STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

Open Records Manual

General Counsel Division
August 2026

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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. It includes annotated lists of these authorities, which are intended to be as complete as possible but should

not be considered exhaustive. The analysis in this manual summarizes current law and is not an Attorney General opinion.

The issue of how long a public entity should retain particular records is separate from whether a particular record is open, exempt, or confidential under the open records law.

General Open Records Law Requirements

1. What Does the Open Records Law Require?

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

> Unless otherwise provided by law, all records 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 public records, open and accessible for inspection during reasonable office hours.

N.D. Const. art. XI, § 6.[1]

> 1. Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. . . .
> 2. Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested. An initial request need not be made in person or in writing, and the copy must be mailed upon request. A public entity may require written clarification of the request to determine what records are being requested but may not ask for the motive or reason for requesting the records or for the identity of the person requesting public records.

N.D.C.C. § 44-04-18.[2]

The North Dakota Supreme Court summarized the purpose of the open records law shortly after its enactment.

> What the Legislature was attempting to accomplish was to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest, in order that the citizen and taxpayer might examine public records to determine whether public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matters.[3]

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[1] This section was approved by the citizens of North Dakota in 1978. *See* 1979 N.D. Sess. Laws ch. 694.

[2] This section was adopted in 1957 and amended in 1977, 1993, 1997, 1999, 2001, 2005, 2007, 2009, 2011, and 2017. *See* 1957 N.D. Sess. Laws ch. 305; 1977 N.D. Sess. Laws ch. 416; 1993 N.D. Sess. Laws ch. 441, § 1; 1997 N.D. Sess. Laws ch. 381, § 3; 1999 N.D. Sess. Laws ch. 104, § 2; 2001 N.D. Sess. Laws ch. 393; 2005 N.D. Sess. Laws ch. 377; 2007 N.D. Sess. Laws ch. 388, § 6; 2009 N.D. Sess. Laws chs. 383 § 1, 384 § 1; 2011 N.D. Sess. Laws. ch. 332, § 3; 2017 N.D. Sess. Laws ch. 308, §§ 4, 5. The 1997 amendments explain terminology and add provisions regarding access to electronic records, how certain requests should be made, how the section is violated, and when disclosure properly can be delayed. The 1999 amendment authorize a fee for locating records if locating the records takes longer than one hour. The 2001 amendments clarify the application of the open records law to pending litigation and to copyrighted material. The 2005 amendments authorize a fee for redacting confidential information if doing so takes longer than one hour and establish a per copy fee public entities may charge for copies. The 2007 amendments authorized an entity to acquire payment before locating, redacting, making, or mailing copies. The 2011 amendments further explain access and charges related to electronic records. The 2017 amendments provided updates and clarification to numerous sections in the open records law.

[3] *Grand Forks Herald, Inc. v. Lyons*, 101 N.W.2d 543, 546 (N.D. 1960).

To serve this important public purpose, these open record provisions should be construed liberally in favor of the public's access to information.[4]

2. Who Is Subject to the Open Records Law?

North Dakota's open records law applies to records 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,[5] to exercise public authority or perform a governmental function;
> **b.** Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision[6] 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.[7]

An entity is subject to the open records 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 records law. Based on the definitions of certain terms used in the open records law, there are three circumstances in which the records of a nongovernmental organization may be open to the public.[8]

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 authority or perform a governmental function on behalf of or in place of the public entity.[9] 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

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[4] *See* N.D.C.C. § 1-02-01 (statute construed liberally to further its purpose); N.D.A.G. 2000-O-12; *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189, 191 (N.D. 1988).

[5] "'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(17).

[6] "'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).

[7] N.D.C.C. § 44-04-17.1(13). "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.

[8] 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.

[9] 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.

or group responsible for making binding legislative or policy decisions on behalf of the political subdivision.[10]

Second, an organization may be a "public entity" if the organization is supported by public funds or is expending public funds.[11] A nongovernmental organization is expending public funds if it receives and uses a direct appropriation from a governmental entity[12] or if it receives and manages a pool of public funds on behalf of one or more public entities.[13] 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.[14] 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.[15] A payment under a vague and indistinct contract for unspecified goods or services is considered "support."[16] The key question is whether public funds are being used to support an organization, or merely to purchase goods or services.[17] When public funds are provided to an organization for its general support, rather than for a particular project, all financial records of the organization, including its budget, must be open to the public to determine how the public funds were used.[18]

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.[19] However, this presumption is limited to grants to new employers or businesses for their general operations.[20]

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 of or in place of a public entity.[21] Examples of "agencies of government" include personnel firms, an advertising company hired to perform an

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[10] 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.

[11] N.D.C.C. § 44-04-17.1(10).

[12] 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.

[13] N.D.A.G. 99-O-05. Records of a nongovernmental organization that is a "public entity" because it is supported by or expending public funds but is not otherwise performing a governmental function are open only to the extent the records pertain to how public funds are being or have been spent. N.D.A.G. 2006-O-04, N.D.A.G. 2003-O-02.

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

[15] 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.

[16] 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.

[17] N.D.A.G. 2015-O-01 (humane society had discretion on how to use the unrestricted mill levy funds from the City and the taxation funds appropriated by the County and was therefore "supported" by public funds); N.D.A.G. 2003-O-02 (a nongovernmental organization that receives 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).

[18] N.D.A.G. 2014-O-07; N.D.A.G. 2014-O-04; N.D.A.G. 2003-O-10; N.D.A.G. 2003-O-02; N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10; N.D.A.G. 99-03; N.D.A.G. 98-O-24.

[19] N.D.C.C. § 44-04-17.1(10); N.D.A.G. 98-O-23 (Community Development Block Grant funds).

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

[21] N.D.C.C. § 44-04-17.1(13), (16). *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.

educational campaign on behalf of a city,[22] a local economic development corporation,[23] a college bookstore,[24] a local humane society,[25] a taxi company,[26] and foundation and alumni association.[27]

Public entities cannot avoid the requirements of the open records law by forming joint enterprises and transferring funds to that enterprise.[28] 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.[29]

3. Court Records

State courts are not subject to the open records law.[30] However, the Supreme Court has also concluded that "it is the right of the public to inspect the records of judicial proceedings after such proceedings are completed and entered in the docket of the court."[31] This right is not unlimited but can be subject to reasonable rules and regulations of the court. Management of court records is an inherent power of the court.[32] District court clerks maintain and dispose of court records according to rules, policies and procedures adopted by the Supreme Court.[33] The Disciplinary Board and the Judicial Conduct Commission of the North Dakota Supreme Court are adjuncts of the Supreme Court and are not subject to the open records laws.[34] Their records are instead governed by rules of the Supreme Court.[35]

Some court decisions and statutes indicate whether certain court records are open to the public. For example, the court docket is open to the public.[36] Criminal records are also open once judicial proceedings are completed.[37] The final order determining parentage is open, but other records are open only with the consent of the parties or order of the court.[38] Juvenile court records are confidential as a general rule, but may be open to the public if the related hearing was open to the public.[39] In addition, "juvenile court" is limited to North Dakota district courts and does not include courts in other jurisdictions.[40] Also, "[f]ollowing an adjudication of delinquency for an offense that would be a felony if committed by an adult, the child's school principal, chief administrative officer, or designated school guidance counselor, if requested, must be allowed access to the disposition order."[41] Other juvenile court records may be shared with the superintendent or principal of the school the child is attending or plans to attend if the child appears to

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[22] N.D.A.G. 2001-O-04.
[23] N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10.
[24] N.D.A.G. 2004-L-25.
[25] N.D.A.G. 2015-O-01.
[26] N.D.A.G. 2014-O-24.
[27] 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.
[28] N.D.A.G. 99-O-02.
[29] N.D.A.G. 2013-O-13 (Diversion Authority Board); N.D.A.G. 2004-O-10 (Stutsman County Correction 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).
[30] N.D.C.C. § 44-04-17.1(16); N.D.A.G. 2002-L-19. *Accord Grand Forks Herald v. Lyons*, 101 N.W.2d 543 (N.D. 1960).
[31] *State v. O'Connell*, 151 N.W.2d 758, 763 (N.D. 1967).
[32] N.D.A.G. 94-F-18.
[33] N.D.C.C. § 27-05.2-06.
[34] N.D.A.G. 2003-O-06.
[35] *Id.*
[36] *Minot Daily News v. Holum*, 380 N.W.2d 347 (N.D. 1986).
[37] *State v. O'Connell*, 151 N.W.2d 758, 763 (N.D. 1967); *see also* N.D.A.G. 75-27.
[38] N.D.C.C. § 14-20-54.
[39] N.D.C.C. § 27-20.2-21.
[40] N.D.A.G. 2000-F-09.
[41] N.D.C.C. § 27-20.2-21(4).

pose a threat to self or to the students or staff of the school.[42] Finally, a victim or victim's guardian may inspect certain records of a "delinquent child" pertaining to the specific offense but may not share the information contained in the files and records with any other person.[43]

4. What Material is Covered by the Open Records Law?

As used in the open records law:

> "Record" means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.[44] "Record" does not include unrecorded thought processes or mental impressions,[45] but does include preliminary drafts and working papers. "Record" also does not include records in the possession of a court of this state.[46]

The term "record" does not include "every scrap of written material possessed by a public official."[47] To be subject to the open records law, a record must have a link or association with "public business."[48]

"'Public business'" means all matters that relate or may foreseeably relate in any way to . . . [t]he performance of the public 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."[49] The open records law is not limited to records possessed by a public entity itself. It also applies when a public entity delegates a public duty to a third party.[50] A request for records in the possession of an "agent" of a public entity may not be denied because the agent does not "own" the records. Rather, records regarding public business that are created or possessed by an agent of a public entity or created by a third-party contractor and possessed by a public entity, should be treated the same as if they were created and possessed by the public entity itself and are subject to the open records law.[51]

5. Who Has the Right to Inspect Open Records?

Every person has a right to inspect any open public record. Interested persons, news media representatives, governmental agencies, and all others stand on an equal footing under the open records

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[42] *Id.*

[43] N.D.C.C. § 27-20.2-21(1)(j). A violation of this subsection is a class B misdemeanor. N.D.C.C. § 27-20.4-21(9).

[44] This definition is not limited to records required to be kept by law. *Accord City of Grand Forks v. Grand Forks Herald*, 307 N.W.2d 572, 577-78 (N.D. 1981); N.D.A.G. 2003-O-04 (Emails stored on a computer's electronic backup system are records in the possession of a public entity); N.D.A.G. 94-F-19; N.D.A.G. 57-148 (Records include day-to-day correspondence of public officials on matters relating to their official duties).

[45] N.D.A.G. 2014-O-22.

[46] N.D.C.C. § 44-04-17.1(16). *Accord Grand Forks Herald v. Lyons*, 101 N.W.2d 543, 546 (N.D. 1960). However, *see* 3. Court Records, above.

[47] N.D.A.G. 62-118 (Jan. 12, 1962).

[48] N.D.C.C. § 44-04-17.1(16); N.D.A.G. 98-L-128.

[49] N.D.C.C. § 44-04-17.1(12).

[50] N.D.C.C. § 44-04-17.1(16) (records in possession or custody of public entity or agent). *Accord Forum Publ'g Co. v. City of Fargo*, 391 N.W.2d 169, 172 (N.D. 1986). N.D.A.G. 2015-O-14 (public entity has the responsibility of producing records relating to public business in the possession of its agent).

[51] N.D.A.G. 2019-O-13; N.D.A.G. 2015-O-14; N.D.A.G. 2014-O-24; N.D.A.G. 2009-O-17; N.D.A.G. 2008-O-15; N.D.A.G. 2007-O-07; N.D.A.G. 2004-L-25; N.D.A.G. 98-L-73.

law.[52] Advance notice of a request to inspect open records is not required. Rather, "anyone who walks into city offices without advance notice is entitled to inspect city records."[53] There is no requirement that a requestor must live within the jurisdiction of the public entity, be a North Dakota resident, or a United States citizen.[54] The motive and identity of the person requesting an open record are usually **irrelevant**; the right to access public records belongs to all persons equally.[55] Generally, a public entity cannot ask a person to put the request in writing or fill out a form before providing public records.[56] However, if, after the initial request, a public entity needs a request to be put in writing for clarification purposes, the public entity may require the request be made in writing, however may still not inquire into the motive or identity of the requestor.[57]

a. Requests from an Adversary to a Pending Action or Proceeding

The general rule that open records are available to anyone upon request does not apply if the person requesting the records is a party to a criminal or civil action, arbitration, or adversarial administrative proceeding in which the public entity is also a party, or if the person is acting as an agent of the party.[58] In those cases, the request must be made to the attorney representing the public entity in the action or proceeding and is governed by applicable discovery rules.[59] Any documents that would normally be open to the public but would be privileged under discovery rules may be withheld from an adversary or agent of an adversary.[60] The public entity may require the person requesting the documents to use the discovery process rather than the open records law to compel the production of its records.[61]

6. When Must Open Records be Available?

North Dakota's open records law requires public records to be "open and accessible for inspection during reasonable office hours." "Reasonable office hours" includes all regular office hours of a public entity.[62] Reasonable is a flexible standard and depends on the facts of each office.[63]

If a public entity does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the public entity's records must be posted on the door of the office of the public entity, if any. Otherwise, the information regarding the

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[52] N.D.A.G. 2011-O-11; N.D.A.G. 2005-O-12; N.D.A.G. 94-F-18; N.D.A.G. Letter to Staiger (Feb. 23, 1978). *See also* N.D.A.G. 81-130 (open records law provides no discretion to public body over persons allowed to inspect open record).

[53] N.D.A.G. Letter to Tomac (July 17, 1991). Immediate access may not be available if the records contain exempt and confidential information, and the public entity needs time to redact such information.

[54] N.D.A.G. 2005-O-12.

[55] N.D.A.G. 2013-O-17; N.D.A.G. 2011-O-11; N.D.A.G. 2008-O-08; N.D.A.G. 2005-O-12; *But see* N.D.A.G. 98-F-13 (23 U.S.C. § 409 is an exception to the open records law).

[56] N.D.A.G. 2009-O-02; N.D.A.G. 2008-O-08; N.D.A.G. 2007-O-03; N.D.A.G. 2006-O-15; N.D.A.G. 2005-O-09; N.D.A.G. 2003-O-21. If the request is for exempt or confidential information, the entity may require identification and written documentation to verify the party receiving the information has the authority to do so.

[57] N.D.C.C. § 44-04-18(2).

[58] N.D.C.C. § 44-04-18(6); N.D.A.G. 2019-O-06 (although the lawsuit named individual employees versus the public entity itself, the lawsuit involved the duties undertaken by the individuals while acting under scope and authority of employment and therefore the requestor could not circumvent discovery rules by making an open record request to the public entities that employed the individuals named in the lawsuit); N.D.A.G. 2011-O-11 (law firm named in lawsuit and requestor, as a partner to the law firm, was an agent of his firm which was a party to the lawsuit and therefore must follow the discovery rules in order to obtain records related to lawsuit).

[59] N.D.C.C. § 44-04-18(6).

[60] *Id.*; N.D.A.G. 2019-O-06; 2011-O-11; N.D.A.G. 2008-O-08; N.D.A.G. 2002-O-05.

[61] N.D.A.G. 2019-O-06; 2011-O-11; N.D.A.G. 2008-O-08; N.D.A.G. 2002-O-05.

[62] N.D.C.C. § 44-04-18(1). Office hours must be "reasonable." N.D.A.G. Letter to Tomac (July 17, 1991); N.D.A.G. 97-106.

