

**Sixty-sixth Legislative Assembly of North Dakota
In Regular Session Commencing Thursday, January 3, 2019**

SENATE BILL NO. 2340
(Senators Unruh, Cook)
(Representatives Heinert, Porter)

AN ACT to create and enact subsection 6 of section 44-04-18.10 of the North Dakota Century Code, relating to protection of records shared for emergency purposes; and to amend and reenact section 44-04-18.4 of the North Dakota Century Code, relating to confidentiality of records regarding emergency planning and response.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 44-04-18.4 of the North Dakota Century Code is amended and reenacted as follows:

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

1. Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed.
2. Under this section, unless the context otherwise requires:
 - a. "Commercial information" means information pertaining to buying or selling of goods and services that has not been previously publicly disclosed and that if the information were to be disclosed would impair the public entity's future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.
 - b. "Financial information" means information pertaining to monetary resources of a person that has not been previously publicly disclosed and that if the information were to be disclosed would impair the public entity's future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.
 - c. "Proprietary information" includes:
 - (1) Information shared between a sponsor of research or a potential sponsor of research and a public entity conducting or negotiating an agreement for the research.
 - (2) Information received from a private business that has entered or is negotiating an agreement with a public entity to conduct research or manufacture or create a product for potential commercialization.
 - (3) A discovery or innovation generated by the research information, technical information, financial information, or marketing information acquired under activities described under paragraph 1 or 2.
 - (4) A document specifically and directly related to the licensing or commercialization resulting from activities described under paragraph 1, 2, or 6.
 - (5) Technical, financial, or marketing records that are received by a public entity, which are owned or controlled by the submitting person, are intended to be and are

treated by the submitting person as private, and the disclosure of which would cause harm to the submitting person's business.

- (6) A discovery or innovation produced by the public entity that an employee or the entity intends to commercialize.
 - (7) A computer software program and components of a computer software program that are subject to a copyright or a patent and any formula, pattern, compilation, program, device, method, technique, or process supplied to a public entity that is the subject of efforts by the supplying person to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that might obtain economic value from its disclosure or use.
 - (8) A discovery or innovation that is subject to a patent or a copyright, and any formula, pattern, compilation, program, device, combination of devices, method, technique, technical know-how or process that is for use, or is used, in the operation of a business and is supplied to or prepared by a public entity that is the subject of efforts by the supplying or preparing person to maintain its secrecy and provides the preparing person an advantage or an opportunity to obtain an advantage over those who do not know or use it or that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, a person that might obtain economic value from its disclosure or use.
- d. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, technical know-how, or process, that:
- (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that can obtain economic value from its disclosure or use; and
 - (2) Is the subject of efforts that are reasonable under the circumstances to maintain the secrecy of the information.
3. This section does not limit or otherwise affect a record pertaining to any rule of the state department of health or to any record pertaining to the application for a permit or license necessary to do business or to expand business operations within this state, except as otherwise provided by law.
 4. This section does not limit the release or use of records obtained in an investigation by the attorney general or other law enforcement official.
 5. Unless made confidential under subsection 1, the following economic development records and information are exempt:
 - a. Records and information pertaining to a prospective location of a business or industry, including the identity, nature, and location of the business or industry, when no previous public disclosure has been made by the business or industry of the interest or intent of the business or industry to locate in, relocate within, expand within this state, or partner with a public entity to conduct research or to license a discovery or innovation. This exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.
 - b. Trade secrets and proprietary, commercial, or financial information received from a person that is interested in applying for or receiving financing, technical assistance, or other forms of business assistance.

