



Open Records

- ❖ All records
- ❖ Possession of public entity
- ❖ Regarding public business
- ❖ OPEN

N.D.C.C. § 44-04-17.1(16) (definition of “record”)

Definition of “RECORD”

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

N.D.C.C. § 44-04-17.1(16)

Definition of “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.”

N.D.C.C. § 44-04-17.1(12)

Generally Open:

- ❖ Personnel file
 - ❖ Job performance
 - ❖ Evaluations
 - ❖ Salary Information
- ❖ E-mails that are business related
- ❖ Records on Personal Devices
 - ❖ Home computers
 - ❖ Personal cell phone
- ❖ Contracts with a public entity – prices, costs

Unless specifically provided by law...

- ❖ There has to be a law that specifically says the record is protected.
- ❖ The law will say the record is “not subject to Article XI of the ND Constitution,” “not an open record,” “exempt,” or “confidential.”

Exempt vs. Confidential

- Exempt records may be released.
- Discretion is with the public entity.
- May be called a “closed” record.
- Not against the law to release an exempt record.
- Confidential records cannot be released.
- No discretion.
- Can only release pursuant to the statute.
- Class C felony to knowingly release. N.D.C.C. § 12.1-13-01

N.D.C.C. §§ 44-04-17.1(2) (“closed record”); (5) (“exempt record”)

N.D.C.C. § 44-04-17.1(3) (“confidential record”)

Definition of “employee”

- N.D.C.C. 44-04-18.1, includes
 - Individual who is employed with a public entity;
 - Individual who has applied for employment;
 - Individual who has been employed with a public entity.

Exempt in Personnel File

- ❖ N.D.C.C. § 44-04-18.1 – “personal information”:
 - ❖ NEW: month/day of birth
 - ❖ home address
 - ❖ home phone number or personal cell number
 - ❖ medical information (v. medical records, which are confidential)
 - ❖ Photograph
 - ❖ driver ID number and employee ID number
 - ❖ payroll deduction info
 - ❖ Including credit, debit, or electronic fund transfer card number; bank account number
 - ❖ dependent(s) info
 - ❖ Name, address, phone number, DOB
 - ❖ NEW: “type” of leave taken and leave applied for but not yet taken

Confidential in Personnel File

- ❖ N.D.C.C. 44-04-18.1
 - ❖ Records of medical treatment or use of employee assistance program (really should not become part of personnel file)
 - ❖ See also N.D.C.C. chap. 23-01.3
- ❖ Group Insurance Plan info and PERS – see:
 - ❖ N.D.C.C. 54-52.1-11 and 54-52.1-12 (group insurance)
 - ❖ N.D.C.C. 54-52.3-05 (pre-tax benefits)
 - ❖ N.D.C.C. 54-52-26 (PERS)
 - ❖ N.D.C.C. 65-04-15 (WSI)

Confidential in Personnel File

- ❖ Other Examples:
 - ❖ Social security numbers (N.D.C.C. 44-04-28)
 - ❖ Computer passwords (N.D.C.C. 44-04-27)
 - ❖ Criminal History Background Checks performed by BCI (N.D.C.C. 12-60-16.6)
 - ❖ Income Tax Return Information (N.D.C.C. 57-38-57)

New Legislation on Personnel Matters

- ❖ Internal Investigations – N.D.C.C. 44-04-18.1(6)
 - ❖ Public entity's internal investigation of a complaint against employee for misconduct is exempt until investigation is complete or 75 days have passed.
- ❖ Applications – N.D.C.C. 44-04-18.27
 - ❖ Records that could reasonably identify an applicant are confidential, except for the designated finalists – those records are open.
 - ❖ Must designate at least 3 (or more) finalists
 - ❖ If do not have 3 applicants, all applications are considered open.

The basic rules:

- ❖ Every person has the right to inspect or make a request for a public record.
- ❖ Generally, cannot make person fill out a form
 - ❖ NEW LEGISLATION – although cannot require initial request to be made in writing, can require for clarification purposes
 - ❖ Exception: need to verify for exempt/confidential records
- ❖ The requester DOES NOT have to give their name or reason for the request.
 - ❖ Exception: need to verify for exempt/confidential records
- ❖ You only have to provide one copy of the record, once.

The basics continued...

- ❖ You must provide records – not opinions or explanations.
 - ❖ Request for information is not a request for records.
- ❖ Requests should reasonably identify the record.
 - ❖ clarification v. intimidation tactics
- ❖ 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.”

The basics continued...

- ❖ Generally, you do not have to create new records or put into different format
 - ❖ Exceptions:
 - ❖ 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
N.D.C.C. § 44-04-18(4)
 - ❖ Database information
 - ❖ Text messages
- NOTE: you do not need to turn over mobile device – N.D.C.C. § 44-04-18(4)

The basics continued...

