CONDUCTING THE PUBLIC'S BUSINESS IN PUBLIC

A guide to South Dakota's Open Meetings Law
(Revised November 2010)

Prepared by representatives of the:

S.D. Attorney General's Office
S.D. Municipal League
Associated School Boards of S.D.
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Q: WHAT IS SOUTH DAKOTA'S OPEN MEETINGS LAW?

A: South Dakota's open meetings law embodies the principle that the public is entitled to the greatest possible information about public affairs and is intended to encourage public participation in government. SDCL 1-25-1 requires that official meetings of public bodies must be public and notice is to be given of such meetings 24 hours in advance of the meetings. While the open meetings law does not define "official meeting," specific statutes relating to cities, counties, and school districts define what constitutes an official meeting. In addition, the attorney general takes the position that a meeting must be open to the public if:

1) A legal quorum of the public body is present at the same place at the same time; and
2) Public business, meaning any matter relating to the activities of the entity, is discussed.

Openness in government is encouraged.

Q: WHO DOES THE OPEN MEETINGS LAW APPLY TO?

A: The open meetings law applies to all public bodies that exercise “sovereign power derived from state statute.” This includes city, counties, school boards and other public bodies such as appointed boards, task forces, and committees (or those that are

created by ordinance or executive proclamation)so long as they have authority to actually exercise sovereign authority. Although no court decisions have been issued on the subject, this probably does not include bodies that are not created by statute, ordinance or proclamation or that serve only in an advisory capacity.

The constitution allows the Legislature and the Court system to create rules regarding their own separate functions.

Q: WHAT DOES THE TERM "SOVEREIGN POWER" MEAN?

A: The open meeting law does not define this term, but it generally means the power to levy taxes, impose penalties, make special assessments, create ordinances, abate nuisances, regulate the conduct of others, or perform other traditional government functions. The term may include the exercise of many other governmental functions. If an entity is unclear whether it is exercising "sovereign power" it should consult with legal counsel.

Q: HOW ARE THE PUBLIC AND MEDIA NOTIFIED WHEN PUBLIC BUSINESS IS BEING DISCUSSED?

A: SDCL 1-25-1.1 requires that all public bodies prominently post a notice and copy of the proposed agenda at the organization's principal office at least 24 hours PRIOR to the meeting. For special or rescheduled meetings, public bodies must comply with the regular meeting notice requirements as much as circumstances permit. The notice must be delivered in person, by mail or by telephone to all local news media who have asked to be notified. It is good practice for local media to renew requests for notification annually to remind the entity of ongoing media interest.

Q: WHO ARE LOCAL MEDIA?

A: There is no definition in state law, but the Attorney General is of the opinion that local media is all media--broadcast and print--that regularly carry news to the community.

Q: WHEN CAN A MEETING BE CLOSED TO THE PUBLIC AND MEDIA?

A: SDCL 1-25-2 allows a public body to close a meeting for discussing employee or student performance, legal matters, employee contract negotiations or pricing strategies by publicly-owned competitive businesses. Meetings may also be closed by cities and counties for certain economic development matters. SDCL 9-34-19. Note that the statute does not <u>require</u> meetings be closed in any of these circumstances.

Federal law pertaining to student and medical records will also cause school districts and cities or counties to conduct executive sessions or conduct meetings so as to refrain from releasing data regarding student records or medical records. Any official action based on these discussions must, however, be made at an open meeting.

Q: WHAT IS THE PROPER PROCEDURE FOR EXECUTIVE SESSIONS?

A: As of July 1, 2010, motions for executive sessions must refer to the specific state law allowing for the executive session i.e. "pursuant to SDCL 1-25-2(3)." Also, to avoid public confusion public bodies should explain the reason for going into executive session. For example the motion might refer to "discussion of student discipline" or "litigation issues with counsel."

Discussion in the executive session must be strictly limited to the announced subject. No official votes may be taken on any matter during an executive session. The public body must return to open session before any official action can be taken.

Board members could be held personally liable for the results of an official vote taken illegally during an executive session. For example, a contract approved only during an executive session could be found void and the board members could be required to repay any public funds spent under the contract

Q: WHAT HAPPENS IF THE MEDIA OR PUBLIC IS IMPROPERLY EXCLUDED FROM A MEETING OR OTHER VIOLATIONS OF THE OPEN MEETING LAW OCCUR?

