

# OPEN GOVERNMENT GUIDE

Access to Public Records  
and Meetings in

SOUTH DAKOTA

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

Sixth Edition  
2011



OPEN GOVERNMENT GUIDE  
OPEN RECORDS AND MEETINGS LAWS IN  
SOUTH DAKOTA

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**SIXTH EDITION**  
**2011**

Previously Titled  
Tapping Officials' Secrets

Published by The Reporters Committee for Freedom of the Press  
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Production of the sixth edition of this compendium was possible  
due to the generous financial contributions of:  
The Stanton Foundation

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ISBN: 1-58078-242-6

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## Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

## User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

*Following the outline.* Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, [www.rcfp.org/ogg](http://www.rcfp.org/ogg). The Internet version of the outlines allows you to search the database and compare the law in different states.

*Updates:* The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at [www.rcfp.org/ogg](http://www.rcfp.org/ogg). This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.



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**FOREWORD**

The antiquated South Dakota open records law finally was overhauled completely during the 2009 legislative session. The revamped law is modeled on and closely parallels Nebraska's in most respects, although the South Dakota Legislature has added a handful of provisions. Since the new law went into effect on July 1, 2009, there is no body of case law establishing precedent. Therefore, most of this outline is based on common sense reading of the new statutes. Whether the South Dakota courts look to Nebraska case law for interpretative guidance is anybody's guess.

**1-27-1. Public records open to inspection and copying**

Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in §1-27-1.1 of this Act, are hereby fully empowered and authorized to examine such public record, and make memoranda and abstracts therefrom during the hours the respective offices are open for the ordinary transaction of business and, unless federal copyright law otherwise provides, obtain copies of public records in accordance with this chapter.

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

**1-27-1.1. Public records defined**

Unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public, public records include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form remains a public record when maintained in any other form. For the purposes of this Act, a tax-supported district includes any business improvement district created pursuant to chapter 9-55.

**1-27-1.2. Fees for specialized service**

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

**1-27-1.3. Liberal construction of public access to public records law—Certain criminal investigation and contract negotiation records exempt**

The provisions of §§1-27-1 to 1-27-1.15, inclusive, and 1-27-4 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order that

the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them. Use of funds as needed for criminal investigatory/confidential informant purposes is not subject to this section, but any budgetary information summarizing total sums used for such purposes is public. Records which, if disclosed, would impair present or pending contract awards or collective bargaining negotiations are exempt from disclosure.

**1-27-1.4. Denial letter to be kept on file**

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

**1-27-1.5. Certain records not open to inspection and copying**

The following records are not subject to §§1-27-1 to 1-27-1.1, and 1-27-1.3:

- (1) Personal information in records regarding any student, prospective student, or former student of any educational institution if such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public consistent with 20 U.S.C. 1232g, as such section existed on January 1, 2009;
- (2) Medical records, including all records of drug or alcohol testing, treatment, or counseling, other than records of births and deaths. This law in no way abrogates or changes existing state and federal law pertaining to birth and death records;
- (3) Trade secrets, the specific details of bona fide research, applied research, or scholarly or creative artistic projects being conducted at a school, postsecondary institution or laboratory funded in whole or in part by the state, and other proprietary or commercial information which if released would infringe intellectual property rights, give advantage to business competitors, or serve no material public purpose;
- (4) Records which consist of attorney work product or which are subject to any privilege recognized in chapter 19-13;
- (5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, if the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training. However, this subdivision does not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person, and this subdivision does not apply to a 911 recording or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure. This law in no way abrogates or changes §§23-5-7 and 23-5-11 or testimonial privileges applying to the use of information from confidential informants;
- (6) Appraisals or appraisal information and negotiation records concerning the purchase or sale, by a public body, of any interest in real or personal property;
- (7) Personnel information other than salaries and routine directory information;
- (8) Information solely pertaining to protection of the security of public or private property and persons on or within public or private property, such as specific, unique vulnerability assessments or specific, unique response plans, either of which is intended to prevent or mitigate criminal acts, emergency management or response, or public safety, the public disclosure of which would create a substantial likelihood of endangering public safety or property; computer or communications network schema, pass-

words, and user identification names; guard schedules; lock combinations; or any blueprints, building plans, or infrastructure records regarding any building or facility that expose or create vulnerability through disclosure of the location, configuration, or security of critical systems;

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

(10) Personally identified private citizen account payment information, credit information on others supplied in confidence, and customer lists;

(11) Records or portions of records kept by a publicly funded library which, when examined with or without other records, reveal the identity of any library patron using the library's materials or services;

(12) Correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees;

(13) Records or portions of records kept by public bodies which would reveal the location, character, or ownership of any known archaeological, historical, or paleontological site in South Dakota if necessary to protect the site from a reasonably held fear of theft, vandalism, or trespass. This subdivision does not apply to the release of information for the purpose of scholarly research, examination by other public bodies for the protection of the resource or by recognized tribes, or the federal Native American Graves Protection and Repatriation Act;

(14) Records or portions of records kept by public bodies which maintain collections of archeological, historical, or paleontological significance which nongovernmental donors have requested to remain closed or which reveal the names and addresses of donors of such articles of archaeological, historical, or paleontological significance unless the donor approves disclosure, except as the records or portions thereof may be needed to carry out the purposes of the federal Native American Graves Protection and Repatriation Act and the Archeological Resources Protection Act;

(15) Employment applications and related materials, except for applications and related materials submitted by individuals hired into executive or policymaking positions of any public body;

(16) Social security numbers; credit card, charge card, or debit card numbers and expiration dates; passport numbers, driver license numbers; or other personally identifying numbers or codes; and financial account numbers supplied to state and local governments by citizens or held by state and local governments regarding employees or contractors;

(17) Any emergency or disaster response plans or protocols, safety or security audits or reviews, or lists of emergency or disaster response personnel or material; any location or listing of weapons or ammunition; nuclear, chemical, or biological agents; or other military or law enforcement equipment or personnel;

(18) Any test questions, scoring keys, results, or other examination data for any examination to obtain licensure, employment, promotion or reclassification, or academic credit;

(19) Personal correspondence, memoranda, notes, calendars or appointment logs, or other personal records or documents of any public official or employee;

(20) Any document declared closed or confidential by court order, contract, or stipulation of the parties to any civil or criminal action or proceeding;

(21) Any list of names or other personally identifying data of occupants of camping or lodging facilities from the Department of Game, Fish and Parks;

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

(23) Records which, if released, could endanger the life or safety of any person;

(24) Internal agency record or information received by agencies that are not required to be filed with such agencies, if the records do not constitute final statistical or factual tabulations, final instructions to staff that affect the public, or final agency policy or determinations, or any completed state or federal audit and if the information is not otherwise public under other state law, including chapter 15-15A and §1-26-21;

(25) Records of individual children regarding commitment to the Department of Corrections pursuant to chapters 26-8B and 26-8C;

(26) Records regarding inmate disciplinary matters pursuant to §1-15-20; and

(27) Any other record made closed or confidential by state or federal statute or rule or as necessary to participate in federal programs and benefits.

#### **1-27-1.6. Certain financial, commercial, and proprietary information exempt from disclosure**

The following financial, commercial, and proprietary information is specifically exempt from disclosure pursuant to §§1-27-1 to 1-27-1.15, inclusive:

(1) Valuable formulae, designs, drawings, computer source code or object code, and research data invented, discovered, authored, developed, or obtained by any agency if disclosure would produce private gain or public loss;

(2) Financial information supplied by or on behalf of a person, firm, or corporation for the purpose of qualifying to submit a bid or proposal;

(3) Financial and commercial information and records supplied by private persons pertaining to export services;

(4) Financial and commercial information and records supplied by businesses or individuals as part of an application for loans or program services or application for economic development loans or program services;

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

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

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

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

or

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

(7) Financial, commercial, and proprietary information supplied in conjunction with applications or proposals for funded scientific research, for participation in joint scientific research projects, for

projects to commercialize scientific research results, or for use in conjunction with commercial or government testing;

(8) Any production records, mineral assessments, and trade secrets submitted by a permit holder, mine operator, or landowner to any public body.

**1-27-1.7. Certain drafts, notes, and memoranda exempt from disclosure**

Drafts, notes, recommendations, and memoranda in which opinions are expressed or policies formulated or recommended are exempt from disclosure pursuant to §§1-27-1 to 1-27-1.15, inclusive.

**1-27-1.8. Certain records, relevant to court actions, exempt from disclosure**

Any record that is relevant to a controversy to which a public body is a party but which record would not be available to another party under the rules of pretrial discovery for causes pending in circuit court are exempt from disclosure pursuant to §§1-27-1 to 1-27-1.15, inclusive.

**1-27-1.9. Documents or communications used for decisional process arising from person's official duties not subject to compulsory disclosure**

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

**1-27-1.10. Redaction of certain information**

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

**1-27-1.11. Subscription or license holder list of Department of Game, Fish and Parks and certain insurance applicant and policyholder information available for fee—Resale or redistribution prohibited—Misdemeanor**

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

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

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

**1-27-1.12. Chapter inapplicable to Unified Judicial System**

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

**1-27-1.13. Certain records not available to inmates**

The secretary of corrections may prohibit the release of information to inmates or their agents regarding correctional operations, de-

partment policies and procedures, and inmate records of the requesting inmate or other inmates if the release would jeopardize the safety or security of a person, the operation of a correctional facility, or the safety of the public. This section does not apply to an inmate's attorney requesting information that is subject to disclosure under this chapter.

**1-27-1.14. Redaction of records of office of register of deeds recorded prior to July 1, 2010**

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

**1-27-1.15. Immunity for good faith denial or provision of record**

No civil or criminal liability may attach to a public official for the mistaken denial or provision of a record pursuant to this chapter if that action is taken in good faith.

**1-27-4. Format of open record**

Any record made open to the public pursuant to this chapter shall be maintained in its original format or in any searchable and reproducible electronic or other format. This chapter does not mandate that any record or document be kept in a particular format nor does it require that a record be provided to the public in any format or media other than that in which it is stored.

**1-27-4.1. Format of written contracts—Storage with records retention officer or designee—Duration**

Any written contract entered by the state, a county, a municipality, or a political subdivision shall be retained in the contract's original format or a searchable and reproducible format. Each contract shall be stored with the records retention officer of that entity or with the designee of the records retention officer unless the contract is required by law to be retained by some other person. Each contract shall be stored during the term of the contract and for two years after the expiration of the contract term.

**1-27-4.2. Availability of contract through internet website or database**

Any contract retained pursuant to §1-27-4.1 may be made available to the public through a publicly accessible internet website or database.

