STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

Open Meetings Manual

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Introduction

The North Dakota Attorney General's office has prepared this manual as a review of existing case law, state statutes, Attorney General opinions, and administrative rules regarding open records and meetings.

General Open Meetings Law Requirements

1. What Does the Open Meetings Law Require?

Open meeting provisions are found in both the North Dakota Constitution and the North Dakota Century Code:

> Unless otherwise provided by law, all meetings of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public.

N.D. Const. art. XI, § 5.[1]

> Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public. . . .
>
> 1. This section is violated when any person is denied access to a meeting under this section, unless such refusal, implicitly or explicitly communicated, is due to a lack of physical space in the meeting room for the persons seeking access or lack of electronic capacity to allow public viewing of the meeting through electronic means.
> 2. For purposes of this section, if the meeting is held in person, the meeting room must be accessible to, and the size of the room must accommodate, the number of persons reasonably expected to attend the meeting. If the meeting is held by electronic means, the electronic capacity must accommodate the number of persons reasonably expected to attend the meeting remotely.
> 3. The right of a person to attend a meeting under this section includes the right to photograph, to record on audiotape or videotape, and to broadcast live on radio or television the portion of the meeting that is not held in executive session, provided there is no active interference with the conduct of the meeting. The exercise of this right may not be dependent upon the prior approval of the governing body. However, the governing body may impose reasonable limitations on recording activity to minimize the possibility of disruption of the meeting.
> 4. For meetings subject to this section, if the meeting is held through any electronic means, the information necessary to join or view the meeting electronically must be included in the notice issued under section 44-04-20.

N.D.C.C. § 44-04-19.[2]

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[1] This section was approved by the citizens of North Dakota in 1974 and became effective July 1, 1975. *See* 1975 N.D. Sess. Laws ch. 604.

[2] This section was first adopted in 1957 and amended in 1977,1997, 2021. *See* 1957 N.D. Sess. Laws ch. 306; 1977 N.D. Sess. Laws ch. 417; 1997 N.D. Sess. Laws ch. 381, § 13, 2021 N.D. Sess. Laws ch. 328. The 1997 amendments explain terminology and add provisions regarding recording of meetings and holding meetings by telephone or video conference. The 2021 amendments included further updates to terminology and created new requirements for holding meetings electronically.

These provisions contain similar language to the open records provisions and serve the same important public purpose. Therefore, the open meetings law should also be construed liberally in favor of the public's access to information.

2. Who Is Subject to the Open Meetings Law?

North Dakota's open meetings law applies to meetings of a "public entity," which is defined to include three categories of entities:

a. 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,[3] to exercise public authority or perform a governmental function;

b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision[4] of the state and any entity created or recognized by the Constitution of North Dakota, state statute, executive order of the governor, resolution, ordinance, rule, bylaw, or executive order of the chief executive authority of a political subdivision of the state to exercise public authority or perform a governmental function; and

c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.[5]

N.D.C.C. § 44-04-17.1(13). An entity is subject to the open meetings law if it falls into any one of these three categories.

a. Nongovernmental Organizations

The fact that an organization is a corporation or other business entity rather than a governmental entity does not necessarily mean that the organization is excluded from the definition of "public entity" for purposes of the open meetings law. Based on the definitions of certain terms used in the open meetings law, there are four circumstances in which the meetings of a nongovernmental organization may be open to the public.[6]

First, the organization may be created or recognized by state law or by an action of a political subdivision, or delegated authority by a governing body of a public entity, to exercise public

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[3] "'Task force or working group' means a group of individuals who have been formally appointed and delegated to meet as a group to assist, advise, or act on behalf of the individual in charge of a state agency or institution when a majority of the members of the group are not employees of the agency or institution." N.D.C.C. § 44-04-17.1(18).

[4] "'Political subdivision' includes any county or city, regardless of the adoption of any home rule charter, and any airport authority, township, school district, park district, rural fire protection district, water resource district, solid waste management authority, rural ambulance service district, irrigation district, hospital district, soil conservation district, recreation service district, railroad authority, or district health unit." N.D.C.C. § 44-04-17.1(11).

[5] "Public funds" means "cash and other assets with more than minimal value received from the state or any political subdivision of the state." N.D.C.C. § 44-04-17.1(14). *See also* N.D.A.G. 98-O-24; N.D.A.G. 98-O-23.

[6] N.D.A.G. 2003-O-10; N.D.A.G. 99-O-03; N.D.A.G. 99-O-02; N.D.A.G. 98-O-23; N.D.A.G. 98-O-21.

authority or perform a governmental function on behalf or of in place of the public entity.[7] As used in N.D.C.C. § 44-04-17.1(13)(b), the terms "resolution, ordinance, rule, [or] bylaw" refer to enactments by the official or group responsible for making binding legislative or policy decisions on behalf of the political subdivision.[8]

Second, an organization may be a "public entity" if the organization is supported by public funds or is expending public funds.[9] A nongovernmental organization is expending public funds if it receives and uses a direct appropriation from a governmental entity[10] or if it receives or manages a pool of public funds on behalf of one or more public entities.[11] An organization is "supported in whole or in part by public funds" if the organization receives public funds that exceed the fair market value of any goods or services given in exchange for the funds.[12] The manner of payment is not important, and can include grants, membership dues, or fees. However, an organization receiving public funds under a contract with a public entity is not supported by those funds as long as the funds were paid in exchange for goods or services that are reasonably identified in the agreement and have an equivalent fair market value, which may include a commercially reasonable amount of profit for the contractor.[13] A payment under a vague and indistinct contract for unspecified goods or services is considered "support."[14] The key question is whether public funds are being used to support an organization, or merely to purchase goods or services.[15]

If an organization receives public funds under an authorized economic development program, the exchange is conclusively presumed to be for fair market value rather than "support" and the organization is therefore not a public entity as a result of receiving the funds.[16] However, this presumption is limited to grants to new employers or businesses for their general operations.[17]

Third, even if an organization is paid fair market value for the services it provides, the organization may be considered an agent or agency of a public entity if the organization performs a governmental function or possesses records regarding public business on behalf or in place of a public entity.[18] Examples of "agencies of government" include personnel firms, an advertising

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[7] N.D.C.C. § 44-04-17.1(13)(a), (b); N.D.A.G. 2017-O-07; N.D.A.G. 2013-O-19; N.D.A.G. 2013-O-16; N.D.A.G. 2008-O-29; N.D.A.G. 2006-O-05; N.D.A.G. 2006-O-02.

[8] N.D.A.G. 97-O-02. One example would be a resolution of a governing body of a political subdivision authorizing a joint enterprise between the political subdivision and the corporation. N.D.A.G. 98-O-23.

[9] N.D.C.C. § 44-04-17.1(10).

[10] N.D.A.G. 2015-O-01; N.D.A.G. 2006-O-08; N.D.A.G. 2006-O-05; N.D.A.G. 2003-O-08; N.D.A.G. 96-F-18.

[11] N.D.A.G. 99-O-02.

[12] N.D.C.C. § 44-04-17.1(10); N.D.A.G. 2015-O-01.

[13] N.D.A.G. 2015-O-05; N.D.A.G. 2004-O-14; N.D.A.G. 2003-O-01; N.D.A.G. 99-O-03; N.D.A.G. 98-F-19.

[14] N.D.A.G. 2015-O-01; N.D.A.G. 2006-O-14; N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10.

[15] N.D.A.G. 2015-O-01 (humane society had discretion on how to use the unrestricted mill levy funds from the city and taxation funds appropriated by the county and was therefore "supported" by public funds); N.D.A.G. 2003-O-02 (a nongovernmental organization that received mill levy money for its general support without a specific contract with the county for specific services to be provided in exchange for the mill levy money and had discretion in using mill levy money was a public entity).

[16] N.D.C.C. § 44-04-17.1(10); N.D.A.G. 98-O-23 (CDBG funds).

[17] N.D.A.G. 2013-O-16; N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10.

[18] N.D.C.C. § 44-04-17.1(12), (15). *See also Forum Publ'g Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986); N.D.A.G. 2017-O-01; N.D.A.G. 2015-O-01; N.D.A.G. 2014-O-24; N.D.A.G. 2014-O-04; N.D.A.G. 2013-O-19; N.D.A.G. 2013-O-16; N.D.A.G. 2008-O-15; N.D.A.G. 2007-O-07.

company hired to perform an educational campaign on behalf of a city,[19] a local economic development corporation,[20] a local humane society,[21] a taxi company,[22] and foundation and alumni associations.[23]

Public entities cannot avoid the requirements of the open meetings law by forming joint enterprises and transferring funds to that enterprise.[24] Thus, a joint enterprise of several public entities to conduct the public business of those entities is an "agency" of those entities and is therefore a "public entity," even if the enterprise is formed as a separate corporation.[25]

Finally, a group composed of the directors or officers of an organization may be a "governing body," and be required to keep its meetings regarding public business open to the public, if the group has been delegated authority from another governing body, such as a county commission or city council. This possibility is addressed later in this manual in the section regarding governing bodies and committees.

3. Courts

The open meetings law does not apply to the judicial branch of government.[26] Therefore, deliberations of the North Dakota Supreme Court are not meetings of a governing body and committees created by the Supreme Court are not subject to the open meetings law.[27] In 2023, the Legislative Assembly expanded this to include, "any meeting of the judicial branch or a committee or workgroup of the judicial branch."[28]

The state constitution provides that court proceedings are open to the public.[29] The court expressed a "policy of openness in judicial proceedings."[30] However, this policy is frequently limited by statutes providing that certain court proceedings are not open to the public. Preliminary hearings may be closed upon the request of the defendant "upon a showing that evidence inadmissible at trial will be offered at the preliminary examination and as a result there is a substantial likelihood of interference with the defendant's right to a fair trial."[31] Juvenile court hearings are closed even if the purpose of the hearing is to declare a person in contempt of court.[32] All adoption hearings are

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[19] N.D.A.G. 2001-O-04.
[20] N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10.
[21] N.D.A.G. 2015-O-01.
[22] N.D.A.G. 2014-O-24.
[23] N.D.A.G. 2014-O-07; N.D.A.G. 2014-O-04; N.D.A.G. 2013-O-10; N.D.A.G. 2009-O-08; N.D.A.G. 2006-O-01.
[24] N.D.A.G. 99-O-02.
[25] N.D.A.G. 2013-O-13 (Diversion Authority Board); N.D.A.G. 2004-O-10 (Stutsman County Correctional Center); N.D.A.G. 2002-O-02 (Valley Regional Dispatch Center); N.D.A.G. 98-O-21 (Association of Soil Conservation Districts); N.D.A.G. 98-O-04 (Southwest Multi-County Correction Center).
[26] N.D.A.G. 2005-O-19. *See also Grand Forks Herald v. Lyons*, 101 N.W.2d 543, 546 (N.D. 1960).
[27] N.D.A.G. 2005-O-19.
[28] 2023 N.D. Sess. Laws ch. 296, § 1 (These meetings are governed by the Constitution of North Dakota).
[29] N.D. Const. art. I, § 9.
[30] *Dickinson Newspapers, Inc. v. Jorgensen*, 338 N.W.2d 72, 79 (N.D. 1983).
[31] *Minot Daily News v. Holum*, 380 N.W.2d 347, 349 (N.D. 1986) (exercise of discretion under N.D.C.C. § 29-07-14).
[32] N.D.C.C. § 27-20.3-13(5).

closed proceedings.[33] Hearings in actions to determine parentage may be closed by the court.[34] Grand jury sessions are not open to the public.[35] Hearings regarding the incapacity of a person and the need for a guardian may be closed,[36] and unnecessary persons must be excluded from involuntary treatment hearings.[37] The petition and preliminary, probable cause hearing for sexually dangerous individuals are confidential but the commitment proceeding is open to the public.[38]

4. What Gatherings Are Covered by the Open Meetings Law?

As used in the open meetings law,

a. "Meeting" means a formal or informal gathering or a work session, whether in person or through any electronic means, of:

(1) A quorum of the members of the governing body of a public entity regarding public business; or

(2) Less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of the smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.

b. "Meeting" does not include:

(1) A chance or social gathering at which public business is not considered;

(2) 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;

(3) The attendance of members of a governing body at meetings of any national, regional, or state association to which the public entity, the governing body, or individual members belong;

(4) Training seminars at which no other public business is considered or discussed; and

(5) Administration of examinations by a regulatory board when no other public business is considered or discussed.

