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# South Dakota open records legislation: a case study in the struggle for government accountability

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SOUTH DAKOTA OPEN RECORDS LEGISLATION:  
A CASE STUDY IN THE STRUGGLE FOR GOVERNMENT ACCOUNTABILITY

By

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Accepted in Partial Completion  
Of the Requirements for the Degree  
Master of Arts

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## **MASTER'S THESIS**

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Sara Casper  
May 1<sup>st</sup>, 2013

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A CASE STUDY IN THE STRUGGLE FOR GOVERNMENT ACCOUNTABILITY

A Thesis  
Presented to  
The Faculty of  
Western Washington University  
In Partial Fulfillment  
Of the Requirements for the Degree  
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March 2013

## ABSTRACT

Although archivists have traditionally seen themselves as passive recipients and caretakers of records, there is an increasing recognition of the power and influence archivists have in shaping the historical record and collective memory. This recognition has led to calls for archivists to use their power to promote social justice and government accountability. One important way to do this is to ensure maximum access to government records. Governments by their nature prefer to restrict records from the public, sometimes with the noble goal of protecting individual privacy, but most often because they wish to maintain power and control over their citizens. Using the development of public records legislation in South Dakota as a case study, this paper argues that true open access to records is an ongoing struggle that requires commitment and vigilance from the public. Archivists, as the guardians of government records, should play an active role in this battle.

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## INTRODUCTION

The opening scenes of *Argo*, an Oscar-winning film based on actual CIA efforts to extract six Americans from Iran during the hostage crisis of 1979 to 1981, show officials at the American Embassy frantically destroying records while an Iranian mob storms the gates. These records contain information about U.S. involvement in Iranian government, including activities to depose the democratically-elected prime minister of Iran, Mohammad Mosaddegh, in 1953, as well as efforts to arm and support the unpopular Shah during his twenty-six year reign of brutality. These records also include intelligence about embassy personnel, which throughout the film haunt the six Americans in hiding outside the Embassy. The information in these records is so important to the Iranians that they spend months painstakingly piecing together documents from shredded files. With access to the Embassy's records, Iranians obtain not only proof of continued U.S. interference in Iranian government, but also power over Americans and their supporters in the country through intelligence which makes escape nearly impossible.

This scene from *Argo* clearly demonstrates the power of records. As Terry Cook writes, records allow “citizens to seek justice in righting past wrongs, from aboriginal displacements to war crimes, from medical neglect to ethnic discrimination.”<sup>1</sup> Records also serve a more mundane, though no less important purpose in democratic governments—informing citizens about the activities of their government, so they can hold government officials accountable for their actions, and as Elena Danielson states, “formulate responsible public policy.”<sup>2</sup> The ability to hold government and government officials accountable for

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<sup>1</sup> Terry Cook, “Archival Music: Verne Harris and the Cracks of Memory,” in Verne Harris, *Archives and Justice: A South African Perspective* (Chicago: Society of American Archivists, 2007): x.

<sup>2</sup> Elena S. Danielson, *The Ethical Archivist* (Chicago: Society of American Archivists, 2010): 127.

their actions through free elections is the defining characteristic of a democracy. A government by the people and for the people must also be held accountable to the people. When government officials are elected, their actions and decisions in office are subject to public scrutiny. When they leave office, they are subject to the judgment of history and future generations. In both cases, information about the activities of the government must be made available to the public in order for them to make the best, most informed decision possible. “Knowledge does not equal power, as the cliché would have it,” writes South African archivist Verne Harris, “but power cannot be exercised without it. Information is essential to efficient and thereby effective democracy.”<sup>3</sup>

Information and records are inherently powerful, so it stands to reason that the places where records are kept, preserved, and made available to the public are centers of power as well. In selecting which records will be preserved, archivists determine what will become part of our collective memory, and by extension, what we will forget. Historically, archivists have shied away from this power, seeing themselves as passive, neutral recipients of records created and shaped by others. However, in the last twenty years there has been a growing recognition of the influence archivists have, not only in shaping the historical record and collective memory, but also in controlling access to records, and in interpreting records for users through finding aids and other collection guides. All of these activities shape the lens through which researchers and society view history. By ignoring this influence and passively accepting records, archives of the past have mostly supported the dominant historical narrative espoused by those in power. In response to this recognition, there are increasing calls from individuals such as Verne Harris and Randall Jimerson for archivists to instead

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<sup>3</sup> Harris, *Archives and Justice*, 270.



embrace their power and use it to promote accountability and social justice. As Jimerson writes in his book *Archives Power*, archives can be important “to all citizens concerned about truth, accountability, and social justice,” if they preserve the documentation of the past that prevents “collective amnesia” and serves “as a corrective to false memories or oblivion.”<sup>4</sup>

This is particularly true for government records, but government records are only useful for accountability if they are accurate and accessible to the private citizen.<sup>5</sup> For example, the Nazi party in Germany kept incredibly detailed, and disturbing, records of their activities during the Holocaust. Yet these records were not available to the average German citizen, or even the average member of the Nazi party, until the end of the war. Once released, these records combined with personal testimonies and physical evidence to condemn the actions of the Nazi party leaders.<sup>6</sup> While the judgment of history and war crimes tribunals may sting, the delayed release of these records made a more timely response, however unlikely it may have been, impossible. As Danielson notes, “timeliness counts,” particularly when releasing information necessary for government accountability.<sup>7</sup>

Despite this, free access to government records has not always been self-evident, even in the United States. In his classic article on the development of government archives, Ernst Posner contends that the rights of scholars and members of the public to access government records were first articulated during the French Revolution, along with the creation of the

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<sup>4</sup> Randall C. Jimerson, *Archives Power: Memory, Accountability, and Social Justice* (Chicago: Society of American Archivists, 2009): 131.

<sup>5</sup> This paper focuses primarily on the accessibility of government records. For a discussion on the authenticity and accuracy of records, see Elena S. Danielson, “Authenticity and Forgery,” in *The Ethical Archivist*, 219-248.

<sup>6</sup> Eric Ketelaar, “The Panoptical Archive” in *Archives, Documentation and Institutions of Social Memory*, ed. Francis X. Blouin, Jr. and William G. Rosenberg (Ann Arbor: University of Michigan Press, 2006): 145. See also the National Archives and Records Administration’s “Holocaust International Research Portal” at <http://www.archives.gov/research/holocaust/international-resources/> for information on Nazi-era records available online.

<sup>7</sup> Danielson, *The Ethical Archivist*, 127.

first ever centralized national government archives.<sup>8</sup> Up to that point, researchers in all countries “had been denied access to the archives and, where they were granted this favor, it was a favor, not a right.”<sup>9</sup> This is echoed by another archivist, Dwayne Cox, who says that the United States followed the English common law tradition for access to government records until the early twentieth century. In this tradition, access to records was only permitted if the requestor could present a valid reason for needing access. The validity of the reason, of course, was determined by the record keeper. Only gradually was this tradition replaced with the notion that citizens have an inherent right to access the records of their government.<sup>10</sup>

Since “unfettered inspection” of government records brings its own issues, including potential violations of individual privacy or confidentiality and threats to public safety, legislators began identifying “categories of restricted information.”<sup>11</sup> These categories had not been necessary in a world where access to records needed to be justified, but in the new system, where even criminals could access government records freely, protections were needed. The goal became not unfettered access, but a more modern approach of access balanced with protections for personal privacy and public safety. Although archivists have a long history of negotiating restrictions with collection donors to protect personal privacy, similar negotiations with government agencies and officials were often unbalanced. As seen in *Argo* and in Nazi Germany, allowing access to records means handing information and power to others. Government officials, even those in democratic governments, do not like to

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<sup>8</sup> Ernst Posner, “Some Aspects of Archival Development Since the French Revolution,” in *A Modern Archives Reader: Basic Readings on Archival Theory and Practice*, ed. by Maygene F. Daniels and Timothy Walch (Washington, D.C.: National Archives and Records Administration, 2004): 5, 8.

<sup>9</sup> *Ibid.*, 8.

<sup>10</sup> Dwayne Cox, “The Rise of Confidentiality: State Courts on Access to Public Records during the Mid-twentieth Century,” *American Archivist* 68 (Fall/Winter 2005): 312-322.

<sup>11</sup> *Ibid.*, 321.

relinquish power. “For all the lip service to transparency,” writes Danielson, “governments find ways to close archives.”<sup>12</sup>

In an attempt to combat what Roland Baumann calls “potential government abuse in the form of excessive restrictions,” interested members of the public pushed for legislation codifying their right to access government records. At the state level, this legislation was often called open records legislation, freedom of information acts or sunshine laws. This legislation sought to both increase access to records, and to define (and limit) categories of restricted information in order to protect individual privacy and public safety. Unfortunately, legislation is never perfect, especially for a topic as complicated and difficult to navigate as open government records. Trying to get a room full of politicians to agree to make records of their activities freely available to the public is difficult at best. In some states, such as Michigan, the governor’s office and legislature are exempt from the provisions of the open records law.<sup>13</sup> In Florida, the legislature has compiled a list of exemptions to the open records law over one thousand items long. This list is difficult for the public to navigate, though the exemptions are at least very specific.<sup>14</sup>

Clearly, the struggle for government accountability and transparency through access to records is not complete anywhere in the United States. Imperfect open records laws impact everyone managing government records, including state agencies, records managers, and archivists. As Danielson discusses in her article “The Ethics of Access,” institutions and bureaucracies are becoming “increasingly sensitive to leaks of information,” particularly

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<sup>12</sup> Danielson, *The Ethical Archivist*, 127.

