

Fifty-fifth  
Legislative Assembly  
of North Dakota

## ENGROSSED SENATE BILL NO. 2228

Introduced by

Senators W. Stenehjem, Andrist, C. Nelson

Representatives Berg, Delmore, Kretschmar

1 A BILL for an Act to create and enact a new section to chapter 27-12 and sections 44-04-17.5,  
2 44-04-18.01, 44-04-18.02, 44-04-18.10, 44-04-18.11, 44-04-19.05, 44-04-19.2, 44-04-21.1,  
3 44-04-21.2, and subsection 19 of section 54-12-01 of the North Dakota Century Code, relating  
4 to public records and public meetings; to amend and reenact sections 44-04-18, 44-04-18.1,  
5 44-04-18.3, 44-04-18.4, 44-04-18.5, 44-04-18.7, 44-04-19, 44-04-19.1, 44-04-20, 44-04-21,  
6 and 54-44.2-08 of the North Dakota Century Code, relating to public records and meetings; and  
7 to repeal section 44-04-18.2 of the North Dakota Century Code, relating to economic  
8 development records and meetings.

9 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

10 **SECTION 1.** A new section to chapter 27-12 of the North Dakota Century Code is  
11 created and enacted as follows:

12 **Confidential records.** Information provided to the state bar association regarding  
13 applicants or participants in a lawyer referral service or volunteer lawyer program administered  
14 by the state bar association is confidential.

15 **SECTION 2.** Section 44-04-17.5 of the North Dakota Century Code is created and  
16 enacted as follows:

17 **44-04-17.5. Definitions.** As used in sections 44-04-17.5 through 44-04-21.2:

- 18 1. "Closed meeting" means all or part of an exempt meeting that a public entity in its  
19 discretion has not opened to the public, although any person necessary to carry  
20 out or further the purposes of a closed meeting may be admitted.  
21 2. "Closed record" means all or part of an exempt record that a public entity in its  
22 discretion has not opened to the public.

- 1           3. "Confidential meeting" or "confidential record" means all or part of a record or  
2           meeting that is either expressly declared confidential or is prohibited from being  
3           open to the public.
- 4           4. "Executive session" means all or part of a meeting that is closed or confidential.
- 5           5. "Exempt meeting" or "exempt record" means all or part of a record or meeting that  
6           is neither required by law to be open to the public, nor is confidential, but may be  
7           open in the discretion of the public entity.
- 8           6. "Governing body" means the multimember body responsible for making a  
9           collective decision on behalf of a public entity. "Governing body" also includes any  
10          group of persons, regardless of membership, acting collectively pursuant to  
11          authority delegated to that group by the governing body.
- 12          7. "Law" includes federal statutes, applicable federal regulations, and state statutes.
- 13          8. "Meeting" means a formal or informal gathering, whether in person or through  
14          other means such as telephone or video conference, of:
- 15           a. A quorum of the members of the governing body of a public entity regarding  
16           public business; or
- 17           b. Less than a quorum of the members of the governing body of a public entity  
18           regarding public business, if the members attending one or more of such  
19           smaller gatherings collectively constitute a quorum and if the members hold  
20           the gathering for the purpose of avoiding the requirements of section  
21           44-04-19.
- 22          "Meeting" includes work sessions, but does not include chance or social  
23          gatherings where public business is not considered and does not include the  
24          attendance of members of a governing body at meetings of any national, regional,  
25          or state association to which the public entity, the governing body, or individual  
26          members belong.
- 27          9. "Organization or agency supported in whole or in part by public funds" means an  
28          organization or agency in any form which has received public funds exceeding the  
29          fair market value of any goods or services given in exchange for the public funds,  
30          whether through grants, membership dues, fees, or any other payment. An  
31          exchange must be conclusively presumed to be for fair market value, and does not

1 constitute support by public funds, when an organization or agency receives a  
2 benefit under any authorized economic development program.

3 10. "Political subdivision" includes any county or city, regardless of the adoption of any  
4 home rule charter, and any township, school district, park district, rural fire  
5 protection district, water resource district, solid waste management authority, rural  
6 ambulance service district, irrigation district, hospital district, soil conservation  
7 district, recreation service district, railroad authority, or district health unit.

