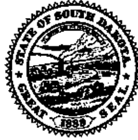
STATE OF SOUTH DAKOTA



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ATTORNEY GENERAL

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January 2, 2014

Hillary Brady
Office of Hearing Examiners
523 East Capitol Avenue
Foss Building
Pierre, SD 57501

RE: **Request for Disclosure of Public Records – Mercer v. South Dakota Attorney General's Office (OHE File – PRR 13-08)**

Dear Ms Brady,

Enclosed find the Attorney General Jackley's Response to Petitioner's Request and Certificate of Service in regard to the above matter. Thank you.

Sincerely,

Marty J. Jackley
Attorney General

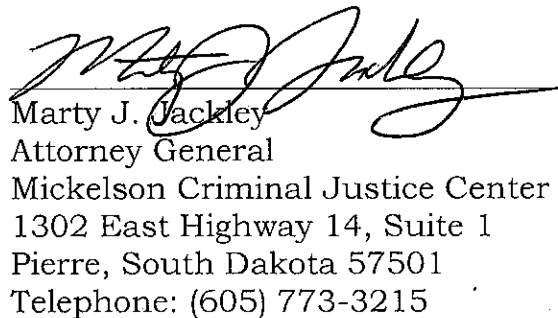
MJJ/lde
Enc.

cc: Bob Mercer w/attachments

STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINER

IN THE MATTER OF THE APPEAL OF CONDITIONAL GRANT OF PETITIONER BOB MERCER'S REQUEST FOR DISCLOSURE OF PUBLIC RECORDS	))))	CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Attorney General's Response to Petitioner's Request** filed in the above entitled matter was served upon Petitioner Bob Mercer, 1820 Camden Court, Pierre, SD 57501 by enclosing the same in an envelope with first class postage prepaid and affixed thereto, and depositing said envelope in the United States mail, at Pierre, South Dakota, on this 2nd day of January, 2014.



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STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINER

IN THE MATTER OF THE APPEAL OF CONDITIONAL GRANT OF PETITIONER BOB MERCER'S REQUEST FOR DISCLOSURE OF PUBLIC RECORDS	))))	ATTORNEY GENERAL JACKLEY'S RESPONSE TO PETITIONER'S REQUEST

Attorney General's Written Response to Notice of Review Request for Disclosure of the Richard Benda Investigation Files.

I. Procedural History

On November 26, 2013, Newspaper Reporter Bob Mercer, hereinafter "Petitioner," made a public records request under SDCL 1-27-37 requesting two specific matters:

1. The death investigation file of Richard L. Benda; and

2. The criminal investigation file wherein the Attorney General discovered and identified the redirection of $550,000 future funds monies to the federal EB5 loan program.

On that same date, the Attorney General granted in part Petitioner's request subject to three conditions. *See* Exhibit A (Attorney General conditional granting of public record request on November 26, 2013). The response set forth the South Dakota statutory framework that provides that investigation, confidential criminal justice information and grand jury materials are exempt and precluded from public record disclosures. *See* SDCL 1-27-1.5(5), 23-5-11 and 23A-5-16(Rule 6(e)). This public record statutory framework provides the legal authority to completely preclude the requested information from disclosure. However, in the interest of open transparency, the Attorney General sought an alternative to non-disclosure, allowing the media to see information, with conditions, that the media otherwise does not have a legal right to access. The conditions were derived from the Supreme Court case law in which an "alternative was designed to satisfy the interests of all parties." *See In the Matter of Hughes County Action,* 452 N.W.2d 128, 134 (S.D. 1990) (Exhibit B). Based upon the Attorney General's desire to address the public interest and maintain protection of the criminal process and the individual privacy rights of the innocent family members including a minor daughter, the following three conditions were established:

1. All reasonable privacy related items and any Rule 6(e) 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.

Responsibility for satisfying conditions 2 and 3 was set forth in the November 26, 2013, response as follows:

> In the event these three conditions are acceptable, I am requesting that you kindly present the signed released form as well as the identification of the two designated media representatives.

See Exhibit A (November 26, 2013, letter).

On December 6 and 7, 2013, the Attorney General received an amended and supplemental public record request from Petitioner, based upon his inability to satisfy conditions, specifically obtaining consent from the immediate family. Despite Petitioner's good faith efforts, the custodial parent, on behalf of a 16 year-old minor, has made it clear to Petitioner that they will not agree to any disclosure in order to protect her minor child.

On December 11, 2013, the Attorney General responded to Petitioner's amended and supplemental requests again reciting the conditions and responsibilities set forth in the Attorney General's November 26, 2013, correspondence. The Attorney General further reiterated:

> While the Attorney General is not concerned that the investigation evidence will not support the independent findings of the pathologist, the coroner's death certificate or state, federal, and local law enforcement death scene investigation, the Attorney General is concerned it may well affect the innocent members of a family or a minor child. Therefore, your amended and supplemental public records requests are denied until such time as the three conditions are fulfilled.

See December 11, 2013, correspondence (Exhibit C).

II. Facts

In the spring of 2013, the Attorney General and the Division of Criminal Investigation in conjunction and cooperation with other law enforcement agencies began a criminal investigation into potential financial misconduct in the Governor's Office of Economic Development. The Attorney General's investigation 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. On November 21, 2013, the Attorney General, pursuant to SDCL 1-11-1(2) and (9) advised Governor Daugaard, that the Attorney General's investigation revealed evidence of three instances of double-billings and double-recovery on vouchers. *See* Exhibit D. The Attorney General advised that because the individual who submitted the voucher was deceased, no criminal action would be pursued by the Attorney General's Office on the voucher matter. *Id.*

Furthermore, during its investigation, the Attorney General discovered additional financial concerns relating to a one million dollar future fund grant to assist Northern Beef LP. *Id.* The Attorney General advised the Governor of details outside of the grand jury process limitations of federal and state Rule 6(e), that in late January of 2011, state check #99697504 in the amount of one million dollars was issued and delivered to Northern Beef Packers LP. *Id.* However, $550,000 of said one million dollars was redirected from its intended purpose and purportedly used to pre-pay EB5 loan monitoring fees for the South Dakota Regional Center, Inc. (SDRC). *Id.* The investigation determined the circumstances giving rise to the diversion of funds, the amount involved, and when, where, why and how the diversion occurred. Because the EB5 Program is a federal immigration program run and controlled by federal immigration authorities, the Attorney General provided its entire criminal investigation file to federal authorities and will continue to assist federal authorities regarding concerns including the impropriety of the payment of the $550,000 loan monitoring fee toward a federally EB5 funded project. *Id.* Both the U.S. Attorney and civil counsel for the Governor's Office of Economic Development were provided these details and concerns of the Attorney General. *Id.*

On October 22, 2013, the South Dakota Division of Criminal Investigation was advised that the Charles Mix County Sheriff's Office was responding to a deceased subject that was found in a shelter belt in rural Charles Mix County. State, federal and local law enforcement authorities responded, secured the scene and preserved all items deemed to have potential evidentiary value for the determination of the cause and manner of death and to ultimately determine whether or not the death was the result of criminal activity or foul

play. An autopsy was requested from a Minnehaha County forensic pathologist.

