

**South Dakota Media Club
and
South Dakota Newspaper Association**

Briefing on 2008 Open Government Issues

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2008 Status of Open Records Debate

Open records issues in South Dakota are receiving more attention than ever at the beginning of 2008. Here's an update on what is happening:

In July, 2007, Attorney General Larry Long released his report on a year-long study of records held by state and local agencies. He also reconvened the Government Openness Task Force to come up with solutions for the problems he found.

In September, the state Supreme Court issued a ruling that for the first time defined the meaning of South Dakota's current records law.

SDCL 1-27-1 says in part: "If the keeping of a record, or the preservation of a document or other instrument is required of an officer or public servant under any statute of this state, the officer or public servant shall keep the record, document, or other instrument available and open to public inspection by any person during normal business hours."

The court interpreted the law this way:

In South Dakota a record is presumed to be open ONLY if there is a law requiring it to be open. There is no law requiring the governor's hunt list to be kept open, therefore it is not available for the public to see.

In other words, in South Dakota we have a presumption that state and local records are confidential unless there's a specific law requiring them to be open.

In the other 49 states and the federal government the presumption is exactly the opposite. Records are assumed to be open unless there's a good reason to keep them confidential. These reasons are known as exemptions from openness.

South Dakota does have some specific laws requiring documents to be kept, for example:

- Minutes of the meetings of government boards and commissions
- Audits of charitable organizations
- Copies of election petitions
- Records in the school business office
- Voter registration records
- Local tax levy records

South Dakota law also says each agency shall make available for public inspection all rules, final orders, decisions, intra-agency memos, together with *all other materials*, written policies or interpretations used by the agency in the discharge of its functions. The high court said the words "all other materials" in that law refer only to materials used in issuing rules or final decisions – not literally all other materials held or used by the agency. So if it's not material needed to write rules or reach final decisions, it's not open.

The Supreme Court refused to consider the constitutional question raised by The Associated Press, the SD Newspaper Association and the SD Broadcasters Association as friends of the court.

Finally, the court said if more openness is desired, the remedy lies with the Legislature. In other words, change the law.

With the attorney general's Open Government Task Force studying the records issue and the ruling by the Supreme Court it appears the 2008 Legislature will be asked to consider some bills on open records. But the governor has made it clear he will not support changing the law so all government records are presumed to be open.

The Government Openness Task Force has its final 2007 meeting Dec. 27 in Pierre. Long has said he'd like to come out with recommended changes in state law, but so far no agreement has been reached among task force members. The task force also is considering a formal process for a person to request a record that includes time limits on getting an answer and the ability to appeal a denial to the Office of Hearing Examiners (something like going to small claims court.)

Everyone on the task force must agree before any recommendation would be made, and so far no final vote has been taken on any of the proposals.

In the meantime, the governor has said he is working on open records legislation which will NOT include a presumption of openness but will answer all of the points raised by Long's study. Senate Republican Leader Dave Knudson has said he is working with Republicans in the House to draft legislation that will meet the governor's approval. And Democratic lawmakers said they will introduce legislation that DOES presume all state and local government information is open.

At this time, we have not seen any legislation drafted but we believe the issue will be on the agenda for the 2008 Legislature.

Here is a recap of the findings of the attorney general's study on government records:

A fairly small amount of all the information kept by state and local agencies is required to be public under current law. Another fairly small amount of information is required to be kept confidential. The vast amount of information kept by state and local government information falls in between. State agencies appear to hold the most information that is not covered by existing law. Agency heads have discretion on whether to release a lot of those records.

Here are the attorney general's recommendations:

1. Create a more standardized definition of public record which does not depend on the "required to be kept" section of current law.
2. Develop standards for state and local officials who have discretion in deciding whether to release information to weigh the benefit of public disclosure against the need for confidentiality to prevent some kind of harm.
3. Create uniform definitions for confidential or limited access records based on their content.
4. Adopt a method to redact or black-out personal identifying information so the rest of the record could be released.
5. Satisfy federal privacy requirements that are imposed on agencies.
6. Clarify whether the public has access to agency documents created by the staff to help officials make decisions.
7. Set standard fees for data retrieval, redaction, copying and other services performed for persons wanting access to documents.

8. Distinguish between commercial requests for data and individual requests, making sure that commercial requesters pay the full costs.

9. Develop a procedure to quickly and economically resolve disputes when access to records is denied by an agency.

Competing interests in the discussion of open records include members of the public, the media, librarians and researchers, elected officials, state agency officials, counties, cities, townships and law enforcement.

The challenge is to balance the public's right to see how government is functioning and spending money versus the need to protect certain information to prevent harm. Examples of legitimate confidentiality issues are: bank account numbers, Social Security numbers, medical records, ongoing law enforcement investigations, inventions and commercial development plans – among others.

On a separate note, Knudson plans to introduce a bill removing the ban on cameras in lower courts. His bill will not mandate cameras, but it will eliminate a law passed by the Legislature that stops the court from even considering the idea. If Knudson's bill passes, we will need to work with the Supreme Court and the Unified Judicial System to get expanded coverage.

South Dakota FOI Chronology

1999 – AP and television news directors met with Chief Justice Robert Miller and Justice David Gilbertson to push for cameras in court. In return media promised to do more training on how to cover courts.

