

OFFICE OF ATTORNEY GENERAL OPEN RECORDS GUIDE

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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

- 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)**.
- Employee work schedules from a Law Enforcement Agency or the Department of Corrections and Rehabilitation **§44-04-18.3**.
- 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**.
- Records and meeting portions concerning ongoing railroad investigations and surveillance under the National Transportation Safety Board and Federal Railroad Administration State Safety Participation Program **§44-04-17.1**.
- Bids submitted to a public entity in response to an invitation for bids remain exempt until all have been received and opened, while proposals submitted in response to a request for proposals remain exempt until a notice of intent to award is issued **§54-44.4-05**.
- Documents and information obtained by the North Dakota Insurance Commissioner during certain examinations or investigations are confidential, privileged, and exempt from open records laws, subpoenas, and civil discovery. The commissioner may use them for regulatory or legal actions but cannot disclose them publicly without the insurer's consent—unless, after notice and hearing, disclosure is deemed to serve public, shareholder, or policyholder interests **§26.1-10-07**.
- A petition-related record received by the secretary of state is exempt from disclosure until the petition is ruled sufficient or 35 days have passed, whichever comes first **§44-04**.
- Records related to an individual's application to a state-run higher education institution **§44-04**.
- Unless otherwise provided by law, a sensitive image as defined by section **44 - 04 - 17.1** is an exempt record **§44-04-18.7**.
- Certain Bank of North Dakota Records **§6-09-35**.

- 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, report but may be disclosed under certain circumstances **§44-04-18.11**, **§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)**
- Home addresses and phone numbers of certain justice system and law enforcement personnel are confidential, except as otherwise provided. Additionally, personnel records of corrections or law enforcement employees may not be disclosed to inmates unless specifically authorized by the appropriate authority **§44-04-18.3**.
- Trade secrets or proprietary, financial, or commercial information submitted to or received by the commission from applicants, contractors, or service recipients, if the commission determines they meet the necessary criteria **§44-04-18**.
- Juvenile law enforcement and correctional records are not open to the public unless the case is transferred for criminal prosecution, involves national security, or the court orders disclosure in the child's interest **§27-20.2-23**.
- Materials and information gathered during a data call or market conduct analysis by the Insurance Commissioner are confidential, not subject to subpoena, and cannot be made public except as specifically allowed by law **§26.1-03-19.8**.
- Records and digital media held by a children's advocacy center related to forensic exams, interviews, advocacy, or therapy are confidential and may only be released to authorized entities or professionals, or upon a judge signed subpoena **§50.25.1-11.1**.
- Reports submitted by a guardian ad litem, visitor, expert examiner, or guardian in guardianship cases are closed to the public and only accessible to the court, involved parties or their counsel, and others with court authorization for good cause **§30.1-28-03.1**.
- Certain Bank of North Dakota Records **§6-09-35**.

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DEFINITION OF MEETING

Meeting means *any gathering of a quorum of the members of a governing body of a public entity regarding public business*, and includes committees and subcommittees, informal gatherings or work sessions, and discussions where a quorum of members are participating by phone or any other electronic communication (either at the same time or in a series of individual contacts).

- If a governing body delegates any authority to two or more people, the newly formed committee is subject to the open meetings law even if the committee does not have final authority or is just fact-finding. What it is called does not matter, it is still a committee. Committee meetings must be noticed, and minutes taken.
- Portfolios are a committee of the governing body if more than one commissioner holds the portfolio.
- Emails or text messages between members of a committee or subcommittee regarding public business may constitute a meeting and violate open meeting laws.

Training seminars and purely social gatherings attended by a quorum of a public entity are not meetings, however, as soon as the members discuss any public business, it becomes a “meeting.”

MEETING NOTICES

Prior written notice is required for all meetings of a public entity, including committees and subcommittees.

- Generally, there is **no minimum advance notice period** for public meetings.

An entity must provide public notice of the date, time and location of a meeting when the governing body is notified. It is not necessary to have a speakerphone or monitor available in a physical location if a meeting is held solely electronically. Instead, all information necessary to join the meeting must be included in the notice.

As soon as an agenda is prepared and given to the governing body, it must be posted and provided to the public in the same manner as the meeting notice. If an executive session is anticipated, the meeting notice also must include the executive session as an agenda item, along with the subject matter and the legal authority for the executive session.

Regular meeting agendas may be added to or altered at the time of the meeting. For **special** meetings, however, *only* the specific topics included in the notice may be discussed.

