

Annotated Open Records and Meetings Laws
North Dakota Century Code §§ 44-04-17.1 through 44-04-21.3
(covering opinions issued since January 1, 1997)

44-04-17.1. Definitions. As used in this section through section 44-04-21.2:

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. "Law" includes federal statutes, applicable federal regulations, and state statutes.
8. a. "Meeting" means a formal or informal gathering, whether in person or through other 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" includes work sessions, but does not include chance or social gatherings where public business is not considered and does not include 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.
9. "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.
10. "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.
11. "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.
 12. "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.
 13. "Public funds" means cash and other assets with more than minimal value received from the state or any political subdivision of the state.
 14. "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.
 15. "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.
 16. "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.

Source: 2001 N.D. Sess. Laws ch. 391, §§ 3, 4; 1997 N.D. Sess. Laws ch. 381, § 2.

Non-governmental organizations

A non-governmental organization is subject to the open records and meetings laws under the following four circumstances: if the organization is 1) a governing body by delegation (N.D.C.C. § 44-04-17.1(6)), 2) recognized by state law or by an action of a political subdivision to exercise public authority or perform a governmental function (N.D.C.C.

§ 44-04-17.1(12)(a)), 3) supported by public funds or expending public funds (N.D.C.C. § 44-04-17.1(9)), or 4) an agent or agency of a public entity performing a governmental function or possessing records on behalf of a public entity (N.D.C.C. §44-04-17.1(12), (15)). 1999 N.D. Op. Att'y Gen. O-03; 1999 N.D. Op. Att'y Gen. O-02; 1998 N.D. Op. Att'y Gen. O-23; 1998 N.D. Op. Att'y Gen. O-21.

The four circumstances described above are disjunctive. 1999 N.D. Op. Att'y Gen. O-02.

(1) Closed meeting

A governing body may admit anyone to a closed meeting whom the body feels is necessary to carry out or further the purposes of the closed meeting. 1999 N.D. Op. Att'y Gen. O-1.

A "closed meeting" is a meeting or part of a meeting which may either be open or closed to the public in the public entity's discretion. 1999 N.D. Op. Att'y Gen. O-1.

(2) Closed record

If a public entity decides not to make public a record which is exempt from the open records law, the record is "closed" as defined in this subsection. 2000 N.D. Op. Att'y Gen. O-02.

(3) Confidential record

A "confidential record" under this section is a record over which a public entity has no discretion and which is prohibited from being open to the public. 2000 N.D. Op. Att'y Gen. O-02.

(4) Executive session

The phrase "executive session" includes both a "confidential meeting" and a "closed meeting" as those terms are defined in this section. 1999 N.D. Op. Att'y Gen. O-01.

(5) Exempt records

Disclosure of exempt records is left to the discretion of the public entity possessing the records. 1998 N.D. Op. Att'y Gen. F-09.

(6) Governing body

-- Multimember body

The phrase "governing" body refers to multi-member groups rather than one individual such as the chairman of a county board of commissioners. 1999 N.D. Op. Att'y Gen. O-05.

A director of a state administrative agency, as a single individual, is not a "governing body." 1998 N.D. Op. Att'y Gen. F-12.

The multi-member body responsible for making a decision on behalf of the child support guidelines drafting advisory committee is the committee itself. 1998 N.D. Op. Att'y Gen. O-17.

The board of a water resource district is the governing body of the district. 1998 N.D. Op. Att'y Gen. F-16; 1998 N.D. Op. Att'y Gen. O-11.

The township board of supervisors is the governing body for a township. 1998 N.D. Op. Att'y Gen. O-09. The group of township electors

who attend the annual township meeting also is a governing body. Id.

The group responsible for filling vacancies on a county commission under N.D.C.C. § 40-02-05 is a governing body. 1998 N.D. Op. Att'y Gen. F-11.

The school district board is the multi-member body responsible for making decisions on behalf of the school district. 1998 N.D. Op. Att'y Gen. O-06; 1997 N.D. Op. Att'y Gen. O-02.

The county social services board is a governing body. 2001 N.D. Op. Att'y Gen. O-15.

-- Delegation to smaller group

A franchise committee formed by a city council is a governing body. 2001 N.D. Op. Att'y Gen. O-04.

A group of less than a quorum of the members of a governing body which was appointed by the chairman of the body to meet with the North Dakota Insurance Reserve Fund was a governing body by delegation. 1998 N.D. Op. Att'y Gen. O-13.

A group is not a governing body by delegation if the delegation is made by an individual rather than a group. 1997 N.D. Op. Att'y Gen. O-02. See also 1998 N.D. Op. Att'y Gen. O-02.

(7) Law

The term "law" does not include a contractual commitment of a public entity to keep a record confidential. 2000 N.D. Op. Att'y Gen. F-09.

The term "law" includes federal regulations pertaining to records of federal prisoners who are placed in the custody of a multi-county correction center. 2000 N.D. Op. Att'y Gen. F-09.

An exception to the open records law can be found in federal law as well as state statutes. 1998 N.D. Op. Att'y Gen. F-13.

The Family Educational Rights and Privacy Act (FERPA), 12 U.S.C. § 1232g, is a "law" prohibiting the disclosure of certain education records. 1998 N.D. Op. Att'y Gen. L-51; 1998 N.D. Op. Att'y Gen. O-06.

The term "law" includes federal regulations which prohibit further disclosure of criminal history record information received from the Federal Bureau of Investigation. 1998 N.D. Op. Att'y Gen. L-32.

(8) Meeting

The term "meeting" has four elements: public entity, governing body, public business, and a gathering of a quorum of the members of the governing body. 1998 N.D. Op. Att'y Gen. O-05.

A gathering needs to pertain to public business for it to be a meeting. 1999 N.D. Op. Att'y Gen. O-09. Social or chance gatherings are not meetings unless public business is considered during the gathering. 1998 N.D. Op. Att'y Gen. O-11; 1998 N.D. Op. Att'y Gen. O-05.

Action need not be taken at a gathering for it to be a meeting, nor is it necessary that the gathering be formally convened as a "meeting." All that is required is that the gathering involve a quorum of the members of a governing body of a public entity and pertain to the public business of the governing body, which includes all stages of the decision-making process. 1998 N.D. Op. Att'y Gen. O-16; 1998 N.D. Op. Att'y Gen. F-16; 1998 N.D. Op. Att'y Gen. O-11; 1998 N.D. Op. Att'y Gen. O-08.

The term "meeting" includes the attendance of a quorum of the members of a governing body at a meeting of another group when the group's discussion pertains to the public business of the governing body. 1998 N.D. Op. Att'y Gen. O-18; 1998 N.D. Op. Att'y Gen. O-10.

A school board retreat involving school business is a meeting. 2001 N.D. Op. Att'y Gen. O-05.

An on-site investigation by a water resource district board of an area which is the subject of a complaint to the board is a meeting. 1998 N.D. Op. Att'y Gen. F-16.

The term "meeting" includes a gathering at which a governing body requests information from its staff for the body's next meeting. 1998 N.D. Op. Att'y Gen. O-11.

By adopting the quorum rule, the Legislature exempted from the open meetings law most conversations between two or three members of an eight member group, even about public business. However, once those conversations cumulatively involve a quorum of the group's members, it is a meeting. 1998 N.D. Op. Att'y Gen. O-05. See also 2001 N.D. Op. Att'y Gen. O-18 (a gathering must involve a quorum to be a meeting).

The term "meeting" does not include conversations between the presiding officer of a governing body and the other members of the governing body to identify agenda topics for the next meeting, as long as the substance of those

topics is not discussed. 1998 N.D. Op. Att'y Gen. O-05.

It is not a meeting for a member of a governing body who was absent from a meeting to contact the other members if the conversations are limited to finding out what happened at the meeting. 1998 N.D. Op. Att'y Gen. O-05.

A series of e-mail messages or letters involving a quorum of the members of a governing body is not a "gathering" of those members and is therefore not a meeting of the governing body, although the messages or letters will be open to the public unless otherwise provided by law. 1998 N.D. Op. Att'y Gen. O-05.

It is not a meeting if the members of a governing body communicate and transact business in writing. 2001 N.D. Op. Att'y Gen. O-14.

A gathering must involve a quorum of the members of a governing body for it to be a meeting. 2001 N.D. Op. Att'y Gen. O-18.

-- Smaller gatherings cumulatively involving a quorum

A series of on-site investigations by individual water resource district board members which collectively involve a quorum is not a meeting if the members are investigating the area on their own, but is a meeting if the separate investigations are an organized effort by the board for its members to obtain information. 1998 N.D. Op. Att'y Gen. F-16.

A series of smaller gatherings collectively involving a quorum is a meeting, even if the members did not intend to violate the open meetings law, if the body intentionally met in groups smaller than a quorum and intentionally discussed or received information regarding public business which would have had to occur in an open meeting if any of the smaller gatherings had involved a quorum. 1998 N.D. Op. Att'y Gen. O-05.

