

2023 SENATE JUDICIARY

SB 2047

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2047
1/10/2023

A Bill relating to the definition of meeting.

9:30 AM Vice Chairman Sickler, Acting as Chairman, opened the meeting.

Present are Senators Paulson, Sickler, Braunberger, Estenson, Luick, and Myrdal. Senator Larson is absent.

Discussion Topics:

- Judicial branch meetings
- Closed meetings
- Open meetings
- Open records law

9:30 AM Sara Behrens, State Court Administrators Office, introduced the bill. They have submitted an amendment to the bill. #12723, #12722

9:34 AM Jack McDonald, ND Newspaper Association, testified verbally in favor of the bill with the proposed amendments.

9:36 AM Acting Chairman Sickler closed the public hearing.

9:36 AM Acting Chairman Sickler closed the meeting.

Rick Schuchard, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2047
1/10/2023

A Bill relating to the definition of meeting.

10:38 AM Chairman Larson opened the meeting.

Present are Chairman Larson and Senators Myrdal, Luick, Estenson, Braunberger, Sickler and Paulson.

Discussion Topics:

- Judicial branch meetings
- Open records

10:39 AM Chairman Larson asks what the wishes of the committee are regarding the bill.

10:39 AM Senator Braunberger moves to adopt amendment LC 23.8022.01001. Motion seconded by Senator Luick. Voice vote taken. Motion passes.

10:40 AM Senator Sickler moves to Do Pass the bill as amended.
Senator Myrdal seconds the motion.

10:40 AM Roll call vote is taken.

Senators	Vote
Senator Diane Larson	Y
Senator Bob Paulson	Y
Senator Jonathan Sickler	Y
Senator Ryan Braunberger	Y
Senator Judy Estenson	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion passed. 7-0-0

Senator Sickler will carry the bill.

This bill does not affect Workforce Development

10:42 AM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

January 10, 2023

AG
1-10-23
(1-1)

PROPOSED AMENDMENTS TO SENATE BILL NO. 2047

Page 2, line 2, remove the overstrike over "and"

Page 2, line 4, remove "; and"

Page 2, remove lines 5 and 6

Page 2, line 7, remove "judicial branch"

Page 2, after line 10, insert:

"d. Notwithstanding subdivisions a and b, "meeting" does not include any meeting of the judicial branch or a committee or workgroup of the judicial branch. Such meetings are governed by section 5 of article XI of the Constitution of North Dakota."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2047: Judiciary Committee (Sen. Larson, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2047 was placed on the Sixth order on the calendar. This bill does not affect workforce development.

Page 2, line 2, remove the overstrike over "and"

Page 2, line 4, remove "and"

Page 2, remove lines 5 and 6

Page 2, line 7, remove "judicial branch"

Page 2, after line 10, insert:

"d. Notwithstanding subdivisions a and b, "meeting" does not include any meeting of the judicial branch or a committee or workgroup of the judicial branch. Such meetings are governed by section 5 of article XI of the Constitution of North Dakota."

Renumber accordingly

2023 HOUSE JUDICIARY

SB 2047

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

SB 2047
3/8/2023

Relating to the definition of meeting.

10:05 AM Chairman Klemin opened the hearing. Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, and Rep. Vetter.

Discussion Topics:

- Meeting definition.
- Open records.

Sara Behrens, Staff attorney, State Court Administrator's Office: Testimony #21371

Hearing closed at 10:10 AM

Rep. S. Olson moved a Do Pass;
Seconded by Rep. Satrom

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	Y
Representative Cole Christensen	N
Representative Claire Cory	N
Representative Donna Henderson	N
Representative SuAnn Olson	Y
Representative Nico Rios	Y
Representative Shannon Roers Jones	A
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	N
Representative Steve Vetter	N

Roll call vote: 6 Yes 6 No 1 Absent; Failed

The meeting closed at 10:15 AM.

Delores Shimek, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

SB 2047
3/8/2023

Relating to the definition of meeting.
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3:20 PM Chairman Klemin opened the meeting. Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, and Rep. Vetter.

Discussion Topics:

- Committee action.

Rep. Rep. Shannon Roers Jones moved a Do Pass;
Seconded by Rep. Satrom

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	A
Representative Cole Christensen	N
Representative Claire Cory	N
Representative Donna Henderson	N
Representative SuAnn Olson	Y
Representative Nico Rios	N
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	N
Representative Steve Vetter	N

Roll call vote: 6 Yes 6 No 1 Absent Motion failed.

