

November 12, 2008

STATE OF SOUTH DAKOTA
OPEN MEETING COMMISSION

IN THE MATTER OF OPEN MEETING	)	FINDINGS OF FACT,
COMPLAINT 08-01	)	CONCLUSIONS OF LAW &
CITY OF MITCHELL, DAVISON	)	FINDING OF NO VIOLATION
COUNTY, SOUTH DAKOTA	)	

INTRODUCTION

This matter came before the Commission upon the referral from the Davison County State's Attorney based upon the complaint of the Daily Republic, hereinafter referred to as the paper. The allegations of the paper are that the City Council committed two violations of the state's open meeting laws on June 2, 2008.

FINDINGS OF FACT

1. The violations alleged by the paper are two fold.
2. One allegation was that the purpose for entrance into the executive session for "legal matters" was too vague; and
3. The other allegation was that the council discussed a topic during executive session that is not within the realm of topics allowed by SDCL 1-25-2.
4. The agenda items concerned two litigation items and a privileged communication pursuant to SDCL 19-13-3. The states attorney submission to the commission was an issue of law.
5. The submitted question presented by the states attorney was "does legal matters" sufficiently describe an executive session under SDCL 1-25-2(3) and if not under SDCL 1-25-2(3) is it sufficient under SDCL 19-13-3.

CONCLUSIONS OF LAW

1. The states attorney submitted for consideration the question of “Does ‘legal matters’ sufficiently define an executive session under SDCL 1-25-2(3).” The issue presented was one of law.

2. The City had the right to go into executive session to discuss litigation, not only litigation already proposed by others. . . , but also litigation that is proposed as a possibility by a board’s own attorney.¹

3. The City also had the right to go into executive session pursuant to SDCL 1-25-2(3) for the purpose of privileged communication.² The commission in Melrose also held that attorney-client privilege is a permissible use of the executive session. To hold other wise “The end result would be that every entity or person except a public board could exercise the attorney-client privilege.”

4. The phrase “legal issues” would encompass SDCL 1-25-2(3) and SDCL 19-13-3.³

¹ In the Matter of the open meeting complaint 06-01 Melrose Township

² Attorney General Opinion 90-31

³ 1-25-2(3) Executive or closed meetings--Purposes--Authorization—Misdemeanor
Executive or closed meetings may be held for the sole purposes of:

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

19-13-3. (Rule 502(b)) Client's privilege on confidential communications with lawyer

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) Between himself or his representative and his lawyer or his lawyer's representative;

(2) Between his lawyer and the lawyer's representative;

(3) By him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) Between representatives of the client or between the client and a representative of the client; or

(5) Among lawyers and their representatives representing the same client.

5. The use of the statutory language or the use of “For Legal Matters” satisfactorily defines the purported reason for the executive session.

This Board finds that no violation of the open meeting laws occurred on the issues presented to the commission.

All commissioners concur.