(9) Organization supported by public funds

The total funds provided to an organization, combined with the indistinct terms of the organization's contract with a public entity, lead to the conclusion the organization is supported by public funds. 2001 N.D. Op. Att'y Gen. O-11.

An organization is supported by public funds if public funds are used to fund the organization's operations rather than to

purchase services from the organization at fair market value. 2001 N.D. Op. Att'y Gen. O-10.

An organization is supported by public funds if it receives unrestricted funds for its general support. 1999 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. O-24.

An organization is not supported by public funds if the funds received by the organization were paid in exchange for goods or services having an equivalent fair market value. 1998 N.D. Op. Att'y Gen. O-24; 1998 N.D. Op. Att'y Gen. O-23.

For the fair market value test to be met, there first must be a contract between the public entity and the contractor that reasonably identifies the goods and services provided in exchange for the public funds. 2001 N.D. Op. Att'y Gen. O-10.

An organization receiving public funds under a contract with a state agency is not supported by public funds under this section, even if the contract is entitled "Grant Agreement," as long as the goods or services provided in exchange for those funds are reasonably identified in the agreement and have a fair market value that is equivalent to the amount of public funds it receives. 1999 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. F-19.

"Fair market value" under this definition can include a commercially reasonable amount of profit for the contractor. 1998 N.D. Op. Att'y Gen. F-19.

-- Economic development funds

The fair market value presumption for funds provided under an economic development program is limited to new employers or businesses accepting funds for their general operations. 2001 N.D. Op. Att'y Gen. O-11; 2001 N.D. Op. Att'y Gen. O-10.

An organization which receives Community Development Block Grant funds and a loan from a city job development authority is not supported by public funds for purposes of this section because the funds are provided under authorized economic development programs. 1998 N.D. Op. Att'y Gen. O-23.

(10) Political subdivision

A city park district is a political subdivision. 1998 N.D. Op. Att'y Gen. O-22.

A soil conservation district is a political subdivision. 1998 N.D. Op. Att'y Gen. O-21.

A public school district is a political subdivision. 1998 N.D. Op. Att'y Gen. L-128.

A water resource district is a political subdivision. 1998 N.D. Op. Att'y Gen. O-11.

(11) Public business

When an organization has received public funds for its general support, all of its financial records pertain to public business and are open because the organization's use of public funds can be fully determined only if those transactions are placed in context with the organization's overall finances. 2001 N.D. Op. Att'y Gen. O-11; 2001 N.D. Op. Att'y Gen. O-10; 1999 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. O-24.

Supervising the employees or other staff of a public entity falls within the public business of the entity, even if delegated to other staff. 1998 N.D. Op. Att'y Gen. O-21; 1998 N.D. Op. Att'y Gen. O-05.

The relationship and communications between members of a governing body of a public entity in their official capacities falls within the public business of the entity. 1998 N.D. Op. Att'y Gen. O-21.

The performance of a member of a governing body in his or her official capacity and the effect of the member's actions on the performance of the public entity's governmental functions are items of public business. 1998 N.D. Op. Att'y Gen. O-16.

Public business includes all matters which relate to a public entity's performance of governmental functions or use of public funds. 1998 N.D. Op. Att'y Gen. O-11.

(12) Public entity

The terms "resolution, ordinance, rule, or bylaw" in subdivision 12(b) refer to enactments by the authority responsible for making binding legislative or policy decisions on behalf of the public entity. 1997 N.D. Op. Att'y Gen. O-02.

A teachers' representative organization is not a public entity because it represents the interests of its individual members and does not exercise public authority or perform a governmental function. 2002 N.D. Op. Att'y Gen. L-15.

The committee created by state law to selected nominees for appointment to the North Dakota Wheat Commission is a public entity. 2001 N.D. Op. Att'y Gen. O-16.

A nonprofit corporation recognized in a resolution of a city housing authority as performing the governmental function of developing a new housing development in

collaboration with the housing authority is a public entity. 1998 N.D. Op. Att'y Gen. O-23.

The North Dakota Association of Soil Conservation Districts is a public entity because it is recognized by state law to perform the governmental function of managing trust lands which are dedicated to the soil conservation programs of the soil conservation districts. 1998 N.D. Op. Att'y Gen. O-21.

The child support guidelines drafting advisory committee is a public entity because it is recognized by state statute to perform the governmental function of reviewing the child support guidelines and serving as an advisory group for the Department of Human Services. 1998 N.D. Op. Att'y Gen. O-17.

A township is a public entity. 1998 N.D. Op. Att'y Gen. O-09.

A public school district is a public entity. 1998 N.D. Op. Att'y Gen. L-128.

The Board of Higher Education is a public entity. 1998 N.D. Op. Att'y Gen. O-05.

A county job development authority is a public entity. 1998 N.D. Op. Att'y Gen. O-03.

The North Dakota Board of Hearing Instrument Dispensers is a public entity. 1998 N.D. Op. Att'y Gen. O-25.

The Public Employees Retirement System (PERS) is a public entity. 1997 N.D. Op. Att'y Gen. F-06.

--- Agency

Nine factors may be used to aid in determining whether a contractor is performing a government function: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public entity's decision making process; 5) whether the contractor is performing a function the public entity otherwise would perform; 6) the extent of the public entity's control over the contractor; 7) whether the contractor was created by the public entity; 8) whether the public entity has a substantial financial interest in the contractor; and 9) for whose benefit the private entity is functioning. 2001 N.D. Op. Att'y Gen. O-11.

A contractor acting in place of or on behalf of a public entity, rather than simply providing services to the entity, is an agency of the public entity. 2001 N.D. Op. Att'y Gen. O-11; 2001 N.D. Op. Att'y Gen. O-10; 2001 N.D. Op. Att'y Gen. O-04.

The fact a contractor is not supported by public funds does not negate the possibility that

the contractor may be acting as an agent of a government entity. 2001 N.D. Op. Att'y Gen. O-10.

A contractor managing a pool of government funds is acting as an "agency of government." 2001 N.D. Op. Att'y Gen. O-11.

A contractor who promotes a city program and makes recommendations to the city on how to conduct the program is performing a governmental function on behalf of the city and is an "agency" of the city. 2001 N.D. Op. Att'y Gen. O-10.

A private advertising firm conducting a media campaign to promote a position of the city council is acting as an "agent" of the City. 2001 N.D. Op. Att'y Gen. O-04.

The North Dakota Insurance Reserve Fund is a public entity because it is a joint enterprise of several political subdivisions who have united to self-insure against their legal liability. 1999 N.D. Op. Att'y Gen. O-02.

Public entities which are subject to the open records and meetings laws cannot avoid the requirements of those laws by incorporating a joint enterprise and transferring funds to that enterprise. 1999 N.D. Op. Att'y Gen. O-02.

A separately incorporated joint enterprise of soil conservation districts to coordinate their activities is an agency of those districts. 1998 N.D. Op. Att'y Gen. O-21.

A joint enterprise of several political subdivisions to carry out public business on behalf of the political subdivisions is an agency of those subdivisions. 2002 N.D. Op. Att'y Gen. O-02; 1998 N.D. Op. Att'y Gen. O-04.

--- Organizations expending public funds

The North Dakota Insurance Reserve Fund is expending public funds because the contributions from its member-public entities are a form of risk retention rather than the purchase of insurance coverage, and the contributions therefore never lose their identity as public funds. 1999 N.D. Op. Att'y Gen. O-02.

(13) Public funds

Public funds which are transferred to a government self-insurance pool do not lose their identity as public funds. 1999 N.D. Op. Att'y Gen. O-02.

The definition of public funds in this subsection includes cash and other assets or property which have a significant economic value, including the co-signature of a public entity on a loan by a non-governmental organization or the free use of public property.

1998 N.D. Op. Att'y Gen. O-24; 1998 N.D. Op. Att'y Gen. O-23.

The definition of public funds in this subsection does not include de minimis contributions of property or assets, such as the occasional use of a public meeting room. 1998 N.D. Op. Att'y Gen. O-24; 1998 N.D. Op. Att'y Gen. O-23.

The definition of public funds in this subsection does not include funds provided from the federal government directly to a non-governmental organization. 1999 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. O-23.

(14) Quorum

A quorum of an eight-member governing body is four members. 1998 N.D. Op. Att'y Gen. O-05.

(15) Record

The form in which information is recorded is irrelevant to whether the information is a "record." 1998 N.D. Op. Att'y Gen. O-22.

Mere possession of records regarding public business, rather than ownership, is all that is necessary for an item of recorded information to be a "record" under subsection (15). 1998 N.D. Op. Att'y Gen. L-73.

An item of recorded information is not a record if it has not been received or prepared for use in connection with public business. Mere possession of recorded information by a public entity is not sufficient. Rather, the term "connection" requires a link or association between the recorded information and the public entity's public business. 1998 N.D. Op. Att'y Gen. L-128.