In advance of the new open records law, the 2009 legislature passed a bill that created a formalized record request process, including a hearing and appeal procedure in contested cases. Those provisions are as follows:

**1-27-35. Informal requests for disclosure of records—Costs of retrieval or reproduction.**

Any informal request for disclosure of documents or records shall be made to the custodian of the record. The custodian of the record may then provide the requestor with the document or record upon payment of the actual cost of mailing or transmittal, the actual cost of reproduction, or other fee established by statute or administrative rule. A requestor that makes an informal request requiring the dedication of staff time in excess of one hour may be required to pay the cost of the staff time necessary for the location, assembly, or reproduction of the public record. If any records are required or permitted to be made public upon request and no other rate is prescribed for reproduction or retrieval of such records, the Bureau of Administration shall establish, by rules promulgated pursuant to chapter 1-26, the maximum rate, or the formula for calculating rates, for reproduction and retrieval.

**1-27-36. Estimate of retrieval and reproduction cost—Waiver or reduction of fee.**

For any informal request reasonably likely to involve a fee in excess of fifty dollars, the custodian shall provide an estimate of cost to

the requestor prior to assembling the documents or records and the requestor shall confirm in writing his or her acceptance of the cost estimate and agreement to pay. The custodian may exercise discretion to waive or reduce any fee required under this section if the waiver or reduction of the fee would be in the public interest.

**1-27-37. Written request for disclosure of records.**

If an informal request is denied in whole or in part by the custodian of a document or record, a written request may be made by the requestor pursuant to this section:

(1) A written request may be made to the public record officer of the public entity involved. The public record officer shall promptly respond to the written request but in no event later than ten business days from receipt of the request. The public record officer shall respond to the request by:

- (a) Providing the record in whole or in part to the requestor upon payment of any applicable fees pursuant to §§ 1-27-35 and 1-27-36;
- (b) Denying the request for the record; or
- (c) Acknowledging that the public record officer has received the request and providing an estimate of the time reasonably required to further respond thereto;

(2) Additional time to respond to the written request under subsection (1)(c) of this section may be based upon the need to clarify the nature and scope of the written request, to locate and assemble the information requested, to notify any third persons or government agencies affected by the written request, or to determine whether any of the information requested is not subject to disclosure and whether a denial should be made as to all or part of the written request;

(3) If a written request is unclear, the public record officer may require the requestor to clarify which records are being sought. If the requestor fails to provide a written response to the public record officer's request for clarification within ten business days, the request shall be deemed withdrawn and no further action by the public records officer is required;

(4) If the public record officer denies a written request in whole or in part, the denial shall be accompanied by a written statement of the reasons for the denial;

(5) If the public record officer fails to respond to a written request within ten business days, or fails to comply with the estimate provided under subsection (1)(3) of this section without provision of a revised estimate, the request shall be deemed denied.

**1-27-38. Civil action or administrative review of denial of written request or estimate of fees.**

If a public record officer denies a written request in whole or in part, or if the requestor objects to the public record officer's estimate of fees or time to respond to the request, a requestor may within ninety days of the denial commence a civil action by summons or, in the alternative, file a written notice of review with the Office of Hearing Examiners. The notice of review shall be mailed, via registered or certified mail, to the Office of Hearing Examiners and shall contain:

- (1) The name, address, and telephone number of the requestor;
- (2) The name and business address of the public record officer denying the request;

(3) The name and business address of the agency, political subdivision, municipal corporation, or other entity from which the request has been denied;

(4) A copy of the written request;

(5) A copy of any denial or response from the public record officer; and

(6) Any other information relevant to the request that the requestor desires to be considered.

**1-27-39. Response to notice of review.**

Upon receipt, the Office of Hearing Examiners shall promptly mail a copy of the notice of review filed pursuant to § 1-27-38 and all information submitted by the requestor to the public record officer named in the notice of review. The entity denying the written request may then file a written response to the Office of Hearing Examiners within ten business days. If the entity does not file a written response within ten business days, the Office of Hearing Examiners shall act on the information provided. The Office of Hearing Examiners shall provide a reasonable extension of time to file a written response upon written request or agreement of parties.

**1-27-40. Findings and decision of Office of Hearing Examiners.**

Upon receipt and review of the submissions of the parties, the Office of Hearing Examiners shall make written findings of fact and conclusions of law, and a decision as to the issue presented. Before issuing a decision, the Office of Hearing Examiners may hold a hearing pursuant to chapter 1-26 if good cause is shown.

**1-27-41. Appeal.**

The aggrieved party may appeal the decision of the Office of Hearing Examiners to the circuit court pursuant to chapter 1-26. In any action or proceeding under §§ 1-27-35 to 1-27-43, inclusive, no document or record may be publicly released until a final decision or judgment is entered ordering its release.

**1-27-42. Public record officer for the state, county, municipality, township, school district, special district, or other entity.**

The public record officer for the state is the secretary, constitutional officer, elected official, or commissioner of the department, office, or other division to which a request is directed. The public record officer for a county is the county auditor or the custodian of the record for law enforcement records. The public record officer for a first or second class municipality is the finance officer or the clerk or the custodian of the record for law enforcement records. The public record officer for a third class municipality is the president of the board of trustees or the custodian of the record for law enforcement records. The public record officer for an organized township is the township clerk. The public record officer for a school district is the district superintendent or CEO. The public record officer for a special district is the chairperson of the board of directors. The public record officer for any other entity not otherwise designated is the person who acts in the capacity of the chief financial officer or individual as designated by the entity.

**1-27-43. Form of notice of review—Office of Hearing Examiners' notice.**

The following forms are prescribed for use in the procedures provided for in §§ 1-27-35 to 1-27-42, inclusive, but failure to use or fill out completely or accurately any of the forms does not void acts done pursuant to those sections provided compliance with the information required by those sections is provided in writing.

**NOTICE OF REVIEW  
REQUEST FOR DISCLOSURE OF PUBLIC RECORDS**

Date of Request: \_\_\_\_\_

Name of Requestor: \_\_\_\_\_

Address of Requestor: \_\_\_\_\_

Telephone Number of Requestor: \_\_\_\_\_

Type of Review Being Sought:

\_\_\_\_\_ Request for Specific Record

\_\_\_\_\_ Estimate of Fees

\_\_\_\_\_ Estimate of Time to Respond

Short Explanation of Review Being Sought Including Specific Records Requested:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Name of Public Record Officer: \_\_\_\_\_

Address of Public Record Officer: \_\_\_\_\_

Name of Governmental Entity: \_\_\_\_\_

Address of Governmental Entity: \_\_\_\_\_

You must include with the submission of this Notice of Review—Request for Disclosure of Public Records form the following information: (1) A copy of your written request to the public record officer; (2) A copy of the public record officer’s denial or response to your written request, if any; and (3) Any other information relevant to the request that you desire to be considered.

I hereby certify that the above information is true and correct to the best of my knowledge.

**Signature of Requestor:** \_\_\_\_\_

The Notice of Review—Request for Disclosure of Public Records form shall be completed and submitted, via registered or certified mail, return receipt, to the following address:

Office of Hearing Examiners  
500 E. Capitol Avenue  
Pierre, South Dakota 57501  
605-773-6811

**SOUTH DAKOTA OFFICE OF HEARING EXAMINERS  
NOTICE OF REQUEST FOR DISCLOSURE  
OF PUBLIC RECORDS**

TO: (Public Record Officer & Governmental Entity)

\_\_\_\_\_ has filed a Notice of Review—Request for Disclosure of Public Records. A copy of the Notice of Review—Request for Disclosure of Public Records is attached for your review.

You may file a written response to the Notice of Review—Request for Disclosure of Public Records within ten (10) business days of receiving this notice, exclusive of the day of service, at the following address:

Office of Hearing Examiners  
500 E. Capitol Avenue  
Pierre, South Dakota 57501  
605-773-6811

The Office of Hearing Examiners may issue its written decision on the information provided and will only hold a hearing if it deems a hearing necessary.

If you have any questions, please contact the Office of Hearing Examiners.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
Office of Hearing Examiners

**1-27-44. Restriction on internet use of social security numbers by state agencies and political subdivisions.**

No state agency or any of its political subdivisions or any official, agent, or employee of any state agency or political subdivision may:

- (1) Knowingly release or post any person’s social security number on the internet; or
- (2) Require any person to transmit the person’s social security number over the internet, unless the connection is secure or the social security number is encrypted; or
- (3) Require any person to use the person’s social security number to access an internet website, unless a password or unique personal identification number or other authentication device is also required to access the internet website.

# Open Records

## I. STATUTE -- BASIC APPLICATION

### A. Who can request records?

#### 1. Status of requestor.

“[A]ll citizens of [South Dakota], and all other persons interested...” SDCL § 1-27-1.

#### 2. Purpose of request.

The requester’s purpose is generally not relevant under the law. However, resale or redistribution of certain subscription or licensing lists — presumably as “mailing lists” — is prohibited. SDCL § 1-27-1.11.

#### 3. Use of records.

Use of records generally irrelevant, but for resale/redistribution of certain subscription or license holder lists purchased from the Department of Game, Fish and Parks or Department of Public Safety. SDCL § 1-27-1.11.

### B. Whose records are and are not subject to the act?

Act covers records “of or belonging to this state, any county, municipality, political subdivision, or tax-supported district [and all subordinate agencies, boards, commissions, etc.]...” SDCL § 1-27-1.1.

#### 1. Executive branch.

##### a. Records of the executives themselves.

Presumably, an executive’s records are covered as “of or belonging to” state and its subdivisions. The act does protect confidentiality, generally of public officials and employees’ “[c]orrespondence, memoranda, calendars...working papers, and records of telephone calls” as well as their “personal records or documents.” SDCL § 1-27-1.5(12) and (19).

##### b. Records of certain but not all functions.

There is specific exclusion for documents and records “used for the purpose of the decisional or deliberative process...” SDCL § 1-27-1.9. There also is an exclusion for materials “in which opinions are expressed or policies formulated or recommended...” SDCL § 1-27-1.7.

#### 2. Legislative bodies.

Legislative bodies are included as a “branch” of the state. SDCL § 1-27-1.1.

#### 3. Courts.

The act does not apply to “records and documents of the Unified Judicial System.” SDCL § 1-27-1.12.

#### 4. Nongovernmental bodies.

##### a. Bodies receiving public funds or benefits.

Nongovernmental bodies receiving public funds or benefits are not specifically covered. Note, however, the liberal construction of open records laws when public funds are involved.

##### b. Bodies whose members include governmental officials.

Only bodies that are “of” the state or its political subdivisions. It is uncertain whether a record might be considered public because it could be attributed to an individual government official. SDCL § 1-27-1.1.

