

State of South Dakota

EIGHTY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2008

637P0697

SENATE STATE AFFAIRS ENGROSSED NO. **SB 189** - 2/6/2008

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.
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 regulation 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, or
2 intellectual property record as defined in § 1-27-9, or proprietary or trade secret
3 information of private 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 § 1-27-9;
- 6 (5) Work product, deliberative process and attorney-client records as defined in § 1-27-9
7 or 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 do not include the Unified
21 Judicial System. These terms do not apply to statutes regarding the disclosure of state
22 records of financial investigations in §§ 1-27-28 to 1-27-32, inclusive;

23 (4) "State record" means:

24 (a) A record of a department, office, commission, board, or other agency, however

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

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

12 (10A) "Intellectual property record," a record, other than a financial or administrative
13 record, that is produced or collected by or for faculty or staff of a publicly funded
14 postsecondary institution or research facility in the conduct of or as a result of study
15 or research on an educational, commercial, scientific, artistic, technical, or scholarly
16 issue, regardless of whether the study or research was sponsored by the institution
17 alone or in conjunction with a governmental body or private concern, and that has not
18 been publicly released, published, or patented;

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

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

24 (13) "Agency trade secret," any record developed by an agency that is a trade secret as that

- 1 term is defined in subdivision 1-27-28(5);
- 2 (14) "Economic development record," any record held confidential under § 9-34-19, 1-
3 16B-14.1, or 1-16G-11, and includes the prospective location of a business or
4 industry, including the identity, nature, and location of the business or industry, if
5 such information has not been previously disclosed by the specific business or
6 industry at issue;
- 7 (15) "Work product record," any agency record of an attorney or other representative of
8 a party as described in subdivision 15-6-26(b)(3);
- 9 (16) "Deliberative process record," any predecisional agency record that would reveal
10 advisory opinions, recommendations, or deliberations comprising part of a process
11 by which governmental decisions and policies are formulated and which is not
12 required to be part of a contested case agency record under chapter 1-26;
- 13 (17) "Final disciplinary decision," the final decision of an agency regarding a disciplinary
14 action against an agency employee resulting in suspension, termination, or reduction
15 in pay or grade, regardless of the possibility of any later proceedings or court
16 proceedings. In the case of arbitration proceedings arising under collective bargaining
17 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 (18) "Person," any natural person, business entity, or governmental entity;
- 21 (19) "Agency fiscal record," any record kept by an agency for fiscal audit purposes,
22 including contracts, vouchers, and lists or ledgers showing indebtedness (bonds,
23 warrants, certificates, and other similar evidence of indebtedness), sources of
24 revenue, amounts received, accounts receivable, accounts payable, claims and

1 demands, general and special taxes levied and paid, special assessments levied and
2 paid, and other similar lists or ledgers that show the financial transactions, account
3 balances, or financial condition of the agency. Personal or governmental account
4 numbers (such as social security numbers, student identification numbers, credit card
5 numbers, and bank account numbers) or passwords are not agency fiscal records;

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

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

11 (22) "Investment information," records and information an agency receives from private
12 sources regarding potential and existing investments of agency funds, agency
13 investment strategy, and research conducted by or for an agency for purposes of
14 making agency investments.

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

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

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

3 Each agency shall maintain:

- 4 (1) A record of the final vote of each member in every agency proceeding in which a roll
5 call vote is made or a record of the numerical vote if individual votes are not
6 recorded;
- 7 (2) A record setting forth the name, public office address, title, and salary of every
8 officer or employee of the agency; and
- 9 (3) Current records retention schedules as required in § 1-27-13 or otherwise maintain
10 a reasonably detailed current list by subject matter, of all records in the possession
11 of the agency, regardless of whether such records are public under this chapter or
12 subject to the records retention program provided in this chapter.

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

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

- 17 (1) Copies of contracts with independent contractors and vouchers showing payments
18 to such contractors;
- 19 (2) Name, actual annual gross salary, and salary range, for each current employee of the
20 agency;
- 21 (3) The date of employment for each current employee and, except as provided in section
22 9 of this Act, the work location and telephone number for the office where the
23 employee works;
- 24 (4) Job title, bargaining unit, if any, job description, education and training background,

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

1 agency, a member of a board or commission appointed by the Governor or other
2 elected officer, or executive heads of bureaus, divisions, or public institutions.

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

5 Notwithstanding any other provision of this chapter, the following personnel data relating
6 to officers, agents, or employees of agencies engaged in investigative work or law enforcement
7 services, or to officers, agents, or employees of correctional facilities or secure treatment
8 facilities who are directly involved in supervision of inmates or parolees, may not be disclosed:

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

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

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

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

24 Nothing in this chapter prevents the release of records if the record would otherwise be

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

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

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

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

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

- 21 (1) To determine whether the record in question is a public record; or
- 22 (2) To determine whether inspection or copying of the record would substantially and
23 irreparably injure any person; or
- 24 (3) To determine whether the lawful custodian is entitled to seek such an injunction or

- 1 should seek such an injunction; or
- 2 (4) To seek an injunction under this section.