A personal letter received by an employee at work would not, for that reason alone, be a record. However, information in a school district phone bill regarding personal telephone calls

has a link or association with payment of school district expenses and is a record, notwithstanding the fact that the charges are later reimbursed by school district personnel. 1998 N.D. Op. Att'y Gen. L-128.

Any settlement agreement by the North Dakota Insurance Reserve Fund or its attorneys, as agents of the public entities who participate in the fund, is an open record. The balance of the file of any case which is no longer pending is also an open record, with a limited exception for records in the file referring to or concerning the amount of reserves set aside during the case. 1999 N.D. Op. Att'y Gen. O-02.

The budget of an organization supported by public funds is an open record because it relates to the use and impact of the public funds received by the organization, notwithstanding the fact that the information may be speculative and outdated. 1998 N.D. Op. Att'y Gen. O-24.

Field inspection applications and reports by the State Seed Department are records. 1998 N.D. Op. Att'y Gen. L-77.

The term "record" includes a resume and other personal information of a person applying for employment with a public entity. 1998 N.D. Op. Att'y Gen. F-11.

The term "record" does not include the unwritten thoughts of a public official. 1997 N.D. Op. Att'y Gen. O-1.

The term "record" includes each entry on forms submitted to a public entity regarding public business. 1997 N.D. Op. Att'y Gen. F-06.

-- Court records

Court records are not subject to the open records law. Rather, disclosure of municipal court records is governed by the court or by administrative rules of the North Dakota Supreme Court. 2002 N.D. Op. Att'y Gen. L-19.

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. The entity may charge a reasonable fee for making or mailing the copy, or both. An entity may require payment before making or mailing the copy, or both. 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. As used in this subsection, "reasonable fee" means the actual cost to the public entity of making or mailing a copy of a record, or both, including labor, materials, postage, and equipment, but excluding any cost associated with excising confidential or closed material under section 44-04-18.10. An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records if locating the records requires more than one hour. This subsection does not apply to copies of public records for which a different fee is specifically provided by law.
3. 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.
4. A state-level public entity as defined in subdivision a of subsection 12 of section 44-04-17.1 may establish procedures for providing access from an outside location to any computer data base 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, the entity 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.
5. Any request under this section for records in the possession of a public entity by a party to a criminal or civil action or adversarial administrative proceeding in which the public entity is a party, or by an agent of the party, must comply with applicable discovery rules and be made to the attorney representing that entity in the criminal or civil action or adversarial administrative proceeding. 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.
6. 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.
7. 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 subsection 2.
8. 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.

9. 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.

Source: 2003 N.D. Sess. Laws ch. 48, §33; 2001 N.D. Sess. Laws ch. 393, §§ 5, 6; 1999 N.D. Sess. Laws ch. 104, §2; 1997 N.D. Sess. Laws ch. 381, §3; 1993 N.D. Sess. Laws ch. 441, §1; 1977 N.D. Sess. Laws ch. 416, §1; 1957 N.D. Sess. Laws ch. 305, § 1.

(1) Except as otherwise specifically provided by law

Public entities do not have the authority to create exceptions to the open records law by contract; it is the province of the Legislature to weigh the interests of privacy and the public's right to have access to records regarding public business. 2000 N.D. Op. Att'y Gen. F-09.

A release of records is governed by the law in effect when the entity is required to respond rather than the law in effect when the requested records were created. 2001 N.D. Op. Att'y Gen. O-12.

The application of a statute making certain records confidential may be waived by the party or parties for whose benefit the statute was enacted. 1999 N.D. Op. Att'y Gen. L-30.

When two public entities possess the same record, each entity usually possesses the record in its own capacity and has an independent duty to determine whether the information is an open record. 2000 N.D. Op. Att'y Gen. F-09.

When a state agency holds records on behalf of another agency as its agent, and not in its own capacity, the agency possessing the records is required to respond on behalf of the entity providing the records and may not refer the requester to the providing entity. 1998 N.D. Op. Att'y Gen. L-73.

When an exception to the open records law is based on the identity and purpose of the person making the request, it is appropriate for the public entity to determine that the person's identity or purpose do not make them subject to the exception before the entity is required to disclose the requested records. 1998 N.D. Op. Att'y Gen. F-13.

There is no general exception to the open records law for resumes or other personal information submitted by an applicant for employment with a public entity. 1998 N.D. Op. Att'y Gen. F-11.

Exceptions to the open records law must be specific and cannot be implied. Exceptions should be narrowly construed to minimize the amount of recorded information regarding public business which is withheld from the public. 1997 N.D. Op. Att'y Gen. F-06.

The plain meaning of the term "record" in an exception to the open records law refers to each item of recorded information in a document or file, and not to the entire file or document. 1997 N.D. Op. Att'y Gen. F-06.

-- Hours of access

Access to public records outside regular office hours is not required. 1997 N.D. Op. Att'y Gen. O-1.

(2) Form of request

The trial court properly required a requester to make periodic requests for records rather than one continuing request. Robot Aided Mfg., Inc. v. North Dakota Dep't of Transp., 1999 ND 14, ¶ 16, 589 N.W.2d 187.

A request for a large number of records is not, by definition, overbroad. The number of records requested affects the length of time within which a public entity is required to respond, but not whether a request is sufficient under this section. 2001 N.D. Op. Att'y Gen. O-12.

A request need not be made in person or in writing. A verbal request has the same effect as a written request and must be fulfilled or denied within a reasonable time. 1998 N.D. Op. Att'y Gen. O-04; 1998 N.D. Op. Att'y Gen. O-03.

Once a request for records is made to a public entity under this section, the public entity must either provide the records or explain why the request is not being satisfied. 1998 N.D. Op. Att'y Gen. O-20.

If immediate access is not provided, a public entity should inform a requester whenever possible of the approximate date when access will be provided. However, a public entity is not required to give the requester a specific date by which the request will be fulfilled, as long as the records are provided within a reasonable time. 1998 N.D. Op. Att'y Gen. O-22.

For records which cannot be accessed or copied immediately, the burden is on the public entity to let the requester know when the records become available. 1998 N.D. Op. Att'y Gen. O-04.

A public entity is not required to provide more than one copy of an open record. However, before denying a request for an additional copy, the public entity is responsible for making sure that the requested record is the same as the record previously provided by the public entity. 1998 N.D. Op. Att'y Gen. O-20.

--- Copy

As used in the open records law, the term "copy" means a duplicate or exact reproduction of the original record. 2001 N.D. Op. Att'y Gen. O-06. A black and white photocopy of a color picture is not a "copy" of the original record. Id.

--- Reasonable fee

Unless it takes a public entity longer than one hour to find the requested records, this section effectively maintains free access to public records, but allows a public entity to offset its entire cost of making copies of those records upon request. 2002 N.D. Op. Att'y Gen. O-04.

The definition of reasonable fee limits a public entity to charging no more than its actual cost of making the requested copies, including labor, materials, and equipment. 2002 N.D. Op. Att'y Gen. O-04; 1998 N.D. Op. Att'y Gen. O-22.

In determining the public entity's actual cost of making copies, it is helpful to separate the fixed costs associated with each copy (materials, equipment, and postage) from the labor cost that will vary with each request. 2002 N.D. Op. Att'y Gen. O-04.

A nominal fee of \$0.25 per page may be unreasonable if the total copying charge exceeds the public entity's actual cost of making the copies. 2002 N.D. Op. Att'y Gen. O-04; 1998 N.D. Op. Att'y Gen. O-22 (actual cost was \$0.08 per page).

At some point, a flat fee for each additional page will have to be reduced due to a corresponding decrease in the time needed to prepare a copy. 2002 N.D. Op. Att'y Gen. O-04.

Fees of \$2.00 or \$1.00 per page exceeded the public entity's cost of making copies and were unreasonable. 1998 N.D. Op. Att'y Gen. O-04.

A fee of \$2.50 per page exceeded the public entity's cost of making copies and was unreasonable. 1998 N.D. Op. Att'y Gen. O-03.

--- Copy charges in other statutes

The fee of two dollars per page in N.D.C.C. § 11-15-07(4) for records of a county sheriff is an exception to the "reasonable fee" provided in subsection (2), although the increased fee only applies to "papers" and not to other types of records. 2000 N.D. Op. Att'y Gen. L-94.

The fee in N.D.C.C. § 39-16-03 for certified abstracts of a person's operating record does not apply to the source documents used to compile the abstract, so the maximum amount that may be charged for copies of the source documents is the "reasonable fee" computed under this section rather than the \$3.00 fee per abstract in N.D.C.C. § 39-16-03. Robot Aided Mfg., Inc. v. North Dakota Dep't of Transp., 1999 ND 14, 589 N.W.2d 187.

--- Locate fee

The fee for locating records does not apply to the time it takes a public entity to prepare a summary of requested information on its own initiative rather than providing the source documents sought by the requester. 2000 N.D. Op. Att'y Gen. O-11.