#### 5. Multi-state or regional bodies.

It is uncertain whether a body that includes the state would be considered “of” the state, making that body’s records public. SDCL § 1-27-1.1.

#### 6. Advisory boards and commissions, quasi-governmental entities.

These entities are probably covered, but subject to “decisional or deliberative” process exception. SDCL § 1-27-1.9.

#### 7. Others.

None.

### C. What records are and are not subject to the act?

#### 1. What kind of records are covered?

Public records “include all records and documents, regardless of physical form...” SDCL § 1-27-1.1.

#### 2. What physical form of records are covered?

All forms are covered. SDCL § 1-27-1.1.

#### 3. Are certain records available for inspection but not copying?

No.

### D. Fee provisions or practices.

#### 1. Levels or limitations on fees.

The record custodian may charge “actual cost of mailing or transmittal, the actual cost of reproduction, or other fee established by statute or administrative rule . . . [and] staff time in excess of one hour . . .” SDCL § 1-27-35.

#### 2. Particular fee specifications or provisions.

SDCL § 1-27-35, above.

##### a. Search.

SDCL § 1-27-35, above.

##### b. Duplication.

SDCL § 1-27-35, above.

##### c. Other.

A “reasonable amount representing a portion of the amortization of the cost of computer equipment” may be charged for modem to modem transfer. SDCL § 1-27-1.2.

#### 3. Provisions for fee waivers.

Fees may be waived or reduced if it “would be in the public interest.” SDCL § 1-27-36.

#### 4. Requirements or prohibitions regarding advance payment.

Law authorizes advance payment or promise to pay. SDCL § 1-27-35, 36. Although not expressly applicable to record production, SDCL § 4-3-1 authorizes public officers to require advance payment from persons for whom they perform any service.

#### 5. Have agencies imposed prohibitive fees to discourage requesters?

Not yet under the new law. Under previous law, there were occasional problems with unreasonable fee demands.

### E. Who enforces the act?

Enforcement can be either civil or criminal. The civil options are a lawsuit or administrative hearing with appeal to circuit court. SDCL §

1-27-38. Although the open records statutes do not provide any specific criminal sanctions, the criminal code, itself, makes it a felony to destroy, conceal, remove or impair the availability of any public record. SDCL § 22-1-24. Therefore, it is logical to conclude that the local states attorneys would/should enforce the act. However, there are no recorded cases of prosecutions for open records violations.

### 1. Attorney General's role.

None specified, but a state's attorney may ask the attorney general to assume the case.

### 2. Availability of an ombudsman.

No provision.

### 3. Commission or agency enforcement.

Yes. As of 2008 there has been a hearing examiner procedure, but no cases have been presented yet that involve the open records law that went into effect on July 1, 2009. SDCL § 1-27-38.

#### F. Are there sanctions for noncompliance?

No specific sanctions, but there are generic criminal sanctions.

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open records statute.

Twenty-seven categories of records are "not open to general inspection and copying." SDCL § 1-27-1.5. In addition, the law provides specific exemptions for a handful of other records. SDCL § 1-27-1.6, 1.7, 1.8 and 1.9.

#### 1. Character of exemptions.

##### a. General or specific?

The exemptions are fairly specific.

##### b. Mandatory or discretionary?

The statutory exemption and redaction language, while not explicitly mandatory, will likely be interpreted to be mandatory. SDCL §§ 1-27-1.5 through 1.8 and 1-27-1.10. However, the "deliberative process" exemption is expressly discretionary. SDCL § 1-27-1.9.

##### c. Patterned after federal Freedom of Information Act?

The exemptions more closely follow Nebraska than the federal FOIA.

#### 2. Discussion of each exemption.

No case law.

### B. Other statutory exclusions.

business information (trade secrets, commercial and financial information concerning operations) received by economic development finance authority (SDCL § 1-16B-14.1)

business information (trade secrets, commercial and financial information concerning operations) received by economic development board/office and Science and Technology Authority (SDCL §§ 1-16G-11 and 1-16H-28);

state fair commission's contracts and negotiations with entertainers (SDCL § 1-21-17);

state agency information that is "derogatory to a person" (SDCL § 1-26-2);

state agency information related to investigation, audit or examination of private entity (SDCL §§ 1-27-29,30); disclosure is a Class 1 misdemeanor (SDCL § 1-27-32);

mineral lessee's records furnished to or inspected by commissioner of school and public lands (SDCL § 5-7-58);

county fair board contracts with performers may be kept confidential for 60 days (SDCL § 7-27-20);

trade secrets or financial information provided by business in request for financial assistance from municipal corporation or economic development corporation (SDCL § 9-34-19);

tax return records and lists of taxpayers, licensees and applicants (SDCL § 10-1-28.2, 28.3);

absence excuse certificates of students "alternatively schooled" (SDCL § 13-27-9);

public library records containing identification information (SDCL § 14-2-51);

information in court record not accessible under federal law, state law, court rule or case law (SDCL § 15-15A-7);

records sealed by statute or court order, impounded or communicated in camera, offered in grand jury proceedings or included in presentencing reports, dependency cases or psychiatric reports" (Code of Judicial Conduct (Appendix to SDCL § 16-2));

affidavit of consent to disbarment (SDCL § 16-19-66);

investigative materials related to discrimination complaints filed with State Commission of Human Rights (SDCL § 20-13-32.2);

health care services arbitration panel — records of proceedings confidential until entry of judgment (SDCL § 21-25B-24);

names of victims included in otherwise public sex offender registration records (SDCL § 22-22-40);

drug screening test results of applicants for "safety-sensitive" law enforcement positions (SDCL § 23-2-67);

criminal identification, intelligence, investigative and statistical information (SDCL § 23-5-10,11,17; SDCL § 23-6-16);

DNA records and samples filed with state laboratory (SDCL § 23-5A-23);

court services records (SDCL § 23A-27-47);

crime victim records obtained by department of social services under crime victim compensation program (SDCL § 23A-28B-36);

crime victim's notification of wish to participate in certain phase(s) of case (SDCL § 23A-28C-2);

parental relations termination proceedings files and records (SDCL § 25-5A-20);

adoption records (SDCL §§ 25-6-15.1, 26-4-9.1, and 28-1-31);

child support enforcement case records, including obligor's bank records, (SDCL §§ 25-7A-56.6 and 56.9 and SDCL § 28-1-68);

child welfare agency records regarding children and their families (SDCL § 26-6-20);

juvenile delinquency court records (SDCL §§ 26-7A-37 and 38);

juvenile delinquency case records prepared by court services officers (SDCL § 26-7A-120);

neglected, abused child reports (SDCL § 26-8A-13);

mental health records, including those of law enforcement (SDCL §§ 27A-12-25, 25.1, 27A-12-26, and 26.1);

mental retardation records (SDCL § 27B-8-28);

public assistance information filed with the department of social services (SDCL § 28-1-29);

adult services program and aging program records kept by department of social services (SDCL § 28-1-45.1);

welfare fraud investigative records (SDCL § 28-1-80);

guardianship preliminary evaluations and financial information (SDCL § 29A-5-207,311,508);

veterans' files compiled by state agencies in connection with claims for benefits (SDCL § 33-16-23);

patient information received by ambulance service (SDCL § 34-11-5.1);

hospital licensing and inspection information received by the department of health (SDCL § 34-12-17);

medical research information obtained by the department of health, state medical association, hospital staffs, etc. in the course of medical study (SDCL § 34-14-1);

campground and lodging registration information (SDCL § 34-18-21);

alcohol and drug abuse treatment facilities' records (SDCL § 34-20A-90);

communicable disease reports (SDCL §§ 34-22-12, 12.1 and 12.2);

abortion trial information, specifically patient's name (SDCL §§ 34-23A-7.1 and 34-23A-23);

original birth certificates when new certificate has been issued (SDCL §§ 34-25-16.4,16.5);

trade secrets of owner/operator of air contaminant source (SDCL § 34A-1-14);

trade secrets of owner/operator of water contaminant source (SDCL § 34A-2-94);

trade secrets of hazardous waste disposal facility (SDCL § 34A-11-22);

board of technical professions examination, application and investigation material (SDCL § 36-18A-24);

health professionals diversion program records (SDCL § 36-2A-12);

medical records inspected by board of medical and osteopathic examiners (SDCL § 36-4-22.1);

board of accountancy peer review records (SDCL § 36-20A-15);

commercial fertilizer tonnage information furnished secretary of agriculture (SDCL § 38-19-12);

pesticide formulas (SDCL § 38-20A-15);

commercial feed trade secrets (SDCL § 39-14-70);

data or financial information made or received by Secretary of Agriculture with respect to state beef program (SDCL § 39-24-5);

cruelty to animal report may be confidential (SDCL § 40-1-30);

state lottery records, including applications, credit/security checks, audit work papers, licensees tax returns (SDCL § 42-7A-50);

gaming commission records and information concerning gambling applicants/licensees in Deadwood (SDCL § 42-7B-58);

mining permit application information filed with state agencies (SDCL § 45-6B-19);

test hole information in mineral exploration permit filings confidential for 2 years (SDCL § 45-6C-14,15);

uranium exploration permit filings (SDCL § 45-6D-11, 15, 40, 42 and 45);

trade secrets and financial information contained in request for financial assistance for water management or waste management business filed with department of environment and natural resources (SDCL § 46A-1-98);

various corporate records obtained or required under Uniform Securities Act, including private party information, trade secrets, or records obtained during audit, inspection or investigation (SDCL § 47-31B-607);

banking commission records generally open, but subject to division of banking directors' discretion (SDCL § 51A-2-35);

trust company information (SDCL § 51A-6A-2);

state farm mediation board records (SDCL § 54-13-18);

prearranged funeral trust contract reports filed with board of funeral service (SDCL § 55-11-9);

insurance holding company information received by director of the division of insurance in the course of examination or investigation (SDCL § 58-5A-41);

division of insurance files and records (SDCL §§ 58-3-22, 58-4-44, 58-23A-6, 58-29B-30, and 58-29D-9);

division of insurance internal memos and telephone notes and medical records in general (SDCL § 58-4-45);

insurance fraud prevention unit's files and records (SDCL § 58-4A-12);

employment records obtained by the secretary of labor in administration of unemployment compensation law (SDCL § 61-3-4);

worker's compensation fraud investigation records (SDCL § 62-4-49);

information gathered by department of labor in connection with worker's compensation cases (SDCL § 62-6-5);

### **C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.**

No significant non-statutory exclusions have been created.

### **D. Are segregable portions of records containing exempt material available?**

Yes. SDCL § 1-27-1.10.

### **E. Homeland Security Measures.**

Though not specifically named as such, these are seemingly covered under the listed exclusions. SDCL § 1-27-1.5(8).

