

Open Records & Open Meetings



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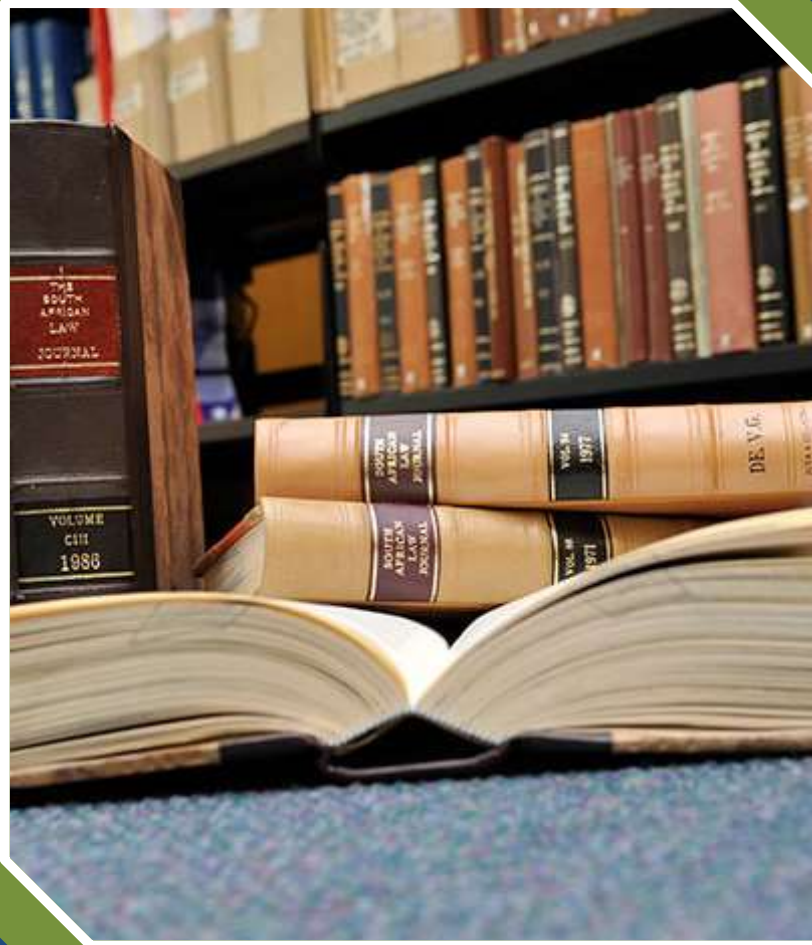
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Presentation Goals

- Identify key definitions applicable to open record and open meeting laws.
- Explain the proper protocol for responding to open record requests.
- Provide 2023 legislative updates.
- Describe how to properly post notice of regular and special meetings.
- Explain the reasons for, and how to properly enter, an executive session.
- Review the Attorney General's opinion process and potential penalties for open record and open meeting violations.



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Open Records & Open Meetings

Primary Sources

- ND Constitution Article 11
- N.D.C.C. Chapter 44-04

Secondary Sources

- North Dakota Attorney General Opinions
- North Dakota Supreme Courts Cases



Open Records

Open Records Basics

What is covered by open record laws?

- All **records** +
- In the possession of a **public entity** +
- Regarding **public business**

are **Open Records**.

Open Records Basics

What is a Record?

- **Recorded information** of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced . . .

Open Records Basics

What is Public Business?

- **All matters** that relate or may foreseeably relate in any way to . . . The performance of the public entity's governmental functions, including any matter over which the public entity has **supervision**, control, jurisdiction, or **advisory power**; or...the public entity's **use of public funds**.

Open Records Basics

There must be a law that specifically says the record is protected.

- The law will typically say the record is:
 - *“not subject to Article XI of the North Dakota Constitution,”*
 - *“not an open record,”*
 - **“exempt,”** or
 - **“confidential.”**

Open Records Basics

Exempt

- May be released.
- Public entity has discretion – needs entity action.
- May be called a “closed” record.
- Not against the law to release an exempt record.

