

**GOVERNMENT OPENNESS TASK FORCE**  
**Notes**  
**Meeting #5 / LRC Conference Room #1 & 2**  
**April 3, 2003**

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**Task Force Members Present:**

Jack MaGee, SD Department of Revenue  
John Brown, City Attorney  
Mark Roby, SD Press Association  
Richard Popp, SD Genealogical Society  
Anne Plooster, SD Education Association  
Dale E. Froehlich, City of Sioux Falls  
Mike Leidholdt, Hughes County Sheriff  
Tena Haraldson, Associated Press  
Stewart Huntington, Black Hills Pioneer  
Linus Storms, Associated School Boards  
Bernie Ripperger, Association of County Commissioners  
John Pedersen, School Administrators of SD  
Lynn Sudbeck, SD Supreme Court  
Kim Dohrer, SD Press Association  
Patrick Callahan, SD Broadcasters Association  
Terry Lohr, Watertown Police Chief  
Doug Schmitt, SD Police Chiefs Association  
Roger Tellinghuisen, SD Trial Lawyers  
Cindy Eikamp, Aberdeen American News  
Diane Best, Attorney General's Office  
Larry Long, Attorney General  
Kevin Thom, Division of Criminal Investigation  
Philip Youngdale, Police Chief Brandon, Executive Board SDPCA

**LRC Staff:**

Doug Decker  
David Ortbahn

**Staff Members Present:**

Lynell Erickson

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**Larry Long:** Larry brought the 5th meeting of the Government Openness Task Force to order. Thanked all for coming. Advised Code Counsel Doug Decker was present as well as Brandon Police Chief Phil Youngdale. Asked Mr. Youngdale to advise the group what issues he views as important in terms of open government.

**Philip Youngdale:** Is Chief of Police in Brandon and has been there for 20 years. Deals with local paper and Argus leader and has been fortunate to have good relationship with them and they are understanding when they are not able to share certain information.

**Long:** Advised the Attorney General's Office has created a bulletin board on the website for people to communicate their thoughts on open government. Had 3 handouts for the task force. First handout was comments e-mailed from Betty Breck who wasn't able to access the bulletin board. Second handout was an e-mail from Dave Bordewyk from the South Dakota Newspaper Association regarding the open meetings topic, and third handout was a report from Terry Lohr regarding the subgroup committee on log sheets. \*See attachments #1 through 3.

Long asked if there were any corrections on the notes. Several corrections were requested by Mr. Lohr. Notes will be posted on the website. Asked Mr. Decker, code counsel with LRC, to address the concept of consolidating or re-codifying all of the statutes that are pertinent to open records.

**Doug Decker:** Advised his job involved the publishing of the code and West Publishing is the new entity that will print and distribute the code. Also publishes the annual session laws and administrative rules. Does not have flexibility to move statutes around without a bill. Explained avenues available to the task force such as a pamphlet or guide regarding statutes and rules that affect their agency but to be aware editorial work that private publishers prepare such as annotations, cross-references and case summaries are copyrighted and cannot be printed without permission. Code commission usually allows some reproduction of the material owned by the state if the pamphlets are for educational purposes and not for sale. There may be some interest with West to do this project.

**Long:** First option is to go to Legislature and ask for re-codification to have as much as we wanted of the records that relate to openness and confidentiality would all be in one section of the code. Option two is to deal with West and have them pull them into a booklet. Third option is we would pull it together ourselves or contract ourselves to have it done. Would West require a minimum number of purchases? Decker will check into that but believes they have flexibility on numbers since they have their own print shop.

**Mark Roby:** Can we do a guide similar to the Game, Fish and Parks hunting guide. Would we need to through West?

**Decker:** Free to go that route however hunting guide does not have statutes or rules but rather summaries and commentaries.

**Roby:** Seems we should focus on pamphlet to educate the common citizen of South Dakota about what is open meeting, what is open record and remedies available. Stay clear of developing competitive product. Would also be easier to have it codified into one section and have one place to go to if disputes.

Discussion continued on options available. Had several samples of other compilations to view. Pamphlets would require updating each time the law is changed.

**Long:** Let's put together committee to explore options available. Roby, MaGee, Best and Tellinghuisen agreed to be on committee. Tellinghuisen added that he agreed with Roby that pamphlet for lay person would be useful but also believe compilation available for attorneys who often give opinions would be invaluable. Decker agreed to be consultant.

**Haraldson:** There are a number of foundations that provide financial support for such publications. Other states have been able to get grants to do these on an ongoing basis.

**Long:** Previous meeting developed into productive police log meeting and perhaps open meetings can be approached the same way. Asked Terry Lohr for update on the subgroup committee regarding log sheets.

