IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27903

ARGUS LEADER MEDIA,

Plaintiff and Appellant,

vs.

LORIE HOGSTAD, in her official capacity as Sioux Falls City Clerk, TRACY TURBAK, in his official capacity as Sioux Falls Finance Officer, and CITY OF SIOUX FALLS,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS
Presiding Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed June 17, 2016

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Appellant, Argus Leader Media, will be referred to in this Brief as "the Argus." The Appellees, collectively, will be referred to as "the City."

JURISDICTIONAL STATEMENT

Argus filed a Notice of Appeal, accepted on June 17, 2016, from a judgment entered by Circuit Court Judge John R. Pekas, on June 6, 2016.

STATEMENT OF LEGAL ISSUES

I

DOES SDCL §1-27-1.5(20) GIVE THE CITY OF SIOUX FALLS AN UNCONDITIONAL CONTRACTUAL POWER TO DECLARE THE PAVILION SIDING "SETTLEMENT AGREEMENT" TO BE A CONFIDENTIAL DOCUMENT?

The trial court held that it does. The trial court concluded that the only reasonable interpretation of SDCL §1-27-1.5(20) "consistent with the [statue's] plain language [and] rationale" is one that effectively grants public bodies the unqualified right to make a contractual agreement to conceal any document from the public.

Lewis v. Annie Creek Mining Co., 48 N.W.2d 815 (S.D. 1951)
City of Sioux Falls v. Ewoldt, 1997 S.D. 16
Argus Leader v. Hagen, 2007 S.D. 96
Simpson v. Tobin, 367 N.W.2d 757 (S.D. 1985)

SDCL §1-27-1
SDCL §1-27-1.1
SDCL §1-27-1.3
SDCL §1-27-1.5
SDCL §2-14-8
SDCL §2-14-11
S.D. Const., Art. VI, §1
S.D. Const., Art. VI, §26
S.D. Const., Art. VI, §27

II

DO SDCL §9-14-17, §9-14-21 AND §9-18-2 SUPERSEDE SDCL §1-27-1.5(20) AS "MORE SPECIFIC PROVISIONS" UNDER SDCL §1-27-33, AND KEEP THE "SETTLEMENT AGREEMENT A PUBLIC DOCUMENT.

The trial court held they do not. The trial court specifically concluded that a municipality's "official acts and proceedings"—a record of which must be kept open under SDCL §9-18-2—does not include contracts and that "all parties interested"—to whom municipal contracts are open under SDCL §9-14-21—does not include the public.

SDCL §1-27-33
SDCL §9-14-17
SDCL §9-14-21
SDCL §9-18-2

STATEMENT OF CASE

On October 9, 2015, Argus sent a written request to the City for disclosure of a government document, specifically, the "settlement agreement" the City had made the previous month with several contractors to resolve a dispute concerning the construction quality of siding on a section of the City's Premier Center. The City denied the request on October 20, 2015. Argus started lawsuit under SDCL §1-27-38 to compel the City[1] to open the "settlement agreement" to public inspection, filing its complaint on December 3, 2016. The City filed its answer on December 15, 2015, generally denying that the "settlement agreement" is "subject to disclosure under SDCL Ch. 1-27."

The City filed a Motion for Summary Judgment on January 11, 2016, and Argus filed a Motion for Summary Judgment on February 10, 2016. Both parties filed supporting briefs and reply briefs. Second Circuit Judge John R. Pekas heard oral arguments on both summary judgment motions on February 22, 2016, and filed a written decision on May 20, 2016. The judgment and notice of entry of judgment were served and filed on June 6, 2016. Argus filed a Notice of Appeal on June 17, 2016.

[1] A municipality's public record officer is the city clerk and/or the finance officer, which accounts for the inclusion of those two officers in the lawsuit. SDCL §1-27-42.

STATEMENT OF FACTS

In 2014, the City raised questions regarding the aesthetic appearance of the exterior metal siding on the west side of the newly-constructed Denny Sanford PREMIER Center ("PREMIER Center") with several of the contractors who performed work on the building. (Pfeifle affidavit, at ¶ 2.) The City negotiated final amounts due and its dissatisfaction with the work with the general contractor and four subcontractors, all of whom were represented by counsel, to resolve the dispute. A confidential settlement agreement was tentatively reached, but after one of the subcontractors disputed its terms, the City retained outside counsel, who ultimately prepared a lawsuit to enforce the terms of the settlement. After further negotiation, the City and the contractors signed the "Confidential Settlement Agreement," in September, 2015. (*Id*. ¶¶ 2-3.)

The City did not file a lawsuit against any of the parties to the settlement stipulation. (Answer ¶7.) On September 18, 2015, the City, in a press release entitled "Settlement Reached Regarding Events Center Exterior Metal Siding" and published on its official website, announced that the City had reached a global settlement of the dispute with the PREMIER Center contractors. (Complaint, Ex. 2.) The City's "settlement agreement" with the contractors included a confidentiality clause providing that, except for disclosure of the global settlement amount of $1,000,000, all other details "shall remain confidential and shall not be disclosed to any person." (Pfeifle affidavit at ¶ 7.)

On October 9, 2015, Joe Sneve, a reporter for the Argus, sent an email to the City's attorney, David Pfeifle, requesting a "copy of the recently agreed upon settlement between the City of Sioux Falls and the contractors involved with the construction of the T. Denny Sanford PREMIER Center." (Complaint, Ex. 1.) On October 21, 2015, Pfeifle sent a letter

to Sneve denying the request, noting the confidentiality clause in the settlement agreement and concluding "[t]his instance is governed by SDCL 1-27-1.5(20), which states that documents declared closed or confidential by contract or stipulation of the parties are not subject to disclosure under the public records law." (Complaint, Ex. 3.)

In an October 31 letter, Argus's attorney asked Pfeifle to reconsider the City's denial of Argus's request, apprising Pfeifle of a previous case in South Dakota's Third Judicial Circuit (Civ. 13-126) in which SDCL §1-27-1.5(20) had been interpreted differently. Pfeifle declined to reconsider.

The City acknowledged the "settlement agreement" is a government record, but contended that it is not subject to disclosure under SDCL § 1-27-1.5(20) "because the parties to the settlement agreed by contract that its terms would be confidential." (Defendant's Statement of Uncontested Material Facts, at ¶8; Pfeifle Affidavit, at ¶ 11.) The City defended its action to keep the "settlement agreement" a secret on the ground that SDCL §1-27-1.5(20) permitted it to make contracts for the purpose of closing any document––including the "settlement agreement"— to the public.

The concealed document in issue is the "settlement agreement," a contract between the City of Sioux Falls and construction businesses responsible for the Premier Center siding. The "settlement agreement's" confidentiality provision is a contract within a contract and the method by which the City closed the whole of the "settlement agreement". In SDCL §1-27-1.5(20) vernacular, the City was party to a contract that "declared a document to be closed or confidential."

ARGUMENT

I.

THE TRIAL COURT'S INTERPRETION OF SDCL §1-27-1.5(20), WHICH SUPPORTS THE CITY'S CONCEALMENT OF A DOCUMENTBY CONTRACT, SUBVERTS THE OBJECTIVES OF THE SOUTH DAKOTA'S OPEN RECORDS LAWS AND IS LEGALLY UNTENABLE.

Introduction.

The 2009 South Dakota Legislature completely revamped South Dakota's existing public records law for the express purpose of enhancing transparency in government. In the process, the Legislature established a presumption that government's records were open to the public, reversing what had previously been tantamount to a presumption of secrecy.[2]

The threshold statute, is SDCL §1-27-1:

> **1-27-1. Public records open to inspection and copying**. Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in § 1-27-1.1, are hereby fully empowered and authorized to examine such public record, and make memoranda and abstracts therefrom during the hours the respective offices are open for the ordinary transaction of business and, unless federal copyright law otherwise provides, obtain copies of public records in accordance with this chapter.
>
> Each government entity or elected or appointed government official shall, during normal business hours, make available to the public for inspection and copying in the manner set forth in this chapter all public records held by that entity or official.

The definition of "public records" is furnished by SDCL §1-27-1.1:

> **1-27-1.1. Public records defined**. Unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public, public records include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or

[2] Prior to 2009 any government record could be closed unless there was a statute expressly requiring that the record be kept.

committee of any of the foregoing. Data which is a public record in its original form remains a public record when maintained in any other form. For the purposes of §§ 1-27-1 to 1-27-1.15, inclusive, a tax-supported district includes any business improvement district created pursuant to chapter 9-55.

In order to protect such interests as personal and business privacy, public safety and security, and law enforcement, the Legislature carved out distinct public record exceptions that are listed at SDCL §1-27-1.5.[3] Among them is SDCL §1-27-1.5(20), the provision at issue in this case: [4]

> **1-27-1.5. Certain records not open to inspection and copying.** The following records are not subject to §§1-27-1, 1-27.1.1, and 1-27-1.3:
>
> (20) Any document declared closed or confidential by court order, contract, or stipulation of the parties to any civil or criminal action or proceeding;

Neither the City nor Argus disputes the fact that the "settlement agreement" is a

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[3] During a Senate State Affairs Committee meeting on February 20, 2009, Senator Dave Knudson, a co-sponsor and primary drafter of SB 147, described the bill as "crafting an open records statute that provides for greater openness and still protects citizens' rights of privacy" and emphasized that the adoption of the "presumption of openness" feature would be a major shift for South Dakota. (SDPB broadcast: http://legis.sd.gov /Legislative_Session/Bills/Bill.naspx?Bill=147& Session =2009) In a March 9, 2009 House State Affairs Committee meeting Knudson reiterated that much of the bill was modeled "more or less word for word" on Nebraska's law, using sweeping language to create a presumption of openness, but providing for the "reasonable expectation of privacy." (SDPB broadcast: http://legis.sd.gov/Legislative_Session /Committees /CommitteeMinutes.aspx? Committee=49&File=minHST03090745. htm&Session=2009)

[4] In the February 20 Senate Affairs Committee meeting, Knudson introduced a proposed amendment to add some "common sense…exceptions" to the Nebraska list. Although it was not discussed, §1-27-1.5(20) was one of those additions that Knudson described as narrow "rifle shot" exemptions. (SDPB broadcast:http://legis.sd.gov/ Legislative_Session /Bills/Bill.naspx?Bill=147& Session=2009) In the March 9 House State of Affairs Knudson explained that if one read the "laundry list" of exceptions, "your head would be nodding that it makes sense that [the particular record] not be disclosed…they are common sense exceptions." (SDPB broadcast: http://legis.sd.gov/ Legislative_Session/ Committees / CommitteeMinutes.aspx?Committee=49&File= minHST03090745.htm& Session=2009)

"document belonging to the municipality" or that the City's sole legal basis for concealing the "settlement agreement" is SDCL §1-27-1.5(20), a provision supposedly allowing the City to withhold documents from the public simply by entering into a contract.[5]

Lastly, although the City and trial court refer to the provision's "plain language" and "plain meaning," it is evident from the resort to interpretative devices that SDCL §1-27-1.5(20) is not a model of legislative clarity.[6]

The best answer to the elemental question—"What does SDCL §1-27-1.5(20) mean?"—is the most reasonable, legally logical interpretation of which it is susceptible. The trial court and the City tout what amounts to a "form over substance" interpretation,[7] the application of which would:

- defeat the objective of SDCL Chap. 1-27 to increase government transparency;
- undermine the limited purpose of SDCL 1-27-1.5's exceptions; and
- disregard the reasonable contextual scope of SDCL 1-27-1.5(20).

In contrast, Argus offers an interpretation that conforms to the 2009 open records

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[5] Notably, the City, by means of contract, agreed to keep confidential a document that also happened to be a contract. It is important to recognize that the document could have been something other than a contract. In fact, it could have been anything. As discussed later, the word "contract" in SDCL §1-27-1.5(20) refers to the method by which a document is converted into a secret document. The trial court's holding would allow the City to conceal to *any* document simply by making a contract to do so.

[6] SDCL §1-27-1.5(20)'s derivation and author remain a mystery. The provision was never specifically addressed in any committee hearing or on the floor of either the South Dakota Senate or House. Although South Dakota's 2009 open records law copied extensively from Nebraska, Nebraska has nothing similar to SDCL §1-27-1.5(20). A survey of every state's open records laws indicates that SDCL §1-27-1.5(20) is unique.

[7] As the trial court put it, we are left to "engage in statutory interpretation in order to answer the question of whether or not the noun 'contract' is modified by the phrase 'of the parties to any civil or criminal action or proceeding.'" (Tr. Ct. Memorandum, p. 4)

law's predominant purpose—government transparency—and accommodates the rationale for the open records exceptions. Argus's SDCL §1-27-1.5(20) solution is "harmonious and workable" with the other law to which it is related. *City of Sioux Falls v. Ewoldt,* 1997 S.D. 16, ¶14.

The trial court misplaces its reliance on the "doctrine of the last antecedent" in the interpretation of SDCL §1-27-1.5(20).

SDCL §1-27-1.5(20) provides that "[a]ny document declared closed or confidential by court order, contract, or stipulation of the parties to any civil or criminal action or proceeding" is not an open record in South Dakota. The trial court, applying the "doctrine of the last antecedent," upon which the City had relied, determined that the phrase "of the parties to any civil or criminal action or proceeding" modified only the word "stipulation," the provision's last antecedent.[8] (Tr. Ct. Memorandum, p. 6)

As the trial court noted, the doctrine was described in *Kaberna v. School Bd. of Lead-Deadwood Sch. Dist. 40-1,* 438 N.W.2d 542, 543 (S.D. 1989) as "a general rule…that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation."[9]

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[8] In a prefatory comment, the trial court wrote, "Records, such as contracts, are exempted from disclosure. Specifically, '…Records which, if disclosed, would impair present…contract awards…are exempt from disclosure.' SDCL §1-27-1.3." (Tr. Ct. Memorandum, p. 3) It implies SDCL §1-27-1.3 provides a general exemption for *contracts*. The issue at hand is the scope of a contractual power to declare *documents* to be secret. In short, in addition to contracts, non-contractual documents are also in jeopardy of being concealed under SDCL 1-27-1.5(20).

[9] The doctrine does not even apply to this description. The context clearly requires the modifier *not* be confined to the literal last antecedent—"dominant purpose"—or even the logically implied "[something] in the dominant purpose." The modifier actually applies to both "something in the subject matter" and "[something] in the dominant purpose."

The trial court agreed with the City that "contract" is a "stand alone" term that is totally detached from the court-related terms sandwiching it. (Tr. Ct. Memorandum, p. 7) As a consequence, the trial court interprets SDCL §1-27-1.5(20) to allow a government body—in this case the City of Sioux Falls—to enter into a contract to conceal any document in any situation.

