

# NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

## LEGAL DIVISION

POLICY LDRM1-01

ORIGINAL DATE: 2/14/2001

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### **23 U.S.C. Section 407 Designation**

#### **Policy**

1. All records that may be subject to 23 U.S.C. Section 407 should be appropriately identified and marked.
2. Before releasing records to any outside agencies, political subdivisions, or individuals, NDDOT employees should determine whether the records are protected by Section 407. Records Management in Legal Division should determine whether the records may be distributed under the Open Records Laws.
3. It is the responsibility of the owner of the records to determine whether or not a record is covered under Section 407.

#### **Standard**

A record should be appropriately identified and marked if it falls within the meaning of 23 U.S.C. Section 407:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway- highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

#### **Procedure**

##### **When to use 23 U.S.C Section 407 Designation:**

1. If the fundamental purpose for a project is safety improvement and the project may be implemented utilizing Federal-aid highway funds, the entire file and all documents related to the project are subject to Section 407 and should be appropriately marked.
2. If identifiable portions of a project are developed solely for safety improvement and the project may be implemented utilizing Federal-aid highway funds, the corresponding portions of the file and all documents related to those portions are subject to Section 407 and should be appropriately marked.
3. If safety is an important motivator for the project or portions of the project, records must be categorized within the project file. Those records addressing safety concerns and the reasons why the department chose certain methods to improve safety are subject to Section 407 and should be appropriately marked. Records as

to what work is performed, by whom, where, when, how, and at what cost remain open for such projects.

4. Following are records that are currently known to be 407 protected and will require the 407 designation:
  - a. Safety reviews
  - b. Safety improvement program or project
  - c. Hazard elimination (HE\_) projects
  - d. 90-1 surveys
  - e. Project concept reports
  - f. Railroad, grade crossing, and related safety information
  - g. Railroad plans
  - h. Traffic operations studies
  - i. Traffic signal inventories and inspections
  - j. Skid testing program
  - k. High accident location analysis
  - l. Crash analysis
  - m. Crash report
  - n. Guardrail projects
  - o. Slope flattening
  - p. Drive slopes if used for future planning
  - q. Pipe extensions
  - r. Guardrail inventory
  - s. Bridge inventory
  - t. Bridge projects and design documents
  - u. Incident reports, if planning a safety project

#### **How to use the Section 407 Designation:**

1. Divisions and districts are to identify records falling into the protected category. Such records, whether they are paper or electronic, must be designated with the following:

**23 U.S.C. § 407 Documents  
NDDOT Reserves All Objections**

2. This designation was designed to continue to protect the records even if they have been released. By identifying Section 407 documents at the point of creation, NDDOT reserves the right to object to having those documents entered as evidence in litigation.
3. The 23 U.S.C. 407 Designation should be placed on the top right of the document on each page.

#### **When to release records:**

1. Release of department records depends upon what the records are needed for.
  - a. For engineering purposes/outside consultants – Section 407 records can be released.
  - b. For media or political purpose– Section 407 records can be released.
2. If the documents are designated with Section 407, then the DOT employee has the right to ask the following questions: “Will this information ever be used, directly or indirectly, in a court proceeding or claim for damages arising from any occurrence at

the locations mentioned or addressed in the requested records?" If a requestor answers "no" to the first question, then the record(s) must be released even if the record is a 407 record; if the requestor answers "yes" to the question, then the record is exempt from the North Dakota open records laws and the department has discretion on whether to release the requested record(s). The decision whether or not to release the records needs to be made by management or the Legal Division.

3. Employees should follow procedures outlined under [Policy LDRM2-01](#), Records Request (Open Records).
4. If there are questions about releasing Section 407 documents, employees should contact their division records coordinator first, and then the Records Manager in Legal Division.

### **Release of Section 407 Documents to other entities:**

1. Non-department entities such as state agencies, political subdivisions, or consulting engineers may request NDDOT's Section 407 material. If the actions of the non-department entities are furthering a department goal or objective, the information should be provided. Under some circumstances it may be appropriate to obtain an agreement from the requesting party to maintain the Section 407 protection. Under some circumstances, however, the information may need to be disclosed, in which case the department should pay special attention to limiting the information to that which is absolutely essential to the purposes for which it is compiled or obtained.
2. It is important that when Section 407 documents are released to other state or federal agencies, such as Federal Highway Administration or Highway Patrol, the agencies are aware of 23 U.S.C. Section 407 and continue to protect the record as NDDOT would. The designation on the document will indicate the documents are Section 407 records, and a letter of explanation must accompany the document.
3. Following is an example of a statement that must accompany any Section 407 records released to other state agencies, political subdivisions, or consulting engineers:

"North Dakota Department of Transportation gathers and maintains \_\_\_\_\_ (type of record) for purposes of safety improvement. As such, it is exempt from discovery and introduction into evidence pursuant to 23 United States Code, Section 407. Therefore, NDDOT entrusts this information to \_\_\_\_\_ (name of state agency, political subdivision, or consulting engineers) with the understanding that it be used only for the requested purposes, and not distributed or released outside of \_\_\_\_\_ (name of state agency, political subdivision, or consulting engineers), unless required by law after thorough research."

### **Definitions**

**FileNet** – NDDOT records repository which stores any digital object for later retrieval and manages the department's records retention.

## **Authority**

- Pursuant to NDDOT Executive Policy Manual I 2-1.7 regarding performing and overseeing assigned tasks, NDDOT Legal Division has authority and is responsible for establishing, maintaining, and enforcing Policies for its Sections.
- **23 U.S.C. Section 407 Designation** In 1987, Congress determined that federal record keeping requirements were subjecting state transportation agencies to inappropriate litigation and stifling the open discussion of safety issues. Congress enacted 23 United States Codes (U.S.C.), Section 407, to remedy these problems. Section 407 protects from discovery four broad categories of information collected or compiled for safety-related purposes.

Three programs created by 23 U.S.C. are specifically covered by Section 407:

1. Railway Crossing – Section 130
2. Bridge replacement and rehabilitation – Section 144
3. Highway Safety Program – Section 148

All records related to these programs are protected from disclosure.

The fourth category involves information collected “for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal aid highway funds.” It is not necessary that the project actually be completed with federal funds, merely which the use of federal funds was a reasonable possibility at the time the records were created. This category requires the record keeper to carefully exercise his or her judgement.

- **NDCC 54-46 RECORDS MANAGEMENT**  
NDCC 54-46-05 Duties of Agency Heads: The head of each agency shall:
  1. Establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.

## **Guidance**

To review the [United States Code](#), please visit the various sections:

[Title 23 - Highways 407](#)

[Title 23-Highways 130](#)

[Title 23-Highways 144](#)

[Title 23-Highways 148](#)

## **Purpose**

## **Applicability**

This policy applies to all NDDOT employees.

## **Non-Compliance**

Non-compliance with this standard shall be reported to the Director, Legal Division, and appropriate Deputy Director.