

**Sixty-fifth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 3, 2017**

HOUSE BILL NO. 1345
(Representatives Devlin, Delmore, K. Koppelman)
(Senators Armstrong, Casper, Nelson)

AN ACT to create and enact subsections 12 and 13 of section 44-04-18, subsection 6 of section 44-04-18.1, and section 11 of section 44-04-19.1 of the North Dakota Century Code, relating to open record and meeting laws; to amend and reenact subsection 11 of section 12.1-34-02, section 12.1-35-03, subsection 9 of section 44-04-17.1, subsections 2, 4, and 7 of section 44-04-18, subsection 2 of section 44-04-18.1, subsection 6 of section 44-04-18.7, section 44-04-18.20, subsections 5, 6, and 9 of section 44-04-19.1, subsections 3 and 5 of section 44-04-20, section 44-04-21.1, and subsection 4 of section 57-40.6-07 of the North Dakota Century Code, relating to open record and meeting laws; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 11 of section 12.1-34-02 of the North Dakota Century Code is amended and reenacted as follows:

11. Protection of identifying information. Victims and witnesses may not be compelled to testify at any pretrial proceeding or at trial for purposes of identifying the victims' or witnesses' address, telephone number, place of employment, or other personal identification except for name without the victims' or witnesses' consent, unless there is a showing of good cause as determined by the court. Records of a criminal justice agency as defined by section 44-04-18.7, a correctional facility as defined in section 12-44.1-01, and the department of corrections and rehabilitation containing the address, telephone number, place of employment, or other information that could be used to locate the victim or witness to a crime, are exempt.

SECTION 2. AMENDMENT. Section 12.1-35-03 of the North Dakota Century Code is amended and reenacted as follows:

12.1-35-03. Information about child victims or witnesses of crimes generally may not appear in public record.

1. In order to protect the child from possible trauma resulting from publicity, the name of the child victim or child witness of a crime, except as specified in subsection 2, and identifying biographical information may not appear on the indictment or any other public record. Instead, a Jane Doe or Joe Doe designation must appear in all public records. Sealed confidential records containing the child's name and necessary biographical information must be kept in order to ensure that no defendant is charged twice.
2. Interviews and statements of child victims or child witnesses obtained during an investigation of a crime of a violent or sexual nature are exempt.
3. Subsection 1 does not apply to the name and identifying biographical information of:
 - a. A child victim or child witness of a criminal offense under title 39 or equivalent ordinance; and
 - b. A child victim of a fire.

SECTION 3. AMENDMENT. Subsection 9 of section 44-04-17.1 of the North Dakota Century Code is amended and reenacted as follows:

9. a. "Meeting" means a formal or informal gathering or a work session, whether in person or through electronic means such as telephone or videoconference, of:
 - (1) A quorum of the members of the governing body of a public entity regarding public business; or
 - (2) Less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.
- b. "Meeting" does not include:
 - (1) A chance or social gathering at which public business is not considered;
 - (2) Emergency operations during a disaster or emergency declared under section 37-17.1-10 or an equivalent ordinance if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group; ~~and~~
 - (3) The attendance of members of a governing body at meetings of any national, regional, or state association to which the public entity, the governing body, or individual members belong; and
 - (4) Training seminars where no other public business is considered or discussed.
- 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.

SECTION 4. AMENDMENT. Subsections 2, 4, and 7 of section 44-04-18 of the North Dakota Century Code are amended and reenacted as follows:

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~~An initial request need not be made in person or in writing, and the copy must be mailed upon request. ~~A public entity may require written clarification of the request to determine what records are being requested, but may not ask for the motive or reason for requesting the records or for the identity of the person requesting public records.~~ A public entity may charge up to twenty-five cents per impression of a paper copy. As used in this section, "paper copy" means a one-sided or two-sided duplicated copy of a size not more than eight and one-half by fourteen inches [19.05 by 35.56 centimeters]. For any copy of a record that is not a paper copy as defined in this section, the public entity may charge a reasonable fee for making the copy. As used in this section, "reasonable fee" means the actual cost to the public entity of making the copy, including labor, materials, and equipment. The entity may charge for the actual cost of postage to mail a copy of a record. An entity may require payment before locating, redacting, making, or mailing the copy. The public entity may withhold records pursuant to a request until such time as a requester provides payment for any outstanding balance for prior requests. An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records, including electronic records, if locating the records requires more than one hour. An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for excising confidential or closed material under section 44-04-18.10 from the records, including electronic records. If a public entity receives five or more requests from the same requester within seven days, the public entity may treat the requests as one request in computing the time it takes to locate and excise the records. If the entity is not authorized to use the fees to cover the cost of providing or mailing the copy, or both, or if a copy machine is not readily available, the entity may make arrangements for the copy to be provided or mailed, or both, by another entity, public or private, and the requester shall pay the

fee to that other entity. This subsection does not apply to copies of public records for which a different fee is specifically provided by law.

