

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

8 BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

9 **SECTION 1.** Section 44-04-17.5 of the North Dakota Century Code is created and
10 enacted as follows:

11 **44-04-17.5. Definitions.** As used in sections 44-04-17.5 through 44-04-21.2:

- 12 1. "Closed meeting" means all or part of an exempt meeting that a public entity in its
13 discretion has not opened to the public, although any person necessary to carry
14 out or further the purposes of a closed meeting may be admitted.
- 15 2. "Closed record" means all or part of an exempt record that a public entity in its
16 discretion has not opened to the public.
- 17 3. "Confidential meeting" or "confidential record" means all or part of a record or
18 meeting that is either expressly declared confidential or is prohibited from being
19 open to the public.
- 20 4. "Executive session" means all or part of a meeting that is closed or confidential.
- 21 5. "Exempt meeting" or "exempt record" means all or part of a record or meeting that
22 is neither required by law to be open to the public, nor is confidential, but may be
23 open in the discretion of the public entity.

- 1 6. "Governing body" means the multimember body responsible for making a collective
2 decision on behalf of a public entity. "Governing body" also includes any group of
3 persons, regardless of membership, acting collectively on behalf of the governing
4 body.
- 5 7. "Law" includes federal statutes, applicable federal regulations, and state statutes.
- 6 8. "Meeting" means a formal or informal gathering, whether in person or through other
7 means such as telephone or video conference, of:
- 8 a. A quorum of the members of the governing body of a public entity regarding
9 public business; or
- 10 b. Less than a quorum of the members of the governing body of a public entity
11 regarding public business, if the members attending one or more of such
12 smaller gatherings collectively constitute a quorum and if the members hold
13 the gathering for the purpose of avoiding the requirements of section
14 44-04-19.
- 15 "Meeting" includes work sessions, but does not include chance or social gatherings
16 where public business is not considered and does not include the attendance of
17 members of a governing body at meetings of any national, regional, or state
18 association to which the public entity, the governing body, or individual members
19 belong.
- 20 9. "Organization or agency supported in whole or in part by public funds" means an
21 organization or agency in any form which has received public funds exceeding the
22 fair market value of any goods or services given in exchange for the public funds,
23 whether through grants, membership dues, fees, or any other payment. An
24 exchange must be conclusively presumed to be for fair market value, and does not
25 constitute support by public funds, when an organization or agency receives a
26 benefit under any authorized economic development program.
- 27 10. "Political subdivision" includes any county or city, regardless of the adoption of any
28 home rule charter, and any township, school district, park district, rural fire
29 protection district, water resource district, solid waste management authority, rural
30 ambulance service district, irrigation district, hospital district, soil conservation
31 district, recreation service district, railroad authority, or district health unit.

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

- a. 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
- b. The public entity's use of public funds.

12. "Public entity" means all:

- a. Public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor to exercise public authority or perform a governmental function;
- b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state and any entity created or recognized by the Constitution of North Dakota, state statute, executive order of the governor, resolution, ordinance, rule, bylaw, or executive order of the chief executive authority of a political subdivision of the state to exercise public authority or perform a governmental function; and
- c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.

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

14. "Quorum" means 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.

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 2. 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 mailing the copy, or both. If the entity is not authorized to use the fees to cover the cost of providing or mailing the copy, or both, or if a copy machine is not readily available, the entity may make arrangements for the copy to be provided or mailed, or both, by another entity, public or private, and the requester shall pay the fee to that other entity. As used in this subsection, "reasonable fee" means the actual cost to the public entity of making or mailing a copy of a record, or both, including

1 labor, materials, postage, and equipment, but excluding any cost associated with
2 locating, reviewing, or providing access to the requested record, or any cost
3 associated with excising confidential or closed material under section 44-04-18.8.
4 This subsection does not apply to copies of public records for which a different fee
5 is specifically provided by law.

