another law or rule regarding transparency, corruption,
29 ~~elections, or lobbying,~~ issued ~~and~~ a final commission order ~~in the relevant matter~~ and a
30 court affirmed the ~~determination~~final commission order, if appealed, except the
31 information ~~records~~ may be disclosed as required by ~~law, as allowed under this~~

- 1 ~~chapter,~~ or as necessary to conduct an investigation arising from a complaint during an
2 enforcement action:
- 3 a. ~~Information Recorded facts relating to an allegation of a violation of article XIV of~~
4 ~~the Constitution of North Dakota, this chapter, or another law or rule regarding~~
5 ~~transparency, corruption, elections, or lobbying which were~~ Relevant information
6 submitted to the commission by an individual;
- 7 b. ~~A record~~ Information prepared for the commission by the commission's staff or
8 ~~agents to help the commission~~ determine whether to issue an alleged violation;
- 9 c. ~~A record~~ Information revealing the contents of a complainant alleged violation;
- 10 b. Information
- 11 d. ~~A record~~ Information that reasonably may be used to identify ~~an accused~~
12 ~~individual~~ a respondent; and
- 13 e. Information
- 14 e. ~~A record~~ Information relating to or created as part of an investigation of a
15 ~~complainant~~ alleged violation.
- 16 2. If a complaint is informally resolved under section 54-66-07, the following information
17 is a confidential record as defined in section 44-04-17.1 ~~when in the possession of the~~
18 ~~commission:~~
- 19 ~~a. Information~~ ~~A record~~ revealing the contents of the complaint;
- 20 ~~b. Information~~ ~~A record~~ that reasonably may be used to identify the accused
21 individual;
- 22 ~~c. Information~~ ~~A record~~ relating to or created as part of the process leading to the
23 informal resolution; and
- 24 ~~d. Information~~ ~~A record~~ revealing the informal resolution.
- 25 ~~3. Information~~ ~~A record~~ that reasonably may be used to identify ~~the complainant~~ a
26 individual who provides relevant information to the commission is confidential unless
27 the ~~complainant~~ individual waives confidentiality, authorizes its disclosure, or divulges
28 information that reasonably would identify the ~~complainant~~ individual. ~~Information~~ ~~A~~
29 ~~record,~~ including evidence under consideration by the investigator or commission,
30 deemed confidential under this subsection may be disclosed as required by law or as

1 necessary to conduct an investigation arising from a complaint to include disclosure of
2 evidence being considered to ~~an accused individual~~ a respondent.

3 ~~4.3.~~ The information ~~A record~~ deemed confidential in subsections 1 and 2 subsection 1 may
4 be disclosed by the ~~ethics~~ individual who provides relevant information to the
5 commission, the respondent, and the commission if the ~~accused individual~~ respondent
6 agrees to the disclosure.

7 ~~5. Notwithstanding this chapter:~~

8 ~~a. If an individual who is a member of a department, board, agency, commission, or~~
9 ~~other public entity is a subject of a complaint or other commission process or~~
10 ~~proceeding, the individual may disclose to the other members a record or other~~
11 ~~information reasonably necessary for the department, board, agency,~~
12 ~~commission, or other public entity to carry out the entity's duties.~~

13 ~~b. If a department, board, agency, commission, or other public entity is a subject of~~
14 ~~a complaint or other commission process or proceeding, a member of the entity~~
15 ~~may disclose to the other members a record or other information reasonably~~
16 ~~necessary for the department, board, agency, commission, or other public entity~~
17 ~~to carry out the entity's duties.~~

18 ~~6. Notwithstanding any statute or administrative rule, including a rule of the ethics~~
19 ~~commission, an individual may disclose a record or other information to the legal~~
20 ~~counsel for the individual, whether in the individual's personal or official capacity, and~~
21 ~~to legal counsel for any department, board, agency, commission, or other public entity~~
22 ~~to which the individual belongs or in which the individual is employed.~~

23 ~~7. Notwithstanding any statute or administrative rule, during the course of any process or~~
24 ~~proceeding of the commission, an individual may disclose a record or other~~
25 ~~information to a codefendant, individual with common interests, or individual who~~
26 ~~possesses information reasonably necessary for the individual to use in the~~
27 ~~commission's process or proceeding.~~

28 4. The commission may disclose the information deemed confidential in subsection 1 to
29 an entity with appropriate enforcement authority.

30 5. A record created or maintained by a public entity, other than the commission, retains
31 its status as an open, closed, exempt, or confidential record as defined in section

- 1 44-04-17.1, notwithstanding the disclosure of the record to the ethics commission
2 during an enforcement action or the relevance of the record to an enforcement action.

3 **SECTION 6. AMENDMENT.** Section 54-66-18 of the North Dakota Century Code is
4 amended and reenacted as follows:

5 **54-66-18. Conflicts of interest - Legislative assembly.**

- 6 1. Each legislative assembly shall adopt conflict of interest rules. The rules must:
7 a. Require the disclosure by a member of a potential conflict of interest relating to
8 any bill in which the member may have a ~~direct~~, unique, ~~substantial~~, or and
9 individual interest.
10 b. Ensure a mechanism is in place to record each disclosure and make it readily
11 available to the public.
12 2. If the legislative assembly adopts rules under subsection 1 which are at least as
13 restrictive as the conflict of interest rules adopted by the ethics commission, the
14 disclosure process portion of the conflict of interest rules adopted by the ethics
15 commission may not apply to members of the legislative assembly.

