



## Statement of the Issues

- I. Whether Hearing Examiner Brady erred in finding that South Dakota statutes preclude the public disclosure of a death investigation record.
  
- II. Whether Hearing Examiner Brady erred in finding that the Attorney General did not abuse his discretion in denying Mercer's request when Benda's family would not consent to disclosure of the death investigation record.

## Statement of the Case and Facts

Mercer has brought this appeal under the public records disclosure provision in SDCL 1-27-41 and SDCL §§1-26-30 through 37. On December 18, 2013, the Office of Hearing Examiners received Mercer's Notice of Review – Request for Disclosure of Public Records.<sup>1</sup> Pursuant to SDCL 1-27-38, Mercer sought the Office of Hearing Examiners' review of the Attorney General's denial response of December 11, 2013, and the Attorney General's November 26, 2013 response to Mercer's request for disclosure of the Office of Attorney General's investigative records and reports regarding the death of Richard L. Benda. The Attorney General filed a response to the Notice of Review on January 2, 2014.<sup>2</sup> Mercer filed a reply to the Attorney General's Office response on January 6, 2014.<sup>3</sup>

On May 9, 2014, after review of the submissions, Hearing Examiner Brady entered Findings of Fact, Conclusions of Law, and Order upholding the Office of Attorney General's denial of Mercer's request for disclosure.<sup>4</sup> The Hearing Examiner determined that the Attorney General's Office records which Mercer sought were not records required to be disclosed to the public under SDCL Ch. 1-27,

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<sup>1</sup>Administrative Record (AR) 1-27.

<sup>2</sup> AR 32-65

<sup>3</sup> AR 67-73

<sup>4</sup> AR 75-82

and that the Attorney General acted within his statutory authority in denying Mercer's request.<sup>5</sup> Mercer filed his Notice of Appeal on June 4, 2014 from the Office of Hearing Examiners' decision.<sup>6</sup>

In order to understand the request for public records and the interests implicated, some background as to the contents of the record is necessary for context purposes. Richard L. Benda was the former Secretary of Tourism and State Development during the administration of Governor Michael Rounds. In that capacity, Benda worked to develop and finance the building of Northern Beef LP in Aberdeen, South Dakota, which is now bankrupt.

In the spring of 2013, at the request of Governor Dennis Daugaard, the Office of Attorney General began a criminal investigation of potential financial misconduct in the Governor's Office of Economic Development involving voucher reimbursements.<sup>7</sup>

Upon the conclusion of the criminal investigation, pursuant to SDCL 1-11-1(2) and (9), the Attorney General notified the Governor regarding the results of that investigation on November 21, 2013.<sup>8</sup> Though there was evidence of criminal wrongdoing, the Attorney General advised that no action would be pursued since the individual involved was deceased.<sup>9</sup>

The Attorney General reported to the Governor that during the investigation, the Attorney General's Office discovered additional financial concerns relating to the \$1 million Future Fund Grant to assist Northern Beef LP.<sup>10</sup> These potential financial concerns arose out of the EB-5 program operated by the State of South Dakota in conjunction with the South Dakota Regional Center, Inc.<sup>11</sup> The Attorney

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<sup>5</sup> See, Conclusions of Law(COL) IV and V, AR 80

<sup>6</sup> AR 87-88

<sup>7</sup> AR 36, 62

<sup>8</sup> AR 36,62-63

<sup>9</sup> AR 62

<sup>10</sup> AR 36, 62-63

<sup>11</sup> AR 36

General advised the Governor that since the EB-5 program is a federal immigration program run and controlled by the federal immigration authorities, the Attorney General provided its entire criminal investigation file to the federal authorities and that the Attorney General's Office would continue to assist federal authorities regarding the matter.<sup>12</sup> The investigation may contain grand jury materials, and "has generally included review of thousands of pages of voluminous financial records including bank records, loan documentation, correspondence, emails, witness interviews, preparation of criminal process documentation, and meetings with retained defense counsel."<sup>13</sup>

