

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

**SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED**

**NOV - 4 2014**

*Shirley A. Johnson Lepp*  
Clerk

**APPEAL NO. 27215**

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**IN THE MATTER OF**

**ROBERT M. MERCER,**

**PLAINTIFF AND APPELLANT,**

**VS.**

**SOUTH DAKOTA ATTORNEY GENERAL OFFICE,**

**DEFENDANT AND APPELLEE**

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**APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT,**

**HUGHES COUNTY, SOUTH DAKOTA**

**THE HONORABLE KATHLEEN TRANDAHL**

**CIRCUIT JUDGE**

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**BRIEF OF APPELLANT**

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**NOTICE OF APPEAL FILED SEPTEMBER 26, 2014**

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## **TABLE OF AUTHORITIES**

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*In the Matter of Hughes County*, 1990 South Dakota, 452 N.W.2d.....

### **Federal case:**

*National Archives and Records Administration v. Favish ET AL*,

2004 U.S. Supreme Court, No. 02-954.....

### **PRELIMINARY STATEMENT**

References to plaintiff and appellant Robert M. Mercer will be appellant. References to defendant and appellee Marty M. Jackley, in his capacity as South Dakota attorney general, will be attorney general.

### **REQUEST FOR ORAL ARGUMENT**

Plaintiff and appellant Robert M. Mercer requests the opportunity to appear before this Court to answer questions and to briefly summarize his argument.

### **JURISDICTIONAL STATEMENT**

This is a civil appeal from findings of fact, conclusions of law and order dated the 2nd day of September, 2014, and filed the 8<sup>th</sup> day of September, 2014. Notice of appeal was timely filed and served September 26, 2014, pursuant to SDCL 15-26A-3(1).

## **STATEMENT OF THE ISSUES**

1. The circuit court selectively relied on one portion of the U.S. Supreme Court decision in *National Archives And Records Administration v. Favish et. al.* without considering the rest of the decision regarding privacy interest and public records.
2. Whether the circuit court erred in finding the attorney general has discretion to withhold death-investigation records in whole by placing a privacy interest above legitimate public interest.
3. Whether the circuit court erred in finding the attorney general has discretion to impose a third-party condition *ad hoc* on the requester for a public record, in this instance the death-investigation records.
4. Whether the circuit court erred in declining redaction to satisfy protection of a privacy interest in the request for death-investigation records where there is a legitimate public interest.
5. Whether the court erred by accepting the assertion of a privacy interest in a public-records request without conducting a review *in camera* of the records, in order to determine the legitimacy and extent of the privacy interest, and consequently failing to balance those findings with the legitimate public interest.

## **STATEMENT OF THE CASE**

Appellant sought release of death-investigation records from attorney general on November 26, 2013. Attorney general agreed, provided that appellant received permission from a member of the deceased family. Unable to get permission, appellant filed an amended request, which the attorney general denied. Appellant filed appeal to the state Office of Hearing Examiners, which on May 9, 2014, upheld the attorney general's denial. Appellant filed appeal to Circuit Court, Hughes County, Sixth Circuit, and on September 2, 2014, Circuit Judge Kathleen Trandahl upheld the denial.

This appeal now follows.

## **STATEMENT OF THE FACTS**

On October 22, 2013, the body of Richard Benda was found at a farm in the rural Lake Andes area. A variety of federal, state and local officials attended the scene. Benda was secretary of tourism and state development from 2006 through early 2011 in the administration of Gov. Mike Rounds. The attorney general publicly stated on November 21, 2013, that Benda died of a self-inflicted shotgun wound, a 12-gauge shotgun was the only weapon found at the scene and the circumstances appeared consistent with suicide.



On November 25, 2013, appellant informed the attorney general by email as a courtesy that a request would be filed for the reports compiled in the death investigation. On November 26, 2013, appellant formally filed the request to the attorney general. Later that same day, the attorney general telephoned the appellant and offered a partial release of some records. During the telephone conversation, appellant mistakenly understood the attorney general was placing a condition on himself as attorney general to get permission first from a family member. Days passed with appellant waiting to hear from attorney general while attorney general made arrangements to provide information and recreation of scene of death. On November 27, 2013, the county coroner issued the death certificate. It carried a 16-word explanation of cause of injury: "DECEDENT SECURED SHOTGUN AGAINST TREE. USED A STICK TO PRESS TRIGGER TO SHOOT HIMSELF IN ABDOMEN."

In the subsequent days a spokesperson for the attorney general told appellant that appellant needed to get a family member's permission. In an attempt to comply, appellant requested and received from attorney general a definition of family member acceptable to attorney general and a sample of a statement that could be signed by a family member granting permission.

Appellant however was unsuccessful in obtaining permission from former wife of the deceased. The friend with whom the deceased was living at the time of

death declined to provide permission, citing the former wife's preference. Appellant also attempted to contact the deceased's attorney but didn't receive a response.

After these events, the former wife sent an email to the appellant and the attorney general saying she would seek injunctive relief to stop issuance of the death investigation information. That set the stage for a multi-party dispute if appellant could find someone else willing to give permission. Appellant spoke to the attorney general by telephone on December 6, 2013, about the matter of injunctive relief. The attorney general informed appellant that he wouldn't fight the former wife's motion if she sought the injunction.

Appellant then filed an amended request for the records on December 7, 2013, stating it would be an impossibility under the circumstances to meet the attorney general's requirement that the appellant obtain a family member's permission. Attorney general denied appellant's amended request.

Appellant appealed to the state Office of Hearing Examiners, where the administrative judge ruled on May 9, 2014, in favor of the attorney general. Appellant then appealed the OHE decision to circuit court in Hughes County.

While the circuit court appeal was pending, attorney general publicly divulged on July 29, 2014, to a legislative committee that, during October 2013, he had prepared an undated arrest warrant for Benda, and had scheduled a grand jury for

later October 2013. These actions were in regard to allegations of double billings for airline travel during 2009 and 2010 and allegations of theft of \$550,000 by Benda in 2010-2011.

These revelations were one of the pieces in a continuing series of information, developed largely by news reporters, often using public records and documents filed in court cases, about Benda and the EB-5 immigrant investor program that developed during the Rounds administration.