16 **SECTION 7. EMERGENCY.** This Act is declared to be an emergency measure.

HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
JANUARY 31, 2025

TESTIMONY OF CLAIRE NESS
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1505

Chairman Schauer and members of the Committee:

For the record, my name is Claire Ness. I am the Chief Deputy Attorney General, and I am here on behalf of the Attorney General's Office in support of House Bill 1505. We appreciate that the legislative leadership have come forward with this legislation, and we have considered it carefully. This testimony touches of two parts of the legislation: conflict of interest rules and confidential information.

Conflict of Interest Rules

In part, this bill would prevent criminal prosecutions of legislators who abide by their conflict of interest rules and procedures or who follow informal advice from a staff member of the Ethics Commission.

Under Article IV, Section 12 of the Constitution of North Dakota, each house of the Legislative Assembly has explicit constitutional authority to make its own rules of procedure. Under the legislative rules for conflicts of interest, a legislator must declare their potential conflict, and the full body (House or Senate) makes the decision on whether the conflict prevents the legislator from voting on a particular matter. This process is transparent to the public and removes the decision about voting from the legislator with the potential conflict. A similar procedure can be enacted in legislative committees. Without House Bill 1505, legislators may be subject to criminal prosecution even when they comply with this constitutionally authorized process.

Also, House Bill 1505 would provide a defense for legislators who rely on informal guidance from a member of the Ethics Commission's staff. Although it very likely would be a violation of the North Dakota Rules of Professional Conduct – and a conflict of interest – for the staff members to advise legislators on legal matters, it can happen. When it does, HB 1505 would protect legislators who comply with guidance they reasonably rely on to keep them from violating ethics laws and rules. According to records and testimony on the matter, a legislator was referred for prosecution – and then prosecuted – after following such guidance.

Confidential Records, Access to Legal Counsel, and Due Process

The Attorney General is responsible for providing guidance on open records laws, analyzing alleged violations of open records laws, and issuing open records opinions. The Attorney General and our staff take this responsibility very seriously and understand the necessity of clear, easily understood confidentiality statutes. State employees may be subject to prosecution for a class C felony under N.D.C.C. 12.1-13-01 if they disclose confidential records, so our confidentiality laws need to give them abundant notice of what can and what cannot be shared.

Our office represents most state agencies, departments, boards, and commissions, and our clients have told us that, when they are asked to respond to the Ethics Commission, they are scared of seeking legal advice or even trying to gather information to defend themselves because of the way the confidentiality provisions of N.D.C.C. 54-66-12 are now interpreted. The provisions in House Bill 1505 will clarify that individuals can indeed consult their attorneys and have access to information and records to protect their legal interests when they are involved in Ethics Commission matters.

Section 5 of the bill makes the following changes to accomplish that goal.

- It changes the word “information” to “records”. Our laws generally protect records, as defined in N.D.C.C. § 44-04-17.1. Using this longstanding term that is easily and commonly understood will help clarify the statute.
- It clarifies that records in the possession of the Ethics Commission – either prepared for, created by, or submitted to, the Ethics Commission – are covered by the confidentiality provisions. This provision is similar to other confidentiality provisions in state law and will allow for the normal use of records that other state entities possess for their day-to-day business.
- It will allow a member of a public entity that is a target of an Ethics Commission proceeding to discuss that proceeding with other members to the extent necessary for the public entity to carry out its duties. Essentially, this will allow individuals to appropriately recuse themselves in matters related to the Ethics Commission proceeding, declare conflicts of interest that arise due to Ethics Commission proceedings, and ensure the business of the public entity can continue uninterrupted without fear of being prosecuted for a felony. These communications may be done in closed sessions to keep the information from being made public.
- It will clarify that an individual may share otherwise confidential records and information with their legal counsel. Employees will have a statutory right to get help from an attorney when faced with Ethics Commission complaints, requests for information, requests for questioning, and other proceedings. For example, state employees have been asked to appear for recorded¹, in-person questioning by a

¹ See *Recording Acknowledgement* form, attached.

team of attorneys comprised of the Ethics Commission staff attorney, the Ethics Commission's contracted attorney, and the Ethics Commission's Executive Director (also an attorney). In cases brought to our office's attention, state employees are not told they can be represented by an attorney during the questioning, unless they specifically ask. Before the questioning, the employees are told the proceeding is confidential and are asked to sign a Confidential Information Acknowledgement notifying them of the criminal penalty for disclosing confidential information about the matter.² They could be excused for believing they might be prosecuted for seeking legal guidance. These proceedings create intimidating scenarios for state employees, especially when they know the Commission can refer them to a prosecutor for criminal charges or release the recording to law enforcement. Clarifying that state employees and officials have a right to work with legal counsel in these situations will help protect their legal rights.

- Also, under House Bill 1505, during the course of an Ethics Commission proceeding, an individual will be able to share records and information with other people who are codefendants, who have common interests, or who possess information reasonably necessary for the individual to use in the proceeding. This will allow individuals to access the information necessary to defend themselves.

These provisions will give state officials and employees (our clients) the ability to perform their day-to-day work without fear of prosecution for a felony. The provisions also will ensure our

² See *Confidential Information Acknowledgement* form, attached. The form says that the disclosure of related information (except as specified in the form) is subject to criminal penalties, and the authorized disclosures in the form do not include disclosure to the individual's attorney.

clients have the ability to access legal counsel and necessary information and records to protect their legal interests or otherwise respond to Ethics Commission requests.