On November 20, 2013, the Minnehaha County forensic pathologist issued the autopsy report indicating that the cause of death was "shotgun wound of abdomen" and manner of death "suicide." The very next morning, the Attorney General released the independent forensic pathologist findings of cause and manner of death, as well as a summary of its investigation results. *See* Exhibit E. The Attorney General specifically stated as follows:

> No physical or digital evidence has been found to indicate foul play. The investigation scene reconstruction, interviews conducted, evidence collected at the scene and forensic testing do not indicate foul play and are consistent with the forensic autopsy findings. The forensic testing included, but was not limited to firearm functioning, ballistic testing, DNA and fingerprinting.

See Exhibit D (Attorney General release of Thursday, November 21, 2013).

On November 27, 2013, the Charles Mix County Coroner issued his official certificate of death setting forth cause of death "PENETRATING SHOTGUN WOUND OF ABDOMEN WITH SHOT GUN." *See* Exhibit F (Certificate of Death – November 27, 2013.) The Certificate of Death further states that the injury occurred as follows:

> DECEDENT SECURED SHOTGUN AGAINST TREE, USED A STICK TO PRESS TRIGGER TO SHOOT HIMSELF IN ABDOMEN.

Id.

III. South Dakota Law prevents Public Record Disclosure of Investigations, Confidential Criminal Justice Information, and Grand Jury Materials.

A. South Dakota Statutory Disclosure Law.

South Dakota law recognizes that in *limited circumstances* even the desire for openness and government transparency must yield in order to protect criminal justice information, grand jury material and individual privacy rights.

SDCL 1-27-1.5(5) provides a specific on point exemption:

> (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 further specifically provides as follows:

> Confidential criminal justice information not subject to inspection—Exception. 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 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.

SDCL 23-5-10 sets forth the relevant definitions:

Terms used in §§ 23-5-10 to 23-5-13, inclusive, mean:

> (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;
>
> ....
>
> (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;

SDCL 23A-5-16 (Rule 6(e)) further specifically provides as follows:

> Disclosure of matters occurring before a grand jury, other than its deliberations and the vote of any juror, may be made to prosecuting attorneys for use in the performance of their duties. Otherwise a juror, attorney, witness, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only if directed by the court preliminary to, or in connection with, a judicial proceeding or if permitted by the court at the request of a defendant upon a showing that grounds may exist for a motion to dismiss an indictment because of matters occurring before a grand jury.

Accordingly, the public disclosure law protects certain matters and items that Petitioner is requesting. Based upon the clear and unambiguous public disclosure law protecting law enforcement investigations, confidential criminal justice information, and grand jury materials, the Attorney General respectfully submits that this Honorable Administrative Law Judge does not have the scope of authority to go beyond the statutory framework.

B. Scope of Authority limited by Statutory Framework

Jurisdiction in administrative law differs from jurisdiction in a traditional court setting. It has three components:

> (1) personal jurisdiction, referring to the agency's authority over the parties and intervenors involved in the proceedings, (2) subject matter jurisdiction, referring to the agency's power to hear and determine the causes of a general class of cases to which a particular case belongs, and (3) **the agency's scope of authority under statute.**

Martin v. American Colloid Company, 804 N.W.2d 65 at 67-68 (S.D. 2011) (other citations omitted) (emphasis added). The Hearing Examiner's scope of authority is limited by and cannot go beyond SDCL 1-26D-4; SDCL 1-27-1.5(5); SDCL 23-5-11; and SDCL 23A-5-16 (Rule 6(c)). These provisions make clear that the Hearing Examiner's administrative review in this matter is limited to the determination of the Attorney General's legal basis to deny Petitioner's public records request.

From a practical stand point, the Hearing Examiner's scope of review is similar to that of a court reviewing a writ of mandamus. *See e.g. Argus Leader v. Hagen*, 2007 S.D. 96, 739 N.W.2d 475. A determination is made by applying the undisputed facts to the statutes that make the requested information confidential. Nothing in SDCL chs. 1-27 or 1-26D allows the Hearing Examiner to craft a remedy that requires disclosure of information in contradiction to the applicable statutes.

In this case SDCL 1-27-1.5 (5), 23-5-11 and 23A-5-16 provide the statutory framework under which Petitioners request was denied. It cannot be disputed that information regarding the future fund monies provided Northern Beef Packers that is included in the Attorney General's Office criminal investigative file, which may include information obtained under the grand jury process, constitutes criminal investigative information as defined in SDCL 23-5-10 (4). It is clear from the Attorney General's letter to the Governor that the purpose of the investigation was to determine whether a violation of the state's criminal laws had occurred. As such, the information gathered by Division of Criminal Investigation agents that is contained in the criminal investigative file is confidential criminal justice information under SDCL 23-5-10 (1). This information also falls squarely with the provisions of SDCL 1-27-1.5 (5) and to the extent it has been obtained via grand jury it is protected by SDCL 23A-5-16.

It is also beyond dispute that the local, state and federal law enforcement investigation into the death of Richard Benda was conducted to determine if the death was the result of criminal activity or foul play. Such an investigation also constitutes criminal investigative information. The then on-going criminal investigation concerning actions of Benda provides factual support that the activities of the law enforcement offices were to determine whether criminal activity or foul play was involved. As such, information in the Attorney General's Offices death investigative file of Richard L. Benda is confidential criminal justice information and is also confidential under SDCL 1-27-1.5 (5).

These determinations should resolve Petitioner's request for review. However, if the Hearing Examiner determines it has authority to craft the Petitioner a remedy where the statutes provide none, the record does not support such an effort. The conditions the Attorney General established for disclosure are consistent with the analysis set forth in *In the Matter of Hughes County Action*, 452 N.W.2d 128, 134 (S.D. 1990)

C. South Dakota Supreme Court Case Law on Conditional Disclosure

In the *In re: Hughes County Action*, the South Dakota Supreme Court addressed the allegations of a rape incident at the Governor's residence as it

pertained to juvenile proceedings. *Id.* While addressing the openness of juvenile proceedings, the South Dakota Supreme Court concluded that "We will not condemn the trial court merely for attempting to provide an alternative to a totally closed hearing." *Id.* The Supreme Court recognized that a conditional access was offered merely as an alternative to a totally closed adjudicatory matter. *Id.* The Supreme Court placed further significance in the fact that the alternative was designed to satisfy the interest of all parties. *Id.* Under the South Dakota public disclosure law as set forth above, the requested criminal justice investigation information is confidential. As with the trial court in the *In re: Hughes County* case, the Attorney General has sought to offer an alternative that is designed to satisfy the interest of all parties. The alternative as set forth in the November 26, 2013, conditional grant included the following:

1. All reasonable privacy related items and any Rule 6(e) 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.

See Exhibit A (November 26, 2013 Letter).

1. All reasonable privacy related items and any Rule 6(e) grand jury materials will need to be redacted.

As to the first condition that privacy and grand jury matters be redacted, the Petitioner states: "The Attorney General in his response didn't consider redaction. The word doesn't appear in his original response or his second response." *See* Mercer Petition at p. 1. Condition #1 in the November 26, 2013, letter, sets forth "All reasonable privacy related items and any Rule 6(e) grand jury materials will need to be **redacted**." *See* Exhibit A (November 26, 2013, letter) (emphasis added). *See* also Exhibit C (December 11, 2013, supplemental letter). In any event, it would appear that both Petitioner and the Attorney General believe that the Attorney General is able to redact certain information, and this redaction condition should not serve to impede disclosure.

