

North Dakota Open Record & Meeting Law

North Dakota Attorney General's Office
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Open records

- ❖ All records
 - ❖ Possession of public entity
 - ❖ Regarding public business
 - ❖ OPEN

N.D.C.C. § 44-04-17.1(16) (definition of “record”)



Definition of “RECORD”

- ▶ Includes recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced.

N.D.C.C. 44-04-17.1(16)



“Public Business”

- ▶ “all matters that relate or may foreseeably relate in any way to ...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...the public entity’s use of public funds.”

N.D.C.C. § 44-04-17.1(12)



Generally Open:

- ❖ Personnel file
 - ❖ Job performance
 - ❖ Evaluations
 - ❖ E-mails that are business related
 - ❖ Records on Personal Devices
 - ❖ Home computers
 - ❖ Personal cell phone
 - ❖ Contracts with a public entity – prices, costs
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Unless specifically provided by law...

- ❖ There has to be a law that specifically says the record is protected.
- ❖ The law will say the record is “not subject to Article XI of the ND Constitution,” “not an open record,” “exempt,” or “confidential.”

Exempt vs. Confidential

- ▶ Exempt records may be released.
- ▶ Discretion is with the public entity.
- ▶ May be called a “closed” record.
- ▶ Not against the law to release an exempt record.
- ▶ Confidential records cannot be released.
- ▶ No discretion.
- ▶ Can only release pursuant to the statute.
- ▶ Class C felony to knowingly release.
§12.1-13-01

N.D.C.C. §§ 44-04-17.1(2) (“closed record”); (5) (“exempt record”)

N.D.C.C. § 44-04-17.1(3) (“confidential record”)

Examples

- ❖ Exempt

- ❖ *N.D.C.C. § 44-04-18.1* – Public employee personal info, including:
 - ❖ address
 - ❖ phone number
 - ❖ photograph
 - ❖ payroll deduction info
 - ❖ dependent(s) info

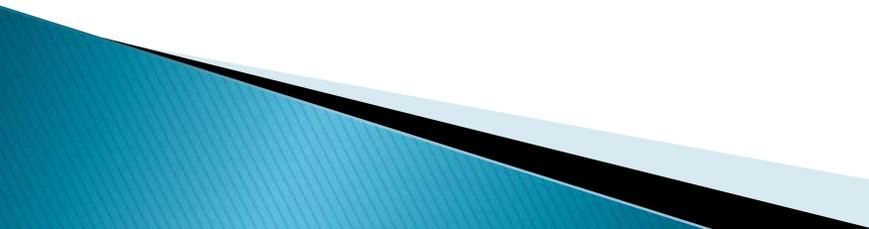
- ❖ Confidential

- ❖ Social security numbers
- ❖ Employee medical records
- ❖ Computer passwords
- ❖ Employee use of EAP records

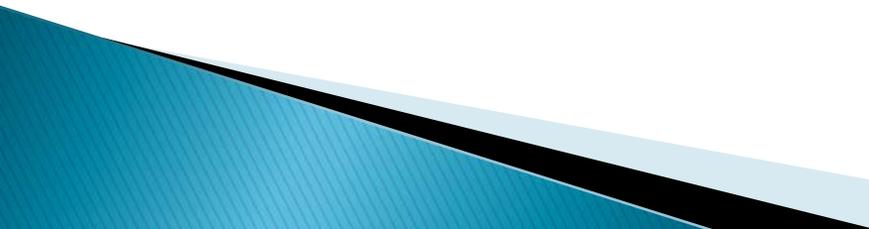
The basic rules:

- ❖ Every person has the right to inspect or make a request for a public record.
 - ❖ The request DOES NOT have to be in writing.
 - ❖ The requester DOES NOT have to give their name or reason for the request.
- ❖ You must provide records – not opinions or explanations.
 - ❖ Do not have to create new records
- ❖ You only have to provide one copy of the record, once.

The basics continued...

