



# A Public Official's Guide to North Dakota's OPEN MEETINGS AND OPEN RECORDS LAWS

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As public servants, the performance of official duties is subject to public scrutiny. North Dakota has "sunshine laws" which provide that all government records and meetings must be open to the public unless a specific statute authorizes a record or meeting to be closed. The best protection for public officials is to have a good working knowledge of the laws and the exceptions that apply.

## Public Access

All "public entities" are subject to the Open Meeting and Open Record laws, including: state and local government agencies, rural fire and ambulance districts, public schools, private businesses or non-profit organizations that are supported by or expending public funds, and contractors, if the contractor is providing services in place of a public entity rather than simply providing services to that entity.

The terms "record" and "meeting" are defined broadly. Anyone has the right to attend meetings of a public entity or to access and obtain copies of the entity's records, regardless of where they live. To deny public access to a record or a meeting, the public entity first has to identify the law that closes the record or the meeting, then the entity must explain that law to the person requesting access.

- To deny access to a **record**, the public entity must explain within a reasonable time the legal authority for denying the request. If asked, the entity must put the denial and explanation in writing.
- To deny access to a **meeting**, the public entity must identify the topics to be considered and the legal authority for closing a meeting before asking the public to leave the meeting room.

## Violations

*Anyone* may ask the Attorney General to issue an opinion regarding an alleged violation of the open records or meetings laws. If the Attorney General finds there was a violation, the entity has seven days to take the corrective action required by the Opinion. Criminal prosecution also may result if the public entity or employee knowingly violated the law.

## Quick Tips

The basic Open Meetings and Open Records laws are found in Chapter 44-04 of the North Dakota Century Code (N.D.C.C.), beginning at Section 44-04-17.1.

- A statute may declare certain records to be **exempt** or **confidential**. If a record is exempt, a public entity may release it at its discretion. It is not a violation of the law to decline to provide an exempt record. If a record is confidential, the public entity either cannot release it or first must redact the confidential information.
- A governing body may close a meeting to talk with its attorney *if* the discussion pertains to the attorney's advice regarding a pending or reasonably predictable lawsuit involving the public entity.
- Economic development information identifying the name, nature and potential location of a business considering relocating or expanding within the state can be closed until the business announces its intentions.
- Public employee salary and job performance information is open but certain personal and payroll information may be exempt or confidential. Generally, a public entity may not close a meeting simply to discuss employee performance or salary issues.
- Confidentiality clauses in a settlement agreement involving a public entity are against public policy and are declared void by state law.
- The definition of "record" includes all recorded information, regardless of physical form (paper, e-mail, computer file, photographs, audiotape, or videotape) that has a connection with how public funds are spent or with a public entity's performance of its governmental functions. E-mails relating to public business are subject to disclosure even if the official uses a personal e-mail account or home computer. Electronic records maintained by or for a public entity must be accessible.
- Public officials and employees generally should know what records under their control must be disclosed. A delay to seek legal advice is reasonable *only* if there is a legitimate legal or factual question on what may be disclosed. It is not reasonable to delay responding to a request until the next meeting of the governing body.

## Open Meetings

“Meeting” means any gathering of a quorum of the members of a governing body of a public entity regarding public business, and includes: committees and subcommittees, informal gatherings or work sessions, and discussions where a quorum of members are participating by phone, e-mail or any other electronic communication (either at the same time or in a series of individual contacts. If a governing body delegates any authority to two or more people, the newly formed committee is also subject to the open records and meetings laws.

- The *only* time a gathering of a quorum of members is not a meeting is if it is a purely social gathering—as soon as public business is discussed, it becomes a “meeting.”
- A member of the public does not have the right to speak to the governing body at an open meeting. The public is entitled only to see and hear what happens at a meeting, and to record or broadcast those observations. Other statutes, however, may require a hearing for public comment.

## Closed Meetings

Before a governing body may close a portion of its meeting, it first must convene in a properly noticed open meeting. Next, it has to announce the legal authority to close the meeting and the topics to be considered during the closed portion of the meeting. After that, unless the law requires a closed meeting, the governing body must vote on whether to close the meeting. Any executive session must be tape recorded. All substantive votes must be recorded by roll call. Final action on the topics considered in the executive session must be taken during the open portion of the meeting.

## Meeting Notice

Prior written notice is required for all meetings of a public entity. The notice must include the date, time and location of the meeting and the agenda topics the governing body expects to address during the meeting. Regular meeting agendas may be altered at the time of the meeting. For special or emergency meetings, *only* the specific topics included in the notice may be discussed.

Meeting notices must be filed with the Secretary of State (state agencies), the City Auditor (city-level entities) or the County Auditor (all other entities) *or*, alternatively, the public entity may choose to post the meeting schedules and notices on its official website. Notices *also* must be posted in the entity’s main office, if it has one, and at the location of the meeting (if the meeting is held elsewhere). Additionally, notice of special or emergency meetings must be given to the entity’s official newspaper and any media representatives who have asked for notices of special or emergency meetings. Copies of meeting notices can be obtained from the appropriate office. If asked, a public entity must provide the requester with personal notice of its meetings during a specified time.

- As a general rule, there is *no minimum advance notice period* for public meetings. Notice must be posted, filed at the central location (or on the entity’s website), *and* given to anyone who has requested it, *at the same time* the members of the governing body are notified of the meeting.

## Open Records

*Anyone* has the right to view or get a copy of public records, regardless of the reason. However, a request must reasonably identify existing records. A request for public records can be made in any manner - in person, by mail, e-mail, fax, or by phone. The entity must respond to the request within a reasonable time, either by providing the requested record or by explaining the legal authority for denying all or part of the request. Depending on the amount of records requested, a “reasonable” time could be a couple of hours or a few days, but not several days or weeks. If the entity cannot fulfill the request immediately, it should give a requester an estimate of when the record(s) will be ready. The entity may supervise access to an original record to prevent its alteration or destruction.

- A public entity cannot ask why the records are requested, ask for identification, or require a request be made in writing (or in person). An entity does *not* have to respond to questions about its functions, create or compile records that do not exist, *or* explain the content of a record.

## Costs

Access to records is generally free. An entity may charge up to 25¢ per page for copies on standard letter or legal size paper. For any other record (photos, maps, etc.), the entity may charge the actual cost of making the copy, including labor, materials and equipment. Other statutes may authorize a different fee. If requested, records must be provided in electronic format.

The first hour of locating requested records (including electronic records) is free. After the first hour, an entity may charge up to \$25 per hour for locating records. An entity also may charge up to \$25 per hour (after the first hour) for the time it takes to review records to redact any exempt or confidential information. In addition to charges for locating and redacting, if providing electronic records takes more than an hour then the actual cost of Information Technology (IT) resources may be charged. If the requester wants the records mailed, actual postage costs may be included in the charge. The entity may require the requester to pay the charges before making or releasing the record(s).