8 11. "Public business" means all matters that relate or may foreseeably relate in any  
9 way to:

10 a. The performance of the public entity's governmental functions, including any  
11 matter over which the public entity has supervision, control, jurisdiction, or  
12 advisory power; or

13 b. The public entity's use of public funds.

14 12. "Public entity" means all:

15 a. Public or governmental bodies, boards, bureaus, commissions, or agencies of  
16 the state, including any entity created or recognized by the Constitution of  
17 North Dakota, state statute, or executive order of the governor to exercise  
18 public authority or perform a governmental function;

19 b. Public or governmental bodies, boards, bureaus, commissions, or agencies of  
20 any political subdivision of the state and any entity created or recognized by  
21 the Constitution of North Dakota, state statute, executive order of the  
22 governor, resolution, ordinance, rule, bylaw, or executive order of the chief  
23 executive authority of a political subdivision of the state to exercise public  
24 authority or perform a governmental function; and

25 c. Organizations or agencies supported in whole or in part by public funds, or  
26 expending public funds.

27 13. "Public funds" means funds received from the state or any political subdivision of  
28 the state.

29 14. "Quorum" means one-half or more of the members of the governing body, or any  
30 smaller number if sufficient for a governing body to transact business on behalf of  
31 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.

**SECTION 3. AMENDMENT.** Section 44-04-18 of the North Dakota Century Code is amended and reenacted as follows:

**44-04-18. Access to public records - ~~Penalty~~ Electronically stored information.**

1. Except as otherwise specifically provided by law, all records of a public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, 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 44-04-17.5, 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. Fees received under this subsection are public moneys and must be deposited as provided by law. An entity may require payment before making or

1           mailing the copy, or both. If the entity is not authorized to use the fees to cover the  
2           cost of providing or mailing the copy, or both, or if a copy machine is not readily  
3           available, the entity may make arrangements for the copy to be provided or mailed,  
4           or both, by another entity, public or private, and the requester shall pay the fee to  
5           that other entity. As used in this subsection, "reasonable fee" means the actual  
6           cost to the public entity of making or mailing a copy of a record, or both, including  
7           labor, materials, postage, and equipment, but excluding any cost associated with  
8           locating, reviewing, or providing access to the requested record, or any cost  
9           associated with excising confidential or closed material under section 44-04-18.8.  
10          This subsection does not apply to copies of public records for which a different fee  
11          is specifically provided by law.

12          3. ~~Violations of this section are punishable as an infraction.~~ Except as provided in  
13          this subsection, nothing in this section requires a public entity to create or compile  
14          a record that does not exist. Access to an electronically stored record under this  
15          section, or a copy thereof, must be provided at the requester's option in either a  
16          printed document or through any other available medium. A computer file is not an  
17          available medium if no means exist to separate or prevent the disclosure of any  
18          closed or confidential information contained in that file. Except as reasonably  
19          necessary to reveal the organization of data contained in an electronically stored  
20          record, a public entity is not required to provide an electronically stored record in a  
21          different structure, format, or organization. This section does not require a public  
22          entity to provide a requester with access to a computer terminal.

23          4. A state-level public entity as defined in subdivision a of subsection 12 of section  
24          44-04-17.5 may establish procedures for providing access from an outside location  
25          to any computer data base or electronically filed or stored information maintained  
26          by that entity. The procedures must address the measures that are necessary to  
27          maintain the confidentiality of information protected by federal or state law. Except  
28          for access provided to another state-level public entity, the entity may charge a  
29          reasonable fee for providing that outside access. If the original information is  
30          keyed, entered, provided, compiled, or submitted by any political subdivision, the

1           fees must be shared by the state and the political subdivision based on their  
2           proportional costs to make the data available.

3           5. Any request under this section for records in the possession of a public entity by a  
4           party to a criminal or civil action or adverse administrative proceeding involving  
5           that entity, or by an agent of the party, must comply with applicable discovery rules  
6           and be made to the attorney representing that entity in the criminal or civil action or  
7           adverse administrative proceeding.

8           6. A denial of a request for records made under this section must describe the legal  
9           authority for the denial and must be in writing if requested.

10          7. This section is violated when a person's right to review or receive a copy of a  
11          record that is not exempt or confidential is denied or unreasonably delayed.

