



September 29, 2023

Sherrie Hart

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MuckRock News

DEPT MR 147568

263 Huntington Ave

Boston, MA 02115

<https://www.muckrock.com/respond/1582035/>

Passcode: PARXNXVY

Re: South Dakota Open Records Law: Cody Wade Kelly

Dear Ms. Hart,

The Sioux Fall Police Department (SFPD) received your requests for the following information:

Surveillance footage collected during the investigation of the officer involved in a shooting that occurred around 10:30PM, on 3/31/22, resulting in the death of Cody Wade Kelly.

This letter is to serve as a denial of your request for the following reasons.

The requested materials are exempt from public records disclosure. *See* SDCL §§1-27-1.5; SDCL 23-5-7; SDCL 23-5-10; and SDCL 23-5-11.

1-27-1.5. Certain records not open to inspection and copying.

The following records are not subject to §§ 1-27-1, 1-27-1.1, 1-27-1.3, and § 1-27-1.23:

(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;

(7) Personnel information other than salaries and routine directory information. However, this subdivision does not apply to the public inspection or copying of any current or prior contract with

any public employee and any related document that specifies the consideration to be paid to the employee;

(12) Correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees;

(19) Personal correspondence, memoranda, notes, calendars or appointment logs, or other personal records or documents of any public official or employee;

Source: SL 2009, ch 10, § 6; sl 2012, ch 11, § 1; sl 2019, ch 5, § 2; SL 2022, ch 4, § 1.

23-5-7. Identification records to be filed and preserved--Restrictions as to use.

Any department or institution that makes or takes any photograph, impression, measurement, description, or record including confidential criminal investigative information, taken or made as provided for in § 23-5-6 shall be filed and preserved by the department or institution. The department or institution may not publish, transfer, or circulate any impression, measurement, description, record, or photograph, except a criminal booking photograph, for a crime classified as a felony pursuant to § 22-6-1 outside the department or institution except to a duly authorized law enforcement officer. If the subject of a measurement, description, or other record becomes a fugitive from justice, or escapes from a penal institution then the measurement, description, or record may be exhibited to the public. This section does not apply to the release of information allowed pursuant to § 24-2-20. Any criminal booking photograph for a crime classified as a felony pursuant to § 22-6-1 is a public record pursuant to chapter 1-27.

Nothing in this section requires any law enforcement agency to provide or reproduce a criminal booking photograph older than six months from the date the criminal booking photograph was taken. An agency requested to provide or reproduce a criminal booking photograph is entitled to recover costs of retrieval or reproduction pursuant to § 1-27-35.

Source: SDC 1939 & Supp 1960, § 34.1614; SL 2001, ch 118, § 1; SL 2017, ch 100, § 1.

23-5-10. Definition of terms.

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

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

(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";

- (3) "Criminal intelligence information," information associated with an identifiable individual, group, organization, or event compiled by a law enforcement agency: in the course of conducting an investigation into a criminal conspiracy, projecting a potential criminal operation, or producing an estimate of future criminal activities; or in relation to the reliability of information derived from reports of informants or investigators or from any type of surveillance;
- (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;
- (5) "Call for service," an event occurring in or near the jurisdiction of a law enforcement agency that requires law enforcement response, evaluation, action, or documentation.

Source: SL 1986, ch 189, § 1; SL 2004, ch 161, § 1.

23-5-11. Confidential criminal justice information not subject to inspection--Exception.

Confidential criminal justice information and criminal history information are specifically exempt from disclosure pursuant to §§ 1-27-1 to 1-27-1.15, inclusive, and may be withheld by the lawful custodian of the records. Information, 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 unless the information contains criminal intelligence, 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.

Source: SL 1986, ch 189, § 2; SL 2004, ch 161, § 2; SL 2009, ch 10, § 18; SL 2014, ch 112, § 1.

Additionally, it would appear that some of the materials responsive to your request may be the property of other agencies. Any records of other agencies or information from other sources would not be public records "of or belonging to" the Sioux Falls Police Department. *See* SDCL 1-27-1.1.

1-27-1.1. Public records defined.

Unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public, public records include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public

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

Source: SL 2009, ch 10, § 2.

Materials relating to requesting public records and appeal of denial can be found in South Dakota Codified Law Chapter 1-27. If you if you have additional questions, further information or clarification concerning your request, you can contact Keith E. Allenstein, Jr., our legal advisor, at kallenstein@siouxfalls.org or 605-367-8880.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jon Thum', with a long horizontal flourish extending to the right.

Jon Thum
Police Chief