In 2009 Rounds appointed the attorney general. He served with Benda for approximately two years in the Rounds government and subsequently won a full term in the 2010 election. The attorney general undertook investigation of Benda at the request of Gov. Dennis Daugaard's counsel in spring 2013 after a federal grand jury reportedly subpoenaed information from the Daugaard administration. A major EB-5 project, the Aberdeen beef plant, shut down in summer 2013 and declared bankruptcy. The attorney general provided his report regarding EB-5 program matters to the U.S. attorney after Benda's death. A California arbitration hearing in 2014 regarding one set of events in South Dakota's EB-5 program showed the attorney general and his office knew about EB-5 activities and were involved in legal defense of the program with the state Board of Regents since 2009. As of October 22, 2014, one year after the body of Benda was discovered, neither state prosecutors nor federal prosecutors had brought any charges.

In this public-records case, the circuit court ruled on September 2, 2014, in favor of the attorney general and against the appellant.

### **STANDARD OF REVIEW**

Issues of statutory and constitutional interpretation are questions of law and subject to review *de novo*. These include *Favish* and the attempted shield against any disclosure under SDCL 1-27-1.5(5); SDCL 23-5-11; and SDCL 23A-5-16.

Other actions in this case are subject to review as clear error and abuse of discretion. These include the *ad hoc* condition that a public-record requestor must get a third party's approval; the lack of a clear procedure for instances where third parties are at odds within that condition; the assumption that an officer of the court can assume the similar authority of a judge as granted by this court in *In The Matter of Hughes County* to fashion the official's own remedy; the lack of a judicial test to find whether privacy interest exists and to what extent; and the lack of a standard regarding balance of privacy interest and legitimate public interest.

## **ARGUMENT**

**1. THE *FAVISH* DECISION IS NOT FULLY DEPOSITIVE IN THIS CASE. THE U.S. SUPREME COURT EXPLICITLY STATED THERE COULD BE OTHER CIRCUMSTANCES REQUIRING A DIFFERENT EXAMINATION OF THE BALANCE BETWEEN PRIVACY INTEREST AND PUBLIC INTEREST.**

The request for information from the death investigation reports regarding Benda's death can be satisfied through use of redaction. Redaction is a specific mechanism provided by SDCL 1-27-1.10 that allows the record custodian to delete information "which would unreasonably invade personal privacy, threaten public safety and security, disclose proprietary information, or disrupt normal government operations." Redaction avoids unwarranted release of gruesome details such as the photographs sought in *National Archives and Records Administration v. Favish Et Al*, 541 U.S. (2004).

The *Favish* decision was cited for the first time by the circuit court in its denial of the Benda death-investigation reports appeal. The circuit court was responding to the appeal's request for a standard. *Favish* appears to have applicability but the circuit court didn't take the additional steps set forth in the final pages.

In *Favish* the U.S. Supreme Court provided protection to surviving family members “who object to the disclosure of graphic details surrounding their relative’s death.” The decision also set two standards that must be met by a citizen requesting the information. The citizen must show there is a significant public interest to be advanced that is more than simply having the information; and the citizen must show the information is likely to advance that interest.

A significant and legitimate public interest to be advanced by release of Benda death-investigation reports is the ability of the public to assess the performance of the attorney general and law enforcement. The Benda death certificate’s cause of injury runs 16 words. Citizens receive more information from the South Dakota Highway Patrol about traffic fatalities or from investigatory reports about officer-involved shootings.

The 16 words state that a stick was used to move the trigger. The unusual method raises questions the death certificate doesn’t answer on its face but the death-investigation reports likely would. Until those reports are released, the public can’t conclusively know.

A second significant and legitimate public interest to be advanced by release of the Benda death investigation reports is the ability of the public to see the evidence upon which the suicide finding was based. This is highly

important regarding public confidence in our law enforcement and public courts.

When a violent death has been alleged to be a crime committed by another person, the public can read an indictment, view a probable cause hearing, attend a trial or watch an allocution by a defendant who has admitted guilt. A finding of suicide however is cloaked in secrecy beyond the death certificate's short explanation of cause of injury. The secrecy prohibits detection and requires the public to accept the finding of suicide without explanation or supporting evidence.

*Favish* dealt with four photographs of the dead body of a presidential aide whose death was determined to have been suicide, but around whose death conspiracy theories swirled. The U.S. Supreme Court noted in *Favish* the death had been the subject of five inquiries that reached the same conclusion and the requestor, Favish, failed to show evidence suggesting government misconduct that could outweigh the surviving family members' privacy interest.

In *Favish* the U.S. Supreme Court noted several times "the balancing exercise in some other case might require us to make a somewhat more precise determination regarding the significance of the public interest and the historical importance of the events in question. We might need to consider the

nexus required between the requested documents and the purported public interest served by disclosure.”

In the Benda request, the privacy interest received total deference without any consideration to the clear, legitimate and significant public interests at stake and the public dangers inherent in the secrecy.

Public interest is a requirement for a county coroner to conduct a death investigation in South Dakota under SDCL 23-14-18.

## **2. STATE LAW PROVIDES DISCRETION TO THE ATTORNEY GENERAL REGARDING RELEASE OF CRIMINAL INVESTIGATION INFORMATION.**

State law doesn’t provide standards for the use of the discretion or the use of redaction.

Information previously withheld by the attorney general about Benda, specifically the arrest warrant preparation and grand jury scheduling, wasn’t disclosed until nine months after Benda’s death. Similarly, an attorney general can reach back in time to cases preceding his term in office and release information from those investigations.



The lack of standards allows for arbitrary decisions about case information.

**3. STATE LAW DOESN'T SPECIFICALLY PROVIDE AUTHORITY  
TO THE ATTORNEY GENERAL TO IMPOSE THIRD-PARTY  
CONDITIONS ON A REQUEST FOR A PUBLIC RECORD.**

The attorney general cited the South Dakota Supreme Court's decision *In The Matter of Hughes County* to justify his action.

In *Hughes County*, a circuit judge imposed a condition that any reporter seeking to cover a specific aspect of a juvenile proceeding must agree the names and addresses of juveniles in the proceeding be withheld from the public. The judge also turned down the juvenile victim's request that reporters be barred.

The attorney general said *Hughes County* was precedent for his decision to require a public-records requestor get a family member's permission before he would release Benda death-investigation information.

There isn't specific authority in state law for such action by the attorney general.

**4. THE CIRCUIT COURT DIDN'T CONSIDER REDACTION AND  
DIDN'T CONDUCT A REVIEW TO DETERMINE WHETHER A  
PRIVACY INTEREST EXISTED.**

The circuit court was advised that redaction is acceptable under South Dakota's public-records law and there isn't a standard for its use. Instead the circuit court relied on *Favish*, stated that appellant sought leniency because the appeal is pro se, and indicated appellant failed to contradict "the independent forensic pathologist report, or the federal and local law enforcement's crime scene death investigation reconstruction or forensic testing."

