

## **Judiciary Committee January 30, 2019**

**LATHROP:** [00:00:02] Looks like we're a little bit after 1:30 so I think we'll get started. Those of you that are frequent flyers in this committee know that I start out by reading something and I'll do that today. So this is done-- Laurie does this to make sure I cover all the bases and I don't forget anything, so I'm going to do that to begin with. Good afternoon and welcome to the Judiciary Committee. My name is Steve Lathrop. I'm the state senator from Legislative District 12 which encompasses Ralston and part of southwest Omaha. I'm the Chair of the Judiciary Committee and I'll-- I think we'll start out by having the senators introduce themselves beginning with Senator DeBoer.

**DeBOER:** [00:00:41] Hi. I'm Wendy DeBoer, senator from District 10 which is northwest Omaha and Bennington and surrounding areas.

**BRANDT:** [00:00:50] Tom Brandt, District 32, Fillmore, Thayer, Jefferson, Saline, and southwestern Lancaster County.

**CHAMBERS:** [00:00:58] Ernie Chambers, District 11 in Omaha.

**SLAMA:** [00:01:05] Oh, yep, sorry. Julie Slama, southeast Nebraska, covering Otoe, Pawnee, Richardson, Johnson, and Nemaha Counties in southeast Nebraska.

**WAYNE:** [00:01:17] Justin Wayne, District 13, which is north Omaha and northeast Douglas County.

**LATHROP:** [00:01:23] So assisting the committee today is Laurie Vollertsen, our committee clerk

who's back here, Neal Erickson and Josh Henningsen are-- are our legal counsel, and the committee pages are Alyssa Lund and Dana Mallett, both students at UNL. On the table inside the doors when you came in, you'll find a yellow testifier sheet. If you're planning on testifying today, please fill one of these sheets out and hand it to the page when you come up to testify. This helps us keep an accurate record for the hearing. There is also a white sheet on the table if you do not wish to testify but would like to record your position on a bill. Also, for future reference, if you are not testifying in person on a bill and would like to submit a letter for the official record, all committees have a deadline of 5:00 p.m. the day before the hearing to receive those letters if you want them included. We'll begin bill testimony with the introducer's opening statement. Following the opening we will hear from proponents of the bill, then opponents, and finally, by anyone speaking in a neutral capacity. We will finish with a closing statement by the introducer if they wish to give one. We ask that you begin your testimony by giving us your name, your first and last name and spell them for the record. We utilize an on-deck chair-- it actually has a piece of paper taped to the chair that says "on deck" for the next person to testify to keep the hearing moving along. If you have any handouts please, bring up 12 copies and give them to the page. If you do not have enough copies, the page can help you by making more. We will be using a light system. When you begin your testimony, the light on the table will turn green. The yellow light is your one- minute warning and when the red light comes on, we ask that you wrap up your final thoughts and stop. As a matter of committee policy, I would like to remind everyone that the use of cell phones and other electronic devices is not allowed during public hearings, though senators may use them to take notes or stay in contact with staff. At this time I would ask everyone to look at their phones and make sure they are on the silent mode. Also, verbal outbursts and applause and things like that are not permitted in the hearing room. If you do, you'll be asked to be excused. You may notice committee members coming and going. That has nothing to do with how they regard your bill, but they have other bills to introduce and other responsibilities that may require them to leave the hearing. One last thing, we're holding hearings in the Warner Chamber. And while our regular hearing room is being renovated, please

remember that water bottles, soda cans, and the like are not permitted on the desks to avoid any damage. This isn't your first time, Colonel. [LAUGH] Yeah, keep the water bottles off. We don't want those rings on there or we'll end up having problems with the building people. Thank you.

With that, we'll begin. The first bill we're going to take up, we're actually going to do two at once because they are very similar to one another, Senator Wishart's LB438 and Senator Wayne's LB94. We'll have Senator Wishart introduce her bill, then Senator Wayne introduce his bill, and then we'll take proponents. And if-- if you want to make some distinction between the two, we're-- we're happy to recognize that. Senator Wishart on-- to open on LB438. Welcome once again to the Judiciary Committee.

**WISHART:** [00:05:01] Well, good afternoon, Chairman Lathrop and members of the Judiciary Committee. I don't anticipate this hearing will take as long as the one we had last week. I don't want to get a reputation. My name is Anna Wishart, A-n-n-a W-i-s-h-a-r-t, and I represent the 27th District in west Lincoln. District 27 encompasses four correctional facilities. Fifty-one percent of the inmate population lives in this district and many correctional officers live and work here. It is a priority of mine to ensure the safety of staff and inmates and the public, which is why I'm here today to introduce LB438. LB438 would provide the Nebraska State Patrol with the ability to conduct criminal investigations within the Nebraska Correctional Center and the Lincoln Regional Center. It is my intent to ensure our Department of Correctional Services and Lincoln Regional Center provide a safe environment for our state employees and prisoners and-- and their Regional Center clients. It is my belief that current criminal investigations are understaffed and the Legislature is not receiving a full picture of the problems within our state facilities. Criminal investigations are very time consuming. It is my understanding from a similar bill on this issue by Senator Chambers, LB816, that there are only two investigators across the state of Nebraska for these facilities. If there is any criminal activity in state facilities, whether it's an assault on an inmate or an assault on an officer or a state employee smuggling in contraband, it is the state's

responsibility to investigate what occurs within our facilities. My research on this issue indicates a minimum of ten investigators would be needed to achieve the goals set forth in this bill, but I am open to what the State Patrol feels they need, which they have spelled out in their fiscal note, and I'm anticipating they will testify on that today. Also, it is important to note that Senator Wayne has a similar bill this committee will be hearing, LB94, and so I look forward to working with the committee on this proposal and Senator Wayne's proposal. Obviously there will be experts on this issue behind me, people who have boots-on-the-ground experience within correctional facilities to answer your questions, but I'd be happy to answer any if you have any. Thank you.

**LATHROP:** [00:07:15] I see no questions. The record can reflect that Senator Pansing Brooks and Senator Morfeld have also joined this. Thank you for your introduction. Are you going to stay to close?

**WISHART:** [00:07:26] I may not be able to. I have another bill up.

**LATHROP:** [00:07:28] OK. Senator Wayne to introduce LB94.

**WAYNE:** [00:07:40] Thank you, Chairman Lathrop and the Judiciary Committee I won't go and read all my testimony. I'll make this very simple. If there is a criminal act, and when we talk about levels of probable cause to reasonable doubt, levels of burdens of proof, I think law enforcement agencies are the ones who should be entitled and should be rightfully used to make sure there is probable cause for an investigation, probable cause to charge or not charge a criminal, and then later turn that over to a prosecutor. I don't believe just because you're behind the walls of a detention center that that standard changes. So although the Department of Corrections does a lot, it should not be investigating any criminal activity within the walls or compounds of Department of Corrections. I think Department of Corrections has a big enough task of making sure that we get

those who come back into our society rehabilitated and ready to-- and ready to produce and be productive citizens. I don't think it's their specialty to investigate criminal activities. I learned about this through a couple different hearings that we had on-- on the committee that I was on over the summer and then we also had a lot of calls. And what concerned me more over the summer was we are now hearing from individuals, although I did meet with Mr. Frakes and he said it is not happening, there are attorneys in Omaha that have contacted me and also individuals have contacted me that said there are correction officers or those who are doing the investigations off campus now, knocking on people's doors, issuing warrants, serving warrants. Again, I think that is the role of State Patrol and we should keep it there and house it there. And with that, I'll answer any questions.

**LATHROP:** [00:09:25] Any questions for Senator Wayne? I see none. Thanks, Senator. If you are going to testify, remember we're doing two different bills, so if you want to address something about one bill or the other, just reference the number, if you wouldn't mind, so that we can keep a straight record while we handle two bills at once.

**JIM MAGUIRE:** [00:09:46] Absolutely.

**LATHROP:** [00:09:48] Thanks. And welcome, Jim.

**JIM MAGUIRE:** [00:09:52] Senators, good afternoon. My name is Jim Maguire. I'm president of the Nebraska Fraternal Order of Police and I am here to support LB438. LB438 is a-- has some changes from LB816 from last year that Senator Chambers introduced. And some of the-- the main changes are asking for ten investigators. Why that number? We have ten institutions; we should have ten investigators, one in each invest-- in each institution. Here are some of the-- some of the things I've looked at just on the Internet. October 22 of '18, there is excessive force allegations towards the staff at-- within the correctional system. The case was referred and investigated by the

Nebraska State Patrol. March 3, 2017, everybody knows that there was a riot at Tecumseh. That case was referred and investigated by the Nebraska State Patrol. June 19, 2018, two persons are arrested during a six-month investigation for drug smuggling. That case was referred to the Nebraska State Patrol. This is already occurring. What we're doing is asking for clarity and direction so that if there is some type of a crime or an investigation that needs to occur within the Department of Corrections, that there is-- there's one point investigation and agency that will do that, rather than having them trying to sort out is this-- is this case big enough for us to investigate or should we refer it. That's not how you should do anything in law enforcement. Policies have to be clear and transparent and these are the folks that are going to do the investigations. This would-- would provide an enormous amount of opportunities for-- for folks to actually sit down, investigate, and talk to the Inspector General who works with the Legislature so that there can be absolute transparency what is going on within the Nebraska correctional system. So that is-- that was the intent behind our organization supporting this. I-- I appreciated Senator Chambers last year bringing this-- this-- his-- his former bill up and when we started digging into it, it was quite glaring-- quite glaring that a change had to be made. And with-- with just the minimal amount of time that I looked at it, it's already occurring that the-- the State Patrol is-- is looking into this. Why do we include the Regional Center? Well, not everybody in the Regional Center is there for mental health, mental health issues. Some of them are there under court order for some type of an evaluation, so that's why they were asked to be part of this, because we know we have problems within the Regional Center. I looked at the fiscal note and some of the things that I'm just going to take a-- point out briefly is we asked for ten investigators. The state patrol is already saying they're going to need 14 investigators, 2 sergeants, 1 lieutenant, an analyst, 2-- 2 assistants. So whether or not that's the proper course, I don't know, but I do know that we're just asking for ten and, you know, 2 would be assigned to NSP and Tecumseh. Thank you.

**LATHROP:** [00:13:15] Thanks Jim. Any questions for this testifier? Senator Chambers.

**CHAMBERS:** [00:13:19] Kind of a general question. If an incident occurs and there's a possibility of criminal activity involved, it would be difficult and maybe even counterproductive to have somebody start the investigation, go so far with it, maybe handle what would be considered evidence, talk to people, and then the State Patrol would come in after that person has done whatever he or she is going to do and try to take over and have continuity. The better course would be to have one agency that starts at the beginning, carries the entire investigation through to completion, and that's the way I view what is being attempted here and why this bill is necessary and of value. So if there's anything I said that you would disagree with, then the record is open.

**JIM MAGUIRE:** [00:14:12] I would absolutely agree with everything that you say and I'll go one step further. If you have an investigator that creates a rapport with a certain person and they feel they're going to say, I will only talk to you, and then you have to say, well, I know you want to talk to me but now everything has to be turned over to another person and they're like, I'm not going to talk to anybody else but you, that part of the investigation stops. And that is sometimes the most important things that you're going to find out in the case right off the beginning. You have to have some kind of a rapport and you don't want that to get lost in the bureaucracy of the whole thing.

**CHAMBERS:** [00:14:51] Thank you.

**LATHROP:** [00:14:54] I see no other questions. I do have one for you.

**JIM MAGUIRE:** [00:14:56] Yes.

**LATHROP:** [00:14:56] What are we trying to fix here? So we have-- this-- the Department of Corrections has a couple of investigators. Is it-- is it because they're Department of Corrections

workers or is it because we only have two or is it both? Can you--

**JIM MAGUIRE:** [00:15:11] It's--

**LATHROP:** [00:15:13] --shed some light on why, why this-- you believe this bill is necessary?

**JIM MAGUIRE:** [00:15:16] Last year I was-- I'll use the word "appalled." I was-- I was appalled that there were only two investigators to investigate all of the ten institutions within the Department of Corrections. So if you have an investigator that has to go to Omaha one day and then he may have to drive to McCook the next day, that entire day is going to be wasted just driving. You need to have folks that are going to be able to do a proper investigation. And then talking to a lot of the-- the guards, it was, you know, and this is their personal views on this, that if they are assaulted, that it is not being properly investigated, that they're not being interviewed properly. And it becomes a morale issue for some of the officers because they don't feel that their backs are being taken care of, if, you know, if you want to put it in that kind of context. So it was a combination of finding out that-- you know, in the city of Omaha you have school resource officers in almost every Class A school. And here we have, you know, correctional-- prison-- well, prisons that have several thousand people in it and you don't have somebody that's permanently assigned and I can assure you, those folks in the prison are-- are a lot different than the kids that are in those schools.

**LATHROP:** [00:16:41] Another question for you. So an assault would be an obvious example, an assault that takes place in the institution. What about an escape?

**JIM MAGUIRE:** [00:16:48] Absolutely.

**LATHROP:** [00:16:50] Is that-- who's investigating escapes right now? That would be all inclusive



because that would be-- that would be a crime and it would-- it would fall to the State Patrol to investigate it because you don't know how did they escape, did they have help, were there other folks involved, was there money involved, and all of that is very time consuming. And a proper investigation has to be completed so that it's not just, you know, getting investigated-- investigated-- investigation started and the person arrested. But there's a lot of follow-up that occurs after that person is arrested, so.

**LATHROP:** [00:17:27] You represent the security staff, you being the FOP?

**JIM MAGUIRE:** [00:17:30] Yes.

**LATHROP:** [00:17:31] Do they feel like the investigations aren't happening for some reason other than not having enough resources?

**JIM MAGUIRE:** [00:17:36] I don't want to speak out of turn on their behalf. They just-- in-- in--

**LATHROP:** [00:17:43] And if you don't know, I don't need you to speculate.

**JIM MAGUIRE:** [00:17:44] I don't want to speculate. I--

**LATHROP:** [00:17:46] OK.

**JIM MAGUIRE:** [00:17:46] I just know the hard feelings that they have.

**LATHROP:** [00:17:48] OK. I see no other questions. Thanks for your testimony.

**JIM MAGUIRE:** [00:17:53] Thank you.

**LATHROP:** [00:17:55] Next proponent. Welcome.

**JAMES DAVIS:** [00:18:10] Welcome. Good afternoon, Senator Lathrop and the Judiciary Committee. My name is James D-a-v-i-s. I am the Deputy Ombudsman for Corrections. So I passed out some handouts, though, but I'll just get to the chase. Back in 1999, we dealt with this issue. Well, the department wanted to hire deputy sheriffs, basically brought that to the Legislature under LB31. That was Senator Kristensen. Senator Brashear was chairing the committee at the time. The committee voted that down. They killed it in committee. Then in 2005, we-- Senator Chambers introduced LB757, deputy sheriffs. It was a category that they fall up under, but also it was language put in the statute that indicated that deputy sheriffs shall not be under the Department of Corrections because deputy sheriffs, they do have law enforcement authority. So that passed. Last year we came with a bill, LB816, that was to take the two external investigators from the Department of Correction and place them up under the State Patrol. So we were only looking at two at the time and then basically after July-- January 1, then the State Patrol, the colonel was supposed to come back with a report indicating what he-- what his needs are. We need additional staff or not? So that came in with two external investigators. At the time the department only has two external investigators, approximately-- they do have extradited officers and they have canine, so that's approximately around about ten. We were only looking at moving the two across the board. Some of the questions you asked, whether they can stay on campus and go off grounds, serve warrants, or have arrest powers, they do and they have. We took a statement from one of the ex-external investigators last year who gave statement that they do these things and then now the department does have a policy that identifies what they can do and I-- I passed that policy out. You guys have it. You can look at it at your convenience. But they do have arrest authority. They can write affidavits and turn it into the county attorney, and search warrants. So I'm open to any questions.

**LATHROP:** [00:21:01] OK. Any questions for Mr. Davis? I see none. Thanks for your testimony.

**JAMES DAVIS:** [00:21:07] OK.

**LATHROP:** [00:21:07] Appreciate it.

**JAMES DAVIS:** [00:21:09] Thank you.

**LATHROP:** [00:21:09] Next proponent wishing to testify on the-- either of these two bills. Seeing no more proponents, opponent testimony? Welcome, Director Frakes.

