

Official Opinion No. 81-1, Applicability of Open Meetings Law to Regents' Hiring Practice

January 6, 1981

Dr. Gordon Foster
Acting Commissioner of Higher Education
Kneip Building
Pierre, South Dakota 57501

Official Opinion No. 81-1

Applicability of Open Meetings Law to Regents' Hiring Practice

Dear Commissioner Foster:

You have requested an official opinion from this office based upon the following factual situation:

FACTS:

The South Dakota Board of Regents have requested that I seek your opinion regarding the Regents' procedure for entering into employment relationships with high-level policymakers such as college presidents, the Commissioner, Board attorney, and the like. The present procedure is as follows: Following public advertisement of a vacancy the Board appoints a 'screening committee' to make recommendations to the Board based upon the applications received in response to the announcement. After the Board, in executive session, has reviewed the recommendations of the screening committee an appropriate top- level administrator is directed by the Board to make a tentative offer of employment, conditioned upon final Board approval to the individual who is the Board's first choice. If the Board's first choice is amenable to entering into an employment relationship a motion approving a contractual relationship with the individual is taken by the Board in open session.

Based on the above facts, you have asked the following questions:

QUESTIONS:

1. Does SDCL 1-25-2 allow the Board to conduct its initial selection and interview process in executive session?

2. Does the authorization to the individual delegated by the Board to make a tentative offer of employment, conditional upon final Board approval, constitute 'official action' within the meaning of SDCL 1-25-2?

3. Does the tentative offer of employment present a possibility of establishing an enforceable contractual relationship of employment, or does the existence of the condition requiring final Board approval preclude the creation of a binding legal relationship?

IN RE QUESTION NO. 1:

The general provisions of the state open meetings law are found at SDCL 1-25-1 and -
2. SDCL 1-25-1 provides:

Except as otherwise provided by law, the official meetings of the state and the political subdivisions thereof, including all related boards, commissions and other agencies, and the official meetings of boards, commissions and agencies created by statute or which are nontaxpaying and derive a source of revenue directly from public funds, shall be open to the public, except as provided in this chapter. A violation of this section is a Class 2 misdemeanor.

SDCL 1-25-2 sets forth the executive session exception to the open meetings law:

Executive or closed meetings may be held for the sole purpose of considering student, employee and personnel matters; 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. Nothing in § 1-25-1 or this section shall be construed to prevent an executive or closed meeting, when 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.

A specific statutory provision relating to the meetings of the Board of Regents, SDCL 13-49-7, also contains open meeting provisions and exceptions:

Meetings may be held on the call of the president or by joint request of a majority of the members, due and reasonable notice always being given.

The affirmative vote of a majority of the members of the board of regents shall be required to take official action. The board of regents shall record their minutes which shall be open to the public. All such meetings of the board of regents shall be open to the public except

when personnel matters and privileged matters between the board and its attorney are being discussed and when such meetings are held the board shall limit the topics discussed or acted upon to such matters only.

In my opinion the 'personnel matters' exception should be broadly construed to include the initial selection and interview process of the Board of Regents. Godsey v. Poe, 36 N.C. App. 682, 245 S.E.2d 522 (1978). Since initial employee screening does not constitute any 'official action,' it is my opinion that the initial screening process can and should be conducted in executive session as expressly authorized under SDCL 1-25-2. The answer to your first question is therefore Yes.

IN RE QUESTION NO. 2:

It is important to note at the outset that the 'tentative offer' referred to in your Question No. 2 is distinguishable from an 'offer' in the legal sense of the term. 'Offer' as defined in Black's Law Dictionary, Revised 4th Edition (1968), p. 1233, is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract, which, coupled with acceptance, creates a binding legal obligation. The 'tentative offer' to which you refer merely consists of giving a description of the terms and conditions under which the Board would be willing to make an 'offer' in the strict legal sense, all of which would be conditional upon final Board approval. A 'tentative offer' would not, in my opinion constitute 'official action' within the meaning of SDCL 1-25-2.

Furthermore, even an 'offer' which was unconditional on its face, if made by a member of the selection committee, an individual member of the Board, or an individual delegated by the Board to act as a negotiator in the hiring process, would not constitute 'official action' inasmuch as no individual acting alone could take 'official action' on behalf of the entire Board within the meaning of SDCL 1-25-2. Only when the Board makes an 'offer' of employment in the legal sense of the term, has 'official action' been taken. Up until the time when official action is taken, the Board may continue to act through informal negotiations or in executive session.

The process you describe, meeting in executive session to discuss the personnel matters, then reconvening in an open meeting to take official action by making a formal offer of employment, has been held to be within an executive session exception to an open meetings law. Letscher v. Northern San Diego Hospital District, 55 Cal. Rptr. 118, 121 (1966). See also, Rice v. Union County Regional High School Board of Education, 382 A.2d 386, 389 (N.J. Super, 1977), where the court held that preliminary discussion relating to the termination of a teacher's employment contract held in executive session did not

violate the open meetings law where formal ratification of the board's decision was made in an open meeting. Although a board cannot take official action in executive session (Stoneman v. Tanworth School District, 320 A.2d 657 (N.H. 1974) in the area of personnel matters any preliminary discussions short of official action may be protected under the confidential cloak of an executive session. Therefore, the answer to your second question is No.

IN RE QUESTION NO. 3:

A 'tentative offer' as you have described it in Question No. 2, above, could not create an enforceable contractual relationship. Only if an 'offer' in the strict legal sense has been made and accepted, is there an enforceable contract of employment. Therefore, a 'tentative offer' as described in Question 2, above, does not give rise to an enforceable contract.

A related question which has not been raised, but which in my opinion warrants at least passing comment, would arise if the entire Board, sitting in executive session, would make an 'offer' of employment. In that situation, the Board acting as a whole clearly has the authority to make an offer of employment which, if accepted, could give rise to an enforceable contract. The only variable which could potentially negate the contract is the violation of the open meetings law. Jurisdictions are split as to the effect of an open meetings law violation on otherwise proper actions taken in closed session. See, Anno. Validity, Construction and Application of Statutes Making Public Proceedings Open to the Public, 38 A.L.R.3d 1070, § 7, pp. 1086-1090. Courts in California, Iowa, Massachusetts, Arizona, Delaware, Illinois, Michigan, Kansas, Minnesota, New York, New Hampshire and Rhode Island have taken the position that action taken in violation of an open meetings law is not _invalidated. Other jurisdictions take the view that action taken in violation of an open meetings statute is voidable, and still other courts, including North Dakota, have adopted the view that an action taken in violation of the open meetings law is void. The South Dakota Supreme Court has not yet had a chance to rule on this question, but the Board should be aware that there is a potential for liability if the Board purports to enter into a binding employment contract in executive session.

Respectfully submitted,

Mark V. Meierhenry
Attorney General