



**NDSBA**  
NORTH DAKOTA SCHOOL  
BOARDS ASSOCIATION

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## **RESPONDING TO OPEN RECORD REQUESTS AMID COVID-19 PANDEMIC**

By Executive Order dated March 15, 2020, Governor Burgum ordered all public and nonpublic schools to closed except for essential personnel needed to engage in appropriate planning for the COVID-19 pandemic. NDSBA previously provided guidance on open meeting requirements to keep in mind as school boards and their representative meet to discuss preparedness. But, what about open records requirements? Must school districts still receive and respond to open records requests received during the closure period? The answer is **likely yes**.

### **Receipt of Open Records Requests during School Closures:**

Open record provisions are found in both the North Dakota Constitution and the North Dakota Century Code. In short, both provide that 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***. This includes the records of a public school district in North Dakota.

"Reasonable office hours" includes all regular office hours of a public entity. Reasonable is a flexible standard and depends on the facts of each office. If a public entity does not have regular office hours (indefinitely or otherwise), the name and telephone number of a contact person authorized to provide access to the public entity's records must be posted on the door of the office of the public entity, if any. Otherwise, the information regarding the contact person must be filed with the secretary of state for state-level entities [and] for public entities defined in subdivision c of subsection 13 of section 44-04-17.1, the city auditor or designee of the city for city-level entities, or the county auditor or designee of the county for other entities. N.D.C.C. § 44-04-18(1). A public entity is not required to provide access to open records outside its regular office hours.

But what happens if the public entity is temporarily closed to the public during its regular office hours due to a state of emergency as ordered by the Governor? Not surprisingly, the ND Century Code does not give us a definitive answer in this regard. However, NDCC 44-04-18(1) specifically requires that when a public entity does not have office hours, the name and telephone number of a contact person authorized to provide access to the public entity's records must be posted on the door of the office of the public entity, if any. Alternatively, this information must be provided to the county auditor or its designee.



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In addition, a public entity may not circumvent the open records law by suddenly refusing to use previously available means of communication without warning. For example, if a public entity previously allowed open records requests to be made via email, it cannot stop checking the email account suddenly, without notice, to the public. The email account should either be shut down, or an automatic reply be put in place notifying requestors the email account is no longer being checked or utilized.

Based on the foregoing, it is unlikely that school districts can simply refuse to receive or ignore open records requests during any state-mandated or locally-mandated closure of their buildings. This is especially unlikely if office staff are still working (either on-site or remotely) who are able to provide access to or copies of requested documents. Rather, school districts should:

- Continue to receive requests received via email or regular mail and telephone as it ordinarily would assuming the availability of staff within the office or working remotely; and
- Designate an individual(s) who will receive such requests during the closure and post the name(s) and contact information for such individual(s) at the district office and/or provide the information to the county auditor. This should cover any desired “in-person” requests.

### **Responding to Open Records Requests during School Closures:**

While school closures will not likely relieve the school district from receiving and responding to open records requests, they likely will impact what is considered a reasonable period of response to requests made during the closure.

Once a request for records is made to a public entity, the public entity **must respond within a reasonable time** by providing the requested records or explaining why the request is not being satisfied. A request for records need not be made in person or in writing unless a statute requires otherwise.

The public entity may only deny the request if a law specifically provides that the record is either exempt or confidential, the record does not exist, or the entity does not have the record in its, or its agent’s, possession. A request for public records may not be denied because it involves a substantial number of copies, the same individual makes multiple requests or that the request would be “cost prohibitive” or a “strain on personnel resources” to fulfill. The number of records being requested affects the time within which a public entity must respond but does not affect the validity of the request. Also, staff are not expected to drop everything and ignore their



regular duties to devote all of their time to responding to a request. Rather, staff are generally expected to respond with reasonable diligence under the circumstances.

The request must reasonably identify a “specific public record.” A request for information is not considered a request for records. When a person asks questions that generally call for explanations, a legal conclusion, or an answer, it is not considered an open record request because there has been no request for an actual record and a public entity has no duty to provide opinions or explanations under the open records law. A public entity may contact a requestor for clarification on a records request, but must do so in a timely manner. A public entity may also require a request be made in writing for clarification purposes.

### **What is “Reasonable” in light of School Closures?**

Although state law includes a number of exemptions from the open records law, public officials and employees generally should know what records are under their control must be disclosed. Therefore, access to an open record usually must be granted within a fairly short period of time after a request has been made. Immediate access or copies are not always required, but the amount of time within which the public entity must respond to the request will usually be measured in hours or a few days rather than several days or weeks. A delay may be reasonable for several reasons and whether records have been produced within a reasonable time will depend on the facts of a given situation.

Factors to consider in determining the appropriate length of time within which to respond to a request include:

- the number of documents to be reviewed;
- excising confidential or closed material;
- the quantity of records requested;
- **whether the public entity employs staff on a part-time or full-time basis and the availability and workload of such staff who can respond to the request;**
- **balancing other responsibilities of the public entity that demand immediate attention;**
- accessibility of the records requested; and,
- sorting out what has previously been provided to a requestor since a requestor is only entitled to one copy.

Although a factor that may be considered is the workload of staff who can respond to record requests, a public entity must begin working on a response in a timely manner and if there is going to be a delay, should keep the requestor informed on the status of the response.

In determining whether a response to a records request is made within a reasonable time, the open records law looks at when the public entity received the request, not the date on the top



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of the request, nor when the request was allegedly mailed. If a public entity cannot reasonably respond to a request immediately, it is not required to identify a specific date when the records will be available, but the burden is on the public entity to let the requester know when the records are available, which must occur within a reasonable time.

Given all of this, NDSBA believes that the school closures pursuant to the Governor's Executive Order (and possibly additional closures due to further executive order or action of individual school districts) will factor into what is a reasonable amount of time to respond to a particular request received or responded to during the closure. However, even in the event of a school closure, each individual situation will be judged on its own. In other words, what is reasonable for one district during the closure will not necessarily be reasonable for another district in terms of responding to an open records request. Also, other factors, such as the volume or breadth of the request and whether the records request are kept electronically versus in hardcopy, will also impact whether the period of response is reasonable in a given situation.

NDSBA generally recommends that school districts develop a plan for receiving and responding to open records requests during any closure, including closures relating to the COVID-19 pandemic. Any such plan should take into account expectations regarding district office staffing, and whether and for how long the district offices will be closed to members of the public. In addition, we recommend that school districts make the following or similar statement to requesters as soon as possible following receipt of an open records request:

**[SCHOOL DISTRICT] is closed in response to the COVID-19 coronavirus. During this [state-mandated] closure, there will be a delay in responding to requests under the North Dakota Open Records laws. [SCHOOL DISTRICT] will process requests as soon as reasonable possible in light of available office staff and business hours. Thank you for your patience during this unprecedented time.**

Again, in light of the requirements of NDCC 44-04-18(1), a school district is not entirely relieved from responding to open records requests during a state-mandated or locally-mandated school closure; however, the extent of the closure and its impact on district staff will factor into what a reasonable response period will be.

For additional guidance and resources relating to the COVID-19 pandemic, please visit NDSBA's website ([www.ndsba.org](http://www.ndsba.org)) where we have gathered the most recent COVID-19 information and guidance.