Opinions under prior law

Subsection (2), in effect, maintains free access to public records but eliminates any expense to the public entity of providing copies of those records. The definition of reasonable fee prohibits public entities from passing on to the requester the cost of locating records or excising closed or confidential material. 1998 N.D. Op. Att'y Gen. O-03. But see amended subsection (2) (authorizing a fee for searches taking longer than one hour).

(3) Records which do not exist

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. 1998 N.D. Op. Att'y Gen. O-22.

A public entity is not required under this section to disclose records which do not exist, or to create a new record by compiling information from other records. 1998 N.D. Op. Att'y Gen.

O-22; 1998 N.D. Op. Att'y Gen. O-20; 1998 N.D. Op. Att'y Gen. O-04; 1997 N.D. Op. Att'y Gen. O-1.

-- Computer data

The apparent reason for the electronic records exception to the rule that creation of a new record is not required is that it may be necessary for a public entity to create a new record, such as a printed document, in order to segregate any closed or confidential information which is stored along with an open record. 1998 N.D. Op. Att'y Gen. O-22.

(5) Requests by a party to litigation or administrative proceedings

A public entity receiving an open records request from or on behalf of an adversary to a pending court action or adversarial administrative proceeding is entitled under this subsection to the full scope of the discovery privilege in N.D.R. Civ. P. 26(b)(3) for material prepared in anticipation of a court action or adversarial administrative proceeding. 2002 N.D. Op. Att'y Gen. O-05.

The exception in this subsection covers more records than the attorney work product exception in N.D.C.C. § 44-04-19.1, but is limited to requests from an adversary or an adversary's representative in a pending court action or adversarial administrative proceeding. It does not apply if the records are requested by a member of the public who has no interest in the action or proceeding. 2002 N.D. Op. Att'y Gen. O-05.

As used in this subsection, "adversarial administrative proceeding" has the same meaning as in N.D.C.C. § 44-04-19.1. An adversarial administrative proceeding began for purposes of this subsection when a complaint was filed with the Labor Department and when a claim was filed with the Workers' Compensation Bureau. 2002 N.D. Op. Att'y Gen. O-05.

A request by a litigant or agent of a litigant for records of a public entity must be submitted to the attorney representing the public entity and is subject to the rules of discovery. 1998 N.D. Op. Att'y Gen. F-13.

This subsection has a procedural component and establishes the discovery process, rather than the open records law, as the exclusive method of compelling a public entity to provide records to its adversary in a pending court action or adversarial administrative proceeding. A public entity may rely on legitimate discovery objections to deny a

request for records under this section from an adversary or agent of an adversary. 2002 N.D. Op. Att'y Gen. O-05.

Since the exception in this subsection is based on the identity of the person making the request, it is appropriate for the public entity to determine that the person is not an adversary or agent of an adversary before disclosing the requested records. 2002 N.D. Op. Att'y Gen. O-05. See also 1998 N.D. Op. Att'y Gen. F-13.

(6) Denial of records

An explanation that a denial was based on the advice of the public entity's attorney is not a sufficient explanation of the entity's legal authority for denying a request. 2000 N.D. Op. Att'y Gen. O-13.

Records are denied, for purposes of requiring a written denial upon request, even if the reason for not disclosing the records is that the records do not exist. 1998 N.D. Op. Att'y Gen. O-10; 1998 N.D. Op. Att'y Gen. O-04.

A request for records is denied, and the denial must be explained and made in writing if requested, when the requested records are thrown away or destroyed while the request for those records is still pending. 1998 N.D. Op. Att'y Gen. O-07.

A reasonable delay in providing records is not a denial which must be made in writing upon request, but the public entity should give the requester some idea of when the records will be available. 1998 N.D. Op. Att'y Gen. O-22; 1998 N.D. Op. Att'y Gen. O-04; 1998 N.D. Op. Att'y Gen. O-03.

A denial must clearly address all the requested records which are not disclosed and the legal authority supporting the denial. 1998 N.D. Op. Att'y Gen. O-03.

An explanation of the legal basis for denying records can be sufficient without citing the number of the specific statute authorizing the denial. 1997 N.D. Op. Att'y Gen. O-1.

(7) Violations

The open records law is violated when records are destroyed or thrown away while a request for those records is still pending. 1998 N.D. Op. Att'y Gen. O-07.

A public entity complies with this section when it mails the records to the requester, even if the records are lost in the mail. 1998 N.D. Op. Att'y Gen. O-07.

-- Unreasonable delay

Unless there is a legitimate legal or factual question on what records must be disclosed, public officials should know what records are open to the public upon request. Providing access is a ministerial act which will not require the action of a governing body in most cases and which cannot be automatically delayed until the next meeting of the body. 2001 N.D. Op. Att'y Gen. O-02.

A delay of seven working days to receive legal advice on a request was unreasonable when legal advice was not required to inform the requester that the records did not exist. 2001 N.D. Op. Att'y Gen. O-04.

A delay to receive legal advice on how to respond to a request is reasonable only if there is a legitimate legal and factual question on what information must be disclosed. 2000 N.D. Op. Att'y Gen. O02. A delay to receive attorney advice may only last as long as reasonably necessary for the attorney to prepare that advice, at which point a meeting must be scheduled and held to receive the advice and respond to the request. Id.

A delay of over a month is not unreasonable if the requester indicated he would pick up the requested records but had not done so. 2001 N.D. Op. Att'y Gen. O-12.

A delay of over a month before denying a request for records which do not exist is unreasonable and a violation of this section. 1998 N.D. Op. Att'y Gen. O-20.

A delay of over a month before providing requested records was an unreasonable delay. 1998 N.D. Op. Att'y Gen. O-19; 1998 N.D. Op. Att'y Gen. O-04.

Because complying with the open records law is an important responsibility, records should be provided immediately when possible and delays which are reasonable will usually be measured in hours or a few days rather than several days or weeks. 1998 N.D. Op. Att'y Gen. O-22; 1998 N.D. Op. Att'y Gen. O-20; 1998 N.D. Op. Att'y Gen. O-04.

A delay of seven working days is closely reviewed by the Office of Attorney General, but was reasonable under the facts. Factors to be considered include the need for removing closed or confidential material, the need to obtain legal advice regarding the openness of the requested records, the quantity of records requested, and whether staff are employed by the public entity on a full or part time basis. 1998 N.D. Op. Att'y Gen. O-03.

Under the facts, immediate disclosure was required and any delay in providing access or copies was unreasonable. 1997 N.D. Op. Att'y Gen. O-1.

(8) Preliminary drafts and working papers

There are two parts to subsection 8: a "right of first review" provision and a "work in progress" provision. 2001 N.D. Op. Att'y Gen. O-04.

-- Right of first review

The "right of first review" provision in subsection 8 applies until the record is given to a member of the governing body or until the first meeting of the body after the record is prepared, whichever occurs first. 2001 N.D. Op. Att'y Gen. O-04.

The authority to withhold records "prepared" at the direction of a governing body is limited to records created at the body's request and does not include records that are collected to create those records. 2001 N.D. Op. Att'y Gen. O-02.

-- Work in progress

The "work in progress" provision in subsection 8 applies only as long as the working paper or preliminary draft are being used to prepare another record. It protects public entities from being interrupted with responding to open records requests for the notes and draft documents they create while preparing a final document. 2001 N.D. Op. Att'y Gen. O-04.

Withholding completed documents as "working papers" until an entire project is complete is not appropriate; the authority to withhold working papers applies only until a final record is prepared. 2001 N.D. Op. Att'y Gen. O-04.

Working papers and preliminary drafts are interchangeable phrases, referring to records that are created and used in the process of creating another record. Once a draft is no longer being worked on or is distributed to members of a governing body, the draft must be disclosed upon request. 1998 N.D. Op. Att'y Gen. O-04.

Notes of meetings are no longer working papers once draft minutes of the meeting are prepared, even if the minutes have not yet been approved by the governing body. 1998 N.D. Op. Att'y Gen. O-04.

Job applications and completed forms are not working papers. 2001 N.D. Op. Att'y Gen.

O-02; 1998 N.D. Op. Att'y Gen. O-03.

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; photograph; medical information; motor vehicle operator's identification number; payroll deduction information; the name, address, telephone number, and date of birth; 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.

Source: 2003 N.D. Sess. Laws ch. 211, §24; 2003 N.D. Sess. Laws ch. 381, §1; 2003 N.D. Sess. Laws ch. 382, §8; 2001 N.D. Sess. Laws ch. 393, §7; 1999 N.D. Sess. Laws ch. 396, §1; 1997 N.D. Sess. Laws ch. 381, §6; 1987 N.D. Sess. Laws ch. 538, §1.

(2) Personal information

Personal information is exempt under this section rather than confidential. 1997 N.D. Op. Att'y Gen. F-06.

(3) Nongovernmental organization

The exception in subsection 3 for personnel files does not apply if the supported organization is also an agency of a political subdivision. 2001 N.D. Op. Att'y Gen. O-11.