The point of this record request wasn't to contradict law enforcement. It was to better know what law enforcement found. It is difficult to know the information contained in reports, much less contradict them, if they remain secret.

Regarding the circuit court's statement that appellant sought leniency, appellant didn't specifically ask for leniency. Appellant filed additional facts with the circuit court that weren't presented to the hearing examiner. Those facts dealt with the threat of injunction by the former wife and the attorney general's response. Appellant sought to ensure those facts were available to the circuit judge. The leniency inference developed from the attorney general's reply.

**5. THE CIRCUIT COURT FAILED TO CONDUCT A REVIEW OF  
THE RECORDS TO DETERMINE WHETHER A PRIVACY  
INTEREST EXISTS AND FAILED TO BALANCE ANY PRIVACY  
INTEREST AGAINST THE PUBLIC INTEREST.**

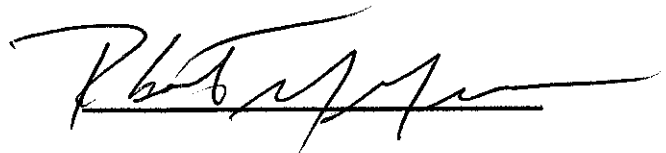
The essential step missing throughout this case is the determination of a privacy interest. The attorney general created the assumption there would be a privacy interest, and the former wife who divorced the deceased asserted a privacy interest. But there is no evidence that the hearing officer or the circuit court independently reviewed the records to see what privacy interest might exist and whether it could be satisfactorily protected by redaction as requested.

**CONCLUSION**

WHEREFORE, Appellant Robert Mercer, respectfully requests that this Honorable Court reverse the decisions of the circuit court and the hearing officer denying release of the Richard Benda death-investigation records used in finding that his death was a suicide, and remand this matter to circuit court with instructions to conduct a review of the records *in camera* and use redaction to remove references that are unwarranted invasions of personal privacy, so that the remaining redacted versions of the records can be released to satisfy the significant public interests at stake in this matter.

Further, appellant requests that this Honorable Court establish the review and redaction process by the circuit courts for future instances where partial release of death-investigation records is requested on appeal and meets the threshold of a significant public interest.

Dated this 4th day of November, 2014.

A handwritten signature in black ink, appearing to read 'Robert M. Mercer', written over a horizontal line.

Robert M. Mercer, pro se

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Pierre, South Dakota 57501

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and corrected copy of the foregoing brief and accompany appendices were served via electronic mail upon the following at their last known address as follows:

Jeffrey P. Hallem [jeff.hallem@state.sd.us](mailto:jeff.hallem@state.sd.us)

*Attorney for the appellee*

Marty Jackley [marty.jackley@state.sd.us](mailto:marty.jackley@state.sd.us) (courtesy)

On this 4th day of November, 2014.

/s/Robert M. Mercer

**CERTIFICATE OF COMPLIANCE**

In accordance with SDCL 15-26A-66(b)(4), I hereby certify this brief complies with the requirements set forth in South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 2,354 words from the Statement of

Case through the Conclusion. I have relied upon the word count of a word-processing program to prepare this certificate.

/s/Robert M. Mercer

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STATE OF SOUTH DAKOTA )  
COUNTY OF HUGHES )

IN CIRCUIT COURT  
SS.  
SIXTH JUDICIAL CIRCUIT

ROBERT M. MERCER,  
Plaintiff and Appellant,

32CIV14-120

vs.

MEMORANDUM DECISION

SOUTH DAKOTA ATTORNEY  
GENERAL OFFICE,  
Defendant and Appellee.

Robert Mercer (Mercer) submitted a request for public records under SDCL 1-27-37 for disclosure of public records regarding the Division of Criminal Investigation's (DCI) investigation of the death of Richard L. Benda. This request for public records was denied by the custodian of record, the South Dakota Attorney General's Office. Mercer sought review from the Office of Hearing Examiners. On May 9, 2014 Hearing Examiner Hillary J. Brady upheld the Attorney General's decision not to release the record. Mercer now seeks an appeal of the Hearing Examiner's decision to this Circuit Court. The parties agreed to submit this administrative appeal to the Circuit Court by their written briefs and they waived oral argument. The court received the final submission on August 4, 2014 when Mercer, by letter, waived the filing of a rebuttal brief. The court has reviewed this file in its entirety, including the Office of Hearing Examiners' Administrative Record, together with the briefs submitted by the Appellant Mercer and the Appellee South Dakota Attorney General Office, and being fully advised in the premises enters this written memorandum decision.

### Statement of the Issues

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

### Statement of the Case and Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>9</sup> AR 62

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

<sup>11</sup> AR 36

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

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

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

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

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<sup>12</sup> AR 36

<sup>13</sup> AR 36

<sup>14</sup> AR 36

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

<sup>16</sup> AR 64

<sup>17</sup> AR 65

PART II:

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

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

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

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

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

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<sup>18</sup> AR 65

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

<sup>20</sup> AR 12

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

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

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

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

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

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

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

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

### Standard of Review

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

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

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

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

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

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

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

The ultimate issue before this court on appeal is whether the record contains substantial evidence to support the Attorney General's Office's determination.<sup>26</sup>

The court shall only reverse the administrative determination if, after careful review of the record, the court is definitely and firmly convinced a mistake has been committed or if the decision constituted "an abuse of discretion or clearly unwarranted exercise of discretion."<sup>27</sup>

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

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

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

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

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

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



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

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

### Memorandum Decision

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

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<sup>31</sup> Id

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

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

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

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

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

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

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

As amended, SDCL 1-27-1 provides:

Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in §1-27-1.1, are hereby fully empowered and authorized to examine such public record, and make memoranda and abstracts therefrom during the hours the respective offices are open for the ordinary transaction of business and, unless federal copyright law

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

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

otherwise provides, obtain copies of public records in accordance with this chapter.

Each government entity or elected or appointed government official shall, during normal business hours, make available to the public for inspection and copying in the manner set forth in this chapter all public records held by that entity or official.

SDCL 1-27-1.1 provides:

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

SDCL 1-27-1.3 provides:

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

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

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

determine whether or not the death was the result of criminal activity or foul play.<sup>89</sup> It is undisputed that under the provisions of SDCL 23-3-6 through §23-3-15.1, the DCI is a law enforcement agency under the control of the Attorney General that is authorized to perform various law enforcement-related duties, including cooperating with local law enforcement officers in the performance of their duties.

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

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

...

