

State of South Dakota

EIGHTY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 2009

583Q0601

SENATE BILL NO. 147

Introduced by: Senators Knudson, Adelstein, Dempster, Gant, Gray, Hansen (Tom), Heidepriem, Rhoden, and Turbak Berry and Representatives Faehn, Cutler, Hunhoff (Bernie), Kirschman, Lust, Noem, Rausch, Rave, and Schlekeway

1 FOR AN ACT ENTITLED, An Act to provide for public access to public records, to provide
2 certain exemptions, and to provide for judicial remedies for noncompliance.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
5 follows:

6 Except as otherwise expressly provided by statute, all citizens of this state, and all other
7 persons interested in the examination of the public records, as defined in section 2 of this Act,
8 are hereby fully empowered and authorized to examine such public record, and make
9 memoranda and abstracts therefrom during the hours the respective offices are open for the
10 ordinary transaction of business and, unless federal copyright law otherwise provides, obtain
11 copies of public records in accordance with this chapter.

12 Section 2. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
13 follows:

14 Unless any other statute expressly provides that particular information or records may not



1 be made public, public records include all records and documents, regardless of physical form,
2 of or belonging to this state, any county, city, political subdivision, or tax-supported district in
3 this state, or any agency, branch, department, board, bureau, commission, council, subunit, or
4 committee of any of the foregoing. Data which is a public record in its original form remains
5 a public record when maintained in computer files.

6 Section 3. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
7 follows:

8 If a custodian of a public record of a county, city, political subdivision, or tax-supported
9 district provides to a member of the public, upon request, a copy of the public record by
10 transmitting it from a modem to an outside modem, a reasonable fee may be charged for such
11 specialized service. Such fee may include a reasonable amount representing a portion of the
12 amortization of the cost of computer equipment, including software, necessarily added in order
13 to provide such specialized service. This section does not require a governmental entity to
14 acquire computer capability to generate public records in a new or different form if that new
15 form would require additional computer equipment or software not already possessed by the
16 governmental entity.

17 Section 4. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
18 follows:

19 The provisions of this Act shall be liberally construed whenever any state, county, or
20 political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition,
21 payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds
22 is involved in order that the citizens of this state shall have the full right to know of and have
23 full access to information on the public finances of the government and the public bodies and
24 entities created to serve them.

1 Section 5. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
2 follows:

3 Each public body shall maintain a file of all letters of denial of requests for records. This file
4 shall be made available to any person on request.

5 Section 6. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
6 follows:

7 The following records, unless publicly disclosed in an open court, open administrative
8 proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be
9 withheld from the public by the lawful custodian of the records:

- 10 (1) Personal information in records regarding any student, prospective student, or former
11 student of any educational institution if such records are maintained by and in the
12 possession of a public entity, other than routine directory information specified and
13 made public consistent with 20 U.S.C. 1232g, as such section existed on January 1,
14 2009;
- 15 (2) Medical records, other than records of births and deaths;
- 16 (3) Trade secrets, academic and scientific research work which is in progress and
17 unpublished, and other proprietary or commercial information which if released
18 would give advantage to business competitors and serve no public purpose;
- 19 (4) Records which represent the work product of an attorney and the public body
20 involved which are related to preparation for litigation, labor negotiations, or claims
21 made by or against the public body or which are otherwise privileged;
- 22 (5) Records developed or received by law enforcement agencies and other public bodies
23 charged with duties of investigation or examination of persons, institutions, or
24 businesses, if the records constitute a part of the examination, investigation,

1 intelligence information, citizen complaints or inquiries, informant identification, or
2 strategic or tactical information used in law enforcement training. However, this
3 subdivision does not apply to records so developed or received relating to the
4 presence of and amount or concentration of alcohol or drugs in any body fluid of any
5 person;

6 (6) Appraisals or appraisal information and negotiation records concerning the purchase
7 or sale, by a public body, of any interest in real or personal property, prior to
8 completion of the purchase or sale;

9 (7) Personal information in records regarding personnel of public bodies other than
10 salaries and routine directory information;

11 (8) Information solely pertaining to protection of the security of public property and
12 persons on or within public property, such as specific, unique vulnerability
13 assessments or specific, unique response plans, either of which is intended to prevent
14 or mitigate criminal acts the public disclosure of which would create a substantial
15 likelihood of endangering public safety or property; computer or communications
16 network schema, passwords, and user identification names; guard schedules; or lock
17 combinations;

