

# State of South Dakota

EIGHTY-THIRD SESSION  
LEGISLATIVE ASSEMBLY, 2008

637P0697

## SENATE BILL NO. 189

Introduced by: Senators Turbak Berry, Abdallah, Gant, Heidepriem, and Koetzle and  
Representatives Cutler, Engels, Gillespie, Halverson, Koistinen, Lust,  
McLaughlin, Novstrup (Al), Thompson, and Weems

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding public records and  
2 the accessibility of public records.

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. Except as otherwise specifically provided by law,~~  
9 ~~every record of a public entity is a public record, open and accessible for inspection during~~  
10 ~~reasonable office hours. As used in this section, reasonable office hours include all regular~~  
11 ~~office hours of a public entity. If a public entity does not have regular office hours, the name and~~  
12 ~~telephone number of a contact person authorized to provide access to the public entity's records~~  
13 ~~shall be posted on the door of the office of the public entity. Otherwise, the information~~  
14 ~~regarding the contact person shall be filed with the secretary of state for any state-level entity,~~



1 the city auditor or finance officer of the city for any city-level entity, or the county auditor for  
2 any other entity. Any employment examination or performance appraisal record maintained by  
3 the Bureau of Personnel is excluded from this requirement.

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

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

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

17 Section 2. That § 1-27-3 be amended to read as follows:

18 1-27-3. ~~Section~~ The provisions of § 1-27-1 shall do not apply to such records as are  
19 specifically enjoined to be held confidential or secret by ~~the laws requiring them to be so kept~~  
20 state or federal statute or to records that meet one or more of the following criteria:

21 (1) Records which, if disclosed, would constitute an unwarranted release of personal  
22 information;

23 (2) Records which, if disclosed, would impair present or pending contract awards or  
24 collective bargaining negotiations;

- 1       (3)   Records that constitute agency trade secrets, agency proprietary information as  
2       defined in section 4 of this Act, or proprietary or trade secret information of private  
3       entities as defined in subdivision 1-27-28(4) or 1-27-28(5);
- 4       (4)   Financial, research and development, or computer software information as defined  
5       in section 4 of this Act;
- 6       (5)   Work product, deliberative process and attorney-client records as defined in section  
7       4 of this Act and chapter 19-13;
- 8       (6)   Records which, if disclosed, could endanger the life or safety of any person;
- 9       (7)   Internal agency records or information received by agencies that are not required to  
10      be filed with such agencies, if such records do not constitute final statistical or factual  
11      tabulations, final instructions to staff that affect the public, or final agency policy or  
12      determinations, or any completed state or federal audit and if such information is not  
13      otherwise public under other state law, including chapter 15-15A and § 1-26-21;
- 14      (8)   Records that are examination questions or answers which are requested prior to the  
15      final round of testing where such questions will be used;
- 16      (9)   Security information or other records that, if disclosed, would jeopardize an agency's  
17      capacity to protect the security of critical infrastructure; and
- 18      (10) Records an agency receives from private sources regarding potential and existing  
19      investments of agency funds, agency investment strategy, and research conducted by  
20      or for an agency for purposes of making agency investments.

21      Nothing in this section imposes civil or criminal liability on any public employee or official  
22      who releases a record that may be considered confidential under this section but which is  
23      otherwise public under § 1-27-1.

24      Section 3. That § 1-27-9 be amended to read as follows:

1 1-27-9. As Terms used in §§ 1-27-9 to 1-27-18, inclusive this chapter mean:

2 (1) "Local record," ~~means a~~ any record of a county, municipality, township, district,  
3 authority, or any public corporation or political entity whether organized and existing  
4 under charter or under general law, unless the record is designated or treated as a  
5 state record under state law;

6 (2) "Record," ~~means any~~ document, book, paper, photograph, sound recording, or other  
7 material, regardless of physical form or characteristics, made or received pursuant to  
8 law or ordinance, maintained for purpose of government audit, or maintained in  
9 connection with the transaction of official business. Library and museum material  
10 made or acquired and preserved solely for reference or exhibition purposes, extra  
11 copies of documents preserved only for convenience of reference, and stocks of  
12 publications and of processed documents are not included within the definition of  
13 records as used in §§ 1-27-9 to 1-27-18, inclusive this chapter;

