



▶ North Dakota Open Records and Open Meetings Laws

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Disclaimer



This presentation
is not intended
as legal advice.



Please consult
with your city
attorney for legal
counsel as
needed.

Goals of Presentation

- ▶ Identify key definitions applicable to open record and open meeting laws.
- ▶ Establish the proper protocol for responding to open record requests.
- ▶ Understand how to properly post notice of regular and special meetings.
- ▶ Recognize the reasons for, and how to properly enter, an executive session.
- ▶ Identify and avoid common open record and meeting violations.

Open Records

“Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.”

N.D.C.C. § 44-04-18(1)

Open Records Basics

What is subject to open records laws?

- ▶ All records
- ▶ In possession of a public entity
- ▶ Regarding public business

What is a Record?

- ▶ "Record" means **recorded information of any kind**, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.

What is a Public Entity?

- ▶ Public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor or any task force or working group created by the individual in charge of a state agency or institution, to exercise public authority or perform a governmental function . . .

What is Public Business?

- ▶ "Public business" means **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.

Examples of records generally open

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

What Records are Open?

- ▶ All records are open unless there is 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.”

What Records can be Withheld?

Exempt Records

- ▶ 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 Records

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

Examples

Exempt Records

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.

Confidential

- ▶ Social Security Numbers
- ▶ Computer Passwords
- ▶ Employee use of Employee Assistance Programs.

Exempt Records – 2021 Changes

- ▶ Image of a victim of a fire (N.D.C.C. §44-04-30(4))
- ▶ Medical records, or a record containing medical information, in possession of a public entity (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 (now) exempt. This is a change from confidential. Finalists' applications and related records remain open to the public.
- ▶ Active litigation records (N.D.C.C. §44-04-19.1(12))
 - ▶ Active litigation records is defined as “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.
- ▶ Accident report forms (N.D.C.C. Sec. 39-08-13)
 - Unless the requester is a party to the accident, their legal representative, insurer or agent of the insurer, the name, driver's license number, and telephone number of a **minor** party is **exempt**.

Confidential Addresses (SB 2276)

- ▶ Telephone numbers and home addresses of: prosecutors, supreme court justices, district court judges, and judicial referees were added to the list of confidential records in N.D.C.C. Sec. 44-04-18.3(1).
- ▶ N.D.C.C §44-04-18.3(5) was created:
 - ▶ A home address of an individual in subsection 1 which is included in a geographic information system, a property title record, or tax parcel data **is confidential** only **if** an individual in subsection 1 or the individual's employer submits a written request to the custodian of the records. The request will remain confidential for the remainder of a calendar year and must be renewed annually.

Responding to Open Records Requests

- ▶ Every person has the right to inspect or make a request for a public record.
- ▶ Cannot make a requester fill out a form or put the request in writing, though you can request 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 – if you need to verify identity to release an otherwise confidential or exempt record.
- ▶ You only have to provide one copy of the record, once.

Responding to Open Records Requests

- ▶ Only required to provide RECORDS.
 - ▶ Request for information or an opinion is not a request for records.
- ▶ Requests should reasonably identify the record.
 - ▶ Clarification v. Intimidation tactics
- ▶ Only have to provide records in your possession or control.
 - ▶ Cannot contract with third party to “hold” your records and then claim not in your “possession.”
- ▶ Generally, do not have to create new records or put in a new format.
 - ▶ Exception: If request paper copy and only have electronic copy, must provide paper copy, but can charge in accordance with N.D.C.C. § 44-04-18(2)

Responding to Open Records Requests

- ▶ 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 Open Records Requests

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!

Responding to Open Records Requests

Provide records within a “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

Open Meetings

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Open Meetings Basics

What is a Meeting?

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

▶ N.D.C.C. § 44-04-17.1(9)

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.

▶ N.D.C.C. § 44-04-17.1(15)

Open Meetings Basics

Definition of a Meeting includes Committees

- ▶ 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 to the committee by the governing body, so long as it relates to the business of the public entity.

Open Meetings Basics

Key questions:

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

Open Meetings Basics

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.

Meetings can happen:

- ▶ By conference call;
- ▶ On short notice;
- ▶ Over video conference;
- ▶ At a restaurant;
- ▶ Anywhere else a quorum is present.

Two Kinds of Meetings

Regular Meetings

- ▶ Set by filing yearly schedule
- ▶ Agenda for each meeting 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”)
- ▶ May discuss items not on the agenda at the meeting.

