

OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

NORTH DAKOTA

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

OPEN GOVERNMENT GUIDE
OPEN RECORDS AND MEETINGS LAWS IN
NORTH DAKOTA

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NORTH DAKOTA

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Previously Titled
Tapping Officials' Secrets

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Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

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FOREWORD

North Dakotans have some of the most comprehensive open records and open meetings laws in the nation. Under North Dakota law, all records of public bodies are open for inspection by anyone, and all meetings of public bodies are open for attendance by anyone, unless there is a specific statutory exception.

The North Dakota Supreme Court and the North Dakota Attorney General (whose opinions are binding on all public officials unless and until they are overruled by a court) have interpreted the open records and open meetings laws to favor the public's right to know. Both the court and the Attorneys General have stated that the term "record," as used in the open records law, must be interpreted expansively.

Because the North Dakota Constitution and North Dakota law state that all records and meetings are open unless there is a specific exception in the law, any discussion of open records and open meetings law naturally focuses upon these exceptions. The Open Records and Open Meetings outline that follows focuses on the exceptions; of course, any attempt to locate every exception in the multiple volumes of the North Dakota Century Code carries the risk (of perhaps even the likelihood) of missing some exceptions, and the author apologizes for any such omissions. Statutes cited in the outline, as well as the remaining provisions of the North Dakota Century Code, may be found and searched online at <http://www.legis.nd.gov/information/statutes/cent-code.html>.

Two additional useful resources include the Open Records Manual and the Open Meetings Manual, both published by the North Dakota Attorney General. Both manuals may be found online at <http://www.ag.nd.gov/OpenRecords/ORM2006A.htm>.

Open Records**I. STATUTE -- BASIC APPLICATION**

In North Dakota, all public records are open records, unless there is a specific statutory exception of a particular type of record. The North Dakota Constitution states:

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.

North Dakota Constitution, Article XI, Section 6.

The North Dakota open records statute contains essentially the same language:

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.

N.D.C.C. § 44-04-18(1).

The North Dakota Supreme Court has concluded, "Thus, for an exception to the open-records law to exist under our constitutional and statutory provisions, it must be specific, i.e., the Legislature must directly address the status of the record in question, for a specific exception, by the plain terms of those provisions, may not be implied." *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189 (N.D. 1988).

Although the state constitution and the statute are clear that unless an express exception applies, public records are open records, there are nonetheless specific statutes declaring that certain records are open records. For example, the statutes address the records of the State Highway Department (N.D.C.C. § 24-02-11), the State Engineer (N.D.C.C. § 61-03-06), the Water Conservation Commission (N.D.C.C. § 61-02-11), school districts (N.D.C.C. § 15.1-07-25), and irrigation district boards of directors (N.D.C.C. § 61-06-21.1). Additionally, city real property assessment rolls (N.D.C.C. § 40-19-03) and master lists of potential jurors (N.D.C.C. § 27-09.1-05) are listed as open records.

A. Who can request records?**1. Status of requestor.**

There is no limitation in the statute regarding who can request records—any member of the public can request or view records. While a former statute used to limit the access of records of a school district to "any taxpayer of the district," that statute has been repealed and reenacted to state, "Except as otherwise provided by law, all records and documents of a school district are open to examination by any person." N.D.C.C. § 15.1-07-25. Additionally, the North Dakota Supreme Court has noted, "The news media does not occupy a special status distinct from that of the general public." *Dickinson Newspapers v. Jorgenson*, 338 N.W.2d 72, 79 (N.D. 1983).

2. Purpose of request.

The purpose of the request does not affect the right to receive records. There is no statutory requirement to disclose a purpose when requesting or accessing public records. Generally, the public entity from which the records are requested cannot ask why the records are requested, ask for identification, or require that a request be made in writing or in person.

3. Use of records.

While the open records constitutional provision and statute contain no provisions regarding the subsequent use of information, other North Dakota law may restrict the use of some information acquired

through the open records law. For example, the attorney general has opined, “North Dakota law, as found at N.D.C.C. Ch. 47-25.1, does provide for a civil action upon the misappropriation of trade secrets.” N.D. Op. Att’y Gen. 85-24, at 3 (1985). This statute may restrict the use of trade secrets information acquired through the open records law.

B. Whose records are and are not subject to the act?

The records of all “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” are covered by open records law. N.D. Const., Art. XI, Sec. 6.

1. Executive branch.

All executive branch agencies are covered by the open records law.

2. Legislative bodies.

All legislative bodies are covered by the open records law. However, it is worth noting the following records, regardless of form or characteristic, of or relating to the legislative counsel, the legislative management, the legislative assembly, the House of Representatives, the Senate, or a member of the legislative assembly are not subject to the law: records of a purely personal or private nature, records that are legislative council work product or legislative council-client communication, records that reveal the content of private communications between a member of the legislative assembly and any person, and (except with respect to a governmental entity determining the proper use of telephone service) records of telephone usage that identify the parties or list the telephone numbers of the parties involved, except records distributed at open meetings. N.D.C.C. § 44-04-18.6.

3. Courts.

Courts are not subject to the open records and open meetings laws. Instead, North Dakota courts maintain and dispose of court records in accordance with the rules, policies, and procedures adopted by the North Dakota Supreme Court. N.D.C.C. § 27-05.2-06. The North Dakota Supreme Court has promulgated Administrative Rule 41, which provides a comprehensive framework for public access to court records. N.D. Sup. Ct. Admin. R. 41. The rule may be found online at <http://www.ndcourts.gov/rules/Administrative/frameset.htm>.

It is generally assumed that a right of access to courts and court records exists, in the absence of an explicit exception. The North Dakota Supreme Court has held, for example, that the public has a right to inspect the records of judicial proceedings after the proceedings are completed and entered in the docket. *State ex rel. Williston Herald, Inc. v. O’Connell*, 151 N.W.2d 758 (N.D. 1967). The right is subject to reasonable rules and regulations by the court as to who may inspect the records and where and how such inspection may be made. *Id.* Additionally, court dockets are open to the public. *Minot Daily News v. Holum*, 380 N.W.2d 347 (N.D. 1986).

4. Nongovernmental bodies.

a. Bodies receiving public funds or benefits.

Because the open records law covers “organizations or agencies supported in whole or in part by public funds, or expending public funds,” the records of such organizations are subject to the act. “Public funds” are defined as cash and other assets with more than minimal value received from the state or from any political subdivision of the state. N.D.C.C. § 44-04-17.1. An organization or agency “supported in whole or in part by public funds” means an organization or agency that has received public funds exceeding the fair market value of any goods or services given in exchange for the funds. *Id.* The funds may be grants, membership dues, fees, or any other type of payment. *Id.* According to the North Dakota attorney general, a nongovernmental organization expends public funds when it receives and uses a direct appropriation from a governmental entity, or when it manages a pool of public funds on behalf of one or more public entities. *See* N.D. Op.

Att’y Gen. 2003-O-08 (2003); N.D. Op. Att’y Gen. 96-F-18 (1996).

The North Dakota attorney general has also opined that nonprofit corporations receiving public funds are public entities subject to the state’s open records and open meetings laws, and that a development company funded by a public sales tax is subject to the open records laws. N.D. Op. Att’y Gen. 2006-O-04 (2006); N.D. Op. Att’y Gen. 2005-O-06 (2005). In *Forum Publishing Company v. City of Fargo*, the North Dakota Supreme Court held that a private personnel firm hired to select a new police chief for the city of Fargo was subject to the open records law. 391 N.W.2d 169, 172 (N.D. 1986). The court stated held it “did not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in the possession of [the private personnel firm].” *Id.*

b. Bodies whose members include governmental officials.

If a body is not a public or governmental body, but its members include governmental officials, the open records law applies only if the body is supported in whole or in part by public funds or if the body expends public funds. For example, in *Adams County Record v. Greater North Dakota Association*, ten state government agencies purchased thirty memberships from the Greater North Dakota Association, a nonprofit corporation engaged in lobbying efforts. 529 N.W.2d 830, 832 (N.D. 1995). The North Dakota Supreme Court held there were disputed issues of fact for the district court to decide as to whether the corporation was subject to the open records law, because the government agencies paid membership dues and because the corporation received public funds in the form of a grant to aid in publishing a magazine. *Id.* at 836-38.

5. Multi-state or regional bodies.

There is no specific statutory provision regarding such bodies. Records obtained by the attorney general are exempt if the attorney general determines: 1) The record is necessary to monitor or enforce compliance with a law or order or to further a civil investigation or litigation by the state; 2) The record is treated as confidential or privileged by the provider; and 3) The provider has not agreed to waive the privilege relating to or confidentiality of the record. N.D.C.C. § 44-04-18.12.

6. Advisory boards and commissions, quasi-governmental entities.

The open records law expressly applies to task forces and working groups created by the individual in charge of a state agency or institution. N.D.C.C. § 44-04-17.1. Additionally, because almost all advisory boards, commissions, and quasi-governmental entities expend public funds or are supported in whole or in part by public funds, they would be within the open records law. It is worth noting all records of the Board of Medical Examiners investigative panels (other than their financial records) are confidential. N.D.C.C. § 43-17.1-08.

C. What records are and are not subject to the act?

1. What kind of records are covered?

Under the 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.” N.D.C.C. § 44-04-17.1(16). Record “does not include unrecorded thought processes or mental impressions, but does include preliminary drafts and working papers.” *Id.* Record “also does not include records in the possession of a court of this state.” *Id.*

All of the decisions of the North Dakota Supreme Court and the opinions of the attorney general regarding this issue have stated that the term “record” should be given an expansive interpretation and

should not be limited to records required by law or ordinance. *See, e.g., Forum Publishing Company v. City of Fargo*, 391 N.W.2d 169, 171 (N.D. 1988); *City of Grand Forks v. Grand Forks Herald*, 307 N.W.2d 572, 577-78 (N.D. 1981) (but note that Justice VandeWalle's concurring opinion states, "I do not imply that every scrap of paper a public official or a public employee might retain in the course of his tenure with a public body is a public record. . . . [T]he term, as used in these provisions, implies a document of some official import to be retained by a public officer or employee in the course of his public duties.").

2. What physical form of records are covered?

As noted above, 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." N.D.C.C. § 44-04-17.1(16).

Additionally, "[a]utomation of public records must not erode the right of access to those records." N.D.C.C. § 44-04-18(3). "As each public entity increases its use of and dependence on electronic record-keeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law." *Id.*

3. Are certain records available for inspection but not copying?

Although generally records must be available for copying, two statutory provisions address this issue. First, if the entity is not authorized to use the fees paid to cover the cost of providing a copy, or if a copy machine is not readily available, the entity may make arrangements for the copy to be provided or mailed by another entity, and the requester shall pay the fee to that other entity. N.D.C.C. § 44-04-18(2). Second, while access to an electronically stored record must be provided at the requester's option in either a printed document or through any other available medium, it is worth noting that "a public entity is not required to provide an electronically stored record in a different structure, format, or organization." N.D.C.C. § 44-04-18(4).

D. Fee provisions or practices.

1. Levels or limitations on fees.

A public entity may charge up to 25 cents per impression of a paper copy, defined as a one-sided or two-sided duplicated copy of a size not more than 8.5 by 14 inches. N.D.C.C. § 44-04-18(2). A public entity may charge a "reasonable fee" for making any copy of a record that is not a paper copy. *Id.* "Reasonable fee" is defined as the actual cost to the public entity of making the copy, including labor, materials, and equipment. *Id.* The entity may also charge for the actual cost of postage to mail a copy of a record. *Id.* The entity may require payment before locating, redacting, making, or mailing a copy. *Id.* If locating records requires more than one hour, the entity may impose a fee not exceeding \$25 per hour per request, excluding the initial hour, for locating records, including electronic records. *Id.* The entity may also impose a fee not exceeding \$25 per hour per request, excluding the initial hour, for excising confidential or closed material, including electronic records. *Id.*

Concerning fees, it is also worth noting that a county official is not required to compile statistical information not already compiled in response to requests made by private individuals, firms or corporations. However, if the official chooses to do so and the process takes more than one hour, the board of county commissioners can then determine a fee not to exceed \$25 per hour. N.D.C.C. § 11-13-02.1.

2. Particular fee specifications or provisions.

The provisions above do not apply to copies of public records for which a different fee is specifically provided by law. N.D.C.C. § 44-04-18(2). For example, accident reports requested by the public from the North Dakota Department of Transportation require a fee of two

dollars. N.D.C.C. § 39-08-13(6). Registration and license records may be inspected during business hours for a fee not to exceed three dollars for each item of information furnished to any person concerning a specific motor vehicle. N.D.C.C. § 39-02-05. A person requesting information concerning a motor vehicle that he or she owns, however, may not be assessed charges. *Id.*

a. Search.

If locating records requires more than one hour, the entity may impose a fee not exceeding \$25 per hour per request, excluding the initial hour, for locating records, including electronic records. N.D.C.C. § 44-04-18(2).

b. Duplication.

A public entity may charge up to 25 cents per impression of a paper copy, defined as a one-sided or two-sided duplicated copy of a size not more than 8.5 by 14 inches. N.D.C.C. § 44-04-18(2).

3. Provisions for fee waivers.

The open records statute does not address fee waivers.

4. Requirements or prohibitions regarding advance payment.

A public entity may require payment before locating, redacting, making, or mailing a copy. N.D.C.C. § 44-04-18(2).

5. Have agencies imposed prohibitive fees to discourage requesters?

There are no reported cases indicating that any North Dakota agency has imposed a prohibitive fee in order to discourage requesters.

E. Who enforces the act?

1. Attorney General's role.

Any interested person may request an attorney general's opinion to review a written denial of a request for records. N.D.C.C. § 44-04-21.1(1). A request must be made within thirty days of the alleged violation. *Id.* The attorney general may request and obtain information claimed to be exempt or confidential in order to determine whether the information is exempt or confidential. *Id.* Any such information may not be released by the attorney general and may be returned to the provider of the information. *Id.* The attorney general shall issue to the public entity involved an opinion on the alleged violation, unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. *Id.*

If the attorney general issues a written opinion concluding that a violation has occurred, the public entity has seven days after the opinion is issued, regardless of whether a civil action is filed, to disclose the record. N.D.C.C. § 44-04-21.1(2). If the public entity fails to disclose the record within the seven-day period and the person requesting the opinion prevails in a civil action brought under N.D.C.C. § 44-04-21.2, the requestor must be awarded costs, disbursements, and reasonable attorney's fees in the action and on appeal. *Id.* The consequences for failing to comply with an attorney general's opinion also include potential personal liability for the person or persons responsible for the noncompliance. *Id.*

Additionally, a civil action may be brought for a violation of the open records laws. N.D.C.C. § 44-04-21.2. The court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity for any violation. *Id.* For an intentional or knowing violation, the court may award damages in amount equal to \$1,000 or actual damages caused by the violation, whichever is greater. *Id.* A civil action must be commenced within sixty days of the date the requestor knew or should have known of the violation or within thirty days of the issuance of an attorney general's opinion on the alleged violation, whichever is later. *Id.* The remedies provided under N.D.C.C. § 44-04-21.2 are not

available if a violation has been corrected before a civil action has been filed and no person has been prejudiced or harmed by the delay. *Id.* A person interested in bringing a civil action must give at least three working days' notice of the alleged violation to the chief administrative officer of the public entity. *Id.* The opportunity to cure a violation does not apply, however, if the entity has previously violated the open records laws. *Id.*

Finally, the attorney general may refer to the appropriate state's attorney any public servant who has been found in more than one opinion to have violated the open records law. N.D.C.C. § 44-04-21.3. A public servant who knowingly violates the open records law is guilty of a class A misdemeanor. *Id.*

2. Availability of an ombudsman.

The open records statute does not address the availability of an ombudsman.

3. Commission or agency enforcement.

The open records statute does not address commission or agency enforcement.

F. Are there sanctions for noncompliance?

If the attorney general issues a written opinion concluding that a violation has occurred, the public entity has seven days after the opinion is issued, regardless of whether a civil action is filed, to disclose the record. N.D.C.C. § 44-04-21.1(2). If the public entity fails to disclose the record within the seven-day period and the person requesting the opinion prevails in a civil action brought under N.D.C.C. § 44-04-21.2, the requestor must be awarded costs, disbursements, and reasonable attorney's fees in the action and on appeal. *Id.* (emphasis added). The consequences for failing to comply with an attorney general's opinion also include potential personal liability for the person or persons responsible for the noncompliance. *Id.*

In a civil action, the court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity for any violation. N.D.C.C. § 44-04-21.2. For an intentional or knowing violation, the court may award damages in amount equal to \$1,000 or actual damages caused by the violation, whichever is greater. *Id.* The remedies are not available if a violation has been corrected before a civil action has been filed and no person has been prejudiced or harmed by the delay. *Id.*

Finally, the attorney general may refer to the appropriate state's attorney any public servant who has been found in more than one opinion to have violated the open records law. N.D.C.C. § 44-04-21.3. A public servant who knowingly violates the open records law is guilty of a class A misdemeanor. *Id.*

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

Because the general rule under North Dakota law is that all records are open unless an exception applies, much of North Dakota open records law consists of exceptions to the rule. Without an express exception, any public record is an open record.

A. Exemptions in the open records statute.

1. Character of exemptions.

The North Dakota Constitution and North Dakota statutes provide that all records are open unless there is a specific exception in the law.

"Confidential" records are characterized by a lack of discretion to disclose the documents to the public, and the release of such records can generally be punished. *See* N.D.C.C. § 44-04-17.1(3); N.D.C.C. § 12.1-13-01.

"Exempt" records are all or part of records that are neither required by law to be open to the public, nor are confidential, but may be open in the discretion of the public entity. N.D.C.C. § 44-04-17.1(5).

2. Discussion of each exemption.

Court Records:

1. Adoption records, except when the child-placing agency authorizes exchanges of information between the genetic parents, adoptive parents, and adopted child. N.D.C.C. § 14-15-16.

2. Records of judicial hearings concerning a minor's application to obtain an abortion without parental consent. N.D.C.C. § 14-02.1-03.1(3).

3. The identity of a woman suing a person who conducted an abortion without informed consent and other records of the proceedings, when the court, on its own or upon motion, determines that the woman's anonymity should be preserved. N.D.C.C. § 14-02.1-03.3.

4. The record of any court hearing conducted under N.D.C.C. § 23-07.5-02(4), relating to testing for bloodborne pathogens. N.D.C.C. § 23-07.5-02(4).

5. The report of genetic testing for parentage, as well as court records concerning hearings on parentage (unless the parties consent or on order of the court for good cause). N.D.C.C. §§ 14-20-35, 14-20-54.

6. All files and records of juvenile courts. N.D.C.C. § 27-20-51. (Procedures for the disposal of juvenile court records are outlined in N.D.C.C. § 27-20-54.)

7. Social services reports requested by judges, including social-psychological evaluations, predisposition reports, treatment, probation, and aftercare services (except as may be disclosed by the judge), as well as records of the Department of Human Services containing individually identifiable information on an individual applying for or receiving assistance or services under any program of the department. N.D.C.C. §§ 50-06-05.1(15)-(16), 50-06-15.

8. Reports, transcripts, records, or other information relating to State Health Officer legal actions to enjoin a person with human immunodeficiency virus infection from continuing to engage in an activity that presents an imminent danger to the public. N.D.C.C. § 23-07.4-03.

9. All information and records obtained in the course of an investigation, evaluation, examination, or treatment under the state's civil commitment procedures and the presence or past presence of a patient in a treatment facility. N.D.C.C. § 25-03.1-43.

10. The name of the respondent to an appeal from an order of involuntary commitment or alternative treatment, a continuing treatment order, an order denying a petition for discharge, or an order of transfer. N.D.C.C. § 25-03.1-29.

11. Veterans discharge documents recorded by clerks of district courts, which can only be made available to designated persons. N.D.C.C. § 37-01-34.

12. Probation records when the plea of guilty is withdrawn by the defendant or the verdict of guilty is set aside by the court, except upon the written order of the court. N.D.C.C. § 12.1-32-07.2.

13. Statements and votes made by grand jurors and other grand jury matters, except when a grand juror is ordered by a court to disclose certain testimony. N.D.C.C. §§ 29-10.1-30, 29-10.1-31. Disclosure of matters occurring before a state grand jury, other than its deliberation and the vote of any juror, may be made to the attorney general for use in the performance of the attorney general's duties and for certain disclosures by the attorney general to law enforcement agencies. N.D.C.C. § 29-10.2-05(2).

14. The testimony of a witness who is interrogated before a grand jury, or any proceedings of the grand jury in the witness' presence, until an indictment is filed and the accused person is in custody. N.D.C.C. § 29-10.1-30.