- ❖ You only have to provide records you have in your possession.
 - ❖ Requests should reasonably identify the record – you can ask for clarification, but cannot intimidate.
 - ❖ Give a legal reason for any denial of records.
 - ❖ Review and redact for confidential information. (N.D.C.C. § 44-04-18.10)
 - ❖ Communicate with requester – give estimate of time, costs, etc.
 - ❖ Provide records within a reasonable time.
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“Reasonable Time”

- ▶ Provide records within a “reasonable time.”
 - ▶ Several factors used to determine appropriate length of any delay, including:
 - need to consult with attorney if reasonable doubt exists on whether the record is open
 - excising confidential information
 - bulk of request and volume of documents reviewed
 - accessibility of documents
 - office staff and availability, workload, balancing of other responsibilities
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Basics of charging:

- ▶ 25 ¢ per copy for 8x11 or 8x14 page.
- ▶ Locating records, even electronic records – first hour free, thereafter \$25/hour.
- ▶ Redacting confidential information – first hour free, thereafter \$25/hour. Electronic records.
- ▶ Actual cost of postage, maps, color photos.
- ▶ Can ask for money up front.
- ▶ NEW LEGISLATION:
 - May withhold records for subsequent requests until you receive payment for any outstanding balance
 - 5 or more requests from same requestor w/in 7 days, may treat as one request when computing time to locate/excise records
- ▶ Access is free!

N.D.C.C. § 44-04-18

Electronic records

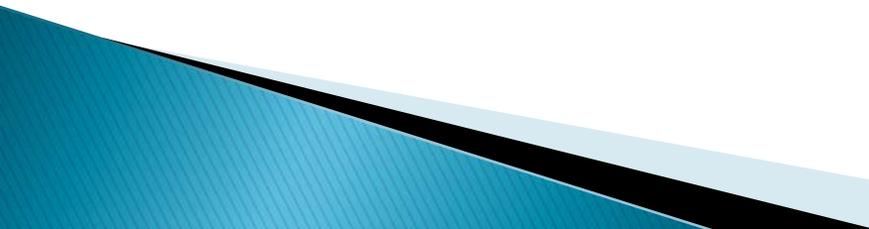
- ❖ Must provide reasonable access to electronically maintained records.
 - ❖ Can't impair ability to access records by contracting with a third party.
 - ❖ No charge for electronic copy unless it takes IT longer than one hour to produce.
 - ❖ If longer than 1 hour – charge actual cost of IT resources.
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Basics of Open Meetings

- ▶ Quorum of
- ▶ Governing body
- ▶ Of a public entity
- ▶ Discussing public business
 - ▶ Is a meeting

*N.D.C.C. § 44-04-17.1(9) definition of
“meeting”*

There are no exceptions for:

- ▶ Committees: two or more people acting collectively pursuant to authority delegated to that group by the governing body.
 - ▶ Did the governing body delegate any sort of authority?
 - ▶ Is the committee doing something the governing body could do itself?
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It doesn't matter.....

- ❖ If the committee doesn't have final authority;
 - ❖ If the committee is just “brainstorming” or “factfinding;”
 - ❖ If the committee is only going to recommend something to the governing body.
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A meeting can happen...