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.

This condition finds direct support in the *Hughes County* decision as an alternative designed to satisfy the interest of all parties. *See In re: Hughes County*, 452 N.W.2d at 134. The *Hughes County* Court emphasized that in addition to the juveniles charged, "The alleged victim in the present action is 16 years old. Her desire to have the juvenile proceedings closed to the media has been made known to this court." *Id* at 133. Richard Benda's family has made it clear and known to both Petitioner and the Attorney General that they do not wish for these matters to be further disclosed in order to protect an innocent 16 year old. *See* Mercer Petition at p. 1-2.

Petitioner has dedicated considerable effort in an analysis of the five balancing factors in the *Bradshaw* decision. *See Associated Press v. Bradshaw*, 410 N.W.2d 577 (S.D. 1987). Because the legislature has abrogated the pertinent statute, the Supreme Court has held that this balancing test no longer applies. *See In the matter of MC*, 527 N.W.2d 290, 292 (S.D. 1995). In fairness, *Bradshaw* was cited in the *Hughes County* decision, and while the *Bradshaw* balancing no longer may apply, conditioning access designed to satisfy the interest of all parties as opposed to strict closure would appear to remain an important consideration. *In re: Hughes County*, 452 N.W.2d at 134. It also is a process utilized by the court's in determining whether to maintain confidentiality of court records. *See* SDCL Ch. 15-15 and *Rapid City Journal v. Delaney*, 2011 S.D. 85 ¶ 26-28, 804 N.W.2d 388, 396-398.

As for the media interests, the *In re: Hughes County* Court recognized that:

> If the media coverage of this matter was not extensive and widespread then the risk of failing to preserve the State's interest in confidential juvenile proceedings would not be as great. When the media's coverage of an incident is extensive and widespread, however, there is a greater risk that the State's interest in preserving the confidentiality of such proceedings may be forsaken.

In re: Hughes County, 452 N.W.2d at 132-133.

The media's coverage in the Benda death investigation has been extensive including the forensic pathologist's determination of cause and manner of death, law enforcement's determination that the evidence did not indicate foul play and is otherwise consistent with the forensic autopsy findings has been extensive. Furthermore, the media has covered the Charles Mix County Coroner Certificate of Death indication that the "DECEDENT SECURED SHOTGUN AGAINST TREE, USED A STICK TO PRESS TRIGGER TO SHOOT

HIMSELF IN ABDOMEN." *See* Coroner's Report, Exhibit F. Similarly, the media has extensively covered the investigation into vouchers and the diversion of the $550,000.

The *Hughes County* Court further determined that both excessive and sensational treatment of the matter clearly supported the trial court's order of closure. *See In re: Hughes County,* 452 N.W.2d at 132. In doing so, the Supreme Court noted that "the Nationally televised program 'A Current Affair,' suggested that a crime had been committed at the Governor's residence and that officials of the State of South Dakota are trying to cover up the alleged fact." *Id.* The Court went on to firmly state that: "Such a suggestion or innuendo clearly indicates that this matter has been treated in a sensational fashion by this member of the media." *Id.* In like fashion, a newspaper Editorial Board, for which the Petitioner writes has sensationalized that the Attorney General has chosen not to investigate "where state funds went and how they were used." Clearly, the Attorney General has investigated it, discovered it, disclosed it to the Governor and the public and provided it to both the US Attorney and civil counsel for the Governor's Office of Economic Development. *See* Exhibit D (Attorney General letter to Governor Daugaard.) Irrespective of the sensationalization, the Attorney General is not permitted by state law and ethics to further disclose criminal investigation specifics and grand jury matters. *See* SDCL 23A-5-16 (Rule6(e)). Ironically, the Attorney General's investigation now forms the basis for part of Petitioner's record request.

Similarly, a political party has further "sensationalized" these very tragic and significant matters with two press releases recognized by some media sources as nothing more than "trying to score political points." Certain media blogs relied upon by Petitioner have sensationalized that the cause of death has ranged from heart attack to being shot in the head to murder by the Chinese triad. See Mercer Original Record Request, November 26, 2013, at Item #2. To be sure, as in the *Hughes County* case, the sensational treatment of this matter would lend further support for an order of closure. *See In re: Hughes County,* 452 N.W.2d at 132. However, the sensationalization of these matters by some should not, standing alone, prevent the public as well as other media sources the potential opportunity to gain information.

The record is clear that the Attorney General and the State have not sought to ignore or to cover matters up and have provided the following to the media and the public:

1. The forensic pathologist's stated cause and manner of death;

2. A general summary of law enforcement death scene investigation and forensic testing (Exhibit E);

3. The Charles Mix County Certificate of Death stating "DECEDENT SECURED SHOTGUN AGAINST TREE, USED A STICK TO PRESS TRIGGER TO SHOOT HIMSELF IN ABDOMEN"; and

4. The Attorney General's letter to the Governor outlining the Attorney General's investigation of both travel vouchers and the redirection of $550,000 of a one million future fund grant purportedly used to prepay EB5 loan monitoring fees for the South Dakota Regional Center, Inc. *See* Exhibit D.

Accordingly, while the Attorney General is not concerned that further disclosures will not support the independent findings of the pathologist, the Coroner's Certificate of Death or state, federal and local law enforcement death scene investigation, the Attorney General remains concerned, it may well affect the innocent members of a family or a minor child. This concern is legitimately supported by the *In re: Hughes County* Supreme Court decision.

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.

There is legal support for utilizing media pool representatives derived from South Dakota's capital punishment statutes, media coverage of trials where the court chooses one media outlet to stream the proceedings, and in the *Hughes County* decision. South Dakota's death penalty statutes call for at least one representative member of the media pool. *See* SDCL 23A-27A-34. The Attorney General has participated in numerous court proceedings including the capital sentencing trials of Eric Robert and Rodney Berget wherein the court selected a media representative to streamline proceedings that have worked very well. As further noted by Petitioner, he personally served to some degree as the media representative in the *In re: Hughes County* matter, that included answering questions for other reporters after proceedings. Mercer Petition at p. 4.

The Attorney General and two media representatives selected by Petitioner had established Wednesday, December 11, 2013, as a date to inspect the records. The reason the Attorney General sought the media pool condition, is that there is a considerable amount of very private and sensitive materials associated with an autopsy and a death scene investigation. Furthermore, there has been extensive expert forensic testing, including firearm functioning, ballistic testing, DNA and fingerprinting, which are highly technical. The Attorney General had arranged for an expert to review the report and findings with the

media representatives at no cost to the media. To conduct this type of a review at a press conference, or on repeat occasions, would not be practical.

The Attorney General recognizes that concerns have been raised by the media in relation to a pool arrangement. The Attorney General believes that given the pool arrangement for capital punishment, streaming courtroom proceedings, and in the *Hughes County* juvenile matter, that the media pool condition should not serve to preclude a public disclosure. A solution could be reached covering all interests including adding additional media members perhaps with further assistance from the South Dakota Newspaper Association and the South Dakota Broadcasters Association. Petitioner is a well-respected and longtime South Dakota journalist that had developed a detailed plan that would further assist to address reasonable concerns that do exist.