15. Reports or presentments of state grand juries that are not accompanied by true bills of indictment, until the individuals concerned have been furnished a copy thereof and given thirty days to file with the district court a motion to suppress or expunge the reports or those portions which are improper and unlawful. N.D.C.C. § 29-10.2-05(3). Any such motion, whether granted or denied, automatically acts as a stay of public announcement of such a report, or portion thereof, until the district court's ruling on the motion is either affirmed or denied by an appellate court, or until the time within which such order may be so appealed has expired, whichever occurs first. *Id.*

16. Sealed jury verdicts, until they have been rendered in open court. N.D.C.C. § 29-22-21.

17. Names of qualified jurors and the contents of jury qualification forms completed by those jurors shall be made available to the public, unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part. N.D.C.C. § 27-09.1-09(3). *See also Forum Comm. Co. v. Paulson*, 752 N.W.2d 177 (N.D. 2008).

18. The contents of any records or papers used by the clerk in connection with the jury selection process, until after all persons selected to serve as jurors have been discharged. N.D.C.C. § 27-09.1-12(4).

19. Wills deposited by testators or their agents with recorders for safekeeping, until the testator's death, when the recorders deliver the wills to the persons designated to receive them or to the appropriate courts. N.D.C.C. § 30.1-11-01.

20. Information contained in a complaint and warrant, if the magistrate orders the information confidential after a law enforcement officer articulates a reason for the confidentiality that convinces the issuing magistrate that limited confidentiality is necessary for the safety of the law enforcement officer or to enable the warrant to be properly served. N.D.C.C. §§ 29-05-32; 29-29-22. The magistrate shall limit the duration of the order to the time of arrest of the accused and shall exempt law enforcement officers in the performance of official duties. N.D.C.C. §§ 29-05-32; 29-29-22.

Legislative Materials:

21. Testimony and other evidence given or adduced at a legislative investigative hearing closed to the public, unless authorized by a majority of the members of the committee. N.D.C.C. § 54-03.2-12(7).

22. All information of a defamatory or highly prejudicial nature received by or for a legislative committee conducting an investigation, unless the information was received at a hearing (but see exception above), a majority of the committee authorizes public release, or its use is required for judicial purposes. N.D.C.C. § 54-03.2-12(8).

23. The following records, regardless of form or characteristic, of or relating to the legislative counsel, the legislative management, the legislative assembly, the House of Representatives, the Senate, or a member of the legislative assembly: records of a purely personal or private nature, records that are legislative council work product or legislative council-client communication, records that reveal the content of private communications between a member of the legislative assembly and any person, and (except with respect to a governmental entity determining the proper use of telephone service) records of telephone usage that identify the parties or list the telephone numbers of the parties involved, except records distributed at open meetings. N.D.C.C. § 44-04-18.6.

State Department of Health Records and Information:

24. The medical records of abortion facilities and hospitals in which abortions are performed and all information contained therein. N.D.C.C. § 14-02.1-07(1)(b). The records may be used by the state department of health only for gathering statistical data and ensuring compliance with the laws. N.D.C.C. § 14-02.1-07(1)(b).

25. Records, reports, and information obtained by the department of health in its enforcement of air pollution control standards, where a satisfactory showing is made to the department that the records, reports, or information (other than emission data), if made public, would divulge trade secrets. N.D.C.C. § 23-25-06.

26. All information, records of interviews, written reports, statements, notes, memoranda, or other data procured by the department of health (or a co-sponsoring person, agency, or organization) in connection with studies conducted for the purpose of reducing morbidity or mortality from any cause or condition of health. N.D.C.C. § 23-01-15.

27. All Health Care Data Committee records, data, and information that could be used to identify individual patients. N.D.C.C. § 23-01.1-05.

28. Department of health information (other than reports relating to vital statistics) concerning licensure of medical hospitals and state hospitals, except that information may be disclosed in a proceeding involving the question of licensure. N.D.C.C. § 23-16-09.

29. Records of maternity homes and reports received therefrom. N.D.C.C. § 50-19-10.

30. Ionizing radiation development records, reports, or information provided to the department of health under chapter 23-20.1 of the North Dakota Century Code, if the department grants confidentiality following a written request, notice of opportunity for a public hearing under chapter 28-32, and a satisfactory showing that confidentiality is required to protect trade secrets or medical and individual radiation exposure files, the disclosure of which would constitute a clear invasion of personal privacy. N.D.C.C. § 23-20.1-09.1.

31. Reports to the department of health concerning individuals with a diagnosis of human immunodeficiency virus infection, acquired immune deficiency syndrome, or human immunodeficiency virus-related illness, including death from human immunodeficiency virus infection (with certain exceptions). N.D.C.C. § 23-07-02.2.

32. Information contained in disease control records, including the results of laboratory tests, except as authorized by department of health rules. N.D.C.C. § 23-07-20.1.

33. Statements of antifreeze formula and other trade secrets that must be furnished to the state health department. N.D.C.C. § 19-16.1-10.

34. For health-related records outside of the department of health, see N.D.C.C. §§ 12-59-04, 15-10-17(7), 23-01-03.1, 23-17-09, and 43-17.1-08.

Department of Human Services Records and Information:

35. Individually identifiable information concerning an individual applying for or receiving assistance or services under any program of the department of human services. N.D.C.C. § 50-06-15(1); *see also* N.D. Admin. Code ch. 75-01-02 and 75-01-03.

36. Information received by the department of human services through inspections of substance abuse treatment programs, except in a proceeding involving the issuance of a license. N.D.C.C. § 50-31-06.

37. The contents of records of licensed foster care facilities and the records of the department of human services pertaining to the children or adults receiving care. N.D.C.C. § 50-11-05; *see also* North Dakota Administrative Code § 75-03-16-27.

38. Records and information maintained with respect to children receiving early childhood services. N.D.C.C. § 50-11.1-07.

39. Reports to the department of human services, and any other information obtained, concerning child abuse and neglect. N.D.C.C. § 50-25.1-11.

40. Information regarding aid to dependent children provided to state agencies and their officials, employees, and agents. N.D.C.C. § 50-09-08.2.

41. The contents of the individual records of a treatment or care center for developmentally disabled individuals, or reports received from those records. N.D.C.C. § 25-16-07.

42. All records and information regarding students with disabilities receiving boarding home care. N.D.C.C. § 15.1-34-10.

43. Information supplied by the tax commissioner to certain state agencies to effectuate the intent of the setoff of income tax refund chapter. N.D.C.C. § 57-38.3-08.

44. Records and files of state and regional long-term care ombudsmen that relate to, or identify, any resident of a long-term care facility or a complainant, except where a resident or legal representative consents in writing to the release and designates to whom the information shall be disclosed, where the ombudsman authorizes a disclosure that does not reveal the identity of any complainant or resident, or where a court of competent jurisdiction orders disclosure. N.D.C.C. § 50-10.1-07.

45. Reports and all records and information obtained or generated as a result of reports relating to vulnerable adult protection services. N.D.C.C. § 50-25.2-12.

State Institutions and the Department of Corrections and Rehabilitation Records and Information:

46. Records of individuals in institutions maintained by the supervising departments of institutions. N.D.C.C. § 25-01.1-13.

47. The medical, psychological, and treatment records of the department of corrections and rehabilitation relating to individuals in the custody or under the supervision of the division of adult services of the department. N.D.C.C. § 12-47-36(2).

48. The case history records of the department of corrections and rehabilitation are exempt records, but upon application to the district court, the court may order the inspection of a case history record unless there is a showing that a proper and legitimate reason exists for denying the inspection. N.D.C.C. § 12-47-36(1). "Case history record" includes inmate disciplinary proceedings, administrative and disciplinary segregation placements, institutional and criminal investigation reports, supervision histories, job placements, education programs, inmate financial accounts, and protective management cases. N.D.C.C. § 12-47-36(1).

49. Additionally, the records of an applicant for commutation, reprieve, pardon, conditional pardon, or remission of fine are subject to N.D.C.C. § 12-47-36. N.D.C.C. § 12-55.1-11. The pardon clerk may permit the inspection of an application for a commutation, reprieve, pardon, conditional pardon, or remission of fine; the recommendations of the pardon advisory board, if any; and the decision of the governor, including any decision made after reconsideration or after proceedings for revocation. N.D.C.C. § 12-55.1-11.

50. All parole records of the department of corrections and rehabilitation obtained in the discharge of official duty by any member of the parole board or employee of a division or department of the department of corrections and rehabilitation on behalf of the parole board. N.D.C.C. § 12-59-04. An application for parole and the decision of the parole board on the application are open records. N.D.C.C. § 12-59-04.

51. Records of the division of adult services of the department of corrections and rehabilitation concerning the application for or award of compensation under the Crime Victims Compensation Act. N.D.C.C. § 54-23.4-17.

52. Information, data, reports, and records made available to an internal quality assurance review committee of the developmental

center at Grafton (except that information, documents, and records otherwise available from original sources are not immune from discovery merely because they were presented during the proceedings of the committee). N.D.C.C. § 25-04-19.

Department of Transportation Records and Information:

53. The following entries on a driver's record or abstract are not open records, except for statistical purposes, other than by order of a court of competent jurisdiction: 1) Entries more than three years old; 2) After the period of suspension ceases, entries concerning a suspension under certain provisions; 3) Entries concerning suspension as the result of a person under 21 years old who has an alcohol concentration of at least two one-hundredths of one percent, but under eight one-hundredths of one percent by weight within two hours after driving or being in actual physical control of a vehicle. N.D.C.C. § 39-16-03.1.

54. In accident report forms, the opinion (as to fault or responsibility) of the investigating officer, except upon affirmation by a party to the accident that the investigating officer's opinion is material to a determination of liability and a payment of a five dollar fee. N.D.C.C. § 39-08-13.

55. Department of transportation records relating to the financial condition of any party if that party has applied for prequalification as a bidder, is designated as a prequalified bidder, is an applicant under the disadvantaged business enterprise program, makes a submission in furtherance of being selected as a consultant, is selected as a consultant, or is subject to audit by the department. N.D.C.C. § 24-02-11.

56. All accident reports made by persons involved in accidents or by garages to the department of transportation or other state agencies. N.D.C.C. § 39-08-14(1).

57. All accident reports and supplemental information filed in connection with the administration of the laws relating to the deposit of security or proof of financial responsibility. N.D.C.C. § 39-08-14(2).

58. Reports of the county auditors to the department of transportation listing the names of blind persons for whom a property tax exemption is claimed, except that such reports may be introduced at hearings on license suspension or revocation. N.D.C.C. § 11-13-18.

Records of the Insurance Commissioner:

59. Nonpublic personal information of insured individuals, as well as names and individual identification data for all owners, purchasers, and insureds. *See, e.g.*, N.D.C.C. § 26.1-02-27; N.D.C.C. § 26.1-02-28; N.D.C.C. § 26.1-36-12.4; N.D.C.C. § 26.1-18.1-23; N.D.C.C. § 26.1-33.4-05; N.D.C.C. § 26.1-33.4-06; N.D.C.C. § 26.1-17.1-24; ; N.D.C.C. § 26.1-50-03.

60. Any confidential documents or information received by the insurance commissioner from the national association of insurance commissioners or state, federal, or international regulatory or law enforcement officials. N.D.C.C. § 26.1-03-11.3.

61. Any documents, materials, or other information in the possession of the insurance commissioner relating to the report or investigation of suspected or actual fraudulent insurance acts. N.D.C.C. §§ 26.1-02.1-06, 26.1-02.1-07; *see also* N.D.C.C. § 26.1-33.4-13.

62. Proceedings, hearings, notices, correspondence, reports, records, and other information in the possession of the insurance commissioner or the department relating to the supervision of any insurer, unless the commissioner deems it is in the best interest of the public or the insurer to make the information public. N.D.C.C. § 26.1-06.2-04.

63. Documents, materials, and other information in the possession of the insurance commissioner that are an actuarial report, work papers, or actuarial opinion summary provided in support of the actuarial opinion, and any other material provided by the insurance company to the commissioner in connection with the actuarial report, work papers, or actuarial opinion summary. N.D.C.C. § 26.1-03-11.1.

64. Reports of financial examinations of insurers, for a period of fifteen days after the adoption of a report, so long as no court has stayed publication. N.D.C.C. 26.1-03-19.4(5)(a). Additionally, all working papers, recorded information, documents, and copies disclosed to the commissioner in the course of a financial examination are confidential. N.D.C.C. 26.1-03-19.4(6)(a).

65. For purposes of any examination other than financial examinations, all preliminary data, drafts, notes, impressions, memoranda, working papers, and work product generated by the insurance commissioner or the person making the examination are confidential until the commissioner releases a final report or upon a declaration by the commissioner of nonconfidentiality. N.D.C.C. § 26.1-03-19.4(6)(b).

66. Any information obtained by the insurance commissioner in the course of an examination relating to insurance holding company systems, unless the insurance company to which it pertains gives written consent or the commissioner, after notice and a hearing, determines that the interests of the policyholders, shareholders, or the public will be served by the publication of the information. N.D.C.C. § 26.1-10-07.

67. In delinquency proceedings brought by the insurance commissioner, all records of the insurer, other documents, and all insurance department files and court records, so far as they pertain to or are a part of the record of the proceedings, unless and until the court orders otherwise or unless the insurer requests that the matter be made public. N.D.C.C. § 26.1-06.1-10.

68. All examination reports, working papers, recorded information, documents, and copies obtained in the course of an examination made under the life settlements chapter or in the course of analysis or investigation by the insurance commissioner of the financial condition or market conduct of a licensee. N.D.C.C. 26.1-33.4-06(7)(b)

69. Any memorandum in support of an actuarial opinion of reserves, and any other material provided by an insurance company to the insurance commissioner in connection therewith. N.D.C.C. § 26.1-35-01.1(4)(h).

70. Health maintenance organization enrollee clinical records available to the insurance commissioner for compliance with the quality assurance program, except upon written consent for disclosure by the enrollee or the enrollee's authorized representative. N.D.C.C. § 26.1-18.1-06(5).

71. Any data or information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained by any health maintenance organization, as well as the information considered by a health care review committee and the records of their actions and related proceedings. N.D.C.C. § 26.1-18.1-23.

72. Annual financial statements filed by government self-insurance pools and all working papers of the insurance commissioner's staff, until the report is final, unless the commissioner declares that the material or any party of the material is not confidential. N.D.C.C. § 26.1-23.1-04.

73. Information regarding the portion of the funds or liability reserves of a self-insured government pool established for the purposes of satisfying a specific claim or cause of action. N.D.C.C. § 26.1-23.1-06.

74. Risk-based capital reports and plans. N.D.C.C. §§ 26.1-03.1-08; 26.1-03.2-08.

75. Asset and agreement reports filed by insurers with the insurance commissioner. N.D.C.C. § 26.1-10.1-01.

Job Service/Unemployment Compensation Records:

76. Records of employers doing business in the state which are obtained by North Dakota job service in the administration of the unemployment compensation law. N.D.C.C. §§ 52-01-02, 03.

Workers Safety and Insurance Records:

77. Information contained in employers' files and reports obtained by Workforce Safety and Insurance. N.D.C.C. § 65-04-15.

78. Information contained in the claims files and records of injured employees, except the claimant's name, date of birth, injury date, employer name, type of injury, whether the claim is accepted, denied, or pending, and whether the claim is active or inactive. N.D.C.C. § 65-05-32.

Records of the Labor Commissioner:

79. Information furnished to the labor commissioner by public officers and employers relating to their respective offices or businesses. *See* N.D.C.C. § 34-05-03.

Board of Equalization Records:

80. Statements of full consideration paid in property conveyances, filed with and maintained by registers of deeds and the State Board of Equalization, except that the Board may make reports to the public that do not reveal the names of any grantors, grantees, or parties. N.D.C.C. § 11-18-02.2(8).

Records of the Tax Commissioner and Other Tax Materials:

81. Confidential information provided to the tax commissioner. *See, e.g.,* N.D.C.C. § 57-02-11.2 (records and information provided by the owner or occupant of commercial property with regard to income and expenses of the property); N.D.C.C. § 57-39.2-23 (information obtained in the enforcement of the sales tax); N.D.C.C. § 57-05-11 (information obtained during assessment of railroad property); N.D.C.C. § 57-37.1-22 (estate tax returns); N.D.C.C. § 57-38-57 (income tax returns).

82. Any federal tax return or return information opened to inspection or disclosed by the United States secretary of the treasury to the state tax commissioner for the administration of the tax laws. N.D.C.C. § 57-01-14.

Department of Financial Institutions Records and Information:

83. Facts and information obtained by the commissioner or department of financial institutions or the department in the course of examinations, receiving reports, investigations, and receiving applications containing trade secrets, commercial, financial, personnel, medical, or examination report information. N.D.C.C. § 6-01-07.1.

84. Reports made by or filed with the state banking board or commissioner of financial institutions relating to any financial institution, which may be inspected only by stockholders, shareholders, depositors, creditors, and sureties on any bonds of any such institution or on the bonds of any officer or employee thereof. N.D.C.C. § 6-01-07.

Industrial Commission Records and Information:

85. Basic exploration data of subsurface minerals collected by an operator, when requested by the operator, for a period of one year (the time period may be further extended upon approval by the industrial commission). N.D.C.C. § 38-12-02.

86. Basic exploration data of coal submitted to the state geologist, for a period of two years (the time period may be extended for one-year periods by the state geologist, for a total period not to exceed ten years, unless it is demonstrated that the time period should be further extended to prevent possible resulting harm). N.D.C.C. § 38-12.1-04.

87. Oil and gas well data reported to the industrial commission (if confidential treatment is requested in writing by those reporting the data), for a period not to exceed six months. N.D.C.C. 38-08-04.

Bank of North Dakota Records and Information:

88. Certain records of the Bank of North Dakota. *See* N.D.C.C. § 6-09-35.

89. Certain customer information held by the Bank of North Dakota (or other financial institution). *See* N.D.C.C. ch. 6-08.1.

Housing Finance Agency Records and Information:

90. The following records of the housing finance agency: 1) Personal or financial information of a participant in any of the housing finance agency's programs, obtained directly or indirectly, except for routine credit inquiries or as required by court order; 2) Internal or interagency memorandums or letters of a personal nature which are not available by law to a party, except insofar as they are available in litigation with the agency; 3) Personal financial statements which the industrial commission requires of any housing finance agency employee or member of the housing finance agency's advisory board. N.D.C.C. § 54-17-07.8

State Geologist Records and Information:

91. Geological and geophysical data obtained by the state geologist, when requested by the seller or donor, until such time as the seller or donor notifies the state geologist that confidentiality is no longer required. N.D.C.C. § 54-17.4-08.

Lignite Records and Information:

92. Lignite industry materials and data submitted to, or made or received by, the industrial commission, to the extent that the commission determines (following a request by a person or entity, which is also confidential) the material or data consist of trade secrets, or commercial, financial, or proprietary information of individuals or entities applying to or contracting with the commission or receiving commission services. N.D.C.C. § 54-17.5-06.

Public Service Commission Records and Information:

93. Public service commission reports of the stock of crude petroleum of any particular pipeline, except the aggregate amounts held by all the pipelines making reports and their aggregate storage capacity. N.D.C.C. § 49-19-02.

94. Specific information included in surface coal mining plans, upon request by the permit applicant and in the discretion of the public service commission, provided such information pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental contents which is potentially toxic in the environment), for a period not to exceed ten years. N.D.C.C. § 38-14.1-13.

Records of State Boards or Commissions Regulating Professions or Industries:

95. State chiropractic board of examiners information concerning licensing of chiropractic hospitals, except that information may be disclosed in a proceeding involving the question of licensure. N.D.C.C. § 23-17-09.

96. Communications to the board of medical examiners investigative panels, as well as their records (except financial records). N.D.C.C. § 43-17.1-08.

97. Information acquired by counselors licensed by the board of counselor examiners in rendering counseling services. N.D.C.C. § 43-47-09.

98. The contents of any document, paper, or record examined by a member, officer, agent, or employee of the board of barber examiners, or any information obtained in the course of his investigation, except as disclosure is required to carry out the barber statute. N.D.C.C. § 43-04-15.

99. Investigative files of the state board of pharmacy, until a complaint is filed or the board decides not to file a complaint. N.D.C.C. § 43-15-10(15).

100. All data and information, including client and juvenile records, acquired by the board of social work examiners in its investigations.

N.D.C.C. § 43-41-10(6) and (7).