(4) Licensees

The Department of Human Services is not an occupational or professional board, association, or commission as those terms are used in this section. 1999 N.D. Op. Att'y Gen. L-57.

44-04-18.2. Certain economic development records exempt from disclosure.
Repealed by 1997 N.D. Sess. Laws ch. 381, §23. For current provision, see N.D.C.C. §44-04-18.4(5).

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

1. Any telephone number and the home address of a juvenile court supervisor 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. A record containing information relating to an employee of the department of corrections and rehabilitation may be disclosed to an appropriate authority under policy established by 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. 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.

Source: 2003 N.D. Sess. Laws ch. 33, § 1;
1997 N.D. Sess. Laws ch. 381, § 7;

Sess. Laws ch. 428, § 1; 1989 N.D. Sess. Laws
541, § 1.

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. "Trade secret" includes:
 - a. A computer software program and components of a computer software program which are subject to a copyright or a patent, and any formula, pattern, compilation, program, device, method, technique, or process supplied to any state agency, institution, department, or board which is the subject of efforts by the supplying person or organization 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 or organizations that might obtain economic value from its disclosure or use; and
 - b. A discovery or innovation which is subject to a patent or a copyright, and any formula, pattern, compilation, program, device, method, technique, or process supplied to or prepared by any public entity which is the subject of efforts by the supplying or preparing entity, person, business, or industry 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, any person who might obtain economic value from its disclosure or use.
3. "Proprietary information" includes information received from a sponsor of research conducted by a public entity, as well as any discovery or innovation generated by that research, technical, financial, and marketing information and other documents related to the commercialization, and any other discovery or innovation produced by the public entity which an employee or the entity intends to commercialize.
4. 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.

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, or expand within this state. 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 commercial or financial information received from a person, business, or industry that is interested in or is applying for or receiving financing or technical assistance, or other forms of business assistance.

Source: 1997 N.D. Sess. Laws ch. 381, §8; 1997 N.D. Sess. Laws. Ch. 155, §3; 1995 N.D. Sess. Laws ch. 243, §2; 1993 N.D. Sess. Laws § 441, §2; 1989 N.D. Sess. Laws ch. 542, §1.

(1) Commercial or financial information

The terms "commercial" and "financial" as used in subsection (1) refer broadly to information pertaining to commerce (the buying or selling of goods or services) or finances (monetary resources). 1998 N.D. Op. Att'y Gen. O-22; 1998 N.D. Op. Att'y Gen. L-17.

Economic development marketing strategies and marketing information are confidential under this section if public disclosure would cause a substantial risk of competitive injury to the public entity. 2001 N.D. Op. Att'y Gen. O-11. See also 2001 N.D. Op. Att'y Gen. O-10.

A list of customer names and addresses of a business venture owned by a city park district is commercial information. 1998 N.D. Op. Att'y Gen. O-22.

Seed field records are commercial information under this section. 1998 N.D. Op. Att'y Gen. L-77.

--- Personal financial information

The plain language of subsection (1) is not limited to financial information of a business and therefore also includes personal financial information. 2000 N.D. Op. Att'y Gen. L-107.

--- Of a privileged nature

Trade secrets and other information which may be protected under this section have a privileged nature if disclosure is likely to impair the public entity's future ability to obtain necessary information or if disclosure would likely cause substantial competitive injury to the person or entity from whom the information was obtained. 1998 N.D. Op. Att'y Gen. O-22; 1998

N.D. Op. Att'y Gen. L-77; 1998 N.D. Op. Att'y Gen. L-17.

Disclosure of personal financial information of an applicant for a tax credit, who is not in competition with other applicants, cannot cause a competitive injury to the applicant. Thus, whether the information is "of a privileged nature" depends on whether disclosure would impair the public entity's future ability to obtain such information from other applicants. 2000 N.D. Op. Att'y Gen. L-107.

Disclosure of a park district's membership list cannot cause competitive injury as a matter of law unless the district is in competition with another entity which offers similar accommodations or services. 1998 N.D. Op. Att'y Gen. O-22.

Information regarding the parentage of seeds has a privileged nature under this section because disclosure of the information would allow a competitor to duplicate and sell the same product in competition with the person providing the information, causing substantial competitive harm to that person. 1998 N.D. Op. Att'y Gen. L-77.

There is no competitive disadvantage from public disclosure of commercial information if all competitors are required to provide the information. 1998 N.D. Op. Att'y Gen. L-77.

The disclosure of contract prices with the government, as a matter of law, does not cause a competitive injury to the contractor. 1998 N.D. Op. Att'y Gen. L-17.

(2) Trade secrets

The definition of trade secret includes any compilation prepared by a public entity which the public entity attempts to keep secret and from which the public entity may derive economic value if the information is not publicly disclosed. 1998 N.D. Op. Att'y Gen. O-22.

A list of customer names and addresses of a business venture owned by a city park district could qualify as a trade secret. 1998 N.D. Op. Att'y Gen. O-22.

(5) Economic development records

The first part of subsection (5) authorizes a public entity to conceal the identity, nature, and prospective location of a business or industry, but only until the business or industry discloses to the public whether it will locate, relocate, or expand within the state. The second part of this subsection applies to trade secrets and commercial and financial information that is received from a business, even if the business'

identity has been disclosed. However, the second part of the exception in subsection (5) does not apply to the identity of the business or to information generated by the public entity itself. 2000 N.D. Op. Att'y Gen. O-07. See also 2001 N.D. Op. Att'y Gen. O-11; 2001 N.D. Op. Att'y Gen. O-10; 2001 N.D. Op. Att'y Gen. O-1.

Economic development records are not exempt under this subsection if they have previously been publicly disclosed or if they do not contain any information regarding the business which may be protected (trade secrets, commercial or proprietary information). 1998 N.D. Op. Att'y Gen. O-03.

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.

Source: 1997 N.D. Sess. Laws ch. 382, § 1; 1997 N.D. Sess. Laws ch. 381, §9; 1989 N.D. Sess. Laws ch. 542, § 2.

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 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 attorney work product or is attorney-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.

Source: 1989 N.D. Sess. Laws ch. 543, § 1.

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. Criminal intelligence and investigative information that is not considered "active" is not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota to the extent that the information is personal information.

2. "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 that it will lead to detection of ongoing or reasonably anticipated criminal activities.
3. "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.
4. "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.
5. "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.
6. "Personal information" means a person's medical information; motor vehicle operator's identification number; social security number; and any credit, debit, or electronic fund transfer card number.
7. A computerized index created by a criminal justice agency of names included in criminal files, whether active or inactive, is an exempt record.

Source: 2001 N.D. Sess. Laws ch. 393, §8;
1997 N.D. Sess. Laws ch. 381, § 10; 1995 N.D.

Sess. Laws ch. 428, §2; 1989 N.D. Sess. Laws
ch. 544, § 1.

(1) Active information

Disclosure of active criminal investigative information is neither prohibited nor required, so disclosure of the information is left to the discretion of the criminal justice agency as an exempt record until the information is no longer active. However, disclosure of the information may be prohibited by other statutes which make the records confidential rather than exempt. 1998 N.D. Op. Att'y Gen. F-09.

Once criminal investigative information is no longer active, the information is an open record

unless another exception applies. 1998 N.D. Op. Att'y Gen. F-09.

(3) Criminal investigative information

Information obtained under a search warrant is criminal investigative information. 1998 N.D. Op. Att'y Gen. F-09.

Criminal investigative information does not include the names of individuals who have been involved in a traffic accident because release of the names does not indicate whether an investigation is being conducted. 1997 N.D. Op. Att'y Gen. O-1.

44-04-18.8. Confidentiality of examination questions and procedures. 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.

Source: 1993 N.D. Sess. Laws ch. 442, § 1.

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.

Source: 1997 N.D. Sess. Laws ch. 383, § 1.

Bank account and credit card numbers

The bank account number and credit card number of persons purchasing memberships

from a city park district are exempt from the open records law under this section. 1998 N.D. Op. Att'y Gen. O-22.

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 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.

Source: 1997 N.D. Sess. Laws ch. 381, § 4.

Duty to separate closed or confidential information

A public entity may not deny a request for an open record because the record also contains closed or confidential information, no matter whether the record is a paper document or a computer file. The public entity must redact or otherwise remove the closed or confidential information and disclose the rest of the record to the requester. 1998 N.D. Op. Att'y Gen. O-22.

(3) Confidentiality agreements

Any confidentiality agreement by the North Dakota Insurance Reserve Fund or its attorneys, as agents of the public entities who participate in the fund, is against public policy and is void. 1999 N.D. Op. Att'y Gen. O-02.

(4) Disclosure of closed or confidential records for purposes of law enforcement or debt collection

The authority to disclose closed or confidential records under this section is subject to federal restrictions on such disclosures. 1998 N.D. Op. Att'y Gen. F-28.