On October 22, 2013, Richard L. Benda was found dead by a family member in rural Charles Mix County, South Dakota.<sup>14</sup> The Charles Mix County Sheriff's Office requested that DCI conduct an in-depth investigation into the cause of Benda's death and whether the death was the result of criminal activity or foul play.<sup>15</sup>

On November 21, 2013, after the conclusion of the DCI's investigation of the death of Richard Benda, the Attorney General Office issued a press release.<sup>16</sup> The press release stated the conclusions of the investigation: that Benda's death was the result of a self-inflicted gunshot wound and that there was no evidence of foul play. The official Certificate of Death, dated November 27, 2013, has been made available to the public.<sup>17</sup> Benda's Certificate of Death included the following information:

CAUSE OF DEATH PART I: PENETRATING SHOTGUN WOUND  
OF ABDOMEN WITH SHOT GUN...

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<sup>12</sup> AR 36

<sup>13</sup> AR 36

<sup>14</sup> AR 36

<sup>15</sup> AR 36-37, 48

<sup>16</sup> AR 64

<sup>17</sup> AR 65

PART II:

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HOW THE INJURY OCCURRED: DECEDENT SECURED  
SHOTGUN AGAINST TREE, USED A STICK TO PRESS TRIGGER  
TO SHOOT HIMSELF IN ABDOMEN.<sup>18</sup>

On November 26, 2013, Mercer made a written Public Records Request under SDCL 1-27-37 for "reports received by and compiled for Attorney General Marty Jackley regarding the Oct. 20 death of Richard Benda."<sup>19</sup> In making his request, Mercer stated:

**I acknowledge that 1-27-1.5(5) provides an exemption that precludes public release of such documents, and that Attorney General Marty Jackley has previously declined to provide the reports citing privacy of the family...**<sup>20</sup> (emphasis added).

The Attorney General's Office responded to Mercer's request on November 26, 2013.<sup>21</sup> This response set forth the statutes that exempted the reports sought by Mercer from the public records disclosure provisions in SDCL Ch. 1-27. Rather than denying the request outright based upon the cited provisions, the Attorney General notified Mercer that he would provide limited disclosure of information upon Mercer meeting of certain preconditions:

Despite the lack of any credible evidence calling into question either the independent forensic pathologist report or law enforcement's crime scene death investigation reconstruction and forensic testing, there is a public interest given the unique nature and circumstances of this case that must be balanced with the criminal process including the presumption of innocence and individual medical and privacy interest. The Attorney General has offered and will make available to Richard Benda's immediate family, the death investigation file if the family so desires. The Attorney General will also make

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<sup>18</sup> AR 65

<sup>19</sup> AR 12-13

<sup>20</sup> AR 12

<sup>21</sup> Finding of Fact (FOF) II; AR 14-18

available to the public, through media representatives, the death investigation file subject to the following conditions:

1. All reasonable privacy related items and any Rule 6(C) grand jury materials will need to be redacted; and
2. A member of Richard Benda's immediate family as defined under South Dakota law execute a written release granting permission for disclosure as set forth herein; and
3. The media select two representative members, following the procedure with the media viewing a lawful execution in South Dakota, to review the redacted materials with the Attorney General. While copies of documentation would not be released, the media representatives would have an opportunity to report their impressions and information they glean from this investigation.

Mercer was unable to fulfill the second condition and on December 6, 2013 he filed an Amended Public Records Request under SDCL 1-27-37.<sup>22</sup> In the Amended Request, Mercer sought disclosure of the requested records without the Attorney General's precondition that a member of Richard Benda's immediate family execute a written release. Mercer complained that there was no immediate family member capable of executing a release. On December 7, 2013, Mercer submitted a Supplement to Amended Public Records Request under SDCL 1-27-37.<sup>23</sup> In the supplement, Mercer detailed his efforts to obtain a release from Benda's ex-wife and mother of Benda's daughter and various other individuals who would fall within the definition of Benda's immediate family.