101. Examination or test questions, scoring keys, and other data used to administer any licensing, employment, academic, or certification examination or test, if the examination or test is to be used again in whole or in part, and records establishing examination or test procedures and instructions regarding the administration, grading, or evaluation of any examination or test, if disclosure may affect scoring outcomes. N.D.C.C. § 44-04-18.8.

Agricultural Records and Information:

102. Audited annual financial statements that must be filed with the department of agriculture by dairy license applicants who purchase milk or cream from dairy producers. N.D.C.C. § 4-30-03.2.

103. Information gained by the state milk marketing board or its representatives through authorized entry, inspection, or investigation, except that such persons may divulge information when called upon to testify in any duly noticed proceeding before the board or in any court proceeding wherein the board is a party. N.D.C.C. § 4-18.1-14.

103. Records pertaining to pesticide application, sales, purchases, and repackaging received by the agriculture commissioner in enforcing the North Dakota Pesticide Act of 1975, except that the commissioner may disclose information where required to enforce the Act. N.D.C.C. § 4-35-24(5).

105. Information created, collected, and maintained by the agricultural mediation service in the course of any mediation, except upon written consent of all parties to the mediation or by an order issued by a court upon a showing of good cause. N.D.C.C. § 6-09.10-10.

106. Documents and records relating to transactions in cultivated ginseng dry root submitted to the agriculture commissioner by a grower or dealer. N.D.C.C. § 4-39-04.

107. Registered pesticide information, when the agriculture commissioner determines it contains or relates to trade secrets, or to commercial or financial information. N.D.C.C. § 19-18-04.2.

108. Information gained by the agriculture commissioner through the use of the release that a dairy processor license applicant must file. N.D.C.C. § 4-30-02.1.

Secretary of State Records and Information:

109. Interrogatories propounded by the Secretary of State the answers thereto, except that the secretary may disclose facts or information obtained therefrom insofar as permitted by law or insofar as required for evidence in any criminal proceedings or in any other action by the state. N.D.C.C. §§ 10-19.1-148, 10-32-152, 10-33-141, 10-35-32, 10-36-09, 45-10.2-111, 45-22-23.

110. Information in the Secretary of State's registry system regarding the execution of international wills, until the death of the maker and then only to any person who presents a death certificate or other satisfactory evidence of the testator's death to the center. N.D.C.C. § 30.1-08.2-09.

State Auditor Records and Information:

111. Information obtained by the state auditor, including the contents of any return, report or other information examined or any listing made therefrom by the state auditor, except when otherwise directed by judicial order or as otherwise provided by law. N.D.C.C. § 54-10-25.

112. Working papers of the state auditor, including records kept by the auditor of the procedures applied, the tests performed, the information obtained, draft audit reports, and the pertinent conclusions reached in the engagement. N.D.C.C. § 54-10-26. Working papers may be, at the discretion of the auditor and unless otherwise prohibited by law, open records. N.D.C.C. § 54-10-26. The final, issued audit report is public information, as are the working papers of an issued au-

dit report, subject to the auditor's discretion to declare all or a portion of such work papers confidential. N.D.C.C. § 54-10-26. The declaration must state the reason for the confidentiality and the date when the working papers will be made public. N.D.C.C. § 54-10-26.

State Toxicologist Records and Information:

113. Results of toxicological or chemical testing or analysis made by the state toxicologist at the request of law enforcement agencies for criminal investigation. N.D.C.C. § 54-12-24.

Securities Commissioner Records and Information:

114. Securities commissioner records regarding the franchise investment law, where the commissioner withholds from public inspection any information the disclosure of which is, in the judgment of the commissioner, not necessary in the public interest or for the protection of investors. N.D.C.C. § 51-19-17(4).

115. The information or documents obtained or prepared in the course of any investigation regarding the issuance and sale of securities, if the securities commissioner chooses to keep the information confidential, but confidential treatment is allowed only during an active and ongoing investigation. N.D.C.C. § 10-04-16.1(1)(c). If an investigation extends beyond six months, the commissioner shall, upon request, state in writing that the need for confidentiality still exists, the general reason why the need exists, and the date, as can best be determined at the time, when the need for confidentiality will cease. N.D.C.C. § 10-04-16.1(1)(c).

Department of Veterans Affairs Records and Information:

116. Records and papers pertaining or relating to veterans that are transferred by the United States government to the Department of Veterans Affairs, in some cases. N.D.C.C. § 37-18-11.

State Historical Society Records and Information:

117. Information from the files of the State Historical Society containing data that specifically identifies the location of archaeological, historical, or paleontological sites in North Dakota, unless the director of the society is satisfied that the applicant has a reasonable need for the information contained in the files and professionally acceptable qualifications to assure that release of the information will not result in unnecessary destruction of the resource. N.D.C.C. § 55-02-07.1.

Vital Records:

118. Birth, death, and fetal death records, filings, data, or other information related to birth, death, and fetal death records, except as authorized. *See* N.D.C.C. § 23-02.1-27.

Judicial Conduct Commission Records and Information:

119. Before the filing and service of formal charges, all proceedings of the judicial conduct commission; after the filing and service of formal charges, all proceedings are public except incapacity proceedings. N.D.C.C. § 27-23-03(5); N.D. R. Jud. Conduct Comm. 6.

120. Before the filing and service of formal charges, all information relating to a complaint that has not been dismissed, unless the judicial conduct commission has determined there is a need to notify another person to protect that person or to notify a government agency to protect the public or the administration of justice, or upon waiver in writing by the judge. N.D.C.C. § 27-23-03(5); N.D. R. Jud. Conduct Comm. 6.

121. All information relating to a complaint that has been dismissed without formal charges being filed. N.D.C.C. § 27-23-03(5); N.D. R. Jud. Conduct Comm. 6.

122. Disciplinary counsel's work product, judicial conduct commission deliberations, and records of the commission's deliberations. N.D.C.C. § 27-23-03(5); N.D. R. Jud. Conduct Comm. 6.

Records of the Attorney General's Office (Including State Fire Marshal):

123. Arson information received by the state fire marshal, any law enforcement officer, or any insurance company, until its release is required pursuant to a criminal or civil proceeding. N.D.C.C. § 18-01-05.1(7).

124. Testimony, correspondence, or other matter secured in an investigation by the state fire marshal. N.D.C.C. § 18-01-28.

125. The attorney general's or state's attorney's investigation of alleged violations of the statement of interests law for public officers and candidates, until a determination has been reached by the investigating officer that enough incriminating evidence exists to bring an action and such action is commenced in the appropriate district court. N.D.C.C. § 16.1-09-06.

For information regarding release of criminal history information by the bureau of criminal investigation, see N.D.C.C. § 12-60-16.6.

Law Enforcement Records and Information:

126. Active criminal intelligence information and active criminal investigative information. N.D.C.C. § 44-04-18.7.

127. Law enforcement records and files concerning children, except where the child is prosecuted as an adult, where the interests of national security require disclosure, or where the court otherwise orders disclosure in the interest of the child. N.D.C.C. § 27-20-52. Additionally, fingerprint files of children are confidential. N.D.C.C. § 27-20-53.

128. The address, telephone number, or any identifying information that, if released, could reasonably be used to locate a victim or alleged victim of domestic violence contained in any record maintained by a law enforcement facility is exempt and may be redacted from the record before release. N.D.C.C. § 44-04-18.20.

129. Any telephone number and the home address of a 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. N.D.C.C. § 44-04-18.3(1).

130. Records or other information that would reveal the identity, or endanger the life or physical well-being, of an undercover law enforcement officer. N.D.C.C. § 44-04-18.3(2).

131. Any record containing the work schedule of employees of a law enforcement agency is exempt. N.D.C.C. § 44-04-18.3(3).

County Records:

132. A report of death, an autopsy report, and any working papers, notes, images, pictures, photographs, or recordings of the medical county coroner in any form. N.D.C.C. § 11-19-11. 165.

Municipality Records:

133. Motor vehicle accident reports required by incorporated cities, towns, and other municipalities, except that a city department may disclose the identity of a person involved in an accident when such identity is unknown or when the individual denies presence at the accident. N.D.C.C. § 39-08-14.

134. Records of libraries that provide a library patron's name or identification sufficient to identify a patron together with the subject about which the patron requested information (in the absence of a subpoena or court order requiring disclosure). N.D.C.C. § 40-38-12.

Education Records and Information:

135. Certain student records and medical records. *See, e.g.,* N.D.C.C. § 15-10-17(7); N.D.C.C. § 15.1-24-04; N.D.C.C. § 15.1-26-06; N.D.C.C. § 15.1-34-10; *see also* the federal Family Educational Rights and Privacy Act.

136. Records of a school law enforcement unit regarding a student at a school. N.D.C.C. § 15.1-19-14.

137. Criminal history records provided to the education standards and practices board. N.D.C.C. § 15.1-13-14.

138. Consideration of the appointment or removal of any president, faculty head, professors, instructors, teachers, officers, and other employees of the institutions under the Board of Higher Education's control, unless the individual involved requests that the meeting be open to other individuals or to the public. N.D.C.C. § 15-10-17(1).

139. Fundraising and donor records of the state board of higher education, university system, and affiliated nonprofit organizations. N.D.C.C. § 44-04-18.15.

140. Patient records at student health services and university system clinics. N.D.C.C. § 44-04-18.16.

Public Employee Records and Information:

141. Any record of a public employee's medical treatment or use of an employee assistance program. N.D.C.C. § 44-04-18.1.

142. Personal and non-confidential information regarding a public employee contained in a personnel record or given to the state or a political subdivision in the course of employment is exempt. N.D.C.C. § 44-04-18.1.

143. Personal information regarding a licensee maintained by an occupational or professional board, association, state agency, or commission created by law is exempt. N.D.C.C. § 44-04-18.1.

144. Records and information pertaining to a public employee's medical and dependent care reimbursement under the pretax benefits program. N.D.C.C. § 54-52.3-05.

145. All records relating to the retirement benefits of a member or beneficiary under the teacher, Highway Patrol member, and public employee retirement funds, as well as records under the uniform group insurance program. *See* N.D.C.C. § 15-39.1-30; N.D.C.C. § 39-03.1-28; N.D.C.C. § 54-52-26; N.D.C.C. § 54-52.1-11.

146. The medical records and related data of the employees, retirees, and dependents obtained as a result of enrollment in the uniform group insurance program. N.D.C.C. § 54-52.1-12.

Child Fatality Review Panel Records:

147. All documentation and reports, except for an annual report, of the child fatality review panel. N.D.C.C. § 50-25.1-04.5.

Attorney Work Product:

148. Attorney work product, meaning a document or record that was prepared by an attorney representing a public entity, which reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity and was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings or in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings. N.D.C.C. § 44-04-19.1. Following the final completion of the civil or criminal litigation or the adversarial administrative proceeding, including the exhaustion of all appellate remedies, attorney work product must be made available for public disclosure by the public entity, unless another exception applies, or unless disclosure would have an adverse fiscal effect on the conduct or settlement of other pending or reasonably predictable proceedings, or unless the attorney work product reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity. N.D.C.C. § 44-04-19.1.

Economic Development Records and Information:

149. 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, or expand within this state, or partner with a public entity to conduct research or to license

a discovery or innovation. N.D.C.C. § 44-04-18.4. This exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law. N.D.C.C. § 44-04-18.4.

150. Trade secrets and proprietary, commercial, or financial information received from a person who is interested in or is applying for or receiving financing, technical assistance, or other forms of business assistance. N.D.C.C. § 44-04-18.4.

Critical Incident Stress Management Team Records and Information:

151. All records and proceedings of a critical incident stress management team in connection with its critical incident stress debriefing activities (except that information, documents, or records otherwise available from original sources are not immune from discovery because they were presented during a critical incident stress debriefing). N.D.C.C. § 32-03-50.

Abandoned Property Records:

152. Documentation and working papers obtained or compiled by the administrator of the state abandoned property office in the course of conducting an audit for unclaimed property, but the administrator's final, completed audit reports are open records. N.D.C.C. § 47-30.1-30.1.

153. Reports filed with the administrator of the state abandoned property office, until twenty-four months after the date payment or delivery is made. N.D.C.C. § 47-30.1-19.1.

Records of Ownership in Registered Public Obligations:

154. Records regarding ownership of or security interests in registered public obligations. N.D.C.C. § 21-03.1-09.

Domestic Violence and Sexual Assault Program Records:

155. Domestic violence or sexual assault program records. *See* N.D.C.C. § 14-07.1-18.

156. Private information disclosed by a minor to a domestic violence organization. N.D.C.C. § 14-07.3-02. The counseling center must establish procedures to provide access by a parent, guardian, or custodian of a minor to private information concerning the minor, subject to the following: 1) The counseling center may deny parental access to private information upon the request of the minor; 2) Upon receipt of the request, the counseling center must determine if honoring the request to deny parental access would be in the best interest of the minor. N.D.C.C. § 14-07.3-03.

911 Records:

157. Unpublished names and telephone numbers generated by or provided to an emergency services communication system coordinator or public safety answering point are confidential. N.D.C.C. § 57-40.6-07. Published names and telephone numbers are exempt. N.D.C.C. § 57-40.6-07.

158. Records which reveal personal information or the identity, address, or telephone number of a person requesting emergency service or reporting an emergency are exempt and may be redacted before being released. N.D.C.C. § 57-40.6-07. Additionally, the medical condition of an individual, medical treatment provided to an individual, and the name of an individual who received medical treatment from a public entity during an emergency medical response is an exempt record. N.D.C.C. § 44-04-18.22.

159. An audio recording of a request for emergency services or of a report of an emergency is an exempt record; however, upon request, a person may listen to the audio recording, but may not copy or record the audio. N.D.C.C. § 57-40.6-07. A person may also request a written transcript of the audio recording, which must be provided to the person within a reasonable time. N.D.C.C. § 57-40.6-07.

Computer Software Programs:

160. Any computer software program or component of a computer software program contracted, developed, or acquired by a public entity or state agency, institution, department, or board and for which the public entity or state agency, institution, department, or board acquires a license, copyright, or patent is exempt. N.D.C.C. § 44-04-18.5.

Other Trade Secret, Proprietary, Commercial, and Financial Information:

161. Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed. See N.D.C.C. § 44-04-18.4 for definitions.

Access to Financial Account Numbers:

162. Any credit, debit, or electronic fund transfer card or account number and any financial institution account number that a public entity, elected official, or appointed official uses or has available. N.D.C.C. § 44-04-18.9.

Lists of Minors:

163. Any record of a public entity that is a compilation of minors' names, addresses, telephone numbers, or any combination thereof is exempt. N.D.C.C. § 44-04-18.13.

Personal and Financial Information in a Consumer Complaint:

164. Personal and financial information submitted to a state agency as part of a consumer complaint, or gathered as part of an investigation of a consumer complaint, is exempt. N.D.C.C. § 44-04-18.17.

Autopsy Images:

165. An autopsy photograph or other visual image or a video or audio recording of an autopsy. N.D.C.C. 44-04-18.18.

Individual Recipients of Economic Assistance or Benefits:

166. Records concerning individual applicants or recipients of economic assistance or support administered under the division of community services or a community action agency, including benefits or services, are exempt. N.D.C.C. § 44-04-18.19. The exempt records include applications, income or eligibility verification, assessments, or other personal, medical, or financial data. N.D.C.C. § 44-04-18.19.

Electronic Mail Addresses and Telephone Numbers:

167. The e-mail address or telephone number of an individual which is provided for the purpose of communicating with a public entity is an exempt record. N.D.C.C. § 44-04-18.21. The provision may not be used to shield the identity of the individual communicating with the public entity. N.D.C.C. § 44-04-18.21.

Library, Archive, and Museum Collections:

168. A public library, archive, or museum may designate a donated record as an exempt record if the donor of the record requests as a condition of the donation that the record not be released to the public for a specific period of time, which may not exceed twenty years beyond the death of the donor. N.D.C.C. § 44-04-18.23.

B. Other statutory exclusions.

Although government officials have attempted to read exclusions into the open records law based upon statutes that do not contain explicit exceptions, the North Dakota Supreme Court has resisted this effort. In *Hovet v. Hebron Public School District*, the court held "an exception to the open-records law may not be implied." 419 N.W.2d 189, 191 (N.D. 1988). In explaining this holding, the court stated:

[F]or an exception to the open-records law to exist under our constitutional and statutory provisions, it must be specific, i.e., the Legislature must directly address the status of the record in

question, for a specific exception, by the plain terms of [the constitutional and statutory] provisions, may not be implied.

Id.

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

There do not appear to be any required court-derived exclusions or common-law exceptions to the open records law. The North Dakota Supreme Court has held, "for an exception to the open-records law to exist under our constitutional and statutory provisions, it must be specific, i.e., the Legislature must directly address the status of the record in question, for a specific exception, by the plain terms of those provisions, may not be implied." *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189, 191 (N.D. 1988).

In *Northern States Power Company v. North Dakota Public Service Commission*, the Supreme Court also held that privileges outlined in the North Dakota Rules of Evidence, incorporated into state agency proceedings, do not automatically create open records law exceptions for information provided to state agencies. See *N. States Power Co. v. N.D. Pub. Serv. Comm'n*, 502 N.W.2d 240, 244-45 (N.D. 1993).

D. Are segregable portions of records containing exempt material available?

Segregable portions of records containing exempt material are available. A public entity may not deny a request for an open record on the ground that the record also contains confidential or closed information. N.D.C.C. § 44-04-18.10(1). If confidential or closed information is contained in an open record, a public entity must permit inspection and receipt of copies of the information contained in the record that is not confidential or closed, but it must first delete, excise, or otherwise withhold the confidential or closed information. N.D.C.C. § 44-04-18.10(2).

E. Homeland Security Measures.

Any plans and only those portions of the records, information, surveys, communications, and consultations used to produce the plans relating to the protection of the public or public officials against threats of violence or other harm are exempt. N.D.C.C. § 44-04-25.

Additionally, N.D.C.C. § 44-04-24 provides:

1. A security system plan kept by a public entity is exempt from the provisions of section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.

2. As used in this section:

a. "Critical infrastructure" means public buildings, systems, including telecommunications centers and computers, power generation plants, dams, bridges, and similar key resources, whether physical or virtual, so vital to the state that the incapacity or destruction of these systems would have a debilitating impact on security, state economic security, state public health or safety, or any combination of those matters.

b. "Security system plan" includes all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, communications, or consultations or portions of any such plan relating directly to the physical or electronic security of a public facility, or any critical infrastructure, whether owned by or leased to the state or any of its political subdivisions, or any privately owned or leased critical infrastructure if the plan or a portion of the plan is in the possession of a public entity; threat assessments; vulnerability and capability assessments conducted by a public entity, or any private entity; threat response plans; and emergency evacuation plans.

3. This exemption applies to security system plans received by a public entity before, on, or after March 20, 2003.

4. Nothing in this section may be construed to limit disclosure required for necessary construction, renovation, or remodeling work on

a public building. Disclosure under this subsection does not constitute public disclosure.

N.D.C.C. § 44-04-24.

III. STATE LAW ON ELECTRONIC RECORDS

The North Dakota Century Code states, “Automation of public records must not erode the right of access to those records.” N.D.C.C. § 44-04-18(3). As public entities increase their use of and dependence on electronic recordkeeping, they must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law. N.D.C.C. § 44-04-18(3).

Furthermore, public entities may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of an agency, including public records online or stored in an electronic recordkeeping system used by the agency. N.D.C.C. § 44-04-18(3).

An electronic copy of a record must be provided upon request at no cost, other than the standard costs allowed, unless the nature or volume of the public records requested to be accessed or provided requires extensive use of information technology resources. N.D.C.C. § 44-04-18(3). In that case, the agency may charge no more than the actual cost incurred for the extensive use of information technology resources incurred by the public entity. N.D.C.C. § 44-04-18(3). “Extensive” is defined as a request for copies of electronic records which take more than an hour of information technology resources to produce. N.D.C.C. § 44-04-18(3).

A. Can the requester choose a format for receiving records?

A public entity is not required to create or compile a record that does not exist. N.D.C.C. § 44-04-18(4).

The requestor has the option of accessing an electronically stored record in either a printed medium or through any other available medium. N.D.C.C. § 44-04-18(4). A computer file is not considered an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in the file. N.D.C.C. § 44-04-18(4). 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. N.D.C.C. § 44-04-18(4).

B. Can the requester obtain a customized search of computer databases to fit particular needs?

A public entity is not required to provide a requester with access to a computer terminal. N.D.C.C. § 44-04-18(4).

A public entity may establish procedures for providing access from an outside location to any computer database or electronically filed or stored information maintained by the entity. N.D.C.C. § 44-04-18(5). The procedures must address the measures that are necessary to maintain the confidentiality of information protected by federal or state law, and a reasonable fee may be charged. N.D.C.C. § 44-04-18(5).

