

**STATE OF SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS**

**IN THE MATTER OF THE PUBLIC
RECORDS REQUEST OF THE PEOPLE
FOR THE ETHICAL TREATMENT
OF ANIMALS V. SOUTH DAKOTA
OF REGENTS**

**FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER
PRR 08-04**

This office received a request for disclosure of public records pursuant to SDCL 1-27-38 from Lori Kettler, Senior Counsel for the People for the Ethical Treatment of Animals Foundation (hereinafter sometimes referred to as "PETA" or "requestor") on October 20, 2008. On October 29, 2008, pursuant to SDCL 1-27-39, notice was sent to James F. Shekleton, General Counsel for the South Dakota Board of Regents (hereinafter sometimes referred to as "Board"). The Office of Hearing Examiners received a response from the Board on November 10, 2008. A copy of the Board's response was forwarded to PETA on December 2, 2008 from this office. No response was received from PETA. There was no good cause shown to hold a hearing.

ISSUES

Whether the Board erred in denying the request of PETA for the documents listed below:

1. All incident reports and animal welfare complaints submitted to USD Institutional Animal Care and Use Committee ("IACUC") by USD faculty and animal care staff;
2. IACUC semi-annual and annual reviews of research projects involving nonhuman primates;
3. All protocol revision request forms submitted to the IACUC for projects involving nonhuman primates;
4. Veterinary medical records and necropsy/histology reports (if applicable) for all nonhuman primates;
5. All video and photographic footage (excluding those obtained on the microscopic level collected of nonhuman primate's surgeries, experiments and postmortem brain examinations;
6. Preliminary notes, final reports, documentation of disciplinary/administrative actions, testimonies, memos, meeting minutes, emails and other correspondence related to internal investigations/inquiries regarding compliance with the federal Animal Welfare Act ("AWA") or the federal Public Health Service Policy on Humane Care and Use of Laboratory Animals ("PHS Policy") carried out by USD, the USD IACUC, and any IACUC subcommittees;

7. USD IACUC meeting minutes (with corresponding attachments);
8. All nonhuman primate-related research protocols (approved, denied and deferred) received by the USD IACUC;
9. Copies of all correspondence between USD and the National Institutes of Health's ("NIH") Office of Laboratory Animal Welfare ("OLAW") regarding AWA/PHS Policy noncompliant incidents;
10. United States Department of Agriculture ("USDA") inspection reports and corresponding inspection narratives;
11. USDA final investigative reports with corresponding attachments;
12. USDA letters of warning with corresponding attachments (USDA-APHIS form 1060);
13. USDA letters of information (LOI) with corresponding attachments;
14. USDA Decision and orders, consent decisions, official investigative reports and settlement agreements and Office of General Counsel complaints and stipulations;
15. USDA annual facility reports;
16. OLAW compliance oversight evaluations and final reports
17. OLAW Assurance with corresponding attachments;
18. All NIH grant applications submitted by Dr. Robert J. Morecraft (2004-date of fulfillment); and
19. All NIH Progress Reports submitted by Dr. Robert J. Morecraft (2004-date of fulfillment)

FINDINGS OF FACT

I.

On July 22, 2008, Ian Smith, a research associate with PETA, sent an e-mail message to Dr. Laura Jenski, University of South Dakota Vice President for Research, requesting the documents set forth in the issues listed above.

II.

On August 26, 2008, James F. Shekleton, General Counsel for the Board of Regents, sent a letter to PETA indicating that the Board was denying PETA's request.

III.

On October 20, 2008, the Office of Hearing Examiners received a Notice of Review Request for Disclosure of Public Records dated October 13, 2008. This review request referred to PETA's July 22, 2008 written request to the Board from Lori Kettler, Senior Counsel, PETA Foundation. Items requested are listed above under Issues.

IV.

The Board responded in a letter dated November 7, 2008 and received in the OHE office on November 10, 2008, that the Board was denying the request of PETA.

V.

Review of the file by OHE staff on December 2, 2008 showed that the response by the Board had not been listed as being sent to PETA. A copy of the Board's response was then forwarded to PETA on December 2, 2008.

VI.

No good cause was offered or shown that would have necessitated a hearing.

VII.

Any additional findings of fact included in the Reasoning section of this decision are incorporated herein by reference.

VIII.

To the extent any of the foregoing are improperly designated and are instead Conclusions of Law, they are hereby redesignated and incorporated herein as Conclusions of Law.

