February 20, 2007

STATE OF SOUTH DAKOTA
SOUTH DAKOTA OPEN MEETINGS COMMISSION

IN THE MATTER OF THE COMPLAINT	*	
OF SOUTH DAKOTANS FOR OPEN	*	
GOVERNMENT AGAINST THE SOUTH	*	DECISION
DAKOTA SCIENCE AND TECHNOLOGY	*	
AUTHORITY	*	

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John Steele, Commission Chair

Background

This matter arises out of the initial meeting of the South Dakota Science and Technology Authority (the "Authority") on September 28 and 29, 2004. The Authority is a creature of state government, established by the legislature in 2004 by an enactment now codified as SDCL 1-16H. The complaining party is an association called South Dakotans for Open Government ("SDOG") headquartered in Brookings, South Dakota.

SDOG, in its complaint, alleges that the Authority, in the meeting in question, went into executive session on multiple occasions without stating a proper reason for such executive sessions and that, while in executive session, it discussed matters and made decisions that were not authorized to be made in executive session. The particulars of these allegations will be dealt with below.

The Authority is subject to the open meeting law, SDCL 1-25, both by the general scope of the provisions of that law, SDCL 1-25-1, and by the enabling legislation that established the Authority, specifically, SDCL 1-16H-13. However, the Authority has expanded authority to conduct executive sessions that is not given to other public bodies, in particular, SDCL 1-16H-28, which authorizes the discussion and consideration of information consisting of "trade secrets, scientific or technical secrets, matters involving national security or commercial or financial information regarding the operation of a business" in executive session.

Proper Motions for Executive Sessions

The minutes of the meeting in question reflect that there were three executive sessions held. The first one (1) was at 11:21 A.M. on September 28; the second one (2) at 8:35 A.M. on September 29 and the third (3) at 11:50 A. M. on September 29. Each party has filed with this commission certain affidavits relating, among other things, to the number of executive sessions and the subjects discussed therein. We take the official minutes as controlling on the factual issues, except as convincingly impeached by the supplemental materials furnished.

Each of the three executive session motions recorded in the minutes reflects a stated reason for the executive session. For (1) it was "to discuss contract matters;" for (2) it was "to discuss contract matters;" and for (3) it was "to discuss contract and personnel matters." SDOG offers impeachment of the minutes by affidavit, alleging that these reasons were not actually publicly declared or included in the oral motions at the time that the motions were made. The Authority, through the affidavit of Trudy Severson, the person taking the notes from which the minutes were prepared, concedes that her notes do not contain any mention of the reasons for the executive sessions being made in any of the three motions. She states, however, that her notes do reflect that, after the first motion for executive session, the presiding member of the Authority declared "We are in executive session to discuss contracts."

With regard to the second executive session, Ms. Severson also states that, Dr. Gowen, the executive director of the Authority, made a statement, immediately prior to the motion to go into executive session that he had just learned of recent developments that may impact contracts.

With regard to the third executive session, Ms. Severson observes that the session was an item on the agenda, listed as "Contract Matters."

Based on these statements, the Authority argues that there was either actual or substantial compliance with the requirement that the purpose of an executive session be stated in the motion to hold it.

With regard to the claim of substantial compliance, this commission does not desire to give SDCL 1-25-2 an overly technical reading. However, with regards the motion requirements of SDCL 1-25-2 they appear to be plain, simple and easy to comply with. There is no need to consider substantial compliance when the requirements of the statute are clear and actual compliance is easily within the capacity of any public body, and certainly within that of the

Authority, whose members and staff appear to be well educated and experienced in public affairs.

Substantive Discussions in Executive Sessions

We are left then, initially, with the question of whether what really happened at the meeting was accurately reflected in the minutes submitted to us or whether the version submitted by SDOG more accurately reflects the true course of events. Unfortunately, the Open Meetings Commission does not have access to the usual tools of an adversary system for determining the real facts in this dispute. The facts are submitted to us by affidavit, without the benefit of oral direct and cross examination to test the accuracy of the witnesses' recollections, their ability to hear and observe, their consistency with each other and with such records as exist, etc. However, in this case, as to this issue, we do not have to resolve the disputed factual question, because we conclude that, even if the minutes accurately reflect what took place at the Authority's meeting, there was not compliance with the statute.

The Authority's reading of the executive session exceptions to the open meeting law, in particular SDCL 1-25-2(3), appears to be that there are, expressed in that subsection, two distinct exceptions to the open meeting requirement: one for consultations with legal counsel about pending litigation and one for the discussion of contractual matters generally. Although it is grammatically possible to read that subsection in that way, we think that a more natural and logical way of reading it is that the subsection expresses one exception to the open meeting principle and that exception is for consultations with legal counsel, which consultations may relate to litigation matters or to contractual matters. We are persuaded that this is the better interpretation and the intent of the legislature, for multiple reasons, in addition to the fact that it seems to us to be the natural and logical way to read it. Those include that, if there is a general exception for contractual matters, the exception in SDCL 1-25-2(5) becomes essentially a dead letter and the legislature should not be presumed to have enacted surplusage. Also, if there is a general exception for contractual matters, it would, in our view, largely gut the open meeting law of any extensive application because a very large portion of what is discussed and decided by most public bodies, on a routine basis, could be classified as a "contract matter." Such an exception would be, as the cliché goes, a hole in the law that you could drive a truck through. Or perhaps a school bus.

We believe that, in order to properly discuss contractual matters in executive session the Authority should have adopted a motion the stated purpose of which, contained in the motion,

was to discuss contractual matters with legal counsel. Or, in view of the Authority's expanded authority for executive sessions under SDCL 1-16H-28, the motion could have been for the stated purpose of having discussions of material consisting of trade secrets, technical secrets, etc. Needless to say, in an executive session convened pursuant to such a motion, the discussion must be restricted to the matters described in the motion and any official action must be taken in a subsequent open session.

