

# Office of Attorney General

## OPEN RECORDS GUIDE

(08/2021)

600 E. Boulevard Avenue, Dept. 125, Bismarck, ND 58505. Tel: (701) 328-2210

North Dakota's laws state that all government records and meetings must be open to the public unless otherwise authorized by a specific law. The basic laws are found in North Dakota Century Code, beginning at §44-04-17.1. The public has the right to know how government functions are performed and how public funds are spent.

### DEFINITION OF RECORD

“Record” includes *all recorded information regardless of physical form (e.g. paper, e-mail, computer file, photograph, audiotape or recording, video, text message, etc.) that has a connection with how public funds are spent or with the public entity's performance of its governmental functions or its public business, regardless of format or location.*

Minutes, memos, reports, outlines, notes, employee salary and job performance records, contracts, telephone records, and travel vouchers are all **OPEN** records and **must** be provided upon request.

### REQUESTS FOR RECORDS

*Anyone* has the right to view or get a copy of public records, regardless of the reason or where they live. A request for public records can be made in any available medium. Generally, a public entity cannot ask why the records are requested, ask for identification, or require a request be made in writing (or in person). However, a request must reasonably identify existing records. If a request is unclear, the entity may require written clarification but cannot ask the requester's motive or identity. The entity can delay taking action until receiving written clarification.

- A request for *information* is not a request for records. A public entity does not have to respond to questions about its decisions, duties, functions or operations or to explain the content of its records.

The public entity must respond to a record request within a *reasonable* time, either by providing the record or explaining the legal authority for denying all or part of the request. What is “reasonable” depends on a number of factors, including the scope and type of records requested.

A public entity may only deny access to or a copy of a record for which there is a specific statute closing all or part of the information. A statute may declare certain records to be exempt or confidential.

If a record is **exempt**, a public entity has discretion to release or withhold it. If a record is **confidential**, it either cannot be released or the confidential information within the record first must be redacted.

### ALLOWABLE CHARGES

Access to public records is generally free. An entity may charge up to 25¢ a page (standard letter or legal size paper). For other types of records, the entity may charge the **actual cost** for copying, including labor, materials and equipment.

The first hour of *locating* requested records (including electronic records) is free. After the first hour, the entity may charge \$25/hr for locating records and a separate \$25/hr (after the 1st hour) for *redacting* any exempt or confidential information. If providing electronic records takes more than one hour, in addition to charges for locating and redacting, the entity may charge the *actual cost* incurred for use of technology resources. *The entity can require full payment of any estimated costs before starting to make copies or releasing records.*

- An entity does not have to convert its records to another format, create or compile records that do not exist, or obtain records originating from another public entity that it does not have in its possession.

If requested records are available on an entity's website or online, an entity can direct the requester to where the record can be accessed and does not have to provide a copy unless a requester is not reasonably able to access the internet.

A public entity may allow the use of personal devices to duplicate records but can impose reasonable procedures or conditions to protect the integrity of its records.

### DENIAL

If a request for records is denied, the entity must explain what specific federal or state law makes all or part of the record closed. If asked, the entity must put the reason for the denial in writing. The denial must state if the requested record does not exist.

- It is not a violation if a public entity declines to provide an exempt record, or if the reason a public entity cannot provide a record is that it does not exist, even if the requester believes the record *should* exist.

### REFUSAL

If repeated requests for records disrupt other essential functions, a public entity may refuse to provide access to or copies of its records to that requester but must put its reasons for doing so in writing. A requester may seek an opinion from the Attorney General on whether the entity's refusal was proper.

### OPINION REQUESTS

A request for an opinion must be submitted to the Office of Attorney General within 30 days of the alleged open record violation or refusal, regardless of when the requester became aware of the violation.

