

HOUSE BILL NO. 1345

Introduced by

Representatives Devlin, Delmore, K. Koppelman

Senators Armstrong, Casper, Nelson

1 A BILL for an Act to create and enact subsections 12 and 13 of section 44-04-18, subsection 6
2 of section 44-04-18.1, and section 11 of section 44-04-19.1 of the North Dakota Century Code,
3 relating to open record and meeting laws; and amend and reenact subsection 11 of section
4 12.1-34-02, section 12.1-35-03, subsection 9 of section 44-04-17.1, subsections 2, 4, and 7 of
5 section 44-04-18, subsection 2 of section 44-04-18.1, subsection 6 of section 44-04-18.7,
6 section 44-04-18.20, subsections 5, 6, and 9 of section 44-04-19.1, subsections 3 and 5 of
7 section 44-04-20, section 44-04-21.1, and subsection 4 of section 57-40.6-07 of the North
8 Dakota Century Code, relating to open record and meeting laws.

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

10 **SECTION 1. AMENDMENT.** Subsection 11 of section 12.1-34-02 of the North Dakota
11 Century Code is amended and reenacted as follows:

12 11. Protection of identifying information. Victims and witnesses may not be compelled to
13 testify at any pretrial proceeding or at trial for purposes of identifying the victims' or
14 witnesses' address, telephone number, place of employment, or other personal
15 identification except for name without the victims' or witnesses' consent, unless there
16 is a showing of good cause as determined by the court. Records of a criminal justice
17 agency as defined by section 44-04-18.7, a correctional facility as defined in section
18 12-44.1-01, and the department of corrections and rehabilitation containing the
19 address, telephone number, place of employment, or other information that could be
20 used to locate the victim or witness to a crime, are exempt.

21 **SECTION 2. AMENDMENT.** Section 12.1-35-03 of the North Dakota Century Code is
22 amended and reenacted as follows:

1 **12.1-35-03. Information about child victims or witnesses of crimes generally may not**
2 **appear in public record.**

3 1. In order to protect the child from possible trauma resulting from publicity, the name of
4 the child victim or child witness of a crime, except as specified in subsection 2, and
5 identifying biographical information may not appear on the indictment or any other
6 public record. Instead, a Jane Doe or Joe Doe designation must appear in all public
7 records. Sealed confidential records containing the child's name and necessary
8 biographical information must be kept in order to ensure that no defendant is charged
9 twice.

10 2. Interviews and statements of child victims or child witnesses obtained during an
11 investigation of a crime of a violent or sexual nature are exempt.

12 3. Subsection 1 does not apply to the name and identifying biographical information of:

13 a. A child victim or child witness of a criminal offense under title 39 or equivalent
14 ordinance; and

15 b. A child victim of a fire.

16 **SECTION 3. AMENDMENT.** Subsection 9 of section 44-04-17.1 of the North Dakota
17 Century Code is amended and reenacted as follows:

18 9. a. "Meeting" means a formal or informal gathering or a work session, whether in
19 person or through electronic means such as telephone or videoconference, of:

20 (1) A quorum of the members of the governing body of a public entity regarding
21 public business; or

22 (2) Less than a quorum of the members of the governing body of a public entity
23 regarding public business, if the members attending one or more of such
24 smaller gatherings collectively constitute a quorum and if the members hold
25 the gathering for the purpose of avoiding the requirements of section
26 44-04-19.

27 b. "Meeting" does not include:

28 (1) A chance or social gathering at which public business is not considered;

29 (2) Emergency operations during a disaster or emergency declared under
30 section 37-17.1-10 or an equivalent ordinance if a quorum of the members

1 of the governing body are present but are not discussing public business as
2 the full governing body or as a task force or working group; ~~and~~

3 (3) The attendance of members of a governing body at meetings of any
4 national, regional, or state association to which the public entity, the
5 governing body, or individual members belong; and

6 (4) Training seminars where no other public business is considered or
7 discussed.

8 c. Notwithstanding subdivisions a and b, as applied to the legislative assembly,
9 "meeting" means any gathering subject to section 14 of article IV of the
10 Constitution of North Dakota.

