

HOUSE GOVERNMENT AND VETERANS AFFAIRS
FEBRUARY 6, 2024

TESTIMONY OF ANNIQUE LOCKARD
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1306

Chairman Schauer, members of the Committee:

I am Annique Lockard, Assistant Attorney General, and I submit this written testimony on behalf of the Attorney General in my capacity as the current open records and open meetings portfolio holder.

Article 11, Section 6, of the North Dakota Constitution provides that “**all records** of 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, **shall be public records, open and accessible** for inspection during reasonable office hours.”

Attachment 1 to this testimony is the “Open Records Guide” that is available on the Attorney General’s website. It provides a summary of open records law, including how the public can request records and how public entities should respond to requests under the law.

This bill amends subsection 2 of Section 44-04-18 of the North Dakota Century Code in two ways. First, it appears to arbitrarily add subdivisions that potentially confuse decades of established law and Attorney General opinion precedent. Second, it grossly expands the duty of public entities to respond to record requests.

Subdivisions

The ability of the public to access public records has existed since the North Dakota Constitution was adopted. Specific to this bill, Section 44-04-18 was created by the Legislative Assembly in 1957. It simply stated what we now view as 44-04-18(1). The Legislative Assembly amended Section 44-04-18 fourteen times from 1977-2017. Section 44-04-18 has substantially existed in the subsection paragraph form it is currently in since 1997. (See S.L. 1997, ch. 381, Sec. 2)

While the addition of subdivisions to subsection 2 of 44-04-18.4 in this bill may appear helpful to drafters, legislators, or the general public, 68 years is a long time for a section of state law. According to a quick Westlaw search, Section 44-04-18 is cited in 298 Attorney General opinions. The topics of those opinions, and subsections that were reviewed, would vary widely but for at least 28 years the Attorney General's office has opined on 44-04-18 in the section format that is in current law. Arbitrarily adding subdivisions to subsection 2 of 44-04-18 risks causing confusion with issued opinions. Opinions prior to this bill becoming an effective law would refer to 44-04-18(2) but after August 1, 2025, opinions regarding alleged open record violations regarding record requests would start referring to (2)(a)-(i) with no noticeable change in the language. Legal research searches may miss relevant opinions with this change to subdivisions. Precedent is important and the needles that move precedent should be used intentionally. This bill lacks that intentionality. Our position is that the structure of Subdivision 2 of Subsection 44-

04-18 has been functioning fine since 1997, through many amendments. This change is unnecessary and will lead to confusion.

Requests

Section 44-04-18 of the North Dakota Century Code provides reasonable guardrails regarding the public's access to public records. A few provisions of Section 44-04-18 are relevant to this bill. First, Section 44-04-18 allows public entities the option to charge limited fees for responding to record requests. A public entity is only permitted the option to charge for: paper copies (up to \$0.25 per page), a reasonable fee for copies larger than 8.5x14 inches, actual postage costs, up to \$25 per hour, after the first hour, to locate records, and up to \$25 per hour, after the first hour, to redact records. Further, “[i]f a public entity receives five or more requests from the same requester within seven days, the public entity may treat the requests as one request in computing the time it takes to locate and excise the records.” (N.D.C.C. 44-04-18(2)) Electronic copies of records must be provided without copy charges, with an exception for “actual cost incurred for the extensive use of information technology resources incurred by the public entity.” (N.D.C.C. 44-04-18(3)) Attachment 2 to this testimony is a “Template for Public Entity Use When Responding to Open Records Request” available on the Attorney General’s website which summarizes the most frequently used allowable costs.

The language on page 2, line 12, new subdivision g, of this bill appears to supersede fee requirements in the same section. We fear this will lead to confusion if this bill becomes an effective law. For example, does one requester who is a citizen

of the state that requests meeting minutes from their city commission automatically use up their one request under this bill if they are directed to the website and the public entity's time was less than 5 minutes to respond? And their next request could be assessed other applicable charges? But a requester that asks for ten years of records that require hours to locate and redact with their first request gets the benefit of this new subdivision?

This bill views open record requests optimistically. That is not always the practical case. While one citizen may benefit from one request per year of a full-time employee's work for one full week of work, the risk of this bill is not one citizen getting one free set of records – it is 100 citizens getting up to 40 hours from one entity. That would be a crippling amount of work for most public entities.