Thank you for your time today. The Attorney General's Office supports a "DO PASS" on House Bill 1505. I'd be happy to answer your questions.



Recording Acknowledgment

The North Dakota Ethics Commission ("Commission") records the interviews it conducts related to its investigation of complaints. The Commission records these interviews to preserve evidence and for record keeping purposes. Under N.D.C.C. § 54-66-12(1), these recordings and the information obtained during the interviews are confidential records as defined in N.D.C.C. § 44-04-17.1. The recordings are only accessible to the Commission and Commission staff during the course of the investigation. The recordings and information may only be disclosed to others as necessary for the Commission to conduct its investigation, for emergency purposes under N.D.C.C. § 44-04-18.10(6), to law enforcement under N.D.C.C. § 44-04-18.10(4), or pursuant to a subpoena or order under N.D.C.C. § 44-04-18.11.

If the Commission finds the respondent has engaged in an ethical violation, the recordings and information may become an open record pursuant to N.D.C.C. § 54-66-12(1).

By signing the below, you acknowledge the above referenced information. You also acknowledge the interview of you by Commission staff will be recorded.

Name (please print): _____

Signature: _____

Date: _____

Ethics Commission Staff Acknowledgment: _____



Confidential Information Acknowledgment

Under N.D.C.C. § 54-66-12, most information related to a complaint filed with the North Dakota Ethics Commission ("Commission") is a confidential record as defined in N.D.C.C. § 44-04-17.1. This confidential information includes: (1) information revealing the contents of a complaint; (2) information that reasonably may be used to identify an accused individual; (3) information relating to or created as part of an investigation of a complaint; (4) information identifying the complainant unless the complainant authorizes the disclosure; and (5) information revealing an informal resolution of a complaint. Unauthorized disclosure by a public servant of this confidential information may be a criminal violation under N.D.C.C. § 12.1-13-01.

The confidential information may only be disclosed to others as necessary for the Commission to conduct its investigation, for emergency purposes under N.D.C.C. § 44-04-18.10(6), to law enforcement under N.D.C.C. § 44-04-18.10(4), or pursuant to a subpoena or order under N.D.C.C. § 44-04-18.11. Confidential information authorized by law to be disclosed to another entity maintains its confidential status pursuant to N.D.C.C. § 44-04-18.10(5).

If the Commission finds the respondent has engaged in an ethical violation, the information may become an open record pursuant to N.D.C.C. § 54-66-12(1).

By signing the below, you acknowledge:

- (1) the Commission may share confidential information with you for the purpose of conducting an investigation of a complaint filed with the Commission;
- (2) you will not share this confidential information with others; and
- (3) the Commission may share any information you provide with others as the Commission is authorized to by law.

Name (please print): _____

Signature: _____

Date: _____

Ethics Commission Staff Acknowledgment: _____

2025 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Pioneer Room, State Capitol

HB 1505
2/20/2025

relating to immunity from criminal prosecution, individuals' rights to appeals, confidential information, and conflicts of interest; and to declare an emergency.

8:31 a.m. Chairman Schauer opened the meeting.

Members present: Chairman Schauer, Vice Chairman Satrom, Representatives Bahl, Brown, Christy, Grindberg, Karls, McLeod, Rohr, Schneider, Steiner, VanWinkle, Vetter
Members absent: Representative Wolff

Discussion Topics:

- Committee work
- Proposed amendments relating to legislative protections

8:37 a.m. Liz Fordahl, Legislative Council, introduced proposed amendments relating to legislative protections #45236.

9:01 a.m. Chris Joseph, General Counsel to the Governor, testified and answered questions.

9:02 a.m. Rebecca Binstock, Executive Director of the North Dakota Ethics Commission, testified and answered questions and submitted testimony, #38258.

9:15 a.m. Vice-Chairman Satrom moved to amend the bill relating to legislative protections against ethics violations.

9:15 a.m. Representative Bahl seconded the motion.

Representatives	Vote
Representative Austen Schauer	Y
Representative Bernie Satrom	N
Representative Landon Bahl	N
Representative Collette Brown	Y
Representative Karen Grindberg	N
Representative Karen Karls	Y
Representative Carrie McLeod	Y
Representative Karen Rohr	Y
Representative Mary Schneider	N
Representative Vicky Steiner	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y
Representative Christina Wolff	AB

9:18 a.m. Motion passed 8-4-1.

9:22 a.m. Representative Rohr moved a Do Not Pass as amended.

9:22 a.m. Representative Steiner seconded the motion.

Representatives	Vote
Representative Austen Schauer	Y
Representative Bernie Satrom	N
Representative Landon Bahl	N
Representative Collette Brown	Y
Representative Karen Grindberg	N
Representative Karen Karls	Y
Representative Carrie McLeod	Y
Representative Karen Rohr	Y
Representative Mary Schneider	N
Representative Vicky Steiner	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y
Representative Christina Wolff	AB

9:22 a.m. Motion passed 8-4-1.

Representative Steiner will carry the bill.

9:23 a.m. Vice-Chairman Satrom moved to reconsider the bill.

9:23 a.m. Representative Bahl seconded the motion.

9:24 a.m. Vice-Chairman Satrom withdrew the motion.

9:25 a.m. Chairman Schauer closed the meeting.