The pivotal factor in the trial court's analysis is the modifying phrase's failure to sensibly complement "court order." In the trial court's words, "clearly the legislature did not intend the modifier to apply in this regard."[10] (Tr. Ct. Memorandum, p. 6)

The trial court's interpretation effects a statutory exception furnishing government with three separate methods of removing any document from public view:

1) by court order;
2) by contract;
3) by stipulation of the parties to any civil or criminal action or proceeding.

The trial court actually made the categorical declaration that "[t]he South Dakota Legislature decided to exclude contracts entered into by the City and declared confidential from being subject to public inspection." (Tr. Ct. Memorandum, p. 10).

Resort to the last antecedent doctrine is not an automatic step—a point the trial court clearly understood. Citing 82 C.J.S. *Statutes* §443, the trial court confirmed that the last antecedent doctrine pertains only "when the intent of the legislature is unclear" and "is merely an aid that yields to more persuasive contextual evidence of legislative intent and common sense."

[10] Argus has never argued that the modifier should be read to apply to "court order." However, that is not to say there are not far more reasonable alternative interpretations of SDCL §1-27-1.5(20) than the trial court's interpretation.

This Court emphasized in *Lewis v. Annie Creek Mining Co.*, 48 N.W.2nd 815, 810 (S.D. 1951) that the doctrine is irrelevant when "there is something in the subject matter or dominant purpose which requires a different interpretation."

Clearly, South Dakota's comprehensive 2009 open records law reflects both a "subject matter" and "dominant purpose" that were not lost on the trial court. The trial court began its analysis by noting "[t]he statutes of South Dakota recognize the need for public records" (Tr. Ct. Memorandum, p. 3), and later acknowledged the rule of "liberal construction of public access to public records law"—coupled with the strict construction of statutory exceptions—citing *Simpson v. Tobin*, 367 N.W.2d 757 (S.D. 1985) and *State v. Peters*, 334 N.W.2d 217 (S.D. 1983) (Tr. Ct. Memorandum, p. 6). But it is equally evident that the "subject matter" and "dominant purpose" are shuffled out in the trial court's application of the doctrine.

In her study, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 THE JOURNAL OF THE LEGAL WRITING INSTITUTE 81 (1996), Terri LeClercq wrote:

> Statute interpreters must first look for meaning within the four corners of the statute—the closed universe—and examine it for consistency. If it is possible to find clues to a modifier's antecedent within the other phrases' construction, or to piece together intent from direct inferences, then intent should rule over punctuation and grammar. If a statute offers no internal clues…interpreters should investigate the legislative history of the statute when it is available….
>
> The only reasonable answer to legislative ambiguity is to look to the legal principles underlying the legislation rather than to stylistic principles that blur answers with contradictory style suggestions. Courts must return to interpretation armed with the competing concepts within the law, with an articulated sense of fairness and with a general sense of the complexity of syntax.

(*Id.* at 100 and 102.)

Joseph Kimble, author of *Doctrine of the Last Antecedent, the Example in Barnhart, Why Both Are Weak, and How Textualism Postures,* 16 SCRIBES J. LEGAL WRITING 5 (2014), also criticized the injudicious use of the doctrine:

> A court that resolved [an] ambiguity by applying the doctrine (or rule, or canon) of the last antecedent would be a court that's at a loss….Even worse is deploying [the doctrine] to counter or trump sensible opposing arguments. The doctrine has little weight or value (except as an expedient), and judges should treat it with skepticism—if they mention it at all.

The judicial and academic cautions regarding the doctrine's use, coupled with the unmistakable objective of the open records law, cast considerable doubt on the merits of the City's case and strength of the trial court's reasoning.

The "doctrine of last antecedent" blasts a loophole in the law through which a truck could be driven. Inferring that SDCL §1-27-1.5(20) allows government to contract away all right of public access requires acceptance of the implausible supposition that the Legislature, having finally enacted the presumption that government records are open records, would attach an exception that effectively gives public bodies the power to hide everything the law was designed to keep open. For that reason, the doctrine must give way to an approach based on common sense. And if there is one thing for certain about the doctrine, it is that courts have been very quick to push it aside when it stands in the way of a better, more rational interpretation.

Although the City's concealment of the "settlement agreement" is a single instance of a governmental entity "declaring a document confidential by contract," it is a dangerous precedent. That, alone, is sufficient reason to examine closely the function and fit of SDCL §1-27-1.5(20) within the structure of the open records law as a whole.

The trial court's interpretation of SDCL §1-27-1.5(20) does not conform to the basic objective of the 2009 South Dakota open records law.

The trial court, having written "[t]he statutes of South Dakota recognize the need for open public records," certainly was quite aware of the reason for the sweeping changes in the state's open records laws. Indeed, the trial court specifically pointed to the U.S. Supreme Court's reminder in *Buckley v. Valeo,* 424 U.S. 1 that "[s]unlight is said to be the best of disinfectants." (Tr. Ct. Memorandum, p. 3)

That transparency has a cleansing effect does not mean government misfeasance or malfeasance is an element in a public access case. The trial court's gratuitous remark that "no claim has been made by the Argus Leader that the City is acting in bad faith in regards to keeping the contract confidential," creates the impression this was an Argus failing. (Tr. Ct. Memorandum, p. 8) "Clean hands" is not a defense in matters of public access. The public has a right to be informed and to know what its government is doing. At the end of the day, after all, the public *is* the government.

Certainly Argus has a valid interest in anything that *has* been hidden, but it also has an interest in what *could* be hidden. The merit of Argus's argument is based on possibility, not actuality. And it is arguably wiser to attempt to preserve open government with preventive laws, rather than reactive ones.

The trial court also made the disconcerting claim that its "interpretation does not significantly broaden a "systematic scheme of secrecy" any more than what the South Dakota Legislature had already intended." (Tr. Ct. Memorandum, p. 8) Surely, the South Dakota Legislature did not intend *any* "systematic scheme of secrecy"—a phrase used by the City—and made a reasonable attempt to fairly protect legitimate interests in confidentiality. Furthermore, even if the City—or any other public body—were "routinely"

hiding contracts or other documents from the public, the pubic would have no way of knowing it. It sets up a classic "Catch 22":

- To obtain access to withheld information, the public must prove some element of wrongdoing;
- But to prove some element of wrongdoing, the public must have access to the withheld information.

Evidently, the trial court had no misgivings. By endorsing a version of the law that gives government *carte blanche* to make agreements to convert an otherwise public document into a secret document, the trial court opted to subjugate the public's interest in knowing what its government is doing to the government's interest in controlling what the public is allowed to know

Defending its decision, the trial court wrote: "This court's interpretation simply comports with what is consistent with the plain language of the statute and the statute's rationale." (Tr. Ct. Memorandum, p. 8) The reality, however, is quite different. The net effect of this "plain language" interpretation is the "stand alone" contract exemption that arms the City—and every other governmental entity—with an unconditional power to make agreements to conceal any document for any reason in any situation. This version attaches no significance whatsoever to a document's actual content or context.

The trial court's interpretative choice necessarily supposes the South Dakota Legislature deliberately scuttled its own plan[11] to enhance transparency by allowing public bodies and officials to diminish—if not obliterate—transparency with contractual deals to conceal documents.

[11] The 2009 open records law was passed unanimously in both the South Dakota House and Senate.

In the interpretative process, the dominant statutory purpose is not just relevant, but of considerable influence. As the South Dakota Supreme Court stated:

> Intent must be determined from the statute as a whole, as well as enactments relating to the same subject. Where statues appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them "harmonious and workable." [Citing *Wiersma v. Maple Leaf Farms,* 1996 S.D. 16.]

(*City of Sioux Falls v. Ewoldt,* 1997 S.D. 16, at ¶14.)

To grant public servants this unqualified power for contractual secrecy would make a travesty of the open records law in South Dakota, nullifying the unmistakable legislative interest in making secrecy the exception, not the rule. "Harmonious and workable" hardly describe an interpretation of SDCL §1-27-1.5(20) that would allow the "rule" of open records to be only a façade.

It is equally important to avoid "absurd" and "unreasonable" interpretative results. This Court noted in *Argus Leader v. Hagen*, 2007 S.D. 96, that "[i]n construing a statute, we presume that the legislature did not intend an absurd or unreasonable result from the application of the statute." *Id.* at ¶19. The supposition that the Legislature would plant a broad "secrecy by contract" exception in the middle of SDCL §1-27-1.5 is untenable.

Indulging government secrecy also violates the democratic principles embodied in the South Dakota Constitution's Bill of Rights.

- **S.D. Const., Art. VI, §1** – All men…have certain inherent rights [and] [t]o secure these rights, governments are instituted among men, deriving their just power from the consent of the governed.
- **S.D. Const., Art. VI, §26** – All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit….
- **S.D. Const., Art. VI, §27** – The blessing of a free government can only be maintained…by a frequent recurrence to fundamental principles.

Statutes must be construed to uphold, not undermine, the state's "supreme law. *Benson v. State,* 2006 S.D. 8. Permitting unchecked concealment of documents that deny "the people" access to the very knowledge that should inform their "consent" hardly reflects the constitutional philosophy.

In *Breck v. Janklow,* 2001 S.D. 28, this Court stressed, "It is presumed the legislature acts with a purpose and does not perform useless acts." *Id.* at ¶20. However, under the trial court's reasoning government bodies can easily sidestep the open records presumption, thereby relegating the core of the Legislature's 2009 open records work to the trash as purposeless and useless.

The trial court's interpretation of SDCL §1-27-1.5(20) does not conform to the design or purpose of SDCL §1-27-1.5's "exceptions to the rule" of open records.

The second sign that the trial court has overstepped normal, rational boundaries interpreting SDCL §1-27-1.5(20) is its inclusion on the list of the exceptions at SDCL §1-27-1.5, which the trial court recognized must be narrowly construed. *Simpson v. Tobin,* 367 N.W. 2d 757, 764 (S.D. 1985) ("Exceptions in statutes generally should be strictly, but reasonably construed; they extend only so far as their language fairly warrants and all doubt should be resolved in favor of the general provision rather than the exception.") *1st American Systems, Inc. v. Rezatto,* 311 N.W. 2d 51, 55 (S.D. 1981) ("In dealing with statutory exceptions, this court construes the language strictly, resolving doubt in favor of the general provision.")

The common characteristic of the SDCL §1-27-1.5 provisions is that each identifies—and defines with reasonable specificity—an exception based on the nature or type of information contained in the document or record. In other words, the confidentiality concern is over the information, itself. For that reason, the exceptions are

expressed in terms of *what* to close, not *how* to close.

However, the trial court's interpretation of SDCL §1-27-1.5(20) focuses only on the *method* by which any document can be closed, as opposed to the actual contents of the document, itself. The discrepancy has serious implications. A decision to close a document could be made without any recognized interest in confidentiality in mind. Unlike the other SDCL §1-27-1.5 exceptions, a document could be concealed without regard for its contents.

Each of the excepted documents is described and linked to some type of protected interest, as delineated on the chart below:

Exempt record/information	**Protected Interest**
(1) Personal information in student records	personal privacy
(2) Medical records	personal privacy
(3) Trade secrets, etc.	business competition
(4) Attorney work product	attorney/client
(5) Law enforcement records	law enforcement
(6) Appraisal/negotiation records in public transaction	public business competition
(7) Personnel information	personal privacy
(8) Security and public safety	security/safety
(9) Gaming Commission security	program integrity
(10) Private debit/credit information	personal privacy
(11) Library records	personal privacy
(12) Working records of public servants	personal privacy
(13) Archaeological records to protect sites	public site protection
(14) Archaeological donor records	personal privacy
(15) Public employment applications	personal privacy
(16) Identification numbers of private sector	personal privacy/protection
(17) Emergency/disaster response plans	security/safety
(18) Testing data for employment/licensing/school	program integrity
(19) Non-work related records of public servants	personal privacy
(21) Records identifying GFP campers	personal privacy
(22) Records unreasonably invading privacy	personal privacy
(23) Records threatening security/safety	security/safety
(24) Agency non-decisional working records	personal privacy
(25) CHIN and juvenile delinquency records	minor privacy

(26) Inmate disciplinary records	inmate privacy
(27) Records closed by other law, and	legislative consistency
(27) Records closed to qualify for federal program	public good

Fixation on the act of contracting draws attention away from the fact that this methodology applies to any document, regardless of its subject matter or the information it contains. Theoretically, if this really were the legislative intention, the means of closing a document would be of relatively little importance. Frankly, a public body might just as well be allowed to close a document simply by sticking it in a drawer marked "secret."

The point is the SDCL §1-27-1.5 provisions concern themselves with what information needs protection. Under the trial court's interpretation, that is never even a consideration. SDCL §1-27.1.5 provisions give government the prerogative to remove information from the public domain under special circumstances that warrant confidentiality. But unless the words "document" and "contract" conform to SDCL §1-27-1.5(20)'s context, the provision becomes a license to remove any information under any circumstances. No recognized interest in confidentiality is necessary. Such a radical departure from the SDCL §1-27-1.5 pattern is hard to defend legally or logically.

The trial court's interpretation of SDCL §1-27-1.5(20) does not conform to the provision's court-related language.

The third component of legislative disharmony is the internal incongruity caused by stuffing a "stand alone" contract exception between "judicial order" and "stipulation of parties [in legal proceeding]"—conspicuously connected concepts. The City and now the trial court, inexplicably, seem comfortable disregarding the contextual signals that suggest a more measured approach.

If the 2009 Legislature had actually intended to grant government bodies an unchecked contractual authority to conceal documents, it most likely would have enacted a

separate statute. It strains credulity that any legislature, absent an ulterior motive, would squeeze a power of such magnitude into the middle of unrelated subject matter. And it is submitted there is not one member of the 2009 Legislature who would believe that it was the Legislature's design to hide that power in a provision that appears to be related to the judicial records.

Construing "contract" as a "stand-alone" category within SDCL §1-27-1.5(20) mimics the designed absurdity of "Let's Make a Deal,":

- "Behind door #1? It's a brand new set of dining room furniture!"
- "Behind door #3? It's a brand new set of bedroom furniture!"
- "Behind door #2? Sorry, it's a goat."

While this type of nonsensical dichotomy might serve a comedic purpose in the game show setting, it hasn't much of a function in legislation.

In the final analysis, the placement and/or use of the word "contract" has to relate to that which goes before, after and around it, which is concept codified at SDCL §2-14-11:

> **2-14-11. Arrangement of laws in code.** Provisions contained in any title, part, or chapter of the code of laws enacted by § 2-16-13 may be construed and considered in the light of such arrangement and such position in any case where such arrangement or such position tends to show the intended purpose and effect thereof.

The general arrangement of SDCL Chap. 1-27 and positioning of SDCL §1-27-1.5(20) support a conclusion that "contract" is not meant to be a "stand alone" term, but connects to the words around it and the purpose of those words. In short, "contract" should fit the body of legislation—chapter, statute and subdivision. The trial court never accounts for the conflict with context.