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

SDCL 23-5-11 provides:

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

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

<sup>89</sup> AR 36-37, 48

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

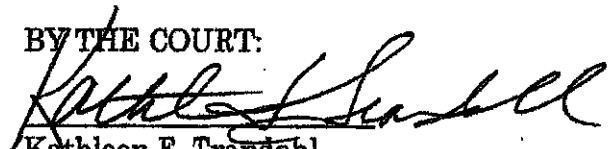
**Conclusion**

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

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

Dated this 2nd day of September, 2014.

BY THE COURT:

  
Kathleen F. Trandahl  
Circuit Judge

ATTEST:

\_\_\_\_\_  
Kelli Sitzman  
Clerk of Courts

cc: Robert M. Mercer  
Jeffrey P. Hallem



STATE OF SOUTH DAKOTA

COUNTY OF HUGHES

BOB MERCER,

Plaintiff and Appellant,

v.

SOUTH DAKOTA ATTORNEY  
GENERAL OFFICE,

Defendant and Appellee.

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IN CIRCUIT COURT  
SIXTH JUDICIAL CIRCUIT

Civ. 14-120


ORDER AFFIRMING  
OFFICE OF HEARING EXAMINERS  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The Court, having before it in the above-caption matter an appeal from the Office of Hearing Examiners, and having entered its Memorandum Decision on September 2, 2014, said decision expressly incorporated herein, now, therefore, it is hereby

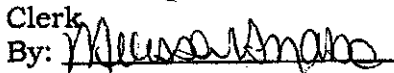
ORDERED that the Findings of Fact and Conclusions of Law of the Office of Hearing Examiners is affirmed.

Dated this 5<sup>th</sup> day of September, 2014.

BY THE COURT:

  
Kathleen F. Trandahl  
Circuit Court Judge

ATTEST:

Clerk  
By:   
Deputy

(Seal)

STATE OF SOUTH DAKOTA  
CIRCUIT COURT, HUGHES CO.

**FILED**


SEP 08 2014

  
By: WAS Clerk  
Deputy

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the *Order Affirming Office of Hearing Examiner's Finding of Facts and Conclusions of Law* was served upon the following by enclosing the same in envelope with first class postage prepaid and affixed thereto, and depositing said envelope in the United States mail, at Pierre, South Dakota, on this 4th day of September, 2014:

Bob Mercer  
1810 Camden Court  
Pierre, SD 57501

  
Jeffrey P. Hallem  
Assistant Attorney General

pld\_JPH\_Bob Mercer - Order (br)

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 27215

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ROBERT M. MERCER,

*Plaintiff and Appellant,*

v.

SOUTH DAKOTA OFFICE OF ATTORNEY GENERAL,

*Defendant and Appellee.*

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APPEAL FROM THE CIRCUIT COURT  
SIXTH JUDICIAL CIRCUIT  
HUGHES COUNTY, SOUTH DAKOTA

---

THE HONORABLE KATHLEEN TRANDAHL  
Circuit Court Judge

---

**APPELLEE'S BRIEF**

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PLAINTIFF AND APPELLANT

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Notice of Appeal filed September 29, 2014

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IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 27215

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ROBERT M. MERCER,

*Plaintiff and Appellant,*

v.

SOUTH DAKOTA OFFICE OF ATTORNEY GENERAL,

*Defendant and Appellee.*

**PRELIMINARY STATEMENT**

Throughout this brief, Plaintiff and Appellant Robert M. Mercer will be referred to as “Mercer.” Defendant and Appellee South Dakota Office of Attorney General will be referred to as “Attorney General’s Office.” The circuit court settled record will be referred to as “SR.” The administrative record before the Office of Hearing Examiners will be referred to as “AR.” References to Mercer’s Appellant’s Brief will be designated as “MB.” Material contained within the Appendix to this brief will be referred to as “APP.” All references will be followed by the appropriate page designations.

**JURISDICTIONAL STATEMENT**

This is an appeal from a September 8, 2014, circuit court Order Affirming the Office of Hearing Examiners’ Findings of Fact and Conclusions of Law. SR 40. Plaintiff filed a Notice of Appeal to

this Court on September 29, 2014, and a Corrected Notice of Appeal on October 1, 2014. SR 45, 50. This Court has jurisdiction pursuant to SDCL §§ 1-26-37 and 15-26A-3(1).

### **STATEMENT OF LEGAL ISSUE AND AUTHORITIES**

WHETHER THE HEARING OFFICER ERRED IN AFFIRMING THE OFFICE OF ATTORNEY GENERAL'S DECISION TO DENY IN TOTO MERCER'S SDCL CH. 1-27 PUBLIC RECORDS REQUEST FOR THE DEATH INVESTIGATION FILE OF RICHARD BENDA?

The Office of Hearing Examiners Hearing Officer determined that the Attorney General's Office acted within its authority as the information was not subject to mandatory disclosure, and that the conditions imposed upon disclosure were proper.

SDCL 1-27-1.5(5)

SDCL 23-5-11

*Argus Leader v. Hagen*, 2007 S.D. 96, 739 N.W.2d 475

*National Archive and Records Administration v. Favish*, 541 U.S. 157 (2003)

### **STATEMENT OF THE CASE**

Mercer initially brought an appeal under the public records disclosure provisions in SDCL §§ 1-27-41 and 1-26-30 through -37. On December 18, 2013, the Office of Hearing Examiners received Mercer's Notice of Review-Request for Disclosure of Public Records. AR 1-27. Pursuant to SDCL 1-27-38, Mercer sought review of the Attorney General's Office's denial letters dated December 11, 2013, and November 26, 2013, which were sent in response to Mercer's

request under the state's public records laws for disclosure of the Attorney General's Office's investigative records and reports regarding the death of Richard Benda. AR 1. The Attorney General's Office filed a response to the Notice of Review on January 2, 2014. AR 32-65. Mercer filed a reply on January 6, 2014. AR 71-73.

After review of the submissions, on May 9, 2014, Hearing Officer Hillary Brady entered Findings of Fact, Conclusions of Law, and Order dated May 9, 2014, upholding the Attorney General's denial of Mercer's request for disclosure. AR 75-82. The Hearing Officer determined that the records which Mercer sought were not records required to be disclosed to the public under SDCL ch. 1-27, and that the Attorney General acted within his statutory authority in denying Mercer's request.

Mercer filed his Notice of Appeal to circuit court on June 6, 2014, pursuant to SDCL §§ 1-27-41 and 1-26-31. SR 1; AR 86. Mercer included a Basis for the Appeal (AR 87-88) and made arguments to the circuit court consistent with this document. APP 1-5. On September 2, 2014, Circuit Court Judge Kathleen Trandahl entered her Memorandum Decision upholding the Office of Hearing Examiners' determination. SR 21-39. On September 8, 2014, the circuit court entered an Order Affirming the Office of Hearing Examiners' Findings of Fact and Conclusions of Law.