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

- 17 4. A state-level public entity as defined in subdivision a of subsection 12 of section
18 44-04-17.5 may establish procedures for providing access from an outside location
19 to any computer data base or electronically filed or stored information maintained
20 by that entity. The procedures must address the measures that are necessary to
21 maintain the confidentiality of information protected by federal or state law. Except
22 for access provided to another state-level public entity, the entity may charge a
23 reasonable fee for providing that outside access. If the original information is
24 keyed, entered, provided, compiled, or submitted by any political subdivision, the
25 fees must be shared by the state and the political subdivision based on their
26 proportional costs to make the data available.

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

6. A denial of a request for records made under this section must describe the legal authority for the denial and must be in writing if requested.
7. This section is violated when a person's right to review or receive a copy of a record that is not exempt or confidential is denied or unreasonably delayed.
8. It is not an unreasonable delay or a denial of access under this section to withhold from the public a record that is prepared at the express direction of, and for presentation to, a governing body until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first. It also is not unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first.

SECTION 3. Section 44-04-18.01 of the North Dakota Century Code is created and enacted as follows:

44-04-18.01. Disclosure of public records.

1. A public entity may not deny a request for an open record on the ground that the record also contains confidential or closed information.
2. Subject to subsection 3 of section 44-04-18, if confidential or closed information is contained in an open record, a public entity shall permit inspection and receipt of copies of the information contained in the record that is not confidential or closed, but shall delete, excise, or otherwise withhold the confidential or closed information.
3. An officer or employee of a public entity may disclose or comment on the substance of an open record. Any agreement prohibiting the disclosure or comment is void and against public policy.
4. Unless otherwise prohibited by federal law, records of a public entity which are otherwise closed or confidential may be disclosed to any public entity for the purpose of law enforcement or collection of debts owed to a public entity, provided that the records are not used for other purposes and the closed or confidential nature of the records is otherwise maintained. For the purpose of this subsection,

"public entity" is limited to those entities defined in subdivision a or b of
subsection 12 of section 44-04-17.5.

SECTION 4. Section 44-04-18.02 of the North Dakota Century Code is created and
enacted as follows:

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

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

SECTION 5. AMENDMENT. Section 44-04-18.1 of the North Dakota Century Code is
amended and reenacted as follows:

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

1. Any record of a public employee's medical treatment or use of an employee assistance program is not to become part of that employee's personnel record and is confidential and may not be released without the written consent of the employee. As used in this section, the term "public employee" includes any 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

1 fund transfer card number; and any account number at a bank or other financial
2 institution.

- 3 3. Nonconfidential information contained in a personnel record of an employee of a
4 public entity as defined in subdivision c of subsection 12 of section 44-04-17.5 is
5 exempt.

6 **SECTION 6. AMENDMENT.** Section 44-04-18.3 of the 1995 Supplement to the North
7 Dakota Century Code is amended and reenacted as follows:

8 **44-04-18.3. Records of law enforcement and correctional employees -**
9 **Confidential informants.**

- 10 1. Any telephone number and the home address of an employee of a law
11 enforcement agency, employee of a state or local correctional facility, and an
12 employee of the department of corrections and rehabilitation are confidential ~~and~~
13 ~~are not subject to section 44-04-18 and section 6 of article XI of the Constitution of~~
14 ~~North Dakota. If this information is recorded with other public information, a public~~
15 ~~agency or record custodian shall permit inspection and receipt of copies of the~~
16 ~~public information that is not confidential, but shall delete or withhold the~~
17 ~~confidential information. A public agency or record custodian may not deny a~~
18 ~~request for public information on the ground that it is recorded with a confidential~~
19 ~~address and phone number.~~ A record containing information relating to an
20 employee of the department of corrections and rehabilitation may be disclosed to
21 an appropriate authority under policy established by the department of corrections
22 and rehabilitation.
- 23 2. Records or other information that would reveal the identity, or endanger the life or
24 physical well-being, of an undercover law enforcement officer is confidential ~~and~~
25 ~~not subject to section 44-04-18 and section 6 of article XI of the Constitution of~~
26 ~~North Dakota.~~ For purposes of this subsection, an "undercover law enforcement
27 officer" means a full-time, salaried employee of a local or state law enforcement
28 agency who acts surreptitiously or poses as someone other than a law
29 enforcement officer while engaging in the investigation of a violation of law.
- 30 3. A law enforcement officer or prosecutor, within the scope of the employment of the
31 officer or prosecutor, may provide assurances of confidentiality to a person

1 providing information regarding violations of the law. Any information that would
2 identify or provide a means of identifying a confidential informant, if the identity of
3 the informant is not otherwise publicly known, is confidential and may be disclosed
4 only as permitted by law.

