

January 23, 2021

The Honorable Mike Lefor  
Chair, ND House Industry, Business and Labor  
600 East Boulevard Avenue  
Bismarck, ND 58505

**Submitted electronically only:**

**Re: Testimony in Support of HB 1296**

Dear Chairman Lefor members of IBL Committee, and HB 1296 Sponsors,

I write individually in support of HB1296. I am an attorney in private practice in Fargo. I am a resident of Legislative District 45. I primarily practice in State and Federal courts in North Dakota, I am also admitted to practice in Minnesota state courts and the United States Court of Appeals for the Armed Forces. For the past 20 years, my primary practice has been criminal defense. I retired from the North Dakota Army National Guard after serving twenty four years, the last eight of which were with the Judge Advocate General Corps. Prior to law school, I served as a Bismarck Police officer for more than five years. I have had the previous privilege of working with members of the Assembly as a citizen member of the Interim Commission on Alternatives to Incarceration.

Unlike federal authorities, North Dakota authorities routinely release booking photographs and contact information for presumptively innocent citizens accused of crimes. If the charge is dismissed or citizen is acquitted, it is impossible to undo the damage done. Like federal law, this bill balances individual right of privacy and the public's right to information collected by government employees. The bill preserves the fundamental purpose of booking photos, permitting unrestricted sharing of the collected information among law enforcement. It permits pre-disposition public dissemination of booking photos in instances in which public interest requires it (i.e., the accused is a fugitive from justice, fails to appear for court, or is convicted of the offense).

I understand a personal friend and colleague may ask for consideration of additional protections, similarly restricting release of the home address and telephone number of an accused. For the reasons outlined below, I equally support that request.

**BOOKING PHOTOS AND PRESERVING THEIR LAW ENFORCEMENT PURPOSES**

Booking photographs are collected by the government for government purposes. They are not collected so media or those interested can avoid the private investigative work necessary to locate personal photographs from other sources, like social media, news outlets, or others. As records collected for a governmental purpose, the government has a compelling interest to ensure release of the booking photographs does not undermine other important government purposes.

Routine release of booking photographs creates a risk of suppression of evidence in criminal courts. Court proceedings may include identification testimony. A witness to the crime may be asked to identify the suspect in court. If that witness has observed widespread public dissemination of a booking photograph, challenges may arise to the identification testimony—i.e., it is not reliable because it is based on seeing the published photograph rather than personally observing the person depicted. The result may be suppression of identification testimony, or more aptly, undermining the prosecution’s case. *See e.g., New Jersey v. Green*, 216 A.3d 104 (N.J. 2019) (holding out-of-court identification was undermined by mugshot exposure and suppressing the identification testimony).

### **STATES MOVING TO PROTECT BOOKING PHOTOGRAPHS PRIOR TO CONVICTION**

The National Conference of State Legislatures (NCSL) has a comprehensive compilation of state laws and the growing trend to protect the confidentiality of booking photographs until conviction. Like this bill, states implementing protections have specific exceptions, permitting release in the interest of public safety, like when the accused is a fugitive from justice. The trends and compiled NCSL data may be helpful for your consideration: <https://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx>

### **FEDERAL LAW ENFORCEMENT EMPLOYS AN APPROACH SIMILAR TO THIS BILL**

Until 2016, Federal law enforcement routinely released booking photographs. Similar to North Dakota’s open records law, N.D.C.C. Ch. 44-04, the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, governs the release and dissemination of information collected by governmental employees. In 2016, the United States Court of Appeals for the Sixth Circuit reversed twenty years of precedent, concluding citizens “enjoy a non-trivial privacy interest in their booking photos” and held routine release of booking photographs during ongoing criminal proceedings violated the FOIA. *Detroit Free Press Inc. v. United States Dept. of Justice*, 829 F.3d 478 (6th Cir. 2016).

