



PRIMER ON SOUTH DAKOTA PUBLIC RECORDS

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PUBLIC RIGHTS

- The public has a “right” to examine AND obtain copies. A presumption of openness.
- Normal business hours apply
- Federal Copyright Law may apply to obtaining copies
- Source: SDCL 1-27-1

PERSONNEL INFORMATION (Not Presumed Open)

- Exceptions
 - Salaries and Wages (published)
 - Directory Information/Employment Dates
- Mostly confidential.
 - Legal Action on Grievances
 - Contracts with Employees
- Sources: SDCL 1-27-1.5(7), SDCL 1-27-1.5(15), SDCL 1-27-1.5(17)(Federal Law and state court cases)

FINANCIAL RECORDS (Presumed Public)

PUBLIC

- Bids (after bid letting); bid awards
- RFP- selection committee list; basis of award (general summary of scoring); final agreement
- Real estate agreements
- Contracts, purchase orders
- Audit reports
- Employee Roster & Salaries (published)
- **GENERALLY PRESUMED OPEN**

NOT PUBLIC

- Sealed bids prior to bid letting
- RFP- pending proposals; scoring sheets of individual committee members; *proposals not awarded*
- Real estate appraisal and negotiation
- Personal or proprietary portions of contracts (SSN)
- Auditor working papers
- City or County credit card numbers
- Payments to confidential informants

PRIVATE CITIZEN INFORMATION CLEAR EXCEPTIONS

- Payment information, credit information and customer lists.
SDCL 1-27-1.5 (10)
- Library patron records. SDCL 1-27-1.5 (11)
- Social security numbers, driver's license numbers, credit/debit card numbers, passport numbers, and financial account numbers.
SDCL 1-27-1.5 (16)
- Medical records. SDCL 1-27-1.5 (2)
- Test results for licensing. SDCL 1-27-1.5 (18)

PRIVATE CITIZEN INFORMATION CLEAR EXCEPTIONS

- “Unreasonable” release of personal information. SDCL 1-27-1.5 (22)
- Financial information. SDCL 1-27-1.6



PRIVATE CITIZEN INFORMATION FREQUENT QUESTIONS

- Addresses
- Telephone Numbers
- Overlap with Marsy's Law

SOUTH DAKOTA CRIME VICTIMS' RIGHTS MARSY'S LAW

- A victim shall have the following rights, beginning at the time of victimization:
 - ⑤ The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records;
 - ⑥ The right to privacy, which includes the right to refuse an interview, deposition or other discovery request, and to set reasonable conditions on the conduct of any such interaction to which the victim consents;
 - ⑩ The right to be informed of these rights, and to be informed that a victim can seek the advice of an attorney with respect to the victim's rights. This information shall be made available to the general public and provided to each crime victim in what is referred to as a Marsy's Card.
- A victim is defined as a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. A victim also includes any spouse, parent, grandparent, child, sibling, grandchild, or guardian, and any person with a relationship to the victim that is substantially similar to a listed relationship, or a lawful representative of a victim who is deceased, incompetent, a minor, or physically or mentally incapacitated. A victim is not the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.

LAW ENFORCEMENT INVESTIGATION INFORMATION (Generally Not Public)

Exceptions:

- 911 Records - law enforcement discretion. SDCL 1-27-1.5 (5)
- Calls For Service - date, time, general location, general subject matter. SDCL 23-5-11
- Motor vehicle accidents. SDCL 32-34-13

OTHER INVESTIGATIONS/INSPECTIONS

- Inspections - generally public if routine
 - Restaurant Inspections?
 - Building Inspections?
 - Daycare Inspections?
- Investigations - **not** public
- Sources: SDCL 1-27-1.5(5), Specific State Laws and City Ordinances.

EMPLOYEE/CONSULTANT WORK PRODUCT

- Final records are open.
- DRAFT reports, working papers, memos, phone records are **not** presumed open. SDCL 1-27-1.5 (12); SDCL 1-27-1.7
- DRAFT Governmental Studies - must be open to obtain input. (FEMA, Environmental Impact, etc.)
- Letters, memos, notes, calendars, personal records of officials/ employees are **not** presumed open. SDCL 1-27-1.5 (12) and (19)
- Test questions, scoring keys and results are **not** presumed open. SDCL 1-27-1.5(18)

RECORDS INVOLVING SECURITY, SAFETY AND PROTECTED SITES

Specific Types of Records that are NOT Public:

- Public Security Information (blueprints, building plans, etc.)
SDCL 1-27-1.5 (8)
- Archaeological, Historical and Paleontological
SDCL 1-27-1.5 (13) and (14)
- Confidential portions of Emergency and Disaster Plans
SDCL 1-27-1.5 (17)
- When release of records would endanger life/safety
SDCL 1-27-1.5 (23)

COURT ORDERS/COURT RECORDS

- Documents “declared closed or confidential by court order, contract, or stipulation”. SDCL 1-27-1.5 (20)
- Court records are subject to separate court rules. SDCL ch. 15-15A

PRIVILEGED RECORDS NOT SUBJECT TO “PRESUMPTION OF OPENNESS”

- Trade secrets, research, proprietary information. SDCL 1-27-1.5 (3)
- Financial information. SDCL 1-27-1.6
- Privileged information. SDCL 1-27-1.5(4), and SDCL ch. 19-19.