CONCLUSION

South Dakota's statutory scheme precludes disclosure of both the death investigation and the criminal financial investigation as records developed or received by law enforcement agencies under SDCL 1-27-1.5(5), confidential criminal justice information not subject to inspection under SDCL 23-5-11 and grand jury materials under SDCL 23A-5-16 (Rule 6(e)). Relying on the *Hughes County* decision, the Attorney General has sought in the interest of public disclosure, an alternative to total denial of access to the requested records. The Attorney General proposed three conditions desiring to satisfy the interest of all parties as recognized by our Supreme Court. The Attorney General believes that the redaction and some form or manner of a media pool in conditions #1 and #3 can be satisfied. However, respecting the family's wishes and considering the sensationalization that has already occurred, the Attorney General is concerned that any further disclosure may significantly affect the innocent members of a family and a minor child. Accordingly, based upon SDCL 1-27-1.5(5), 23-5-11, and 23A-5-16 (Rule 6(e)), Petitioner's request must be respectfully denied. This Honorable Administrative Law Judge does not have the authority to go beyond said statutes or to otherwise expand conditions for disclosure beyond what was permitted by the *Hughes County* decision.

Sincerely,

Marty J. Jackley
Attorney General

MJJ/lde
Enc.

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MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

November 26, 2013

Bob Mercer
Newspaper Reporter
1810 Camden Ct.
Pierre, SD 57501

RE: **Public Records Request under SDCL 1-27-37**

Dear Mr. Mercer,

This letter is intended to serve as the Attorney General's response to your public record request under SDCL 1-27-37 dated November 26, 2013. The Attorney General grants in part, said request, subject to the conditions set forth herein. I will first set forth the law governing this public records request, respond to your individual points set forth herein, and state the conditions upon the release of any information.

I. <u>Public Record and other Governing South Dakota Law</u>.

SDCL 1-27-37 provides in part:

(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:

...

(4) If the public record officer denies a written request in whole or in part, the denial shall be accompanied by a written statement of the reasons for the denial;

> (5) If the public record officer fails to respond to a written request within ten business days, or fails to comply with the estimate provided under subsection (1)(3) of this section without provision of a revised estimate, the request shall be deemed denied.

As you specifically acknowledged in your request, SDCL 1-27-1.5(5) provides a specific on point exemption:

> (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 further specifically provides as follows:

> Confidential criminal justice information not subject to inspection—Exception. 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 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.

See also SDCL 23-5-10 (definition of terms).

Furthermore, while I am not at liberty to discuss whether or not there is grand jury activity in a case, SDCL 23A-5-16 (Rule 6(e)) specifically provides as follows:

> Disclosure of matters occurring before a grand jury, other than its deliberations and the vote of any juror, may be made to prosecuting attorneys for use in the performance of their duties. Otherwise a juror, attorney, witness, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only if directed by the court preliminary to, or in connection with, a judicial proceeding or if permitted by the court at the request of a defendant upon a showing that grounds may exist for a motion to dismiss an indictment because of matters occurring before a grand jury.

Accordingly, the public disclosure law clearly protects from disclosure certain matters and items you have requested based upon the overriding interest and desire to protect individuals presumed innocent as well as overriding privacy interests. Because of the uniqueness of this case and circumstance, there exists a public interest to fashion a remedy that protects the criminal process and individual privacy interests as more fully developed below.

II. Specific points set forth in your public record request.

1. I agree.

2. It is true that the Attorney General conducted an official investigation into the death of Richard Benda to namely determine whether there was evidence of foul play. That investigation was assisted by both federal authorities and local law enforcement. That investigation required just under 30 days to complete both an independent autopsy by a forensic pathologist as well as an independent crime scene investigation with considerable forensic testing. Considering the involvement of federal, state and local law enforcement authorities, there has been absolutely no credible facts or evidence calling into question either: (1) the forensic pathologist report, or (2) the Attorney General's released information that the death investigation reconstruction and forensic testimony demonstrated no foul play and were consistent with the suicide ruling. Internet blogs, specifically excluding yours, that speculate and provide misinformation about cause of death ranging from heart attacks to gunshot wounds to the head, and otherwise

misquote the Attorney General's written releases, fail to provide justification for any release of documents. Furthermore, press releases issued by political parties that fail to state any factual or legal basis, further ignoring the participation of federal, state and local law enforcement, do not support a public record request. However, I do believe that release of reports fashioned in such a way to protect the presumption of innocence, other criminal process safeguards and individual privacy interests would assist the public in appreciating the process and circumstances.

3. I agree.

4. South Dakota public record laws is set forth above in I.

The criminal investigation relating to alleged financial misconduct at the Governor's Office of Economic Development has been released to both federal authorities and the Governor's Office of Economic Development. The Governor has released the Attorney General's letter and findings. Criminal and state public disclosure laws preclude me from releasing further information regarding said matters at this time; however, said matters may become public, depending upon federal action or any civil litigation.

III. Public Record Disclosure Subject to Conditions

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 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(e) 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.

In the event these three conditions are acceptable, I am requesting that you kindly present the signed release form as well as the identification of the two designated media representatives. Thank you for respecting the privacy of the immediate family under these most difficult circumstances.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/lde

452 N.W.2d 128
Supreme Court of South Dakota.

In the Matter of HUGHES COUNTY ACTION NO. JUV 90–3.
In the Matter of HUGHES COUNTY ACTION NO. JUV 89–35.
In the Matter of HUGHES COUNTY ACTION NO. JUV 90–4.

No. 16997. | Argued Feb. 15, 1990. | Decided Feb. 28, 1990.

Media appealed from an order of the Circuit Court of the Sixth Judicial Circuit, Hughes County, Marshall P. Young, J., which closed adjudicatory portion of juvenile proceedings to media. The Supreme Court, Wuest, C.J., held that: (1) media did not have absolute statutory right of access to juvenile proceedings; (2) closure order was not clearly against reason and evidence; and (3) trial court's attempt to condition media's access to proceedings was not unconstitutional prior restraint or unconstitutional sanction on publication of lawfully obtained information.

Affirmed.

West Headnotes (6)

[1] **Infants**
Public access; closure

Media had no absolute statutory right of access to juvenile proceedings. SDCL 26–8–32.

[2] **Trial**
Publicity of proceedings

Media's rights of access to judicial proceedings are no greater than those possessed by public.

[3] **Constitutional Law**
Access to proceedings; closure
Infants
Public access; closure

In determining whether juvenile proceeding should be closed, trial court must balance First Amendment rights of public and press against state's interests in preserving juvenile offender's anonymity and general protection over juveniles. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[4] **Infants**
Public access; closure

Trial court properly refused to let media attend adjudicatory phase of juvenile proceedings concerning alleged rape at Governor's residence; media coverage was pervasive and sensational, state had strong interest in preserving confidentiality of juvenile proceedings, there were no alternative measures to closure, closure would be temporary, and minor victim also requested closure.

3 Cases that cite this headnote

[5] **Infants**
Public access; closure

That name of one of three juveniles who were subject of juvenile proceedings had been released to public did not prohibit trial court from excluding media from adjudicatory phase of proceedings, especially where media did not obtain name of juvenile through any actions of trial court.