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[33] N.D.C.C. § 14-15-16(3).
[34] N.D.C.C. § 14-20-54.
[35] N.D.C.C. § 29-10.1-2.8.
[36] N.D.C.C. § 30.1-28-03.
[37] N.D.C.C. § 25-03.1-19. *See also* N.D.C.C. § 47-25.1-05 (preserving secrecy of trade secret).
[38] N.D.C.C. §§ 25-03.3-03, 25-03.3-11, 25-03.3-13.

c. Notwithstanding subdivisions a and b, as applied to the legislative assembly, "meeting" means any gathering subject to section 14 of article IV of the Constitution of North Dakota.[39]

d. Notwithstanding subdivisions a and b, "meeting" does not include any meeting of the judicial branch or a committee or workgroup of the judicial branch. Such meetings are governed by section 5 of article XI of the Constitution of North Dakota.

N.D.C.C. § 44-04-17.1(9). As this definition indicates, whether a gathering of a group of persons is a "meeting" depends in part on the number of persons attending (quorum) and the topics of discussion (public business), although the form of the gathering is generally irrelevant. Traditionally, video conferences and conference calls are the most common means to hold a meeting when members of a governing body cannot physically be present. However, these are only examples of means by which a meeting may take place. In 2005, the phrase "other means" was replaced by "electronic means" in an effort to bring awareness to evolving technology that creates new ways for a governing body to have simultaneous discussion through electronic means. Governing bodies should be aware that simultaneous discussion by a quorum may be determined to be a meeting.[40] In 2021, the Legislative Assembly replaced "such as telephone or videoconference" with "any" to incorporate evolving technology into open meetings law.[41] The exception for regulatory board examinations was also in added in 2021.[42] Also important is whether the persons attending the gathering are members of a "governing body," which will be discussed later in this manual. The letter and spirit of the law prohibit officials from contriving subterfuges to evade the requirements of the open meetings law.[43] Any doubt whether a gathering is a meeting should be resolved by complying with the open meetings law.

a. Gatherings and Attendance at other Entity's Meetings

A governing body does not have to transact business or make formal decisions for a gathering to be a meeting.[44] Rather, the public's right to observe and monitor the performance of governmental functions through attendance at public meetings applies to all stages of the decision-making process, from gathering information to deliberating to making a final decision.[45]A gathering of a quorum of the members of a governing body of a public entity to discuss or receive information regarding the business of the public entity is a "meeting," even if the members merely listen and do

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[39] Article IV, Section 14 of the North Dakota Constitution provides: "All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, must be open and public."

[40] *See* N.D.A.G. 2015-O-04 (series of smaller gatherings in person and by telephone were "meetings"); N.D.A.G. 2014-O-23 (series of telephone calls between city council members was a "meeting"); N.D.A.G. 2012-O-02 (series of telephone calls between quorum involving public business were more than ministerial in nature and were "meetings"); N.D.A.G. 2011-O-17 (telephone calls between a quorum of city council were "meetings"); N.D.A.G. 2007-O-14 (email exchange among a quorum was a "meeting").

[41] 2021 N.D. Sess. Laws ch. 328, § 1.

[42] *Id.*

[43] N.D.C.C. § 44-04-17.1(9); N.D.A.G. Letter to Atkinson (Mar. 5, 1976). *See Peters v. Bowman Pub. Sch. Dist.*, 231 N.W.2d 817 (N.D. 1975).

[44] N.D.A.G. 2001-O-07; N.D.A.G. 98-O-16; N.D.A.G. 98-F-16.

[45] *See* N.D.C.C. §§ 44-04-17.1(9)(a)(1) ("regarding" public business), 44-04-17.1(12) ("all matters that relate or may foreseeably relate in any way to" public business).

not interact or participate in the discussion[46] and even if no decision is being made.[47] The presence of public employees or the members of a governing body in the audience of a gathering of another entity generally does not make the entity holding the gathering subject to the open meetings law,[48] but the members' presence may constitute a separate meeting of the governing body if a quorum is present and the governing body's public business is being discussed.[49]

If a quorum of a governing body is present at another entity's meeting but the public business of the governing body is discussed, the governing body would be responsible for providing notice of the meeting, even if members do not participate and even though the governing body does not call the meeting.[50] In a 2018 Opinion, this office recognized that it was a violation of open meetings law when a quorum of county commissioners attended a leadership forum in Washington, DC, that members of the public and press were not permitted to attend.[51] Although the Commission did not have control over who was allowed at the briefing, as this was dictated by White House Staff, there is no exception to the open meetings law for such circumstances.[52]

Not every gathering of the members of a governing body is a "meeting."

> [I]t is appropriate for a member who was absent from a meeting to contact the other members, if the conversations are limited to finding out what happened at the meeting. Similarly, it would be appropriate for the presiding officer of a governing body to contact the other members to determine which items to include on the agenda of the next meeting, as long as the conversations do not include information-gathering or discussion regarding the substance of the issues on the agenda. It is only when those meetings become steps in the decision-making process (information gathering, discussion, formulating or narrowing of options, or action) regarding public business that the open meetings law is triggered.[53]

b. Quorum

For a gathering to be a part of the decision-making process, and the public to be entitled to access, the gathering must involve a sufficient number of members of a governing body to take some official action or perform some step in the process, even if no action is actually taken at a particular gathering. Thus, to be a "meeting," the gathering must be attended by a quorum of a governing body,[54] or a quorum must be involved in a series of smaller gatherings that collectively involve a

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[46] *See* N.D.A.G. 2008-O-11 (lunch presentation a "meeting"); N.D.A.G. 2008-O-10 (same).
[47] N.D.A.G. 2017-O-02.
[48] N.D.A.G. Letter to Jones (Jan. 28, 1985).
[49] N.D.A.G. 2016-O-23; N.D.A.G. 98-O-18; N.D.A.G. 98-O-10.
[50] N.D.A.G. 2023-O-03; N.D.A.G. 2013-O-14; N.D.A.G. 2012-O-06; N.D.A.G. 2008-O-10.
[51] N.D.A.G. 2018-O-20.
[52] *Id.*
[53] N.D.A.G. 98-O-05 (internal citation omitted); *see also* N.D.A.G. 2007-O-08.
[54] *See generally* N.D.A.G. 2001-O-18 (pre-meeting discussion involving less than a quorum is not a meeting); N.D.A.G. 2001-O-03 (same).

quorum.[55] "'Quorum' means 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."[56] By adopting the quorum rule, the Legislature impliedly exempted from the open meetings law most conversations between less than a quorum of the members of a governing body.[57] As a result, a meeting involving a single member of a governing body is generally not a meeting of that governing body.[58]

However, the definition of "meeting" recognizes that a quorum of a governing body does not need to be present at one time for the "quorum rule" to be met. Numerous opinions recognize when a series of conversations regarding public business between members of a governing body collectively involve a quorum, the definition of "meeting" is met that requires compliance with open meetings law.[59] This rule has been applied to conversations between members of the governing body in person, by telephone, or through text messages and other electronic means.[60]

In 2021, the Legislative Assembly created new guidelines specific to quorums of the State Board of Higher Education committees.[61]

c. Public Business

Because a gathering must pertain to "public business" of the public entity to fall within the definition of "meeting," the purpose of a gathering must be considered, and not every gathering will constitute a "meeting."[62] For example, a social or chance gathering where public business is not considered is not a "meeting."[63] Discussions involving purely ministerial matters are not considered "public business" that trigger open meetings law.[64] The definition of "public business" is broad and includes "all matters that relate or may foreseeably relate in any way to . . . [t]he performance of the public

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[55] N.D.C.C. § 44-04-17.1(9). For example, a planned series of investigations of the site of a complaint by the members of a governing body is a meeting. N.D.A.G. 98-F-16. *See also* N.D.A.G. 2016-O-11 (series of smaller gatherings collectively involved a quorum); N.D.A.G. 2015-O-06 (chair of county commission asked auditor to contact other commissioners to get approval to terminate employee and auditor relayed approval back to chair, series of smaller gatherings collectively involved a quorum and public business was discussed); N.D.A.G. 2015-O-04 (series of smaller gatherings of city commission in person and by phone that ultimately built consensus and authorized certain commissioners to act on behalf of the whole commission in negotiations of a separation package were meetings); N.D.A.G. 2014-O-23; N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17.

[56] N.D.C.C. § 44-04-17.1(15). *See* N.D.A.G. 2003-O-05 (the mayor of a city council is to be counted as a member of the governing body in determining whether a quorum is present so as to conduct business); N.D.A.G. 98-O-05 (a quorum of an eight-member board is four members).

[57] N.D.A.G. 98-O-05.

[58] N.D.A.G. 2008-O-24; N.D.A.G. 2005-O-15; N.D.A.G. 2004-O-12.

[59] N.D.A.G. 2018-O-10; *but see* N.D.A.G. 2019-O-11 (the act of board members individually filling out an evaluation without input of any other board member does not implicate open meetings law because it lacks a quorum) and N.D.A.G. 2019-O-10 (Board members individually reaching out to a non-board member is not considered a "meeting" as long as the non-board member does not relay the substance of his or her discussion with a Board member to a quorum of other board members).

[60] N.D.A.G. 2019-O-10; N.D.A.G. 2018-O-10; N.D.A.G. 2016-O-11; N.D.A.G. 2015-O-06; N.D.A.G. 2015-O-04; N.D.A.G. 2014-O-23; N.D.A.G. 2013-O-01; N.D.A.G. 2012-O-02; N.D.A.G. 2011-O-17; N.D.A.G. 2010-O-09; N.D.A.G. 2008-O-22; N.D.A.G. 2007-O-08; N.D.A.G. 2006-O-11; N.D.A.G. 2005-O-04; N.D.A.G. 2005-O-02; N.D.A.G. 2004-O-18; N.D.A.G. 2004-O-08; ND.A.G. 2003-O-18; N.D.A.G. 2001-O-14; N.D.A.G. 2000-O-08; N.D.A.G. 98-O-05.

[61] 2021 N.D. Sess. Laws ch. 121, § 2; N.D.C.C. § 15-10-17.5.

[62] N.D.A.G. 2017-O-08.

[63] N.D.C.C. § 44-04-17.1(9)(b)(1); *see also* N.D.A.G. 2014-O-19.

[64] N.D.A.G. 2018-O-06 (opening remarks at a social gathering generally welcoming everyone with brief reference to the agenda to be discussed at an upcoming meeting was not considered "public business" triggering open meetings law).

entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or . . . [t]he public entity's use of public funds."[65] Meetings of a nongovernmental organization that is a "public entity" only because it is supported by or expending public funds, but is not otherwise performing a governmental function, are open only to the extent the meetings pertain to how public funds are being or have been spent.[66]

d. Emails and Other Electronic Communications

There are many ways members of a governing body may communicate using technological means that may implicate open meeting laws. Communication among a quorum of a governing body, through instant messaging, text messaging, email, or other technology, may be considered a meeting subject to the open meeting law.[67]

As provided previously in section (b), anytime a "quorum" of a governing body is included in discussions involving "public business" a meeting occurs subject to open meeting laws, including the notice requirements outlined in an upcoming section. Therefore, when a quorum of a governing body or committee is utilizing electronic means, such as emails or text messaging, to discuss public business, it is conducting a "meeting." Because there is no way for the public to be part of such conversations or discussions in real time, meetings being held using such technology violate open meeting laws.