**SCOTT FRAKES:** [00:21:32] Chairman Lathrop. Good afternoon, Chairman Lathrop, members of the Judiciary Committee. My name is Scott Frakes, F-r-a-k-e-s. I'm the director of the Nebraska Department of Correctional Services, NDCS, and I'm here today to provide testimony in opposition to LB94 as well as LB438. LB94 and LB438 propose to transfer the investigators employed by NDCS to the Nebraska State Patrol for the purpose of investigating criminal activity within NDCS facilities. NDCS employs 19 individuals who are involved in various aspects of NDCS investigations. These individuals are instrumental to the investigation and intelligence divisions of NDCS, as well as conducting investigations involving personnel. Removing investigators from NDCS and placing them in another agency would seriously weaken the ability of NDCS to perform internal investigations and gather intelligence, which would make managing the inmate population considerably more difficult. The importance of utilizing in-house investigators does not negate the fact that we actively work with law enforcement when necessary to investigate criminal activity in NDCS facilities. Pursuant to NDCS policy, all criminal investigations of inmates involving murder, attempted murder, infliction of serious bodily harm, sexual assault-- assault or arson, are referred to

the State Patrol. All investigations of NDCS employees that potentially constitute a felony are also referred to the State Patrol, as are investigations of criminal activity by individuals who are not employees or inmates in NDCS. Two of the 19 investigators in NDCS are law enforcement certified. Having individuals trained in law enforcement techniques and procedures improves communication with outside law enforcement agencies and simplifies the process of referring cases to the State Patrol, local law enforcement, and county attorneys. In addition, these NDCS investigators assist with investigating incidents that may not result in prosecution but which can influence classification and housing assignment decisions. Another issue with transferring the NDCS investigators to the State Patrol is the impact it would have on efficiency. My leadership team has -- pardon me-- has immediate access to the information needed to safely operate our prisons. Additionally, law enforcement has the access and support needed to ensure criminal activity is appropriately addressed. I want to emphasize that our relationship-- that the relationship our investigative team has developed with the State Patrol over the last few years has been a mutually beneficial and productive one. The quality of the investigations performed by the State Patrol is excellent. That agency has been a great partner to NDCS and we hope to continue that relationship going forward. Thank you for the opportunity to testify today, and I'd be happy to try to answer any questions.

**LATHROP:** [00:24:42] Senator Slama.

**SLAMA:** [00:24:44] Director Frakes, thanks for coming out today. You said that these bills would make it more difficult to perform internal investigations and gather intelligence. Could you go into a little bit more detail as to what that means?

**SCOTT FRAKES:** [00:24:57] The majority of our investigative staff are tied to intelligence gathering and investigating day-to-day activities within the prisons. Some of it borders on criminal

activity, but more likely it's just behavior that's counter to good, safe prison operations. And so having this current system that we've been able to develop gives us the access, gives us the immediate information that we need to be responsive to things. We don't have the time in a-- operating a prison system to wait for an outside agency to complete an investigation, draw their conclusions, refer that through their chain of command, as we use the term, and then bring that information back to the department. We need real-time information to make decisions and to be able to safely operate our prisons.

**LATHROP:** [00:26:03] Senator Chambers.

**CHAMBERS:** [00:26:04] Mr. Frakes, on page 2, where you mention that 2 of the 19 investigators are law enforcement certified, what does that mean? Because they're not law enforcement officers.

**SCOTT FRAKES:** [00:26:18] Correct. They've completed the law enforcement academy and they have that certification but our two staff are not; they're not law enforcement. They do not have arrest powers. They can do affidavits, they can put together a request for a search warrant, but they do not have the legal authority to go and arrest people.

**CHAMBERS:** [00:26:41] You said in your testimony that they investigate-- there are investigations of criminal activity by individuals who are not employees or inmates. So that means they go off the premises or grounds of the institution into the civilian population to investigate, doesn't it?

**SCOTT FRAKES:** [00:27:04] So the reference there would be to visitors that come to the facility, contractors that come to the facility, other people that are not employees or incarcerated people. That's what the specific reference was.

**CHAMBERS:** [00:27:17] Let me ask the question differently.

**SCOTT FRAKES:** [00:27:18] Um-hum.

**CHAMBERS:** [00:27:18] Do these people do any do they have contact with people off the grounds of the penitentiary?

**SCOTT FRAKES:** [00:27:27] On occasion they will talk with staff off the grounds of a facility, yes.

**CHAMBERS:** [00:27:30] Did they go to the homes of people?

**SCOTT FRAKES:** [00:27:34] On very rare occasion and normally it would be an escort with law enforcement and by the law enforcement's request that they be present.

**CHAMBERS:** [00:27:42] Law enforcement requests that they accompany law enforcement?

**SCOTT FRAKES:** [00:27:47] Normally. There are situations, though, where they're involved in trying to determine issues related to personnel actions and the employee has been suspended from the facility, and so they may have contact with them outside of the-- outside the facility.

**CHAMBERS:** [00:28:03] But not always are they accompanying law enforcement, are they?

**SCOTT FRAKES:** [00:28:06] Not always, no.

**CHAMBERS:** [00:28:08] And whose homes would they go to when they're not being accompanied by law enforcement personnel? And to narrow the focus, are they the homes of only correctional employees or are they the homes of nonemployees?

**SCOTT FRAKES:** [00:28:29] To my knowledge, it's only employees.

**CHAMBERS:** [00:28:32] So you--

**SCOTT FRAKES:** [00:28:32] And it's a-- and it's a rare occurrence.

**CHAMBERS:** [00:28:34] You would say categorically that these investigators never go to the homes of nonemployees in any of their investigations.

**SCOTT FRAKES:** [00:28:43] To my knowledge, yes.

**CHAMBERS:** [00:28:44] What do you mean by your knowledge? When you say to your knowledge, it means that they could do it but you just don't know about it. Is that what you're saying?

**SCOTT FRAKES:** [00:28:52] Well, can I put the question back, do you believe that it has occurred? And if so, I don't want to refute what you believe. But to my knowledge, the conversations that I've had with them, it's only been to talk to staff and it's been on rare occasion.

**CHAMBERS:** [00:29:07] When you say the conversations you've had with them, you mean with these investigators?

**SCOTT FRAKES:** [00:29:14] Yes.

**CHAMBERS:** [00:29:15] Now have they been instructed by you not to go to the homes of anybody who is not an employee of the department?

**SCOTT FRAKES:** [00:29:24] No.

**CHAMBERS:** [00:29:25] Why have they not been given that instruction?

**SCOTT FRAKES:** [00:29:28] Because the question hasn't been raised.

**CHAMBERS:** [00:29:31] Well, it has been now. Are you going to do that from this point onward?

**SCOTT FRAKES:** [00:29:36] I'm not sure, Senator.

**CHAMBERS:** [00:29:38] Well, why wouldn't you? Do you think there will be occasions when you want them to go to the homes of people who are not employees?

**SCOTT FRAKES:** [00:29:45] Again, it would depend on the situation, if they were escorted, if they were requested by law enforcement as part of the investigation. And then you're asking specifically about on their own individual merit or discretion. I'd have to know more about what the situation was and why they believed that was necessary.

**CHAMBERS:** [00:30:03] When you say state-- when you say law enforcement, have State Patrol officers requested that these individuals accompany them to the home of noncorrectional employees?



**SCOTT FRAKES:** [00:30:17] I don't know.

**CHAMBERS:** [00:30:18] So that might be why you're saying you don't know whether they go to these homes or not. Well, somebody from the State Patrol is probably going to testify and I'll pursue it there.

**SCOTT FRAKES:** [00:30:29] Yeah.

**CHAMBERS:** [00:30:29] I still don't understand why you are opposed to having the State Patrol conduct criminal investigations in the institution.

**SCOTT FRAKES:** [00:30:40] Well, I'm not specifically opposed because we work hand-in-hand and have an excellent partnership with the State Patrol and with law enforcement across the state, so I'm not opposed. What I'm opposed to is removing the resources from my department to allow me to safely and efficiently operate my department.

**CHAMBERS:** [00:30:59] Well, when you say your department, it might be better to say the department of which you are the director. It's not yours; it doesn't belong to you. You have no proprietary ownership. Maybe you feel that way and that would be a mistake. But I want to go into a little more detail with you. Do these investigators of yours have arrest authority?

**SCOTT FRAKES:** [00:31:19] No.

**CHAMBERS:** [00:31:21] Well, if somebody needs to be arrested, they then call whom?

**SCOTT FRAKES:** [00:31:25] Normally, the State Patrol, law enforcement, but normally the State Patrol.

**CHAMBERS:** [00:31:30] If this bill were in place and there were State Patrol investigators and an arrest was necessary, they could effectuate the arrest, couldn't they?

**SCOTT FRAKES:** [00:31:39] Yes.

**CHAMBERS:** [00:31:43] I'm going to see if there are other questions before I proceed. And maybe they will ask and maybe if there are no other questions, maybe I won't have any more either, but we'll see.

**LATHROP:** [00:31:53] Senator DeBoer has some questions for you.

**DeBOER:** [00:31:57] Thank you, Director Frakes, for being here. I want to sort of make sure that I have the timeline of how this works in my head properly figured out. I heard and-- and recognize the validity of saying that time is of an essence sometimes when you're doing some of these investigations. Does your internal investigator then make like immediate sort of preliminary findings to you? Do they-- wouldn't they also take a sort of period of time of some sort to-- to sort of complete their investigatory process and-- oh, well, let's start with that. Can you walk me through that process?

**SCOTT FRAKES:** [00:32:43] You know, it's very situational. But they have the ability to do fact finding, just simple intelligence gathering. They have the ability to report that information very quickly to the warden and the warden's executive team, then depending on what the issues were and the significance of those, those issues may be brought forward to Central Office and shared with my

deputies or, depending on how serious it is, with me. Again, if it rises to the level of a serious felony, as I mentioned in testimony, and escape wasn't included but escape is one of those as well where we immediately notify law enforcement, so if we-- as soon as we have any reason to believe that a serious felony has been committed, we're going to reach out to law enforcement immediately. Now if it's a question of-- an example, we have some intelligence that suggests that there may be improper communication between staff and an incarcerated person. It's against the law, and it starts at the misdemeanor level, and then depending on what that communication is and what else might be involved, it can, you know, work its way up. So before we would call law enforcement simply because we've heard something in a phone monitoring or we've read something in a letter, that would-- you know, some [INAUDIBLE] that an inmate was sending out, we'd typically go dig a little bit more and see what else, is there any other information to support it, do we have anything else, do we have other telephone calls, do we have other communication that we can access, is there video, because our facilities are pretty well covered with video. And at the point that we appear-- it appears that we have something that would suggest physical contact or more significant interaction between staff and one of the people that we take care of, we're going to call law enforcement. If it's-- if either we can't substantiate it at all or it appears that it's a very low-level thing that should be addressed as a personnel issue, then we'll go that direction.

**DeBOER:** [00:34:58] So I just want to make sure that I'm able to pinpoint the scope and exact direction of your objection to the bill. So I heard you say a minute ago that you are concerned about involving another agency because of the time lapse that would happen. Here it sounds like maybe there are certain matters that you'd like to keep within the department. And I think I also heard you say at some moment that you were concerned about losing your resources, those two officers or-- I don't know if that's the correct term-- those two investigators.

**SCOTT FRAKES:** [00:35:33] Right.

**DeBOER:** [00:35:33] Would you have the same objections to this bill or this pair of bills if those two officers, investigators were to remain in the department but that the investigatory job, whatever, was transferred to the State Patrol? Would-- is it just the loss of that resource of that in-the-moment investigation or is it a kind of a-- I mean, are we dealing with a turf battle? I mean, help me out here.

**SCOTT FRAKES:** [00:36:11] No turf battle, nor do I have any concerns about keeping information inside the department, only in the respect of making sure that we-- the information that we have that helps us manage our population is managed in a way that keeps everyone safe. So again, not a turf battle. I-- Senator Lathrop's question earlier about what's broken would be my question back. I don't believe it is broken. I think we have developed a very effective system. We work well with law enforcement. We're addressing things at the correct level. I get the information I need as the director of the Nebraska Department of Correctional Services to oversee and operate the agency that I'm responsible for. The State Patrol gets the information they need to proceed when there's criminal action to be pursued. The prosecutors get the information they need to prosecute the cases. And the system, the system works.

**DeBOER:** [00:37:12] So if the concern that sort of gave birth to these bills was that there just isn't enough investigatory capacity, and so let's say we add these investigators outside of the department, would you object to, I mean, having more resources to do these investigations?

**SCOTT FRAKES:** [00:37:34] There again, if we had a backlog, if I believed that we were not taking care of business, I'd have my hand in the air, but I don't believe that. It's not the case. We did have a problem before. The specific person who testified last year that was an employee of the department and was released by the department helped create a significant backlog in our

investigations. We've addressed that issue. We're on top of things; again, excellent relationship with law enforcement, so--

**DeBOER:** [00:38:10] Thank you.

**SCOTT FRAKES:** [00:38:11] Yes.

**LATHROP:** [00:38:14] Senator Morfeld.

**MORFELD:** [00:38:16] Director, thank you for coming today. One of the things that I heard you-- in your talk with Senator Chambers earlier was your opposition. It seems as though you have many levels of opposition to this, but one of your main points of opposition to this was taking away the resources from your department to be able to investigate these. I mean, what if we did a hybrid maybe that you still have your resources to do internal investigations but there's also an investigation done by the-- the State Patrol as well to ensure that it's thorough, but you, you know, you can deploy your investigatory resources to people it sounds like as you see fit. But clearly the State Patrol has a lot more resources that are more statewide and potentially more flexible. What do you think about that?

**SCOTT FRAKES:** [00:39:07] I think we have that hybrid now, Senator. That's what I feel that we do have.

**MORFELD:** [00:39:10] That's what you feel the current process is?

**SCOTT FRAKES:** [00:39:12] Yes.

**MORFELD:** [00:39:17] OK.

**LATHROP:** [00:39:17] Senator Pansing Brooks.

**PANSING BROOKS:** [00:39:18] Thank you. Some of the testimony that I have-- thank you for being here, Director Frakes. Some of the testimony I'm looking at discusses a case where there were allegations made against some of the Department of Corrections staff. And so the argument is, well, then when the case is being investigated internally, that it shows more transparency to have some help from the outside. So could you comment about that, like by the State Patrol, so if you could comment on that, please.

**SCOTT FRAKES:** [00:39:51] Again, if there's evidence that says that there's been criminal activity, then we're going to bring the State Patrol in. A lot of our investigations with staff are around rules violations, personnel-related issues, interpersonal issues, workplace hostility, and so all of those pieces are all tied into this world that we describe as-- as investigations. I don't really know how to answer better than that. Soon as it rises to the level that we believe there's been a law violation, that there's now a need for potential criminal activity, criminal charges, then we bring in law enforcement.

**PANSING BROOKS:** [00:40:39] Is there-- thank you for that. Is there a-- do you have a process or a set of rules or guidelines that that initiates that process to calling them in, or does it just directly go to you and then you call in State Patrol, or how does that work?

**SCOTT FRAKES:** [00:40:57] The short answer is yes. We have-- we have staff at the facility level that gather intelligence and-- and then we have-- we've specifically identified 19 people that have "investigator" in their job title. But I probably have 150 staff in their roles that do things that

resemble investigation, especially when you talk about personnel issues and things like that, so again, very situational. If it-- if it-- if it rises to the level of workplace harassment or sexual harassment, then we have a position dedicated in our Central Office that coordinates those, reviews them, reaches out and identifies people that can investigate those at the facility level. If it appears to be-- have the potential to be criminal, then we're going to use our two certified investigators first to step in and then look at the evidence that they have and the information they have and decide if there's-- what else that they can identify that would either tell them, yes, we think there's a law violation so we're notifying the State Patrol, or we don't-- you know, it's-- it's rumor, it's, you know, intelligence that can't be supported by any facts. And we have other staff that are both working in the facilities as well as in our Central Office that work together to create this intelligence network across the ten facilities. And so they have a role, too, because there's just a lot of different ways that information surfaces, again, whether it's through the phone monitoring, through monitoring of mail, through searches of cells, through just all the different ways that we interact with our population.

**PANSING BROOKS:** [00:42:44] Thank you.

**SCOTT FRAKES:** [00:42:44] Yes.

**PANSING BROOKS:** [00:42:44] Just one more question then. We know that we're having trouble getting people to fill all the positions at the Department of Corrections. So what about these 19 investigators? Are those positions filled now?

**SCOTT FRAKES:** [00:43:04] Yes.

**PANSING BROOKS:** [00:43:05] And are they-- and have they been or is this-- and how difficult is it to have these people, and how difficult is it to have-- to keep the two investigators that are law

enforcement certified?