11 **SECTION 4. AMENDMENT.** Subsections 2, 4, and 7 of section 44-04-18 of the North
12 Dakota Century Code are amended and reenacted as follows:

13 2. Upon request for a copy of specific public records, any entity subject to subsection 1
14 shall furnish the requester one copy of the public records requested. ~~AAn initial~~
15 request need not be made in person or in writing, and the copy must be mailed upon
16 request. A public entity may require written clarification of the request to determine
17 what records are being requested, but may not ask for the motive or reason for
18 requesting the records or for the identity of the person requesting public records. A
19 public entity may charge up to twenty-five cents per impression of a paper copy. As
20 used in this section, "paper copy" means a one-sided or two-sided duplicated copy of
21 a size not more than eight and one-half by fourteen inches [19.05 by 35.56
22 centimeters]. For any copy of a record that is not a paper copy as defined in this
23 section, the public entity may charge a reasonable fee for making the copy. As used in
24 this section, "reasonable fee" means the actual cost to the public entity of making the
25 copy, including labor, materials, and equipment. The entity may charge for the actual
26 cost of postage to mail a copy of a record. An entity may require payment before
27 locating, redacting, making, or mailing the copy. The public entity may withhold
28 records pursuant to a request until such time as a requester provides payment for any
29 outstanding balance for prior requests. An entity may impose a fee not exceeding
30 twenty-five dollars per hour per request, excluding the initial hour, for locating records,
31 including electronic records, if locating the records requires more than one hour. An

1 entity may impose a fee not exceeding twenty-five dollars per hour per request,
2 excluding the initial hour, for excising confidential or closed material under section
3 44-04-18.10 from the records, including electronic records. If a public entity receives
4 five or more requests from the same requester within seven days, the public entity
5 may treat the requests as one request in computing the time it takes to locate and
6 excise the records. If the entity is not authorized to use the fees to cover the cost of
7 providing or mailing the copy, or both, or if a copy machine is not readily available, the
8 entity may make arrangements for the copy to be provided or mailed, or both, by
9 another entity, public or private, and the requester shall pay the fee to that other entity.
10 This subsection does not apply to copies of public records for which a different fee is
11 specifically provided by law.

12 4. Except as provided in this subsection, nothing in this section requires a public entity to
13 create or compile a record that does not exist. Access to an electronically stored
14 record under this section, or a copy thereof, must be provided at the requester's option
15 in either a printed document or through any other available medium. A computer file is
16 not an available medium if no means exist to separate or prevent the disclosure of any
17 closed or confidential information contained in that file. Except as reasonably
18 necessary to reveal the organization of data contained in an electronically stored
19 record, a public entity is not required to provide an electronically stored record in a
20 different structure, format, or organization. This section does not require a public entity
21 to provide a requester with access to a computer terminal or mobile device. A public
22 entity is not required to provide a copy of a record that is available to the requester on
23 the public entity's website or on the internet. The public entity shall notify the requester
24 the record is available online and direct the requester to the website where the record
25 can be accessed. If the requester does not have reasonable access to the internet
26 due to lack of computer, lack of internet availability, or inability to use a computer or
27 the internet, the public entity shall produce paper copies for the requester, but may
28 charge the applicable fees under this section.

29 7. A denial of a request for records made under this section must describe the legal
30 authority for the denial, or a statement that a record does not exist, and must be in
31 writing if requested.

1 **SECTION 5.** Subsections 12 and 13 to section 44-04-18 of the North Dakota Century Code
2 are created and enacted as follows:

3 12. A public entity may allow an individual to utilize the individual's own personal devices
4 for duplication of records and, if so, shall establish reasonable procedures to protect
5 the integrity of the records as long as the procedures are not used to prevent access
6 to the records.

7 13. If repeated requests for records disrupt other essential functions of the public entity,
8 the public entity may refuse to permit inspection of the records, or provide copies of
9 the records. A public entity refusing to provide access or copies of public records
10 under this section shall state in writing the reasons supporting the refusal and provide
11 the reasoning to the requester. The requester may seek an attorney general's opinion
12 under section 44-04-21.1, on whether the public entity's decision was proper.

13 **SECTION 6. AMENDMENT.** Subsection 2 of section 44-04-18.1 of the North Dakota
14 Century Code is amended and reenacted as follows:

15 2. Except as otherwise specifically provided by law, personal information regarding a
16 public employee contained in an employee's personnel record or given to the state or
17 a political subdivision by the employee in the course of employment is exempt. As
18 used in this section, "personal information" means a person's month and day of birth;
19 home address; home telephone number or personal cell phone number; photograph;
20 medical information; motor vehicle operator's identification number; public employee
21 identification number; payroll deduction information; the name, address, telephone
22 number, and date of birth of any dependent or emergency contact; any credit, debit, or
23 electronic fund transfer card number; and any account number at a bank or other
24 financial institution. Information regarding the type of leave taken by an employee is
25 exempt, although the amount of leave taken or accrued, and the dates of the leave
26 taken, is public record. Information regarding leave applied for but not yet taken is
27 exempt until the leave is taken.