There is no conflict between this section and a statute which makes records closed or confidential, and disclosure is therefore permitted, unless 1) the statute making the records closed or confidential goes further and explains the specific circumstances under which the records may be shared with other public entities, and 2) the circumstances listed in the statute are unique and not common to all closed or confidential records. 1998 N.D. Op. Att'y Gen. F-28; 1998 N.D. Op. Att'y Gen. L-194.

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.

Source: 1997 N.D. Sess. Laws ch. 381, § 5.

44-04-18.12. Cooperative investigations and litigation. A record acquired under an agreement between or involving a governmental agency in another jurisdiction and the attorney general is confidential, except for the purposes specified in the agreement, if the attorney general determines:

1. The record is necessary to further a civil investigation or litigation by the state;
2. The record can be obtained only by agreeing to keep the record confidential; and
3. The record is treated as confidential by the provider of the records.

Source: 2003 N.D. Sess. Laws ch. 437, §1;
1997 N.D. Sess. Laws ch. 381, § 11.

44-04-18.13. Lists of children. Any record of a public entity that is a compilation of children's names, addresses, phone numbers, or any combination thereof, is exempt.

Source: 1997 N.D. Sess. Laws ch. 381, § 12.

44-04-18.14. Certain records of occupational information coordinating committee—Exempt. Records provided to the North Dakota occupational information coordinating committee by any person for use in the followup information on North Dakota education and training system for research or statistical purposes may only be used to prepare

aggregate data compilations that do not identify any individual and may not be disclosed to the public by the occupational information coordinating committee. A request for disclosure of the records under section 44-04-18 or section 6 of article XI of the Constitution of North Dakota must be directed to the person or entity that has provided the records to the occupational information coordinating committee.

Source: 1997 N.D. Sess. Laws ch. 46, § 5.

44-04-18.15. Fundraising and donor records of board of higher education and university system exempt. Any donor or prospective donor name, address, telephone number, tax or financial record, or other personal information received or retained by a board of higher education or university system officer or employee is exempt from section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.

Source: 1999 N.D. Sess. Laws ch. 397, § 1.

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.

Source: 1999 N.D. Sess. Laws ch. 398, § 1.

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.

Source: 1999 N.D. Sess. Laws ch. 399, § 1.

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.

Source: 2003 N.D. Sess. Laws ch. 384, § 1.

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 audio or video tape 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 where 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.

Source: 1997 N.D. Sess. Laws ch. 381, §13; 1977 N.D. Sess. Laws ch. 417, §1; 1957 N.D. Sess. Laws ch. 306, § 1.

Gen. O-07; 1998 N.D. Op. Att'y Gen. O-17; 1998 N.D. Op. Att'y Gen. F-11.

General Application

This section does not establish meetings as the exclusive method for a public entity to conduct business. 2001 N.D. Op. Att'y Gen. O-14.

This section does not restrict the topics which may be discussed by the governing body of a public entity at a regular meeting, even if a topic is not included in either the notice or the agenda of the meeting. 1999 N.D. Op. Att'y Gen. O-08.

Public participation

The public's right to attend an open meeting under this section does not include the right to participate in that meeting. 1999 N.D. Op. Att'y

Except as otherwise specifically provided by law

As a general rule, there is no statutory exception to the open meetings law for personnel matters. 2001 N.D. Op. Att'y Gen. O-09; 1998 N.D. Op. Att'y Gen. O-05.

(1) Violations

A meeting which cannot be heard by the public is the equivalent of a closed or secret meeting and is a violation of the open meetings law. 2001 N.D. Op. Att'y Gen. O-13.

Not every remark during an executive session which is irrelevant to the reason for the executive session is a violation of the open meetings law. 1999 N.D. Op. Att'y Gen. O-04.

This section is violated when a person attempts to attend a meeting but is unable to do so because the door to the meeting room is locked. 1999 N.D. Op. Att'y Gen. O-08; 1998 N.D. Op. Att'y Gen. O-17.

Usually, a complete failure to provide public notice of a meeting is a violation of

N.D.C.C. § 44-04-20 rather than this section. However, taking deliberate action to conceal a meeting from the public is functionally the same as closing the door to the meeting and is a violation of this section as well as N.D.C.C. § 44-04-20. 1999 N.D. Op. Att'y Gen. O-08; 1998 N.D. Op. Att'y Gen. O-16.

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. "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.
4. "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.
5. "Adversarial administrative proceedings" include only those administrative proceedings where 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 where the administrative agency or institution acts in its own rulemaking capacity.
6. 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.
7. 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.

8. 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.

Source: 2001 N.D. Sess. Laws ch. 393, §9; 1997 N.D. Sess. Laws ch. 381, §15; 1995 N.D. Sess. Laws ch. 329, §12; 1993 N.D. Sess. Laws ch. 45, §17; 1991 N.D. Sess. Laws ch. 476, §1; 1989 N.D. Sess. Laws ch. 545, §1.

Attorney-client relationship

The right of a government entity to confidentiality in its relationship with its attorney is quite different from the right of private clients to confidentiality and is limited to the right provided in this section. 2000 N.D. Op. Att'y Gen. O-12. However, the evidentiary privilege for attorney-client communications still applies. Id.

A public entity waives the right to invoke the attorney consultation or work product exceptions in this section if it allows its adversary to attend the executive session or review the work product. 2002 N.D. Op. Att'y Gen. O-01.

(2) Closed session for attorney consultation

The authority in this subsection to close a portion of a meeting to receive "attorney consultation" as defined in this section may be invoked only during an open meeting and only by following the procedural requirements in N.D.C.C. § 44-04-19.2. 2000 N.D. Op. Att'y Gen. O-03.

(3) Attorney work product, defined

The records that fall within the definition of "attorney work product" under this subsection are similar to the "opinion work product" that may be protected under N.D.R. Civ. P 26(b)(3). Records that are exempt as attorney work product include correspondence between attorneys for a public entity on legal issues in a reasonably predictable lawsuit, a summary of information the entity's attorney feels is relevant to a reasonably predictable lawsuit, and transcripts or recordings of witness interviews conducted in a question and answer manner by the entity's attorney. 2002 N.D. Op. Att'y Gen. O-05.

This subsection protects the products of an attorney's thought process on legal issues posed by a pending or reasonably predictable court action or adversarial administrative proceeding. 2002 N.D. Op. Att'y Gen. O-05.

A simple factual narrative obtained by a public entity's attorney does not include any impressions or work product of the attorney or the entity and would not be protected under this section. 2002 N.D. Op. Att'y Gen. O-05.

(4) Attorney consultation, defined

The purpose of the attorney consultation exception is not to hide information from the public, but rather to allow a public entity to conduct a lawsuit or adversarial administrative proceeding without revealing its strategy or legal theories to its adversary. 2002 N.D. Op. Att'y Gen. O-01.

The exception for attorney consultation is limited to instances when the consultation "concerns" the public entity's legal interests in a pending or reasonably predictable case or proceeding, but the public entity does not have to be a party to the litigation or proceeding for the exception to apply. 2000 N.D. Op. Att'y Gen. O-12.

The line between a discussion of the status or underlying facts of a pending or reasonably predictable proceeding or litigation and attorney consultation regarding that litigation will frequently be drawn at the point where the public entity's bargaining or litigating position would be adversely affected if the discussion occurred in an open meeting. 1999 N.D. Op. Att'y Gen. O-04.

Discussion between a governing body and its attorney regarding a key element in a reasonably predictable civil action was directly related to that action and constituted attorney consultation. 1999 N.D. Op. Att'y Gen. O04; 1998 N.D. Op. Att'y Gen. O-12.

Attorney consultation does not include a simple update on the status of litigation unless the update includes the attorney's mental impression, strategy, or advice regarding the litigation. 1999 N.D. Op. Att'y Gen. O-04; 1998 N.D. Op. Att'y Gen. O-1.

Discussion between a state licensing board and its attorney to discuss changes to the board's decision in a pending adversarial administrative proceeding following a remand by a district court, to address a board members' questions about a suggested change, and to discuss how to respond to the recommendations of an administrative law judge in the proceeding.

Falls within the definition of attorney consultation. 1999 N.D. Op. Att'y Gen. O07; 1999 N.D. Op. Att'y Gen. O-06.

--- **Reasonably predictable**

A governing body does not have to wait until the moment before it is sued to claim that litigation is reasonably predictable. However, the governing body must show more than a fear or potential of being a party to litigation or an adversarial administrative proceeding. The possibility of litigation or a proceeding by or against the governing body must be realistic and tangible. 2001 N.D. Op. Att'y Gen. O-15.

(5) Adversarial administrative proceedings

The definition of adversarial administrative proceedings in this subsection also applies to the use of the phrase in N.D.C.C. § 44-04-18(5). A proceeding begins for purposes of this definition when a person files a complaint with the Labor Department or files a claim for benefits from the Workers' Compensation Bureau. 2002 N.D. Op. Att'y Gen. O-05.

A proceeding by a state licensing board to revoke or suspend a person's license is an adversarial administrative proceeding under this section. 1999 N.D. Op. Att'y Gen. O-06.