"Public hearing" means a proceeding conducted for the purpose of acquiring information that will be considered in a certificate or permit action evaluation and which affords the public an opportunity to present views, opinions, and information.

PROVIDING PUBLIC NOTICE OF MEETINGS

At the same time the governing body is notified of the meeting, the meeting notice must be:

1. Posted at the main office of the public entity, if the entity has a main office.
2. Posted at the location of the meeting, if held somewhere other than the entity's main office.
3. Filed with the appropriate official [the Secretary of State for state- level entities, the city auditor for city- level entities, and the county auditor(s) for all other entities].
4. Posted on the public entity's website, if the entity has a website.
5. Provided to any individual who has requested notice of the meeting.

Notice of special meetings also must be given to the entity's official newspaper. Generally, there is no requirement that the meeting notice be published.

If asked, a public entity must provide a requester with personal notice of its meetings. Unless the requester specifies a shorter time period, the request to receive notice is good for one year.

PUBLIC PARTICIPATION

A member of the public has the right to attend an open meeting and to record or broadcast the meeting but **does not have the right to speak**.

EXECUTIVE SESSIONS

Only the portions of a public meeting that are specifically confidential or exempt from the open meetings law may be closed to the public and held in executive session. The remainder of the meeting must be open to the public.

- Generally, a public entity **may not close** a meeting to discuss salary issues or employee job performance.

There are several reasons why a meeting may not be open to the public. For instance:

- The portion of a meeting during which confidential or exempt records are considered may be closed to the public. This is particularly common for school board meetings to discuss student records.
- Board meetings concerning the nonrenewal, dismissal for cause, or suspension of a teacher, principal, superintendent, or directors may be closed except for certain representatives of the board and the teacher, principal, superintendent, and director.
- A governing body may close a meeting to talk with its attorney if the discussion pertains to the attorney's advice regarding a "pending or reasonably predictable" lawsuit involving the public entity.
- An executive session also may be held to discuss the risks, strengths or weaknesses of an action of the public entity or negotiating strategy, if holding the discussion in an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity.
- In addition to discussing closed or confidential economic development records, an executive session is authorized to discuss a public entity's efforts to recruit a new business to the area served by the public entity.
- State agency loss control committee meetings regarding closed records of a specific pending or reasonably predictable claim against the state or a state employee may be held in executive session.

CLOSED MEETINGS PROCEDURES

Although certain statutes may apply to particular meetings or entities, state law specifies the following general procedure for holding an executive session.

1. Convene in an open session preceded by public notice;
2. Announce during the open portion of the meeting the topics to be considered during the executive session and the legal authority for holding an executive session on those topics;
3. Pass a motion to hold an executive session, unless a motion is unnecessary because a confidential meeting is required;
4. Record the executive session electronically;
5. Limit the topics considered during the executive session to the announced, authorized topics; and
6. Take final action on the topics considered in the executive session during the open portion of a meeting.

Under these provisions, a governing body's authority to hold an executive session may be invoked only during a properly noticed open meeting, and not during a separate meeting for which public notice is not provided. To close a portion of the meeting, the governing body may either excuse the public or reconvene in another location.

A vote to go into executive session is not necessary if a confidential meeting is required or if the governing body is closing the meeting to discuss confidential records. However, because a discussion of exempt records does not necessarily have to occur in an executive session, a vote is necessary to determine whether the discussion will occur in an open meeting or in an executive session.

Final action on the topics considered in the executive session must be taken during the open portion of the meeting. Substantive votes must be recorded by roll call.

MINUTES

The minutes of meetings are public records and must be provided to anyone upon request. Draft minutes should be made available to the public even if the minutes have not been approved. Some public entities are required by law to provide minutes to the official newspaper. Minutes must include, at a minimum:

1. The names of the members attending the meeting;
2. The date and time the meeting was called to order and adjourned;
3. A list of topics discussed regarding public business;
4. A description of each motion made at the meeting and whether the motion was seconded;
5. The results of every vote taken at the meeting; and
6. The vote of each member on every recorded roll call vote.

This requirement applies to all governing bodies, including committees and subcommittees.

OPINION REQUESTS

A request for an Opinion alleging that a public entity held a meeting without posting public notice must be received by the Attorney General's office within 90 days of the alleged violation, regardless of when the requester learned about the violation. For all other violations of the open meetings laws, the request for an Opinion must be received within 30 days of the alleged violation.