4. Except as provided in this subsection, nothing in this section requires a public entity to create or compile a record that does not exist. Access to an electronically stored record under this section, or a copy thereof, must be provided at the requester's option in either a printed document or through any other available medium. A computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file. Except as reasonably necessary to reveal the organization of data contained in an electronically stored record, a public entity is not required to provide an electronically stored record in a different structure, format, or organization. This section does not require a public entity to provide a requester with access to a computer terminal or mobile device. A public entity is not required to provide a copy of a record that is available to the requester on the public entity's website or on the internet. The public entity shall notify the requester the record is available online and direct the requester to the website where the record can be accessed. If the requester does not have reasonable access to the internet due to lack of computer, lack of internet availability, or inability to use a computer or the internet, the public entity shall produce paper copies for the requester, but may charge the applicable fees under this section.
7. A denial of a request for records made under this section must describe the legal authority for the denial, or a statement that a record does not exist, and must be in writing if requested.

SECTION 5. Subsections 12 and 13 to section 44-04-18 of the North Dakota Century Code are created and enacted as follows:

12. A public entity may allow an individual to utilize the individual's own personal devices for duplication of records and, if so, shall establish reasonable procedures to protect the integrity of the records as long as the procedures are not used to prevent access to the records.
13. If repeated requests for records disrupt other essential functions of the public entity, the public entity may refuse to permit inspection of the records, or provide copies of the records. A public entity refusing to provide access or copies of public records under this section shall state in writing the reasons supporting the refusal and provide the reasoning to the requester. The requester may seek an attorney general's opinion under section 44-04-21.1, on whether the public entity's decision was proper.

SECTION 6. AMENDMENT. Subsection 2 of section 44-04-18.1 of the North Dakota Century Code is amended and reenacted as follows:

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

SECTION 7. Subsection 6 to section 44-04-18.1 of the North Dakota Century Code is created and enacted as follows:

6. Records relating to a public entity's internal investigation of a complaint against a public entity or employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint.

SECTION 8. AMENDMENT. Subsection 6 of section 44-04-18.7 of the North Dakota Century Code is amended and reenacted as follows:

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

SECTION 9. AMENDMENT. Section 44-04-18.20 of the North Dakota Century Code is amended and reenacted as follows:

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

The address, telephone number, or any identifying information that, if released, could reasonably be used to locate or identify a victim or alleged victim of domestic violence, of a sex offense under chapter 12.1-20, of sexual performances by a child under chapter 12.1-27.2, or of human trafficking under chapter ~~42.1-40~~12.1-41, contained in any record maintained by a ~~law enforcement~~criminal justice agency as defined by section 44-04-18.7 or correctional facility as defined by section 12-44.1-01 is exempt from ~~section 44-04-18~~ and may be redacted from the record before it is released.

SECTION 10. AMENDMENT. Subsections 5, 6, and 9 of section 44-04-19.1 of the North Dakota Century Code are amended and reenacted as follows:

5. "Attorney consultation" means any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable or pending civil or criminal litigation or adversarial administrative proceedings or ~~concerning pending civil or criminal litigation or pending adversarial administrative proceedings~~to receive its attorney's advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity which, if held in public, would have an adverse fiscal effect on the entity. All other discussions beyond the attorney's advice and guidance must be made in the open, unless otherwise provided by law. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.
6. "Attorney work product" means any document or record that:
 - a. Was prepared by an attorney representing a public entity or prepared at such an attorney's express direction;
 - b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and
 - c. Was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, ~~or~~ in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings, or for guidance on the legal risks, strengths, and weaknesses of an action of a public entity.
9. A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding a pending claim, 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. A record revealing negotiation strategy or instruction under this section is exempt. Drafts of contracts or agreements subject to negotiations are exempt but only for so long as release would have an adverse fiscal effect on the public entity, unless the records are otherwise exempt or confidential.