The meeting closed at 3:31 PM.

Delores Shimek, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

SB 2047
4/3/2023

Relating to the definition of meeting.

10:04 AM Chairman Klemin opened the hearing. Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle and Rep. Vetter.

Discussion Topics:

- Public meetings.
- Court committees.
- State powers.

Justice Jerod Tuffe: Supreme Court: No written testimony.

Rep. Satrom moved a Do Pass;
Seconded by Rep. Shannon Roers Jones

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	Y
Representative Cole Christensen	Y
Representative Claire Cory	Y
Representative Donna Henderson	Y
Representative SuAnn Olson	Y
Representative Nico Rios	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y

Roll call vote: 13 Yes 0 No 0 Absent Motion carried.
Carrier: Rep. Christensen

The meeting closed at 10:13 AM

Delores Shimek, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2047, as engrossed: Judiciary Committee (Rep. Klemin, Chairman) recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2047 was placed on the Fourteenth order on the calendar.

TESTIMONY

SB 2047

PROPOSED AMENDMENTS TO SENATE BILL NO. 2047

Page 2, line 4, remove ; and

Page 2, remove lines 5 through 7

Page 2, after line 10, insert:

- d. Notwithstanding subdivisions a and b, “meeting” does not include any meeting of the judicial branch or a committee or workgroup of the judicial branch. Such meetings are governed by section 5 of article XI of the Constitution of North Dakota.

Senate Bill 2047
House Judiciary Committee
Testimony Presented by Sara Behrens
January 10, 2022

Good morning Chair Larson, members of the committee. My name is Sara Behrens and I am a staff attorney with the State Court Administrator's Office. I am here today in support of Senate Bill 2047.

We have submitted a proposed amendment to the bill which would remove the addition originally proposed and, instead, create a new subdivision d. After speaking with Jack McDonald, this was a compromise that leads to the same result.

Senate Bill 2047 simply excludes from the definition of meeting under the open meetings law, meetings of judicial committees and workgroups. This codifies the current understanding of the Judicial Branch and is supported by North Dakota Attorney General Opinion 2005-O-19. As stated in that opinion, nothing in the legislative history of the open meetings law indicates that it was meant to apply to the judicial branch. The Attorney General further explained that separation of powers would likely prevent the open meetings law from being applied to the judicial branch.

While there are Attorney General Opinions applying the open meetings law to the State Board of Law Examiners and the Judicial Conference, those were distinguished because they were creations of the Legislature and were found to fall under the definition of "public entity" which includes an entity created by state statute.

We wish to make it clear that the meetings of committees, workgroups, and other groups created by the Judicial Branch are not subject to the open meetings law. Instead, judicial branch meetings are subject to section 5 of Article XI of the North Dakota Constitution. The Supreme

Court can then determine if it believes any meetings should be closed and create court rules to govern. There is already a corresponding exclusion under the definition of “record” to make clear that judicial branch records are not subject to the open records law. Instead, whether judicial branch records are open is governed by court rule.

We thank you for your consideration and urge a do pass.

**OPEN RECORDS AND MEETINGS OPINION
2005-O-19**

DATE ISSUED: November 22, 2005

ISSUED TO: Supreme Court Gender Fairness Implementation Committee

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Roland Riemers asking whether the North Dakota Supreme Court Gender Fairness Implementation Committee violated N.D.C.C. § 44-04-19 by holding a meeting that was not open to the public.

FACTS PRESENTED

In 1994 the North Dakota Supreme Court created the North Dakota Commission on Gender Fairness in the Courts to study gender fairness in the court system and recommend rule changes to address gender fairness in a final report. This process was completed in 1996. In 1997, the Gender Fairness Implementation Committee (hereafter, "Implementation Committee") was established by the North Dakota Supreme Court by administrative order.¹ The purpose of the Implementation Committee is to oversee the implementation of the recommendations made in the final report of the North Dakota Commission on Gender Fairness in the Courts, monitor the progress of the judicial branch in eradicating gender bias in the courts, make recommendations on related issues, and submit progress reports.² The Implementation Committee consists of seven members of the bench and bar appointed by the chief justice, in consultation with the president of the State Bar Association. Justice Mary Maring is the current chair. The Implementation Committee is funded through an allocation of funds for general judicial system committee activity which is included in the general fund appropriation for the judicial branch. Agendas and minutes of Supreme Court advisory committees are regularly posted on the Supreme Court's website, but the Supreme Court has never treated the committees as subject to the open meetings law.