6. Unless made confidential under subsection 1 or made exempt under subsection 5:
 - a. Bids received by a public entity in response to an invitation for bids by the public entity are exempt until all of the bids have been received and opened by the public entity.
 - b. Proposals received by a public entity in response to a request for proposals are exempt records until a notice of intent to award is issued.
 - c. Records included with any bid or proposal naming and generally describing the entity submitting the proposal are open.
7. Unless made confidential under subsection 1, records received or distributed by the state department of emergency services under chapter 37-17.1 and the state local intelligence center from the federal government and any public or private agency or entity for emergency or disaster prevention, protection, mitigation, preparation, response, and recovery, or for cyber or physical threat are exempt. Records in the possession or under the control of a public entity which relate to cybersecurity information or critical infrastructure, the disclosure of which may expose or create vulnerability of critical infrastructure systems; or the safeguarding of telecommunications, electric, water, sanitary sewage, storm water drainage, energy, fuel supply, hazardous liquid, natural gas, coal, or other critical infrastructure system, are exempt.
 - a. Upon receipt of a request for records under this subsection which originated in a federal agency or entity and are in the possession of the state department of emergency services, state local intelligence center, or other public entity, the requester must be referred to the federal agency or entity from which the records originated to submit an application under the applicable federal laws or rules.
 - b. For purposes of this section, "cybersecurity" means processes or capabilities that protect and defend systems, communications, and information from exploitation and unauthorized use or modification.
 - c. For purposes of this section, "critical infrastructure" has the same meaning as in subdivision a of subsection 2 of section 44-04-24.
8. Unless made confidential under subsection 1, university research records are exempt. "University research records" means data and records, other than a financial or administrative record, produced or collected by or for faculty or staff of an institution under the control of the state board of higher education in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone, or in conjunction with a governmental or private entity, provided the information has not been publicly released, published, or patented.
9. Personally identifiable study information is confidential. "Personally identifiable study information" means information about an individual participating in a human research study or project at an institution under the control of the state board of higher education which requires prospective institutional review board review or a determination of exemption, if the information can be used to distinguish or trace the individual's identity, or is linked or linkable to the individual. Examples of personally identifiable study information include name, maiden name, mother's maiden name, alias, personal identification number, social security number, passport number, driver's license number, taxpayer identification number, financial account or credit card number, address, email address, photographic images, fingerprints, handwriting, and other biometric data. Information about participants in human subjects research which does not constitute personally identifiable study information but is part of a human subjects research study or project at an institution under the control of the state board of higher education requiring prospective institutional review board review or a determination of exemption is a university research record under subsection 8.

10. Subsections 8 and 9 do not apply to a student record or other information disclosed by an institution under the control of the state board of higher education to the statewide longitudinal data system.

(Contingent effective date - [See note](#)) Confidentiality of trade secret, proprietary, commercial, financial, and research information.

1. Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed.
2. Under this section, unless the context otherwise requires:
 - a. "Commercial information" means information pertaining to buying or selling of goods and services that has not been previously publicly disclosed and that if the information were to be disclosed would impair the public entity's future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.
 - b. "Financial information" means information pertaining to monetary resources of a person that has not been previously publicly disclosed and that if the information were to be disclosed would impair the public entity's future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.
 - c. "Proprietary information" includes:
 - (1) Information shared between a sponsor of research or a potential sponsor of research and a public entity conducting or negotiating an agreement for the research.
 - (2) Information received from a private business that has entered or is negotiating an agreement with a public entity to conduct research or manufacture or create a product for potential commercialization.
 - (3) A discovery or innovation generated by the research information, technical information, financial information, or marketing information acquired under activities described under paragraph 1 or 2.
 - (4) A document specifically and directly related to the licensing or commercialization resulting from activities described under paragraph 1, 2, or 6.
 - (5) Technical, financial, or marketing records that are received by a public entity, which are owned or controlled by the submitting person, are intended to be and are treated by the submitting person as private, and the disclosure of which would cause harm to the submitting person's business.
 - (6) A discovery or innovation produced by the public entity that an employee or the entity intends to commercialize.
 - (7) A computer software program and components of a computer software program that are subject to a copyright or a patent and any formula, pattern, compilation, program, device, method, technique, or process supplied to a public entity that is the subject of efforts by the supplying person to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that might obtain economic value from its disclosure or use.
 - (8) A discovery or innovation that is subject to a patent or a copyright, and any formula, pattern, compilation, program, device, combination of devices, method, technique,

technical know-how or process that is for use, or is used, in the operation of a business and is supplied to or prepared by a public entity that is the subject of efforts by the supplying or preparing person to maintain its secrecy and provides the preparing person an advantage or an opportunity to obtain an advantage over those who do not know or use it or that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, a person that might obtain economic value from its disclosure or use.