As recognized above, public entities can engage in ministerial discussions, such as requesting an item be placed on the agenda, setting a meeting date and time, or providing information for members of the governing body to review before a meeting, without triggering open meeting laws, as long as no public business is included in such ministerial discussions.[68] However, if the discussions involve public business, going beyond ministerial matters and instead delve into the substantive merits of an issue or suggested agenda topic, provide opinions regarding public business, give approval for a decision of a member of the governing body,[69] or build support and consensus for certain positions, open meeting laws are triggered.[70] The governing body should use safeguards to protect against communication that may trigger the open meetings law and the governing body should be careful not to use the "reply all" functions when responding to information received by email or other electronic means.[71]

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[65] N.D.C.C. § 44-04-17.1(12). N.D.A.G. 2009-O-17.
[66] N.D.A.G. 2015-O-01; N.D.A.G. 2006-O-14; N.D.A.G. 2006-O-04; N.D.A.G. 2004-O-04.
[67] N.D.A.G. 2018-O-12; N.D.A.G. 2018-O-10; N.D.A.G. 2014-O-12; N.D.A.G. 2007-O-14; N.D.A.G. 2006-O-14.
[68] N.D.A.G. 2018-O-19; N.D.A.G. 2018-O-10.
[69] N.D.A.G. 2017-O-04.
[70] N.D.A.G. 2018-O-17; N.D.A.G. 2018-O-10; N.D.A.G. 2018-O-06; N.D.A.G. 2015-O-12; N.D.A.G. 2015-O-06; N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07; N.D.A.G. 2013-O-01; N.D.A.G. 2012-O-02; N.D.A.G. 2010-O-09; N.D.A.G. 2008-O-22; N.D.A.G. 2007-O-14; N.D.A.G. 2007-O-08.
[71] N.D.A.G. 2018-O-10; N.D.A.G. 2014-O-12; N.D.A.G. 2013-O-07.

5. What Is a Governing Body?

a. Chief Decision-Making Body

The open meetings law does not apply to meetings between two or more public employees. The public's right to know how government decisions are made and public funds are spent does not require access to a meeting of a "group" that is not authorized to perform some stage in a public entity's decision-making process. Instead, the term "meeting" is limited to gatherings of a "governing body" of a public entity.[72]

"Governing body" includes "the multimember body responsible for making a collective decision on behalf of a public entity."[73] This definition preserves the public's right to view the process leading up to government decision-making, but does not extend the open meetings, notice, voting and minutes laws to conversations between public officials or employees that are not a "governing body."

Because the definition of "meeting" requires a governing body consisting of more than one decision-maker authorized to act on behalf of a public entity, the open meetings law does not apply to public entities governed by a single individual rather than a group.[74] Similarly, a group of department heads[75] or other employees of a public entity is not a governing body unless the group is a separate public entity under the open meetings law or, as discussed in the next paragraph, is acting pursuant to authority delegated by a governing body.

b. Committees

If the open meetings law applied only to the chief decision-making body of a public entity, the body could avoid compliance with the open meetings law simply by delegating authority to a committee or other group. To allow the requirements of the open meetings law to be so easily circumvented would effectively render those requirements meaningless.[76] Therefore, the 1997 amendments to the open meetings law further define "governing body" to include "any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body."[77]

This definition follows the delegation of authority from one governing body to another. As long as a governing body delegates any of its public business to two or more people, a "committee" is formed that is subject to the same open meeting requirements as the original governing body.[78]

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[72] N.D.C.C. § 44-04-17.1(9).
[73] N.D.C.C. § 44-04-17.1(6).
[74] N.D.A.G. 2007-L-09; N.D.A.G. 98-F-12.
[75] N.D.A.G. 98-O-08; N.D.A.G. 96-F-09.
[76] Thus, under prior law, a group that was not directly subject to the open meetings law, such as a committee, could become subject to the open meetings law indirectly if the group, through the exercise of functions that have been delegated to it by the public entity, "assume[d] the color of a public body because of the delegation of such authority." N.D.A.G. 96-F-09; N.D.A.G. 67-244. For example, the Supreme Court held that the open meetings law applies to school board committees negotiating teacher contracts. *Dickinson Educ. Ass'n v. Dickinson Pub. Sch. Dist. No. 1*, 252 N.W.2d 205, 212 (N.D. 1977).
[77] N.D.C.C. § 44-04-17.1(6). N.D.A.G. 2003-O-05 (gathering of three members of a seven-member board would have been a meeting if the members were acting pursuant to authority delegated to them by the city council).
[78] N.D.A.G. 2015-O-10.

The delegation can be to any group of people, including people who are not members of the original governing body,[79] and no formal motion is needed, as long as it is apparent that it is the collective decision of the governing body to delegate any part of its public business to two or more people.[80] For example, a school district board may ask a "committee" of its members or other persons to interview applicants for open positions in the school district and recommend three applicants for each position. The committee would be a "governing body" as a result of the authority it received from the board as governing body of the school district. If the committee asked a group of faculty members to collectively review all applications for teaching positions to determine which applicants would be interviewed by the committee, the group of faculty members also would be a "governing body" because of the authority delegated to the group by the committee. However, a group is not a "governing body" if the delegation of authority comes from a single individual rather than a governing body,[81] unless the group is a task force or working group.[82] Also, a delegation to a "governing body" does not occur if the delegation is to one person.[83]

Any time a quorum of the committee gets together to discuss whatever public business has been delegated to it, a meeting occurs subject to the state's open meeting laws, including the requirements to notice its meetings and prepare minutes.[84] It is important to note the definition of "governing body" does not require that the group be authorized to take final action on an item of public business.[85] Rather, the group need only be authorized by the governing body to take some action, including information gathering or holding discussions, for the group to be a "governing body" by delegation.[86]

Any doubt whether a committee or other group is subject to the open meetings law should be resolved in favor of opening meetings of the group to the public. "[M]eetings of groups connected with public agencies or institutions or groups assuming quasi-public functions should, as a matter of policy, be open to the public except in the most unusual of circumstances."[87]

6. Who Has the Right to Attend Open Meetings?

Every person has a right to attend any open meeting, regardless of the person's interest in the meeting. In the analogous situation of open court proceedings, the Supreme Court has stated that "[t]he news media does not occupy a special status distinct from that of the general public. . . . The news media's right to be present stems from being a member of the public and, as such, it may

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[79] N.D.A.G. 2010-O-01.
[80] N.D.A.G. 2019-O-08; N.D.A.G. 2016-O 15; N.D.A.G. 2014-O-05.
[81] N.D.A.G. 2019-O-08; N.D.A.G. 97-O-02.
[82] N.D.C.C. § 44-04-17.1(18).
[83] N.D.C.C. § 44-04-17.1(6) (a delegation must be to a group of persons); N.D.A.G. 2018-O-18; N.D.A.G. 2015-O-13; N.D.A.G. 2008-O-24; N.D.A.G. 2005-O-15; N.D.A.G. 2005-L-14; N.D.A.G. 2004-O-12.
[84] N.D.A.G. 2019-O-08; N.D.A.G. 2019-O-03; N.D.A.G. 2018-O-19; N.D.A.G. 2018-O-09; N.D.A.G. 2004-O-15.
[85] N.D.A.G. 2015-O-10; N.D.A.G. 2004-O-15.
[86] *See* N.D.A.G. 2009-O-12 (portfolio held by more than one member of a governing body creates a committee and any meeting attended by such members is subject to open meeting laws if the meeting pertains to the business assigned to that portfolio); N.D.A.G. 2009-O-05 (a two-member commission portfolio is a committee).
[87] N.D.A.G. 67-244.

freely report whatever occurs in open court, not as a special privilege, but as a member of the public."[88]

a. Public Comment at Open Meetings

The purpose of the open meetings law is to give members of the public access to the meetings of a governing body of a public entity. Historically, the right of the public to access open meetings did not include the right of the public to participate or speak at the meetings. That changed for some public entities in 2025 when the Legislative Assembly enacted a new statute, N.D.C.C. § 44-04-20.1, requiring governing bodies of cities, counties, townships, school districts, park districts, and water resource districts to include an opportunity for individuals to provide public comment at their regular meetings.[89] This law applies only to regular meetings, not special meetings, and only to governing bodies of the specific public entities listed in the statute: cities, counties, townships, school districts, park districts, and water resource districts.[90] For meetings of governing bodies of all other types of public entities, members of the public generally do not have the right to participate or speak at the public meeting.[91]

7. How Is the Open Meetings Law Enforced?

a. Administrative Review

Any interested person may request an Attorney General's opinion to review an alleged violation of the open meetings law, the procedures for conducting an executive session, the law requiring notice of meetings, or the law regarding open voting and minutes by any public entity other than the Legislative Assembly or any committee thereof.[92]

> A request made under this section must be made within thirty days of the alleged violation, except that a request based on allegations that a meeting occurred without notice required by section 44-04-20, must be made within ninety days of the alleged violation. In preparing an opinion under this section, the attorney general has discretion to obtain and review a recording made under section 44-04-19.2. The attorney general may request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential. Any such information may not be released by the attorney general and may be returned to the provider of the information. The attorney general shall issue to the public entity involved an opinion on the alleged violation, which may be a summary opinion, unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. The attorney general may decline to issue an opinion if the person requesting the opinion has

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[88] *Dickinson Newspapers, Inc. v. Jorgensen*, 338 N.W.2d 72, 79 (N.D. 1983); *see also* N.D.A.G. 2008-O-28.
[89] 2025 N.D. Sess. Laws ch. 415, § 1.
[90] N.D.C.C. § 44-04-20.1.
[91] N.D.A.G. 2003-O-07; N.D.A.G. 99-O-07; N.D.A.G. 98-F-11. *But see* N.D.A.G. 2007-O-11 (governing body has authority to control decorum of a public hearing).
[92] N.D.C.C. § 44-04-21.1(1).

> made more than one request within the last thirty days or more than five requests for opinions in twelve months. If the request pertains to a [nongovernmental organization supported by or expending public funds], the opinion must be issued to the public entity providing the public funds. In any opinion issued under this section, the attorney general shall base the opinion on the facts given by the public entity.

N.D.C.C. § 44-04-21.1(1).

If the request is the subject of settled law, the Attorney General may issue a summary opinion, which holds the same force and effect of a formal Attorney General's Opinion, however, the recitation of facts and analysis may be abbreviated. If a summary opinion concludes that a violation occurred, the same requirements apply to the public entity pursuant to N.D.C.C. § 44-04-21.1(2), as discussed below.

If the Attorney General's opinion concludes that a violation occurred, the public entity has seven days to comply with the opinion and take corrective action, regardless of whether a civil action is filed under section 44-04-21.2. If the public entity fails to do so, and the person requesting the opinion prevails in a civil action brought under section 44-04-21.2, the person must be awarded attorneys' fees and costs for the trial and any appeal. "The consequences for failing to comply with an attorney general's opinion issued under this section will be the same as for other attorney general's opinions, including potential personal liability for the person or persons responsible for the noncompliance."[93] A state-level public entity that does not comply in full with the Attorney General's opinion is responsible for obtaining separate legal counsel, at its own expense, and the attorney must obtain an appointment as a special assistant attorney general under N.D.C.C. § 54-12-08.[94]

b. Civil Action

In 1997, the Legislative Assembly authorized a civil action by any interested person against a public entity for an alleged violation of the open meetings law, the procedures for conducting an executive session, the law requiring notice of meetings, or the law regarding open voting and minutes.[95] The action must be commenced within 60 days of the date the person knew or should have known of the violation or within 30 days of issuance of an Attorney General's opinion on the alleged violation, whichever is later. The action must be commenced in the county where the entity has its principal office or in Burleigh County for entities that do not have a principal office within the state.