SR 40. Mercer filed a Notice of Appeal to this Court on September 29, 2014, and a Corrected Notice of Appeal dated October 1, 2014. SR 45, 50.

### **STATEMENT OF FACTS**

In the spring of 2013, at the request of Governor Daugaard, the Attorney General's Office began a criminal investigation of potential financial misconduct in the Governor's Office of Economic Development involving voucher reimbursements. AR 36, 62.

On November 21, 2013, upon the conclusion of the criminal investigation, pursuant to SDCL 1-11-1(2) and (9), the Attorney General notified the Governor of the results of that investigation. AR 36, 62-63. Though there was evidence of criminal wrongdoing, the Attorney General advised that no action would be pursued since the individual involved was deceased.

The Attorney General reported to the Governor that during the investigation, the Attorney General's Office discovered additional financial concerns relating to a one million dollar Future Fund Grant to assist Northern Beef LP. AR 36, 62-63. These potential financial concerns arose out of the EB-5 program operated by the State of South Dakota in conjunction with the South Dakota Regional Center, Inc. The Attorney General advised the Governor that because the EB-5 program is a federal immigration program run and controlled by federal immigration authorities, the Attorney

General provided its entire criminal investigation file to the federal authorities and that his office would continue to assist federal authorities regarding the matter.

On October 22, 2013, Richard L. Benda was discovered dead by a family member in rural Charles Mix County. AR 36. The Charles Mix County Sheriff's Office requested that the Office of Attorney General Division of Criminal Investigation ("DCI") conduct an in-depth investigation into the cause of Benda's death and whether the death was the result of criminal activity or foul play. AR 36-37, 48.

On November 21, 2013, after the conclusion of the DCI death investigation, the Attorney General's Office issued a press release. AR 64. The press release stated the conclusions of the investigation: that Benda's death was the result of a self-inflicted gunshot wound and that there was no evidence of foul play. The official Certificate of Death, dated November 27, 2013, has been made available to the public. AR 65. Benda's Certificate of Death included the following information:

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

PART II:

. . .

HOW THE INJURY OCCURRED: DECEDENT  
SECURED SHOTGUN AGAINST TREE, USED A STICK



TO PRESS TRIGGER TO SHOOT HIMSELF IN  
ABDOMEN.

AR 65.

On November 26, 2013, Mercer made a written Public Records Request under SDCL 1-27-37 for “reports received by and compiled for Attorney General Marty Jackley regarding the Oct. 20 death of Richard Benda.” AR 12-13. In making his request, Mercer stated:

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

AR 12.

The Attorney General’s Office responded to the request on November 26, 2013. AR 46-50. This response set forth the statutes that exempted the reports sought by Mercer from the mandatory public records disclosure provisions in SDCL ch. 1-27. Rather than denying the request outright based upon the cited provisions, the Attorney General notified Mercer that he would provide limited disclosure of information upon Mercer meeting three preconditions:

The Attorney General will also make available to the public, through media representatives, the death investigation file subject to the following conditions:

1. All reasonable privacy related items and any Rule 6(e) grand jury materials will need to be redacted; and
2. A member of Richard Benda’s immediate family as defined under South Dakota law execute a written release granting permission for disclosure as set forth herein; and

3. The media select two representative members, following the procedure with media viewing a lawful execution in South Dakota to review the redacted materials with the Attorney General. While copies of documentation would not be released, the media representatives would have an opportunity to report their impressions and information they glean from the investigation.

AR 49-50.

On December 6, 2013, Mercer submitted an Amended Public Records Request Under SDCL 1-27-37. AR 19-20. In the amended request, Mercer sought disclosure of the requested records without the Attorney General's precondition that a member of Richard Benda's immediate family execute a written release. Mercer complained that there was no immediate family member capable of executing a release. On December 7, 2013, Mercer submitted a Supplement to Amended Public Records Request Under SDCL 1-27-37. AR 21-23. In the supplement, Mercer detailed his efforts to obtain a release from Benda's ex-wife and mother of Benda's daughter and various other individuals who would fall within the definition of Benda's immediate family.

In a letter dated December 11, 2013, the Attorney General denied Mercer's amended and supplemental public records requests. AR 58-61. Therein, the Attorney General set forth the reasons for the denial including: that the requested records fell within statutory exceptions to public disclosure; the refusal of any member of

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

Mercer has included information in his brief that is not part of the record below and for which judicial notice has not been requested. Some of the information presented is of the type a request for judicial notice would be appropriate. However, Mercer's statement that the Attorney General "served with Benda for approximately two years in the Rounds government" (MB 11) is simply not accurate. The Attorney General is a separate constitutional officer, who has now been twice elected, that heads a constitutional office that is separate and independent from the control of a governor.

## **ARGUMENT**

THE OFFICE OF HEARING EXAMINERS CORRECTLY DETERMINED THAT THE ATTORNEY GENERAL'S OFFICE HAD AUTHORITY TO DENY IN TOTO MERCER'S SDCL CH. 1-27 PUBLIC RECORDS REQUEST FOR THE DEATH INVESTIGATION OF RICHARD BENDA.

### *A. Standard of Review.*

This matter is before the Court as an administrative appeal. As such, the Court reviews the Office of Hearing Examiners' decision in the same manner as the circuit court with no presumption that the circuit court's decision was correct. *St. Pierre v. South Dakota Real Estate Commission*, 2012 S.D. 25, ¶ 14, 813 N.W.2d 151, 156.

In addition, as a mixed question of law and fact based upon a written record, this Court's review of the Office of Hearing Examiners' decision is de novo. *Id.*; *McKibben v. Horton Vehicle Components, Inc.*, 2009 S.D. 47, ¶ 11, 767 N.W.2d 890, 894. The Court's review of the Attorney General's Office's denial of Mercer's public records request is confined to the administrative record before the Office of Hearing Examiners and matters properly moved by a party for the Court to take judicial notice. *See* SDCL 1-26-35; SDCL ch. 19-10; *Kurtenbach v. Frito-Lay*, 1997 S.D. 66, ¶ 24 n.4, 563 N.W.2d 869, 875. Further, the scope of the Court's review is governed by the provisions of SDCL 1-26-36.

