

December 8, 2023

**Via Certified Mail, Signature and Return Receipt Requested**

Office of Hearing Examiners  
500 E. Capitol Avenue  
Pierre, South Dakota 57501

Re: Oglala Sioux Tribe Request for Public Records to City of Martin,  
South Dakota

Dear Office of Hearing Examiners:

Enclosed please find the Oglala Sioux Tribe's NOTICE OF REVIEW REQUEST FOR DISCLOSURE OF PUBLIC RECORDS with attached Exhibits 1-4.

We respectfully request a hearing in this matter.

By copy of this letter, I am simultaneously serving a copy on counsel for the City of Martin, South Dakota.

Sincerely,



Stephanie R. Amiotte  
Legal Director | ACLU of South Dakota  
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Cc w/encl: Samantha Kelty, Native American Rights Fund  
Tara Ford, Public Counsel  
Bryan Sells, The Law Office of Bryan Sells  
Sara Frankenstein



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December 8, 2023

**Via Certified Mail, Signature and Return Receipt Requested**

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

**Re: Oglala Sioux Tribe Appeal to the South Dakota Office of  
Hearing Examiners – Open Records Request to the City  
of Martin, South Dakota**



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Dear Office of Hearing Examiners:

As a supplement to the Notice of Review dated December 8, 2023, filed on today's date, the Oglala Sioux Tribe ("Tribe") submits this Appendix for additional consideration by the Office of Hearing Examiners.

The Tribe ("Tribe") brings this appeal to challenge (1) the City of Martin's attempt to charge attorney fees for the Tribe's public records request and (2) the City of Martin's demand that the Tribe waive its sovereign immunity in order to receive a response to its public records request.

On August 25, 2023, the Tribe made a public records request to the City of Martin ("City") pursuant to the South Dakota Open Records Law (S.D.L.C. § 1-27). Please find a copy of the request attached at Exhibit 1. On September 11, 2023, the City replied to the request. Please find a copy of the response attached at Exhibit 2. In its letter, the City stated that "[i]f full payment is not received upfront," the City requires the Tribe to "waive sovereign immunity to account for the possible non-payment of the requested materials." The letter from Gunderson, Palmer, Nelson & Ashmore, LLP noted that the "City charges \$235 per hour for my services, \$225 per hour for its deputy attorney's services, and \$34.53 per hour for its city employee's time and effort to acquire the requested materials." The City did not provide a full estimate of the fee, but it did state that the "request may cost many, many hours of both attorney and city employee time." The Tribe objected to the conditions in a letter sent on November 29, 2023. Please find a copy of the letter attached at Exhibit 3. The City responded on December 6, 2023, affirming its stance on the conditions. Please find a copy of the letter attached at Exhibit 4.

**Analysis**

The City's conditions are unreasonable, not grounded in South Dakota law, and undermine the objective of governmental transparency at the heart

of the public records request process. As a result, the Tribe brings this appeal.

**(1) South Dakota Law Does Not Authorize Charging Attorney Fees to Complete a Public Records Request.**

The City's attempt to charge attorney fees for the Tribe's public records request is improper. South Dakota's public records statute confers no explicit right to charge an attorney fee, and doing so would contravene the State's rules for attorney fees, basic principles of statutory interpretation, and the statute's purpose of increasing government transparency.

**a. The City is not entitled to attorney fees because there is no statutory authorization for the fees under S.D.C.L. § 1-27-35.**

South Dakota public records statute does not authorize the recovery of attorney fees. S.D.C.L. § 1-27. Under South Dakota law, the Tribe may "be required to pay the cost of the staff time necessary for the location, assembly, or reproduction of [a] public record" after making an informal or formal request that requires a staff member to dedicate more than one hour to performing such tasks. S.D.C.L. §§ 1-27-35, 1-27-37. The language of these provisions is limited to "staff time" for "locat[ing], assembl[ing], or reproduc[ing]" records. S.D.C.L. § 1-27-35. The Tribe does not object to paying the reasonable cost of staff time. The Tribe objects only to the City's insistence that the Tribe pay the City's attorney fees, including the review of the documents referred to in § 1-27-35. The statute does not authorize the payment of attorney fees nor does it include a requirement to pay for attorney review of privileged material. Requestors only need to pay for (1) locating the documents, (2) assembling the documents, and (3) reproducing the documents. Therefore, South Dakota law does not support the City's attempt to seek attorney fees under S.D.C.L. § 1-27-35.

**b. Attorney services are not a "specialized service" under S.D.C.L. § 1-27-1.2.**

Since the statute does not authorize the payment of attorney fees, the City has also tried to wedge its demand for attorney fees under § 1-27-1.2. This section allows a public agency to charge a fee for "any specialized service" provided in fulfillment of a public records request. However, despite the City's demand, the "specialized service" fee allowed by this provision does not include attorney fees.

South Dakota courts have applied the doctrine of "noscitur a sociis," by which "the meaning of a particular term in a statute may be ascertained by



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reference to words associated with them in the statute[.]” *S. Dakota Auto Club, Inc. v. Volk*, 305 N.W.2d 693, 699 (S.D. 1981); *see also Opperman v. Heritage Mut. Ins. Co.*, 1997 S.D. 85, ¶¶ 4-12, 566 N.W.2d 487, 490-91 (S.D. 1997); *Brookings Mall, Inc. v. Captain Ahab’s, Ltd.*, 300 N.W.2d 259, 262 (S.D. 1980). The meaning of the allowable “specialized service” fee is therefore limited by the following sentence in § 1-27-1.2, which refers to such a fee in relation to “the amortization of the cost of computer equipment” needed for said specialized service. The final two sentences of § 1-27-1.2 also refer to computer equipment or software required to generate public records and the electronic transfer of certain materials. Each sentence that follows the more general sentence allowing a fee for “any specialized service” is specifically focused on computer processes for generating and transferring records. This language—and the absence of any language in the provision suggesting a broader scope—suggests that a “specialized service” relates to labor and equipment, or software costs associated with the electronic production or transfer of records.