5 **SECTION 7. AMENDMENT.** Section 44-04-18.4 of the 1995 Supplement to the North
6 Dakota Century Code is amended and reenacted as follows:

7 **44-04-18.4. Confidentiality of trade secret, proprietary, commercial, and financial**
8 **information.**

- 9 1. Trade secret, proprietary, commercial, and financial information is confidential if it
10 is of a privileged nature and it has not been previously publicly disclosed.
- 11 2. "Trade secret" includes:
 - 12 a. A computer software program and components of a computer software
13 program which are subject to a copyright or a patent, and any formula,
14 pattern, compilation, program, device, method, technique, or process supplied
15 to any state agency, institution, department, or board which is the subject of
16 efforts by the supplying person or organization to maintain its secrecy and that
17 may derive independent economic value, actual or potential, from not being
18 generally known to, and not being readily ascertainable by proper means by,
19 other persons or organizations that might obtain economic value from its
20 disclosure or use; and
 - 21 b. A discovery or innovation which is subject to a patent or a copyright, and any
22 formula, pattern, compilation, program, device, method, technique, or process
23 supplied to or prepared by any ~~state agency, institution, department, or board~~
24 public entity which is the subject of efforts by the supplying or preparing entity,
25 person, business, or industry to maintain its secrecy and that may derive
26 independent economic value, actual or potential, from not being generally
27 known to, and not being readily ascertainable by proper means by, any
28 person who might obtain economic value from its disclosure or use.
- 29 3. "Proprietary information" includes information received from a sponsor of research
30 conducted by ~~an institution~~ a public entity, as well as any discovery or innovation
31 generated by that research, technical, financial, and marketing information and

1 other documents related to the commercialization, and any other discovery or
2 innovation produced ~~at the institution~~ by the public entity which an employee;
3 ~~institution,~~ or the ~~board~~ entity intends to commercialize.

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

8 5. An institution of higher education shall include justification for maintaining the
9 confidentiality of information as to each grant or contract involving confidential
10 information in the institution's regular report to the board of higher education of
11 grants and contracts received. The justification must contain general information
12 required by the board and must include at least the following nonconfidential
13 information:

- 14 a. A general description of the nature of the information sought to be protected;
15 b. A general explanation of why the information derives independent economic
16 value, actual or potential, from not being generally known to other persons;
17 c. A general explanation of why the information is not readily ascertainable
18 through proper means by other persons;
19 d. A general description of the persons or entities that would obtain economic
20 value from disclosure or use of the information, and how they would obtain
21 this value; and
22 e. A general description of the efforts used to maintain the secrecy of the
23 information.

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

30 6. Unless made confidential under subsection 1, the following economic development
31 records and information are exempt:

- 1 a. Records and information pertaining to a prospective location of a business or
2 industry, including the identity, nature, and location of the business or
3 industry, when no previous public disclosure has been made by the business
4 or industry of the interest or intent of the business or industry to locate in,
5 relocate within, or expand within this state. This exemption does not include
6 records pertaining to the application for permits or licenses necessary to do
7 business or to expand business operations within this state, except as
8 otherwise provided by law.
- 9 b. Trade secrets and commercial or financial information received from a person,
10 business, or industry that is interested in or is applying for or receiving
11 financing or technical assistance, or other forms of business assistance.

12 **SECTION 8. AMENDMENT.** Section 44-04-18.5 of the North Dakota Century Code is
13 amended and reenacted as follows:

14 **44-04-18.5. ~~Confidentiality of computer~~ Computer software programs -**
15 **Exemption.** Any computer software program or component of a computer software program
16 developed by a public entity or for which any state agency, institution, department, or board a
17 public entity acquires a license, copyright, or a patent is confidential exempt. A public entity
18 may enter into agreements for the sale, licensing, and distribution of its licensed, patented, or
19 copyrighted computer software programs.