In a letter dated December 11, 2013, the Attorney General denied Mercer's amended and supplemental public records requests.<sup>24</sup> Therein, the Attorney General set forth the reasons for the denial including: that the requested records fell within statutory exceptions to public disclosure; the refusal of any member of

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<sup>22</sup> AR 19-20

<sup>23</sup> AR 21-23

Richard Benda's immediate family to provide a written release; and the Attorney General's concern that disclosure could affect the innocent members of the family or minor child.

### Standard of Review

This appeal is before the Circuit Court as an administrative appeal brought pursuant to the provisions of SDCL 1-27-41 and §§1-26-30 through 37. As an administrative appeal, the Court's review of the Attorney General's denial of mercer's public records request is confined to the Office of Hearing Examiners' administrative record and matters properly moved by a party for the court to take judicial notice.<sup>25</sup> This court's review of this appeal is governed by SDCL 1-26-36, which sets forth the standard of review as follows:

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the

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<sup>24</sup> AR 58-61

<sup>25</sup> See, SDCL 1-26-35; SDCL Ch. 19-10; and *Kurtenbach v. Frito-Lay*, 1997 SD 66, ¶24 n.4

agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

The ultimate issue before this court on appeal is whether the record contains substantial evidence to support the Attorney General's Office's determination.<sup>26</sup> The court shall only reverse the administrative determination if, after careful review of the record, the court is definitely and firmly convinced a mistake has been committed or if the decision constituted "an abuse of discretion or clearly unwarranted exercise of discretion."<sup>27</sup>

This court's review in this case is de novo as the Hearing Examiner's determination was based on the written record and interpretation of law.<sup>28</sup> Mercer has appeared pro se at the administrative level and before this court on appeal. Mercer's brief was filed and served before the Office of Hearing Examiners filed the administrative record and indices with the Clerk of Courts. The brief contains no references to the administrative record. Further, Mercer's statement of the case, facts and argument include references to statements, conversations, and alleged facts that are absent from the settled record, and for which there was no request for judicial notice. As appellant, it was Mercer's ultimate responsibility for presenting an adequate record on appeal.<sup>29</sup> Mercer seeks leniency from the court given his pro se status in his attempts to supplement the record. However, as the Appellee Office of Attorney General Brief, page 7 properly states, "[a]n unrepresented party 'can claim no advantage from his [pro se] status.'<sup>30</sup> When a litigant proceeds without the assistance of an attorney, that litigant cannot use this pro se status as an excuse for ignorance of court rules, court procedures or the rules of law.<sup>31</sup> The court must and does ignore all statements and factual references by Mercer that are not supported by the administrative record.

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<sup>26</sup> *Hanten v. Palace Builders, Inc.*, 1997 SD 3, ¶8

<sup>27</sup> *In the Matter of the Application of Benton*, 2005 SD 2, ¶8

<sup>28</sup> *Id.*; *McKibben v. Horton Vehicle Components, Inc.*, 2009 SD 47, ¶11

<sup>29</sup> *Strong v. Gant*, 2014 SD 8, ¶23; *In the Matter of the Application of B.Y. Development, Inc.*, 2000 SD 102, ¶9

<sup>30</sup> *Webb v. Webb*, 2012 SD 41, ¶14



Furthermore, issues of statutory interpretation are a question of law and reviewed de novo.<sup>32</sup> South Dakota courts follow specific statutory construction rules. “Interpreting statutes according to their plain language is a primary rule of statutory construction.”<sup>33</sup> If the “language of the statute is clear, certain and unambiguous, there is no reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed.”<sup>34</sup> “The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute.”<sup>35</sup> “The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.” In *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 (citations omitted) the Supreme Court states:

Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.

### Memorandum Decision

- I. **Hearing Examiner Brady did not err in finding that South Dakota statutes preclude the public disclosure of a death investigation record.**

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<sup>31</sup> Id

<sup>32</sup> *State v. Erwin*, 2013 S.D. 35, ¶ 8, 831 N.W.2d 65, 67 (citing *State v. Jucht*, 2012 S.D. 66, ¶ 22, 821 N.W.2d 629, 634).

<sup>33</sup> *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 (*State v. Young*, 2001 S.D. 76, ¶ 6, 630 N.W.2d 85, 87).