The most reasonable interpretation of SDCL §1-27-1.5(20) narrows the use of confidentiality "contracts" to "documents" within a judicial process or litigation.

The trial court asserts that the City offers the "only interpretation [of SDCL §1-27-1.5(20)] that makes logical sense." (Tr. Ct. Memorandum p. 5) Yet it is an interpretation that simply cannot be reconciled with the main objective of the open records law, the general approach of the open records exceptions and the terminology of SDCL §1-27-1.5(20) itself. There is no reasonable rationale for a law that gives government this astonishing right to do with its records—in fact, public records—whatever it chooses. And that is precisely what the trial court and City's "stand alone" contract exception would do.

So it is reasonable to look for a better option in which there is a sensible weaving of the words "contract" and "document" into the fabric of the law, permitting them to work in harmony with it. The remaining task is to then determine the interpretation that most logically suits the probable legislative intention.

Any sentence that includes three alternatives [A^1, A^2,A^3]—two intended to have a common modifier [~] inapplicable to the third—is capable of being written in different ways, although some are admittedly more "correct," than others.

- A^1, A^2~ or A^3~;
- A^1, A^2~, or A^3~;
- A^1, A^2 or A^3~;
- A^1, A^2, or A^3~;
- A^1 or A^2~ or A^3~.

It makes eminent sense that contextual substance must trump contrived punctuation, regardless of sentence structure—especially when the resulting

interpretation is in tune with the the preferred statutory presumption and the rule of narrowly construed exceptions.[12]

The trial court and City made the conscious and unfortunate decision to elevate punctuation over common sense substance. Preoccupied by the inflexible placement of the comma, the trial court appears to dismiss its potentially devastating ramifications. The resulting "contract" exemption becomes the tail wagging the dog.

To favor common sense over absurdity requires a different interpretative path. It is a rational thesis that is reinforced by SDCL §2-14-8:

> **2-14-8. Punctuation not controlling**
> Punctuation shall not control or affect the construction of any provision when any construction based on such punctuation would not conform to the spirit and purpose of such provision.[13]

There could not be a more appropriate case for the application of that principle than this one. Blind allegiance to any punctuation—let alone equivocal punctuation—should never lead to statutory disaster. And in this case, SDCL §1-27-1.5(20) could become

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[12] To get some academic perspective, it is useful to substitute a hypothetical punctuated as SDCL §1-27.1.5(20) is. For instance, suppose there is a state law establishing that pedestrians are presumed to have the right of way over vehicular traffic and providing that exceptions are to be narrowly construed. Suppose further that there is an exception that reads: "Pedestrians yield the right of way to vehicular traffic if warned by an emergency vehicle siren, command, or directive of a law enforcement official." Punctuation and/or doctrine of last antecedent notwithstanding, "command" as a stand-alone word makes no sense. Common sense dictates that the provision was not designed to allow *anybody* to deprive pedestrians of their presumptive right of way.

[13] In a perfect world SDCL §1-27-1.5(20) wording and punctuation would have eliminated any ambiguity in the law. However, as we know, this is not a perfect world. Questionable punctuation and diction are common occurrences. One need go no further than the First and Second Amendments to the United States Constitution to find examples of both.

something much worse than an ill-fitting, non-conforming provision. Conceivably, it could effectively neutralize the open records presumption.

The point—codified by SDCL §2-14-8—is that we should be careful not to value form over substance. Inelegant punctuation should never be permitted to undermine substantive content. The trial court's rigid use of the comma creates a statutory aberration that can be avoided by the application of SDCL §2-14-8 or reason or both.

The only way to reconcile the use of "document" and "contract" in SDCL §1-27-1.5(20) is with the clear objective of identifying the particular information thought to be "at risk." Logic suggests that the word "document" is not used in a universal sense, but should be understood as a term related to judicial processes. Similarly, the word "contract"—bookended as it is by "court order" and "stipulation of parties"—should be read in the same judicial context.

In a 2013 case that the *Mitchell Daily Republic* started in the Office of Hearing Examiners and that the Huron School District appealed to the Third Judicial Circuit, the District made an argument similar to that of the City's regarding the interpretation of SDCL §1-27-1.5(20). In its appeal brief, the District wrote:

> Both the rules of grammar and the rules of statutory construction[14] require that the statute be read so that the last phrase only applies to "stipulation." Therefore, the parties to a "contract" do not have to also be parties to an action or proceeding. In the case at hand, the Settlement Agreement entered into by the parties is clearly a contract, and because it was declared closed by its terms, it is not subject to disclosure.

Neither Hillary Brady of the Office of Hearing Examiners (PRR 12-09) nor Judge

[14] The "doctrine of last antecedent" figured prominently in the District's argument.

Jon R. Erickson (Beadle County Civil File 13-126) agreed with the District's position. Holding "the plain language of [SDCL §1-27-1.5(20)] itself contemplates a filed civil or criminal action/proceeding," Ms. Brady also noted the importance of adhering to rules of construction:

> When dealing with exemptions to a general rule the Court in *1st American Systems, Inc. v. Rezatto*, 311 N.W. 2nd 51, 55 (S.D. 1981) states that "[I]n dealing with statutory exceptions, this court construes the language strictly resolving doubt in favor of the general provision. *Lien v. Rowe*, 77 S.D. 422, 426, 92 N.W. 2nd 922, 924 (1958). Moreover, we construe the provision consistent with the overall purpose of the entire statute. *Western Surety Co. v. Mydland*, 85 S.D. 172, 173-174, 179 N.W.2nd 3, 4 (1970).

Upholding the OHE, Judge Erickson repeated the general rule regarding exceptions:

> "Exceptions to general provisions of an ordinance must be strictly, but reasonably construed, [cite omitted]. Exceptions extend only as far as their language fairly allows, with all doubts being resolved in favor of the general provision." [Cite omitted]. *Peters v. Spearfish ETJ Planning Com'n,* 1997 S.D. 105, ¶13, 567 N.W.2d 880.

Judge Erickson concluded:

> In the absence of any actual litigation having been filed between [parties], the Hearing Examiner correctly held that SDCL ¶1-27-1.5(20) does not apply to exempt the agreement between [the parties] from disclosure as a public record. [and] In view of the inapplicability of SDCL §1-27-1.5(20), the agreement between [the parties] is a public record and must be made available to the public for inspection and copying.

(Civ. 13-126, Findings of Fact and Conclusions of Law #4 and #5).)[15]

It is particularly difficult to fit "contract" comfortably into the judicial framework. SDCL §1-27-1.5(20) can be read as allowing persons to protect private information that has

[15] Argus takes issue with the trial court's assertion that Judge Erickson based his decision exclusively on SDCL §13-8-43. SDCL §13-8-43 was added on appeal as an alternative ground. Judge Erickson's opinion and conclusions of law indicate he agreed with the *Daily Republic* on both grounds that were raised.

or will become an open record in the course of litigation or judicial proceedings. *E.g.*, *Rapid City Journal v. Judge John J. Delaney*, 2011 S.D. 55 (2011).[16]

Another valid understanding is that "contract" and "stipulation" are synonyms and not separate concepts. In *Faircloth v. Raven Industries*, 2000 S.D. 158, ¶6, this Court stressed that an interpreting court must "assume that the legislature intended that no part of its statutory scheme be rendered mere surplusage." Doubling up for emphasis in a statute does not necessarily amount to "surplusage" or a legislative sin. At the beginning of SDCL §1-27-1.5(20), for instance, the Legislature wrote "[a]ny document declared closed or confidential," although "closed" and "confidential" are frequently used interchangeably in the open records context.[17]

A third possibility is that SDCL §1-27-1.5(20) was designed to cover litigation resolved by court order and litigation resolved by settlements—settlements that are routinely documented by both a contractual release signed by the parties and a stipulation signed by their attorneys. [18]

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[16] That SDCL §1-27-1.5(20) applies to private litigants raises another question if "document" and "contract" are not tied to the context. Is the trial court giving private and public bodies a commensurate contractual power? If so, what does the word "document" include? It quickly becomes nonsensical unless private citizens are being given control only over private documents that have been made public through legal process. This makes it all the more reasonable to conclude that the reference to "parties" who do not have to be public bodies reflect the possibility that private documents have/would become public documents by being involved or raised in the course of litigation.

[17] Interestingly enough, the City declared that "a stipulation is a contract." *Estate of Thomas v. Sheffield*, 511 N.W.2d 841 (S.D. 1994). If "contract" encompasses stipulations, stipulations by litigants would be a wholly contained subset. It would follow that everything after "contract" in SDCL §1-27-1.5(20) would be superfluous.

[18] BLACK'S LAW DICTIONARY, 4th ed. (1968) defines "contract" as an agreement between the parties; "stipulation" is generally applied to an agreement between the attorneys.

In truth, any interpretation that has a plausible explanation connecting "contract" to the provision's context is logically preferable to the trial court's "stand alone" theory. If SDCL §1-27-1.5(20) does, in fact, remove virtually any accountability for secrecy, South Dakota's open record presumption wouldn't be worth the paper upon which it is printed.

Finally, with particular respect to concealment of documents that happen to be contracts, there are also several other contract-specific statutes in SDCL Chapter 1-27 that, collectively, make a convincing argument that the Legislature intended to limit, not expand, the occasions for concealing government contracts.

- **1-27-4.1. Format of written contracts--Storage with records retention officer or designee--Duration.** Any written contract entered by [a governmental entity] shall be retained in the contract's original format….Each contract shall be stored with the records retention officer….during the term of the contract and for two years after the expiration of the contract term.
- **1-27-4.2. Availability of contract through internet website or database.** Any contract retained pursuant to § 1-27-4.1 may be made available to the public through a publicly accessible internet website or database.
- **1-27-45. Searchable internet website for posting and access of public records and financial information.** The state shall maintain a searchable internet website for the posting and access of public records and financial information of the state, municipalities, counties, school districts, and other political subdivisions….
- **1-27-46. Contracts to be displayed on searchable internet website.** The state shall display on the searchable internet website created pursuant to § 1-27-45 copies of each written contract for supplies, services, or professional services of ten thousand dollars or more….Each contract shall be displayed electronically not less than sixty days after commencement of the contract term and for not less than one following the end of the contract term.

Together, these statutes advance a more convenient, efficient means of providing and protecting the public's access to government's contracts. The statutes also fortify the very reasonable belief that South Dakotans have a right to *expect* their government's contracts to be open—at least in the absence of some compelling, competing interest. If the

trial court's position were adopted, South Dakotans would be entitled to expect nothing, even when no competing interest is at stake.

II.

"MORE SPECIFIC" MUNICIPAL RECORD-KEEPING STATUTES APPLY UNDER SDCL §1-27-33 AND REQUIRE DISCLOSURE OF THE CITY'S "SETTLEMENT AGREEMENT."

SDCL §1-27-33 provides that if there are "more specific provisions regarding public access or confidentiality elsewhere in [the law]" those provisions "supersede" SDCL Chapter 1-27 provisions, including SDCL §1-27-1.5(20).

There are some statutes describing basic record-keeping duties and obligations of municipal officers that reasonably qualify under SDCL §1-27-33, including:

- **9-14-17. Records maintained by finance officer--Warrants on treasury--Expense estimates--Contracts.** The municipal finance officer shall keep an office at a place directed by the governing body. The finance officer shall keep…all papers and records of the municipality….The finance officer shall…countersign all contracts made on the [municipality's] behalf…."
- **9-14-21. Examination of treasurer reports and accounts--Audit and adjustment of claims--Record of contracts.** The municipal finance officer shall…keep a record of the finance officer's acts and doings. The finance officer shall keep a book in which the finance officer shall enter all contracts. The book shall include an index to the contracts and shall be open to the inspection of all parties interested….
- **9-18-2. Records of acts and proceedings of municipal officers--Open to public.** Every municipal officer shall keep a record of the official acts and proceedings of his office, and such record shall be open to public inspection….

Collectively, these laws establish a reasonably clear and unambiguous mandate to the City to keep its records—including its contracts—open. Given that SDCL §1-27-1.5(20) refers only to closing "any document," it goes without saying that any statute dealing with documents that are described with more specificity supersedes the more generic law under SDCL §1-27-33.

Again, it is important to bear in mind that while SDCL §1-27-1.5(20) refers to "contract" as an action taken with respect to "documents" in general, the document can be a contract. If a statute indicates that a city's contract should not be closed, SDCL §1-27-1.5(20) will not change that. Cities are going to be governed by the laws that direct them how to deal with their own records.[19]

Discounting SDCL §9-18-2, the trial court expressed doubt that a city contract was even "encompassed within 'official acts and proceeding.'" The notion that contracts made by public officials in a representative capacity are *unofficial* acts is extraordinary. BLACK'S LAW DICTIONARY, 4th ed. (1968), defines "official act" as "[o]ne done by an officer in his official capacity under color or by virtue of his office."

The trial court next takes issue with Argus's reading of SDCL §9-14-21 and contends that the public is not "an interested party." It seems a fair suggestion that the public, served and represented by it government, can reasily be an "interested party" to a pubic contract. In closing his "Gettysburg Address," Abraham Lincoln referred to our "government of the people, by the people and for the people"—a description worth repeating and remembering 150 years later. The City is not the council or the mayor or the city attorney. The City is the people.

Even if one were to disregard the public's inherent "interest," the finance officer's codified duties should entail public access to city contracts. The finance officer has a duty

[19] The trial court's observation that "SDCL 1-27-1.5(20) excludes contracts entered into by the City and declared confidential from the open records requirement" (Tr. Ct. Memorandum, p. 9) understates the true impact of the trial court's interpretation. As previously noted, the trial court is giving the City a contractual power to declare "any document" confidential. The document does not have to be a contract.

to keep the book of contracts (SDCL §9-14-21) and the duty to counter-sign contracts (SDCL §9-14-17). As a municipal officer, finance officer must keep a record of those "official acts and proceedings" and keep that record "open to public inspection" under SDCL §9-18-2.

CONCLUSION

This case—essentially a debate over the correct interpretation of SDCL §1-27-1.5(20)[20]—boils down to making a choice between diametric opposites:

- Both the trial court and City support an interpretation that allows a public body or official to close any document for any reason at any time in any situation by means of a contract; the interpretation is based on the belief that the word "contract," stands alone, disconnected from and unrestricted by the context SDCL §1-27-1.5(20).
- The Argus advocates an interpretation that narrows use of a confidentiality "contract" to parties engaged in the judicial process; the interpretation is based on the belief that the word "contract" is incorporated in the context of SDCL §1-27-1.5(20) to be read in harmony with the open records law.

The Argus's interpretative approach meshes with the open records law and dovetails with its purpose. It is workable, logical, sensible and fair. The trial court's interpretation, on the other hand, clashes with the law and circumvents its primary objective. The unqualified contractual power to conceal documents that the trial court would hand over to public bodies exceeds any authority government previously had and effectively nullify much of the 2009 Legislature's open records work.