"If a court finds that any of these sections have been violated by a public entity, the court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity."[96] Damages may be assessed in the amount of $1,000

[93] N.D.C.C. § 44-04-21.1(2).
[94] N.D.C.C. § 44-04-21.1(3).
[95] N.D.C.C. § 44-04-21.2(1).
[96] *Id.*

or actual damages, whichever is greater, for an intentional or knowing violation of these laws. The court can also void any action that is a product of an illegal meeting.[97]

This section does not authorize a civil action if the violation has been cured before the action is filed and no person has been harmed by the delay.[98] Furthermore, a public entity may not be sued for attorneys' fees or damages, or both, until at least three working days after the chief administrative officer for the public entity receives notice and opportunity to cure the alleged violation. This opportunity to cure a violation does not apply if the public entity has previously been found by the Attorney General to have violated the open records or meetings laws.[99]

c. Criminal Violations

Under legislation enacted in 2001, a public servant who knowingly violates the open records and meetings laws is guilty of a class A misdemeanor.[100]

8. Examples of Meetings Generally Open to the Public

a. Sessions of the Legislative Assembly, including committee meetings.[101]

b. Meetings of a board of county commissioners.[102]

c. Most school board meetings.

d. Meetings of a city governing body.[103]

e. Meetings of a governing body of a public entity to consider personnel records.[104]

f. Informal consultations between a quorum of a governing body and its attorney unless exempt from the open meetings law under N.D.C.C. § 44-04-19.1 as attorney consultation.

g. Meetings of licensing and professional boards.

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[97] N.D.C.C. § 44-04-21.2(2).
[98] N.D.C.C. § 44-04-21.2(3).
[99] *Id.*
[100] N.D.C.C. §§ 44-04-21.3, 12.1-11-06.
[101] N.D. Const. art. IV, § 14; N.D.C.C. § 44-04-17.1(9)(c). However, "[a] caucus of members of either house of the legislative assembly may meet in an executive session that is not subject to section 44-04-19.2 if the meeting is not held on public property." N.D.C.C. § 44-04-19.3.
[102] N.D.C.C. § 11-11-06.
[103] N.D.C.C. § 40-06-02.
[104] N.D.A.G. 2016-O-01; N.D.A.G. Letter to Collins (Aug. 10, 1989).

Exemptions From the Open Meetings Law

Meetings of an entity subject to the open meetings law are presumptively open to the public. However, because the open meetings law does not apply if "otherwise specifically provided by law," a meeting of a governing body of a public entity need not be open if it falls within a specific exemption from the open meetings law or if a confidential meeting is required. Interpreting identical language in the open records law, the North Dakota Supreme Court has held that a "specific" exemption may not be implied.[105] Therefore, an exemption from the open meetings law must also be firmly grounded in law rather than an implied, vague, or arguable exemption.

1. Sources of Exemptions

Exemptions from the open meetings law must be "specifically provided by law." "Law" includes "federal statutes, applicable federal regulations, and state statutes."[106] Exemptions from the open records law may be the largest source of exemptions from the open meetings law. If a public entity has exercised its discretion not to disclose to the public records that are exempt from the open records law, or if records are confidential, the portions of a meeting during which those records are discussed may be held in executive session.[107] To conclude otherwise would defeat the purpose of the statute making a record confidential or exempt. However, a person who is entitled to have access to closed or confidential records may not be excluded from an executive session which is held to discuss those records.[108]

The application of a statute making certain meetings confidential or exempt or making records discussed during a meeting confidential or exempt, may be waived by the party or parties for whose benefit the statute was passed.[109]

2. Types of Exemptions

Whether a meeting is open, exempt, or confidential may depend on the records to be discussed during the meeting. Therefore, the open meetings law has the same type of exemptions as the open records law. In addition, a distinction can be drawn between meetings that must be open under the open meetings law, meetings that are confidential and must not be open to the public, and meetings for which public access is neither required nor prohibited. Whether public access is prohibited or merely not required will depend on the terms of the law authorizing the meeting to be closed. The term "executive session" refers to both confidential meetings and exempt meetings which have not been opened and are therefore closed.[110]

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[105] *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189, 192 (N.D. 1988).
[106] N.D.C.C. § 44-04-17.1(8). *See also Dickinson Newspapers Inc. v. Jorgensen*, 338 N.W.2d 72, 75 (N.D. 1983) (court rules).
[107] N.D.C.C. § 44-04-19.2(1).
[108] N.D.A.G. 2000-O-02.
[109] *See* N.D.A.G. 99-L-30.
[110] N.D.C.C. § 44-04-17.1(4).

a. Confidential Meetings

"Confidential meeting" means "all or part of a . . . meeting that is either expressly declared confidential or is prohibited from being open to the public."[111] Under this definition, a meeting may be required to be confidential or closed to the public in two ways. First, a statute may require that a meeting be closed or prohibit a meeting from being open. Second, the entity may be considering records that are confidential or otherwise prohibited from disclosure.[112] In either case, confidential meetings are characterized by a lack of discretion to open the meeting to the public.[113] Disclosing confidential information to the public is a class C felony.[114]

b. Exempt Meetings

Questions regarding the open meetings law are generally discussed in terms of the public's right of access to meetings. Rarely discussed is an agency's discretion to voluntarily allow public access to meetings that are not confidential but are exempt from the open meetings law. In this context, "exempt meeting" means "all or part of a . . . meeting that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity."[115] These exemptions frequently provide that meetings "may be closed" or "are not subject to the open meetings law." Similarly, if records will be discussed at a public entity's meeting that are exempt from the open records law and have not been voluntarily disclosed by the public entity, the meeting is exempt from the open meetings law and may be closed. If a public entity exercises its discretion not to allow public access to the exempt portion of a meeting, that meeting is defined as a "closed meeting," although "any person necessary to carry out or further the purposes of a closed meeting may be admitted."[116] A governing body must pass a motion by recorded roll call vote to enter into an executive session for exempt records or information.[117]

3. Limits on Exemptions

In addition to the requirement that exemptions be specifically provided by law, there may be several other limits on exemptions from the open meetings law.

a. Temporary Exemptions

Some exemptions from the open meetings law may be considered temporary because the record of the meeting must later be open to the public. For example, the records of an administrative investigation of a complaint concerning a school district employee are confidential until the investigation is completed, which must occur within sixty days after the complaint is filed.[118]

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[111] N.D.C.C. § 44-04-17.1(3).
[112] N.D.A.G. 2013-O-09; N.D.A.G. 2013-O-05.
[113] N.D.A.G. 94-F-28.
[114] N.D.C.C. § 12.1-13-01.
[115] N.D.C.C. § 44-04-17.1(5).
[116] N.D.C.C. § 44-04-17.1(1).
[117] N.D.C.C. § 44-04-19.2(2)(a).
[118] N.D.C.C. § 15.1-07-25(2).

b. Open to Certain People

Some exemptions indicate that certain people are allowed to attend a meeting which is otherwise not open to the public. For example, during a school board executive session to consider the nonrenewal or termination of a teacher's contract, both the teacher and the board are allowed to choose certain people to attend the hearing.[119] In general, the fact an exempt meeting is closed does not preclude the attendance of any person the governing body reasonably believes needs to be present to carry out or further the purpose of the meeting.[120] Each member of the governing body has an inherent right to attend an executive session of that body, unless the subject of the executive session is litigation involving that member.[121]

c. Closed Only for Specific Purposes

Whether a meeting is exempt from the open meetings law may depend on the subject to be discussed. For example, hearings may be closed if the appointment or renewal of a college president is being considered, but not for general consideration of the president's performance.[122] In 2021, the Legislative Assembly amended that provision to include that the state board of higher education may hold executive sessions to consider appointment or removal of "the commissioner of higher education, or a president or other faculty head, professor, instructor, teacher, officer, or other employee of an institution under the board's control."[123]

4. How Do I Conduct an Executive Session?

Only the portions of a public meeting that are specifically confidential or exempt from the open meetings law, or during which confidential or exempt records are discussed, may be closed to the public and held in executive session.[124] The remainder of the meeting must be open to the public.[125]

Although certain statutes may apply to particular meetings or entities, state law specifies the following general procedure for holding an executive session.[126]

1. Convene in an open session preceded by public notice;
2. Pass a motion to hold an executive session, unless a motion is unnecessary because a confidential meeting is required;[127]

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[119] N.D.C.C. § 15.1-15-06.
[120] N.D.C.C. § 44-04-17.1(1); N.D.A.G. 2006-L-34; N.D.A.G. 2002-O-10.
[121] N.D.A.G. 2006-L-22; N.D.A.G. 99-L-115.
[122] N.D.C.C. § 15-10-17(1); N.D.A.G. 81-41.
[123] 2021 N.D. Sess. Laws ch. 121, § 1; N.D.C.C. § 15-10-17(1)(d).
[124] N.D.C.C. §§ 44-04-17.1(4); 44-04-19.2(1).
[125] N.D.C.C. § 44-04-19.2(3).
[126] N.D.C.C. § 44-04-19.2(2).
[127] A motion to hold an executive session is a nonprocedural vote that must be taken by a recorded roll call vote. N.D.C.C. § 44-04-21; N.D.A.G. 2001-O-17.

3. 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;[128]
4. Record the executive session electronically or on audio or video tape;
5. Limit the topics considered during the executive session to the announced, authorized topics; and
6. Take final action[129] on the topics considered in the executive session during the open portion of a meeting.[130]

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.[131] To close a portion of the meeting, the governing body may either excuse the public or reconvene in another location.

Under N.D.C.C. § 44-04-19.2(2), 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.[132]

The recording of an executive session may be disclosed upon a majority vote of the governing body, unless the executive session was required to be confidential.[133] The recording must be disclosed pursuant to court order[134] or to the Attorney General for the purpose of administrative review.[135] The Attorney General must return the recording to the governing body upon completion of the administrative review without disclosing the recording to the public. Unauthorized disclosure of the

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[128] The announcement need not reveal closed or confidential information or cite the number of the specific statute authorizing the executive session, as long as the motion identifies the appropriate topic and statutory basis for closing the meeting. N.D.A.G. 2015-O-13; N.D.A.G. 99-O-04. Just stating the governing body will be closing a meeting to discuss "confidential" records is insufficient as it does not identify the legal authority for closing the meeting. N.D.A.G. 2019-O-12. For closed attorney consultations, a governing body is not always required to identify the specific litigation or administrative proceeding, as long as other information is provided about the topics to be considered during the executive session. N.D.A.G. 2000-O-10. *See* N.D.A.G. 2002-O-01 (announcement indicating N.D.C.C. § 44-04-19.1 was insufficient); N.D.A.G. 2001-O-17 (announcement of "wage negotiation strategy"); N.D.A.G. 2001-O-15 (announcement of attorney consultation for reasonably predictable lawsuit). For closed negotiation strategy session, a mere announcement of "negotiations" is not sufficient to identify the legal authority for closing the meeting. A public entity should therefore use the word "strategy," "instruction" or similar verbiage to close a meeting under N.D.C.C. § 44-04-19.1(9). *See* N.D.A.G. 2015-O-13; N.D.A.G. 2005-O-18.

[129] "Final action" means "a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy, but does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1." N.D.C.C. § 44-04-19.2(2)(e). N.D.A.G. 2018-O-14; N.D.A.G. 2018-O-08; N.D.A.G. 2015-O-16; N.D.A.G. 2014-O-08; N.D.A.G. 2014-O-09; N.D.A.G. 2013-O-02; N.D.A.G. 2005-O-21.