<sup>34</sup> *Erwin*, ¶ 8, 831 N.W.2d at 67 (quoting *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611).

<sup>35</sup> *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17 (citing *U.S. West Communications, Inc. v. Public Util. Comm'n*, 505 N.W.2d 115, 122-23 (S.D.1993)).

South Dakota's Public Record laws are codified at SDCL Ch. 1-27. This court has jurisdiction to hear this appeal pursuant to SDCL 1-27-41, which provides that "[t]he aggrieved party may appeal the decision of the Office of Hearing Examiners to the circuit court pursuant to chapter 1-26."

In 2009 the South Dakota Legislature amended the laws and changed what records should be made public and subject to public inspection and copying. The interpretation of these statutes, as amended, is one of first impression. Before 2009, SDCL 1-27-1 provided that "if the keeping of a record . . . [was] required of an officer or public servant under any statute of this state, the officer or public servant shall keep the records . . . available and open to inspection . . . ." In 2009, the Legislature broadened its presumption of openness,<sup>36</sup> so that it can only be rebutted by another statute which expressly exempts a specific type of record, discarding the requirement that the record must be "kept." At the same time the Legislature expanded its public record law to allow more records to be subject to inspection, it also limited it by adding 27 exemptions.<sup>37</sup>

In order for Mercer to prevail on his appeal, he must establish as a matter of law that the records requested for disclosure, "the reports received by and compiled for Attorney General regarding the October 20 death of Richard Benda," are public records subject to the mandatory disclosure provisions in SDCL Ch. 1-27. The general provisions for disclosure can be found in SDCL 1-27-1, §1-27-1.1 and 1-27-1.3.

As amended, SDCL 1-27-1 provides:

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

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<sup>36</sup> Swier, S., *The South Dakota Public Records Dispute Resolution Procedure and Public Records Act: A Fundamental Change in South Dakota Law*, 55 S.D.L. REV. 1, 3 (2010).

<sup>37</sup> SDCL 1-27-1.5(1)-(27); S.B. 147, 84<sup>th</sup> Leg. (S.D. 2009)

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 1-27-1.1 provides:

Unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public, public records include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form remains a public record when maintained in any other form. For the purposes of §§1-27-1 to 1-27-1.15, inclusive, a tax-supported district includes any business improvement district created

SDCL 1-27-1.3 provides:

The provisions of §§1-27-1 to 1-27-1.15, inclusive, and 1-27-4 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them. Use of funds as needed for criminal investigatory/confidential informant purposes is not subject to this section, but any budgetary information summarizing total sums used for such purposes is public. Records which, if disclosed, would impair present or pending contract awards or collective bargaining negotiations are exempt from disclosure.

The records requested by Mercer were prepared and received by the Attorney General in conjunction with DCI's request from the Charles Mix County Sheriff to investigate the death of Richard Benda.<sup>38</sup> The investigation DCI performed was to

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<sup>38</sup> Early in this case's procedural history, the Attorney General believed that Mercer was requesting inspection of the criminal investigation file for decedent Richard

determine whether or not the death was the result of criminal activity or foul play.<sup>39</sup> It is undisputed that under the provisions of SDCL 23-3-6 through §23-3-15.1, the DCI is a law enforcement agency under the control of the Attorney General that is authorized to perform various law enforcement-related duties, including cooperating with local law enforcement officers in the performance of their duties.

The presumption of openness must yield to certain confidential criminal justice information and certain criminal history information that the legislature determined to be specifically exempt from disclosure pursuant to SDCL 1-27-1.5(5) and 23-5-11. SDCL 1-27-1.5 provides in relevant part:

The following records are not subject to §§1-27-1, 1-27-1.1, and 1-27-1.3:

...