C. Does the existence of information in electronic format affect its openness?

No. “Automation of public records must not erode the right of access to those records.” N.D.C.C. § 44-04-18(3).

D. How is e-mail treated?

A “record” under North Dakota law 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. N.D.C.C. § 44-04-17.1(16). E-mail is treated as a record.

1. Does e-mail constitute a record?

Yes, if it is in the possession or custody of a public entity or its agent and has been received or prepared for use in connection with public business or contains information relating to public business. N.D.C.C. § 44-04-17.1(16); *see, e.g.*, N.D. Op. Att’y Gen. 2008-O-15 (2008); N.D. Op. Att’y Gen. 2008-O-07 (2008).

2. Public matter on government e-mail or government hardware

As long as an exception does not apply, public matter on government e-mail or government hardware, if it is in the possession or custody of a public entity or its agent and has been received or prepared for use in connection with public business or contains information relating to public business, is an open record. N.D.C.C. § 44-04-17.1(16).

3. Private matter on government e-mail or government hardware

Certain confidential matter on government e-mail or hardware must be redacted before release. *See, e.g.*, N.D. Op. Att’y Gen. 2006-O-13 (2006) (e-mails containing educational records and other personal information of students required to be redacted under Family Educational Rights and Privacy Act); N.D. Op. Att’y Gen. 2005-O-05 (2005) (same).

4. Public matter on private e-mail

As long as an exception does not apply, public matter on private e-mail, if it is in the possession or custody of a public entity or its agent and has been received or prepared for use in connection with public business or contains information relating to public business, is an open record. N.D.C.C. § 44-04-17.1(16); *see, e.g.*, N.D. Op. Att’y Gen. 2008-O-15 (2008); N.D. Op. Att’y Gen. 2008-O-07, at 5 (2008) (“To allow a person to circumvent the open records law by maintaining public records on a private computer would be inconsistent with past court decisions and Attorney General’s opinions.”).

5. Private matter on private e-mail

Private matter on private e-mail likely would not meet the definition of a public record—being in the possession or custody of a public entity or its agent and received or prepared for use in connection with public business or containing information relating to public business. N.D.C.C. § 44-04-17.1(16).

E. How are text messages and instant messages treated?

There is no statutory or case law addressing this issue. However, it is worth noting that a “record” under North Dakota law 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. N.D.C.C. § 44-04-17.1(16) (emphasis added).

1. Do text messages and/or instant messages constitute a record?

There is no statutory or case law addressing this issue. However, it is worth noting that a “record” under North Dakota law 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. N.D.C.C. § 44-04-17.1(16) (emphasis added).

F. How are social media postings and messages treated?

There is no statutory or case law addressing this issue.

G. How are online discussion board posts treated?

There is no statutory or case law addressing this issue.

H. Computer software

A computer software program and components of a computer software program that are subject to a copyright or a patent and any formula, pattern, compilation, program, device, method, technique, or process supplied to a public entity that is the subject of efforts by the supplying person to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that might obtain economic value from its disclosure or use is confidential. N.D.C.C. § 44-04-18.4(2)(c)(7).

1. Is software public?

Any computer software program or component of a computer software program contracted, developed, or acquired by a public entity or state agency, institution, department, or board and for which the public entity or state agency, institution, department, or board acquires a license, copyright, or patent is exempt. N.D.C.C. § 44-04-18.5.

2. Is software and/or file metadata public?

Any computer software program or component of a computer software program contracted, developed, or acquired by a public entity or state agency, institution, department, or board and for which the public entity or state agency, institution, department, or board acquires a license, copyright, or patent is exempt. N.D.C.C. § 44-04-18.5.

I. How are fees for electronic records assessed?

A public entity may charge a “reasonable fee” for making any copy of a record that is not a paper copy. N.D.C.C. § 44-04-18(2). “Reasonable fee” is defined as the actual cost to the public entity of making the copy, including labor, materials, and equipment. N.D.C.C. § 44-04-18(2). The entity may also charge for the actual cost of postage to mail a copy of a record. N.D.C.C. § 44-04-18(2). The entity may require payment before locating, redacting, making, or mailing a copy. N.D.C.C. § 44-04-18(2). If locating records requires more than one hour, the entity may impose a fee not exceeding \$25 per hour per request, excluding the initial hour, for locating records, including electronic records. N.D.C.C. § 44-04-18(2). The entity may also impose a fee not exceeding \$25 per hour per request, excluding the initial hour, for excising confidential or closed material, including electronic records. N.D.C.C. § 44-04-18(2).

An electronic copy of a record must be provided upon request at no cost, other than the standard costs discussed above, unless the nature or volume of the public records requested to be accessed or provided requires extensive use of information technology resources. N.D.C.C. § 44-04-18(3). In that case, the agency may charge no more than the actual cost incurred for the extensive use of information technology resources incurred by the public entity. N.D.C.C. § 44-04-18(3). “Extensive” is defined as a request for copies of electronic records which take more than an hour of information technology resources to produce. N.D.C.C. § 44-04-18(3).

J. Money-making schemes.

The open records statute does not address money-making schemes

K. On-line dissemination.

The open records statute does not address online dissemination.

IV. RECORD CATEGORIES -- OPEN OR CLOSED

North Dakota law states that all public records are open records unless there is a specific statutory exception.

A. Autopsy reports.

An autopsy report and any working papers and notes relating to an autopsy report are confidential and may be disclosed only as per-

mitted. See N.D.C.C. § 23-01-05.5. The report of death is a public record. N.D.C.C. § 23-01-05.5.

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

Please see the discussion of statutory exemptions, outlined in Section II(A)(2) above.

1. Rules for active investigations.

Please see the discussion of statutory exemptions, outlined in Section II(A)(2) above.

Additionally, concerning criminal investigations, the open records statute provides:

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.
- 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; motor vehicle operator’s identification number; social security number; any credit, debit, or electronic fund transfer card 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.

N.D.C.C. § 44-04-18.7.

2. Rules for closed investigations.

The exception applies only to active criminal intelligence information and active criminal investigative information. Certain information concerning a closed investigation may be subject to other exceptions, however.

C. Bank records.

Please see the discussion of statutory exemptions, outlined in Section II(A)(2) above.

D. Budgets.

Please see the discussion of statutory exemptions, outlined in Section II(A)(2) above.

E. Business records, financial data, trade secrets.

Please see the discussion of statutory exemptions, outlined in Section II(A)(2) above.

Additionally, the open records statute provides:

1. Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed.

2. Under this section, unless the context otherwise requires:

a. “Commercial information” means information pertaining to buying or selling of goods and services that has not been previously publicly disclosed and that if the information were to be disclosed would impair the public entity’s future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.

b. “Financial information” means information pertaining to monetary resources of a person that has not been previously publicly disclosed and that if the information were to be disclosed would impair the public entity’s future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.

c. “Proprietary information” includes:

(1) Information shared between a sponsor of research or a potential sponsor of research and a public entity conducting or negotiating an agreement for the research.

(2) Information received from a private business that has entered or is negotiating an agreement with a public entity to conduct research or manufacture or create a product for potential commercialization.

(3) A discovery or innovation generated by the research information, technical information, financial information, or marketing information acquired under activities described under paragraph 1 or 2.

(4) A document specifically and directly related to the licensing or commercialization resulting from activities described under paragraph 1, 2, or 6.

(5) Technical, financial, or marketing records that are received by a public entity, which are owned or controlled by the submitting person, are intended to be and are treated by the submitting person as private, and the disclosure of which would cause harm to the submitting person’s business.

(6) A discovery or innovation produced by the public entity that an employee or the entity intends to commercialize.

(7) A computer software program and components of a computer software program that are subject to a copyright or a patent and any formula, pattern, compilation, program, device, method, technique, or process supplied to a public entity that is the subject of efforts by the supplying person to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that might obtain economic value from its disclosure or use.

(8) A discovery or innovation that is subject to a patent or a copyright, and any formula, pattern, compilation, program, device, combination of devices, method, technique, technical know-how or process that is for use, or is used, in the operation of a business and is supplied to or prepared by a public entity that is the subject of efforts by the supplying or preparing person to maintain its secrecy and provides the preparing person an advantage or an opportunity to obtain an advantage over those who do not know or use it or that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, a person that might obtain economic value from its disclosure or use.

d. “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, technical know-how, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain the secrecy of the information.

3. This section does not limit or otherwise affect a record pertaining to any rule of the state department of health or to any record pertaining to the application for a permit or license necessary to do business or to expand business operations within this state, except as otherwise provided by law.

4. This section does not limit the release or use of records obtained in an investigation by the attorney general or other law enforcement official.

5. Unless made confidential under subsection 1, the following economic development records and information are exempt:

a. 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 does not include records

pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.

b. Trade 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.

N.D.C.C. § 44-04-18.4.

F. Contracts, proposals and bids.

Bids or proposals received by a public entity in response to a request for proposals by the public entity are exempt until all of the proposals have been received and opened by the public entity or until all oral presentations regarding the proposals, if any, have been heard by the public entity. N.D.C.C. § 44-04-18.4. Records included with any bid or proposal naming and generally describing the entity submitting the proposal are open. N.D.C.C. § 44-04-18.4.

G. Collective bargaining records.

A governing body may hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. N.D.C.C. 44-04-19.1(9). The executive session may be held only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity. N.D.C.C. 44-04-19.1(9).

All meetings of the governing body of a public entity that are not open to the public must be recorded electronically or on audio or videotape. N.D.C.C. § 44-04-19.2(5). The recording may be disclosed publicly only upon majority vote of the governing body, unless the executive session was required to be confidential. N.D.C.C. § 44-04-19.2(5).

H. Coroners reports.

A report of death, an autopsy report, and any working papers, notes, images, pictures, photographs, or recordings of the medical county coroner in any form are confidential. N.D.C.C. § 11-19-11.

I. Economic development records.

Unless confidential because they contain trade secret, proprietary, commercial, or financial information that is of a privileged nature and has not been previously disclosed, the following economic development records are exempt: 1) 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 its interest or intent to locate, relocate, or expand within the state, or partner with a public entity to conduct research or to license a discovery or innovation (this exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within the state, except as otherwise provided by law); and 2) Trade secrets and proprietary, commercial, or financial information received from a person who is interested in applying for or receiving financing, technical assistance, or other forms of business assistance. N.D.C.C. § 44-04-18.4(5).

J. Election records.

North Dakota is the only state without voter registration.

A central voter file and pollbooks are maintained by the secretary of state and county auditors. County auditors must generate a pollbook for each precinct in the county from the central voter file by the day before an election. N.D.C.C. § 16.1-02-13. With the exception of a "secured active" record and the voter's birth date and identification number, which are exempt records, the precinct pollbooks are open records. N.D.C.C. § 16.1-02-13. A secured active record indicates an

individual who is protected by a protection order or disorderly conduct restraining order. N.D.C.C. § 16.1-02-07.

A voter list or a report generated from the central voter file may be made available to a candidate, political party, or a political committee for election related purposes, but may not be sold or distributed for non-election-related purposes. N.D.C.C. § 16.1-02-15. The information available to the candidate, political party, or political committee includes the name, addresses, unique identifier, location, and four years of voting history of an individual. N.D.C.C. § 16.1-02-15. A voter's birth date and state identification number is exempt, as is a secured active record. N.D.C.C. § 16.1-02-15.

1. Voter registration records.

North Dakota is the only state without voter registration.

2. Voting results.

After the polls are closed, the inspector of elections and the judges must immediately generate the canvass report from the electronic voting system. N.D.C.C. § 16.1-15-02. The ballots counted by the machine must be equal in number with the names on the poll clerks' lists. N.D.C.C. § 16.1-15-02. The canvass must continue without adjournment until completed and must be open to the public. N.D.C.C. § 16.1-15-02.

K. Gun permits.

Information collected from an applicant for a license to carry a firearm or dangerous weapon concealed is confidential. N.D.C.C. § 62.1-04-03(8).

L. Hospital reports.

Please see the discussion of statutory exemptions, outlined in Section II(A)(2) above.

Generally, disclosure of protected health information or personal medical records is prohibited. *See, e.g.*, N.D.C.C. ch. 23-01.3 (broadly prohibiting release of protected health information).

M. Personnel records.

Personnel records, including information regarding the salary and job performance of an employee, are generally open to the public, according to the attorney general.

Any record of a public employee's medical treatment or use of an employee assistance program is confidential and must not be included in the employee's personnel record. N.D.C.C. § 44-04-18.1.

Personal information is exempt. N.D.C.C. § 44-04-18.1. Personal information includes a person's 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, telephone 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. N.D.C.C. § 44-04-18.1. Nonconfidential information contained in a personnel record of an employee of a public entity is also exempt. N.D.C.C. § 44-04-18.1.

1. Salary.

Generally open.

2. Disciplinary records.

Generally open.

3. Applications.

Generally open. *See Forum Publ'g Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986).

4. Personally identifying information.

Personal information is exempt. N.D.C.C. § 44-04-18.1. Personal information includes a person's home address; home telephone num-

ber or personal cell phone number; photograph; medical information; motor vehicle operator's identification number; public employee identification number; payroll deduction information; the name, address, telephone 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. N.D.C.C. § 44-04-18.1.

5. Expense reports.

The open records statute does not address expense reports contained in personnel records.

6. Other.

Any record of a public employee's medical treatment or use of an employee assistance program is confidential and must not be included in the employee's personnel record. N.D.C.C. § 44-04-18.1.

N. Police records.

Please see the discussion of rules for active investigations, outlined in Section IV(B)(1) above.

Additionally, as a summary, active criminal intelligence information and active criminal investigative information is confidential. N.D.C.C. § 44-04-18.7. Law enforcement records and files concerning children, except where the child is prosecuted as an adult, where the interests of national security require disclosure, or where the court otherwise orders disclosure in the interest of the child, are also confidential. N.D.C.C. § 27-20-52. Fingerprint files of children are confidential. N.D.C.C. § 27-20-53. Finally, the address, telephone number, or any identifying information that, if released, could reasonably be used to locate a victim or alleged victim of domestic violence contained in any record maintained by a law enforcement facility is exempt and may be redacted from the record before release. N.D.C.C. § 44-04-18.20.

The following records and information are generally open:

- 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.
- 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.

N.D.C.C. § 44-04-18.7(2).

1. Accident reports.

Generally open, except for that portion containing an investigating officer's opinion. *See* N.D.C.C. § 39-08-13.

2. Police blotter.

Generally open. *See* N.D.C.C. § 44-04-18.7(2).

3. 911 tapes.

Please see the discussion of 911 records, outlined in Section II(A)(2) above.

An audio recording of a request for emergency services or of a report of an emergency is an exempt record; however, upon request, a person may listen to the audio recording, but may not copy or record the audio. N.D.C.C. § 57-40.6-07. A person may also request a written transcript of the audio recording, which must be provided to the person within a reasonable time. N.D.C.C. § 57-40.6-07.

4. Investigatory records.

a. Rules for active investigations.

Please see the discussion of rules for active investigations, outlined in Section IV(B)(1) above.

b. Rules for closed investigations.

Please see the discussion of rules for closed investigations, outlined in Section IV(B)(2) above.

5. Arrest records.

Generally open. *See* N.D.C.C. § 44-04-18.7(2).

6. Compilations of criminal histories.

Generally open. *See* N.D.C.C. § 12-60-16.2.

7. Victims.

If children or victims of domestic violence, generally closed. Please see the discussion of statutory exemptions, outlined in Section II(A)(2) above.

8. Confessions.

Not addressed.

9. Confidential informants.

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. N.D.C.C. § 44-04-18.3(4).

10. Police techniques.

Generally closed. *See* N.D.C.C. § 44-04-18.7.

11. Mug shots.

Generally open. *See* N.D.C.C. § 44-04-18.7(2).

12. Sex offender records.

Generally open. *See* N.D.C.C. § 12.1-32-15. Relevant and necessary conviction and registration information must be disclosed to the public if the individual is a moderate or high risk and the disclosure is necessary for public protection. N.D.C.C. § 12.1-32-15(13). Upon request, law enforcement agencies may release conviction and registration information regarding low-risk, moderate-risk, or high-risk offenders. N.D.C.C. § 12.1-32-15(13).

13. Emergency medical services records.

Please see the discussion of 911 records, outlined in Section II(A)(2) above.

O. Prison, parole and probation reports.

The case history records of the department of corrections and rehabilitation are exempt records. N.D.C.C. § 12-47-36(1). Upon application to the district court, with service of the application on the department of corrections and rehabilitation and opportunity for the department to submit a written response, the court may order the inspection of a case history record, unless there is a showing that a proper and legitimate reason exists for denying inspection of the case history record. N.D.C.C. § 12-47-36(1). If the court issues an order allowing inspection, the court must allow the department of corrections and rehabilitation to remove all identifying information that may create a risk of harm to property or to any person. N.D.C.C. § 12-47-36(1).

“Case history record” does not include medical, psychological, and treatment records and legal files. N.D.C.C. § 12-47-36(1). The term includes inmate disciplinary proceedings, administrative and disciplinary segregation placements, institutional and criminal investigation reports, supervision histories, job placements, education programs, inmate financial accounts, and protective management cases.

Records with respect to a person’s identity, location, legal files except records under court seal, criminal convictions, or projected date of release, except for the records of a person who is under protective management, are open records. N.D.C.C. § 12-47-36(4).

The parole board may permit the inspection of a person’s pre-parole report, or parts of the report, prepared for the parole board. N.D.C.C. § 12-47-36(7).

The department of corrections and rehabilitation must maintain the confidentiality of witness protection program records and legal files under seal. N.D.C.C. § 12-47-36(9).

P. Public utility records.

Generally open, unless a specific exception applies. *See, e.g.*, N.D.C.C. § 49-19-02 (Public Service Commission reports of the stock of crude petroleum of any particular pipeline are not public).

Q. Real estate appraisals, negotiations.

1. Appraisals.

Generally open. *See* N.D. Op. Att’y Gen. 2002-L-41 (2002).

2. Negotiations.

A governing body may hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. N.D.C.C. 44-04-19.1(9). The executive session may be held only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity. N.D.C.C. 44-04-19.1(9).

All meetings of the governing body of a public entity that are not open to the public must be recorded electronically or on audio or videotape. N.D.C.C. § 44-04-19.2(5). The recording may be disclosed publicly only upon majority vote of the governing body, unless the executive session was required to be confidential. N.D.C.C. § 44-04-19.2(5).

3. Transactions.

Not addressed.

4. Deeds, liens, foreclosures, title history.

Generally open.

5. Zoning records.

Generally open. *See* N.D. Op. Att’y Gen. 2004-O-05 (2004).

R. School and university records.

Generally restricted under the federal Family Educational Rights and Privacy Act, which is a specific exception to the open records law.

Please see the discussion of education records and information exemptions, outlined in Section II(A)(2) above. Records of a school law enforcement unit regarding a student at a school are also confidential. N.D.C.C. § 15.1-19-14.

1. Athletic records.

There are no applicable statutory exemptions.

2. Trustee records.

Fundraising and donor records of the state board of higher educa-

tion, university system, and affiliated nonprofit organizations are exempt. N.D.C.C. § 44-04-18.15.

3. Student records.

Student records and medical records are generally confidential. *See, e.g.*, N.D.C.C. § 15-10-17(7); N.D.C.C. § 15.1-24-04; N.D.C.C. § 15.1-26-06; N.D.C.C. § 15.1-34-10; *see also* the federal Family Educational Rights and Privacy Act.

Records of a school law enforcement unit regarding a student at a school are confidential. N.D.C.C. § 15.1-19-14.

Patient records at student health services and university system clinics are confidential. N.D.C.C. § 44-04-18.16.

4. Other.

Information concerning the consideration of the appointment or removal of any president, faculty head, professors, instructors, teachers, officers, and other employees of the institutions under the Board of Higher Education’s control, unless the individual involved requests that the meeting be open to other individuals or to the public, is exempt. N.D.C.C. § 15-10-17(1).

Criminal history records provided to the education standards and practices board are confidential. N.D.C.C. § 15.1-13-14.

S. Vital statistics.

Birth, death, and fetal death records, filings, data, or other information related to birth, death, and fetal death records, except as authorized, are confidential. *See* N.D.C.C. § 23-02.1-27.

1. Birth certificates.

Birth records, filings, data, and other information related to birth, except as authorized, are confidential. *See* N.D.C.C. § 23-02.1-27.

2. Marriage & divorce.

Generally open.

3. Death certificates.

Death and fetal death records, filings, data, and other information related to death and fetal death records, except as authorized, are confidential. *See* N.D.C.C. § 23-02.1-27.

