

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF OGLALA LAKOTA

SEVENTH JUDICIAL CIRCUIT

IN THE MATTER OF THE REVIEW OF
DENIAL OF PUBLIC RECORDS REQUEST
OF OGLALA SIOUX TRIBE BY THE
CITY OF MARTIN

CIVIL CASE NO: 56CIV24-000004

**OGDLALA SIOUX TRIBE'S STATEMENT
OF ISSUES ON APPEAL**

Appellant Oglala Sioux Tribe submits the following Statement of the Issues on Appeal pursuant to S.D.C.L. § 1-26-31.4:

1. Whether the Hearing Examiner erred in ruling that the City of Martin can condition production of public records pertaining to federal voting rights of Native Americans upon the Oglala Sioux Tribe's waiver of tribal sovereign immunity when tribal sovereign immunity is not subject to diminution by states?
2. Whether the Hearing Examiner erred in ruling that the City of Martin could require the Oglala Sioux Tribe to either a) prepay the estimated costs to compile public records contrary to S.D.C.L. § 1-27-35 which requires "payment of the actual cost" of public records after they have been compiled; or b) waive sovereign immunity and enter into a contract to pay the costs after compilation of the public records when no laws in S.D.C.L. Ch. 1-27 require either of these conditions?

Dated this 6th day of March 2024.

American Civil Liberties Union of South
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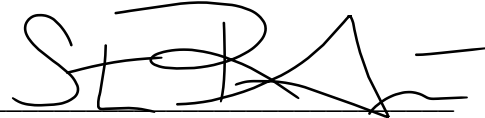
CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2024, the Oglala Sioux Tribe's Statement of Issues on Appeal was served via email and U.S. Mail, postage prepaid, upon the following:

Sara Frankenstein
Gunderson, Palmer, Nelson, Ashmore, LLP
506 Sixth Street
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sfrankenstein@gpna.com
Counsel for Appellee City of Martin

This 6th day of March 2024.

American Civil Liberties Union of South
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<p>IN THE MATTER OF THE REVIEW OF DENIAL OF PUBLIC RECORDS REQUEST OF OGLALA SIOUX TRIBE BY THE CITY OF MARTIN</p>	<p>CIVIL CASE NO: ⁵⁶CIV24-000004</p> <p>NOTICE OF APPEAL BY THE OGLALA SIOUX TRIBE</p>
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TO: THE SOUTH DAKOTA OFFICE OF HEARING EXAMINERS, HEARING EXAMINER CATHERINE WILLIAMSON, CITY OF MARTIN, SOUTH DAKOTA AND ITS COUNSEL OF RECORD, SARA FRANKENSTEIN AND THE CLERK OF COURTS OF OGLALA LAKOTA COUNTY

Notice is hereby given that pursuant to S.D.C.L. §§ 1-26-30.2 and 1-27-41, the Oglala Sioux Tribe appeals from the Office of Hearing Examiner’s Decision dated January 26, 2024.

Pursuant to S.D.C.L. § 1-26-31.2, the Oglala Sioux Tribe states as follows:

1. The case caption of the matter appealed from is, “*In the Matter of the Review of Denial of Public Records Request of Oglala Sioux Tribe by the City of Martin*” in the Office of Hearing Examiner file number PRR23-007. A copy of the Office of Hearing Examiner’s Decision appealed from is attached as Exhibit A.

2. This appeal is made to the Circuit Court of the Seventh Judicial Circuit in Oglala Lakota County, South Dakota where the Oglala Sioux Tribe is located, pursuant to S.D.C.L. § 1-26-31.1(1).

3. For purposes of this appeal, the Oglala Sioux Tribe is the appellant and the City of Martin, South Dakota is the appellee.

4. A copy of this Notice of Appeal by the Oglala Sioux Tribe has been served upon the City of Martin, South Dakota’s attorney of record, Sara Frankenstein, the South Dakota Office of

Hearing Examiners and Catherine Williamson, Hearing Examiner, who rendered the decision at their mailing addresses and via email as certified below.