A: Excluding the media or public from a meeting that has not been properly closed subjects the public body or the members involved to(a)prosecution as a Class 2 misdemeanor punishable by a maximum sentence of 30 days in jail, a $500 fine or both or (b) a reprimand by the Open Meeting Commission. The same penalties apply if the agenda for the meeting is not properly posted or other open meeting violations occur.

Also action taken during any meeting that is not open or has not been properly noticed could, if challenged, be declared null and void. It could even result in personal liability for members of the governing body involved, depending upon the action taken.

Q: HOW ARE ISSUES REFERRED TO THE OPEN MEETINGS COMMISSION?

A: Persons alleging violations of the open meetings laws must make their complaints with law enforcement officials in the county where the offense occurred. After a signed notarized complaint is made under oath, and any necessary investigation is conducted, the State's Attorney may (a) prosecute the case as a misdemeanor, (b)

find that the matter has no merits and file a report with the Attorney General for statistical purposes or (c) forward the complaint to the Open Meetings Commission for a determination. The commission is comprised of five State's Attorneys appointed by the Attorney General. The commission examines whether a violation has occurred and makes written public findings explaining its reasons.

If you have questions on the procedures or status of a pending case, you may contact the Attorney General's Office at 605-773-3215 to talk to an assistant for the Open Meetings Commission. Procedures for the Open Meeting Commission are posted on the website for the Office of Attorney General. http://atg.sd.gov/

Q: ARE TELECONFERENCES CONSIDERED PUBLIC MEETINGS?

A: Yes. The open meetings law allows meetings, including executive or closed meetings, to be conducted by teleconference--an information exchange by audio or video medium--if a place is provided for the public to participate by speaker phone. The media and public must be notified of telephone conference call meetings under the same notice requirements as any other meeting.

All votes shall be taken by roll call during a teleconference.

Q: MAY AGENDA ITEMS BE CONSIDERED IF THEY ARE ADDED LESS THAN 24 HOURS BEFORE A MEETING?

A. Agendas for public meetings must be posted at least 24 hours in advance. The rationale is that the public and media should have some time to determine whether to come to the meeting. Adding agenda items right before meetings (or during meetings)frustrates that purpose. In one court case, a personnel issue was not posted as part of the agenda and the local circuit court held that the personnel decision was void. *McElhaney v. City of Edgemont* (Fall River County Civ. 98-44).For special or rescheduled meetings, public bodies are to comply to the extent circumstances permit. In other words, posting less than 24 hours in advance may be permissible in emergencies.

Q: ARE EMAIL DISCUSSIONS "MEETINGS" FOR PURPOSES OF THIS LAW?

A: Courts in some states have held that contemporaneous email communications among a quorum of the governing members of a public body constitute a "meeting" of the public body when the members discuss the merits of pending issues. Email participation in scheduling or similar activity would not, under this analysis, constitute a public meeting. For additional reference see Wood v.

Battle Ground School District 27 P.3d 1208 (Wash. 2001); 1998 N.D. Op. Atty. Gen. 0-27

Q: WHAT RECORDS MUST BE AVAILABLE TO THE PUBLIC IN CONJUNCTION WITH PUBLIC MEETINGS?

A: There are a number of state laws pertaining to public records (SDCL ch. 1-27). Some are specific to records of meetings. For example, SDCL 1-27-1.17 requires that draft minutes of public meetings must be made available to the public at the principal place of business for the public body within 10 days after the meeting (or made available on the website for the public body within five days).

Another law provides that meeting packets or materials given out to members of a public body must also be made available to the public when provided to the public body, but contains various exemptions. This law, SDCL 1-27-1.16, is recited fully below.

These laws, enacted in 2010, are *in addition* to any specific requirements for public bodies (i.e. like publication requirements in state laws pertaining to cities, counties, or school districts). Enforcement of these public records law are handled by separate procedures in SDCL 1-27-35, et.seq.rather that the Open Meeting Procedures described above. Violations of these laws are also Class 2 misdemeanors.

Q: WHAT REQUIREMENTS APPLY TO TASK FORCES, COMMITTEES AND WORKING GROUPS?

A: Legislation enacted in 2010 clarified that task forces and committees that exercise ”sovereign power” and are created by statute, ordinance or proclamation are required to comply with the Open Meeting Law. SDCL 1-25-1.