## **III. STATE LAW ON ELECTRONIC RECORDS**

### **A. Can the requester choose a format for receiving records?**

No. SDCL § 1-27-4.

### **B. Can the requester obtain a customized search of computer databases to fit particular needs?**

No, but records may be "maintained . . . in any searchable and reproducible electronic or other format . . ." suggesting that this will be allowed in practice. SDCL § 1-27-4.

### **C. Does the existence of information in electronic format affect its openness?**

No.

### **D. How is e-mail treated?**

Not specifically addressed.

**1. Does e-mail constitute a record?**

Physical form of a record is irrelevant under SDCL § 1-27-1.1. Theoretically, email can be a record. However, work-related “correspondence” and “personal correspondence” are protected under SDCL § 1-27-1.5 (12) and (19).

**2. Public matter on government e-mail or government hardware**

If not within “correspondence” exception, presumably accessible.

**3. Private matter on government e-mail or government hardware**

Confidential

**4. Public matter on private e-mail**

Uncertain.

**5. Private matter on private e-mail**

Confidential

**E. How are text messages and instant messages treated?**

Same as for emails

**1. Do text messages and/or instant messages constitute a record?**

Same as for emails

**2. Public matter message on government hardware.**

Same as for emails

**3. Private matter message on government hardware.**

Same as for emails

**4. Public matter message on private hardware.**

Same as for emails

**5. Private matter message on private hardware.**

Same as for emails

**F. How are social media postings and messages treated?**

Presumably, the same as emails.

**G. How are online discussion board posts treated?**

Presumably, the same as emails.

**H. Computer software****1. Is software public?**

Form and format do not alter a record’s essence. SDCL § 1-27-1.1 and SDCL § 1-27-4.

**2. Is software and/or file metadata public?**

Same

**I. How are fees for electronic records assessed?**

If there is a “modem to modem” transfer, law allows “reasonable fee . . . for specialized service,” including amortization of computer hardware and software. SDCL § 1-27-1.2.

**J. Money-making schemes.**

Motor vehicle licensee lists and Game, Fish and Parks subscription and licensee lists may not be resold or redistributed. SDCL § 1-27-1.11.

**1. Revenues.**

Unknown.

**2. Geographic Information Systems.**

Unknown.

**K. On-line dissemination.**

State government has a home page and provides access to a variety of information via the internet. Contracts, in particular, may be made accessible to the public via internet. SDCL § 1-27-4.2.

**IV. RECORD CATEGORIES -- OPEN OR CLOSED****A. Autopsy reports.**

Arguably these are open once arrest is made following inquest. SDCL § 23-14-12. Although coroners must file reports and inquest verdicts with bureau of criminal statistics, in the bureau’s hands, those records are not public. SDCL § 23-6-14 and 23-6-17. *See also* SDCL § 1-27-1.5 (4). Autopsy performed by order of department of labor in worker’s compensation occupational disease death claim case is public record. SDCL § 62-8-41. University of South Dakota medical school must keep record of bodies received. SDCL § 34-26-9. Physician or coroner fetal death report filed with department of health. SDCL § 34-25-32.2.

**B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)**

Presumably closed. *See* SDCL § 1-27-1.5(5).

**1. Rules for active investigations.**

Distinction is not made between active and closed investigations.

**2. Rules for closed investigations.**

Distinction is not made between active and closed investigations.

**C. Bank records.**

Personal bank records are closed. SDCL §§ 1-27-1.5 (10), (16), (22), and 1-27-1.6. Division of banking records open, subject to director’s discretion or federal law. SDCL § 51A-2-35. Bank statements of condition are published. SDCL § 51A-13-2.

**D. Budgets.**

Presumably open if final product. *See* SDCL § 1-27-1.7 regarding “recommendations.”

**E. Business records, financial data, trade secrets.**

All generally closed. SDCL §§ 1-27-1.5 (3) and 1-27-1.6.

**F. Contracts, proposals and bids.**

Public contracts are open. SDCL § 1-27-4.1. Proposals and bids should also be open, in the absence of a specific exemption or exclusion. *See* SDCL § 5-18, generally, regarding bidding process.

**G. Collective bargaining records.**

Those involving public employees should be open. Private agreements that are filed with the Department of Labor should also be open.

**H. Coroners reports.**

Coroner’s report should be open when in coroner’s possession. In hands of law enforcement could be exempt. SDCL § 1-27-1.5 (5). When report is “return[ed] to circuit court” it would be covered by Unified Judicial System rules and not open records law. SDCL §§ 23-14-16 and 1-27-1.12. *See* autopsies, above.

**I. Economic development records.**

If not “proprietary” or “trade secret” information, open.

**J. Election records.**

There is no provision excepting election records from presumption of openness. Further, there are specific openness requirements. A county auditor's tabulations of unofficial returns are public. SDCL § 12-20-13. Absentee ballots counted in public. SDCL § 12-19-44. Official county canvasses filed by auditors with secretary of state are permanent state records. SDCL § 12-20-38.1. Board of state canvassers abstracts also are filed and kept by secretary of state. SDCL § 12-20-48.

**1. Voter registration records.**

Open. SDCL § 12-4-9

**2. Voting results.**

Open. SDCL § 12-20-38.1.

**K. Gun permits.**

State law is designed to prevent release of information concerning those licensed to own owning a firearm or carry a concealed pistol. SDCL § 23-7-8.10.

**L. Hospital reports.**

Information obtained by department of health from hospitals is confidential (S.D.C.L. § 34-12-17).

**M. Personnel records.**

Confidential, other than "salaries and routine directory information." SDCL § 1-27-1.5 (7).

**1. Salary.**

Open, generally. SDCL § 1-27-1.5 (7). More specifically, counties, municipalities and school boards publish salaries. SDCL § 6-1-10.

**2. Disciplinary records.**

Presumably closed. SDCL § 1-27-1.5 (7).

**3. Applications.**

Closed, except for those "submitted by individuals hired into executive or policymaking positions of any public body." SDCL § 1-27-1.5 (15).

**4. Personally identifying information.**

Closed. SDCL § 1-27-1.5(7).

**5. Expense reports.**

Presumably open.

**N. Police records.**

In absence of case law, this whole area is difficult to predict, making the advice tenuous. The open records exception for law enforcement agencies and the laws on confidential criminal justice information might lead to different conclusions. SDCL §§ 1-27-1.5 (5) and 23-5.

**1. Accident reports.**

Open. SDCL § 32-34-13, 13.1.

**2. Police blotter.**

Open conditionally. "Information about calls for service revealing the date, time, and general location and general subject matter of the call...may be released..." SDCL § 23-5-11.

**3. 911 tapes.**

Open conditionally. Must be determined that "public interest in disclosure outweighs interest in nondisclosure." SDCL § 1-27-1.5 (5).

**4. Investigatory records.**

Closed, presumptively. SDCL §§ 1-27-1.5 (5) and 23-5, generally.

**a. Rules for active investigations.**

Closed. SDCL §§ 1-27-1.5 (5) and 23-5-10.

**b. Rules for closed investigations.**

The basic open records law does not specifically distinguish between active and closed investigations. SDCL § 1-27-1.5 (5). However, the more specific law making "criminal investigative information" confidential might be interpreted to make that distinction. SDCL §§ 23-5-10 and 23-5-11.

**5. Arrest records.**

Open, presumably, but not from all sources, e.g. attorney general. SDCL § 23-5-12.

**6. Compilations of criminal histories.**

Closed, generally. SDCL § 23-6-14.

**7. Victims.**

Falls under UJS rules. SDCL § 1-27-1.12. Generally open, but victim in sex-crime can suppress name until arraignment. SDCL § 23A-6-22. Victim compensation hearings open. SDCL § 23A-28B-37). Victim identification information confidential under sex offender registration law. SDCL § 22-24B-15.

**8. Confessions.**

Closed, presumably, during investigative stage. SDCL § 1-27-1.5 (5).

**9. Confidential informants.**

Closed, presumably, in possession of law enforcement. SDCL § 1-27-1.5 (5). However, possibly different as court document. Temporary sealing of affidavit in support of search warrant suggests possibility of disclosure. SDCL § 23A-35-4.1.

**10. Police techniques.**

Closed, presumably. SDCL §§ 1-27-1.5 (5) and (8).

**11. Mug shots.**

Restricted access. SDCL §§23-5-7 and 1-27-1.5 (5).

**12. Sex offender records.**

Open. *See* SDCL §§ 22-24B-2, 15 and 21.

**13. Emergency medical services records.**

Uncertain, but likely closed. SDCL §§ 1-27-1.5(2) and (5).

**O. Prison, parole and probation reports.**

Jail records are presumably open, since they are essentially non-investigatory. SDCL § 24-11-16. Files and case histories of penitentiary inmates are confidential. SDCL § 24-15-1. Records and reports of Board of Pardons and Paroles, which meets in public, may be open. SDCL § 24-13-3 and 24-13-10. Probation reports are not specifically addressed by statute, but court services records generally confidential. SDCL § 23A-27-47. Pardons remain public record for five years. SDCL § 24-14-11. Some information under these categories might also be closed if it constitutes part of a "court record." SDCL § 15-5A-7.

**P. Public utility records.**

Commission records open. SDCL § 49-1-12. Utility companies' records generally open only to stockholders. SDCL § 49-33-18.

**Q. Real estate appraisals, negotiations.****1. Appraisals.**

Closed. SDCL § 1-27-1.5(6).

**2. Negotiations.**

Closed. SDCL § 1-27-1.5(6).

**3. Transactions.**

Open

**4. Deeds, liens, foreclosures, title history.**

Open

**5. Zoning records.**

Open

**R. School and university records.**

Generally open. SDCL §§ 13-49-21 and 13-8-43.

**1. Athletic records.**

Presumably open to the extent record not considered “personal.”

**2. Trustee records.**

Open. SDCL § 13-49-7.

**3. Student records.**

Closed. SDCL § 1-27-1.5 (1).

**S. Vital statistics.****1. Birth certificates.**

Open. SDCL §§ 34-25-1, 34-25-8 and 1-27-1.5 (2). However, access to “out-of-wedlock” information is limited. SDCL § 34-25-52.

**2. Marriage & divorce.**

Open. SDCL § 34-25-1.

**3. Death certificates.**

Open. SDCL §§ 34-25-1 and 1-27-1.5 (2).

**4. Infectious disease and health epidemics.**

Generally closed. *See* SDCL § 34-22-12.1

**V. PROCEDURE FOR OBTAINING RECORDS****A. How to start.**

An “informal request” can be made. SDCL § 1-27-35. If that is denied in whole or in part, then a formal written request can be made. SDCL § 1-27-27.