Allowing public entities the discretion to charge reasonable fees for public records has been a part of Section 44-04-18 since 1993. (See S.L. 1993, ch. 441, Sec. 1) There is no requirement in ch. 44-04 for a public entity to charge for access to or copies of records. There are only limits on allowable charges; the public entity always has the discretion whether to charge for the records or not. Under current law, all records could be provided for free. Page 2, lines 12-13, of this bill change that precedent and would require a public entity to provide records responsive to one request per requester free of charge. There are a wide range of record requests that public entities receive – from meeting minutes available on a city or county commission websites to voluminous e-mail requests that need days of review and redactions. The law currently provides that a public entity could not charge a

requester for meeting records available on their website and would have the discretion to charge for reviewing e-mails in the second example.

The one request per requester be provided free of charge language in this bill is limited by two things. First, “production of the request does not exceed forty hours” and “the requester is not a citizen of the state.” Record request responses that would take up to forty hours, in my experience hearing from a variety of the public entities defined in ch. 44-04 and opinions issued by this office, are relatively rare. If an entity is dealing with a request nearing forty hours of work that is a significant commitment of the time and resources of the public entity. Allowing public entities to have discretion over charging gives them the authority to decide how to efficiently and responsibly manage timely record request responses. These allowable, discretionary fees are the final guardrail for state agencies and political subdivisions against a vexatious requester that seeks to weaponize the open records law against public entities and public servants.

Second, this bill as currently drafted limits requests under this section to citizen of the state. Under current law, a public entity is specifically prohibited from asking “for the identity of the person requesting public records.” (N.D.C.C. 44-04-18(2)) It is unclear how a public entity would be able to ask for citizenship, to meet this new requirement, but still be prohibited from asking about the requester’s motive or reason for the request or their identity.

As a final reminder, Chapter 44-04 of the North Dakota Century Code defines public entity as:

- 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 or any task force or working group created by the individual in charge of a state agency or institution, 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.

House Bill 1306 applies to all of these entities. This testimony is intended to bring awareness to the legislative assembly that passage of this bill as introduced will cause a significant increase in duties for the long list of public entities in chapter 44-04 and appears to address problems that do not exist while creating new ones. Further, this bill creates conflicts with current law and potentially increases the cost and workload for public entities that they will lose the discretion to recoup.

Thank you for your time and consideration. Please contact our office with any questions.

Office of Attorney General

OPEN RECORDS GUIDE

600 E. Boulevard Avenue, Dept. 125, Bismarck, ND 58505. Tel: (701) 328-2210

North Dakota's laws state that all government records and meetings must be open to the public unless otherwise authorized by a specific law. The basic laws are found in North Dakota Century Code, beginning at §44-04-17.1. The public has the right to know how government functions are performed and how public funds are spent.

DEFINITION OF RECORD

"Record" includes *all recorded information regardless of physical form (e.g. paper, e-mail, computer file, photograph, audiotape or recording, video, text message, etc.) that has a connection with how public funds are spent or with the public entity's performance of its governmental functions or its public business, regardless of format or location.*

Minutes, memos, reports, outlines, notes, employee salary and job performance records, contracts, telephone records, and travel vouchers are all **OPEN** records and **must** be provided upon request.

REQUESTS FOR RECORDS

Anyone has the right to view or get a copy of public records, regardless of the reason or where they live. A request for public records can be made in any available medium. Generally, a public entity cannot ask why the records are requested, ask for identification, or require a request be made in writing (or in person). However, a request must reasonably identify existing records. If a request is unclear, the entity may require written clarification but cannot ask the requester's motive or identity. The entity can delay taking action until receiving written clarification.

- A request for *information* is not a request for records. A public entity does not have to respond to questions about its decisions, duties, functions or operations or to explain the content of its records.

The public entity must respond to a record request within a *reasonable* time, either by providing the record or explaining the legal authority for denying all or part of the request. What is "reasonable" depends on a number of factors, including the scope and type of records requested.

A public entity may only deny access to or a copy of a record for which there is a specific statute closing all or part of the information. A statute may declare certain records to be exempt or confidential.

If a record is **exempt**, a public entity has discretion to release or withhold it. If a record is **confidential**, it either cannot be released or the confidential information within the record first must be redacted.

ALLOWABLE CHARGES

Access to public records is generally free. An entity may charge up to 25¢ a page (standard letter or legal size paper). For other types of records, the entity may charge the **actual cost** for copying, including labor, materials and equipment.

The first hour of *locating* requested records (including electronic records) is free. After the first hour, the entity may charge \$25/hr for locating records and a separate \$25/hr (after the 1st hour) for *redacting* any exempt or confidential information. If providing electronic records takes more than one hour, in addition to charges for locating and redacting, the entity may charge the *actual cost* incurred for use of technology resources. *The entity can require full payment of any estimated costs before starting to make copies or releasing records.*

- An entity does not have to convert its records to another format, create or compile records that do not exist, or obtain records originating from another public entity that it does not have in its possession.