[63] N.D.A.G. Letter to Odegard (Oct. 5, 1977) (normal office hours of 9 a.m. to 5 p.m. from Monday to Friday would be reasonable).

contact person must be filed with the secretary of state for state-level entities, 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 entities, or the county auditor or designee of the county for other entities.[64]

A public entity is not required to provide access to open records outside its regular office hours.[65] However, public servants can provide access to public records after normal office hours, as long as the public servant does not personally accept compensation for providing that access.[66]

7. How Do I Respond to a Request for Records?

a. Requests for Open Records

All records must be open and accessible for inspection by the public unless otherwise specifically provided by law.[67] In addition to access, a person is entitled to obtain one copy of an open record and to have the copy mailed to the requester.[68] As used in the open records law, "copy" means a duplicate or exact reproduction of the original record.[69] Once a request for records is made to a public entity, the public entity must respond within a reasonable time by providing the requested records or explaining why the request is not being satisfied.[70] A public entity is not required to provide more than one copy of a record to the same requester, but the entity should make sure that the requested copy has previously been provided to the requester, and the public entity must explain that the request for records is being denied because the records have previously been provided to the requester.[71]

A request for records need not be made in person or in writing unless a statute requires otherwise.[72] In addition, the North Dakota Supreme Court has held that a public entity is not required to comply with a continuing request for records and can require separate, periodic requests.[73] Although the open records law does not require officers or employees of a public entity to comment on the substance of an open record, an officer or employee may do so and agreements prohibiting such verbal disclosure are against public policy and are void.[74]

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[64] N.D.C.C. § 44-04-18(1).
[65] N.D.A.G. 97-O-01.
[66] N.D.A.G. 82-02.
[67] N.D.C.C. § 44-04-18(1).
[68] N.D.C.C. § 44-04-18(2).
[69] N.D.A.G. 2005-O-05 (The document printed from the computer is the copy for which a person may be charged); N.D.A.G. 2001-O-06 (black and white photocopy of color photographs was not a "copy").
[70] N.D.C.C. § 44-04-18(7), (8); N.D.A.G. 2004-O-05; N.D.A.G. 2004-O-11. *See also* N.D.A.G. 2019-O-15 (violation of open records law when public entity did not inform the requestor that a record was being withheld and under what authority).
[71] N.D.A.G. 2019-O-06 (to the extent the records have already been provided to the requestor, the public entities did not violate open records law by denying to produce further copies of already requested and provided records); N.D.A.G. 2015-O-15 (a public entity only has to produce a copy of a requested record once to a requestor); N.D.A.G. 2014-O-10 ("A public entity is not required to provide more than one copy of a record to the same requestor."); N.D.A.G. 2013-O-14 (a requester is entitled to receive one copy of a requested record once, even if he/she is requesting the same record from multiple entities all within the same county); N.D.A.G. 98-O-20.
[72] N.D.C.C. § 44-04-18(2); N.D.A.G. 2011-O-11; N.D.A.G. 2008-08.
[73] *Robot Aided Mfg., Inc. v. N.D. Dep't of Transp.*, 589 N.W.2d 187 (1999); N.D.A.G. 2003-O-08.
[74] N.D.C.C. § 44-04-18.10(3).

Once a request for records is made, a public entity does not have discretion to decide whether the request is meritorious. A public entity may not circumvent the open records law by suddenly refusing to use previously available means of communication without warning.[75] For example, if a public entity previously allowed open records requests to be made via email, it cannot stop checking the email account suddenly, without notice, to the public.[76] The email account should either be shut down, or an automatic reply be put in place notifying requestors the email account is no longer being checked or utilized.[77]

The public entity may only deny the request if a law specifically provides that the record is either exempt or confidential, the record does not exist, or the entity does not have the record in its, or its agent's, possession.[78] A request for public records may not be denied because it involves a substantial number of copies, the same individual makes multiple requests[79] or that the request would be "cost prohibitive" or a "strain on personnel resources" to fulfill.[80] The number of records being requested affects the time within which a public entity must respond but does not affect the validity of the request.[81]

The request must reasonably identify a "specific public record."[82] A request for information is not considered a request for records.[83] When a person asks questions that generally call for explanations, a legal conclusion, or an answer, it is not considered an open record request because there has been no request for an actual record and a public entity has no duty to provide opinions or explanations under the open records law.[84] A public entity may contact a requestor for clarification on a records request, but must do so in a timely manner.[85] A public entity may require a request be made in writing for clarification purposes.[86]

A request also may not be denied if a document or file contains both open and closed or confidential information.[87] Instead, the public entity must remove the closed or confidential information and

[75] N.D.A.G. 2016-O-08.
[76] *Id.*; N.D.A.G. 2025-O-04. *But see* N.D.A.G. 2026-O-07 (a public entity did not violate the open records law by failing to respond to an email request sent from a blocked address where the requester had previously been notified that email requests would not be accepted and was provided alternative means to submit requests); N.D.A.G. 2018-O-23 (the open records law does not require public entities to accept email requests, as long as other means are available to submit the requests).
[77] N.D.A.G. 2025-O-04; N.D.A.G. 2016-O-16.
[78] N.D.A.G. 2019-O-13; N.D.A.G. 2015-O-17; N.D.A.G. 2014-O-07; N.D.A.G. 2013-O-17; N.D.A.G. 2010-O-02.
[79] N.D.A.G. Letter to Swanson (Aug. 13, 1991). "If a public entity receives five or more requests from the same requester within seven days, the public entity may treat the requests as one request in computing the time it takes to locate and excise the records." N.D.C.C. § 44-04-18(2); *see also* N.D.A.G. 2014-O-18.
[80] N.D.A.G. 2014-O-07.
[81] *Id.*; N.D.A.G. 2001-O-12.
[82] N.D.C.C. § 44-04-18(2) ("Upon request for a copy of specific public records, any entity subject to [open records law] shall furnish the requester one copy of the public records requested").
[83] N.D.A.G. 2018-O-23; N.D.A.G. 2014-O-22; N.D.A.G. 2007-O-07.
[84] N.D.A.G. 2018-O-23; N.D.A.G. 2006-O-09.
[85] N.D.A.G. 2014-O-07; N.D.A.G. 2013-O-17.
[86] N.D.C.C. § 44-04-18(2).
[87] N.D.C.C. § 44-04-18.10(1). N.D.A.G. 2003-O-01.

disclose the rest of the record.[88] Except for certain computer records,[89] however, nothing requires a public entity to create a new record, disclose records which do not exist, or disclose records it does not have in its, or its agent's, possession or custody.[90] A public entity also is not required to create a new record by compiling information from other records.[91]

A public entity may require the presence of one of its employees or officials as a security measure when providing access to its records, but that requirement may not be used to deny access merely because it is inconvenient.[92] A public entity may allow a requestor to utilize his or her own personal devices for duplication of records, but may establish reasonable procedures to protect the integrity of the records, so long as such procedures do not prevent access to the records.[93]

The open records law is violated when a person's right to review or receive a copy of an open record is denied or unreasonably delayed, or when an improper fee is charged for copies of records.[94] A denial of an open records request must indicate the entity's specific authority for denying access to the requested record and be made in writing, if requested.[95] This requirement applies even if the request is denied on the basis that the requested records do not exist.[96] An explanation that a denial is based on the advice of the public entity's attorney is not sufficient.[97] A denial must address all the requested records which are not provided.[98]

b. Disruption of Office Functions

If repeated requests by the same requestor disrupt the essential office functions of a public entity, the public entity may refuse to permit inspection or the records or provide further copies of additional record requests.[99] A public entity refusing to provide records under this section must state, in writing, the reasons supporting its refusal, and provide the reasoning to the requestor.[100] The requestor can ask for an Attorney General's opinion under N.D.C.C. § 44-04-21.1 on whether the public entity's decision was proper.[101]

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[88] N.D.C.C. § 44-04-18.10(2); N.D.A.G. 2015-O-11. If confidential or closed information in an email cannot be separated in the electronic record, the public entity must provide a printed copy of the email with the confidential information removed. N.D.A.G. 2003-O-04.

[89] Under general open records laws, an entity is not required to create or compile a record that does not exist; however, there is an exception for electronically stored information. If public records are maintained in a database, there must be some meaningful way to access that information and make copies of the information. This may require a public entity to create a document, program, or compilation in order to reveal a copy of the requested records. *See* N.D.A.G. 2008-O-17; N.D.A.G. 2007-O-01.

[90] N.D.C.C. § 44-04-18(4); N.D.A.G. 2014-O-22; N.D.A.G. 2008-O-08; N.D.A.G. 2005-O-13 (Each agency of a political subdivision is only responsible for records in its possession and not for records in the possession of another agency of the same political subdivision); N.D.A.G. 2004-O-05; *but see* N.D.A.G. 2015-O-14 (a public entity has the ultimate responsibility to produce a record relating to public business in the possession of its "agent" if the agent fails to do so).

[91] N.D.C.C. § 44-04-18(4); N.D.A.G. 98-O-20.

[92] N.D.A.G. 2009-O-17; N.D.A.G. Letter to Tomac (July 17, 1991).

[93] N.D.C.C. § 44-04-18(12).

[94] N.D.C.C. § 44-04-18(8).

[95] N.D.C.C. § 44-04-18(7).

[96] N.D.A.G. 2018-O-13; N.D.A.G. 2017-O-10; N.D.A.G. 2014-O-22; N.D.A.G. 2011-O-10; N.D.A.G. 98-O-10.

[97] N.D.A.G. 2000-O-13.

[98] N.D.A.G. 2019-O-15; N.D.A.G. 98-O-03.

[99] N.D.C.C. § 44-04-18(13).

[100] *Id.*

[101] *Id.*

c. Response within a Reasonable Time

Although state law includes a number of exemptions from the open records law, public officials and employees generally should know what records are under their control must be disclosed.[102] Therefore, access to an open record usually must be granted within a fairly short period of time after a request has been made. Immediate access or copies are not always required, but the amount of time within which the public entity must respond to the request will usually be measured in hours or a few days rather than several days or weeks.[103] A delay may be reasonable for several reasons and whether records have been produced within a reasonable time will depend on the facts of a given situation.[104]

When there is a doubt whether a record must be disclosed, a public official or employee may take a reasonable amount of time to determine whether an exemption from the open records law applies to the record in question and may consult with its attorney if needed.[105] However, a delay to seek legal advice is reasonable only if there is a legitimate legal and factual question on what information must be disclosed, and is limited to the length of time which is reasonably necessary to obtain that advice.[106]

Further delay in responding to a request until the next regular meeting of the governing body is not reasonable.[107] Generally, a public entity's response to an open records request cannot be automatically extended until the next scheduled meeting of the governing body simply to enable the governing body to give its permission to release the records.[108] Providing access to public records is a ministerial act which will not require action of a governing body in most cases.[109] An exception to this general rule is if the governing body is required by law to make the decision on whether records are confidential.[110] In that situation, it is not unreasonable to delay the response until the governing body has an opportunity to meet and determine the status of the records.

Other factors to consider in determining the appropriate length of time within which to respond to a request include the number of documents to be reviewed, excising confidential or closed material, the quantity of records requested, whether the public entity employs staff on a part-time or full-time basis and the availability and workload of such staff who can respond to the request, balancing other responsibilities of the public entity that demand immediate attention, accessibility of the records requested, and sorting out what has previously been provided to a requestor since a requestor is only entitled to one copy.[111] Although a factor that may be considered is the workload of staff who can respond to record requests, a public entity must begin working on a response in a

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[102] N.D.A.G. 2013-O-17; N.D.A.G. 2008-O-08.
[103] N.D.A.G. 98-O-22.
[104] N.D.A.G. 2019-O-02.
[105] N.D.A.G. 2013-O-15; N.D.A.G. 82-23.
[106] N.D.A.G. 2006-O-08; N.D.A.G. 2001-O-02. *See also* N.D.A.G. 2001-O-04 (delay of seven days for legal advice was not necessary to indicate that the requested records did not exist).
[107] *Id.*
[108] N.D.A.G. 2017-O-06; *see also* N.D.A.G. 2001 (similarly, providing access to records generally does not require the approval, supervision, or action by a head of an agency).
[109] *Id.*; *see also* N.D.A.G. 2006-O-15.
[110] N.D.A.G. 2019-O-09.
[111] N.D.A.G. 2019-O-15; N.D.A.G. 2017-O-09; N.D.A.G. 2014-O-25; N.D.A.G. 2014-O-20; N.D.A.G. 2014-O-06; N.D.A.G. 2013-O-15; N.D.A.G. 2013-O-14; N.D.A.G. 2012-O-07: N.D.A.G. 98-O-03.

timely manner and if there is going to be a delay, should keep the requestor informed on the status of the response.[112]

In determining whether a response to a records request is made within a reasonable time, the open records law looks at when the public entity received the request, not the date on the top of the request, nor when the request was allegedly mailed.[113] If a public entity cannot reasonably respond to a request immediately, it is not required to identify a specific date when the records will be available,[114] but the burden is on the public entity to let the requester know when the records are available, which must occur within a reasonable time.[115] Extenuating or emergency situations, such as the COVID-19 pandemic, may cause the adoption of reasonable processes by offices to handle increased open records requests.[116]

Public entities only have to provide copies of records in its possession. Although it is commendable for a public entity to attempt to obtain records that it does not have from another source, if this results in a long delay, the public entity may be liable for the unreasonable delay, versus promptly notifying the requestor that it does not possess the records.[117] Likewise, if an entity misinterprets a request which results in an unreasonable delay in providing records, the public entity may be liable.[118]

d. Electronic Records

In the area of electronic records, it may be more difficult to separate closed or confidential information from information subject to public disclosure. Therefore, a specific provision describes the proper method of providing public access to electronic records.

> Access to an electronically stored record under this section, or a copy thereof, must be provided at the requester's option in either a printed document or through any other available medium. A computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file. Except as reasonably necessary to reveal the organization of data contained in an electronically stored record, a public entity is not required to provide an electronically stored record in a different structure, format, or organization. This section does not require a public entity to provide a requester with access to a computer terminal or mobile device.[119]

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[112] N.D.A.G. 2019-O-02 (violation when the public entity did not begin working on the response for over a week and failed to keep the requestor informed of the reason for delay and status of the records request).

[113] N.D.A.G. 2017-O-09; *see also* N.D.A.G. 2019-O-04; N.D.A.G. 2018-O-24.

[114] N.D.A.G. 98-O-22.

[115] N.D.A.G. 98-O-20; N.D.A.G. 98-O-04; *see also* N.D.A.G. 2023-O-06; N.D.A.G. 2023-O-04 (entity researched expansive records to fulfill request, but did not inform requester; despite effort, delay was found to be unreasonable because of the lack of communication).

[116] N.D.A.G. 2021-O-09.

[117] N.D.A.G. 2018-O-21; N.D.A.G. 2017-O-06; N.D.A.G. 2015-O-17; N.D.A.G. 2013-O-14; N.D.A.G. 2008-O-08; N.D.A.G. 2007-O-11; N.D.A.G. 98-O-20.

[118] N.D.A.G. 2018-O-21; *but see* N.D.A.G. 2018-O-23 (public entities interpretation of a vague request that did not identify a specific record was reasonable).

[119] N.D.C.C. § 44-04-18(4). *See also* N.D.A.G. 98-O-22 (it may be necessary to create a new record to segregate closed or confidential information in the same electronic record); N.D.A.G. 2008-O-17; N.D.A.G. 2007-O-01 (information in a database is a record subject to the open records law and required to be accessible).