12          8. It is not an unreasonable delay or a denial of access under this section to withhold  
13          from the public a record that is prepared at the express direction of, and for  
14          presentation to, a governing body until the record is mailed or otherwise provided  
15          to a member of the body or until the next meeting of the body, whichever occurs  
16          first. It also is not unreasonable delay or a denial of access to withhold from the  
17          public a working paper or preliminary draft until a final draft is completed, the  
18          record is distributed to a member of a governing body or discussed by the body at  
19          an open meeting, or work is discontinued on the draft but no final version has been  
20          prepared, whichever occurs first.

21          **SECTION 4.** Section 44-04-18.01 of the North Dakota Century Code is created and  
22          enacted as follows:

23          **44-04-18.01. Disclosure of public records.**

24          1. A public entity may not deny a request for an open record on the ground that the  
25          record also contains confidential or closed information.

26          2. Subject to subsection 3 of section 44-04-18, if confidential or closed information is  
27          contained in an open record, a public entity shall permit inspection and receipt of  
28          copies of the information contained in the record that is not confidential or closed,  
29          but shall delete, excise, or otherwise withhold the confidential or closed  
30          information.

1        3. An officer or employee of a public entity may disclose or comment on the  
2        substance of an open record. Any agreement prohibiting the disclosure or  
3        comment is void and against public policy.

4        4. Unless otherwise prohibited by federal law, records of a public entity which are  
5        otherwise closed or confidential may be disclosed to any public entity for the  
6        purpose of law enforcement or collection of debts owed to a public entity, provided  
7        that the records are not used for other purposes and the closed or confidential  
8        nature of the records is otherwise maintained. For the purpose of this subsection,  
9        "public entity" is limited to those entities defined in subdivision a or b of  
10       subsection 12 of section 44-04-17.5.

11       **SECTION 5.** Section 44-04-18.02 of the North Dakota Century Code is created and  
12 enacted as follows:

13       **44-04-18.02. Disclosure pursuant to subpoena or order.**

- 14       1. Unless disclosure under a court order is otherwise prohibited or limited by law,  
15       closed records must be disclosed pursuant to a subpoena issued by a court,  
16       administrative law judge, or administrative hearing officer, or other court order.  
17       2. Unless disclosure under a court order is otherwise prohibited or limited by law,  
18       confidential records must be disclosed pursuant to a court order. Upon request of  
19       the public entity ordered to make the disclosure, the court ordering the disclosure  
20       shall issue a protective order to protect the confidential nature of the records.  
21       3. Any person who discloses confidential records of a public entity under this section  
22       is immune from prosecution for violating section 12.1-13-01.

23       **SECTION 6. AMENDMENT.** Section 44-04-18.1 of the North Dakota Century Code is  
24 amended and reenacted as follows:

25       **44-04-18.1. Public employee personal, medical, and employee assistance records**  
26 **- Confidentiality.**

- 27       1. Any record of a public employee's medical treatment or use of an employee  
28       assistance program is not to become part of that employee's personnel record and  
29       is confidential and may not be released without the written consent of the  
30       employee. As used in this section, the term "public employee" includes any  
31       person employed by ~~the state or any of its political subdivisions~~ 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; social security number; payroll deduction information; the name, address, phone number, date of birth, and social security number 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.

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 44-04-17.5 is exempt.

**SECTION 7. AMENDMENT.** Section 44-04-18.3 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**44-04-18.3. Records of law enforcement and correctional employees - Confidential informants.**

1. Any telephone number and the home address of 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 ~~and are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota. If this information is recorded with other public information, a public agency or record custodian shall permit inspection and receipt of copies of the public information that is not confidential, but shall delete or withhold the confidential information. A public agency or record custodian may not deny a request for public information on the ground that it is recorded with a confidential address and phone number.~~ 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 ~~and not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.~~ 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.

**SECTION 8. AMENDMENT.** Section 44-04-18.4 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**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

1                   supplied to or prepared by any ~~state agency, institution, department, or board~~  
2                   public entity which is the subject of efforts by the supplying or preparing  
3                   entity, person, business, or industry to maintain its secrecy and that may  
4                   derive independent economic value, actual or potential, from not being  
5                   generally known to, and not being readily ascertainable by proper means by,  
6                   any person who might obtain economic value from its disclosure or use.