If requested records are available on an entity's website or online, an entity can direct the requester to where the record can be accessed and does not have to provide a copy unless a requester is not reasonably able to access the internet.

A public entity may allow the use of personal devices to duplicate records but can impose reasonable procedures or conditions to protect the integrity of its records.

DENIAL

If a request for records is denied, the entity must explain what specific federal or state law makes all or part of the record closed. If asked, the entity must put the reason for the denial in writing. The denial must state if the requested record does not exist.

- It is not a violation if a public entity declines to provide an exempt record, or if the reason a public entity cannot provide a record is that it does not exist, even if the requester believes the record *should* exist.

REFUSAL

If repeated requests for records disrupt other essential functions, a public entity may refuse to provide access to or copies of its records to that requester but must put its reasons for doing so in writing. A requester may seek an opinion from the Attorney General on whether the entity's refusal was proper.

OPINION REQUESTS

A request for an opinion must be submitted to the Office of Attorney General within 30 days of the alleged open record violation or refusal, regardless of when the requester became aware of the violation.

EXEMPT (may be withheld at the discretion of the public entity)

- Home address, home/personal phone numbers, employee ID number, driver's license number, dependent information and emergency contact of public employees **§44-04-18.1(2)**, or individuals licensed by a state occupational/professional board, association, agency, or commission **§44-04-18.1(4)**.
- Personal financial information of public employees used for payroll purposes and the *type* of leave taken or accrued (the *amount* of leave taken and dates taken is open) **§44-04-18.1**.
- Active criminal intelligence, criminal investigative information, officer training materials, information that may impact officer safety **§44-04-18.7**, the work schedule of employees of a law enforcement agency **§44-04-18.3(3)**; records relating to background interviews of law enforcement applicants **§44-04-18.31**, active investigations records of MFCU **§50-24.8-12**.
- Homicide or sex crime scene images or any image of a minor victim of a crime **§44-04-18.7(8)** image of a victim of a fire **§44-04-30(4)**.
- Address, phone number, identifying information that could be used to locate or identify a victim/alleged victim of domestic violence, human trafficking, a sex offense, or a sexual performance by a child **§44-04-18.20**.
- Law enforcement records containing an individual's personal information, including driver's license number, day/month of birth (the year of birth is open), home street address (the city, state, zip is open), height, weight, home and personal cell phone numbers, and medical information **§44-04-18.7**. *NOTE: If a victim has asserted Marsy's law: the complete home and employment address or location, email address, and any other contact information for the victim or a member of the victim's family is also protected. This information may be contained in digital media such as audio, video, or images, or in witness statements.*
- Address, phone number, place of employment or other information in records of a criminal justice agency, correctional facility or the DOCR that could be used to locate the victim or witness to a crime **§12.1-34-02(11)**.
- Financial account numbers **§44-04-18.9**.
- Communications between a legislator and a public employee or official **§44-04-18.6**.
- E-mail address/phone number of an individual provided for purposes of communicating with a public entity, except this exemption cannot be used to shield the person's identity **§44-04-18.21**.
- Interviews/statements of child victims or witnesses obtained during an investigation of a violent crime or sex offense **§12.1-35-03(2)**.
- Driver's license number, phone, day/month of birth, and insurance information from a motor vehicle accident report form, except it is open to the parties involved or their insurers **§39-08-13(4)**.
- Applications for employment with a public entity, until the finalists are designated, then the applications and related records of the designated finalists are open **§44-04-18.27**.
- Records related to the name and medical condition of an individual and treatment provided by a public entity during an emergency medical response **§44-04-18.22**, medical records or other records containing medical information in possession of public entity **§44-04-18.32**.
- Recordings of 911 calls and related responses, except a person may listen to, or obtain written transcript of, the recordings **§57-40.6-07(4)**.
- Body camera images taken in a private place by law enforcement or firefighter **§44-04-18.7**.
- Records relating to the internal investigation of a complaint of misconduct by an entity or employee, but only until the investigation is complete or for 75 days, whichever is first, then it is open **§44-04-18.1**.
- Attorney work product **§44-04-19.1(1)** and active litigation records **§44-04-19.1(12)**.
- Security system plans, critical infrastructure information vital to maintaining public safety, security, or health; **§44-04-24**; public health & security response plans **§44-04-24**, **§44-04-25**, records relating to cyberthreats, or security, disaster, or emergency threat assessments, mitigation, responses, or recovery, of public facilities or critical infrastructure **§44-04-18.4**.
- Bids/proposals in response to an RFP, but only until all proposals opened/presentations heard, after which it is open **§44-04-18.4(6)**.
- Personal information of applicants/recipients of economic assistance programs administered under division of community services or a community action agency **§44-04-18.19**.
- Records revealing negotiating strategy and draft agreements subject to negotiations, but only as long as release would have an adverse fiscal effect on the entity **§44-04-19.2**.
- Settlement agreements between a public entity and another party, until fully executed and accepted by all parties **§44-04-19.1**.
- Private donor and prospective donor personal and financial information. **§44-04-18.15**.
- Title IX complaint and investigation records **§44-04-18.28**.
- Risk Management records of claims against the state/employee **§32-12.2-11(1)** & state agency loss control committee records **§32-12.2-12**. ■