**SCOTT FRAKES:** [00:43:18] So to answer the first part of it, they're seen-- that work is seen as pretty attractive and there's a lot of staff that would like an opportunity to take part in that kind of work, so we don't have a problem filling those positions. And the higher level investigators are captain-level positions, so they're attractive. The two certified positions, we've had-- I don't remember all. I believe three people have moved through those positions since I've been here, I think. But we have not had any problem each time there's been a vacancy in finding someone that was interested. Well, as it was mentioned earlier, way back in this process there was an effort-- I believe the department actually was certifying its own staff and that practice stopped a long time ago, so we only hire people that have law enforcement background and come with certification, and we expect them then to maintain that certification. But because my agency is not authorized to have arrest authority, they don't have arrest authority.

**PANSING BROOKS:** [00:44:24] OK, so you're saying of the 19, most of them have been law enforcement certified?

**SCOTT FRAKES:** [00:44:28] No, just the two criminal, just the two certified criminal investigators. The rest almost always come up through the department.

**PANSING BROOKS:** [00:44:36] OK. And just-- you heard the previous testimony, I'm sure, about, as you were sitting here, about the fact that with all that you have to deal with across the whole state, that does seem cumbersome. So can you explain why 2/19 is sufficient to investigate everything that's going on and to keep on top of it all so that there is rapid response and so that law enforcement could be called in rapidly if necessary?



**SCOTT FRAKES:** [00:45:07] So much like law enforcement and other criminal-- criminal justice agencies across the world, you have a certain cadre of people that carry the title "investigator" and have some very specific duties. Some coordinate investigations, some administer the process, and some just do full-time, very classic, television kind of investigative work. But just like the law enforcement officer on the street who in the day-to-day work that they do is connected to investigative duties, my corporals, my caseworkers, really doesn't matter what their job title is, at different times, they have the potential to do work that feeds the investigative process. On the personnel side, we tend to use managers and upper managers to conduct those, again, like workplace harassment investigations, as an example. So I think of 19 as people with a job-specific job title and another 150-200 or more staff, and if I count really all the corporals and uniform staff now we're getting up to 1,300, that do things that make that definition.

**PANSING BROOKS:** [00:46:25] Thank you, Director Frakes.

**LATHROP:** [00:46:28] Senator Chambers.

**CHAMBERS:** [00:46:30] Mr. Director, in view the discussion you've had with others, certain information is now part of the record, so I can focus my questioning. And Vice Chair Pansing Brooks had touched on some of the items that occurred to me. I want to ask you about a response you gave to Senator DeBoer about you not wanting, and forget how I'm phrasing it, another agency to be in your department doing these activities. That's the area that I want. Why do you not want that to occur as would be the case if this bill were enacted?

**SCOTT FRAKES:** [00:47:17] Just because the flow of information would change significantly. I'm not worried about where the information ultimately goes-- well, I shouldn't say that. I don't-- I want it to be managed like all criminal justice investigation information should be managed.

Confidentiality is important. But in terms of you needing to know, other stakeholders needing to know, that's not my concern. My concern is, like in any situation, if the State Patrol is responsible, and you could say embedded, they're, you know, actually sitting in my facilities gathering this information, putting together assessments, doing the same thing that we do to a great degree because a lot of investigations don't simply start with, oh, I observed a crime, it's, I have some information, I think there may be something to it, and cases are built, sometimes over a long time, if all that information is gathered and then funneled through the State Patrol and ultimately at some point I'm made aware of it, there could be really important information that we need to know for the day-to-day operations of the facility. And the current process that we have gives us that information real time, not days or sometimes weeks later, as could occur. And it's not-- I'm not saying that it was a bad thing. It's not about turf. It's not about, you know, an intentional effort by that agency to withhold from me. It's just that that's just how the processes would work. I know how they are. I know how we are.

**CHAMBERS:** [00:48:57] But if there would be a Patrol person at each of the ten institutions, I don't see there-- where there would be any lag time. You would have somebody who is trained in investigating, a law enforcement person who could effectuate an arrest and would not have to get permission from anybody or coordinate with anybody or call somebody from the outside, as would be the case with your investigators. Now here's what I want to ask you. These two persons who are law enforcement certified are-- if-- let me use the word "stationed." Where are they stationed? Do they have an office somewhere, the two of them?

**SCOTT FRAKES:** [00:49:41] They share an office at-- at our Central Office building.

**CHAMBERS:** [00:49:45] And is that where they spend the day or do they go out periodically to survey what's going on or do they go out only when they're called?

**SCOTT FRAKES:** [00:49:56] They don't-- to my-- I don't, you know, watch them every moment of the day, but to my knowledge, they don't spend a lot of time doing surveillance or intelligence gathering. They do go to the facilities on a regular basis to interview staff, to interview inmates, to look at evidence that's been gathered.

**CHAMBERS:** [00:50:17] Well, but there are only two of them. They-- neither one, nor both of them, could do much surveilling of ten institutions, I think you would agree.

**SCOTT FRAKES:** [00:50:25] Not their job.

**CHAMBERS:** [00:50:27] Now these people who are not law enforcement certified, what training do they get and who provides it?

**SCOTT FRAKES:** [00:50:39] They receive training in investigative techniques. Depending on what their role is, they receive training in security threat group or gang knowledge and intervention. Reid investigative techniques is one of the trainings that we send our investigators to. I can't--

**CHAMBERS:** [00:50:56] I'm interested in the investigative part.

**SCOTT FRAKES:** [00:50:59] OK.

**CHAMBERS:** [00:50:59] Who trains them with reference to how to conduct investigations, the two law enforcement-certified persons?

**SCOTT FRAKES:** [00:51:08] No, we use Reid, it's R-e-i-d, Reid investigative-- I'm not sure what

the name of it is and I don't know-- it's-- I don't know what company we specifically turn to for that.

**CHAMBERS:** [00:51:21] Is there a-- is there a manual according to which they are trained?

**SCOTT FRAKES:** [00:51:28] No, not a manual.

**CHAMBERS:** [00:51:29] Are there identifiable individuals who provide the training?

**SCOTT FRAKES:** [00:51:35] They receive training from-- it's called Reid investigative techniques, one specific piece.

**CHAMBERS:** [00:51:43] Are those persons [INAUDIBLE] that kind of training, trained themselves? How-- what training do they have to make them trainers?

**SCOTT FRAKES:** [00:51:54] They're certified in that technique and we pay for it. We don't--it's not our staff that delivers that training.

**CHAMBERS:** [00:52:00] You said they're certified?

**SCOTT FRAKES:** [00:52:01] They're certified in training that technique and we pay for that. We send people to it. We don't-- they're not-- we don't have our own trainers in-house for investigative techniques.

**CHAMBERS:** [00:52:12] So somebody from outside trains these 17 who are not law enforcement certified.

**SCOTT FRAKES:** [00:52:19] When they rise to the level of actually being-- because part of our folks that do investigative work are doing surveillance, they're doing phone monitoring, they're doing other stuff that's--

**CHAMBERS:** [00:52:31] Here's what I'm trying to get to, Mr. Director, and I'm trying to focus my questioning so I won't make you have to go far afield to answer it. Let's say that we have ten step-- three steps to get from not trained to be an investigator to becoming one. A point will be reached where that person has enough training to reach level three and now be an investigator, not law enforcement certified but an investigator. How much time does it take for these untrained people to become trained enough to be designated investigators?

**SCOTT FRAKES:** [00:53:15] It'll depend on which role that they're placed in. And again, because we develop our staff in-house for these roles--

**CHAMBERS:** [00:53:22] Well, how many--

**SCOTT FRAKES:** [00:53:22] --it starts with their-- the academy that they attend as brand-new employees where they gather skills around talking to people, report writing, basic legal issues. And then it just kind of goes across their career in terms of the training they receive and information they gather--

**CHAMBERS:** [00:53:44] OK.

**SCOTT FRAKES:** [00:53:44] --because we're not-- we're not training them to be criminal investigators. We're training them to be intelligence gatherers and--

**CHAMBERS:** [00:53:51] I see that as a serious flaw because if you had Patrol persons stationed, they are there and they have the training and whatever came up, they would be able to handle it. They don't have to summon somebody from someplace else. We don't have to wonder if the one summoned is trained. We don't have to worry if the ones summoned may have friendships with some of those who are being investigated, whether that one who has been trained may have his or her own informants among the population and the kinds of things that might be involved in conducting an investigation. So here's what I want to ask you. Let's say it's a set of circumstances where one of the law enforcement-certified persons is working in Omaha. There is an issue and then an urgent issue of a similar nature comes up at Tecumseh. Now one is in Omaha; one is at Tecumseh. Then one-- an incident occurs much farther west and you don't have a law enforcement-certified person to send there but one is needed. What do you do then, call the sheriff?

**SCOTT FRAKES:** [00:55:00] Call the appropriate law enforcement agent, yes.

**CHAMBERS:** [00:55:02] But if-- but if we had a Patrol person there, we wouldn't have that lag time in case the law enforcement agency you called didn't have somebody available, correct?

**SCOTT FRAKES:** [00:55:13] So is that-- It seems like there's a belief that there is illegal, criminal-level activity happening in every one of the facilities every day. Is-- is-- if that's a belief, it's not true, I don't believe, but--

**CHAMBERS:** [00:55:27] But if we enacted this bill, then we would have the Patrol persons available based on what is in the bill. Do you agree with that?

**SCOTT FRAKES:** [00:55:37] Yes.

**CHAMBERS:** [00:55:40] And regardless of what you think or the colonel thinks, the policy decision is ours to make as lawmakers. Do you agree with that?

**SCOTT FRAKES:** [00:55:50] I do.

**CHAMBERS:** [00:55:51] And if we have not heard testimony that satisfies us that there is adequate investigation of possible criminal activity, we have to do something. I have about two or three more questions. Who is the supervisor of the two law enforcement-certified persons? Who supervises them?

**SCOTT FRAKES:** [00:56:22] The name is James Foster.

**CHAMBERS:** [00:56:24] Say it again?

**SCOTT FRAKES:** [00:56:25] James Foster.

**CHAMBERS:** [00:56:26] I mean what is the position. That's what I should have asked you. What is the position of the person in Corrections who supervises these two persons? Well, are they administrators?

**SCOTT FRAKES:** [00:56:37] Yes.

**CHAMBERS:** [00:56:38] OK.

**SCOTT FRAKES:** [00:56:38] Yes. He's in Central Office.

**CHAMBERS:** [00:56:40] And if there was any question about maybe activity by these administrators, these investigators, the two certified, they would not investigate their own supervisor, would they?

**SCOTT FRAKES:** [00:56:55] Yes, yes, yeah, if they believe that--

**CHAMBERS:** [00:57:04] So--

**SCOTT FRAKES:** [00:57:04] If they believe their supervisor was engaging in illegal activity, they would reach out to someone, the supervisor's supervisor or above, bring that information forward, and we would make a decision. In that situation I would expect I'd probably be called into the conversation quickly and we would decide.

**CHAMBERS:** [00:57:21] That's all I'll ask you. Thank you, Mr. Frakes.

**LATHROP:** [00:57:24] I want to ask a few questions.

**SCOTT FRAKES:** [00:57:27] OK.

**LATHROP:** [00:57:27] So if I understood your testimony correctly at the beginning, you said that if there is a serious felony, that the State Patrol gets called in.

**SCOTT FRAKES:** [00:57:36] Immediately.

**LATHROP:** [00:57:37] So murder, somebody gets killed, somebody is sexually assaulted, kidnapping--



**SCOTT FRAKES:** [00:57:50] Escape.

**LATHROP:** [00:57:50] --prison riot, escape, those things, the higher level things are already covered by the State Patrol.

**SCOTT FRAKES:** [00:57:56] Yeah.

**LATHROP:** [00:57:56] Now we're talking about the things that would be not inconsequential but lesser levels of criminal activity. Am I understanding that right?

**SCOTT FRAKES:** [00:58:06] And at the point we believe this, say, let's use the term, lower level illegal activity is verifiable to some degree, then we're calling law enforcement as well.

**LATHROP:** [00:58:19] OK. Part of the-- part of the difficulty for Corrections is some of these lower level things are breaches of the rules and they can at some level rise to the level of criminal activity.

**SCOTT FRAKES:** [00:58:31] That's true.

**LATHROP:** [00:58:31] Right? So if somebody has contraband or K2 or something like that or a cell phone or whatever they're not supposed to have in their room, it starts out as maybe some intelligence, then it-- then it turns into just regular old Corrections. You got to go in there and find out if he's got it, right? I picked up from the testimony of the representative from the FOP, and I'm not clear right now if this is an issue about competency or about what is and isn't getting investigated. And maybe I should have asked that question earlier, but I want to talk to you about

that because when Mr. Maguire testified, what I heard him say is that some of the staff aren't-- don't have the sense that these investigators are covering their back or taking care of their back. Now let me tell you how I heard that or what I heard when he said that, which is, seems to us like some of these inmates can punch a guard, it might not rise to the level of requiring a hospitalization or what we might call a serious bodily injury, but is a-- a criminal assault nonetheless. Are all of those things being investigated right now by them? I-- I'm-- I'm trying to sort out the-- the purpose of the bill and what's going to be different and what we're trying to fix. And I guess I'll talk to Senator Wayne and Senator Wishart when they close. But are we turning some of these things into-- that are criminal activity into things that we ignore or things that are dealt with from a disciplinary point of view rather than a criminal point of view? Do you follow me?

**SCOTT FRAKES:** [01:00:21] I do, absolutely.

**LATHROP:** [01:00:23] All right. Help me out.

**SCOTT FRAKES:** [01:00:24] I understand the perception. I had the same perception in the last state that I worked for. Part of that perception unfortunately is driven by the fact that in many cases, probably the majority of the cases, even though the information is taken forward, they're not prosecuted because there are caseload issues, there are-- if you're looking at someone that's already doing a 20-year sentence, 10-year sentence, whatever it might be, and-- and now we're talking about a misdemeanor-level assault, the value of taking them to court and going through that process won't produce any, you know, really measurable outcome except for the record of saying that you were held accountable in a court of law. So prosecutors have to make a lot of hard decisions about what they focus their time and their energy and their resources on. But my staff and my staff in Washington State were the same way in believing that somehow the department can force prosecution. That's not true. So that's part of the problem that feeds that perception and it will

always be part of the perception. We had a backlog of cases. That was another area that definitely fed the perception in 2015-2016. And I believe that things were not getting taken downtown. That's why I-- you know, referred to law enforcement, referred to the prosecutors, it should be. We've cleared up the backlog. Any staff assault that rises to the level of criminal activity could be, you know, it could be charged as a crime, it's referred.

**LATHROP:** [01:01:58] Well, every-- every staff assault would be criminal activity, right?

**SCOTT FRAKES:** [01:02:02] Well, there's stuff that we take disciplinary action for: bumped into somebody, pushed their hand away. We classify that as staff assault but I'm not sure that it's--

**LATHROP:** [01:02:13] OK.

**SCOTT FRAKES:** [01:02:14] You know, there's-- there's some low-level things we also worry--

**LATHROP:** [01:02:16] There's a deliberate punching of somebody.

**SCOTT FRAKES:** [01:02:19] Definitely goes forward. Spitting bodily fluids, all of those go forward.

**LATHROP:** [01:02:23] OK. Let me talk about those which we would say don't result in serious bodily injury so we're not bringing in the State Patrol. Are all of those being referred to the county attorney in whatever county it is?

**SCOTT FRAKES:** [01:02:36] Yes.

**LATHROP:** [01:02:36] So to the extent they're not being prosecuted your testimony would be that that's a county attorney decision and not the fact that they haven't been investigated.

**SCOTT FRAKES:** [01:02:45] Yes. That's my belief.

**LATHROP:** [01:02:47] I know after this hearing I'm going to probably-- I may get a different point of view but I--

**SCOTT FRAKES:** [01:02:52] And some-- and it's not that none of them are prosecuted. There are prosecutions that occur and it--

**LATHROP:** [01:02:56] OK.

**SCOTT FRAKES:** [01:02:57] --again, depends on all those factors that--

**LATHROP:** [01:02:58] So what happens if I am incarcerated at the Nebraska State Penitentiary and I am in handcuffs, or I'm not, somebody comes-- security staff comes into my room and I get assaulted. What are we doing with those?

**SCOTT FRAKES:** [01:03:19] Definitely, if there's any evidence to support that allegation, we're referring it to law enforcement and have referred a couple of cases in the last year or so.

**LATHROP:** [01:03:28] So anybody who is an inmate that's-- that alleges-- makes a credible allegation that they've been assaulted, that goes outside the institution.

**SCOTT FRAKES:** [01:03:37] Yes.

**LATHROP:** [01:03:39] OK. Those are the questions I had. Senator Pansing Brooks, yeah.

**PANSING BROOKS:** [01:03:45] Since you opened the door, I'm just interested. You did say that escapes go to the State Patrol. So were the three most recent escapes, was the State Patrol brought in on those escapes?