20 **SECTION 9. AMENDMENT.** Section 44-04-18.7 of the 1995 Supplement to the North
21 Dakota Century Code is amended and reenacted as follows:

22 **44-04-18.7. Criminal intelligence information and criminal investigative**
23 **information - Nondisclosure - Record of information maintained.**

- 24 1. Active criminal intelligence information and active criminal investigative information
25 are ~~confidential and~~ not subject to section 44-04-18 and section 6 of article XI of
26 the Constitution of North Dakota. A criminal justice agency shall maintain a list of
27 all files containing active criminal intelligence and investigative information which
28 have been in existence for more than one year. With respect to each file, the list
29 must contain the file's number or other identifying characteristic and the date the
30 file was established. The list required under this subsection is subject to section
31 44-04-18. Criminal intelligence and investigative information that is not considered

"active" is not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota to the extent that the information is personal information.

2. "Criminal intelligence information" means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity. Criminal intelligence information must be considered "active" as long as it is related to intelligence gathering conducted with a reasonable good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities.

3. "Criminal investigative information" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. Criminal investigative information must be considered "active" as long as it is related to an ongoing investigation that is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future.

4. "Criminal justice agency" means any law enforcement agency or prosecutor. The term also includes any other unit of government charged by law with criminal law enforcement duties or having custody of criminal intelligence or investigative information for the purpose of assisting law enforcement agencies in the conduct of active criminal investigations or prosecutions.

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

- a. Arrestee description, including name, date of birth, address, race, sex, physical description, and occupation of arrestee.
- b. Facts concerning the arrest, including the cause of arrest and the name of the arresting officer.
- c. Conviction information, including the name of any person convicted of a criminal offense.
- d. Disposition of all warrants, including orders signed by a judge of any court commanding a law enforcement officer to arrest a particular person.

- e. A chronological list of incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred.
- f. A crime summary, including a departmental summary of crimes reported and public calls for service by classification, nature, and number.
- g. Radio log, including a chronological listing of the calls dispatched.
- h. General registers, including jail booking information.
- i. Arrestee photograph, if release will not adversely affect a criminal investigation.

6. "Personal information" means a person's medical information; motor vehicle operator's identification number; social security number; and any credit, debit, or electronic fund transfer card number. ~~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 confidential information.~~

SECTION 10. Section 44-04-18.10 of the North Dakota Century Code is created and enacted as follows:

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

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

SECTION 11. Section 44-08-18.11 of the North Dakota Century Code is created and enacted as follows:

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

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

3 **44-04-19. ~~Open-governmental~~ Access to public meetings.** Except as otherwise
4 specifically provided by law, all meetings of a public or governmental bodies, boards, bureaus,
5 commissions, or agencies of the state or any political subdivision of the state, or organizations
6 or agencies supported in whole or in part by public funds, or expending public funds, entity
7 must be open to the public. ~~The governing members of the above bodies, boards,~~
8 ~~commissions, agencies, or organizations meeting in violation of this section are guilty of an~~
9 ~~infraction for a first offense. A public or governmental body, board, bureau, commission, or~~
10 ~~agency meets in violation of this section if it refuses~~ That portion of a meeting of the governing
11 body of a public entity as defined in subdivision c of subsection 12 of section 44-04-17.5 which
12 does not regard public business is not required to be open under this section.