Dated this 26th day of February 2024.

American Civil Liberties Union of South
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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2024, the Notice of Appeal by the Oglala Sioux Tribe was served via email and U.S. Mail, postage prepaid, upon the following:

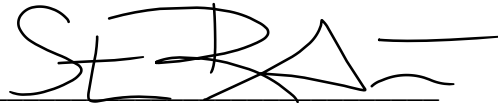
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This 26th day of February 2024.

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**STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS**

**IN THE MATTER OF THE REVIEW OF
DENIAL OF PUBLIC RECORDS
REQUEST OF OGLALA SIOUX TRIBE
BY THE CITY OF MARTIN**

PRR 23-007

DECISION

This office received a request for review of denial of disclosure of public records pursuant to SDCL §1-27-38 from the Oglala Sioux Tribe (OST) by and through their Attorney, Stephanie Amiotte with the ACLU. Response was made to this Office by Attorney Sara Frankenstein on behalf of the City of Martin (City). Pursuant to SDCL §1-27-40, although requested by OST, no good cause was shown that necessitates a hearing.

ISSUE

Whether the City erred in the response given to OST with an informal public records request?

FINDINGS OF FACT

1. On August 25, 2023, the OST Legal Department sent a letter to the Mayor of Martin requesting copies of records. The letter notes that these records may be maintained by the City of Martin or the Black Hills Council of Local Governments, Central South Dakota Enhancement District or by similar entities that have provided technical election and districting assistance to the City of Martin.
2. The Request by OST to the City was for:
 - 1) All documents pertaining to city ward and mayoral elections for the past 20 years, including election results, election return records documenting the official elections results, all candidates on the ballots, and a list of all candidates who won each election.
 - 2) All documents related to any city ward maps, boundary changes, or reorganization plans approved or considered by the city council for the past 20 years, including maps proposed but not adopted and contracts with consultants for the creation of new maps.
 - 3) All city draft and final agendas, handouts, minutes, and recordings for all meetings at which maps or ward boundaries were discussed or considered for the past 20 years.
 - 4) Any and all analysis, including letters or memorandums, regarding draft or final maps, redistricting, Section 2 of the Voting Rights Act of 1965, or any of the *Gingles* factors for the past 20 years.

- 5) All documents and correspondence related to complaints, allegations, concerns, investigations, and reports (draft and final versions) concerning racial or ethnic discrimination, vote dilution, vote denial, or other voting-related discrimination in local general and special elections prepared by or submitted to the City of Martin for the past 20 years.
 - 6) All documents, including any writings, memoranda, and correspondence, related to complaints, allegations or concerns of and investigations into and reports of racial or ethnic discrimination involving a local government agency or employee in any context, including, but not limited to, healthcare, criminal justice, housing, employment, and education prepared by or submitted to City of Martin for the past 20 years.
 - 7) All policies, procedures, guidelines, and related training materials regarding the prohibition of racial or ethnic discrimination by local government agencies and employees prepared by or submitted to City of Martin.
3. The OST requested that if practicable, documents available in electronic format would be sent in electronic format. They also agreed to pay any fees related to the request upon receipt of invoice.
 4. On September 11, 2023, within the appropriate time frame, the City responded to the OST with a self-described “partial denial”.
 5. Since the request was for 20 years of documents, the City requested that any fees be paid prior to the City compiling the documents. They went on to state that if the fee cannot be not paid by OST upfront, “the City of Martin requires that the Oglala Sioux Tribe waive sovereign immunity to account for the possible nonpayment of the requested materials.”
 6. The City indicated that the public documents could be provided 60 days after the written confirmation of payment of the fees.
 7. The City was a party to litigation regarding voting rights about 20 years ago. See *Cottier v. City of Martin*, 2005 WL 6949764, 2005 D.S.D. 8 (D.S.D. 2005); *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010); *Cottier v. City of Martin*, 562, U.S. 1044 (2010) (denying writ of certiorari).
 8. The City indicated to OST that all public documents would be made available, but that many of the requested documents were not public. The City cited attorney-client privilege and statutory exemptions and exceptions under SDCL §§ 1-27-1.5(4) and (12), 1-27-1.7, 1-27-1.8, 1-27-1.9.
 9. The City detailed that the cost of compiling the documents would involve attorney fees of \$235 per hour, \$225 per hour for deputy attorney services, and \$34.53 per hour for city employee’s time. The cost of electronic transfer would not be charged.
 10. The City did not give the OST a cost estimate or an estimated number of hours for compiling the documents.