[20] The focus in the conclusion is on SDCL §1-27-1.5(20). Although the case could be decided on the SDCL §1-27-33 ground, Argus thinks the "contract" issue is capable of recurrence and, therefore, hopes the Court will take the opportunity to provide guidance on SDCL §1-27-1.5(20)'s scope.

In the process of interpreting law, the best and most indispensable tool is common sense. And in matters relating to open government, "a frequent recurrence to fundamental principles" is always worthwhile. S.D. Const., Art. VI, §27.

The most critical elements of a democracy are an informed public and an accountable government. Thomas Jefferson wrote:

> The good sense of the people will always be found to be the best army….The people are the only censors of their governors; and even their errors will tend to keep these to the true principles of their institution….The way to prevent these irregular interpositions of the people is to give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis for government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter….Cherish, therefore, the spirit of our people, and keep alive their attention….[and]
>
> If a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be. The functionaries of every government have propensities to command at will the liberty and property o their constituents. There is no safe deposit for these but with the people themselves, nor can they be safe with them without information. Where the press is free and every man able to read, all is safe.

THE POLITICAL WRITING OF THOMAS JEFFERSON, 93, Edited by E. Dumbauld (1955).

James Madison agreed with Jefferson that knowledge was crucial and warned of the consequences of ignorance:

> A Popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. Knowledge will forever govern ignorance; and the people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 WRITINGS OF JAMES MADISON 103 (To W.T. Barry, Aug. 4, 1822) (G. Hunt ed. 1910).

Concepts such as freedom, transparency, accountability, responsibility, duty, service, right to know and right to question are not just platitudes. Those who dismiss the words of Jefferson and Madison as hoary democratic philosophy never present any intelligently articulated counter-arguments in praise of secret government. They don't because there aren't any. Nobody seriously advocates that an ignorant public and an unchecked government are good for the country, the state or the City of Sioux Falls.

The creation and perpetuation of a representative form of government requires that government—including its records—be accessible to those governed. To that end, transparency should be the common objective of both the public *and* public servants. Justice Black, in his concurrence in *Barr v. Matteo,* 360 U.S. 564, 577 (1959), warned:

> The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.

Without transparency, knowledge is limited, as is any assurance of accountability. And it is a sad truth that the lack of accountability provides the perfect breeding ground for corruption. While that may not be an inevitable result, secrecy does not provide the same protection for the public that disclosure would. Surely, it is axiomatic that the public deserves all the protection possible. It is essential that neither public servants nor private citizens allow themselves to become complacent about the dangers of uncontrolled secrecy in government. Both must share the responsibility of preserving government transparency and all that it entails, including government accountability. To that end, the open records exemptions and SDCL §1-27-1.5(20) in particular—must make sense.

Whether or not the City and trial court recognize it, their interpretation of SDCL §1-27-1.5(20) poses a serious threat to open, accountable government. South Dakotans deserve better, and it is apparent the 2009 Legislature meant to provide better. The danger can be eliminated simply by resort to sound reasoning.

Argues respectfully urges the Supreme Court to reverse the judgment of the trial court and remand the case with instructions to enter judgment for the Argus.

Dated this the 4th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type volume limitation in SDCL §15-26A-66(b)(2). Relying on the word count of Microsoft Word for Mac 2011, the Brief contains 8,642 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Appellant's Brief in *Argus Leader Media v. City of Sioux Falls, et al.*, was served on Appellee's attorney, James E. Moore, 300 S. Phillips Avenue, #300, Sioux Falls, SD 57117 by email addressed to james.moore@woodsfuller.com on this 4th day of August, 2016.

/s/ JON E. ARNESON
JON E. ARNESON

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 27903

ARGUS LEADER MEDIA,

Plaintiff and Appellant,

vs.

LORIE HOGSTAD, in her official capacity as Sioux Falls City Clerk, TRACY TURBAK, in his official capacity as Sioux Falls Finance Officer, and CITY OF SIOUX FALLS,

Defendants and Appellees.

APPENDIX TO APPELLANT'S BRIEF

DOCUMENT **Appendix Page**

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
ARGUS LEADER MEDIA, Plaintiff, vs. LORIE HOGSTAD, in her official capacity a Sioux Falls City Clerk, TRACY TURBAK, in this official capacity as Sioux Falls Finance Officer, the CITY OF SIOUX FALLS, Defendants.	CIV. 15-3268 Memorandum and Order on Summary Judgment

A hearing was held on February 22, 2016, before the Court, Hon. John Ryan Pekas, Circuit Judge presiding upon the cross Motions for Summary Judgment filed by the City of Sioux Falls, Lorie Hogstand, and Tracy Turbak (the "City") and the Argus Leader Media (the "Argus Leader"). The City is represented by James E. Moore and the Argus Leader is represented by Jon E. Arneson. After fully reviewing the parties' arguments, reading all of their written submissions and the relevant authorities, and carefully considering the issues presented, the court grants the City's Motion for Summary Judgment and denies the Argus Leader's Motion for Summary Judgment:

FACTUAL BACKGROUND

In 2014, questions were raised by the City that regarded the aesthetic appearance of the exterior metal siding on the west side of the new-constructed Denny Sanford Premier Center ("Premier Center"). The City negotiated final amounts due and its dissatisfaction with the work with the general contractor and four subcontractors, all of whom were represented by counsel, to resolve the dispute. After mediation, the parties reach a confidential settlement agreement.

After one of the subcontractors disputed the terms of the agreement, the City retained outside counsel, who ultimately prepared a lawsuit to enforce the terms of the settlement. After further negotiation, the parties entered into a second settlement, the Confidential Settlement Agreement (the "Settlement"), which was signed in September, 2015. The City announced that they had reached a global settlement of the dispute with the Premier Center contractors on September 18, 2015.

The Settlement, in paragraph 6.6, provides that each party to the agreement warrants that except for disclosure of the global settlement amount of $1,000,000.00, all other details shall remain confidential and shall not be disclosed to any person.

On October 9, 2015, Joe Sneve ("Sneve"), a reporter for the Argus Leader, sent an email to the City's Attorney, David Pfeifle ("Pfeifle"), requesting a copy of the Settlement. On October 21, 2015, Pfeifle sent a letter to Sneve denying his request for a copy of the Settlement, citing the confidentiality language and SDCL § 1-27-1.5(20) as grounds for the denial. On October 31, 2015, Jon Arneson sent a letter to Pfeifle requesting that the City reconsider its denial of Sneve's request for a copy of the Settlement. Pfeifle responded to Jon Arneson on November 19, 2015, declining to reconsider the denial of Sneve's request for a copy of the Settlement. The Argus Leader then filed a complaint on December 1, 2015, asking this court to order the City to provide the Argus Leader with a copy of the Settlement and requesting this court to award the Argus Leader costs disbursements and a civil penalty under SDCL § 1-27-40.2 in the amount of $50 per day for each day that delivery of these records was unreasonably delayed through the fault of the City.

AUTHORITES AND ANALYSIS

1.) SDCL § 1-27-1.5(20) excludes the Settlement from public inspection and copying

The statutes of South Dakota recognize the need for open public records. ". . . Sunlight is said to be the best of disinfectants. . . " Buckley v. Valeo, 424 U.S. 1, 67 (1976). Public records are to be open to inspection and copying by the public:

> Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in § 1-27-1.1, are hereby fully empowered and authorized to examine such public record, and make memoranda and abstracts therefrom during the hours the respective offices are open for the ordinary transaction of business and, unless federal copyright law otherwise provides, obtain copies of public records in accordance with this chapter.
>
> Each government entity or elected or appointed government official shall, during normal business hours, make available to the public for inspection and copying in the manner set forth in this chapter all public records held by that entity or official.

SDCL § 1-27-1. However, SDCL § 1-27-1.5 provides for 27 exceptions. Mercer v. S.D. Attorney Gen. Office, 2015 S.D. 31, ¶ 17, 864 N.W.2d 299, 303. Under SDCL 1-27-1.5, certain "records are not subject to §§ 1-27-1, 1-27-1.1, and 1-27-1.3[.]" Mercer v. S.D. Attorney Gen. Office, 2015 S.D. 31, ¶ 19, 864 N.W.2d 299, 304. Specifically:

> The following records are not subject to §§ 1-27-1, 1-27-1.1, and 1-27-1.3:
>
> ...
>
> (20) Any document declared closed or confidential by court order, contract, or stipulation of the parties to any civil or criminal action or proceeding;

Records, such as contracts, are exempted from disclosure. Specifically, ". . . Records which, if disclosed, would impair present . . . contract awards . . . are exempt from disclosure. SDCL § 1-27-1.3. The Argus Leader argues that the Settlement entered into by the City with the several sub-contractors is not a 'contract' for the purposes of SDCL § 1-27-1.5(20). This argument hinges on the idea that the noun 'contract' is modified by the phrase 'of the parties to any civil or criminal action or proceeding,' and since the contract at issue in this case was not one declared

confidential to a civil action, then the contract would not be excepted from public disclosure laws via SDCL § 1-27-1. The City, on the other hand, argues that the word contract is an antecedent that stands alone and, therefore, by having a provision in the Settlement declaring itself as confidential that the Settlement is indeed excepted from public disclosure laws. Thus, this court must engage in statutory interpretation in order to answer the question of whether or not the noun 'contract' is modified by the phrase 'of the parties to any civil or criminal action or proceeding.'

The Supreme Court of South Dakota has adopted "the rule known as the 'Doctrine of the Last Antecedent' which states: '[i]t is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation.'" Rogers v. Allied Mut. Ins. Co., 520 N.W.2d 614, 617 (S.D. 1994)(citing Kaberna v. School Bd. of Lead–Deadwood Sch. Dist. 40–1, 438 N.W.2d 542, 543 (S.D.1989); Lewis v. Annie Creek Mining Co., 74 S.D. 26, 33, 48 N.W.2d 815, 819 (1951)). "Under the last-antecedent doctrine, where no contrary intention appears, relative and qualifying words, phrases, and clauses are to be applied to the immediately preceding words or phrase." 82 C.J.S. Statutes § 443 (citations omitted). "Such words, phrases, and clauses are not to be construed as extending to or modifying others that are more remote nor are they ordinarily to be construed as extending to following words." Id. "The last antecedent is the 'last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." 2A Sutherland Statutory Construction § 47:33 (7th ed.).

However, this doctrine is not absolute and "can be overcome by other indicia of the meaning of the statute." 82 C.J.S. Statutes § 443(citing U.S. v. Hayes, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009)). This doctrine is only to apply where "there are uncertainties or ambiguities, when other rules of construction fail, and when the intent of the legislature is unclear." Id.

(citations omitted). The doctrine is merely an aid that yields to more persuasive contextual evidence of legislative intent and common sense. Id. "Accordingly, the doctrine will not be adhered to where extension to a more remote antecedent is clearly require by a consideration of the entire act...[w]here several words are followed by a clause that is as much applicable to the first and other words as to the last, the clause should be read as applicable to all." Id. (citations omitted). Furthermore, the use of seriatim comma is not dispositive of legislative intent to limit the qualifying phrase to the last antecedent. "[M]any leading grammarians, while sometimes noting that commas at the end of series can avoid ambiguity, concede that use of such commas is discretionary." United States v. Bass, 404 U.S. 336, 340, 92 S. Ct. 515, 518, 30 L. Ed. 2d 488 (1971). While the 'absence of offsetting commas around a statutory phrase suggests that a phrase modifies only the language immediately adjoining...the omission of a comma does not necessarily foreclose applying the modifier to all of the preceding words." 82 C.J.S. Statutes § 430.

In this situation, the court finds that the only interpretation of this statute that makes logical sense is that the modifier "of the parties to any civil or criminal action or proceeding" only modifies the last antecedent "stipulation." "The purpose of statutory construction is to interpret the true intention of the law, which is to be construed primarily from the plain meaning of the statute." In re Estate of Howe, 2004 S.D. 118, ¶ 41, 689 N.W.2d 22, 32 (citations omitted). "The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said...we must give legislation its plain meaning...[w]e cannot amend to produce or avoid a particular results." Id. (citations omitted).

This court simply has to look at the effect of applying the modifier "of the parties to any civil or criminal action or proceeding" to each of the antecedents. By doing so, the statute would be read as saying "[a]ny document declared close or confidential by court order...of the parties

to any civil or criminal action or proceeding". This is clearly an absurd sentence that would result from the Argus Leader's interpretation. If the modifier is going to be applied to all antecedents, then that application should make sense. In the case at hand though, having the modifier applicable to "court order" is illogical. There is no such thing as a "court order of the parties" and clearly the legislature did not intend the modifier to apply in this regard.

Thus, the Doctrine of the Last Antecedent should be applied in interpreting this statute. There seems to be no legislative intent to apply the qualifying phrase to all antecedents. While the Argus Leader is able to find multiple instances where the Doctrine of the Last Antecedent was not used by the Legislature in statutes through South Dakota's code, those instances are not determinative of the matter before this court. The statutes listed by the Argus Leader in their brief used a qualifying phrase to describe all antecedents in a way that was intuitive and made logical sense. Here, the opposite is true as doing so would accomplish an outlandish result.

This court does acknowledge liberal construction of public access to public records law. Specifically:

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

SDCL § 1-27-1.3. And furthermore, "[e]xceptions in statutes generally should be strictly, but reasonably construed; they extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception." Simpson v. Tobin, 367 N.W.2d 757, 764 (S.D. 1985)(citing State v. Peters, 334 N.W.2d 217 (S.D.1983)).

"In dealing with statutory exceptions, this court construes the language strictly resolving doubt in favor of the general provision." 1st Am. Sys., Inc. v. Rezatto, 311 N.W.2d 51, 55 (S.D. 1981)(citing Lien v. Rowe, 77 S.D. 422, 426, 92 N.W.2d 922, 924 (1958)).

Despite this, the most reasonable construction of the statute at issue is to apply the Doctrine of the Last Antecedent and allow for the word "contract" to stand alone. While the public disclosure laws are to be interpreted liberally and general provisions are favored where there are doubts about the applicability of an exception, this court should not engage in an interpretation that clearly results in absurdity. In this case, that means the court should restrict the modifier to the last antecedent, "stipulation" and not apply it to "contract". Therefore, the City's contract, which was declared confidential, is not subject to inspection by the public as it is a document excepted from SDCL § 1-27-1.

The Argus Leader cites to a decision letter that was written by the Honorable Judge Jon Erickson out of the Third Judicial Circuit in support of their above argument. However, in that letter Judge Erickson rests his holding on that fact that:

> SDCL 13-18-43 requires the District to keep open to reasonable inspection by the public all contracts relating to school business. There are no exceptions. Therefore, SDCL 1-27-1.5(20) does not apply to School Boards and School Districts Officers.

