

# State of South Dakota

EIGHTY-THIRD SESSION  
LEGISLATIVE ASSEMBLY, 2008

637P0697

## SENATE ENGROSSED NO. **SB 189** - 2/11/2008

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. Private  
16 use of information contained within an original list, when value is added, does not constitute  
17 redistribution. Violation of this section by the resale or redistribution of any such list is a Class  
18 2 misdemeanor.

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

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

- 23 (1) Records which, if disclosed, would constitute an unwarranted release of personal  
24 information;

- 1       (2)   Records which, if disclosed, would impair present or pending contract awards or  
2       collective bargaining negotiations;
- 3       (3)   Records that constitute agency trade secrets, agency proprietary information, or  
4       intellectual property record as defined in § 1-27-9, or proprietary or trade secret  
5       information of private entities as defined in subdivision 1-27-28(4) or 1-27-28(5);
- 6       (4)   Financial, research and development, or computer software information as defined  
7       in § 1-27-9, unless such information is otherwise made public by state law, including  
8       chapter 15-15A or § 1-26-21;
- 9       (5)   Work product, deliberative process and attorney-client records as defined in § 1-27-9  
10      or chapter 19-13;
- 11      (6)   Records which, if disclosed, could endanger the life or safety of any person;
- 12      (7)   Internal records of a public entity produced in the routine process of work, including  
13      but not limited to preliminary working drafts, internal memoranda and  
14      communications, and telephone messages and other ephemeral notes and records,  
15      unless such records constitute a completed state or federal audit, a final policy of or  
16      determination by the public entity, final instructions to staff directly affecting the  
17      public, or a final statistical or factual tabulation, or are otherwise public under state  
18      law;
- 19      (8)   Records that are examination questions or answers which are requested prior to the  
20      final round of testing where such questions will be used;
- 21      (9)   Security information or other records that, if disclosed, would jeopardize a public  
22      entity's capacity to protect the security of critical infrastructure; and
- 23      (10) Records received from a private entity regarding potential or existing investment of  
24      funds by a public entity, investment strategy by a public entity, or research conducted

1           for a public entity for purposes of investing funds.

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

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

6           1-27-9. ~~As used in §§ 1-27-9 to 1-27-18, inclusive~~ Except as otherwise provided, terms  
7 used in this chapter mean:

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

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

20           (3) "State agency," or "agency," or "agencies," includes all state officers, boards,  
21 commissions, departments, institutions, and agencies of state government;

22           (4) "State record" means:

23           (a) A record of a department, office, commission, board, or other agency, however  
24 designated, of the state government;

- 1 (b) A record of the State Legislature;
- 2 (c) A record of any court of record, whether of state-wide or local jurisdiction;
- 3 (d) Any other record designated or treated as a state record under state law;
- 4 (5) "Public entity," the State of South Dakota, municipalities, counties, school districts,  
5 townships, and any other local governmental entity exercising any part of the  
6 sovereign power of the state, and any agency, officer, board, office, bureau, division,  
7 commission, council, or other person or entity performing any governmental function  
8 for the state or for any local governmental entity exercising any part of the sovereign  
9 power of the state. The term does not include the Unified Judicial System;
- 10 (6) "Critical infrastructure," systems, assets, places or things, whether physical or virtual,  
11 so vital to the agency that the disruption, incapacitation, or destruction of such  
12 systems, assets, places or things could jeopardize the health, safety, welfare, or  
13 security of the agency, its residents, or its economy;
- 14 (7) "Security information," government data the disclosure of which would be likely to  
15 jeopardize the security of critical infrastructure or to jeopardize the security of  
16 information, possessions, persons, or property against theft, tampering, improper use,  
17 attempted escape, illegal disclosure, trespass, or physical injury;
- 18 (8) "Personal information," data that tends to establish the particular identity of a natural  
19 person, including but not limited to the person's name, address, social security  
20 number, driver's license number, date of birth, medical records, financial account  
21 numbers, and credit, debit or electronic funds transfer card numbers;
- 22 (9) "Financial information," information pertaining to monetary resources of a person or  
23 private entity which, if disclosed, would impair the agency's future ability to obtain  
24 necessary information, would cause substantial competitive injury to the person or

1 private entity from which the information was obtained, or would contribute to  
2 identity theft;

3 (10) "Research and development information," data 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 rom  
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 (10A) "Intellectual property record," a record, other than a financial or administrative  
15 record, that is produced or collected by or for faculty or staff of a publicly funded  
16 postsecondary institution or research facility in the conduct of or as a result of study  
17 or research on an educational, commercial, scientific, artistic, technical, or scholarly  
18 issue, regardless of whether the study or research was sponsored by the institution  
19 alone or in conjunction with a governmental body or private concern, and that has not  
20 been publicly released, published, or patented;

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

24 (12) "Agency proprietary record," any information on pricing, costs, revenue, taxes,

1 market share, customers and personnel developed by a public entity and used for that  
2 entity's business purposes;