<sup>13</sup> Terry Pastika, Natalie Brouwer, “Accessing Government: How difficult is it?,” *Citizen Advocacy Center*, 2008: 6, accessed August 8, 2011, <http://www.citizenadvocacycenter.org/midwest-open-government-project.html>.

<sup>14</sup> Caitlin Ginley, “Access Denied: State Public Records Laws are Riddled with Loopholes,” *State Integrity Investigation*, June 1, 2012, [http://www.stateintegrity.org/state\\_open\\_records\\_laws\\_loopholes](http://www.stateintegrity.org/state_open_records_laws_loopholes).

since those leaks tend to generate more bad publicity than refusing to release information.<sup>15</sup> Since government agencies and representatives tend toward excessive access restrictions, it becomes the responsibility of the public and those that manage access to government records to advocate for greater openness. At the very least, as Baumann argues, government archivists should inform themselves about the “statutory environment in which they operate” instead of relying on others, such as the attorney general’s office, to interpret the laws for them.<sup>16</sup> However, the Society of American Archivists Code of Ethics states that archivists should “promote open and equitable access to the records in their care” with the objective being to “minimize restrictions and maximize ease of access.”<sup>17</sup> Archivists in particular, then, have an ethical obligation to get involved in the struggle for open records and government accountability.

Nowhere is the ongoing struggle to balance access and privacy concerns more evident than in South Dakota. South Dakota public records policies have made great strides, evolving from narrow legislation, which only applied to records required by state statutes to be kept, to comprehensive open records legislation. However, as with most legislation, even the most recent open records law has flaws. Compromises during the development of the legislation provide havens and loopholes for those wishing to withhold information from the public. The law has also unanticipated and negative effects on access to historical records at the State Archives. In addition to these issues, the system of laws governing access to government records is so complex that determining which laws apply in which circumstances

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<sup>15</sup> Elena Danielson, “The Ethics of Access,” *American Archivist* 52 (Winter 1989): 60.

<sup>16</sup> Roland M. Baumann, “The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law,” *American Archivist* 49 (Fall 1986): 354.

<sup>17</sup> “SAA Core Values Statement and Code of Ethics,” Society of American Archivists, accessed February 24, 2013, <http://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics>.

can be difficult. Although the open records law was a good step toward greater government transparency in South Dakota, it was not the end of the struggle for accountability.

Government accountability is an ongoing concern which requires a committed and vigilant public to maintain. Archivists, as the guardians of government records, have an ethical obligation to take an active role in that struggle.

### DEFINING “PUBLIC RECORD”

Public records policies began appearing at the state level in the 1950s, although the majority of states passed laws after the federal Freedom of Information Act (FOIA) and subsequent Watergate scandal brought government accountability through records concerns to the forefront.<sup>18</sup> The FOIA, enacted in 1966, allowed Americans greater access to federal records by incorporating a rebuttable presumption of openness.<sup>19</sup> The presumption of openness means that records are assumed to be open to the public unless specific legislation requires them to be closed. This places the burden of proof on the government agents, requiring that individual or office to prove that a record is restricted, rather than forcing the citizens requesting information to prove why they should have access.

With this legislation in place, the Watergate scandal drew attention to the need to ensure access to government records. The conspiracy began in 1972 with a burglary in the Democratic National Committee offices at the Watergate building in Washington, D.C. It ended with the impeachment and eventual resignation of President Nixon in 1974. One of the key pieces of evidence documenting Nixon’s role in the cover up was a series of audio

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<sup>18</sup> Ginley, “Access Denied.”

<sup>19</sup> “FOIA,” Federal Communications Commission, accessed February 24, 2013, <http://www.fcc.gov/foia>.

tapes, released upon the demand of the Supreme Court.<sup>20</sup> These audio tapes, and other government records, were essential in holding Nixon accountable for his actions. The public spotlight on the Watergate controversy meant that the entire country now had a clear example of the role open access to records can play in government accountability. The scandal inspired many states to pass their own freedom of information laws, most of which included a presumption of openness.

In contrast to the rest of the country, where legislation regarding access to public records largely developed in the wake of the FOIA and Watergate and incorporated a rebuttable presumption of openness, the first public records law in South Dakota was passed on March 14<sup>th</sup>, 1935. It did not include a presumption of openness. Instead it stated that any records which were required to be kept by state statute must be made available to the public during regular business hours. Exempted from these requirements were records and files related to ongoing criminal investigations, and records “specifically enjoined to be held secret by the laws requiring them to be kept.”<sup>21</sup> In other words, public records were defined to be only those documents specifically listed in the legal code. This definition did not include correspondence, policy planning documents, and other files informally kept by government officials, which nonetheless are important for documenting the activities of state government.

It is possible that this strict definition of a public record was an attempt to keep state agencies from saving, as Margaret Cross Norton wrote in an article for the *American Archivist* in 1945, “any piece of paper with writing upon it which flutters by chance into a

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<sup>20</sup> “Watergate,” *Washington Post*, June 7-14, 2012, accessed February 24, 2013, <http://www.washingtonpost.com/watergate>.

<sup>21</sup> South Dakota State Legislature, *An Act to require public records to be kept open for inspection*, HB 175, (1935).

government office...”<sup>22</sup> By 1935 it was clear that the volume of records produced by government agencies was increasing exponentially. Norton refers to a survey by the National Archives which determined that the volume of federal records produced between 1930 and 1940 was equal to the volume produced between 1776 and 1930.<sup>23</sup> The same exponential growth occurred in all levels of government, and has continued in every decade up to the present. Agencies which, in the past, could successfully keep every record they created, now found themselves overwhelmed and completely out of space. Unfortunately, laws associated with government recordkeeping made it difficult to destroy any of these records, even inactive ones without permanent value.

Eventually records management programs were established to help actively manage government records and information, so that the small percentage of records with permanent value could be adequately preserved, and the rest destroyed when they ceased to be useful. A records management program was not established in South Dakota, however, until 1967.<sup>24</sup> Between 1935 and 1967, the narrow and specific definition of a public record provided by the 1935 public records law gave record keepers guidelines for distinguishing between “record” and “nonrecord” materials.<sup>25</sup>

This also helps explain why the State Historical Society, though it had been collecting historical books, documents, and artifacts since 1901, contained no large collections of

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<sup>22</sup> Margaret Cross Norton, “The Purpose and Nature of Archives” in *Norton on Archives: The Writings of Margaret Cross Norton on Archival & Records Management*, ed. by Thornton W. Mitchell (Chicago: Society of American Archivists, 2003), 33.

<sup>23</sup> Norton, “Services and Resources of an Archives” in *Norton on Archives*, 72.

<sup>24</sup> South Dakota Codified Law (SDCL) 1-27-12.

<sup>25</sup> Norton, “Services and Resources of an Archives,” in *Norton on Archives*, 73.

government records until the State Archives was established in 1975.<sup>26</sup> Documents required by state statute to be kept by a particular office cannot be transferred to another office. Since only documents required to be kept by state statute were considered to be government records, government records could not be transferred to the Historical Society. All other files created and maintained by government agencies were kept by that agency as long as they were useful, then either destroyed, taken home by state employees, or occasionally donated to the Historical Society as manuscript collections. Once state agencies were authorized to transfer records with permanent value to the State Archives, the Archives began receiving not only records as defined by the 1935 public records law, but also some of the important policy documents, correspondence, and files created by the agencies which were not subject to the public records law.

The public records law of 1935 served its purpose well for South Dakota. It recognized that citizens of South Dakota should not have to justify their desire to access the records of their government. By providing a narrow and clear definition of a public record, the public records law allowed for a smoother transition between the old recordkeeping system, where fewer records were created and nearly everything kept permanently, to a modern records management system with retention schedules, a records destruction board, and a State Archives to store records with permanent value. Unfortunately, the narrow definition of a public record meant that the public did not have easy access to many important records documenting government activities, including policy development and

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<sup>26</sup> SDCL 1-18C-2. In South Dakota, the State Archives has always been an office of the State Historical Society, although administration of the State Historical Society itself has changed hands several times over the years. Currently the Historical Society is located within the Department of Tourism.



decision making. The scope of the public records law of 1935 was simply too narrow to be good, comprehensive open records legislation.

