

State of South Dakota

EIGHTY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 2009

583Q0601

SENATE ENGROSSED NO. **SB 147** - 2/24/2009

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 § 1-27-1 be amended to read as follows:

5 1-27-1. ~~If the keeping of a record, or the preservation of a document or other instrument is~~
6 ~~required of an officer or public servant under any statute of this state, the officer or public~~
7 ~~servant shall keep the record, document, or other instrument available and open to inspection~~
8 ~~by any person during normal business hours. Any employment examination or performance~~
9 ~~appraisal record maintained by the Bureau of Personnel is excluded from this requirement.~~
10 ~~—Any subscription or license holder list maintained by the Department of Game, Fish and~~
11 ~~Parks may be made available to the public for a reasonable fee. State agencies are exempt from~~
12 ~~payment of this fee for approved state use. The Game, Fish and Parks Commission may~~
13 ~~promulgate rules pursuant to chapter 1-26 to establish criteria for the sale and to establish the~~
14 ~~fee for the sale of such lists.~~



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

7 ~~Any list released or distributed under this section may not be resold or redistributed.~~
8 ~~Violation of this section by the resale or redistribution of any such list is a Class 2 misdemeanor.~~
9 Except as otherwise expressly provided by statute, all citizens of this state, and all other persons
10 interested in the examination of the public records, as defined in section 2 of this Act, are hereby
11 fully empowered and authorized to examine such public record, and make memoranda and
12 abstracts therefrom during the hours the respective offices are open for the ordinary transaction
13 of business and, unless federal copyright law otherwise provides, obtain copies of public records
14 in accordance with this chapter.

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

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

20 Unless any other statute expressly provides that particular information or records may not
21 be made public, public records include all records and documents, regardless of physical form,
22 of or belonging to this state, any county, municipality, political subdivision, or tax-supported
23 district in this state, or any agency, branch, department, board, bureau, commission, council,
24 subunit, or committee of any of the foregoing. Data which is a public record in its original form

1 remains a public record when maintained in any other form. For the purposes of this Act, a tax-
2 supported district includes any business improvement district created pursuant to chapter 9-55.

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

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

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

16 The provisions of this Act shall be liberally construed whenever any state, county, or
17 political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition,
18 payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds
19 is involved in order that the citizens of this state shall have the full right to know of and have
20 full access to information on the public finances of the government and the public bodies and
21 entities created to serve them. Use of funds as needed for criminal investigatory/confidential
22 informant purposes is not subject to this section, but any budgetary information summarizing
23 total sums used for such purposes is public. Records which, if disclosed, would impair present
24 or pending contract awards or collective bargaining negotiations are exempt from disclosure.

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 may not be disclosed:

- 8 (1) Personal information in records regarding any student, prospective student, or former
9 student of any educational institution if such records are maintained by and in the
10 possession of a public entity, other than routine directory information specified and
11 made public consistent with 20 U.S.C. 1232g, as such section existed on January 1,
12 2009;
- 13 (2) Medical records, including all records of a drug or alcohol testing, treatment, or
14 counseling, other than records of births and deaths. This law in no way abrogates or
15 changes existing state and federal law pertaining to birth and death records;
- 16 (3) Trade secrets, the specific details of bona fide research, applied research, or scholarly
17 or creative artistic projects being conducted at a school, postsecondary institution or
18 laboratory funded in whole or in part by the state, and other proprietary or
19 commercial information which if released would infringe intellectual property rights,
20 give advantage to business competitors, or serve no material public purpose;
- 21 (4) Records which consist of attorney work product or which are subject to any privilege
22 recognized in chapter 19-13;
- 23 (5) Records developed or received by law enforcement agencies and other public bodies
24 charged with duties of investigation or examination of persons, institutions, or

1 businesses, if the records constitute a part of the examination, investigation,
2 intelligence information, citizen complaints or inquiries, informant identification, or
3 strategic or tactical information used in law enforcement training. However, this
4 subdivision does not apply to records so developed or received relating to the
5 presence of and amount or concentration of alcohol or drugs in any body fluid of any
6 person, and this subdivision does not apply to a 911 recording or a transcript of a 911
7 recording, if the agency or a court determines that the public interest in disclosure
8 outweighs the interest in nondisclosure. This law in no way abrogates or changes
9 §§ 23-5-7 and 23-5-11 or testimonial privileges applying to the use of information
10 from confidential informants;