Access from a remote location is also authorized for records of state-level entities or political subdivisions if procedures are adopted to maintain the confidentiality of information protected by federal or state law.[120]

If a public entity has copies of records online, it may point a requestor to the website where he or she can access the records, instead of producing a copy of the records.[121] However, if the requestor does not have reasonable access to the internet, the public entity must produce paper copies for the requestor, but may charge the applicable fees under N.D.C.C. § 44-04-18.[122]

e. Preliminary Drafts and Working Papers

Preliminary drafts and working papers are expressly included in the statutory definition of "record."[123] However, state law authorizes a public entity to temporarily delay public disclosure of these records under certain circumstances.[124] The phrases "working paper" and "preliminary draft" are interchangeable and refer to records which are created and used in the process of creating another record.[125] There are two parts to the delay provision for preliminary drafts and working papers: a "right of first review" provision and a "work in progress" provision.[126] A record prepared at the express direction of, and for presentation to, a governing body may be withheld from the public "until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first."[127] Similarly, a working paper or preliminary draft may be withheld "until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first."[128]

For public entities headed by a single individual, a working paper or preliminary draft may be withheld from the public "until a final draft is completed, or work is discontinued on the draft, but no final version has been prepared, whichever occurs first."[129]

A separate provision applies to the working papers of a higher education internal auditor and the compliance officer of the North Dakota University System. N.D.C.C. § 15-10-44.3 provides that the working papers of a higher education internal auditor or compliance officer are exempt.[130] Working papers may be made available for inspection at the discretion of the higher education internal

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[120] N.D.C.C. § 44-04-18(5). *See* N.D.A.G. 2007-O-01.
[121] N.D.C.C. § 44-04-18(4). *See* N.D.A.G. 2017-O-09.
[122] N.D.C.C. § 44-04-18(4).
[123] N.D.C.C. § 44-04-17.1(16).
[124] N.D.C.C. § 44-04-18(9), (10); *but see* N.D.A.G. 2015-O-08 (Disclosure of working papers and preliminary drafts can be delayed until work is discontinued on the draft or the draft is provided to a member of the governing body. However, the law specifically provides that disclosure of draft minutes may not be conditioned on the approval of the minutes by the governing body); N.D.A.G. 2004-O-07 (source documents that are complete in and of themselves are not considered a working paper or preliminary draft).
[125] N.D.A.G. 98-O-04.
[126] N.D.A.G. 2001-O-04.
[127] N.D.C.C. § 44-04-18(9). This provision does not apply to source documents that are collected on behalf of a governing body rather than prepared at the direction of the governing body. N.D.A.G. 2001-O-02; *see also* N.D.A.G. 2015-O-07; N.D.A.G. 2009-O-01.
[128] N.D.C.C. § 44-04-18(9).
[129] N.D.C.C. § 44-04-18(10); N.D.A.G. 2015-O-07.
[130] N.D.C.C. § 15-10-44.3(2) ("Working papers include records kept by a higher education internal auditor or compliance officer of the procedures applied, the tests performed, the information obtained, draft audit and compliance reports, and the pertinent conclusions reached in the engagement.").

auditor or compliance officer.[131] A draft audit or compliance report released to the governing body or management of the audited entity is confidential until the final report is issued or work on the engagement ceases.[132] The issued audit or compliance report is public information.[133] Working papers related to an issued audit or compliance report are public unless the information is otherwise confidential or exempt under state or federal law, or the higher education internal auditor or compliance officer declares all or a portion of the working papers as confidential.[134]

8. What can be Charged for Open Records?

A public entity may only charge those fees provided by law for copies of public records. A public entity may estimate the cost associated in fulfilling a request for records based on the legally allowable charges and can require payment based on the estimate before preparing or providing copies of the requested records.[135] The public entity may also withhold records pursuant to a request until such time as a requester provides payment for any outstanding balance for prior requests.[136] Finally, if the public entity has put in the work and has copies of requested records ready and available, the requestor cannot avoid paying for such records by now modifying the request.[137]

a. Fees for Locating and Providing Access to Records

Until 1999, a public entity could not charge a fee for locating and providing access to public records unless those fees were authorized by statute. As amended in 1999, N.D.C.C. § 44-04-18(2) currently provides in part: "[a]n entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records, including electronic records, if locating the records requires more than one hour. . . . If a public entity receives five or more requests from the same requester within seven days, the public entity may treat the requests as one request in computing the time it takes to locate and excise the records."[138] This provision authorizes a public entity to charge a fee for locating the records that a person has requested if the search takes longer than one hour,[139] but does not authorize an access fee once the records have been located. A public entity may not charge a fee for the time to prepare a new record that had not been requested and may not charge a fee for organizing, scanning, counting, or printing documents or for the time it takes to forward electronic records.[140] An access fee is authorized when a state-level public entity provides outside access to electronic records, except for access to another state-level public entity.[141]

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[131] N.D.C.C. § 15-10-44.3(3).
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] N.D.A.G. 2018-O-03; N.D.A.G. 2018-O-02; N.D.A.G. 2014-O-18; N.D.A.G. 2014-O-17.
[136] N.D.C.C. § 44-04-18(2).
[137] N.D.A.G. 2016-O-20.
[138] N.D.C.C. § 44-04-18(2). *See also* N.D.A.G. 2014-O-17 (multiple requests from the same requestor received within a short time frame all related to the same subject matter were treated as one request in computing the time it took to locate and redact the records).
[139] A public entity may charge $25 per hour, after the first hour for retrieving emails of certain city officials from emails of all other city employees with which they are intermingled. N.D.A.G. 2003-O-04.
[140] N.D.A.G. 2025-O-07; N.D.A.G. 2014-O-18; N.D.A.G. 2012-O-08; N.D.A.G. 2000-O-11.
[141] N.D.C.C. § 44-04-18(5).

b. Fees for Reviewing and Excising Closed or Confidential Information

Prior to 2005, a public entity could not charge a fee for the time it took the public entity to review the records and excise closed or confidential material from the records. As amended in 2005, N.D.C.C. § 44-04-18(2) provides, in part: "[a]n entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for excising confidential or closed material under 44-04-18.10 from the records, including electronic records."[142] If the public entity receives five or more requests from the same requester within seven days, the public entity may treat the requests as one request in computing the time it takes to locate and excise the records."[143]

c. Fees for Copying Records

Public entities may recover the costs incurred in providing copies of public records. Section 44-04-18(2), N.D.C.C. provides:

> A public entity may charge up to twenty-five cents per impression of a paper copy. As used in this section, "paper copy" means a one-sided or two-sided duplicated copy of a size not more than eight and one-half by fourteen inches [19.05 by 35.56 centimeters]. For any copy of a record that is not a paper copy as defined in this section, the public entity may charge a reasonable fee for making the copy. As used in this section, "reasonable fee" means the actual cost to the public entity of making the copy, including labor, materials, and equipment. The entity may charge for the actual cost of postage to mail a copy of a record. An entity may require payment before locating, redacting, making, or mailing the copy. . . . This subsection does not apply to copies of public records for which a different fee is specifically provided by law.[144]

Under this section, a public entity may charge its actual costs for making a copy of a record that cannot be copied on paper of a size not more than eight and one-half by fourteen inches, such as large maps, color photographs or computer discs.[145] As the last sentence in N.D.C.C. § 44-04-18(2) indicates, a public entity may charge a different fee for records if specifically authorized by another statute.[146]

d. Fees Associated with Electronic Records

The locating and reviewing and redacting charges authorized under open record laws when responding to a request for records apply to both paper and electronic copies of records.[147]

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[142] N.D.C.C. § 44-04-18(2); *see also* N.D.C.C. § 44-04-18(3) (if information technology resources are required, the public entity may charge the actual cost incurred by the technology resources, after the first hour).

[143] N.D.C.C. § 44-04-18(2); *see also* 2014-O-17 (multiple requests from the same requestor received within a short time frame all related to the same subject matter were treated as one request in computing the time it took to locate and redact the records); N.D.A.G. 2012-O-08 (time spent doing the ministerial task of duplicating the documents in order to conceal information cannot be computed as part of the time spent reviewing the records for confidential information).

[144] N.D.C.C. § 44-04-18(2). N.D.C.C. § 44-04-18 does not authorize a public entity to charge for the time it takes to print out records requested; the public entity may only charge the $.25 per page when making a paper copy. The $.25 per page copying cost covers the employee time associated with printing the document. N.D.A.G. 2014-O-18. In addition, even if multiple copies need to be printed for review or excising confidential or exempt information, a public entity may only charge the requester $.25 once for the copy the requestor ultimately receives. *See* N.D.A.G. 2005-O-05 (The document printed from the computer is the copy for which a person may be charged).

[145] N.D.A.G. 2001-O-06.

[146] N.D.A.G. 2018-O-01; N.D.A.G. 2000-L-94.

[147] N.D.C.C. § 44-04-18(1); N.D.A.G. 2011-O-12.

However, N.D.C.C. § 44-04-18 does not allow a public entity to charge for the time it takes to forward emails or "transfer" emails to a new folder.[148] In addition, N.D.C.C. § 44-04-18(4) provides:

> Access to an electronically stored record under this section, or a copy thereof, must be provided at the requester's option in either a printed document or through any other available medium. A computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file. Except as reasonably necessary to reveal the organization of data contained in an electronically stored record, a public entity is not required to provide an electronically stored record in a different structure, format, or organization.[149]

A copy of an electronically stored record must be provided at the requester's option in any available medium, including an electronic format.[150] If a thumb/jump driver is needed to transfer electronic records, such as audio and visual recordings, a requestor is responsible for paying for the thumb/jump drive.[151] Under N.D.C.C. § 44-04-18(4), if an electronic record exists, and a person makes a request for such a record in its electronic form, the public entity must provide an electronic copy to the requestor, and thereby the public entity may not charge the $.25 per paper copy under N.D.C.C. § 44-04-18(2).[152] However, the law allows a public entity to charge $.25 per page for a printed copy of an electronic record when this is the only method to remove closed or confidential information.[153] When it is necessary to print out the document to excise such information, the document printed from the computer is the copy for which the person may be charged and the person cannot be charged for multiple copies of the same record even if it is necessary to make additional copies during the process of redacting closed or confidential information.[154]

If a person makes a request for an electronic record but wants to receive such a copy in paper form, the public entity must provide the paper copy but may charge the $.25 per page authorized by N.D.C.C. § 44-04-18(2).[155]

Finally, the law provides that "if the nature or volume of the public records requested to be accessed or provided requires extensive use of information technology resources, the agency may charge no more than the actual cost incurred for the extensive use of information technology resources incurred by the public entity."[156] "Extensive use" is defined as taking information technology resources more than one hour to produce.[157]

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[148] N.D.A.G. 2025-O-07; N.D.A.G. 2014-O-18; N.D.A.G. 2012-O-08; N.D.A.G. 2011-O-12; N.D.A.G. 2006-O-13; N.D.A.G. 2005-O-05.

[149] N.D.C.C. § 44-04-18(4).

[150] N.D.A.G. 2008-O-19; N.D.A.G. 2008-O-18. If there is no structural, format, or organizational change required to transmit an electronic copy, the law does not allow the public entity to require the copies be paper copies, unless necessary to redact confidential or exempt information. N.D.A.G. 2008-O-29.

[151] N.D.A.G. 2015-O-16.

[152] N.D.A.G. 2011-O-12.

[153] N.D.C.C. § 44-04-18(4).

[154] N.D.A.G. 2014-O-18; N.D.A.G. 2005-O-05.

[155] However, if a public entity only has a paper copy of a public record, the public entity is not required to scan the paper copy, converting it into an electronic copy. N.D.A.G. 2014-O-18 (a public entity does not have to create or compile a record that does not exist and the entity does not have an obligation to reformat records in a physical form into an electronic form; the public entity may choose to do so, however, it may not charge for the time spent in scanning the records into electronic format).

[156] N.D.C.C. § 44-04-18(3).

[157] *Id.*; *see also* N.D.A.G. 2025-O-07 (discussing when a public entity may charge for extensive use of information technology resources).

9. Open Records and Copyright

Federal copyright protection comes into existence immediately upon the creation of an original work, even if the copyright has not been registered.[158] While copyright protection is not available for original works of the United States Government,[159] state and local government entities are not similarly precluded from claiming copyright protection in their original works.[160] Any use of a copyrighted record without the permission of the public entity, except for "fair use" as defined in the Copyright Act, is prohibited.[161] "A disclosure of a requested record under [the open records law] is not a waiver of any copyright held by the public entity in the requested record . . . ."[162]

10. How Is the Open Records Law Enforced?

a. Administrative Review

Any interested person may request an Attorney General's opinion to review an alleged violation of the open records law by any public entity other than the Legislative Assembly or any committee thereof.[163]

> 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 the notice required by section 44-04-20, must be made within ninety dates 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 made more than one request within the last thirty days or more than five requests for opinions in the last 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.[164]

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,

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[158] 17 U.S.C. § 102.
[159] 17 U.S.C. § 105.
[160] *See, e.g.*, *County of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179 (2nd Cir. 2001).
[161] 17 U.S.C. § 107.
[162] N.D.C.C. § 44-04-18(11).
[163] N.D.C.C. § 44-04-21.1(1).
[164] N.D.C.C. § 44-04-21.1(1).

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."[165] 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.[166]

b. Civil Action

In 1997, the Legislative Assembly authorized a civil action by any interested person against a public entity for violations of the open records law.[167] A complaint alleging a violation of the open records law must be accompanied by a dated, written request for the requested record. 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."[168] Damages may be assessed in the amount of $1,000 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.[169]

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.[170] 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.[171] 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.[172]

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[165] N.D.C.C. § 44-04-21.1(2).
[166] N.D.C.C. § 44-04-21.1(3).
[167] N.D.C.C. § 44-04-21.2(1).
[168] *Id.*
[169] N.D.C.C. § 44-04-21.2(2).
[170] N.D.C.C. § 44-04-21.2(3).
[171] *Id.*
[172] *Id.*

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.[173]

11. Examples of Records Generally Open to the Public

a. Minutes of Open Meetings

Public entities must take minutes of all meetings. Minutes are public records and are open to the public, even if not yet formally approved.[174] Minutes of the confidential or closed portion of a meeting are not required to be open.[175]

b. Personnel Records

Personnel records, including information regarding the salary and job performance of a public employee, are generally open to the public.[176] However, there is an exception to this general rule for "personal information" regarding a current or past public employee, or applicant for employment with a public entity.

> "[P]ersonal information" means a person's month and day of birth; home address; home telephone number or personal cell phone number; photograph; medical information; motor vehicle operator's identification number; public employee identification number; payroll deduction information; the name, address, phone number, and date of birth, of any dependent or emergency contact; any credit, debit, or electronic fund transfer card number; and any account number at a bank or other financial institution. Information regarding the type of leave taken by an employee is exempt, although the amount of leave taken or accrued, and the dates of the leave taken, is public record. Information regarding leave applied for but not yet taken is exempt until the leave is taken.[177]

Information other than that listed above, including information contained in a job application or resume submitted by a finalist for employment with a public entity, is open to the public, unless otherwise made exempt or confidential by law.[178]

In 2021, Legislative Assembly amended N.D.C.C. § 44-04-18.27,[179] which was enacted in 2017 to protect employment applications received by public entities.[180] The amendment changed the classification of these records from confidential to exempt. Under the current statute, "[t]he applications and any records related to the applications which contain information that could

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[173] N.D.C.C. §§ 44-04-21.3, 12.1-11-06.

[174] N.D.C.C. § 44-04-21(2); N.D.A.C. 2016-O-17; N.D.A.G. 2015-O-08; N.D.A.G. 2011-O-07.

[175] N.D.A.G. 98-O-25; N.D.A.G. 67-193.

[176] N.D.A.G. 2013-O-16; N.D.A.G. 2011-O-10; N.D.A.G. 2008-O-02; N.D.A.G. 2006-O-14; N.D.A.G. 2006-O-03.

[177] N.D.C.C. § 44-04-18.1(2), *Compare Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189 (N.D. 1988) (teacher's personnel file); *Forum Publ'g Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986) (job applications); *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572 (N.D. 1981) (personnel file of former chief of police); N.D.A.G. Letter to Rayl (Apr. 21, 1988). N.D.C.C. § 44-04-18.1(3) also provides an exception to this general rule – personnel records of public entities that are subject to open records law only because they are "supported by public funds" are not open records. N.D.A.G. 2013-O-16; N.D.A.G. 2006-O-04.

[178] *See* N.D.A.G. 2016-O-03; N.D.A.G. 98-F-11.

[179] 2021 N.D. Sess. Laws ch. 328, § 2.

[180] 2017 N.D. Sess. Laws ch. 311, § 1.

reasonably be used to identify an applicant are **exempt**."[181] However, public entities must designate three or more finalists from qualified applicants, and the applications and any other record related to the finalists are open to the public once the finalists are designated.[182] If the public entity "receives applications from fewer than three applicants who meet the minimum qualifications, the applications and records related to the applications are open to the public."[183] Public entities "may adopt policies regarding the release of exempt records under this section."[184]

c. Financial Records and Contracts of a Public Entity

Financial records of a public entity, including its checkbook, are generally open to the public.[185] However, financial account numbers, including any credit, debit, or electronic fund transfer card or account number, are not open records.[186] Contracts and settlements of lawsuits or claims against the entity are open also.[187]

d. Corporate Information

Nonfinancial corporate information contained in the annual reports filed with the Secretary of State is not confidential and is open to the public.[188] This information includes the name and address of a corporation, its registered agent, officers and board of directors, and a brief statement of the corporation's business.

e. Emails and Other Electronic Records

The definition of "record" in N.D.C.C. § 44-04-17.1(16) includes emails in the possession of employees of a public entity related to public business, regardless of whether the emails are stored at home, on a private computer, or sent/received from a personal email address.[189] The definition also includes text messages in the possession of employees of a public entity that relate to public business, regardless of whether the text messaging was sent or received by using a personal or private cell phone.[190]

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[181] N.D.C.C. § 44-04-18.27.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] N.D.A.G. 2014-O-07; N.D.A.G. 2009-O-08; N.D.A.G. 94-L-103.
[186] N.D.C.C. § 44-04-18.9.
[187] N.D.A.G. 94-L-90.
[188] *See* N.D.C.C. § 10-19.1-146.
[189] N.D.A.G. 2014-O-20 (emails, texts, or other recorded information containing public business on personal devices, such as cell phones or home computers, are subject to open records law); N.D.A.G. 2014-O-10 (emails were considered public record because they were in the possession of a public employee and regarded public business, even though the emails were sent from a "private" email address the public entity did not direct the employee to create) N.D.A.G. 2008-O-15 (copies of emails on the home computers of "agents" of a public entity regarding public business are subject to open record laws).
[190] N.D.A.G. 2014-O-20.