## THE GAG LAW AND INCREASING SECRECY

The public records law of 1935 remained in effect, relatively unchanged except for the records management related additions, until 1996, when the State Treasurer, Dick Butler, pushed for an audit of Citibank. This audit revealed that the corporation had \$4.2 million in unclaimed property that properly belonged to the state.<sup>27</sup> These results generated such bad publicity for Citibank that the legislature was afraid they would move their operations out-of-state. The loss of such a large company would have been a huge hit to the economy of the state. It would also be particularly embarrassing for the legislature, because it had gone to such great lengths to attract Citibank in the first place by eliminating the state's usury laws, and passing an emergency law actually drafted by Citibank executives.<sup>28</sup> In addition, the largely Republican legislature was afraid these results would give ammunition to Butler and the rest of the Democratic Party in the upcoming elections.<sup>29</sup>

In an attempt to prevent all this from happening, the state legislature passed South Dakota Law 1-27-27 through 1-27-32, which was affectionately referred to by the press as the "gag law."<sup>30</sup> The gag law made it illegal for state employees to release any information about state investigations to the public, which included confirming whether or not an

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<sup>27</sup> "Repeal 'gag law'," *Rapid City (SD) Journal*, July 10, 2001, accessed August 17, 2012, [http://rapidcityjournal.com/repeal-gag-law/article\\_a5925f28-7949-5a83-95ea-adab37c3751c.html](http://rapidcityjournal.com/repeal-gag-law/article_a5925f28-7949-5a83-95ea-adab37c3751c.html).

<sup>28</sup> Robin Stein, "The Ascendancy of the Credit Card Industry," *Frontline*, Public Broadcasting System, 2004, accessed July 1, 2012, <http://www.pbs.org/wgbh/pages/frontline/shows/credit/more/rise.html>.

<sup>29</sup> Mark Fitzgerald, "South Dakota Keeps Gag Law," *Editor & Publisher* 134, 7 (February 12, 2001): 9.

<sup>30</sup> Donna Smith, "Open records law defined: Maze of rules complicate original statute," *Pierre (SD) Capital Journal*, September 27, 2002.

investigation took place.<sup>31</sup> While this law prevented Butler from discussing the details of the Citibank audit in public, it was too late to improve Citibank's reputation.

The law would have been objectionable solely because it was a partisan attempt to deliberately hide the truth from the public. However, it also had far-reaching consequences for both government and corporate accountability. How can the general public ensure that the state is properly investigating issues if they are not given access to information about those investigations? And if the state is not properly policing private corporations, how can those corporations be forced to comply with state and federal laws? The gag law fostered a culture of government secrecy that undermined democracy and accountability in the state.

Not only did this law increase government secrecy to an unnecessary level, it also placed many state employees in an untenable situation. Federal regulations required some state employees, such as environmental inspectors, to release information on their investigations to the public. If the state employees complied with these federal regulations, they could be charged by the state with a felony. If they withheld information to comply with the gag law, they put their federal funding at risk.<sup>32</sup> This made the gag law a no-win proposition for many in state government. In response to these concerns, the legislature made minor changes to the law to allow these employees to comply with federal regulations, but the majority of the law remained intact.<sup>33</sup>

The passage of the gag law caused an outcry in the press, although sufficient support could not be generated in the legislature to repeal the law. This is partly because the gag law

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<sup>31</sup> South Dakota State Legislature, *An Act to prohibit certain disclosures by a state agency of information concerning a private entity*, HB 1227, 71<sup>st</sup> Session (1996).

<sup>32</sup> South Dakota Resources Coalition, "Resolution: Repeal of the South Dakota Gag Law on State Agencies," October 20, 2001, accessed August 17, 2012, <http://sdrcworks.org/about/positions/gag-law-2001/>.

<sup>33</sup> South Dakota State Legislature, Senate, *An Act to revise the public records law to clarify certain disclosures*, SB 242, 72<sup>nd</sup> Session (1997).

became a partisan issue, instead of an issue of good government. The Republican-controlled legislature, heavily influenced by Governor Bill Janklow, firmly opposed any proposed changes to the gag law. Janklow was a polarizing figure in South Dakota politics. His supporters saw him as a tough-talking man with a good heart who was willing to fight for South Dakota; his opponents thought he was a power hungry, manipulative despot and a bully.<sup>34</sup> He was certainly loud, forceful, and relentless in pursuing the causes he supported. He was also well-established in South Dakota politics and incredibly popular with the electorate—he served as governor for a record four terms (from 1970 to 1987, and from 1995 to 2003), before being elected to the U.S. House of Representatives. As one of the key figures behind bringing Citibank to South Dakota, Janklow strongly supported the gag law, and it proved to be impossible to overturn with him in office, despite yearly efforts by opponents.<sup>35</sup>

## WINDS OF CHANGE

With Janklow unable to run for reelection in 2002, critics of the gag law saw an opportunity for change. Many non-governmental organizations passed resolutions calling for the repeal of the gag law. One of these groups was the South Dakota Resources Coalition, formed in 1972 to promote environmental protection and the wise use of natural resources. The group sponsors television programming, writes editorials, conducts seminars and workshops, publishes a newsletter, and advocates for or against legislation as it affects their

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<sup>34</sup> Students and Teachers Against Racism, "Quotes About Janklow," accessed February 18, 2013, <http://www.racismagainstindians.org/SDBurning/QuotesaboutJanklow.htm>.

<sup>35</sup> Fitzgerald, "South Dakota Keeps Gag Law," 9.

mission.<sup>36</sup> The gag law came to their attention first because its original form prevented environmental inspectors from releasing information about companies that pollute the environment. Although that immediate issue was resolved within a year of the passage of the gag law, the South Dakota Resources Coalition recognized that the law still created an environment of secrecy that would make it difficult for them to know whether environmental laws were being enforced. For this reason, in 2001 they passed a resolution calling for the repeal of the gag law.<sup>37</sup>

Another group advocating for the repeal of the gag law was Dakota Rural Action, a grassroots organization focused on protecting family agriculture and environmental conservation.<sup>38</sup> Dakota Rural Action formed in 1987 specifically to advocate in the legislature for the rights and needs of “family farmers, ranchers, workers, educators, church and small business people who are dedicated to social and economic justice for South Dakota people.”<sup>39</sup> Every year they hire a lobbyist who advocates for members’ interests, and keeps members informed about legislation of interest to the organization. Since Dakota Rural Action most often seeks to hold corporate farms and other corporations accountable to law, they passed a resolution in 2003 calling for the repeal of the gag law.<sup>40</sup>

Both the South Dakota Resources Council and Dakota Rural Action are nonpartisan groups that recognized the implications of the gag law for government accountability, and took action accordingly. They were not alone. Several candidates in the 2002 gubernatorial

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<sup>36</sup> South Dakota Resources Coalition, “About,” accessed August 17, 2012, <http://sdrworks.org/about/>.

<sup>37</sup> South Dakota Resources Coalition, “Gag Law – 2001,” accessed August 17, 2012, <http://sdrworks.org/about/positions/gag-law-2001/>.

<sup>38</sup> Dakota Rural Action, “Mission,” accessed August 17, 2012, <http://dakotarural.org/about-2/mission-2/>,

<sup>39</sup> Dakota Rural Action, “History and Background,” accessed August 17, 2012, <http://dakotarural.org/about-2/history-background/>.

<sup>40</sup> Dakota Rural Action, “DRA Resolutions,” accessed August 17, 2012, <http://dakotarural.org/2010-2011-dra-resolutions/>.

election also spoke out against the gag law, acknowledging its unpopularity with the public. In a news conference at the South Dakota Newspaper Association's annual convention, five out of six candidates, three Democrats and two Republicans, said they would support an appeal of the gag law.<sup>41</sup> The only candidate who did not support an appeal, Republican Mike Rounds, said that the law was necessary to protect companies that are required to file information with the state.<sup>42</sup> Rounds won the Republican primary, facing Democrat Jim Abbott in the general election. Abbott made the gag law an important campaign issue, linking Rounds to the initial passage of the law in 1996, when he was the State Senate majority leader. Abbott attempted to place himself on the side of open government.<sup>43</sup> The emphasis on open government from the press, Abbott, and even from within his own party placed pressure on Rounds, and by the end of the campaign he was advocating for changes to the gag law. Rounds even promised to work with the legislature on a new "freedom-of-information law" to demonstrate his commitment to open government.<sup>44</sup>

Leading the push for greater government transparency was the South Dakota Newspaper Association. During the election, the South Dakota Newspaper Association continually forced the candidates to consider the gag law and other open government concerns. As previously mentioned, the Newspaper Association brought all the gubernatorial candidates together for a press conference at their annual convention, and then questioned the candidates on the gag law. Also, the First Amendment Committee of the Newspaper Association sponsored a special question-and-answer session for both candidates specifically

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<sup>41</sup> "Few would retain gag law," *Rapid City (SD) Journal*, May 10, 2002, accessed February 18, 2013, [http://rapidcityjournal.com/article\\_6dc3db58-121e-5e73-b68e-6982736da19e.html](http://rapidcityjournal.com/article_6dc3db58-121e-5e73-b68e-6982736da19e.html).

<sup>42</sup> *Ibid.*

<sup>43</sup> Jim Abbott, "Letter to the Editor," *Parker (SD) The New Era*, August 22, 2002, 2.

