

Office of Attorney General



Guidance on Marsy's Law

(1) **Who can invoke the rights provided in Marsy's Law?**

An individual must meet the definition of a "victim" to invoke the rights of Marsy's Law. A person must suffer direct or threatened harm as a result of a crime to be considered a "victim."

A "victim" is defined by Marsy's Law as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. If a victim is deceased, incompetent, incapacitated, or a minor, the victim's spouse, parent, grandparent, child, sibling, grandchild, or guardian, and any person with a relationship to the victim that is substantially similar to a listed relationship, may also exercise these rights. The term 'victim' **does not include** the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim." N.D. Const. art. I, § 25 (4).

A "victim" is further defined in N.D.C.C. § 12.1-34-01(10) as "a natural person who has suffered direct or threatened physical, financial, or psychological harm as the result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed." The term 'victim' includes the family members of a minor, incompetent, incapacitated, or deceased person."

(2) **Who is responsible for distributing "Marsy's Cards" to victims?**

Crime victims should be given a "Marsy's Card" outlining his or her rights under Marsy's Law. The Office of Attorney General has developed an official "Marsy's Card" for statewide use by criminal justice agencies in compliance with N.D.C.C. § 12.1-34-08. Criminal justice agencies **must** use this official Marsy's Card, available for download from the Criminal Justice Resources page of the Attorney General's website, www.attorneygeneral.nd.gov.

Law enforcement officials investigating a criminal act should, at the time of initial contact with the victim or as soon thereafter as possible, provide a "Marsy's

Card” to each victim. The prosecuting attorney should provide the victim with a Marsy’s Card if the victim does not already have one.

The Department of Corrections & Rehabilitation (DOCR) is responsible for providing post-conviction notifications to victims of offenders in the custody of the DOCR.

The provision of a card to the victim(s) should be documented for the record by the responding law enforcement officer (if applicable) and/or the prosecuting attorney.

(3) Does a victim need to affirmatively assert the rights of Marsy’s Law?

Yes - A victim must affirmatively assert his or her rights outlined in Marsy’s Law.

(4) How does a victim enforce their rights under Marsy’s Law?

Victims must specifically assert their right to the responding law enforcement officer at the time of the initial response, OR thereafter to the appropriate prosecuting attorney’s office. The prosecuting authority will be either the State’s Attorney or City Attorney, depending on the crime and jurisdiction. Victims may contact the prosecuting attorney’s office in the county or city in which the crime or attempted crime was committed in order to assert these rights.

If a victim immediately asserts his or her rights under Marsy’s Law to the responding law enforcement officer, the responding law enforcement agency will need to consider the protected information under Marsy’s Law before responding to any record requests, media inquiries or issuing a release/statement. This protected information could include the address of the crime and any contact information pertaining to the victim. Law enforcement officers should refer to question (7), following, for guidance on what information is protected.

An assertion of Marsy’s Law rights by the victim(s) should be documented for the record by the responding law enforcement officer (if applicable) and/or the prosecuting attorney.

(5) Which agencies are subject to the asserted rights and enforcement of Marsy’s Law?

Marsy’s Law provides that “[t]he victim...may assert and seek enforcement of the rights enumerated in this section...in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right.” N.D. Const., art. I, § 25(2). This includes any court of the state in which the criminal proceeding is being heard, the prosecuting attorney, and criminal justice agencies.

“Criminal justice agency” is defined as follows:

N.D.C.C. § 12-60-16.1(6): “any government law enforcement agency or entity authorized by law to provide information regarding, or to exercise the powers of, arrest, detention, prosecution, correctional supervision, rehabilitation, or release of persons suspected in, charged with, or convicted of, a crime.”

N.D.C.C. § 44-04-18.7(5): “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.”

(6) Documenting a victim’s assertion of rights.

Until an electronic system is in place that provides a central location to record whether a victim has asserted his or her rights under Marsy’s law, it is the responsibility of the prosecuting attorney’s office to develop an internal system or method to document who has asserted these rights. This internal system or method should be updated regularly.