DELIBERATIVE PROCESS PRIVILEGE

Applies to Elected and Appointed Officials

- Confidential documents and communications
- Decisional or deliberative process
- Relating to any decision arising from official duties
- Use only after consulting w/ your attorney
- Source: SDCL 1-27-1.9

OTHER LAWS

- Economic Development. SDCL 9-34-19
- Records declared confidential. SDCL 1-27-3
- Federal requirements - HIPAA, etc.

MEETING MATERIALS

- Printed materials relating to agenda item and is given to public body, generally must be available to general public.
 - Posted on website
 - Available at business office
 - Available in meeting room
 - Excludes confidential materials
- Source: SDCL 1-27-1.16

PUBLIC RECORD REQUESTS

- Informal Request – oral request or written request via email or postal mail to person other than the Public Record Officer
- Formal Request – written request to Public Record Officer (Finance Officer or Police Chief)
- City handles all written requests the same.
- Sources: SDCL 1-27-35, SDCL 1-27-37 and SDCL 1-27-42

RESPONDING TO WRITTEN REQUESTS

- Respond within 10 business days
- Seek clarification if necessary
- Provide record in whole or in part upon payment of fees; or
- Deny and provide written statement of reasons for denial; or
- Acknowledge and provide estimated time reasonably required.
- Request “deemed denied” when public records officer fails to respond within 10 business days
- Sources: SDCL 1-27-37

RESPONSE

Produce Record

- Must provide record in original format or any searchable and reproducible electronic format
- Not required to honor requests for a particular format if records are not maintained in manner requested
- Not required to create new records
- Source: SDCL 1-27-4

RESPONSE

Seek Clarification

- Request clarification within 10 business days
- Request “deemed withdrawn” when requestor fails to respond with clarification within 10 business days
- Sources: SDCL 1-27-37(3)

RESPONSE

Additional Time

- To clarify the nature and scope of the request
- To locate and assemble information
- To notify third persons or agencies affected if necessary
- To determine whether the information is subject to disclosure
- Source: SDCL 1-27-37 (2)

RESPONSE

Fees

- Provide an estimate if fees are likely to exceed \$50. Requestor must agree in writing or City may deny request.
- Payment of fees may be required before providing records if estimate exceeds \$10.
- Records search = \$7.50 per hour
- Photocopies per page = \$0.10 (8.5 x 11)
- Discretionary fee waiver or reduction in the public interest
- No fees for minutes of meetings within past 3 years.
- Sources: SDCL 1-27-1.2, SDCL 1-27-35, SDCL 1-27-36, SDCL 1-27-37, and City Ordinance 41.003

RESPONSE

Deny in Whole or in Part

- Deny request in whole; or
- Deny request in part by redacting information (i.e. SSN, DOB) prior to providing requested documents
- Provide written statement of reason for denial and include statute
- Provide copy of denial to public records officer (Finance Officer or Chief of Police)
- Sources: SDCL 1-27-1.10 and SDCL 1-27-37

PUBLIC RECORDS

Formal Requests

- Written request sent to the public records officer (Finance Officer or Chief of Police)
- Technically may be made only after custodian of document denies a record request in whole or in part
- We treat all written requests the same way.
- Source: SDCL 1-27-37

DENIAL FILE

- Effective July 1, 2009
- Maintain file of all letters of denial of requests of records
- File available to public upon request
- Source: SDCL 1-27-1.4

PUBLIC RECORDS Appeals

- Within 90 days of denial requester can initiate a lawsuit or appeal to the state's Office of Hearing Examiners (OHE)
 - Denial of request in whole or in part
 - Request deemed denied
 - Fee disputes
 - Delays in responding to request
- Source: SDCL 1-27-38

PUBLIC RECORDS

Court Appeals

- No record must be made public until appeal is final
- No civil or criminal liability for releasing or refusing to release in “Good Faith”
- If public entity acted unreasonably and in bad faith, payment of costs and \$50 penalty is warranted
- Sources: SDCL 1-27-1.15, SDCL 1-27-40.2, and SDCL 1-27-41



Questions?

Thank you!

Disclaimer: while the presenters are attorneys, this presentation is for general information purposes only and should not be construed as providing legal advice or opinions for a specific situation. The audience is encouraged to contact the attorney of their choice for any specific legal discussion and legal advice.