Task forces, committees, and working groups that are not created by statute, ordinance, or proclamation or are advisory only may not be subject to the open meeting law, but are encouraged to comply to the extent possible when public matters are discussed. Ultimately, if such advisory task forces, committees and working groups present any reports or recommendations to public bodies, the public bodies must wait until the next meeting (or later) before taking final action on the recommendations. This “waiting period” also became effective in 2010. SDCL 1-27-1.18.

Pertinent S.D. Open Meetings Statutes

(other specific provisions may apply depending on the public body involved)

1-25-1. Open Meetings. The official meetings of the state, its political subdivisions, and any public body of the state or its political subdivisions are open to the public unless a specific law is cited by the state, the political subdivision, or the public body to close the official meeting to the public. For the purposes of this section, a political subdivision or a public body of a political subdivision means any association, authority, board, commission, committee, council, task force, school district, county, city, town, township, or other agency of the state, which is created or appointed by statute, ordinance, or resolution and is vested with the authority to exercise any sovereign power derived from state law.

It is not an official meeting of one political subdivision or public body if its members provide information or attend the official meeting of another political subdivision or public body for which the notice requirements of § 1-25-1.1 have been met.

Any official meeting may be conducted by teleconference as defined in § 1-25-1.2. A teleconference may be used to conduct a hearing or take final disposition regarding an administrative rule pursuant to § 1-26-4. A member is deemed present if the member answers present to the roll call conducted by teleconference for the purpose of determining a quorum. Each vote at an official meeting held by teleconference shall be taken by roll call.

If the state, a political subdivision, or a public body conducts an official meeting by teleconference, the state, the political subdivision, or public body shall provide one or more places at which the public may listen to and participate in the teleconference meeting. The requirement to provide one or more places for the public to listen to the teleconference does not apply to an executive or closed meeting. A violation of this section is a Class 2 misdemeanor.

1-25-1.1. Public notice. All public bodies shall provide public notice, with proposed agenda, at least 24 hours prior to any meeting, by posting a copy of the notice, visible to the public, at the principal office of the public body holding the meeting, and, for special or rescheduled meetings, delivering, in person, by mail or by telephone, the information in the notice to members of the local news media, who have requested notice. For special or rescheduled meetings, all public bodies shall also comply with the public notice provisions of this section for regular meetings to the extent that circumstances permit. A violation of this section is a Class 2 misdemeanor.

1-25-1.2. Teleconference defined.

For the purpose of this chapter, a teleconference is information exchanged by audio or video medium.

1-25-2. Executive or closed meetings. Executive or closed meetings may be held for the sole purpose of:

1) Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. The term "employee" does not include any independent contractors.

2) Discussing the expulsion, suspension, discipline, assignment of or the educational program of a student;

3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;

4) Preparing for contract negotiations or negotiating with employees or employee representatives;

5) Discussing marketing or pricing strategies by a board or commission of a business owned by the state or any of its political subdivisions, where public discussions would be harmful to the competitive position of the business.

However, any official action concerning such matters shall be made at an open official meeting. An executive or closed meeting shall be held only upon a majority vote of the members of such body present and voting, and discussion during the closed meeting is restricted to the purpose specified in the closure motion. Nothing in 1-25-1 or this section may be construed to prevent an executive or closed meeting if the federal or state Constitution or the federal or state statutes require or permit it. A violation of this section is a Class 2 misdemeanor.

SDCL 9-34-19. Executive Sessions (Municipal and Counties). Any documentary material or data made or received by a municipal corporation, county, or an economic development corporation receiving municipal or county funds, for the purpose of furnishing assistance to a business, to the extent that such material or data consists of trade secrets or commercial or financial information regarding the operation of such business, is not a public record. Any discussion or consideration of such trade secrets or commercial or financial information by a municipal corporation or county may be done in executive session closed to the public.

1-25-6. Duty of states attorney. If a complaint alleging a violation of chapter 1-25 is made pursuant to § 23A-2-1, the state's attorney shall take one of the following actions:
(1) Prosecute the case pursuant to Title 23A;
(2) Determine that there is no merit to prosecuting the case. Upon doing so, the state's attorney shall send a copy of the complaint and any investigation file to the attorney general. The attorney general shall use the information for statistical purposes and may publish abstracts of such information, including the name of the government body involved for purposes of public education; or
(3) Send the complaint and any investigation file to the South Dakota Open Meetings Commission for further action.