**SCOTT FRAKES:** [01:03:56] The three most recent?

**PANSING BROOKS:** [01:03:58] Yeah, that have been in the news regarding from the work release and--

**SCOTT FRAKES:** [01:04:03] OK. Yes, although we're still trying to determine if there was a communication breakdown on Saturday night in terms of-- we-- our records show that we notified the State Patrol, but the State Patrol is saying that they didn't-- they found out from LPD.

**PANSING BROOKS:** [01:04:16] OK.

**SCOTT FRAKES:** [01:04:17] So we still want to run that down, but our process is, yes, they would be notified, as well as local law enforcement where the prison is.

**PANSING BROOKS:** [01:04:24] And so-- and then what is the process on notifying the public or the media or-- well, the media or the public?

**SCOTT FRAKES:** [01:04:33] Well, the media-- you know, until a few days ago, I had a different mind-set about what we refer to as "walkaways" from community custody. But under statute in

Nebraska, there's only one word and that's "escape." The system I came out of did not report to the media about people that left work release, community custody facilities. And when I got here, it was not our practice and I didn't question that. This incident Saturday night, I had already-- there were some other things that were happening, prior conversations with the Inspector General, actually, that had me going, hmm, I probably should think harder about how we view this. I'll say philosophically we view-- or I'll speak for me. I have viewed escape from a work release, a community corrections center, community custody center, much closer to absconding from parole than escape from a secure facility. OK. But today I have a different opinion about that. And so moving forward, we're going to make sure that the media is notified whenever someone leaves a work-release center that's not authorized and we place them on escape, so--

**PANSING BROOKS:** [01:06:00] Thank you for that explanation because I do think that it's important for the public to understand what this difference is too. And maybe that's something we need to think about in the future, but there is definitely a difference of wandering off from the police--

**SCOTT FRAKES:** [01:06:14] Not coming back from work in this case.

**PANSING BROOKS:** [01:06:17] --versus coming out of a secure facility like we had had a year ago, or two.

**SCOTT FRAKES:** [01:06:22] Right.

**PANSING BROOKS:** [01:06:22] Thank you very much.

**LATHROP:** [01:06:24] OK. Senator DeBoer.

**DeBOER:** [01:06:27] Sorry, one more quick one. Do you have an idea of the number of referrals you've made or what percentage of cases, investigatory incidences that you have referred out to the State Troopers or other agencies? Do you have a sense of what percentage go to county attorneys, you know, to be prosecuted, any sense of that, like just-- I know it's going to be general.

**SCOTT FRAKES:** [01:06:54] No. Actually, I was trying to get that information put together and get it in my head before I came here today and other things got in the way, so--

**DeBOER:** [01:07:04] Maybe you can supply some of that.

**SCOTT FRAKES:** [01:07:05] --I don't-- I can get back.

**DeBOER:** [01:07:06] Yeah.

**SCOTT FRAKES:** [01:07:06] We will do that, yes.

**DeBOER:** [01:07:08] Yeah. Thank you

**LATHROP:** [01:07:11] That's it for this bill. Thanks, Director.

**SCOTT FRAKES:** [01:07:13] Thank you.

**LATHROP:** [01:07:14] Any other opposition testimony, please. Colonel, and while you're coming forward, I will acknowledge that on Friday I called you "Trooper" not recognizing that you were the colonel. I apologize for that. I don't think we'd met before. So, Colonel, welcome to the Judiciary

Committee.

**JOHN BOLDOC:** [01:07:34] Thank you, Mr. Chair. I actually didn't catch it, so no apology necessary. And I'll trade you a bottle of water for a cell phone later, OK?

**LATHROP:** [01:07:44] [LAUGH] Yeah, yeah, right.

**JOHN BOLDOC:** [01:07:44] Well, good afternoon, Chairman Lathrop. Members of the Judiciary Committee, my name is Colonel John Bolduc, J-o-h-n B-o-l-d-u-c, superintendent of the Nebraska State Patrol. I'm here to testify in opposition to both LB438 and LB94. These bills place responsibility to investigate criminal activity within the Department of Correctional Services' facilities, including the Lincoln-- Lincoln Regional Center, with the Nebraska State Patrol. Currently the State Patrol has a positive working relationship with the Department of Corrections and actively investigates criminal activity within those facilities. The state patrol can continue and will continue to assist the Department of Corrections with criminal investigations without legislative changes. LB438 mandates that the Nebraska State Patrol assign a minimum of ten criminal investigators to carry out criminal investigations within the assigned facilities, four of whom are assigned to specific institutions. Respectfully, the State Patrol requests that duty assignments not be determined by the Unicameral but, rather, determined by operational or investigative needs. Without the authority to assign personnel my personnel based on actual need, it is difficult to properly serve the citizens of the state of Nebraska. The language within LB438 transfers any investigator from the Department of Corrections to the State Patrol. The Department of Corrections employs 19 individuals who have the word "investigator" in their title. Of those 19, only 2 are certified law enforcement officers. The Department of Corrections employee will not be able to serve as Nebraska State Patrol investigators. Should they meet our minimum qualifications and wish to apply, they would be required to successfully graduate from our training academy.



They would then begin their careers as Troopers, as do all State Patrol investigators. Investigators within the State Patrol assigned to investigate criminal matters are seasoned, certified law enforcement officers with numerous hours of specialized training. They accumulate years of valuable law enforcement experience before being selected to serve as investigators. The investigators employed by the Department of Corrections conduct a variety of noncriminal investigations, including matters related to violations of institutional policy and regulation violations. The State Patrol should not be involved in conducting policy and regulatory investigations within these facilities. That duty lies solely with the Department of Corrections and they must retain sufficient staff to accomplish that mission. Mr. Chair, Senators, I'd be happy to answer any questions you have at this time.

**LATHROP:** [01:10:33] Senator Chambers.

**CHAMBERS:** [01:10:34] Colonel, I often am the point person. You make a very persuasive argument here from the standpoint of law enforcement and the standpoint of the commander of the law enforcement entity that is-- could be called by some "the state police." The policy that results in the existence of a State Patrol was formulated by the Legislature. Who determines how many State Troopers there will be in the State Patrol?

**JOHN BOLDUC:** [01:11:13] Ultimately, Senator, that's determined by the Legislature through the appropriations.

**CHAMBERS:** [01:11:18] So the colonel-- and the reason I say "the colonel," so it's not like I'm saying anything about you one way or the other.

**JOHN BOLDUC:** [01:11:25] Certainly.

**CHAMBERS:** [01:11:25] The superintendent of the State Patrol does not determine how many Patrolmen, and I-- I shouldn't say "Patrolmen" because I mean females too.

**JOHN BOLDUC:** [01:11:33] Of course.

**CHAMBERS:** [01:11:33] Patrol personnel, that is a legislative function to determine matters of that kind.

**JOHN BOLDUC:** [01:11:41] The total staffing, yes, sir.

**CHAMBERS:** [01:11:43] And requests can be made but if the Legislature doesn't accede to the request, then additional personnel will not be made available because no money will be appropriated for that purpose.

**JOHN BOLDUC:** [01:11:54] That would be correct, sir.

**CHAMBERS:** [01:11:55] But if there is work that needs to be done, that's where management skill and ability would come in to make the best use of what is available to do the job the best that it can be done with what is available.

**JOHN BOLDUC:** [01:12:11] That would be correct.

**CHAMBERS:** [01:12:13] OK, now I think we agree in general about the administrative duties of the State Patrol. And as a member of the Legislature, I have a different perspective on what happens in the institution than would the colonel because the colonel doesn't have to be bothered with those

kind of issues. We are faced with a high turnover of employees in the prison, period, much enforced overtime, low employee morale. And if morale is very low, there are ways that employees can sabotage an operation. I'm not saying that's happening. The director cannot control that. We in the Legislature are given certain information by the director and those who speak for the director which will not always accord with the reality and the facts as they begin to come in. If we would decide to enact these two pieces of legislation as written, I'm doing it that way so we know what we're talking about-- numbers, get away from that for a moment-- you would be the one to assign specific persons to these institutions. Is that correct?

**JOHN BOLDOC:** [01:13:43] That is correct.

**CHAMBERS:** [01:13:44] And anybody that you assigned as an investigator would be the seasoned, trained, experienced individual of the kind you mentioned in your report-- I meant your testimony. If we leave things as they are now and it is known that criminal activity has occurred-- I'm not going to tell you how I know, but I know that the director does not involve the State Patrol every time conduct that is deemed criminal is committed. And I know sometimes it may not come to the director's attention. But let's say that an investigation is undertaken by one of these two certified people and it goes to a certain level and their training and experience will not allow them to carry it further and they then request the State Patrol. Would your investigator take up where that person left off, or would that investigator undertake a complete investigation? If the steps are from A to Z, 26 steps, and their investigator can take us to L, which is the 12th letter in the alphabet, would your investigator start with M, which is the 13th, and take it to the 26th, or would that investigators start at A?

**JOHN BOLDOC:** [01:15:19] Well, Senator, that's an excellent question. The answer is It depends. They may need to start with C, they may need to start with A, they might go right to X if all the

facts are laid out. It depends on what the needs of the investigation are and what ground has been covered.

**CHAMBERS:** [01:15:37] Well, if we have one of those investigations where it is necessary for the State Patrol person to start at the beginning, then why wouldn't it be better to have a person available from the beginning? We could specify the kinds of actions that would require the State Patrol, if we're not going position people there, and mandate that the director call in the State Patrol and in case of doubt, call in the State Patrol and don't let an explosive situation go and go until it explodes and the public knows and then the Patrol is called in like firefighters to put out a fire. What we have to have is a level of confidence, which we don't have generally as the Legislature, nor does the public, that the institutions are being operated in the way they should. There have been studies undertaken by professionals and after the studies were undertaken and completed, the information was not made available and it was not utilized. Then in court proceedings, people in the Legislature and otherwise became aware of these other reports that had been made and the studies of what happened in the department, and that's how the information came to us, so we don't have credible information coming to us. I don't think the State Patrol would withhold from the Legislature any information that was required or expected to be transmitted to the Legislature by the Patrol. That's a comment that I'll make and I think you would agree. Here's what I'm going to ask you now. Have you been here long enough to be aware of what have been called riots at the Tecumseh Institution?

**JOHN BOLDUC:** [01:17:33] Yes.

**CHAMBERS:** [01:17:34] And you're aware that there were deaths that resulted?

**JOHN BOLDUC:** [01:17:37] I'm aware of that, yes.

**CHAMBERS:** [01:17:38] Were you here when that happened?

**JOHN BOLDOC:** [01:17:40] No, sir, I was not.

**CHAMBERS:** [01:17:41] Oh, you weren't?

**JOHN BOLDOC:** [01:17:42] No, sir.

**CHAMBERS:** [01:17:42] OK. If that kind of situation arose, when would you want the State Patrol to be summoned?

**JOHN BOLDOC:** [01:17:51] Well, in any emergency situation like that, as soon as possible.

**CHAMBERS:** [01:17:58] And I think you and I can have a discussion at any time that we choose. And I don't want to extend this hearing, but I think Mr. Frakes listens very carefully. There are other matters, such as the requirement-- just so you'll know that I'm not just going off-- witnesses to executions, and the director on his own decided to close the curtains and not allow the media, who are there to witness, or the witnesses, who were there because of statutory provisions, to witness everything they were supposed to. And there's information being withheld right now. And what the-- what the director needs to know is that when more than one person knows something, somebody is going to say something, and we're going to have a conversation, but I won't ask you anymore questions right now. However, I'm inclined, if we don't take this legislation exactly as it is, to do something because our duty is to make sure that the institutions are run as they should be. And I don't think two so-called trained, so-called investigators can properly do the job when there are ten institutions involved.

**JOHN BOLDUC:** [01:19:15] Thank you, Senator.

**LATHROP:** [01:19:20] Senator Slama.

**SLAMA:** [01:19:20] Colonel, thanks for coming out today. So just for the record, this bill has to do with the transition of power between two groups, the Department of Corrections giving up some of their investigative powers to the State Patrol. The Department of Corrections is against this and the State Patrol is against this. Why is, in short, is the State Patrol against this? Is there anything-- is there any reasoning behind this bill that you can get behind?

**JOHN BOLDUC:** [01:19:49] Well, certainly, everyone involved in the drafting of this legislation and who's spoken about the issues in Corrections, and I think we all understand that the discipline of Corrections is a challenging environment, we all want to make sure that it's a safe environment, that it's an effective environment. And my argument is, with respect to criminal investigations that are required to be conducted within these facilities, they're already happening. In 2018 we were requested to conduct 58 investigations within Department of Corrections facilities. I believe we did that to the best of our abilities and we received the outcomes that I think were desired. In 2017 we investigated 40 of those incidents. We were again requested by the Department of Corrections to come in, conduct those investigations, and-- and we did do just that. So it is something that is happening on a routine basis. I believe that we're handling those requests effectively and getting the right cases to the prosecutors in a timely manner. And I think that we're getting the outcomes that the public expects and deserves.

**SLAMA:** [01:21:00] So it's a situation where if it ain't broke, don't fix it.

**JOHN BOLDOC:** [01:21:03] Senator, I understand the sentiment. I try never to use those words because I'm a bit of a change agent and those are antithetical to what I'm trying to accomplish.

**SLAMA:** [01:21:15] But you would say right now that it's a positive working relationship, and effective [INAUDIBLE]

**JOHN BOLDOC:** [01:21:18] I would. I think it is a very positive relationship. We communicate regularly. The folks in the facilities know who and when, to contact folks from our staff when those needs arise, and I believe that we're responsive to those requests and conduct through investigations.

**SLAMA:** [01:21:35] Great. Thank you.

**JOHN BOLDOC:** [01:21:35] Thank you.

**LATHROP:** [01:21:38] I think that's it. Thanks, Colonel.

**CHAMBERS:** [01:21:38] Wait a minute.

**LATHROP:** [01:21:38] Oh, wait. I'm sorry.

**CHAMBERS:** [01:21:40] I wanted to give others a chance before I ask a couple of questions that are somewhat tangential.

**LATHROP:** [01:21:44] OK.

**CHAMBERS:** [01:21:45] Is it OK now?

**LATHROP:** [01:21:46] Yeah, sure. Senator Chambers, you're recognized.

**CHAMBERS:** [01:21:49] Colonel, did you talk to the Governor or anybody on the Governor's staff about these bills?

**JOHN BOLDUC:** [01:21:53] Yes. The Governor's staff, yes. That's routine.

**CHAMBERS:** [01:21:55] Were you instructed to come and testify against them?

**JOHN BOLDUC:** [01:22:00] Well, yes, once I made my position known.

**CHAMBERS:** [01:22:02] Was your position against it prior to your talking to the Governor's staff members?

**JOHN BOLDUC:** [01:22:09] Yes, Senator, it was.

**CHAMBERS:** [01:22:10] If your position had been in favor of these bills, would you have come and testified in favor of them if the Governor was opposed to them?

**JOHN BOLDUC:** [01:22:23] Well, Senator, I think you understand how that whole system works.

**CHAMBERS:** [01:22:26] Is--

**JOHN BOLDUC:** [01:22:27] We coordinate all of our testimony, for or against a bill, prior to. And



being a cabinet member, I do work for the Governor. There are occasions where we're given instructions and I believe that you know that.

**CHAMBERS:** [01:22:39] For the sake of the record, are law enforcement agencies considered paramilitary organizations?

**JOHN BOLDUC:** [01:22:48] Well, the way that we're structured, yes, it's-- they're often referred to that.

**CHAMBERS:** [01:22:52] It's applied to them. And using that analogy, based on the structure of law enforcement vis-a-vis the civil authorities, in America, the Commander-in-Chief of the military always is a civilian, do you agree?

**JOHN BOLDUC:** [01:23:11] Yes.

**CHAMBERS:** [01:23:12] Is the commander of the State Patrol deemed to be the colonel or the Governor?

**JOHN BOLDUC:** [01:23:21] Well, Senator, the commander of the State Patrol would be me, so it would be the colonel.

**CHAMBERS:** [01:23:27] The colonel?

**JOHN BOLDUC:** [01:23:27] Yes.

**CHAMBERS:** [01:23:28] But the Governor gives you instructions which you must obey or you

would be terminated, correct?

**JOHN BOLDUC:** [01:23:34] That's a possible outcome, yes, sir.

**CHAMBERS:** [01:23:36] If the Governor instructed you to speak on a bill and you were against it and he said speak as though you're for it, would you come and speak for it because he told you to if you were against it?

**JOHN BOLDUC:** [01:23:48] Well, Senator, it depends on the bill. Ultimately, I have a conscience and I have to make a decision and I've been at odds with my bosses in the past and at my own peril. So in that hypothetical, if I felt very strongly in opposite of the person who employed me, I would make my choice and live with the consequences.

