

HOUSE POLITICAL SUBDIVISIONS  
FEBRUARY 5, 2021

TESTIMONY OF MARY KAE KELSCH  
OFFICE OF ATTORNEY GENERAL  
HOUSE BILL NO. 1349

Mr. Chairman, members of the Committee.

I am Mary Kae Kelsch, Assistant Attorney General, and I appear on behalf of the Attorney General in support of HB 1349. This bill relates to the open records and meetings law. I will go through the proposed changes by section.

Section 1, Section 3, and Section 5 are related and I will address together. The changes proposed here address issues that emerged during the pandemic. When public buildings closed, officials started calling our office asking how to conduct public meetings when the building was unavailable. Even though our law allows for meetings to be held by video or conference call, the law required that in those instances, a speakerphone or monitor had to be at a physical location. This was almost always the county or city building. When those buildings were closed, that requirement became impossible. In addition, because the public could attend a meeting by video, the requirement to have a physical location was outdated. In order for public entities to continue to hold public meetings an executive order was issued waiving the physical location requirement. The changes are also an attempt to reflect the changes in technology. For example, much of our language about capacity focused on physical capacity and not electronic capacity. (Section 3). There

are also modifications proposed for what a notice must contain when meetings are all electronic. (Section 5).

Also in section 1 is a change that would allow regulatory boards to administer its exams without it being a public meeting.

Section 2. Last session a bill passed making the identity of applicants for public employment confidential until finalists are designated. Confidential is the highest level of protection that may be provided under the open records law. A person is guilty of a class C felony if the person knowingly discloses confidential information acquired as a public servant. NDCC § 12.1-13-01. The threshold of confidentiality is not practical when public entities at all levels are constantly receiving applications for various jobs. We are aware that there are other bills that propose changes to this law. We believe by changing the applications to exempt, rather than confidential, solves most issues that were discovered with this statute. The classification of exempt gives discretion to the public entity to decide whether it can release a record. The level of protection should be left to the entity to decide and can be protected to the degree appropriate for the situation.

Section 4. The change proposed here would protect litigation files until litigation is completed. Currently, if a party to the litigation wants records, the law provides that both parties use the discovery process which offers certain protections. However, if records are requested by someone who is not a party to litigation, the open records law applies. Unfortunately, in most cases, these requests are from a party who wants to sue the state and wants valuable information contained in the

current litigation file. This puts the state in a vulnerable and unfair position. After the case is closed, these records would be open and accessible.

Section 6. This section would give the State Fire Marshal the same protections for the records of a fire department. It also would make images of a victim of a fire exempt. Unfortunately, there have been deaths associated with fires and as a part of the investigation photos are taken. This would allow protection for those images.

Section 7. This section would make medical records or records that contain medical information in the possession of a public entity exempt. The protection for medical records is scattered throughout the code and most people do not realize that there are many situations where a medical record held by a public entity would have to be released in response to an open records request. This language proposes to close that loophole.

Section 8. Last session a Medicaid Fraud Unit was created in the Attorney General's office. This would language proposes to exempt active investigation records.

I would be happy to answer any questions.