1-25-6.1. Duty of state's attorney (County Commission Issues). If a complaint alleges a violation of this chapter by a board of county commissioners, the state's attorney shall take one of the following actions:
(1) Prosecute the case pursuant to Title 23A;
(2) Determine that there is no merit to prosecuting the case. The attorney general shall use the information for statistical purposes and may publish abstracts of the information as provided by § 1-25-6;
(3) Send the complaint and any investigation file to the South Dakota Open Meetings Commission for further action; or
(4) Refer the complaint to another state's attorney or to the attorney general for action pursuant to § 1-25-6.

SDCL 1-25-7. Referral to Open Meeting Commission. Upon receiving a referral from a state's attorney or the attorney general, the South Dakota Open Meetings Commission shall examine the complaint and investigatory file submitted by the state's attorney or the attorney general and shall also consider signed written submissions by the persons or entities that are directly involved. Based on the investigatory file submitted by the state's attorney or the attorney general and any written responses, the commission shall issue a written determination on whether the conduct violates this chapter, including a statement of the reasons therefor and findings of fact on each issue and conclusions of law necessary for the proposed decision. The final decision shall be made by a majority of the commission members, with each member's vote set forth in the written decision. The final decision shall be filed with the attorney general and shall be provided to the public entity and or public officer involved, the state's attorney, and any person that has made a written request for such determinations. If the commission finds a violation of this chapter, the commission shall issue a public reprimand to the offending official or governmental entity. However,

no violation found by the commission may be subsequently prosecuted by the state's attorney or the attorney general. All findings and public censures of the commission shall be public records pursuant to § 1-27-1. Sections 1-25-6 to 1-25-9, inclusive, are not subject to the provisions of chapter 1-26.

1-25-8. Open Meetings Commission Members. The South Dakota Open Meeting Commission shall be comprised of five state's attorneys appointed by the attorney general. Each commissioner shall serve at the pleasure of the attorney general. A chair of the commission shall be chosen annually from the membership of the commission by a majority of its members.

1-25-9. Open Meetings Commission Member Conflicts. No member of the commission may participate as part of the commission or vote on any action regarding a violation of this chapter if that member reported or was involved in the initial investigation, is an attorney for anyone who reported or was involved in the initial investigation, or represents or serves as a member of the governmental entity about whom the referral is made. The provisions of this section do not preclude a commission member from otherwise serving on the commission for other matters referred to the commission.

1-27-1.16. Meeting packets and materials. If a meeting is required to be open to the public pursuant to § 1-25-1 and if any printed material relating to an agenda item of the meeting is prepared or distributed by or at the direction of the governing body or any of its employees and the printed material is distributed before the meeting to all members of the governing body, the material shall either be posted on the governing body's website or made available at the official business office of the governing body at least twenty-four hours prior to the meeting or at the time the material is distributed to the governing body, whichever is later. If the material is not posted to the governing body's website, at least one copy of the printed material shall be available in the meeting room for inspection by any person while the governing body is considering the printed material. However, the provisions of this section do not apply to any printed material or record that is specifically exempt from disclosure under the provisions of this chapter or to any printed material or record regarding the agenda item of an executive or closed meeting held in accordance with § 1-25-2. A violation of this section is a Class 2 misdemeanor. However, the provisions of this section do not apply to printed material, records, or exhibits involving contested case proceedings held in accordance with the provisions of chapter 1-26.

1-27-1.17. Draft minutes. The unapproved, draft minutes of any public meeting held pursuant to § 1-25-1 that are required to be kept by law shall be available for inspection by any person within ten business days after the meeting. However, this section does not apply if an audio or video recording of the meeting is available to the public on the governing body's website within five business days after the meeting. A violation of this section is a Class 2 misdemeanor. However, the provisions of this section do not apply to draft minutes of contested case proceedings held in accordance with the provisions of chapter 1-26.

1-27-1.18. Working group reports. Any final recommendations, findings, or reports that result from a meeting of a committee, subcommittee, task force, or other working group which does not meet the definition of a political subdivision or public body pursuant to § 1-25-1, but was appointed by the governing body, shall be reported in open meeting to the governing body which appointed the committee, subcommittee, task force, or other working group. The governing body shall delay taking any official action on the recommendations, findings, or reports until the next meeting of the governing body.