

## OPEN RECORDS REQUIREMENTS AFFECTING ELECTRONIC MAIL AND RECORDS MANAGEMENT

This memorandum was prepared in response to a request for information regarding the effect of North Dakota open records requirements on the use and management of documents transmitted via electronic mail.

### NORTH DAKOTA OPEN RECORDS LAWS

Section 6 of Article XI of the Constitution of North Dakota provides:

Unless 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.

North Dakota Century Code (NDCC) Section 44-04-18 also provides that unless otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. Section 44-04-17.1 defines a record as "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." Section 44-04-17.1 further provides that a record includes preliminary drafts and working papers.

With respect to electronically stored records, Section 44-04-18 provides that access to an electronically stored record must be provided at the requester's option in either a printed document or through any other available medium. If no means exist to separate or prevent the disclosure of any closed or confidential information contained in a computer file, the computer file is not considered to be an available medium.

Because the definition of "record" appears to include electronically produced and stored information, electronic mail is subject to the constitutional and statutory provisions that require all records of public or governmental entities of the state or a political subdivision are public records that must be open and accessible for inspection. However, not all electronic mail may be considered to be a "record" that is subject to the open records requirement. If an electronic mail document in the possession or custody of a public entity or agent is of a personal nature and was not received or prepared for use in connection

with public business or contains information relating to public business, the document does not fall within the definition of a "record" under Section 44-04-17.1. In addition, the North Dakota Century Code contains various exceptions to the open records requirements, including:

1. Public employee personal, medical, and employee assistance records (NDCC Section 44-04-18.1).
2. Records of law enforcement and correctional employees and records relating to confidential informants (NDCC Section 44-04-18.3).
3. Trade secret, proprietary, commercial, and financial information and information relating to economic development records (NDCC Section 44-04-18.4).
4. Records relating to the Legislative Council, the Legislative Assembly, the House of Representatives, the Senate, or a member of the Legislative Assembly if the records are of a purely personal or private nature, a record that is an attorney work product or is attorney-client communication, a record that reveals the content of private communications between a member of the Legislative Assembly and any person, and a record of telephone usage which identifies the parties or lists the telephone numbers of the parties involved (NDCC Section 44-04-18.6).
5. Active criminal intelligence information and criminal investigative information (NDCC Section 44-04-18.7).
6. Attorney work product (NDCC Section 44-04-19.1).

### NORTH DAKOTA RECORDS MANAGEMENT REQUIREMENTS

North Dakota Century Code Section 54-46-05 requires the head of each executive branch agency to establish and maintain an active, continuing program for the economical and efficient management of the records of the agency, regardless of the form of the records. That section also requires agency heads to submit to the state records administrator schedules proposing the length of time each state record series warrants retention for administrative, legal, or fiscal purposes. Section 54-46-08 requires the administrator, after consultation with the official or department head concerned, the Attorney General, the State Auditor, and the state archivist to determine that the type or class of record has no further administrative,

legal, or fiscal value before the final disposition of any type or class of record.

North Dakota Century Code Section 12.1-11-05 provides that it is a Class C felony if a public servant who has custody of a government record knowingly, without lawful authority, destroys the verity or availability of a government record. That section defines a "government record" as any record, document, or thing belonging to, or received or kept by the government for information or record, or any other record, document, or thing required to be kept by law pursuant to a statute that expressly invokes the penalty in that section.

### **CONCLUSION**

Unless specifically exempted from the open records requirements, electronic mail in the 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 is a public record that must be open and accessible for inspection. The definition of record includes preliminary drafts and working papers. Agencies in the executive branch of state government are required to maintain a records management program to guide the agencies in retaining records of the agency. Electronic mail that is a record of the agency must be maintained and disposed in the same manner as any other record of the agency. It is a Class C felony for a public servant to improperly dispose of or destroy a government record. Therefore, a public servant who destroys a public record, including electronic mail or a record that consists of preliminary drafts or working papers, could be subject to criminal prosecution, unless it can be shown the record was disposed of under an approved records management program.