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February 10, 2005

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HAND DELIVERY

Office of the Attorney General  
ATTN: Diane Best,  
Assistant Attorney General  
500 E. Capitol Avenue  
Pierre, SD 57501

RE: South Dakota Open Meetings Commission  
South Dakota Science and Technology Authority  
MAGT file: 4427

Dear Ms. Best:

This is in response to your letter of January 26, 2005, and the accompanying two letters alleging violations of South Dakota's "open meeting" laws (SDCL Ch. 1-25). As you know, I am counsel for the South Dakota Science and Technology Authority (the "Authority").

Enclosed please find the original Affidavits of David Snyder, Dave Bozied, Trudy Severson and Valerie Tracy. Attached to Ms. Severson's Affidavit, you will find a copy of the official Minutes of the meeting in question and a copy of the Agenda that was posted for that meeting. The Authority respectfully requests that the Open Meetings Commission consider this letter and the accompanying Affidavits as the Authority's response to the allegations made in the letters which you transmitted to me.

For the purposes of this response, the term "Meeting" means the meeting which was held at the Authority's office in Rapid City on September 28 and 29, 2004.

First, the Authority would point out that there is apparently still no valid "complaint" in this matter. Pursuant to SDCL 23A-2-1 and 23A-2-2, a complaint must be either "signed under oath" or accompanied by affidavits. The documents filed with State's Attorney Brenner consist of a letter dated October 15, 2004, and January 13, 2005, neither of which was signed under oath and neither of which are in the proper form to constitute an affidavit. The signature of a notary public does appear at the bottom of both letters, but

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the mere presence of that signature does not mean that the author of the document has taken an oath as to the truth of the document's contents. See SDCL 22-29-8; SDCL Ch. 23A-46, Appendix, Form 1.

Second, with the exception of a reference in the January, 2005, letter to a "Black Hills Pioneer" reporter, neither letter identifies the complaining witness or witnesses. This omission would seem to be inconsistent with general principles of due process. In fairness, counsel and the witnesses who signed the enclosed Affidavits all believe the complaining witness to be a reporter for the Black Hills Pioneer.

Despite these irregularities, the Board of Directors of the Authority would like to conclude this matter as soon as possible, and therefore has directed me to file a formal response in the form of this letter and the accompanying Affidavits.

The two complaint letters contain a hodgepodge of allegations, comments and outright conjecture and speculation. It appears, however, that the substantive allegations or "complaints" are as follows:

1. The Board went into closed meetings four times without specifying the reason for closing the meeting.
2. The decision to defer adoption of the budget was not made in open session.
3. The decision to defer committee appointments was not made in open session.
4. No decision was made on the proposed investment policy, and the decision to defer that decision was not made in open session.
5. A decision concerning the next meeting date was not made in open session.
6. Dr. Gowen "cut off" a scheduled presentation by Syd Devries.
7. A scheduled tour of the Homestake Mine was cancelled during a closed meeting.
8. The proposal from Black Hills Vision did not qualify for discussion in a closed meeting.
9. Contracts were not approved in open session.

Please note that in addition to what we have identified above as the apparent substantive allegations, the two complaint letters contain a number of other factual assertions which are not true, including several allegations concerning the temporal relationship of certain acts or alleged acts by the Board. The foregoing list of what the Authority perceives as

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the substantive allegations is not intended as an admission that any of the facts alleged in either letter are true (except as otherwise set out below and in the accompanying Affidavits).

As a preliminary matter, it is important to know that the Meeting was the very first meeting of the Board. The first day (September 28) was an orientation session, and no substantive official action was scheduled or taken that day. The Board did not approve the agenda, adopt bylaws or elect officers until the second day of the Meeting. (Ms. Pat Lebrun was appointed chairperson of the Meeting the first day, but only served until David Snyder was elected chairman of the Board the following morning).

The Authority would also point out that the official Minutes of the Meeting were approved at a special meeting held on November 2, 2004. The Open Meeting Commission's own records will reflect that the complaint letters were not forwarded to counsel for the Authority until after the date. As the enclosed Affidavits show, no Authority staff or Board member was aware of the existence of the complaint until after the Minutes were approved.

Finally, the Authority would point out that the apparent complaining witness (a reporter for the Black Hills Pioneer) was NOT PRESENT most of the second afternoon of the Meeting. Many of the substantive allegations in the complaint letters involve events which occurred during that reporter's absence, and thus the Authority would submit that the "testimony" (in the form of the complaint letters) concerning those allegations is entitled to little or no weight.

The Authority responds to each of the specific allegations as follows:

1. The Authority denies that there were a total of five closed sessions during the Meeting. As the minutes and all of the Affidavits reflect, there was a scheduled closed session on September 28, an unscheduled closed session first thing on the morning of the 29<sup>th</sup> and a scheduled closed session starting at approximately noon and lasting most of the afternoon of the 29<sup>th</sup>.