Jackson Toman, Committee Clerk

Sixty-ninth
Legislative Assembly
of North Dakota

PROPOSED AMENDMENTS TO

CL
2/20/25
1 of 4

HOUSE BILL NO. 1505

Introduced by

Representative Lefor

Senator Hogue

1 A BILL for an Act to create and enact a new section to chapter 54-03 and a new section to
2 chapter 54-66 of the North Dakota Century Code, relating to immunity and ~~an affirmative~~
3 defense for ~~individuals~~persons related to voting on legislation and closure of matters by the
4 ethics commission; to amend and reenact sections 12.1-13-02, 54-66-10, 54-66-12, and
5 54-66-18 of the North Dakota Century Code, relating to immunity from criminal prosecution,
6 individuals' rights to appeals, confidential information, and conflicts of interest; to provide for
7 application; and to declare an emergency.

8 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

9 **SECTION 1. AMENDMENT.** Section 12.1-13-02 of the North Dakota Century Code is
10 amended and reenacted as follows:

11 **12.1-13-02. Speculating or wagering on official action or information.**

- 12 1. ~~A person~~An individual is guilty of a class A misdemeanor if during employment as a
13 public servant, or within one year thereafter, in contemplation of official action by
14 ~~himself~~the individual as a public servant or by a government agency with which ~~he~~the
15 individual is or has been associated as a public servant, or in reliance on information
16 to which ~~he~~the individual has or had access only in ~~his~~the individual's capacity as a
17 public servant, ~~he~~the individual:
- 18 a. Acquires a pecuniary interest in any property, transaction, or enterprise which
19 may be affected by ~~such~~the information or official action;
- 20 b. Speculates or wagers on the basis of ~~such~~the information or official action; or

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- 1 c. Aids another individual to do any of the foregoing.
- 2 2. ~~A person~~An individual is guilty of a class A misdemeanor if as a public servant ~~he~~the
3 individual takes official action which is likely to benefit ~~him~~the individual as a result of
4 an acquisition of a pecuniary interest in any property, transaction, or enterprise, or of a
5 speculation or wager, which ~~he~~the individual made, or caused or aided another to
6 make, in contemplation of ~~such~~the official action.
- 7 3. An individual is immune from prosecution under this section if:
 - 8 a. The individual was a member of the legislative assembly at the time the official
9 action was taken;
 - 10 b. The official action was a vote on a measure in the senate or house of
11 representatives or a legislative committee; and
 - 12 c. The individual adhered to ~~legislative rules~~section 54-66-18 requiring an individual
13 to disclose a ~~personal or private~~potential conflict of interest to the member's
14 respective chamber of the legislative assembly, legislative committee, the
15 president of the senate, or the speaker of the house.

16 **SECTION 2.** A new section to chapter 54-03 of the North Dakota Century Code is created
17 and enacted as follows:

18 **Voting on legislation - Immunity - ~~Affirmative defense~~Defense.**

19 If an individual who is a member of the legislative assembly adheres to:

- 20 1. ~~Legislative rules~~Section 54-66-18 requiring an individual to disclose a ~~personal or~~
21 ~~private~~potential conflict of interest to the member's respective chamber of the
22 legislative assembly, a legislative committee, the president of the senate, or the
23 speaker of the house, the individual ~~is~~and an "organization" for which the individual is
24 an "agent", as those terms are defined under section 12.1-03-04, are immune from
25 criminal prosecution under the laws of this state for an offense arising from the
26 individual voting on a measure in a legislative committee, the senate, or the house of
27 representatives.
- 28 2. Informal ~~advice~~guidance from ~~a staff member~~the executive director of the ethics
29 commission, reliance on the ~~advice~~informal guidance is ~~an affirmative~~a defense in a
30 prosecution for an offense arising from the individual voting on a measure in a
31 legislative committee, the senate, or the house of representatives, if:

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- 1 a. The individual acts in good faith; and
- 2 b. The material facts surrounding the conduct are substantially the same as the
- 3 conduct presented in the informal guidance.
- 4 3. Written guidance from the executive director of the ethics commission issued under
- 5 the rules of the ethics commission, reliance on the written guidance is a defense in a
- 6 prosecution for an offense arising from the individual voting on a measure in a
- 7 legislative committee, the senate, or the house of representatives.

8 **SECTION 3.** A new section to chapter 54-66 of the North Dakota Century Code is created
9 and enacted as follows:

10 **Issuance of alleged violation - Closure of the matter.**

11 Upon completion of an informal investigation, the executive director shall prepare a report
12 and recommendation to the commission to close the matter or prepare a request to the
13 commission to issue an alleged violation. The executive director commission may issue an
14 alleged violation, require additional informal investigation, or close the matter-at. At any time
15 during the enforcement action, the commission may settle and close the matter. A settlement
16 may include the issuance of an advisory opinion pursuant to section 54-66-04.2 or informal
17 guidance pursuant to the rules of the commission.

18 **SECTION 4. AMENDMENT.** Section 54-66-10 of the North Dakota Century Code is
19 amended and reenacted as follows:

20 **54-66-10. Appeals.**

21 An accused individual may appeal a ~~finding of the ethics commission order~~ to the district
22 court of the county where the accused individual resides, the district court in Burleigh County, or
23 a district court of the county in which a substantial part of the subject matter of the alleged
24 violation occurred within thirty days after notice of the commission order.