<sup>44</sup> "Rounds considers review of gag law," *Rapid City Journal*, September 5, 2002, accessed February 18, 2013, [http://rapidcityjournal.com/article\\_76c2552a-99c7-570f-93ab-6d7618c23f25.html](http://rapidcityjournal.com/article_76c2552a-99c7-570f-93ab-6d7618c23f25.html).

devoted to the gag law, open records, and open meetings.<sup>45</sup> Both of these gatherings ensured that open government issues were a focus in the campaign, forcing Rounds in particular to acknowledge public opinion and become more receptive to changes in the gag law and open records reform.

In addition to pressing political candidates to improve open government, South Dakota newspapers also combined forces in September 2002 to launch an investigation into South Dakota public records access policies. During this investigation, reporters from South Dakota's eleven daily newspapers attempted to gain access to specific records from state and local governments. Then each reporter wrote an article describing his or her experiences, including any difficulties obtaining records or dealing with staff, and the articles were shared and published throughout the state. These articles highlight some of the issues of managing access to records under the 1935 public records law's "required to be kept" definitions, particularly the central role of the record keeper in determining access.

The public records special feature articles were published on September 27, 2002. Nearly all the reporters were successful at obtaining their assigned records, whether the records were required to be kept or not, although some investigators faced significant amounts of resistance and suspicion from the record holders. What soon became clear was that practical access to public records depended on the judgment of the record holders, and that the record holders were often under the impression that the laws governing public access to records were more liberal and open than they were in actuality.

For instance, in one of the articles produced by the investigation, the Marshall County Sheriff says that police log books are public records as long as they do not contain any

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<sup>45</sup> Joe Kafka, "Governor candidates differ on public records meetings," *Parker (SD) The New Era*, August 8, 2002, 5.

information relating to minors.<sup>46</sup> While he was certainly within his rights to make the log books public, the books were not public records as defined by the 1935 public records law, since they were not required to be kept by state law. He was under no legal obligation to make them available to the public. In another article, the Tripp County Treasurer stated that all the Treasurer's Office records were open to the public.<sup>47</sup> This, of course, was another misunderstanding of the public records law. Not all of the records maintained by the Treasurer's Office were required to be kept by state law, so therefore not all of the records were open to the public.

While the reliance on the record holders' judgment actually improved access to records in these cases, researchers and investigators were standing on shaky ground. A record keeper's judgment may fall in favor of restriction just as easily as in favor of access. Without clear guidelines and a mandate from the government ensuring access, the public's right-to-know about the activities of its government, one of the most important foundations for a functioning democracy, was subject to the whims of the record holder. Also, it would be easy for one of these record holders to unknowingly or accidentally release private or confidential information to the public. In either case, the record keeper's decisions were difficult to protest, since the only appeal available was through the courts—a long and expensive process.

The articles resulting from the public records investigation, the efforts of the South Dakota Newspaper Association and other non-governmental organizations, and the debates over the gag law and public records during the 2002 gubernatorial election brought open

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<sup>46</sup> "County sheriff lets people see police log book," *Pierre (SD) Capital Journal*, September 27, 2002, 16.

<sup>47</sup> Chuck Clement, "County official: 'Our records are open'," *Pierre (SD) Capital Journal*, September 27, 2002, 16.

government issues to the attention of the public and South Dakota's elected officials.

Rounds won the election and became governor, at least partly because of his promise to work with the legislature to amend the gag law and pass new comprehensive open records legislation. Another elected official with a stake in open government was Republican Attorney General Larry Long, who created the Open Government Task Force in December 2002. The task force was comprised of thirty individuals with a stake in public records access, including representatives from the archives, administration, records management, the news media, local government, etc. These individuals met to discuss open government and records issues, to seek out new ways to improve government transparency, and to develop and support legislation to implement those strategies.

Government is notorious for working slowly, but finally, in 2004, the efforts of all these groups and organizations began to bear fruit. The state legislature amended the gag law so that it only applied to investigations that included trade secrets or proprietary information.<sup>48</sup> This much more narrow scope made the gag law tolerable to critics, while still leaving the protections for companies required to file information, which so concerned Governor Rounds. In 2006, Rounds was up for reelection and needed to make good on his promise to work with the legislature to pass new open records legislation. With his support, the legislature passed a bill requiring the Attorney General's office to study open government in South Dakota and submit a report addressing public records and open meetings issues. The report was supposed to suggest legislation to improve government accountability. This was the first step towards developing a more comprehensive public records law.

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<sup>48</sup> South Dakota State Legislature, Senate, *An Act to revise certain provisions regarding public records kept by state agencies*, SB 59, 79<sup>th</sup> Session (2004).



THE ATTORNEY GENERAL'S REPORT<sup>49</sup>

From 2006 to 2007, the Attorney General's office investigated public records issues in South Dakota. First they used existing records retention manuals to develop a list of all the records created by each agency, and determined whether those records were required to be kept by state statute, and whether the statutes restricted them from public access. Then the Attorney General's office interviewed staff members in each agency to determine whether those records, when requested, were released to the public or withheld. In the process of these investigations, the office compiled a list of state and federal regulations restricting access to records that was twenty eight pages long.<sup>50</sup>

Once these initial investigations were complete, the Attorney General's office convened its Open Government Task Force of thirty stakeholders to analyze the results and make recommendations. The task force was expected to submit a new public records law for consideration in the legislature. Unfortunately, competing interests and priorities prevented them from reaching a consensus on how to approach comprehensive public records reform. Striking the correct balance between providing the access to records necessary for governmental accountability and protecting the privacy and safety of individuals is never easy. The Open Government Task Force was simply unable to agree on where access to South Dakota government records should fall on this spectrum. According to Larry Long,

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<sup>49</sup> The Attorney General's report also addressed open meetings issues, but as that lies outside the scope of this paper, those sections are not analyzed here.

<sup>50</sup> "Report of the Attorney General on the Status of Open Government in South Dakota, Appendix B: State and Federal Laws Restricting Public Access to Documents," June 30, 2007, accessed April 21, 2012, <http://legis.state.sd.us/agopengov/AppendixB.pdf>.

the Attorney General at the time, the only true consensus centered on creating an appeals process to allow individuals to protest denials of requests to access records.<sup>51</sup>

Although the task force did not develop an open records bill, its discussions shaped the recommendations which were eventually included in the Attorney General's report submitted to the legislature in 2007. First, the Attorney General determined that many more record series were being actively created by government agencies than were required to be kept by state statute. Also, it was sometimes unclear in the laws whether a record was required to be kept, or just to be "filed" with a particular agency.<sup>52</sup> To rectify this, the Attorney General recommended that the public records law (SDCL 1-27-1) be revised to better reflect the records actually being created.<sup>53</sup> It is important to note that the Attorney General was not, at this point, advocating for a rebuttable presumption of openness in the law, just that the law should be expanded to apply to more records.

Second, the Attorney General recommended that any new legislation minimize the extent to which agencies are required to exercise discretion in determining when records should be made available to the public, and provide clear guidelines for when discretion is necessary.<sup>54</sup> In other words, any public records legislation needed to be clear and understandable to the records holders, so that all public information could be easily accessed, and no restricted information accidentally released. Again, the 2002 special newspaper investigation into public records revealed that the people determining which records could be

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<sup>51</sup> Larry Long, "Senate Bill 186 – Scheduled for Hearing," January 30, 2008, live broadcast of committee hearing, RealPlayer audio, 50:31, <http://legis.state.sd.us/sessions/2008/audio.aspx?CommitteeCode=SST&MeetingDate=01/30/2008&BillNumber=186>.

<sup>52</sup> "Attorney General's Report on the Status of Open Government in South Dakota, Summary," July 2, 2007, 15, accessed April 21, 2012, <http://legis.state.sd.us/agopengov/Summary.pdf>.

<sup>53</sup> Ibid, 29.

<sup>54</sup> Ibid, 30.

released to the public were often confused or misinformed about the laws governing their records. The Attorney General hoped to rectify this, as much out of fear that confidential or restricted information was being inadvertently released as out of concern that public records be consistently available to the public.

The third major recommendation in the Attorney General's report came directly from the Open Government Task Force—the development of a procedure to allow individuals to dispute the denial of a records request without the expense of a lawsuit.<sup>55</sup> The report does not specify which form this procedure should take, but gives examples from other states, most of which consist of some kind of committee or commission that meets specifically to hear appeals and resolve public records disputes. For example, in Nebraska public records access disputes are submitted to a Records Board consisting of the state elected officials as well as three representatives with banking or legal backgrounds, and three representing general users, including the news media and libraries. In other states, such as North Dakota, public records disputes are submitted in writing to the Attorney General's office, where they are either informally resolved or an official opinion is issued. Of the fifty states, only twelve had separate procedures to resolve public records disputes in 2006.<sup>56</sup>

The Attorney General's report also made several smaller recommendations designed to protect the privacy of individuals and ensure that confidential or restricted information is not released to the public. These included the creation of a list of “documents that merit confidentiality,”<sup>57</sup> adopting ways to redact personally identifying information from public

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<sup>55</sup> “Attorney General's Report,” 39.

<sup>56</sup> Ibid, 39-42.