4. Infectious disease and health epidemics.

To protect the integrity of disease control records, to ensure their proper use, and to ensure efficient and proper administration of the department of health’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 records. N.D.C.C. § 23-07-20.1.

V. PROCEDURE FOR OBTAINING RECORDS

A. How to start.

1. Who receives a request?

Any official of any agency can be asked for public records. It is worth noting many older records are maintained by the records management program of the state information technology department. *See* N.D.C.C. Ch. 54-46. Inquiries for records that are no longer available through the relevant agency should be directed to this office. The records management program can be reached at (701) 328-3585. The state records administrator and his or her agents and employees are subject to the same restrictions and penalties regarding the dissemination of information as are the personnel of the agency involved. N.D.C.C. 54-46-14.

2. Does the law cover oral requests?

Yes. The North Dakota open records law provides, “[e]xcept as oth-

erwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.” N.D.C.C. § 44-04-18(1) (emphasis added). A request need not be made in person or in writing, and the copy must be mailed upon request. N.D.C.C. § 44-04-18(2).

a. Arrangements to inspect & copy.

There is no need for advanced arrangements to inspect and copy under North Dakota law. Of course, calling in advance may facilitate the process of inspecting records.

b. If an oral request is denied:

Any interested person may request an attorney general’s opinion to review an alleged violation of the open records law. N.D.C.C. § 44-04-21.1(1). The request must be made within thirty days of the alleged violation. N.D.C.C. § 44-04-21.1(1). 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. N.D.C.C. § 44-04-21.1(1). The attorney general must then issue to the public entity involved an opinion on the alleged violation, unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. N.D.C.C. § 44-04-21.1(1).

(1). How does the requester memorialize the refusal?

In any opinion issued, the attorney general must base the opinion on the facts given by the public entity. N.D.C.C. § 44-04-21.1(1).

3. Contents of a written request.

The open records law does not require that requests be in writing and thus does not provide requirements for the content of a written request. Other statutory provisions may apply. For example, N.D.C.C. § 12-60-16.6 states that requests for criminal history information must be in writing and specifies the information that must be included in the written request.

Additionally, in order to bring a court action under N.D.C.C. § 44-04-21.2, the complaint must be accompanied by a dated, written request for the requested record. N.D.C.C. § 44-04-21.2.

a. Description of the records.

The open records law does not require that requests be in writing and thus does not provide requirements for the content of a written request.

b. Need to address fee issues.

The open records law does not require that requests be in writing and thus does not provide requirements for the content of a written request.

c. Plea for quick response.

The open records law does not require that requests be in writing and thus does not provide requirements for the content of a written request.

d. Can the request be for future records?

Yes, the request may be for future records. See, e.g., N.D. Op. Att’y Gen. 98-O-22 (1998) (a public entity cannot deny a request for a record on the basis that the record does not exist if the record was created or received while the request was pending).

B. How long to wait.

Once a request is made, a public entity is required to respond within a reasonable time. The attorney general has stated that access to an open record usually must be granted within a fairly short period of time after a request, because public officials and employees generally should know what records under their control must be disclosed.

Similarly, when there is doubt whether a record must be disclosed, a public official or employee may take a reasonable amount of time to determine whether an exemption applies. The attorney general has said the amount of time within which the public entity must respond to a request is usually measured in hours or a few days rather than several days or weeks. See N.D. Op. Att’y Gen. 98-O-22 (1998).

1. Statutory, regulatory or court-set time limits for agency response.

The attorney general has said the amount of time within which the public entity must respond to a request is usually measured in hours or a few days rather than several days or weeks. See N.D. Op. Att’y Gen. 98-O-22 (1998).

2. Informal telephone inquiry as to status.

The open records statute does not address an informal telephone inquiry as to status, but it is certainly not prohibited.

3. Is delay recognized as a denial for appeal purposes?

The open records statute does not address whether a delay is recognized as a denial for appeal purposes.

C. Administrative appeal.

North Dakota law lays out the administrative appeal procedure:

44-04-21.1. Administrative review procedure.

1. Any interested person may request an attorney general’s opinion to review a written denial of a request for records under section 44-04-18, a denial of access to a meeting under section 44-04-19, or other alleged violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 by any public entity other than the legislative assembly or any committee thereof. 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 days of the alleged violation. In preparing an opinion under this section, the attorney general has discretion to obtain and review a recording made under section 44-04-19.2. The attorney general may request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential. Any such information may not be released by the attorney general and may be returned to the provider of the information. The attorney general shall issue to the public entity involved an opinion on the alleged violation unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. If the request pertains to a public entity as defined in subdivision c of subsection 12 of section 44-04-17.1, 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.

2. If the attorney general issues a written opinion concluding that a violation has occurred, the public entity has seven days after the opinion is issued, regardless of whether a civil action is filed under section 44-04-21.2, to disclose the record, to issue a notice of a meeting that will be held within a reasonable time to correct the violation, or to take steps to correct any other violation. If the public entity fails to take the required action within the seven-day period and the person requesting the opinion prevails in a civil action brought under section 44-04-21.2, the person must be awarded costs, disbursements, and reasonable attorney’s fees in the action and on 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.

3. If a state-level public entity as defined in subdivision a of subsection 12 of section 44-04-17.1 does not comply in full with the at-

torney general's opinion, and a civil action is brought under section 44-04-21.2 or is reasonably predictable, the entity, at its sole cost and expense, shall retain separate counsel who has been approved and appointed by the attorney general as a special assistant attorney general to represent the entity in that action.

1. Time limit.

A request to review a denial of a request for records must be made within thirty days of the alleged violation. N.D.C.C. § 44-04-21.1.

2. To whom is an appeal directed?

The request for review is directed to the state attorney general. N.D.C.C. § 44-04-21.1.

a. Individual agencies.

While the initial request should be made to the individual agency from whom the record is sought, the review of the denial of the request is made to the state attorney general. N.D.C.C. § 44-04-21.1.

b. A state commission or ombudsman.

The request for review is directed to the state attorney general. N.D.C.C. § 44-04-21.1.

c. State attorney general.

Any interested person may request an attorney general's opinion to review a written denial of a request for records, a denial of access to a meeting, or other alleged violation of the open records or open meetings laws by any public entity other than the legislative assembly or any committee thereof. N.D.C.C. § 44-04-21.1.

3. Fee issues.

If the attorney general issues a written opinion concluding that a violation has occurred, the public entity fails to take required action within a seven-day period, and the person who requested the opinion prevails in a civil action brought under N.D.C.C. § 44-04-21.2, the requestor must be awarded costs, disbursements, and reasonable attorney's fees in the action and on appeal.

4. Contents of appeal letter.

The open records law does not specify the requirements of the contents of an appeal letter.

5. Waiting for a response.

In preparing an opinion, the attorney general has discretion to obtain and review a recording made under N.D.C.C. § 44-04-19.2. N.D.C.C. § 44-04-21.1. The attorney general may also request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential. N.D.C.C. § 44-04-21.1. The attorney general must issue to the public entity involved an opinion on the alleged violation unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. N.D.C.C. § 44-04-21.1.

6. Subsequent remedies.

North Dakota law also provides for court action, as discussed below.

D. Court action.

North Dakota law also provides for court action:

44-04-21.2. Remedies for violations and enforcement procedure.

1. A violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 may be the subject of a civil action brought by an interested person or entity. For an alleged violation of section 44-04-18, the complaint must be accompanied by a dated, written request for the requested record. 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. For an intentional or knowing violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21, the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. An action under this subsection must be commenced within sixty days of the date the person knew or should have known of the violation or within thirty days of issuance of an attorney general's opinion on the alleged violation, whichever is later. Venue for an action is in the county where the entity has its principal office or, if the entity does not have a principal office within the state, in Burleigh County.

2. Any action that is a product of a violation of section 44-04-19, 44-04-20, or 44-04-21 is voidable by a court in a civil action authorized by this section.

3. The remedies provided in this section are not available if a violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 has been corrected before a civil action is filed and no person has been prejudiced or harmed by the delay. An interested person or entity may not file a civil action under this section seeking attorney's fees or damages, or both, until at least three working days after providing notice of the alleged violation to the chief administrative officer for the public entity. This subsection does not apply if the attorney general has found under section 44-04-21.1, on a prior occasion, that the public entity has violated section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21.

44-04-21.3. Attorney general referral and criminal penalties.

The attorney general may refer to the appropriate state's attorney any public servant as defined in section 12.1-01-04 who has been found in more than one opinion issued pursuant to section 44-04-21.1 to have violated section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21. A public servant as defined in section 12.1-01-04 who knowingly violates section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 is guilty of an offense under section 12.1-11-06.

1. Who may sue?

An "interested person or entity" may sue. N.D.C.C. § 44-04-21.2(1).

2. Priority.

The remedies provided are not available if a violation has been corrected before a civil action is filed and no person has been prejudiced or harmed by the delay. N.D.C.C. § 44-04-21.2(3). An interested person or entity may not file a civil action seeking attorney's fees or damages, or both, until at least three working days after providing notice of the alleged violation to the chief administrative officer for the public entity. N.D.C.C. § 44-04-21.2(3). This provision does not apply if the attorney general has found under N.D.C.C. § 44-04-21.1, on a prior occasion, that the public entity has violated the open records or meetings laws. N.D.C.C. § 44-04-21.2(3).

3. Pro se.

Pro se suits are not advisable in most instances. In many cases, the State Broadcasters Association or the North Dakota Newspaper Association will assist with either an *amicus curiae* brief or with the financing of the suit.

4. Issues the court will address:

The court may address violations of N.D.C.C. §§ 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21.

a. Denial.

The court may address alleged denials. See N.D.C.C. § 44-04-21.2(1).

b. Fees for records.

The court may address unlawful fees charged for records. See N.D.C.C. § 44-04-21.2(1).

c. Delays.

The court may address unreasonable delays. See N.D.C.C. § 44-04-21.2(1).

d. Patterns for future access (declaratory judgment).

If a court finds a violation, the court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity. N.D.C.C. § 44-04-21.2(1).

5. Pleading format.

The complaint must be accompanied by a dated, written request for the requested record. N.D.C.C. § 44-04-21.2(1).

6. Time limit for filing suit.

An action must be commenced within sixty days of the date the person knew or should have known of the violation or within thirty days of issuance of an attorney general's opinion on the alleged violation, whichever is later. N.D.C.C. § 44-04-21.2(1).

7. What court.

Venue for an action is in the county where the entity has its principal office or, if the entity does not have a principal office within the state, in Burleigh County. N.D.C.C. § 44-04-21.2(1).

8. Judicial remedies available.

The court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity. N.D.C.C. § 44-04-21.2(1). For an intentional or knowing violation, the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. N.D.C.C. § 44-04-21.2(1).

9. Litigation expenses.

The court may award costs, disbursements, and reasonable attorney's fees against the entity. N.D.C.C. § 44-04-21.2(1).

a. Attorney fees.

The court may award reasonable attorney's fees against the entity. N.D.C.C. § 44-04-21.2(1).

b. Court and litigation costs.

The court may award costs and disbursements against the entity. N.D.C.C. § 44-04-21.2(1).

10. Fines.

For an intentional or knowing violation, the court may award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. N.D.C.C. § 44-04-21.2(1).

11. Other penalties.

The attorney general may refer to the appropriate state's attorney any public servant as defined in N.D.C.C. § 12.1-01-04 who has been found in more than one opinion issued to have violated N.D.C.C. §§ 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21. N.D.C.C. § 44-04-21.3. A public servant who knowingly violates N.D.C.C. §§ 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 is guilty of an offense under N.D.C.C. § 12.1-11-06.

12. Settlement, pros and cons.

The open records law does not address settlement.

E. Appealing initial court decisions.**1. Appeal routes.**

Any appeal of a decision of the district court would be taken directly to the North Dakota Supreme Court.

2. Time limits for filing appeals.

In a civil case, the notice of appeal must be filed with the clerk of the district court within sixty days of the date of service of notice of entry of the judgment or order.

3. Contact of interested amici.

In many cases, the State Broadcasters Association or the North Dakota Newspaper Association will assist with either an *amicus curiae* brief or with the financing of the suit.

Open Meetings

I. STATUTE -- BASIC APPLICATION.

North Dakota law provides that all public meetings are open meetings unless there is a specific statutory exemption of a particular type of meeting. The North Dakota Constitution provides:

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

North Dakota Constitution, Article XI, Section 5.

The North Dakota open meetings law provides, “Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.” N.D.C.C. § 44-04-19. Additionally, unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. N.D.C.C. § 44-04-21. Minutes must be kept of all open meetings and are open records. N.D.C.C. § 44-04-21.

The law is simple: Unless there is a specific exemption, meetings are open to the public.

A. Who may attend?

The law contains no restrictions on who may attend public meetings. However, the attorney general has expressed doubt that a non-resident could invoke the open meetings law against a state agency. See Guy and McDonald, *Government in the Sunshine: The Status of Open Meetings and Open Records Laws in North Dakota*, 53 N.D. L. Rev. 51, 66 (1976).

B. What governments are subject to the law?

State, county, municipal, township, school board, and all other levels of state government are subject to the open meetings law. A specific statutory provision states that all meetings of the governing body of a municipality must be open to the public, and a journal of its proceedings kept. N.D.C.C. § 40-06-02.

Unless an exception applies, all meetings of a public entity must be open to the public. N.D.C.C. § 44-04-19. A “public entity” is defined as all:

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, to exercise public authority or perform a governmental function;

b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision 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.

N.D.C.C. § 44-04-17.1(13).

1. State.

Subject to the law.

2. County.

Subject to the law.

3. Local or municipal.

Subject to the law.

C. What bodies are covered by the law?

The following bodies are expressly covered by the law:

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, to exercise public authority or perform a governmental function;

b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision 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.

N.D.C.C. § 44-04-17.1(13).

1. Executive branch agencies.

Covered by the law.

2. Legislative bodies.

Covered by the law. The January filing date for regularly scheduled meetings does not apply to meetings of the legislative assembly or any committee of the legislative assembly. N.D.C.C. § 44-04-20(3).

3. Courts.

The open meetings law does not apply to courts. Therefore, the attorney general has said deliberations of the North Dakota Supreme Court are not open meetings, and committees created by the North Dakota Supreme Court are not subject to the open meetings law.

Court proceedings are generally open to the public under the state constitution, with several exceptions. For example, juvenile hearings, adoption hearings, parentage hearings, grand jury sessions, incapacity hearings, and involuntary treatment hearings are generally closed.

4. Nongovernmental bodies receiving public funds or benefits.

Organizations or agencies supported in whole or in part by public funds, or expending public funds, are covered by the law. N.D.C.C. § 44-04-17.1(13).

“Public funds” are defined as cash and other assets with more than minimal value received from the state or from any political subdivision of the state. N.D.C.C. § 44-04-17.1. An organization or agency “supported in whole or in part by public funds” means an organization or agency that has received public funds exceeding the fair market value of any goods or services given in exchange for the funds. *Id.* The funds may be grants, membership dues, fees, or any other type of payment. *Id.* According to the North Dakota attorney general, a nongovernmental organization expends public funds when it receives and uses a direct appropriation from a governmental entity, or when it manages a pool of public funds on behalf of one or more public entities. See N.D. Op. Att’y Gen. 96-F-18 (1996); N.D. Op. Att’y Gen. 99-O-02 (1999).

5. Nongovernmental groups whose members include governmental officials.

If a body is not a public or governmental body, but its members include governmental officials, the open meetings law applies only if the body is supported in whole or in part by public funds or if the body expends public funds.

6. Multi-state or regional bodies.

There is no specific statutory provision regarding such bodies.

7. Advisory boards and commissions, quasi-governmental entities.

The open meetings law expressly applies to task forces and working groups created by the individual in charge of a state agency or institution. N.D.C.C. § 44-04-17.1. Additionally, because almost all advisory boards, commissions, and quasi-governmental entities expend public funds or are supported in whole or in part by public funds, they would be within the open meetings law.

8. Other bodies to which governmental or public functions are delegated.

If an organization is created or recognized by state law or by an action of a political subdivision to exercise public authority or perform a governmental function, the organization is subject to the open meetings law. N.D.C.C. § 44-04-17.1(13).

9. Appointed as well as elected bodies.

Covered by the law.

D. What constitutes a meeting subject to the law.

The law defines a “meeting” as a formal or informal gathering or a work session, whether in person or through electronic means such as telephone or videoconference. N.D.C.C. § 44-04-17.1(9). A meeting does not include a chance or social gathering at which public business is not considered; emergency operations during a disaster or emergency if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group; or the attendance of members of a governing body at meetings of any national, regional, or state association to which the public entity, the governing body, or individual members belong. N.D.C.C. § 44-04-17.1(9).

As applied to the legislative assembly, “meeting” means any gathering subject to section 14 of article IV of the Constitution of North Dakota, which states, “All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, must be open and public.” N.D.C.C. § 44-04-17.1(9).

1. Number that must be present.

a. Must a minimum number be present to constitute a “meeting”?

Yes. A quorum of the members of the governing body of a public entity regarding public business must be present to meet the statutory definition of a “meeting.” N.D.C.C. § 44-04-17.1(9). Alternatively, less than a quorum of the members of the governing body of a public entity regarding public business may constitute a meeting, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of the open meetings law. N.D.C.C. § 44-04-17.1(9).

A “quorum” is defined as one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity. N.D.C.C. § 44-04-17.1(15).

b. What effect does absence of a quorum have?

For the open meetings law to apply, either a quorum must be present or the members attending one or more smaller gatherings collectively must constitute a quorum and must hold the gathering for the purpose of avoiding the requirements of the open meetings law. N.D.C.C. § 44-04-17.1(9).

2. Nature of business subject to the law.

A gathering must pertain to “public business” to be subject to the law. A governing body does not have to transact business for a gather-

ing to be a meeting. *See, e.g.,* N.D. Op. Att’y Gen. 2001-O-07 (2001). The open meetings law applies to all stages of the decision-making process, including gathering information, holding deliberations, and making a final decision, according to the attorney general.

In *Dickinson Education Association v. Dickinson Public School District No. 1*, 252 N.W.2d 205, 212-13 (N.D. 1977), the North Dakota Supreme Court held that committees (consisting of a portion of the total membership of a covered board) must hold their meetings in public. The court also held that all school board (or negotiating committee) meetings where teacher contract offers and school board offers and counteroffers are considered must be open to the public.

a. “Information gathering” and “fact-finding” sessions.

Subject to the law.

b. Deliberations toward decisions.

Subject to the law.

3. Electronic meetings.

The law specifically applies to electronic meetings, defining a “meeting” as a formal or informal gathering or a work session, whether in person or through electronic means such as telephone or videoconference. N.D.C.C. § 44-04-17.1(9) (emphasis added).

a. Conference calls and video/Internet conferencing.

Subject to the law.

b. E-mail.

Simultaneous communication between a quorum of a governing body through e-mail may be considered a meeting subject to the open meetings law. *See* N.D. Op. Att’y Gen. 2007-O-14 (2007) (opining that an e-mail exchange constituted a “meeting”).

c. Text messages.

Simultaneous communication between a quorum of a governing body through text messages may be considered a meeting subject to the open meetings law. *See* N.D. Op. Att’y Gen. 2007-O-14 (2007)

d. Instant messaging.

Simultaneous communication between a quorum of a governing body through instant messaging may be considered a meeting subject to the open meetings law. *See* N.D. Op. Att’y Gen. 2007-O-14 (2007)

e. Social media and online discussion boards.

There is no case or statutory law specifically addressing this issue, but simultaneous communication between a quorum of a governing body through nontraditional means has been considered a meeting subject to the open meetings law. *See* N.D. Op. Att’y Gen. 2007-O-14 (2007)

E. Categories of meetings subject to the law.

1. Regular meetings.

All regular meetings are subject to the open meetings law.

a. Definition.

When reasonable and practicable, a governing body of a public entity should attempt to set a regular schedule for its meetings by statute, ordinance, or resolution. N.D.C.C. § 44-04-20(3).

b. Notice.

The open meetings law provides that public notice must be given in advance of all meetings of a public entity, including executive sessions, conference call meetings, and videoconferences. N.D.C.C. § 44-04-20(1). Unless otherwise specified by law, or as decided by the public

entity, notices need not be published. N.D.C.C. § 44-04-20(1).