**CHAMBERS:** [01:24:09] Did you discuss this, these bills with Mr. Frakes before you came?

**JOHN BOLDUC:** [01:24:13] I did just this afternoon and I spoke to him on the phone last night.

**CHAMBERS:** [01:24:18] And did you express your views to him?

**JOHN BOLDUC:** [01:24:20] I did.

**CHAMBERS:** [01:24:20] And he expressed his to you?

**JOHN BOLDUC:** [01:24:22] Yes, sir.

**CHAMBERS:** [01:24:23] Did he tell you of problems that would exist for his agency if these bills

were enacted?

**JOHN BOLDUC:** [01:24:29] Not in great detail, no, sir.

**CHAMBERS:** [01:24:31] But he did say that he'd rather they not be enacted.

**JOHN BOLDUC:** [01:24:34] Yes.

**CHAMBERS:** [01:24:35] And was his conversation basically what he said to us today in terms of his objections?

**JOHN BOLDUC:** [01:24:41] Yes.

**CHAMBERS:** [01:24:43] Do you feel that those two investigators, who are supposedly law enforcement trained, are sufficient to do the job that needs to be done by such people?

**JOHN BOLDUC:** [01:24:54] Well, I'm not familiar with the inner workings of Corrections and I'm no expert. I don't know exactly how they carry out their duties. I know how I would carry out the duties if these were assigned to me and to the State Patrol.

**CHAMBERS:** [01:25:07] OK.

**JOHN BOLDUC:** [01:25:07] And they-- they may be different.

**CHAMBERS:** [01:25:09] And I'm not going to make-- try to get you to go beyond what you feel comfortable answering. That's all I have. Thank you.

**JOHN BOLDUC:** [01:25:15] Thank you, Senator.

**LATHROP:** [01:25:17] I think that's all the questions. Thanks, Colonel. We appreciate you coming here today.

**JOHN BOLDUC:** [01:25:22] Mr. Chairman.

**LATHROP:** [01:25:22] Anyone else here to testify in opposition? Is there anyone here to testify in a neutral capacity? Seeing none, Senator Wayne, do you wish to close? While you're coming to the chair, I'll let the record reflect that we have letters of support from Spike Eickholt from the ACLU, James Woody, Jan-- John Antonich from NAPE/AFSCME, and no letters in neutral or in opposition. Senator Wayne to close.

**WAYNE:** [01:25:58] Thank you, Chairman Lathrop. At the beginning of this, you asked the question of what we're trying to fix, or at a minimum there needs to be more investigators. We can have a conversation about where those investigators lie, which that goes to my second point here in a second. But at a minimum there needs to be more investigators. Driving from McCook to Omaha is an all-day trip and if it's a pressing emergency, as Senator [SIC] Frakes has said numerous times, real-time data, that's why he didn't want the State Patrol, because of a lag time. I think there would be a greater lag time when you're sending one person all across the state. That's the first point. The second point is, very rarely is it beneficial for any institution to investigate themselves. I may be the only one here on this committee who had the unfortunate task of walking into another political subdivision where we internally investigated everything before we turned it over to local law enforcement and as a result, there was an incident at Nathan Hale which a principal did not report because we did it internally. And we didn't think there was enough for a crime, not me as a board

member but our school district as a whole, and, in fact, there was enough and that teacher did eventually be prosecuted and found guilty, because those who are not trained in the law and understand probable cause versus reasonable doubt versus preponderance of evidence versus scintilla of evidence, like law enforcement are trained, can't always make that distinction of what's criminal and what's not. We heard testimony that it's more about serious crimes being turned over. Assault is a misdemeanor. There are lots of assaults that are simple fistfights that are a misdemeanor that need to be turned over and need to be prosecuted. What good does it do if an individual has a minor altercation and commits a law violation multiple days, multiple times throughout his or her incarceration to be jammed out? If they're not turned over and they're not prosecuted, the only thing left is to take away their good time law. So that individual comes back in our society, jammed out, and the society doesn't know that person continued to have violent tendencies in the institution because they were never prosecuted, they were never met the threshold of a felony. Might I remind this committee that domestic violence is a misdemeanor and there are individuals who commit violent acts that are misdemeanors that aren't even turned over if they're not serious crimes. As it relates to discipline among staff employees, again, we have a judicial system set up where there are two individuals or two agencies or two elements that make the decision of discretionary whether prosecute or whether or not. Oftentimes that is law enforcement at the beginning of the crime, or prosecutors. That should never be turned over to somebody to do it to themselves, to their own agency. This is not about Corrections. This is a broader analysis of anything with any political subdivision or any agency investigating themselves. We must bear that in mind. Lastly, there are Fourth Amendment issues that must be raised. If I am a contractor working and I drop my phone or I leave it behind or if I'm a visitor and I leave it behind, if that isn't turned over to law enforcement who can do a proper warrant, according to the U.S. Supreme Court, to search it, to make sure that it is properly investigated, they are still a state actor and they have still violated my Fourth Amendment rights if they-- the institution takes it upon themselves to investigate it. There are significant problems with investigating yourself. And with all of the issues

that we hear about in Corrections, and I think they're making strides and making progress, it's not unreasonable to take the idea of investigating crimes off of their plate, to let them focus on rehabilitating prisoners and making sure that when they come out they're safe and sound. But not turning everything over to law enforcement is a great injustice, especially if that inmate continues to have altercations that don't rise to the level of criminal activity and then walks back out-- walks back out on the streets and we as the public have no idea. That is a far greater danger than having State Patrol housed at every-- every location. Thank you.

**LATHROP:** [01:30:54] Thanks, Senator Wayne. We appreciate that close and your bill. That will close the hearings on LB438 and LB94. The next bill up will be Senator Blood who will introduce LB113. Good afternoon, Senator Blood.

**BLOOD:** [01:31:20] Well, good afternoon, Chairman Lathrop. And good afternoon to the entire Judiciary Committee. And thank you for allowing me the opportunity to speak with you today. My name is Senator Carol Blood. That's spelled C-a-r-o-l B, as in "boy," l-o-o-d, as in "dog," and I represent District 3 which includes western Bellevue and southeastern Papillion, Nebraska. Today I bring you a bill that I think is essential to be passed if we want to make sure the Ombudsman's Office is able to do their job in the most effective way possible. LB113 amends Section 47-913 to make sure that the Department of Corrections provides the Ombudsman's Office and the Inspector General for Corrections with access to all documents or information submitted for entry into the department's criminal information database. This includes documents and information submitted by department staff and related to activity or action that has taken place within the correctional facilities. This also includes physical documents maintained by department staff to document what has been submitted for entry into the DOC's database. I want to first say that this bill is really just a vehicle to clarify our existing law. The Ombudsman's Office and the Inspector General's Office are already supposed to be getting this information. Unfortunately, the Department of Corrections

appears to be reading existing statute, including the Public Counsel Act which is 84-240 to 81-254, differently than what was originally intended. Requests for this kind of information are controlled by the agency intelligence administrator who determines if the requests meet the department's developed guidelines for sharing and if so, then an on-site discussion about reports are requested instead of providing access to such reports. There have also been some claims that requests are being made for information-- excuse me. There have also been some claims that the requests are being made for information the offices of the Ombudsman and Inspector are not allowed to have. This is in reference to the federal Central Intelligence database, or also the CID, and what happens to information once it is submitted to that database. When information, such as the intelligence reports that are put together by state employees, is entered-- entered into the federal CID, it unfortunately becomes off limits to local agencies like the Ombudsman. The Ombudsman's Office has assured me that they are not looking for access to the CID or information entered by other law enforcement agencies across the country. They are simply wanting information that is already compiled by state employees and then entered into the Nebraska Department of Corrections criminal database before it's ever submitted to the federal CID. Again, that information is something the Ombudsman's Office and the Inspector General are supposed to have access to already. That is why I was really surprised when I read the fiscal note for LB113. The DOC is now claiming that giving the Ombudsman's staff access to the info is going to cost more than \$40,000 and take up to two years. I'm going to repeat that. Something that they're already supposed to be doing is now going to cost up to \$40,000 and take up to two years. That was a head scratcher for me. The department claims they would need to hire a contractor, but I fail to see why this wouldn't be handled by the OCIO. The cost isn't really the issue here, though, as the fiscal note also points out that even if it did somehow cost tens of thousands of dollars to give the Ombudsman's Office access to information they are already supposed to have access to, it could be handled with their current appropriation. What is flabbergasting to me is the claim that it would take an additional two years to get. I am at a loss how in the world would take that long. So I'm assuming someone for the

Department of Corrections is here to testify in some capacity on this bill. And if they are, I hope we can get an answer to that question. Having just found out about this last night, my office was not able to get an answer on it before the hearing, and the department certainly didn't reach out to us once they decided the bill was going to cause these kinds of complications. At the heart of this issue, and why I feel it is urgent, is what is happening to inmates that are being-- being placed in restrictive housing. Once they are placed in this kind of detainment, they are supposed to be set-- there is supposed to be a set of attainable goals they must complete in order to be released back into general population. Over the last few years, there have been reports popping up that the inmates have indeed been meeting these goals needed to be released from restrictive housing, but they are never actually released. While there's certainly a general prison overcrowding problem in this state, there are also severe problems that have popped up because of the overcrowding in the general prison population. Inmates being held in restrictive housing for far too long is one of those offshoots. The Department of Corrections ends up double bunking in the restrictive housing units, rooming violent offenders with nonviolent offenders, and the entire system becomes a powder keg inside a powder keg. Stories like the one involving Terry Berry should be avoided at all costs, and I believe this bill will at the very least take some steps to alleviate that problem. And at the very least, again, it'll take some steps in getting to the bottom of why it's happening. The prevalent theory on why those who have fulfilled their obligations for release from restrictive housing are not being released is that certain information isn't making it into the right hands, meaning folks responsible for take-- making restrictive housing recommendations for removal. In order to determine how this can be fixed or what needs to be corrected. The Ombudsman and the Inspector General need to be able to be privy to that information. One more time, they are already supposed to be privy to that information. LB113 simply makes it clear as a bell so we stop having interagency disagreements on what information they're supposed to see and share and when. The sad fact of the matter is that the number of inmates being sent to restrictive housing continues to be high. We need to reverse that trend. I want to make sure it's understood this isn't just about treating inmates fairly under the law,



though it is the state's responsibility to make sure that that's what we are doing. This is about the added stress that is put on the people who are tasked with housing and watching over these inmates. Putting this many people in restrictive housing means extra time and attention must be paid to them, all while more and more bodies are being added to a prison population that we already can't manage. As we strive to provide mental health services in support of moving our prison population through the system, there is now newer research that shows we are unknowingly increasing PTSD amongst our inmate-- inmates, which is the opposite of what we're trying to do as we rehabilitate and move them back into society as law-abiding citizens. We continue to layer problem on top of problem on top of problem. At the end of the day, passing LB113 means we are easing the burden on the grand total of four people that are tasked with watching over the department's 5,500 inmates in the Ombudsman and Inspector General's Office. We are making sure that everyone knows what information from the Department of Corrections is supposed to be shared and when to the offices that depend on this information to do their jobs efficiently. We are also going to be lessening the burden on the DOC and its more than 2,000 employees. I fully believe that will be the end game here. It's why I brought LB113 and it's why I hope that the members of this committee will vote yes on advancing this important piece of legislation to the full Legislature. With that, I will say that there are some representatives here from the Ombudsman's Office who can more readily walk you through just where specifically they are running into roadblocks, as well as why they believe it to be the case. So I'd ask you to save your technical questions for them. Having said that, I'm more than happy to take your questions as well.

**LATHROP:** [01:40:12] Senator Slama.

**SLAMA:** [01:40:14] Hi. Thanks for coming out today. Could you specify-- you said a few times that this is information they're already supposed to have access to.

**BLOOD:** [01:40:23] Um-hum.

**SLAMA:** [01:40:23] Could you point to where specifically that's codified?

**BLOOD:** [01:40:26] I actually did. I said it was in the Public Counsel Act, 81-240 to 81-254.

**SLAMA:** [01:40:28] Perfect. And can you explain or clarify how this criminal information database intelligence is relevant to the duties--

**BLOOD:** [01:40:43] Well, it's--

**SLAMA:** [01:40:44] --of either the Ombudsman or the Inspector General?

**BLOOD:** [01:40:47] It's not the database that's-- it's the information being put into the database, the information that's already in the hands of state employees. The Ombudsman's Office isn't-- isn't concerned about the data--

**SLAMA:** [01:40:57] That's my question. It's how it's relevant to their duties.

**BLOOD:** [01:41:00] Well, how can you investigate without information?

**SLAMA:** [01:41:05] Thank you. And so what protections are in place to make sure that this information isn't shared by those four folks, by anyone else?

**BLOOD:** [01:41:11] Well, I think that would be a question that's more appropriate for the Ombudsman who will come after me.

**SLAMA:** [01:41:15] Thank you.

**LATHROP:** [01:41:19] I see no other questions. Thanks, Senator Blood.

**BLOOD:** [01:41:22] Thank you, Senator Lathrop.

**LATHROP:** [01:41:22] Are you going to stick around to close?

**BLOOD:** [01:41:24] I will. It's nice and warm in here. I'm going to stick around for a little bit.

**LATHROP:** [01:41:26] I'm sorry. I didn't hear you.

**BLOOD:** [01:41:28] I will, sir. It's nice and warm in here.

**LATHROP:** [01:41:29] OK. It is warm.

**BLOOD:** [01:41:32] It is.

**LATHROP:** [01:41:33] And it isn't warm everywhere in this Capitol. Jerall, Welcome.

**JERALL MORELAND:** [01:41:52] All right. Thank you. Senator Lathrop, members of the Judiciary Committee, good afternoon. My name is J-e-r-a-l-l M-o-r-e-l-a-n-d. I'm here today representing the State Ombudsman's Office in the capacity as Deputy Ombudsman for Institutions. I would like to thank Senator Blood for introducing LB113 which would provide for additional clarification and guidance concerning legislative oversight. As Senator Blood has mentioned in her

introduction, I'm available to address any questions from this committee. However, today I would like to also offer a couple of additional remarks related to the bill for this committee's consideration that may be of value, first in regards to a historical perspective on this issue. We're talking about going back to the way it was before; that is, this office has had access to this type of information for many years. However, in 2015, we began running into roadblocks, which, ironically, is about the same time LR424, the special committee created to look into correctional matters, focused on reform initiatives for the use of restrictive housing. Based on the work of this group, many recommendations were made to reform the use of restrictive housing. Some of the reforms frameworked a criteria for the placement of an inmate on restrictive housing, required the use of behavioral plans and, where appropriate, individualized plans for inmates placed on long-term restrictive housing, and it placed processes that assured the inmate knew the expectations that needed to be met in order to be removed from a restrictive housing setting. Now that there is a focus on how the department is doing their job in terms of implementing these reform initiatives, it seems that we may be trying to hide the ball. We believe there is no excuse for this. Using the CID program as a reason for nontransparency is only putting up a smokescreen. Next, 28 CFR Part 23 is a guideline for law enforcement agencies that operate federally funded criminal intelligence systems. The operating principles of 28 CFR provide guidance to law enforcement regarding how to operate criminal intelligence information systems effectively. The department is responsible for developing their guidelines per the operating principles of 28 CFR. Through some due diligence, we have identified some information as to who has access to the department's database. If you look at one of the attachments I provided, you'll note written communication to the Inspector General of Corrections from the Department of Correctional Services. In this written communication, you will find that upper administration at department facilities and members of MDRT, which is a multidisciplinary directors review team at Central Office, all have the ability to access this information. It should also be noted that it-- it is our understanding that intel officers placed at each facility and the agency intelligence administrator all have access to this information as well. Finally,

the other key thing to this matter is we are not talking about accessing information that has been given to-- given to the department by other parties through the CID process, such as law enforcement, as we are not sure how that information would relate to reasons for inmate being placed on restrictive housing anyway. Instead, we are talking about information that the department has developed themselves and have classified as confidential intelligence memos. We believe there is no reason why the Ombudsman's Office and Inspector General for Corrections would not have access to these materials and the department should not be allowed to hide these from us. Thank you for addressing the important issue and I look forward to any questions.

**LATHROP:** [01:46:00] Thanks, Jerall. Senator Slama.

**SLAMA:** [01:46:04] So I'll just reference-- thank you for coming out today. I'll just start off with the question I asked Senator Blood. So what protections are in place to make sure this information is not shared with anyone else?

**JERALL MORELAND:** [01:46:16] As Senator blood had mentioned, we would follow the act, Public Counsel Act, 81-245-- 240, excuse me. In that act, there are several provisions. One of those provisions is that the work that Inspector-- the Ombudsman's Office would do would be held confidential. There's also a means on if we wanted to publish the information that we have come up with, that we would still reach out to the department where they would be able to make mitigating factors as well, so we'd include that in any report if there was a decision to move forward with the report. In regards to-- I think we're doing two things here. In regards to the Inspector General for Corrections, they would follow their act and they have very similar language in their act as well that would dictate how we would move about sharing that information.