11. The City's letter concluded with the appeal process that is open to the OST if they choose to either appeal the partial denial or seek review.
12. On November 29, 2023, the ACLU, now representing OST, responded to the City's partial denial by letter. They opposed paying any costs of records that included attorney fees. Specifically, they noted that "specialized services" allowed under statute are not attorney fees but refer to computer costs or technology costs associated with a records search.
13. The City responded on December 6, 2023, with a letter citing their legal references as to why attorney fees should be considered specialized services within the statute.
14. The City also notes that the OST's request was "overly broad and burdensome"; no particular document(s) was requested but only broad categories of documents.
15. The City has a long history of litigation regarding voting rights, many of the documents requested may be protected under attorney-client privilege. The City told OST that before any document is provided to the OST, "an attorney will need to review many of the documents to ensure no inadvertent disclosure of privileged or protected information."
16. The City suggested that if the OST had a "narrower, more specific records request" the fees would be commensurate with the request.
17. In that December 6 letter, the City told the OST that they were "unwilling to waive its statutory protections" or pass "the cost of this extensive request onto its taxpayers."
18. On December 8, 2023, the City wrote to the OST to make an attempt to settle this action. The City sent to the OST the current redistricting map enacted on January 12, 2022, along with corresponding demographic data.
19. On December 11, 2023, the OST e-mailed the City to acknowledge receipt of the map and information.
20. On December 8, 2023, the OST rejected the settlement offers of the City and requested a review of the partial denial and the City's demand for upfront payment which includes attorney fees. This request to the OHE was made in a timely and legal fashion.
21. The City responded to the review in a timely manner.
22. The matter was fully briefed by both parties.
23. Any additional findings of fact included in the Reasoning section of this decision are incorporated herein by reference.
24. To the extent any of the foregoing are improperly designated and are instead Conclusions of Law, they are hereby redesignated and incorporated herein as Conclusions of Law.

REASONING

The OST submitted a request for review of the partial denial by a public agency. This review is made pursuant to SDCL §1-27-1.

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.

SDCL §1-27-1.

The matter is ripe for review. The OST made a valid, informal request and the response by the City was a self-described partial denial. The City's partial denial also contains language indicating that an appeal or review of the decision may be brought. The partial denial by the City on September 11, 2023, made this matter ripe for review. SDCL §1-27-38. The OST requested this review within the 90-day statutory timeline set out at SDCL §1-27-38.

The City's partial denial letter to the OST set out hourly rate of fees that will be charged and which documents they could compile without charge. It also asked the OST for either pre-payment or an agreement by the OST to waive their sovereign immunity in this instance, for collection purposes after documents were collected. At that point, the ACLU stepped in to represent the OST. The parties both attempted to settle the matter, which was unsuccessful.

The OST made seven requests for the City. Each of these requests is set out below along with the City's initial response. Included in this list is the statutory language of the exemptions claimed by the City.

- 1) All documents pertaining to city ward and mayoral elections for the past 20 years, including election results, election return records documenting the official elections results, all candidates on the ballots, and a list of all candidates who won each election.
City: Subject to the applicable fee, the City can provide this information within 60 days of your written confirmation that you will pay the fee outlined below.
- 2) All documents related to any city ward maps, boundary changes, or reorganization plans approved or considered by the city council for the past 20 years, including maps proposed but not adopted and contracts with consultants for the creation of new maps.
City: Subject to the applicable fee, the City can provide this information within 60 days of your written confirmation that you will pay the fee. To the extent this request seeks information exempt under §1-27-1.7, the request is denied.