<sup>57</sup> Ibid, 30.

records, protecting the confidentiality of proprietary information and research, and adopting legislation to protect information whose release may compromise public safety.<sup>58</sup>

In summary, the Attorney General's report recommended that a more centralized, comprehensive and clear system for determining public access to state and local government records be established. The system should include more of the government records created, not just those specifically required to be kept by statute. Any records containing confidential information, or information with the potential to threaten public safety, should be restricted. The majority of public access determinations should be addressed by clear and comprehensive legislation and not left in the hands of individual records holders. And finally, any disputes should be handled through a special appeals process for a faster and more affordable resolution than is possible within the court system.

#### INITIAL ATTEMPTS AT COMPREHENSIVE OPEN RECORDS LEGISLATION

The Attorney General's report was released in July of 2007. During the next legislative session, two bills were introduced into the State Senate which attempted to implement the Attorney General's recommendations. The first, Senate Bill 186, was sponsored by Dave Knudson of Sioux Falls, a Republican and the Senate Majority Leader. Senate Bill 186 initially tried to incorporate all of the Attorney General's suggestions for public records without instituting a rebuttable presumption of openness, and also made changes to the open meetings laws. The resulting bill tried to solve too much at once, leaving it complicated to navigate, and doomed to failure.

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<sup>58</sup> Ibid, 32-34.

First, Senate Bill 186 expanded the definition of a public record to include “[a]ny record or document required by state or federal statute, ordinance, administrative rule, permit, or license to be filed with or kept by any government entity or any elected or appointed government official,” and required that those records be made available to the public during business hours.<sup>59</sup> While this slightly expanded the definition of a public record as determined by the 1935 public records law, it still excluded informally created records, which make up the majority of files created by state agencies and officials. This tiny opening was made even smaller with a list of exemptions to the law, which were included to protect personal privacy and public safety.

In addition to only slightly improving public access to government records, Senate Bill 186 also included some controversial measures which worried both state agencies and county officials. Senate Bill 186 required that all records be preserved in their original format or in a searchable electronic format, effectively removing microfilm as an acceptable preservation medium. To underscore this change, Senate Bill 186 proposed to repeal SDCL 1-27-8, which makes microfilm and other certified copies admissible as evidence in court. Many offices, particularly those such as the Secretary of State in which many public records were formally filed, routinely microfilmed their public records to save space. Not only would this change require them to keep the more voluminous paper records, but it could potentially make the thousands of microfilm rolls which had already been created inadmissible in court.

Senate Bill 186 also proposed some sweeping administrative changes for records management. Setting procedures for records requests, public disclosure of information,

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<sup>59</sup> South Dakota State Legislature, Senate, *An Act to revise certain provisions regarding public records and public meetings*, SB 186 as introduced, 83<sup>rd</sup> Session (2008).

reproduction of records, and archiving noncurrent records all became the responsibility of the Commissioner of the Bureau of Administration under the bill. Although the state Records Management office was located administratively within the Bureau of Administration, there was no central office responsible for setting the procedures mentioned. The State Archives, however, was responsible for collecting, managing, preserving, and providing access to noncurrent state records with permanent value. Senate Bill 186 left it unclear just what role the State Archives would play in the future, or whether it would be combined with Records Management under the Bureau of Administration. The bill also weakened SDCL 1-27-14.1, which mandates that each agency head transfer his or her records to the State Archives upon leaving office. Senate Bill 186 proposed that the records be given to the successor to that office, unless the entire agency ceased to exist, at which point the records could be transferred either to the State Archives, or to the agency absorbing the functions of the old agency.

The bill also outlined the process for obtaining access to public records, including an appeals process to contest denials of access. First, the individual would submit an informal request for the record. If that request was denied, then the individual could submit a formal, written request. In order to deny the formal request, the public records officer must submit a written letter explaining the reasons for the denial. The requestor can then submit the case to the Office of Hearing Examiners for review. The decisions of the Office of Hearing Examiners may be appealed to the circuit court.

These sweeping changes, combined with changes to the open meeting laws, which were even more controversial, meant that support for the bill was lukewarm at best. Even the proponents of the bill, who praised it as a “common sense measure” and “a good

compromise,” expressed trepidation over some of the specifics, such as the removal of microfilm as an acceptable preservation medium.<sup>60</sup> Between when the bill was introduced to the Senate and when it was brought before the Senate State Affairs committee, Senator Knudson received enough feedback from interested parties to realize that it would never pass in its original form. Much as with the Open Government Task Force, the only real consensus centered on the segments establishing an appeals process for public records disputes. He and the rest of the Senate State Affairs committee drastically amended the bill, removing everything except the appeals process. The amended bill, containing only the appeals process, easily passed through the Senate and the House, and was signed into law on March 17, 2008. Although this was not the comprehensive reform many were hoping for, it did provide an alternate way to gain access to records, instead of relying solely on the judgment or generosity of the records holder.

The other attempt at comprehensive public records reform, Senate Bill 189, was less successful at producing legislation. Senate Bill 189, introduced by the newly elected Nancy Turbak Berry, a Democrat from Watertown, was the first to incorporate a rebuttable presumption of openness for all state and local government records. In contrast to Senate Bill 186, Senate Bill 189 recognized that even the informal files created and maintained by state agencies and officials were records of the activities of those entities, and that those records ought to be public. In the debates over the bill, Turbak Berry gave a passionate

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<sup>60</sup> Yvonne Taylor (South Dakota Municipal League) and Neil Fulton (Governor’s Office), “Senate Bill 186 – Scheduled for Hearing,” January 30, 2008, live broadcast of committee hearing, RealPlayer audio, 50:31, <http://legis.state.sd.us/sessions/2008/audio.aspx?CommitteeCode=SST&MeetingDate=01/30/2008&BillNumber=186>.

defense of the presumption of openness.<sup>61</sup> She argued that the presumption of openness was not a radical change that would indiscriminately open all government records, regardless of privacy concerns or public safety. The rebuttable presumption of openness, she said, merely places the burden of proof on the government office, rather than the citizen. Records are open unless the office can give a good reason for them to be closed. “[T]he starting point,” she said, “always ought to be that if the government is going to withhold information from its citizens, it...ought to show why.”<sup>62</sup> Turbak Berry also pointed out that South Dakota was the only state in the entire country operating without a presumption of openness in place. “This is not a controversial issue across the nation,” she said, “It should not be a controversial issue here.”<sup>63</sup>

In addition to these philosophical arguments, Turbak Berry also argued that the presumption of openness was a more practical choice. Since government officials are more familiar with the law code than the average citizen, they are “in a better position to address the analysis of openness.”<sup>64</sup> To emphasize this point, Turbak Berry revealed how difficult it was for her to find anything in the code, despite her twenty-five years of experience as a lawyer. Also, she argued, with the presumption of openness, any new records the government creates are automatically incorporated into the law.<sup>65</sup> Under the public records law of 1935, or even the proposed Senate Bill 186, these new records are not open to the public until the legislature enacts a law requiring them to be kept. This delay creates more

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<sup>61</sup> Nancy Turbak Berry, “Senate Bill 189 – Scheduled for Hearing,” January 30, 2008, live broadcast of committee hearing, RealPlayer audio, 50:31, accessed February 10, 2013, <http://legis.state.sd.us/sessions/2008/audio.aspx?CommitteeCode=SST&MeetingDate=01/30/2008&BillNumber=189>.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.



work for the legislature, and unnecessarily delays access to records which might contain important information.

Despite these philosophical and practical arguments, Turbak Berry's Senate Bill 189 proved to be too controversial for South Dakota. The bill barely passed through the Senate, before being tabled by the House State Affairs committee. It faced all the same objections as Senate Bill 186, with the added fear that a presumption of openness was too radical a change. There was also a strong partisan opposition to any bill proposed by a Democrat which could not be overcome for such a controversial issue. Again, without a consensus comprehensive public records reform was impossible. However, the debates over Senate Bill 189, and in particular Senator Turbak Berry's defense of the presumption of openness, began to lay the foundations for that consensus.

The results for the 2008 legislative session were mixed. Despite efforts from both parties, no comprehensive public records reform legislation passed. However, Senate Bill 186 did result in the creation of an affordable appeals process to handle public records requests. Senate Bill 189 may have failed miserably as legislation, but it fostered discussion about the presumption of openness both in the legislature and the media. These discussions bore fruit in the following legislative session.

## COMPROMISE AND DETERMINATION

The legislature convened in January 2009 determined to pass some kind of public records reform legislation. Between sessions, Senator Knudson had worked with other legislators and interested stakeholders to develop a bill. The result, Senate Bill 147, was based primarily on the Nebraska public records laws and incorporated a rebuttable

presumption of openness, as well as the customary list of exemptions. In a change from the previous session, when philosophical discussions took center stage, this session focused almost entirely on the exemptions. None of the opponents to Senate Bill 147 took issue with the presumption of openness, and Yvonne Taylor, representative for the South Dakota Municipal League, specifically mentioned Senator Turbak Berry's speech from the 2008 session as having influenced the League's position on the presumption of openness.<sup>66</sup> Even those individuals who expressed doubts about the presumption of openness, such as Neil Fulton, Chief of Staff for Governor Rounds, recognized which way the wind was blowing and deemed Senate Bill 147 a workable compromise.<sup>67</sup> With this consensus in place, and the sheer determination to pass something evident on all parts, comprehensive records reform was finally a possibility.