The individual who is responsible for responding to open records requests within the prosecuting attorney’s office should have access to this system and information so that record requests are responded to in a timely manner.

(7) What information and records are protected under Marsy’s Law?

Marsy’s Law provides 19 enumerated rights for victims in North Dakota including the “right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim’s family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records.” N.D. Const. art. I, § 25(1)(e). *See also* N.D.C.C. ch. 12.1-34 – Fair Treatment of Victims and Witnesses, N.D.C.C. ch. 12.1-35 – Child Victim and Witness Fair Treatment Standards, and N.D. Sup. Ct. Admin. R. 41.

The North Dakota Constitution also provides “[u]nless otherwise provided by law, 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.” N.D. Const. art. XI, § 6. *See also* N.D.C.C. ch. 44-04 – open record and meeting laws, beginning with N.D.C.C. § 44-04-17.1.

The above constitutional and statutory provisions must be read together as a whole to provide a consistent meaning and to reach a just and reasonable result, feasible of execution. N.D.C.C. § 01-02-38(3) and (4).

The following is intended to reconcile Marsy's Law with the state's open records law:

Information that can be used to locate a victim or victim's family:

Under Marsy's Law, addresses or other information that could reasonably be used to locate a victim or a member of the victim's family is protected. This includes employment addresses, references to a building in which an individual works or resides, or any other information that could reasonably be used to locate the victim or the victim's family. This information could be contained in digital media such as audio, video or images, or in witness statements. See *also* N.D.R.Crim.P. 16 and N.D. Sup. Ct. Admin. R. 41.

Information that can be used to harass the victim or victim's family:

Under Marsy's Law, telephone numbers and other contact information that could be used to harass a victim or victim's family is protected. This information could be contained in digital media such as audio, video or images, or in witness statements. See *also* N.D.R.Crim.P. 16 and N.D. Sup. Ct. Admin. R. 41.

Information that would disclose privileged information about the victim:

"Privileged" information is not defined in Marsy's Law or by North Dakota open records law. However, several statutes found throughout the North Dakota Century Code provide protection for certain "privileged" information. The public entity will need to point to such a law to withhold information or records that are "privileged."

Information that would disclose confidential information about the victim:

"Confidential" information is already defined and protected under the open records law and includes "all or part of a record...that is either expressly declared confidential or is prohibited from being open to the public." N.D.C.C. § 44-04-17.1(3). The public entity will need to point to such a law to withhold information or records that are confidential.

Names of a Victim or Victim's family

There is nothing under Marsy's Law that protects the name of a victim or the victim's family. There are, however, limited exceptions under the open records law that would protect the identity of certain crime victims. For example, the identity of victims of domestic violence, sexual offenses, sexual performance of a child, or human trafficking are protected under N.D.C.C. § 44-04-18.20. Child victim names and identifying information, except if they relate to victims of traffic accidents or of a fire, are protected under N.D.C.C. § 12.1-35-03. Unless the victim falls into one of those categories, **the victim's name cannot be withheld.**

Some common laws that already provide protections to victims include:

- N.D.C.C. § 12.1-34-01(11): "Victim" means a natural person who has suffered direct or threatened physical, financial, or emotional harm where there is probable cause to believe that the harm has been caused by the commission of a criminal act. The term "victim" includes the family members of a minor, incompetent, incapacitated, or deceased person.
- N.D.C.C. § 12.1-34-02(5): Victim contact and location information is confidential.
- N.D.C.C. § 44-04-18.7: Active criminal intelligence and investigative information is exempt.
 - "Personal information" contained in such records is exempt, regardless of whether a case is active or inactive, and includes home street address, home and cell phone numbers, month and date of birth, height and weight, medical records and medical information, motor vehicle operator identification number, social security numbers, any credit, debit, or electronic funds transfer card numbers, and any financial account numbers.
- N.D.C.C. § 44-04-18.7(8): Crime scene images of a victim of a homicide or sex crime or any image of a minor victim of any crime is exempt.
- N.D.C.C. § 44-04-18.7(9): Images from a body camera or similar device taken in a private place is an exempt record.
- N.D.C.C. §§ 11-19.1-11, 23-01-05.5, 44-04-18.18: Autopsy report and images are confidential. The final report of death is confidential until eight days after it is finalized, after which it is an open record. N.D.C.C. § 23-01-05.5.
- N.D.C.C. § 44-04-18.21: Email addresses and telephone numbers are exempt.
- N.D.C.C. § 44-04-18.22: Information regarding the medical condition and medical treatment provided to an individual during an emergency medical response is exempt.
- See also: N.D.R.Ct. 3.4 (privacy protection for filings made with the Court).

(8) Procedure for responding to a request for records.

Unless it is already affirmatively documented by the criminal justice agency, agencies responding to open record requests must contact the prosecuting attorney's office in the city or county in which the crime was committed and ask whether a victim has affirmatively asserted his or her rights under Marsy's Law before responding to record requests. A criminal justice agency may respond to the requestor that the requested records may be subject to Marsy's Law and it is in the process of determining whether such rights have been asserted.

The prosecuting attorney's office should determine whether such rights have been asserted and communicate this to the criminal justice agency. The criminal justice agency must then respond to the request for records taking into account Marsy's Law, if there is an affirmatively asserted right, and open records law.

The prosecuting attorney's office or victim witness coordinators/advocates must notify a victim that a request for records has been made.

(9) How does a victim get notification about a request for information about them?

Under Marsy's Law and N.D.C.C. § 12.1-34-02 (1)(b), a victim has the right to be notified of any request for information or records that could be used to locate or harass the victim or victim's family or that would disclose confidential or privileged information about the victim.

This type of request for information could come in the form of a records request or as a discovery request under the Rules of Criminal Procedure. With regard to compliance with Rule 16, the prosecuting attorney will need to notify the victim that the requested information is subject to disclosure. However, prosecuting attorneys should use their discretion in redacting protected information to be in compliance with this section.

Criminal justice agencies responding to record requests should contact the prosecuting attorney's office to verify whether the victim has invoked his or her rights to the protections afforded under Marsy's Law. The prosecuting attorney, or victim's advocates working with the same, must provide notification to the victim that a records request has been made.

A victim must provide contact information to the prosecuting attorney so he or she can be notified of any such requests. Victims should be informed of their responsibility to provide accurate and up-to-date contact information.

(10) Can a victim receive a copy of a report or record?

Under Marsy's Law, the victim has the right, upon request, to receive a copy of any report or record relevant to the exercise of a victim's right, except for those portions made confidential by law or unless a court determines disclosure would substantially interfere with the investigation of a case, and to receive a copy of any pre-sentence report or plan of disposition when available to defendant or delinquent child. See also N.D.R.Crim.P. 32.

(11) What if a victim doesn't want to talk to the defense attorney?

Under Marsy's Law, a victim has the right to refuse an interview, deposition or other discovery request made by the defendant, the defendant's attorney, or any person acting on behalf of the defendant. If the victim chooses to participate in any of the above referenced communications, the victim has the right to set

reasonable conditions on the conduct of any such interactions. See also N.D.R.Crim.P. 15 and N.D.R.Juv.P. 12.1.

However, this right does not apply at trial when a victim is a witness subject to cross examination by the defendant or the defendant's attorney.

(12) How will a victim know what's going on while the case is pending?

Under Marsy's Law, a victim has the right to reasonable, accurate and timely notice of, and to be present at, all proceedings involving the criminal or delinquent conduct, including release, plea, sentencing, adjudication and disposition, and any proceeding during which a right of the victim is implicated.

The prosecuting attorney's office is responsible for providing notice to the victim of any scheduled hearings. A victim must provide contact information to the prosecuting attorney so he or she can be notified of any scheduled hearings.