While a decision by a trial court in a different circuit would only be persuasive authority, this court is not convinced that Judge Erickson's decision fully addressed the issue that is currently at stake here. Judge Erickson was able to rest his decision on the basis of SDCL 13-8-43, which was a more specific provision requiring contracts related to school business to be open for public inspection. This does not address whether or not the term 'contract' is modified by the phrase 'of the parties to any civil or criminal action or proceeding.' Therefore, this court finds that Judge

Erickson's decision in Beadle County Civil File 13-126 has no bearing on this court's interpretation of SDCL §1-27-1.5(20).

Lastly, this court finds that interpreting the word 'contract' as a stand-alone antecedent does not undercut the legislative purposes of SDCL § 1-27-1. First, no claim has been made by the Argus Leader that the City is acting in bad faith in regards to keeping the contract confidential.1 Secondly, under the Argus Leader's interpretation of SDCL § 1-27-1.5(20), the only thing the City would have to do to make a contract confidential would be to file or serve a civil lawsuit. Thus, the only difference between this court's interpretation and the Argus Leader's interpretation of SDCL § 1-27-1.5(20) is the cost of service of process or a filing fee. This court's interpretation does not significantly broaden a "systematic scheme of secrecy" any more than what the South Dakota Legislature had already intended. This court's interpretation simply comports with what is consistent with the plain language of the statute and the statute's rationale.

2.) No Superseding Municipality Laws Compel Disclosure of the City's Settlement Agreement

Finally, the Argus Leader argues that SDCL § 1-27-33 is dispositive of this case regardless of this court's interpretation of SDCL § 1-27-1.5. SDCL § 1-27-33 provides that:

> The provisions of this chapter do not supersede more specific provisions regarding public access or confidentiality elsewhere in state or federal law.

The Argus Leader then goes on to list certain provisions of SDCL § 9, including SDCL § 9-14-17, which states in part:

> The municipal finance officer shall keep an office at a place directed by the governing body. The finance officer shall keep the corporate seal, all papers and

1 In fact, the City has disclosed arguably the most important term, that is, the global settlement amount of $1,000,000.00.

> records of the municipality, and a record of the proceedings of the governing body, whose meetings the finance officer shall attend.

SDCL § 9-14-21, which states:

> The municipal finance officer shall examine all reports, books, papers, vouchers, and accounts of the treasurer; audit and adjust all claims and demands against the municipality before they are allowed by the governing body; and keep a record of the finance officer's acts and doings. The finance officer shall keep a book in which the finance officer shall enter all contracts. *The book shall include an index to the contracts and shall be open to the inspection of all parties interested.*

And, lastly, SDCL § 9-18-2, which reads:

> Every municipal officer shall keep a record of the official acts and proceedings of his office, and such record shall be open to public inspection during business hours under reasonable restrictions.

Thus, the Argus Leader argues that these municipality-related statutes already impose an obligation on the City to keep its records, including the contract at issue in this case, open. The crux of the Argus Leader's argument then rests on the notion that a conflict exists between SDCL § 1-27-1.5(20) and SDCL § 9-18-2 and that SDCL § 9-18-2 should prevail as it is the more specific provision. This court disagrees.

As this court interprets it, SDCL 1-27-1.5(20) excludes contracts entered into by the City and declared confidential from the open records requirement. This court also interprets SDCL § 9-18-2 as not requiring municipal contracts to be open to public inspection. SDCL §9-18-2 only goes so far as to state that the "record of the official acts and proceedings of his office...shall be open to public inspection" without further defining what is encompassed within "official acts and proceedings." Moreover, SDCL § 9-14-21 sets out its own standard of inspection for contracts entered into by the municipality, which contradicts the Argus Leader's interpretation of SDCL § 9-18-2. SDCL § 9-14-21 allows the inspection of contracts for "all parties interested," which is distinct from being open to inspection by the public. Were SDCL § 9-18-2 to encompass contracts entered into by the City, then the language in SDCL § 9-14-21, which allows the book

of contracts to be open to inspection only by interested parties, would be mere surplusage. This court does acknowledge that "[w]hen the question of which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute." Benson v. State, 2006 SD 8, ¶ 71, 710 N.W.2d at 158 (quoting Martinmaas, 2000 SD 85, ¶ 49, 612 N.W.2d at 611) (other citations omitted). This is further elaborated by SDCL § 1-27-33, which indeed states that the provisions of SDCL § 1-27 will not supersede more specific provisions regarding public access found elsewhere in South Dakota's code.

Yet, "where statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them harmonious and workable." Wiersma v. Maple Leaf Farms, 1996 SD 16, ¶ 4, 543 N.W.2d 787, 789. The South Dakota Legislature decided to exclude contracts entered into by the City and declared confidential from being subject to public inspection. SDCL § 1-27-1.5(20). The legislature's objective in SDCL §1-27-1.5(20) comports with this court's interpretation that SDCL §9-18-2 does not require that all municipal contracts be open to public inspection, but only open to inspection by interested parties via SDCL § 9-14-21. This interpretation satisfies this court's duty to give a reasonable construction to all provisions and to construe such provisions in a workable and practical manner.

CONCLUSION

The Argus Leader's Motion for Summary Judgment is DENIED and the City's Motion for Summary Judgment is GRANTED. The Settlement is a document declared confidential by contract and is not open to public inspection according to SDCL § 1-27-1.5(20).

Therefore, let an Order be entered accordingly.

ORDER

Based on the Findings of Fact and Conclusions of Law, the Court hereby,

ORDERS, ADJUDGES AND DECREES as follows:

1. The Plaintiff's motion for summary judgment is DENIED.

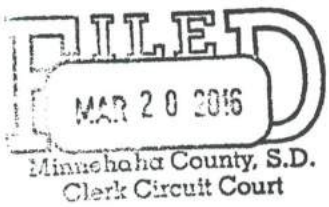
2. The Defendant's motion for summary judgment is GRANTED.

3. Counsel for the Defendant's will prepare a Judgment accordingly.

Dated on May 20, 2016.

John Ryan Pekas
Circuit Court Judge

Attest: Angelia M. Gries, Clerk of Courts
By: Lammi Penning
Deputy



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

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ARGUS LEADER MEDIA,	:	CIV. 15-3268
Plaintiff,	:	
v.	:	
LORIE HOGSTAD, in her official capacity as Sioux Falls City Clerk, TRACY TURBAK, in his official capacity as Sioux Falls Finance Officer, and CITY OF SIOUX FALLS,	:	**JUDGMENT**
Defendants.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

On January 11, 2016, Defendants Lorie Hogstad, Tracy Turbak, and the City of Sioux Falls moved under SDCL § 15-6-56 that the Court grant summary judgment dismissing the complaint filed by Plaintiff Argus Leader Media. On February 10, 2016, the Argus Leader filed its own motion for summary judgment. Both motions were fully briefed by the parties. The Court held a hearing on February 22, 2016, at which the parties were represented by counsel of record. After considering the oral and written arguments of counsel, all of the documents on file, and otherwise being fully advised, the Court issued a Memorandum Opinion and Order dated May 20, 2016, granting the Defendants' motion and denying the Plaintiff's motion. For the reasons stated in the opinion, which is incorporated by reference, it is hereby

ORDERED AND ADJUDGED that judgment is entered in favor of Defendants and Plaintiff's complaint is dismissed with prejudice.

BY THE COURT:

John Ryan Pekas
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS

BY: _____, DEPUTY

(SEAL) UNIFIED JUDICIAL SYSTEM JUSTICE STATE OF SOUTH DAKOTA

FILED
JUN 06 2016
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27903

ARGUS LEADER MEDIA,

Plaintiff/Appellant,

vs.

LORIE HOGSTAD, in her official capacity as Sioux Falls City Clerk, TRACY TURBAK, in his official capacity as Sioux Falls Finance Officer, and CITY OF SIOUX FALLS,

Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE JOHN R. PEKAS

BRIEF OF APPELLEES

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Notice of Appeal filed June 17, 2016

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JURISDICTIONAL STATEMENT

The Memorandum and Order on Summary Judgment was entered on May 20, 2016. (SR 59.) The Judgment was entered on June 16, 2016. (SR 70.) Notice of Entry of Judgment was filed on the same day. (SR 72.) The Appellant's Notice of Appeal was filed on June 17, 2016. (SR 74.)

STATEMENT OF ISSUES

1. The circuit court held that the exclusion in SDCL § 1-27-1.5(20) for any document declared confidential by "contract" precluded public disclosure of a settlement agreement containing a confidentiality clause that was entered into between the City of Sioux Falls and several contractors after a construction dispute. The statutory exclusion lists three different exceptions: any document declared closed or confidential by: (1) "court order"; (2) "contract"; or (3) "stipulation of the parties to any civil or criminal action or proceeding." Did the circuit court correctly hold that the exception applied because the statutory language "of the parties to any civil or criminal action or proceeding" applies only to "stipulation," and not to "court order" or "contract"?

   Wheeler v. Cinna Bakers LLC, 2015 S.D. 25, 864 N.W.2d 17.
   MGA Ins. Co. v. Goodsell, 2005 S.D. 118, 707 N.W.2d 483.
   Kaberna v. School Bd., 438 N.W.2d 542 (S.D. 1989).
   SDCL §§ 1–27–1, –1.1, –1.3, –1.5(20).

2. In SDCL Ch. 9-14, the legislature included several statutes outlining the duties of municipal officers and employees, none of which mention or address the open-records provisions in SDCL Ch. 1-27 or the specific exemption in SDCL § 1-27-1.5(20). This Court applies the rules that statutes must be interpreted so that none of their parts are meaningless and that more specific statutes control over general statutes when statutes cannot be reconciled. Do the general sections in SDCL Ch. 9-14 on the duties of municipal employees trump the specific open-records exception in SDCL § 1-27-1.5(20)?

   Breck v. Janklow, 2001 S.D. 28, 623 N.W.2d 449.
   Wildeboer v. S.D. Junior Chamber of Commerce, 1997 S.D. 33, 561 NW.2d 666.
   SDCL §§ 1–27–4.1, –4.2, –45, and –46; 9–14–17, –21; and 9–18–2.

STATEMENT OF THE CASE

The facts are undisputed. The issues on appeal are pure questions of law. Argus Leader Media (the "Argus Leader") brought suit against the City of Sioux Falls and two

of its officials (the "City") seeking a declaratory judgment requiring the City to turn over a copy of the confidential global settlement agreement (the "Confidential Settlement Agreement") reached in September of 2015 between the City and several contractors who worked on the T. Denny Sanford PREMIER Center ("PREMIER Center"). The City denied the Argus Leader's request for a copy of the Confidential Settlement Agreement because South Dakota law expressly provides that "[a]ny documents declared closed or confidential by court order, *contract*, or stipulation of the parties to any civil or criminal proceeding" are not open records subject to public inspection and copying. SDCL § 1–27–1.5(20) (emphasis added). The plain language of the statute provides that documents declared confidential by contract are not open to public inspection and copying, and as a result, Circuit Judge John R. Pekas of the Second Judicial Circuit in Minnehaha County properly granted summary judgment in favor of the City.

STATEMENT OF THE FACTS

In 2014, the City raised questions regarding the aesthetic appearance of the exterior of the metal siding on the west side of the PREMIER Center with several of the contractors who performed work on the building. (SR 59 and 25 at ¶ 1.) The City negotiated with the general contractor and four subcontractors, all of whom were represented by counsel, to resolve the dispute. (*Id.*) After mediation, the parties reached a confidential settlement agreement. (*Id.*) One of the subcontractors later disputed the terms of the agreement, so the City retained outside counsel who ultimately prepared a lawsuit to enforce the terms of the settlement. (SR 60 and 25–26 at ¶ 2.) Before the lawsuit was served, the parties reached a global settlement of the dispute that was

memorialized in the Confidential Settlement Agreement and formally announced to the public on September 18, 2015. (SR 60 and 25–26 at ¶¶ 2–3.)

Paragraph 6.6 of the Confidential Settlement Agreement provides that each party to the agreement warrants that, except for disclosure of the global settlement amount of $1,000,000, all other details "shall remain confidential and shall not be disclosed to any person." (SR 60 and 26 at ¶ 4.) The City disclosed the global settlement amount in its official announcement, but the City did not disclose any other details or terms of the Confidential Settlement Agreement, including the respective contributions of the contractors. (SR 2 at Ex. 2.)

On October 9, 2015, Joe Sneve, a reporter for the Argus Leader, sent an email to David Pfeifle, the City Attorney, requesting a "copy of the recently agreed upon settlement between the City of Sioux Falls and the contractors involved with the construction of the T. Denny Sanford PREMIER Center." (SR 60 and 26 at ¶ 5.) Pfeifle denied Sneve's request on October 21, 2015, citing the confidentiality language of the Confidential Settlement Agreement and SDCL § 1–27–1.5(20) as grounds for the denial. (SR 60 and 26 at ¶ 6; SR 2 at Ex. 3.) The Argus Leader's attorney, Jon Arneson, wrote to Pfeifle on October 31, 2015, asking Pfeifle to reconsider the City's decision. (SR 60 and 26 at ¶ 7.) Pfeifle responded on November 19, 2015, and declined to reconsider the City's decision to deny the Argus Leader's request. (SR 60 and 26–27 at ¶ 8.)

On December 1, 2015, the Argus Leader brought an action seeking a declaratory judgment requiring the City to turn over a copy of the Confidential Settlement Agreement to the Argus Leader. (SR 2.)

ARGUMENT

The plain language of SDCL § 1–27–1.5(20) exempts the Confidential Settlement Agreement from public inspection and copying. Even if the Court concludes that the language of the statute is ambiguous, longstanding rules of statutory construction support the City's interpretation of the statute. In addition, the authority cited by the Argus Leader in support of its argument is not binding and unpersuasive.

The Court reviews a circuit court's grant of summary judgment under the *de novo* standard of review. *Heitmann v. Am. Fam. Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, __ N.W.2d __ (quoting *Ass Kickin Ranch, LLC v. Star Mut. Ins. Co.*, 2012 S.D. 73, ¶ 7, 822 N.W.2d 724, 726). On review of a grant of summary judgment, the Court must "decide 'whether genuine issues of material fact exist and whether the law was correctly applied.'" *Id.* (quoting *Ass Kickin Ranch*, 2012 S.D. 73, ¶ 6). "We will affirm a circuit court's decision so long as there is a legal basis to support its decision." *Id.*

1. The plain language of SDCL § 1–27–1.5(20) exempts the Confidential Settlement Agreement from public inspection and copying.