Although the bill passed unanimously through the Senate and the House, it was amended multiple times to add to or revise the list of exemptions to satisfy critics. Most of these amendments make sense, and are important to protect personal privacy and public safety, or to comply with federal requirements. However, at least one of these amendments had far-reaching and unintended consequences. Neil Fulton, representing the Governor's Office, initially opposed the bill out of fear that access to working papers and correspondence received by the Governor's Office and the Legislature would unnecessarily reveal private information about individuals.<sup>68</sup> The Secretary of State, Chris Nelson, also opposed the bill,

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<sup>66</sup> Yvonne Taylor, "Senate Bill 147 – State Affairs Motion to Amend, Passed," February 20, 2009, live broadcast of committee hearing, RealPlayer audio, 2:35:28, accessed February 10, 2013, <http://sdpb.sd.gov/SDPBPodcast/2009/sst26.rm>.

<sup>67</sup> Neil Fulton, "Senate Bill 147 – State Affairs Motion to Amend, Passed," live broadcast of committee hearing.

<sup>68</sup> The Governor's Office in South Dakota has traditionally been very protective of the correspondence it receives from constituents. Governors M. Michael Rounds and William Janklow both mandated that their records be restricted from the public until their deaths, and Rounds even insisted that his correspondence be restricted from Archives staff.

fearing that access to working papers would inhibit or discourage participation in government.<sup>69</sup> To answer these objections, an amendment was introduced adding a working papers exemption to the bill. After this amendment, both Fulton and Nelson became supporters of the bill.

While this support undoubtedly helped the bill pass and ensured that it would not be vetoed by the Governor, its vague wording and lack of a specific definition for “working papers” have continually caused problems for those managing access to historical state records. Do working papers include drafts that document the deliberation process? Is all correspondence considered to be working papers? When records are transferred to the State Archives, can they still be considered working papers, even though they are not actively being used by the records creator? None of these questions are answered by the bill as passed.

## BELTS AND SUSPENDERS

Amendments such as the working papers amendment were not the only way Senator Knudson and other proponents of the bill ensured its success. The presentation of the entire bill was structured so as to minimize fears that confidential information would accidentally be released to the public. One of the arguments continually presented in favor of the bill was that it would simplify the open records process so that everyone involved, from ordinary citizens to record keepers, would be able to determine which records were open and which were restricted. This implied, then, that records would not be unnecessarily hidden from the

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<sup>69</sup> Neil Fulton and Chris Nelson, “Senate Bill 147 – State Affairs Motion to Amend, Passed,” live broadcast of committee hearing.

public, but also that records containing confidential information would not be accidentally released.

The other argument frequently presented, in an attempt to keep discussions over lists of exemptions from becoming permanently stymied, was that all prior legislation declaring records confidential would remain in place. This would protect any records which might slip through the cracks in the list of exemptions. In 2008, Senator Turbak Berry referred to this as the “belt and suspenders” approach.<sup>70</sup> Only one of these protections would likely be sufficient to keep one’s pants in place, but having both ensures there will be no accidental exposures.

Unfortunately, these arguments conflict with each other. Having a belt and suspenders may ensure that the pants stay on, but it makes getting dressed in the morning much more complicated. In the same way, adding a layer of open records legislation on top of the existing legislation makes determining whether or not a record is restricted more complicated, not less so. South Dakota inheritance tax records are excellent examples of this complication. From 1939 to 2001, South Dakota had an inheritance tax. Many of the inheritance tax records contain personally identifying information, such as social security numbers, which are protected from disclosure in the list of exemptions in Senate Bill 147. However, since the right to privacy traditionally ends with death, and the decedents are by definition deceased, does this exemption even apply?

To make matters even more complicated, the inheritance tax records are also subject to SDCL 10-41-17, which restricts access to licensed abstractors, title insurance company agents, and attorneys; the spouse and any other relatives of the decedent within three degrees

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<sup>70</sup> Turbak Berry, “Senate Bill 189 – Scheduled for Hearing,” live broadcast of committee hearing.

of kinship; beneficiaries of the decedent; Department of Revenue officials; law enforcement; and anyone with a court order. However, if the Department of Revenue decided to pursue removing SDCL 10-41-17 from the books, since the inheritance tax itself no longer exists, then these records would be subject to SDCL 10-1-28.3. That law is even more restrictive, only allowing access to Department of Revenue employees, law enforcement, and the taxpayer.

While it is unclear whether or not the legislators recognized this particular flaw in logic, most admitted that Senate Bill 147 had weaknesses. However, despite some reservations, they saw the bill as an essential first step to improving access to state and local government records. For example, Representative Bernie Hunhoff strongly supported the bill, despite expressing some fears that the bill left loopholes and hiding places for those trying to keep information from the public.<sup>71</sup> Even the primary creator of the bill, Senator Knudson, called it imperfect, but said the imperfections could be ironed out in future legislative sessions.<sup>72</sup>

## UNANTICIPATED CONSEQUENCES FOR HISTORICAL RECORDS

Senate Bill 147, which became SDCL 1-27-1, informally known as the Open Records Law of 2009, undoubtedly opened more current records up to the public by placing the burden of proof on the government agency. It also specifically stated that all documents created by government in the course of its activities are public records, not just documents

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<sup>71</sup> Bernie Hunhoff, "Senate Bill 147 - House of Representatives Do Pass Amended, Passed," March 10, 2009, live broadcast of hearing, RealPlayer audio, 2:46:48, accessed February 10, 2013, <http://sdpb.sd.gov/SDPBPodcast/2009/hou36.rm>.

<sup>72</sup> Dave Knudson, "Senate Bill 147 - Senate Do Pass Amended, Passed," February 24, 2009, live broadcast of hearing, RealPlayer audio, 3:33:59, accessed February 10, 2013, <http://sdpb.sd.gov/SDPBPodcast/2009/sen28.rm>.

required to be kept by statute. However, in the State Archives, where nearly all records had been open in practice, if not by law, the new open records legislation forced many records to be restricted.

After the passage of the Open Records Law, the State Archives' first order of business was to review its holdings to see which records were restricted. Staff at the Archives searched through their collections management databases for records using the list of exemptions from the public records law as a guide, and flagged any collections potentially containing restricted information. During the course of this review the staff discovered that many records containing confidential information, or information that might compromise public safety (such as blueprints to public buildings) had been open to the public for years. An official and permanent restriction was placed on this information, as should have been in place all along.

However, the working papers clause proved to be more frustrating for staff. The vague definition of "working papers," which includes a blanket restriction on correspondence, calendars, memoranda, and telephone logs, provides a haven for those who want to hide information from the public. Executives often use this clause to justify placing restrictions on correspondence and decision making documents. This is sometimes referred to as the deliberative process privilege, which is also incorporated into the federal FOIA.<sup>73</sup> The justification behind this privilege is that it encourages open and honest discussion of policy between government officials and their subordinates. While this is reasonable to a certain extent, government records are supposed to capture the activities of government officials, including their policy and decision making processes. These records ought to,

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<sup>73</sup> "Freedom of Information Act Guide, May 2004: Exemption 5," U.S. Department of Justice, accessed February 24, 2013, <http://www.justice.gov/oip/exemption5.htm>.

eventually, be available to the public so that the public can hold the officials accountable for their actions and decisions.

The deliberative process privilege, to a limited extent, is defensible with regard to executives responsible for formulating government policies and decision making. However, the working papers clause included in the South Dakota Open Records Law applies to all public officials and employees.<sup>74</sup> This invites broader interpretations of “working papers.” For example, government employees could argue that their active project files are “working papers,” since the project is not complete. An argument could even be made that closed project files are “working papers,” even if the final project reports are not. While these broader interpretations are uncommon, the working papers loophole makes it difficult to argue against them.

The law also restricts “working papers” indefinitely and retroactively, which causes problems for those managing historical state records, such as the State Archives. The most common record series in the Archives are agency correspondence files, which are specifically mentioned and restricted in the working papers clause. This means that any records containing correspondence in the Archives, no matter how old, are restricted forever. Since it is unreasonable to restrict such an important record indefinitely, the Archives in practice only restricts correspondence if there is no signed transfer document, with the understanding that by signing the transfer document the records officer or agency head is waiving his or her right to restrict the records. While most of the newer accessions have signed transfer documents, records which were accessioned prior to the 1980s were rarely documented. In other words, the oldest accessions in the Archives, and the ones least likely

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<sup>74</sup> See Appendix A: South Dakota Open Records Law, 2012.

to contain information about living individuals, are the ones most likely to be restricted by this law.

