

OFFICIAL OPINION NO. 03-01, Pardons

February 14, 2003

The Honorable Chris Nelson
Secretary of State
500 East Capitol Avenue, Ste. 204
Pierre, SD 57501-5070

OFFICIAL OPINION 03-01

Pardons

Dear Secretary of State Nelson:

You have requested an official Attorney General's opinion regarding the following factual situation:

FACTS:

The Secretary of State is required under SDCL 1-8-1(1) and (2) to affix the great seal to and file pardons issued by the governor. I have received a request to disclose the names of individuals who are named on Orders Granting Pardon that were filed in the Secretary of State's Office from 1995 through 2002. All of the pardons issued during this period of time include language similar to the following: "It is further ordered that all official records relating to this personal offense, along with all recordation relating to the defendant's arrest, indictment or information, trial, finding of guilt and receipt of a pardon are hereby sealed pursuant to § 24-14-11 of the South Dakota Codified Laws."

Based upon this factual situation, you asked the following questions:

QUESTION NO. 1:

Are all Orders Granting Pardon required to be sealed?

QUESTION NO. 2:

If the answer to Question No. 1 is "no" and some Orders Granting Pardon are subject to disclosure, how do I determine which pardons may be disclosed?

A brief discussion of South Dakota open records laws and pardons is necessary to give context to the answers to your questions.

OPEN RECORDS LAWS

As you have correctly noted, the Secretary of State is specifically required to keep and file pardons pursuant to SDCL 1-8-1(1) and (2), which state as follows:

It is the duty of the secretary of state:

(1) To file official acts of the Governor to which attestation over his signature and the great seal is required;

(2) To affix the great seal and his attestation to all commissions, pardons, and other public instruments.

This statute gives direction on whether the records are public. SDCL 1-8-1(2) states that the Secretary of State is to affix the seal and attest to all "commissions, pardons and other public instruments to which the signature of the Governor is required" and then enumerates certain exceptions (none of which is applicable here). Use of the term "other public instruments" immediately following the reference to pardons is meaningful. It is apparent that the term is designed to include a group of similar documents, all of which are public. In the absence of such interpretation, the term "other" would be surplusage. Indeed, effect should be given to every part and every word of the statute being interpreted. Maynard v. Heeren, 563 N.W.2d 830 (1997). Accordingly, the general law applying to the Secretary of State provides that pardons are public.

The foregoing general rule is consistent with the policy set forth in SDCL 1-27-1. In that statute, the legislature declared its public record policy. The statute provides, in pertinent part:

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

An exception to this general rule is found in SDCL 1-27-3, which reads:

Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept.

Thus, because the Secretary of State is legally required to file pardons pursuant to SDCL 1-8-1(1) and (2), such pardons are open to public inspection unless the legislature has declared otherwise.

PARDONS

The power to pardon an individual for a criminal offense is granted to the Governor by the South Dakota Constitution at Article IV, Section 3, which states:

The Governor may, except as to convictions on impeachment, grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures.

The above quoted provision was adopted in 1972.^[1] Therefore, since 1972, every South Dakota Governor has enjoyed the self-executing constitutional power to "grant pardons, commutations, and reprieves, . . ."

In 1978, the legislature enacted SDCL 24-14-1, which states:

The Governor may, by executive order, delegate to the board of pardons and paroles [hereinafter "Board"] the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.

In 1987, Governor George S. Mickelson entered an Executive Order pursuant to SDCL 24-14-1.^[2] Since then the Board has periodically been utilized to process applications for pardons.

There are four avenues for seeking a pardon:

First: an applicant can petition the Board for an Executive Order Pardon under SDCL ch. 24-14 and Executive Order 87-15.

Second: an applicant can petition the Board for an Exceptional Pardon under SDCL 24-14-8 if the applicant has been released from the penitentiary for at least 5 years and has had only one felony for an offense punishable by imprisonment less than life.

Third: an applicant may petition the Governor who may refer the application to the Board for consideration and a recommendation pursuant to SDCL 24-14-5.

Fourth: an applicant may petition the Governor who may act on the application pursuant to his constitutional power without involving the Board or SDCL ch. 24-14 in any way (hereafter "constitutional pardon").

The first, second and third avenues all require compliance with the process set forth in SDCL ch. 24-14 and ARSD 17:60:05. This process includes: notice to the prosecuting attorney, judge who presided at the trial and county sheriff (SDCL 24-14-3 and ARSD 17:60:05:03 and 06); a hearing which is open to the public and allows objectors to appear in person or through writing (SDCL 24-14-6); and, in cases other than exceptional pardons, publication of the notice of hearing in newspapers of general circulation in the county where the offense was committed and posting of the notice in a conspicuous place on the door of the county's courthouse. SDCL 24-14-4. Publication and posting the notice of hearing is not required for exceptional pardons. SDCL 24-14-9. After the hearing, the Board makes a recommendation to the Governor, all pursuant to SDCL ch. 24-14.