[130] In voting to take final action following an executive session, a governing body can refer generally to the subject of the motion being voted on and is not required to reveal closed or confidential information. N.D.A.G. 2001-F-10; N.D.A.G. 2000-O-04.

[131] N.D.A.G. 2000-O-03.

[132] N.D.A.G. 2000-O-02.

[133] N.D.C.C. § 44-04-19.2(5).

[134] N.D.C.C. § 44-04-18.11.

[135] N.D.C.C. § 44-04-21.1(1).

recording by a public servant is a violation of N.D.C.C. § 12.1-13-01. The recording and any minutes of an executive session remain closed even if the underlying statutory basis for the executive session no longer applies.[136] The recording must be maintained by the public entity for a minimum of six months after the executive session.[137]

Although all executive sessions must be recorded, minutes of executive sessions need not be kept. Rather, the following must be included in the regular meeting minutes:

> The minutes of an open meeting during which an executive session is held must indicate the names of the members attending the executive session, the date and time the executive session was called to order and adjourned, a summary of the general topics that were discussed or considered that does not disclose any closed or confidential information, and the legal authority for holding the executive session.

N.D.C.C. § 44-04-19.2(4).

5. Examples of Meetings Generally Not Open to the Public

a. Meetings to Discuss Closed or Confidential Records.

The portion of a meeting during which confidential or exempt records are considered may be closed to the public.[138] This is particularly common for school board meetings to discuss student records.[139]

b. Nonrenewal, Dismissal for Cause, or Suspension of Teachers, Principals, Superintendents, and Directors.

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.[140]

c. Attorney Consultation.

An executive session may be held for "attorney consultation."[141] A recorded roll call vote is required before proceeding into an executive session for "attorney consultation."[142] The right of a public entity in North Dakota to confidentiality in its relationship with its attorney is different from the right of private citizens.[143] For an executive session to be authorized, the mere presence of the public entity's attorney at the meeting is not enough and the meeting cannot be closed to merely receive

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[136] N.D.C.C. § 44-04-19.2(5); N.D.A.G. 98-O-25.
[137] N.D.C.C. § 44-04-19.2(5).
[138] N.D.C.C. § 44-04-19.2(1).
[139] N.D.A.G. 2000-O-04. This exception is limited to student records and does not include all discussions regarding specific students. *Id.*
[140] N.D.C.C. §§ 15.1-14-06, 15.1-14-10, 15.1-14-12, 15.1-14-16, 15.1-14-20, 15.1-14-26, 15.1-14-30, 15.1-15-02, 15.1-15-05.1, 15.1-15-06, 15.1-15-08, 15.1-15-10.
[141] N.D.C.C. § 44-04-19.1(2), (5). N.D.A.G. 2018-O-28; N.D.A.G. 2015-O-10.
[142] N.D.A.G. 2015-O-15.
[143] N.D.A.G. 2015-O-01 (open meeting laws do not generally recognize an "attorney-client privilege" between an attorney and a public entity, except for those entities subject to such laws only because they are supported by public funds); N.D.A.G. 2000-O-12.

an update on status of litigation or to receive information from its attorney on applicable law or process and procedure, because such discussions do not adversely affect the public entity's litigation position.[144] Rather, to properly hold an executive session for attorney consultation, the public entity must be receiving and discussing the attorney's advice regarding pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings.[145] The purpose of the exemption is to conceal a public entity's attorney consultation from its adversary, rather than to prevent public access to the meeting.[146] A public entity does not have to be a party to a court action or administrative proceeding, as long as it has a legal interest in the action or proceeding.[147] However, the exemption for attorney consultation is waived if the public entity allows its adversary to the pending or reasonably predictable court action or administrative proceeding to attend the executive session.[148]

The phrase "reasonably predictable" requires a realistic and tangible threat of litigation or proceedings, and not a mere fear or potential of being a party to litigation or an administrative proceeding.[149] However, a public entity does not have to wait until the moment before a lawsuit or administrative appeal is filed before claiming that litigation or administrative proceedings are "reasonably predictable."[150]

Adversarial administrative proceedings include administrative proceedings where the administrative agency acts as a complainant, respondent, or decision maker in an adverse administrative proceeding.[151] An administrative agency is not limited to agencies of the state, but includes local governing bodies as well.[152]

During the 65th Legislative Session in 2017, the definition of "attorney consultation" was expanded to include discussions where a governing body receives "its attorney's advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity that, if held in public, would have an adverse fiscal effect on the entity."[153] All other discussions beyond this advice and guidance must be made in the open. In 2023, the Legislative Assembly clarified that statements made during an attorney consultation are exempt if "the statements relate to the subject for which attorney consultation was established."[154]

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[144] N.D.A.G. 2015-O-01; N.D.A.G. 2014-O-09; N.D.A.G. 2004-O-19.
[145] N.D.A.G. 2015-O-01; N.D.A.G. 2002-O-10.
[146] N.D.A.G. 2002-O-01.
[147] N.D.A.G. 2000-O-12.
[148] N.D.A.G. 2002-O-01.
[149] N.D.A.G. 2015-O-13; N.D.A.G. 2015-O-10; N.D.A.G. 2015-O-01; N.D.A.G. 2014-O-08; N.D.A.G. 2009-O-14.
[150] N.D.A.G. 2001-O-15.
[151] N.D.C.C. § 44-04-19.1(4). An Attorney General review of alleged violations of open meeting laws is not an "adversarial administrative proceeding." N.D.A.G. 2015-O-01.
[152] *Edinger v. Governing Auth. of Stutsman Cnty. Corr. Ctr.*, 695 N.W.2d 447, 43 (N.D. 2005).
[153] 2017 N.D. Sess. Laws ch. 308, § 10. N.D.C.C. § 44-04-19.1(5). Please be aware that analysis on attorney consultation in Attorney General's opinions before this date may be affected by the change in law. *See* N.D.A.G. 2018-O-28; N.D.A.G. 2018-O-05.
[154] 2023 N.D. Sess. Laws ch. 394, § 3. *See also Schmitz v. North Dakota Board of Chiropractic Examiners*, 971 N.W.2d 892 (N.D. 2022) (The court parsed out segments of the executive session by the time stamps and found that parts of the executive session were not exempt to open laws).

d. Negotiation Strategy Sessions.

An executive session also may be held to discuss negotiating strategy or provide negotiating instructions regarding pending or reasonably predictable claim, litigation, adversarial administrative proceedings, or contracts.[155] An executive session is authorized under this exception only if holding an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity,[156] and may not be used to perform employee evaluations.[157] The terms "strategy" and "instructions" are key limiting terms in this subsection and do not authorize an executive session simply to receive an update on the status of negotiations.[158] When a governing body makes a unilateral decision on a contract, without options for further negotiations, it is not considered a negotiation strategy session that can be discussed in executive session.[159] A recorded roll call vote is required before proceeding into an executive session for negotiation strategy and instructions.[160]

e. Economic Development.

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.[161]

f. State Agency Loss Control Committees

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.[162]

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[155] N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2013-O-13.

[156] N.D.A.G. 2015-O-13 (a public entity cannot close a meeting for "negotiation strategy session" under N.D.C.C. § 44-04-19.1(9) if the negotiations are conducted with the other party present during the executive session because there would no longer be an adverse fiscal effect on the bargaining position of the public entity); *see also* N.D.A.G. 2005-O-18; N.D.A.G. 2005-O-03; N.D.A.G. 2004-O-21; N.D.A.G. 2000-O-09.

[157] N.D.A.G. 2017-O-03; N.D.A.G. 2001-O-17; N.D.A.G. 2000-O-09.

[158] N.D.A.G. 2015-O-10; N.D.A.G. 2015-O-04; N.D.A.G. 2013-O-11; N.D.A.G. 2000-O-05.

[159] N.D.A.G. 2017-O-03; N.D.A.G. 2016-O-01; 2010-O-11; N.D.A.G. 2005-O-21; *but see* N.D.A.G. 2018-O-08 (executive session regarding negotiation strategies to be utilized to secure employment with desirable candidate was appropriate).

[160] N.D.A.G. 2015-O-15.

[161] N.D.C.C. § 44-04-18.4; N.D.A.G. 2019-O-12; N.D.A.G. 2001-O-01.

[162] N.D.C.C. § 32-12.2-12.

Guidelines for Notices of Open Meetings

The Attorney General's office provides the following guidelines in compliance with N.D.C.C. § 44-04-20(8).

1. What Does the Law Require?

N.D.C.C. § 44-04-20 provides:

1. Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity as defined in section 44-04-17.1, including executive sessions and meetings held remotely. Unless otherwise specified by law, resolution, or ordinance, or as decided by the public entity, notices required by this section need not be published.

2. The notice required in this section must contain the date, time, and location of the meeting and, if practicable, the topics to be considered. However, the lack of an agenda in the notice, or a departure from, or an addition to, the agenda at a meeting, does not affect the validity of the meeting or the actions taken thereat. The notice also must contain the general subject matter of any executive session expected to be held during the meeting. For meetings to be held by electronic means, the location of the meeting is the electronic address and any other information necessary to allow the public to join or view the electronic meeting as required under section 44-04-19.

3. If the governing body holds regularly scheduled meetings, the schedule of these meetings, including the aforementioned notice information, if available, must be filed annually with the secretary of state for state-level bodies or for public entities defined in subdivision c of subsection 13 of section 44-04-17.1, the city auditor or designee of the city for city-level bodies, and the county auditor or designee of the county for all other bodies or the schedule must be posted on the public entity's website. This schedule must be furnished to anyone who requests the information. When reasonable and practicable, a governing body of a public entity should attempt to set a regular schedule for its meetings by statute, ordinance, or resolution. This subsection does not apply to meetings of the legislative assembly or any committee thereof. Filing a yearly schedule of upcoming meetings does not relieve a public entity from its obligation to post an agenda for each meeting as required in subsections 2 and 4.

4. The notice required in this section must be posted at the principal office of the governing body holding the meeting, if such exists, and at the location of the meeting on the day of the meeting. In addition, unless all the information contained in the notice was previously filed with the appropriate office under subsection 3, the notice must be filed in the office of the secretary of state for state-level bodies or for public entities defined in subdivision c of subsection 13 of section 44-04-17.1, the city auditor or designee of the city for city-level bodies, the county auditor or designee of the county for all other bodies. If the public entity has a website, notice also must be posted on the public entity's website. This subsection does not apply to meetings of the legislative assembly or any committee thereof.

5. The governing body's presiding officer has the responsibility of assuring that public notice of a meeting's date, time, and location, is given at the same time as such governing body's members are notified, and that this notice is available to anyone requesting such information. As soon as an agenda is prepared for a meeting with the information required in subsection 2 and given to members of the governing body, the agenda must be posted at the locations as required by subsection 4 and given to anyone requesting the information. When a request is made for notice of meetings, the request is effective for one year unless a different time period is specified.

6. In the event of emergency or special meetings of a governing body, the person calling such a meeting shall, in addition to the notices in subsection 4, also notify the public entity's official newspaper, if any, and any representatives of the news media which have requested to be so notified of such special or emergency meetings, of the time, place, date, and topics to be considered at the same time as such governing body's members are notified. If the public entity does not have an official newspaper, then it must notify the official newspaper of the county where its principal office or mailing address is located. Topics that may be considered at an emergency or special meeting are limited to those included in the notice.

7. A committee of an institution under the authority of the state board of higher education, in lieu of the notice requirements in this section, may file in the office of the president of the institution the name, address, and telephone number of a person who may be contacted to obtain specific times, dates, and locations of any meetings of that committee or to request specific notification of each meeting of that committee.

8. The attorney general shall prepare general guidelines to assist public entities in following the provisions of this section.