(5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, if the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training. However, this subdivision does not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person, and this subdivision does not apply to a 911 recording or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure. This law in no way abrogates or changes §§23-5-7 and 23-5-11 or testimonial privileges applying to the use of information from confidential informants;

SDCL 23-5-11 provides:

Confidential criminal justice information and criminal history information are specifically exempt from disclosure pursuant to §§1-27-1 to 1-27-1.15, inclusive, and may be withheld by the lawful custodian of the records. Information about calls for service revealing the date, time, and general location and general subject matter of the call is not confidential criminal

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Benda. But in his January 6, 2014 response, Mercer clarified that "...the scope of this public records request is solely for the Benda death investigation reports." FOF IX, AR 77

<sup>39</sup> AR 36-37, 48

justice information and may be released to the public, at the discretion of the executive of the law enforcement agency involved, unless the information contains intelligence or identity information that would jeopardize an ongoing investigation. The provisions of this section do not supersede more specific provisions regarding public access or confidentiality elsewhere in state or federal law.

The definition of confidential criminal justice information is set forth in SDCL 23-5-10, which provides in relevant part:

(1) "Confidential criminal justice information," criminal identification information compiled pursuant to chapter 23-5, criminal intelligence information, criminal investigative information, criminal statistics information made confidential pursuant to §23-6-14, and criminal justice information otherwise made confidential by law;

(2) "Criminal history information," arrest information, conviction, information, disposition information, and correction information compiled by the attorney general pursuant to chapter 23-5, commonly referred to as a "rap sheet";

...

(4) "Criminal investigative information," information associated with an individual, group, organization, or event compiled by a law enforcement agency in the course of conducting an investigation of a crime or crimes. This includes information about a crime or crimes derived from reports of officers, deputies, agents, informants, or investigators or from any type of surveillance;

The court has reviewed the public records statutes and finds the language of the statutes to be clear, certain and unambiguous, so there is no reason for construction or interpretation. The court's only function is to declare the meaning of the statutes as clearly expressed.<sup>40</sup> The court gives the words and phrases their plain meaning and effect and determines that the statutes, taken as a whole, preclude the public disclosure of the death investigation record.

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<sup>40</sup> *Erwin*, ¶ 8, 831 N.W.2d at 67 (quoting *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611).

In fact, Mercer, in his initial request and brief on appeal has conceded that the requested records are exempt from disclosure under the provisions of SDCL 1-27-1.1(5).<sup>41</sup> In his “description of legal issues” and prayer for relief, Mercer asks this court to declare that law enforcement death investigations which end with the conclusion that death was caused by suicide or accident are to be made public, and order the Attorney General to disclose the DCI’s investigation file. As argued in the Appellee Office of Attorney General Brief, page 12:

Mercer inappropriately requests this Court to become a super-legislature and craft language that, to date, the Legislature has not enacted. Mercer’s plea does not square with standard rules of statutory construction. “In interpreting legislation, this Court cannot add language that simply is not there.” (citations omitted).

Mercer’s reliance on South Dakota and Supreme Court cases to convince the court to grant access to the requested records is misplaced. *In the Matter of Hughes County Action*, 452 NW2d 128 (SD 1990) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555(1980) the courts addressed the constitutional, common law, and statutory rights of the public and press for access to court proceedings and hearing.<sup>42</sup> Unlike public access to court proceedings, hearings and court documents, the general public and press do not have a recognized constitutional right of access to documents held by law enforcement agencies.

As made clear in *Argus Leader v. Hagen*, 2007 SD 96, the ability of the general public and the press to obtain records from governmental agencies and entities is wholly governed by statute. The fact that the DCI’s investigation concludes that there was no evidence of a crime or foul play in Benda’s death provides no legal basis to modify or reverse the Attorney General’s denial of Mercer’s public records disclosure request. The provisions of SDCL 1-27-1.5(5), §23-5-10 and -11 are clearly intended by the Legislature (with certain narrowly defined exceptions) to allow law enforcement agencies the ability to conduct investigations free from mandatory disclosure upon request of a member of the public.

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<sup>41</sup>See, AR 12, Brief of Appellant at p.4

<sup>42</sup> See also, *Rapid City Journal v. Delaney*, 2011 SD 55.