2000 – First media training sessions included sessions with law enforcement, judges, clerks. A Pierre training session was attended by governor, attorney general and Supreme Court

2000 – Media drafted proposed camera rules for all levels of court, based on Iowa rules. Chief justice appointed a committee of media, judges and lawyers to work out procedures.

2000 – The Unified Judicial System agreed to create a charge account system for media requesting documents by fax from circuit courts around the state.

2001 – The Supreme Court approved a pilot project for expanded media coverage of Supreme Court hearings. The first case was covered in August in Pierre.

2001 – SD Newspaper Association created a First Amendment Committee to work on FOI issues including cameras in court and open records.

2001 – Lost in Court program trained more than 100 reporters at locations in Sioux Falls and Rapid City on coverage of a murder case.

2002 – Bill to make mug shots public failed in Legislature.

2002 – SDNA created Eagle Award to recognize contributions to freedom of information and gives the first award to the SD Supreme Court for opening its doors to cameras.

2002 – Media panels appeared before Associated School Boards, Association of County Commissioners, Municipal League. Broadcast media held roundtables with candidates for attorney general and governor.

2002 – SD Associated Press newspapers conducted audit of public records access in all 66 counties

2003 – The Supreme Court made camera coverage permanent.

2003 – Attorney General Larry Long created a Government Openness Task Force to look at improving access to public meetings in South Dakota.

2003 – South Dakotans for Open Government, SDOG, created to educate the public about government openness issues.

2004 – Legislature passed a bill creating the Open Meetings Commission, a panel of state's attorneys, to hear access complaints and issue informational rulings.

2004 --Legislature modifies Gag Law, clarifies list of information appropriate to release from police logs, and – for a second time -- refuses to make police mug shots public.

2004 – Trial court camera demonstration at USD Law School with judges, Supreme Court and lawyers attending.

2005 – Lost in Court program repeated, again training more than 100 reporters.

2006 – Legislature funded study of information held by state and local agencies at the request of the attorney general.

2006 – SDNA FOI committee held editorial board interviews with attorney general and governor candidates on open meetings and open records.

2007 – Attorney General issued report on study of public records with nine recommendations for changes.

2007 – Attorney General Larry Long reconvened Government Openness Task Force to look for solutions to the problems identified in his study.

2007 – Senate Republican Leader David Knudson and Democratic Leader Scott Heidepriem agreed to introduce a bill removing the ban on cameras in lower court, leaving the issue up to the court system and judges.

2007 – Knudson plans to draft open records legislation in cooperation with governor's office but says it will not include a presumption that records are open to the public unless there's a good reason to keep them confidential.

FOI Talking Points

Headline or most important point to communicate:

Open records and open meetings are good government issues. Good government depends on citizen access at every level.

1. South Dakota has arguably the weakest open record law in the nation, worse than the other 49 states and the U.S. government.
2. The South Dakota Supreme Court ruled in 2007 that the existing law means state and local government must allow the public to see information ONLY when there's a specific statute requiring that piece of information to be open.
3. South Dakota law has not kept up with the proliferation of state and local agencies over the years, so there are very few statutes that require specific information to be open to inspection.
4. The open records law is outdated and fails to contemplate electronic document storage and retrieval, database searches, Web sites, e-mail and live streaming—not to mention the law's inability to accommodate any new information systems yet to be invented.
5. South Dakota's Constitution, unlike those in many other states, has no statement favoring open government or recognizing that good government depends on an informed and involved public.
6. The current law assumes all records are closed unless required by law to be open. Good government starts from the opposite approach: All information is public unless there's a good reason to keep it confidential. Even then the least restrictive means should be used to protect valid privacy and security concerns while providing as much public information as possible.
7. The current law provides no guidelines to help the public request information. There is no requirement that an agency even respond to a request, no time limit for responding and no appeal if the agency refuses to provide information.
8. Most South Dakota residents already assume that the law mirrors the federal system, where information is public unless there's a good reason to keep it confidential. Even the governor has said he believes that is the law. But the Supreme Court disagrees.
9. South Dakota residents are already living under a presumption of openness when it comes to federal government records. The federal government has a formal process for people to request information and get a response.
10. Changing South Dakota law to presume that public information is open will NOT mean reckless distribution of sensitive data. The new law will not trump any existing state or federal laws that protect information. Each state agency will continue to be responsible for keeping records in good order and releasing them appropriately.
11. Information collected, used and stored by local and state agencies belongs to the taxpayers who pay for its creation and storage. Under existing law, there's no requirement that taxpayers be allowed to see the information they own or track the spending of public funds.
12. The new law should require an agency to give the reason that information is protected and cannot be released to the public. This would result in more uniform decisions among agencies, and even among officials within agencies, when it comes to providing information.

13. Either side – the agency or the citizen – should be able to appeal a records request to a hearing examiner, who will give a written opinion. Those opinions will serve as precedent for future record requests, eventually forming a body of law on the subject. The hearing examiner's opinion may be appealed in circuit court.

14. A strong open records law will help the average person track his dealings with state and local agencies.

15. A strong open records law will be a boon to genealogists, librarians, historians, researchers, educators, scientists, and others who study public documents.

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