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

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

16 (8) Information solely pertaining to protection of the security of public property and
17 persons on or within public property, such as specific, unique vulnerability
18 assessments or specific, unique response plans, either of which is intended to prevent
19 or mitigate criminal acts the public disclosure of which would create a substantial
20 likelihood of endangering public safety or property; computer or communications
21 network schema, passwords, and user identification names; guard schedules; lock
22 combinations; or any blueprints, building plans, or infrastructure records regarding
23 any building or facility owned, operated, or occupied by a government entity that
24 expose or create vulnerability through disclosure of the location, configuration, or

- 1 security of critical systems;
- 2 (9) The security standards, procedures, policies, plans, specifications, diagrams, access
3 lists, and other security-related records of the Gaming Commission and those persons
4 or entities with which the commission has entered into contractual relationships.
5 Nothing in this subdivision allows the commission to withhold from the public any
6 information relating to amounts paid persons or entities with which the commission
7 has entered into contractual relationships, amounts of prizes paid, the name of the
8 prize winner, and the municipality, or county where the prize winner resides;
- 9 (10) Personally identified private citizen account payment information, credit information
10 on others supplied in confidence, and customer lists;
- 11 (11) Records or portions of records kept by a publicly funded library which, when
12 examined with or without other records, reveal the identity of any library patron
13 using the library's materials or services;
- 14 (12)
- 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) Employment applications and related materials, except for applications and related
5 materials submitted by individuals hired into executive or policymaking positions of
6 any public body;
- 7 (16) Social security numbers; credit card, charge card, or debit card numbers and
8 expiration dates; passport numbers, driver license numbers; or other personally
9 identifying numbers or codes; and financial account numbers supplied to state and
10 local governments by citizens or held by state and local governments regarding
11 employees or contractors;
- 12 (17) Any emergency or disaster response plans or protocols, safety or security audits or
13 reviews, or lists of emergency or disaster response personnel or material; any location
14 or listing of weapons or ammunition; nuclear, chemical, or biological agents; or other
15 military or law enforcement equipment or personnel;
- 16 (18) Any test questions, scoring keys, results, or other examination data for any
17 examination to obtain licensure, employment, or academic credit;
- 18 (19) Personal correspondence, memoranda, notes, calendars or appointment logs, or other
19 personal records or documents of any public official or employee used solely for that
20 official's or employee's own personal use and having no official purpose;
- 21 (20) Any document declared closed or confidential by court order, contract, or stipulation
22 of the parties to any civil or criminal action or proceeding;
- 23 (21) Any list of names or other personally identifying data of occupants of camping
24 facilities from the Department of Game, Fish and Parks;

- 1 (22) Records which, if disclosed, would constitute an unreasonable release of personal
2 information;
- 3 (23) Records which, if released, could endanger the life or safety of any person;
- 4 (24) Internal agency record or information received by agencies that are not required to
5 be filed with such agencies, if the records do not constitute final statistical or factual
6 tabulations, final instructions to staff that affect the public, or final agency policy or
7 determinations, or any completed state or federal audit and if the information is not
8 otherwise public under other state law, including chapter 15-15A and § 1-26-21;
- 9 (25) Records of individual children regarding commitment to the Department of
10 Corrections pursuant to chapters 26-8B and 26-8C;
- 11 (26) Records regarding inmate disciplinary matters pursuant to § 1-15-20; and
- 12 (27) Any other confidential or closed record under state statute or as provided by federal
13 statutes or rules or as necessary to participate in federal programs and benefits.