In addition, the victim should register his/her information for relevant court case notifications with the North Dakota Statewide Automated Victim Information and Notification System (ND SAVIN) which will provide notifications of most district court hearings (ND SAVIN does not provide notice of municipal court hearings or juvenile court proceedings).

(13) At what type of hearings is a victim allowed to be heard?

Under Marsy's Law, the victim has a right to be heard in any proceeding involving release, plea, sentencing, adjudication, disposition or parole, and any proceeding during which a right of the victim is implicated. This applies equally to juvenile victims. See N.D.R.Juv.P. 4(3).

The prosecuting attorney's office is responsible for notifying the victim of the court proceedings listed above. Also, the victim should register with the North Dakota Statewide Automated Victim Information and Notification System (ND SAVIN) for court case notifications, which will provide notifications of most district court hearings (ND SAVIN does not provide notice of municipal court hearings or juvenile court proceedings).

The Department of Corrections & Rehabilitation (DOCR) is responsible for notifying the victim of parole board and pardon board proceedings.

In addition, the victim should register with ND SAVIN for DOCR incarceration notifications, which will provide notification of parole board proceedings (ND SAVIN does not provide notice of pardon board proceedings).

It is the victim's responsibility to provide accurate and up to date contact information to the prosecuting attorney, ND SAVIN and DOCR.

(14) Will a victim get the chance to tell the court how this crime has impacted his/her life?

Under Marsy's Law, a victim has the right to provide information regarding the impact of the offender's conduct on the victim and the victim's family to the individual responsible for conducting any pre-sentence or disposition investigation or compiling any pre-sentence investigation report or recommendation regarding, and to have any such information considered in any sentencing or disposition recommendations.

If the court orders a pre-sentence investigation, the prosecuting attorney's office is responsible for providing the DOCR with a Victim Impact Statement, if one exists. If one does not exist, the DOCR is responsible for contacting the victim to gather the requisite information.

(15) How will a victim know the final outcome of the case?

Under Marsy's Law, the victim has the right to be informed of the conviction, adjudication, sentence, disposition, place and time of incarceration, detention or other disposition of the offender, any scheduled release date of the offender, and the release of or the escape by the offender from custody or commitment.

The prosecuting attorney's office is responsible for providing the court related information to the victim. A victim must provide contact information to the prosecuting attorney so he or she can be notified of any scheduled hearings.

The custodial authority is responsible for providing the incarcerated related information to the victim.

In addition, the victim should be encouraged to register with ND SAVIN to receive automated notifications by telephone, text or email. Multiple registration options are available on ND SAVIN. A victim may select to register to receive some or all of the following types of notifications:

1. Offender incarceration
 - For jails, incarceration notifications include release (with reason when provided), escape, return to custody, transfer, and additional notifications, where available (such as death, temporary leave, and work release).
 - For DOCR notifications it includes all the notifications above, as well as the fact an offender is out to court, returned from court, 30-day advance release, has move to another facility, and parole board notifications.
2. Offender Criminal Case Hearings, case status, and disposition.
3. Offender Parole & Probation
 - Change of address, offender absconded or returned, offender revocation status and off-revocation status, and expiration/discharge.

4. Protection and Restraining Orders

- Service of order, hearing schedule and changes, order status, and expiration (with 30 day advance notice).

A victim's registration with ND SAVIN alone does not fulfill criminal justice agencies' notification obligations. Criminal justice agencies must routinely use ND SAVIN administrative tools to check to ensure timely notification was made through ND SAVIN to victims who have asserted Marsy's Law rights. If not, they must make timely notification through other means.

(16) What if a victim is afraid the defendant will be released early? Is there anything a victim can do to participate in the process to help prevent that from happening?

Under Marsy's Law, the victim is to be informed in a timely manner of all post-judgment processes and procedures, to participate in proceedings, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender. The parole authority shall extend the right to be heard to any person harmed by the offender.