During August 2005, the Implementation Committee conducted a series of focus group discussions in order to gauge whether the judicial system had made any progress in addressing the bias-related issues outlined in the 1996 final report of the Commission on Gender Fairness in the Courts. Lawyers practicing in the areas of criminal and

¹ Administrative Order 7 of the North Dakota Supreme Court (1997).

² Id.

domestic law were invited by the Implementation Committee to the group discussions. Others who were invited were domestic violence advocates, those who appear in court proceedings under Supreme Court Administrative Rule 34, individuals involved in victim and witness assistance, and child support enforcement personnel. Public notice was not given of the meeting.

Prior to the August 24, 2005, meeting in Grand Forks, Justice Maring was contacted by an associate of Mr. Riemers, who asked to attend the meeting. He was told that the meeting was only for specific invitees and that it was not a meeting for the general public. Mr. Riemers and his associate arrived at the meeting in Grand Forks demanding to attend and address the committee. Justice Maring refused to allow them to attend the meeting at that time. Instead she arranged for Mr. Riemers and his associate to present comments to the Implementation Committee at a later time that day.

ISSUE

Whether the Gender Fairness Implementation Committee is subject to the open meetings law.

ANALYSIS

The open meetings law generally requires all meetings of a public entity to be open to the public.³ In 1997 the open meetings law was amended in order to strengthen and clarify the law.⁴ Even though at that time the definition of “public entity” was expanded to include “any entity created or recognized by the Constitution of North Dakota . . . ,”⁵ nothing in the legislative history from the 1997 amendments indicates that it was ever intended to apply to the judicial branch. Most notable is a conspicuous absence of testimony from the court and exceptions in the law that the court would logically want addressed if subject to the law. For instance, there is no exception for deliberations of the Supreme Court.

The Georgia Supreme Court, in a decision with almost identical facts as presented here, refused to apply the Georgia open meetings law to the Georgia Commission on Gender Bias in the Judicial System, based on the separation of powers between the judicial and executive branches of government and because, like North Dakota, the law did not specifically reference the judicial branch, nor otherwise apply it to the judiciary in clear and unmistakable terms.⁶

³ See N.D.C.C. § 44-04-19.

⁴ See 1997 N.D. Sess. Laws ch. 381.

⁵ N.D.C.C. § 44-04-17.1(12)(a).

⁶ Fathers are Parents Too, Inc. v. Hunstein, 415 S.E.2d 322, 323 (Ga. 1992).

OPEN RECORDS AND MEETINGS OPINION 2005-O-19

November 22, 2005

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The North Dakota Constitution creates the legislative, executive, and judicial branches as coequal branches of government, thus creating the separation of powers doctrine.⁷ Because each branch is supreme in its own sphere⁸ it is unlikely that the Legislature could subject the judicial branch, or a judicially created committee to the requirements of the open meetings law. The separation of powers doctrine prohibits the Legislature from applying the open meetings law to the judiciary's rule-making function. The North Dakota Supreme Court is constitutionally vested with the authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state.⁹ According to the Supreme Court, it almost exclusively uses committees to carry out its rule-making function.¹⁰ The Implementation Committee is acting under the rule-making authority of the Supreme Court by assessing the rules promulgated to address gender bias in the courts.

Courts in other jurisdictions with state constitutions that explicitly grant rule-making authority to the judiciary have found it unconstitutional to apply an open meetings law to the judiciary's rule-making functions.¹¹ A Florida Attorney General's opinion explained that a court-related committee created by the Legislature was subject to the open meetings law, but that a "substantial question exists as to whether the Legislature could subject the judiciary or a judicially-created committee to the requirements of the Sunshine Law because of the separation of powers doctrine and because the Supreme Court is constitutionally vested with the power to adopt rules for the practice and procedure in all courts. . . ." ¹²

This office has never addressed whether the separation of powers doctrine prohibits the open meetings law from applying to the courts. However, in 1990, this office issued an opinion concluding that the open meetings law applied to the State Bar Board.¹³ The State Bar Board had power and duties relating to the admission of applicants to the bar. There are two important facts that distinguish that opinion from this situation. First, the

⁷ N.D. Const. art. XI, § 26; State v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987). See also Brett L. Bornsen, Comment, *Constitutional Law – Separation of Powers: The North Dakota Supreme Court Invalidates a Discovery Statute that Conflicted with a Rule of Procedure* State v. Hanson, 558 N.W.2d 611 (N.D. 1996), 74 N.D. L. Rev. 775 (1998).