- ❖ By conference call;
 - ❖ At a restaurant;
 - ❖ On very short notice;
 - ❖ Over video conference.
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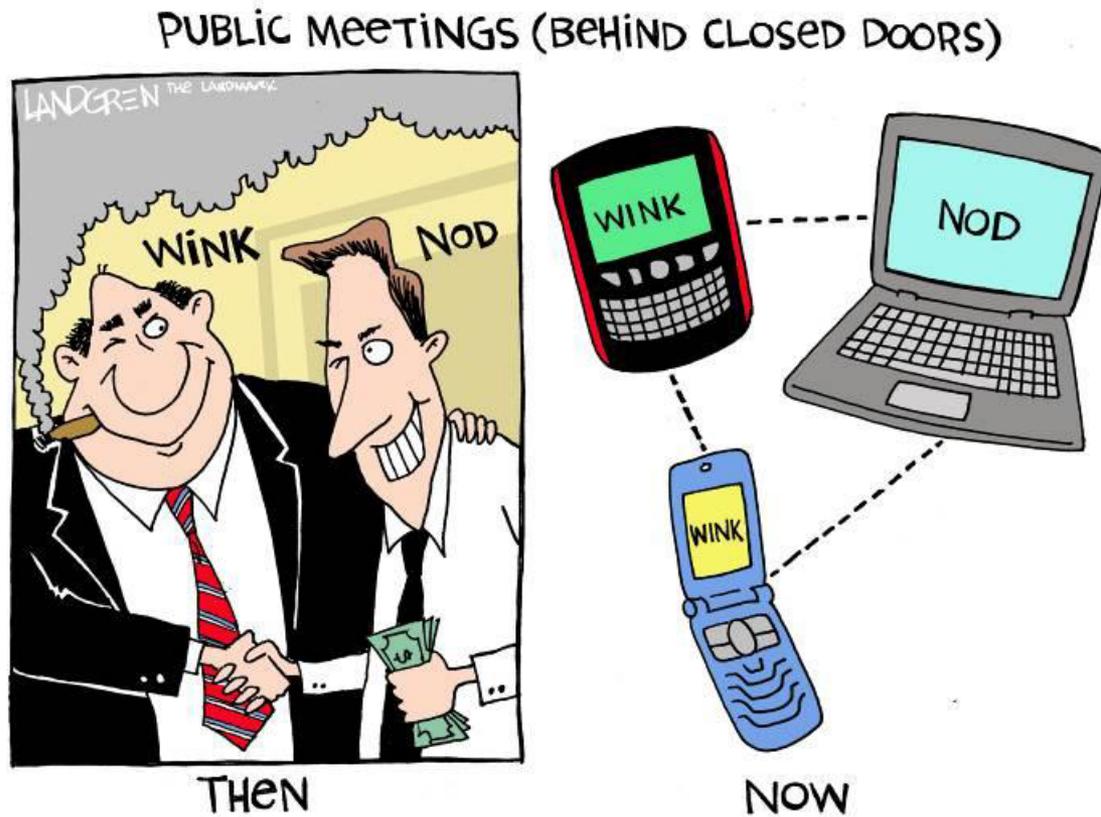
Exceptions:

- ▶ Meetings of national, regional, or state associations.
- ▶ Chance or social gatherings.
- ▶ Delegation to one person – one person is not a committee.

N.D.C.C. § 44-04-17.1(9)(b)