SDCL § 1–27–1 provides that, "[e]xcept as otherwise expressly provided by statute," all citizens of South Dakota have the authority to examine public records. SDCL § 1–27–1.1 broadly defines "public records," and SDCL § 1–27–1.3 provides that the public records statutes should be liberally construed. However, SDCL § 1–27–1.5 sets forth at least twenty-seven express exceptions to the public records statutes. Section 1–27–1.5 provides, in pertinent part: "The following records are not subject to §§ 1–27–1, 1–27–1.1, and 1–27–1.3: . . . (20) Any document declared closed or confidential by

court order, *contract*, or stipulation of the parties to any civil or criminal action or proceeding." SDCL § 1–27–1.5(20) (emphasis added).

By its plain language, SDCL § 1–27–1.5(20) clearly and unambiguously provides three separate categories of records that are closed to public inspection. "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." *Wheeler v. Cinna Bakers LLC*, 2015 S.D. 25, ¶ 6, 864 N.W.2d 17, 20 (quoting *City of Rapid City v. Anderson*, 2000 S.D. 77, ¶ 7, 612 N.W.2d 289, 291). Further, 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." *MGA Ins. Co. v. Goodsell*, 2005 S.D. 118, ¶ 9, 707 N.W.2d 483, 485 (quoting *State v. Myrl & Roy's Paving, Inc.*, 2004 S.D. 98, ¶ 6, 686 N.W.2d 651, 653–54).

Here, SDCL § 1–27–1.5(20) is unambiguous. In clear and plain language, it presents three categories of information that are exempt from the public disclosure requirements of South Dakota law. The language of the statute creates three separate categories of documents declared closed or confidential: (1) those by court order; (2) those by contract; and (3) those by stipulation of the parties to a proceeding. Because the terms of the Confidential Settlement Agreement, a contract, were declared confidential by the language in paragraph 6.6, the Confidential Settlement Agreement falls squarely within the exception provided in SDCL § 1–27–1.5(20).

The Argus Leader, in its brief, is quick to skip over the application of the plain meaning of the statute, suggesting instead that "it is evident from the resort to interpretive

devices that SDCL § 1-27-1.5(20) is not a model of legislative clarity." (Appellant's Br. at 8.) The logic is backwards. As this Court knows, the fact that parties disagree about the meaning of a statute does not make it ambiguous. *See, e.g.*, *Peters v. Spearfish ETJ Planning Comm'n*, 1997 S.D. 105, ¶ 8, 567 N.W.2d 880, 884. It is equally wrong to say that the use of interpretation means that a text is unclear. Rather, as stated in the first principle of interpretation in *Reading Law: The Interpretation of Legal Texts*, "[e]very application of a text to particular circumstances entails interpretation." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 53 (2012).

Thus, this Court has stated that its "first step in determining legislative intent is to look at the plain language of the statute." *Wheeler*, 2015 S.D. 25, ¶ 6, 864 N.W.2d at 20. Instead of beginning with this first step, the Argus Leader skips ahead and argues that its interpretation of section 1–27–1.5(20), based mostly on non-textual arguments, is the better interpretation. The Argus Leader fails, however, to make a compelling argument that the statute is ambiguous. No rule of grammar or punctuation supports the Argus Leader's understanding that "of the parties to any civil or criminal action or proceeding" modifies "contract." The Court is charged with determining what the legislature actually said, not what it thinks the legislature should have said. *MGA Ins. Co.*, 2005 S.D. 118, ¶ 9, 707 N.W.2d at 485. Because the language of the statute is unambiguous, making the intent of the legislature clear, the Court need go no further than concluding that the Confidential Settlement Agreement is exempt from disclosure under the plain and clear language of section 1–27–1.5(20).

2. Rules of statutory construction support the circuit court's conclusion that the Confidential Settlement Agreement is exempt from public inspection and copying.

Even if the Court were to determine that the statute is ambiguous, fundamental rules of statutory construction support the circuit court's interpretation of the statute. The Argus Leader argued to the circuit court that the phrase "stipulation of the parties to any civil or criminal action or proceeding" modifies the term "contract" in SDCL § 1–27–1.5(20). The City argued before the circuit court that the doctrine of the last antecedent required the opposite interpretation, and the circuit court agreed. In response, the Argus Leader now argues that the circuit court inappropriately relied on the doctrine of the last antecedent, in part because "[t]he doctrine has little weight or value." (Appellant's Br. at 9–12 (quoting Kimble, *Doctrine of the Last Antecedent, the Example in Barnhart, Why Both are Weak, and How Textualism Postures*, 16 SCRIBES J. LEGAL WRITING 5 (2014)).)

This Court "long ago" adopted the "Doctrine of the Last Antecedent." *See Kaberrna v. School Bd.*, 438 N.W.2d 542, 543 (S.D. 1989) (citing *Lewis v. Annie Creek Mining Co.*, 74 S.D. 26, 48 N.W.2d 815 (1915)). The doctrine states: "[I]t is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation." *Id.* (quoting *Lewis*, 74 S.D. at 33, 38 N.W.2d at 819). This doctrine is not an outlier, but rather "the legal expression of a commonsense principle of grammar." *Reading Law* at 144.[1] The United States Supreme Court approves of the doctrine. "While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, we have said that construing a statute in accord

[1] Scalia and Garner state the canon as follows: "A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent." *Reading Law* at 144. In *The Elements of Style*, the rule is stated as follows: "modifiers should come, if possible, next to the word they modify." William Strunk & E.B. White, *The Elements of Style* at 30 (3rd ed. 1979).

with the rule is 'quite sensible as a matter of grammar.'" *Barnhart v. Thomas*, 540 U.S. 20, 27 (2003). Applying the doctrine in this case, the modifier "of the parties to any civil or criminal action or proceeding" applies only to the last antecedent in the list of three, i.e., "stipulation," and not "contract."

The Argus Leader argues that two phrases in SDCL § 1–27–1.5(20), "by court order" and "by stipulation of the parties to any civil or criminal action or proceeding," suggest a "dominant purpose" that weighs against applying the doctrine of the last antecedent. (Appellant's Br. at 9.) The City does not dispute that the statute's purpose is relevant, but purpose must be determined from the text, not from nontextual sources and interpretations. *See Reading Law* at 56-58 ("[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.") The Argus Leader's interpretation would leave a statute that makes no logical sense and would create ambiguity in an otherwise unambiguous statute. For example, parties to civil or criminal actions or proceedings can enter into contracts and they can enter into stipulations, but a court order can only be entered by a judge. If the modifier applied to "court order," the statute would mean that "any document declared closed or confidential by court order . . . of the parties to any civil or criminal action or proceeding" is exempt from public inspection an copying—an interpretation that makes little, if any, sense.[2]

In addition, if the modifier were applied to both "contract" and "stipulation," it would make those terms redundant. A stipulation is a contract. *See Estate of Thomas v.*

[2] The Argus Leader disavows this argument by stating that it "has never argued that the modifier should be read to apply to 'court order'" (Appellant's Br. at 9 n.10), but it offers no grammatical or legal principle that would allow the modifier to apply to the second and third antecedents, but not the first.

Sheffield, 511 N.W.2d 841, 843 (S.D. 1994) (‘“[S]tipulations are treated as binding contracts” (quoting *Pekarek v. Wilking*, 380 N.W.2d 161, 163 (Minn. Ct. App. 1986)).) Thus, the legislature must have intended some distinction. The Court must “assume that the legislature intended that no part of its statutory scheme be rendered mere surplusage.” *Faircloth v. Raven Indus.*, 2000 S.D. 158, ¶ 6, 620 N.W.2d 198, 201.

The Argus Leader argued before the circuit court that the legislature was merely “doubling up for emphasis” and that the City’s argument fails because, under the City’s interpretation, the term “contract” would encompass the word “stipulation” and thus the use of “stipulation” would be surplusage. As an example of the legislature “doubling up,” the Argus Leader argued that the statute uses the phrase “closed or confidential,” which is itself a doubling. But this argument misses the mark. If the Argus Leader were correct, the statute would read: “any document declared closed or confidential by court order, or a contract or stipulation of the parties to any civil or criminal action or proceeding.” But those are not the words, the grammatical structure, or the punctuation the legislature used in drafting section 1–27–1.5(20).

Unlike the phrase “closed or confidential,” the Legislature used commas to separate the three distinct categories of information it exempted from the public records statutes in SDCL § 1–27–1.5(20). The legislature defined three categories of documents and used a serial comma to separate them. One of the functions of a comma is to “separate[] items (including the last from the next-to-last) in a list of more than two.” Bryan Garner, *A Dictionary of Modern American Usage*, at 537 (1998). As Garner writes, “omitting the final comma [in a series] may cause ambiguities, *whereas including it never will*.” *Id*. (emphasis added). *See also Reading Law* at 165 (“Authorities on

English usage overwhelmingly recommend using the serial comma to prevent ambiguities.") The legislature could have written the statute such that the phrase "of the parties to any civil or criminal action or proceeding" would modify the word "contract." Instead, the legislature placed the modifier at the end of the sentence and isolated the word "contract" between commas. "No intelligent construction of a text can ignore its punctuation." *Reading Law at 16*.[3] Stated with greater particularity to the issue here, "[p]unctuation in a legal text will rarely change the meaning of a word, but it will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part." *Id*. Accepting the Argus Leader's argument would require the Court to rewrite the statute, which it cannot do. *See MGA Ins. Co*., 2005 S.D. 118, ¶ 29, 707 N.W.2d at 488 ("we cannot rewrite the statute").

The Argus Leader's reliance on SDCL § 2-14-8 does not contradict this argument. The statute provides: "Punctuation shall not control or affect the construction of any provision when any construction based on such punctuation would not conform to the spirit and purpose of such provision." The statute does not forbid consideration of punctuation, but only constructions based on punctuation that defeat the purpose of the statute. Purpose must be "described as concretely as possible, and not abstractly." *Reading Law* at 57. While the purpose of SDCL § 1-27-1 is to enable public access to government records, the purpose of SDCL § 1-27-1.5(20) is to except certain records from public disclosure. The circuit court's decision is not contrary to that purpose.

[3] Contrast this statement with the Argus Leader's put down about "blind allegiance" to punctuation. (Appellant's Br. at 21.) Use of the serial comma is not "inelegant punctuation," and following a standard rule of punctuation is not "rigid." (*Id.* at 22.) There is no basis for the Argus Leader's reference to "[q]uestionable punctuation." *Id.* at 21 n.13.

The Argus Leader cites a number of "judicial and academic cautions" regarding the use of the doctrine of the last antecedent. (Appellant's Br. at 12.) The Argus Leader also contends that the circuit court and the City "made the conscious and unfortunate decision to elevate punctuation over common sense and substance." (Appellant's Br. at 21.) The City, like the circuit court's decision, relies on grammar and punctuation because there is no other sensible and principled way to read the language of a statute. The circuit court's decision results in the only interpretation of the statute that makes logical sense and that gives meaning to the text. On the other hand, the Argus Leader's interpretation would require the Court to render meaningless the word "contract" and to apply the modifier to "court order" in a way that would not make sense.

Further, the Court should avoid interpreting a statute in a way that would lead to an absurd or unreasonable result. *See Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 15, 739 N.W.2d 475, 480 ("In construing a statute, we presume that the legislature did not intend an absurd or unreasonable result from the application of the statute." (internal quotation marks and citation omitted)). There is no clear legislative directive to support the Argus Leader's strained interpretation of the statute. The Argus Leader interprets the statute to stand for the proposition that only a settlement agreement made during a pending civil action or proceeding can be confidential, while a settlement agreement made on the eve of litigation cannot. There is no reason that can be gleaned from the statute for the Court to conclude that the legislature intended such a result, nor is there any apparent reason why such a result would make sense or serve the goals of the public records statutes. "It is presumed the legislature acts with purpose and does not perform useless acts." *Breck v. Janklow*, 2001 S.D. 28, ¶ 20, 623 N.W.2d 449, 457 (citing *Scott v. North Dakota*

Workers Comp. Bureau, 1998 N.D. 221, 587 N.W.2d 153, 156; *Bickel v. Jackson*, 530 N.W.2d 318, 320 (N.D. 1995)).

Although the Argus Leader attempts to paint the City's argument as absurd or illogical, the Argus Leader misses the absurdity of its own position. For example, based on the Argus Leader's own interpretation of the statute, to make the Confidential Settlement Agreement indisputably confidential, the only thing the City had to do to obtain confidentiality was serve the civil lawsuit its counsel had drafted.[4] In essence, under the Argus Leader's interpretation of the statute, the difference between a document that is properly declared confidential and a state-wide scheme of "contractual secrecy" that defeats the legislature's intent in adopting the open records law is the cost of service of process or a filing fee. The circuit court properly recognized this absurdity. (SR 66.)

In addition, the Argus Leader argues that the nature of the exceptions laid out in SDCL § 1–27–1.5(20) supports its argument. (Appellant's Br. at 16-17.) For example, the Argus Leader argues that the enumerated exceptions "are expressed in terms of *what* to close, not *how* to close." *(Id.)* (emphasis original). The Argus Leader argues that "the trial court's interpretation of SDCL § 1–27–1.5(20), however, focuses only on the *method* by which any document can be closed, as opposed to the actual contents of the document, itself." (*Id*. at 17) The Argus Leader also argues that the trial court's interpretation of SDCL § 1–27–1.5(20) is inconsistent with the objectives of South Dakota's public records laws. (Appellant's Br. at 13.) The Argus Leader contends that it is not concerned about anything that "has been hidden," but instead about something that "could be hidden." (*Id*.) The merit of its argument, the Argus Leader argues, "is based

[4] A lawsuit is commenced in South Dakota state court by service (SDCL §§ 15-2-30, 15-6-3), and in federal court by filing (Fed. R. Civ. P. 3).

on possibility, not actuality." (*Id*.) The Argus Leader also requests that the Court "look for a better option" than the words used by the legislature by "determin[ing] the interpretation that most logically suits the probable legislative intention." (Appellant's Br. at 20.) This invitation to abandon the text and create a brave new world of statutory interpretation in South Dakota should be declined.

A major problem with the Argus Leader's arguments, aside from ignoring the text, is that the arguments ask the Court to fix perceived legislative drafting issues based upon potential unintended consequences of the statute as currently written. This case involves only the question whether the Confidential Settlement Agreement is exempt from public inspection and copying. As the circuit court noted, there is no allegation of malevolent secrecy on the part of the City in this case, and the City disclosed "arguably the most important term, that is, the global settlement amount of $1,000,000." (SR 66 n.1.) The Argus Leader does not explain what public interest would be served by disclosure of the individual amounts that made up the total settlement, especially if, absent confidentiality, a settlement could not have been reached. The facts in this case establish that confidentiality was a material term without which a settlement would not have happened. (SR 29 at ¶ 7.)