SECTION 11. Subsection 11 to section 44-04-19.1 of the North Dakota Century Code is created and enacted as follows:

11. A settlement agreement between a public entity and another party is exempt from disclosure until it has been fully executed and accepted by all concerned parties unless the records are otherwise exempt or confidential. In the case of multiple settlement agreements involving multiple parties involved in the same incident or undertaking, a settlement agreement is exempt until settlement agreements have been fully executed by all concerned parties unless the records are otherwise exempt or confidential.

SECTION 12. AMENDMENT. Subsections 3 and 5 of section 44-04-20 of the North Dakota Century Code are amended and reenacted as follows:

3. If the governing body holds regularly scheduled meetings, the schedule of these meetings, including the aforementioned notice information, if available, must be filed annually ~~in January~~ with the secretary of state for state-level bodies or for public entities defined in subdivision c of subsection 13 of section 44-04-17.1, the city auditor or designee of the city for city-level bodies, and the county auditor or designee of the county for all other bodies or the schedule must be posted on the public entity's website. This schedule must be furnished to anyone who requests the information. When reasonable and practicable, a governing body of a public entity should attempt to set a regular schedule for its meetings by statute, ordinance, or resolution. This subsection does not apply to meetings of the legislative assembly or any committee thereof. Filing a yearly schedule of upcoming meetings does not relieve a public entity from its obligation to post an agenda for each meeting as required in subsections 2 and 4.
5. The governing body's presiding officer has the responsibility of assuring that such public notice of a meeting's date, time, and location, is given at the same time as such governing body's members are notified, and that this notice is available to anyone requesting such information. As soon as an agenda is prepared for a meeting with the information required in subsection 2 and given to members of the governing body, the agenda must be posted at the locations as required by subsection 4 and given to anyone requesting the information. When a request is made for notice of meetings, the request is effective for one year unless a different time period is specified.

SECTION 13. AMENDMENT. Section 44-04-21.1 of the North Dakota Century Code is amended and reenacted as follows:

44-04-21.1. Administrative review procedure.

1. Any interested person may request an attorney general's opinion to review a written denial of a request for records under section 44-04-18, a denial of access to a meeting under section 44-04-19, or other alleged violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 by any public entity other than the legislative assembly or any committee thereof. A request made under this section must be made within thirty days of the alleged violation, except that a request based on allegations that a meeting occurred without the notice required by section 44-04-20, must be made within ninety days of the alleged violation. In preparing an opinion under this section, the attorney general has discretion to obtain and review a recording made under section 44-04-19.2. The attorney general may request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential. Any such information may not be released by the attorney general and may be returned to the provider of the information. The attorney general shall issue to the

public entity involved an opinion on the alleged violation, which may be a summary opinion, unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. If the request pertains to a public entity as defined in subdivision c of subsection 13 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 attorney general may require officials of the public entity at issue in the opinion to obtain mandatory training by a certain date. 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 13 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.

SECTION 14. AMENDMENT. Subsection 4 of section 57-40.6-07 of the North Dakota Century Code is amended and reenacted as follows:

4. An audio recording of a request for emergency services or of a report of an emergency is an exempt record as defined in section 44-04-17.1. However, upon request, a person may listen to the audio recording, but may not copy or record the audio. A person also may request a written transcript of the audio recording, which must be provided to the person within a reasonable time. The emergency services communication system coordinator may refer requests to the appropriate investigating agency possessing the recording and shall communicate this referral to the requester. The investigating agency shall answer requests for the records. If an investigating agency does not have possession of the record, the emergency services communication system coordinator shall respond to the request for the record.

SECTION 15. EMERGENCY. This Act is declared to be an emergency measure.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-fifth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1345 and that two-thirds of the members-elect of the House of Representatives voted in favor of said law.

Vote: Yeas 91 Nays 1 Absent 2

Speaker of the House

Chief Clerk of the House

This certifies that two-thirds of the members-elect of the Senate voted in favor of said law.

Vote: Yeas 47 Nays 0 Absent 0

President of the Senate

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2017.

Approved at _____ M. on _____, 2017.

Governor

Filed in this office this _____ day of _____, 2017,
at _____ o'clock _____ M.

Secretary of State