



OPEN MEETINGS AND OPEN RECORDS

A guide to assist townships in navigating open
record and open meetings laws

DISCLAIMER

- This presentation is not intended as legal advice.
- The information and commentary provided in this presentation and any comments or materials provided are for educational purposes only and should not be considered legal advice.
- Please consult with your public entity's attorney for legal counsel as needed.

PRESENTATION GOALS

- Identify key definitions applicable to open record and open meeting laws.
- Explain the proper protocol for responding to open record requests.
- Describe how to properly post notice of regular and special meetings.
- Explain quorums and what constitutes a meeting
- Explain the reasons for, and how to properly enter, an executive session.
- Review the Attorney General's opinion process and potential penalties for open record and open meeting violations.

WHAT GOVERNS OPEN MEETING AND OPEN RECORDS RULES

- N.D.C.C Chapter 44-04
- ND Constitution Article 11
- North Dakota Attorney General Opinions
- North Dakota Supreme Court

WHAT IS SUBJECT TO OPEN RECORDS?

- All records in possession of the public entity regarding public business are open records.
- Public business is defined as 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)
- Records are recorded information of any kind regardless of the form of recording.
- A record may be a text message, email, recorded meeting, meeting agenda/minutes, notes, check register, or any other document that contains your entity's business

EXEMPT V. CONFIDENTIAL RECORDS

- Exempt records may be released by your board—you have discretion whether you release those records but there needs to be entity action to release.
 - Exempt records-employee date of birth, address, leave taken and reasons, DMV image, payroll deductions, employee applications, current litigation records.
- Confidential records can not be released by any action of the board. Release of confidential records are punishable by a Class C Felony.
 - Confidential Records-Social Security Numbers, usernames and passwords, whether an employee has used the employee assistance program, and criminal history reports completed by the NDBCI.

WHO HAS THE RIGHT TO THE PUBLIC RECORD

- Every person has the right to inspect or make a request for a public record.
 - The person does not need to be a township, county, or state citizen. Anyone has the right to inspect or make the request for a public record.
- Generally, entity cannot make a requester fill out a form. •
 - Although you cannot require the initial request in writing either, you can request written (reasonable) clarification. I typically do this if a complex request to ensure I don't miss something they have requested.
 - Exception – if you need to verify identity to release an otherwise confidential or exempt record.
- Requester DOES NOT have to give their name or reason for the request.
- You only have to provide one copy of the record, once.

RESPONDING TO THE REQUEST

- You only have to provide records you have in your possession.
 - However, cannot contract with third party to “hold” your records and then claim not in your “possession.”
- You do not have to create new records or put in a new format. •
Exceptions:
 - If requester asks for a paper copy and you only have electronic copy, you must provide paper copy but can charge in accordance with N.D.C.C. § 44-04-18(2).
 - Text messages – you are not required to provide access to the device.
- You must give a legal reason for any denial of records. • Including if records do not exist. •
- Review and redact for confidential information.
- Communicate with requester – give estimate of time, costs, etc.
- If the record is on a website you may refer the requester to the website, but if they don’t have internet access you must provide a paper copy

CHARGES FOR OPEN RECORDS

- May charge up to 25¢ per copy of a size no more than 8x14.
- May charge actual cost of postage, maps, color photos.
- Locating records – first hour free, thereafter \$25/hour.
- Redacting confidential information – first hour free, thereafter \$25/hour.
- May require payment before locating, redacting, making, or mailing the copy.
- 5 or more requests from same requestor w/in 7 days, may treat as one request when computing time to locate/excise records.
- Access should be free!

HOW LONG DO I HAVE TO RESPOND

- 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; and
- Office staff and availability, workload, balancing of other responsibilities.
- If there will be a delay – communicate that to the requester.

WHAT IS A MEETING?

- A quorum of a governing body of a public entity discussing public business is an Open Meeting. N.D.C.C. § 44-04-17.1(9)
- Quorum-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.

