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 **APPELLANT OGLALA SIOUX TRIBE'S REPLY BRIEF**

Pursuant to S.D.C.L. § 1-26-33.2 the Oglala Sioux Tribe (OST or Tribe) submits this Reply to the Appellee City of Martin's Brief dated May 8, 2024 (City's Brief).[1] The Court should dismiss as moot or deny the City's Notice of Review of the Office of Hearing Examiner's (OHE) Decision because the City cannot charge the Tribe attorney's fees under S.D.C.L. § 1-27-1.2. A plain reading of the statute does not support that attorney's fees are considered "any specialized service" under S.D.C.L. § 1-27-1.2. Further, federal law and state public records laws prohibit the City from requiring the Tribe to prepay estimated costs for voting rights public records or waive sovereign immunity for future collection purposes. The Tribe respectfully requests that the Court modify the OHE Decision to reverse its ruling that the City may require waiver of tribal sovereign immunity or prepayment of the estimated costs to compile public records rather than paying for the actual costs of the records after compilation pursuant to S.D.C.L. § 1-26-36 (1), (2), (4), (5) and (6).

I. The City's Request for Attorney's Fees is Moot.

The City asks this Court to reverse the OHE Decision "that the City of Martin could not seek attorney's fees under SDCL § 1-27-1.2 for the review of documents when the public records request requires legal analysis to fulfill the request," City's Brief p.1. However, this issue is moot

[1] S.D.C.L. § 1-26-33.2 allows the Tribe to "serve a reply brief within ten days after service of appellee's brief." S.D.C.L. § 15-6-6(a) governs the computation of time and specifies that "[w]hen the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Therefore, this Reply Brief is timely filed on May 22, 2024.

because the Tribe did not appeal from the part of the OHE Decision that held the City did not have to compile records that would require attorney review or legal analysis to fulfill the request. OHE Decision p. 11 ¶ 10; Tribe's App., Ex. 5, OST Notice of Appeal. The Tribe has not indicated that it ever intends to seek this information again in the future. Courts can only "[] render [] opinions pertaining to actual controversies affecting people's rights." Skjonsberg v. Menard, Inc., 922 N.W.2d 784, 787–88 (S.D. 2019) (citations omitted). "[A]n appeal will be dismissed as moot where, before the appellate decision, there has been a change of circumstances or the occurrence of an event by which the actual controversy ceases and it becomes impossible for the appellate court to grant effectual relief." Larson v. Krebs, 898 N.W.2d 10, 15–16 (S.D. 2017), quoting Sullivan v. Sullivan, 764 N.W.2d 895, 899 (S.D. 2009). Here, there is no remaining justiciable issue for which the Court could effectively grant relief to the City.

The OHE eliminated the need for attorney review of any remaining requests when it ruled that any requests that would require the City to obtain "legal assistance in compiling all documents held by the City that relate to certain topics, such as the Voting Rights Act of 1965 . . . are not required to be compiled by the City." OHE Decision p. 11 ¶ 10. The City concedes "legal advice would be required to respond to the request" only "[i]f these requests were deemed proper[,]" City's Brief p. 5. The City has acknowledged that there is no longer a need for legal review of these requests. The City also has indicated its City Finance Officer is able to respond to the remaining public records requests.[2] Id. The City would gain no relief even if the Court were to rule in the City's favor since there is no present or future indication these same types of records will be

[2] The Tribe does not dispute the City Finance Officer's hourly rate in this appeal. While the Tribe questioned whether the City Finance Officer was the appropriate employee to fulfill the Tribe's request after it had been significantly narrowed by the OHE's ruling, the Tribe does not raise this issue in this appeal. City's Brief, App. Ex. B p. 2.

sought by the Tribe. Thus, the City's Notice of Review seeking to charge the Tribe for its attorney's fees to review the public records that are no longer being requested by the Tribe has become moot.[3]

II. The City Cannot Charge the Tribe Attorney's Fees Under S.D.C.L. § 1-27-1.2.

Even if the issue is not moot, the City's claim that S.D.C.L. § 1-27-1.2 allows the City to charge attorney's fees as "a reasonable fee [that] may be charged for any specialized service[,]" ignores prevailing and established law in South Dakota; fails to interpret the entirety of the text of S.D.C.L. § 1-27-1.2; and directly contradicts the purpose of the law.