Common Violations

- ▶ Using technology to circumvent open meeting laws

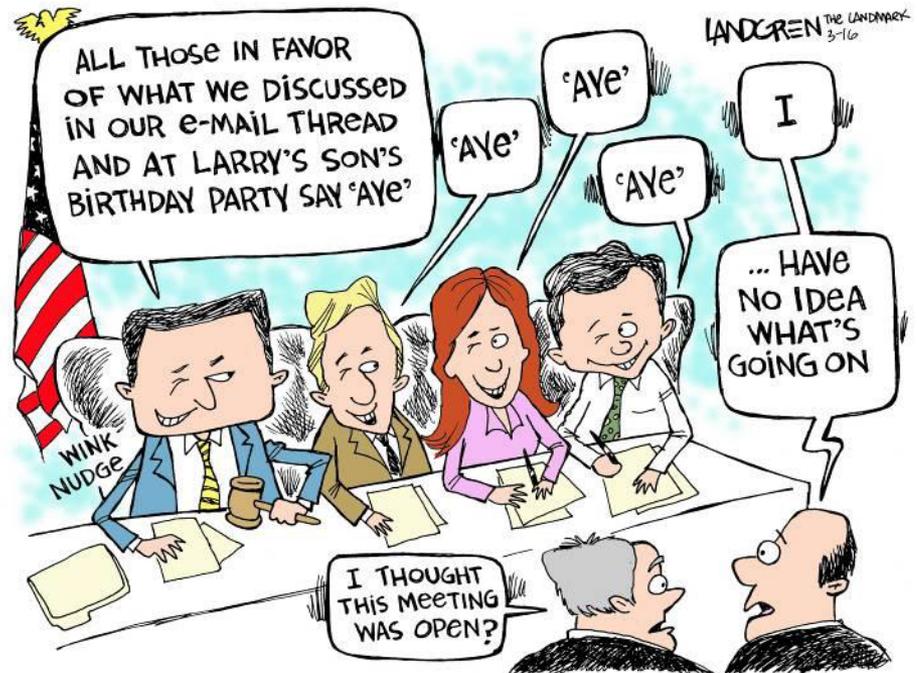


Common Violations

- ▶ Using emails or other electronic devices involving a quorum of a governing body to discuss public business
 - Permissible:
 - Provide information for members to review before a meeting
 - Ministerial matters – setting a meeting date
 - Violations:
 - Sharing thoughts, ideas, opinions, to a quorum
 - Hitting “reply all” and holding discussions via email

Common Violations

- ▶ Telephone straw polling.
- ▶ Serial meetings – smaller gatherings collectively constitute a quorum and public business is discussed.



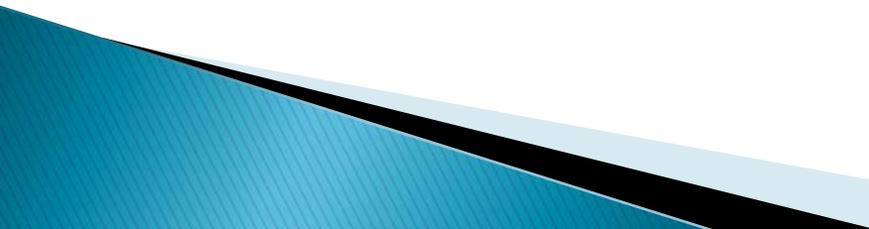
Not to worry....

Posting notice is easy!

What the notice should say:

- ❖ Time, date, and location of the meeting;
 - ❖ Topics to be discussed;
 - ❖ Notice of any executive session.
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- ❖ The public should be able to read the notice and understand what the governing body is planning to discuss. Don't be vague.

N.D.C.C. § 44-04-20



Where to put the notice:

- ❖ At the main office;
- ❖ Appropriate central location: city auditor, county auditor, secretary of state OR put on public entity's website;
- ❖ Location of the meeting;
- ❖ Give to anyone who has requested it.
- ❖ NOTE: Notice should be posted “at the same time as such governing body’s members are notified.”

❖ *Myth: publishing of notice*

Two kinds of meetings:

❖ Regular

- ❖ Agenda should contain all topics known at the time of drafting the notice
- ❖ May discuss items not on the agenda at the meeting

