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VIA Email: Chairman Dave Anderson, (dbanderson@nd.gov)
Vice-Chairman Edwin Koeser, (ekoeser@nd.gov)
Commissioner Cynthia Lindquist, (clindquist@nd.gov)
Commissioner Ronald Goodman, (regoodman@nd.gov)
Commissioner Murray Sagsveen, (msagsveen@nd.gov)

Dear Ethics Commissioners,

The Attorney General's Office has grave concerns about the immense consequences of the attached draft legislation proposed by your staff regarding prohibited actions for providing information to the Ethics Commission. The draft legislation is apparently intended to protect perceived whistleblowers from retaliation. The way it is written, however, would result in far-reaching, harmful consequences for every employer, regulatory body, and individual in the state. Attorneys in our office have been working for some time with our clients to try to meet with your Executive Director to discuss these negative impacts before the legislation is introduced to the Legislative Assembly.

If adopted, the proposed law would prohibit every private and public individual and organization¹ in the state from taking any adverse action against anyone who makes an allegation, or provides information or documents, to the Ethics Commission, regardless of whether the adverse action was retaliatory in any way. The draft language does not require any nexus between the adverse action and the individual's interactions with the Ethics Commission. So, for example, an employee could fail to meet all work expectations and then be shielded from any consequences simply because the employee went to the Ethics Commission and asserted an unrelated ethical violation. Similarly, any member of a regulated profession could be shielded from adverse actions by a regulatory board if the member provided unrelated information to the Ethics Commission.

¹ See the definition of "person" in North Dakota Century Code § 1-01-49(10).

If the draft legislation became law, providing information to the Ethics Commission would essentially become a get-out-of-jail-free card that would upend employers' ability to manage their staffs and nullify regulatory bodies' ability to safeguard the public from unsafe licensees. The Ethics Commission could be dragged into every employment grievance and disagreement over licensure qualifications. This is why whistleblower laws protect people from retaliation for engaging in protected activities, not against disciplining them for any reason.

Moreover, the state already has robust whistleblower protections in place. North Dakota Century Code § 34-01-20 prohibits the type of retaliation the Commission apparently wishes to address with this draft legislation. That statute also provides penalties for violations and gives employees the right to file complaints in court or with the Labor Department for alleged violations. These robust protections mirror other time-tested, federal and state, whistleblower laws around the country.

This office would appreciate the opportunity to discuss these issues in further detail with your staff or with you, so you are aware of the potential consequences of the draft legislation before it is introduced.

Sincerely,



Claire J. Ness
Chief Deputy Attorney General

Draft Legislation Regarding Prohibited Actions for Providing Info to Ethics Commission

Prohibited Actions.

1. A person shall not take or threaten to take any retaliatory, disciplinary, or other adverse action against another person who in good faith:
 - a. provides relevant information to the commission asserting an ethical violation; or
 - b. provides testimony, records, documents, or other information to the commission during an investigation or proceedings held in connection with an enforcement action.
2. Nothing in this chapter shall preclude civil or criminal actions for libel or slander or other civil or criminal actions against a person who provides false information to the commission.