25 **SECTION 5. AMENDMENT.** Section 54-66-12 of the North Dakota Century Code is
26 amended and reenacted as follows:

27 **54-66-12. Confidential information.**

- 28 1. The following ~~information is a~~ are confidential ~~record as defined in~~ records under
29 section 44-04-17.1 ~~when in the possession of the commission,~~ unless the commission
30 ~~has determined the accused individual violated article XIV of the Constitution of North~~
31 ~~Dakota, this chapter, or another law or rule regarding transparency, corruption,~~

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elections, or lobbying, issued ana final commission order in the relevant matter and a court affirmed the determination final commission order, if appealed, except the information records may be disclosed as required by law, as allowed under this chapter, or as necessary to conduct an investigation arising from a complaint during an enforcement action:

a. ~~Information~~ Recorded facts relating to an allegation of a violation of article XIV of the Constitution of North Dakota, this chapter, or another law or rule regarding transparency, corruption, elections, or lobbying which were Relevant information submitted to the commission by an individual;

b. ~~A record~~ Information prepared for the commission ~~by the commission's staff or agents to help the commission~~ determine whether to issue an alleged violation;

c. ~~A record~~ Information revealing the contents of ~~a complaint~~ an alleged violation;

b. Information

d. ~~A record~~ Information that reasonably may be used to identify ~~an accused individual~~ a respondent; and

e. Information

e. ~~A record~~ Information relating to or created as part of an investigation of ~~a complaint~~ an alleged violation.

2. ~~If a complaint is informally resolved under section 54-66-07, the following information is a confidential record as defined in section 44-04-17.1 when in the possession of the commission:~~

~~a. Information~~ A record revealing the contents of the complaint;

~~b. Information~~ A record that reasonably may be used to identify the accused individual;

~~c. Information~~ A record relating to or created as part of the process leading to the informal resolution; and

~~d. Information~~ A record revealing the informal resolution.

~~3. Information~~ A record that reasonably may be used to identify ~~the complainant~~ an individual who provides relevant information to the commission is confidential unless the ~~complainant~~ individual waives confidentiality, authorizes its disclosure, or divulges information that reasonably would identify the ~~complainant~~ individual. ~~Information~~ A

b074

record, including evidence under consideration by the investigator or commission, deemed confidential under this subsection may be disclosed as required by law or as necessary to conduct an investigation ~~arising from a complaint~~ to include disclosure of evidence being considered to ~~an accused individual~~ a respondent.

4.3. The information ~~A record~~ deemed confidential in ~~subsections 1 and 2~~ subsection 1 may be disclosed by the ~~ethics~~ individual who provides relevant information to the commission, the respondent, and the commission if the ~~accused individual~~ respondent agrees to the disclosure.

~~5. Notwithstanding this chapter:~~

~~a. If an individual who is a member of a department, board, agency, commission, or other public entity is a subject of a complaint or other commission process or proceeding, the individual may disclose to the other members a record or other information reasonably necessary for the department, board, agency, commission, or other public entity to carry out the entity's duties.~~

~~b. If a department, board, agency, commission, or other public entity is a subject of a complaint or other commission process or proceeding, a member of the entity may disclose to the other members a record or other information reasonably necessary for the department, board, agency, commission, or other public entity to carry out the entity's duties.~~

~~6. Notwithstanding any statute or administrative rule, including a rule of the ethics commission, an individual may disclose a record or other information to the legal counsel for the individual, whether in the individual's personal or official capacity, and to legal counsel for any department, board, agency, commission, or other public entity to which the individual belongs or in which the individual is employed.~~

~~7. Notwithstanding any statute or administrative rule, during the course of any process or proceeding of the commission, an individual may disclose a record or other information to a codefendant, individual with common interests, or individual who possesses information reasonably necessary for the individual to use in the commission's process or proceeding.~~

4. The commission may disclose the information deemed confidential in subsection 1 to an entity with appropriate enforcement authority.

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- 1 5. A record created or maintained by a public entity, other than the commission, retains
2 its status as an open, closed, exempt, or confidential record as defined in section
3 44-04-17.1, notwithstanding the disclosure of the record to the ethics commission
4 during an enforcement action or the relevance of the record to an enforcement action.

5 **SECTION 6. AMENDMENT.** Section 54-66-18 of the North Dakota Century Code is
6 amended and reenacted as follows:

7 **54-66-18. Conflicts of interest - Legislative assembly.**

- 8 1. Each legislative assembly shall adopt conflict of interest rules. The rules must:
9 a. Require the disclosure by a member of a potential conflict of interest relating to
10 any bill in which the member may have a ~~direct, unique, substantial, or~~ and
11 individual interest.
12 b. Ensure a mechanism is in place to record each disclosure and make it readily
13 available to the public.
14 2. If the legislative assembly adopts rules under subsection 1 which are at least as
15 restrictive as the conflict of interest rules adopted by the ethics commission, the
16 disclosure process portion of the conflict of interest rules adopted by the ethics
17 commission may not apply to members of the legislative assembly.

18 **SECTION 7. APPLICATION.** This Act applies to actions occurring on or after the effective
19 date of this Act.

20 **SECTION 8. EMERGENCY.** This Act is declared to be an emergency measure.

**REPORT OF STANDING COMMITTEE
HB 1505**

Government and Veterans Affairs Committee (Rep. Schauer, Chairman) recommends **AMENDMENTS** ([25.1244.01010](#)) and when so amended, recommends **DO NOT PASS** (8 YEAS, 4 NAYS, 1 ABSENT OR EXCUSED AND NOT VOTING). HB 1505 was placed on the Sixth order on the calendar.