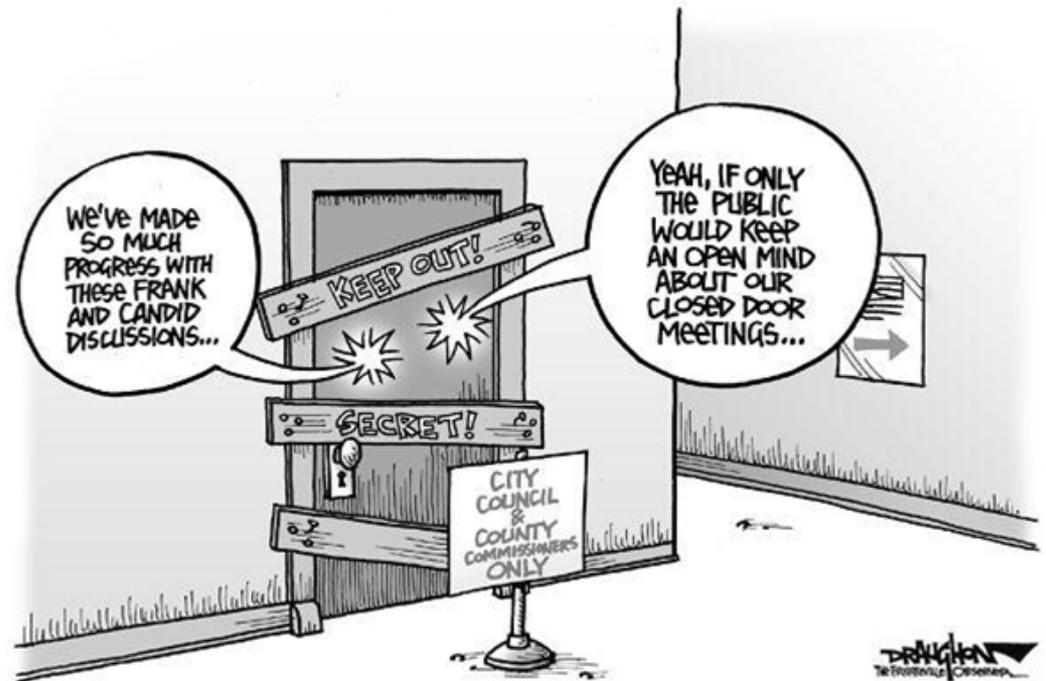
❖ Special

- ❖ Can only discuss the items on the notice
- ❖ Provide notice to the official newspaper

Executive Sessions

N.D.C.C. § 44-04-19.2

- ❖ Must be legally authorized
 - ❖ Most common: Attorney consultation and negotiation. (N.D.C.C. § 44-04-19.1)
 - ❖ Most common violation: closing meeting to discuss personnel matters!



Executive session procedure:

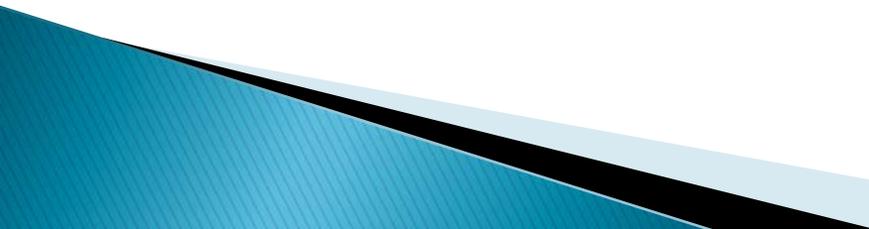
- ❖ Convene in open meeting;
- ❖ Announce in open meeting the topics to be discussed and legal authority;
 - ❖ NOTE: To discuss confidential information – no motion necessary. To discuss exempt/closed information, need a motion to enter into the executive session.
- ❖ Record the session (keep for 6 months);
- ❖ Note time of executive session and who attended in minutes;
- ❖ Only discuss topics in announcement;
- ❖ Final action in open meeting.

N.D.C.C. § 44-04-19.2(2)

Minutes of Meetings

- ▶ **Must contain:**
 - Names of members attending
 - Date and time meeting was called to order and adjourned
 - List of topics discussed
 - Description of each motion made and whether seconded
 - Results of every vote taken
 - Vote of each member on every recorded roll call vote (required for all nonprocedural votes)

N.D.C.C. § 44-04-21(2)



Violations

- ▶ Attorney general's opinions under N.D.C.C. § 44-04-21.1:
 - 30 days of alleged violation except meetings without notice - 90 days.
 - If action isn't taken & requester prevails in civil action requester will get attorney's fees.
 - Consequence for failure to comply with AG opinion - potential personal liability & pay for legal counsel.
- ▶ AG can refer a public servant to the state's attorney for multiple violations.
- ▶ A public servant who knowingly violates the law is guilty of a class A misdemeanor.

N.D.C.C. § 44-04-21.3

N.D.C.C. § 12.1-11-06

Violations

- ▶ Violations may be subject of civil action under N.D.C.C. § 44-04-21.2.
 - ▶ Action must be commenced within 60 days of the date the person knew or should have known of the violation or 30 days from issuance of AG opinion.
 - ▶ Court may award \$1,000 or actual damages for intentional or knowing violations.
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More information

- ❖ www.ag.nd.gov
- ❖ Manuals
- ❖ Opinions
- ❖ Fact Sheets