The prosecuting attorney's office is responsible for providing notice to the victim if a post-judgment motion for reduction in sentence is filed with the court. A victim must provide up-to-date contact information to the prosecuting attorney so he or she can be notified of any scheduled hearings.

In addition, the victim should register his/her information for court case notifications with ND SAVIN, which provides notifications of post judgment hearings occurring within two years of the case closure. The victim should also register his/her information for DOCR incarceration notifications with ND SAVIN to receive parole board notifications.

The DOCR is responsible for notifying victims of offenders at the DOCR.

It is the victim's responsibility to provide accurate and up to date contact information to the prosecuting attorney, ND SAVIN and the DOCR.

(17) How will a victim know if the defendant's custody status changes?

Under Marsy's Law, the victim has the right to be promptly notified of any release or escape of the accused.

The victim is responsible for registering his/her information with the North Dakota Statewide Automated Victim Information and Notification System (ND SAVIN) which will provide notification of a defendant's release from county jail and the DOCR. Some correctional facilities may automatically register victims for notification, provided there is a method for opt-out. Victims can opt out of ND SAVIN notifications by calling the ND SAVIN/VINE Help Line. Victims must

contact the Department of Juvenile Services (DJS) at the DOCR to be registered for notification regarding a juvenile. ND SAVIN does not provide notifications for civil commitments.

Correctional facilities involved in the booking, release and/or transfer of an inmate to a new facility are responsible for changing the status of the inmate in their jail management systems to reflect the status of the offender in a timely manner, including "transfer" status.

If the defendant returns to custody after his/her release on bail, the correctional facility is responsible for notifying the victim of the defendant's change in custody, as a bond hearing is likely to follow. The prosecuting attorney is then responsible for notifying the victim of any court hearings, including bond hearings.

The State Hospital is responsible for notifying victims of an offender's release or escape from commitment.

It is the victim's responsibility to provide accurate and up to date contact information to the prosecuting attorney, ND SAVIN, DOCR, DJS, and the State Hospital.

(18) Does a victim get his/her property back? How?

Under Marsy's Law, a victim has the right, upon request, to the prompt return of the victim's property when no longer needed as evidence in a case.

The victim is responsible for providing the prosecuting attorney with a list of the requested property. The prosecuting attorney is responsible for arranging the release of the requested property. If the property is a consumer good, the prosecuting attorney will need to comply with N.D.C.C. ch. 29-31.1 and N.D.C.C. § 29-01-20.

(19) What about restitution?

Under Marsy's Law, a victim has the right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct.

All monies and property collected from any person who has been ordered to make restitution shall be first applied to the restitution owed to the victim before paying any amounts owed to the government.

The victim shall provide the prosecuting attorney's office an itemized list of the nature and amount of restitution requested. Restitution will need to be handled in conjunction with the statutory provision found in N.D.C.C. § 12.1-32-08, which requires a restitution hearing prior to a Court's order for restitution.

(20) Who can act on a victim's behalf to assert his/her rights?

Under Marsy's Law, the victim, the retained attorney of the victim, a lawful representative of the victim, or the attorney for the government upon request of the victim, may assert and seek enforcement of the rights enumerated and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right.

(21) Does Marsy's Law create a claim against the State for damages if there's a violation of a victim's rights?

Marsy's Law does not create any cause of action for damages against the State, any officer, employee, or agent of the State or of any of its political subdivisions, or any officer or employee of the court.

(22) What responsibilities does a victim have under Marsy's Law?

A victim must specifically assert their rights to the responding law enforcement officer at the time of the initial response, OR thereafter to the appropriate prosecuting attorney's office.

The victim also is responsible for registering with ND SAVIN to receive notifications as directed, and for ensuring that the victim's contact information is accurate and kept up to date in ND SAVIN and at the prosecuting attorney's office, ND DOCR, DJS, the State Hospital, and/or any other entity as required in order to receive notifications. ❖