A. The American Rule Does Not Allow Recovery of Attorney's Fees by the City.

South Dakota follows the "American Rule" that each party pays their own attorney's fees, unless an exception applies. The only exception relevant here is "'when an award of attorney's fees is authorized by statute.'" Long v. State, 904 N.W. 2d 358, 363 (S.D. 2017) (citation omitted). The only other exceptions to the American Rule recognized in South Dakota are when the parties have contracted for a different allocation of attorney's fees, Endres v. Endres, 984 N.W.2d 139, 150 (S.D. 2022), and when attorney's fees can be recovered as damages under certain contract claims and, in limited circumstances, under some tort claims where a party's actions necessitated

[3] No exception to the mootness doctrine applies in this case. The "capable of repetition yet evading review" exception only applies when: "'(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" Rapid City J. v. Delaney, 804 N.W.2d 388, 391 (S.D. 2011) (citation omitted). "A theoretical possibility of repetition will not constitute an exception to the mootness doctrine: '[T]here must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." Sullivan v. Sullivan, 764 N.W.2d 895, 900 (S.D. 2009) (citations omitted). Here, however, the reason the issue is no longer live is because the Tribe is no longer seeking the records the OHE determined were not public in nature and there is no indication by the Tribe that they will seek the same records in the future. Thus, the two required elements for the exception to apply are not met.

Nor does the public interest exception to the mootness doctrine apply. This exception only applies when the issue at bar involves "'general public importance, probable future recurrence, and probable future mootness.'" Larson, 898 N.W.2d at 17 (quoting Sedlacek v. S. Dakota Teener Baseball Program, 437 N.W.2d 866, 868 (S.D. 1989)). While this case does involve an issue of general public importance, it is unlikely that such an issue would arise again given there is no indication the Tribe will seek the same type of records that were denied by the OHE and, if it did, even more unlikely that it would become moot before it could be adjudicated.

an outside proceeding which required the opposing party to retain counsel. See e.g., Colton v. Decker, 540 N.W.2d 172 (S.D. 1995) (denying attorney's fees as damages under S.D.C.L. § 57A-2-715(1) or (2) or S.D.C.L. § 15-17-38 but allowing attorney's fees as damages in other litigation as "reasonable expenses" to clear title and retrieve a truck from Wyoming under the commercial code statute, S.D.C.L. § 57A-2-715). See also, Jacobson v. Leisinger, 746 N.W.2d 739, 743 (S.D. 2008) (allowing attorney fees to be recovered in a tort action for conversion when the fees were "incurred in other litigation which is necessitated by the act of the party sought to be charged"). Neither of these exceptions are applicable or relevant to this case because this is not a contract case and there was not outside litigation in a separate tort action necessitating the need for attorney work as a claim for damages. The South Dakota Supreme Court has rejected a party's argument seeking to expand exceptions to the American Rule in other circumstances similar to the manner the City is attempting to expand it.

Additionally, any analysis of the state's Public Records Act must take into account the "presumption of openness" embodied in these laws. Argus Leader Media v. Hogstad, 902 N.W.2d 778, 782 (S.D. 2017); Argus Leader v. Hagen, 739 N.W.2d 475, 480 (S.D. 2007) (finding that an open records statute contained "a presumption of openness" even when the statute was "clear and unambiguous"). The City's argument to deviate from the American Rule for an expanded reading of "specialized services" creates significantly more expense and conflicts with the Public Records Act's presumption of openness. In contrast, abiding by the American Rule is in harmony with the presumption of openness. The rationale supporting the "American Rule" is that a system which requires a party to pay another party's attorney's fees would cause people to be "unjustly discouraged" from "vindicat[ing] their rights[.]" Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (citations omitted). Interpreting S.D.C.L. § 1-27-1.2 to allow

attorney's fees as a "specialized service" would grant municipalities like the City unfettered discretion to routinely claim attorney review is required to complete a public records request and provide the requestor with an exorbitant estimate, especially for requests to which the municipality does not wish to respond. Here, because the City insisted upon the Tribe paying the estimate in advance rather than the actual cost, the City would receive a windfall of attorney's fees and then not produce the very same records that the attorney reviewed and determined were not required to be produced. Such a system would "unjustly discourage" records requests, would undermine the Public Record Act's presumption of openness, and unjustly enrich the City for not producing public records.