SDCL 1-27-1.7: “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.”

- 3) All city draft and final agendas, handouts, minutes, and recordings for all meetings at which maps or ward boundaries were discussed or considered for the past 20 years.
City: Final agendas, handouts, and minutes are all subject to public disclosure. *See* SDCL § 1-27-1.16. The City of Martin will provide the requested information within 60 days of your written confirmation that you will pay the applicable fee. However, no fee will be assessed for the electronic transfer of open meeting minutes. Any draft minutes or agendas, to the extent they still exist, are protected by attorney-client privilege (SDCL § 1-27-1.5(4)) and correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees are exempt under SDCL § 1-27-1.5(12).

SDCL §1-27-1.5(4): “Records which consist of attorney work product or which are subject to any privilege recognized in article V of chapter 19-19.”

- 4) Any and all analysis, including letters or memorandums, regarding draft or final maps, redistricting, Section 2 of the Voting Rights Act of 1965, or any of the *Gingles* factors for the past 20 years.
City: Most documents that include analysis regarding the draft or final redistricting maps are protected from public disclosure. The City of Martin objects to this request to the extent that it seeks internal documents that are subject to attorney-client privilege or are attorney work product (exempt under SDCL §§ 1-27-1.5(4) and 1-27-1.8); correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees (exempt under SDCL § 1-27-1.5(12)); drafts, notes, recommendations, and memoranda in which opinions are expressed or policies formulated or recommended (exempt under SDCL § 1-27-1.7); and any 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 (exempt under SDCL § 1-27-1.9). Additionally, a Westlaw or LexisNexis search can provide information about extensive litigation involving the City of Martin and Section 2 of the Voting Rights Act. *Cottier v. City of Martin*, 2005 WL 6949764, 2005 D.S.D. 8 (D.S.D. 2005); *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010); *Cottier v. City of Martin*, 562 U.S. 1044 (2010) (*denying writ of certiorari*).

SDCL 1-27-1.5(12): “Correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees.”

SDCL 1-27-1.8: “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.”

- 5) All documents and correspondence related to complaints, allegations, concerns, investigations, and reports (draft and final versions) concerning racial or ethnic discrimination, vote dilution, vote denial, or other voting-related discrimination in local general and special elections prepared by or submitted to the City of Martin for the past 20 years.

City: The City of Martin objects to this request to the extent that it seeks internal documents that are subject to attorney-client privilege ² (exempt under SDCL § 1-27-1.5(4)) [FN 2 *See also* 1979 S.D. Op. Atty. Gen. 119, 1979 WL 41933.]; correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees (exempt under § 1-27-1.5(12)); drafts, notes, recommendations, and memoranda in which opinions are expressed or policies formulated or recommended (exempt under § 1-27-1.7); and any 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 (exempt under § 1-27-1.9).

Any information not falling into an exempted category the City of Martin can provide the information within 60 days of your confirmation that you will pay the applicable fee.

- 6) All documents, including any writings, memoranda, and correspondence, related to complaints, allegations or concerns of and investigations into and reports of racial or ethnic discrimination involving a local government agency or employee in any context, including, but not limited to, healthcare, criminal justice, housing, employment, and education prepared by or submitted to City of Martin for the past 20 years.

City: The City of Martin objects to this request to the extent that it seeks internal documents that are subject to attorney-client privilege ³ (exempt under § 1-27-1.5(4)) [FN 3 *See also* 1979 S.D. Op. Atty. Gen. 119, 1979 WL 41933.]; correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees (exempt under § 1-27-1.5(12)); drafts, notes, recommendations, and memoranda in which opinions are expressed or policies formulated or recommended (exempt under § 1-27-1.7); and any 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 (exempt under § 1-27-1.9).

Any information not falling into an exempted category the City of Martin can provide the information within 60 days of your confirmation that you will pay the applicable fee.

- 7) All policies, procedures, guidelines, and related training materials regarding the prohibition of racial or ethnic discrimination by local government agencies and employees prepared by or submitted to City of Martin.