Exemptions from the Open Records Law

Records possessed by an entity subject to the open records law are presumptively open to the public during normal business hours. However, because the open records law does not apply if "otherwise specifically provided by law," public records need not be disclosed if they fall within a specific exemption from the open records law.[191]

> [B]ecause the open-records law provides that governmental records are to be open to the public "Except as otherwise specifically provided by law," an exception to the open-records law may not be implied. In order that a record may be excepted from the open-records law the Legislature must specifically address the status of that type of record -- e.g., statements that a certain type of record is confidential or that it is not open to the public.[192]

As a result, in contrast to the broad interpretation of the open records law, an exemption from the open records law must be firmly grounded in law rather than an implied, vague, or arguable exemption.[193]

1. Sources of Exemptions

Exemptions from the open records law must be "specifically provided by law." "Law" includes "federal statutes, applicable federal regulations, and state statutes."[194] The term "law" does not include contracts entered into by public entities; rather, it is the exclusive province of the Legislature to enact exceptions to the open records law.[195] Therefore, open records law cannot be limited by policy or contract.[196] A public entity may not close or make confidential a record through administrative rules. State law, however, delegates to some administrative agencies the authority to, by administrative rule, make certain confidential records available to the public.[197] Upon becoming effective, administrative rules adopted pursuant to N.D.C.C. ch. 28-32 "have the force and effect of law."[198]

As a general rule, when two public entities possess the same record, each entity possesses the record in its own capacity and must make its own decision on whether to disclose the record.[199] Most exceptions to the open records law are specific to the entity possessing the records, and do not apply to records which are also possessed by another public entity.[200] In 2005, however, an exception to the general rule was created to provide protection for secondary disclosure of confidential records. N.D.C.C. § 44-04-18.10 provides that "[c]onfidential records that are authorized by law to be disclosed to another entity continue to be confidential in the possession of the receiving entity, except as otherwise provided by law."[201]

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[191] Records not subject to the open records law are still public records. N.D.A.G. 94-L-52; N.D.A.G. 65-75.

[192] *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189, 191 (N.D. 1988) ("specific" and "implied" have opposite meanings), *cited with approval in Adams Cnty. Rec. v. Greater N.D. Ass'n*, 529 N.W.2d 830 (N.D. 1995).

[193] Marking something as "confidential" is of no legal significance absent a federal or state law expressly declaring the record to be confidential. N.D.A.G. 2005-O-16.

[194] 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).

[195] N.D.A.G. 2005-O-16; N.D.A.G. 2005-O-06; N.D.A.G. 2000-F-09.

[196] N.D.A.G. 2017-O-01.

[197] *See* N.D.C.C. §§ 23-07-20.1, 50-06-15.

[198] N.D.C.C. § 28-32-06.

[199] N.D.A.G. 2002-L-06; N.D.A.G. 98-L-73; N.D.A.G. 94-L-1.

[200] N.D.A.G. 2000-F-09.

[201] N.D.C.C. § 44-04-18.10(5).

The application of a statute making certain records confidential, or exempt may be waived by the party or parties for whose benefit the statute was passed.[202]

a. Effective Date of New Exemptions

A public entity's response to an open records request is not governed by the law in effect when the requested records were created, but rather by the law in effect on the date the entity is required to respond to the request.[203]

2. Types of Exemptions

There are three classes of public records under North Dakota law.[204] The first class consists of documents that are confidential. Disclosure of these documents is generally **prohibited**. The second class consists of documents that are subject to the open records law. Disclosure of these documents is generally **required**. A public entity generally has no discretion regarding disclosing records in either of these two classes. There is a third class of documents consisting of documents that are not confidential but are also not subject to the open records law and considered exempt or closed. Because disclosure of this class of documents is neither prohibited as confidential, nor required to be open, disclosure of these exempt documents by a public entity is **discretionary**. Whether disclosure is prohibited or merely not required will depend on the specific wording of the law excluding those records from the application of the open records law.

a. Confidential Records

The phrase "confidential records" means "all or part of a record . . . that is either expressly declared confidential or is prohibited from being open to the public."[205] Confidential records are characterized by a lack of discretion to disclose documents to the public, and the release of confidential records generally can be punished. The disclosure of confidential information is prohibited by N.D.C.C. § 12.1-13-01, which provides in part:

> A person is guilty of a class C felony if, in knowing violation of a statutory duty imposed on him as a public servant, he discloses any confidential information which he has acquired as a public servant.

Statutes declaring records to be confidential will often indicate that any release of the records is subject to the penalty in this section. However, this penalty would apply without such a reference unless otherwise provided by another statute.

Records need not be expressly declared confidential for their disclosure to be prohibited by N.D.C.C. § 12.1-13-01, which also provides, "'Confidential information' means information made available to the government under a governmental assurance of confidence as provided by statute." This definition "includes not only those documents which a statute specifically states are confidential, but also those which a statute provides cannot be disclosed or for which the Legislature has provided a penalty for disclosure."[206]

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[202] N.D.A.G. 99-L-30.
[203] N.D.A.G. 2002-L-32; N.D.A.G. 2001-O-12.
[204] *See* N.D.A.G. 94-L-194.
[205] N.D.C.C. § 44-04-17.1(3).
[206] N.D.A.G. 94-L-194.

b. Exempt Records

Questions regarding the open records law are generally discussed in terms of the public's right of access to information. Rarely discussed is an agency's discretion to voluntarily disclose to the public records that are not confidential but are exempt from the open records law. In this context, the phrase "exempt record" means "all or part of a record . . . 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."[207] There are few opinions of this office describing this discretion, but it should be "based upon the particular situation, the type of record, the interests served by release or nondisclosure of the document and any other relevant factors."[208]

> Disclosure of a document or information to one individual or one category of persons does not necessarily mean . . . that the document has become an open record which must be disclosed to all persons. For example, a determination could be made to disclose records only to those persons who were directly affected by them, or those individuals who were named within the records without opening the records to the general public. The administrator's best discretion should be used in each instance to determine whether a request for a record will be granted.[209]

If the public entity has not exercised its discretion to disclose all or part of an exempt record, the record is a "closed record."[210]

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 records law.

a. Temporary Exemptions

Some public records are exempt from the open records law for only a limited time. For example, criminal intelligence and investigative information is exempt only so long as the information is related to "active" intelligence gathering or investigations.[211] Similarly, the investigative records of the state fire marshal, fire departments, and rural fire protection districts are confidential until the investigation is closed or no longer active.[212]

There are public entities that, by law, must monitor and enforce compliance with the law or an order. The investigatory work product obtained, compiled, or prepared by a public entity gathered while doing so is exempt as long as the records are related to monitoring and enforcement activity conducted with a reasonable good-faith belief that it will lead to enforcement of the law or an order.[213]

Attorney work product is open to the public once litigation or adversarial administrative proceedings are completed, including the exhaustion of all appellate remedies, as long as no other

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[207] N.D.C.C. § 44-04-17.1(5).
[208] N.D.A.G. 94-L-194.
[209] *Id.*
[210] N.D.C.C. § 44-04-17.1(2).
[211] N.D.C.C. § 44-04-18.7.
[212] N.D.C.C. § 44-04-30. The state fire marshal was added to this list in 2021. *See* 2021 N.D. Sess. Laws ch. 328, § 6.
[213] N.D.C.C. § 44-04-19.1(3), (7). This exception applies to public entities charged by law with the duty to monitor and enforce some law or order. N.D.A.G. 2014-O-04.

exception applies; disclosure would not have an adverse fiscal effect on other pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings; or the attorney work product reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity.[214] Finally, bids received by a public entity are exempt until all bids have been received and opened by the public entity.[215] Proposals received by a public entity in response to a request for proposals are exempt until a notice of intent to award is issued.[216]

b. Open to Certain People or Entities

The open records law and its exemptions are not meant to interfere with government operations. Thus, even where records are declared confidential, they may be open to certain entities or people as provided by law. For example, confidential law enforcement records "of a child alleged or found to be delinquent or in need of services or protection may nevertheless be open to a juvenile court having the child before it in any proceeding and to the attorney for a party to that proceeding."[217] Likewise, confidential child abuse and neglect reports are available to law enforcement officials or other public officials who require such information to discharge their official duties.[218] Also, criminal justice agencies may disclose criminal history information to other criminal justice agencies, but only the Bureau of Criminal Investigation may disclose that information to a person or entity that is not a criminal justice agency.[219] Finally, a request from a party (or agent of a party) to litigation involving a public entity is subject to the rules of discovery.[220]

c. Open for Limited Purpose

In addition to restricting the entities or persons who may have access to public records, specific exemptions may allow access to public records only for certain purposes. A non-treating mental health professional would have access to confidential treatment records only if necessary to conduct an investigation and report as directed by a state's attorney regarding a petition for involuntary treatment or commitment for mental illness.[221] Confidential records relating to government operations are nevertheless available to the state auditor when necessary in conducting an audit.[222] Disclosure of confidential or exempt records may also be authorized or required for statistical purposes or research projects, although any identifying information contained in the records will generally be required to be kept confidential.[223] Finally, while the general public may have access to records of a public entity that is a party in a pending court action or adversarial administrative proceeding, the public entity's adversary in the action or proceeding would not have such access.[224]

d. Compilations and Source Documents

Some open records exemptions apply to records which are compilations of information from other records.[225] The Supreme Court has held that a law authorizing a specific fee for copies of a

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[214] N.D.C.C. § 44-04-19.1(8).
[215] N.D.C.C. § 44-04-18.4(6)(a).
[216] N.D.C.C. § 44-04-18.4(6)(b).
[217] N.D.C.C. § 27-20.2-23.
[218] N.D.C.C. § 50-25.1-11; N.D.A.G. 94-F-03; N.D.A.G. 88-12.
[219] N.D.C.C. § 12-60-16.6.
[220] N.D.C.C. § 44-04-18(6).
[221] N.D.A.G. 94-L-267.
[222] N.D.C.C. § 54-10-22.1. N.D.A.G. 95-L-1; N.D.A.G. 94-L-305.
[223] *See* N.D.A.G. 85-23; N.D.A.C. ch. 10-13-10; N.D.A.C. §§ 33-06-03-04 (communicable disease information); 75-01-02-01 (economic assistance recipients).
[224] N.D.C.C. § 44-04-18(6); N.D.A.G. 2002-O-05.
[225] *See, e.g.*, N.D.C.C. §§ 12-60-16.1(5) (definition of "criminal history record information"); 39-16-03 (motor vehicle operator abstracts); N.D.A.G. 2013-O-09.

compilation which exceeds the entity's actual cost of making the copy does not apply to copies of the source documents used to prepare that compilation. The source documents are instead subject to the copy fee allowed in N.D.C.C. § 44-04-18(2).[226] Similarly, the fact a compilation is a closed record does not authorize a public entity to deny a request for source documents which were used to prepare the compilation.[227]

4. Disclosure of Closed or Confidential Information

As discussed above, unauthorized, knowing disclosure of confidential records is generally a class C felony.[228] Whether to disclose exempt records is generally left to the discretion of the public entity. However, there may be circumstances under which a public entity is required or authorized to disclose confidential or closed records.

If not prohibited by federal law, a public entity may share confidential or closed records with any other public entity for the purpose of law enforcement or collection of debts owed to a public entity.[229] The recipient public entity may not use the records for other purposes and must otherwise maintain the closed or confidential nature of the records. This authority applies to governmental entities only and does not apply to nongovernmental organizations that are expending or supported by public funds. In addition, this authority does not apply if the statute making the records confidential or closed also explains the specific circumstances under which the records may be shared with other public entities if those circumstances are unique and not common to all confidential or closed records.[230]

Disclosure of confidential or closed information also may be required by a court. If a public entity receives a valid subpoena or other court order to produce closed records, the entity must comply with the subpoena or order unless disclosure under a court order is otherwise prohibited or limited by law.[231] A court order is required to compel disclosure of confidential information that is not privileged or otherwise protected by law from court-ordered disclosure. Upon request of the public entity, the court ordering disclosure shall also issue a protective order to preserve the confidentiality of the records. Any person who discloses confidential information under this section is immune from prosecution for breaching the confidentiality of the record.

A member of a governing body of a public entity has an inherent right to have access to all closed or confidential records of the public entity, unless the records involve litigation between the member and the governing body.[232]

5. Secondary Disclosures

If confidential records are authorized by law to be disclosed to another entity, the records continue to be confidential in the possession of the receiving entity, except as otherwise provided by law.[233] Sometimes,

[226] *Robot Aided Mfg., Inc. v. N.D. Dep't of Transp.*, 589 N.W.2d 187, 191 (N.D. 1999).
[227] N.D.A.G. 2013-O-09; N.D.A.G. 2001-O-02; N.D.A.G. 99-L-71.
[228] N.D.C.C. § 12.1-13-01.
[229] N.D.C.C. § 44-04-18.10(4).
[230] N.D.A.G. 98-F-28; N.D.A.G. 98-L-194.
[231] N.D.C.C. § 44-04-18.11.
[232] N.D.A.G. 99-L-115.
[233] N.D.C.C. § 44-04-18.10(5).

a law authorizing disclosure of closed[234] information to certain individuals or entities will restrict further disclosure of that information by the individuals or entities which receive the records.[235] However, because most exceptions to the open records law are specific to the entity possessing the records, secondary disclosure of closed records by a public entity which has received the records will not be prohibited, and may be required upon request under N.D.C.C. § 44-04-18, unless a specific exception to the open records law applies to the records in the possession of the public entity.[236]

6. Examples of Records Generally Not Open to the Public

a. Law Enforcement Records

This significant area of open records exemptions is discussed later in this manual in greater detail.

b. Attorney Work Product

The 1989 Legislature enacted a law declaring attorney work product exempt from the open records law. The purpose of the exemption is to conceal a public entity's attorney work product from its adversary, rather than to prevent public access to the work product.[237] To be exempt under this statute, attorney work product must (1) be prepared by the attorney or at the attorney's express direction; (2) reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency; and (3) be prepared exclusively for litigation or adversarial administrative proceedings, or in anticipation of reasonably predictable litigation or adversarial administrative proceedings, or for guidance on the legal risks, strengths, and weaknesses of an action of a public entity.[238] All three of these requirements must be met for attorney work product to be exempt under this statute.[239] Adversarial administrative proceedings include administrative proceedings where the administrative agency acts as a complainant, respondent, or decision maker in an adverse administrative proceeding.[240] An administrative agency is not limited to agencies of the state, but includes local governing bodies as well.[241]

The exemption for attorney work product protects the products of an attorney's thought process on legal issues posed by a pending or reasonably predictable court action or adversarial administrative proceeding. The types of records eligible for protection under the exemption are similar to those that may be protected as opinion work product under North Dakota Rule of Civil Procedure 26(b)(3).[242]

Attorney work product is not exempt under this section once litigation or adversarial administrative proceedings are completed, including the exhaustion of all appellate remedies, unless another

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[234] N.D.C.C. § 44-04-17.1(2) ("closed records" means all or part of an exempt records that a public entity in its discretion has not opened to the public).