B. The Plain Language of S.D.C.L. § 1-27-1.2 Does Not Authorize Attorney's Fees.

The City's claim that under S.D.C.L. § 1-27-1.2 "'specialized service' should include an hourly rate of an attorney if the public record request requires legal analysis" is contrary to the plain language analysis employed by the South Dakota Supreme Court when addressing claims for attorney's fees that are alleged to arise from a statute. City's Brief p. 5. When reading such statutes, the South Dakota Supreme Court has "rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power[,]" Schuldies v. Millar, 555 N.W.2d 90, 100 (S.D. 1996). The Court looks to whether "the statute expressly authorizes the award of attorney fees in such circumstances." Rupert v. City of Rapid City, 827 N.W.2d 55, 67 (S.D. 2013). In other words, the words "attorney's fees" must appear in the statute.

When these words are not expressly included, the state supreme court regularly rejects claims that a statute allows attorney's fees to be charged through inference or interpretation of other language. Long, 904 N.W.2d at 363-64 (denying a request to examine legislative history or allow attorney's fees in a reverse condemnation case because a "reading of the plain language of

SDCL 5–2–18 reveals no language referencing payment of attorney's fees or expenses"); Schuldies, 555 N.W.2d at 100 (rejecting attorney's fees claim under statute authorizing "fair compensation for the time and money properly expended in pursuit of the property" in a conversion action because the language was "insufficiently specific.").

The City wants to impose attorney's fees as an enumerated cost to compile public records when it has not incurred them, and the statute does not expressly authorize them. The language "reasonable fee . . . for any specialized service" is easily as vague as the language in S.D.C.L. § 21-3-3(3) for "fair compensation for the time and money properly expended in pursuit of the property" in a conversion claim, where attorney's fees were denied. Schuldies, 555 N.W. 2d at 100. This is especially true when the South Dakota Legislature regularly "line-item[s]" terms like "legal fees" or "attorney fees" rather than lumping them in with broader language. OHE Decision p. 8. The Legislature did not "expressly authorize[] the award of attorney fees;" thus, the City is not entitled to charge the Tribe for its outside attorney fees when responding to public record requests.

The City's interpretation of S.D.C.L. § 1-27-1.2 also fails to read this law in its entirety. The South Dakota Supreme Court has stated that when interpreting statutes it will not only "give words their plain meaning and effect," but also that it will "read statutes as a whole." Reck v. S. Dakota Bd. of Pardons & Paroles, 932 N.W.2d 135, 139 (S.D. 2019) (internal citation omitted). When reading statutes as a whole, the South Dakota Supreme Court regularly applies the doctrine of "noscitur a sociis," by which "the meaning of a particular term in a statute may be ascertained by 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., 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 "specialized service" is limited by the following sentence in S.D.C.L. § 1-27-1.2, which refers to such a fee in relation to "the amortization of the cost of computer equipment" for said specialized service. The final two sentences of S.D.C.L. § 1-27-1.2 also refer to computer equipment or software. 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, equipment, or software costs associated with the electronic production or transfer of records. The phrase "any specialized service" does not encompass attorney time to review records for privilege or work product.

If this Court finds the "specialized services" language ambiguous, the legislative history of S.D.C.L. § 1-27-1.2 demonstrates the Legislature did not intend for attorney fees to be charged to a requester making a public records request. State v. Mundy-Geidd, 857 N.W.2d 880, 883 (S.D. 2014) (finding that if legislation is ambiguous then legislative history should be consulted to determine intent). S.D.C.L. § 1-27-1.2 was amended in 2012 to include the language at issue; that "a reasonable fee may be charged for any specialized service." The prime sponsor explained the bill was to eliminate an outdated modem charge and to reduce costs associated with public records requests.[4] Senator Al Novstrup, another sponsor of the bill, also spoke about how the legislation

[4] When introducing the bill on January 30, 2012, Senator Kraus explained: "The original intent of this bill is two-fold. One is to drop the modem charge, which is outdated . . . And the second intent is to allow no charge for transmission of simple information like perhaps a board meeting or board minutes[.]" See, Hearing on S.B. 75: Revise the determination of fees that may be charged for certain public records Before the S. Comm. On Local Gov., 87th Leg. Sess. (2012) (statement of Senator Elizabeth Kraus), https://sdpb.sd.gov/sdpbpodcast/2012/slo11.mp3#t=3019 at 50:40 to 51:18.

was intended to reduce the costs that government entities could charge to requestors rather than increase them. He stated that "the biggest obstacle to open government today is" when government employees inform a requestor that "I can get you that, but it's going to cost you."[5] At no point in legislative history was there a discussion of expanding S.D.C.L. § 1-27-1.2 to add more costs or include another category of persons—attorneys—to review and compile records.[6] Instead, the purpose of the amendment was to remove outdated language and to make it less expensive to obtain public records. The City's interpretation of "specialized services" is incorrect and contradicts the intent of the legislature because allowing attorney's fees under S.D.C.L. § 1-27-1.2 will only increase the likelihood that a government employee will inform a requestor that "I can get you that, but it's going to cost you."