14 (3) "State agency," or "agency," or "agencies," includes all state officers, boards,  
15 commissions, departments, institutions, and agencies of state government. The terms  
16 specifically include the South Dakota Legislature, any state or municipal department,  
17 board, bureau, division, commission, public authority, council, office, or other  
18 governmental entity performing a governmental or proprietary function for the state  
19 or any one or more of the local subdivisions including counties, townships, school  
20 districts, municipalities, and authorities. These terms specifically include  
21 organizations or agencies supported in whole or in part by public funds or expending  
22 public funds. These terms do not include the Unified Judicial System. These terms  
23 do not apply to statutes regarding the disclosure of state records of financial  
24 investigations in §§ 1-27-28 to 1-27-32, inclusive;

- 1 (4) "State record" means:
- 2 (a) A record of a department, office, commission, board, or other agency, however
- 3 designated, of the state government;
- 4 (b) A record of the State Legislature;
- 5 (c) A record of any court of record, whether of state-wide or local jurisdiction;
- 6 (d) Any other record designated or treated as a state record under state law;
- 7 (5) "Public record," any record that is required to be made public pursuant to § 1-27-1;
- 8 (6) "Critical infrastructure," systems, assets, places or things, whether physical or virtual,
- 9 so vital to the agency that the disruption, incapacitation, or destruction of such
- 10 systems, assets, places or things could jeopardize the health, safety, welfare, or
- 11 security of the agency, its residents, or its economy;
- 12 (7) "Security information," government data the disclosure of which would be likely to
- 13 jeopardize the security of critical infrastructure or to jeopardize the security of
- 14 information, possessions, persons, or property against theft, tampering, improper use,
- 15 attempted escape, illegal disclosure, trespass, or physical injury;
- 16 (8) "Personal information," data that is linked to the identity of a person and includes
- 17 medical records, social security number, credit, debit or electronic fund transfer card
- 18 numbers, any financial account numbers, driver's license numbers, date of birth,
- 19 unless such information is public under other state law, including chapter 15-15A and
- 20 § 1-26-21;
- 21 (9) "Financial information," information pertaining to monetary resources of a person
- 22 which, if disclosed, would impair the agency's future ability to obtain necessary
- 23 information, would cause substantial competitive injury to the person from which the
- 24 information was obtained, or would contribute to identity theft. Financial information

1 is confidential under this section unless such information is otherwise public under  
2 other state law, including chapter 15-15A and § 1-26-21;

3 (10) "Research and development data," information shared between a sponsor or potential  
4 sponsor of research and an agency in conducting or negotiating an agreement for  
5 research, or information received from a private business that has entered into or is  
6 negotiating an agreement with an agency to conduct research, develop, or  
7 manufacture or create a product for potential commercial use, or a discovery or  
8 innovation generated by the research information, technical information, financial  
9 information or marketing information acquired for such purposes, or a document  
10 specifically and directly related to the licensing or commercialization resulting from  
11 activities described in this subdivision, or a discovery or innovation produced by the  
12 agency that an employee or the agency intends to market commercially and the  
13 disclosure of which would cause harm to such marketing efforts;

14 (11) "Computer software information," computer software programs and components of  
15 computer software programs that are subject to copyright or patent protection by any  
16 private entity, agency, officer, or public servant;

17 (12) "Agency proprietary record," any record developed by an agency that is proprietary  
18 as that term is defined in subdivision 1-27-28(4);

19 (13) "Agency trade secret," any record developed by an agency that is a trade secret as that  
20 term is defined in subdivision 1-27-28(5);

21 (14) "Economic development record," any record held confidential under § 9-34-19, 1-  
22 16B-14.1, or 1-16G-11, and includes the prospective location of a business or  
23 industry, including the identity, nature, and location of the business or industry, if  
24 such information has not been previously disclosed by the specific business or

1 industry at issue;

2 (15) "Work product record," any agency record of an attorney or other representative of  
3 a party as described in subdivision 15-6-26(b)(3);