Mercer next contends that the death investigation record is not included in the category of records in SDCL 23-5-11. Mercer argues that the death investigation records are not "criminal justice information" or "criminal history information" because a suicide is not a crime and thus should be released. The court does not agree with this argument. To take Mercer's position that an outcome of an investigation is what defines that record as criminal or not is contrary to statute and reason. While the DCI investigation ruled out criminal activity as the cause of death of decedent Benda, the record still contains "criminal investigation information" and "criminal justice information" that was used to determine there was not any criminal activity. If the court adopted Mercer's argument that the court adopt language that would allow law enforcement death investigations that concluded that a death caused by suicide or accident are to be made public, this would open the door to the next request that law enforcement release all criminal investigation records where charges were dropped or the case ended in an acquittal. The circumstances under which records and reports of law enforcement investigations into the death of an individual should be disclosed to the public remains an issue for the Legislature, not the courts. If the legislature wants to expand our public record laws to allow the release to the public of all law enforcement death investigations that concluded the death was the result of a suicide or accident, that is their job to do in the next legislative session.

This court concludes from a review of the undisputed facts and provisions of law that the records in the DCI death investigation file involving Richard Benda are clearly exempt from disclosure under the provisions of SDCL 1-27-1.5(5) and SDCL 23-5-11. Hearing Examiner Brady did not err in finding that South Dakota statutes preclude the public disclosure of a death investigation record.

**II. Hearing Examiner Brady did not err in finding that the Attorney General did not abuse his discretion in denying Mercer's request when Benda's family would not consent to disclosure of the death investigation record.**

Mercer contends that the Attorney General's attempt to craft a means by which Mercer could obtain partial disclosure of information in the DCI's death investigation file was legally inadequate and requires modification by this court. Mercer requests the court to independently exercise agency discretion to craft alternative criteria that allows him to review DCI's death investigation file. There is no legal or factual support for Mercer's request.

Under SDCL 1-26-36(6), the court may only reverse or modify the Attorney General's decision if it is established that the substantial rights of Mercer have been prejudiced because the administrative decision was "[a]rbitrary or capricious or characterized by an abuse of discretion, or clearly unwarranted exercise of discretion" as "discretion exercised to an end or purpose not justified by, and clearly against reason and evidence."<sup>43</sup>

It is undisputed in his letter dated November 26, 2013, the Attorney General, notwithstanding any legal obligation or duty, and given the unique circumstances surrounding the matter, advised Mercer that if he met three preconditions, the Attorney General would exercise implied discretion and allow limited disclosure of information from DCI's investigative file. There is nothing in the record that supports any inference that at the time the Attorney General set the three preconditions that Mercer could not meet them.

On appeal, Mercer appears to argue that in the absence of legislatively proscribed standards, the Attorney General had no discretion to fashion a limited disclosure option. If this argument is adopted by the court, then the court must find that the Attorney General had no discretion to disclose records to the general public under SDCL Ch. 1-27, and Mercer did not lose any rights when the Attorney General added three preconditions.

The court finds that the Attorney General does have discretion to disclose information to the public from DCI's investigation file pursuant to SDCL 1-27-37(1)(a), (b) and (c)<sup>44</sup>, and that the Attorney General's decision to exercise discretion

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<sup>43</sup> *Argus Leader v. Hagen*, 2007 SD 96, ¶7

<sup>44</sup> SDCL 1-27-37 provides in relevant part:



in a manner that took into consideration the personal privacy interests of the Benda family is not “discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.”<sup>45</sup> As provided in Appellant Office of Attorney General’s Brief, page 15, there is no evidence that the Attorney General abused his discretion by making consent from a member of Benda’s immediate family a precondition to disclosure. The Attorney General’s decision to exercise his discretion in a manner that took into consideration the personal privacy interests of the Benda family is not “discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.”<sup>46</sup> Recognizing that Benda’s family may have personal and privacy reasons to keep the details of his suicide confidential is not unjustified or unreasonable.