February 18, 2025

Representative Austen Schauer
Chairman, House Government and Veterans Affairs Committee
600 East Boulevard Ave
Bismarck, ND 58505
aschauer@ndlegis.gov

RE: Correction of the Legislative Record for House Bills 1360 and 1505

Dear Chairman Schauer:

On January 31, 2025, the House Government and Veterans Affairs Committee ("Committee") held hearings for HB 1360 and HB 1505. The Ethics Commission ("Commission") presented testimony on both bills. The Commission appreciated the opportunity to discuss these bills with the Committee and looks forward to continuing to work with the Legislative Assembly.

During the hearings, the Office of the Attorney General presented testimony through Chief Deputy Attorney General Claire Ness. Many of the issues raised by the Office of the Attorney General are inaccurate, but the Commission did not have an opportunity to respond to them because the Commission testified first on HB 1360.

After discussions with Legislative Council, the Commission respectfully requests the Committee add this letter to the legislative record for HB 1360 and HB 1505. The Commission directed Commission staff to send this letter at its February 13, 2025 meeting. Due to the historical and interpretative value of legislative records, the Commission must request this correction of the record to preserve the Commission's integrity as a constitutional entity established in Article XIV of the North Dakota Constitution. Additionally, the Commission requests this correction to provide accurate information for those who may be tasked in the future with adjudicating matters related to the Commission's scope of authority, purpose, and procedures.

I. The Commission is not "above the other 3 branches of government."

The Office of the Attorney General stated in its testimony "one of the Commission's staff members" has, on multiple occasions, said the Commission is "above the other 3 branches of government" during educational sessions. The Office of the Attorney General provided no citation to this quote attributed to Commission staff. The Commission has been unable to substantiate the assertion based upon its review of its recorded, publicly available webinars, training sessions, and records.

The Commission clearly articulates on its website, in communications, and during educational sessions that it is an independent constitutional entity—not a branch of state government.¹ Under Article XIV of the North Dakota Constitution, the Commission does not exist in the traditional sense of checks and balances and does not review the institutional actions of the three branches. Instead, it reviews the actions of individuals and whether those actions comply with ethical obligations in state law.

II. HB 1360 removed duplicate provisions from statute in the interest of simplicity and recognition of the Commission's constitutional authority.

The Commission focused on removing red tape from both the statutes and its rules. Currently, many of the provisions are duplicative and unnecessary. By reducing the number of laws, it makes the Commission's process easier for all individuals to follow, specifically those navigating it without an attorney.

Throughout its testimony, the Office of the Attorney General suggests the Commission is removing due process protections and implies the Commission is moving due process protections from statute to ethics rules for nefarious reasons. This accusation is not substantiated.

Due process must be followed regardless of whether the parameters are outlined in statute or rule. The Commission has no desire for litigation on this issue and believes a regulated individual's due process rights are paramount. Bolstering due process is a primary reason the Commission worked to propose HB 1360 with the Legislative Assembly and other stakeholders.

HB 1360 simply affirms recognition of the Commission's constitutional authority to create rules. The Commission believes many of the procedural and due process aspects are better outlined in the Commission's rules, similar to how the judicial branch outlines rules of procedure in court rules. For instance, the Rules of Civil Procedure, Rules of Evidence, Rules of Court, etc. are not duplicated in statute. The specific provisions referenced by the Office of the Attorney General are addressed in turn below.

- a. Formalizing notice requirements is dependent on the Commission's budgetary request for a case management system. If the case management system is not approved, notice and service of documents will be handled through a manual process, rather than electronically. The statutory notice provision for complaints is also removed because the Commission will no longer receive complaints. Instead, in unison with Article XIV, the Commission will receive relevant information that can progress to an

¹ *E.g., Frequently Asked Questions*, N.D. Ethics Comm'n, <https://www.ethicscommission.nd.gov/frequently-asked-questions> (last visited Feb. 11, 2025) (asking "Which of the three branches of government does the Ethics Commission fall under?" and responding "None! The Ethics Commission is an independent constitutional entity and is not part of any of the three branches of our state government.").

alleged violation. A respondent will be notified and served documentation at each step in the process either manually or electronically.

- b. The statutory provisions for responding to a complaint are removed because the Commission will no longer receive complaints. The proposed ethics rules allow a respondent to respond multiple times throughout the process including: (1) at any time the respondent wishes to settle and receive education; (2) in writing before a finding of reasonable cause is issued; (3) in writing to the investigation report and recommendation; (4) in person at the formal hearing; (5) in writing in a request for hearing; and (6) if a rehearing is granted, in writing and in person at the rehearing.
- c. The statement that a respondent is entitled to be represented by counsel during a Commission investigation is moved from statute to the Commission's rules. Regardless of a statement in statute or rules, an individual can always be represented in any matter to protect his or her legal interests. This is a basic tenant of law, as eloquently explained by Ms. Thompson during the legislative hearing.
- d. The Commission does not have authority to remove public officials from office. The North Dakota Constitution specifically empowers the Legislative Assembly to expel its members and remove other public officials from office through impeachment.²
- e. Similarly, the Commission does not have the power to overturn administrative and quasi-judicial decisions of executive branch agencies. The current statute stating so is unnecessary. The Commission is not a court exercising judicial review of government action. Instead, the constitution gives the Commission authority to investigate whether *individuals* violated ethical obligations. Any underlying decision, vote, or action stands regardless of whether the Commission determines the public official acted unethically when making it.