Thus, the Argus Leader's arguments regarding potential abuses and government secrecy are not based on either the facts of this case or the language of the statute, but on an appeal to the Argus Leader's own view of justice. At issue, however, is the text. See *Reading Law* at 347-78 (discussing the "false notion that the quest in statutory interpretation is to do justice"). The Argus Leader's attempt to outline conceivable problems that could arise in other cases under the statutory language as written is a

debate best left for the legislative chambers. Based on the language of the statute as drafted by the legislature, the circuit court properly declared what the legislature said.

3. The authority cited by the Argus Leader is not binding and unpersuasive.

The Argus Leader relies heavily on the decision of a hearing examiner and a circuit court judge in another case with distinguishable facts. (Appellant's Br. at 22–23.) That case involved the Superintendent of the Huron School District who entered into a settlement agreement with the school district. The terms of the settlement agreement declared that the agreement was closed and confidential. The Mitchell Daily Republic requested a copy of the agreement, and the request was denied. The newspaper then submitted a written request for administrative review of the denial and the hearing examiner decided that the agreement was a public record under SDCL § 1–27–1.5(20). On appeal to the circuit court, the school district first argued that the phrase "civil or criminal action or proceeding" applies only to the word "stipulation" and not to "contract." The school district then argued that the term "proceeding" does not necessarily require a judicial action. Judge Jon Erickson addressed in his decision only the district's second argument. He decided that a "proceeding" necessarily involved judicial action.

Although the Argus Leader cites to Judge Erickson's Findings of Facts and Conclusions of Law, that document is not in the record.[5] Because the Findings of Facts and Conclusions of Law were never entered into the record, the City lacks the

[5] The Argus Leader attached to its complaint the Hearing Examiner's Findings of Fact and Conclusions of Law and Order, (SR 2 at Ex.4), and Judge Erickson's written decision (SR 2 at Ex.6). However, the Argus Leader has not entered Judge Erickson's Findings of Fact and Conclusions of Law into the record, and as such, that document is not part of the Settled Record in this case.

opportunity to respond to this argument based on the context of Judge Erickson's Findings of Fact and Conclusions of Law. In other words, the City and the Court lack the benefit of reviewing all the findings of fact and conclusions of law entered by Judge Erickson in addition to those contained in the block quote the Argus Leader cited in its brief. (Appellant's Br. at 22.) More importantly, though, Judge Erickson concluded in his memorandum decision that "SDCL § 1–27–1.5(20) does not apply to School Board and School District Officers" because SDCL § 13–8–43 "requires the District to keep open to reasonable inspection by the public all contracts relating to school business" and "[t]here are no exceptions" to that statute. Thus, any comments related to SDCL § 1–27–1.5(20) are dicta, and the decision did not even address the merits of the argument the City asserted and the circuit court adopted here—i.e., that the phrase "of the parties to any civil or criminal action or proceeding" applies only to the word "stipulation" and not to "contract."

The circuit court noted that Judge Erickson's decision could be considered persuasive authority. However, the circuit court stated that it was "not convinced that Judge Erickson's decision fully addressed the issue that is currently at stake here." (SR 65.) The circuit court noted that Judge Erickson's decision rested on SDCL § 13–8–43, which was a more specific statute dealing with contracts related to school business records. (*Id.*) There is no reason why this Court should rely on an unappealed and factually and legally distinguishable decision to resolve a purely legal question that, instead, should be decided based on the text of the statute.

4. There are no "more specific" statutes that supersede SDCL § 1–27–1.5(20).

The Argus Leader argues that SDCL §§ 1–27–4.1, –4.2, –45, and –46, taken together, demonstrate that the legislature intended to keep open to the public contracts entered into by government entities. (Appellant's Br. at 25.) But none of these statutes are applicable here. Section 1–27–4.1 requires written contracts entered into by government entities to be stored by the records retention officer for at least two years. Section 1–27–4.2 states that any retained contract "*may* be made available to the public through a publicly accessible internet website or database." (emphasis added). Section 1–27–45 provides that the state must maintain a searchable internet website for posting public records and financial information of the state, municipalities, and other government entities. Section 1–27–46 requires that the state display publicly on a searchable internet website "each written contract for supplies, services, or professional services of ten thousand dollars or more." None of these statutes requires that the Confidential Settlement Agreement be open to public inspection, and none of these statutes expresses intent to override any provision of SDCL § 1–27–1.5(20). The closest any of these statutes comes to requiring the Confidential Settlement Agreement to be open to the public is section 1–27–46, but the Confidential Settlement Agreement is not a contract for supplies, services, or professional services of ten thousand dollars or more, so this provision is inapplicable.

In addition, the Argus Leader argues that SDCL §§ 9–14–17, –21, and 9–18–2 are all more specific statutes dealing with municipal contracts that "supersede" SDCL § 1–27–1.5(20). (Appellant's Br. at 26.) First, Chapter 9-14 outlines the duties of municipal officers and employees. It does not contain any open records acts enacted by the legislature. Section 9-14-17 states that the municipal finance officer is required to keep

and store all records of the municipality. This section imposes no requirement that the Confidential Settlement Agreement be open to the public.

Section 9-14-21 further outlines the duties of the municipal finance officer. That section states:

> The municipal finance officer shall examine all reports, books, papers, vouchers, and accounts of the treasurer; audit and adjust all claims and demands against the municipality before they are allowed by the governing body; and keep a record of the finance officer's acts and doings. The finance officer shall keep a book in which the finance officer shall enter all contracts. The book shall include an index to the contracts and shall be open to the inspection of all parties interested. The finance officer shall perform such other duties as may be required by ordinance, resolution, or direction of the governing body. However, the finance officer may destroy any record which the Records Destruction Board, acting pursuant to § 1-27-19, declares to have no further administrative, legal, fiscal, research, or historical value.

SDCL § 9-14-21. Given that this statute outlines the duties of the municipal finance officer and does not purport to be part of an open records act, the provisions of SDCL § 1-27-1.5 are more specific because the legislature enacted them with the express purpose of outlining when a contract is or is not open for public inspection and copying. A statute specifically dealing with when records are open or closed, and which includes appropriate exceptions, is more specific than a statute outlining the duties of a municipal officer.

Similarly, section 9-18-2 outlines the duties of every municipal officer. It states: "[e]very municipal officer shall keep a record of the official acts and proceedings of his office, and such record shall be open to public inspection during business hours under reasonable restrictions." The Argus Leader essentially argues that, under section 9–18–2, any "official acts or proceedings"

are open for public inspection notwithstanding the provisions of SDCL § 1–27–1.5.

If it were true that the provisions of chapter 9-14 trump South Dakota's open records law, then the entirety of SDCL § 1–27–1.5(20) would be surplusage. The legislature's work in passing open records statutes, which the Argus Leader recounts in great detail, including the enumeration of the twenty-seven exceptions listed in section 1–27–1.5, would be all for naught. Under the Argus Leader's argument, any "contracts" referred to in SDCL § 9-14-21 or any "official acts or proceedings" referred to in SDCL § 9-18-2 would be open for public inspection, regardless of whether they otherwise contain information falling within any of the enumerated exceptions to South Dakota's open records laws set forth in SDCL § 1-27-1.5. The Argus Leader's argument goes from asking the Court to give no meaning to the word "contract" in SDCL § 1–27–1.5(20) in the beginning of its brief, to asking the Court to give no meaning to entire sections of the South Dakota Code by the end of its brief. The unsoundness of the Argus Leader's position is illustrated by its resort to such far-fetched arguments.

The legislature is presumed to act with purpose, and the Court should not interpret a statute in a way that renders any of its parts meaningless. *See Breck*, 2001 S.D. 28, ¶ 20, 623 N.W.2d at 457 ("It is presumed the legislature acts with a purpose and does not perform useless acts.") (citations omitted). Moreover, where statutes conflict and cannot reasonably be reconciled, "general statutes must yield to specific statutes if they are not consistent." *Wildeboer v. S.D. Junior Chamber of Commerce*, 1997 S.D. 33, ¶ 24, 561 N.W.2d 666, 670.

Assuming a conflict with the cited sections in Chapter 9-14, the open-records exception is the more specific statute. Thus, the circuit court properly concluded that none of these provisions required the Confidential Settlement Agreement to be open to public inspection and copying. Any contrary conclusion would give no effect to the provisions of South Dakota's open records laws, including the enumerated exceptions.

CONCLUSION

Having written off the plain language of the statute, the longstanding grammatical rule of the doctrine of the last antecedent, and punctuation as irrelevant to interpreting statutory text, the Argus Leader instead appropriates the writings of Thomas Jefferson and James Madison as further support for its nontextual interpretation of SDCL § 1–27–1.5(20). (Appellant's Br. at 29.) In so placing its focus on rhetoric, the Argus Leader has failed to address the City's straightforward textual arguments. The City interprets SDCL § 1–27–1.5(20) in a logical way, consistently with common grammatical rules and rules of statutory construction, in which every word of the statute is given effect. The Argus Leader, by contrast, ignores the plain language of the statute, ignores grammar and punctuation in favor of loose references to "transparency" and "government accountability" (Appellant's Br. at 30), and asks the Court to read out entire sections of South Dakota law to reach its desired result. The plain, unambiguous language of SDCL § 1–27–1.5(20), as well as the relevant rules of statutory interpretation, all lead to the same result—the Confidential Settlement Agreement, made confidential by its contractual terms, is exempt from public disclosure. The City respectfully requests that the judgment be affirmed.

Dated this ____ day of September, 2016.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 5,645 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this ____ day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of September, 2016, I electronically served via e-mail, a true and correct copy of the foregoing Brief of Appellees to Jon Arneson at 123 South Main Avenue, Sioux Falls, SD 57104, Attorney for Appellants.

_____
One of the Attorneys for Defendants

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27903

ARGUS LEADER MEDIA,

Plaintiff and Appellant,

vs.

LORIE HOGSTAD, in her official capacity as Sioux Falls City Clerk, TRACY TURBAK, in his official capacity as Sioux Falls Finance Officer, and CITY OF SIOUX FALLS,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS
Presiding Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed June 17, 2016

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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

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ARGUS LEADER MEDIA,

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vs. **APPELLANT'S REPLY BRIEF**

LORIE HOGSTAD, in her official capacity as Sioux Falls City Clerk, TRACY TURBAK, in his official capacity as Sioux Falls Finance Officer, and CITY OF SIOUX FALLS,

Defendants and Appellees.

PRELIMINARY STATEMENT

Appellant, Argus Leader Media, will be referred to in this Reply Brief as "the Argus." The Appellees, collectively, will be referred to as "the City." The settled record will be referred to as "SR." To facilitate the Court's review, this reply brief incorporates the City's argument numbering and addresses them in the order presented.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ITS INTERPRETION OF SDCL §1-27-1.5(20).

The question for this Court is whether the trial court correctly interpreted SDCL §1-27-1.5(20), a specific open records exception for "[a]ny document declared closed or confidential by court order, contract, or stipulation of parties to any civil or criminal

action or proceeding." The trial court subscribed to the City's position that among the specific exceptions listed at SDCL §1-27-1.5, the South Dakota Legislature insinuated a general power to conceal any document by means of "contract," resulting in an expansive open records exception that effectively neutralizes the open records law, itself.[1]

The trial court summarily rejected the Argus's "substance over form" interpretation[2] that logically and sensibly blends the word "contract" into its specific context and that of the general open records law to comport with its purpose.

The City's "plain language" argument.

The City contends that "[t]he plain language of [SDCL §1-27-1.5(20)] provides that documents declared confidential by contract are not open to public inspection and copying…." (Appellee Brief, p. 2) In defense of the trial court's decision, the City has repeatedly asserted that this extraordinarily sweeping new contractual power is "plain," "clear," "unambiguous" and "certain" legislative creation. (Appellee Brief, p. 5)

Taking up the City's argument, the trial court held that "contract" is a stand-alone term, providing a distinct, unqualified power to conceal. There is no mention who, supposedly, has this contractual authority or to what documents it pertains, [3] which

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[1] In its comprehensive overhaul of SDCL chap. 1-27 in 2009, the South Dakota Legislature, by unanimous vote, transformed the state into one in which government's records would be presumptively open. (SDCL §§'s 1-27-1; Tr. Ct. Memorandum, p. 3)

[2] The gist of this approach is that it elevates the law's "spirit and purpose" over unorthodox or flawed punctuation—in this case the insertion of a comma. See SDCL §2-14-8.

[3] "Document" is first defined as an "original or official paper relied on as the basis, proof, or support of something" and, second, as a "writing conveying information." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 10TH ED. (1996)

suggests that neither the trial court nor the City ever seriously considered the incredible ramifications of their interpretation.

After conceding that SDCL §1-27-1.1 "broadly defines 'public records,' the City acknowledges—as did the trial court (SR 64)—that SDCL §1-27-1.3 provides that public records statutes should be liberally construed." (Appellee Brief, p. 4) Yet liberal construction never factors into the analysis of either. As for the reciprocal rule that exceptions must be narrowly construed,[4] at least the trial court paid it lip service. (SR 64). The City does not bother.

But most disturbing is that neither the City nor trial court offers any coherent rationale for promoting an open records exception that systematically undermines the essential objectives of an open records law. To accept this unparalleled grant of secrecy requires this Court to discard the fundamental rules of construction and suspend its common sense.

After chiding the Argus for suggesting SDCL §1-27-1.5(20) "is not a model of legislative clarity," the City contends that the process of interpreting legislative intent begins—and ends—with a statute's "plain language." (Appellee's Brief, p. 6) In short,

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[4] In *Peters v. Spearfish ETJ Planning Com'n,* 1997 S.D. 105, ¶13, this Court emphasized the well-established rule:

> Additionally, exceptions to general provisions of an ordinance must be strictly, but reasonably construed. See *Olsen v. City of Spearfish*, 288 N.W.2d 497, 500 (S.D.1980). Exceptions extend only as far as their language fairly allows, with all doubts being resolved in favor of the general provision. Id. (citing *Lien v. Rowe*, 77 S.D. 422, 426, 92 N.W.2d 922, 924 (1958)).

the City insists that there is no ambiguity in SDCL §1-27-1.5(20)[5] and, therefore, no reason to consider any alternative legislative intent.

The Argus begs to differ. The very fact the legislature created a chapter of law predicated on an open record presumption—a presumption new to South Dakota—is ample reason to question the intended use of the word "contract." Consideration of alternatives is a valid exercise under the circumstances.

The City's "rules of statutory construction" argument.

Allowing for the possibility of ambiguity in SDCL §1-27-1.5(20), the City maintains that the trial court correctly relied on the "last antecedent doctrine" to reach a definitive interpretation. The doctrine, as we know, would preclude any textual modification of the word "contract" and result in the grant of unqualified contractual power to conceal documents.

