

# Open Meetings



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# Disclaimer

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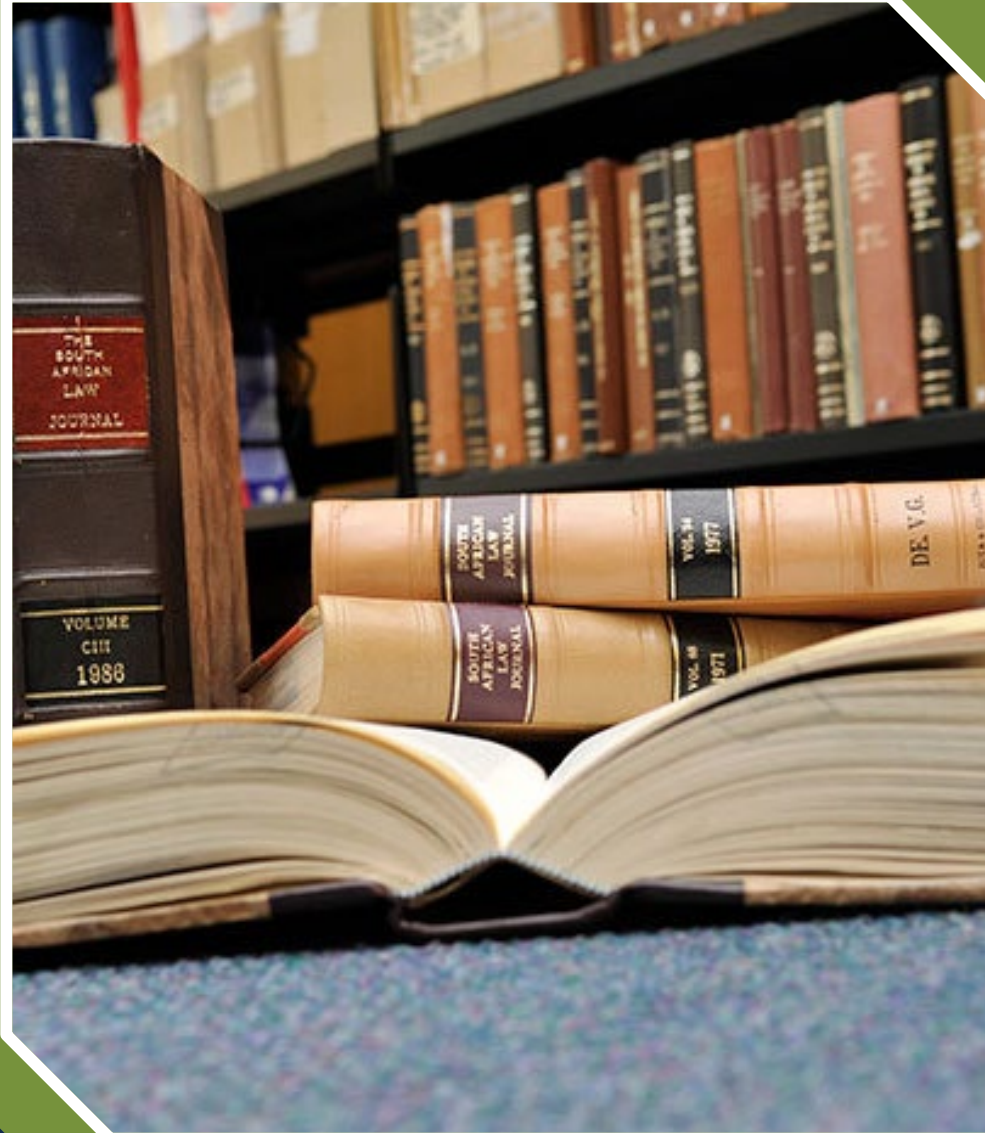
This presentation is not intended as legal advice.

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The information and commentary provided in this presentation and any comments or materials provided are for educational purposes only and should not be considered legal advice.

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Please consult with your public entity's attorney for legal counsel as needed.