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

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

- 18 (1) Valuable formulae, designs, drawings, computer source code or object code, and
19 research data invented, discovered, authored, developed, or obtained by any agency
20 if disclosure would produce private gain or public loss;
- 21 (2) Financial information supplied by or on behalf of a person, firm, or corporation for
22 the purpose of qualifying to submit a bid or proposal for any construction or repair
23 contract or highway construction or improvement;
- 24 (3) Financial and commercial information and records supplied by private persons

1 pertaining to export services;

2 (4) Financial and commercial information and records supplied by businesses or
3 individuals during application for loans or program services or during application for
4 economic development loans or program services;

5 (5) Financial and commercial information, including related legal assistance and advice,
6 supplied to or developed by the state investment council or the division of investment
7 if the information relates to investment strategies or research, potential investments,
8 or existing investments of public funds;

9 (6) Proprietary data, trade secrets, or other information that relates to:

10 (a) A vendor's unique methods of conducting business;

11 (b) Data unique to the product or services of the vendor; or

12 (c) Determining prices or rates to be charged for services, submitted by any
13 vendor to any public body;

14 (7) Financial, commercial, and proprietary information supplied in conjunction with
15 applications or proposals for funded scientific research, for participation in joint
16 scientific research projects, for projects to commercialize scientific research results,
17 or for use in conjunction with commercial or government testing;

18 (8) 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 Drafts, notes, recommendations, and memoranda in which opinions are expressed or policies
23 formulated or recommended are exempt from disclosure pursuant to this Act. However, a
24 specific record is not exempt if publicly cited by a public body in connection with any public

1 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 § 1-27-4 be amended to read as follows:

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

22 Section 11. That § 1-27-6 be repealed.

23 ~~— 1-27-6. Whenever any record or document is copied or reproduced in a method described~~
24 ~~in § 1-27-4, the officer shall retain a copy or reproduction in his office.~~

1 Section 12. That § 1-27-7 be repealed.

2 ~~1-27-7. If the original records or documents are disposed of or destroyed, the officer shall,~~
3 ~~unless viewing equipment is otherwise available within the corporate limits of the municipality~~
4 ~~wherein the records or documents are kept, provide suitable equipment for displaying such~~
5 ~~record or document in whole or in part by projection to no less than its original size, or for~~
6 ~~preparing for persons entitled thereto copies of the record or document, but which shall not be~~
7 ~~required to be in its original size.~~

8 Section 13. That § 1-27-8 be repealed.

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

14 Section 14. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as
15 follows:

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

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

22 In response to any request pursuant to § 1-27-36 or 1-27-37, a public record officer may
23 redact any portion of a document which contains information precluded from public disclosure
24 by § 1-27-3 or which would unreasonably invade personal privacy, threaten public safety and

1 security, disclose proprietary information, or disrupt normal government operations. A redaction
2 under this section is considered a partial denial for the application of § 1-27-37.

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

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

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

16 Any list released or distributed under this section may not be resold or redistributed.
17 Violation of this section by the resale or redistribution of any such list is a Class 2 misdemeanor.

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

20 The provisions of this chapter do not apply to records and documents of the Unified Judicial
21 System.

22 Section 18. That § 23-5-11 be amended to read as follows:

23 23-5-11. ~~The provisions of § 1-27-1 do not apply to confidential criminal justice~~
24 ~~information.~~ Confidential criminal justice information and criminal history information are

1 specifically exempt from disclosure pursuant to this Act and may be withheld by the lawful
2 custodian of the records. Information about calls for service revealing the date, time, and general
3 location and general subject matter of the call is not confidential criminal justice information
4 and may be released to the public, at the discretion of the executive of the law enforcement
5 agency involved, unless the information contains intelligence or identity information that would
6 jeopardize an ongoing investigation. The provisions of this section do not supersede more
7 specific provisions regarding public access or confidentiality elsewhere in state or federal law.

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

10 The secretary of corrections may prohibit the release of information to inmates or their
11 agents regarding correctional operations, department policies and procedures, and inmate
12 records of the requesting inmate or other inmates if the release would jeopardize the safety or
13 security of a person, the operation of a correctional facility, or the safety of the public. This
14 section does not apply to an inmate's attorney requesting information that is subject to disclosure
15 under this chapter.

16 Section 20. That § 1-15-20.1 be amended to read as follows:

17 1-15-20.1. For the purposes of § 1-15-20 and chapter 1-27, an inmate is any person, adult,
18 or juvenile, who has been sentenced or committed to or placed in a facility or program under
19 the control of the Department of Corrections pursuant to § 1-15-1.4.

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

22 This chapter does not require the redaction of any record, or any portion of a record, which
23 is recorded in the office of the register of deeds prior to July 1, 2010.