7           3. "Proprietary information" includes information received from a sponsor of research  
8           conducted by ~~an institution~~ a public entity, as well as any discovery or innovation  
9           generated by that research, technical, financial, and marketing information and  
10           other documents related to the commercialization, and any other discovery or  
11           innovation produced ~~at the institution~~ by the public entity which an employee;  
12           ~~institution~~, or the ~~board~~ entity intends to commercialize.

13          4. This section does not limit or otherwise affect a record pertaining to any rule of the  
14           state department of health or to any record pertaining to the application for a  
15           permit or license necessary to do business or to expand business operations  
16           within this state, except as otherwise provided by law.

17          5. An institution of higher education shall include justification for maintaining the  
18           confidentiality of information as to each grant or contract involving confidential  
19           information in the institution's regular report to the board of higher education of  
20           grants and contracts received. The justification must contain general information  
21           required by the board and must include at least the following nonconfidential  
22           information:

- 23           a. A general description of the nature of the information sought to be protected;  
24           b. A general explanation of why the information derives independent economic  
25           value, actual or potential, from not being generally known to other persons;  
26           c. A general explanation of why the information is not readily ascertainable  
27           through proper means by other persons;  
28           d. A general description of the persons or entities that would obtain economic  
29           value from disclosure or use of the information, and how they would obtain  
30           this value; and

e. A general description of the efforts used to maintain the secrecy of the information.

The board of higher education shall review the justification at a public meeting of the board and shall decide if the confidential status should be maintained for the project. If the board decides against granting the confidential status, the justification may be resubmitted at the next meeting of the board and the confidential status may be maintained until that time. If the board again decides, upon reconsideration, not to grant confidentiality, the information becomes public.

6. 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.

**SECTION 9. AMENDMENT.** Section 44-04-18.5 of the North Dakota Century Code is amended and reenacted as follows:

**44-04-18.5. Confidentiality of computer Computer software programs -**

**Exemption.** Any computer software program or component of a computer software program developed by a public entity or for which any state agency, institution, department, or board a public entity acquires a license, copyright, or a patent is confidential exempt. A public entity may enter into agreements for the sale, licensing, and distribution of its licensed, patented, or copyrighted computer software programs.

1           **SECTION 10. AMENDMENT.** Section 44-04-18.7 of the 1995 Supplement to the North  
2 Dakota Century Code is amended and reenacted as follows:

3           **44-04-18.7. Criminal intelligence information and criminal investigative**  
4 **information - Nondisclosure - Record of information maintained.**

- 5           1. Active criminal intelligence information and active criminal investigative information  
6 are ~~confidential~~ and not subject to section 44-04-18 and section 6 of article XI of  
7 the Constitution of North Dakota. A criminal justice agency shall maintain a list of  
8 all files containing active criminal intelligence and investigative information which  
9 have been in existence for more than one year. With respect to each file, the list  
10 must contain the file's number or other identifying characteristic and the date the  
11 file was established. The list required under this subsection is subject to section  
12 44-04-18. Criminal intelligence and investigative information that is not considered  
13 "active" is not subject to section 44-04-18 and section 6 of article XI of the  
14 Constitution of North Dakota to the extent that the information is personal  
15 information.
- 16           2. "Criminal intelligence information" means information with respect to an identifiable  
17 person or group of persons collected by a criminal justice agency in an effort to  
18 anticipate, prevent, or monitor possible criminal activity. Criminal intelligence  
19 information must be considered "active" as long as it is related to intelligence  
20 gathering conducted with a reasonable good faith belief that it will lead to detection  
21 of ongoing or reasonably anticipated criminal activities.
- 22           3. "Criminal investigative information" means information with respect to an  
23 identifiable person or group of persons compiled by a criminal justice agency in the  
24 course of conducting a criminal investigation of a specific act or omission, including  
25 information derived from laboratory tests, reports of investigators or informants, or  
26 any type of surveillance. Criminal investigative information must be considered  
27 "active" as long as it is related to an ongoing investigation that is continuing with a  
28 reasonable good faith anticipation of securing an arrest or prosecution in the  
29 foreseeable future.
- 30           4. "Criminal justice agency" means any law enforcement agency or prosecutor. The  
31 term also includes any other unit of government charged by law with criminal law

1 enforcement duties or having custody of criminal intelligence or investigative  
2 information for the purpose of assisting law enforcement agencies in the conduct  
3 of active criminal investigations or prosecutions.