**1. Who receives a request?**

Informal request is directed to the “custodian of the record.” SDCL § 1-27-35. The formal written request is made to the “public record officer of the public entity involved.” SDCL § 1-27-37.

**2. Does the law cover oral requests?**

Yes. SDCL § 1-27-35.

**a. Arrangements to inspect & copy.**

If request granted, then arrangements made with custodian of the record. SDCL § 1-27-35.

**b. If an oral request is denied:**

A written request should be sent to the public record officer of the agency. SDCL § 1-27-37.

**(1). How does the requester memorialize the refusal?**

There is no specific procedure established for denial of an informal request by a custodian. It should be noted, however, that if a denial in whole or in part is made in writing, it is to be kept on file with the agency. SDCL §§ 1-27-35 and 1-27-1.4.

**(2). Do subsequent steps need to be in writing?**

Yes. SDCL § 1-27-37.

**3. Contents of a written request.**

No specific requirements, but clarity is strongly recommended to avoid delays. SDCL § 1-27-37 (3).

**a. Description of the records.**

Again, no specific requirement, but to degree possible, record should be plainly identified to eliminate confusion and delay.

**b. Need to address fee issues.**

Yes, payment or a promise to pay is a prerequisite to receiving records. SDCL § 1-27-35 thru 37.

**c. Plea for quick response.**

No provision.

**d. Can the request be for future records?**

No provision.

**B. How long to wait.**

There is no time limit for the response to an informal request. However, there is no reason to wait longer than ten days.

**1. Statutory, regulatory or court-set time limits for agency response.**

A public records officer has ten days from receipt of a request to grant, deny or seek additional time. SDCL § 1-27-37.

**2. Informal telephone inquiry as to status.**

No provision.

**3. Is delay recognized as a denial for appeal purposes?**

Yes. Failure to respond in ten days is tantamount to a denial. SDCL § 1-27-37.

**4. Any other recourse to encourage a response.**

Nothing in particular.

**C. Administrative appeal.**

The 2008 amendments added an administrative review of whole or partial denials of record requests. SDCL § 1-27-35 thru 43.

**1. Time limit.**

Within ninety days of denial. SDCL § 1-27-38.

**2. To whom is an appeal directed?**

Notice of review is filed with Office of Hearing Examiners. SDCL § 1-27-38.

**a. Individual agencies.**

Notified by Office of Hearing Examiners, which sends copy of notice of review. SDCL § 1-27-39.

**b. A state commission or ombudsman.**

Office of Hearing Examiners, above. SDCL § 1-27-38.

**c. State attorney general.**

No provision.

**3. Fee issues.**

No provision.

**4. Contents of appeal letter.**

SDCL §§ 1-27-38 (1) through (6).

**a. Description of records or portions of records denied.**

A copy of the written request is required. SDCL § 1-27-38 (4).

**b. Refuting the reasons for denial.**

A copy of any denial or response is required, but no refutation is required. SDCL § 1-27-38(5)

**5. Waiting for a response.**

No time limit in which Office of Hearing Examiners must hold hearing of decide case.

**6. Subsequent remedies.**

Decision of Office of Hearing Officer may be appealed to circuit court.

**D. Court action.**

Alternative to administrative review is to “commence a civil action by summons” within same 90-day time frame. SDCL § 1-27-38.

**1. Who may sue?**

Presumably any requestor who has had request denied in whole or in part by a public records officer or objects to the officer’s fee or time estimate. SDCL § 1-27-38.

**2. Priority.**

No provision.

**3. Pro se.**

Permissible

**4. Issues the court will address:**

Presumably the court will address whatever is necessary to implement open records law, either allowing or denying access. However, there are no procedural or substantive provisions under the open records law regarding enforcement by lawsuit.

**a. Denial.**

Presumably.

**b. Fees for records.**

Presumably.

**c. Delays.**

Presumably.

**d. Patterns for future access (declaratory judgment).**

Presumably.

**5. Pleading format.**

A simple pleading alleging failure to comply with open records law might suffice. Certainly the usual remedies such as mandamus, prohibition, injunction or declaratory judgment action would seem appropriate, too. However, mandamus and prohibition do not employ a summons, making the “summons” directive problematic. SDCL § 1-27-37.

**6. Time limit for filing suit.**

Ninety days from receipt of denial or fee/time estimate. SDCL § 1-27-37.

**7. What court.**

Circuit court.

**8. Judicial remedies available.**

Writs of mandamus or prohibition.

**9. Litigation expenses.**

Unlikely.

**a. Attorney fees.**

Unlikely.

**b. Court and litigation costs.**

Unlikely.

**10. Fines.**

Unlikely.

**11. Other penalties.**

Unlikely.

**12. Settlement, pros and cons.**

Depends entirely on merits of specific case and value of case as precedent.

**E. Appealing initial court decisions.****1. Appeal routes.**

Circuit Court decisions may be appealed to the South Dakota Supreme Court.

**2. Time limits for filing appeals.**

Within 30 days.

**3. Contact of interested amici.**

Interested *amici* can contact the South Dakota Newspaper Association in Brookings, South Dakota, or the Associated Press or *Argus Leader* in Sioux Falls, South Dakota, both of which are active in asserting the press and public’s rights of access. The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state’s highest court.

**F. Addressing government suits against disclosure.**

Has not been raised in the specific context. However, in *Hobart v. Ferebee*, 2004 S.D. 138 (2004), the South Dakota Supreme Court struck down a protection order granted to a private citizen against his neighbor that required the neighbor to obtain court permission in advance of filing any complaints with any governmental agency on the grounds that it violated the First Amendment right of free speech and the right to petition the government.

# Open Meetings

## I. STATUTE -- BASIC APPLICATION.

South Dakota's open meetings statute, S.D.C.L. § 1-25-1, provides that unless "otherwise provided by law" the "official" meetings of all boards, commissions and agencies that are related to state government or its political subdivisions, that are created by statute, or that are non-taxpaying and supported in part by public funds are open.

### A. Who may attend?

The "public" may attend. (S.D.C.L. § 1-25-1)

### B. What governments are subject to the law?

#### 1. State.

Subject to law.

#### 2. County.

Subject to law.

#### 3. Local or municipal.

Subject to law.

### C. What bodies are covered by the law?

#### 1. Executive branch agencies.

Covered.

##### a. What officials are covered?

The law does not refer to meetings of officials acting in an individual capacity.

##### b. Are certain executive functions covered?

Particular executive functions are not specified.

##### c. Are only certain agencies subject to the act?

The law contains no specific agency exceptions, but does have the general exception "except as otherwise provided by law." The main category of exceptions is the professional review boards and committees. *E.g.*, physicians (S.D.C.L. § 36-4-26.1); lawyers (S.D.C.L. § 16-19-99); accountants (S.D.C.L. § 36-20A-4).

#### 2. Legislative bodies.

S.D.C.L. § 1-25-1, arguably, is directed toward the executive branch. It does not specifically cover the state legislature or its committees. (S.D. Const. Art. III, § 15, requires open legislative sessions, unless "business is such as ought to be kept secret." A proposal to eliminate the secrecy clause and to extend the requirement of openness to legislative committee and commission meetings has twice been rejected.)

#### 3. Courts.

Courts are not covered by the act. (Court access is typically a matter of state and federal constitution. *See* S.D. Const. Art. VI, § 20.)

#### 4. Nongovernmental bodies receiving public funds or benefits.

These bodies are covered. (S.D.C.L. § 1-25-1)

#### 5. Nongovernmental groups whose members include governmental officials.

These groups are probably not covered.

#### 6. Multi-state or regional bodies.

These bodies are not specifically covered.

#### 7. Advisory boards and commissions, quasi-governmental entities.

These groups are at least covered to the extent there is interaction with the appointing body. *See* Op. Att'y Gen. No.86-27 (1986).

#### 8. Other bodies to which governmental or public functions are delegated.

These bodies are probably covered to the same extent. *Id.*

#### 9. Appointed as well as elected bodies.

No distinction is made between elected or appointed bodies.

### D. What constitutes a meeting subject to the law.

S.D.C.L. § 1-25-1 does not define "meeting."

#### 1. Number that must be present.

##### a. Must a minimum number be present to constitute a "meeting"?

A quorum must be present to constitute a "meeting."

##### b. What effect does absence of a quorum have?

A meeting would not be official in the absence of a quorum.

#### 2. Nature of business subject to the law.

##### a. "Information gathering" and "fact-finding" sessions.

These sessions are subject to the law.

##### b. Deliberations toward decisions.

These deliberations are subject to the law.

#### 3. Electronic meetings.

##### a. Conference calls and video/Internet conferencing.

Specifically authorized. (S.D.C.L. § 1-25-1).

##### b. E-mail.

Presumably open. Teleconference defined at SDCL § 1-25-1.2 to include exchange of information by audio or video medium. Arguably, reading electronic messages is application of "video" medium.

##### c. Text messages.

Presumably open

##### d. Instant messaging.

Presumably open

##### e. Social media and online discussion boards.

Presumably open.

### E. Categories of meetings subject to the law.

#### 1. Regular meetings.

##### a. Definition.

Not defined, but includes teleconferences.

##### b. Notice.

"All public bodies shall provide public notice, with proposed agenda, at least twenty-four hours prior to any meeting, by posting a copy of the notice, visible to the public, at the principal office of the public body holding the meeting, and, for special or rescheduled meetings, delivering, in person, by mail or by telephone, the information in the notice to members of the local news media who have requested notice. For special or rescheduled meetings, all public bodies shall also com-

ply with the public notice provisions of this section for regular meetings to the extent that circumstances permit. A violation of this section is a Class 2 misdemeanor.” S.D.C.L. § 1-25-1.1.

**(1). Time limit for giving notice.**

At least 24 hours prior to meeting. S.D.C.L. § 1-25-1.1.

**(2). To whom notice is given.**

Posted so that notice is “visible to public.” S.D.C.L. § 1-25-1.1.

**(3). Where posted.**

Public body’s principal office. S.D.C.L. § 1-25-1.1.

**(4). Public agenda items required.**

The proposed agenda is required. S.D.C.L. § 1-25-1.1.

**(5). Other information required in notice.**

None.

**(6). Penalties and remedies for failure to give adequate notice.**

Class 2 misdemeanor (30 days jail and/or up to \$200 fine); also, action taken at any meeting not properly noticed could be held to be void and possibly subject members of a public body to personal liability.

**c. Minutes.**

State agencies required to keep minutes under generic open meetings chapter. S.D.C.L. § 1-25-3. Various other governmental bodies covered under specific statutes interspersed throughout the code. *E.g.*, county commissions (S.D.C.L. § 7-18-3); townships (S.D.C.L. § 8-6-3); municipalities (S.D.C.L. § 9-18-1); school boards (S.D.C.L. § 13-8-34).