III. S.D.C.L. §§ 1-27-35 and 1-27-36 Only Authorize the City to Charge the Tribe for the Actual Assembly Costs.

The City concedes that the OHE erred in requiring the Tribe to pay estimated costs instead of actual costs and asks this Court to "modify the OHE decision to require payment of the actual cost of the request." City's Brief p. 17. This is a complete change of position by the City. See Tribe's App., Ex. 3 p. 4 (City's Letter responding to the original request and stating that if the Tribe refused to waive sovereign immunity it would require the Tribe to "pay for the **estimated**

Later in the legislative process, Senator Kraus introduced an amended version of the bill but emphasized that the dual purposes of the bill remained the same as the bill's original version and only "makes two changes in our current statutes. . . . number one, it removes outdated language that permits a charge for the use of a modem. And number two, it specifies that no fee may be charged for the electronic transfer of any minutes 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 past three years." See, Hearing on S.B. 75: Revise the determination of fees that may be charged for certain public records Before the S. Comm. On Local Gov., 87th Leg. Sess. (Feb. 13, 2012) (statement of Senator Elizabeth Kraus), https://sdpb.sd.gov/sdpbpodcast/2012/sen20.mp3#t=3494, at 58:30 to 59:30.

[5] See, Hearing on S.B. 75: Revise the determination of fees that may be charged for certain public records Before the S. Comm. On Local Gov., 87th Leg. Sess. (Jan. 30, 2012) (statement of Senator Al Novstrup) https://sdpb.sd.gov/sdpbpodcast/2012/slo11.mp3#t=3019 at 55:15 to 55:25.

[6] S.D.C.L. § 1-27-42 designates the persons who are authorized to serve as public records officers for the state, a county, municipalities, townships, school districts and special districts. The statute does not designate an attorney for any of these entities as a public records officer authorized to compile and assemble records in response to public records requests.

costs to complete the task upfront.") (emphasis added); City's App., Ex. A p. 2 (City's Letter after the OHE Decision was issued stating the City "anticipates" fulfilling the requests will cost $276.24 and requesting payment of this estimated amount if sovereign immunity is not waived). In light of the City's reversal of its prior position about charging estimated costs, the Court should find the OHE erred by allowing the City to demand prepayment of any estimated costs.

The OHE likewise erred in finding that the City could request prepayment "prior to the City compiling the records requests[,]" OHE Decision p. 11, because the actual cost cannot be known until the records are compiled.[7] Any amount considered before then is an estimate only. The City acknowledges, "[o]bviously, the estimate will not always be the same as the actual cost incurred" and "the City can only collect the actual cost incurred[.]" City's Brief p. 15. As such, the OHE erred in ordering the Tribe to "pay the estimated costs prior to the City compiling the records request[ed]." OHE Decision p. 11.

IV. The City Cannot Lawfully Condition Production of Public Records On a Waiver of Sovereign Immunity.

A. The OHE Decision and City's Prior Position Does Not Support the City's Arguments.

The City's claim that the OHE Decision "merely allows the City's ability to request a waiver of immunity in order to collect such costs **should the Tribe receive the records but not pay**[,]" is incorrect and not factually supported. City's Brief p. 8 (emphasis added). Since the City never offered to provide the records to the Tribe before prepayment of estimated fees was received, the Tribe would never have an occasion to "receive the records but not pay[.]" Also, under South

[7] The City argues that the "language of SDCL § 1-27-35 unambiguously permits the City to require payment of the actual cost before producing the requested public records." City's Brief p. 15. The Tribe agrees and argued as much in its own brief. Appellant's Brief p. 15. But the issue on appeal is whether the OHE erred in allowing the City to demand this payment before it even compiles the requested documents and has created an invoice for the actual costs to present to the Tribe for payment.