The *Free Press* court recognized the FOIA’s competing interests: a “general philosophy of full agency disclosure,” balanced with a need to restrict information compiled for law enforcement purposes when restriction is necessary to protect against “an unwarranted invasion of personal privacy.” *Id.* at 480. Addressing personal privacy, the court described booking photos as:

- “snapped ‘in the vulnerable and embarrassing moments immediately after [the person is] accused, taken into custody, and deprived of most liberties’”
- “[m]ore than just ‘vivid symbols of criminal *accusation*’
- Conveying “*guilt* to the viewer”
- Uniformly interpreted “with guilt and criminality”
- “effectively eliminating the presumption of innocence and replacing it with an unmistakable badge of criminality”

The court went on to note: “A disclosed booking photo casts a long, damaging shadow over the depicted individual.” The court further noted mug-shot collection websites harvest booking photos, posting them online, and demanding a ransom to remove them. Ultimately, recognizing the change in technology and the ubiquity of the internet, in overruling its 1996 decision holding FOIA required the release of booking photographs, the court recognized that ten years earlier it “could not have known or expected that a booking photo could haunt the depicted individual for decades.” As a result of this case, federal law enforcement rarely releases booking photographs, reserving release for instances when public safety requires it.

I urge members to review the decision: <https://caselaw.findlaw.com/us-6th-circuit/1742220.html> I urge lawmakers to adopt the rationale of the decision, recommending passage of this bill and implementing protections similar to those provided by federal law.

### **FURTHER PROTECTIONS**

I am told my colleague and friend, Dan Herbel, may ask this Committee to consider amending the bill to include protections against public disclosure of home addresses and telephone numbers for those accused of crimes. For many of the same reasons, and more, I strongly support Mr. Herbel’s suggestion.

Collection of personal information and sharing of that information between governmental agencies has unquestionable importance. Prior to conviction, sharing that information with the media, the public, and solicitors generally does not. Law enforcement does not function to limit the legwork a reporter must otherwise complete on her own. More importantly, the law which authorizes collection of data must also protect us all from improper use of that data.

Since arrest and court records have become automated and readily accessible, opportunists have developed mechanisms to mine that data for profit. Like the extortionist mugshot photograph websites discussed in *Detroit Free Press*, other opportunists seeking to take advantage of people at their weakest have begun routinely using police and court records to solicit. Often those solicitations are misleading.

I regularly represent citizens accused of impaired driving. Virtually every client receives an unsolicited letter for installation of ignition interlock devices. The official-looking letters suggest the drivers are required by law to install these expensive devices. But North Dakota law does not require what is suggested. Although I warn prospective clients of this scam, even represented clients have taken the bait. The majority of those accused of this type of offense are unrepresented, and therefore even more vulnerable. Too many people are being duped by opportunists mining law enforcement and court records. Protection is warranted.

Regrettably, even in my profession, opportunists are using these records to send unsolicited representation letters to recent and vulnerable arrestees. Lawmakers should address whether public policy favors the use of open records as a cost-saving measure for lawyers who wish to save the expense of advertising or traditional methods of attracting clients. I personally detest the reality that some within my profession are using public records for personal profit in circumstances in which the

The Honorable Mike Lefor

January 23, 2021

Page 4

recipient is vulnerable. In these circumstances, if they wish to directly solicit, they should be required to find contact information on their own, rather than from government records.

Finally, restricting public access to address and contact information of an accused prior to conviction is a sound policy to protect the accused and her family. I have represented clients who following accusation have been directly threatened by vigilante tactics on social media. Essentially anyone can anonymously post threats online. Those threats are often coupled with contact information for the person threatened. As a matter of policy, our law should not permit government records to be the source of the contact information included in the threat.

### **CONCLUSION**

I write in support of HB1296. Government employees in law enforcement and court services are not employed to collect information for interested reporters or solicitors. Government records should not be used to hurt vulnerable citizens, even those accused of a crime. Booking photographs collected for legitimate law enforcement purposes should be preserved for those purposes. Absent a compelling public interest, booking photographs—effectively eliminating the constitutional presumption of innocence—should not be publically disclosed prior to conviction.

Respectfully submitted,

*/s/ Mark A. Friese*

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