**(1). Information required.**

S.D.C.L. § 1-25-3 refers only to “detailed minutes of the proceedings.”

**(2). Are minutes public record?**

Minutes are open to public inspection. S.D.C.L. § 1-25-3.

**2. Special or emergency meetings.**

**a. Definition.**

Not defined.

**b. Notice requirements.**

Parties must comply with notice components of statute “to the extent that circumstances permit.” S.D.C.L. § 1-25-1.1.

**(1). Time limit for giving notice.**

Must comply with notice requirements for regular meetings to “extent circumstances permit.” (S.D.C.L. § 1-25-1.1).

**(2). To whom notice is given.**

Notice is posted for the general public and delivered to “local news media” who have requested notice in person, by mail or by phone (S.D.C.L. § 1-25-1.1).

**(3). Where posted.**

The public body’s principal office (S.D.C.L. § 1-25.1.1).

**(4). Public agenda items required.**

A proposed agenda is required. *Id.*

**(5). Other information required in notice.**

None specified.

**(6). Penalties and remedies for failure to give adequate notice.**

Class 2 misdemeanor (30 days jail and/or up to \$200 fine).

**c. Minutes.**

Required to be kept (S.D.C.L. § 1-25-3).

**(1). Information required.**

“[D]etailed minutes of proceedings” are required to be kept (S.D.C.L. § 1-25-3).

**(2). Are minutes a public record?**

Minutes are presumably public record. (S.D.C.L. § 1-27-1).

**3. Closed meetings or executive sessions.**

S.D.C.L. § 1-25-2 provides the subject matter bases for closed meetings. However, it should be noted that the statute is precatory rather than mandatory with respect to closure. In short, other than the odd statute here and there requiring closure in certain instances, *e.g.*, certain gaming commission meetings under S.D.C.L. § 42-7B-8.1, executive sessions are not required.

**a. Definition.**

Not defined, other than by permissible subject matter categories; S.D.C.L. § 1-25-2, however, prohibits any official action in a closed meeting and restricts discussion to “purpose specified in the closure motion.”

**b. Notice requirements.**

Executive sessions, if planned, should be noticed as part of the agenda of an open meeting under S.D.C.L. § 1-25-1.1. In essence, executive sessions are meetings within meetings, and “notice” is technically given by the vote of the public body in the course of an open meeting, a requirement of S.D.C.L. § 1-25-2.

Maximum penalty for failure to close meeting properly and for a proper purpose is 30 days and/or \$100 fine.

**(1). Time limit for giving notice.**

See above.

**(2). To whom notice is given.**

See above.

**(3). Where posted.**

See above.

**(4). Public agenda items required.**

See above.

**(5). Other information required in notice.**

See above.

**(6). Penalties and remedies for failure to give adequate notice.**

See above.

**c. Minutes.**

Uncertain, since no official action can be taken in executive session; because closed meeting is limited to discussion, it boils down to how “detailed” is detailed.

**(1). Information required.**

Again, if required at all, “detailed” minutes of proceedings.

**(2). Are minutes a public record?**

Presumably not. S.D.C.L. §§ 1-25-3 and 1-25-2.

**d. Requirement to meet in public before closing meeting.**

Yes. S.D.C.L. § 1-25-2).

**e. Requirement to state statutory authority for closing meetings before closure.**

Yes. S.D.C.L. § 1-25-2.

**f. Tape recording requirements.**

None.

**F. Recording/broadcast of meetings.**

**1. Sound recordings allowed.**

Presumably permitted. Op. Att’y Gen. 75-169 (1975) advised that tape recorders were allowed in meetings of conservancy subdistrict board.

**2. Photographic recordings allowed.**

Not addressed. Executive bodies have tended to establish their own rules, which vary. Legislative sessions are broadcast. S.D.C.L. § 23A-44-16 prohibits cameras in courtrooms.

**G. Are there sanctions for noncompliance?**

In 2004 the South Dakota Legislature passed S.D.C.L. §§ 1-25-6 through 1-25-9 establishing an Open Meeting Commission, the sole function of which is to consider complaints of open meetings law violations that local states attorneys have passed along. The Commission, comprising five states attorneys appointed by the attorney general, reviews any investigatory file and written submissions by the parties and then determines whether a violation has occurred. The Commission enters findings of fact, conclusions of law and its decision. The sanction for a violation is a “public reprimand.” The Commission’s decision is a bar to further prosecution.

**II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS**

**A. Exemptions in the open meetings statute.**

**1. Character of exemptions.**

**a. General or specific.**

Specific. S.D.C.L. § 1-25-2.

**b. Mandatory or discretionary closure.**

Discretionary. S.D.C.L. § 1-25-2.

**2. Description of each exemption.**

Exemptions specified in S.D.C.L. § 1-25-2:

- (1) Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. The term “employee” does not include any independent contractor;
- (2) Discussing the expulsion, suspension, discipline, assignment or educational program of a student;
- (3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;
- (4) Preparing for contract negotiations or negotiating with employees or employee representatives;
- (5) Discussing marketing or pricing strategies by a board or commission of a business owned by the state or any of its political subdivisions, when public discussion may be harmful to the competitive position of the business.

**B. Any other statutory requirements for closed or open meetings.**

No.

**C. Court mandated opening, closing.**

It is possible.

**III. MEETING CATEGORIES -- OPEN OR CLOSED.**

**A. Adjudications by administrative bodies.**

Except in cases of professional review, they are presumably open. S.D.C.L. § 1-26.

**1. Deliberations closed, but not fact-finding.**

Uncertain.

**2. Only certain adjudications closed, i.e. under certain statutes.**

If routine hearings are presumably open and professional licensing investigations are generally closed.

**B. Budget sessions.**

Presumably open. *E.g.*, state agencies (S.D.C.L. §§ 4-7-1, 10); counties (S.D.C.L. §§ 7-21-8, 9); school boards (S.D.C.L. § 13-11-2); municipalities (S.D.C.L. § 9-21-2).

**C. Business and industry relations.**

These meetings are presumably open, unless discussions of competitive marketing or pricing strategies are involved. (S.D.C.L. § 1-25-2(5))

**D. Federal programs.**

Presumably open.

**E. Financial data of public bodies.**

Presumably open.

**F. Financial data, trade secrets or proprietary data of private corporations and individuals.**

Presumably closed, in light of various confidential records provisions.

**G. Gifts, trusts and honorary degrees.**

Presumably open.

**H. Grand jury testimony by public employees.**

Presumably closed. *See* S.D.C.L. § 23A-5-16 for secrecy of grand jury proceedings generally.

**I. Licensing examinations.**

Presumably open.

**J. Litigation; pending litigation or other attorney-client privileges.**

Closed. S.D.C.L. § 1-25-2(3).

**K. Negotiations and collective bargaining of public employees.**

**1. Any sessions regarding collective bargaining.**

Closed. S.D.C.L. § 1-25-2(4).

**2. Only those between the public employees and the public body.**

Closed. S.D.C.L. § 1-25-2(4).

**L. Parole board meetings, or meetings involving parole board decisions.**

Regular meetings and meetings to hear parole applications are open. S.D.C.L. §§ 24-13-4 and 24-13-6.

**M. Patients; discussions on individual patients.**

Presumably closed. S.D.C.L. § 19-13-6. *But see* S.D.C.L. § 19-2-3 concerning waiver if health is an issue in any proceeding.

**N. Personnel matters.**

**1. Interviews for public employment.**

Presumably closed. S.D.C.L. § 1-25-2(1).

**2. Disciplinary matters, performance or ethics of public employees.**

Closed. S.D.C.L. § 1-25-2(1).

**3. Dismissal; considering dismissal of public employees.**

Closed. S.D.C.L. § 1-25-2(1).

**O. Real estate negotiations.**

Closed in cases of state-owned businesses, but it is uncertain whether this applies to agencies in general. S.D.C.L. § 1-25-2(5).

**P. Security, national and/or state, of buildings, personnel or other.**

No special exemption, but presumably closed.

**Q. Students; discussions on individual students.**

Closed. S.D.C.L. § 1-25-2(2).

**IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS**

**A. When to challenge.**

A person contesting closure should advise the public body of that fact and attempt to convince them that a closed meeting would be improper in the first instance. The public body might be persuaded to postpone holding such a meeting until counsel have had an opportunity to confer about its legality.

**1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?**

No, but as a practical matter mandamus or prohibition actions are generally expedited remedies. S.D.C.L. §§ 21-29 and 21-30.

**2. When barred from attending.**

Must be careful to assert that matter is not moot because it is capable of being repeated without any opportunity to make a timely challenge.

**3. To set aside decision.**

As soon as possible.

**4. For ruling on future meetings.**

As soon as possible with declaratory judgment action. S.D.C.L. § 21-24.

**5. Other.**

*See Olson v. Cass*, 349 N.W.2d 435 (S.D. 1984) in which the South Dakota Supreme Court indicated that “substantial compliance” with the open meetings law was sufficient.

**B. How to start.**

**1. Where to ask for ruling.**

**a. Administrative forum.**

**(1). Agency procedure for challenge.**

No formal procedure.

**(2). Commission or independent agency.**

In 2004 the South Dakota Legislature passed S.D.C.L. § 1-25-6 through § 1-25-9 establishing an Open Meeting Commission, the sole function of which is to consider complaints of open meetings law violations that local states attorneys have passed along. The Commission, comprising five states attorneys appointed by the attorney general, reviews any investigatory file and written submissions by the parties and then determines whether a violation has occurred. The Commission enters findings of fact, conclusions of law and its decision. The sanction for a violation is a “public reprimand.” The Commission’s decision is a bar to further prosecution.

**b. State attorney general.**

Violation of open meetings law has been a Class 2 misdemeanor for many years, but prosecution has been non-existent. So although a complaint could be filed with the local states attorney, nothing was likely to come of it. Now, however, with the recently established Open Meeting Commission (above), a state’s attorney has three options: 1) prosecuting; 2) finding “no merit to prosecuting” and filing copies of the complaint and any investigative file with the attorney general; 3) deferring to the South Dakota Open Meetings Commission “for further action.”

**c. Court.**

The South Dakota Supreme Court and circuit courts have concurrent jurisdiction in mandamus, prohibition or injunction actions. In addition, depending on the circumstances, a declaratory judgment action may be appropriate.

**2. Applicable time limits.**

None.

**3. Contents of request for ruling.**

Specifically set out facts of incident, cite relevant law, establish standing and assert grounds why the issue is not moot.