1 Cases that cite this headnote

[6] **Constitutional Law**

Access to proceedings; closure
Infants
Public access; closure
Infants
Scope and Extent of Use in Criminal Prosecution

That trial court conditioned media's access to juvenile proceedings on media's promise not to publish names, pictures, places of residence or identities of any parties involved did not constitute impermissible prior restraint or unconstitutional sanction on publication of lawfully obtained information; trial court did not prohibit or restrain media from publishing any information with respect to proceedings and court did not close adjudicatory portion of proceedings to media as means of punishing media for publishing lawfully obtained information. SDCL 26–8–34; U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

Attorneys and Law Firms

***129** Jon E. Arneson, Sioux Falls, for appellants, Argus Leader, Associated Press and KSFY–TV.

Craig A. Kennedy, Yankton, for State of S.D.

Brent A. Wilbur, Pierre, James C. Robbennolt, Pierre, and Al Arendt, Pierre, for appellees.

Rick Johnson, Gregory, amicus curiae.

Opinion

WUEST, Chief Justice.

The Argus Leader, Associated Press and KSFY–TV (media) appeal from a circuit court's order of closure in a juvenile proceeding. We affirm.

Only a brief recital of the facts is necessary to enable this court to resolve the legal issues raised on appeal. On November 28, 1989, there was an alleged incident at the Governor's residence in Pierre, South Dakota. Two days later the incident was reported to the Pierre police as a rape. As a result of this reported incident, petitions alleging juvenile delinquency were filed against three juvenile high school students in Pierre, South Dakota. A fourth person, an eighteen-year-old high school student, was charged as an adult and pled guilty to a misdemeanor on January 16, 1990.

Shortly after the alleged crime was reported, the media began to publish information it had obtained about this incident and the proceedings which followed. As a result of this media attention, the three juveniles moved for a closure of proceedings ***130** pursuant to SDCL 26–8–32.[1] At the closure hearing on January 22, 1990, the three juveniles presented evidence regarding the nature and extent of the media's coverage of the proceedings. The media presented no evidence.

After hearing arguments from each party, the trial court asked whether any compromise could be reached to sufficiently satisfy the interests of each party. When the trial court received no response to this inquiry, it offered to allow the media access to the juvenile proceedings if the media would not publish the names, pictures, place of residence or identity of any parties involved.[2] The media refused to accept this offer.

Based upon the discussions, arguments, and the media's refusal to compromise, the trial court determined that, in the interest of the three juveniles, it had no other alternative but to close the adjudicatory portion of the juvenile proceedings. An order, supported by findings of fact and conclusions of law, was subsequently entered to that effect. The media appealed from the trial court's order of closure and, pursuant to motions, we stayed the juvenile proceedings and granted an expedited briefing schedule and oral argument.

On appeal, the media presents three arguments. The media first contends that it has an absolute right of access to juvenile proceedings under SDCL 26–8–32. Second, the media argues that the trial court's findings of fact are clearly erroneous and do not support its order of closure. Third, the media contends that the trial court's offer to allow media access to the juvenile proceedings upon the condition that the media not reveal any information concerning the identity of any individuals involved in the action, constitutes an unconstitutional prior restraint and an unconstitutional sanction on publication of lawfully obtained information.

[1] We first address the media's argument that SDCL 26–8–32 provides it with an absolute right of access to juvenile proceedings. This issue is not new to this court. In *Associated Press v. Bradshaw,* 410 N.W.2d 577 (S.D.1987) we rejected this precise argument. We believe that our reasoning in *Bradshaw* is sound and we again

refuse to accept the argument that the media has an absolute statutory right of access to juvenile proceedings under SDCL 26–8–32.

As we pointed out in *Bradshaw,* the media's right of access to juvenile proceedings stems from SDCL 26–8–32 which our legislature adopted in 1968. This statute provides:

> Upon the trial or hearing of cases arising under this chapter, the court shall admit the general public to the hearing room, except when the child, his parents or their attorney request that the hearing be private, and *in that event the court may admit only such persons as may have a direct interest in the case, witnesses, officers of the court and news media representatives.* Summons may be issued requiring the appearance of any other person whose presence the court deems necessary. (Emphasis added).

[2] In rejecting the media's argument in *Bradshaw* that this statute provides the media with an absolute right of access to juvenile proceedings, we first noted that ***131** the media's rights of access to judicial proceedings are no greater than those possessed by the public. *Bradshaw, supra,* at 579, *citing, Pell v. Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); *Saxbe v. Washington Post Co.,* 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974). Given this principle, we then stated:

> SDCL 26–8–32 reads that "the court *may* admit" certain categories of persons. By the language used (i.e., may) our legislature gave judges the discretion to admit one, all, or a combination of the enumerated parties to a juvenile court hearing. *To hold otherwise would give the press greater rights than that of the general public.* (Emphasis added).

Bradshaw, supra, at 579. We believe that this reasoning is sound. Hence, we are unable to conclude that our interpretation of SDCL 26–8–32 was erroneous and we therefore decline the media's invitation to reverse our decision in *Bradshaw.*

[3] We next address the media's contention that the trial court's findings of fact are clearly erroneous and hence do not support the order of closure. In determining whether a juvenile proceeding should be closed, a trial court must balance the First Amendment rights of the public and the press against the State's interests in preserving the juvenile offender's anonymity and general protection over juveniles. *Bradshaw, supra* at 579. This balancing of rights and interests, of course, requires the exercise of discretion on the part of the trial court. *Id.* After the trial court has balanced these rights and interests, it determines whether closure is warranted and enters findings of fact and conclusions of law supporting its decision. *Bradshaw,* supra at 580, *citing Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). On appeal, our task is to determine whether the findings of fact set forth in support of the closure order are clearly erroneous,[3] and whether the trial court abused its discretion in closing the juvenile proceedings to the media.

[4] In *Bradshaw,* this court set forth a number of factors that a trial court should consider in determining whether a juvenile proceeding should be closed. These factors, which are not intended to be exclusive, include: (1) the nature and extent of press coverage, including the circulation and geographical distribution; (2) whether the coverage prior to the closure hearing has been excessive or sensational; (3) whether the minor's name has been released to the public; (4) whether there are alternative measures to closure; and, (5) whether the proceedings closed to the public and press will be temporary. *Bradshaw, supra.* In the present case, the trial court entered findings of fact concerning each of these factors and concluded that the adjudicatory portion of the juvenile proceedings was to be closed to the media. Our review of the record indicates that the trial court's findings were not clearly erroneous and support the order of closure.

The trial court found that newspaper and electronic media coverage of this matter in South Dakota was widespread and pervasive. The trial court further found that this coverage had become nationwide. We do not believe that these findings can be disputed. The record reflects that this matter has been reported on by the Washington, D.C. *Times,* the Orlando, Florida, *Sentinel, Newsweek* magazine and the nationally distributed newspaper *U.S.A. Today.* This matter was also reported on in a nationally televised program, "A Current Affair." Additionally, over eighty articles regarding this matter have been published in South Dakota newspapers as of January 16, 1990. Considering these facts, it is clear the trial court did not err in finding that the media's coverage of this matter has been widespread and extensive. This fact weighs heavily

in favor of trial court's order of closure. It is clear that the State has a strong interest in preserving the confidentiality of juvenile proceedings.[4] If the ***132** media coverage of this matter was not extensive and widespread then the risk of failing to preserve the State's interest in confidential juvenile proceedings would not be as great. When the media's coverage of an incident is extensive and widespread, however, there is a greater risk that the State's interest in preserving the confidentiality of such proceedings may be forsaken. The trial court's finding with respect to this issue supports its order of closure.