4 5. "Criminal intelligence and investigative information" does not include:

- 5 a. Arrestee description, including name, date of birth, address, race, sex,  
6 physical description, and occupation of arrestee.  
7 b. Facts concerning the arrest, including the cause of arrest and the name of the  
8 arresting officer.  
9 c. Conviction information, including the name of any person convicted of a  
10 criminal offense.  
11 d. Disposition of all warrants, including orders signed by a judge of any court  
12 commanding a law enforcement officer to arrest a particular person.  
13 e. A chronological list of incidents, including initial offense report information  
14 showing the offense, date, time, general location, officer, and a brief summary  
15 of what occurred.  
16 f. A crime summary, including a departmental summary of crimes reported and  
17 public calls for service by classification, nature, and number.  
18 g. Radio log, including a chronological listing of the calls dispatched.  
19 h. General registers, including jail booking information.  
20 i. Arrestee photograph, if release will not adversely affect a criminal  
21 investigation.

22 6. "Personal information" means a person's medical information; motor vehicle  
23 operator's identification number; social security number; and any credit, debit, or  
24 electronic fund transfer card number. ~~If this information is recorded with other~~  
25 ~~public information, a public agency or record custodian shall permit inspection and~~  
26 ~~receipt of copies of the public information that is not confidential, but shall delete or~~  
27 ~~withhold the confidential information. A public agency or record custodian may not~~  
28 ~~deny a request for public information on the ground that it is recorded with~~  
29 ~~confidential information.~~

30 **SECTION 11.** Section 44-04-18.10 of the North Dakota Century Code is created and  
31 enacted as follows:

1           **44-04-18.10. Cooperative investigations and litigation.** A record acquired under a  
2 written agreement between a governmental agency in another jurisdiction and the attorney  
3 general is confidential, except for the purposes specified in the agreement, if the attorney  
4 general determines:

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

8           **SECTION 12.** Section 44-08-18.11 of the North Dakota Century Code is created and  
9 enacted as follows:

10           **44-04-18.11. Lists of children.** Any record of a public entity that is a compilation of  
11 children's names, addresses, phone numbers, or any combination thereof, is exempt.

12           **SECTION 13. AMENDMENT.** Section 44-04-19 of the North Dakota Century Code is  
13 amended and reenacted as follows:

14           **44-04-19. ~~Open governmental~~ Access to public meetings.** Except as otherwise  
15 specifically provided by law, all meetings of a public or governmental bodies, boards, bureaus,  
16 commissions, or agencies of the state or any political subdivision of the state, or organizations  
17 or agencies supported in whole or in part by public funds, or expending public funds, entity  
18 must be open to the public. The governing members of the above bodies, boards,  
19 commissions, agencies, or organizations meeting in violation of this section are guilty of an  
20 infraction for a first offense. A public or governmental body, board, bureau, commission, or  
21 agency meets in violation of this section if it refuses That portion of a meeting of the governing  
22 body of a public entity as defined in subdivision c of subsection 12 of section 44-04-17.5 which  
23 does not regard public business is not required to be open under this section.

- 24           1. This section is violated when any person or persons is denied access to such a  
25 meeting under this section, unless such refusal, implicitly or explicitly  
26 communicated, is due to a lack of physical space in the meeting room for the  
27 person or persons seeking access.
- 28           2. For purposes of this section, the meeting room must be accessible to, and the size  
29 of the room must accommodate, the number of persons reasonably expected to  
30 attend the meeting.

1       3.   The right of a person to attend a meeting under this section includes the right to  
2       photograph, to record on audio or video tape and to broadcast live on radio or  
3       television the portion of the meeting that is not held in executive session, provided  
4       that there is no active interference with the conduct of the meeting. The exercise  
5       of this right may not be dependent upon the prior approval of the governing body.  
6       However, the governing body may impose reasonable limitations on recording  
7       activity to minimize the possibility of disruption of the meeting.