In *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157, 160-161 (2004), when President Clinton’s deputy counsel, Vincent Foster, was found dead of an apparent suicide, the media wished to compel the release of 4 death scene photos. The Court recognized that family members have a personal privacy interest “to be shielded by the [law enforcement record] exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased.”<sup>47</sup> Further, the Court required a balancing to

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... (1) A written request may be made to the public record officer of the public entity involved. The public record officer shall promptly respond to the written request but in no event later than ten business days from receipt of the request. The public record officer shall respond to the request by:

- (a) Providing the record in whole or in part to the requestor upon payment of any applicable fees pursuant to §§1-27-35 and 1-27-36;
- (b) Denying the request for the record; or
- (c) Acknowledging that the public record officer has received the request and providing an estimate of the time reasonably required to further respond thereto;

<sup>45</sup> *Argus Leader v. Hagen*, 2007 SD 96, ¶7

<sup>46</sup> *Argus Leader v. Hagen*, 2007 SD 96, ¶7

<sup>47</sup> *Nat’l Archives and Records Admin.*, 541 U.S. at 166

determine if release would be an *unwarranted invasion of personal privacy*.<sup>48</sup> When privacy concerns as present, the requesting party must show sufficient reason for disclosure to overcome the “presumption of legitimacy accorded to the Government’s official conduct” by clear evidence that officials acted negligently or improperly.<sup>49</sup> Neither the “decedent’s former status as a public official, nor the fact that other pictures had been made public, detracts from the weighty privacy interests involved.”

In the instant case, the information within the death investigation file is of the same type of detailed information as death scene photos, which are also likely within the death investigation file. Additionally, the file may contain more information about the incident upsetting to close family members. Release of more detailed information than already released and published<sup>50</sup> would disrupt any peace the decedent’s family has gained. Mercer asserts that his purpose in compelling the record is for the public to determine the cause of death for itself.<sup>51</sup> Mercer fails to rebut the presumption of legitimacy by failing to show any evidence that may reasonably contradict the independent forensic pathologist report, or the federal and local law enforcement’s crime scene death investigation reconstruction or forensic testing. A mere suspicion is not enough to outweigh the privacy interests, the presumption of innocence, protection of the criminal process, and protection of the decedent’s minor child. Just like in *Nat’l Archives*, neither the “decedent’s former status as a public official, nor the fact that [information about the death has] been made public, detracts from the weighty privacy interests involved.

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<sup>48</sup> Exemption 7(C) uses the word “unwarranted” while SDCL 1-27-1.10 used the term “unreasonably.” Both result in a balancing of privacy interests with concerns about government transparency.

<sup>49</sup> *Nat’l Archives and Records Admin.*, 541 U.S. at 174

<sup>50</sup> The Death Certificate and a press release stating the cause of death as suicide and circumstances surrounding the incident have already been released. AR 64-65.

<sup>51</sup> Applicant also asserts that there is speculation as to the former Administration involvement in foreign investors. That information, however, would be within the criminal investigation record, for which Applicant clarified he was not asking. Appellant’s Br. at 3; FOF IX, AR at 77.

The Attorney General was justified and warranted in balancing the release of the death investigation record with the privacy concerns. The Attorney General could have outright denied designation, but in keeping with his implied discretion to balance interests, he properly considered the immediate family members and minor child affected by release of more information.

Hearing Officer Brady did not err in finding that the Attorney General did not abuse his discretion in denying Mercer's request when Benda's family would not consent to disclosure of the death investigation record.

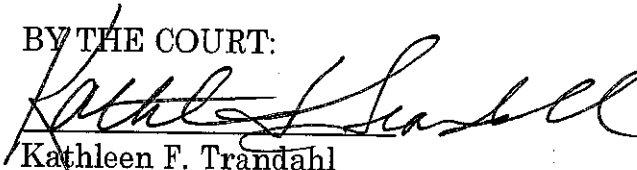
### Conclusion

For the foregoing reasons, the Hearing Examiner's decision is affirmed.

Mr. Hallem is directed to prepare the order affirming the decision of the OHE in accordance with this decision.

Dated this 2nd day of September, 2014.

BY THE COURT:

  
Kathleen F. Trandahl  
Circuit Judge

ATTEST:

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Kelli Sitzman  
Clerk of Courts

cc: Robert M. Mercer  
Jeffrey P. Hallem