

CONDUCTING THE PUBLIC'S BUSINESS IN PUBLIC

A guide to South Dakota's Open Meetings Law (Revised November 2006)

Prepared by representatives of the:

S.D. Office of the Attorney General
S.D. Municipal League
Associated School Boards of S.D.
S.D. Association of County Commissioners
S.D. Association of County Officials
S.D. Newspaper Association
S.D. Broadcasters Association

Q: WHAT IS SOUTH DAKOTA'S OPEN MEETINGS LAW?

A: South Dakota's open meetings law was written in 1965 and has been amended several times since then. The law--which is intended to encourage public participation in government--now is contained in three relevant statutes.

The first, SDCL 1-25-1, requires that official meetings of cities, counties, school boards and all related boards and commissions be open to the public.

The meetings of boards and commissions which are created by law OR which are entitled to receive revenue directly from public tax funds are also subject to the open meetings law.

It is a Class 2 misdemeanor to break this law. A Class 2 misdemeanor is punishable by a penalty of 30 days in jail, a \$500 fine or both (SDCL 22-6-2). Alternatively, violation of this law could result in a public reprimand by a state board.

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.

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. In the case of special or rescheduled meetings, public bodies are asked to comply with the regular meeting notice requirements as much as circumstances will permit. The notice must be delivered in person, by mail or over the telephone to all local news media who have asked to be notified. While the law is

silent on the issue, it is recommended that local media renew requests for notification annually as a means of reminding the entity of ongoing media interest.

Q: WHO ARE LOCAL MEDIA?

A: Because there is no definition set out in state law, the attorney general is of the opinion that local media is all media--broadcast and print--that regularly carries news to the community.

Q: WHAT HAPPENS WHEN A PUBLIC BODY FAILS TO COMPLY BY PROPERLY NOTIFYING LOCAL MEDIA OR POSTING NOTICE?

A: No South Dakota court has ruled on this question. The attorney general believes that any action taken during any meeting that 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: WHEN CAN A MEETING BE CLOSED TO THE PUBLIC AND MEDIA?

A: SDCL 1-25-2 allows a majority of the body present to vote to close a meeting when discussion revolves around employee or student performance, legal matters, employee contract negotiations or pricing strategies by publicly-owned competitive businesses. Meetings may also be closed for certain economic development matters. Refer to SDCL 9-34-19.

Note that the statute does not require meetings be closed in any of these circumstances.

Federal legislation regarding student records and medical records often requires 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 be made at an open meeting. Violating this section of the law is a Class 2 misdemeanor or may result in a public reprimand by a state board.

Q: DOES THIS LAW REQUIRE THAT THE PUBLIC BODY MAKE REFERENCE TO A SPECIFIC LEGAL OR PERSONNEL MATTER?

A: The public body must refer to the general purpose in the motion calling for an executive session. Discussion in the executive session must be strictly limited to the announced subject. The attorney general encourages public bodies to cite the specific reason when calling for an executive session, for example to "discuss student discipline" or "pursuant to SDCL 1-25-2(3)."

No official votes may be taken on any matter during an executive session. The governing body must adjourn the executive session and 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 AN OFFICIAL MEETING?

A: Excluding the media or public from a meeting that has not been properly closed subjects the officers 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 public determination that an open meeting should have been held and explaining the reasons therefor.

The first level of enforcement is the local state's attorney. If an allegation is made regarding an open meeting violation, the local state's attorney may elect to prosecute the case, may determine the matter has no merit, or may refer the issue to the Open Meetings Commission, a special five-member commission comprised of state's attorneys, which was created in 2004. The commission is to examine whether a violation has occurred and make written public findings. If the commission finds that a violation has occurred, the public officer cannot also be prosecuted for the same event.

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

A: Persons alleging violations of the open meetings laws must file their complaints with law enforcement officials in the county where the offense occurred. After a signed notarized complaint is filed and any necessary investigation is conducted, the state's attorney may elect to prosecute the case as a misdemeanor. In the alternative, if the complaint has no merit, the state's attorney is to report the complaint to the attorney general for statistical purposes. As another alternative, the state's attorney may forward the complaint to the Open Meetings Commission for a determination.

Q: WHAT ARE THE PROCEDURES FOR THE OPEN MEETINGS COMMISSION?

Procedures for the Open Meetings Commission are posted on the Web site for the Office of Attorney General at <http://www.state.sd.us/attorney/>

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 and you will be directed to an assistant for the Open Meetings Commission.

Q: WHO DOES THE OPEN MEETINGS LAW APPLY TO?

A: The open meetings law applies to all public bodies that are not specifically exempted by the law. That means that all units of local government--including school boards, city and county commissions--and state government boards and commissions are bound by the open meetings law. Generally speaking, any unit of government that receives public funds as revenue is subject to the open meetings law.

The meetings of boards and commissions which are created by law or which are entitled to receive revenue directly from public tax funds are subject to the open meetings law.

The law's applicability becomes less clear when it comes to the Legislature, the governor, the constitutional officers and special committees appointed by local governments.

For instance, if the attorney general refuses to issue a polygraph examiner's permit, he is acting as an agency, and not as attorney general, putting the open meetings law into play.

The open meetings law is not, however, applicable to the attorney general's staff meetings or to meetings with constituents, since these are executive functions of the office holder and not agency actions. The constitution allows the Legislature to create rules regarding its activities.

Q: WILL ALL TELECONFERENCES BE 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. State agencies must provide two places for the public to participate.

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. A teleconference cannot be used for hearings or final action for state administrative rules.

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 the 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 that 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: In some states courts have held that contemporaneous email communications conducted 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. 0-5.

South Dakota Open Meetings Law

1-25-1. Open Meetings.

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 other 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.

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 Dakota Digital 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.

1-25-1.1. Public notice provided.

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, when public discussions 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.

SDCL 9-34-19. Executive Sessions (Municipal and Counties).

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.

1-25-6. Duty of state's 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.

1-25-7. Open Meetings Commission.

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.

1-25-8. Open Meetings Commission Members.

The South Dakota Open Meetings 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 Members 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.

pId1030_db(dh)