Dakota law, a requesting party must always pay for public records prior to receiving them unless the fees are waived. See S.D.C.L. § 1-27-35 (specifying that a municipality may "provide the requestor with the document or record upon payment of the actual cost . . . ."); S.D.C.L. § 1-27-36 (specifying that a custodian of record 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 . . . .").[8] No waiver or reduction of fees was offered to the Tribe by the City nor did the OHE determine waiver or reduction of fees should be considered by the City even though voting rights records are in the public interest. Therefore, the City's fictional fact pattern that it relies upon to support its demand that the Tribe waives sovereign immunity has never existed in the past; does not exist presently; and because the OHE Decision adopted the City's unreasonable position ensures it will not exist in the future. And if the City had followed the clear language of the law, the City's fictional concern about non-payment by the Tribe after receiving the records would not exist. Instead, as the City admits, the City may merely exercise its "ability to withhold the public records until the requester pays the actual cost[.]" City's Brief p. 11. Therefore, the City's stated concerns do not justify its demand to the Tribe to waive sovereign immunity.

Similarly, the City's claim that "the Tribe has a meaningful alternative to waiving sovereign immunity" because "[t]he Tribe may simply prepay the actual cost of the request," City's Brief p. 12, ignores that this was never an option provided by the City to the Tribe.[9] In response

[8] The Tribe has never disputed that this language requires payment of actual costs after documents are compiled but before they are produced. Appellant's Brief pp. 14-15 (summarizing the steps of the codified process to obtain public records).

[9] The City appears to now use the term "prepay" to refer to the Tribe paying for the records **after** they are compiled but before they are produced. This is in sharp contrast to the OHE's use of the term "prepay" to mean payment **before** the records are compiled and different than how the City originally used the term to refer to payment by the Tribe before it compiles the records sought. See OHE Decision p. 11 ¶ 5 (explaining that the OST could "prepay estimated costs") and p. 11 (elaborating on this to mean that the Tribe could "pay the estimated costs prior to the City compiling the records request[ed]"); Tribe's App., Ex. 3 Letter from Gunderson Palmer, p. 4 (Demanding that the Tribe "pay for the estimated costs to complete the task upfront."). This brief uses the term "prepayment" consistently with the OHE

to the Tribe's public records request, the City demanded that the Tribe waive sovereign immunity and, if it refused to do so, the City demanded that the Tribe "pay for the estimated costs to complete the task upfront." Tribe's App., Ex. 3 Letter from Gunderson Palmer, p. 4. The OHE agreed and ordered the Tribe to "waive sovereign immunity to contract with the City to begin to compile the documents or . . . **pay the estimated costs prior to the City compiling the records request[ed]**." OHE Decision p. 11(emphasis added). Even after the OHE Decision, the City continued to insist on the prepayment of the estimated costs in conformance with the OHE ruling. City's App., Ex. A p. 2 (City's Letter after the OHE Decision was issued stating the City "anticipates" fulfilling the requests will cost $276.24 and requesting payment of this estimated amount if sovereign immunity is not waived).

At no point has the Tribe been offered the option to "simply prepay the actual cost of the request" as an alternative to waiving sovereign immunity. City's Brief p. 12. In fact, that is what the Tribe is asking this Court on appeal: allow it to pay actual costs rather than estimated costs upon receipt of the invoice, which is what the Tribe offered at the very outset in its original letter to the City requesting these public records. Instead, the Tribe has consistently been presented with two options that are equally harmful to the Tribe, first by the City and now the OHE Decision adopting the City's position. It could prepay the estimated cost of the request prior to the documents being compiled—a process that may significantly over-estimate fees and that even the City now admits defies the plain language of the law. Or, if the Tribe did not prepay the estimated costs and wished to proceed with the statutory public records process available to any other requestor, it had to waive its sovereign immunity—a condition the City admits is not required

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decision to mean payment prior to the records being compiled and the term "payment" when referring to the payment of the actual costs of public records after they are compiled.

under the law. Id. at 11 ("The City does not dispute that the statute does not require a waiver of sovereign immunity.").