**SLAMA:** [01:47:18] Thank you.

**JERALL MORELAND:** [01:47:18] Sure.

**LATHROP:** [01:47:18] I have a couple questions. Tell me what the criminal information database is.

**JERALL MORELAND:** [01:47:24] It's-- it's our understanding that this is a-- well, first, the department has a database that they develop and they place documents, reports in. From that database, at times, some of those reports may refer to criminal activities. So they would then submit those type of documents related to criminal activity to open access. They would allow open access to law enforcement agencies to look at that kind of information. So it really is a-- it's a-- it's a principle, it's a way for those agencies that deal with criminal activity, a way for them to assure that there are protections to whoever they are placing in that kind of database.

**LATHROP:** [01:48:22] Is this database a national thing? I'm asking just basic questions so I can understand bill better, and I want to start with the database. Is this something that law enforcement-- so if the State Patrol picked up Bill Smith, they're going to put something into this database. And if he's in prison and they have some reason to believe he's doing something that breaks the law, they'll put information into the same database. Is that what we're talking about?

**JERALL MORELAND:** [01:48:52] That's not my understanding. My understanding of what we're look--

**LATHROP:** [01:48:56] What is this database then that we're talking about?

**JERALL MORELAND:** [01:48:58] Right. OK. My understanding is what we're looking at is you

have law enforcement agencies that maintain a database of documents, reports on certain criminal activities. There is a-- an understanding that sometimes the information in those database could be helpful for other-- or for other facilities. So I'm not aware of some inclusive database that everybody can have access to. It just controls or gives principles on how the department would share the information they have in their database with other law enforcement agencies.

**LATHROP:** [01:49:34] OK. Is this database in house?

**JERALL MORELAND:** [01:49:36] This database is in house that we're referring to, yes.

**LATHROP:** [01:49:40] OK. So it's-- it's housed inside the Department of Corrections. And if something's going on with respect to inmate Smith, they can put something inside this database.

**JERALL MORELAND:** [01:49:50] Correct.

**LATHROP:** [01:49:50] OK. And can some of this stuff that gets put into the database-- what kind of-- what kind of information goes in there? Is it just criminal activity or is it suspicion that they're in a security group? For example, gang-- gang activity.

**JERALL MORELAND:** [01:50:10] Right. Right. I think the earlier bill, Director Frakes had mentioned how that process kind of works and that is that you have approximately 2,000 employees of Corrections, Department of Corrections. All of those employees at times will see something that they may believe they need to write an incident report on. From those incident reports you may-- that those incident reports may lead to some kind of additional investigations. And so I think it's-- it's accumulation of all of those reports. It's accumulation of the work that-- work caseworkers do in their unit, information that they find.

**LATHROP:** [01:50:50] OK. So this is sort of a holding place for information that any one of the 2,000 people that work in the Department of Corrections can put information in there about inmate Smith.

**JERALL MORELAND:** [01:51:02] That's the original-- that's the original way they collect all that information, yes.

**LATHROP:** [01:51:07] OK that's what they do with it, far as you know?

**JERALL MORELAND:** [01:51:12] Yes. My understanding is it goes into that kind of database. But then there is personnel within Corrections that look at it and say, OK, the-- some of the information we have relate to criminal activity. It is there where they then would make that information as one of the operating factors of the CID. In other words, that information now they believe is controlled by how the principles of operating information shared with other law enforcement facilities should run.

**LATHROP:** [01:51:48] OK. You don't have a problem that they maintain the database or even the information they're putting in the database. That-- that's all legitimate Correction functions.

**JERALL MORELAND:** [01:51:57] Correct.

**LATHROP:** [01:51:58] And this is of consequence to us because you believe information in that database is used to put somebody in restrictive housing or leave them there. Is that why we're-- why we're here [INAUDIBLE]



**JERALL MORELAND:** [01:52:12] I guess the short answer is, yes, Senator, but I would explain it this way. When LR424 looked at the issue and who's being placed on restrictive housing, there were certain factors that led the LR to believe that there needed to be some process in place. In other words, they had put together a five- or six-point criteria: Why is a person, and what would cause a person to be placed on restrictive housing? From there they wanted to make sure the inmate knew why they were placed on restrictive housing, but they also needed to know what would they need to accomplish to be taken off of restrictive housing. Unfortunately, what we have found in some cases is the inmates have been placed on restrictive housing, which we have had not-- we don't have necessarily a big issue on that because we're able to look at reasons why. But what we have found is at times the inmates have done what they're supposed to do. They have followed their behavioral plan and we find that they still are-- they still remain or they are still retained on restrictive housing and then we are told that it could be reasoned for confidential reports, it could be from information-- a summary of information from smaller reports. And so it's-- it's a roadblock. We're not able to get to the final question of why is that inmate retained on restrictive housing for a long period of time.

**LATHROP:** [01:53:47] And access to this database will give you information that will help you, for lack of a better term, mediate a solution.

**JERALL MORELAND:** [01:53:56] I guess in our opinion we're not requesting access to the CID database. In order for that information to get to the C-- to fall under the operating procedures of CID, it has to be developed by employees. So we're asking to get that information prior to putting that information--

**LATHROP:** [01:54:18] Oh.

**JERALL MORELAND:** [01:54:18] --in the CID.

**LATHROP:** [01:54:19] OK. So this isn't about getting-- being able to access the same database that, say, the director can. You just want to know if something's on its way in there. You're getting a look at the paper copy, for example, before it goes in there.

**JERALL MORELAND:** [01:54:34] Correct.

**LATHROP:** [01:54:35] Why?

**JERALL MORELAND:** [01:54:36] See--

**LATHROP:** [01:54:36] What are you going to do with it?

**JERALL MORELAND:** [01:54:38] For-- for example, I mentioned when we go about doing our work as far as investigating a complaint to the office, for example, one complaint may be from an inmate, I was placed on restrictive housing, I have completed my behavioral health plan, I am still on restrictive housing for over a year, so we need to go in there and figure out if the actions by the department are valid or not. And so it helps us carry out our duties.

**LATHROP:** [01:55:07] OK. In effect, you can maintain your own file.

**JERALL MORELAND:** [01:55:10] That's correct

**LATHROP:** [01:55:14] That's helpful. I think I better understand what we're-- what we're trying to do. Is there any information that you don't feel like should be-- so when I-- when we did the tour--

I'm just going to-- and maybe I'm laboring under a misunderstanding. But when we did the tour, what I understood was that the Department of Corrections has some people that are involved in intelligence. That intelligence officer may have a conversation with inmate-- inmate Jones, who communicates that Smith is involved in some security threat of some type. That's sort of inside information and it comes from inmate Jones. And so is that the kind of information we're talking about?

**JERALL MORELAND:** [01:56:02] That would be part of it, Senator, yes.

**LATHROP:** [01:56:06] So I imagine things wouldn't work out very well for inmate Jones if Smith found out that Jones told the intelligence person

**JERALL MORELAND:** [01:56:14] That would be correct. Yes.

**LATHROP:** [01:56:15] OK. How do we deal with that?

**JERALL MORELAND:** [01:56:16] On whose side, Corrections' side or our side?

**LATHROP:** [01:56:20] On the Inspector General's side or on the Ombudsman's side, so the--

**JERALL MORELAND:** [01:56:23] On the--

**LATHROP:** [01:56:23] You now have a slip of paper that says the intelligence officer spoke with Jones. Jones said that Smith is part of some security threat group and Smith or the security threat group is up to something and that is a reason for-- apparently a reason for putting somebody in restrictive housing.

**JERALL MORELAND:** [01:56:45] Um-hum.

**LATHROP:** [01:56:45] So now that-- now that you or the Inspector General have access to that information, what-- what happens? Because you're kind of in the-- you're kind of in the position of mediator. And how do you mediate something like that when you have information that provides the basis for the classification in restrictive housing without disclosing it to the inmate and causing other problems?

**JERALL MORELAND:** [01:57:15] I'll make two points, Senator. The first point is this office has been handling information, sensitive information like that, for years. We understand importance of especially information being provided by one inmate from another inmate. We understand importance of that and how that can impact the corrections system, as well as inmates in the system. And so the inform-- we've always have looked at that type of information as sensitive, as it should be, in some cases as confidential, as it should be as well. I would also point in my testimony that we have had-- we're looking at going back to where we were. So we've always had the option of looking at information such as this that was sensitive, what in nature that is confidential. And I think we've always protected that information and-- and dealt with that information as we could. I mentioned to the senator here there would be times if-- if a decision was made to do a report, that any report we have done in the past, we have redacted information as well. And so I think we know how to handle sensitive, confidential information as an office.

**LATHROP:** [01:58:34] OK. That was very helpful, at least for me. Anyone else have questions for Jerall? I don't see any. Thanks for coming here.

**JERALL MORELAND:** [01:58:42] Thank you.

**LATHROP:** [01:58:43] Thanks for answering my questions today. Anyone else here in support of this LB113 cares to testify? Anyone here in opposition that wants to be heard? Opponent testimony? Seeing none, anyone here in a neutral capacity on LB113? OK. Before we close, let me see if we have letters. We do. The-- the record can reflect that we have two letters in support, one from James Woody and the other from Spike Eickholt with the Nebraska ACLU. Senator Blood to close.

**BLOOD:** [01:59:27] Thank you, Chairman Lathrop. I'd like to offer to Senator Slama, especially since she's relatively new to the process, the definition of this office. A lot of people don't know that the Office of the Inspector General of the Nebraska Correctional System was established in 2015 by the Nebraska Legislature and their job is to provide increased accountability and oversight of the Nebraska correctional system. They identify and examine systemic issues of the Nebraska Department of Correctional services and also investigate incidents resulting in death or serious injury that occur within the Nebraska Correctional System, and so obviously playing a role for the-- for the Legislature, and they do report to us every year. We need to make sure that they have every tool necessary to do a good job on our behalf. Jerall and I actually worked together in the late '80s and '90s in the prison system, and I'm here to tell you that the-- the issues that they have now are not any different than what they had in the late '80s and '90s. We had-- that's where Tecumseh came from. We had overcrowding. They were closing down the gymnasiums, filling them with bunk beds. Staff assaults were-- had increased. A lot of things never change. But that doesn't mean that they have to keep going that way. And I see us going in a better direction because of laws that have come before me and before you. But if we don't respect the laws that are already on the books and make sure that they're functional, then we're also not doing our job. And so I ask this committee to-- to really think about what we can do to make sure that they can do their job to the best of their ability. We're not pumping any money into anything to make this happen. We're just making sure

that-- sure that they have the tools that they need to do a job that is well done because we don't need another riot, we don't need another staff assault, another inmate being killed. What we need is a functional prison system, and I think we're moving in the right direction, and this is one of the ways we can help do that.

**LATHROP:** [02:01:38] Very good. Thank you, Senator Blood. We appreciate you bringing this bill before the committee. We have two bills left today, LB233 and LB340. We're going to take a five-minute break, so we'll be back here at 3:40, OK? Just enough time for people--

[02:10:36] [BREAK]

**LATHROP:** [02:10:49] OK. I think we're ready to start again, if everybody could take their seat. Welcome back. After that break, it looks like we have some people returning to their seats or getting something. In any case, we are now to LB233. Senator Wayne is introducing that bill for us. Welcome again, Senator Wayne.

**WAYNE:** [02:11:20] Good afternoon, Chairman Lathrop and the Judiciary Committee. This is the second year in a row I'm going against my criminal defense nature of introducing a new crime. My name is Justin Wayne, J-u-s-t-i-n W-a-y-n-e, and I represent the 13th Legislative District which comprises of north Omaha and northeast Douglas County. I did hand out pretty much a white amendment, a white-copy amendment. This is Senator-- Senator-- Director Frakes and I met yesterday, and my initial bill banned everybody from staff to pretty much a ban on all cell phones inside of correctional facilities, and then I also had county jails because Douglas County doesn't allow you to have a cell phone. But I did learn that Lancaster and a couple other do allow that and if it works for their attorneys and them, I don't want to impede upon-- on that. So we do have a white - copy amendment where-- there are some times in which at the prison staff or contractors or other

people who are there, medical health professionals who aren't necessarily staff but contracted, do need to have their cell phones to be able to call not only down the road if something happens as an emergency, to be able to access their phone. So we try to address that by in Section 2 stopping-- or changing to-- the words to "intentionally and unlawfully." And when you read the definition of "unlawfully," it means contrary to law-- law, regulation, or order of the detaining authority. And we thought the regulation would give us enough, and I will rely on legal counsel from Judiciary Committee to help if there needs to be any additional clarifying language. But at the end of the day, this bill is really about making sure that cell phones are not behind prison walls with inmates being able to coordinate any illegal activity. There are times, and there should be discretions and why it's a Class I misdemeanor, where, rightfully or wrongfully, however you want to fall, on which side of the fence, there are inmates who simply have a phone to call a loved one because they may be dying or they maybe have family emergencies. Doesn't make it right, doesn't make it the best option, but they're human and they do make that-- mistakes. So we thought Class I was appropriate and we thought a Class I misdemeanor would also show the severity of it. And the other reason for it, quite honestly, is because by making it a crime, it goes back to the earlier bill which we talked about where since it is a crime to have a cell phone, it would be turned over to the Nebraska State Patrol for investigation. That's why it's important to me. I think allowing inmates to have phones behind prison walls is a dangerous situation not just for the prison but for-- also for society, which this committee will hear later about witness tampering and other things that I have introduced that makes this very important. I do want to know for the record and I handed out that this may be, if he's listening, the only time that I get Office of Attorney General support, so I want to make sure I share that with everybody, [LAUGH] a letter saying that they are supportive of the Class I misdemeanor in this case. And again, this is just a way to not only protect those who work in the Department of Corrections and help Mr. Frakes accomplish what he needs to do, it's also a way to protect society outside of the prison walls. And with that, I'll answer any questions.

**LATHROP:** [02:14:53] OK. Senator Pansing Brooks

**PANSING BROOKS:** [02:14:54] Thank you. Thanks for bringing this, Senator Wayne. Was there any discussion, or maybe I'm missing it, but about having the Ombudsman be able to, or the IG be able to bring in a phone?

**WAYNE:** [02:15:07] There was conversations around that. We-- this allows for regulation of proper phone-- what I mean is a form to be filled out and going-- knowing going in and going out, that a phone is coming in and coming out, it clear-- we clarify that it's not a part of the bill. I think Director Frakes-- well, I know Director Frakes and I had an understanding specifically around that and I'm comfortable with the direction. I've talked the Ombudsman and they're comfortable with the-- the direction in which that will be allowed and we'll be able to put the guidelines around there to make sure that there's no safety risk but allow them to have their phone

**PANSING BROOKS:** [02:15:49] OK. Then along those lines, I know that as senators have an ability to go see the prisons basically when we feel it's necessary. What about senators? Just adding that. Did you have [INAUDIBLE]

**WAYNE:** [02:15:57] We didn't have that conversation. I mean, I check my phone even when I go. To me, there's just not a need for it. Even when I'm with my-- in Douglas County with my clients, there isn't something that I need immediate access to that I can't walk downstairs and check. I just think having a rule that that it's-- cell phones aren't allowed sends the message to everybody. I am allowing for exceptions for attorneys in here because, like I said, there are some places where it's needed. But other than that, I don't think it's appropriate for, quite honestly, anybody to have cell phones behind. Just too many things can happen, including myself.



**PANSING BROOKS:** [02:16:45] Thank you.

**LATHROP:** [02:16:45] Senator Brandt.

**BRANDT:** [02:16:46] So this would call-- cover all detention facilities in the state. County jails?

**WAYNE:** [02:16:51] The first one did. I'm trying to limit it to Corrections, again, because when you say all detention facilities, that includes the local and city-- county and city jails and their relationship with their inmates are slightly different than what it is in Omaha. And so I don't want to try to impede upon them in that regard. But I'm trying-- it's not just cell phones. I'm trying to stop communication devices in general. I don't know if you remember the old beeper days, but unfortunately they're coming back because they're harder to track, so--

**BRANDT:** [02:17:18] So this doesn't cover county jails.

**WAYNE:** [02:17:21] No.

**BRANDT:** [02:17:21] I guess I'm trying to get some clarity on that.

**WAYNE:** [02:17:23] No. I mean I'm-- no, I believe I took that out of the white amendment and I will double check-- facilities as the meaning of 83-107-- 170, which is the corrections-- Department of Corrections.