**4. How long should you wait for a response?**

If an informal request is made of an agency in a non-emergency situation, then give a reasonable time (30-60 days) to respond.

**5. Are subsequent or concurrent measures (formal or informal) available?**

There is nothing to prohibit duplicity, but separate legal actions should not be taken.

**C. Court review of administrative decision.**

Technically, there is not a review, but an original court proceeding.

**1. Who may sue?**

Presumably any aggrieved member of the public, but courts’ concept of standing may vary in cases in which a party is not affected or not a resident of a particular body’s jurisdiction.

**2. Will the court give priority to the pleading?**

Not known.

**3. Pro se possibility, advisability.**

Inadvisable, if only because of procedural pitfalls, but possible.

**4. What issues will the court address?****a. Open the meeting.**

Presumably.

**b. Invalidate the decision.**

Possible.

**c. Order future meetings open.**

Questionable.

**5. Pleading format.**

Often this genre of actions requires pleading in the form of an affidavit.

**6. Time limit for filing suit.**

There is no special limitation.

**7. What court.**

Circuit court is the usual choice, but if the case is exceedingly strong and there is little likelihood of setting a bad precedent, thought should be given to an original proceeding before the South Dakota Supreme Court.

**8. Judicial remedies available.**

Mandamus, prohibition, injunction, declaratory judgment.

**9. Availability of court costs and attorneys' fees.**

Costs available, but not attorney fees. S.D.C.L. §§ 15-17-1 and 15-17-7.

**10. Fines.**

No civil fine, but possible criminal fine of up to \$200. S.D.C.L. § 22-6-2.

**11. Other penalties.**

Criminal penalty of up to 30 days and/or up to \$200 fine. S.D.C.L. § 22-6-2.

**D. Appealing initial court decisions.****1. Appeal routes.**

Appeal from circuit court to the South Dakota Supreme Court.

**2. Time limits for filing appeals.**

60 days.

**3. Contact of interested amici.**

South Dakota Newspaper Association in Brookings South Dakota, or the Associated Press or *Argus Leader* in Sioux Falls, South Dakota.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

**V. ASSERTING A RIGHT TO COMMENT.**

This matter has not been legislated or litigated. Presumably, there is a generic right to comment at a public meeting, subject to reasonable time, place and manner restrictions.

**A. Is there a right to participate in public meetings?**

See above.

**B. Must a commenter give notice of intentions to comment?**

See above.

**C. Can a public body limit comment?**

See above.

**D. How can a participant assert rights to comment?**

See above.

**E. Are there sanctions for unapproved comment?**

See above.

**Appendix**

*Open records request model letter*

Dear [Public official]:

My client [the Associated Press] has advised me that on [date] they requested of you/your office an opportunity to inspect/copy [record/document description]. It is my understanding that you/your office denied them that right.

It is my belief that under state law [cite any statutes that might pertain] and fundamental democratic principle that such a record/document is open and should be available for public inspection and/or copying.

Finally, in order to save us all some time, I would appreciate it if you would specify any statutory or case law upon which you rely in making your decision to deny access.

I thank you for your attention to this matter.

Respectfully,

[Name]

## Statute

### Open Records

*South Dakota Codified Laws*  
*Title 1. State Affairs and Government*  
*Chapter 1-27. Public Records and Files*

#### *1-27-1. Records open to inspection—Sale of lists*

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

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

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

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

#### *1-27-3. Records declared confidential or secret*

Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept.

#### *1-27-4. Document reproduction or recording methods*

If any officer of the State of South Dakota, any political subdivision, municipal corporation, or public corporation is required or authorized by law to record, copy, file, recopy, or replace any document, plat, paper, voucher, receipt, or book on file or of record in the officer's office, the officer may do so by any photostatic, microphotographic, microfilm, mechanical, or electronic process which produces a clear, accurate, and permanent copy or reproduction of the original in accordance with the standards not less than those approved for permanent records by the National Bureau of Standards or the American National Standards Association. However, no school district is required to maintain its permanent school records on microfilm if the district maintains its permanent school records in an electronic format that can be used to produce clear, accurate reproductions of the originals.

#### *1-27-6. Retention of reproduced records*

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

#### *1-27-7. Viewing and reproduction equipment to be provided*

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

#### *1-27-8. Reproductions admissible in evidence—Preparation of enlarged copies*

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

#### *1-27-9. Records management programs—Definition of terms*

As used in §§ 1-27-9 to 1-27-18, inclusive:

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

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

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

(4) "State record" means:

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

(b) A record of the State Legislature;

(c) A record of any court of record, whether of state-wide or local jurisdiction;

(d) Any other record designated or treated as a state record under state law.

#### *1-27-10. Records as property of state—Damage or disposal only as authorized by law*

All records of public officials of this state required to be kept or maintained by law are the property of the state and may not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of, in whole or in part, except as provided by law.

#### *1-27-11. Board to supervise destruction of records—State records manager as ex officio member—Permission required for destruction*

There is hereby created a board consisting of the commissioner of administration, state auditor, attorney general, auditor-general, and state archivist to supervise and authorize the destruction of records. The state records manager shall also serve as an ex officio member in an advisory capacity only. No record shall be destroyed or otherwise disposed of by any agency of the state unless it is determined by majority vote of such board that the record has no further administrative, legal, fiscal, research, or historical value.

#### *1-27-11.1. Direction and supervision of board by Bureau of Administration—Independent functions retained*

The board created by § 1-27-11 shall be administered under the direction and supervision of the Bureau of Administration and the commissioner thereof, but shall retain the quasi-judicial, quasi-legislative, advisory, other nonadministrative and special budgetary functions (as defined in § 1-32-1) otherwise vested in it and shall exercise those functions independently of the commissioner of administration.

*1-27-12. State records management program to be established*

The commissioner of administration shall establish within the organizational structure of the Bureau of Administration a records management program, which will apply efficient and economical management methods to the creation, utilization, maintenance, retention, preservation, and disposal of state records.

*1-27-12.1. Records management internal service fund*

There is hereby created in the state treasury a records management internal service fund. The commissioner of administration shall apportion all expenses incurred in the administration and operation of the records management program to all state departments, agencies, and institutions utilizing such program. All payments received by the Bureau of Administration pursuant to this section shall be deposited in the records management internal service fund.

*1-27-13. Records management procedures proposed by state agencies*

The head of each agency shall submit to the commissioner of administration, in accordance with the rules, regulations, standards, and procedures established by him, schedules proposing the length of time each state record series warrants retention for administrative, legal, or fiscal purposes after it has been received by the agency.

*1-27-14. Obsolete records listed by state agencies*

The head of each agency, also, shall submit lists of state records in his custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal, or fiscal value to warrant further keeping for disposal in conformity with the requirements of § 1-27-11.

*1-27-14.1. Transfer of records by outgoing agency heads—Terminated agency records*

Upon termination of employment with the state, each agency head shall transfer his records to his successor or to the state archives for appraisal and permanent retention, unless otherwise directed by law. The records of any state agency shall, upon termination of its existence or functions, be transferred to the custody of the archivist, unless otherwise directed by law.

*1-27-14.2. Transfer of jeopardized nonessential agency material to state archivist*

In any case where material of actual or potential archival significance is determined by a state agency to be in jeopardy of destruction or deterioration, and such material is not essential to the conduct of daily business in the agency of origin, the agency head shall have authority to transfer said records to the physical and legal custody of the state archivist whenever the archivist is willing and able to receive them.

*1-27-14.3. Title to transferred records pending formal transfer*

Records transferred to the physical custody of the archivist remain the legal property of the agency of origin, subject to all existing copyrights and statutory provisions regulating their usage, until such time as the agency head formally transfers legal title to the archivist.

*1-27-15. Destruction of nonrecord materials*

Nonrecord material or materials not included within the definition of records as contained in § 1-27-9 may, if not otherwise prohibited by law, be destroyed at any time by the agency in possession of such materials without the prior approval of the commissioner of administration.

*1-27-16. Rules, standards, and procedures*

The commissioner of administration shall promulgate such rules, standards, and procedures as are necessary or proper to effectuate the purposes of §§ 1-27-9 to 1-27-18, inclusive, except that rules, standards, and procedures re-

lating to disposal of records pursuant to § 1-27-11 shall be issued by the board created by § 1-27-11.

*1-27-17. Legislative and judicial records management programs*

Upon request, the commissioner of administration shall assist and advise in the establishment of records management programs in the legislative and judicial branches of state government and may, as required by them, provide program services similar to those available to the executive branch of state government pursuant to the provisions of §§ 1-27-9 to 1-27-16, inclusive.

*1-27-18. Local records management programs*

The governing body of each county, municipality, township, district, authority, or any public corporation or political entity, whether organized and existing under charter or under general law, shall promote and implement the principles of efficient records management for local records. The governing body may, as far as practical, follow the program established for the management of state records. The commissioner of administration may, upon the request of a governing body, provide advice and assistance in the establishment of a local records management program.

*1-27-19. Annual meeting to authorize destruction of political subdivision records—Record of disposition*

The State Record Destruction Board shall meet at least once each year and consider requests of all political subdivisions for the destruction of records and to authorize their destruction as in the case of state records. However, in the case of any records recommended to be destroyed, the board shall require a record to be kept of the disposition of the documents.

*1-27-20. English as common language—Use in public records and public meetings*

The common language of the state is English. The common language is designated as the language of any official public document or record and any official public meeting.

*1-27-21. "Public document or record" defined—Public meeting*

For the purposes of §§ 1-27-20 to 1-27-26, inclusive, an official public document or record is any document officially compiled, published, or recorded by the state including deeds, publicly probated wills, records of births, deaths, and marriages, and any other document or record required to be kept open for public inspection pursuant to chapter 1-27. An official public meeting is any meeting or proceeding required to be open to the public pursuant to chapter 1-25.

*1-27-22. Application of English as common language requirement*

The provisions of §§ 1-27-20 to 1-27-26, inclusive, do not apply:

- (1) To instruction in foreign language courses;
- (2) To instruction designed to aid students with limited English proficiency in a timely transition and integration into the general education system;
- (3) To the conduct of international commerce, tourism, and sporting events;
- (4) When deemed to interfere with needs of the justice system;
- (5) When the public safety, health, or emergency services require the use of other languages. However, any such authorization for the use of a language other than the common language in printing informational materials or publications for general distribution must be approved in an open public meeting pursuant to chapter 1-25 by the governing board or authority of the relevant state or municipal entity and the decision shall be recorded in publicly available minutes;
- (6) When expert testimony, witnesses, or speakers require a language other than the common language. However, for purposes of deliberation, decision making, or record keeping, the official version of such testimony or commentary shall be the officially translated English language version.