EXCEPTIONS TO OPEN MEETINGS

- Chance or social gatherings where no public business is considered or discussed.
- 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.
- Attendance at meetings of national, regional, or state associations.
- Training seminars where no public business is discussed.
- Onsite inspections by a township board under 58-03-20.

COMMITTEE BUSINESS

- Committee: Two or more people acting collectively pursuant to authority delegated to that group by the governing body. •
- Includes delegation of any public business, including information gathering.
- Applies even if the public business being discussed was not delegated, and no decision-making authority was granted, to the committee by the governing body, so long as it relates to the business of the public entity.
 - Key questions to ask yourself: • Did the governing body delegate any sort of authority? • Is the committee doing something the governing body could do itself?

REGULAR MEETINGS VS SPECIAL MEETINGS

- Regular Meetings •
 - Set by filing yearly schedule. •
 - Must still create agenda for each meeting.
 - May discuss items not on the agenda at the meeting.
 - Agenda should contain all topics known at the time the agenda is drafted but may contain some boilerplate or catch-all items (i.e. “Committee Reports”).
- Special Meetings
 - Can only discuss the items on the published agenda.
 - Agenda must be specific (no “catch-all” entries such as “old business”).

PUBLIC COMMENT POLICY

- SB 2180 (N.D.C.C. 44-04-20.1) •
- Shall develop a policy regarding public comment. Policy may provide that a public comment:
- Must be pertinent to the public entity
- May not interfere with the orderly conduct of the regular meeting
- May not be defamatory, abusive, harassing, or unlawful • May be prohibited if an alternative procedure exists to bring that particular type of public comment before the public entity, the public comment includes confidential or exempt information, or the public comment is otherwise prohibited by law
- NDTOA has a sample public that we adopted on the website

NOTICE OF MEETING

- What must the notice include? •
 - Time, date, and location of the meeting; • Topics to be discussed; • Notice of any executive session. •
 - If a meeting is held electronically, the information necessary to join the meeting must be in the notice. (i.e. Zoom/Teams link)
 - The public should be able to read the notice and reasonably know what is going to be discussed at the meeting
- Notice should be posted “at the same time as such governing body’s members are notified.”
- Remember: When governing body receives the agenda, the public should see the agenda.?
- Post notice of date at the same time members know of the date.
 - Once agenda is prepared, it should also be posted at the required locations.

POSTING MEETING NOTICE

- Posted at the main office and
- Location of the meeting on the day of the meeting;
- Appropriate central location: County Auditor AND posted on public entity's website (if you have a website);
 - Meeting notice should be filed with the County Auditor
- Given to anyone who has requested it.
- Special meetings – notification must be given to official newspaper. (Committee meetings are probably special meetings)

EXECUTIVE SESSION

- Executive Sessions Must be specifically authorized by law
- Most common reasons:
 - Discussing exempt/confidential records,
 - Attorney consultation; and
 - Negotiation strategy.

EXECUTIVE SESSION

- How to Hold an Executive Session •
- 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 - motion to enter executive session.
- Record the session on audio or video (keep for 6 months);
- Note time of executive session and who attended in minutes; • Only discuss topics in announcement;
- If you act, final action in open meeting.

VIOLATIONS OF OPEN RECORDS/OPEN MEETINGS

- Any interested person may request an attorney general's opinion to review:
 - 1) a written denial of a request for records or
 - 2) a denial of access to a meeting. •
- Request must be made within 30 days of alleged records violation.
- Meetings without notice must be within 90 days of alleged violation.
- If the attorney general issues a written opinion concluding that a violation has occurred, the public entity has seven days 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 the person must be awarded costs, disbursements, and reasonable attorney's fees in the action and on appeal.
- Other remedies include: • Attorney General can mandate training for violations of law.

Resources

- ND Attorney General has a number of resources available
 - Open Records Guide
 - Open Meetings Guide
 - Template for responding to open records request
 - Sample meetings notice
 - Notice checklist
 - Sample form for Closing Executive Session



Thank You