City: Subject to the applicable fee outlined below, the City of Martin can provide this information within 60 days of your written confirmation that you will pay the fee. To the extent this request seeks information expressly exempt from being publicly disclosed under SDCL § 1-27 the request is denied.

Central to each of these responses, is the fact that the City can provide all non-exempted documents within 60 days of the request, if the fee is paid in advance. However, at no point, does the City give the OST an estimate of the total fees. The OST was given no indication as to how much they are agreeing to pay. The City indicated that the total fees would consist of hourly wages to a city employee and hourly fees for outside legal counsel. The OST objects to paying any fee that encompasses the legal fees of the City. The OST also has not agreed to waive sovereign immunity for collection purposes, if they do not pay in advance.

State law indicates how a public agency may bill for compiling a request for public records. SDCL §1-27-35 sets the initial cost:

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.

SDCL §1-27-35.¹

In this case, the request was for 20 years of documents and records concerning voting. This is no small task as the City was heavily involved in voting rights litigation for many years. For large requests such as this, SDCL §§ 1-27-36 and 1-27-1.2 must also be consulted.

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.

SDCL §1-27-36.

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,

¹ ARSD 10:10:01:03

For reproduction of a record, the custodian may charge the following fees:

- (1) \$.25 per page for letter or legal size documents;
- (2) \$.50 per page for 11" x 17" size document;
- (3) \$3.00 per page for a page larger than 11" x 17", or the actual cost of reproduction, whichever is larger;
- (4) For the reproduction of records not stored in either an electronic or a paper format, such as micro-film, the custodian may charge an additional fee not greater than the actual cost of retrieval from that format.

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.

SDCL §1-27-1.2.

Pursuant to SDCL §1-27-35, the City is not required to provide any documents until payment is made by OST of the actual cost of reproduction and staff time necessary for locating, assembling, or reproducing the records. The law also requires that the City make a good-faith estimate of the cost and that this estimate be agreed upon by the OST prior to the City assembling the documents. SDCL §1-27-36. Prior to entering into a contract with the OST to compile documents, the City is allowed to ask the OST to waive sovereign immunity.

The law requires that the OST sign a written agreement or contract to pay the estimated costs prior to any work or assembly taking place. SDCL Ch. 1-27 makes no mention of a waiver of sovereign immunity in order to make collection from a Tribal Government possible, although it is allowed under state contract law. Due to the Tribe's sovereign immunity, the City has no way to collect from the OST in state court if the OST has not paid in advance. It is permissible for the City to ask for a waiver and for the OST to refuse the waiver. The ACLU, although legal representative for the OST, has also not agreed to incur the costs of collecting these documents from the City. Due to these facts, it is not unreasonable for the City to require payment of estimated costs or require a waiver of sovereign immunity in order to facilitate collection of costs.

The OST will not agree to pay for the City's attorney fees in compiling these documents. The law only allows the City to charge for "staff time" and "specialized service." SDCL §§ 1-27-35 and 1-27-1.2. The City argues that legal fees are a "specialized service". There is no precedent for legal fees to be itemized by public agencies as "specialized" as the above law anticipates an amortization of costs of the special services. The City's use of an attorney in this case would be for this one specific case, not amortized among all legal work. Likewise, the use of the term "legal fees" or "attorney fees" in statute are separated when listed with "costs." Legal fees or Attorney Fees are not automatically part of "costs" but are commonly line-itemed in statute². If public agencies could collect attorney fees with public records requests, the statute would reflect this. Therefore, attorney fees in compiling these public records or responding to requests are not allowed to be charged or collected by the City.