Under the above scope of review the ultimate issue before the Court on appeal is whether the record contains substantial evidence to support the Attorney General's Office's determination. *Hanten v. Palace Builders, Inc.*, 1997 S.D. 3, ¶ 8, 558 N.W.2d 76, 78. The Court shall only reverse the agency's determination if, after careful review of the entire record, the Court is definitely and firmly convinced a mistake has been committed or if the decision constituted "an 'abuse of discretion or clearly unwarranted exercise of discretion.'" *In the Matter of the Application of Benton*, 2005 S.D. 2, ¶ 8, 691 N.W.2d 598, 601 (citations omitted).

Mercer has not treated this matter as an appeal that is subject to review under the above stated standards. Many of Mercer's

arguments are legally inappropriate, as the ultimate issue is whether the Office of Hearing Examiners correctly determined that the Attorney General's Office acted within its legal authority when it denied Mercer's SDCL ch. 1-27 public records request. Mercer's arguments are based upon the faulty premise that he is entitled to the requested records and that the Office of Hearing Examiners and/or the circuit court were required to fashion him relief unless the Attorney General's Office can convince the Court otherwise. Also, Mercer's arguments on this appeal are largely different in kind than those made when he was on appeal before the circuit court. See AR 86-88; Mercer's circuit court brief App 1-5. For lawyers, matters not raised before the circuit court would not be addressed by this Court on appeal. See *e.g.*, *Masloskie v. Century 21 American Real Estate, Inc.*, 2012 S.D. 58, ¶ 15, 818 N.W.2d 798, 803-4. Though circuit court briefs are normally not part of the record on appeal, the Attorney General's Office respectfully requests that the Court take judicial notice of Mercer's brief under SDCL ch. 19-10 as it is part of the court documents submitted to the circuit court in this matter.

Pro se status does not give rise to the flexibility to argue whatever one pleases regardless of the record made below. As this Court has recognized, "[a]n unrepresented party 'can claim no advantage from his [pro se] status.'" *Webb v. Webb*, 2012 S.D. 41,

¶ 14, 814 N.W.2d 818, 823 (citation omitted). Proceeding pro se cannot be used as an excuse for ignorance of court procedures, rules, or law. *Id.*

B. *Records from the DCI investigation file are statutorily exempted from the mandatory disclosure provisions of SDCL ch. 1-27.*

The fact that Mercer is a member of the press does not change the scope or nature of the Court's review. "[T]he right to speak and publish does not carry with it the *unrestrained right* to gather information." *Sioux Falls Argus Leader v. Miller*, 2000 S.D. 63, ¶ 7, 610 N.W.2d 76, 80 (citations omitted). Under the First Amendment, members of the press have the same right to information as the general public. *Miller*, 2000 S.D. 63 at ¶ 14, 610 N.W.2d at 84.

Additionally, unlike access to court hearings and documents, there is no constitutional or common law right associated with Mercer's public records disclosure request of records in the custody of the Attorney General's Office. Mercer's ability to obtain public disclosure is wholly dependent upon the provisions of SDCL ch. 1-27.

In *Argus Leader v. Hagen*, 2007 S.D. 96, 739 N.W.2d 475, this Court addressed the denial of a public records disclosure request made under the then existing provisions of SDCL ch. 1-27. In *Hagen*, the Court determined, after review of the relevant statutory provisions of SDCL ch. 1-27 and elsewhere, that the Secretary of

Tourism and State Development was not required to disclose for public inspection the invitation list for the Governor's Hunt.

Though the statutes have been amended, the guiding statutory construction principles announced in *Hagen* are still applicable to this matter. Applying standard rules of statutory construction, the *Hagen* Court noted that although SDCL 1-27-1 created a general presumption of openness, that presumption was subject to various statutory limitations. *Hagen*, 2007 S.D. 96, ¶¶ 14, 20, 739 N.W.2d at 480, 481-82. The *Hagen* Court concluded that where there is a specific statute exempting the public record from public disclosure, that statute will prevail over the general presumption and policy of openness. *Hagen*, 2007 S.D. 96 at ¶¶ 20-21, 25, 739 N.W.2d at 482.

In order for Mercer to prevail on his appeal, he must establish as a matter of law that the records requested for disclosure, "the reports received by and compiled for Attorney General regarding the October 20 death of Richard Benda," (AR 12) are public records subject to the mandatory disclosure provisions in SDCL ch. 1-27. As was the case in *Hagen*, Mercer's arguments for disclosure must be rejected. The specific statutory provisions exempting law enforcement investigations from public disclosure supersede the general provisions in SDCL §§ 1-27-1, 1-27-1.1 and 1-27-1.3.

The records requested by Mercer were prepared and received by DCI in conjunction with the Charles Mix County Sheriff's Office's request to investigate the death of Richard Benda. The investigation DCI performed was to determine the cause and manner of death and to ultimately determine whether or not the death was the result of criminal activity or foul play. AR 36-37, 48. Additionally, there can be no dispute that under the provisions of SDCL §§ 23-3-6 through 23-3-19, DCI is a law enforcement agency under the control of the Attorney General, and DCI is authorized to perform various law enforcement-related duties, including cooperating with local law enforcement officers in performance of their duties.

In interpreting statutes this Court has stated:

The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.

*In re Estate of Ricard*, 2014 S.D. 54, ¶ 8, 851 N.W.2d 753, 755-56

(citations omitted). There is no ambiguity. Therefore, given the



undisputed facts and provisions of law, all records in the DCI death investigation file are clearly exempted from disclosure under the provisions of SDCL §§ 1-27-1.5 (5) and SDCL 23-5-10 and -11.

SDCL 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:

...

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

SDCL 23-5-11 provides:

Confidential criminal justice information and criminal history information are specifically exempt from disclosure pursuant to §§ 1-27-1 to 1-27-1.15, inclusive, and may be withheld by the lawful custodian of the records. Information, if maintained about calls for service revealing the date, time, and general location and general subject matter of the call is not confidential criminal justice information and shall be released to the public, at the discretion of the executive of the law enforcement agency involved, unless the information contains intelligence or identity information that would jeopardize an ongoing investigation, or identity

information associated with a mental health or a chemical dependency or abuse intervention. The provisions of this section do not supersede more specific provisions regarding public access or confidentiality elsewhere in state or federal law.

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

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

. . .

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

Mercer has not provided the Court with legal argument or proffered statutory construction explaining why these statutes are inapplicable or, notwithstanding the explicit exceptions, why any portion of the requested investigative file is subject to mandatory disclosure under the provisions of SDCL §§ 1-27-1, 1-27-1.1, and 1-27-1.3.