CONFIDENTIAL (cannot be released)

- Social Security number **§44-04-28**;
- Phone number & home address of prosecutors, supreme court justices, district court judges, judicial referees, juvenile court directors or probation officers, employees of law enforcement agencies, state or local correctional facilities, and DOCR (*the home address included in a GIS system or property tax records is also confidential but only if the individual or their employer submits a written request, renewed annually*); records or other information that would reveal the identity, or endanger the life or physical well-being, of an undercover officer; **§44-04-18.3**;
- Public employee medical treatment records **§44-52.1-12**, **§44-04-18.1(1)**, **Ch. 23-01.3**; patient records at university system medical centers or public health authority **§44-04-18.16**; Employee Assistance program records **§44-04-18.1(1)**; HIPAA may prohibit release of health information from other sources.
- Criminal history records **§12-60-16.5**, **§12-60-16.6**. *These may be obtained only from BCI.*
- Identifying information of a living child victim or witness of a crime, except in the case of traffic accident or victim of fire **§12.1-35-03**;
- Names of persons injured or deceased, but only until law enforcement has notified the next of kin or for 24 hours, whichever occurs first, then the information is open **§39-08-10.1**;
- Autopsy photographs, images, audio/video recordings, working papers, notes, except the final report of death, which becomes open eight days after it is finalized **§44-04-18.18**, **§23-01-05.5**;
- Income, and sales & use tax returns and information **§57-38-57**, **§57-39.2-23**;
- Trade secret, proprietary, commercial & financial information, if it is of a privileged nature and has not yet been publicly disclosed; research records of the universities and colleges under the SBHE; **§44-04-18.4**;
- Electronic security codes and passwords **§44-04-27**;
- Fire investigations until the investigation is completed, then it is open **§44-04-30(1)**;
- WSI employer files, except a Safety Grant recipient's name & amount awarded is open **§65-04-15**;
- Foster care records **§50-11-05**;
- Law enforcement & correctional facility records of delinquent, unruly, or deprived child **§27-20-52(1)**. ■

Attachment 2 to "Testimony of Annique Lockard, Office of Attorney General, House Bill 1306

TO:

FROM:

Re: Your request for records

DATE

You requested records¹:

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- Pursuant to N.D.C.C. § 44-04-18(4), [available] records responsive to your request are online at:

 - Attached are [the records you requested] [additional records responsive to your request].
 - Some information is redacted because it is exempt and/or confidential pursuant to Marsy's Law and/or N.D.C.C. §§ _____
 - To the extent [requested] [other records] may/do exist, release is prohibited by the provisions of Marsy's law and/or the records are/would be confidential or exempt in entirety, under N.D.C.C. §§ _____
 - The records you requested cannot be provided because no such records exist OR the requested records are not records of this agency.
 - The estimated cost for the requested records is calculated as follows:

Actual cost of technology resources	\$ _____
_____ pages @ 25¢ per page	\$ _____
_____ other copies @ \$ _____ each	\$ _____
_____ hours for locating records @ \$25/hr (after the 1 st hour)	\$ _____
_____ hours for redacting records @ \$25/hr (after the 1 st hour)	\$ _____
TOTAL:	\$ _____

Estimated costs are payable *in advance*. We do not waive estimated costs. *After* we receive a *cashier's* check/money order for the estimated costs, payable to "_____", we will begin work on your request. We estimate it will take approximately _____ days to complete your request.

- If we do not receive [payment] [clarification] from you within ten (10) days from today's date, we will consider your request withdrawn.
- Your request did not reasonably identify specific records. We cannot comply with your request without clarification. Please call me at (701) _____.
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¹ A public entity does not have to convert its records to another format, create or compile records that do not exist, or obtain records originating from another public entity that it does not have in its possession. A public entity has no obligation to respond to requests for *information*, to respond questions about its duties, functions or operations, or to explain the content of its records.