However, the fourth avenue (constitutional pardon) does not involve the Board or SDCL ch. 24-14 in any way, and does not contemplate any public notice or hearing. It is simply an exercise by the Governor of his constitutional power to pardon.

IN RE QUESTION 1:

You ask whether all pardons filed in your office are required to be sealed. The answer to your question is "no," because of the limiting language of SDCL 24-14-11, which states:

Any person who has been granted a pardon **under the provisions of this chapter** shall be released from all disabilities consequent on such person's conviction. Upon the granting of a pardon **under the provisions of this chapter**, the Governor shall order that all official records relating to the pardoned person's arrest, indictment or information, trial, finding of guilt and receipt of a pardon shall be sealed. The effect of such order is to restore such person, in the contemplation of the law, to the status the person occupied

before arrest, indictment or information. No person as to whom such order has been entered may be held thereafter under any provision of any law to be guilty of perjury or of giving a false statement by reason of such person's failure to recite or acknowledge such arrest, indictment, information or trial in response to any inquiry made of such person for any purpose.

For the sole purpose of consideration of the sentence of a defendant for subsequent offenses or the determination of whether the defendant is a habitual offender under chapter 22-7, the pardoned offense shall be considered a prior conviction.

(Emphasis added.)

The phrase "under the provisions of this chapter" refers to SDCL ch. 24-14 and mandates the sealing of the records of a pardon when the pardon was issued "under the provisions of" SDCL 24-14 ("this chapter"). The statute makes no reference to pardons issued outside of SDCL ch. 24-14.

The question you raise involves statutory construction. When answering questions of this nature, this Office utilizes the rules of construction adopted by our Supreme Court:

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. 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. When the language in a 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.

Moss v. Guttormson, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17 (citations omitted).

Based on the clear and unambiguous language of SDCL 24-14-11, it is my opinion that only those pardons that are granted under the provisions of SDCL ch. 24-14 can be sealed. Any pardons granted without utilizing the provisions of SDCL ch. 24-14 may not be sealed, notwithstanding any language to the contrary that is in an order granting pardon. Thus, SDCL 24-14-11 is an exception to the public records law, but only for those pardons granted after compliance with the Board process in ch. 24-14.

I have reviewed other statutory exceptions to the public records provisions and find none of them applicable. Further, given pre-1983 South Dakota law that all pardons were open to public inspection, I conclude that the right of a governor to issue pardons does not include the inherent power to seal such record. This is consistent with the Vermont Supreme Court's decision in Doe v. Salmon, 378 A.2d 512 (Vt. 1977) wherein the court held, despite a constitutional provision similar to South Dakota's, that there was no constitutional or common law authority supporting the premise that records of pardons are exceptions to the public record laws. Therefore, under circumstances where ch. 24-14 is not utilized, a governor's order sealing a pardon has no force and effect.

IN RE QUESTION 2:

I understand that, with respect to the pardons filed with your office from 1995 through 2002, some were granted utilizing SDCL ch. 24-14 and some were granted under a governor's inherent constitutional authority. There is nothing on the face of the documents that allows you to discern which pardons were granted under the SDCL ch. 24-14 process because all of these pardons contain language directing that they be sealed pursuant to SDCL 24-14-11. Further, I understand you do not have any other information in your possession allowing you to determine which pardons utilized the statutory procedure. The ultimate issue, then, is whether you have the authority and ability to determine which pardons are open to public inspection.

While the filing of pardons is a ministerial duty of your office, you also have an inherent duty to comply with the public records laws in SDCL ch. 1-27. Therefore, if you can obtain information which allows you to determine which pardons can be made public, you should do so. I recognize the information necessary for you to make this determination is not in your office.

In my opinion, because the Secretary of State already possesses all pardons, it is not a violation of SDCL 24-14-11 for the Board to disclose to the Secretary of State the names of those applicants who utilized the ch. 24-14 procedure. Therefore, the Board may provide you with this information, which you may use to determine which pardons shall be open to the public.

In conclusion, those pardons granted as a result of an application processed under SDCL ch. 24-14 are properly sealed. The others are available for public inspection.

Very truly yours,

LARRY LONG
ATTORNEY GENERAL

[1] Prior to 1972, a governor's power to pardon was limited by the prior version of Article IV, Section 5 of the South Dakota Constitution and SDCL ch. 23-59. Under those provisions of law, the legislature was specifically authorized to regulate the process of obtaining a pardon, and the governor was required to report to the legislature each session regarding the pardons granted. Further, the governor could only grant pardons upon recommendation of the Board of Pardons and Paroles. See In Re Opinion of the Judges, 83 S.D. 477, 161 N.W.2d 707 (1968). Under SDCL 23-59-3, which was first enacted in 1890 (now repealed), copies of all orders granting pardon were to be filed with the Secretary of State and kept as "records open to public inspection."

[2] See Ex. Order 87-15 (May 5, 1987). An executive order was also entered in 1982 which delegated similar authority to the Board regarding pardons. See Ex. Order 82-4 (April 12, 1982).