Indeed, Mercer does not contest the application of the above statutes on this appeal and conceded their applicability below.. This is reason alone to affirm the Office of Hearing Examiners’ decision.

The circumstances under which records and reports of law enforcement investigations into the death of an individual should be subject to mandatory public disclosure is an issue for the Legislature. The Legislature has made that policy decision. The provisions of SDCL §§ 1-27-1.5(5), 23-5-10 and -11 are clearly intended by the Legislature (with certain narrowly defined exceptions not relevant here) to allow law enforcement agencies the ability to conduct such investigations free from mandatory disclosure upon request of a member of the public.

C. *Mercer's request that the Court require partial disclosure under SDCL 1-27-1.10, where no statutory right to the investigative file otherwise exists, must be rejected.*

SDCL 1-27-1.10 provides:

In response to any request pursuant to § 1-27-36 or 1-27-37, a public record officer may redact any portion of a document which contains information precluded from public disclosure by § 1-27-3 or which would unreasonably invade personal privacy, threaten public safety and security, disclose proprietary information, or disrupt normal government operations. A redaction under this section is considered a partial denial for the application of § 1-27-37.

Mercer's request for redaction does not square with standard rules of statutory construction. Based on the expressed language utilized by the Legislature, the obvious purpose of SDCL 1-27-1.10 is to allow a public record officer to redact a document that is subject to mandatory public disclosure to the extent it contains information that is precluded from public disclosure, or fits within one of the

stated exceptions to disclosure. On its face the statute is not applicable here, as the provisions of SDCL §§ 1-27-1.5(5) and 23-5-11 clearly provide that the investigative materials developed and obtained by law enforcement during a criminal investigation are totally exempt from mandatory public disclosure.

As *Hagen* makes clear, the ability of the general public and the press to obtain records from governmental agencies and entities is wholly governed by statute. Mercer has not provided the Court with any basis to enlarge SDCL 1-27-1.10 to suit his purpose. “In interpreting legislation, this Court cannot add language that simply is not there.” See *Matter of the Estate of Gossman*, 1996 S.D. 124, ¶ 11, 555 N.W.2d 102, 106 (citations omitted). Mercer is inappropriately requesting this Court to become a super-legislature and craft language that, to date, the Legislature has not enacted. If disclosure of criminal investigatory files in redacted form is to be required of law enforcement agencies, it is a policy decision for the Legislature to make.

There are sound policy reasons behind the Legislature’s determination to exempt law enforcement investigative files from mandatory disclosure. During a criminal investigation law enforcement officers must travel down many “rabbit trails” in their effort to determine whether criminal wrongdoing has occurred. To open those files, or require redaction of information fitting selected

criteria, would create a huge obstacle for effective law enforcement investigative activities. It would be a severe deterrent in obtaining the cooperation of citizens if they thought the information provided to law enforcement would be open to mandatory public disclosure.

D. *The Attorney General's Office did not abuse its discretion in denying Mercer's request where Benda's family would not consent to disclosure.*

The remaining issues Mercer has raised on appeal pertain to the assertion that the Attorney General's Office abused its discretion by denying in toto Mercer's disclosure request when the Attorney General was informed that family members would not provide consent.

Mercer argues that the Attorney General's Office's attempt to craft a means by which Mercer could obtain partial disclosure of information in the DCI's death investigation file was legally inadequate and requires modification by this Court. Mercer requests the Court to independently exercise agency discretion to craft alternative criteria that allows him to review DCI's death investigation file or force redaction. There is no legal or factual support for Mercer's request. Mercer cannot establish a legal basis for modification or reversal of the denial of disclosure merely by establishing that he was unable to meet one of the Attorney General's preconditions for disclosure.

In raising his various issues, Mercer fails to recognize the circuit court's and this Court's scope of review in this matter. Mercer appears to be asserting that de novo review means that the circuit court or this Court should make the determination of whether and to what extent concern over family privacy should be considered and whether and to what extent redaction should take place by personally reviewing the information in the investigative file. Such assertions are legally viable only where there is a right to obtain the information in the first instance.

The Court may only reverse or modify the Attorney General's Office's decision if it is established that the substantial rights of Mercer have been prejudiced because the administrative decision was "[a]rbitrary or capricious or characterized by an abuse of discretion, or clearly unwarranted exercise of discretion." SDCL 1-26-36(6). The South Dakota Supreme Court has defined "abuse of discretion" as "discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Hagen*, 2007 S.D. 96 at ¶ 7, 739 N.W.2d at 748.

It is undisputed that in his letter dated November 26, 2013, the Attorney General, notwithstanding any legal obligation or duty to do so, and given the unique circumstances surrounding the matter, advised Mercer that if he met three preconditions the Attorney General would exercise implied discretion and allow limited

disclosure of information from DCI's investigative file. There is nothing in the record that supports any inference that at the time the Attorney General set the three preconditions that Mercer could not meet them.

On appeal, Mercer argues that in the absence of legislatively prescribed standards, the Attorney General's Office had no discretion, or must have abused that discretion in fashioning the limited disclosure option. The Attorney General's Office respectfully disagrees with this argument. However, assuming the Court agrees with Mercer that the Attorney General had no discretion, this conclusion does not provide a legal basis for the modification or reversal of the Attorney General's Office's denial. Agreeing with Mercer's argument results in the legal conclusion that the Legislature, in enacting the provisions of SDCL §§ 1-26-1.5(5) and 23-5-11, did not provide the Attorney General with any discretion to disclose records to the general public under SDCL ch. 1-27. If this is the case, then Mercer is not entitled to any portion of the investigative file.

Assuming the Court agrees that the Attorney General has limited discretion to disclose information to the public from DCI's investigation file under unique and special circumstances, Mercer cannot establish that the Attorney General abused his discretion by

making consent from a member of Benda's immediate family a precondition to disclosure.

Again, Mercer has not established that he possessed any right, let alone a substantial one, supporting the proposition that he was legally prejudiced by the alleged abuse of discretion. Mercer also has not provided the Court with any legal authority or factual basis, other than his inability to comply, which support his assertion that the Attorney General abused his discretion.

The Attorney General's decision to exercise his discretion in a manner that took into consideration the personal privacy interests of the Benda family is not "discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Hagen*, 2007 S.D. 96 at ¶ 7, 739 N.W.2d at 478. Recognizing that Benda's family may have personal privacy reasons to keep the details of his suicide confidential is not unjustified or unreasonable. This is especially true where the Attorney General publicly disclosed the results of the death investigation (death was self-inflicted); and that there was a certificate of death available which stated Benda's death was the result of a self-inflicted shotgun wound to the abdomen, and described how the injury occurred. Disclosure of additional details could only serve to satisfy morbid curiosity and those government conspiracy theorists who want to believe there is something more.