The trial court also found that the media's coverage of this event was excessive and sensational. We do not believe that this finding is clearly erroneous. As noted previously, over eighty articles regarding this matter have been published in newspapers throughout the state. Much of the information printed in these articles is not new information, but rather a restatement of facts previously set forth in other articles. This indicates that the coverage of this incident has been excessive. Furthermore, the nationally televised program "A Current Affair," suggested that a crime had been committed at the Governor's residence and that officials of the state of South Dakota are trying to cover up this alleged fact. Such a suggestion or innuendo clearly indicates that this matter has been treated in a sensational fashion by this member of the media. The sensationalistic treatment of this matter on national television and the numerous state newspaper articles relating to this matter clearly support the trial court's order of closure.

[5] The trial court's next finding concerns the factor of whether the names of the minors have been released to the public. The trial court found that the name of one of the juveniles involved in this action was released to the public by the media. The trial court further found that the names of the other two juveniles have not been published by the media. Since the name of one of the juveniles has already been published, the media contends that it should be allowed to have access to the juvenile proceedings. We disagree.

In addressing this issue, it is significant to note that the media did not obtain the name of the juvenile alleged to have been involved in this incident through any actions of the trial court. Therefore, the media cannot argue that the trial court has indicated that this is a matter of public interest. *See, Oklahoma Publishing Co. v. District Court,* 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977). Furthermore, we do not believe the mere publishing of the name of one of the minors allegedly involved in this incident dictates that the juvenile proceedings should be open to the media. This issue was recently presented to the Supreme Court of Vermont in *In re J.S.,* 140 Vt. 458, 438 A.2d 1125 (1981). The court rejected the argument that the juvenile proceedings of a particular action should be opened to the media since the media was already aware of the juvenile's identity and in fact had previously published the juvenile's name. The court reasoned:

> The fact that J.S.'s name is already a household word in Essex Junction, and that the nature of the offense and his alleged participation with a named adult defendant in certain crimes will be disclosed in a trial of the adult, is no reason to dismantle our juvenile court system. Confidential proceedings continue to serve overriding interests.

In re J.S., supra, 438 A.2d at 1131.

Our State has a strong interest in preserving the confidentiality of juvenile proceedings. There is no reason to abandon this interest merely because one of the names of the juveniles involved in this action has been released to the public. This is particularly true when considering the interests of the two other juveniles whose identities have not been released to the public.[5] The State's interest in preserving the confidentiality of these juvenile proceedings may still be substantially served under these circumstances.

***133** We next turn our attention to the trial court's finding that there were no alternative measures to closure. We are convinced that the trial court had no other alternative than to close the judicial proceedings to the media. It is clear that the trial court made sufficient efforts to provide an alternative to closure which would sufficiently satisfy the interests of all parties.[6] These attempts, however, were stifled because the media would not agree to refrain from publishing confidential information obtained at the juvenile proceedings if they were allowed to have access to such proceedings. If the trial court chose to succumb to the demands of the media, the interests of the State in keeping juvenile proceedings confidential would be forsaken. As a result of the media's refusal to enter into any sort of compromise to protect the interests of all parties, the trial court was left with no other alternative but to close the adjudicatory portion of the juvenile proceedings to the media.

Another factor considered in determining whether a closure of juvenile proceedings is necessary is whether the closure will be temporary. In this regard, the trial

court specifically found that the closure order would only apply to the adjudicatory hearing. The trial court did not hold that the dispositional phase of this proceeding would be closed to the media. Therefore, it is apparent that the order of closure is temporary, not permanent. This fact clearly supports the validity of the trial court's order of closure.

We have reviewed the list of factors the trial court should consider in determining whether juvenile proceedings should be closed. *Bradshaw, supra.* We believe, however, that another factor should be considered. In the present case, the alleged victim is also a minor. Her interests must be considered as well in determining whether closure is warranted in this case. In *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), the United States Supreme Court recognized that the State has a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment. Recognizing this interest, the United States Supreme Court declared that under certain circumstances closure may be necessary to protect the welfare of the minor victim. The Court stated that "among the factors to be weighed [in determining whether closure is necessary to protect the welfare of a minor victim] are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim and the interests of the parents and relatives." *Globe Newspaper, supra,* at 457 U.S. 608, 102 S.Ct. 2620, 73 L.Ed.2d 258. The alleged victim in the present action is 16 years old. Her desire to have the juvenile proceedings closed to the media has been made known to this court.[7] The trial court recognized the alleged victim's interest when it noted that her name had not been released to the public. These facts weigh heavily in favor of the trial court's order of closure since this closure fulfills the compelling interest of the state in protecting the minor alleged victim.

We have reviewed the trial court's findings of fact and are unable to conclude that they are clearly erroneous. Furthermore, we are satisfied that these findings support the order of closure and that the trial court did not abuse its discretion in entering this order. An abuse of discretion "refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *People in the Interest of D.H.,* 408 N.W.2d 743, 745 (S.D.1987); *State v. Bartlett,* 411 N.W.2d 411, 413 (S.D.1987). The trial court's decision to close the adjudicatory portion of this juvenile proceeding is not clearly against reason ***134** and evidence. Therefore, we hold that the trial court did not err in entering this order of closure.

[6] Finally, we address the issue of whether the trial court's conditioning access to the juvenile proceedings on the media's compliance with SDCL 26–8–34 constitutes an unconstitutional prior restraint and an unconstitutional sanction on publication of lawfully obtained information. After reviewing the facts of this case, we are unable to conclude that the trial court's actions constituted an unconstitutional prior restraint. By conditioning the media's access to the juvenile proceedings on its compliance with SDCL 26–8–34, the trial court in no way prohibited or restrained the media from publishing any information with respect to this matter. Since there is no action against the media for violating this statute, nor an order directing the media to comply with this statute, we refrain from determining any questions regarding the constitutionality of SDCL 26–8–34. Since 1892 to the present this court has refrained from determining the constitutionality of a statute until a necessity for a decision arises. *See, State v. Becker,* 3 S.D. 51, 51 N.W. 1018 (1892); *See also, In re Snyder's Estate v. Snyder,* 74 S.D. 14, 48 N.W.2d 238 (1951); *State v. Big Head,* 363 N.W.2d 556 (S.D.1985). We make no exception to this long-standing rule in the present case.

Additionally, we reject the media's contention that the conditioning of access on the media's compliance with SDCL 26–8–34 constituted an unconstitutional sanction on publication of lawfully obtained information. The trial court did not close the adjudicatory portion of the juvenile proceedings to the media as a means of punishing the media for publishing lawfully obtained information. Rather, such conditional access was offered merely as an alternative to a totally closed adjudicatory hearing. This alternative was designed to satisfy the interests of all parties. We will not condemn the trial court merely for attempting to provide an alternative to a totally closed hearing.