(7) Negotiation sessions

There are three elements to the exception in subsection (7) for negotiation strategy sessions:

- 1) discussion of negotiation strategy or providing instructions to the governing body's attorney or negotiator;
- 2) litigation, adversarial

administrative proceedings, or contracts which are currently being negotiated or for which negotiation is reasonably predictable; and 3) an adverse fiscal affect on the public entity's bargaining position if the meeting were open. 2000 N.D. Op. Att'y Gen. O-09.

A contract need not be in writing for an executive session to be authorized under this subsection. 2001 N.D. Op. Att'y Gen. O-17.

A meeting may not be closed under this subsection simply because a contract is being discussed; the meeting may be closed only if allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity. 1999 N.D. Op. Att'y Gen. O-1.

Receiving an update from the governing body's attorney on the status of contract negotiations, rather than strategizing or instructing the attorney regarding the negotiation, may not occur in an executive session under subsection (7). 1998 N.D. Op. Att'y Gen. O-12.

The terms "strategy" and "instructions" are key terms which limit the application of the open meetings exception in subsection (7). 2000 N.D. Op. Att'y Gen. O-05.

A governing body may not close its evaluation or discussion of an employee's job performance under subsection (7) simply because the discussion occurs in the context of determining whether to approve a raise or cost of living increase for the employee. 2001 N.D. Op. Att'y Gen. O-17; 2000 N.D. Op. Att'y Gen. O-09.

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.

Source: 2001 N.D. Sess. Laws ch. 393, §10; 1997 N.D. Sess. Laws ch. 381, § 14.

Minutes of executive sessions

To the extent that minutes are kept of executive sessions, the minutes are not open records because requiring disclosure of the minutes would defeat the legislative purpose of authorizing a closed meeting. 1998 N.D. Op. Att'y Gen. O-25.

Unless a statute provides otherwise, the minutes of executive sessions are treated the same as recordings of those sessions and continue to be closed even if disclosure would no longer defeat the purpose of the executive session. 1998 N.D. Op. Att'y Gen. O-25.

(1) Meeting to consider confidential or closed records

When an executive session is held to discuss closed or confidential records, a person who is entitled to have access to those records may not be excluded from the executive session under this subsection. 2000 N.D. Op. Att'y Gen. O-02.

An executive session may be held under subsection one of this section to discuss records which are confidential under the Family

Educational Rights and Privacy Act (FERPA), 12 U.S.C. § 1232g. 1998 N.D. Op. Att'y Gen. O-06.

An executive session under subsection one of this section must be limited to a discussion of the closed or confidential records. 1998 ND. Op. Att'y Gen. O-06.

(2) Procedure for closing

The requirements in subsection two of this section for closing a meeting should not be applied so rigidly that a script needs to be prepared ahead of time in order to comply with those requirements. 1998 N.D. Op. Att'y Gen. O-25.

Even if a public entity has legal authority to hold an executive session, the entity may exercise that authority only after it convenes in an open meeting and complies with the procedural requirements in this section. 2000 N.D. Op. Att'y Gen. O-03; 2000 N.D. Op. Att'y Gen. O-1.

The fact that a governing body is holding an executive session cannot be kept a secret. Before going into executive session, the body must announce both the legal authority for the session and the general topics that will be discussed. 1999 N.D. Op. Att'y Gen. O04. A complete failure to announce the topic and legal

authority of an executive session is a violation of this section. 2000 N.D. Op. Att'y Gen. O-1.

-- Vote to hold an executive session

Since a discussion of exempt records does not necessarily have to occur in an executive session, a governing body is required to vote on whether the discussion will occur during the open portion of the meeting or during an executive session. By contrast, when a governing body discusses confidential records, a vote is unnecessary because the meeting is required to be closed to the public. 2000 N.D. Op. Att'y Gen. O-02.

A governing body substantially complied with this section, despite its failure to vote on whether to hold an executive session, when no member of the body or the public objected to holding the executive session. 1999 N.D. Op. Att'y Gen. O-06.

-- Sufficiency of announcement

The purpose of requiring a public announcement of the legal authority and topics of an executive session is to provide the public with a legally sufficient reason for holding the executive session. 2000 N.D. Op. Att'y Gen. O-10.

The announcement of an executive session required under subsection (2) must be made before the governing body holds the executive session, rather than after the governing body reconvenes in an open meeting. 2000 N.D. Op. Att'y Gen. O-05. See also 1999 N.D. Op. Att'y Gen. O-04; 1998 N.D. Op. Att'y Gen. O-1.

Before going into executive session, a governing body is not required to reveal closed or confidential information or cite the number of the particular statute authorizing the executive session as long as the motion identifies the applicable statutory basis for closing the meeting. However, a governing body does not comply with this section if it merely quotes or cites the applicable exception. It must also provide more information about the subject of the executive session. 1999 N.D. Op. Att'y Gen. O-04.

In an executive session to discuss negotiation strategy regarding contracts, the announcement must sufficiently identify the particular contract or contracts for which the governing body was discussing negotiation strategy or providing negotiation instructions. 2001 N.D. Op. Att'y Gen. O-17; 2000 N.D. Op. Att'y Gen. O-05.

An announcement of an executive session for attorney consultation is sufficient if it indicates the reason for the executive session is 1) attorney consultation 2) regarding reasonably predictable or pending litigation or adversarial administrative proceedings and 3) further indicates the topic of the executive session by announcing the name of the other parties or the purpose of the executive session. 2001 N.D. Op. Att'y Gen. O-15.

In describing the topic of an executive session for attorney consultation, it is not always necessary for a governing body, in addition to announcing the legal authority for the session, to identify the specific litigation or adversarial administrative proceeding, as long as other information is provided about the topics considered during the executive session. In some cases, it is appropriate to refer to the purpose of the executive session (i.e. consideration of a settlement offer) rather than identify the particular litigation or proceeding. 2000 N.D. Op. Att'y Gen. O-10.

Since this statute authorizes multiple reasons for holding an executive session, an announcement does not sufficiently describe the legal authority for an executive session if it simply cites this section. 2002 N.D. Op. Att'y Gen. O-01.

-- Final action

Final action may occur during an executive session only if required by law. To vote in the open while maintaining the confidentiality of the matter being voted on, the public entity should have made the motion during the executive session, reconvened in an open meeting, and restated the motion without revealing the confidential information. 2001 N.D. Op. Att'y Gen. F-10; 2000 N.D. Op. Att'y Gen. O-04.

(5) Recordings of executive sessions

The purpose of requiring all executive sessions to be recorded is to provide a process for citizens to verify that the discussion during an executive session was limited to the announced topics. 2000 N.D. Op. Att'y Gen. O-10.

A member of a governing body who was absent from a properly closed meeting is entitled to review the recording required under this subsection. Allowing the member to review the recording does not make the recording an open record. 1999 N.D. Op. Att'y Gen. L-115.

The recording of an executive session continues to be a closed record even after the underlying basis for the executive session, such

as an attorney consultation regarding pending litigation, no longer applies. 1998 N.D. Op. Att'y Gen. O-25. See also 1999 N.D. Op. Att'y Gen. O-07.

Opinions under prior law

There is no specific retention period for recordings under this section. However, the

recording should be kept for at least sixty days, and the Office of Attorney General recommends a retention period of six months. 1998 N.D. Op. Att'y Gen. O-12. But see amended subsection (5) (recording must be maintained for minimum of six months).

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.

Source: 1997 N.D. Sess. Laws ch. 381, § 16.

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, where 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, the location of the meeting and the place the meeting is held is the location of a speakerphone or monitor as required under section 44-04-19.
3. In cases where 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. 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, and the county auditor or designee of the county for all other bodies. 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.

6. In the event of emergency or special meetings of a governing body, the person calling such a meeting shall 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. 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.

Source: 2003 N.D. Sess. Laws ch. 382, §12; 1997 N.D. Sess. Laws ch. 381, §17; 1991 N.D. Sess. Laws ch. 477, §1; 1987 N.D. Sess. Laws ch. 539, §1; 1983 N.D. Sess. Laws ch. 493, §1; 1979 N.D. Sess. Laws ch. 477, §1.

session, but does not have to identify the purpose of the executive session or the identity of the other party to the litigation or proceeding being discussed. 2000 N.D. Op. Att'y Gen. O-10. See also 2001 N.D. Op. Att'y Gen. O-15.

Postponed or rescheduled meetings

A new notice must be prepared, posted and filed for meetings which are postponed or rescheduled. 1998 N.D. Op. Att'y Gen. O-09.

(1) Notice in advance of a meeting

There is no mandatory minimum notice period in this section, as long as notice is provided to the public at the same time that the members of the governing body are notified of the meeting. 1998 N.D. Op. Att'y Gen. O-13.

Because the attendance of a quorum of a governing body at a meeting of another group was a surprise, and providing advance notice of the meeting was not reasonable, the governing body would have been in substantial compliance with this section if it prepared a notice and filed it with the appropriate official the day after the meeting. 1998 N.D. Op. Att'y Gen. O-10. See also 1998 N.D. Op. Att'y Gen. O-18; 1998 N.D. Op. Att'y Gen. O-13.