B. *The Tribe's Substantial Rights are Prejudiced by the OHE Decision Allowing the City to Condition Public Records Production on Waiver of Sovereign Immunity.*

The City erroneously claims that the OHE's decision was not "prejudicial to a substantial right of the Tribe because the Tribe has the choice of which option it elects." City's Brief at 8. Both options are prejudicial to the Tribe as neither follows the law nor treats the Tribe equally to other public record requestors. Imposing conditions on the Tribe that are contrary to state law and not imposed on other requestors is inherently prejudicial and violates equal protection. See, Navajo Nation v. State of N.M., 975 F.2d 741 (10th Cir. 1992) (finding that a state budget cut that singled out a federally recognized tribe for unequal treatment violated the Equal Protection clause); Fallon Paiute-Shoshone Tribe v. City of Fallon, 174 F. Supp. 2d 1088, 1094 (D. Nev. 2001) (granting summary judgment on the tribe's equal protection claim because of the different treatment it faced as compared to similarly situated persons, including the University of Nevada). The City does not dispute the Tribe's equal protection argument—a silence that speaks volumes.

The City's Brief also ignores the impact of the OHE's ruling that the City may demand that the Tribe waive its inherent sovereign immunity in order to gain access to public records; a right accorded to all other public records requesters with no such contemporaneous waiver or burden. "The doctrine of tribal sovereign immunity derives from the status of Indian tribes as 'separate sovereigns preexisting the Constitution.'" See Bodi v. Shingle Springs Band of Miwok Indians, 832 F. 3d 1011, 1016 (9th Cir. 2016) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014)). As a matter of federal law, tribal sovereign immunity is not subject to diminishment by states. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 789 (2014) (quoting Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. at 756 (1998)). The City's reliance on Bay Mills to argue

the opposite is misplaced. Contrary to the City's assertion that "The [Supreme] Court ultimately determined Congress only partially abrogated the Tribe's sovereign immunity under the IGRA, but the partial abrogation did not allow the State of Michigan to bring suit against the Tribe," City's Brief p. 10, the Supreme Court "affirmed that **tribes** retain sovereign immunity when engaged in off-reservation commercial activity." Federal Indian Law-Tribal Sovereign Immunity-Michigan v. Bay Mills Indian Community, 128 Harv. L. Rev. 301 (2014) (emphasis added) (noting that "in dicta that a state may use alternative, state-specific enforcement measures against **individuals** affiliated with the commercial activity.") (emphasis added). Nowhere in the Bay Mills case does the U.S. Supreme Court reach the broad conclusion that the City asserted in its brief which demonstrates a clear misunderstanding of the Tribe's federal sovereignty.

Because the Tribe has not adopted a tribal resolution to waive its tribal sovereign immunity, nor has Congress chosen to dispense of tribal sovereign immunity, the OHE and the City cannot inextricably intertwine the waiver demand with a fundamental political right to access public voting records. Oregon v. Mitchell, 400 U.S. 112, 241 (1970). This is true whether the attempted diminishment of sovereign immunity is through the enactment of policy, law, or disparate application of laws to Tribes, which is the case here. The OHE's Decision allowing the City to condition production of public records, in any manner, on the waiver of sovereign immunity, diminishes the Tribe's federally protected rights. Despite the OHE's efforts to recast this case as a contract case to create a result not authorized by law, it is not a contract case. This case involves state laws pertaining to public records involving fundamental political rights: access to voting records. Therefore, the impact of the waiver demand carries implications that amount to a "severe intrusion" upon the sovereign rights of the Tribe and contravenes established precedent. See Cheyenne River Sioux Tribe, 595 N.W.2d at 607.

Last, the Tribe has already suffered prejudice both in the form of a demand that it voluntarily diminish its sovereignty in order to access the statutory public records process, but also because a delay in the Tribe accessing public voting records has occurred. The City's waiver demand has resulted in a nearly yearlong delay in the Tribe's ability to get access to public information necessary to protect voting rights during a federal election year. The Tribe originally submitted the request in September 2023, over a year before the 2024 election. But the City's improper waiver demand has delayed the production of these records for, at the time of this filing, approximately nine months, and the delay will only increase before the dispute is resolved. Any appeal to the state Supreme Court will further delay this, too. This delay has significantly decreased the possibility that the data obtained could be used to address any voting rights violations.