- 13 1. This section is violated when any person or persons is denied access to such a
14 meeting under this section, unless such refusal, implicitly or explicitly
15 communicated, is due to a lack of physical space in the meeting room for the
16 person or persons seeking access.
- 17 2. For purposes of this section, the meeting room must be accessible to, and the size
18 of the room must accommodate, the number of persons reasonably expected to
19 attend the meeting.
- 20 3. The right of a person to attend a meeting under this section includes the right to
21 photograph, to record on audio or video tape and to broadcast live on radio or
22 television the portion of the meeting that is not held in executive session, provided
23 that there is no active interference with the conduct of the meeting. The exercise
24 of this right may not be dependent upon the prior approval of the governing body.
25 However, the governing body may impose reasonable limitations on recording
26 activity to minimize the possibility of disruption of the meeting.
- 27 4. For meetings subject to this section where one or more of the members of the
28 governing body is participating by telephone or video, a speakerphone or monitor
29 must be provided at the location specified in the notice issued under section
30 44-04-20.

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

3 **44-04-19.05. Confidential or closed meetings.**

- 4 1. A governing body may hold an executive session to consider or discuss closed or
5 confidential records.
- 6 2. Unless a different procedure is provided by law, an executive session that is
7 authorized by law may be held if:
- 8 a. The governing body first convenes in an open session and, unless a
9 confidential meeting is required, passes a motion to hold an executive
10 session;
- 11 b. The governing body announces during the open portion of the meeting the
12 topics to be discussed or considered during the executive session and the
13 body's legal authority for holding an executive session on those topics;
- 14 c. The executive session is recorded under subsection 5;
- 15 d. The topics discussed or considered during the executive session are limited to
16 those for which an executive session is authorized by law and that have been
17 previously announced under this subsection; and
- 18 e. Final action concerning the topics discussed or considered during the
19 executive session is taken at a meeting open to the public, unless final action
20 is otherwise required by law to be taken during a closed or confidential
21 meeting. For purposes of this subsection, "final action" means a collective
22 decision or a collective commitment or promise to make a decision on any
23 matter, including formation of a position or policy, but does not include
24 guidance given by members of the governing body to legal counsel or other
25 negotiator in a closed attorney consultation or negotiation preparation session
26 authorized in section 44-04-19.1.
- 27 3. The remainder of a meeting during which an executive session is held is an open
28 meeting unless a specific exemption is otherwise applicable.
- 29 4. The minutes of an open meeting during which an executive session is held must
30 indicate the names of the members attending the executive session, the date and
31 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 14. 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 unless specifically made public by the public ~~agency~~ entity receiving such work product.
2. Attorney consultation is exempt from section 44-04-19. That portion of a meeting of a ~~public agency~~ governing body during which an attorney consultation occurs may be closed; ~~by a majority vote of the public agency governing body in an open meeting for the purpose of having the attorney consultation under section 44-04-19.05. The remainder of the meeting, where no attorney consultation occurs, is an open meeting unless a specific exemption is otherwise applicable.~~
3. "Attorney work product" means any document or record that:
 - a. Was prepared by an attorney representing a public ~~agency~~ entity or prepared at such an attorney's express direction;

- 1 b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of
2 that attorney or the ~~agency~~ entity; and
- 3 c. Was prepared exclusively for civil or criminal litigation, for adversarial
4 administrative proceedings, or in anticipation of ~~imminent~~ reasonably
5 predictable civil or criminal litigation or adversarial administrative proceedings.
- 6 4. "Attorney consultation" means any discussion between a ~~public agency~~ governing
7 body and its attorney in instances in which the ~~public agency~~ governing body
8 seeks or receives the attorney's advice regarding and in anticipation of ~~imminent~~
9 reasonably predictable civil or criminal litigation or adversarial administrative
10 proceedings or concerning pending civil or criminal litigation or pending adversarial
11 administrative proceedings. Mere presence or participation of an attorney at a
12 meeting is not sufficient to constitute attorney consultation.
- 13 5. ~~"Public agency" means all public or governmental bodies, boards, bureaus,~~
14 ~~commissions, or agencies of the state, or any political subdivision of the state, or~~
15 ~~organizations or agencies supported in whole or in part by public funds or~~
16 ~~expending public funds.~~
- 17 6. "Adversarial administrative proceedings" include only those administrative
18 proceedings where the administrative agency or institution of higher education acts
19 as a complainant ~~or~~ respondent, or decisionmaker in an adverse administrative
20 proceeding. This term does not refer to those instances where the administrative
21 agency or institution acts in its own rulemaking capacity.
- 22 7. ~~6.~~ Following the final completion of the civil or criminal litigation or the adversarial
23 administrative proceeding, including the exhaustion of all appellate remedies,
24 attorney work product must be made available for public disclosure by the public
25 ~~agency~~ entity, unless another exception to section 44-04-19 applies or if disclosure
26 would have an adverse fiscal effect on the conduct or settlement of other pending
27 or reasonably predictable civil or criminal litigation or adversarial administrative
28 proceedings.
- 29 7. A governing body may hold an executive session under section 44-04-19.05 to
30 discuss negotiating strategy or provide negotiating instructions to its attorney or
31 other negotiator regarding litigation, adversarial administrative proceedings, or