This Court has recognized the propriety of maintaining confidentiality in other instances where there was excessive and sensational treatment of a tragic matter. *See In the Matter of Hughes County Action*, 452 N.W.2d 128, 132 (S.D. 1990). Additionally, the circuit court, in reviewing Mercer's abuse of discretion argument, recognized that personal privacy interests are valid considerations in determining whether to disclose information to the public. SR 36-39. Contrary to Mercer's assertions, the circuit court's cite to *National Archive and Records Administration v. Favish*, 541 U.S. 157, 160-61, 124 S.Ct. 1570, 1574, 158 L.Ed.2d 319 (2003) to support its conclusion is not unusual and was clearly proper. SR 37-38. The referenced portion of the *Favish* decision clearly supports the circuit court's conclusion. Not applying the rest of *Favish*, that was premised on the application of specific provisions of federal law, was also proper. Again, this is not a case where the information being sought is subject to statutory mandatory disclosure.

Finally, Mercer's assertion that the circuit court or this Court should independently verify that the mother of Benda's child has the ability to assert legitimate privacy interests on behalf of her minor child is not worthy of a response.

Mercer's arguments to the contrary must be rejected. The actions of the Attorney General did not constitute an abuse of discretion.

## **CONCLUSION**

Mercer has not presented the Court with any statutory basis to reverse the Office of Hearing Examiners' decision. Given the clear statutory exceptions to disclosure, the Attorney General's Office had the authority to deny Mercer's request. Further, there was no abuse of discretion. With no statutory support, Mercer is requesting that this Court turn issues regarding disclosure of confidential criminal justice information into a discovery proceeding whereby law enforcement is to disclose their entire investigative file to judicial officers to determine what is and what is not required to be publicly disclosed. This is not the factual record for the Court to independently attempt to fashion alternative relief.

WHEREFORE, based upon the forgoing arguments and authorities, the Attorney General's Office respectfully requests that the Findings of Fact, Conclusions of Law, and Order of the Office of Hearing Examiners be affirmed.

Dated this 10th day of December, 2014.

Respectfully submitted,

MARTY J. JACKLEY  
ATTORNEY GENERAL

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### **CERTIFICATE OF COMPLIANCE**

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 4,872 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 10th day of December, 2014.

/s/ Jeffrey P. Hallem  
Jeffrey P. Hallem  
Assistant Attorney General

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 10th day of December, 2014, a true and correct copy of Appellee's Brief in the matter of *Robert M. Mercer v. South Dakota Office of Attorney General* was served via electronic mail upon Robert M. Mercer, [bobmercer1@aol.com](mailto:bobmercer1@aol.com) and also via U.S. mail to Robert M. Mercer, 1810 Camden Court, Pierre, South Dakota 57501.

/s/ Jeffrey P. Hallem  
Jeffrey P. Hallem  
Assistant Attorney General

27215

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

DEC 19 2014

*Shirley A. Johnson-Ley*  
Clerk

APPEAL NO. 27215

IN THE MATTER OF

ROBERT M. MERCER,

PLAINTIFF AND APPELLANT,

VS.

SOUTH DAKOTA ATTORNEY GENERAL OFFICE,

DEFENDANT AND APPELLEE

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT,  
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE KATHLEEN TRANDAHL  
CIRCUIT JUDGE

REPLY OF APPELLANT

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NOTICE OF APPEAL FILED SEPTEMBER 26, 2014

27215

## RESPONSE TO APPELLE'S BRIEF

I am not a lawyer and therefore I will not attempt to offer rebuttal to the points made in the response from the Office of Attorney General. Instead I will rely on and accept the collective wisdom of the court. However, I would like to address the recurring difficulty in this case: New significant facts about Richard Benda and Joop Bollen came to light time after time as the case moved forward, including since appellant's brief was filed with this court.

The latest such incidence came in November 2014 during the period appellee was preparing its response. We learned from the attorney general that he and his investigators didn't interview Bollen during their investigation of Benda in 2013; instead they relied on federal interviews with Bollen. In response to this revelation, the attorney general twice issued news releases defending his action. Perhaps the best indication that the public expected a state investigation to include interview of Bollen came from the state senator chairing the Legislature's committee on the matter of Benda and Bollen; the senator evidently didn't know the attorney general hadn't interviewed Bollen and erroneously declared in the panel's last meeting on Nov. 13, 2014, that the attorney general had indeed interviewed Bollen and in fact had interrogated him.

It also became ultimately clear during that meeting Bollen was the key witness for state government in a California arbitration hearing related to EB-5 activities and state government provided Bollen's defense. Those circumstances imply that state officials

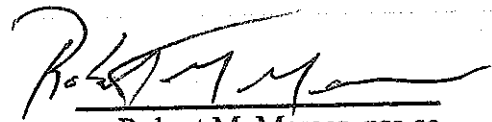
had reason to protect Bollen and that state officials never spoke to Bollen about Benda's death. These new facts illustrate why the state laws providing the protection of total secrecy to a public official in such an instance are opposite the public interest.

~~Time after time in this records appeal, new facts came to light. The death~~

certificate was issued after the initial request for records. We later learned the attorney general and his investigators hadn't spoken to Benda during their investigation of him in 2013. We learned in July 2014 from the attorney general during a legislative committee hearing that he had been preparing to indict Benda for an alleged theft of \$550,000 of state funds while Benda was a public official – money that wound up being routed to Bollen's EB-5 services company, SDRC Inc., where Bollen had received a state contract from Benda and for whom Benda subsequently went to work – and also for Benda double-billing state government for three airline tickets while Benda was a state official. The attorney general made these preparations for an arrest and a grand jury only weeks before Benda's death.

The Favish decision by the U.S. Supreme Court lays the legal foundation for piercing that secrecy afforded by South Dakota law. In camera review by a state circuit judge provides the forum for assessing each specific case. Redaction, specifically allowed in South Dakota records law, provides the means for allowing citizens to know at least in part what the records show. Such a safeguard is needed to serve the public interest.

Dated this 18th day of December, 2014.

A handwritten signature in black ink, appearing to read "Robert M. Mercer", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing brief and accompany appendices were served via electronic mail upon the following at their last known address as follows:

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On this 18th day of December, 2014.



**CERTIFICATE OF COMPLIANCE**

In accordance with SDCL 15-26A-66(b)(4), I hereby certify this brief complies with the requirements set forth in South Dakota Codified Laws.