As a final matter, we are not unmindful of the media's First Amendment rights. The freedoms granted in the First Amendment, however, are not absolute and can be limited in certain situations. The present case represents one of those situations. Our State has a strong interest in preserving the confidentiality of juvenile proceedings. *Bradshaw, supra.* In *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 107, 99 S.Ct. 2667, 2673, 61 L.Ed.2d 399, 407–408 (1979), the state's interest in preserving the confidentiality of juvenile proceedings was recognized by Justice Rehnquist, now Chief Justice Rehnquist, in his concurring opinion. Justice Rehnquist stated:

> It is a hallmark of our juvenile justice system in the United States that virtually from its inception at

> the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity ... The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State.

In the present case, the trial court recognized both the State's interest in preserving the confidentiality of juvenile proceedings and also the First Amendment rights of the media. The trial court, having sought a solution which would sufficiently satisfy the interest of each party, determined that closure of the adjudicatory portion of this proceeding was necessary to fulfill the State's strong interest in preserving the confidentiality of juvenile proceedings. This determination was made primarily because the media indicated that it would not preserve confidential information obtained at the juvenile proceedings if it were allowed to have access to such proceedings. In light of this fact, as well as all of the other facts previously mentioned, we must conclude that the trial court did not err in rendering the order of closure.

Order of closure is affirmed.

***135** MORGAN and HENDERSON, JJ., and HERTZ and GILBERTSON, Circuit Judges, concur.

HERTZ, Circuit Judge, sitting for SABERS, J., disqualified.

GILBERTSON, Circuit Judge, sitting for MILLER, J., disqualified.

Parallel Citations

17 Media L. Rep. 1513

Footnotes

1 SDCL 26–8–32 provides:

> Upon the trial or hearing of cases arising under this chapter, the court shall admit the general public to the hearing room, except when the child, his parents or their attorney request that the hearing be private, and in that event the court may admit only such persons as may have a direct interest in the case, witnesses, officers of the court and news media representatives. Summons may be issued requiring the appearance of any other person whose presence the court deems necessary.

2 Essentially, the trial court stated that it would allow media access to the juvenile proceedings so long as the media complied with SDCL 26–8–34. SDCL 26–8–34 provides:

> The name, picture, place of residence, or identity of any child, parent, guardian, other custodian, or any person appearing as a witness in proceedings under this chapter shall not be published or broadcast in any news media, nor given any other publicity, unless for good cause it is specifically permitted by order of the court.

3 *Wiggins v. Shewmake,* 374 N.W.2d 111 (S.D.1985); *McFarland v. Northwest Realty Co.,* 362 N.W.2d 98 (S.D.1985); *Dougherty v. Beckman,* 347 N.W.2d 587 (S.D.1984).

4 For an excellent discussion of the State's interest in preserving the confidentiality of juvenile proceedings *see,* Jonas, S., *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment,* 17 Columbia Journal of Law and Social Problems 287 (1982).

5 The identity of the alleged victim who is also a minor has not been disclosed to the public. Her interests, as well, must be considered in determining whether closure was necessary.

6 The importance of attempting to provide an alternative to closure has been emphasized repeatedly by the United States Supreme Court. *See e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); *Press Enterprise Co. v. Superior Court,* 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).

7 The alleged victim filed an Amicus Curiae brief expressing her desire to have the juvenile proceedings closed to the media. Additionally, we note that her attorney, Rick Johnson, was present during the oral arguments presented in this court regarding this matter.

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MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

December 11, 2013

Bob Mercer
Newspaper Reporter
1810 Camden Ct.
Pierre, SD 57501

RE: **Supplemental Public Records Request under SDCL 1-27-37**

Dear Mr. Mercer,

This letter is intended to serve as the Attorney General's response to your amended and supplemental public record requests dated December 6 and 7, 2013. The Attorney General denies your request for the following reasons.

South Dakota law recognizes that in *limited circumstances* even the desire for openness and government transparency must yield in order to protect individual privacy rights.

SDCL 1-27-1.5(5) provides a specific on point exemption:

> (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;

Further, SDCL 23-5-11 specifically provides as follows:

> Confidential criminal justice information not subject to inspection—Exception. 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 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.

See also SDCL 23-5-10 (definition of terms).

Furthermore, while I am not at liberty to discuss grand jury activity in a case, SDCL 23A-5-16 (Rule 6(e)) specifically provides as follows:

> Disclosure of matters occurring before a grand jury, other than its deliberations and the vote of any juror, may be made to prosecuting attorneys for use in the performance of their duties. Otherwise a juror, attorney, witness, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only if directed by the court preliminary to, or in connection with, a judicial proceeding or if permitted by the court at the request of a defendant upon a showing that grounds may exist for a motion to dismiss an indictment because of matters occurring before a grand jury.

Accordingly, the public disclosure law clearly protects certain matters and items you have requested based upon the overriding privacy interests.

In my response of November 26, 2013, I acknowledged the uniqueness of this case and the public interest it has generated. The South Dakota Supreme Court has stated that conditions can be placed on the media to see information that the media otherwise does not have a right to access. <u>In the Matter of Hughes County Action</u>, 452 NW2d 128, 134 (SD 1990). As such, the following three conditions, once satisfied, would have allowed for partial public

disclosure and maintained protection of the criminal process and the individual privacy rights of the innocent family members:

1. All reasonable privacy related items and any Rule 6(e) 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.

Responsibility for satisfying conditions 2 and 3 was clearly set forth in my November 26, 2013, response as follows:

> In the event these three conditions are acceptable, I am requesting that you kindly present the signed released form as well as the identification of the two designated media representatives.

You base your amended and supplemental requests on your inability to comply with these conditions, specifically obtaining consent from the immediate family.

I disagree with the assertion there is a legal impossibility by conditioning any release of the Richard L. Benda's Death Investigation File upon your obtaining consent from an immediate family member. This assertion was only made after the custodial parent, on behalf of the child, refused to provide consent as did the personnel representative of the Richard L. Benda Estate. In my November 26, 2013, response to your public records request, I advised that disclosure of any contents of the Richard L. Benda Death Investigation File was contingent on a receipt of a written release from a member of Benda's immediate family. We subsequently advised you that the applicable definition of "immediate family," was SDCL 22-1-2 (19): "'Immediate family,' any spouse, child, parent, or guardian of the victim..." Further we provided a sample waiver for your potential use.

While the Attorney General is not concerned that the investigation evidence will not support the independent findings of the pathologist, the coroner's death certificate or state, federal, and local law enforcement death scene investigation, the Attorney General is concerned it may well affect the innocent

members of a family or a minor child. Therefore, your amended and supplemental public records requests are denied until such time as the three conditions are fulfilled.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/lde

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MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

November 21, 2013

Governor Dennis Daugaard
Office of the Governor
500 E. Capitol
Pierre, SD 57501

Dear Governor Daugaard,

Pursuant to your request of April 8, 2013, the Attorney General's Office has investigated allegations of individual financial misconduct involving reimbursement vouchers in the Governor's Office of Economic Development. This investigation was conducted pursuant to SDCL 1-11-1(2) and (9).