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# Open Records & Open Meetings

## Primary Sources

- ND Constitution Article 11
- N.D.C.C. Chapter 44-04

## Secondary Sources

- North Dakota Attorney General Opinions
- North Dakota Supreme Courts Cases

# What is a meeting?

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A **quorum** of  
a **governing body**  
of a **public entity**  
discussing **public business**  
**is an Open Meeting.**

# What is a quorum?

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**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.

# Reminder

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## Meetings can happen...

- By conference call;
- On very short notice;
- Over video conference; or
- At a restaurant

**anywhere** a quorum is present.

# Open Meeting Exceptions

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- Chance or social gatherings where no public business is considered or discussed.
- Emergency operations during a disaster or emergency declared under section 37-17.1-10 or an equivalent ordinance if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group.
- Attendance at meetings of national, regional, or state associations.
- Training seminars where no public business is discussed.

# Meetings includes Committees

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- Committee: **Two or more people** acting collectively pursuant to authority delegated to that group by the governing body.
  - *Includes delegation of any public business, including information gathering.*
  - *Applies even if the public business being discussed was not delegated, and **no decision-making authority was granted**, to the committee by the governing body, so long as it relates to the business of the public entity.*

Key questions:

- Did the governing body delegate any sort of authority?
- Is the committee doing something the governing body could do itself?



# Reminder

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It does not matter...

- If the committee does not have final authority;
- If the committee is just “brainstorming” or “fact-finding;”
- If the committee is only intended to recommend something to the governing body;
- If the subject being discussed is not a subject within the authority delegated to the committee.

...a quorum of a committee is still a meeting.

# Two Kinds of Meetings

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## Regular Meetings

- Set by filing yearly schedule.
  - *Must still create agenda for each meeting.*
- May discuss items not on the agenda at the meeting.
- Agenda should contain all topics known at the time the agenda is drafted but may contain some boilerplate or catch-all items (i.e. “Committee Reports”).

## Special Meetings

- Can **only discuss the items on the published agenda.**
- Agenda must be specific (no “catch-all” entries such as “old business”).

# Access to Meetings

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- If a meeting is held in-person, the meeting room must be accessible to, and the size of the room must accommodate, the number of persons reasonably expected to attend the meeting.
- If the meeting is held by electronic means, the electronic capacity must accommodate the number of persons reasonably expected to attend the meeting remotely.

# What must the notice include?

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- Time, date, and location of the meeting;
- Topics to be discussed;
- Notice of any executive session.
- If a meeting is held electronically, **the information necessary to join the meeting must be in the notice.** (i.e. Zoom/Teams link)

Remember: The public should be able to read the notice and understand what the governing body is planning to discuss.

Do not be vague.

# When should the Notice be provided?

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- Notice should be posted “**at the same time as such governing body’s members are notified.**”
  - *Remember: When governing body receives the agenda, the public should see the agenda.*

*If it’s a special meeting, and the members know the date of the meeting, but no agenda has been prepared?*

- Post notice of date at the same time members know of the date.
- Once agenda is prepared, it should also be posted at the required locations.

# Where must the notice go?

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- Posted at the main office and
- Location of the meeting on the day of the meeting;
- Appropriate central location: County Auditor AND posted on public entity's website (if you have a website);
- Given to anyone who has requested it.

Special meetings – notification must be given to official newspaper. (*Committee meetings are probably special meetings*)

- Remember: **This does not mean it needs to be published.**

# What must meeting minutes contain?

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- Names of members attending;
- Date and time meeting was called to order and adjourned;
- List of topics discussed;
- Description of each motion made and whether it was seconded (and by whom);
- Results of every vote taken; and
- The vote of each member on every roll call vote (required for all *nonprocedural* votes).

# Common Meeting Violations

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Using emails or other communication methods where a quorum is involved to discuss public business.