[235] *See, e.g.,* N.D.C.C. § 44-04-18.10(4) and (5), N.D.C.C. ch. 23-01.3; N.D.C.C. § 44-04-24(5) (protecting security system plans and disaster and cybersecurity information); N.D.C.C. § 44-04-18.4(7) (records relating to emergency or disaster prevention, protection, mitigation, response, and recovery or cybersecurity planning, mitigation, or threat remain exempt after disclosure pursuant to N.D.C.C. § 44-04-18.10(5)).

[236] N.D.A.G. 2002-L-15.

[237] N.D.A.G. 2002-O-01.

[238] N.D.C.C. § 44-04-19.1(6).

[239] N.D.A.G. 2015-O-11; N.D.A.G. 2014-O-04; N.D.A.G. 2010-O-08; N.D.A.G. 2007-O-07; N.D.A.G. 2002-O-05; N.D.A.G. 92-F-04.

[240] N.D.C.C. § 44-04-19.1(4). The Attorney General's review of alleged violations of open record and meeting laws pursuant to N.D.C.C. § 44-04-21.1 is not considered an "adversarial administrative proceeding." N.D.A.G. 2015-O-01.

[241] *Edinger v. Governing Auth. of Stutsman Cnty. Corr. Ctr.*, 695 N.W.2d 447, 454 (N.D. 2005).

[242] N.D.A.G. 2002-O-05.

exception applies.[243] Attorney work product continues to be exempt if disclosure "would have an adverse fiscal effect on the conduct or settlement of other pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings;" or the attorney work product "reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity."[244] Attorney work product is not exempt if "specifically made public by the public entity receiving such work product"[245] or if the public entity waives the exemption by allowing its adversary in the litigation or proceeding to review the attorney work product.[246]

c. Trade Secrets, Proprietary, Commercial, and Financial Information

Like any other public record, records containing trade secrets, proprietary, commercial, or financial information are open to the public unless otherwise specifically provided by law. Thus, before the exemptions discussed below were adopted, public records containing trade secrets, proprietary, commercial, or financial information were open to the public.[247] The 1989 Legislature enacted a statute declaring certain information confidential.[248] This statute was substantially amended in 1993, and currently provides in part, "Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed."[249] The terms "trade secret," "proprietary," "commercial information" and "financial information" are defined by statute.[250] In addition to falling into a statutory definition, the record must also be "privileged" and not previously publicly disclosed in order to be considered confidential.[251] Records are "of a privileged nature" only if disclosure of the records is likely to 1) impair the [public entity's] ability to obtain necessary information in the future or 2) cause substantial harm to the competitive position of the [person or entity which provided or prepared the information].[252]

Information prepared by a public entity is not "of a privileged nature," and therefore is not confidential under this section, unless the public entity is in competition with another entity which offers similar goods or services.[253] Also, there can be no "competitive disadvantage" from disclosure if all competitors are required to provide the same information.[254]

Judicial interpretations of similar language in the federal Freedom of Information Act are helpful when determining whether records are "of a privileged nature" under N.D.C.C. § 44-04-18.4.[255] Applying these interpretations, the Attorney General has concluded that disclosure of contract

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[243] N.D.C.C. § 44-04-19.1(8).
[244] *Id.*
[245] N.D.C.C. § 44-04-19.1(1).
[246] N.D.A.G. 2002-O-01.
[247] N.D.A.G. 85-24.
[248] 1989 N.D. Sess. Laws ch. 542, § 1. *See N. States Power Co. v. N.D. Pub. Serv. Comm'n*, 502 N.W.2d 240 (N.D. 1993).
[249] N.D.C.C. § 44-04-18.4(1)
[250] N.D.C.C. § 44-04-18.4.
[251] N.D.C.C. § 44-04-18.4(1).
[252] N.D.A.G. 98-O-22, *citing* N.D.A.G. 98-L-77; N.D.A.G. 98-L-17; *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).
[253] N.D.A.G. 2017-O-01 (draft logos that could be used by contractor in the future were considered trade secret and proprietary information); N.D.A.G. 2014-O-02 (a customer list in possession of the North Dakota Mill and Elevator Association is confidential commercial information); N.D.A.G. 98-O-22.
[254] N.D.A.G. 98-L-77; *see also* N.D.A.G. 2002-O-08 (if the information is available through other resources, then it cannot be claimed that disclosure will cause a competitive harm).
[255] N.D.A.G. 94-L-194, *citing Miami Herald Publ'g Co. v. U.S. Small Business Admin.*, 670 F.2d 610 (5th Cir. 1982).

prices is part of doing business with the government and, as a matter of law, it does not cause a competitive injury to the contractor to disclose the contract prices.[256]

The plain language of the exemption in N.D.C.C. § 44-04-18.4(1) for financial information of a privileged nature applies not only to financial information of a business, but also to personal financial information such as a detailed breakdown of a person's income and medical expenses.[257] Disclosure of financial information of a person who is not in competition with another person or with a business cannot cause a competitive injury to that person. Thus, whether the information is "of a privileged nature" in such a situation and therefore confidential, depends on whether disclosure would impair the public entity's future ability to obtain such information.

d. Economic Development Records

Unless economic development records are confidential under N.D.C.C. § 44-04-18.4(1) or another statute, N.D.C.C. § 44-04-18.4(5) exempts from the open records law:

> Records and information pertaining to a prospective location of a business or industry, including the identity, nature, and location of the business or industry, when no previous public disclosure has been made by the business or industry of the interest or intent of the business or industry to locate in, relocate within, expand within this state, or partner with a public entity to conduct research or to license a discovery or innovation.

This exemption applies only until the business or industry discloses to the public whether it will locate, relocate, or expand within the state.[258]

This statute also exempts "[t]rade secrets and proprietary, commercial, or financial information received from a person that is interested in applying for or receiving financing, technical assistance, or other forms of business assistance."[259] This provision does not apply to the identity of the business or to records generated by the public entity itself, unless the record generated by the public entity contains protected information provided by the business.[260] There is also a specific statutory exemption from the open records law for records of the North Dakota Development Fund, Incorporated.[261]

Marketing strategies and other marketing information of a public entity engaged in economic development may be confidential as trade secrets under N.D.C.C. § 44-04-18.4.[262]

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[256] N.D.A.G. 98-L-17.
[257] N.D.A.G. 2019-O-12; N.D.A.G. 2000-L-107.
[258] N.D.A.G. 2005-O-06; 2000-O-07.
[259] N.D.C.C. § 44-04-18.4(5)(b). *See* N.D.A.G. 2019-O-12; N.D.A.G. 2005-O-06; N.D.A.G. 94-L-1.
[260] N.D.A.G. 2000-O-07.
[261] N.D.C.C. § 10-30.5-07; *see also* N.D.A.G. 95-L-253; N.D.A.G. Letter to Govig (Dec. 19, 1991).
[262] N.D.A.G. 2001-O-11.

e. Minutes and Recordings of Executive Sessions

The recording of an executive session is not an open record,[263] and continues to be closed to the public even if the underlying statutory basis for the executive session no longer applies.[264] In addition, to the extent that a public entity keeps minutes of an executive session, those minutes are treated the same as the recordings and are not open to the public. Nevertheless, a member of a governing body has a right to listen to the recording, and allowing a member access does not make the recording an open record.[265]

f. Personal Medical Health Records

There are several exemptions to the open records law for personal medical and health records possessed by public entities. Medical records obtained as a result of enrollment in the uniform group insurance plan are confidential.[266] Any record of a public employee's medical treatment or use of an employee assistance program is confidential.[267] Other medical information of public employees which has been provided in the course of employment with the state or a political subdivision is exempt.[268] Records of patients at a state college or university student health service or other university system medical center or clinic are confidential.[269] Individually identifiable health information obtained by a fire department or rural fire protection district is also confidential.[270] In 2021, the Legislative Assembly expanded protection for medical records or medical information.[271] "Unless otherwise provided by law, a medical record or a record containing medical information in the possession of a public entity is an exempt record."[272]

The broadest exemption for personal health information is located in N.D.C.C. ch. 23-01.3. Under this chapter, disclosure of "protected health information" in the possession of a "public health authority" is generally prohibited.[273] "Protected health information" is defined generally as any information which either identifies an individual or could be used to identify an individual, and which relates to the individual's physical or mental condition, health care, or payment for the provision of health care.[274] The definition of "public health authority" includes the State Department of Health, the local public health units, and any other governmental agency which is primarily responsible for public health matters and is primarily engaged in public health activities.[275]

g. Student Records

Student records at state higher education institutions are confidential under state law,[276] but the application of state law to records of elementary and secondary school students is limited. Federal law, however, imposes extensive restrictions on the disclosure of student records. As stated earlier

[263] N.D.C.C. § 44-04-19.2(5). "The recording may be disclosed upon majority vote of the governing body unless the executive session was required to be confidential."
[264] N.D.A.G. 98-O-25.
[265] N.D.A.G. 99-L-115.
[266] N.D.C.C. § 54-52.1-12; N.D.A.G. 97-F-06.
[267] N.D.C.C. § 44-04-18.1(1); N.D.A.G. 2006-O-03.
[268] N.D.C.C. § 44-04-18.1(2).
[269] N.D.C.C. § 44-04-18.16.
[270] N.D.C.C. § 44-04-30(3).
[271] 2021 N.D. Sess. Laws ch. 328, § 7.
[272] N.D.C.C. § 44-04-18.32.
[273] N.D.C.C. §§ 23-01.3-02, 23-01.3-08.
[274] N.D.C.C. § 23-01.3-01(7).
[275] N.D.C.C. § 23-01.3-01(8).
[276] N.D.C.C. § 15-10-17(7).

in this manual, exemptions from the open records law can be found in federal law as well as state law. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, "is a specific exception to the open records law."[277] This law provides that "education records" which contain "personally identifiable information" of a student must be confidential and may not be disclosed without prior written consent.[278] Before denying a request for records, educational institutions must perform a proper analysis to determine if the requested records can be redacted to such an extent that release would not violate FERPA; that is, that the student's "personally identifiable information" can be adequately redacted from the record.[279] An educational institute may also disclose "directory information," which is information that would generally not be considered harmful or an invasion of privacy if disclosed, and may be disclosed only after the public is given notice of the material designated by the school as directory information.[280] "A record related to an individual's application for admission to an institution of higher education under the administration of the state board of higher education is exempt, except as otherwise provided by law."[281]

The phrase "education records" under FERPA includes a non-academic record of a student which is included in the student's permanent file.[282] However, the phrase "education records" under FERPA does not include a letter to a school district from a parent of a child based on the parent's personal observations, even if the parent is also a school district employee.[283] Additionally, a student's disciplinary records may be released if "personally identifiable information" is adequately removed.[284] This exemption from the open records law for "education records" is also an exemption from the open meetings law.[285]

A school may create or designate a "law enforcement unit."[286] Records of a law enforcement unit regarding a student are confidential but may be released to the juvenile courts and law enforcement agencies, as well as to the student's parents or guardian.[287]

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[277] N.D.A.G. 98-L-51.

[278] 20 U.S.C. § 1232g(b). "Personally identifiable information" is defined by 20 U.S.C. § 1232g. N.D.A.G. 94-F-28. "For purposes of reviewing records under [FERPA], or any other federal privacy law, the assistant or special assistant attorney general is considered a state educational official authorized to access student records." N.D.C.C. § 54-12-08(4). The law does not require an educational institution to attempt to obtain consent to release education records under an open records request. N.D.A.G. 2014-O-14.

[279] N.D.A.G. 2014-O-14 (it was a violation of open record law when the educational institution denied a request for records pursuant to FERPA without first performing an analysis on whether "personally identifiable information" could be adequately redacted from records in compliance with FERPA); N.D.A.G. 2013-O-08; N.D.A.G. 2008-O-27. *See also* 34 C.F.R. 99.31(b)(1) (Under FERPA, "an educational agency . . . may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.").

[280] N.D.A.G. 2000-O-04; N.D.A.G. Letter to Manbeck (Mar. 13, 1990); N.D.A.G. 81-130.

[281] N.D.C.C. § 44-04-18.34.

[282] N.D.A.G. 2000-O-04.

[283] N.D.A.G. 2000-O-06.

[284] N.D.A.G. 2013-O-08; N.D.A.G. 2008-O-27; N.D.A.G. 2000-O-04.

[285] N.D.C.C. § 44-04-19.2(1).

[286] N.D.C.C. § 15.1-19-14; 34 C.F.R. § 99.8 (definition of "law enforcement unit").

[287] N.D.C.C. § 15.1-19-14.

h. Reports of Child Abuse or Neglect

Reports of child abuse or neglect made under N.D.C.C. ch. 50-25.1 generally are confidential.[288] Any person who permits or encourages the unauthorized disclosure of these reports is guilty of a class B misdemeanor.[289] However, disclosure of these reports may be made to public officials who require the information in connection with their official duties, including federal officials.[290] In addition, "information reflecting the disposition of reports of institutional child abuse or neglect" must be made available to the public, but must protect the identity of persons reporting, the children, and parents of the children involved.[291]

i. Disease Control Records

N.D.C.C. § 23-07-20.1 provides:

> To protect the integrity of disease control records, to ensure their proper use, and to ensure efficient and proper administration of the department's disease control function, it is unlawful for any person to permit inspection of or to disclose information contained in disease control records, including results of laboratory tests, or to copy or issue a copy of all or part of any such record except as authorized by rules.[292]

A person who violates this section is guilty of an infraction.[293]

j. Motor Vehicle Records

Until August 1, 1997, most driver license and motor vehicle information was open to the public, although photographs were not.[294] The 2001 Legislative Assembly enacted legislation prohibiting release of "personal information" in a motor vehicle record to the general public unless expressly authorized by the person to whom the information pertains.[295] "'Personal information' means information that identifies a person, including an individual's photograph or computerized image, social security number, driver identification number, name, address, telephone number, and medical or disability information."[296] A driver's license number may not be based on the driver's social security number.[297]

k. State Agency Risk Management and Loss Control Records

The following records regarding a specific pending or reasonably predictable claim against the state or a state employee are privileged and exempt: records relating to the funds or liability reserves of the risk management fund established for the purpose of satisfying the claim, incident reports,

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[288] N.D.C.C. § 50-25.1-11; N.D.A.G. 88-04.
[289] N.D.C.C. § 50-25.1-14.
[290] N.D.A.G. 94-F-03.
[291] N.D.C.C. § 50-25.1-04.1; N.D.A.G. 94-F-12.
[292] N.D.C.C. § 23-07-20.1; *see also* N.D.A.C. §§ 33-06-01-01; 33-06-05.5-01.
[293] N.D.C.C. § 23-07-21(1).
[294] N.D.C.C. § 39-06-14(4) (Photographs).
[295] N.D.C.C. § 39-33-05. *See also* 2013-L-01 (difference between a "motor vehicle record" under N.D.C.C. ch. 39-33 and an "accident report" under N.D.C.C. § 39-08-13).
[296] N.D.C.C. § 39-33-01(8).
[297] N.D.C.C. § 39-06-14(3).

investigation reports, and other risk management fund records of the claim.[298] Discretion to disclose these exempt records lies with the Office of Management and Budget, which shall disclose the records when disclosure will not prejudice any outstanding or reasonably predictable claim, all civil litigation or adversarial administrative proceedings regarding the claim are completed, and the applicable statute of limitations for a reasonably predictable claim has expired.[299] Internal agency loss control committees, including the risk management motor vehicle crash review board,[300] are recognized by state law and therefore should be considered public entities,[301] but records of these committees pertaining to the risk management records described in this paragraph are exempt.[302]

l. Multistate Investigations and Litigation

Records acquired by the attorney general's office from a governmental agency, or a nonpublic entity are exempt if the records are necessary to monitor or enforce compliance with a law or order or to further a civil investigation or litigation by the state, considered confidential or privileged by the provider of the records, and the privilege or confidentiality has not been waived.[303]

m. Lists of Minors

Any record that is a compilation of minor's names, addresses, phone numbers, or any combination of that information is exempt.[304]

n. Computer Programs and Computer Passwords

Computer programs contracted for, developed by, or acquired by a public entity and for which the public entity has acquired a license, copyright or patent are exempt.[305] A public entity may enter into agreements for the sale, licensing and distribution of its licensed, patented, or copyrighted computer programs.[306] A state agency, institution, department, or board needs approval from the governor to enter into such agreements.[307] The state's interest in the computer software may be protected against improper or unlawful use or infringement, including by taking legal action and collecting sums due for the licensing or sale of the computer program.[308]