28 **SECTION 7.** Subsection 6 to section 44-04-18.1 of the North Dakota Century Code is
29 created and enacted as follows:

30 6. Records relating to a public entity's internal investigation of a complaint against a
31 public entity or employee for misconduct are exempt until the investigation of the

1 complaint is complete, but no longer than seventy-five calendar days from the date of
2 the complaint.

3 **SECTION 8. AMENDMENT.** Subsection 6 of section 44-04-18.7 of the North Dakota
4 Century Code is amended and reenacted as follows:

- 5 6. "Personal information" means a person's medical records or medical information
6 obtained from the medical records; motor vehicle operator's identification number;
7 social security number; any credit, debit, or electronic fund transfer card number;
8 month and date of birth; height; weight; home street address; home telephone number
9 or personal cell phone number; and any financial account numbers.

10 **SECTION 9. AMENDMENT.** Section 44-04-18.20 of the North Dakota Century Code is
11 amended and reenacted as follows:

12 **44-04-18.20. Domestic violence and victim record information of law enforcement**
13 **exempt.**

14 The address, telephone number, or any identifying information that, if released, could
15 reasonably be used to locate or identify a victim or alleged victim of domestic violence, of a sex
16 offense under chapter 12.1-20, of sexual performances by a child under chapter 12.1-27.2, or of
17 human trafficking under chapter ~~12.1-40~~12.1-41, contained in any record maintained by a law-
18 enforcement criminal justice agency as defined by section 44-04-18.7 or correctional facility as
19 defined by section 12-44.1-01 is exempt from ~~section 44-04-18~~ and may be redacted from the
20 record ~~before it is released.~~

21 **SECTION 10. AMENDMENT.** Subsections 5, 6, and 9 of section 44-04-19.1 of the North
22 Dakota Century Code are amended and reenacted as follows:

- 23 5. "Attorney consultation" means any discussion between a governing body and its
24 attorney in instances in which the governing body seeks or receives the attorney's
25 advice regarding and in anticipation of reasonably predictable or pending civil or
26 criminal litigation or adversarial administrative proceedings or ~~concerning pending civil~~
27 ~~or criminal litigation or pending adversarial administrative proceedings~~ to receive its
28 attorney's advice and guidance on the legal risks, strengths, and weaknesses of an
29 action of a public entity that, if held in public, would have an adverse fiscal effect on
30 the entity. All other discussions beyond the attorney's advice and guidance must be

1 made in the open, unless otherwise provided by law. Mere presence or participation of
2 an attorney at a meeting is not sufficient to constitute attorney consultation.

- 3 6. "Attorney work product" means any document or record that:
- 4 a. Was prepared by an attorney representing a public entity or prepared at such an
5 attorney's express direction;
- 6 b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that
7 attorney or the entity; and
- 8 c. Was prepared exclusively for civil or criminal litigation, for adversarial
9 administrative proceedings, ~~or~~ in anticipation of reasonably predictable civil or
10 criminal litigation or adversarial administrative proceedings, or for guidance on
11 the legal risks, strengths, and weaknesses of an action of a public entity.

- 12 9. A governing body may hold an executive session under section 44-04-19.2 to discuss
13 negotiating strategy or provide negotiating instructions to its attorney or other
14 negotiator regarding a pending claim, litigation, adversarial administrative
15 proceedings, or contracts, which are currently being negotiated or for which
16 negotiation is reasonably likely to occur in the immediate future. An executive session
17 may be held under this subsection only when an open meeting would have an adverse
18 fiscal effect on the bargaining or litigating position of the public entity. A record
19 revealing negotiation strategy or instruction under this section is exempt. Drafts of
20 contracts or agreements subject to negotiations are exempt but only for so long as
21 release would have an adverse fiscal effect on the public entity, unless the records are
22 otherwise exempt or confidential.

23 **SECTION 11.** Subsection 11 to section 44-04-19.1 of the North Dakota Century Code is
24 created and enacted as follows:

- 25 11. A settlement agreement between a public entity and ~~an other~~another party is exempt
26 from disclosure until it has been fully executed and accepted by all concerned parties
27 unless the records are otherwise exempt or confidential. In the case of multiple
28 settlement agreements involving multiple parties involved in the same incident or
29 undertaking, a settlement agreement is exempt until settlement agreements have
30 been fully executed by all concerned parties unless the records are otherwise exempt
31 or confidential.