The lack of restriction expiration dates applies to all of the public records law exemptions, not just correspondence and working papers. The danger to individual privacy and public safety diminishes over time, as people die and buildings are torn down or refitted. It seems evident that eventually the danger would be so slight as to warrant a lifting of the restriction. The Open Records Law of 2009 does not allow space for this to happen. The Archives often runs into difficulties with this. Sometimes records are only restricted because they include social security numbers. As time passes and individuals die, their social security numbers are published in the Social Security Death Index. Once all of the individuals whose numbers are included in the records pass on, the records will no longer contain information which violates individual privacy. However, because they contain social security numbers, they are indefinitely restricted by the South Dakota public records law.

Social security numbers can usually be redacted from a document fairly easily, allowing the record to be viewed by the public. However, if there are large volumes of records, or if the records have been microfilmed (which is still an accepted preservation medium in South Dakota), this redaction process becomes much more complicated and time-intensive for Archives staff. Other private information which becomes less dangerous over time can also be more difficult to redact as well.

Also, as discussed earlier, the new public records law does not negate any other access restrictions passed by the legislature. That means those twenty-eight pages of restrictions included in the Attorney General's report are still in effect, in addition to the list



of exemptions included in SDCL 1-27-1.5. This does not make access to government records more clear and comprehensible—it simply adds a new layer of restrictions to the mess.

## CONTINUING LEGISLATION

Every year since the Open Records Law was passed changes and additions have been proposed by the legislature to clarify its provisions. In 2010, these efforts focused on reforming the open meetings laws. In 2011, several changes were proposed, most of which attempted either to make specific record series available, or to restrict certain information in public records.<sup>75</sup> All of these laws were promptly deferred to the 41<sup>st</sup> legislative day.<sup>76</sup> The only bill that escaped this fate, and made it through both the House and Senate, created a penalty for wrongfully denying access to public records.<sup>77</sup> This bill was an important enforcement measure for the open records law, although fees can only be assessed by the court system, not by the Office of Hearing Examiners, which is by law supposed to hear disputes over access to public records.

The first major addition to the open records law passed during the 2012 legislative session, and addressed access to records from governors and former governors. Unlike the open records law and all previous additions, the governors' records law specifically addressed access to noncurrent records. The bill stated that governors' papers were in fact subject to the open records law, and that any restricted records in the collection were closed for ten years, or until the death of the former governor, whichever happened last. During that

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<sup>75</sup> “2011 Session Subject Index – Public Records” accessed February 10, 2013, <http://legis.state.sd.us/sessions/2011/Keyword.aspx?Keyword=111>.

<sup>76</sup> Since the South Dakota State Legislature meets for a maximum of 40 days, a common way to permanently table a bill is to defer it to the 41<sup>st</sup> legislative day.

<sup>77</sup> South Dakota State Legislature, Senate, *An Act to provide a penalty for denying access to public records*, SB 101, 86<sup>th</sup> Session (2011).

time a particular individual would be appointed by the former governor to approve or deny access to these restricted materials. The bill also had a provision allowing governors to deposit their records in any “museum, institution of higher learning, or other suitable repository within South Dakota” provided it is capable of preserving and providing access to the records.<sup>78</sup>

Since over three quarters of the records created by the Governor’s Office are correspondence files, which are subject to the “working papers” exemption of the open records law, this law did not really open access to governors’ records. However, it did clarify the process by which those records would eventually become available, which up to that point had been determined rather haphazardly. And perhaps most importantly, the law irrefutably recognizes that records produced and kept by governors are state records that belong to the people of South Dakota, not the personal property of the governor himself.

The 2013 legislative session proposed one bill in particular that had exciting possibilities for opening historic state government records. Senate Bill 110, sponsored by Senator Jeff Monroe of Pierre at the request of the South Dakota Genealogical Society, sought to open to the public military records which are over seventy-five years old. Currently all state-produced military records are closed except to the veteran and his or her dependents. Since, as with most access restrictions in South Dakota, there is no end-date to the restriction, even historic records from the Spanish American War and the Civil War are closed to the general public. In contrast, federal military records are open to the public after 75 years, protecting the privacy of living veterans, but allowing public access to records with historical and genealogical value. Since most of the federal records for South Dakota

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<sup>78</sup> South Dakota State Legislature, House, *An Act to provide for the public access to the records of former Governors and lieutenant governors*, HB 1233, 87<sup>th</sup> Session (2012).

veterans were destroyed in a fire at the National Personnel Records Center in St. Louis in 1973, the state-generated documents are often the only service records available.<sup>79</sup> This bill sought to apply current federal access standards to the state records in order to assist military historians and genealogists in South Dakota.

Unfortunately, although the bill passed through the Senate unopposed, it stalled in the House State Affairs committee over administrative objections, including the placement of the proposed changes in existing statutes. The bill had strong support from the public and from the South Dakota Department of Military and Veterans Affairs, however, so the Genealogical Society intends to pursue these changes again during the 2014 legislative session. If it does pass, it will provide a good example for future attempts to establish reasonable restriction end-dates and to open historical records.

## CONCLUSION

South Dakota public records policy has evolved greatly in the last eighty years. The 1935 public records law recognized the rights of South Dakotans to access records created by their government. The creation of a state records management program in 1967, and the State Archives in 1975 demonstrated that many more record series were being created and managed in state offices than were considered “records” by the public records law. This knowledge, combined with the greater visibility of open government concerns in the form of efforts to overturn the gag law, created a climate suitable to open records reform.

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<sup>79</sup> For more information on this fire, see “The 1973 Fire, National Personnel Records Center” at the National Archives and Records Administration, accessed February 10, 2013, <http://www.archives.gov/st-louis/military-personnel/fire-1973.html>.

Even in this more hospitable atmosphere, legislative reform was not easy. It took three years for the state legislature to draft a piece of open records legislation that could pass through the House and the Senate. The Open Records Law of 2009 finally incorporated a presumption of openness, recognizing that even informal files kept and maintained by state officials and employees were public records, and ought to be made available. It is not, however, perfect legislation. The working papers clause, the belt and suspenders approach, and the lack of restriction end-dates all make providing access to government records more difficult, particularly for those managing historical records.

Given all this, two themes emerge in the South Dakota case study which citizens of governments everywhere would do well to pay heed. First, even governments with good intentions are reluctant to release records to the public. This is because governments recognize the power that access to information gives citizens, and few politicians are willing to give up power once they have it. We see this fear in South Dakota most obviously with the passage of the gag law, which was passed solely to prevent the public from discovering information that would have proved politically detrimental to those in power. The legislature's subsequent refusal to repeal the law, despite yearly proposals and the law's clear unpopularity with the public, also demonstrated this disinclination to end the environment of secrecy promoted by the gag law.

However, there is even a current of this reluctance to release information in the events leading up to open records reform in 2009. The driving force behind support of open records reform for many government officials was not the need to protect the rights of citizens to access government records, but the fear that information was being released too freely by individual record holders. For example, the Attorney General's report called for clear access

guidelines in order to minimize the individual discretion exercised by government employees and record keepers. Even the belt and suspenders argument used to promote and defend the 2009 Open Records Law emphasized all the protections in place to prevent accidental exposures of restricted information.

Governments are good at finding reasons to withhold information and records from the public. Some of these reasons are legitimate, such as protecting personal privacy, and some are not. It becomes the job of archivists, researchers, and other members of the public to analyze the reasons behind record restrictions, to advocate for reasonable restriction end-dates, and to promote openness wherever possible. There have been some attempts at this in South Dakota, with the proposal to end restrictions on military records after 75 years, though none have been successful.

The second theme evident in the South Dakota case study is that access to government records does not improve without sustained support from the community. In South Dakota, the most tireless advocates for open records have been members of the news media. The South Dakota Newspaper Association not only led the fight to repeal the gag law, but also held press conferences with gubernatorial candidates to focus on issues of open government, and led investigations into the realities of access to government records. They joined forces with nongovernmental organizations to pressure legislators to repeal the gag law and support open records. Even so, it took eight years for the gag law to be significantly changed, and five more years after that for comprehensive open records reform to become a reality. And even the passage of the Open Records Law of 2009 did not create an environment of truly open, maximum access in South Dakota. The work of these advocates for open records and government transparency will never be completely finished.

The ongoing struggle to provide open access to government records is not unique to South Dakota. Citizens in every state, in every nation, and at all levels of government, grapple with the same issues seen here. South Dakota was the last state to pass an open records law that incorporated a presumption of openness. However, it is not the only state to struggle with finding the balance between the public's right-to-know and the individual's right-to-privacy. These questions are never easy, particularly with modern threats such as terrorism and identity theft always lurking in the shadows, providing governments with justifications for withholding information. The South Dakota case study is important because it demonstrates that the quest for truly open records does not end with the passage of an open records law. This is essential for individuals in all states to remember. Archivists in particular should be aware of the statutory environments in which they operate, not only so they can administer access to their collections responsibly, but also so they can identify the limitations of those statutes, and work to improve them.

Open records, and by extension, open government, require a constantly vigilant public. As the South Dakota case study illustrates, even a public records law with a presumption of openness does not necessarily indicate truly open access to records. And without open access to records, society is at a disadvantage. History tells us that governments must be held accountable to the people, or they become corrupt. Without open access to records, the public lacks the information necessary to make good, informed decisions and judgments. This makes it easier for politicians to abuse their power and take advantage of the public. While these abuses may take the form of atrocities or human rights violations, as in the case of Nazi Germany, they might also simply be corrupt policies that allow funds to be misspent, or companies that pollute the environment to escape punishment.