18 (9) The security standards, procedures, policies, plans, specifications, diagrams, access
19 lists, and other security-related records of the Gaming Commission and those persons
20 or entities with which the commission has entered into contractual relationships.
21 Nothing in this subdivision allows the commission to withhold from the public any
22 information relating to amounts paid persons or entities with which the commission
23 has entered into contractual relationships, amounts of prizes paid, the name of the
24 prize winner, and the city, or county where the prize winner resides;

- 1 (10) With respect to public utilities, personally identified private citizen account payment
2 information, credit information on others supplied in confidence, and customer lists;
- 3 (11) Records or portions of records kept by a publicly funded library which, when
4 examined with or without other records, reveal the identity of any library patron
5 using the library's materials or services;
- 6 (12) Correspondence, memoranda, and records of telephone calls related to the
7 performance of duties by a member of the Legislature in whatever form. The lawful
8 custodian of the correspondence, memoranda, and records of telephone calls, upon
9 approval of the Executive Board of the Legislative Research Council, shall release
10 the correspondence, memoranda, and records of telephone calls which are not
11 designated as sensitive or confidential in nature to any person performing an audit of
12 the Legislature. A member's correspondence, memoranda, and records of confidential
13 telephone calls related to the performance of his or her legislative duties shall only
14 be released to any other person with the explicit approval of the member;
- 15 (13) Records or portions of records kept by public bodies which would reveal the location,
16 character, or ownership of any known archaeological, historical, or paleontological
17 site in South Dakota if necessary to protect the site from a reasonably held fear of
18 theft, vandalism, or trespass. This subdivision does not apply to the release of
19 information for the purpose of scholarly research, examination by other public bodies
20 for the protection of the resource or by recognized tribes, or the federal Native
21 American Graves Protection and Repatriation Act;
- 22 (14) Records or portions of records kept by public bodies which maintain collections of
23 archaeological, historical, or paleontological significance which reveal the names and
24 addresses of donors of such articles of archaeological, historical, or paleontological

1 significance unless the donor approves disclosure, except as the records or portions
2 thereof may be needed to carry out the purposes of the federal Native American
3 Graves Protection and Repatriation Act;

4 (15) Job application materials submitted by applicants, other than finalists, who have
5 applied for employment by any public body. For purposes of this subdivision, the
6 term, job application materials, means employment applications, resumes, reference
7 letters, and school transcripts. For the purposes of this section, the term, finalist,
8 means any applicant:

9 (a) Who reaches the final pool of applicants, numbering four or more, from which
10 the successful applicant is to be selected;

11 (b) Who is an original applicant when the final pool of applicants numbers less
12 than four; or

13 (c) Who is an original applicant and there are four or fewer original applicants;

14 (16) Social security numbers; credit card, charge card, or debit card numbers and
15 expiration dates; and financial account numbers supplied to state and local
16 governments by citizens; and

17 (17) Any other confidential or closed record as defined by state statute.

18 Section 7. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
19 follows:

20 The following financial, commercial, and proprietary information is specifically exempt
21 from disclosure pursuant to this Act:

22 (1) Valuable formulae, designs, drawings, computer source code or object code, and
23 research data obtained by any agency within five years of the request for disclosure
24 if disclosure would produce private gain or public loss;

- 1 (2) Financial information supplied by or on behalf of a person, firm, or corporation for
2 the purpose of qualifying to submit a bid or proposal for any construction or repair
3 contract or highway construction or improvement;
- 4 (3) Financial and commercial information and records supplied by private persons
5 pertaining to export services;
- 6 (4) Financial and commercial information and records supplied by businesses or
7 individuals during application for loans or program services or during application for
8 economic development loans or program services;
- 9 (5) Financial and commercial information supplied to the state investment council by any
10 person if the information relates to the investment of public trust or retirement funds
11 and if disclosure would result in loss to such funds or in private loss to the providers
12 of this information;
- 13 (6) Proprietary data, trade secrets, or other information that relates to:
 - 14 (a) A vendor's unique methods of conducting business;
 - 15 (b) Date unique to the product or services of the vendor; or
 - 16 (c) Determining prices or rates to be charged for services, submitted by any
17 vendor to any public body;
- 18 (7) Any production records, mineral assessments, and trade secrets submitted by a permit
19 holder, mine operator, or landowner to any public body.

20 Section 8. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
21 follows:

22 Preliminary drafts, notes, recommendations, and intra-agency memoranda in which opinions
23 are expressed or policies formulated or recommended are exempt from disclosure pursuant to
24 this Act. However, a specific record is not exempt if publicly cited by a public body in

1 connection with any public action.

2 Section 9. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
3 follows:

4 Any record that is relevant to a controversy to which a public body is a party but which
5 record would not be available to another party under the rules of pretrial discovery for causes
6 pending in circuit court are exempt from disclosure pursuant to this Act.