The fact that the OHE's Decision conditions the Tribe's access to the normal statutory process on a waiver of sovereign immunity also contradicts the City's arguments that its request for such a waiver was appropriate. First, this fact further undermines the City's claim that "the current situation is analogous to" Bay Mills, 572 U.S. 782 (2014), and that it is appropriate for the City to bargain with the Tribe for a waiver of immunity. City's Brief pp. 9-12. The City cannot bargain or negotiate over whether it will comply with state's public records statutes which the City undisputedly admits apply to it. Municipalities are "creatures of the Legislature" and such a creature "is not greater than its creator, and may not question that power which . . . set the bounds of its capacities." Edgemont Sch. Dist. 23-1 v. S. Dakota Dep't of Revenue, 593 N.W.2d 36, 40 (S.D. 1999) (cleaned up). By refusing to comply with state law absent a waiver of sovereign immunity, the City exceeded "the bounds of its capacities" that had been set by the Legislature. Therefore, the City's reliance on Bay Mills is unconvincing since the City's proposed "bargain" attempted to bypass statutory language the City must comply with and the holding of Bay Mills

was that the Tribe retains its sovereign immunity even in commercial litigation, without exceptions.

Second, the City's claims that Three Affiliated Tribes of Fort Bethold Rsrv. v. Wold Eng'g, 476 U.S. 877 (1986) "actually weighs in favor of the OHE decision," id. p. 12, is also incorrect. The City attempts to distinguish Three Affiliated Tribes on the grounds that a "factor relied upon by the Court was whether the Tribe had a meaningful alternative" and that "[h]ere, the Tribe has a meaningful alternative to waiving sovereign immunity. The Tribe may simply prepay the actual cost of the request." Id. But that was never an option for the Tribe as the City's demand was prepayment of estimated costs; not actual costs. The OHE decision was clear; the Tribe's alternative to waiving sovereign immunity is not to "simply prepay the actual cost of the request," id., but to be deprived of the same statutory process all other requesters are allowed, and to instead "pay the estimated costs prior to the City compiling the records request[ed]." OHE Decision p. 11. Therefore, Three Affiliated Tribes is controlling, and this Court should find that the OHE erred in ruling that the City can condition production of the public records request on a waiver of tribal sovereign immunity.

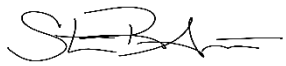
CONCLUSION

The City's Notice of Review asking this Court to modify the OHE's Decision to allow it to charge the Tribe attorney's fees under S.D.C.L. § 1-27-1.2 is moot because the requests at issue are no longer being sought by the Tribe, thus it should be dismissed or alternatively denied. However, the part of the OHE Decision that the Tribe must either prepay the City estimated costs for records before they are compiled or enter into a contract that waives its sovereign immunity prejudices substantial rights of the appellant, is in violation of constitutional and statutory

provisions, constitutes an error of law, and should be modified under S.D.C.L. § 1-26-36 (1), (2), (4), (5) and (6).

Dated this 22nd day of May 2024.

American Civil Liberties Union of South Dakota



Stephanie R. Amiotte
South Dakota Bar No. 3116
P.O. Box 91952
Sioux Falls, South Dakota 57109
605-370-4313
Samiotte@aclu.org

Andrew Malone
South Dakota Bar No. 5186
ACLU of South Dakota
P.O. Box. 91952
Sioux Falls, South Dakota 57109
605-910-4004
Amalone@aclu.org

Samantha Kelty*
Native American Rights Fund
950 F. Street, NW, Ste. 1050
Washington, DC 20004
928-814-8922
Kelty@narf.org
*Admitted Pro Hac Vice

Tara Ford*
Public Counsel
610 South Ardmore Avenue
Los Angeles, CA 90005
213.385.2977
tford@publiccounsel.org

Mustafa Filat*
Public Counsel
610 South Ardmore Avenue
Los Angeles, CA 90005

213.385.2977
ifilat@publiccounsel.org
*Admitted Pro Hac Vice

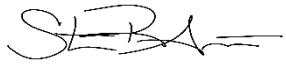
CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2024, Appellant Oglala Sioux Tribe's Reply Brief was served via the South Dakota Odyssey File and Service Portal and email upon the following:

Sara Frankenstein
Gunderson, Palmer, Nelson, Ashmore, LLP
506 Sixth Street
Post Office Box 8045
Rapid City, SD 57709
sfrankenstein@gpna.com
Counsel for City of Martin

This 22nd day of May 2024.

American Civil Liberties Union of South Dakota



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Stephanie R. Amiotte
South Dakota Bar No. 3116
P.O. Box 91952
Sioux Falls, South Dakota 57109
(605) 370-4313
samiotte@aclu.org