3 (13) "Agency trade secret," any record developed by a public entity that is a trade secret  
4 as that term is defined in subdivision 1-27-28(5);

5 (14) "Work product record," any record of an attorney or other representative of a public  
6 entity that concerns an anticipated or pending contested case, litigation, or other  
7 dispute involving the public entity and reveals the mental impressions, conclusions,  
8 opinions, or legal theories of the attorney or other representative of the public entity;

9 (15) "Deliberative process record," any predecisional record of a public entity that would  
10 reveal advisory opinions, recommendations, or deliberations comprising part of a  
11 process by which governmental decisions and policies are formulated and which is  
12 not required to be part of a contested case record under chapter 1-26;

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

20 (17) "Person," any natural person, business entity, or governmental entity;

21 (18) "Private entity," any person or entity that is not a public entity;

22 (19) "Investment information," records and information an agency receives from private  
23 sources regarding potential and existing investments of agency funds, agency  
24 investment strategy, and research conducted by or for an agency for purposes of

1           making agency investments.

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

3           23-5-7. All photographs, impressions, measurements, descriptions, or records including  
4 confidential criminal investigative information, taken or made as provided for in § 23-5-6 shall  
5 be filed and preserved by the department or institution where made or taken and ~~shall~~ may not  
6 be published, transferred, or circulated outside such department or institutions, nor exhibited  
7 to the public or any person or persons except duly authorized law enforcement officers unless  
8 the subject of such photograph, measurement, description, or other record becomes a fugitive  
9 from justice, or escapes from a penal institution. However, this section ~~shall~~ does not apply to  
10 the release of information allowed pursuant to § 24-2-20. Further, a booking photograph may  
11 be made public at the discretion of the executive officer of the arresting agency.

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

14           Each public entity shall maintain:

- 15           (1) A record of the final vote of each member in every public entity proceeding in which  
16 a roll call vote is made or a record of the numerical vote if individual votes are not  
17 recorded;
- 18           (2) A record setting forth the name, public office address, title, and salary of every  
19 officer or employee of the public entity; and
- 20           (3) Current records retention schedules as required in § 1-27-13 or otherwise maintain  
21 a reasonably detailed current list by subject matter, of all records in the possession  
22 of the public entity, regardless of whether such records are public under this chapter  
23 or subject to the records retention program provided in this chapter.

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

1 follows:

2 If the following records, pertaining to current and former employees, volunteers, and  
3 independent contractors of a public entity are maintained, they are public:

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

6 (2) The date of employment for each current employee and, except as provided in section  
7 7 of this Act, the employee's work location and job title and telephone number for the  
8 office where the employee works;

9 (3) For employees or officers who are paid a moving allowance, housing allowance,  
10 motor vehicle allowance, severance pay, or other payment not constituting employee  
11 salary, wages, or authorized travel or per diem reimbursements, the actual annual  
12 sum of such payments. For employees or officers receiving any in-kind benefit, such  
13 as use of a motor vehicle for personal purposes or a dwelling, the existence of such  
14 benefit is public and the fair market value of such in-kind benefit, if it has been  
15 calculated by the public entity, is public;

16 (4) Any final disciplinary decision regardless of whether further legal action may be  
17 possible;

18 (5) The existence of any civil, criminal, or regulatory complaint that has been formally  
19 commenced against a public official who is the head or deputy head of an agency, a  
20 member of a board or commission appointed by the Governor or other elected officer,  
21 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 public entities engaged in investigative work or law  
2 enforcement services, or to officers, agents, or employees of correctional facilities or secure  
3 treatment facilities who are directly involved in supervision of inmates or parolees, may not be  
4 disclosed:

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

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

12 Nothing in this chapter prevents the release of a record if the record would otherwise be  
13 public but contains information held confidential under § 1-27-3, provided that the confidential  
14 information has been redacted before public disclosure. Further, nothing in this chapter prevents  
15 the release of records to any person who filed the record with the public entity or prevents the  
16 release of regulatory records to the person regulated, if such regulatory records do not constitute  
17 investigatory records or records that are to be withheld from the person regulated under specific  
18 laws pertaining to such records.

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

21 Pursuant to the rules of civil procedure, a circuit court may enjoin or limit the examination  
22 and copying of a specific public record or a narrowly drawn class of public records as provided  
23 in this section. Any action for injunction pursuant to this section may be brought by the lawful  
24 custodian of a public record or by any other person who would be aggrieved or adversely

1 affected by the examination or copying of such record. The injunction may be issued only if it  
2 is proved by clear and convincing evidence that the examination clearly would not be in the  
3 public interest, and that the examination would substantially and irreparably injure any person.

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

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

- 10 (1) To determine whether the record in question is a public record; or
- 11 (2) To determine whether inspection or copying of the record would substantially and  
12 irreparably injure any person; or
- 13 (3) To determine whether the lawful custodian is entitled to seek such an injunction or  
14 should seek such an injunction; or
- 15 (4) To seek an injunction under this section.