## EXEMPT (may be withheld at the discretion of the public entity)

- Home address, home/personal phone numbers, employee ID number, driver's license number, dependent information and emergency contact of public employees **§44-04-18.1(2)**, or individuals licensed by a state occupational/professional board, association, agency, or commission **§44-04-18.1(4)**.
- Personal financial information of public employees used for payroll purposes and the *type* of leave taken or accrued (the *amount* of leave taken and dates taken is open) **§44-04-18.1**.
- Active criminal intelligence, criminal investigative information, officer training materials, information that may impact officer safety **§44-04-18.7**, the work schedule of employees of a law enforcement agency **§44-04-18.3(3)**; records relating to background interviews of law enforcement applicants **§44-04-18.31**, active investigations records of MFCU **§50-24.8-12**.
- Homicide or sex crime scene images or any image of a minor victim of a crime **§44-04-18.7(8)** image of a victim of a fire **§44-04-30(4)**.
- Address, phone number, identifying information that could be used to locate or identify a victim/alleged victim of domestic violence, human trafficking, a sex offense, or a sexual performance by a child **§44-04-18.20**.
- Law enforcement records containing an individual's personal information, including driver's license number, day/month of birth (the year of birth is open), home street address (the city, state, zip is open), height, weight, home and personal cell phone numbers, and medical information **§44-04-18.7**. *NOTE: If a victim has asserted Marsy's law: the complete home and employment address or location, email address, and any other contact information for the victim or a member of the victim's family is also protected. This information may be contained in digital media such as audio, video, or images, or in witness statements.*
- Address, phone number, place of employment or other information in records of a criminal justice agency, correctional facility or the DOCR that could be used to locate the victim or witness to a crime **§12.1-34-02(11)**.
- Financial account numbers **§44-04-18.9**.
- Communications between a legislator and a public employee or official **§44-04-18.6**.
- E-mail address/phone number of an individual provided for purposes of communicating with a public entity, except this exemption cannot be used to shield the person's identity **§44-04-18.21**.
- Interviews/statements of child victims or witnesses obtained during an investigation of a violent crime or sex offense **§12.1-35-03(2)**.
- Driver's license number, phone, day/month of birth, and insurance information from a motor vehicle accident report form, except it is open to the parties involved or their insurers **§39-08-13(4)**.
- Applications for employment with a public entity, until the finalists are designated, then the applications and related records of the designated finalists are open **§44-04-18.27**.
- Records related to the name and medical condition of an individual and treatment provided by a public entity during an emergency medical response **§44-04-18.22**, medical records or other records containing medical information in possession of public entity **§44-04-18.32**.
- Recordings of 911 calls and related responses, except a person may listen to, or obtain written transcript of, the recordings **§57-40.6-07(4)**.
- Body camera images taken in a private place by law enforcement or firefighter **§44-04-18.7**.
- Records relating to the internal investigation of a complaint of misconduct by an entity or employee, but only until the investigation is complete or for 75 days, whichever is first, then it is open **§44-04-18.1**.
- Attorney work product **§44-04-19.1(1)** and active litigation records **§44-04-19.1(12)**.
- Security system plans, critical infrastructure information vital to maintaining public safety, security, or health; **§44-04-24**; public health & security response plans **§44-04-24**, **§44-04-25**, records relating to cyberthreats, or security, disaster, or emergency threat assessments, mitigation, responses, or recovery, of public facilities or critical infrastructure **§44-04-18.4**.
- Bids/proposals in response to an RFP, but only until all proposals opened/presentations heard, after which it is open **§44-04-18.4(6)**.
- Personal information of applicants/recipients of economic assistance programs administered under division of community services or a community action agency **§44-04-18.19**.
- Records revealing negotiating strategy and draft agreements subject to negotiations, but only as long as release would have an adverse fiscal effect on the entity **§44-04-19.2**.
- Settlement agreements between a public entity and another party, until fully executed and accepted by all parties **§44-04-19.1**.
- Private donor and prospective donor personal and financial information. **§44-04-18.15**.
- Title IX complaint and investigation records **§44-04-18.28**.
- Risk Management records of claims against the state/employee **§32-12.2-11(1)** & state agency loss control committee records **§32-12.2-12**. ■

## CONFIDENTIAL (cannot be released)

- Social Security number **§44-04-28**;
- Phone number & home address of prosecutors, supreme court justices, district court judges, judicial referees, juvenile court directors or probation officers, employees of law enforcement agencies, state or local correctional facilities, and DOCR (*the home address included in a GIS system or property tax records is also confidential but only if the individual or their employer submits a written request, renewed annually*); records or other information that would reveal the identity, or endanger the life or physical well-being, of an undercover officer; **§44-04-18.3**;
- Public employee medical treatment records **§44-52.1-12**, **§44-04-18.1(1)**, **Ch. 23-01.3**; patient records at university system medical centers or public health authority **§44-04-18.16**; Employee Assistance program records **§44-04-18.1(1)**; HIPAA may prohibit release of health information from other sources.
- Criminal history records **§12-60-16.5**, **§12-60-16.6**. *These may be obtained only from BCI.*
- Identifying information of a living child victim or witness of a crime, except in the case of traffic accident or victim of fire **§12.1-35-03**;
- Names of persons injured or deceased, but only until law enforcement has notified the next of kin or for 24 hours, whichever occurs first, then the information is open **§39-08-10.1**;
- Autopsy photographs, images, audio/video recordings, working papers, notes, except the final report of death, which becomes open eight days after it is finalized **§44-04-18.18**, **§23-01-05.5**;
- Income, and sales & use tax returns and information **§57-38-57**, **§57-39.2-23**;
- Trade secret, proprietary, commercial & financial information, if it is of a privileged nature and has not yet been publicly disclosed; research records of the universities and colleges under the SBHE; **§44-04-18.4**;
- Electronic security codes and passwords **§44-04-27**;
- Fire investigations until the investigation is completed, then it is open **§44-04-30(1)**;
- WSI employer files, except a Safety Grant recipient's name & amount awarded is open **§65-04-15**;
- Foster care records **§50-11-05**;
- Law enforcement & correctional facility records of delinquent, unruly, or deprived child **§27-20-52(1)**. ■