Poor access to government records not only paves the way for government abuses, but it also makes those abuses easier to hide from the judgment of future generations. By giving the government control over access to records, society moves the power of shaping the historical record into the hands of government officials. Governments are by nature subjective; they have an interest in hiding their mistakes and abuses of power from the public. If we as a society wish to create and maintain an accurate historical record and collective memory, one that supports social justice by providing documentation of government abuses as well as its successes, then we must fight for what Roland Baumann calls “a favorable climate for maximum access.”<sup>80</sup> Without this public access to knowledge, the power to shape history lies entirely with the government.

Government archivists are in a unique position to monitor the accessibility of government records, and to identify gaps in the historical record—activities which are key to maintaining government accountability. However, these archivists are also usually employed by the institutions they are attempting to hold accountable. The opposed and competing obligations of the public and the employer sometimes lead to difficult decisions and crises of ethics. In May 2011, the Society of American Archivists Council released a Core Values Statement which was written specifically to help archivists resolve these “competing claims and imperatives.”<sup>81</sup> The Core Values Statement calls on archivists to promote “the widest possible accessibility of materials,” particularly to the records of public officials and agencies in order to ensure government accountability. In addition, the Statement encourages the use of archives to support social justice, and advocacy “in the public arena” for policies and legislation that open access to records and promote good recordkeeping.

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<sup>80</sup> Baumann, “The Administration of Access to Confidential Records in State Archives,” 351.

<sup>81</sup> “SAA Core Values Statement and Code of Ethics,” Society of American Archivists.

For archivists in places like South Dakota, this translates to partnering with other groups, such as the news media and library professionals, to bring open records issues to the public's attention. It means sending letters and making phone calls to legislators. It means using existing professional networks like the Society of American Archivists to support archivists in other states. In short, it means being active participants in the struggle for open records and government accountability, and not passive bystanders. Archivists are few in number, but we have an ethical obligation to advocate for open government records. By working together, and with other groups with a stake in open government, we can help maintain government accountability.



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## APPENDIX A: SOUTH DAKOTA OPEN RECORDS LAW, 2012

**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, 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 §§ 1-27-1 to 1-27-1.15, inclusive, 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, a reasonable fee may be charged for any 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.

No fee may be charged for the electronic transfer of any minutes of open meeting actions of a political subdivision, board or agency of a political subdivision, or the governing board of an agency that levies property taxes that were recorded in the last three years.

**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 letters 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, 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. However, this subdivision does not apply to the public inspection or copying of any current or prior contract with any public employee and any related document that specifies the consideration to be paid to the employee;
- (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, passwords, 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, department 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 in office of register of deeds not required.** 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.

**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.

**1-27-1.16. Material relating to open meeting agenda item to be available--Exceptions--Violation as misdemeanor.** If a meeting is required to be open to

the public pursuant to § 1-25-1 and if any printed material relating to an agenda item of the meeting is prepared or distributed by or at the direction of the governing body or any of its employees and the printed material is distributed before the meeting to all members of the governing body, the material shall either be posted on the governing body's website or made available at the official business office of the governing body at least twenty-four hours prior to the meeting or at the time the material is distributed to the governing body, whichever is later. If the material is not posted to the governing body's website, at least one copy of the printed material shall be available in the meeting room for inspection by any person while the governing body is considering the printed material. However, the provisions of this section do not apply to any printed material or record that is specifically exempt from disclosure under the provisions of this chapter or to any printed material or record regarding the agenda item of an executive or closed meeting held in accordance with § 1-25-2. A violation of this section is a Class 2 misdemeanor. However, the provisions of this section do not apply to printed material, records, or exhibits involving contested case proceedings held in accordance with the provisions of chapter 1-26.

**1-27-1.17. Draft minutes of public meeting to be available--Exceptions--Violation as misdemeanor.** The unapproved, draft minutes of any public meeting held pursuant to § 1-25-1 that are required to be kept by law shall be available for inspection by any person within ten business days after the meeting. However, this section does not apply if an audio or video recording of the meeting is available to the public on the governing body's website within five business days after the meeting. A violation of this section is a Class 2 misdemeanor. However, the provisions of this section do not apply to draft minutes of contested case proceedings held in accordance with the provisions of chapter 1-26.

**1-27-1.18. Recommendations, findings, and reports of appointed working groups to be reported in open meeting--Action by governing body.** Any final recommendations, findings, or reports that result from a meeting of a committee, subcommittee, task force, or other working group which does not meet the definition of a political subdivision or public body pursuant to § 1-25-1, but was appointed by the governing body, shall be reported in open meeting to the governing body which appointed the committee, subcommittee, task force, or other working group. The governing body shall delay taking any official action on the recommendations, findings, or reports until the next meeting of the governing body.

**1-27-1.19. Public access to records of former Governors and lieutenant governors.** The records of any Governor and any lieutenant governor are the property of the state and shall be transferred to his or her successor or the state archivist upon leaving office. Once transferred, public access to such records is subject to the provisions of chapter 1-27.

**1-27-1.20. Exempt records to be opened upon death or ten years after leaving office.** Unless released to the public pursuant to § 1-27-1.21, any record of an officer designated in § 1-27-1.19, exempted from the provisions of § 1-27-1, shall be opened to the public upon either the death of the former officer or ten years from the date the officer left office, whichever transpires last.

**1-27-1.21. Right of former Governor and lieutenant governor to approve or deny release of exempt records.** Whenever an officer designated in § 1-27-1.19 leaves office and transfers his or her records to the state archivist, the former officer shall retain the right to approve or deny the release of any record exempted from the provisions of § 1-27-1. The former officer may exercise that right either personally or may designate in writing a person to do so to the archivist.

**1-27-1.22. Agreement for transfer of records to suitable repository.** The state archivist may enter into agreements with any officer designated in § 1-27-1.19 for the transfer of the former officer's records to a museum, institution of higher learning, or other suitable repository within South Dakota upon determining that such repository will allow for the preservation, study, and public access of such records consistent with §§ 1-27-1.19 to 1-27-1.21, inclusive. Such agreements shall be entered into only after a public hearing.

1-27-2. Repealed by SL 1977, ch 16, § 3

**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. 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.

1-27-5. Repealed by SL 1970, ch 10, § 1

1-27-6 to 1-27-8. Repealed by SL 2009, ch 10, §§ 11 to 13.

APPENDIX B: 2008 LEGISLATURE – SENATE BILL 186 AS ENROLLED

AN ACT

ENTITLED, An Act to revise certain provisions regarding public records.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 1-26D-4 be amended to read as follows:

1-26D-4. Hearing examiners have all powers delineated in §§ 1-26-19.1 and 1-26-19.2 and shall hear all contested cases that arise under Titles 10 and 58 and chapter 1-27.

Section 2. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as follows: The provisions of this Act do not apply to the Unified Judicial System or Public Utilities Commission.

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

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

Section 5. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as follows: 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 sections 3 and 4 of this Act;
  - (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.

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

Section 7. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as follows: Upon receipt, the Office of Hearing Examiners shall promptly mail a copy of the notice of review filed pursuant to section 6 of this Act 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.

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

Section 9. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as follows: 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 this Act, no document or record may be publicly released until a final decision or judgment is entered ordering its release.

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

Section 11. That chapter 1-27 be amended by adding thereto a NEW SECTION to read as follows: The following forms are prescribed for use in the procedures provided for in sections 3 to 10, inclusive, of this Act, 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

APPENDIX C: GAG LAW, 1996

1996 Session Laws of the State of South Dakota, Chapter 12

(HB 1227)

STATE AGENCIES PROHIBITED FROM RELEASING CERTAIN INFORMATION  
ON PRIVATE ENTITIES

AN ACT ENTITLED, An Act to prohibit certain disclosures by a state agency of information concerning a private entity.

*BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:*

Section 1. Terms used in this Act mean:

- (1) "State agency," each association, authority, board, commission, committee, council, department, division, state office, task force, and their officers, legal representatives, consultants, or other agents. The term does not include the Legislature, the Unified Judicial System, any law enforcement agency, or any unit of local government;
- (2) "Private entity," any person or entity that is not a public entity as defined by § 3-21-1(2).

Section 2. A state agency which is authorized by law to investigate, examine, or audit the papers, books, records, financial condition, or other information held by or concerning a private entity may not disclose that it is conducting such an investigation, examination, or audit, except as provided by this Act.

Section 3. All information obtained from or concerning the private entity by the state agency as a result of such an investigation, examination, or audit is confidential, except as provided by this Act.

Section 4. A state agency may not disclose that it is investigating, examining, or auditing a private entity, and may only 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 this Act;
- (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; or
- (8) To the extent necessary to submit any final reports or filings which are otherwise required by law to be prepared and filed.

Section 5. Disclosure of information made confidential by this Act, except as provided in section 4 of this Act, is a Class 6 felony.

**Signed March 4, 1996.**