REASONING

PETA requested documents from the Board which are listed under Issues. They argued that the records requested are required to be kept by the Board under State and Federal laws and pursuant to policy. Generally, SDCL 1-27-1 provides, in pertinent part:

If the keeping of a record, or the preservation of a document or other instrument is required of an officer or public servant under any statute of

this state, the officer or public servant shall keep the record, document, or other instrument available and open to inspection by any person during normal business hours.... (emphasis added)

The South Dakota Supreme Court has construed the above statute in the case of *Argus Leader v. Hagen*, 2007 SD 96, 739 N.W.2d 475. The Court in *Argus Leader* went through the following process in interpreting SDCL 1-27-1:

“Interpreting statutes according to their plain language is a primary rule of statutory construction.” *State v. Young*, 2001 SD 76, ¶ 6, 630 N.W.2d 85, 87 (citing *Nickerson v. American States Ins.*, 2000 SD 121, ¶ 11, 616 N.W.2d 468, 470). SDCL 1-27-1 provides that a document is open to public inspection “[i]f the keeping of a record, or the preservation of a document or other instrument is required of an officer or public servant under any statute of this state[.]”

The 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. *Benson v. State of SD*, 2006 SD 8, ¶ 71, 710 N.W.2d 131, 158 (quoting *Martinmaas v. Engelmann*, 2000 SD 85, ¶ 49, 612 N.W.2d 600, 611). Words and phrases in a statute must be given their plain meaning and effect. *Id.* 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. *Id.*

The language of SDCL 1-27-1 is clear and unambiguous. *Argus Leader* is correct that there is a presumption of openness under SDCL 1-27-1, but only if the record or document is required by statute to be kept or maintained. *Argus Leader*'s expansive interpretation of SDCL 1-27-1 would make every document generated by or in the possession of government a public record with the accompanying requirement that it be maintained. This would include such things as ephemeral notes and phone messages.

“In construing a statute, we presume ‘that the legislature did not intend an absurd or unreasonable result’ from the application of the statute.” *State v. Wilson*, 2004 SD 33, ¶ 9, 678 N.W.2d 176, 180 (quoting *State v. I-90 Truck Haven Service, Inc.*, 2003 SD 51, ¶ 3, 662 N.W.2d 288, 290) (citing *Martinmaas*, 2000 SD 85, ¶ 49, 612 N.W.2d at 611)). *Argus Leader* dismisses this argument by maintaining that “[r]easonableness in the form of ‘common sense, democratic philosophy, constitutional principles and legislative reality’ ” tempers its position. This Court, however, must apply the language of the statutes as enacted by the legislature. SDCL 1-27-1 requires open inspection of any record required

by statute to be maintained. (Emphasis added)

The Court in *Argus Leader* found that the language of SDCL 1-27-1 is clear and unambiguous. The same analysis applies in this matter. It is clear from the Court's reasoning pursuant to SDCL 1-27-1 that absent any South Dakota statutory authority necessitating a record be kept "available and open to inspection" the records requested need not be made available to the public.

PETA generally refers to the federal Freedom of Information Act to bolster their argument for the existence of federal statutes which preclude the retention of the documents they requested via the Animal Welfare Act – AWA, 7 USC §§2131 *et seq.* However:

The Freedom of Information Act (FOIA), Title 5 of the United States Code, section 552, generally provides that any person has the right to request access to federal agency records or information....The FOIA applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or by state and local government agencies. Any requests for state or local government records should be directed to the appropriate state or local government agency. <http://www.state.gov/m/a/ips/> (last visited April 3, 2009) (emphasis added).

The term "agency" as used in 5 U.S.C. § 552(f) (1) is defined as follows:

f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

It follows then that PETA's argument that the Animal Welfare Act triggers application of SDCL 1-27-33¹ through the Freedom of Information Act is not applicable as that statute refers to federal government agencies.

PETA cites to the following attorney general's opinions 1993-94 S.D. S.D. Atty. Gen. 91, 1994 WL 261317A and 1983 S.D. Atty. Gen. 31, 1983 WL 180597 as the basis for their arguments. However, attorney general opinions are merely advisory. They are not settled law. The South Dakota Supreme Court ruled in *Rural Pennington County Tax Ass'n v. Dier*, 515 N.W.2d 841, (S.D. 1994) that the "[O]pinions of the Attorney General are, of

¹ 1-27-33. Specific public access or confidentiality provisions not superseded by chapter provisions. The provisions of this chapter do not supersede more specific provisions regarding public access or confidentiality elsewhere in state or federal law.

course, not binding on this Court. They are, however, “entitled to weight in gleaning the legislature's intention.” Application of Farmers State Bank, 466 N.W.2d 158, 163 (S.D.1991). Additionally, and more importantly, those opinions superseded *Argus Leader*.