The notice must contain the date, time, and location of the meeting and, if practicable, the topics to be considered. N.D.C.C. § 44-04-20(2). However, the lack of an agenda in the notice, or a departure from, or an addition to, the agenda at a meeting, does not affect the validity of the meeting or the actions taken at the meeting. N.D.C.C. § 44-04-20(2). The notice must also contain the general subject matter of any executive session expected to be held during the meeting. N.D.C.C. § 44-04-20(2). For meetings to be held by telephone or videoconference, or other electronic means, the location of the meeting and the place the meeting is held is the location of a speakerphone or monitor. N.D.C.C. § 44-04-20(2).

(1). Time limit for giving notice.

If the governing body holds regularly scheduled meetings, the schedule of the meetings, including the notice information, if available, must be filed annually in January with the secretary of state for state-level bodies or for public entities, the city auditor or designee of the city for city-level bodies, and the county auditor or designee of the county for all other bodies, or the schedule must be posted on the public entity's website. N.D.C.C. § 44-04-20(3) (emphasis added). The schedule must be furnished to anyone who requests the information. N.D.C.C. § 44-04-20(3).

The governing body's presiding officer has the responsibility of assuring that the notice is given at the same time as the governing body's members are notified, and that the notice is available to anyone requesting such information. N.D.C.C. § 44-04-20(5). When a request is made for notice of meetings, the request is effective for one year, unless a different time period is specified. N.D.C.C. § 44-04-20(5).

(2). To whom notice is given.

The notice must be filed with the secretary of state for state-level bodies or for public entities, the city auditor or designee of the city for city-level bodies, and the county auditor or designee of the county for all other bodies, or the schedule must be posted on the public entity's website. N.D.C.C. § 44-04-20(3) (emphasis added). The schedule must be furnished to anyone who requests the information. N.D.C.C. § 44-04-20(3).

A committee of an institution under the authority of the state board of higher education, instead of the standard notice requirements, may file in the office of the president of the institution the name, address, and telephone number of a person who may be contacted to obtain specific times, dates, and locations of any meetings of that committee or to request specific notification of each meeting of that committee. N.D.C.C. § 44-04-20(7).

(3). Where posted.

The notice must be posted at the principal office of the governing body holding the meeting, if one exists, and at the location of the meeting on the day of the meeting. N.D.C.C. § 44-04-20(4). In addition, unless all the information contained in the notice was previously filed with the appropriate office under N.D.C.C. § 44-04-20(3), the notice must be filed in the office of the secretary of state for state-level bodies or for public entities, the city auditor or designee of the city for city-level bodies, the county auditor or designee of the county for all other bodies, or posted on the public entity's website. N.D.C.C. § 44-04-20(4).

(4). Public agenda items required.

The notice must contain the date, time, and location of the meeting and, if practicable, the topics to be considered. N.D.C.C. § 44-04-20(2). However, the lack of an agenda in the notice, or a departure from, or an addition to, the agenda at a meeting, does not affect the validity of the meeting or the actions taken at the meeting. N.D.C.C. § 44-04-20(2). The notice must also contain the general subject matter of any executive session expected to be held during the meeting. N.D.C.C. § 44-04-20(2). For meetings to be held by telephone or

videoconference, or other electronic means, the location of the meeting and the place the meeting is held is the location of a speakerphone or monitor. N.D.C.C. § 44-04-20(2).

(5). Other information required in notice.

The notice must contain the date, time, and location of the meeting. N.D.C.C. § 44-04-20(2).

(6). Penalties and remedies for failure to give adequate notice.

The notice provision law is violated when a notice is not provided in substantial compliance with the law. N.D.C.C. § 44-04-20(9).

A violation of the notice provision law may be the subject of a civil action brought by an interested person or entity. N.D.C.C. § 44-04-21.2(1). The court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity. N.D.C.C. § 44-04-21.2(1). For an intentional or knowing violation, the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. N.D.C.C. § 44-04-21.2(1).

Action taken at an improperly noticed meeting is voidable. N.D.C.C. § 44-04-21.2(2).

c. Minutes.

(1). Information required.

Minutes must be kept of all open meetings and are open records. The minutes must include, at a minimum:

- a. The names of the members attending the meeting;
- b. The date and time the meeting was called to order and adjourned;
- c. A list of topics discussed regarding public business;
- d. A description of each motion made at the meeting and whether the motion was seconded;
- e. The results of every vote taken at the meeting; and
- f. The vote of each member on every recorded roll call vote.

N.D.C.C. § 44-04-21.

The disclosure of minutes may not be conditioned on the approval of the minutes by the governing body. N.D.C.C. § 44-04-21.

The governing body of a municipality is expressly required to keep a journal of its proceedings. N.D.C.C. § 40-06-02.

(2). Are minutes public record?

Unless there is a specific exception to the open records law, minutes are open records.

2. Special or emergency meetings.

a. Definition.

There is no statutory definition of special or emergency meetings, but such a meeting is presumably a meeting that is not regularly scheduled. See N.D.C.C. § 44-04-20.

b. Notice requirements.

In the event of emergency or special meetings, the person calling the meeting must, in addition to the standard notices, also notify the public entity's official newspaper, if any, and any representatives of the news media who have requested to be notified of special or emergency meetings, of the time, place, date, and topics to be considered, at the same time the governing body's members are notified. N.D.C.C. § 44-04-20(6). If the public entity does not have an official newspaper, then it must notify the official newspaper of the county where its principal office or mailing address is located. N.D.C.C. § 44-04-20(6). Topics

that may be considered at an emergency or special meeting are limited to those included in the notice. N.D.C.C. § 44-04-20(6).

c. Minutes.

(1). Information required.

Minutes must be kept of all open meetings and are open records. The minutes must include, at a minimum:

- a. The names of the members attending the meeting;
- b. The date and time the meeting was called to order and adjourned;
- c. A list of topics discussed regarding public business;
- d. A description of each motion made at the meeting and whether the motion was seconded;
- e. The results of every vote taken at the meeting; and
- f. The vote of each member on every recorded roll call vote.

N.D.C.C. § 44-04-21.

The disclosure of minutes may not be conditioned on the approval of the minutes by the governing body. N.D.C.C. § 44-04-21.

(2). Are minutes a public record?

Unless there is a specific exception to the open records law, minutes are open records.

3. Closed meetings or executive sessions.

a. Definition.

A governing body may hold an executive session to consider or discuss closed or confidential records. Unless a different procedure is provided by law, an executive session that is authorized by law may be held if:

- a. The governing body first convenes in an open session and, unless a confidential meeting is required, passes a motion to hold an executive session;
- b. The governing body announces during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics;
- c. The executive session is recorded under N.D.C.C. § 44-04-19.2(5);
- d. The topics discussed or considered during the executive session are limited to those for which an executive session is authorized by law and that have been previously announced; and
- e. Final action concerning the topics discussed or considered during the executive session is taken at a meeting open to the public, unless final action is otherwise required by law to be taken during a closed or confidential meeting. "Final action" means a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy, but does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in N.D.C.C. § 44-04-19.1.

N.D.C.C. § 44-04-19.2(2).

The remainder of a meeting during which an executive session is held is an open meeting, unless a specific exception applies. N.D.C.C. § 44-04-19.2(3).

A public entity may sequester all competitors in a competitive selection or hiring process from that portion of a public meeting wherein presentations are heard or interviews are conducted. N.D.C.C. § 44-04-19.2(6).

A caucus of members of either house of the legislative assembly may meet in an executive session that is not subject to N.D.C.C. § 44-04-19.2 if the meeting is not held on public property. N.D.C.C. § 44-04-19.3.

b. Notice requirements.

The notice given for the general meeting also contain the general subject matter of any executive session expected to be held during the meeting. N.D.C.C. § 44-04-20(2).

Before holding an executive session, the governing body must first convene in an open session and, unless a confidential meeting is required, passes a motion to hold an executive session. N.D.C.C. § 44-04-19.2(2). Additionally, the governing body must announce during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics. N.D.C.C. § 44-04-19.2(2).

c. Minutes.

(1). Information required.

The minutes of an open meeting during which an executive session is held must indicate the names of the members attending the executive session, the date and time the executive session was called to order and adjourned, a summary of the general topics that were discussed or considered that does not disclose any closed or confidential information, and the legal authority for holding the executive session. N.D.C.C. § 44-04-19.2(4).

(2). Are minutes a public record?

The minutes indicating the names of the members attending the executive session, the date and time the executive session was called to order and adjourned, a summary of the general topics that were discussed or considered (without disclosing any closed or confidential information), and the legal authority for holding the executive session are open records. N.D.C.C. § 44-04-19.2(4).

d. Requirement to meet in public before closing meeting.

Before holding an executive session, the governing body must first convene in an open session and, unless a confidential meeting is required, passes a motion to hold an executive session. N.D.C.C. § 44-04-19.2(2).

e. Requirement to state statutory authority for closing meetings before closure.

The governing body must announce during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics. N.D.C.C. § 44-04-19.2(2).

f. Tape recording requirements.

All meetings of the governing body of a public entity that are not open to the public must be recorded electronically or on audiotape or videotape. N.D.C.C. § 44-04-19.2(5). The recording must be disclosed pursuant to court order under N.D.C.C. § 44-04-18.11(2) or to the attorney general for the purpose of administrative review under N.D.C.C. § 44-04-21.1. N.D.C.C. § 44-04-19.2(5). The attorney general may not disclose to the public any recording received and must return the recording to the governing body upon completion of the administrative review. 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. N.D.C.C. § 44-04-19.2(5).

All recordings must be retained for a minimum of six months after the executive session that is the subject of the recording. N.D.C.C. § 44-04-19.2(5).

F. Recording/broadcast of meetings.

The right of a person to attend a meeting includes the right to photograph, to record on audiotape or videotape, and to broadcast live on radio or television the portion of the meeting that is not held in executive session, provided that there is no active interference with the conduct of the meeting. N.D.C.C. § 44-04-19(3). The exercise of this right may not be dependent upon the prior approval of the governing body. N.D.C.C. § 44-04-19(3). However, the governing body may impose reasonable limitations on recording activity to minimize the possibility of disruption of the meeting. N.D.C.C. § 44-04-19(3).

G. Are there sanctions for noncompliance?

The court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity. N.D.C.C. § 44-04-21.2(1). For an intentional or knowing violation, the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. N.D.C.C. § 44-04-21.2(1).

Additionally, action taken at an improperly convened meeting is voidable. N.D.C.C. § 44-04-21.2(2).

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open meetings statute.

1. Character of exemptions.

North Dakota law provides that all public meetings are open meetings, unless there is a specific statutory exemption of a particular type of meeting.

2. Description of each exemption.

Open records law exceptions generally provide corresponding exceptions in the open meetings law. The portion of a meeting during which closed or confidential records are discussed may be held in executive session.

Additionally, the following meetings are expressly exempted from the open meetings law (or the constitutional provision requiring open access to courts) by statute.

Judicial Proceedings:

1. Trials of cases of scandalous or obscene natures, if the presiding judge or justice, in his discretion, excludes persons not necessarily present as parties or witnesses. N.D.C.C. § 27-01-02.

2. Juvenile court hearings, except hearings to declare a person in contempt of court. N.D.C.C. § 27-20-24.

3. Jury deliberations. N.D.C.C. § 12.1-09-05; § 29-22-01; § 29-22-02.

4. Preliminary hearings in criminal matters, where the magistrate holding the hearing, within his discretion and upon the request of the defendant, excludes every person except his clerk, the prosecutor and his counsel, the attorney general of the state, the state's attorney of the country, the defendant and his counsel, such other person as he may designate, and the officer having the defendant in custody. N.D.C.C. § 29-07-14; *see also Dickinson Newspapers Inc. v. Jorgensen*, 338 N.W.2d 72 (N.D. 1983) (upholding constitutionality of this provision.)

5. Grand jury sessions. N.D.C.C. § 29-10.1-28; *see also* N.D.C.C. § 29-10.2-04(l) (state grand juries governed by same provisions as county grand juries.)

6. Court hearings determining incapacity (*i.e.*, the necessity for a guardian), if the person alleged to be incapacitated or his counsel requests a closed hearing. N.D.C.C. § 30.1-28-03(7).

7. On request of a party and for good cause shown, parentage hearings. N.D.C.C. § 14-20-54.

8. Judicial hearings concerning a minor's application to obtain an abortion without parental consent.. N.D.C.C. § 14-02.1-03.1(3).

9. Court proceedings or actions brought by women against persons who performed abortions without informed consent, where the court, sua sponte or upon motion, determines that the anonymity of the women should be preserved. N.D.C.C. § 14-02.1-03.3.

10. Court hearings concerning the state health officer's legal action to enjoin a person with human immunodeficiency virus infection from continuing to engage in behavior that presents an imminent danger to the public health. N.D.C.C. § 23-07.4-03.

11. Adoption proceedings. N.D.C.C. § 14-15-16.

12. Criminal proceedings (including depositions and other discovery proceedings) where the defendant is charged with a sex offense involving a child, when the court, upon the motion of the prosecuting attorney and following a hearing, has determined that the testimony of a child may be closed to the public to protect the child's reputation, after considering the following factors: (1) The nature and seriousness of the offense; (2) The age of the child; (3) The extent to which the size of the community would preclude the anonymity of the victim; (4) The likelihood of public opprobrium due to the status of the victim; (5) Whether the prosecution has demonstrated a substantial probability that the identity of the witness would otherwise be disclosed to the public during the proceeding and that the disclosure would cause serious harm to the witness; (6) Whether the witness has disclosed information concerning the case to the public through press conferences, public meetings, or other means; and (7) Any other factor the court may find necessary to protect the interests of justice. N.D.C.C. §§ 12.1-35-05.2, 12.1-35-05.3.

Other Proceedings:

13. A governing body may hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. N.D.C.C. 44-04-19.1(9). The executive session may be held only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity. N.D.C.C. 44-04-19.1(9).

14. Hearings conducted by the department of human services, unless both the claimant and the opposing principal agree to the presence of unauthorized persons. N.D. Admin. Code § 75-01-03-15.

15. Legislative investigative committee hearings, if a closed meeting is requested by an investigated individual and a majority of the committee consents. N.D.C.C. § 54-03.2-10. In any event, no hearing, or part thereof, can be televised, filmed, or broadcast, except upon approval by a majority of the entire committee. N.D.C.C. § 54-03.2-10.

16. Executive sessions called by the state board of higher education to appoint or remove college or university employees, unless the person or persons involved request that the meeting be open to other persons or the public. N.D.C.C. § 15-10-17(l).

17. Board meetings concerning the nonrenewal, dismissal for cause, or suspension of a teacher, principal, superintendent, or directors may be closed. N.D.C.C. §§ 15.1-14-06, 15.1-14-10, 15.1-14-16, 15.1-14-20, 15.1-14-26, 15.1-14-30, 15.1-15-02, 15.1-15-06, 15.1-15-08, 15.1-15-10.

18. Proceedings concerning an attorney general's or state's attorney's investigation of alleged violations of the financial interest statement law, until a determination has been reached by the investigating officer that enough incriminating evidence exists to bring an action and such action is commenced in the appropriate district court. N.D.C.C. § 16.1-09-06.

19. Meetings of the child fatality review panel. N.D.C.C. § 50-25.1-04.5.

20. All agricultural mediation service meetings and meetings involving the credit review board, staff negotiators, or mediators wherein the finances of specific farmers, creditors, and others are discussed. N.D.C.C. § 6-09.10-10.

21. The portion of a meeting during which an attorney consultation (i.e., any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings) occurs may be closed. N.D.C.C. § 44-04-19.1(2) and (5).

22. The portion of a meeting held to discuss or consider 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, or expand within this state, or partner with a public entity to conduct research or to license a discovery or innovation. N.D.C.C. § 44-04-18.4. This exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law. N.D.C.C. § 44-04-18.4.

23. The portion of a meeting held to discuss or consider information pertaining to trade secrets and proprietary, commercial, or financial information received from a person who is interested in or is applying for or receiving financing, technical assistance, or other forms of business assistance. N.D.C.C. § 44-04-18.4.

24. The portions of social work examiners board meetings where client and juvenile testimony or records are taken. N.D.C.C. § 43-41-10(7).

25. The medical portion of a workers' compensation hearing when Workforce Safety and Insurance grants a claimant's request to close the medical portion of a hearing. N.D.C.C. § 65-05-32(6).

26. A caucus of members of either house of the legislative assembly may meet in an executive session that is not subject to N.D.C.C. § 44-04-19.2 if the meeting is not held on public property. N.D.C.C. § 44-04-19.3.

B. Any other statutory requirements for closed or open meetings.

Although government officials have attempted to read exclusions into the open meetings and open records laws based upon statutes that do not contain explicit exceptions, the North Dakota Supreme Court has resisted this effort. In *Hovet v. Hebron Public School District*, 419 N.W.2d 189, 191 (N.D. 1988), the court held that "an exception to the open-records law may not be implied." *Id.*

III. MEETING CATEGORIES -- OPEN OR CLOSED.

A. Adjudications by administrative bodies.

Generally open. Please see the discussion of statutory exemptions, outlined in Section II(A)(2) above.

B. Budget sessions.

Generally open. Please see the discussion of statutory exemptions, outlined in Section II(A)(2) above.

C. Business and industry relations.

The portion of a meeting held to discuss or consider 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, or expand within this state, or partner with a public entity to conduct research or to license a discovery or innovation. N.D.C.C. § 44-04-18.4. This exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law. N.D.C.C. § 44-04-18.4.

D. Federal programs.

Not addressed.

E. Financial data of public bodies.

Generally open.

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

The portion of a meeting held to discuss or consider information pertaining to trade secrets and proprietary, commercial, or financial information received from a person who is interested in or is applying for or receiving financing, technical assistance, or other forms of business assistance. N.D.C.C. § 44-04-18.4.

G. Gifts, trusts and honorary degrees.

Not addressed.

H. Grand jury testimony by public employees.

State and county grand jury sessions are generally closed. N.D.C.C. §§ 29-10.1-28, 29-10.2-04(l).

I. Licensing examinations.

Not open. N.D.C.C. § 44-04-18.8.

J. Litigation; pending litigation or other attorney-client privileges.

The portion of a meeting during which an attorney consultation (i.e., any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings) occurs may be closed. N.D.C.C. § 44-04-19.1(2) and (5).

K. Negotiations and collective bargaining of public employees.

A governing body may hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. N.D.C.C. 44-04-19.1(9). The executive session may be held only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity. N.D.C.C. 44-04-19.1(9).

L. Parole board meetings, or meetings involving parole board decisions.

All parole records of the department of corrections and rehabilitation obtained in the discharge of official duty by any member of the parole board or employee of a division or department of the department of corrections and rehabilitation on behalf of the parole board are not open. N.D.C.C. § 12-59-04. An application for parole and the decision of the parole board on the application are open records. N.D.C.C. § 12-59-04.

M. Patients; discussions on individual patients.

Generally not open.

N. Personnel matters.

Executive sessions called by the state board of higher education to appoint or remove college or university employees, unless the person or persons involved request that the meeting be open to other persons or the public. N.D.C.C. § 15-10-17(l).

Board meetings concerning the nonrenewal, dismissal for cause, or suspension of a teacher, principal, superintendent, or directors may be closed. N.D.C.C. §§ 15.1-14-06, 15.1-14-10, 15.1-14-16, 15.1-14-20, 15.1-14-26, 15.1-14-30, 15.1-15-02, 15.1-15-06, 15.1-15-08, 15.1-15-10.

O. Real estate negotiations.

A governing body may hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. N.D.C.C. 44-04-19.1(9). The executive session may be held only when an open meeting would have an adverse fiscal effect on the bargaining or litigation position of the public entity. N.D.C.C. 44-04-19.1(9).

P. Security, national and/or state, of buildings, personnel or other.

The portions of a meeting which would reveal a security system plan, a public health or security plan, or a portion of any such plan, made exempt by N.D.C.C. § 44-04-24 or N.D.C.C. § 44-04-25, are exempt from N.D.C.C. § 44-04-19 and section 5 of article XI of the Constitution of North Dakota. N.D.C.C. § 44-04-26.

Q. Students; discussions on individual students.

Generally closed under the federal Family Educational Rights and Privacy Act, which is a specific exception to the open records law.

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

A. When to challenge.

Unless a specific statutory exemption to the open meetings law is applicable, a challenge to non-admission is appropriate.

B. How to start.

Although no formal administrative appeal process is established by statute, taking the following steps will often open the doors to a meeting (or dissuade a board from retiring to executive session).