- ❖ Give a legal reason for any denial of records.
 - ❖ New legislation: including if records do not exist
N.D.C.C. § 44-04-18(7)
- ❖ Review and redact for confidential information.
N.D.C.C. § 44-04-18.10
- ❖ Communicate with requester – give estimate of time, costs, etc.

The basics continued...

- ❖ New Legislation:
 - ❖ If records available on the internet, can 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.
 - ❖ Can charge in compliance with N.D.C.C. § 44-04-18

Duplication of Records

❖ New Legislation:

- ❖ May allow an individual to utilize own personal devices but can establish reasonable procedures so long as they do not prevent access to the records.

N.D.C.C. § 44-04-18(12)

“Reasonable Time”

- 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
 - office staff and availability, workload, balancing of other responsibilities

Basics of charging:

- 25 ¢ per copy for 8x11 or 8x14 page.
- Locating records – first hour free, thereafter \$25/hour.
- Redacting confidential information – first hour free, thereafter \$25/hour.
- No charge to forward electronic copies unless it takes IT longer than one hour to produce, thereafter can charge actual cost of IT resources
- Actual cost of postage, maps, color photos.
- Can ask for money up front.
- 2015 LEGISLATION:
 - May withhold records for subsequent requests until you receive payment for any outstanding balance
 - 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 free!

N.D.C.C. § 44-04-18

Basics of Open Meetings

- **Quorum** of
- **Governing body**
- **Of a public entity**
- **Discussing public business**
- **MEETING**

N.D.C.C. § 44-04-17.1(9) definition of “meeting”

Definition of “meeting” includes those of “committees”

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

It doesn't matter.....

- ❖ If the committee doesn't have final authority;
- ❖ If the committee is just “brainstorming” or “factfinding;”
- ❖ If the committee is only going to recommend something to the governing body.

Common Violations

- Using emails or other electronic devices involving a quorum of a governing body to discuss public business
 - Permissible:
 - Provide information for members to review before a meeting
 - Ministerial matters – setting a meeting date
 - Violations:
 - Sharing thoughts, ideas, opinions, to a quorum
 - Hitting “reply all” and holding discussions via email

Common Violations

- Telephone straw polling.
- Serial meetings – smaller gatherings collectively constitute a quorum and public business is discussed.



Two kinds of meetings:

❖ **Regular**

- ❖ Set by filing yearly schedule
 - ❖ Must still create agenda for each meeting
- ❖ Agenda should contain all topics known at the time of drafting the notice
- ❖ May discuss items not on the agenda at the meeting

❖ **Special**

- ❖ Can only discuss the items on the agenda
- ❖ Agenda must be specific
 - ❖ Cannot use “catch-all” phrases such as “old business,” “new business”

Not to worry....

Posting notice is easy!

What the notice should 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

Where to put the notice:

- ❖ At the main office;
- ❖ Appropriate central location: city auditor, county auditor, secretary of state OR put on public entity's website;
- ❖ Location of the meeting;
- ❖ Give to anyone who has requested it.
- ❖ Special meetings – agenda must be given to official newspaper
 - ❖ NOTE: this does NOT mean it needs to be published!

When to provide notice:

- ❖ Notice should be posted “at the same time as such governing body’s members are notified.”
 - ❖ 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(5)

Executive Sessions

N.D.C.C. § 44-04-19.2

- ❖ Must be legally authorized
 - ❖ Most common: exempt/confidential records; attorney consultation and negotiation strategy. (N.D.C.C. § 44-04-19.1)
 - ❖ Most common violation: closing meeting to discuss personnel matters!



Executive session procedure:

- ❖ 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 into the executive session.
- ❖ Record the session (keep for 6 months);
- ❖ Note time of executive session and who attended in minutes;
- ❖ Only discuss topics in announcement;
- ❖ Final action in open meeting.

N.D.C.C. § 44-04-19.2(2)

Minutes of Meetings

- 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 seconded
 - Results of every vote taken
 - Vote of each member on every recorded roll call vote (required for all nonprocedural votes)

N.D.C.C. § 44-04-21(2)

Violations

- Attorney General's opinions under N.D.C.C. § 44-04-21.1:
 - 30 days of alleged violation except meetings without notice – 90 days.
 - If action isn't taken & requester prevails in civil action requester will get attorney's fees.
 - Consequence for failure to comply with AG opinion – potential personal liability & pay for legal counsel.
 - NEW: Attorney General can now mandate training for violations of law.
- AG 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.

N.D.C.C. § 44-04-21.3

N.D.C.C. § 12.1-11-06

Violations

- Violations may be subject of civil action under N.D.C.C. § 44-04-21.2.
- 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.
- Court may award \$1,000 or actual damages for intentional or knowing violations.

More information

www.attorneygeneral.nd.gov

- ❖ Manuals
- ❖ Opinions
- ❖ Fact Sheets