- Permissible
  - *To provide information for members to review before a meeting;*
  - *To set a meeting date.*
- Violations
  - *Hitting “**reply all**” to a permissible communication to hold a discussion or provide an opinion.*
  - *A member sharing thoughts, ideas, or opinions to a quorum of a public entity or a committee, even if no one responds.*
  - *Track changes? Sharepoint? G-drive?*



# Common Meeting Violations

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- Straw polling (no matter who does the polling)
  - *Calling members prior to the meeting and polling their votes*
- Serial meetings
  - *A series of smaller gatherings, where public business is discussed, which collectively constitute a quorum*



# Executive Session

N.D.C.C. § 44-04-19.2



# Executive Sessions

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Must be specifically authorized by law

- Most common reasons:
  - *Discussing exempt/confidential records,*
  - *Attorney consultation; and*
  - *Negotiation strategy.*

# Executive Sessions

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Common violations:

- *Closing meeting to discuss personnel matters!*
  - *Contractual terms and negotiation strategy may be discussed in executive session, but personnel issues cannot.*
- *Procedural discussion within the executive session.*
  - *Roll call*
  - *Motions*

# Attorney Consultation

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## 2 Ways

1. Advice regarding and in anticipation of reasonably predictable or pending litigation or adversarial administrative proceedings **OR**
2. To receive attorney's advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity, which, if held in public, **would have an adverse fiscal effect.**

# Attorney Consultation

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- All statements made by a participant or between participants during an executive session held for the purpose of attorney consultation are exempt if the statements relate to the subject for which attorney consultation was established
- Remember: Just because attorney is sitting in does not automatically make it an attorney consultation!

# Negotiation Strategy

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- Must relate to strategy or provide instructions to an attorney or other negotiator,
- Regarding a pending claim, litigation, adversarial administrative proceedings, or contracts,
- Which is currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future,
- **AND** must have adverse fiscal effect if the discussion would be held in public.

# How to Hold an Executive Session

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- Convene in open meeting;
- Announce in open meeting the topics to be discussed and legal authority;
  - *Note: **To discuss confidential information – no motion necessary.** To discuss exempt/closed information - motion to enter executive session.*
- Record the session on audio or video (**keep for 6 months**);
- Note time of executive session and who attended in minutes;
- Only discuss topics in announcement;
- (usually) Final action in open meeting.





# Violations

# Violations Basics

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- Any interested person may request an attorney general's opinion to review: 1) a written denial of a request for records or 2) a denial of access to a meeting.
  - *Request must be made within 30 days of alleged records violation.*
  - *Meetings without notice must be within 90 days of alleged violation.*
- If the attorney general issues a written opinion concluding that a violation has occurred, the public entity has seven days to correct any other violation.
- If the public entity fails to take the required action within the seven-day period and the person requesting the opinion prevails in a civil action the person must be awarded costs, disbursements, and reasonable attorney's fees in the action and on appeal.
- Other remedies include:
  - *Attorney General can mandate training for violations of law.*

# Civil Penalties

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Violations may be subject of civil action.

- Action must be commenced within 60 days of the date the person knew or should have known of the violation **or** 30 days from issuance of AG opinion – **whichever is later.**
- Court may award \$1,000 or actual damages for intentional or knowing violations – **whichever is greater.**

# Criminal Penalties

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Violations may be subject of criminal action.

- Attorney General can refer a public servant to the state's attorney for multiple violations.
- A public servant who knowingly violates the law is guilty of a class A misdemeanor.
- Class C felony for knowingly releasing confidential information.

# References & Resources

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- North Dakota Constitution [Article XI General Provisions](#)
- North Dakota Century Code Chapter [44-04](#)
- Attorney General's website: [www.attorneygeneral.nd.gov](http://www.attorneygeneral.nd.gov)
  - *Open Records & Meetings Laws*
    - Manuals & Guides
      - [Open Records Guide](#)("One pager")
      - [Template for Responding to an Open Records Request](#)
      - [Open Meetings Guide](#) ("One pager")
      - [Sample Form for Closing Executive Sessions](#)
      - [Sample Meeting Notice](#)
      - [Notice Checklist](#)

# Questions?

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