The Authority further denies that it violated the provision of SDCL 1-25-2 that requires a closure motion to include a statement of the reason for the closed meeting. The official Minutes show that a reason was stated. As her Affidavit states, Ms. Severson's notes do not indicate that a reason was stated as a part of the motions, but Board member Bozied states in his Affidavit that he believes he would have brought it to the Board's attention if no reason was stated.

Even if no reason was stated as a part of the closure motions themselves, the purpose was obvious from the context in which the motions were made. The agenda clearly stated the reasons for the two scheduled closed sessions, and the press was present when the agenda

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was amended to state the reasons for the expanded closed session on the 29<sup>th</sup>. Ms. Severson's Affidavit states that Dr. Gowen stated the reason for the unscheduled closed session which occurred on the morning of the 29<sup>th</sup> before the Board made the motion and went into closed session. Further, the Minutes and Affidavits clearly show that *no* official action was taken during any of the three closed sessions. Accordingly, even if the Commission finds that a reason was not stated as a part of any or all of the closure motions, the evidence is clear that the Authority was in each case in substantial compliance with the statute. See Olson v. Cass, 349 N.W.2d 435 (SD 1984).

2. The Authority denies the allegation that the decision to defer adoption of the budget was not made in open session. The Minutes and the Affidavits show that the decision to defer the budget was made in open session late on September 29, after the apparent complaining witness left the meeting and the Authority's office.

3. The Authority denies the allegation that the decision to defer committee appointments was not made in open session. The Minutes and the Affidavits show that decision was made in open session, before the final closed session.

4. The Authority denies that no decision on the proposed investment policy was made or that a decision to defer that decision was made during a closed meeting. The Minutes and the Affidavits show that the investment policy was approved in open session prior to the appointment of an auditor and before the final closed session.

5. The Authority denies the allegation that a decision concerning the next meeting date was not made in open session. As is shown by the Minutes and the Affidavits, there was no official motion to set the next meeting date, but it was discussed during an open session and agreed upon by consensus during an open session. In addition, notices of both the next regular meeting and the intervening special meeting were posted and given to members of the press who requested it, all as required by SDCL 1-25-1. Accordingly, the purpose of the law was served, and the Authority was in substantial, if not complete technical, compliance with SDCL 1-25-2. See Olson v. Cass, 349 N.W.2d 435 (SD 1984).

6. It is true that Dr. Gowen asked Mr. Devries to defer part of his presentation until the scheduled tour of the mine. As is stated in paragraph 17 of David Snyder's Affidavit, that was done because the Board was running behind schedule and because it seemed that the presentation would be easier to follow if the listeners could see what was being discussed. The request and the deferral in no way constitute a violation of Chapter 1-25, as neither was an "official act," and no "official action" was taken as a result of the request and deferral.

7. It is true that the mine tour was cancelled, and the Minutes are silent as to when that occurred. However, the cancellation of the tour – obviously an informational item and

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part of the Board's orientation – does not constitute an “official action” within the meaning of SDCL 1-25-1. Accordingly, there was no violation of Chapter 1-25.

8. The Authority denies that it was unlawful to discuss the Black Hills Vision proposal in closed session. As noted in the Affidavit of David Snyder, and as is obvious from the proposal summary included with the complaint letters, the Black Hills Vision proposal includes mention of a possible contractual relationship with Battelle. Battelle provides management services to a number of government-owned and –funded laboratories around the country. Any discussion of a possible relationship with Black Hills Vision obviously had to involve a possible contract with Battelle. Accordingly, the Authority was acting within the law when it discussed that contract matter in closed session.

9. Finally, the allegation that contracts were not approved in open session is false. The official minutes and the Affidavits show that those contracts were approved in open session. The fact that the apparent complaining witness had left and thus was not present for that portion of the meeting does not mean it did not happen. The Affidavit of David Snyder explains the “not really” comment referred to in the January 13 letter, and will not be further explained here.

In summary, the Authority denies that any violation of SDCL Ch. 1-25 occurred during its inaugural meeting on September 28 and 29, 2005. The Authority respectfully requests that the Commission issue its Order dismissing the complaint filed by South Dakotans for Open Government, as embodied in the letters dated October 15, 2004, and January 13, 2005.

Respectfully submitted,

MAY, ADAM/GERDES & THOMPSON LLP

TIMOTHY M. ENGEL

TME:tme

cc w/ enc: Mr. Dave Bozied  
Mr. Casey Peterson  
Mr. Steve Zellmer  
Mr. Thomas C. Adam  
Ms. Pat Lebrun  
Mr. David Snyder  
Ms. Trudy Severson  
Ms. Valerie Tracy