

## Memorandum

I have requested a public discussion of our methods of conducting closed committee meetings. South Dakota's open meetings laws (see attached) require that meetings must be open when a quorum is present. On an ongoing basis, we have many smaller committee meetings that are closed and unannounced to discuss public matters and generally advise city staff on directions leading to a public decision. The final decision of the full governing body is conducted at a public meeting. This is allowable procedure by South Dakota law when a quorum is not present. Sometimes the full governing body is divided into two groups with less than a quorum in each to discuss a matter, often with the meetings being conducted consecutively. This is clearly done to avoid open meetings laws. Often the reason for the procedure is because sensitive and confidential matters are being discussed. At other times, advisory committees are also closed to the public. The premise has always been that since a quorum does not exist, it is perfectly legal.

While it is not my intention to significantly change our existing procedure as it relates to committee meetings, I would like to discuss the merits of, at the very least, informing the public that the meetings are happening and when. Possibly on the City's website. If it is inappropriate for the public to attend the meetings, then I would like the burden of openness to fall on the committee and not the public. We should always err on the side of openness. This provides a layer of accountability and transparency.

### **Some recommended discussion questions:**

In the spirit of open government, if a committee meeting is legally closed (no quorum present), is it still appropriate to at least broadly give a recap explanation of proceedings to the media without divulging confidential information to keep the public informed?

Does it hurt any closed productive discussions in a committee meeting if the public simply knows that meetings are happening?

Who decides if and when certain aspects of a meeting are confidential?

Respectfully submitted,

Paul Lowrie, City Commissioner

**From the South Dakota Newspaper Association's website:**

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. The attorney general has taken the position that a meeting, that must be open to the public, occurs when the following conditions exist:

1. A legal quorum of the entity 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 and although state law may not require an entity to open a meeting to the public, state law in no way prevents openness. When in doubt, open the meeting.

The following website is useful in researching open meetings laws:

<http://www.rcfp.org/ogg/index.php>

**SDCL 1-25-1. Meetings of public agencies to be open--**Teleconference meetings--Exception for Digital Dakota Network--Misdemeanor. 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. It does not constitute an official meeting if members of a political subdivision of this state are attending a meeting of the state or one of its political subdivisions, a board, a commission, an association, an agency, or any other public entity for which public notice is provided pursuant to § 1-25-1.1 for the purpose of providing information or observing, and the notice requirements in § 1-25-1.1 do not apply. Meetings, including executive or closed meetings may be conducted by teleconference. Members shall be deemed present if they answer present to the roll call taken by teleconference. Any vote at a meeting held by teleconference shall be taken by roll call. Except for executive or closed meetings held by teleconference, there shall be provided one or more places at which the public may listen to and participate in the proceeding. Except for executive or closed meetings held by teleconference of related boards and commissions of the state, there shall be provided two or more places at which the public may listen to and participate in the proceeding. Except for the Digital Dakota Network, no teleconference may be used in conducting hearings or taking final disposition pursuant to § 1-26-4. Teleconference meetings are subject to the notice provisions of chapter 1-25.

A violation of this section is a Class 2 misdemeanor.

**Source:** SL 1965, ch 269; SL 1980, ch 24, § 9; SL 1989, ch 15, § 1A; SL 1990, ch 18, § 1; SL 1990, ch 30, § 1; SL 1993, ch 17; SL 2005, ch 16, § 1; SL 2008, ch 13, § 1.

**SDCL 1-25-1.1. Notice of meetings of public bodies--Violation as misdemeanor.** All public bodies shall provide public notice, with proposed agenda, at least twenty-four 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.

**Source:** SL 1987, ch 22, § 2; SL 1990, ch 19; SL 1990, ch 30, § 2.

**SDCL 1-25-1.2. "Teleconference" defined.** For the purposes of this chapter, a teleconference is information exchanged by audio or video medium.

**Source:** SL 1990, ch 18, § 2.

1-25-2. Executive or closed meetings--Purposes--Authorization--Misdemeanor.  
Executive or closed meetings may be held for the sole purposes 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 contractor;
- (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, when public discussion may 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.

**Source:** SL 1965, ch 269; SL 1980, ch 24, § 10; SL 1987, ch 22, § 1.

**SDCL 1-25-3. State agencies to keep minutes of proceedings--**Availability to public--Misdemeanor. Any board or commission of the various departments of the State of South Dakota shall keep detailed minutes of the proceedings of all regular or special meetings. The minutes shall be available for inspection by the public at all times at the principal place of business of the board or commission. A violation of this section is a Class 2 misdemeanor.

**Source:** SL 1953, ch 307; SDC Supp 1960, § 55.2917; SL 1966, ch 165, § 16; SL 1980, ch 24, § 11; SL 1996, ch 9, § 1.

### **Sections 1-25-4 and 1-25-5 have been repealed**

**SDCL 1-25-6. Duty of state's attorney on receipt of complaint alleging chapter violation.** If a complaint alleging a violation of this chapter 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.

**Source:** SL 2004, ch 19, § 1.

**SDCL 1-25-7. Consideration by commission of complaint or written submissions alleging chapter violation--**Findings--Public censure. Upon receiving a referral from a state's attorney, the South Dakota Open Meetings Commission shall examine the complaint and investigatory file submitted by the state's attorney 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 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.

**Source:** SL 2004, ch 19, § 2.

**SDCL 1-25-8. Open Meeting Commission--Appointment of members--Chair.** 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.

**Source:** SL 2004, ch 19, § 3.

**SDCL 1-25-9. Limitations on participation by commission members.** 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.

**Source:** SL 2004, ch 19, § 4.

**SDCL 9-34-19. Exemption of documentary material and data involving trade secrets, etc. from disclosure--Consideration in executive session.** Any documentary material or data compiled 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.

**Source:** SL 1998, ch 48, § 1; SL 2004, ch 77, § 1.