

SENATE POLITICAL SUBDIVISIONS
MARCH 25, 2021

TESTIMONY OF MARY KAE KELSCH
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. HB 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 In addition, because the public could attend a meeting by video, the requirement to have a physical location was outdated.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 a regulatory board to administer 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. N.D.C.C. § 12.1-13-01. This law applies to all public entities and the threshold of confidentiality is not practical when public entities at all levels are constantly receiving applications for various jobs openings. This bill would change the status of the applications to exempt in order to give public entities more flexibility in handling job applications. This change solves the 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. The finalists records would still be open to the public.

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 the Medicaid Fraud Control Unit was created in the Attorney General's office. This language proposes to exempt active investigation records.

I would be happy to answer any questions.