III. Article XIV empowers the Commission to enforce ethics law.

Article XIV directs the Commission to "adopt ethics rules related to transparency, corruption, elections, and lobbying" and to "investigate alleged violations" of the Commission's rules, Article XIV, and state laws related to transparency, corruption, elections, and lobbying.³ The constitution specifically gives the Commission this investigative authority to ensure ethics laws are enforced.

² N.D. CONST. art. IV, §§ 7, 9, 10, 12; N.D. CONST. art. XI, §§ 8-15.

³ N.D. CONST. art. XIV, § 3(2).

The Commission's rulemaking authority under Article XIV can include provisions on how those rules are enforced. Legislation is not needed for the Commission to exercise the authority granted to it by the constitution to make ethics law as Article XIV is self-executing.⁴ The Legislative Assembly recognized this fact in 2019, as confirmed by the legislative record for HB 1521.⁵

The term "enforcement action" means the investigation and the proceeding before the Commission related to that investigation. The word proceeding refers to the respondent's multiple opportunities to respond to the Commission's investigation as outlined above. The outcome of the process is the same as what is currently in the complaint process. The Commission will make a finding of whether someone violated an ethics law, and, if so, whether the law authorizes a penalty. If another entity must enforce the penalty by law, the Commission can make the referral to that entity with its findings. This principle is already in statute with the current complaint process. Section 54-66-09(2), N.D.C.C., explicitly states, "If the commission determined a violation occurred, the commission may impose a penalty authorized by law for the violation or refer the matter to the agency with enforcement authority over the violation."

Alternatively, the Commission could conduct its investigations like audits, legislative studies, or other investigations and give the respondent an opportunity to respond when the investigation findings are made public. A process like this does not serve the interests of respondents, and the Commission wants respondents to have the opportunity to respond throughout the investigation.

The Office of the Attorney General seemed to indicate other agencies are more appropriate enforcement entities. It appears the enforcement mechanism the Office of the Attorney General references is litigation and/or criminalization of ethics related conduct. The Commission believes a litigious approach does not serve the state well. Additionally, the Legislative Assembly and the Commission both recognize the majority of ethics issues should move away from the criminal realm. The Commission believes the educational enforcement process in HB 1360 will benefit everyone involved in the process by focusing on corrective rather than punitive action.

IV. HB 1360 renamed "accused individual" to "regulated individual" but did not change the substance of the definition.

In an apparent attempt to claim HB 1360 expands the Commission's authority, the Office of the Attorney General took issue with the term "regulated individual." HB 1360 does not expand the Commission's authority over any individuals. The bill uses the current definition of "accused individual" but instead renames this person as the "regulated individual." The definition itself has not changed and still means "a lobbyist, public official, candidate for public office, political committee, or contributor." Currently, the Commission uses the campaign finance definition for "political committee" in N.D.C.C. ch. 16.1-08.1 and the plain language definition of contributor. If

⁴ N.D. CONST. art. XIV, § 4(1).

⁵ See generally *Hearings on H.B. 1521 Before the H. and S. Ethics Comms.*, 66th Legis. Assemb., Reg. Sess. (N.D. 2019).

the Legislative Assembly wishes to define "contributor" it is also an undefined term in N.D.C.C. ch. 16.1-08.1 and would likely need a definition there as well.

V. The First Amendment demands the ability for respondents to speak publicly about an investigation against them. The Commission recognized this constitutional requirement in HB 1360.

The Commission believes any respondent should be able to defend him or herself publicly—the First Amendment demands it. HB 1360 addresses this issue by allowing a respondent to share the information related to the enforcement action openly and publicly, if the respondent chooses. The proposal in HB 1360 was the result of many hours of legal research, discussion, information gathering, and years of the Commission working on complaints.

The Commission's concerns regarding the First Amendment were not addressed in the confidentiality provision in HB 1505, which the Office of the Attorney General supported. If unaddressed and left in its current form, the Commission believes that statute could open the Commission to legal liability.

The Office of the Attorney General raised issues that individuals or potential witnesses are hesitant to share information related to complaints with the Office of the Attorney General due to the confidential nature of complaints. The Commission has never read the confidentiality provisions in this way. The definition of "confidential" in N.D.C.C. § 44-04-17.1 means the record is prohibited from being open to the public, not that a public servant is precluded from discussing that confidential information with an attorney. While likely unnecessary, the Commission believes a simple amendment to the proposal in HB 1360 would ease this worry. The amendment could state, "An individual contacted by the commission regarding an enforcement action may share information related to the enforcement action with an attorney representing the individual or the individual's employer."

VI. A respondent or witness may always bring legal counsel with to Commission interviews.

As noted above, it is a basic tenant of law that an individual can always be represented by an attorney in any matter to protect his or her legal interests. Currently, the confidentiality statute does not recognize a right for a witness to have an attorney during a Commission interview. However, the Commission absolutely recognizes individuals are entitled to bring legal representation with them to protect their legal interests. The Commission has no objection to provisions in statute asserting respondents may be represented by an attorney. If included, the Commission recommends expanding it by stating witnesses may also be represented. However, the Commission believes any such statute should clearly state the attorney is at the witness' or respondent's own cost.