9. This section is violated when a notice is not provided in substantial compliance with this section.

2. Where Must Notices of Meetings Be Provided?

Unless otherwise specifically provided by law, public notice must be given of all meetings governed by N.D.C.C. § 44-04-19, including executive sessions and meetings held remotely.[163] If a meeting is postponed or rescheduled, a new notice must be provided.[164] Notifying interested members of the public about a meeting, or announcing a meeting during the previous meeting, is not a substitute for complying with the requirements in N.D.C.C. § 44-04-20.[165]

The notice of a meeting must be 1) posted in a conspicuous place at the governing body's main office, if one exists; 2) filed with the secretary of state for state-level bodies or nongovernmental organizations supported by or expending public funds, the city auditor or designee of the city for city-level bodies, and the county auditor or designee of the county for all other public bodies or

[163] N.D.C.C. § 44-04-20.
[164] N.D.A.G. 2016-O-21; N.D.A.G. 98-O-09.
[165] N.D.A.G. 2001-O-05; N.D.A.G. 2000-O-03.

posted on the public entity's website, if the entity has a website;[166] and 3) posted at the location of the meeting on the day of the meeting, if the meeting is held somewhere other than the governing body's main office.[167] The notice must also be given to anyone requesting the information.[168] If a public entity's jurisdiction covers more than one jurisdiction or political subdivision, it must file its notice in each public entity it serves.[169]

North Dakota law recognizes two types of meetings: regular meetings and special or emergency meetings. Unless required and set by statute, ordinance, or resolution, regular meetings are established by filing an annual schedule of its upcoming meetings.[170] Any such schedule, including the required notice information if available, shall be filed annually either on the public entity's website or with the secretary of state for state-level bodies or nongovernmental organizations supported by or expending public funds, the city auditor for all city-level bodies, the county auditor for all other public bodies, or the public entity's website.[171] The notice requirements of N.D.C.C. § 44-04-20 also applies to committees.[172] This schedule must be furnished by that official to anyone who requests the information. Filing a yearly schedule of upcoming meetings does not relieve a public entity from its obligations to post an agenda for each meeting with the requirements of N.D.C.C. § 44-04-20(2) and (4).[173]

A meeting held on any day other than the regular meeting date as provided in the filed annual meeting schedule, is considered an emergency or special meeting.[174] If the entity does not hold regular meetings, or fails to produce an annual schedule of upcoming meetings, all meetings are then considered a special meeting that must be noticed accordingly.[175] For emergency or special meetings, in addition to the notice requirements above, notice must also be provided to the entity's official newspaper, if any, and any representative of the news media who requests or has requested it.[176] If the public entity does not have an official newspaper, then it must notify the official newspaper of the county where its principal office or mailing address is located.[177] The topics that may be considered at an emergency or special meeting are limited to those included in the notice,

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[166] Notice of meetings of multi-county agencies must be filed in the auditor's office of each participating county. N.D.A.G. 2015-O-12; N.D.A.G. 2005-O-10; N.D.A.G. 98-O-04.

[167] N.D.C.C. § 44-04-20(4).

[168] A governing body is not required by this section to provide notice to any individual unless the individual has asked for such notice. N.D.A.G. 2018-O-25; N.D.A.G. 99-O-06; *see also* N.D.A.G. 2016-O-18 (must provide notice to those requesting in some practical way); N.D.A.G. 2009-O-13 (Public entities should provide notice in whatever way is agreed upon by the person and the public entity or in a manner that is practical. Sufficient notice given to individual even though notice not provided in exact manner requested).

[169] N.D.A.G. 2018-O-11; N.D.A.G. 2015-O-12; N.D.A.G. 2005-O-10.

[170] N.D.C.C. § 44-04-20(3); N.D.A.G. 2013-O-06.

[171] N.D.C.C. § 44-04-20(3).

[172] N.D.A.G. 2019-O-08.

[173] N.D.C.C. § 44-04-20(3).

[174] N.D.A.G. 2018-O-07; N.D.A.G. 2013-O-06.

[175] N.D.A.G. 2016-O-05; N.D.A.G. 2005-O-17.

[176] N.D.C.C. § 44-04-20(6); N.D.A.G. 2011-O-16; N.D.A.G. 2001-O-08; N.D.A.G. 98-O-13 (notice to the entity's official newspaper is required even if the newspaper did not ask for notice of special or emergency meetings). *Compare Quarles v. McKenzie Pub. Sch.l Dist.*, 325 N.W.2d 662, 670 (N.D. 1982).

[177] N.D.C.C. § 44-04-20(6).

including any topics to be discussed in an executive session.[178] As soon as a date and time is set for a meeting, notice must be given to the public at the above required locations, even if no agenda is prepared at this time.[179] Once an agenda is prepared, the agenda must also be posted at the required locations.

3. When Must Notices of Meetings Be Provided?

Notice must be provided in advance of all meetings governed by N.D.C.C. § 44-04-19.[180] Notices should be given as early as possible, but there is no mandatory minimum notice period in N.D.C.C. § 44-04-20.[181] Rather, N.D.C.C. § 44-04-20 simply requires that notice be provided at the same time the governing body's members are notified of a meeting.[182] Even if the governing body has not yet prepared an agenda for its meeting, if the governing body knows the meeting date, notice should be provided informing the public of the meeting date.[183] If the attendance of a quorum of the members of a governing body at a meeting of another group is a surprise, the notice should be provided immediately.[184]

4. What Must Notices Contain?

A written notice of each public meeting must be prepared containing the date, time, and location of the meeting,[185] the general subject matter of any executive sessions expected to be held during the meeting,[186] and, if practicable, the topics to be considered or agenda.[187] This "if practicable" language has been interpreted to require the governing body to include in its notice a list of all topics the governing body expects to discuss at the time the notice is prepared.[188]

Every item in the notice should be specified as clearly as possible. Each public entity should prepare a proposed agenda of its meetings and follow that agenda as much as possible. However, the lack of an agenda or a departure from it at a regular meeting will not affect the validity of the meeting or any actions taken at the meeting. A governing body is free to discuss any topic at a regular meeting, as long as the notice of the meeting listed all the topics the governing body expected to discuss when the notice was prepared.[189]

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[178] *Id.; see also* N.D.A.G. 2000-O-03; N.D.A.G. 2002-O-11.
[179] N.D.C.C. § 44-04-20(5); *see also* N.D.A.G. 2016-O-04 (governing body knew the meeting date and time a month in advance but did not provide notice until two weeks before the meeting when an agenda was prepared, and this violated open meeting laws).
[180] N.D.C.C. § 44-04-20(1).
[181] N.D.A.G. 98-O-13. There may be other laws applicable to certain governing bodies for specific meetings that require minimum notice. If such a law exists, the governing body should follow the specific law.
[182] N.D.A.G. 2018-O-11.
[183] N.D.C.C. § 44-04-20(5); N.D.A.G. 2016-O-04.
[184] N.D.A.G. 2012-O-06; N.D.A.G. 98-O-10; N.D.A.G. 98-O-08; *but see* N.D.A.G. 2013-O-14 ("if it is reasonable to suspect beforehand that a quorum might attend a meeting, public notice should be provided when the members learned of the gathering").
[185] *See* N.D.A.G. 2014-O-03 (notice does not need to contain the exact street address if it reasonably identifies location).
[186] *See* N.D.A.G. 2018-O-28; N.D.A.G. 2015-O-13; N.D.A.G. 2013-O-09; N.D.A.G. 2001-O-15; N.D.A.G. 2000-O-10 (notice must contain general description of executive session).
[187] N.D.C.C. § 44-04-20(2).
[188] N.D.A.G. 2008-O-23; N.D.A.G. 2006-O-07; N.D.A.G. 2006-O-05; N.D.A.G. 2003-O-12.
[189] N.D.A.G. 2015-O-13; N.D.A.G. 2013-O-09; N.D.A.G. 2011-O-14; N.D.A.G. 2011-O-06; N.D.A.G. 2009-O-16; N.D.A.G. 2008-O-03; N.D.A.G. 99-O-08.

The law requires a level of specificity from a special meeting agenda that is not required for regular meetings because a governing body may only discuss topics during the special meeting that are listed in the notice.[190] Therefore a notice of a special meeting cannot contain general terms that may have multiple meanings or "catch-all" phrases, such as "new business," and instead must specifically list each item to be discussed.[191] It is a violation of the open meetings law to consider or discuss topics not listed on the agenda for a special meeting.[192]

5. Must the Notice Be Published or Provided to the News Media?

Unless otherwise specified by law, meeting notices need not be published.[193] However, publication is not prohibited and is an effective way of notifying interested persons of the meeting. To follow the spirit of the open meetings law, all public bodies are encouraged to give notice of their meetings to representatives of the news media.[194] As discussed earlier in this manual, notice of emergency or special meetings must be given to the entity's official newspaper, and any representative of the news media who requested it.[195]

6. Who Is Responsible for Providing Notices?

While most public bodies have a secretary or some other executive officer who generally provides notices of public meetings, the public entity's presiding officer is responsible for assuring the required notice is given to the public.[196]

7. How Is the Notice Law Violated?

The law requiring notice of all meetings of governing bodies of public entities is violated when a meeting is held for which public notice has not been provided in substantial compliance with statutory requirements.[197]

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[190] N.D.C.C. § 44-04-20(6); N.D.A.G. 2013-O-01 (The purpose of an agenda is to provide sufficient information to interested members of the public concerning anticipated business to be discussed by the governing body. General terms that could have numerous meanings or "catch-all" phrases are not appropriate for special meetings because they do not provide meaningful notice of what the governing body intends to discuss at the special meeting). *See also* N.D.A.G. 2018-O-28; N.D.A.G. 2018-O-19; N.D.A.G. 2018-O-09; N.D.A.G. 2011-O-15; N.D.A.G. 2010-O-11; N.D.A.G. 2009-O-04; N.D.A.G. 2009-O-03; N.D.A.G. 2008-O-03; N.D.A.G. 2005-O-07; N.D.A.G. 2002-O-11.

[191] N.D.A.G. 2018-O-07.

[192] N.D.A.G. 2018-O-04; N.D.A.G. 2017-O-04.

[193] N.D.A.G. 2011-O-16; N.D.A.G. 2002-O-12.

[194] N.D.A.G. 81-10.

[195] N.D.C.C. § 44-04-20(6). Because some public entities are not required by law to have an official newspaper, the law was amended in 2005 to require public entities that do not have an official newspaper to give notice of special or emergency meetings to the official newspaper of the county where the public entities' principal office or mailing address is located. The law is silent on the medium in which newspapers are required to receive notice, but notice must be given in some way to the official newspaper. *See* N.D.A.G. 2016-O-07.

[196] N.D.C.C. § 44-04-20(5); N.D.A.G. 2009-O-16; N.D.A.G. 2008-O-28; N.D.A.G. 2004-O-09; N.D.A.G. 2003-O-13; N.D.A.G. 98-O-13.

[197] N.D.C.C. § 44-04-20(9); N.D.A.G. 2014-O-11 (although city council failed to post notice at the location of the meeting, substantial compliance because council met at the same location for the past three years).

Other Required Open Meetings Procedures

1. Location of Meetings

The location of any open meeting "must be accessible to, and the size of the room must be sufficient to accommodate, the number of persons reasonably expected to attend the meeting."[198] The open meetings law does not specifically address the proximity of the public entity's meeting place to the people affected by the entity's decisions, however, holding a meeting a substantial distance away from the public entity's jurisdiction could result in the denial of the public's access to the meeting.[199]

If one or more members of the governing body are participating in the meeting by telephone or video, the location of the meeting is the place where a speakerphone or monitor is provided.[200]

The Americans with Disabilities Act of 1990 (ADA) also requires that meeting locations be readily accessible to individuals with disabilities.[201] A public body should contact its attorney if it has any questions regarding ADA compliance.