**BRANDT:** [02:17:34] All right. Thank you.

**LATHROP:** [02:17:38] I see no other questions. Thanks, Senator Wayne. Anyone here to testify in

favor of LB233? Good afternoon once again.

**JAMES DAVIS:** [02:18:05] Hey, good afternoon, Senator Lathrop and the Judiciary Committee.

My name is James Davis D-a-v-i-s, and I'm in support of LB233. I do support no cell phones inside of a correctional facility. That includes staffing that basically rely-- I mean use their cell phones.

But also I do support Director Frakes when he sent out his memorandum September 19 putting a moratorium on cell phones, and basically you guys have a copy of that, saying that it's contraband

and basically nothing good comes of contraband. So I do support that. Also, looking at the

language, I don't want to take away the GTL pads from the inmates who already have access to

touchpads inside the system, or cell phones at work release centers. So some inmates do have access

to cell phones at the work release centers and also GTL pads in the medium- and maximum-security

facility. So we don't want to take away any of that access. Also, I think they have access to e-mails,

to electronic e-mails. So that's something that's governed by the Department of Correction and we

think that the inmates should have that.

**LATHROP:** [02:19:36] OK. I see no questions. Can I ask you a question while we're on it?

**JAMES DAVIS:** [02:19:43] Go ahead.

**LATHROP:** [02:19:43] So when we toured, there was some-- some indication that cell phones are prevalent, and maybe "prevalent" isn't the right word, that they're appearing inside the Department of Corrections--

**JAMES DAVIS:** [02:19:58] That's--

**LATHROP:** [02:19:59] --like inmates are getting their hands on cell phones?

**JAMES DAVIS:** [02:19:59] That's correct. That's correct. Not only inmates, but also you have staff that are privy to those cell phones and they sell them. Basically a cell phones can go for \$1,500 to \$2,000. We did have incidents at an NSP where staff was selling cell phones, and then also you have trafficking of cell phones from different agencies into to the department through CSI.

**LATHROP:** [02:20:29] That's where they're coming from?

**JAMES DAVIS:** [02:20:30] No, they're coming from a different state agency and it's trafficking through CSI laundry that we did have an incident like that occur.

**LATHROP:** [02:20:39] OK. Senator Pansing Brooks.

**PANSING BROOKS:** [02:20:41] Thank you for being here, Mr. Davis. I seem to remember a time recently, a couple years ago, when there was consternation from the Ombudsman's Office about the inability to take phones. So could you tell me what the change is now in-- in your office and what you're thinking about that?

**JAMES DAVIS:** [02:21:02] I didn't want that to be the focal point of why we supported Senator Wayne's bill, but it-- it was an issue in our office where Director Frakes banned the Ombudsman from having a cell phone and there was no apparent reason for that because we were conducting business as usual. It was a conversation from one public official to another. The department called me at home on a Sunday to come in to intervene on an individual named Nikko Jenkins because he was self-harming and I said I would do so, and so basically that was the extent of it.

**PANSING BROOKS:** [02:21:45] OK. So to me, I can see a reason why the-- at least the

Ombudsman, if not senators, do need to go in if there is self-harming or something's going on. I don't really understand why we're acquiescing that-- that the IG doesn't have an ability to go in and inform through pictorial representation.

**JAMES DAVIS:** [02:22:09] Well--

**PANSING BROOKS:** [02:22:11] Bring in a camera instead of a phone?

**JAMES DAVIS:** [02:22:12] Well, it's-- a phone is an essential tool for us to have, and I agree, where we can take pictures, determine the quality-of-life issues, medical issues, take recordings real time.

**PANSING BROOKS:** [02:22:31] Yes.

**JAMES DAVIS:** [02:22:31] But we just didn't want it to be-- you know, we just didn't want it to be identified with us, the Ombudsman's Office, to just bring in cell phones, if you're following me.

**PANSING BROOKS:** [02:22:49] Well, as a-- I don't really because as-- as the representative of the Legislature, you are our eyes into that system.

**JAMES DAVIS:** [02:22:58] That's correct.

**PANSING BROOKS:** [02:22:59] And so to me that's part of understanding what's going on, understanding about some of the things that were going on with the riots, and--

**JAMES DAVIS:** [02:23:08] That's correct.

**PANSING BROOKS:** [02:23:09] --seeing pictures early on that-- that we weren't privy to. So it seems to me that that is not-- I really take exception to the fact that you are not-- that the IG and Ombudsman's Office is not allowed to bring in phones.

**JAMES DAVIS:** [02:23:25] That's correct.

**PANSING BROOKS:** [02:23:26] [INAUDIBLE]

**JAMES DAVIS:** [02:23:26] Well, I believe under statute we do have the authority to do so. We can use any tools that we need to do our job, so that was something--

**PANSING BROOKS:** [02:23:36] But this would supersede that, I believe, I mean, if it says no phones then, it seems to me.

**JAMES DAVIS:** [02:23:43] That would be no phones for nobody, anybody.

**PANSING BROOKS:** [02:23:44] Right.

**JAMES DAVIS:** [02:23:48] And I think that would be a problem for the department also.

**PANSING BROOKS:** [02:23:53] OK. Thank you, Mr. Davis.

**JAMES DAVIS:** [02:23:56] No, go ahead.

**LATHROP:** [02:23:57] I think that's all the questions for you. Thanks, James. Jerall, you look like

you want to testify.

**JERALL MORELAND:** [02:24:02] Yes. Good afternoon again, Senator Lathrop, Judiciary Committee. To respond to your questions--

**LATHROP:** [02:24:13] Give us your name again and spell it.

**JERALL MORELAND:** [02:24:18] Jerall Moreland, J-e-r-a-l-l, Moreland, M-o-r-e-l-a-n-d..

**LATHROP:** [02:24:18] Thank you.

**JERALL MORELAND:** [02:24:19] Sure. To respond to your question, Senator Lathrop, Senator Pansing Brooks, it's my understanding that the-- we will be able to use phones as a tool moving forward. The process they ask from us is to fill out the form that they have put together to determine approval of it. But we are going to move forward with being able to use a phone. That's the Inspector General for Corrections as well as the Ombudsman's Office.

**PANSING BROOKS:** [02:24:47] OK. Question.

**LATHROP:** [02:24:48] Senator Pansing Brooks, yeah.

**PANSING BROOKS:** [02:24:51] So did you talk to Senator Wayne about possibly being one of the exceptions that's listed, just like an attorney, because if it's now going to be pursuant to some rule at the Department of Corrections that can be taken away, whereas if it's in state statute I really feel like it's a stronger ability. So I don't know if there's-- if you would think that-- I don't quite see how having it-- having you all not in part of state statute and then some sort of gentle--

gentlepersons' agreement that you're going to just go ahead and fill out some form which can be denied at whim if it's not part of state statute, I have a concern about that, so--

**JERALL MORELAND:** [02:25:32] It's our testimony, which was made part of the record. At the last paragraph it talks about the strategy being to restrict all cell phones into state correctional facilities excluding first responders and investigative bodies, and we would include ourself under that investigative body as our testimony, so we would support being placed in to statute, yes.

**PANSING BROOKS:** [02:25:56] OK. You would support putting yourself in there? Because to me we just heard all about the investigative bodies. There's 19 investigators at the Department of Corrections, 2 of whom are law enforcement, and they're not including the Ombudsman's Office in what Corrections, I believe, classifies as investigators. So the fact that-- that the Ombudsman's Office thinks that you are investigators does not align with whether or not truly the Department of Corrections thinks you are investigators.

**JERALL MORELAND:** [02:26:28] OK.

**PANSING BROOKS:** [02:26:28] So that, again, unless it's clarified in statute, I have concerns about it.

**JERALL MORELAND:** [02:26:34] Yep.

**PANSING BROOKS:** [02:26:34] Thank you.

**JERALL MORELAND:** [02:26:34] Thank you.

**CHAMBERS:** [02:26:34] Just one comment and then--

**LATHROP:** [02:26:36] Wait a minute. Senator Chambers, yes.

**CHAMBERS:** [02:26:38] -- [INAUDIBLE] just so somebody is at the table. We can do whatever we want to as the Legislature once a bill comes to us. We can modify it as we see fit. That's all I have.

**JERALL MORELAND:** [02:26:59] OK. Thank you, Senator.

**LATHROP:** [02:27:01] Mr. Inspector General, welcome to Judiciary Committee.

**DOUG KOEBERNICK:** [02:27:02] Thank you, Senator Lathrop. I like this-- the new digs. It's very nice. The seating is more comfortable out there too. So good afternoon, Senator Lathrop and members of the Judiciary Committee. My name is Doug Koebornick, spelled K-o-e-b-e-r-n-i-c-k, and I am the Inspector General of Corrections and I work for the Nebraska Legislature. I'm testifying today in support of LB233 because I think it's important to have this discussion about cell phones in our prison system. I'm going to just kind of jump into the reason I am-- I'm here is to talk about the data. One of the things that my position does is look at the entire system of--

**LATHROP:** [02:27:39] Doug, can you pull that mike a little closer so I can hear you better?

**DOUG KOEBERNICK:** [02:27:44] Yeah.

**LATHROP:** [02:27:44] Thanks.



**DOUG KOEBERNICK:** [02:27:44] So one of the things that my office does is look at-- at the system and the data in the system. And one of the things that I've focused on over the last year or two is to look at contraband and cell phones and things like that. So I wanted to bring some information to you today. Last year the Department of Correctional Services reported that they had found 79 cell phones in their facilities in 2015. This went down slightly in 2016 to 64 but increased to 166 in 2017. I requested more up- to-date data from the department last fall and recently received some new data that indicates that it went from like that 166 in 2017 to over 250 cell phones in the first 11 months of 2018. I'm not totally comfortable with that data because it's my understanding that the data that I was provided does not actually capture all the cell phones that are found by the department. I've asked for more-- for more information on that and when I receive that I will forward that to you. Of the two-- over 250 that I know about, one of the things that is alarming is at the Nebraska State Penitentiary they've had at least 136 found there. So just one facility has over half of the cell phones according to the data that I've seen. Lastly, I provided you with an excerpt from my 2018 annual report regarding contraband. It shares that I made many recommendations to the department after an inmate death to assist in preventing contraband, including cell phones, from entering facilities. The department accepted all the recommendations and provided me with additional information on the actions that they have taken to address this concern. These are listed in that excerpt. They made notable improvements in the area of visitor and staff searches specifically, and I want to acknowledge that and commend them for that. And like I said at the beginning, I do think that it is important to have this discussion and I want to thank Senator Wayne for introducing this legislation

**LATHROP:** [02:29:45] Thanks, Doug. Senator Pansing Brooks.

**PANSING BROOKS:** [02:29:49] Thank you. I just want to get you on the record about this. So what-- I presume you heard my previous questions about the ability of the IG and the Ombudsman

to be able to use phones to-- for investigative purposes. What are your thoughts in those regards?

**DOUG KOEBERNICK:** [02:30:03] I haven't seen the white copy so I can't-- I can't comment on that. But I do think that having a cell phone when we go in can be helpful. I haven't brought one in since September of 2017. I think if the Legislature wants us to have that authority and that ability, that you should put it in the statute because, like you said, if we fill out a form to request that we get approved or for use of a cell phone, that can be denied. In my case, it was. The last time I looked or got information from the department, they had over 200 people that were approved to use a cell phone within the facilities and there are about 50 that were denied. I was one of those 50. I wasn't on the list that they gave me but I was denied that and I was told that I could use other means to capture photos or audio or things like that. So I-- you know, if that's something that you guys think that needs to be in there, that you want us to have that ability, then we should put it in statute because I'm a good example of-- of why that's the case.

**PANSING BROOKS:** [02:31:09] And-- thank you. One more thing, so-- so was the suggestion to bring in a camera--

**DOUG KOEBERNICK:** [02:31:16] Yes, like I could bring a camera--

**PANSING BROOKS:** [02:31:17] --come back and bring in a camera?

**DOUG KOEBERNICK:** [02:31:19] --you know, bring in a tablet, bring in a laptop, use one of their computers, something like that, to do work inside.

**PANSING BROOKS:** [02:31:27] Thank you very much.

**DOUG KOEBERNICK:** [02:31:31] Um-hum.

**LATHROP:** [02:31:31] I think that's it. Thanks, Doug.

**DOUG KOEBERNICK:** [02:31:32] Thank you.

**LATHROP:** [02:31:34] Anyone else here in support of LB233? Welcome once again, Director Frakes

**SCOTT FRAKES:** [02:31:49] Thank you, Chairperson Lathrop.

**LATHROP:** [02:31:55] We're going to have you start with your name and spell it for me.

**SCOTT FRAKES:** [02:32:01] We'll do that, okay. Scott Frakes, F-r-a-k--e-s, director of the Nebraska Department of Correctional Services. I'm testifying in opposition but that's based on the bill that was provided initially that we were able to analyze. I've just received the amendments, the amended bill. Having-- if I'd have had more opportunity to digest this, I'm not sure that I would still be-- my testimony definitely would be different. I don't know if there would still be opposition. And I-- in talking with Senator Wayne, I believe that we're going to be able to make some other adjustments and probably land in a place where we both agree that we have legislation that will be effective to help the department and the needs of everyone else that's represented. But I do want to put my testimony on record just because--

**LATHROP:** [02:32:48] Sure.

**SCOTT FRAKES:** [02:32:48] --where we're at. And I'm going to move through it really quickly.

So again, I've shared my name, at this point testifying in opposition to LB233, which makes it a Class I misdemeanor to bring a cellular phone into an NDCS facility. The bill as previously written prohibits NDCS from allowing anyone to enter a facility with a cell phone with the exception of law enforcement officials and first responders. So we already know that that's changed. No question the law-- the unlawful introduction of cell phones into prisons is a growing problem in Nebraska and it's a significant problem in corrections across the globe. In 2018, I implemented a policy to provide greater control of the use of authorized cell phones within facilities. We have provided a copy of the policy and the attachment that's been discussed previous to my testimony. This policy gives the process for NDCS employees and outside stakeholders to request authorization for retention of a cell phone inside a secure facility. That's really an important point on that is that it is a process that makes sure that we know what's coming in and that that phone comes back out when the person leaves that's authorized to have it. And there are a number of legitimate business needs for authorized cellular phones, so we've got a process, we know it's working. I'm not opposed, NDCS is not opposed to including unlawful introduction of cell phones within the criminal code. I do believe that that could be a beneficial deterrent. I'm opposed in the section again of the original bill which restricts my authority to allow individuals to bring in cell phones. We have a good process and it's working. I'll be glad to answer more questions about that. In fact, that's where I think I should just stop. If I can answer questions, I'd be happy to do so.

**LATHROP:** [02:34:45] So we're not sure if you're for, against, or neutral, but you think you can work it out with Senator Wayne.

**SCOTT FRAKES:** [02:34:50] I think we're definitely on the right path. Yes.

**LATHROP:** [02:34:52] All right. Well, that's encouraging. Senator Pansing Brooks.

**PANSING BROOKS:** [02:34:55] Thank you for coming, Director Frakes. I just wanted to check to see if you would have objection to an amendment that would allow the Ombudsman's Office and the IG to have a phone when they go in.

**SCOTT FRAKES:** [02:35:05] What I would hope to land on with Senator Wayne or with the collective body would be language that would identify those people that you say definitely should be allowed to have it and still give me the authority to have a process, very similar to what we have now. So in that case, it wouldn't be me approving whether or not they had it but that we would be able to document what the phone was. What we do is we provide people a card. I have one here. When I show up-- and I no longer bring my phone into the facilities either, but if there was a reason that I needed to have the phone for some situation, I show the phone, I show my authorization card, staff take the card, they verify that that's the phone that's authorized. When I come back out of the facility, I show the phone, they verify, so we have accountability. So as long as I have the ability to have a tracking process, not-- if there are specific groups of people that you're telling me need to have a phone, I think we can work through that as long as I can have a tracking process that ensures accountability.

**PANSING BROOKS:** [02:36:09] OK, I [INAUDIBLE] a tracking process, but I think it could be quite cumbersome if they have to wait for your approval, wherever you are, on whatever occasion that they show up on--

**SCOTT FRAKES:** [02:36:17] That's why we issue everyone this card that--

**PANSING BROOKS:** [02:36:20] OK. And how do-- how would we-- how would you handle attorneys that are coming to see a client who are allowed in this bill to bring in one?

**SCOTT FRAKES:** [02:36:26] Well, I have to work through that and figure out what the right answer for that is. And again, I still want to talk to Senator Wayne and get a sense of where do we land on this, so today we would tell them that they have to secure their cell phone, just like we would tell you, you have to secure your cell phone, like I've told the Governor that he had to secure his cell phone.