4 (16) "Deliberative process record," any predecisional agency record that would reveal  
5 advisory opinions, recommendations, or deliberations comprising part of a process  
6 by which governmental decisions and policies are formulated and which is not  
7 required to be part of a contested case agency record under chapter 1-26;

8 (17) "Final disciplinary decision," the final decision of an agency regarding a disciplinary  
9 action against an agency employee resulting in suspension, termination, or reduction  
10 in pay or grade, regardless of the possibility of any later proceedings or court  
11 proceedings. In the case of arbitration proceedings arising under collective bargaining  
12 agreements, a final disposition occurs at the conclusion of the arbitration  
13 proceedings, or upon the failure of the employee to elect arbitration within the time  
14 provided by the collective bargaining agreement;

15 (18) "Person," any natural person, business entity, or governmental entity;

16 (19) "Agency fiscal record," any record kept by an agency for fiscal audit purposes,  
17 including contracts, vouchers, and lists or ledgers showing indebtedness (bonds,  
18 warrants, certificates, and other similar evidence of indebtedness), sources of  
19 revenue, amounts received, accounts receivable, accounts payable, claims and  
20 demands, general and special taxes levied and paid, special assessments levied and  
21 paid, and other similar lists or ledgers that show the financial transactions, account  
22 balances, or financial condition of the agency. Personal or governmental account  
23 numbers (such as social security numbers, student identification numbers, credit card  
24 numbers, and bank account numbers) or passwords are not agency fiscal records;

1       (20) "Private entity," any person or entity that is not a public entity as defined by  
2             subdivision 3-21-1(2);

3       (21) "Financial investigation, examination, or audit," any examination conducted by a  
4             state agency of a private entity's proprietary information or trade secret information;  
5             and

6       (22) "Investment information," records and information an agency receives from private  
7             sources regarding potential and existing investments of agency funds, agency  
8             investment strategy, and research conducted by or for an agency for purposes of  
9             making agency investments.

10       Section 4. That § 23-5-7 be amended to read as follows:

11       23-5-7. All photographs, impressions, measurements, descriptions, or records including  
12       confidential criminal investigative information, taken or made as provided for in § 23-5-6 shall  
13       be filed and preserved by the department or institution where made or taken and ~~shall~~ may not  
14       be published, transferred, or circulated outside such department or institutions, nor exhibited  
15       to the public or any person or persons except duly authorized law enforcement officers unless  
16       the subject of such photograph, measurement, description, or other record becomes a fugitive  
17       from justice, or escapes from a penal institution. However, this section ~~shall~~ does not apply to  
18       the release of information allowed pursuant to § 24-2-20. Further, a booking photograph may  
19       be made public at the discretion of the executive officer of the arresting agency.

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

22       Each agency shall maintain:

23       (1)    A record of the final vote of each member in every agency proceeding in which a roll  
24             call vote is made or a record of the numerical vote if individual votes are not

1 recorded;

2 (2) A record setting forth the name, public office address, title, and salary of every  
3 officer or employee of the agency; and

4 (3) Current records retention schedules as required in § 1-27-13 or otherwise maintain  
5 a reasonably detailed current list by subject matter, of all records in the possession  
6 of the agency, regardless of whether such records are public under this chapter or  
7 subject to the records retention program provided in this chapter.

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

10 If the following records, pertaining to current and former employees, volunteers, and  
11 independent contractors of an agency are maintained, they are public:

12 (1) Copies of contracts with independent contractors and vouchers showing payments  
13 to such contractors;

14 (2) Name, actual annual gross salary, and salary range, for each current employee of the  
15 agency;

16 (3) The date of employment for each current employee and, except as provided in section  
17 9 of this Act, the work location and telephone number for the office where the  
18 employee works;

19 (4) Job title, bargaining unit, if any, job description, education and training background,  
20 if available, previous work experience and honors and awards received for each  
21 current employee;

22 (5) For retired employees, the first and last date of employment and the actual annual  
23 benefits currently received, exclusive of the amount of employee-contributed  
24 benefits;