Confidential

- Cannot be released.
- Public entity has no discretion.
- Can only be released pursuant to a statute.
- Class C felony to knowingly release confidential records.

Exempt

- Public employee personal information, including:
 - *Month/Day of Birth;*
 - *Home Address;*
 - *Personal Phone Numbers;*
 - *Photograph;*
 - *DMV and Employee ID Numbers;*
 - *Payroll Deduction Information;*
 - *Dependent/emergency contact information;*
 - *Any credit, debit, or electronic fund transfer card number;*
 - *Any account number at a bank or other financial institution; and*
 - *Type of leave taken, and leave applied for but not yet taken.*
- Internal investigation complaints – for no more than 75 days from the date of the Complaint

Confidential

- Social Security Numbers;
- Computer Passwords; and
- Employee use of Employee Assistance Programs; and
- CHRI Checks performed by BCI.

Examples of Records that are generally open

- Personnel file, including:
 - *Job performance*
 - *Evaluations*
- Business-related e-mails
- Records on personal devices, including:
 - *Cell phones (e-mail, messages, photos)*
 - *Computers (e-mail, documents, etc.)*
- Contracts with a public entity, including:
 - *Prices*
 - *Costs*

Examples of Records that are generally exempt

- Medical records, or a record containing medical information, in possession of a public entity are exempt. (N.D.C.C. § 44-04-18.32)
- Applications (N.D.C.C. § 44-04-18.27)
 - *Applications and any records related to the applications which contain information that could reasonably be used to identify an applicant are exempt. Finalists' information remains open.*
- Active litigation records (N.D.C.C. § 44-04-19.1(12))
 - *Records obtained, compiled, or prepared by a public entity or the attorney representing a public entity for the purpose of litigation, unless the records already have been filed publicly or the litigation is completed, are exempt.*

Vendor Record Examples

- Trade secret, proprietary, commercial, and financial information is confidential – “if it is of a privileged nature.” N.D.C.C § 44-04-18.4(1).
- Economic development records and information may be exempt. N.D.C.C § 44-04-18.4(5).
- Bids received by a public entity in response to an invitation for bids by the public entity are exempt until all of the bids have been received and opened by the public entity. N.D.C.C § 44-04-18.4(6)(a).
- Proposals received by a public entity in response to a request for proposals are exempt records until a notice of intent to award is issued. N.D.C.C § 44-04-18.4(6)(b).
- Records included with any bid or proposal naming and generally describing the entity submitting the proposal are open. N.D.C.C § 44-04-18.4(6)(c).

2023 Open Record Legislative Changes

- SB 2232 – Law Enforcement Records
 - *Descriptions of crime scene images that include a minor are exempt. (New subsection in N.D.C.C. § 44-04-18.7)*
 - Effective August 1, 2023

Responding to Record Requests

- Every person has the right to inspect or make a request for a public record.
- Generally, entity cannot make a requester fill out a form.
 - *Although you cannot require the initial request in writing either, you can request written (reasonable) clarification.*
 - *Exception – if you need to verify identity to release an otherwise confidential or exempt record.*
- Requester DOES NOT have to give their name or reason for the request.
 - *Exception – to verify identity for confidential or exempt records.*
- You only have to provide one copy of the record, once.

Responding to Record Requests

- You must provide RECORDS – not opinions or explanations.
 - *A request for information is not a request for records.*
- Requests should reasonably identify the record.
 - *Can clarify; do not intimidate.*
 - *Can suggest.*
- You only have to provide records you have in your possession.
 - *However, cannot contract with third party to “hold” your records and then claim not in your “possession.”*

Responding to Record Requests

- You do not have to create new records or put in a new format.
 - *Exceptions:*
 - If requester asks for a paper copy and you only have electronic copy, you must provide paper copy, but can charge in accordance with N.D.C.C. § 44-04-18(2).
 - Text messages – you are not required to provide access to the device.
- You must give a legal reason for any denial of records.
 - *Including if records do not exist.*
- Review and redact for confidential information.
- Communicate with requester – give estimate of time, costs, etc.