Special Meetings

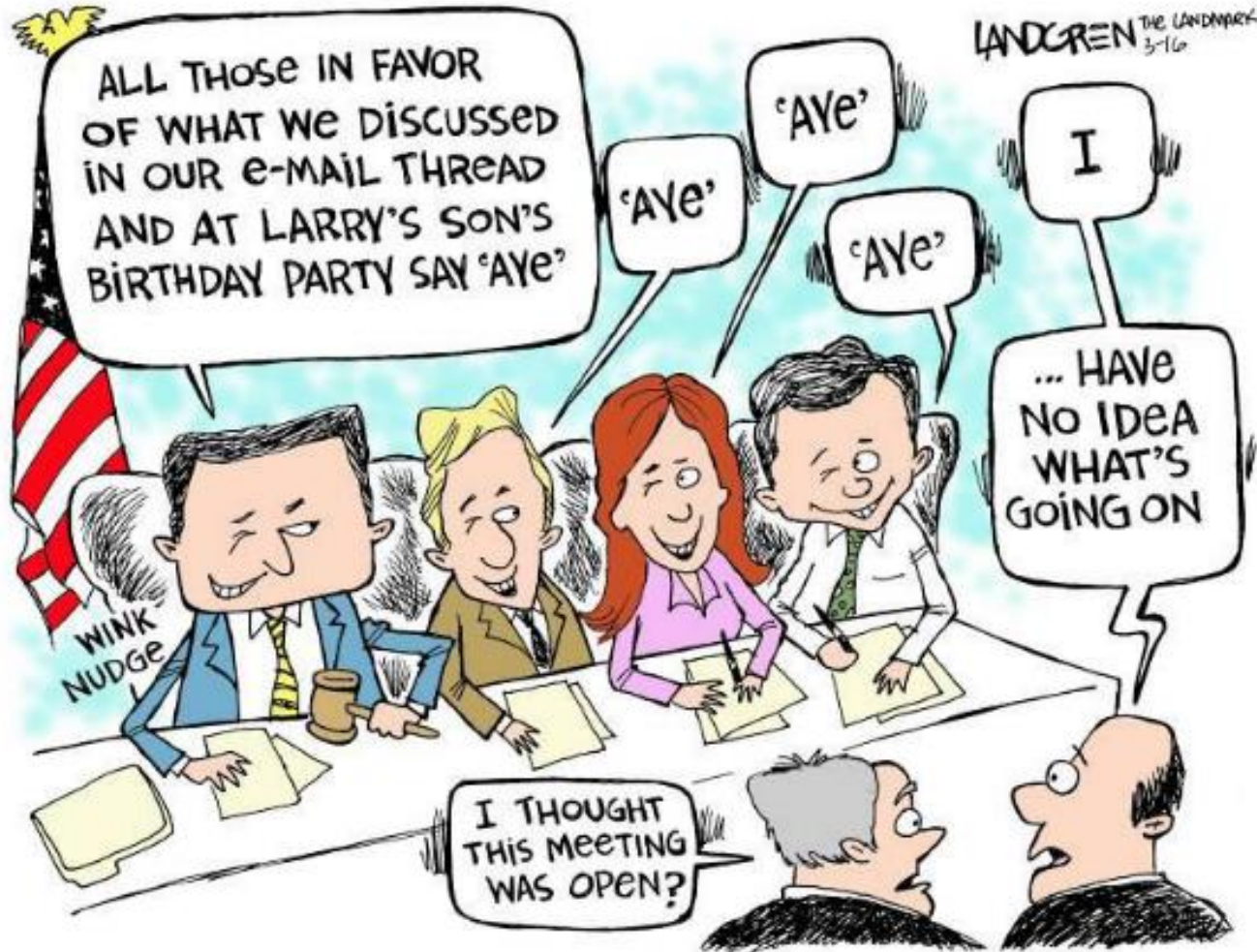
- ▶ Can only discuss the items on the published agenda
- ▶ Agenda must be specific (no “catch-all” entries)

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.
- ▶ 2021 Legislative change: Administration of examinations by a regulatory board when no other public business is considered or discussed.

▶ N.D.C.C. § 44-04-17.1(9)(b)

Common Violations



Common 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
 - ▶ Ministerial matters – setting a meeting date
 - ▶ Violations
 - ▶ A member sharing thoughts, ideas, or opinions to a quorum of a public entity or a committee, even if no one responds.
 - ▶ Hitting “reply all” to a permissible communication to hold a discussion or provide an opinion.
- ▶ Telephone straw polling (no matter who does the polling)
- ▶ Serial meetings - a series of smaller gatherings which collectively constitute a forum - and public business is discussed.

Providing Notice of Meetings

What should the Notice say?

- ▶ Time, date, and location of the meeting;
- ▶ Topics to be discussed;
- ▶ Notice of any executive session.

The public should be able to read the notice and understand what the governing body is planning to discuss. Don't be vague.

- ▶ N.D.C.C. § 44-04-20(2)

Providing Notice of Meetings

Where should the Notice go?