Computer passwords, security codes, combinations, or security-related plans used to protect electronic information or prevent access to computer and other electronic security information of a public entity are confidential.[309]

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[298] N.D.C.C. § 32-12.2-11; N.D.A.G. 2012-O-09; N.D.A.G. 2010-O-08; *but see* N.D.A.G. 2008-O-05; N.D.A.G. 2008-O-04.
[299] N.D.A.G. 2012-O-09; N.D.A.G. 2010-O-08.
[300] N.D.C.C. § 32-12.2-14; 2023 N.D. Sess. Laws ch. 300, § 2 (amending "accident crash review board" to "crash review board").
[301] N.D.C.C. § 44-04-17.1(13)(a).
[302] N.D.C.C. § 32-12.2-12. These exceptions are discussed in detail in the State Risk Management Manual.
[303] N.D.C.C. § 44-04-18.12.
[304] N.D.C.C. § 44-04-18.13. *See also* N.D.C.C. § 15.1-13-37 (Information obtained by the education standards and practices board, which could reasonably identify a child is also exempt from N.D.C.C. § 44-04-18).
[305] N.D.C.C. § 44-04-18.5.
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] N.D.C.C. § 44-04-27.

o. Financial Account Numbers

Any bank account or credit card number used by a public entity or official for making deposits, transfers, or payments is exempt.[310]

p. Personal Information of Licensed Professionals

The exemption for "personal information" of public employees includes personal information maintained by an occupational or professional licensing board of any "individual who has applied for, holds, or has held in the past an occupational or professional license, certificate, credential, permit, or registration issued by a state occupational or professional board, association, agency, or commission."[311]

q. Consumer Complaint Information

Personal and financial information of a person who submits a consumer complaint to a state agency, or a person on whose behalf a complaint is submitted, is exempt.[312]

> For purposes of this section, "personal and financial information" means the home address, home telephone number, social security number, consumer report, and credit, debit, or electronic fund transfer card number of the complainant and any person on whose behalf the complaint is made, and any account number of a business or individual at a bank, brokerage, or other financial institution.[313]

This exception does not apply to records regarding the nature of a consumer complaint, the name of the complainant or person on whose behalf a complaint is made, and the address and telephone number of the business that is the subject of the complaint.[314]

r. Inmate Records

A correctional facility is not considered a "law enforcement" or "criminal justice" agency for purposes of the open records exceptions for criminal investigative or intelligence information.[315] Certain inmate records maintained by correctional facilities and the Department of Corrections and Rehabilitation (DOCR) are confidential or exempt from disclosure. Medical, psychological, and treatment records of inmates are confidential and may be disclosed only as authorized by law.[316] Certain case history records maintained by the DOCR are exempt.[317] Institutional discipline, conduct, and protective management records of sentenced inmates are exempt, while those records for all other inmates are confidential and may be disclosed only as authorized by law.[318]

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[310] N.D.C.C. § 44-04-18.9.

[311] N.D.C.C. § 44-04-18.1(4). "Personal information" includes a person's home address, home phone number or personal cell phone number, photograph, medical information, motor vehicle operator's identification number; employee identification number, and certain dependent information, under N.D.C.C. § 44-04-18.1(2).

[312] N.D.C.C. § 44-04-18.17.

[313] *Id.*

[314] *Id.*

[316] N.D.C.C. §§ 12-44.1-28, 12-47-36.

[316] N.D.C.C. §§ 12-44.1-28, 12-47-36.

[317] N.D.C.C. § 12-47-36(1).

[318] N.D.C.C. § 12-44.1-28(5)-(6); *see also* N.D.A.G. 2026-O-10.

Records of the DOCR or a local jail that identify an inmate and the inmate's location, convictions, and projected release dates are open, except for inmates under protective management.[319] Whether records of federal inmates at state or local facilities are open to the public depends on the application of federal law and may be determined only on a case-by-case basis.[320]

Files and records of the Division of Juvenile Services (DJS) relating to a juvenile committed to the division are confidential and may be disclosed only as authorized by law.[321] Law enforcement and correctional facilities records and files of a child alleged or found to be delinquent or in need of services or protection are not open to the public except as provided by law.[322]

s. Legislative Records and Information

The 1989 Legislature declared certain legislative records and information exempt from the open records law. These are records of a purely personal and private nature, a record that is legislative council work product or is legislative council-client communication, and records that reveal the content of communications between a legislator and any person and a record of telephone usage.[323] Records revealing the content of communication between a member of the Legislative Assembly and any person is exempt in the possession of the Legislative Assembly or any other public officer or employee.[324]

If Legislative Council makes a public records request on behalf of a member of the Legislative Assembly, the written or digital record of such a request, including information on the identity of the requester, is considered a public record, and must be maintained by Legislative Council.[325]

t. Bank of North Dakota Customer Records

Most information of customers at the Bank of North Dakota is confidential.[326] However, the name of an agricultural or commercial borrower of the Bank of North Dakota and the amount of financing provided to the borrower are open to the public upon request to the Industrial Commission after the loan has closed.[327]

u. Social Security Numbers

Social security numbers in the possession of a public entity are confidential.[328] They can be released as authorized by state or federal law, for purposes of participating in retirement or other employment benefits programs, or if authorized by the individual to whom the social security number is assigned.[329] Public entities may release social security numbers to its agents, employees,

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[319] N.D.C.C. §§ 12-44.1-28, 12-47-36.
[320] N.D.A.G. 2000-F-09.
[321] N.D.C.C. § 27-21-12.
[322] N.D.C.C. § 27-20.2-23.
[323] N.D.C.C. § 44-04-18.6. However, telephone records are available to governmental entities to determine the proper use of telephone services.
[324] N.D.C.C. § 44-04-18.6 (2).
[325] N.D.C.C. § 44-04-18.26.
[326] N.D.C.C. § 6-09-35. *See also* N.D.C.C. ch. 6-08.1; N.D.A.G. 2011-O-09; N.D.A.G. 2004-O-01.
[327] N.D.C.C. § 6-08.1-02(7); N.D.A.G. 2001-F-10.
[328] N.D.C.C. § 44-04-28.
[329] *Id*.

or contractors if such disclosure is necessary to perform its duties.[330] The numbers must remain confidential in the hands of the agents, employees, or contractors.[331]

v. Records Regarding Security of a Public Entity, Public Officials, and the Public

Certain records regarding security of public entities are exempt or confidential due to concerns that the release of this information would put the security of public buildings, public officials, or the public at risk.

Security system plans and records regarding disaster mitigation, preparation, response, vulnerability, or recovery or for cybersecurity planning, mitigation, or threat, kept by a public entity are exempt from the open records law.[332] This includes a wide range of records relating directly to the physical and electronic security of a public facility or critical infrastructure of a public entity, including threat response plans, cybersecurity plans, and emergency evacuation plans.[333] This information is protected even if disclosed to another public entity.[334] Not only are the plans protected, but the portions of the records, information, surveys, communications, and consultations used to produce plans relating to protecting the public or public officials are also exempt.[335] Security related plans used to protect electronic information or to prevent access to computer or telecommunications networks of a public entity are confidential.[336]

Records of fire departments and fire protection districts such as emergency response standard operating procedures, pre-fire action plans, and infrastructure planes are exempt.[337]

w. Autopsy Images

An autopsy photograph or other visual image or video or audio recording of an autopsy is confidential and may be disclosed in accordance with N.D.C.C. § 23-01-05.5.[338] Provided certain statutory requirements are met, an autopsy image may be viewed or disclosed by a prosecutor or criminal justice agency for purposes of an investigation or prosecution; by a medical examiner, coroner, or physician for teaching or training purposes; to the decedents' spouse, adult child, or parent; or pursuant to court order in accordance with N.D.C.C. § 44-04-18.11.[339] Consult N.D.C.C. § 23-01-05.5 for more information on the specific circumstances in which autopsy images may be disclosed. An autopsy report is confidential and may only be disclosed in accordance with N.D.C.C. § 44-04-18.11 and N.D.C.C. § 23-01-05.5(5)-(6).[340] The report of death[341] becomes a public record

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[330] N.D.C.C. § 44-04-28(2)(c).
[331] *Id*.
[332] N.D.C.C. § 44-04-24; N.D.C.C. § 44-04-18.4(5).
[333] N.D.C.C. § 44-04-24; N.D.C.C. § 44-04-18.4(5). *See* N.D.A.G. 2008-O-03 (surveillance video from security cameras exempt); *see also* N.D.C.C. § 62.1-02-14(4) (this includes a school's armed first responder program).
[334] N.D.C.C. § 44-04-24(2)(b)(5); N.D.C.C. § 44-04-18.10(6).
[335] N.D.C.C. § 44-04-25.
[336] N.D.C.C. § 44-04-27.
[337] N.D.C.C. § 44-04-30.
[338] N.D.C.C. § 44-04-18.18.
[339] N.D.C.C. § 23-01-05.5(7).
[340] N.D.C.C. § 23-01-05.5(4). Working papers relating to a final autopsy report may be disclosed in accordance with N.D.C.C. § 44-04-18.11 and N.D.C.C. § 23-01-05.5(5). Notes created by the state forensic examiner or the examiner's designee during an investigation into the cause and manner of death are confidential records under N.D.C.C. § 23-01-05.5(9).
[341] The report of death is the face page of the autopsy report that identifies the decedent and states the cause of death. N.D.C.C. § 23-01-05.5(1)(c).

eight days after it is finalized.[342] However, the report of death may be withheld if it is determined by the appropriate investigating agency to be active criminal intelligence and investigative information, as defined by N.D.C.C. § 44-04-18.7.[343]

x. Records of Individuals Receiving Economic Assistance

Individually identifiable information, including, but not limited to a person's name, address, telephone number, fax number, email address, which is submitted to the Department of Health and Human Services for the purpose of applying for or receiving assistance or services administered or supervised by the department is confidential.[344]

Applications, income or eligibility verification, assessments, or other personal, medical, or financial data provided by persons applying for or receiving economic assistance from programs administered under the division of community services or a community action agency are exempt.[345]

y. Internal Investigations

If a public entity receives a complaint against it or a public employee for misconduct, and initiates an internal investigation, records relating to the investigation are exempt until the investigation is closed or seventy-five days have passed from the date of the complaint.[346]

z. Records involving Negotiation, Contracts, and Settlement Agreements

Records revealing a public entity's negotiation strategy and instruction regarding pending claims, litigation, adversarial administrative proceedings, or contracts, if revealing the record would have an adverse fiscal effect on the public entity, are exempt.[347] Drafts of contracts or agreements subject to negotiations are exempt if release would have an adverse fiscal effect.[348]

Settlement agreements are exempt until they are fully executed and accepted by all concerned parties.[349] If a public entity participates in multiple settlement agreements with multiple parties regarding the same incident or undertaking, the agreements are exempt until all settlement agreements are fully executed by all parties.[350]

aa. University Records

"University research records," as defined by N.D.C.C. § 44-04-18.4(8) are exempt provided the information has not been previously publicly released, published, or patented. "Personally

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[342] N.D.C.C. § 23-01-05.5. The decedent's next of kin can request the report of death when it is finalized by providing contact information to state forensic examiner or the examiner's designee.
[343] N.D.A.G. 2019-O-01.
[344] N.D.C.C. § 50-06-15(3).
[345] N.D.C.C. § 44-04-18.19.
[346] N.D.C.C. § 44-04-18.1(6).
[347] N.D.C.C. § 44-04-19.1(9). The pending claim, litigation, adversarial administrative proceeding, or contract must currently involve negotiations or which negotiation is reasonably likely to occur in the immediate future.
[348] *Id.*
[349] N.D.C.C. § 44-04-19.1(11).
[350] *Id.*

identifiable information," as defined by N.D.C.C. § 44-04-18.4(9) of individuals participating in a human research study or project by a university is confidential. Finally, any records which contain personally identifiable information about a party to a Title IX compliant is an exempt record.[351]

bb. Images of Fire Victims

Images "of a victim of a fire" are exempt records.[352]

cc. Medicaid Fraud Control Unit Investigations

Active investigation records of the Medicaid Fraud Control Unit are exempt "unless the investigation is closed and not referred for further investigation or adjudication."[353]

dd. Department of Corrections and Rehabilitations Internal Investigations

Department of Corrections and Rehabilitations internal investigation records that could "reasonably . . . identify victims, witnesses, employees providing investigative information, or individuals providing information as correctional confidential informants" that disclosure of would cause "a credible threat of violence or other harm" are exempt.[354]

ee. Ground Water Monitoring Participants

The names and addresses of landowners and operators who participate in a pesticide ground water monitoring program are exempt from the public disclosure requirements of N.D.C.C. § 44-04-18 and section 6 of article XI of the North Dakota Constitution.[355] This does not apply to records concerning ground water monitoring wells installed or required to be installed by a state agency.[356]

ff. Water Resource Boards

The information provided to a board of a water resource district under N.D.C.C. § 61-32-03.3 is an exempt record under N.D.C.C. § 44-04-18.[357]

gg. Sensitive Images

"Unless otherwise provided by law, a sensitive image as defined by section 44-04-17.1 is an exempt record."[358] A "sensitive image" is defined as "an image depicting an exposed intimate part, gruesome injury, deceased individual, or a minor."[359]

hh. Active Litigation Records

In 2021, the Legislative Assembly made active litigation records exempt from disclosure.[360] "'[A]ctive litigation records' means records obtained, compiled, or prepared by a public entity or the attorney representing a public entity for the purpose of litigation unless the records already have been filed

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[351] N.D.C.C. § 44-04-18.28.
[352] N.D.C.C. § 44-04-30(4).
[353] N.D.C.C. § 50-24.8-12(5).
[354] N.D.C.C. § 54-23.3-07.1.
[355] N.D.C.C. § 23.1-11-08.
[356] *Id.*
[357] N.D.C.C. § 61-32-03.3(8); *see also* N.D.C.C. § 61-32-03.1(3)(d) (providing that certain detailed drawings submitted with subsurface water management permit applications are exempt records)
[358] N.D.C.C. § 44-04-18.7(12).
[359] N.D.C.C. § 44-04-17.1(17).
[360] 2021 N.D. Sess. Laws ch. 328, § 4.

publicly or the litigation is completed."[361] For the exemption to apply, the public entity must demonstrate that the specific records were prepared for the purpose of litigation.[362] A vague or speculative assertion of future litigation is insufficient to establish that records qualify as active litigation records.[363]

[361] N.D.C.C. § 44-04-19.1(12).
[362] N.D.A.G. 2025-O-21 (explaining that a claim file did not become an active litigation record after a requester stated they were "moving forward with litigation" because the file was not created for the purpose of litigation).
[363] *Id.*

Law Enforcement Records

Some of the most expansive exemptions from the open records law involve law enforcement records. Law enforcement agencies are subject to the open records law, and records of these agencies are not automatically excluded from the application of the open records law.[364] Instead, the general presumption that public records are open applies to law enforcement records and a specific exemption from the law is required.[365] There are, however, numerous statutory exemptions, some of which are discussed below, for law enforcement records that are open to the public.

1. Law Enforcement Records of a Child

A broad law enforcement exemption from the open records law is found in N.D.C.C. § 27-20.2-23:

> 1. Unless a charge of delinquency is transferred for criminal prosecution under section 27-20.4-21, the interest of national security requires, or the court otherwise orders in the interest of the child, the law enforcement and correctional facility records and files of a child alleged or found to be delinquent or in need of services or protection are not open to public inspection; but inspection of these records and files is permitted by:
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> a. A juvenile court having the child before it in any proceeding;
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> b. Counsel for a party to the proceeding;
>
> c. The officers of public institutions or agencies to whom the child is or may be committed;
>
> d. Law enforcement officers of other jurisdictions when necessary for the discharge of their official duties;
>
> e. A court in which the child is convicted of a criminal offense for the purpose of a presentence report or other dispositional proceeding, or by officials of correctional facilities to which the child is detained or committed, or by the parole board, the governor, or the pardon advisory board, if one has been appointed, in considering the child's parole or discharge or in exercising supervision over the child;
>
> f. The professional staff of the uniform crime victims compensation program when necessary for the discharge of its duties pursuant to chapter 54-23.4; and

[364] N.D.A.G. 79-201. This opinion was limited to "law enforcement" types of records that deal specifically with the investigation and detection of crime. Other records regarding the general administration of law enforcement agencies were unaffected by the opinion and continued to be open to the public. *See* N.D.A.G. 81-05 (job applications).