Any document that may be protected by attorney-client privilege is not a public record. Any documents that are a public employee or public official's drafts, notes, memoranda are exempt under SDCL §§ 1-27-1.5(12) or 1-27-1.7 and are not public records. The requests by OST are not

² Evidence of this is contained throughout S.D. Code, but a few example cites are: SDCL §§ 5-12-50.1 ("including *legal fees* and the costs of"), 10-50-90 ("the court shall award the state the recovery of its expert witness fees, costs, and reasonable *attorney fees*"), 10-59-34 ("shall reimburse the other party for all court costs and *attorney fees*"), 21-35-23 ("in addition to such taxable costs as are allowed by law, allow reasonable *attorney fees* and compensation"), 15-39-45.1 ("not including allowable costs or *attorney fees*"), 15-39-73 ("The court shall have power in its discretion to award costs, including *attorney fees*"), and 25-4A-15 ("The court may order either party to pay *attorney fees* and costs").

public record requests but are very broad requests for documentation and legal opinions about documents that span over twenty years. Each of these requests are discussed here:

1. *All documents pertaining to city ward and mayoral elections for the past 20 years, including election results, election return records documenting the official elections results, all candidates on the ballots, and a list of all candidates who won each election.*

These documents are readily available to the City staff and should not contain documents protected by attorney-client privilege. The City's response to this request is reasonable and legal.

2. *All documents related to any city ward maps, boundary changes, or reorganization plans approved or considered by the city council for the past 20 years, including maps proposed but not adopted and contracts with consultants for the creation of new maps.*

This request is overly broad and does not request specific documents. This request must be narrowed by OST. The City staff is not required to perform legal research for the OST and determine whether documents are "related to" certain topics. As written, this requests documents exempted under SDCL §1-27-1.7. Furthermore, under SDCL §1-27-1.9, documents used for the purpose of making a decision are not subject to compulsory disclosure.

3. *All city draft and final agendas, handouts, minutes, and recordings for all meetings at which maps or ward boundaries were discussed or considered for the past 20 years.*

This general request for meeting agendas, etc. should be readily obtainable by City staff and is allowed. However, the City is not required to separate out each meeting in which maps or ward boundaries were discussed. If public meeting documents and recordings are available online, the City need only send the link to the OST. The City may make these recordings and documents available for a member of the OST to listen to or view during regular office hours.

4. *Any and all analysis, including letters or memorandums, regarding draft or final maps, redistricting, Section 2 of the Voting Rights Act of 1965, or any of the Gingles factors for the past 20 years.*

The City clerks are not required to perform legal research for the OST and determine whether documents meet these requirements or not. The OST must narrow the request before the City can compile any documents related to this request. The City's response to this request is reasonable and legal.

5. *All documents and correspondence related to complaints, allegations, concerns, investigations, and reports (draft and final versions) concerning racial or ethnic discrimination, vote dilution, vote denial, or other voting-related discrimination in local general and special elections prepared by or submitted to the City of Martin for the past 20 years.*

The City clerks are not required to perform legal research for the OST and determine whether documents meet these requirements or not. The OST must narrow the request before the City can compile any documents related to this request. The City's response to this request is reasonable and legal.

6. *All documents, including any writings, memoranda, and correspondence, related to complaints, allegations or concerns of and investigations into and reports of racial or ethnic discrimination involving a local government agency or employee in any context, including, but not limited to, healthcare, criminal justice, housing, employment, and education prepared by or submitted to City of Martin for the past 20 years.*

The City clerks are not required to perform legal research for the OST and determine whether documents meet these requirements or not. The OST must narrow the request before the City can compile any documents related to this request. The City's response to this request is reasonable and legal.

7. *All policies, procedures, guidelines, and related training materials regarding the prohibition of racial or ethnic discrimination by local government agencies and employees prepared by or submitted to City of Martin.*

These documents should be readily available to the City staff and should not contain documents protected by attorney-client privilege. The City may make these recordings and documents available for a member of the OST to review during regular office hours. The City's response to this request is reasonable and legal.

Prior to any documents being compiled, the City must send to the OST a good-faith estimate of costs to compile records and documents from requests 1, 3, and 7 and the OST must agree to pay the amount. It is reasonable to expect that the OST prepay for any copies of documents prior to the documents being compiled. If the OST does not wish to pay for any copies, the City can make arrangements to have the documents available for inspection during business hours. SDCL §§1-27-1 and 1-27-35.