⁸ State v. Hanson, 558 N.W.2d 611, 614 (N.D. 1996).

⁹ N.D. Const. art. VI, § 3.

¹⁰ The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, sets forth rule-making procedures, but applies only to the executive branch. See N.D.C.C. § 28-32-01(2).

¹¹ See In re 42 PA.C.S.S. 1703, 394 A.2d 444 (Pa. 1978); In re the "Sunshine Law", 255 N.W.2d 635 (Mich. 1977).

¹² Florida AGO 83-97 (Dec. 13, 1983).

¹³ See N.D.A.G. 90-04.

OPEN RECORDS AND MEETINGS OPINION 2005-O-19

November 22, 2005

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State Bar Board was established by the Legislature. Here, the Implementation Committee is solely created by the Supreme Court. Second, art. VI, § 3 of the state constitution provides that the Supreme Court has the authority to promulgate rules and regulations regarding the admission to practice law and the conduct, disciplining, and disbarment of attorneys at law, unless otherwise provided by law.¹⁴ The court's authority, therefore, was not exclusive, allowing for the application of the open meetings law.¹⁵ Here, the authority to promulgate rules of procedure is solely vested in the Supreme Court.¹⁶

The statutory open meetings law is similar to a provision in the North Dakota Constitution. The constitutional provision states “[u]nless otherwise provided by law, all meetings of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public.”¹⁷

This provision was proposed in the 1973 legislative session by Senate Concurrent Resolution No. 4010 and approved by the electors in 1974.¹⁸ Almost identical language had been discussed during the 1972 Constitutional Convention but was not included in the proposed constitution at that time.¹⁹ Because the language in the two provisions is so similar, the legislative history from the constitutional convention is helpful to illustrate the intent behind the open meetings provision in article XI, § 5. The legislative history indicates that the language was meant to only pertain to the executive branch:

Delegate Rundle: “...I would like to explain, first, that we took out the courts. I had originally had one include courts, and there were so many exemptions that had to be in that I withdrew that the other day. . . . And then the Committee put the word “executive bodies” in here to make sure this didn’t include the courts...”²⁰

Delegate Maxwell: “. . . This proposal deals with the executive branch...”²¹

¹⁴ N.D. Const. art. VI, § 3 (emphasis added).

¹⁵ N.D.A.G. 90-04.

¹⁶ See N.D. Const. art. VI, §3.

¹⁷ N.D. Const. art. XI, § 5.

¹⁸ See 1973 N.D. Sess. Laws ch. 530, § 1; 1975 N.D. Sess. Laws ch. 604.

¹⁹ See 1973 N.D. Sess. Laws ch. 529.

²⁰ Debates of the North Dakota Constitutional Convention of 1972, vol. II, pg. 1021, (January 31, 1972).

²¹ Id. at 1024.

Nothing in the legislative history of Senate Concurrent Resolution No. 4010 proposed one year later, in 1973, suggests that its application was any broader than the similar proposal considered by the constitutional convention.

CONCLUSION

It is my opinion that the Implementation Committee is not subject to the open meetings law because applying the open meetings law to an exclusive function of the Court is prohibited by the separation of powers doctrine. Thus, the Implementation Committee of the Supreme Court did not violate the law when it failed to follow the notice requirements of the open meetings law and refused to allow the requestor in to the meeting on August 24, 2005.

Wayne Stenehjem
Attorney General

Assisted by: Mary Kae Kelsch
Assistant Attorney General

vkk

Senate Bill 2047
House Judiciary Committee
Testimony Presented by Sara Behrens
March 1, 2023

Good morning Chair Klemin, members of the committee. My name is Sara Behrens and I am a staff attorney with the State Court Administrator's Office. I am here today in support of Senate Bill 2047.

Senate Bill 2047 simply excludes from the definition of meeting under the open meetings law, meetings of judicial committees and workgroups. This codifies the current understanding of the Judicial Branch and is supported by North Dakota Attorney General Opinion 2005-O-19. As stated in that opinion, nothing in the legislative history of the open meetings law indicates that it was meant to apply to the judicial branch. The Attorney General further explained that separation of powers would likely prevent the open meetings law from being applied to the judicial branch.

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