[365] N.D.A.G. Letter to Rudnick (June 16, 1992); N.D.A.G. Letter to Alexander (Nov. 14, 1985); N.D.A.G. Letter to Neugebauer (Jan. 31, 1983).

g. A superintendent, assistant superintendent, principal, or designee of the school in which the child is currently enrolled or of a school in which the child wishes to enroll.

2. Notwithstanding that law enforcement records and files of a child alleged or found to be delinquent, or in need of services or protection are not open to public inspection, this section does not limit the release of general information that does not identify the identity of the child.

This section applies only to records held by law enforcement agencies, not school records.[366] "The lack of an ongoing investigation is not relevant to the statutory requirement that the records not be disclosed to the public."[367] Rather, this exemption applies regardless of whether a record is active or inactive. As amended in 1995, this section authorizes the release of general information regarding a crime so long as the child whom the records concern is not identified. However, identifying information of a juvenile may be released for the purpose of apprehending a juvenile "who is alleged to have committed a delinquent act involving actual or threat of serious bodily injury which would constitute a felony if committed by an adult or who has escaped or left without authorization from a secure detention facility."[368] Because counsel for a party to the proceeding has access to these records, this section also does not limit the information available for discovery in that proceeding.[369] Sharing this information is also permitted between attorneys in the same county state's attorney's office.[370]

This section, as amended in 1997, is limited to files of children alleged or found to be delinquent, unruly, or deprived, and does not apply to all children or to files of other individuals that simply mention or concern a child.[371] A record is not confidential under this section unless it has a connection with a charge or finding that a child is in need of protection or service, or delinquent.[372]

Other statutes provide additional protection to child witnesses or victims of crime:

> In order to protect the child from possible trauma resulting from publicity, the name of the child victim or child witness of a crime, except as specified in subsection 2, and identifying biographical information may not appear on the indictment or any other public record. Instead, a Jane Doe or Joe Doe designation must appear in all public records. Sealed confidential records containing the child's name and necessary biographical information must be kept in order to ensure that no defendant is charged twice.[373]

This protection does not apply to the name and identifying biographical information of a child victim or child witness of a criminal offense under title 39 or an equivalent ordinance, or to a child victim of a fire.[374]

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[366] N.D.A.G. 95-L-181.
[367] N.D.A.G. Letter to Larson (June 23, 1989).
[368] N.D.C.C. § 27-20.2-22.
[369] *See* N.D.R. Crim. P. 16.
[370] N.D.A.G. 99-L-126.
[371] *See* 1997 N.D. Sess. Laws ch. 138, § 3.
[372] N.D.A.G. 2002-L-19; N.D.A.G. 2000-L-4. *See* 2021 N.D. Sess. Laws ch. 245, § 22 (replacing the terms "unruly" and "deprived" with "in need of services" or "in need of protection.").
[373] N.D.C.C. § 12.1-35-03(1).
[374] N.D.C.C. § 12.1-35-03(3); *see* N.D.A.G. 97-O-01 (concluding that N.D.C.C. § 12.1-35-03 did not exempt the names of juveniles involved in a motor vehicle accident where the offenses involved were under Title 39).

"Interviews and statements of child victims or child witnesses obtained during an investigation of a crime of a violent or sexual nature are exempt."[375]

In any criminal proceeding in which the defendant is charged with a violation of chapter 12.1-20 involving a child, the court, upon the motion of the prosecuting attorney, shall conduct a hearing to determine whether the testimony of and relating to a child may be closed to the public in order to protect the child's reputation.[376] Pursuant to N.D.C.C. § 12.1-35-05.2, the court must consider several criteria before closing the proceedings.

2. Criminal Intelligence and Investigative Information

The policy discussed in the Attorney General's 1979 opinion that weighed against the public's access to public information was the need for efficient operation of law enforcement agencies in the investigation and detection of crime. This policy is now preserved by the open records exemption in N.D.C.C. § 44-04-18.7:

1. Active criminal intelligence information and active criminal investigative information are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota. A criminal justice agency shall maintain a list of all files containing active criminal intelligence and investigative information which have been in existence for more than one year. With respect to each file, the list must contain the file's number or other identifying characteristic and the date the file was established. The list required under this subsection is subject to section 44-04-18. Personal information of any person contained in an active or nonactive file is an exempt record as defined in subsection 5 of section 44-04-17.1.

2. "Criminal intelligence and investigative information" does not include:

    a. Arrestee description, including name, date of birth, address, race, sex, physical description, and occupation of arrestee.

    b. Facts concerning the arrest, including the cause of arrest and the name of the arresting officer.

    c. Conviction information, including the name of any person convicted of a criminal offense.

    d. Disposition of all warrants, including orders signed by a judge of any court commanding a law enforcement officer to arrest a particular person.

    e. A chronological list of incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred.

[375] N.D.C.C. § 12.1-35-03(2).
[376] N.D.C.C. § 12.1-35-05.2.

f. A crime summary, including a departmental summary of crimes reported and public calls for service by classification, nature, and number.

g. Radio log, including a chronological listing of the calls dispatched.

h. General registers, including jail booking information.

i. Arrestee photograph if release will not adversely affect a criminal investigation.

3. “Criminal intelligence information” means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity. Criminal intelligence information must be considered "active" as long as it is related to intelligence gathering conducted with a reasonable good-faith belief it will lead to detection of ongoing or reasonably anticipated criminal activities. Criminal intelligence information also includes training materials and information obtained by a criminal justice agency regarding prospective criminal activities which impact officer safety until the information is publicly disclosed.

4. “Criminal investigative information” means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. Criminal investigative information must be considered “active” as long as it is related to an ongoing investigation that is continuing with a reasonable good-faith anticipation of securing an arrest or prosecution in the foreseeable future.

5. “Criminal justice agency” means any law enforcement agency or prosecutor. The term also includes any other unit of government charged by law with criminal law enforcement duties or having custody of criminal intelligence or investigative information for the purpose of assisting law enforcement agencies in the conduct of active criminal investigations or prosecutions.

6. “Personal information” means a person’s medical records or medical information obtained from the medical records; motor vehicle operator’s identification number; social security number; any credit, debit, or electronic fund transfer card number; month and date of birth, height, weight, home street address, home telephone number or personal cell phone number; and any financial account numbers.

7. A computerized index created by a criminal justice agency of names included in criminal files, whether active or inactive, is an exempt record.

8. Crime scene images of a victim of a homicide or sex crime or any image of a minor victim of any crime is an exempt record as defined in subsection 5 of section 44-04-17.1.

9. An image taken with a body camera or similar device and which is taken in a private place is an exempt record.[377]

10. An image taken by a coroner, a medical examiner, or coroner or medical examiner personnel, using a digital camera or similar device is an exempt record.

11. Unless otherwise provided by law, descriptions of crime scene images that include a minor or a minor victim or parts of a record containing such descriptions are exempt.

12. Unless otherwise provided by law, a sensitive image as defined by section 44-04-17.1 is an exempt record.

This section was amended in 1997 to make the records exempt rather than confidential and thereby give law enforcement agencies discretion to disclose the records.[378]

The information in subsection five of this statute that is not made exempt under the statute is similar to the "offense report" or "police blotter" information that the Attorney General previously concluded was not exempt from the open records law.[379] "Criminal investigative information" applies to information compiled by a criminal justice agency.[380] An evidence log is one example of information compiled by a criminal justice agency and is therefore exempt.[381] Information obtained under a search warrant is another example of "criminal investigative information."[382]

Criminal intelligence or investigative information is not exempt under this statute once it becomes inactive.[383] Thus, this inactive information is subject to the open records law unless another exemption applies.[384] However, "personal information," as defined in subsection 6 of this statute, contained in the criminal intelligence or investigative files remain exempt even if the file is inactive.[385] The phrase "criminal investigative information" under this statute does not include the names of people involved in a traffic accident because release of the names does not indicate whether a criminal investigation is being conducted.[386]

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[377] The requirement that body camera images be taken "by a law enforcement officer or a firefighter" was removed in 2023. *See* 2023 N.D. Sess. Laws ch. 397, § 1.

[378] *See* 1997 N.D. Sess. Laws ch. 381, § 10. N.D.A.G. 2014-O-16 (police department had the discretion to deny a request for the identity of a victim because, at the time of the request, the information was exempt "active criminal investigative information" while the department was actively investigating the incident and release of the name could impede cooperation of certain individuals necessary to the investigation); N.D.A.G. 2014-O-15 (law enforcement had the discretion to withhold transcripts of a 911 call required by N.D.C.C. § 57-40.6-07(4) because the transcripts also contained active criminal intelligence and investigative information); *see also* N.D.A.G. 2019-O-01; 2018-O-03; N.D.A.G. 2017-O-05.

[379] N.D.A.G. 79-201; *see also* N.D.A.G. Letter to McLean (Jan. 27, 1986).

[380] N.D.C.C. § 44-04-18.7(4).

[381] N.D.A.G. 2005-O-13.

[382] N.D.A.G. 98-F-09.

[383] N.D.A.G. 2004-O-03. *Compare* N.D.A.G. 2005-O-13 (criminal investigative information is active during prosecution of the case in court because ultimate guilt or innocence has not been determined).

[384] N.D.A.G. 98-F-09.

[385] N.D.C.C. 44-04-18.7(1).

[386] N.D.A.G. 97-O-01.

3. Records of Law Enforcement and Correctional Employees

Another statute also promotes efficient law enforcement activities by protecting the safety of law enforcement and court personnel engaged in crime investigation and detection activities and subsequent legal action.

1. . . . a telephone number and the home address of a prosecutor, justice of the United States, federal judge, magistrate judge, supreme court justice, district court judge, judicial referee, juvenile court director or probation officer, an employee of a law enforcement agency, employee of a state or local correctional facility, and an employee of the department of corrections and rehabilitation are confidential. Information contained in a personnel record of an employee of the department of corrections and rehabilitation may not be disclosed to an inmate in the legal custody of the department of corrections and rehabilitation confined in a jail, prison, or other correctional facility unless authorized by the director of the department of corrections and rehabilitation. Information contained in a personnel record of a law enforcement officer of a state or local law enforcement agency or in the personnel record of a correctional employee of a correctional facility subject to chapter 12-44.1 may not be disclosed to an inmate confined in a state correctional facility or correctional facility subject to chapter 12-44.1 unless authorized by the employing agency.
2. Records or other information that would reveal the identity, or endanger the life or physical well-being, of an undercover law enforcement officer is confidential. For purposes of this subsection, an "undercover law enforcement officer" means a full-time, salaried employee of a local or state law enforcement agency who acts surreptitiously or poses as someone other than a law enforcement officer while engaging in the investigation of a violation of law.
3. Any record containing the work schedule of employees of a law enforcement agency or the department of corrections and rehabilitation is exempt.[387]

Home addresses of prosecutors, justices of the United States, federal judges, magistrate judges, supreme court justices, district court judges, judicial referees, juvenile court directors or probation officers, employees of a law enforcement agencies, employees of state or local correctional facilities, and employees of the department of corrections and rehabilitation in geographic information systems, property title records, or tax parcel data, is confidential only if an above-listed individual, or their employer, requests their address be confidential in writing to the custodian of the records.[388] Such requests are only confidential for the remainder of a calendar year and must be renewed annually.[389]

Records from background interviews with individuals other than the applicant for a law enforcement officer position are exempt records.[390]

[387] N.D.C.C. § 44-04-18.3(1)-(3).
[388] N.D.C.C. § 44-04-18.3(5).
[389] *Id.*
[390] N.D.C.C. § 44-04-18.31.

4. Confidential Informants

The 1997 Legislative Assembly enacted a new provision affirming the authority of law enforcement officials to maintain the confidentiality of informants other than undercover law enforcement officers:

> A law enforcement officer or prosecutor, within the scope of the employment of the officer or prosecutor, may provide assurances of confidentiality to a person providing information regarding violations of the law. Any information that would identify or provide a means of identifying a confidential informant, if the identity of the informant is not otherwise publicly known, is confidential and may be disclosed only as permitted by law.[391]

5. Information Resulting from Child Abuse or Neglect Investigations

Reports of suspected child abuse or neglect, as well as any other information obtained under N.D.C.C. ch. 50-25.1, are confidential. N.D.C.C. § 50-25.1-11(1) provides:

1. A report made under this chapter, as well as any other information obtained, is confidential and must be made available to:

    a. A physician who has before the physician a child whom the physician reasonably suspects may have been abused or neglected.

    b. A person who is authorized to place a child in protective custody and has before the person a child whom the person reasonably suspects may have been abused or neglected and the person requires the information to determine whether to place the child in protective custody.

    c. Authorized staff of the department and its authorized agents, children's advocacy centers, and appropriate state child protection team members, and citizen review committee members.

    d. Any person who is the subject of the report; provided, however, that the identity of persons reporting or supplying information under this chapter is protected until the information is needed for use in an administrative proceeding arising out of the report.

    e. Public officials and their authorized agents who require the information in connection with the discharge of their official duties.

    f. A court, including an administrative hearing office, whenever the court determines that the information is necessary for the determination of an issue before the court.

    g. A person engaged in a bona fide research purpose approved by the department's institutional review board; provided, however, that no individually identifiable information as defined in section 50-06-15 is made available to the researcher unless the information is absolutely essential to the research purpose and the department gives prior approval.

[391] N.D.C.C. § 44-04-18.3(4).

h. An individual who is identified in subsection 1 of section 50-25.1-03, and who has made a report of suspected child abuse or neglect, if the child is likely to or continues to come before the reporter in the reporter's official or professional capacity.

i. A parent or a legally appointed guardian of the child identified in the report as suspected of being, or having been, abused or neglected, provided the identity of persons making the report or supplying information under this chapter is protected. Unless the information is confidential under section 44-04-18.7, when a decision is made under section 50-25.1-05.1 that a child is abused or neglected, the department or authorized agent shall make a good-faith effort to provide written notice of the decision to individuals identified in this subsection. The department or authorized agent shall consider any known domestic violence when providing notification under this section.

j. A public or private school that is the subject of a report of institutional child abuse or neglect, provided the identity of the persons reporting or supplying the information under this chapter is protected, except if the individuals reporting or supplying information are employees of the public or private school.

Law enforcement officials would have access to these records under subsection five of this statute. Violating the confidentiality of these records is a class B misdemeanor.[392] This section does not prohibit a prosecutor from providing these reports to defense counsel as part of required discovery in criminal or juvenile court cases.[393]

6. Criminal History Information

N.D.C.C. ch. 12-60 and North Dakota Administrative Code art. 10-13 govern the reporting, collecting, maintaining, and disseminating of criminal history record information.

"'Criminal history record information' includes information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, information, or other criminal charges, any dispositions arising therefrom, sentencing, correctional supervision, and release."[394]

The Bureau of Criminal Investigation (BCI) is the state central repository for this information.[395] BCI and other criminal justice agencies are required to disclose criminal history record information to a criminal

[392] N.D.C.C. § 50-25.1-14.

[393] N.D.A.G. 84-31.

[394] N.D.C.C. § 12-60-16.1(5). Generally, records such as arrest records, investigative reports, incident reports, and records of court proceedings are not confidential. A review of those types of records is commonly referred to as conducting a "background check." There is a difference between a "background check," conducted by local law enforcement by accessing publicly available documents, and a "criminal history record check," performed by BCI by accessing confidential law enforcement databases. The "criminal history background check" is confidential and may only be received and accessed under the authority of N.D.C.C. ch. 12-60. N.D.A.G. 2013-O-09.