Requests 2, 4, 5, and 6 are denied as being overly broad. The City is under no obligation to provide documents that answer these requests. City records clerks are not lawyers and requiring a staff clerk to separate out which documents relate to the Voting Rights Act of 1965 or the *Gingles* factors is unreasonable and does not meet the purpose of the public records act. Public record requests were not intended to supplant legal discovery that parties engage in during litigation. If the OST narrows their request and asks for specific documents, then the City may respond at that time. A public records request is not a fishing expedition in anticipation of litigation.

CONCLUSIONS OF LAW

1. The Office of Hearing Examiners has jurisdiction over the parties and subject matter of this appeal and the authority to conduct the appeal pursuant to the provisions of SDCL Chapters 1-26D and 1-27.
2. The OST made a timely request to the Office of Hearing Examiners for a review of the City's response to a request for disclosure of certain records.
3. Pursuant to SDCL §1-27-40 no good cause was shown necessitating a hearing.
4. The partial denial by the City was made in good faith.

5. The City had good cause to require OST to agree to either a) prepay estimated costs or b) waive sovereign immunity and enter into a contract to pay the costs upon the compilation of the requested documents.
6. The City is under an affirmative duty to provide the OST an estimate of the total costs of producing the documents requested. SDCL §1-27-36.
7. The City may charge the OST actual costs of city staff time to reproduce, compile, and find the documents requested. SDCL §1-27-35. The City may charge the OST actual cost of mailing or transmittal, the actual cost of reproduction, or other fee established by statute or administrative rule. SDCL §1-27-35, ARSD 10:10:01:03.
8. The City may not charge the OST for outside legal fees incurred in producing the records. The statute gives strict parameters as to what may be charged by an agency for public records and outside legal fees are not mentioned.
9. The OST request Numbers 1, 3, and 7 are reasonable requests for public records. The City may compile these requests upon agreement with the OST for payment of costs of staff and administrative fees. SDCL §§ 1-27-35, 1-27-36, and ARSD 10:10:01:03.
10. The OST request Numbers 2, 4, 5, and 6 are not public records requests, but are requests for legal assistance in compiling all documents held by the City that relate to certain topics, such as the Voting Rights Act of 1965. These requests are not required to be compiled by the City. The City is not required to redact or remove certain information from documents to create records open to the public as opposed to records exempt from disclosure. SDCL §1-27-1.10. See also *Mercer v. S.D. Att’y Gen. Office*, 2015 S.D.3, ¶23.
11. Any additional conclusions of law included in the Reasoning section of this decision are incorporated herein by this reference.
12. To the extent any of the foregoing are improperly designated and are instead findings of fact, they are hereby redesignated and incorporated herein as findings of fact.

ORDER

IT IS HEREBY ORDERED that the response by the City of Martin to the Oglala Sioux Tribe is upheld in part and denied in part. The OST requests for public records from request 1, 3, and 7 may be disclosed. Requests 2, 4, 5, and 6 are not proper requests for public records and are denied.

IT IS FURTHER ORDERED that the City is required to make an estimate of costs allowed by law which cannot include outside legal fees and provide that estimate to the OST. The OST may waive sovereign immunity to contract with the City to begin to compile the documents or the OST may pay the estimated costs prior to the City compiling the records requests. Digital public records that do not involve a cost to the City are ordered to be provided to the OST without cost. The City may also waive costs to compile specific records and provide them to the OST.

Dated this 26th day of January, 2024



Catherine Williamson
Office of Hearing Examiners

NOTICE: Pursuant to SDCL §1-27-41 an aggrieved party may appeal the decision of the Office of Hearing Examiners to the circuit court pursuant to chapter 1-26. In any action or proceeding under §§ 1-27-35 to 1-27-43, inclusive, no document or record may be publicly released until a final decision or judgment is entered ordering its release.

CERTIFICATE OF SERVICE

I CERTIFY THAT ON January 26, 2024 at Pierre, South Dakota, a true and correct copy of the Decision was mailed by First Class Mail and e-mailed to the parties listed below.



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