1. Identify yourself and the organization you represent, if any.
2. State that you “object” to the closure of the meeting and ask that your objection be recorded in the minutes (or other record of the proceeding).
3. Refer the board (or judge or other entity) to the open meetings provisions of the North Dakota Constitution (Article XI, Section 5) and the Century Code (N.D.C.C. § 44-04-19) and remind them that it is a crime for them to close the meeting.
4. If the board (or judge or other entity) refuses to open the meeting, request that the meeting be delayed until you have the opportunity to contact appropriate officials and/or your attorney and to bring legal action to determine if the meeting should be opened.
5. Contact the state’s attorney (for county and local officials), the city attorney (for city officials), and/or the attorney general’s office and ask them to speak directly to the presiding officer.
6. Contact and retain a private attorney who is familiar with the open meetings law to seek appropriate action.

In conducting these steps, speak with respect, but speak forcefully. Record your statements in the best manner available.

1. Where to ask for ruling.

Any interested person may request an attorney general’s opinion to review an alleged violation of the open meetings law. N.D.C.C. § 44-04-21.1(1). The request must be made within thirty days of the alleged violation, except that a request based on allegations that a meeting occurred without the required notice must be made within ninety days of the alleged violation. N.D.C.C. § 44-04-21.1(1). 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. N.D.C.C. § 44-04-21.1(1). The attorney general must then issue to the public entity involved an opinion on the alleged violation, unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. N.D.C.C. § 44-04-21.1(1).

North Dakota law lays out the administrative appeal procedure:

44-04-21.1. Administrative review procedure.

1. Any interested person may request an attorney general’s opinion to review a written denial of a request for records under section 44-04-18, a denial of access to a meeting under section 44-04-19, or other alleged violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 by any public entity other than the legislative assembly or any committee thereof. 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 days of the alleged violation. In preparing an opinion under this section, the attorney general has discretion to obtain and review a recording made under section 44-04-19.2. The attorney general may request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential. Any such information may not be released by the attorney general and may be returned to the provider of the information. The attorney general shall issue to the public entity involved an opinion on the alleged violation unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. If the request pertains to a public entity as defined in subdivision c of subsection 12 of section 44-04-17.1, 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.

2. If the attorney general issues a written opinion concluding that a violation has occurred, the public entity has seven days after the opinion is issued, regardless of whether a civil action is filed under section 44-04-21.2, to disclose the record, to issue a notice of a meeting that will be held within a reasonable time to correct the violation, or to take steps to correct any other violation. If the public entity fails to take the required action within the seven-day period and the person requesting the opinion prevails in a civil action brought under section 44-04-21.2, the person must be awarded costs, disbursements, and reasonable attorney’s fees in the action and on 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.

3. If a state-level public entity as defined in subdivision a of subsection 12 of section 44-04-17.1 does not comply in full with the attorney general’s opinion, and a civil action is brought under section 44-04-21.2 or is reasonably predictable, the entity, at its sole cost and expense, shall retain separate counsel who has been approved and appointed by the attorney general as a special assistant attorney general to represent the entity in that action.

a. Administrative forum.

The request for review of a denial of access to a meeting is directed to the state attorney general. N.D.C.C. § 44-04-21.1.

b. State attorney general.

Any interested person may request an attorney general's opinion to review an alleged violation of the open meetings law, including the denial of access to a meeting. N.D.C.C. § 44-04-21.1(1). The request must be made within thirty days of the alleged violation, except that a request based on allegations that a meeting occurred without the required notice must be made within ninety days of the alleged violation. N.D.C.C. § 44-04-21.1(1). N.D.C.C. § 44-04-21.1. 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. N.D.C.C. § 44-04-21.1(1). The attorney general must then issue to the public entity involved an opinion on the alleged violation, unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. N.D.C.C. § 44-04-21.1(1).

c. Court.

North Dakota law also provides for court action, as discussed below.

2. Applicable time limits.

The request for review of a denial of access to a meeting must be made within thirty days of the alleged violation, except that a request based on allegations that a meeting occurred without the required notice must be made within ninety days of the alleged violation. N.D.C.C. § 44-04-21.1(1).

3. Contents of request for ruling.

The open meetings law does not specify the requirements of the contents of a request for review of a denial of access to a meeting.

4. How long should you wait for a response?

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. N.D.C.C. § 44-04-21.1(1). The attorney general must then issue to the public entity involved an opinion on the alleged violation, unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. N.D.C.C. § 44-04-21.1(1).

5. Are subsequent or concurrent measures (formal or informal) available?

The court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity. N.D.C.C. § 44-04-21.2(1). For an intentional or knowing violation, the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. N.D.C.C. § 44-04-21.2(1).

Any action that is a product of a violation of N.D.C.C. §§ 44-04-19, 44-04-20, or 44-04-21 is voidable by a court in a civil action. N.D.C.C. § 44-04-21.2(2).

The remedies provided are not available if a violation has been corrected before a civil action is filed and no person has been prejudiced or harmed by the delay. N.D.C.C. § 44-04-21.2(3). An interested person or entity may not file a civil action seeking attorney's fees or damages, or both, until at least three working days after providing notice of the alleged violation to the chief administrative officer for the public entity. N.D.C.C. § 44-04-21.2(3). This provision does not apply if the attorney general has found under N.D.C.C. § 44-04-21.1, on a prior occasion, that the public entity has violated the open records or meetings laws. N.D.C.C. § 44-04-21.2(3).

C. Court review of administrative decision.

North Dakota law also provides for court action:

44-04-21.2. Remedies for violations and enforcement procedure.

1. A violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 may be the subject of a civil action brought by an interested person or entity. For an alleged violation of section 44-04-18, the complaint must be accompanied by a dated, written request for the requested record. 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. For an intentional or knowing violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21, the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. An action under this subsection must be commenced within sixty days of the date the person knew or should have known of the violation or within thirty days of issuance of an attorney general's opinion on the alleged violation, whichever is later. Venue for an action is in the county where the entity has its principal office or, if the entity does not have a principal office within the state, in Burleigh County.

2. Any action that is a product of a violation of section 44-04-19, 44-04-20, or 44-04-21 is voidable by a court in a civil action authorized by this section.

3. The remedies provided in this section are not available if a violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 has been corrected before a civil action is filed and no person has been prejudiced or harmed by the delay. An interested person or entity may not file a civil action under this section seeking attorney's fees or damages, or both, until at least three working days after providing notice of the alleged violation to the chief administrative officer for the public entity. This subsection does not apply if the attorney general has found under section 44-04-21.1, on a prior occasion, that the public entity has violated section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21.

44-04-21.3. Attorney general referral and criminal penalties.

The attorney general may refer to the appropriate state's attorney any public servant as defined in section 12.1-01-04 who has been found in more than one opinion issued pursuant to section 44-04-21.1 to have violated section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21. A public servant as defined in section 12.1-01-04 who knowingly violates section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 is guilty of an offense under section 12.1-11-06.

1. Who may sue?

An "interested person or entity" may sue. N.D.C.C. § 44-04-21.2(1).

2. Will the court give priority to the pleading?

The open meetings law does not specify that the court will give priority to the pleading.

3. Pro se possibility, advisability.

Pro se suits are not advisable in most instances. In many cases, the State Broadcasters Association or the North Dakota Newspaper Association will assist with either an *amicus curiae* brief or with the financing of the suit.

4. What issues will the court address?

The court may address violations of N.D.C.C. §§ 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21.

a. Open the meeting.

The court may award declaratory relief, an injunction, or a writ of probation or mandamus against the public entity, which could include opening the meeting. See N.D.C.C. § 44-04-21.2(1).

b. Invalidate the decision.

Any action that is a product of an improperly closed meeting may be voidable by a court in a civil action. N.D.C.C. § 44-04-21.2(2).

c. Order future meetings open.

The court may award declaratory relief, an injunction, or a writ of probation or mandamus against the public entity, which could include ordering future meetings be open. See N.D.C.C. § 44-04-21.2(1).

5. Pleading format.

The open meetings law does not contain special procedural rules; the traditional rules of civil procedure apply.

6. Time limit for filing suit.

An action must be commenced within sixty days of the date the person knew or should have known of the violation or within thirty days of issuance of an attorney general's opinion on the alleged violation, whichever is later. N.D.C.C. § 44-04-21.2(1).

7. What court.

Venue for an action is in the county where the entity has its principal office or, if the entity does not have a principal office within the state, in Burleigh County. N.D.C.C. § 44-04-21.2(1).

8. Judicial remedies available.

The court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity. N.D.C.C. § 44-04-21.2(1). For an intentional or knowing violation, the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. N.D.C.C. § 44-04-21.2(1).

9. Availability of court costs and attorneys' fees.

The court may award costs, disbursements, and reasonable attorney's fees against the entity. N.D.C.C. § 44-04-21.2(1).

10. Fines.

For an intentional or knowing violation, the court may award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. N.D.C.C. § 44-04-21.2(1).

11. Other penalties.

The attorney general may refer to the appropriate state's attorney any public servant as defined in N.D.C.C. § 12.1-01-04 who has been found in more than one opinion issued to have violated N.D.C.C. §§ 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21. N.D.C.C. § 44-04-21.3. A public servant who knowingly violates N.D.C.C. §§ 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 is guilty of an offense under N.D.C.C. § 12.1-11-06.

D. Appealing initial court decisions.

Any appeal of a decision of the district court would be taken directly to the North Dakota Supreme Court. The traditional rules of appellate procedure apply.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

1. Appeal routes.

Any appeal of a decision of the district court would be taken directly to the North Dakota Supreme Court.

2. Time limits for filing appeals.

In a civil case, the notice of appeal must be filed with the clerk of the district court within sixty days of the date of service of notice of entry of the judgment or order.

3. Contact of interested amici.

In many cases, the State Broadcasters Association or the North Dakota Newspaper Association will assist with either an *amicus curiae* brief or with the financing of the suit.

V. ASSERTING A RIGHT TO COMMENT.

North Dakota law does not require that the public be allowed to participate at an open meeting. However, an opportunity for public comment is not prohibited.

Statute

Open Records

N.D.C.C. 44-04-17.1 et seq.

44-04-17.1. Definitions.

As used in this section through section 44-04-32:

1. “Closed meeting” means all or part of an exempt meeting that a public entity in its discretion has not opened to the public, although any person necessary to carry out or further the purposes of a closed meeting may be admitted.

2. “Closed record” means all or part of an exempt record that a public entity in its discretion has not opened to the public.

3. “Confidential meeting” or “confidential record” means all or part of a record or meeting that is either expressly declared confidential or is prohibited from being open to the public.

4. “Executive session” means all or part of a meeting that is closed or confidential.

5. “Exempt meeting” or “exempt record” means all or part of a record or meeting that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity.

6. “Governing body” means the multimember body responsible for making a collective decision on behalf of a public entity. “Governing body” also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.

7. “Information technology resources” includes data processing hardware and software or technology support services necessary to facilitate a response to a request for electronic records.

8. “Law” includes federal statutes, applicable federal regulations, and state statutes.

9. a. “Meeting” means a formal or informal gathering or a work session, whether in person or through electronic means such as telephone or video-conference, of:

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

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

b. “Meeting” does not include:

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

(2) Emergency operations during a disaster or emergency declared under section 37-17.1-10 or an equivalent ordinance if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group; and

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

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

10. “Organization or agency supported in whole or in part by public funds” means an organization or agency in any form which has received public funds exceeding the fair market value of any goods or services given in exchange for the public funds, whether through grants, membership dues, fees, or any other payment. An exchange must be conclusively presumed to be for fair market value, and does not constitute support by public funds, when an organization or agency receives a benefit under any authorized economic development program.

11. “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.

12. “Public business” means all matters that relate or may foreseeably relate in any way to:

a. The performance of the public entity’s governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or

b. The public entity’s use of public funds.

13. “Public entity” means all:

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, to exercise public authority or perform a governmental function;

b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision 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.

14. “Public funds” means cash and other assets with more than minimal value received from the state or any political subdivision of the state.

15. “Quorum” means one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity.

16. “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. “Record” does not include unrecorded thought processes or mental impressions, but does include preliminary drafts and working papers. “Record” also does not include records in the possession of a court of this state.

17. “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.

44-04-18. Access to public records - Electronically stored information.

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. As used in this subsection, “reasonable office hours” includes all regular office hours of a public entity. 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 contact person must be filed with the secretary of state for state-level entities, for public entities defined in subdivision c of subsection 12 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.

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. A request need not be made in person or in writing, and the copy must be mailed upon request. 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. An 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. An 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 section 44-04-18.10 from the records, including electronic records. If the entity is not authorized to use the fees to cover the cost of providing or mailing the copy, or both, or if a copy machine is not readily available, the entity may make arrangements for the copy to be provided or mailed, or both, by another entity, public or private, and the requester shall pay the fee to that other entity. This subsection does not apply to copies of public records for which a different fee is specifically provided by law.

3. Automation of public records must not erode the right of access to those records. As each public entity increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law. A public entity may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency, including public records online or stored in an electronic recordkeeping system used by the agency. An electronic copy of a record must be provided upon request at no cost, other than costs allowed in subsection 2, except 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. "Extensive" is defined as a request for copies of electronic records which take more than one hour of information technology resources to produce.

4. Except as provided in this subsection, nothing in this section requires a public entity to create or compile a record that does not exist. 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.

5. A state-level public entity as defined in subdivision a of subsection 12 of section 44-04-17.1 or a political subdivision as defined in subsection 10 of section 44-04-17.1, may establish procedures for providing access from an outside location to any computer database or electronically filed or stored information maintained by that entity. The procedures must address the measures that are necessary to maintain the confidentiality of information protected by federal or state law. Except for access provided to another state-level public entity or political subdivision, the state or political subdivision may charge a reasonable fee for providing that outside access. If the original information is keyed, entered, provided, compiled, or submitted by any political subdivision, the fees must be shared by the state and the political subdivision based on their proportional costs to make the data available.

6. Any request under this section for records in the possession of a public entity by a party to a criminal or civil action, adjudicative proceeding as defined in subsection 1 of section 28-32-01, or arbitration in which the public entity is a party, or by an agent of the party, must comply with applicable discovery rules or orders and be made to the attorney representing that entity in the criminal or civil action, adjudicative proceeding, or arbitration. The public entity may deny a request from a party or an agent of a party under this subsection if the request seeks records that are privileged under applicable discovery rules.

7. A denial of a request for records made under this section must describe the legal authority for the denial and must be in writing if requested.

8. This section is violated when a person's right to review or receive a copy of a record that is not exempt or confidential is denied or unreasonably delayed or when a fee is charged in excess of the amount authorized in subsections 2 and 3.

9. It is not an unreasonable delay or a denial of access under this section to withhold from the public a record that is prepared at the express direction of, and for presentation to, a governing body 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. It also is not an unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft 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.

10. For public entities headed by a single individual, it is not an unreasonable delay or a denial of access to withhold from the public a working paper or

preliminary draft until a final draft is completed, or work is discontinued on the draft but no final version has been prepared, whichever occurs first. A working paper or preliminary draft shall be deemed completed if it can reasonably be concluded, upon a good-faith review, that all substantive work on it has been completed.

11. A disclosure of a requested record under this section is not a waiver of any copyright held by the public entity in the requested record or of any applicable evidentiary privilege.

44-04-18.1. Public employee personal, medical, and employee assistance records - Confidentiality - Personal information maintained by state entities.

1. Any record of a public employee's medical treatment or use of an employee assistance program is not to become part of that employee's personnel record and is confidential and, except as otherwise authorized by law, may not be used or disclosed without the written authorization of the employee. As used in this section, the term "public employee" includes any individual who has applied for employment, is employed, or has been employed by a public entity.

2. Except as otherwise specifically provided by law, personal information regarding a public employee contained in an employee's personnel record or given to the state or a political subdivision by the employee in the course of employment is exempt. As used in this section, "personal information" means a person's 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, telephone 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.

3. Nonconfidential information contained in a personnel record of an employee of a public entity as defined in subdivision c of subsection 12 of section 44-04-17.1 is exempt.

4. Except as otherwise specifically provided by law, personal information regarding a licensee maintained by an occupational or professional board, association, state agency, or commission created by law is exempt. As used in this section, "licensee" means an 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.

44-04-18.3. Records of juvenile court supervisors and probation officers and law enforcement and correctional employees - Law enforcement work schedules - Confidential informants.

1. Any telephone number and the home address of a 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.

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 is exempt.

4. 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.

44-04-18.4. Confidentiality of trade secret, proprietary, commercial, and financial information.

1. Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed.

2. Under this section, unless the context otherwise requires:

a. “Commercial information” means information pertaining to buying or selling of goods and services that has not been previously publicly disclosed and that if the information were to be disclosed would impair the public entity’s future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.

b. “Financial information” means information pertaining to monetary resources of a person that has not been previously publicly disclosed and that if the information were to be disclosed would impair the public entity’s future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.

c. “Proprietary information” includes:

(1) Information shared between a sponsor of research or a potential sponsor of research and a public entity conducting or negotiating an agreement for the research.

(2) Information received from a private business that has entered or is negotiating an agreement with a public entity to conduct research or manufacture or create a product for potential commercialization.

(3) A discovery or innovation generated by the research information, technical information, financial information, or marketing information acquired under activities described under paragraph 1 or 2.

(4) A document specifically and directly related to the licensing or commercialization resulting from activities described under paragraph 1, 2, or 6.

(5) Technical, financial, or marketing records that are received by a public entity, which are owned or controlled by the submitting person, are intended to be and are treated by the submitting person as private, and the disclosure of which would cause harm to the submitting person’s business.

(6) A discovery or innovation produced by the public entity that an employee or the entity intends to commercialize.

(7) A computer software program and components of a computer software program that are subject to a copyright or a patent and any formula, pattern, compilation, program, device, method, technique, or process supplied to a public entity that is the subject of efforts by the supplying person to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that might obtain economic value from its disclosure or use.

(8) A discovery or innovation that is subject to a patent or a copyright, and any formula, pattern, compilation, program, device, combination of devices, method, technique, technical know-how or process that is for use, or is used, in the operation of a business and is supplied to or prepared by a public entity that is the subject of efforts by the supplying or preparing person to maintain its secrecy and provides the preparing person an advantage or an opportunity to obtain an advantage over those who do not know or use it or that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, a person that might obtain economic value from its disclosure or use.

d. “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, technical know-how, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain the secrecy of the information.

3. This section does not limit or otherwise affect a record pertaining to any rule of the state department of health or to any record pertaining to the application for a permit or license necessary to do business or to expand business operations within this state, except as otherwise provided by law.

4. This section does not limit the release or use of records obtained in an investigation by the attorney general or other law enforcement official.

5. Unless made confidential under subsection 1, the following economic development records and information are exempt:

a. 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 does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.

b. Trade 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.

6. Unless made confidential under subsection 1 or made exempt under subsection 5, bids or proposals received by a public entity in response to a request for proposals by the public entity are exempt until all of the proposals have been received and opened by the public entity or until all oral presentations regarding the proposals, if any, have been heard by the public entity. Records included with any bid or proposal naming and generally describing the entity submitting the proposal are open.

44-04-18.5. Computer software programs exempt.

Any computer software program or component of a computer software program contracted, developed, or acquired by a public entity or state agency, institution, department, or board and for which the public entity or state agency, institution, department, or board acquires a license, copyright, or patent is exempt from section 44-04-18 and section 6 of article XI of the Constitution of North Dakota. After receiving written approval from the governor, a state agency, institution, department, or board may enter into agreements for the sale, licensing, and distribution of its contracted, licensed, patented, or copyrighted computer software programs. A state agency, institution, department, or board may take any needed action, including legal action, to protect the state’s interest in the computer software against improper or unlawful use or infringement and may collect and enforce the collection of any sums due for the licensing or sale of the computer software. A public entity may enter into agreements for the sale, licensing, and distribution of its licensed, patented, or copyrighted computer software programs.

44-04-18.6. Access to legislative records and information.

The following records, regardless of form or characteristic, of or relating to the legislative council, the legislative management, the legislative assembly, the house of representatives, the senate, or a member of the legislative assembly are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota: a record of a purely personal or private nature, a record that is legislative council work product or is legislative council-client communication, a record that reveals the content of private communications between a member of the legislative assembly and any person, and, except with respect to a governmental entity determining the proper use of telephone service, a record of telephone usage which identifies the parties or lists the telephone numbers of the parties involved. This section does not apply to any record distributed at a meeting subject to section 44-04-19 and section 5 of article XI of the Constitution of North Dakota.

44-04-18.7. Criminal intelligence information and criminal investigative information - Nondisclosure - Record of information maintained.

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.

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; motor vehicle operator's identification number; social security number; any credit, debit, or electronic fund transfer card 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.

44-04-18.8. Examination questions and procedures exemption.