1 contracts, which are currently being negotiated or for which negotiation is
2 reasonably likely to occur in the immediate future. An executive session may be
3 held under this subsection only when an open meeting would have an adverse
4 fiscal effect on the bargaining or litigating position of the public entity.

- 5 8. Nothing in this section may be construed to waive any attorney-client privilege of a
6 public entity as defined in subdivision c of subsection 12 of section 44-04-17.5
7 regarding matters that do not pertain to public business.

8 **SECTION 15. AMENDMENT.** Section 44-04-20 of the North Dakota Century Code is
9 amended and reenacted as follows:

10 **44-04-20. Notice of public meetings required - Exceptions - Schedule set by**
11 **statute, ordinance, or resolution.**

- 12 1. Unless otherwise provided by law, public notice must be given in advance of all
13 meetings ~~governed by~~ of a public entity as defined in section ~~44-04-19~~ 44-04-17.5,
14 including ~~executive sessions,~~ conference call meetings, and video conferences.
15 ~~This notice~~ Unless otherwise specified by law, resolution, or ordinance, or as
16 decided by the public entity, notices required by this section need not be published.
- 17 2. The notice required in this section must contain the date, time, and location of the
18 meeting and, where practicable, the topics to be considered. However, the lack of
19 an agenda in the notice, or a departure from, or an addition to, the agenda at a
20 meeting, does not affect the validity of the meeting or the actions taken thereat.
21 The notice must also contain the general subject matter of any executive session
22 expected to be held during the meeting. For meetings to be held by telephone or
23 video conference, the location of the meeting and the place the meeting is held is
24 the location of a speakerphone or monitor as required under section 44-04-19.
- 25 3. In cases where the ~~public~~ governing body holds regularly scheduled meetings, the
26 schedule of these meetings, including the aforementioned notice information, ~~if~~
27 available, must be filed annually in January with the secretary of state for
28 state-level bodies or for public entities defined in subdivision c of subsection 12 of
29 section 44-04-17.5, the city auditor or designee of the city for city-level bodies, and
30 the county auditor or designee of the county for all other ~~public~~ bodies. This
31 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. 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.~~

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

SECTION 16. 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 17. 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 1. Any interested person may request an attorney general's opinion to review a
2 written denial of a request for records under section 44-04-18, a denial of access to
3 a meeting under section 44-04-19, or other alleged violation of section 44-04-18,
4 44-04-19, 44-04-19.05, 44-04-20, or 44-04-21 by any public entity other than the
5 legislative assembly or any committee thereof. A request made under this section
6 must be made within thirty days of the alleged violation. In preparing an opinion
7 under this section, the attorney general has discretion to obtain and review a
8 recording made under section 44-04-19.05. The attorney general shall issue to the
9 public entity involved an opinion on the alleged violation unless the request is
10 withdrawn by the person requesting the opinion or a civil action has been filed
11 involving the possible violation. If the request pertains to a public entity as defined
12 in subdivision c of subsection 12 of section 44-04-17.5, the opinion must be issued
13 to the public entity providing the public funds. In any opinion issued under this
14 section, the attorney general shall base the opinion on the facts given by the public
15 entity.
- 16 2. If the attorney general issues a written opinion concluding that a violation has
17 occurred, the public entity has seven days after the opinion is issued, regardless of
18 whether a civil action is filed under section 44-04-21.2, to disclose the record, to
19 issue a notice of a meeting that will be held within a reasonable time to correct the
20 violation, or to take steps to correct any other violation. If the public entity fails to
21 take the required action within the seven-day period and the person requesting the
22 opinion prevails in a civil action brought under section 44-04-21.2, the person must
23 be awarded costs, disbursements, and reasonable attorneys fees in the action and
24 on appeal. The consequences for failing to comply with an attorney general's
25 opinion issued under this section will be the same as for other attorney general's
26 opinions, including potential personal liability for the person or persons responsible
27 for the noncompliance.
- 28 3. If a state-level public entity as defined in subdivision a of subsection 12 of section
29 44-04-17.5 does not comply in full with the attorney general's opinion, and a civil
30 action is brought under section 44-04-21.2 or is reasonably predictable, the entity,
31 at its sole cost and expense, shall retain separate counsel who has been approved