As a matter of practice, the Commission does not advise witnesses or respondents on who to bring with them to interviews. That is not the role of the Commission. Further, because the Commission is not a criminal law enforcement agency and does not arrest people it does not have a constitutional duty to "Mirandize" people and advise they can seek the assistance of counsel. The Office of the Attorney General's suggestion that the Commission should be held to this standard is not the norm of any investigation. A large number of state agencies conduct civil investigations. To the Commission's knowledge, there is no other state law that requires these agencies to notify witnesses or respondents to seek counsel.

Additionally, the Commission's acknowledgment forms referenced by the Office of the Attorney General give a witness or a respondent notice of the current confidentiality statute and that the interview is recorded. It is an acknowledgment of the statute, and that is why it makes no mention that a witness or respondent can bring an attorney to the interview. Notably, the Office of the Attorney General did not assert that any information presented on the forms is inaccurate. If the Office of the Attorney General wanted the Commission to add such notice to the forms, it could have contacted the Commission well before the legislative hearings to articulate any concerns.

VII. The Office of the Attorney General did not discuss HB 1360 or HB 1505 with the Commission before the hearings.

The Commission was not made aware of these concerns from the Office of the Attorney General until the hearings. In response to an open records request, the Commission provided draft language of HB 1360 to the Office of the Attorney General in October 2024. Attorneys in the Office of the Attorney General contacted the Commission's staff with questions about different proposed legislation, but not HB 1360 or HB 1505. Having not heard from anyone in their office and after discussions with a legislator indicating the Office of the Attorney General had concerns, Executive Director Binstock reached out to an assistant attorney general days before the hearing to discuss the bill in general. The assistant attorney general did not raise any of the concerns to which the Office of the Attorney General testified at the hearing. Had the Commission learned of concerns earlier, the Commission would have welcomed them and been able to alleviate those concerns through discussions.

In conclusion, the Commission looks forward to continuing the discussion on these important matters and would be happy to answer any additional questions.

Sincerely,

A handwritten signature in black ink that reads "Logan Carpenter". The signature is written in a cursive, flowing style.

Logan Carpenter
General Counsel, North Dakota Ethics Commission



CC: Rebecca Binstock, Executive Director, North Dakota Ethics Commission
Dave Anderson, Chair, North Dakota Ethics Commission
John Bjornson, Director, North Dakota Legislative Council



North Dakota Legislative Council

Prepared by Legislative Council staff

LC# 25.9447.01000

February 20, 2025

AMENDMENT TO HOUSE BILL NO. 1505 (LC# 25.1244.01010)

Section 1

Section 1 of the bill grants immunity to an individual who might otherwise be prosecuted for the specific crime of speculating or wagering on official action or information because the individual cast a vote on a legislative measure. If the individual discloses his or her potential conflict of interest as required under North Dakota Century Code Section 54-66-18, the individual is immune from prosecution.

Section 2

Section 2 of the bill also grants immunity to an individual who might otherwise be prosecuted *for any crime* because the individual cast a vote on a legislative measure. However, if the individual discloses his or her potential conflict of interest as required under Section 54-66-18, the individual, and any organization for which the individual may act on behalf of, is immune from prosecution for any crime resulting from that vote.

Additionally, if an individual is prosecuted for a crime because the individual cast a vote on a legislative measure, the individual may raise as a defense his or her reliance on informal guidance from the Executive Director of the Ethics Commission, if good faith and substantially similar material facts exist, or his or her reliance on written guidance issued by the Executive Director of the Ethics Commission.

Section 3

Section 3 is a new section in Chapter 54-66 that permits the Executive Director of the Ethics Commission to prepare a report and recommendation to the Ethics Commission. The Ethics Commission will close the matter, require additional information, or issue an alleged violation. At any time, the Ethics Commission may settle and close the matter, including issuing an advisory opinion pursuant to Section 54-66-04.2 or informal guidance pursuant to the commission's rules.

Section 4

Section 4 reflects the proposed enforcement action rules of the Ethics Commission. It offers additional venues for appeal of an order of the Ethics Commission and limits the time for appeal to thirty days after notice of the order. In addition to the county where the respondent lives, an individual may appeal in the District Court in Burleigh County or any county where the alleged violation took place.

Section 5

Section 5 governs the confidentiality of information related to an investigation by the Ethics Commission. Generally speaking, this section makes the information related to the investigation confidential. The amendment updates terminology to reflect the enforcement action and removes the reference to an informal resolution, which is being removed from the process.

Section 5 also guarantees the respondent may disclose confidential information related to the enforcement action at his or her discretion, addressing one of the several problems that has affected members of the Legislative Assembly. The identity of an individual who provides information to the Ethics Commission remains confidential if the individual desires.

Section 6

Section 6 governs the conflicts of interest rules, which must be adopted by the Legislative Assembly. This section states a member must disclose a potential conflict of interest relating to any bill in which the member may have a direct, unique, substantial, or individual interest. "Substantial" and "direct" have been removed. "Substantial" may be problematic based on North Dakota caselaw in which the North Dakota Supreme Court found the amount of a conflict of interest was not significant, but any conflict should be disclosed. Further, the court held a threshold created two separate classes of legislators and violated Equal Protection. "Direct" may be problematic because a bill might directly affect all property holders in the state on a property tax bill.

Section 7

This application clause provides the Act applies only to actions occurring on or after the effective date.

Section 8

The emergency clause provides the Act becomes effective upon its filing by the Secretary of State.