- ▶ Must be posted at the main office and
- ▶ Location of the meeting on the day of the meeting;
- ▶ Appropriate central location: in the city auditor's office (or designee of the city for city-level entities)
OR posted on public entity's website;
- ▶ Given to anyone who has requested it.

Special meetings – notification must be given to official newspaper

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

- ▶ N.D.C.C. § 44-04-20(4) and (6)

Providing Notice of Meetings

- ▶ 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.
 - ▶ What 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.
- ▶ N.D.C.C. § 44-04-20(4) and (6)

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).

▶ N.D.C.C. § 44-04-21 (2)

2021 Legislative Changes

- ▶ House Bill 1349 amended §44-04-19 (regarding access to public meetings) to provide that a governing body no longer has to have a speakerphone or monitor available in a physical location if a meeting is held electronically. Rather, the information necessary to join the meeting must be in the notice.
- ▶ HB 1349 also clarified that meetings held in-person must be in an accessible meeting to accommodate the numbers expected to attend. If the meeting is held by electronic means, the electronic capacity must accommodate the number of persons reasonably expected to attend the meeting remotely.

Executive Sessions

A governing body may hold an executive session to consider or discuss closed or confidential records.

N.D.C.C. § 44-04-19.2(1)

Executive Session

- ▶ Must be legally authorized
 - ▶ Most common violation: closing meeting to discuss personnel matters!
 - ▶ Remember: exempt vs. confidential information
- ▶ Attorney consultation (N.D.C.C. § 44-04-19.1(5))
 - ▶ Just because attorney is sitting in does not automatically make it an attorney consultation!
 - ▶ Expanded definition: advice regarding and in anticipation of reasonably predictable or pending litigation OR 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.
- ▶ Negotiation strategy. (N.D.C.C. § 44-04-19.1(9))
 - ▶ Must relate to negotiation strategy and instruction and must have adverse fiscal effect if it would be held in public.

Executive Session

- ▶ Convene in open meeting;
 - ▶ Note: To discuss confidential information – no motion necessary. To discuss exempt/closed information - motion to enter executive session.
- ▶ Announce in open meeting the topics to be discussed and legal authority;
- ▶ 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

- ▶ Any interested person may request an attorney general's opinion to review a written denial of a request for records, a denial of access to a meeting, or other alleged violations by any public entity other than the legislative assembly. (N.D.C.C. § 44-04-21.1(1))
- ▶ Request must be made within 30 days of alleged 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 after the opinion is issued to disclose the record, to issue a notice of a meeting that will be held within a reasonable time to correct the violation, or to take steps 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. (N.D.C.C. § 44-04-21.1(2)).

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.
- ▶ N.D.C.C. § 44-04-21.2

Violations – Criminal Penalties

- ▶ AG can refer a public servant to the state's attorney for multiple violations. (N.D.C.C. §44-04-21.3)
- ▶ A public servant who knowingly violates the law is guilty of a class A misdemeanor. (N.D.C.C. §44-04-21 and N.D.C.C. §12.1-11-06)

▶ N.D.C.C. § 44-04-21.3

Resources



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PRIZE NOTIFICATION SCAM STILL FINDING VICTIMS

July 20, 2021

Attorney General Wayne Stenehjem warns all North Dakotans that the best way to stop a scam is to simply hang up. Every day the Attorney General's Consumer Protection division receives reports from people who have lost money to scams.

ATTORNEY GENERAL INVESTIGATES STEPHEN W. HILL FOR CONSUMER FRAUD VIOLATIONS

July 15, 2021

Recent Opinions

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ONLINE PUBLICATION OF LEGAL NOTICES

July 8, 2021

An official newspaper of a political subdivision must be printed to qualify under the statute.

REQUIREMENTS FOR MINUTES OF MEETINGS

July 8, 2021

The North Prairie Regional Water District violated the open meetings laws when it did not comply with the notice requirements for a special meeting and approved minutes that did not contain all the information required by statute.

WAYNE STENEHJEM NORTH DAKOTA ATTORNEY GENERAL

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2021 Legislative Changes

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► Public Meetings

Requesting an Opinion

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SEARCH OPINIONS

Open Records Information

- [Open Records Guide](#)
- [Checklist for Law Enforcement Agencies' Use in Responding to an Open Records Request*](#)
- [Template for Public Entity Use When Responding to an Open Records Request](#)

The Open Records Manual can be saved or printed. In addition to providing detailed information about the state's sunshine laws, this manual contains summaries of court decisions relating to open records laws.

- [Open Records Manual](#)

* Contact the city attorney or state's attorney for assistance on Marsy's Law provisions.

Open Record Opinions

- [Index of Open Record Opinions](#)
- [Summary of Open Record Opinions](#)

Open Meetings Information

- [Open Meetings Guide](#)
- [Sample Form for Closing Executive Sessions](#)
- [Sample Meeting Notice](#)
- [Notice Checklist](#)

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► Questions?