Responding to Record Requests

- If records available on the internet, **may refer the requestor to the website.**
- However, if requestor does not have internet access or a computer, will need to provide a paper copy of the record.

Reasonable Time

Several factors used to determine appropriate length of any delay, including:

- Need to consult with attorney if reasonable doubt exists on whether the record is open;
- Excising confidential information;
- Bulk of request and volume of documents reviewed;
- Accessibility of documents; and
- Office staff and availability, workload, balancing of other responsibilities.

If there will be a delay – communicate that to the requester.

Basics of Charging

- May charge up to 25¢ per copy of a size no more than 8x14.
- May charge actual cost of postage, maps, color photos.
- Locating records – first hour free, thereafter \$25/hour.
- Redacting confidential information – first hour free, thereafter \$25/hour.
- May require payment before locating, redacting, making, or mailing the copy.
- 5 or more requests from same requestor w/in 7 days, may treat as one request when computing time to locate/excise records.
- Access is (usually) free!

TO:

FROM:

Re: Your request for records

DATE

You requested records¹:

- Pursuant to N.D.C.C. § 44-04-18(4), [available] records responsive to your request are online at:

 - Attached are [the records you requested] [additional records responsive to your request].
 - Some information is redacted because it is exempt and/or confidential pursuant to Marsy's Law and/or N.D.C.C. §§ _____
 - To the extent [requested] [other records] may/do exist, release is prohibited by the provisions of Marsy's law and/or the records are/would be confidential or exempt in entirety, under N.D.C.C. §§ _____
 - The records you requested cannot be provided because no such records exist OR the requested records are not records of this agency.
 - The estimated cost for the requested records is calculated as follows:

Actual cost of technology resources	\$ _____
_____ pages @ 25¢ per page	\$ _____
_____ other copies @ \$ _____ each	\$ _____
_____ hours for locating records @ \$25/hr (after the 1 st hour)	\$ _____
_____ hours for redacting records @ \$25/hr (after the 1 st hour)	\$ _____
TOTAL:	\$ _____
- Estimated costs are payable *in advance*. We do not waive estimated costs. *After* we receive a *cashier's* check/money order for the estimated costs, payable to "_____" we will begin work on your request. We estimate it will take approximately _____ days to complete your request.
- If we do not receive [payment] [clarification] from you within ten (10) days from today's date, we will consider your request withdrawn.
 - Your request did not reasonably identify specific records. We cannot comply with your request without clarification. Please call me at (701) _____.

[Template for Public Entity Use When Responding to an Open Records Request](#)



Open Meetings

Open Meetings Basics

What is a Meeting?

- A **quorum** of
- A **governing body**
- Of a **public entity**
- Discussing **public business**

Open Meetings Basics

What is a Quorum?

- **One-half or more of the members** of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity.

Reminder

A Meeting can happen...

- By conference call;
- On very short notice;
- Over video conference; or
- At a restaurant

Anywhere a quorum is present.

Open Meeting Exceptions

- Chance or social gatherings where no public business is considered or discussed.
- Emergency operations during a disaster or emergency declared under section 37-17.1-10 or an equivalent ordinance if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group.
- Attendance at meetings of national, regional, or state associations.
- Training seminars where no public business is discussed.

Committees

Definition of Meetings includes Committees.

- Committee: **Two or more people** acting collectively pursuant to authority delegated to that group by the governing body.
 - *Includes delegation of any public business, including information gathering.*
 - *Applies even if the public business being discussed was not delegated, and **no decision-making authority was granted**, to the committee by the governing body, so long as it relates to the business of the public entity.*

Key questions:

- Did the governing body delegate any sort of authority?
- Is the committee doing something the governing body could do itself?

Reminder

It does not matter...