The drafting history of § 1-27-1.2 further supports a reading that limits the allowable “specialized service” to that associated with electronic processes for fulfilling records requests. An earlier draft of § 1-27-1.2 allowed a fee for “specialized service[s]” specifically when an agency provides a public record “by transmitting it from a modem to an outside modem.” While removing that language may broaden the scope of “specialized service,” the surrounding sentences suggest that the scope remains limited to a broader set of computer processes. Taken together, the drafting history and surrounding sentences support a reading of “specialized service” that is technological in nature, not legal.

Even considering the plain language of the statute, the specialized services do not authorize the payment of attorney fees. The South Dakota Supreme Court has stated that it will “give words their plain meaning and effect, and *read statutes as a whole*.” *Reck v. S. Dakota Bd. of Pardons & Paroles*, 2019 S.D. 42, ¶ 11, 932 N.W.2d 135, 139 (S.D. 2019) (internal citation omitted) (emphasis added). Reading the statute as a whole makes clear that “specialized services” refers to computer processes, software costs, and similar technical services. When reading the statute as a whole, the plain language of the statute does not suggest that attorney fees to review potentially privileged documents are a “specialized service.”

Therefore, South Dakota law does not support the City’s attempt to seek attorney fees under S.D.C.L. § 1-27-1.2.

**c. Requiring attorney fees for public records requests will undermine the statute’s intended purpose of expanding government transparency.**



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Charging attorney fees here would also contravene the statute’s purpose of expanding government transparency. In line with this purpose, courts generally construe public records statutes in a way that favors disclosure. *See* Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 Urb. Law. 65, 66 (1996). This led the Supreme Court of Alaska, for example, to disallow a city from charging a fee for an attorney’s privilege review of public records when the statute only authorized a “search” fee for a given request. *Fuller v. City of Homer*, 113 P.3d 659, 666 (Alaska 2005). Similarly, the Wisconsin Supreme Court held that Wisconsin’s public records statute does not authorize an agency to assess fees for the cost of redacting information, when fees for redaction were not specifically enumerated in the text of the fee provision. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 55-56, 815 N.W.2d 367, 379-80 (Wisconsin 2012).

This situation is analogous to both *Fuller* and *Milwaukee Journal Sentinel*, in that the City seeks to impose a fee not specifically enumerated in the statute. Neither provision addressing allowable staff or service fees in South Dakota’s public records statute enumerates an allowable fee for attorney services. As discussed above, § 1-27-1.2 does not specify whether “specialized service[s]” includes legal services, and principles of statutory interpretation suggest it does not. Additionally, the text of § 1-27-35 enumerates allowable staff time fees for “the location, assembly, or reproduction of the public record”—tasks that do not need to be performed by an attorney.

What is clear from the language of South Dakota’s records statute, though, is that it anticipates and allows fees for public costs, not attorney fees. Section 1-27-1.2 allows a fee “if a custodian of a public record of a county, municipality, political subdivision, or tax-supported district”—in other words, a staff employee of a public agency—performs a specialized service while fulfilling a records request. Section 1-27-35 similarly allows the custodian of a public record to charge a fee, and within that context also allows a fee for “staff time necessary for the location, assembly, or reproduction of [a] public record.” An attorney is not needed to fulfill these duties typically performed by public agency employees.

It is unreasonable to charge members of the public for the fee of a private attorney. The City should not pass on the cost of attorney fees to the Tribe. Doing so would only impair the public’s ability to access government affairs by making it prohibitively expensive to seek government transparency.

## **(2) South Dakota Law Does Not Require Waiver of Sovereign Immunity to Complete a Public Records Request.**

The Tribe objects to the demand that it must waive its sovereign immunity in order for the City to complete the records request. South Dakota law does not require governmental entities to waive their sovereign immunity in order to complete a public records request. In addition, the South Dakota Public Records Act does not provide standards for a record custodian's discretion to deny release based on such conditions.

In its September 11, 2023, letter, the City stated:

If full payment is not received upfront, the City of Martin requires that the Oglala Sioux Tribe waive sovereign immunity to account for the possible non-payment of the requested materials. The Oglala Sioux Tribe must include the waiver in its written confirmation that it will pay the associated fee for gathering the twenty years of records.

However, the City has not calculated a fee. The City has simply stated that the "request may cost many, many hours of both attorney and city employee time." Moreover, as detailed above, demanding the Tribe to pay the City's attorney fees is improper. Given these facts, the Tribe objects to waiving its sovereign immunity in exchange for access to the requested records.

### **Conclusion**

The Tribe recognizes that charging a reasonable fee for staff time is allowable, but charging attorney fees is not allowed under S.D.C.L. § 1-27-1.2 nor S.D.C.L. § 1-27-35. Therefore, the Tribe brings this appeal and asks the Office of Hearing Examiners to enter a decision concluding that the City shall release the requested records without the charge of attorney fees and without the Tribe's waiver of sovereign immunity.

We believe good cause exists for a hearing on this matter and respectfully request that a hearing be scheduled. Thank you.

Sincerely,



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