1 and appointed by the attorney general as a special assistant attorney general to
2 represent the entity in that action.

3 **SECTION 18.** Section 44-04-21.2 of the North Dakota Century Code is created and
4 enacted as follows:

5 **44-04-21.2. Remedies for violations and enforcement procedure.**

- 6 1. A violation of section 44-04-18, 44-04-19, 44-04-19.05, 44-04-20, or 44-04-21 is
7 not a violation of section 12.1-11-06, but may be the subject of a civil action
8 brought by an interested person or entity. For an alleged violation of section
9 44-04-18, the complaint must be accompanied by a dated, written request for the
10 requested record. If a court finds that any of these sections have been violated by
11 a public entity, the court may award declaratory relief, an injunction, a writ of
12 prohibition or mandamus, costs, disbursements, and reasonable attorney's fees
13 against the entity. For an intentional or knowing violation of section 44-04-18,
14 44-04-19, 44-04-19.05, 44-40-20, or 44-04-21, the court may also award damages
15 in an amount equal to one thousand dollars or actual damages caused by the
16 violation, whichever is greater. An action under this subsection must be
17 commenced within sixty days of the date the person knew or should have known of
18 the violation or within thirty days of issuance of an attorney general's opinion on the
19 alleged violation, whichever is later. Venue for an action is in the county where the
20 entity has its principal office or, if the entity does not have a principal office within
21 the state, in Burleigh County.
- 22 2. Any action that is a product of a violation of section 44-04-19, 44-04-20, or
23 44-04-21 is voidable by a court in a civil action authorized by this section.
- 24 3. The remedies provided in this section are not available if a violation of section
25 44-04-18, 44-04-19, 44-04-20, or 44-04-21 has been corrected before a civil action
26 is filed and no person has been prejudiced or harmed by the delay. An interested
27 person or entity may not file a civil action under this section seeking attorney's fees
28 or damages, or both, until at least three working days after providing notice of the
29 alleged violation to the chief administrative officer for the public entity.

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

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

4 **SECTION 20. AMENDMENT.** Section 54-44.2-08 of the 1995 Supplement to the North
5 Dakota Century Code is amended and reenacted as follows:

6 **54-44.2-08. ~~Access to electronically stored information-- Coordination by~~**
7 **information services division.** ~~An entity of the state may establish procedures for providing~~
8 ~~access to any computer data base or electronically filed or stored information maintained by~~
9 ~~that entity. The procedures must address the measures that are necessary to maintain the~~
10 ~~confidentiality of information protected by federal or state law. The entity may charge a~~
11 ~~reasonable fee for providing that access. If the original information is keyed, entered, provided,~~
12 ~~compiled, or submitted by any political subdivision, the fees must be shared by the state and~~
13 ~~the political subdivision based on their proportional costs to make the data available. The~~
14 information services division shall cooperate with each state entity providing access to any
15 computer data base or electronically filed or stored information under subsection 4 of section
16 44-04-18 to assist in providing economical, efficient, and compatible access.

17 **SECTION 21. REPEAL.** Section 44-04-18.2 of the North Dakota Century Code is
18 repealed.