However, even the City accepts that the doctrine's application is not automatic and is very much dependent upon a variety of factors. Citing *Lewis v. Annie Creek Mining Co.*, 48 N.W.2d 815, 819 (S.D. 1951) ("…modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation.") and *Barnhart v. Thomas*, 540 U.S. 20, 27 (2003) ("…this rule is not absolute and can assuredly be overcome by other indicia of meaning…."), the City makes the cautious admission that it "does not dispute that the statute's purpose is relevant…." (Appellee Brief, pp. 7,8)

[5] At the very least, the decisions of the hearing examiner [PRR 12-09] and Judge Jon Erickson [Beadle County Civil File 13-126] in Huron School Board open records case substantiate that the "plain meaning" is not as obvious as the City and trial court believe.

The City has never made much of an attempt to identify the "dominant purpose" of the open records law[6], much less worry about the implications of its interpretation. Instead, it resorts to strict "textualism"[7] to justify its narrow focus on the comma at the expense of the open records law as a whole.

The Argus takes issue with the City's not-so-subtle insinuation that "textualism" prevails and with its pronouncement that "[t]he City, like the circuit court's decision, relies on grammar and punctuation because there is no other sensible and principled way to read the language of the statute." (Appellee Brief, p. 11)

But even confirmed textualists are not bound to an overly restrictive interpretation when it is unreasonable. The late Justice Antonin Scalia, for instance, in his concurring opinion in *Green v. Bock Laundry Machine Company*, 490 U.S. 504, 109 S.Ct. 1981, 1994 (1989), wrote:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision

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[6] Although the trial court started with the observation that "[t]he statutes of South Dakota recognize the need for open public records" (SR 61), without any further discussion of "purpose," he concluded (SR 66):

> Lastly, this court finds that interpreting the word 'contract' as a stand-alone antecedent does not undercut the legislative purpose of SDCL §1-27-1….This court's interpretation simply comports with what is consistent with the plain language of the statute and the statute's rationale.

[7] See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012). "Textualism" is a school of interpretative theory that focuses on a statute's words. Another theory, "intentionalism," focuses on legislative intention. A third, "pragmatism" shifts the focus to the reader to determine what is sensible.

> must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.

The truth of the matter is that the trial court and the City leave us with a "contract" exception to the open records law has the capability of swallowing the law whole. Unspecified persons or entities can, for any—or no—reason, conceal any document under any circumstances. Even a textual absolutist would have trouble swallowing the potentially absurd consequences of the City's preoccupation with the comma in SDCL §1-27-1.5(20) and recognize a different interpretation was in order.

The other interpretative theories, "intentionalism" and "pragmatism" steer toward the Argus's more rational interpretation that conforms to the framework of SDCL 1-27, SDCL §1-27-1.5 *and* SDCL §1-27-1.5(20).

So, too, there is support for the Argus's viewpoint in the South Dakota case law cited here and in Appellant's Brief. *Kaberna v. School Bd. Of Lead-Deadwood Sch. Dist. 40-1*, 438 N.W. 2d 542, 543, (S.D. 1989) (quoting *Lewis v. Annie Creek Mining Co.*, 48 N.W.2d 815, 810 (S.D. 1951) (generally last antecedent doctrine applies "unless there is something in the subject matter or dominant purpose which requires a different interpretation."); *City of Sioux Falls v. Ewoldt,* 1997 S.D. 16, at ¶14 (Citing *Wiersma v. Maple Leaf Farms,* 1996 S.D. 16.) ("Intent must be determined from the statute as a whole, as well as enactments relating to the same subject. Where statutes appear to conflict, it is our responsibility to give reasonable construction to both…construing them together to make them 'harmonious and workable.'"); *Argus Leader v. Hagen*, 2007 S.D. 96, at ¶19 ("In construing a statute, we presume that the legislature did not intend an absurd and unreasonable result from the application of the statute."); *Breck v. Jankow,*

2001 S.D. 28, at ¶20 ("It is presumed the legislature acts with a purpose and does not perform useless acts."); *Simpson v. Tobin,* 367 N.W.2d 757, 764 (S.D. 1985) ("Exceptions in statutes generally should be strictly, but reasonably construed; they extend only so far as their language fairly warrants and all doubt should be resoled in favor of the general provision rather than the exception."); *Benson v. State,* 2006 S.D. 8 (Statues must be construed to uphold the state Constitution, the state's "supreme law.")

Adopting what the City considered to be SDCL §1-27-1.5(20)'s "plain meaning," the trial court never offered a plausible explanation why a legislature would intentionally do something as illogical and improbable as sabotaging its own hard work by incorporating an unparalleled power to close records that are presumably open. Despite citing 82 C.J.S. §443 for the rule that the last antecedent doctrine yields to "more persuasive contextual evidence of legislative intent and common sense," the trial court let the comma control and found the City's was "the only interpretation that makes logical sense…."

The decision is this case can and should be predicated on the combined influence of SDCL §2-14-8 and SDCL §2-14-11.

> **2-14-11. Arrangement of laws in code.** Provisions contained in any title, part, or chapter of the code of laws enacted by § 2-16-13 may be construed and considered in the light of such arrangement and such position in any case where such arrangement or such position tends to show the intended purpose and effect thereof.
>
> **2-14-8. Punctuation not controlling** Punctuation shall not control or affect the construction of any provision when any construction based on such punctuation would not conform to the spirit and purpose of such provision.

The City correctly notes that SDCL §2-14-8 "[forbids] only constructions based on punctuation that defeat the purpose of the statute." (Appellee Brief, p. 10) But that is

precisely the case here. The trial court's interpretation of SDCL §1-27-1.5(20) is the poster child for cases in which punctuation *does* defeat the statutory purpose. Further, ain accordance with SDCL §2-14-11, it is not reasonable to ascertain SDCL §1-27-1.5(20)'s purpose in total isolation. It is part of the fabric of SDCL 1-27 and needs to be considered in that context.[8]

The Argus's basic premise is that the scope of the word "contract" is limited by the context and that placing unconditional reliance on the function of a comma—very possibly an inadvertent one—would produce an outlandish result.

As the Argus has suggested:

- the comma was a drafting mistake;[9]
- 'contract' and 'stipulation' were used synonymously as one type of document-closing action, with the other being "court orders;"[10]
- "document" could refer to court-related materials in a litigation context.[11]

In a back-firing effort to denigrate the Argus's interpretation, the City protests that the Argus's reading would create 'surplusage,' writing: "In addition, if the modifier

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[8] If SDCL §1-27-1.5(20) allowed documents to be printed on yellow paper—as opposed to be concealed—the "purpose" might not be so important. But government access and accountability are, indisputably, significant matters.

[9] SDCL §1-27-1.5(20)'s origin remains a mystery. The legislative intention to give South Dakotans a presumption of open government's records is not a mystery.

[10] As the City points out, the Argus has never urged an interpretation that would apply the modifier to "court order." (Appellee Brief, footnote 2) Argus thinks the provision is better understood not as a series of three separate categories, but just two. It is not unreasonable to consider "contract" and "stipulation" to have been used synonymously or in a manner that covered agreements made by both attorneys and the parties.

[11] Argus refers to the dictionary definition—a favored source for Justice Scalia's "plain meaning." As noted previously, "document" is defined in a manner that lends credence to the notion that 27-1.5(20) relates to records connected to judicial actions and litigation.

were applied to both "contract" and "stipulation," it would make those terms redundant. *A stipulation is a contract."* (Appellee Brief, p. 8, emphasis added.) Ironically, the City hoists itself on its own petard. If 'contract' encompasses 'stipulation,' then in SDCL §1-27-1.5(20), the word 'stipulation' is redundant and all that follows, utterly pointless.

In theory, the City would avoid its surplusage problem only if it were understood that 'contract' pertained to 'documents' in a generic context, while 'stipulation' applied to 'documents' in a legal one. It would be more sensible, however, to conclude that 'document' is used in SDCL §1-27-1.5(20) to refer to a narrower judicial context. That would fit SDCL §1-27-1.5's pattern.[12]

Finally, the City seems to argue that statutory construction in this case should, essentially, be determined by the integrity of the City's action and that "potential unintended consequences of the statute as currently written" should not be taken into account. (Appellee, p. 13). The City actually wrote: "As the circuit court noted, there is no allegation of malevolent secrecy on the part of the City in this case, and the City disclosed 'arguably the most important term….The Argus does not explain what public interest would be served….'"

This is not only an untenable position, but also a preposterous one. In the first place, SDCL §1-27-1.5(20) is not judged by the facts of this or any other particular case. Moreover, it is not incumbent upon the public to prove a special "interest" or to establish

[12] The Argus refers the Court to its previous discussion of this point (Appellant Brief, pp. 16-18). The City seems to take issue with it, but offers no explanation for the aberration. (Appellee, p. 12-13)

wrongdoing. Surely, we do not have to wait until the harm has been done to interpret a law in a manner that would have prevented the harm in the first place.[13]

In conclusion, the South Dakota Code contains many statutes that are not perfectly written or punctuated. SDCL §1-27-1.5(20) is one of them. This Court should follow the statutory rule of punctuation that the legislature set for itself and rely on its collective common sense.

The City's "non-binding/unpersuasive authority" argument.

The City takes Argus to task for even mentioning Judge Jon Erickson's decision in a previous case involving the interpretation of SDCL §1-27-1.5(20). (Beadle County Civil File 13-126) The Argus brought the case to the trial court's attention to provide an existing legal view, being fully aware that it was not binding authority. That is not to say, Judge Erickson's decision lacks relevance or merit.[14]

Strangely, the City also claims that the Argus improperly cited Judge Erickson's Findings of Fact and Conclusions of Law because "that document is not in the record." (Appellee's Brief, p. 14) Regardless of the precedential value of a circuit court's decision, it is still a legal opinion that can be cited without being made "part of the record." Argus is not aware that it is not incumbent upon a party to put legal authority—

[13] To avoid repetition, the Argus again directs the Court's attention to its earlier comments on this subject. (Appellant's Brief, pp. 13-14)

[14] The City misconstrued the decision and convinced the trial court to do the same. Had Judge Erickson agreed with the City and trial court, as they claim he does, he would have concluded the settlement agreement in that case was also legitimately sealed by the contract/stipulation of the parties. His conclusions reflect the opposite view.

whether it be *Marbury v. Madison*, a Minnesota Court of Appeals decision or a South Dakota circuit court decision—into the record before citing it.[15]

II.

THE TRIAL COURT ERRED IN HOLDING THERE WERE NOT "MORE SPECIFIC" STATUTES UNDER SDCL §1-27-33 PREEMPTING SDCL 1-27-1.5(20).

The City's "no more specific superseding statutes" argument.

The City summarily rejects as "more specific" any and all SDCL Chap. 9-14 statutes delineating the responsibilities of municipal officers and employees because "[SDCL Chap. 9-14] does not contain any open records acts enacted by the legislature." (Appellee Brief, p. 16) SDCL §1-27-33 refers only to "more specific provisions regarding public access or confidentiality." There is no requirement that they be part of "open records acts."

In a subsequent argument, the City contends "the provisions of SDCL §1-27-1.5 are more specific [than those specifying municipal record duties] because the legislature enacted them with the express purpose of outlining when a contract is or is not open…." This begs the question, to which SDCL §1-27-1.5 provisions is the City referring? Certainly, SDCL §1-27-1.5(20) does not serve that purpose.

Furthermore, if the City truly believes that its grand vision of SDCL §1-27-1.5(20) allows it to disregard SDCL §9-18-2, it is misguided. With SDCL 9-18-2, the

[15] In any case, significant portions of Judge Erickson's conclusions *were* incorporated in the Argus's material facts. (SR 40, ¶¶12-14) To each reference, the City's response was: "Disputed as to the reasoning and applicability of the Hearing Examiner's [sic] decision, which are legal issues." (SR 46-47, ¶¶12-14). Clearly, the City understood there to be a distinction between law and fact.

legislature clearly imposed the duty on officials of municipalities—state political subdivisions—to keep an open record of "official acts and proceedings." The City's interpretation of SDCL §1-27-1.5(20) is, at best, a generic contractual authority that cannot possibly be considered "more specific" than a law limited to a particular class of government.[16]

The City's argument regarding specificity is meritless and troubling.[17] Moreover, it is highly doubtful that the open records law is properly interpreted in a manner that so casually sweeps away preexisting statutory requirements that certain government records be kept open.

CONCLUSION

The City, predictably, disparages the Argus for alluding to the views of Thomas Jefferson and James Madison, as well as to concepts like 'transparency' and 'government accountability.' The Argus makes no apology for either.

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[16] It is worth noting that in questioning the implications of adhering to SDCL §9-14-21 or SDCL §9-18-2 record-keeping rules, the City expresses concern that records might "contain information falling within any of the enumerated exceptions to South Dakota's open records laws set forth in SDCL §1-27-1.5." (Appellee's Brief, p. 18) Interestingly, it is the first time the City seems to recognize that records should be closed only for legitimate reasons. Plainly, under the City's interpretation of SDCL §1-27-1.5(20), concealment is permissible without regard for the information it contained or need for protection.

[17] A case in point is SDCL §9-14-23, which allows a city to "contract for legal services," but requires "[a]ny contract for legal services shall be made by ordinance or resolution." Ordinances and resolutions are open records. See SDCL §9-19-7, SDCL §9-19-8, SDCL §9-19-14 and SDCL §9-19-15. The City, presumably, would allow Mr. Moore and the City to override these express statutes by contracting/agreeing to keep the legal contract a secret. Moreover, it could be accomplished without any reason being given.

The City simply misses the point. The South Dakota's liberally construed open records provisions—including its strictly construed exceptions—were enacted to foster "transparency" and "government accountability." And so long as South Dakota government derives its "just powers from the consent of the governed" (S.D. Const. Art. VI §1) and "political power is inherent in the people" (S.D. Const. Art. VI §26.) the philosophies of Jefferson and Madison will remain relevant.

In the final analysis, City never manages a logical reconciliation of this uncommonly comprehensive contract power to conceal documents with any other law. Without question, the City's interpretation establishes an inexplicable incongruity. And not a rational one at that. In contrast, relying on common sense and statutory license, the Argus offers an interpretation of SDCL §1-27-1.5(20) that works effectively within the contextual framework of the surrounding law and is in keeping with its purpose. It is logical. It is reasonable. It is right.

Argues urges the Supreme Court to reverse the judgment of the trial court and remand the case with instructions to enter judgment for the Argus.

Dated this the 11th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type volume limitation in SDCL §15-26A-66(b)(2). Relying on the word count of Microsoft Word for Mac 2011, the Reply Brief contains 3,590 words.

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REQUEST FOR ORAL ARGUMENT

Appellant, Argus Leader Media, respectfully requests oral argument .

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Appellant's Reply Brief in *Argus Leader Media v. City of Sioux Falls, et al.,* was served on Appellee's attorney, James E. Moore, 300 S. Phillips Avenue, #300, Sioux Falls, SD 57117 by email addressed to james.moore@woodsfuller.com on this 11th day of October, 2016.

/s/ JON E. ARNESON
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