8       4.   For meetings subject to this section where one or more of the members of the  
9       governing body is participating by telephone or video, a speakerphone or monitor  
10       must be provided at the location specified in the notice issued under section  
11       44-04-20.

12       **SECTION 14.** Section 44-04-19.05 of the North Dakota Century Code is created and  
13 enacted as follows:

14       **44-04-19.05. Confidential or closed meetings.**

15       1.   A governing body may hold an executive session to consider or discuss closed or  
16       confidential records.

17       2.   Unless a different procedure is provided by law, an executive session that is  
18       authorized by law may be held if:

19       a.   The governing body first convenes in an open session and, unless a  
20       confidential meeting is required, passes a motion to hold an executive  
21       session;

22       b.   The governing body announces during the open portion of the meeting the  
23       topics to be discussed or considered during the executive session and the  
24       body's legal authority for holding an executive session on those topics;

25       c.   The executive session is recorded under subsection 5;

26       d.   The topics discussed or considered during the executive session are limited  
27       to those for which an executive session is authorized by law and that have  
28       been previously announced under this subsection; and

29       e.   Final action concerning the topics discussed or considered during the  
30       executive session is taken at a meeting open to the public, unless final action  
31       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 44-04-18.02 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.

**SECTION 15. AMENDMENT.** Section 44-04-19.1 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**44-04-19.1. Open records and open meetings - Exemptions for attorney work product and, 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



1 unless specifically made public by the public ~~agency~~ entity receiving such work  
2 product.

- 3 2. Attorney consultation is exempt from section 44-04-19. That portion of a meeting  
4 of a ~~public agency governing body~~ during which an attorney consultation occurs  
5 may be closed; by a ~~majority vote of the public agency governing body in an open~~  
6 ~~meeting for the purpose of having the attorney consultation under section~~  
7 ~~44-04-19.05. The remainder of the meeting, where no attorney consultation~~  
8 ~~occurs, is an open meeting unless a specific exemption is otherwise applicable.~~
- 9 3. "Attorney work product" means any document or record that:
- 10 a. Was prepared by an attorney representing a public ~~agency~~ entity or prepared  
11 at such an attorney's express direction;
- 12 b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of  
13 that attorney or the ~~agency~~ entity; and
- 14 c. Was prepared exclusively for civil or criminal litigation, for adversarial  
15 administrative proceedings, or in anticipation of ~~imminent~~ reasonably  
16 predictable civil or criminal litigation or adversarial administrative proceedings.
- 17 4. "Attorney consultation" means any discussion between a ~~public agency governing~~  
18 ~~body~~ and its attorney in instances in which the ~~public agency governing body~~  
19 seeks or receives the attorney's advice regarding and in anticipation of ~~imminent~~  
20 reasonably predictable civil or criminal litigation or adversarial administrative  
21 proceedings or concerning pending civil or criminal litigation or pending adversarial  
22 administrative proceedings. Mere presence or participation of an attorney at a  
23 meeting is not sufficient to constitute attorney consultation.
- 24 5. ~~"Public agency" means all public or governmental bodies, boards, bureaus,~~  
25 ~~commissions, or agencies of the state, or any political subdivision of the state, or~~  
26 ~~organizations or agencies supported in whole or in part by public funds or~~  
27 ~~expending public funds.~~
- 28 6. "Adversarial administrative proceedings" include only those administrative  
29 proceedings where the administrative agency or institution of higher education acts  
30 as a complainant ~~or~~, 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.

~~7.~~ 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 ~~agency~~ entity, unless another exception to section 44-04-19 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 44-04-19.05 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 44-04-17.5 regarding matters that do not pertain to public business.

**SECTION 16.** Section 44-04-19.2 of the North Dakota Century Code is created and enacted as follows:

**44-04-19.2. 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 44-04-19.05 if the meeting is not held on public property.

**SECTION 17. AMENDMENT.** Section 44-04-20 of the North Dakota Century Code is amended and reenacted as follows:

**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 ~~governed by~~ of a public entity as defined in section ~~44-04-19~~ 44-04-17.5, including executive sessions, conference call meetings, and video conferences.