*1-27-23. Costs of publication in other languages as separate budget line item*

Pursuant to the exemptions outlined in § 1-27-22, all costs related to the preparation, translation, printing, and recording of documents, records, brochures, pamphlets, flyers, or other informational materials in languages other than the common language shall be delineated as a separate budget line item in the agency, departmental, or office budget.

*1-27-24. Effect of common language requirement on state employment*

No person may be denied employment with the state or any political subdivision of the state based solely upon that person's lack of facility in a foreign language, except where related to bona fide job needs reflected in the exemptions in § 1-27-22.

*1-27-25. Common language requirements not applicable to private activities*

Sections 1-27-20 to 1-27-26, inclusive, may not be construed in any way to infringe upon the rights of citizens under the State Constitution or the Constitution of the United States in the use of language in any private activity. No agency or officer of the state nor any political subdivision of the state may place any restrictions or requirements regarding language usage in any business operating in the private sector other than official documents, forms, submissions, or other communications directed to government agencies and officers, which communications shall be in the common language as recognized in §§ 1-27-20 to 1-27-26, inclusive.

*1-27-26. Enforcement of common language requirements*

Any citizen of the state has standing to bring an action against the state to enforce §§ 1-27-20 to 1-27-26, inclusive. The circuit court has jurisdiction to hear and decide any such action brought pursuant to §§ 1-27-20 to 1-27-26, inclusive.

*1-27-27. Requesting information or data from a state agency*

Before requesting or requiring that any local government provide information or data to a state agency, the state agency shall first determine whether the information or data is available from the Department of Legislative Audit. If the information or data is available from the Department of Legislative Audit, the state agency may not require the local government to provide the information or data.

*1-27-28. Definition of terms*

Terms used in §§ 1-27-29 to 1-27-32, inclusive, mean:

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

(2) "State agency," any association, authority, board, commission, committee, council, department, division, office, officer, task force, or other agent of the state vested with the authority to exercise any portion of the state's sovereignty. The term does not include the Legislature, the Unified Judicial System, the Public Utilities Commission, the Department of Environment and Natural Resources, any law enforcement agency, or any unit of local government, or joint venture comprised of local governments;

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

(4) "Proprietary information," information on pricing, costs, revenue, taxes, market share, customers, and personnel held by private entities and used for that private entity's business purposes;

(5) "Trade secret," information, including a formula, pattern, compilation, program, device, method, technique, process, marketing plan, or strategic planning information that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

*1-27-29. Disclosure of information concerning private entity restricted*

No state agency may disclose that it is conducting a financial investigation, examination, or audit of a private entity while the financial investigation, examination, or audit is ongoing, except as provided by § 1-27-31.

*1-27-30. Confidentiality of proprietary or trade information of private entity*

All proprietary or trade secret information obtained by a state agency from or concerning a private entity is confidential, except as provided by § 1-27-31.

*1-27-31. Circumstances allowing for disclosure of information concerning private entity*

A state agency may disclose that it is conducting a financial investigation, examination, or audit of a private entity and disclose the information obtained from such an investigation, examination, or audit as follows:

(1) To the private entity being investigated, examined, or audited;

(2) To those persons whom the private entity has authorized in writing to receive such information;

(3) To the officers, employees, or legal representatives of any other state agency which requests the information in writing for the purpose of investigating and enforcing civil or criminal matters. The written request will specify the particular information desired and the purpose for which the information is requested;

(4) To any administrative or judicial body if the information is directly related to the resolution of an issue in the proceeding, or pursuant to an administrative or judicial order. However, no person may use a subpoena, discovery, or other applicable statutes to obtain such information;

(5) To another state pursuant to an agreement between the State of South Dakota and the other state, but only if the other state agrees to keep the information confidential as set forth in §§ 1-27-28 to 1-27-32, inclusive;

(6) To the attorney general, state's attorney, or any state, federal, or local law enforcement officer;

(7) To a federal agency pursuant to the provisions of federal law;

(8) To the extent necessary to submit any final reports or filings which are otherwise required by law to be prepared or filed;

(9) Repealed by SL 2004, ch 25, § 4.

(10) To comply with federal law, rules, or program delegation requirements ; or

(11) To the extent necessary to protect the health or welfare of the citizens of this state or nation pursuant to a court order obtained under the same process as orders issued pursuant to § 15-6-65(b).

*1-27-32. Disclosure of confidential information as misdemeanor*

Disclosure of information made confidential by §§ 1-27-28 to 1-27-32, inclusive, except as provided in § 1-27-31, is a Class 1 misdemeanor.

*1-27-33. Specific public access or confidentiality provisions not superseded by chapter provisions*

The provisions of this chapter do not supersede more specific provisions regarding public access or confidentiality elsewhere in state or federal law.

**Open Meetings***1-25-1. Meetings of public agencies to be open—Teleconference meetings—Exception for Digital Dakota Network—Misdemeanor*

Except as otherwise provided by law, the official meetings of the state and the political subdivisions thereof, including all related boards, commissions and other agencies, and the official meetings of boards, commissions and agencies created by statute or which are nontaxpaying and derive a source of revenue directly from public funds, shall be open to the public, except as provided in this

chapter. Meetings, including executive or closed meetings may be conducted by teleconference. Members shall be deemed present if they answer present to the roll call taken by teleconference. Any vote at a meeting held by teleconference shall be taken by roll call. Except for executive or closed meetings held by teleconference, there shall be provided one or more places at which the public may listen to and participate in the proceeding. Except for executive or closed meetings held by teleconference of related boards and commissions of the state, there shall be provided two or more places at which the public may listen to and participate in the proceeding. Except for the Digital Dakota Network, no teleconference may be used in conducting hearings or taking final disposition pursuant to § 1-26-4. Teleconference meetings are subject to the notice provisions of chapter 1-25.

A violation of this section is a Class 2 misdemeanor.

*1-25-1.1. Notice of meetings of public bodies—Violation as misdemeanor*

All public bodies shall provide public notice, with proposed agenda, at least twenty-four hours prior to any meeting, by posting a copy of the notice, visible to the public, at the principal office of the public body holding the meeting, and, for special or rescheduled meetings, delivering, in person, by mail or by telephone, the information in the notice to members of the local news media who have requested notice. For special or rescheduled meetings, all public bodies shall also comply with the public notice provisions of this section for regular meetings to the extent that circumstances permit. A violation of this section is a Class 2 misdemeanor.

*1-25-1.2. “Teleconference” defined*

For the purposes of this chapter, a teleconference is information exchanged by audio or video medium.

*1-25-2. Executive or closed meetings—Purposes—Authorization—Misdemeanor*

Executive or closed meetings may be held for the sole purposes of:

- (1) Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. The term “employee” does not include any independent contractor;
- (2) Discussing the expulsion, suspension, discipline, assignment of or the educational program of a student;
- (3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;
- (4) Preparing for contract negotiations or negotiating with employees or employee representatives;
- (5) Discussing marketing or pricing strategies by a board or commission of a business owned by the state or any of its political subdivisions, when public discussion may be harmful to the competitive position of the business.

However, any official action concerning such matters shall be made at an open official meeting. An executive or closed meeting shall be held only upon a majority vote of the members of such body present and voting, and discussion during the closed meeting is restricted to the purpose specified in the closure motion. Nothing in § 1-25-1 or this section may be construed to prevent an executive or closed meeting if the federal or state Constitution or the federal or state statutes require or permit it. A violation of this section is a Class 2 misdemeanor.

*1-25-3. State agencies to keep minutes of proceedings—Availability to public—Misdemeanor*

Any board or commission of the various departments of the State of South Dakota shall keep detailed minutes of the proceedings of all regular or special meetings. The minutes shall be available for inspection by the public at all times at the principal place of business of the board or commission. A violation of this section is a Class 2 misdemeanor.

*1-25-6. Duty of state’s attorney on receipt of complaint alleging chapter violation*

If a complaint alleging a violation of this chapter is made pursuant to § 23A-2-1, the state’s attorney shall take one of the following actions:

- (1) Prosecute the case pursuant to Title 23A;
- (2) Determine that there is no merit to prosecuting the case. Upon doing so, the state’s attorney shall send a copy of the complaint and any investigation file to the attorney general. The attorney general shall use the information for statistical purposes and may publish abstracts of such information, including the name of the government body involved for purposes of public education; or
- (3) Send the complaint and any investigation file to the South Dakota Open Meetings Commission for further action.

*1-25-7. Consideration by commission of complaint or written submissions alleging chapter violation—Findings—Public censure*

Upon receiving a referral from a state’s attorney, the South Dakota Open Meetings Commission shall examine the complaint and investigatory file submitted by the state’s attorney and shall also consider signed written submissions by the persons or entities that are directly involved. Based on the investigatory file submitted by the state’s attorney and any written responses, the commission shall issue a written determination on whether the conduct violates this chapter, including a statement of the reasons therefor and findings of fact on each issue and conclusions of law necessary for the proposed decision. The final decision shall be made by a majority of the commission members, with each member’s vote set forth in the written decision. The final decision shall be filed with the attorney general and shall be provided to the public entity and or public officer involved, the state’s attorney, and any person that has made a written request for such determinations. If the commission finds a violation of this chapter, the commission shall issue a public reprimand to the offending official or governmental entity. However, no violation found by the commission may be subsequently prosecuted by the state’s attorney or the attorney general. All findings and public censures of the commission shall be public records pursuant to § 1-27-1. Sections 1-25-6 to 1-25-9, inclusive, are not subject to the provisions of chapter 1-26.

*1-25-8. Open Meeting Commission—Appointment of members—Chair*

The South Dakota Open Meeting Commission shall be comprised of five state’s attorneys appointed by the attorney general. Each commissioner shall serve at the pleasure of the attorney general. A chair of the commission shall be chosen annually from the membership of the commission by a majority of its members.

*1-25-9. Limitations on participation by commission members*

No member of the commission may participate as part of the commission or vote on any action regarding a violation of this chapter if that member reported or was involved in the initial investigation, is an attorney for anyone who reported or was involved in the initial investigation, or represents or serves as a member of the governmental entity about whom the referral is made. The provisions of this section do not preclude a commission member from otherwise serving on the commission for other matters referred to the commission.

*1-25A-1. Purchase of advertising time permitted for public announcements*

Any office, agency, board, or commission of this state or any of its counties, townships or municipalities is hereby authorized to purchase radio and television advertising time to broadcast any announcement found to be in the public interest.

*1-25A-2. Broadcast not equivalent of legal notice*

Nothing in § 1-25A-1 shall authorize the purchase of radio and television advertising time to broadcast any legal notice which is required to be given by law, nor shall it be construed to give radio and television legal publication status.