(2) Contents of notice

Changes to the agenda of a regular meeting are not prohibited, even if made during the meeting. 1998 N.D. Op. Att'y Gen. O-21.

The reference to an executive session for attorney consultation in the notice of a meeting needs to include a general description of the

-- Regular meetings

A governing body is free to discuss any item of public business at a regular meeting, even if an item is not included in either the notice or the agenda of the meeting, as long as the notice of the regular meeting included all the topics the governing body expected to discuss when the notice was prepared. 1999 N.D. Op. Att'y Gen. O-08.

A person who attends a regular meeting to listen to the governing body's discussion on a particular item or topic of public business, but who leaves the meeting before it adjourns, assumes the risk that the governing body will discuss that item or topic in the person's absence. A governing body does not violate this section by discussing a specific topic after the person leaves unless 1) the governing body planned ahead of time to discuss that topic during the regular meeting but did not include the topic in the notice of the meeting, or 2) affirmatively misled or represented to the person that the governing body would not be discussing that topic at the regular meeting. 1999 N.D. Op. Att'y Gen. O-08.

(4) Posting meeting notices

Announcing a meeting date during a previous meeting is not a substitute for posting

and filing a notice as required in this section. 2001 N.D. Op. Att'y Gen. O-05.

Notifying interested members of the public is not a substitute for complying with this section. 2000 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. O-11.

-- Central filing of notices

Central filing of meeting notices with the county auditor is not required if all the information contained in the notice, including agenda information, was included in an annual schedule already on file with the county auditor, but a notice still must be prepared and posted. 1998 N.D. Op. Att'y Gen. O-11.

Notice of meetings of a multi-county agency must be filed in the auditor's office of each participating county. 1998 N.D. Op. Att'y Gen. O-04.

(5) Timing of public notice

Providing notice may be delegated by the governing body's presiding officer to another official, but the presiding officer remains responsible for ensuring that sufficient notice is provided. 1998 N.D. Op. Att'y Gen. O-13.

Notice usually must be provided when the members of the governing body are informed of the meeting. Where the attendance of a quorum at a meeting of another body is a surprise, the notice should be provided immediately. 1998 N.D. Op. Att'y Gen. O-10; 1998 N.D. Op. Att'y Gen. O-08.

-- Notice upon request

Notice of a meeting must be given to any individual who requests it. The notice must be given at the same time the governing body's members are notified of the meeting. 1999 N.D. Op. Att'y Gen. O-10.

This section does not require a governing body to provide notice to any individual unless

the individual has asked for such notice. 1999 N.D. Op. Att'y Gen. O-06.

(6) Emergency or special meetings

Notice of a special meeting was deficient because the city had not appointed an official newspaper to which to provide a copy of the notice. 2001 N.D. Op. Att'y Gen. O-08.

Providing notice of special or emergency meetings to a public entity's newspaper is a mandatory requirement, even if the newspaper has not requested such notices. 1998 N.D. Op. Att'y Gen. O-13.

During a special or emergency meeting, the governing body was limited to discussing the topics which were included in the notice of the meeting, including any executive sessions. 2000 N.D. Op. Att'y Gen. O-03; 1998 N.D. Op. Att'y Gen. O-01.

(9) Substantial compliance

A notice which did not identify the time of a meeting or its location within a certain city, and which was posted after the meeting despite the fact it could reasonably have been provided in advance of the meeting, was not in substantial compliance with this section. 1998 N.D. Op. Att'y Gen. O-13.

Notice was provided in substantial compliance with this section, despite the failure to post the notice at the meeting location, when the notice of the meeting was also published twice in the local newspaper. 1998 N.D. Op. Att'y Gen. O-09.

Notice was not provided in substantial compliance with this section when the public entity failed to post the notice of the meeting at the location of the meeting and failed to file the notice with the county auditor. 1998 N.D. Op. Att'y Gen. O-09.

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.

Source: 1997 N.D. Sess. Laws ch. 381, §18; 1979 N.D. Sess. Laws ch. 478, § 1.

Voting

A motion to hold an executive session is a nonprocedural motion and must be decided by a recorded roll-call vote. 2001 N.D. Op. Att’y Gen. O-17.

This section does not allow the selection of nominees for appointment to the North Dakota Wheat Commission by anonymous written ballots; a recorded roll-call vote was required. 2001 N.D. Op. Att’y Gen. O-16.

Approving bills and approving an airport abatement are examples of nonprocedural matters which may only be approved by taking a recorded roll call vote. 1998 N.D. Op. Att’y Gen. O-09.

Minutes

Draft minutes of an open meeting are open records and must be available for access and copying upon request. 1998 N.D. Op. Att’y Gen. O-11.

The minutes of a meeting do not have to identify the location of a meeting, although that information must be included in the notice of the meeting. 1998 N.D. Op. Att’y Gen. O-18.

It is not necessary that minutes reflect the specific discussions or concerns raised by members of the public at a meeting, as long as the minutes include a list of topics discussed. 1998 N.D. Op. Att’y Gen. O-14.

It is not necessary that minutes reflect a discussion between a member of the public and a public official while the official was reporting to the governing body. 1998 N.D. Op. Att’y Gen. O-14.

When advance notice of a meeting is not reasonable, the meeting should be recorded, or at least the minutes should be more detailed and should 1) summarize the information received at the meeting and 2) state each member's position on the topics discussed at the meeting, if expressed. 1998 N.D. Op. Att’y Gen. O-10.

Minutes are not sufficient when they fail to mention when the meeting was called to order and adjourned, the motions that were made and seconded, and the vote of each member on all recorded roll call votes. 1998 N.D. Op. Att’y Gen. O-09.

Draft minutes usually must be prepared and made available before the next regular meeting of the governing body. 1998 N.D. Op. Att’y Gen. O-25; 1998 N.D. Op. Att’y Gen. O-04.

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. 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.

Source: 2003 N.D. Sess. Laws ch. 381, §19; 1997 N.D. Sess. Laws ch. 381, § 19.

Factual basis for opinions

For purposes of an opinion issued under this section, whether minutes have been requested is a question of fact which, if disputed, will be resolved in favor of the public entity. Accordingly, without weighing the credibility of the requester against the public entity, this office will assume that the minutes were never requested. 1998 N.D. Op. Att'y Gen. O-15; 1998 N.D. Op. Att'y Gen. O-11.

Whether an announcement of an executive session was made and contained certain information is a question of fact which, if disputed, will be resolved in favor of the public entity. 2000 N.D. Op. Att'y Gen. O-04.

Whether an informal gathering after a meeting pertained to public business or was a social gathering is a question of fact which, if disputed, will be resolved in favor of the public entity. 1999 N.D. Op. Att'y Gen. O-09.

For purposes of an opinion issued under this section, this office will not question a governing body's assurance that its members did not participate in a series of smaller conversations

regarding public business which cumulatively involved a quorum of the governing body. 2000 N.D. Op. Att'y Gen. O-08.

Whether a quorum of a governing body's members attended a "pre-meeting" without public notice is a question of fact which must be assumed as true for purposes of an opinion issued under this section. 2001 N.D. Op. Att'y Gen. O-15.

Timely allegations

The Office of Attorney General will assume that a meeting was legally held and conducted when the meeting occurred more than thirty days before an opinion regarding the meeting was requested. 1998 N.D. Op. Att'y Gen. O-25.

Intentional violations

In issuing an opinion under this section, it makes no difference whether a violation was intentional or accidental. 2001 N.D. Op. Att'y Gen. O-07.

Review of meeting minutes

The Office of Attorney General cannot review an alleged deficiency in the minutes of a meeting until after the minutes have been

approved by the governing body, because the deficiencies may still be cured by the body prior to adopting the minutes. 1998 N.D. Op. Att'y Gen. O-25.

The Office of Attorney General will not review the accuracy of meeting minutes, other than to determine whether the minutes meet the minimum requirements of N.D.C.C. §44-04-21. 1998 N.D. Op. Att'y Gen. O-18.

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.

Source: 2001 N.D. Sess. Laws ch. 393, §11;
1997 N.D. Sess. Laws ch. 381, § 20.

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.-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 12.1-11-06.

Source: 2001 N.D. Sess. Laws ch. 393, § 12.

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.

Source: 2003 N.D. Sess. Laws ch. 385, § 1.

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.

Source: 2003 N.D. Sess. Laws ch. 385, § 2.

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.

Source: 2003 N.D. Sess. Laws ch. 385, § 3.

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.

Source: 2003 N.D. Sess. Laws ch. 376, § 1.

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; or
- 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.

Source: 2003 N.D. Sess. Laws ch. 382, § 9.

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.

Source: 2003 N.D. Sess. Laws ch. 382, § 10.

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.

Source: 2003 N.D. Sess. Laws ch. 382, § 11.