The Attorney General's investigation of the travel vouchers revealed evidence of double billing and double recovery on two sets of documents. First, vouchers dated December 14, 2009, and March 11, 2010, revealed double billing and payment for:

November 1, 2009	NWA ticket to China EB-5	$ 982.90
December 8, 2009	NWA ticket to China EB-5	$3,740.60

Second, vouchers dated March 11, 2010, and April 16, 2010, revealed double billing and payment for:

January 11, 2010	NWA ticket to Las Vegas Shot Show	$836.30

Because the individual who submitted the vouchers is deceased, there will be no further action by the Attorney General's Office on the voucher matter.

The Attorney General's review further disclosed financial concerns related to a one million dollar Future Fund Grant to assist Northern Beef LP. On September 28, 2005, Northern Beef LP was formed to develop and construct a

large beef processing plant on land near Aberdeen. Ownership of Northern Beef was transferred to a new group of federal EB-5 investors on or about January 8, 2008, eventually including South Korean investors.

On or about December 8, 2010, the South Dakota Department of Tourism agreed to issue payments on a reimbursement basis for construction or equipment costs not to exceed one million dollars to Northern Beef Packers LP. In late January of 2011, State check #99697504 in the amount of one million dollars was issued and delivered to Northern Beef Packers LP. However, $550,000 of said one million dollars was redirected from its intended purpose and purportedly used to pre-pay EB-5 loan monitoring fees for the South Dakota Regional Center, Inc. (SDRC). SDRC utilizes the services of the California and South Korea based law firm Hanul Professional Law Corporation to identify and recruit potential federal EB-5 investors to process the required U.S. Citizenship and Immigration Services documentation.

Because the EB-5 Program is a federal immigration program run and controlled by federal immigration authorities, the United States Attorney and the Department of Justice have primary authority over federal immigration law and the EB-5 Program. I will naturally continue to assist federal authorities regarding these concerns including the impropriety of the payment of the $550,000 loan monitoring fees toward a federally EB-5 funded project.

To the extent any of these matters are disclosed, it is important to remember that no charges have been filed by state or federal authorities. Thus, the safeguards and protections of the criminal process – including the presumption of innocence and the requirement that the government prove each and every element of a crime beyond a reasonable doubt – are implicated.

Governor, to the extent you have any questions or desire any further review consistent with SDCL 1-11-1, please don't hesitate to contact me.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/lde

cc: Paul Bachand, GOED Counsel
Brendan Johnson, US Attorney
Jim Seward, Governor's General Counsel

NEWS RELEASE

Marty J. Jackley
South Dakota Attorney General

Charles McGuigan
Chief Deputy Attorney General

FOR IMMEDIATE RELEASE : Thursday, November 21, 2013
CONTACT: Sara Rabern (605)773-3215

Richard Benda Death Investigation Results Released

PIERRE, S.D - Attorney General Marty Jackley announced today that the Division of Criminal Investigation has concluded its investigation into the death of Richard Benda, Sioux Falls.

On October 22, 2013, Benda was found dead in rural Charles Mix County by a family member, which was immediately reported to local law enforcement. The scene was secured by law enforcement at which time the Division of Criminal Investigation was contacted and asked to conduct a death investigation.

The autopsy, conducted by the Forensic Pathologist, Minnehaha County Coroner indicates that the cause of death was a self-inflicted gunshot wound to the abdomen and ruled a suicide. No physical or digital evidence has been found to indicate foul play. The investigation scene reconstruction, interviews conducted, evidence collected at the scene and forensic testing do not indicate foul play and are consistent with the forensic autopsy findings. The forensic testing included, but was not limited to firearm functioning, ballistic testing, DNA and fingerprinting.

The Attorney General would like to thank the Charles Mix County Sheriff's Office and federal authorities for their assistance during the death investigation. The Attorney General again offers condolences to the family and friends of Richard Benda during this most difficult time and appreciates the public further respecting these private family matters. If you have any additional questions please contact Sara Rabern at 605-773-3215.

-30-

CERTIFICATE OF DEATH

FACT OF DEATH NUMBER 5886

STATE FILE NUMBER 140-2013-006262

DECEDENT'S INFORMATION:

DATE FILED: 11/22/2013

NAME: RICHARD LYNN BENDA
ALIAS:
SEX: MALE **SOCIAL SECURITY NUMBER:** 504-60-6068 **ARMED FORCES:** NO
DATE OF DEATH: 10/20/2013 **DATE OF BIRTH:** 02/18/1954 **AGE:** 59 YEARS

PLACE OF DEATH INFORMATION:
TYPE: GROVE OF TREES
FACILITY NAME OR ADDRESS: 3/4 MILE N OF INTERSECTION 379TH AVE AND 288TH ST LAKE ANDES CHARLES MIX SOUTH DAKOTA

DISPOSITION INFORMATION:
METHOD: BURIAL
CEMETERY: MOUNT HOPE CEMETERY
LOCATION: WATERTOWN SOUTH DAKOTA
CREMATORY:
LOCATION:

DEMOGRAPHIC INFORMATION:
RESIDENCE: 3005 S HOLBROOK AVE SIOUX FALLS MINNEHAHA SOUTH DAKOTA 57106
PLACE OF BIRTH: SOUTH DAKOTA UNITED STATES OF AMERICA **MARITAL STATUS:** DIVORCED
SURVIVING SPOUSE'S NAME, IF WIFE MAIDEN NAME:
FATHER'S NAME: ELMER BENDA
MOTHER'S NAME PRIOR TO FIRST MARRIAGE: EUNICE THOMPSON

INFORMANT INFORMATION:
INFORMANT'S NAME: DAVE ANDERSON **RELATIONSHIP:** FRIEND
MAILING ADDRESS: 3005 S HOLBROOK AVE SIOUX FALLS SOUTH DAKOTA 57106
FUNERAL HOME: CRAWFORD FUNERAL CHAPEL 1311 4TH ST NE WATERTOWN SOUTH DAKOTA 57201

William Crawford

FUNERAL SERVICE LICENSEE: CRAWFORD WILLIAM J **LICENSE NO:** 1192

MEDICAL CERTIFICATE

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

PART II:

CORONER CONTACTED: YES **AUTOPSY PERFORMED:** YES **AUTOPSY AVAILABLE:** Y
ACTUAL OR PRESUMED TIME OF DEATH: 1430 - 1830 **MANNER OF DEATH:** SUICIDE
INJURY INFORMATION:
DATE OF INJURY: 10/20/2013 **TIME OF INJURY:** 1430 - 1830
INJURY AT WORK: NO **TYPE OF WORK:**
PLACE OF INJURY: FARM SHELTER BELT OF FARM YARD
LOCATION OF INJURY: 3/4M N OF INTERSECTION OF 288 ST, 379 AV LAKE ANDES CHARLES MIX SOUTH DAKOTA 5735
HOW THE INJURY OCCURRED: DECEDENT SECURED SHOTGUN AGAINST TREE, USED A STICK TO PRESS TRIGGER TO SHOOT HIMSELF IN ABDOMEN

Chad S Peters

CERTIFIER: PETERS CHAD S **SD LIC NO:**
CERTIFIER'S ADDRESS: PO BOX 218 WAGNER SOUTH DAKOTA 57380

DATE ISSUED: NOVEMBER 27, 2013