- 1       (6) For employees or officers who are paid a moving allowance, housing allowance,  
2       motor vehicle allowance, severance pay, or other payment not constituting employee  
3       salary, wages, or authorized travel or per diem reimbursements, the actual annual  
4       sum of such payments. For employees or officers receiving any in-kind benefit, such  
5       as use of a motor vehicle for personal purposes or a dwelling, the existence of such  
6       benefit is public and the fair market value of such in-kind benefit, if it has been  
7       calculated by the agency, is public;
- 8       (7) Any final disciplinary decision regardless of whether further legal action may be  
9       possible;
- 10      (8) Terms of any agreement settling any dispute arising out of an employment  
11      relationship, including a severance payment, and which shall include the specific  
12      reasons for the agreement if it involves the payment of more than ten thousand  
13      dollars of public money;
- 14      (9) Time sheets or comparable data if maintained that account for the employee or  
15      official's work time, except data that would reveal the reasons for the use of sick or  
16      medical leave or other data that would constitute an unwarranted invasion of person  
17      privacy such as individual contributions to pension plans; and
- 18      (10) The existence of any regulatory civil, criminal, or regulatory complaint that has been  
19      formally commenced against a public official who is the head or deputy head of an  
20      agency, a member of a board or commission appointed by the Governor or other  
21      elected officer, or executive heads of bureaus, divisions, or public institutions.

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

24      Notwithstanding any other provision of this chapter, the following personnel data relating

1 to officers, agents, or employees of agencies engaged in investigative work or law enforcement  
2 services, or to officers, agents, or employees of correctional facilities or secure treatment  
3 facilities who are directly involved in supervision of inmates or parolees, may not be disclosed:

- 4 (1) Place of prior employment;
- 5 (2) Payroll time sheets or other comparable data, to the extent that disclosure of payroll  
6 time sheets or other comparable data may disclose future work assignments; and
- 7 (3) Home address or telephone number, the location of an employee during nonworking  
8 hours, or the location of an employee's immediate family members.

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

11 Any final settlement agreement to which the agency is a party is public if it involves the  
12 termination of a license, permit, or registration issued by that agency regardless of whether  
13 formal termination proceedings have been initiated, if it involves the resolution of a legal  
14 dispute by a public agency that does not involve the expenditure of public funds, or if the release  
15 of such information will not, in the reasonable opinion of the agency, prompt nonmeritorious  
16 money claims against the agency.

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

19 Nothing in this chapter prevents the release of records if the record would otherwise be  
20 public but contains information held confidential under § 1-27-3 that has been redacted before  
21 public disclosure. Further, nothing in this chapter prevents the release of records to any person  
22 who filed the record with the agency or prevents the release of regulatory records to the person  
23 regulated, if such regulatory records do not constitute investigatory records or records that are  
24 to be withheld from the person regulated under specific laws pertaining to such records.

1 Section 10. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as  
2 follows:

3 Pursuant to the rules of civil procedure, a circuit court may enjoin or limit the examination  
4 and copying of a specific public record or a narrowly drawn class of public records as provided  
5 in this section. Any action for injunction pursuant to this section may be brought by the lawful  
6 custodian of a public record or by any other person who would be aggrieved or adversely  
7 affected by the examination or copying of such record. The injunction may be issued only if it  
8 is proved by clear and convincing evidence that the examination clearly would not be in the  
9 public interest, and that the examination would substantially and irreparably injure any person.

10 In ruling upon requests for injunction pursuant to this section, the court shall take into  
11 account the policy of this chapter that free and open examination of public records generally is  
12 in the public interest, even though such examination may on occasion cause inconvenience or  
13 embarrassment to public officials or other persons.

14 Good faith, reasonable delay by a lawful custodian of a record in permitting the examination  
15 and copying of a public record is not a violation of this chapter if the purpose of the delay is:

- 16 (1) To determine whether the record in question is a public record; or
- 17 (2) To determine whether inspection or copying of the record would substantially and  
18 irreparably injure any person; or
- 19 (3) To determine whether the lawful custodian is entitled to seek such an injunction or  
20 should seek such an injunction; or
- 21 (4) To seek an injunction under this section.