[395] N.D.C.C. § 12-60-07(3).

justice agency, a court, pursuant to a subpoena, or as otherwise required by law.[396] Each local police department or county state's attorney's office is a "criminal justice agency,"[397] but county social service boards are not.[398] Courts and clerks of court also are not criminal justice agencies.[399] Only BCI can provide a criminal history record to other parties.[400] BCI can disseminate criminal history record information to other parties only if certain requirements are met and upon written request.[401] The request must contain certain information.[402] Only record information of a conviction, or of a reportable event occurring in the last three years that has not been purged or sealed, may be released.[403]

The restrictions on disclosure of "criminal history record information" as a compilation do not apply to releases by local law enforcement agencies of records of specific offenses which are used as source documents for compiling criminal history record information.[404]

7. Crimes against Children and Sex Offender Registration Information

Relevant and necessary conviction and registration information must be disclosed to the public by a law enforcement agency if the individual is a moderate or high risk and the agency determines that disclosure of the information is necessary for public protection.[405] In addition, law enforcement agencies may release upon request conviction and registration information regarding low-risk, moderate-risk, or high-risk offenders.[406] A law enforcement agency shall register juvenile offenders in the same manner as adult offenders and may release any relevant and necessary information on file if necessary to protect public health or safety.[407]

8. Reports of Student Alcohol and Drug Violations

Law enforcement records regarding an incident in which a student is believed to have violated certain statutes regarding alcohol or drugs must be provided to the principal of the school where the student is enrolled unless doing so would jeopardize a prolonged criminal investigation.[408] The notice must be in writing and must be provided within two weeks after an incident occurs and the principal shall forward the notice to the school's chemical abuse preassessment team or support team.[409]

9. Notification of Serious Injury or Death

A law enforcement agency investigating a serious injury or death of any person is responsible for notifying the immediate family of the seriously injured or deceased person.[410] The investigating agency may not release to the public the name of the seriously injured or deceased person until a member of the immediate family has been notified and given an opportunity to notify other immediate family members,

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[396] N.D.C.C. § 12-60-16.5.
[397] N.D.A.G. 95-L-74.
[398] N.D.A.G. 94-L-311.
[399] N.D.A.G. 99-L-71.
[400] N.D.C.C. § 12-60-16.6; N.D.A.G. 2013-O-09.
[401] N.D.C.C. § 12-60-16.6.
[402] *See* N.D.C.C. § 12-60-16.6(3).
[403] N.D.C.C. § 12-60-16.6.
[404] N.D.A.G. 2013-O-09; N.D.A.G. 2000-L-99; N.D.A.G. 99-L-71.
[405] N.D.C.C. § 12.1-32-15(14).
[406] Id.
[407] N.D.C.C. § 12.1-32-15(16).
[408] N.D.C.C. § 15.1-24-05.
[409] N.D.C.C. § 15.1-24-05(1), (2).
[410] N.D.C.C. § 39-08-10.1.

or until twenty-four hours after positive identification of the person was made, whichever occurs first.[411] "Immediate family" means "spouse, parent, child, sibling, or any person who regularly resides in the household of the seriously injured or deceased person."[412]

10. Crash Reports

Crash reports made by law enforcement officers are generally not privileged or confidential,[413] and therefore are subject to the open records law.[414] However, certain information contained in a crash report is exempt from disclosure unless the requester is a party to the crash, a party's legal representative, the insurer of any party to the crash, the agent of the insurer, or the legal representative or insurer of an individual involved in defending or investigating a prior or subsequent claim or crash involving a party to the crash.[415] The exempt information includes the driver identification number, telephone number, insurance company name and policy information, and day and month of birth of any party in the report.[416] The name of a minor party, the driver's license number of a minor party, and a minor party's uniquely owned telephone number are also exempt, unless the requester is one of the persons identified above.[417]

Upon request and payment of up to a $7 fee, the director of the Department of Transportation may provide an investigating officer's crash report to any person if the report does not contain exempt information and the crash is one for which a driver is required to file a report under N.D.C.C. § 39-08-09.[418]

"Crash reports made by persons involved in crashes or by garages" are confidential.[419]

11. Victim Information

Generally, non-active, closed investigation files kept by criminal justice agencies are open records.[420] This includes closed files that contain complaints of domestic violence, sexual offenses, sexual performance of a child, and human trafficking. If a criminal justice agency or correctional facility receives a request for a file related to allegations of domestic violence, sexual assault pursuant to chapter 12.1-20, sexual performance of a child under chapter 12.1-27.2, or human trafficking under chapter 12.1-41, it may redact any addresses, telephone numbers, or any identifying information that, if released, could reasonably be used to locate or identify a victim or alleged victim of such crimes.[421]

In 2016, Article I, Section 25, of the Constitution, otherwise known as "Marsy's Law," was enacted by initiated measure in the State of North Dakota. The law enumerates 19 rights afforded to victims including a victim's "right to prevent the disclosure of information or records that could be used to locate or harass the victim

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[411] Law enforcement may also withhold the identity of a victim as "active criminal investigative" information under circumstances enumerated by N.D.C.C. § 44-04-18.7(4). N.D.A.G. 2014-O-16.
[412] N.D.C.C. § 39-08-10.1(3).
[413] N.D.C.C. § 39-08-13(4). Crash report was changed from accident report in 2021. *See* 2021 N.D. Sess. Laws ch. 295, § 5. A crash report is different from a "motor vehicle record" under N.D.C.C. ch. 39-33. N.D.A.G. 2013-L-01.
[414] *See* N.D.A.G. 96-L-232.
[415] N.D.C.C. § 39-08-13(4), (5). The release of information to such entities is still authorized even if a "victim" has rights under Marsy's Law. *See* N.D.A.G. 2016-L-04.
[416] N.D.C.C. § 39-08-13(4).
[417] N.D.C.C. § 39-08-13(5).
[418] N.D.C.C. § 39-08-13(7).
[419] N.D.C.C. § 39-08-14.
[420] *See* N.D.C.C. § 44-04-18.7(1).
[421] N.D.C.C. § 44-04-18.20. *See also* N.D.C.C. § 12.1-41-10 (the identity, pictures, and images of an alleged victim of human trafficking or victim's family are confidential with limited disclosure provided by law).

or victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records."[422] A "victim" is defined in Marsy's Law as "a person who suffers direct or threatened physical, financial, or psychological harm as the result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed."[423] A victim must specifically invoke his or her rights under Marsy's Law for the protections to apply.[424] Portions of Marsy's Law were codified in N.D.C.C. §§ 12.1-34-01 (updating the definition of "victim" and "family member") and 12.1-34-02 (updating a victim's right to prevent disclosure of confidential or privileged information and the right to notified of any request for information).

N.D.C.C. § 12.1-34-02 also protects the address, telephone number, place of employment, or other information, which could be used to locate a victim or witness to a crime. However, if a victim invokes their Marsy's Law rights, this protection would extend to protecting the location information of a victim's family. Criminal justice agencies will need to review a record and reasonably interpret what information could be used to locate a victim or victim's family, which would include addresses or reference to a specific building or place of employment, which could lead to the location.[425]

Information that could be used to "harass" a victim or victim's family is also protected under affirmatively invoked Marsy's Law rights which is interpreted as contact information including telephone numbers and email addresses.[426]

Marsy's Law only applies to records of criminal justice agencies and does not protect the name of a victim.[427] More information regarding Marsy's Law can be found on the Attorney General's website.

[422] N.D. Const. art. I, § 25(1)(e).
[423] N.D. Const. art. I, § 25(4). If a victim is deceased, incompetent, incapacitated, or a minor, the victim's spouse, parent, grandparent, child, sibling, grandchild, or guardian, and any person with a relationship to the victim that is substantially similar to a listed relationship, may also exercise these rights. The term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.
[424] N.D.A.G. 2016-L-04.
[425] *Id.*
[426] *Id.*
[427] *Id.*

North Dakota Court Decisions Regarding Open Records

1. North Dakota Supreme Court Cases

Grand Forks Herald v. Lyons, 101 N.W.2d 543 (N.D. 1960).

The open records law does not apply to county court records. County courts are not "agencies of the state" as that phrase is used in the open records law. The purpose of the open records law is to make information available to the public relative to the spending of public monies and the handling of public business. What the Legislature was attempting to accomplish was to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest, in order that the citizen and taxpayer might examine public records to determine whether public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matters. Applications for marriage licenses and issuance of such licenses are not records of the county court. Such records are subject to the open records law and are open to inspection provided such applications and licenses contain no information specifically made confidential by law.

State ex rel. Williston Herald, Inc. v. O'Connell, 151 N.W.2d 758 (N.D. 1967).

Judicial records, generally, are accessible to the public for any proper purpose. The public has a right to inspect records of judicial proceedings after such proceedings are completed and entered in the docket of the court. This right of inspection, however, is not unlimited. The court, in its discretion, may impound its files in a given case when justice so requires, and in that event may deny inspection thereof. Any right of inspection of the criminal records of a county court of increased jurisdiction is subject to reasonable rules and regulations regarding who may inspect the records and where and how such inspection may be made.

City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981).

Municipal personnel files are public records subject to disclosure under the open records law. The term "records" as used in the open records law is unambiguous. The Legislature intended to give the term "records" an expansive meaning. Municipal personnel files are open for inspection equally to members of the public, which includes the news media. Public records are not limited to those records which are required by law to be kept and maintained. The use of the term "record" implies that a document of some official import be retained by the public officer or employee in the course of his public duties. Disclosure of the contents of a former city police chief's personnel file did not constitute an impermissible invasion of the former city police chief's privacy.

Forum Publishing Company v. City of Fargo, 391 N.W.2d 169 (N.D. 1986).

Job applications in the possession of a private consulting firm hired by the city to screen applicants for the position of chief of police are public records subject to the open records law. If the city had undertaken the task of screening applicants without hiring a private consulting firm, the job applications would clearly have been subject to the open records law. The purpose of the open records law would be thwarted if the court were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity were not public records.

Hovet v. Hebron Public School District, 419 N.W.2d 189 (N.D. 1988).

An implied exception to the open records law does not exist for a teacher's personnel file. The open records law provides that governmental records are to be open to the public except as otherwise specifically provided by law, and the Legislature has not specifically provided an exception for teacher personnel files. Allowing the public to view a teacher's personnel file would not violate the teacher's right to privacy. The federal right to privacy has not been recognized as applying to personnel records, and even if a right to privacy existed under the North Dakota Constitution, there would be no right to privacy in the personnel record of a person employed by a public agency.

Northern States Power Company v. North Dakota Public Service Commission, 502 N.W.2d 240 (N.D. 1993).

Price and volume data contained in a natural gas provider's filing with the Public Service Commission was not exempt from the open records law, although the data was a trade secret for purposes of N.D.C.C. ch. 47-25.1, the Uniform Trade Secrets Act. There is no specific, legislated exception to the open records law for public utility contracts that are required by law to be publicly filed with a regulatory agency, and such tariff filings are not exempt from disclosure as proceedings under N.D.C.C. ch. 28-32, the Administrative Agencies Practice Act. (*But see* amended N.D.C.C. § 44-04-18.4.)

Gosbee v. Bendish, 512 N.W.2d 450 (N.D. 1994).

An attorney's actions seeking access to a draft lease which was in the possession of county officials was moot. The attorney had been provided with a copy of the lease pursuant to the attorney's motion in the trial court.

North Dakota Commission on Medical Competency v. Racek, 527 N.W.2d 262 (N.D. 1995).

The North Dakota Commission on Medical Competency is an arm of the Board of Medical Examiners. Although all records of the North Dakota Commission on Medical Competency are confidential and exempt from the open records law under N.D.C.C. § 43-17.1-08, the records of the Board of Medical Examiners are not exempt and are open to the public under the open records law. (*But see* N.D.C.C. § 44-04-18.1(4).)

Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830 (N.D. 1995).

There was no majority opinion in this case. The case addresses the application of the open records law to a private, nonprofit corporation which was alleged to have been supported by public funds. The open records law, which provides for inspection of records of organizations or agencies supported in whole or in part by public funds, or expending public funds, requires that public funds be used as "support" for the organization before inspection is required, but not every transfer of public funds to a private entity is support. "Support" means something other than a quid pro quo or bargained-for exchange of money for identifiable and specific goods and services. Where membership dues result in a quid pro quo, in sufficiently identifiable quantities, there is not "support" under the open records law which would allow public inspection of records of a nongovernmental organization, but those dues which are for the general support of the organization constitute "support" for purposes of the open records law. "Records" subject to inspection under the open records law should be given an expansive meaning and the term is not limited to those records which are required by law to be kept and maintained; once it has been determined that an entity falls under a category of organization subject to the law, then by the plain language of the open records law, all records of the entity are open to inspection. Exceptions to the open records law must be specific and may not be implied. The policy underlying the open records law is to allow taxpayers to see how state funds are used.

Borr v. McKenzie County Public School District No. 1, 560 N.W.2d 213 (N.D. 1997).

A teacher's right to an open and accurate personnel file was not abridged by a principal's notations in a desk journal or daily planner concerning complaints that were immediately brought to the attention of the teacher, even though the notations were not immediately transferred verbatim to the teacher's personnel file. Notations in a principal's private diary regarding a teacher's performance which were never discussed with the teacher would violate the statutes prohibiting a secret personnel file, if that record was later used at a nonrenewal hearing.

Toth v. Disciplinary Board of the Supreme Court of North Dakota, 562 N.W.2d 744 (N.D. 1997).

A settlement agreement between the State Board of Chiropractic Examiners, which is a state agency, and a chiropractor was an open record. A state agency cannot circumvent the open records law through a confidentiality clause in a settlement agreement.

Adams County Record v. Greater North Dakota Association, 564 N.W.2d 304 (N.D. 1997).

The trial court properly concluded as a question of fact that a quid pro quo existed under a binding unilateral contract where GNDA published Horizons magazine and the state in return paid $30,000 annually to GNDA. A bargained-for exchange occurred when GNDA accepted the state's unilateral offer by publishing the magazine.

Robot Aided Manufacturing, Inc. v. North Dakota Department of Transportation, 589 N.W.2d 187 (N.D. 1999).

A law authorizing a specific fee for a compilation of information does not apply to the source documents used to create the compilation. Instead, the source documents are subject to the "reasonable fee" requirement in N.D.C.C. § 44-04-18. A public entity is not required to comply with a continuing request for records and can require separate, periodic requests.

Thompson-Widmer v. Larsen, 955 N.W.2d 76 (N.D. 2021).

Fulfilling a legitimate records request constitutes a privileged communication under N.D.C.C. § 14-02-05(1). Previous cases had determined that there was no liability for defamatory statements that are privileged. The fulfilment of an open records request in an exercise of an official duty, and "a political subdivision employee is immune from liability for '[a] claim based upon an act or an omission of a political subdivision employee exercising due care in the execution of a valid or invalid statute or regulation.'" N.D.C.C. § 32-12.1-04(3).

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

The court used an in-camera review of executive sessions to parse out times where the executive session was properly engaged in attorney consultation and those times where the conversation did not satisfy the requirements of attorney consultation. The court notes that the mere presence of an attorney does not automatically constitute an attorney consultation. The executive session was cut into distinct time section, parsed by the second, and portions were to be made public as they did not qualify under an exception to the open records law stated in N.D.C.C. § 44-04-19.1(5).

Mickelson v. City of Rolla, 993 N.W.2d 342 (N.D. 2022).

Mickelson had requested records from the City of Rolla which had not been fulfilled nor had there been communication to explain the delay. Mickelson sought to bring a civil action against the City of Rolla, but the court found that Mickelson had not satisfied the requirement of notice as defined in N.D.C.C. § 44-04-21.2(3), which states notice must be provided at least three working days prior to the filing of a civil action. This notice must also provide the alleged violation. The court also determined that a letter to the Attorney General requesting an opinion was not sufficient notice to the entity. Also, the "Outline of Ordinances" provided to the mayor of Rolla was not sufficient notice as it did not contain the alleged violation.

Hagen v. North Dakota Insurance Reserve Fund, 993 N.W.2d 519 (N.D. 2023)

The court concluded that documents dealing with litigation that is completely resolved, does not satisfy the exception for pending litigation under N.D.C.C. § 44-04-19.1(8). The court also rejected the argument that the excluded documents constituted attorney work product and would give the entity a disadvantage in future settlement negotiations, stating that this did not constitute a genuine potential for future liability.

2. North Dakota District Court Cases

Radig v. Conrad, No. 24668 (N.D. 4th Dist., Oct. 26, 1977) (Burleigh Co.).

Records indicating a state employee's deductions for deferred compensation are not public records subject to the open records law. This information relates to private financial transactions in which the public has no legitimate interest; it does not relate to whether public funds are being properly expended. Making these records public would invade the right to privacy of the state employee.