2. Agendas and Schedules

N.D.C.C. § 44-04-20 requires the topics to be considered, or agenda, to be included in the notice of meeting if practicable. However, except for emergency or special meetings, a governing body's failure to file an agenda with its notice of meeting, or departure from a stated agenda, does not affect the validity of the meeting or actions taken at that meeting.[202] A governing body is free to discuss any topic at a regular meeting, as long as the notice of the meeting listed all the topics the governing body expected to discuss when the notice was prepared.[203] If no statute, ordinance, resolution, rule or bylaw specifies other procedures, general rules of parliamentary procedure allow members, during a regular meeting, to add items to the agenda as new business.[204]

3. Procedures Governing Meetings

One or more of the members of a governing body may hold or participate in an open meeting by telephone or video, as long as a speakerphone or monitor is provided at the location specified in the notice of the meeting.[205]

The right of a person to attend an open meeting includes the right to photograph, record, or broadcast the portion of the meeting that is not held in executive session, as long as there is no active interference with the meeting.[206] Prior approval or notice to the governing body is not

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[198] N.D.C.C. § 44-04-19(2); N.D.A.G. 2013-O-05; N.D.A.G. 2008-O-28.
[199] N.D.A.G. 2012-O-03; N.D.A.G. 2002-O-12 (proximity of meeting place to people affected).
[200] N.D.C.C. § 44-04-20(2).
[201] 42 U.S.C. §§ 12101-12213, 47 U.S.C. §§ 225, 611. *See also* 28 C.F.R. § 35.150; N.D.C.C. § 54-21.3-04.1; N.D.A.G. 95-L-249.
[202] N.D.C.C. § 44-04-20(2); N.D.A.G. 98-O-21. *But see* N.D.A.G. 2013-O-05 (the obligation to file a yearly notice does not relieve a governing body from its obligation to post notice of each meeting as required by statute).
[203] N.D.A.G. 2015-O-13; N.D.A.G. 2013-O-09; N.D.A.G. 2011-O-14; N.D.A.G. 2011-O-06; N.D.A.G. 2009-O-16; N.D.A.G. N.D.A.G. 2008-O-23; N.D.A.G. 99-O-08.
[204] N.D.A.G. Letter to Mushik (Apr. 25, 1990).
[205] N.D.C.C. §§ 44-04-19(4), 44-04-20(2).
[206] N.D.C.C. § 44-04-19(3).

required, although the governing body can impose reasonable restrictions on the recording activity, such as a limit on the number or location of recording devices, to minimize disruption to the meeting. Although what constitutes an unreasonable disruption is a question of fact, "[t]hat members of the [governing body] may be inhibited, intimidated, or uncomfortable is not sufficient disruption to authorize the [governing body] to limit the recording of its meetings. A meeting is not unreasonably disrupted when members of the public or the media unobtrusively make audio or video recordings of the meeting while sitting in their seats or standing at the back or side of the room."[207]

The right of a person to attend an open meeting does not include the right to address the governing body during the meeting, unless public comment is required under N.D.C.C. § 44-04-20.1 or another specific statute requires a public hearing.[208] A meeting that cannot be heard by a member of the public may be considered equivalent of an executive session and is a violation of the open meetings law.[209]

Unless otherwise specified by law, such as for executive sessions, the procedures to be followed during a meeting are left to the public entity's discretion.[210] Steps may be taken by the public entity to control the decorum of the meeting. A governing body has the authority to adopt reasonable rules and policies to ensure that a public meeting is conducted in an orderly manner, including the orderly behavior of those attending.[211] If specific procedures have not been adopted by statute, ordinance, resolution, rule, or bylaw, generally accepted rules of parliamentary procedure can govern the meeting.[212] Robert's Rules of Order is one widely accepted authority.[213]

4. Recorded Votes

Unless otherwise specifically provided by law, all votes of whatever kind taken at a meeting subject to the open meetings law must be open to the public.[214] A governing body must come out of an executive session and make a motion and vote on "final action" in the public.[215] "Final action" means "a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy."[216] The purpose of requiring final action to be taken

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[207] N.D.A.G. 96-F-09.

[208] N.D.C.C. § 44-04-20.1; N.D.A.G. 2015-O-09; N.D.A.G. 2013-O-05; N.D.A.G. 2007-O-11; N.D.A.G. 99-O-07; N.D.A.G. 98-O-17.

[209] N.D.A.G. 2001-O-13; *but see* N.D.A.G. 2019-O-16 (no evidence that the governing body attempted to preclude the public from attending or hearing the meeting).

[210] N.D.A.G. 2015-O-09; N.D.A.G. 2001-O-16; N.D.A.G. Letter to Larson (Sept. 19, 1989); N.D.A.G. Letter to Nething (Aug. 28, 1986). *See, e.g.*, N.D.C.C. § 40-06-05 (cities).

[211] N.D.A.G. 2015-O-09; N.D.A.G. 2007-O-11.

[212] N.D.A.G. Letter to Mushik (Apr. 25, 1990).

[213] The Attorney General's office will not review alleged violations of Robert's Rules of Order. Robert's Rules of Order is not "law" as defined by N.D.C.C. § 44-04-17.1(8) and is not an authorized basis for review under N.D.C.C. § 44-04-21.1.

[214] N.D.C.C. § 44-04-21(1), N.D.A.G. 2010-O-07. 2023 N.D. Sess. Laws ch. 398, § 1 (exempted nonprocedural votes considering amendments during a legislative session, by a legislative committee or the legislative assembly. House Bill 1463 was passed, overriding a veto of the governor).

[215] N.D.C.C. § 44-04-19.2(2)(e); N.D.A.G. 2018-O-08; N.D.A.G. 2015-O-15; N.D.A.G. 2005-O-21.

[216] N.D.C.C. § 44-04-19.2(2)(e); *see also* N.D.A.G. 2018-O-08 (when the governing body reached a consensus on a matter of public business, it was considered "final action" that should have been taken in an open meeting); N.D.A.G. 2018-O-16 (when the governing

during the open portion of a public meeting is to allow the public to see how its representatives vote on matters of public business and use of public funds.[217]

"Final action" does not include "guidance given by members of the governing body or to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session."[218] It is only considered "guidance" for attorney consultation if the discussion would reveal attorney work product, litigation strategy, or legal risks, strengths, and weaknesses that would have an adverse fiscal effect on the public entity if conducted in public.[219] Likewise, it is only considered "guidance" under negotiation strategy sessions if the information provided to the negotiator would undermine future negotiations and result in adverse fiscal effects if revealed in public.[220] However, when a governing body makes a unilateral decision without options for further negotiations, or authorizes a negotiator to finish negotiations and enter into a final agreement without further approval from the governing body, it goes beyond "guidance" and is considered "final action."[221]

Roll call votes indicating how each member voted must be taken and recorded for all nonprocedural votes, and for any procedural vote upon the request of any member of the governing body.[222] A member of the public attending a meeting or reading the minutes should be able to identify the vote of each member.[223] Nonprocedural votes pertain to the merits or substance of an issue before the governing body, and any doubt whether a vote is substantive or procedural should be resolved in favor of a recorded roll call vote.[224] Secret ballots or votes are not permitted unless specifically provided by law.[225]

5. Minutes of Meetings and Publication

Although not required for all public entities until 1997,[226] N.D.C.C. § 44-04-21(2) now requires:

> Minutes must be kept of all open meetings and are records subject to section 44-04-18. The minutes must include, at a minimum:

a. The names of the members attending the meeting;

b. The date and time the meeting was called to order and adjourned;

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body reached a consensus on who to offer a position to and at what salary, it was considered "final action" that should have been taken in an open meeting).

[217] N.D.A.G. 2018-O-14.

[218] N.D.C.C. § 44-04-19.2(2)(e).

[219] N.D.A.G. 2018-O-14.

[220] N.D.A.G. 2018-O-14; N.D.A.G. 2018-O-08.

[221] N.D.A.G. 2018-O-14; N.D.A.G. 2018-O-08; N.D.A.G. 2016-O-22; N.D.A.G. 2014-O-09; N.D.A.G. 2005-O-21; N.D.A.G. 2004-O-22.

[222] N.D.A.G. 2005-O-10; N.D.A.G. 2004-O-17.

[223] N.D.A.G. 2018-O-10 ("motion carried" is insufficient to determine how members voted); N.D.A.G. 2009-O-20 (votes of each member must be made public, "nodding" to vote is insufficient); N.D.A.G. 2005-O-10 (it was a violation of the law to not list the vote of each member on every recorded roll call vote in the minutes); N.D.A.G. 2004-O-17 (the practice of raising hands to vote is not sufficient because the public attending the meeting may not see the hands being raised); N.D.A.G. Letter to Jacobson (Feb. 15, 2001).

[224] *See, e.g.*, N.D.A.G. 98-O-09 (approving payment of bills and an airport abatement are nonprocedural matters).

[225] N.D.A.G. 2001-O-16.

[226] *But see, e.g.,* N.D.C.C. §§ 11-11-35 (counties), 40-06-02 (cities).

c. A list of topics discussed regarding public business;

d. A description of each motion made at the meeting and whether the motion was seconded;

e. The results of every vote taken at the meeting; and

f. The vote of each member on every recorded roll call vote.

. . . [T]he disclosure of minutes kept under this subsection may not be conditioned on the approval of the minutes by the governing body.

Although the law does not require a verbatim record, minutes should provide a list all the topics discussed regarding public business.[227] This requirement applies to all governing bodies, including committees. Draft minutes should be prepared and made available to the public before the governing body's next regular meeting.[228]

There is no general statute expressly requiring all governing bodies to publish minutes or records of their entire meetings. However, specific statutes may require certain bodies to publish the minutes or other record of their meetings.[229] For example, every four years, the residents of a city must vote on whether to require the city governing body to publish minutes or a complete summary of its proceedings in the city's official newspaper.[230] Every two years, the residents of a school district vote on whether a record of the school board's proceedings shall be published in the official newspaper of the school district.[231] A county governing body must supply to its official newspaper "a full and complete report of its official proceedings at each regular and special meeting no later than seven days after the meeting at which the report is read and approved."[232]

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[227] N.D.A.G. 2013-O-06; N.D.A.G. 2010-O-06.

[228] *See* N.D.A.G. 98-O-25; N.D.A.G. 98-O-04.

[229] 2023 N.D. Sess. Laws ch. 178, § 1 (requiring school districts, upon request, to record and archive regular and special meetings); *see* N.D.C.C. § 15.1-09-30.

[230] N.D.C.C. § 40-01-09.1.

[231] N.D.C.C. § 15.1-09-31. If required, each teacher's annual salary must be specified in the "complete" record of the meeting at which the teacher's contract was approved. N.D.A.G. 67-196. This record must include the required "itemized list of obligations" approved by the district at each meeting, and applies to special as well as general meetings, but a complete record would not be required for the closed meeting authorized to discuss the nonrenewal or termination of a teacher's contract if no formal action is taken. Also, the record need not be a verbatim transcript of the meeting but need only show the substantive actions of the district board. N.D.A.G. 67-193.

[232] N.D.C.C. § 11-11-37; *see also* N.D.A.G. 94-L-90. County expenditures must be itemized rather than categorized in the published report, but the required report need not be a verbatim account of the meeting so long as a fair statement of what transpired at each meeting is published, including each roll call vote. N.D.A.G. Letter to Hagerty (Dec. 24, 1985); N.D.A.G. 69-124; N.D.A.G. 46-62.

North Dakota Court Decisions Regarding Open Meetings

1. North Dakota Supreme Court Cases

Green v. Beste, 76 N.W.2d 165 (N.D. 1956).