~~This notice~~ 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 video conference, 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 ~~public~~ 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 44-04-17.5, the city auditor or designee of the city for city-level bodies, and the county auditor or designee of the county for all other ~~public~~ bodies. This schedule must be furnished to anyone who requests the information. ~~In addition, every public body shall post public notice of each of its meetings~~ 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 ~~its~~ 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 4, 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 44-04-17.5, 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 public governing body's presiding officer has the responsibility of assuring that such public notice is given at the same time as such public 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 public 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, if any, located where the meeting is to be held and 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 public governing body's members are notified. ~~Where reasonable and practicable, a public body should attempt to set a regular schedule for its meetings by statute, ordinance, or resolution. Topics that may be considered at an emergency or special meeting are limited to those included in the notice to the media.~~

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 bodies entities in following the provisions of this section. ~~Unless otherwise specified by law, resolution, or ordinance, or as decided by the public body, notices required by this section do not have to be published. The provisions of section 12.1-11-06 do not apply to this section.~~

9. This section is violated when a notice is not provided in substantial compliance with this section.

**SECTION 18. AMENDMENT.** Section 44-04-21 of the North Dakota Century Code is amended and reenacted as follows:

**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 ~~show the~~ 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 ~~must show the recorded~~
- 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 the approval of the minutes by the governing body.

**SECTION 19.** Section 44-04-21.1 of the North Dakota Century Code is created and enacted 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, 44-04-19.05, 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

1           recording made under section 44-04-19.05. The attorney general shall issue to the  
2           public entity involved an opinion on the alleged violation unless the request is  
3           withdrawn by the person requesting the opinion or a civil action has been filed  
4           involving the possible violation. If the request pertains to a public entity as defined  
5           in subdivision c of subsection 12 of section 44-04-17.5, the opinion must be issued  
6           to the public entity providing the public funds. In any opinion issued under this  
7           section, the attorney general shall base the opinion on the facts given by the public  
8           entity.

9           2. If the attorney general issues a written opinion concluding that a violation has  
10           occurred, the public entity has seven days after the opinion is issued, regardless of  
11           whether a civil action is filed under section 44-04-21.2, to disclose the record, to  
12           issue a notice of a meeting that will be held within a reasonable time to correct the  
13           violation, or to take steps to correct any other violation. If the public entity fails to  
14           take the required action within the seven-day period and the person requesting the  
15           opinion prevails in a civil action brought under section 44-04-21.2, the person must  
16           be awarded costs, disbursements, and reasonable attorneys fees in the action and  
17           on appeal. The consequences for failing to comply with an attorney general's  
18           opinion issued under this section will be the same as for other attorney general's  
19           opinions, including potential personal liability for the person or persons responsible  
20           for the noncompliance.

21           3. If a state-level public entity as defined in subdivision a of subsection 12 of section  
22           44-04-17.5 does not comply in full with the attorney general's opinion, and a civil  
23           action is brought under section 44-04-21.2 or is reasonably predictable, the entity,  
24           at its sole cost and expense, shall retain separate counsel who has been approved  
25           and appointed by the attorney general as a special assistant attorney general to  
26           represent the entity in that action.

27           **SECTION 20.** Section 44-04-21.2 of the North Dakota Century Code is created and  
28   enacted as follows:

29           **44-04-21.2. Remedies for violations and enforcement procedure.**

30           1. A violation of section 44-04-18, 44-04-19, 44-04-19.05, 44-04-20, or 44-04-21 is  
31           not a violation of section 12.1-11-06, but 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, 44-04-19.05, 44-40-20, 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, 44-04-20, 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.

**SECTION 21.** Subsection 19 of section 54-12-01 of the North Dakota Century Code is created and enacted as follows:

19. Give written opinions to public entities as defined in subdivision a or b of subsection 12 of section 44-04-17.5, when requested by an interested person under section 44-04-21.1.

**SECTION 22. AMENDMENT.** Section 54-44.2-08 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**54-44.2-08. ~~Access to electronically stored information~~— Coordination by information services division.** ~~An entity of the state may establish procedures for providing~~

~~access 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. The entity may charge a  
reasonable fee for providing that 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. The  
information services division shall cooperate with each state entity providing access to any  
computer data base or electronically filed or stored information under subsection 4 of section  
44-04-18 to assist in providing economical, efficient, and compatible access.~~

**SECTION 23. REPEAL.** Section 44-04-18.2 of the North Dakota Century Code is  
repealed.