PETA argues that SDCL 1-26-2² requires that the Board disclose information generated in the course of federal regulated research. The Court in *Argus Leader* observed:

[¶ 19.] SDCL ch 1-26 is the South Dakota Administrative Procedures Act. It addresses the promulgation of administrative rules and the conduct of contested administrative hearings. Applying the principle of ejusdem generis, “all other materials” is limited to the context of promulgation of administrative rules and resolution of administrative proceedings. Construing the language “all other materials” to provide public inspection of any document in the possession of an agency would be an absurd and unreasonable application of the statute....

As stated in the Boards Response, page 8, “The record production requirements of SDCL § 1-26-2 apply only to the promulgation of rules of general application or to the resolution of contested cases, only to the exercise of legislative or judicial powers by administrative agencies. Other exercises of administrative discretion do not implicate the Administrative Procedures Act.” (citations omitted) The IACUC committee that PETA is seeking records from does not exert quasi judicial authority over individual rights that would trigger the Administrative Procedures Act and in turn SDCL §1-26-2. (See 9 C.F.R. §2.31 for IACUC functions)

PETA argues, without providing authority that SDCL 1-25-3 applies to committees appointed by University administrators. PETA argues that USD/IACUC “is a state agency in its own right, it is also a ‘board or Commission’ of USD, which is governed by the South Dakota Board of Regents, both of which are state agencies. Thus the minutes of the IACUC meetings requested by PETA must be released without further delay” (PETA October 13, 2009 Request, p. 8). Based upon this contention PETA urges that SDCL 1-25-3 should apply to the records they are requesting. This is inapplicable as SDCL 1-25-3 applies only to boards or commissions that are required to meet in public pursuant to SDCL 1-25. The USD IACUC is not of that ilk.

Finally, PETA argues that SDCL 40-1-16 creates record-keeping requirements for research facilities that might trigger SDCL 1-27-1 disclosure obligations. It appears to this examiner that any requirement that research facilities operators maintain records is absent from SDCL 40-1-16. It appears the legislature did consider the possibility of

² 1-26-2. Agency materials available for public inspection--Derogatory materials. Each agency shall make available for public inspection all rules, final orders, decisions, opinions, intra-agency memoranda, together with all other materials, written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions. An agency shall hold confidential materials derogatory to a person but such information shall be made available to the person to whom it relates.

records and only addresses same in the context of assembled records in response to a citizen complaint. (See SDCL 40-1-28) The matter at hand is not applicable to this situation.

Based on the status of the law regarding SDCL 1-27 at this time, it appears there are no specific South Dakota statutes that either require the disclosure of the information or the preservation of that material. During the 2009 legislative session, the South Dakota legislature has made modifications to SDCL 1-27. However, those changes do not go into effect until July 1, 2009. As such, the Board's actions are affirmed.

CONCLUSIONS OF LAW

I.

The Office of Hearing Examiners has jurisdiction over the parties and subject matter of this appeal and the authority to conduct the appeal pursuant to the provisions of SDCL Chapter 1-26D and 1-27.

II.

Pursuant to SDCL 1-27-40 no good cause was offered or shown that would have necessitated a hearing.

III.

The language of SDCL 1-27-1 is clear and unambiguous. Pursuant to the language of the statute, only documents or instruments required of an officer or public servant under any statute of this state shall be kept open for inspection. The records requested do not conform to the strictures of the statute.

IV.

Any additional conclusions of law included in the Reasoning section of this decision are incorporated herein by this reference.

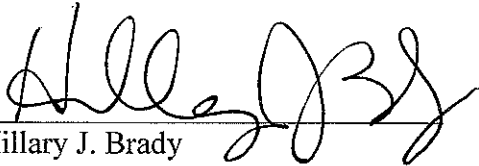
V.

To the extent any of the foregoing are improperly designated and are instead findings of fact, they are hereby redesignated and incorporated herein as findings of fact.

ORDER

It is hereby ordered that the actions of the Board of Regents in denying the requests of the People for the Ethical Treatment of Animals Foundation be affirmed.

Dated this 15th day of April, 2009

A handwritten signature in black ink, appearing to read 'Hillary J. Brady', written over a horizontal line.

Hillary J. Brady
Office of Hearing Examiners

NOTICE: Pursuant to SDCL 1-27-41 an aggrieved party may appeal the decision of the Office of Hearing Examiners to the circuit court pursuant to chapter 1-26. In any action or proceeding under §§ 1-27-35 to 1-27-43, inclusive, no document or record may be publicly released until a final decision or judgment is entered ordering its release.