Under a statute stating that a city council may hold special meetings in the manner prescribed by city ordinance (N.D.C.C. § 40-08-10), a city was not authorized to hold a special meeting when it had failed to pass an ordinance specifying the procedure for calling a special meeting. The purpose of requiring all city council meetings to be open to the public is to enable the public to attend those meetings and to keep in touch with the proceedings of the council. The only way that the public can be assured of its right to do that is to have those meetings at the time specified by law or by a legally-enacted ordinance. Any proceedings at a meeting held at other times than so specified are void and illegal. Recessing a regular meeting to an unspecified later date constitutes an adjournment of the meeting. Because a special meeting of the council to create an improvement district was held on a date which was privately arranged by the members of the council, rather than at a time provided by statute or legally-enacted ordinance, the city council's creation of the improvement district was void.

Hennessy v. Grand Forks School District, 206 N.W.2d 876 (N.D. 1973).

The statute requiring the school board to notify a teacher that it is contemplating a nonrenewal of the teacher's contract and allowing the teacher, upon request, to meet with the school board in an executive session, calls only for an informational meeting and does not intend a decision-making meeting of the school board. A determination by the school board not to renew a teacher's contract must be made at a meeting which is open to the public, after the board has complied with the statute affording the teacher an opportunity for a meeting with the school board in an executive session. Once the executive session has been held at which the school board gives an explanation to the teacher and discusses with the teacher its reasons for its contemplated decision not to renew the contract, the board has jurisdiction to make a final decision at its next regular meeting.

Dathe v. Wildrose School District, 217 N.W.2d 781 (N.D. 1974).

A statute regarding a school board meeting to consider decisions not to renew teaching contracts stated, "[t]he meeting shall be an executive session of the board unless both the school board and the teacher requesting such meeting shall agree that it shall be open to other persons or the public." N.D.C.C. § 15-47-38. The superintendent was allowed to attend the meeting and participate, even though the statute requires that the meeting "shall be an executive session of the board" unless the parties agree to the contrary. The parties did not agree to the contrary. Allowing the superintendent to attend the meeting did not affect its character as an "executive session." An "executive session" is one from which the public is excluded and at which only such selected persons as the board may invite are permitted to be present.

Peters v. Bowman Public School District, 231 N.W.2d 817 (N.D. 1975).

An executive (closed) session conducted by the school district for the purpose of evaluating a teacher violated the open meetings law. The decision not to renew a teacher's contract was illegal where, although the actual decision to send a letter of nonrenewal was taken at an open board meeting, the reasons for the contemplated nonrenewal were discussed at a prior, invalid executive session. Without implying that in every case action taken upon the basis of information learned outside of an official and legal board meeting is void, the court found the action of the school district in this case a clear attempt to evade the open meetings law. When the official action of the school district is clearly the product of an illegal meeting, documented in the minutes, and not clearly denied in the testimony, such official action is invalid even though such official action is taken at an otherwise legal meeting.

Dickinson Education Association v. Dickinson Public School District, 252 N.W.2d 205 (N.D. 1977).

All school board meetings at which teacher contract offers and school board offers and counteroffers are considered are required to be open to the public. In addition, all school board and teacher contract negotiating sessions, regardless of negotiating committee composition, are open to the public. In this case, a committee represented the school board in the negotiations. Violation of the open meetings provisions in this case constituted harmless error. (*But see* subsection 27 of N.D.C.C. § 15-29-08.)

Southern Valley Grain Dealers Association v. Board of County Commissioners of Richland County, 257 N.W.2d 425 (N.D. 1977).

There was no violation of due process in the granting of a tax exemption at a meeting of the board of county commissioners of Richland County on February 5, 1975, which meeting was a continuation, pursuant to statute, of a meeting and hearing held on November 19, 1974, statutory notice of which was given. So long as no decision was made by the county board of commissioners on the application for granting a tax exemption for a new industry, reasonable postponements of consideration of the matter, as to which statutory notice had been given, did not preclude action by the board at a later date. Statutory notice by an agency of consideration of a matter at a meeting on a specified date gives jurisdiction to act at that meeting, or at a later regular meeting, or at a meeting continued to a definite time and place within a reasonable time, but action once taken cannot be reversed or modified without again giving the statutory notice.

KFGO Radio, Inc. v. Rothe, 298 N.W.2d 505 (N.D. 1980).

A state's attorney's inquiry into facts surrounding a felony or criminal act causing a death involves actions which are quasi-judicial in nature and is within the scope of the constitutional requirement that "all courts shall be open." Hence, a state's attorney's inquiry must be open to the public, including the news media. Although the public has a constitutional right of access to court proceedings, limitations may be placed thereon as not only may the size of the court room justifiably limit attendance but in the interest of fairness a court may exclude members of the public who are creating physical disturbances or causing potentially dangerous situations. The right of access to judicial proceedings is limited both by the constitutional right to a fair trial and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants. A state's attorney's inquiry into facts surrounding a felony or a criminal act causing death does not come within the scope of the open meetings law, nor the notice provisions in N.D.C.C. § 44-04-20. A state's attorney is not required to give notice to the media or the public of pending state's attorney's inquiries into facts surrounding a suspected felony or criminal acts causing death. In view of the policy considerations which favor open court proceedings and in the absence of a directive from the Legislature to exclude the public from state's attorney's inquiries, such inquiries, under N.D.C.C. § 11-16-15, are open to the public.

Danroth v. Mandaree Public School District, 320 N.W.2d 780 (N.D. 1982).

Although the school board violated the open meetings law by holding a secret meeting at which it determined not to renew a teacher's contract, the teacher was not entitled to be reinstated or have damages awarded and the district court did not err in ordering only that the school board reconsider its action.

Quarles v. McKenzie Public School District, 325 N.W.2d 662 (N.D. 1982).

A teacher is entitled to request and receive a continuance of a nonrenewal hearing at any time during the meeting without showing any cause therefor. N.D.C.C. § 44-04-20 does not require a more cumbersome notice for a special or emergency meeting than for a regularly scheduled meeting. (*But see* N.D.C.C. § 44-04-20(6).)

Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72 (N.D. 1983).

Since a preliminary examination is not a trial or pretrial proceeding, neither the state constitutional provision that all courts shall be open, nor the Sixth Amendment of the United States Constitution apply with the same force and effect as it applies to trials. The statute governing preliminary examinations expressly provides that the closing of a preliminary examination by excluding all except specified persons is within the discretion of the court, and thus, even if the preliminary examination were considered a "meeting" subject to the open meetings law, closure thereunder would be authorized. A magistrate's discretion to close a preliminary examination does not mean that the proceedings will be private or secret. The record is not sealed but will usually be available to the public after the jury has been selected for trial or if and after the case has been dismissed. If, upon the motion by a criminal defendant and hearing thereon, the magistrate at a preliminary examination finds and determines that evidence inadmissible at trial on the issue of guilt or innocence will be admissible at the preliminary examination, which is designed only to determine probable cause and, as a result, there is a substantial likelihood that such evidence will interfere with the defendant's right to a fair trial and impartial jury, then departure from the policy of openness in judicial proceedings is justified, since pretrial publicity of inadmissible evidence can defeat defendant's constitutional right to a fair and public trial. The news media does not occupy a special status distinct from that of the general public; its right to be present at a criminal trial stem from being a member of the public. The constitutional right to a public trial is primarily for the benefit of the defendant, and the news media's access to the courtroom is subordinate to the defendant's right to a fair trial. The term "otherwise provided by law" in Article I, Section 10 of the North Dakota Constitution (relating to indictments for criminal offenses) is not limited to statutes, but includes rules adopted by the supreme court pursuant to Article VI, Section 3 of the North Dakota Constitution.

Annexation of a part of Donnybrook Public School District to Stanley Public School District, 365 N.W.2d 514 (N.D. 1985).

Failure of a county committee to take a recorded roll call vote on an annexation petition is not an adequate reason for the State Board of Public School Education to deny the annexation petition or to remand the matter to the county committee for a rehearing.

Minot Daily News v. Holum, 380 N.W.2d 347 (N.D. 1986).

On a criminal defendant's motion to close the preliminary examination to the public, the trial court must seek to accommodate the policy of openness in judicial proceedings with the defendant's right to a fair trial. The preliminary examination of a criminal defendant should be closed to the public only upon a showing that evidence inadmissible at the trial will be offered at the preliminary examination, that there is a substantial likelihood of interference with the defendant's right to a fair trial, and that there are no reasonable alternatives to complete disclosure. The public should be excluded only from that portion of the preliminary examination that jeopardizes the defendant's right to a fair trial, and the transcript of the proceedings should be made available to the public at the earliest time consistent with the defendant's right to a fair trial. The preliminary examination of a criminal defendant should not be closed to the public without factual and legal findings on the record supporting the closure, and explaining why alternatives to closure were inadequate.

Retzlaff v. Grand Forks Public School District, 424 N.W.2d 637 (N.D. 1988).

The school board did not violate the open meetings law by privately meeting with the principal in groups of two or three to discuss the nonrenewal of a first-year teacher's contract, as the meetings occurred after the school board had voted not to renew the teacher's contract at an open meeting. A meeting of less than a quorum to discuss an action already taken at an open meeting is not subject to the open meetings law.

Edinger v. Governing Authority of Stutsman Co. Correctional Center, 695 N.W.2d 447 (N.D. 2005).

A governing body may consult its attorney if there is a reasonable probability of some form of legal action, either litigation or an administrative proceeding. When the information available to the governing body suggests a reasonable probability of litigation or adversarial administrative proceedings, N.D.C.C. § 44-04-19.1 authorizes the governing body to close a portion of a meeting to receive and discuss the advice of its attorney. The definition of "administrative agency" in N.D.C.C. § 28-32-01(2) does not apply to the attorney-consultation exemption to the open meeting law under N.D.C.C. § 44-04-19.1.

Schmitz v. State Board of Chiropractic Examiners, 971 N.W.2d 892 (N.D. 2022).

Section 44-04-19.1(5) provides two – separate – avenues for governing bodies to consult with its attorney or receive legal advice in executive session. One, to seek or receive the attorney's advice regarding and in anticipation of reasonably predictable or pending civil or criminal litigation, or an adversarial administrative proceeding; or two, to receive its attorney's advice on the legal risk, strengths, and weaknesses of an action of a public entity which, if held in public, would have an adverse fiscal effect on the entity. "All other discussions beyond the attorney's advice and guidance must be made in the open, unless there is another exception, and a qualification that mere presence or participation of an attorney at a meeting does not constitute attorney consultation." The Board at times, discussed a pending administrative proceeding "without consulting its attorney or seeking [their] guidance on the adversarial proceed."

Haskell v. Grand Forks Public School District, 31 N.W.3d 626 (N.D. 2026).

The school board's attorney's public statements regarding the school board's legal position did not constitute a waiver of the right to enter an executive for purposes of attorney consultation under N.D.C.C. § 44-04-19.1(2). Even if the amount of a contract dispute is publicly known, a public entity may still enter an executive session for attorney consultation under N.D.C.C. § 44-04-19.1(2) to discuss other topics that may have an adverse fiscal effect on the entity, including "the cost of litigating the dispute, the likelihood of succeeding in litigation, or the potential impact on resolutions of other contract disputes." A party does not have a due process right to participate in an in-camera review or to access exempt records for the purpose of fully arguing why the records are not exempt. "A district court that declines to conduct even minimal verification of a government exemption claim—particularly when the burden of review is as modest as it is here—abuses its discretion." The district court abused its discretion by not conducting an in-camera review of a 27-minute executive session recording when the burden of conducting the review was modest.

2. North Dakota District Court Cases

Meyer v. Nelson County Reorganization Committee, Civil No. 5549 (N.D. Northeast Central Dist., July 19, 1993) (Nelson Co.).

A joint county school district reorganization committee violated the open meetings law. The court ordered the committee to meet again at an open meeting to reconsider the matter that had been considered at the improperly closed meeting.