The following records are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota: examination or test questions, scoring keys, and other data used to administer any licensing, employment, academic, or certification examination or test, if the examination or test is to be used again in whole or in part; and records establishing examination or test procedures and instructions regarding the administration, grading, or evaluation of any examination or test, if disclosure may affect scoring outcomes.

44-04-18.9. Access to financial account numbers.

Any credit, debit, or electronic fund transfer card or account number and any financial institution account number that a public entity, elected official, or appointed official uses or has available for making electronic or other deposits, transfers, or payments is not an open record.

44-04-18.10. Disclosure of public records.

1. A public entity may not deny a request for an open record on the ground that the record also contains confidential or closed information.

2. Subject to subsection 3 of section 44-04-18, if confidential or closed information is contained in an open record, a public entity shall permit inspection and receipt of copies of the information contained in the record that is not confidential or closed, but shall delete, excise, or otherwise withhold the confidential or closed information.

3. An officer or employee of a public entity may disclose or comment on the substance of an open record. Any agreement prohibiting the disclosure or comment is void and against public policy.

4. Unless otherwise prohibited by federal law, records of a public entity which are otherwise closed or confidential may be disclosed to any public entity or federal agency for the purpose of law enforcement or collection of debts

owed to a public entity, provided that the records are not used for other purposes and the closed or confidential nature of the records is otherwise maintained. For the purpose of this subsection, "public entity" is limited to those entities defined in subdivision a or b of subsection 12 of section 44-04-17.1.

5. Confidential 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.

44-04-18.11. Disclosure pursuant to subpoena or order.

1. Unless disclosure under a court order is otherwise prohibited or limited by law, closed records must be disclosed pursuant to a subpoena issued by a court, administrative law judge, or administrative hearing officer, or other court order.

2. Unless disclosure under a court order is otherwise prohibited or limited by law, confidential records must be disclosed pursuant to a court order. Upon request of the public entity ordered to make the disclosure, the court ordering the disclosure shall issue a protective order to protect the confidential nature of the records.

3. Any person who discloses confidential records of a public entity under this section is immune from prosecution for violating section 12.1-13-01.

44-04-18.12. Cooperative investigations and litigation.

A record acquired by the office of attorney general from a governmental agency or a nonpublic entity is exempt if the attorney general determines:

1. The record is necessary to monitor or enforce compliance with a law or order or to further a civil investigation or litigation by the state;

2. The record is treated as confidential or privileged by the provider of the records; and

3. The provider of the records has not agreed to waive the privilege relating to or confidentiality of the record.

44-04-18.13. Lists of minors.

Any record of a public entity that is a compilation of minor's names, addresses, telephone numbers, or any combination thereof, is exempt.

44-04-18.15. Fundraising and donor records of board of higher education, university system, and affiliated nonprofit organizations exempt.

Any donor or prospective donor name, address, telephone number, electronic mail address, estate planning information, tax record or financial information, or other personal information or correspondence received or retained by a board of higher education or university system officer or employee or by an affiliated nonprofit organization that provides support to and is organized and operated for the benefit of an institution under the authority of the board of higher education is exempt. For the purposes of this section, "financial information" includes data that provides details regarding a gift, a payment schedule of a gift, the form of a gift, or the specific amount of a gift made by a donor.

44-04-18.16. Confidentiality of patient records at student health services and university system clinics.

Any patient record of a patient at a state college or university student health service, university of North Dakota medical center or family practice center, or other university system medical center or clinic is confidential.

44-04-18.17. Personal and financial information in a consumer complaint.

Personal and financial information submitted to a state agency as part of a consumer complaint, or gathered pursuant to an investigation of a consumer complaint, is an exempt record as defined in subsection 5 of section 44-04-17.1. 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. "Personal and financial information" does not include the nature of the complaint, name of the complainant or any person on whose behalf the complaint was submitted, or the address or telephone number of the business that is the subject of the complaint.

44-04-18.18. Autopsy images - Confidential - Exceptions.

1. An autopsy photograph or other visual image or a video or audio recording of an autopsy is confidential. However, a criminal justice agency may use or disclose these materials for purposes of an investigation or prosecution.

2. a. After redacting all information identifying the decedent, including name, address, and social security number, and anonymizing facial recognition, a medical examiner, coroner, or physician may use an autopsy photograph, image, or recording for:

- (1) Medical or scientific teaching or training purposes;
- (2) Teaching or training of law enforcement personnel;
- (3) Teaching or training of attorneys or others with a bona fide professional need to use or understand forensic science;
- (4) Conferring with medical or scientific experts; or
- (5) Publication in a scientific or medical journal or textbook.

b. A medical examiner, coroner, or physician who has in good faith complied with this subsection is not subject to any penalty or liability for using an autopsy photograph, image, or recording.

3. The decedent's spouse, child, parent, or sibling, upon proof of the relationship, may view an autopsy photograph, image, or recording in the business office of a medical examiner, coroner, or physician who has possession of the materials, if there is not an active criminal investigation or prosecution.

4. Disclosure of an autopsy photograph, image, or recording may be obtained under section 44-04-18.11.

44-04-18.19. Exemption of records relating to individual recipients of economic assistance or benefits.

Records concerning individual applicants or recipients of economic assistance or support administered under the division of community services or a community action agency, including benefits or services, are exempt from section 44-04-18 and section 6 of article XI of the Constitution of North Dakota. These exempt records include applications, income or eligibility verification, assessments, or other personal, medical, or financial data.

44-04-18.20. Domestic violence record information of law enforcement exempt.

The address, telephone number, or any identifying information that, if released, could reasonably be used to locate a victim or alleged victim of domestic violence contained in any record maintained by a law enforcement facility is exempt from section 44-04-18 and may be redacted from the record before it is released.

44-04-18.21. Electronic mail addresses and telephone numbers exempt.

The electronic mail address or telephone number of an individual which is provided to a public entity for the purpose of or in the course of communicating with that public entity is an exempt record. This section may not be used to shield the identity of the individual communicating with the public entity.

44-04-18.22. Medical condition or medical treatment information obtained during emergency medical response - Exempt.

The medical condition of an individual, medical treatment provided to an individual, and the name of an individual who received medical treatment from a public entity during an emergency medical response is an exempt record.

44-04-18.23. Library, archive, and museum collections - Exempt records.

A public library, archive, or museum may designate a donated record as an exempt record if the donor of the record requests as a condition of the donation that the record not be released to the public for a specific amount of time, which may not exceed twenty years beyond the death of the donor.

Open Meetings

44-04-19. Access to public meetings.

Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public. That portion of a meeting of the governing body of a public entity as defined in subdivision c of subsection 12 of section 44-04-17.1 which does not regard public business is not required to be open under this section.

1. This section is violated when any person is denied access to a meeting under this section, unless such refusal, implicitly or explicitly communicated, is due to a lack of physical space in the meeting room for the person or persons seeking access.

2. For purposes of this section, the meeting room must be accessible to, and the size of the room must accommodate, the number of persons reasonably expected to attend the meeting.

3. The right of a person to attend a meeting under this section includes the right to photograph, to record on audiotape or videotape and to broadcast live on radio or television the portion of the meeting that is not held in executive session, provided that there is no active interference with the conduct of the meeting. The exercise of this right may not be dependent upon the prior approval of the governing body. However, the governing body may impose reasonable limitations on recording activity to minimize the possibility of disruption of the meeting.

4. For meetings subject to this section when one or more of the members of the governing body is participating by telephone or video, a speakerphone or monitor must be provided at the location specified in the notice issued under section 44-04-20.

44-04-19.1. Open records and open meetings - Exemptions for attorney work product, attorney consultation, and negotiation preparation.

1. Attorney work product is exempt from section 44-04-18. Attorney work product and copies thereof shall not be open to public inspection, examination, or copying unless specifically made public by the public entity receiving such work product.

2. Attorney consultation is exempt from section 44-04-19. That portion of a meeting of a governing body during which an attorney consultation occurs may be closed by the governing body under section 44-04-19.2.

3. Active investigatory work product is exempt from section 44-04-18.

4. "Adversarial administrative proceedings" include only those administrative proceedings in which the administrative agency or institution of higher education acts as a complainant, respondent, or decisionmaker in an adverse administrative proceeding. This term does not refer to those instances in which the administrative agency or institution acts in its own rulemaking capacity.

5. "Attorney consultation" means any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.

6. "Attorney work product" means any document or record that:

a. Was prepared by an attorney representing a public entity or prepared at such an attorney's express direction;

b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and

c. Was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, or in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings.

7. "Investigatory work product" means records obtained, compiled, or prepared by a public entity in an effort to monitor and enforce compliance with the law or an order. Investigatory work product must be considered active as long as it is related to monitoring or enforcement activity conducted with a reasonable good-faith belief that it will lead to enforcement of the law or an order.

8. Following the final completion of the civil or criminal litigation or the adversarial administrative proceeding, including the exhaustion of all appellate remedies, attorney work product must be made available for public disclosure by the public entity, unless another exception to section 44-04-18 applies or 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.

9. A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity.

10. Nothing in this section may be construed to waive any attorney-client privilege of a public entity as defined in subdivision c of subsection 12 of section 44-04-17.1 regarding matters that do not pertain to public business.

44-04-19.2. Confidential or closed meetings.

1. A governing body may hold an executive session to consider or discuss closed or confidential records.

2. Unless a different procedure is provided by law, an executive session that is authorized by law may be held if:

a. The governing body first convenes in an open session and, unless a confidential meeting is required, passes a motion to hold an executive session;

b. The governing body announces during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics;

c. The executive session is recorded under subsection 5;

d. The topics discussed or considered during the executive session are limited to those for which an executive session is authorized by law and that have been previously announced under this subsection; and

e. Final action concerning the topics discussed or considered during the executive session is taken at a meeting open to the public, unless final action is otherwise required by law to be taken during a closed or confidential meeting. For purposes of this subsection, "final action" means a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy, but does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.

3. The remainder of a meeting during which an executive session is held is an open meeting unless a specific exemption is otherwise applicable.

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

5. All meetings of the governing body of a public entity that are not open to the public must be recorded electronically or on audiotape or videotape. The recording must be disclosed pursuant to court order under subsection 2 of section 44-04-18.11 or to the attorney general for the purpose of administrative review under section 44-04-21.1. The attorney general may not disclose to the public any recording received under this subsection and must return the recording to the governing body upon completion of the administrative review. The recording may be disclosed upon majority vote of the governing body unless the executive session was required to be confidential. Disclosure of the recording by a public servant except as provided in this subsection is a violation of section 12.1-13-01. All recordings under this subsection must be retained for a minimum of six months after the executive session that is the subject of the recording.

6. A public entity may sequester all competitors in a competitive selection or hiring process from that portion of a public meeting wherein presentations are heard or interviews are conducted.

44-04-19.3. Open meetings exemption - Legislative caucuses.

A caucus of members of either house of the legislative assembly may meet in an executive session that is not subject to section 44-04-19.2 if the meeting is not held on public property.

44-04-20. Notice of public meetings required - Exceptions - Schedule set by statute, ordinance, or resolution.

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

2. The notice required in this section must contain the date, time, and location of the meeting and, if practicable, the topics to be considered. However, the lack of an agenda in the notice, or a departure from, or an addition to, the agenda at a meeting, does not affect the validity of the meeting or the actions taken thereat. The notice must also contain the general subject matter of any executive session expected to be held during the meeting. For meetings to be held by telephone or videoconference, or other electronic means, the location of the meeting and the place the meeting is held is the location of a speaker-

phone or monitor as required under section 44-04-19.

3. If the governing body holds regularly scheduled meetings, the schedule of these meetings, including the aforementioned notice information, if available, must be filed annually in January with the secretary of state for state-level bodies or for public entities defined in subdivision c of subsection 12 of section 44-04-17.1, the city auditor or designee of the city for city-level bodies, and the county auditor or designee of the county for all other bodies or the schedule must be posted on the public entity's website. This schedule must be furnished to anyone who requests the information. When reasonable and practicable, a governing body of a public entity should attempt to set a regular schedule for its meetings by statute, ordinance, or resolution. This subsection does not apply to meetings of the legislative assembly or any committee thereof.

4. The notice required in this section must be posted at the principal office of the governing body holding the meeting, if such exists, and at the location of the meeting on the day of the meeting. In addition, unless all the information contained in the notice was previously filed with the appropriate office under subsection 3, the notice must be filed in the office of the secretary of state for state-level bodies or for public entities defined in subdivision c of subsection 12 of section 44-04-17.1, the city auditor or designee of the city for city-level bodies, the county auditor or designee of the county for all other bodies, or posted on the public entity's website. This subsection does not apply to meetings of the legislative assembly or any committee thereof.

5. The governing body's presiding officer has the responsibility of assuring that such public notice is given at the same time as such governing body's members are notified, and that this notice is available to anyone requesting such information. When a request is made for notice of meetings, the request is effective for one year unless a different time period is specified.

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

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

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

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

44-04-21. Open voting at public meetings required - Results recorded in minutes.

1. Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section 44-04-19 must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. Procedural votes must be recorded roll call votes upon the request of any member of a governing body holding a meeting subject to this section. As used in this section, "nonprocedural" should be broadly interpreted and includes all votes that pertain to the merits of the matter before the governing body.

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

- a. The names of the members attending the meeting;
- b. The date and time the meeting was called to order and adjourned;
- c. A list of topics discussed regarding public business;
- d. A description of each motion made at the meeting and whether the motion was seconded;
- e. The results of every vote taken at the meeting; and
- f. The vote of each member on every recorded roll call vote.

Notwithstanding subsection 8 of section 44-04-18, the disclosure of minutes

kept under this subsection may not be conditioned on the approval of the minutes by the governing body.

44-04-21.1. Administrative review procedure.

1. Any interested person may request an attorney general's opinion to review a written denial of a request for records under section 44-04-18, a denial of access to a meeting under section 44-04-19, or other alleged violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 by any public entity other than the legislative assembly or any committee thereof. 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 days of the alleged violation. In preparing an opinion under this section, the attorney general has discretion to obtain and review a recording made under section 44-04-19.2. The attorney general may request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential. Any such information may not be released by the attorney general and may be returned to the provider of the information. The attorney general shall issue to the public entity involved an opinion on the alleged violation unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. If the request pertains to a public entity as defined in subdivision c of subsection 12 of section 44-04-17.1, 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.

2. If the attorney general issues a written opinion concluding that a violation has occurred, the public entity has seven days after the opinion is issued, regardless of whether a civil action is filed under section 44-04-21.2, to disclose the record, to issue a notice of a meeting that will be held within a reasonable time to correct the violation, or to take steps to correct any other violation. If the public entity fails to take the required action within the seven-day period and the person requesting the opinion prevails in a civil action brought under section 44-04-21.2, the person must be awarded costs, disbursements, and reasonable attorney's fees in the action and on 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.

3. If a state-level public entity as defined in subdivision a of subsection 12 of section 44-04-17.1 does not comply in full with the attorney general's opinion, and a civil action is brought under section 44-04-21.2 or is reasonably predictable, the entity, at its sole cost and expense, shall retain separate counsel who has been approved and appointed by the attorney general as a special assistant attorney general to represent the entity in that action.

44-04-21.2. Remedies for violations and enforcement procedure.

1. A violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 may be the subject of a civil action brought by an interested person or entity. For an alleged violation of section 44-04-18, the complaint must be accompanied by a dated, written request for the requested record. 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. For an intentional or knowing violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21, the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. An action under this subsection must be commenced within sixty days of the date the person knew or should have known of the violation or within thirty days of issuance of an attorney general's opinion on the alleged violation, whichever is later. Venue for an action is in the county where the entity has its principal office or, if the entity does not have a principal office within the state, in Burleigh County.

2. Any action that is a product of a violation of section 44-04-19, 44-04-20, or 44-04-21 is voidable by a court in a civil action authorized by this section.

3. The remedies provided in this section are not available if a violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 has been corrected before a civil action is filed and no person has been prejudiced or harmed by the delay. An interested person or entity may not file a civil action under this section seeking attorney's fees or damages, or both, until at least three working days after providing notice of the alleged violation to the chief administrative officer for the public entity. This subsection does not apply if the attorney general has found under section 44-04-21.1, on a prior occasion, that the public entity has violated section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21.

44-04-21.3. Attorney general referral and criminal penalties.

The attorney general may refer to the appropriate state's attorney any public servant as defined in section 12.1-01-04 who has been found in more than one opinion issued pursuant to section 44-04-21.1 to have violated section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21. A public servant as defined in section 12.1-01-04 who knowingly violates section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 is guilty of an offense under section 12.1-11-06.

44-04-22. Conflict of interest law.

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

44-04-24. Security system plan - Exemption.

1. A security system plan kept by a public entity is exempt from the provisions of section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.

2. As used in this section:

a. "Critical infrastructure" means public buildings, systems, including telecommunications centers and computers, power generation plants, dams, bridges, and similar key resources, whether physical or virtual, so vital to the state that the incapacity or destruction of these systems would have a debilitating impact on security, state economic security, state public health or safety, or any combination of those matters.

b. "Security system plan" includes all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, communications, or consultations or portions of any such plan relating directly to the physical or electronic security of a public facility, or any critical infrastructure, whether owned by or leased to the state or any of its political subdivisions, or any privately owned or leased critical infrastructure if the plan or a portion of the plan is in the possession of a public entity; threat assessments; vulnerability and capability assessments conducted by a public entity, or any private entity; threat response plans; and emergency evacuation plans.

3. This exemption applies to security system plans received by a public entity before, on, or after March 20, 2003.

4. Nothing in this section may be construed to limit disclosure required for necessary construction, renovation, or remodeling work on a public building. Disclosure under this subsection does not constitute public disclosure.

44-04-25. Public health and security plans - Exemption.

Any plans and only those portions of the records, information, surveys, communications, and consultations used to produce the plans relating to protection of the public or public officials against threats of violence or other harm are exempt from the provisions of section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.

44-04-26. Security system plan - Public health and security plans - Exemption from public meeting requirements.

Those portions of a meeting which would reveal a security system plan, a public health or security plan, or a portion of any such plan, made exempt by section 44-04-24 or 44-04-25, are exempt from section 44-04-19 and section 5 of article XI of the Constitution of North Dakota.

44-04-27. Computer passwords and security information - Confidential.

Security codes, passwords, combinations, or security-related plans used to protect electronic information or to prevent access to computers, computer systems, or computer or telecommunications networks of a public entity are confidential.

44-04-28. Social security numbers - Confidential.

1. Social security numbers in the possession of a public entity are confidential. However, social security numbers may be released as authorized in this section or by other state or federal law.

2. A social security number may be released:

a. For purposes of participation in retirement or other employment benefits programs;

b. As authorized by the individual to whom the social security number is assigned, that individual's lawful agent or guardian, or by order of a court; or

c. To another public entity or its agents, employees, or contractors if disclosure is necessary for the receiving entity to perform its duties and responsibilities. The receiving governmental entity and its agents, employees, and contractors shall maintain the confidential status of the numbers.

44-04-29. Client files at the university of North Dakota school of law - Confidential.

Information in the files of private clients receiving legal services through the clinical education program of the university of North Dakota school of law is confidential unless the information has been requested and is properly obtainable through applicable discovery rules.

44-04-30. Records of fire departments and rural fire protection districts confidential.

1. a. An investigation record of a fire department or a rural fire protection district is confidential until the investigation:

(1) Is closed and not referred for further criminal investigation or prosecution; or

(2) The criminal investigation is no longer active under section 44-04-18.7.

b. This subsection does not restrict the release of the name and identifiable biographical information of a child under section 12.1-35-03.

2. Standard operating procedures written for emergency response, prefire action plans, plans of a building, pipeline, electrical system, or any other infrastructure plan in the hands of a fire department or rural fire protection district are exempt from section 44-04-18.

3. Individually identifiable health information obtained by a fire department or rural fire protection district is confidential.

44-04-31. Business associate - Duty to protect information.

1. As used in this section, "business associate" has the meaning set forth in title 45, Code of Federal Regulations, part 160, section 103.

2. If a public entity is acting as a business associate of another public entity, the entity acting as a business associate shall comply with all the requirements applicable to a business associate under title 45, Code of Federal Regulations, part 164, section 504, subsection e, paragraph 2.

44-04-32. Animal feeding operation record requests.

The state department of health shall keep a written record of each individual who requests information and the type of information requested regarding an animal feeding operation permit. Within seven business days of receiving the request, the department shall provide written notice to the owner and operator of the animal feeding operation describing the type of information that has been requested and the name and address of the requester. If an individual makes inquiries on more than three files in any one request, the department shall charge the individual a fee sufficient to cover the cost of mailing the notice to the owners and operators whose files are being examined and a fee for copying the records as allowed under section 44-04-18.