**PANSING BROOKS:** [02:36:47] Thank you very much.

**LATHROP:** [02:36:49] Can you tell me where these phones are coming from?

**SCOTT FRAKES:** [02:36:53] Oh, boy.

**LATHROP:** [02:36:54] I mean--

**SCOTT FRAKES:** [02:36:54] Well--

**LATHROP:** [02:36:54] I heard--

**SCOTT FRAKES:** [02:36:56] Yeah.

**LATHROP:** [02:36:57] --Koebernick's testimony, 160-some, and--

**SCOTT FRAKES:** [02:37:00] Now over-- well over 200.

**LATHROP:** [02:37:01] --how many did you have in 2018?

**SCOTT FRAKES:** [02:37:04] Over 250. It's probably going to be 250 to 300, so--

**LATHROP:** [02:37:06] And are those just the ones you found?

**SCOTT FRAKES:** [02:37:09] Exactly.

**LATHROP:** [02:37:10] Are these burner phones?

**SCOTT FRAKES:** [02:37:11] Pretty much most of them.

**LATHROP:** [02:37:14] Somebody might go to Walmart and pick up a burner phone?

**SCOTT FRAKES:** [02:37:16] Yeah.

**LATHROP:** [02:37:17] And so we were talking about criminal activity. Bringing this stuff in is criminal activity. What luck are you having getting to the bottom of who's bringing them in and-- yeah.

**SCOTT FRAKES:** [02:37:33] I'd say we're making good headway. It's not-- it's not specifically criminal activity today so that's, you know, one piece of it and I don't-- whether or not that's going to be an effective deterrent is another question. But going back to your original question, we have had staff, we have had visitors, we have had-- I don't know if I can remember a contractor situation here. I've had it in the past. The biggest bulk source that we've identified is they bundle them and throw them over our perimeter fences, "they" being some member of the community, you know, that we usually don't catch because it's not that difficult to sneak up in the middle of the night to a correctional facility and throw something into an area, especially if the inmates-- or inmate on the

inside has said this is the specific area you need to come to and toss it over where you probably won't be observed and I'll be able to get to it because I work in whatever that area is, or I have access to whatever that area is. We've gotten a lot better in terms of our intelligence and efforts to stop it. That's why we know, because we've recovered some packages, in one case at least ten cell phones, I believe, in one single package. Plus, James referenced the incident we just recently had with Cornhusker State Industries laundry services. We've had two cases that I can think of where someone on the sending in, one case LRC and one case from the veterans' home, planted the cell phones in the dirty laundry and fortunately, we were able to catch that before it got into the facility. But you know, like all crime, like all activities, if you're catching 250 cell phones, we know there's more out there.

**LATHROP:** [02:39:24] [INAUDIBLE] a lot more than that.

**SCOTT FRAKES:** [02:39:24] Yeah. And, I mean, I hope there's not 500, but they're out there.

**LATHROP:** [02:39:27] OK.

**SCOTT FRAKES:** [02:39:29] Yep.

**LATHROP:** [02:39:29] We'll see if anybody has any other questions. Senator Morfeld.

**MORFELD:** [02:39:33] Just to lighten it up a little bit, have you ever seen the Shawshank Redemption?

**SCOTT FRAKES:** [02:39:37] Certainly.



**MORFELD:** [02:39:38] Yeah, that's-- that's just-- it's the first hour, I think, is using the laundry for the-- anyway.

**SCOTT FRAKES:** [02:39:43] We seem-- we've had a number of issues around laundry. Laundry is the-- laundry is a weak point in-- in prison security systems, or it can be a weak point.

**MORFELD:** [02:39:52] And I'm not making light of the job.

**SCOTT FRAKES:** [02:39:53] Yeah.

**MORFELD:** [02:39:53] I -- I know it's tough to secure the facilities and--

**SCOTT FRAKES:** [02:39:57] Yeah.

**MORFELD:** [02:39:57] --and I respect what you're doing.

**LATHROP:** [02:39:57] OK. I think that's it. Thanks, Director.

**SCOTT FRAKES:** [02:40:01] Thank you.

**LATHROP:** [02:40:01] Appreciate your coming in today. So we were on proponents, kind of a little bit of a gray area testifier there. Is-- are there any other proponents of LB233?

**PANSING BROOKS:** [02:40:14] He was actually opponent.

**LATHROP:** [02:40:14] Any opponents? Anybody here in a neutral capacity?

**SPIKE EICKHOLT:** [02:40:33] Good afternoon, Chairman Lathrop and members of the committee. My name is Spike Eickholt, S-p-i-k-e, last name E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Defense Attorneys Association in a neutral position on the bill. When we saw the original bill as introduced, we had some concerns. And I did meet with Senator Wayne, I think last week and earlier this week, and I have had a chance to review AM89, which was provided to the committee, so I'm really only going to speak to those. But just so the record is clear of what our concerns were, I'll just state them. As introduced, the bill provided for no exceptions, including any exceptions for attorneys, and the bill also applied to all detention facilities, including the jails and the youth detention facilities, arguably, as well. Not so much with the Department of Corrections but with the local jails, many of our members regularly take cell phones or laptops or other devices in there to meet with clients because many times your discovery and the materials that you have when you're meeting with your clients, especially when they're in jail because most of the people in jail are pretrial detainees, you have to have access to those devices anymore to have a meaningful meeting or meetings with your clients to explain the case against them. You have everything from cruiser videos that are on digital format only, you have "dash cam" videos, you have surveillance videos depicting the part of the crime that you have to simply be able to show to your client. I know that in Douglas County they do tightly control phones and laptops and those things coming in. But in Lancaster County it's a pretty liberal policy. They generally will allow you to-- attorneys to have phones or laptops in there with very minimal interference with those, and the other jails around the state are different there. I don't think that if AM-- this bill as amended does not include jails, but the jails still have their discretion to kind of maybe speak to a senator, or as Senator Brandt asked about, the jails will still have the discretion to decide how they're going to handle electronic devices coming in. The concern that we had with the bill as introduced, all of them were just prohibited altogether, no exceptions, and we didn't want that and, as you heard, Senator Wayne amended that provision. The other part that we asked Senator Wayne to maybe

narrow a bit was to require the intentional introduction of a phone into the facility. The crime is committed when you bring the phone there. And as written, that's when the crime's committed. And as you all know, sometimes, like the Chair earlier, you forget you have your phone on you. It's just there with you all the time and you don't want someone who has-- in cold weather has got a bag or a coat and they bring it in and then realize it, they're already in trouble. However, we acknowledge that-- our association acknowledges that the problem with phones in the prisons is a real one. We're not going to say that perhaps some legislative change shouldn't be implemented to account-- to address that issue. But with the amended version, we are OK with this.

**LATHROP:** [02:43:38] Senator Pansing Brooks.

**PANSING BROOKS:** [02:43:40] Thank you. Thanks for coming, Eickholt. So along those lines, something that I thought of, an attorney or-- or if it were somebody else just walking, we forgot that we had their phone, the minute you go through the-- the beeper, does that institute the offense, do you know, from the bill as drafted?

**SPIKE EICKHOLT:** [02:43:57] I would think so, even as amended, because --well, not with intentional, at least you'd have that explanation, I didn't intentionally bring it in there. You still may be in some trouble but at least you'd have that as a defense, at least you'd have that argument. If you didn't have any kind of mens rea requirement, and as originally drafted it didn't, if you simply bring it in there, you're in violation. But I think as amended it at least accommodates that. And perhaps "knowingly" would be another qualifier to have as well.

**PANSING BROOKS:** [02:44:25] I think knowingly would be good, yes.

**SPIKE EICKHOLT:** [02:44:28] Yeah, something like that.

**LATHROP:** [02:44:31] I see no other questions. Thank you for your testimony. Anyone else in a neutral capacity?

**TIM HRUZA:** [02:44:43] Good afternoon, Chairman Lathrop. Members of the Judiciary Committee, my name is Tim Hruza, that's H-r-u-z-a, testifying today on behalf of the Nebraska State Bar Association. Mr. Eickholt-- we appear today in a neutral capacity. We were initially opposed to the bill as drafted for many of the reasons that Mr. Eickholt stated related to concerns about an attorney being able to competently meet with a client and counsel them while in a jail facility or-- or even a prison facility to some extent. I have reviewed a draft of the amendment. It was a previous draft. I haven't seen the entire language of the most recent version. We do believe it will address our concerns related to attorneys and having access to-- or-- or more specifically, I guess, the concern about creating a crime by introducing a cell phone into a facility, whether inadvertently or intentionally, so long as you're intending to meet with a client. So with that, I would answer any questions. But Mr. Eickholt's testimony covers most of our concerns.

**LATHROP:** [02:45:50] I see no questions. Thanks, Tim.

**TIM HRUZA:** [02:45:52] Thank you.

**LATHROP:** [02:45:53] Anyone else here in a neutral capacity? Senator Wayne to close.

**WAYNE:** [02:46:02] So let me address Senator Pansing Brooks's initial concerns about not listing Inspector General or any investigative authority by the Legislature. The reason I chose not to do that, and why I will vigorously oppose it, is because of a thing called attorney-client privilege. I'm going to take a hypothetical here. Hypothetical, there is a prisoner who has multiple cases going

before the Court of Appeals and the Supreme Court sitting on death row. Hypothetically, somebody walks in with a cell phone and makes a phone call to that person's attorney. That person is in the room talking to their attorney. There is an argument that they waive attorney-client privilege throughout their whole appeal. Unless we are going to make the phone that everybody brings in to investigate privileged, I have a strong concern about one of my clients who maybe have been charged with a crime talking to an inspector or a investigator about their case and say, "and my attorney and I said something," and that's on a recorded device in their phone. So I'm trying to figure out a way to strike a balance and it's going to be a lot of negotiation going on between everybody. This first draft was a first attempt. We already found a little bit of concerns, but there needs to be regulations within the walls to make sure when an attorney is called, it's only called, or when anybody is called, it's only a call to that attorney because that's what-- what happened in the case we're talking about. And there is argument he waived attorney-client privilege, not knowingly. It wasn't anybody's fault. They thought everybody was doing the right thing. But allowing cell phones into, which are communication devices, to privileged communication people that can make a phone call, call-- if a third party is doing that, causes great concerns. And as defense counsel, I would not want somebody investigating any claim and recording my client, who works for the state, I might add, without being read their rights. They are still a functioning person of our body. They work for the state. Anything they say can and will be used against them, and now that has opened the door. Not only do prosecutors listen to jail phone calls, but if we have an investigator in from this body there and they're talking to him, they can subpoena and will get those records because they're not privileged communication under the law. So we have to expand greatly if we go down that path, which I don't have a problem doing, but that wasn't the intent of my bill. It was to stop and put punishment to the hundreds of cell phones that we're seeing in-- in-- in corrections facilities and really prisons across-- jails across the state. And with that, I'll answer any questions. Yes, ma'am.

**LATHROP:** [02:48:59] Senator Pansing Brooks.

**PANSING BROOKS:** [02:49:00] Well, I'm trying to find your amendment, but I-- I didn't get-- oh,  
OK [INAUDIBLE]

**WAYNE:** [02:49:04] I have another one that I wrote on.

**PANSING BROOKS:** [02:49:07] It's-- it's my understanding that there was-- there's some part that  
was referenced earlier in the-- in the testimony that-- that there are-- that investigators will be  
allowed them, just not--

**WAYNE:** [02:49:23] Not-- go ahead.

**PANSING BROOKS:** [02:49:23] --Ombudsman investigators and IG investigators, or--

**WAYNE:** [02:49:26] No, that was what the Ombudsman, they would like to see. I haven't gone that  
far and-- and don't worry about looking at the current amendment because there's probably going to  
be another one after this one that will-- I didn't go that far because of the ongoing litigation that  
often happens in the correction facilities. I wasn't sure, and I didn't want to muddy down this bill, of  
how to deal with those communications by a state body and a state person investigating them. That's  
just the defense attorney in me. I wasn't sure how to do it so I left it out. But I did have a  
conversation with Frakes and we had a conversation about how to make the process of tracking in,  
tracking out better. It's not in my bill. But I just wasn't sure how-- if we as a state authorize  
somebody to investigate, they are a state actor and there is no Miranda warning, there's no anything,  
and there's too many litigations that are still going on. Especially if this becomes a crime, I don't  
want anybody making admissions without those proper procedures. And I just wasn't capable of

figuring out how to do that without making all communication private. And then that gets more complicated because then every report that they write would be waiving that-- that-- that initial privilege. So it's a complex situation where I didn't-- I couldn't get there.

**PANSING BROOKS:** [02:50:46] Well, it is complex. So what do you do with a case like Nikko Jenkins who is cutting himself and there was-- or in a case like where we got initial pictures of the riot and what had happened so that we can get that information from--

**WAYNE:** [02:51:00] That's the complexity of--

**PANSING BROOKS:** [02:51:03] [INAUDIBLE] a thousand words, so--

**WAYNE:** [02:51:04] Absolutely. I'm OK with cameras. I'm OK with the cell phone. I'm OK with all that. I'm just-- I'm suggesting that those individuals who may have started a fire still-- and ultimately some people-- two people died. They were charged. And what I'm afraid of is if we're-- if we're recording people's conversations, that's now admissible in their trial and defense counsel never had an opportunity to stop that from happening by advising them, because we're investigating it, we are state people, we are-- it's under the color of state law. So I'm OK with pictures, I'm ok with-- but there has to be some guidelines around that. And I don't know if we want to put that in statute because those are a lot of guidelines we're going to have to figure out.

**PANSING BROOKS:** [02:51:52] Well, I just don't want one set of investigators to have the ability and not the other set of investigators, so--

**WAYNE:** [02:51:59] I'm willing to work on that and I've-- I've talked to Director Frakes and we're-- we're trying to work that out. Again, this was my first attempt to get more feedback because every

time I write a new amendment I find new things that we need to talk to because cell phones are so complicated. And with the new-- well, the latest Supreme Court ruling that if it's an individual outside the facility, there's a whole separate process that has to happen because it's-- prisoners don't have a right to expectation of privacy. But if-- if it's my cell phone and I leave it there, I do. So there's a whole complicated issue that, you know, maybe this year we won't be able to get it done because it is cell phones and they're not-- no longer just flip phones. There's so many things you can do with it.

**PANSING BROOKS:** [02:52:42] OK. Thank you. I just want to say I'm totally with you on getting phones out of the prisons. It's just-- just being able to have access to information, so--

**WAYNE:** [02:52:53] I just wanted to you know I thought about it, we have been thinking about it, but I can't disassociate myself with the criminal defense attorney that I've-- I've been for the last ten years, so I--

**PANSING BROOKS:** [02:53:05] [INAUDIBLE] Justin. Thank you, Senator Wayne.

**WAYNE:** [02:53:06] Thank you.

**LATHROP:** [02:53:06] OK. I think that's it.

**WAYNE:** [02:53:07] Thank you.

**LATHROP:** [02:53:07] Thank you for your close. That'll close our hearing on LB233 and bring us to LB340.



**PANSING BROOKS:** [02:53:31] OK. We're now opening LB340. Welcome, Chair Lathrop.

**LATHROP:** [02:53:40] Good afternoon, Vice Chair Pansing Brooks and members of the Judiciary Committee. My name is Steve Lathrop, L-a-t-h-r-o-p. I'm the state senator from District 12 and I'm here today to introduce LB340. This bill addresses something that was brought to my attention by our Inspector General of Corrections. On a recent visit to the Work Ethic Camp in McCook, he learned that the facility has a room reserved for women despite it effectively being a male-only facility. He was told that current statute still allows judges to place women there, a law that goes back to when the facility was run by the Probation Administration. However, that has not been the practice for some time. The Work Ethic Camp is now run by the Department of Corrections and, it is our understanding, is used by the Department-- pardon me-- and it's our understanding the department could use this room for other purposes. LB340 is a simple fix that strikes reference to women in the facility from a pair of statutes. This would allow the department to put that space to better use. It's my understanding the department has no problem with this bill. It's also my understanding the Inspector General has submitted a letter in support in the interest of saving time, and that's included in your materials, but is here and willing to answer questions that you might have. And with that, I'd ask for your support on LB340.

**PANSING BROOKS:** [02:55:15] Thank you, Senator Lathrop. Any questions for Senator Lathrop? Seeing none, we'll go to proponents. Any proponents? No proponents. Any opponents? Do we have any opponents? And what about anybody in the neutral, any neutral testifiers? Do we have any letters, just one letter? [INAUDIBLE] So we have one letter from Doug Koebernick, the Inspector General of Corrections, and that's it. Senator Lathrop, would you like to close?

**LATHROP:** [02:56:02] I waive close.

**PANSING BROOKS:** [02:56:02] Senator Lathrop waives closing and that ends our hearing on LB340 and ends our hearings for today. So thank you all for coming and we're [RECORDER MALFUNCTION]