With regard to the matter of what was discussed in executive session, the most substantial of the allegations made by SDOG is that the entering into various contracts was discussed in closed sessions.

With regard to one of these, a contemplated contract with Black Hills Vision, SDOG asserts that there is no indication of anything in the public proposal of Black Hills Vision that would qualify it for executive session discussion. The Authority relies on the same reading of SDCL 1-25-2(3) as described above to defend this action and asserts that, since that discussion was a contractual matter, it could legitimately be taken up in executive session. We reject that logic for the same reasons as stated above. We conclude that the Black Hills Vision contract should only have been discussed in executive session to the extent that it involved consideration of trade secrets, scientific secrets or other matters specified in SDCL 1-16H-28 or to the extent necessary for the Authority to secure such legal advice as it deemed prudent. In either of those events, the motion for executive session should have specified those as the reasons for the executive session and discussion should have been confined to those matters.

The Authority also appears to have dealt with other contract matters in executive session, according to the affidavits submitted, in particular those of David Snyder. In addition to the Authority's reading of SDCL 1-25-2(3), rejected above, the Authority observes that its legal counsel was present during the discussions of contractual arrangements with Homestake/Barrick and with Dynatech (the nature of those agreements being unnecessary to this discussion) and that counsel was asked for legal opinions from time to time during those discussions. The implicit argument is that, had the motions for executive session been made, citing the reason for a closed session as discussing contractual matters with legal counsel that such discussions would have been proper because of the presence of counsel and the soliciting of opinions from counsel "from time to time."

Our view of the open meeting law is that public bodies are required to separate general discussions of contracts from the seeking of legal advice and opinions from counsel, and that

only legal matters should be discussed in executive session. It may be objected that such a procedure is cumbersome and may require going into and out of executive session numerous times in the course of any particular discussion. That may well be. The open meeting law is intended to make sure that the public's business is conducted, insofar as possible, in public, and that is a principle that trumps efficiency when necessary.

The Authority also relies on SDCL 1-25-2(4) which pertains to "preparing for contract negotiations or negotiating with employees or employee representatives." In order to prevail, this exception would need to be read as though the terms "preparing for contract negotiations" would be completely separate from the reference to employees or employee representatives. This Commission finds, however, that this exception applies only to employee relations and not to other general contractual matters. As explained above, an exception that encompasses all discussion of contracts also would not comport with the spirit and intent of the Open Meetings Law.

Finally, in a February 1, 2007 letter, SDOG advised this Commission that it seeks a ruling on whether SDCL 1-25-2(1) allows for discussion of salaries and benefits in an executive session. SDCL 1-25-2(1) pertains to the discussion of "qualifications, competence, performance, character of fitness of employees. Based on the information filed with the complaint and oral arguments raised, this issue was not specifically raised previously and the Authority was not asked to responds to that specific allegation. Accordingly, the issue will not be considered here.

Other matters raised by SDOG include that the Authority took its lunch during an executive session, when lunch was a public agenda item. We do not believe that placing of lunch on an agenda prohibits members of a public body from thereafter having lunch in executive session if that is convenient for them, so long as the lunchtime discussions are confined to proper executive session matters, and the session is closed pursuant to a proper motion. The open meeting law regulates the conduct of public business not the consumption of comestibles by public officials.

SDOG also alleges that contracts of the Authority were not approved in open session. The minutes reflect that they were so approved and the minutes are corroborated by affidavits of those present. We take those allegations, therefore, as unsubstantiated.

Findings of Fact

For the reasons stated above, the Commission therefore makes the following findings of fact:

1. The Authority is a creature of the state government of South Dakota and was established by act of the legislature now codified as SDCL 1-16H

2. The Authority met in official sessions on September 28 and 29, 2004.

3. During its September 28 and 29 meeting, the Authority went into closed session on three different occasions. The first and second occasions were for the stated purpose of considering "contract matters." The third occasion was for the purpose of considering "contract and personnel matters."

4. In the course of those closed sessions, the Authority considered entry into contracts with Homestake/Barrick, Dynatech, and Black Hills Vision. So far as the record before us appears, none of those discussions involved consideration of trade secrets, scientific or technical secrets, matters involving national security or commercial or financial information regarding the operation of a business. In any event, the motion of the Authority to go into closed session did not invoke its authority to do so under SDCL 1-16H-28.

5. The Authority's attorney was present during two of the three closed sessions and was asked for legal opinions or advice during those sessions, from time to time.

6. All contracts entered into by the Authority at its September 28 and 29, 2004 meeting were approved in open session.

Conclusions of Law

Based on the foregoing findings of fact and for the reasons set forth above, the Commission makes the following conclusions of law:

1.The Authority is subject to the open meeting requirements of SDCL 1-25, with the additional exceptions for closed meetings authorized by SDCL 1-16H-28.

2. A motion for a closed session for the stated purpose of discussing "contract matters" is an insufficient basis for closing a meeting which is otherwise required to be a public meeting pursuant to SDCL 1-25-1. For that reason, the Authority did not properly go into closed session on any of the three occasions when it did so on September 28 and 29, 2004.

3. Consideration of entering into contracts is not in and of itself a proper subject for a closed session under SDCL 1-25-2, and therefore the Authority acted illegally when it considered entering into contracts in closed session.

4. The Authority violated the South Dakota Open Meeting Law, SDCL 1-25, and should be reprimanded.

Conclusion and Reprimand

We therefore publicly reprimand the Authority for holding closed sessions not in compliance with the South Dakota Open Meeting Law, SDCL 1-25.

Commissioners Beck and Rothschadl concur.
Consistent with SDCL 1-25-9, Commissioner Brenner did not participate.