- If the committee does not have final authority;
- If the committee is just “brainstorming” or “fact-finding;”
- If the committee is only intended to recommend something to the governing body;
- If the subject being discussed is not a subject within the authority delegated to the committee.

...a quorum of a committee is still a meeting.

Two Kinds of Meetings

Regular Meetings

- Set by filing yearly schedule.
 - *Must still create agenda for each meeting.*
- May discuss items not on the agenda at the meeting.
- Agenda should contain all topics known at the time the agenda is drafted, but may contain some boilerplate or catch-all items (i.e. “Committee Reports”).

Special Meetings

- Can **only discuss the items on the published agenda.**
- Agenda must be specific (no “catch-all” entries such as “old business”).

Notice Requirements

What must the Notice say?

- Time, date, and location of the meeting;
- Topics to be discussed;
- Notice of any executive session.
- If a meeting is held electronically, **the information necessary to join the meeting must be in the notice.** (Zoom/Teams link)

The public should be able to read the notice and understand what the governing body is planning to discuss. Do not be vague.

Providing Notice

When should the Notice be provided?

- Notice should be posted “**at the same time as such governing body’s members are notified.**”
 - *Remember: When governing body receives the agenda, the public should see the agenda.*

If it’s a special meeting, and the members know the date of the meeting, but no agenda has been prepared?

- Post notice of date at the same time members know of the date.
- Once agenda is prepared, it should also be posted at the required locations.

Providing Notice

Where must the Notice go?

- Posted at the main office and
- Location of the meeting on the day of the meeting;
- Appropriate central location: County Auditor OR posted on public entity's website; **(2023 Legislative Change: If you have a website, notice must be posted on the website.)**
- Given to anyone who has requested it.

Special meetings – notification must be given to official newspaper. (*Committee meetings are probably special meetings*)

- Remember: **This does not mean it needs to be published.**

Meeting Minutes

Minutes must contain:

- Names of members attending;
- Date and time meeting was called to order and adjourned;
- List of topics discussed;
- Description of each motion made and whether it was seconded (and by whom);
- Results of every vote taken; and
- The vote of each member on every roll call vote (required for all *nonprocedural* votes).

Common Meeting Violations

Using emails or other communication methods where a quorum is involved to discuss public business.

- Permissible
 - *To provide information for members to review before a meeting;*
 - *To set a meeting date.*
- Violations
 - *Hitting “**reply all**” to a permissible communication to hold a discussion or provide an opinion.*
 - *A member sharing thoughts, ideas, or opinions to a quorum of a public entity or a committee, even if no one responds.*
 - *Track changes?*

Common Meeting Violations

- Straw polling (no matter who does the polling)
 - *Calling members prior to the meeting and polling their votes*
- Serial meetings
 - *A series of smaller gatherings, where public business is discussed, which collectively constitute a quorum*



Executive Session

N.D.C.C. § 44-04-19.2



Executive Sessions

Must be specifically authorized by law

- Most common reasons:
 - *Discussing exempt/confidential records,*
 - *Attorney consultation; and*
 - *Negotiation strategy.*
- Most common violation:
 - *Closing meeting to discuss personnel matters!*
 - *Contractual terms and negotiation strategy may be discussed in executive session, but personnel issues cannot.*

Executive Session Basics

Attorney consultation – 2 Ways

1. Advice regarding and in anticipation of reasonably predictable or pending litigation or adversarial administrative proceedings **OR**
 2. To receive attorney's advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity, which, if held in public, **would have an adverse fiscal effect.**
- Remember: Just because attorney is sitting in does not automatically make it an attorney consultation!

Schmitz v. State Board of Chiropractic Examiners (2022 ND 52)

Facts:

- Dr. Schmitz, a licensed chiropractor, alleged the Board held discussions beyond the scope of attorney consultation during an executive session.
- District Court released parts of the executive session.
- Schmitz appealed.