7 Section 10. That § 1-27-1 be amended to read as follows:

8 1-27-1. If the keeping of a record, or the preservation of a document or other instrument is
9 required of an officer or public servant under any statute of this state, the officer or public
10 servant shall keep the record, document, or other instrument available and open to inspection
11 by any person during normal business hours. Any employment examination or performance
12 appraisal record maintained by the Bureau of Personnel is excluded from this requirement.

13 Any subscription or license holder list maintained by the Department of Game, Fish and
14 Parks may be made available to the public for a reasonable fee. State agencies are exempt from
15 payment of this fee for approved state use. The Game, Fish and Parks Commission may
16 promulgate rules pursuant to chapter 1-26 to establish criteria for the sale and to establish the
17 fee for the sale of such lists.

18 Any automobile liability insurer licensed in the state, or its certified authorized agent, may
19 have access to the name and address of any person licensed or permitted to drive a motor vehicle
20 solely for the purpose of verifying insurance applicant and policyholder information. An insurer
21 requesting any such name and address shall pay a reasonable fee to cover the costs of producing
22 such name and address. The Department of Public Safety shall set such fee by rules promulgated
23 pursuant to chapter 1-26.

24 Any list released or distributed under this section may not be resold or redistributed.

1 Violation of this section by the resale or redistribution of any such list is a Class 2 misdemeanor.

2 Each government entity or elected or appointed government official shall, during normal
3 business hours, make available to the public for inspection and copying in the manner set forth
4 in this chapter all official records held by that entity or official.

5 Section 11. That § 1-27-4 be amended to read as follows:

6 ~~1-27-4. If any officer of the State of South Dakota, any political subdivision, municipal~~
7 ~~corporation, or public corporation is required or authorized by law to record, copy, file, recopy,~~
8 ~~or replace any document, plat, paper, voucher, receipt, or book on file or of record in the~~
9 ~~officer's office, the officer may do so by any photostatic, microphotographic, microfilm,~~
10 ~~mechanical, or electronic process which produces a clear, accurate, and permanent copy or~~
11 ~~reproduction of the original in accordance with the standards not less than those approved for~~
12 ~~permanent records by the National Bureau of Standards or the American National Standards~~
13 ~~Association. However, no school district is required to maintain its permanent school records~~
14 ~~on microfilm if the district maintains its permanent school records in an electronic format that~~
15 ~~can be used to produce clear, accurate reproductions of the originals. Any record made open to~~
16 ~~the public pursuant to this chapter shall be maintained in its original format or in a searchable~~
17 ~~and reproducible electronic format. This section does not mandate that any record or document~~
18 ~~be kept in a particular format nor does it require that a record be provided to the public in any~~
19 ~~format or media other than that in which it is stored.~~

20 Section 12. That § 1-27-6 be repealed.

21 ~~—1-27-6. Whenever any record or document is copied or reproduced in a method described~~
22 ~~in § 1-27-4, the officer shall retain a copy or reproduction in his office.~~

23 Section 13. That § 1-27-7 be repealed.

24 ~~—1-27-7. If the original records or documents are disposed of or destroyed, the officer shall,~~

1 ~~unless viewing equipment is otherwise available within the corporate limits of the municipality~~
2 ~~wherein the records or documents are kept, provide suitable equipment for displaying such~~
3 ~~record or document in whole or in part by projection to no less than its original size, or for~~
4 ~~preparing for persons entitled thereto copies of the record or document, but which shall not be~~
5 ~~required to be in its original size.~~

6 Section 14. That § 1-27-8 be repealed.

7 ~~— 1-27-8. A photographic, microphotographic, or microfilm copy of any such record, or a~~
8 ~~certified copy thereof, shall be admissible as evidence in any court or proceeding and it shall~~
9 ~~have the same force and effect as though the original record has been produced and proved. It~~
10 ~~shall be the duty of the custodian of such records to prepare enlarged typed or photographic~~
11 ~~copies of the records whenever their production is required by law.~~

12 Section 15. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
13 follows:

14 No elected or appointed official of the state or any political subdivision may be compelled
15 to provide documents, records, or communications used for the purpose of the decisional or
16 deliberative process relating to any decision arising from that person's official duties.

17 Section 16. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
18 follows:

19 In response to any request pursuant to § 1-27-36 or 1-27-37, a public record officer may
20 redact any portion of a document which contains information precluded from public disclosure
21 by § 1-27-3 or which would unreasonably invade personal privacy, threaten public safety and
22 security, disclose proprietary information, or disrupt normal government operations. A redaction
23 under this section is considered a partial denial for the application of § 1-27-37.

24 Section 17. The effective date of this Act is July 1, 2010.