- d. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, technical know-how, or process, that:
 - (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that can obtain economic value from its disclosure or use; and
 - (2) Is the subject of efforts that are reasonable under the circumstances to maintain the secrecy of the information.
3. This section does not limit or otherwise affect a record pertaining to any rule of the state department of health or department of environmental quality or to any record pertaining to the application for a permit or license necessary to do business or to expand business operations within this state, except as otherwise provided by law.
4. This section does not limit the release or use of records obtained in an investigation by the attorney general or other law enforcement official.
5. Unless made confidential under subsection 1, the following economic development records and information are exempt:
 - a. Records and information pertaining to a prospective location of a business or industry, including the identity, nature, and location of the business or industry, when no previous public disclosure has been made by the business or industry of the interest or intent of the business or industry to locate in, relocate within, expand within this state, or partner with a public entity to conduct research or to license a discovery or innovation. This exemption does not include records pertaining to the application for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.
 - b. Trade secrets and proprietary, commercial, or financial information received from a person that is interested in applying for or receiving financing, technical assistance, or other forms of business assistance.
6. Unless made confidential under subsection 1 or made exempt under subsection 5:
 - a. Bids received by a public entity in response to an invitation for bids by the public entity are exempt until all of the bids have been received and opened by the public entity.
 - b. Proposals received by a public entity in response to a request for proposals are exempt records until a notice of intent to award is issued.
 - c. Records included with any bid or proposal naming and generally describing the entity submitting the proposal are open.
7. Unless made confidential under subsection 1, records received or distributed by the state department of emergency services under chapter 37-17.1 and the state local intelligence center from the federal government and any public or private agency or entity for emergency or disaster prevention, protection, mitigation, ~~preparation~~, response, and recovery, or for cyber

or physical threat are exempt. Records in the possession or under the control of a public entity which relate to cybersecurity information or critical infrastructure, the disclosure of which may expose or create vulnerability of critical infrastructure systems; or the safeguarding of telecommunications, electric, water, sanitary sewage, storm water drainage, energy, fuel supply, hazardous liquid, natural gas, coal, or other critical infrastructure system, are exempt.

- a. Upon receipt of a request for records under this subsection which originated in a federal agency or entity and are in the possession of the state department of emergency services, state local intelligence center, or other public entity, the requester must be referred to the federal agency or entity from which the records originated to submit an application under the applicable federal laws or rules.
- b. For purposes of this section, "cybersecurity" means processes or capabilities that protect and defend systems, communications, and information from exploitation and unauthorized use or modification.
- c. For purposes of this section, "critical infrastructure" has the same meaning as in subdivision a of subsection 2 of section 44-04-24.

8. Unless made confidential under subsection 1, university research records are exempt. "University research records" means data and records, other than a financial or administrative record, produced or collected by or for faculty or staff of an institution under the control of the state board of higher education in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone, or in conjunction with a governmental or private entity, provided the information has not been publicly released, published, or patented.
9. Personally identifiable study information is confidential. "Personally identifiable study information" means information about an individual participating in a human research study or project at an institution under the control of the state board of higher education which requires prospective institutional review board review or a determination of exemption, if the information can be used to distinguish or trace the individual's identity, or is linked or linkable to the individual. Examples of personally identifiable study information include name, maiden name, mother's maiden name, alias, personal identification number, social security number, passport number, driver's license number, taxpayer identification number, financial account or credit card number, address, email address, photographic images, fingerprints, handwriting, and other biometric data. Information about participants in human subjects research which does not constitute personally identifiable study information but is part of a human subjects research study or project at an institution under the control of the state board of higher education requiring prospective institutional review board review or a determination of exemption is a university research record under subsection 8.
10. Subsections 8 and 9 do not apply to a student record or other information disclosed by an institution under the control of the state board of higher education to the statewide longitudinal data system.

SECTION 2. Subsection 6 of section 44-04-18.10 of the North Dakota Century Code is created and enacted as follows:

6. Records confidential or exempt under subsection 7 of section 44-04-18.4 and which are required to be disclosed to another entity for emergency or disaster prevention, protection, mitigation, response, and recovery or for cybersecurity planning, mitigation, or threat remain confidential or exempt after the required disclosure.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-sixth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2340.

Senate Vote: Yeas 47 Nays 0 Absent 0

House Vote: Yeas 82 Nays 7 Absent 5

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2019.

Approved at _____ M. on _____, 2019.

Governor

Filed in this office this _____ day of _____, 2019,

at _____ o'clock _____ M.

Secretary of State