Holding:

- By a vote of 3-2, the Supreme Court ordered the case back to District Court for release of an additional approximately 18 minutes of the executive session recording.

Schmitz

Following examples found impermissible and ordered to be disclosed:

- An unidentified speaker summarized their thoughts on how the closed session would be conducted and noted that the board members may have questions for the attorney and asked the attorney whether that is an acceptable way to proceed. The majority disclosed that question but protected the board attorney's response.
- A board member's summary and comments on the ALJ's proposed summary judgment order, followed a few seconds later by a question to the board's attorney.
- A response from the executive director to the board member's question for information, indicated she did not have the information, and then asked the board's attorney.
- Board discussion which included a summary of factual information related to the reason for the consultation by a board member.

“Now” - SB 2232

“All statements made by a participant or between participants during an executive session held for the purpose of attorney consultation are exempt if the statements relate to the subject for which attorney consultation was established.”

(Effective August 1, 2023)

Executive Session Basics

Negotiation strategy

- Must relate to strategy or provide instructions to an attorney or other negotiator,
- Regarding a pending claim, litigation, adversarial administrative proceedings, or contracts,
- Which is currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future,
- **AND** must have adverse fiscal effect if the discussion would be held in public.

How to Hold an Executive Session

- Convene in open meeting;
- Announce in open meeting the topics to be discussed and legal authority;
 - *Note: **To discuss confidential information – no motion necessary.** To discuss exempt/closed information - motion to enter executive session.*
- Record the session (**keep for 6 months**);
- Note time of executive session and who attended in minutes;
- Only discuss topics in announcement;
- (usually) Final action in open meeting.



Violations



Violations Basics

- Any interested person may request an attorney general's opinion to review: 1) a written denial of a request for records or 2) a denial of access to a meeting.
 - *Request must be made within 30 days of alleged records violation.
Meetings without notice must be within 90 days of alleged violation.*
- If the attorney general issues a written opinion* concluding that a violation has occurred, the public entity has seven days to correct any other violation.
- If the public entity fails to take the required action within the seven-day period and the person requesting the opinion prevails in a civil action the person must be awarded costs, disbursements, and reasonable attorney's fees in the action and on appeal.
- Attorney General can mandate training for violations of law.

Violations – Civil Penalties

- Violations may be subject of civil action.
- Action must be commenced within 60 days of the date the person knew or should have known of the violation **or** 30 days from issuance of AG opinion – **whichever is later.**
- Court may award \$1,000 or actual damages for intentional or knowing violations – **whichever is greater.**

Violations – Criminal Penalties

- Attorney General can refer a public servant to the state's attorney for multiple violations.
- A public servant who knowingly violates the law is guilty of a class A misdemeanor.

2023 Bills – Effective August 1st

- **HB 1197** - Publication of Legal Notices
 - *Recognized that many newspapers now have online e-editions*
 - *Defines “E-edition” and “Publish” so that print edition is the same as e-edition*
- **HB 1262 - Body Cameras**
 - *Images taken with a body camera or similar device and taken in a private place remain exempt.*
 - *Removed requirement that the camera be worn by a law enforcement officer or firefighter.*
 - *Will apply to public employees, like inspectors, wearing a camera.*

2023 Changes to Remember

- **SB 2232**
 - *Executive Sessions*
 - All attorney consultation statements will be protected.
 - *Notice*
 - If you have a website, must post notice on the website.

References & Resources

- North Dakota Constitution [Article XI General Provisions](#)
- North Dakota Century Code Chapter [44-04](#)
- Attorney General's website: www.attorneygeneral.nd.gov
 - *Open Records & Meetings Laws*
 - Manuals & Guides
 - [Open Records Guide](#) (“One pager”)
 - [Template for Responding to an Open Records Request](#)
 - [Open Meetings Guide](#) (“One pager”)
 - [Sample Form for Closing Executive Sessions](#)
 - [Sample Meeting Notice](#)
 - [Notice Checklist](#)

Questions?