1 **SECTION 12. AMENDMENT.** Subsections 3 and 5 of section 44-04-20 of the North Dakota
2 Century Code are amended and reenacted as follows:

3 3. If the governing body holds regularly scheduled meetings, the schedule of these
4 meetings, including the aforementioned notice information, if available, must be filed
5 annually ~~in January~~ with the secretary of state for state-level bodies or for public
6 entities defined in subdivision c of subsection 13 of section 44-04-17.1, the city auditor
7 or designee of the city for city-level bodies, and the county auditor or designee of the
8 county for all other bodies or the schedule must be posted on the public entity's
9 website. This schedule must be furnished to anyone who requests the information.
10 When reasonable and practicable, a governing body of a public entity should attempt
11 to set a regular schedule for its meetings by statute, ordinance, or resolution. This
12 subsection does not apply to meetings of the legislative assembly or any committee
13 thereof. Filing a yearly schedule of upcoming meetings does not relieve a public entity
14 from its obligation to post an agenda for each meeting as required in subsections 2
15 and 4.

16 5. The governing body's presiding officer has the responsibility of assuring that such
17 public notice of a meeting's date, time, and location, is given at the same time as such
18 governing body's members are notified, and that this notice is available to anyone
19 requesting such information. As soon as an agenda is prepared for a meeting with the
20 information required in subsection 2 and given to members of the governing body, the
21 agenda must be posted at the locations as required by subsections 4 and 5
22 subsection 4 and given to anyone requesting the information. When a request is made for notice
23 of meetings, the request is effective for one year unless a different time period is
24 specified.

25 **SECTION 13. AMENDMENT.** Section 44-04-21.1 of the North Dakota Century Code is
26 amended and reenacted as follows:

27 **44-04-21.1. Administrative review procedure.**

28 1. Any interested person may request an attorney general's opinion to review a written
29 denial of a request for records under section 44-04-18, a denial of access to a meeting
30 under section 44-04-19, or other alleged violation of section 44-04-18, 44-04-19,
31 44-04-19.2, 44-04-20, or 44-04-21 by any public entity other than the legislative

1 assembly or any committee thereof. A request made under this section must be made
2 within thirty days of the alleged violation, except that a request based on allegations
3 that a meeting occurred without the notice required by section 44-04-20, must be
4 made within ninety days of the alleged violation. In preparing an opinion under this
5 section, the attorney general has discretion to obtain and review a recording made
6 under section 44-04-19.2. The attorney general may request and obtain information
7 claimed to be exempt or confidential for the purpose of determining whether the
8 information is exempt or confidential. Any such information may not be released by the
9 attorney general and may be returned to the provider of the information. The attorney
10 general shall issue to the public entity involved an opinion on the alleged violation,
11 which may be a summary opinion, unless the request is withdrawn by the person
12 requesting the opinion or a civil action has been filed involving the possible violation. If
13 the request pertains to a public entity as defined in subdivision c of subsection 13 of
14 section 44-04-17.1, the opinion must be issued to the public entity providing the public
15 funds. In any opinion issued under this section, the attorney general shall base the
16 opinion on the facts given by the public entity.

17 2. If the attorney general issues a written opinion concluding that a violation has
18 occurred, the public entity has seven days after the opinion is issued, regardless of
19 whether a civil action is filed under section 44-04-21.2, to disclose the record, to issue
20 a notice of a meeting that will be held within a reasonable time to correct the violation,
21 or to take steps to correct any other violation. If the public entity fails to take the
22 required action within the seven-day period and the person requesting the opinion
23 prevails in a civil action brought under section 44-04-21.2, the person must be
24 awarded costs, disbursements, and reasonable attorney's fees in the action and on
25 appeal. The attorney general may require officials of the public entity at issue in the
26 opinion to obtain mandatory training by a certain date. The consequences for failing to
27 comply with an attorney general's opinion issued under this section will be the same
28 as for other attorney general's opinions, including potential personal liability for the
29 person or persons responsible for the noncompliance.

30 3. If a state-level public entity as defined in subdivision a of subsection 13 of section
31 44-04-17.1 does not comply in full with the attorney general's opinion, and a civil

1 action is brought under section 44-04-21.2 or is reasonably predictable, the entity, at
2 its sole cost and expense, shall retain separate counsel who has been approved and
3 appointed by the attorney general as a special assistant attorney general to represent
4 the entity in that action.

5 **SECTION 14. AMENDMENT.** Subsection 4 of section 57-40.6-07 of the North Dakota
6 Century Code is amended and reenacted as follows:

7 4. An audio recording of a request for emergency services or of a report of an emergency
8 is an exempt record as defined in section 44-04-17.1. However, upon request, a
9 person may listen to the audio recording, but may not copy or record the audio. A
10 person also may request a written transcript of the audio recording, which must be
11 provided to the person within a reasonable time. The emergency services
12 communication system coordinator may refer requests to the appropriate investigating
13 agency possessing the recording and shall communicate this referral to the requester.
14 The investigating agency shall answer requests for the records. If an investigating
15 agency does not have possession of the record, the emergency services
16 communication system coordinator shall respond to the request for the record.