**Lohr:** Met and went directly to the issues that we would like to see accomplished. Had consensus that media would like to see consistency. Suggested media form a panel and come up to Watertown to joint sheriffs and police chiefs meeting in May. Should make some progress with that meeting.

**Kim Dohrer:** Left with the impression that the basic log information available to the media should include the nature of the call, the location, the time of the caller and disposition.

Discussion continued on confidential criminal justice information and what particular records would be available to the media and a person off the street. Would this be put into law or more by agreement and how would smaller agencies deal with this. Clarification was made on accident reports (available pursuant to specific statutes) and case reports (confidential law enforcement and not available).

**Long:** Seems we have a consensus and a place to start in terms of drafting something all can live with regarding log sheets. Open Meetings. Basic structure and history of open meetings law found in SDCL 1-25 is result of commission put together between local government and media in 1965. Not many amendments since then. Believe those that generate most of the open meetings calls are county commissioners, city council and school boards.

**Storms:** Workshop is offered in 6 different areas of state for school board members to attend. Executive session is covered but attendance is not mandatory. To get everyone knowledgeable about the laws is difficult. Executive session laws are vague.

**John Pedersen:** Agrees with Linus the Associated Schools Boards provides opportunity to educate board members but not all members go. Feels superintendents have a responsibility to make sure they educate board members of purpose of executive session. Puts a lot of responsibility on superintendents to not abuse executive session. Executive session is necessary but possibly is used to much.

**John Brown:** Not sure what the real problem is with respect to open meetings whether its misuse or too many unintentional secret meetings. Maybe media can advise.

**Storms:** Brought up several scenarios where statutes conflict each other and taking straw polls in executive session in order to see where others are standing.

**Plooster:** What is the difference between a straw vote in executive session and voting in public? She sees that as action you shouldn't be doing.

Discussion continued on the taking of straw polls and other scenarios not within the laws of executive session. Solution may be changing penalty and tape recording executive sessions and if dispute, take it to judge. Ramifications for not understanding laws should be motivation to learn. Deterrent for board members could be to hold them personally liable for illegal actions. Could happen where action taken by a board illegally is brought before the Supreme Court and become void. Best solution is to stop violations through education.

**Magee:** Suggest boards and commissions have counsel with them at the meeting to advise if they are complying with the executive session laws.

**Lohr:** Is there training similar to law enforcement for members and officials? There would be an expectation of them to know what is and what isn't lawful.

**Storms:** Brought up other scenario when board members talk about what went on in executive session. What consequences are there for this action?

Discussion continued on members disclosing information in executive sessions. May not be statute prohibiting the discussion of it and it's only an assumption that such information is confidential.

Consensus was to continue the open meetings as a whole group rather than a subcommittee and continue on with it at the next meeting.

Next meeting set for April 29th at 10:00 a.m. at the Matthew Training Center in the Foss Building.

## Attachment #1

As a member of the public familiar with Open Meetings laws and violations, I would recommend the following changes in the current laws and practices:

- 1) Better definition of which bodies are covered by the Open Meetings law and which are not
- 2) Better definition of what constitutes a meeting (considering quorums, telephonic & electronic communications, purpose, etc).
- 3) Expansion of agenda-posting requirements to include electronic posting .
- 4) More strict and more definite requirements for holding and posting agendas for special meetings.
- 5) Add provision that "no action can be taken at regular or special meetings which is not on agenda".
- 6) Add provision that "action taken in violation of the Open Meetings Law is void".
- 7) Do something about penalties.
  - a) Either change penalty to civil fine or simply void action taken in violation as mentioned in suggestion 6), or, if criminal penalties are retained, enforce them by requiring State's Attorneys to prosecute all complaints.
  - b) Clarify who is responsible for upholding requirements of Open Meetings Law (e.g., if school business manager fails to post school board meeting agenda, is the business manager responsible or are all School Board members responsible for penalties, either civil or criminal?)
- 8) Provide means and time for reasonable public participation at all meetings.
- 9) Hold attorneys for public bodies responsible for advice they give the body.
- 10) Enable citizens to enforce laws throu
  - a) An Open Government Ombudsman or Attorney General Hotline;
  - b) Attorney General opinions available at public request such as North Dakota offers; or
  - c) Court action with state-issued kits like the small claims court kit and court fees waived for public interest matters..
- 11) Educate the public . The Attorney General's brochure in the binder is an excellent start. I wasn't aware it was available. Require public bodies to make those brochures available to the public.
- 12) Utilize available technology where possible, for example holding meetings via the internet so the public can listen/view and participate, as suggested at the task force meeting.
- 13) Require that executive sessions be recorded and sealed, to be opened only for Court use.

## Attachment #2

-----Original Message-----

**From:** David Bordewyk [mailto:sdna@sdna.com]

**Sent:** Wednesday, April 02, 2003 4:16 PM

**To:** diane.best@state.sd.us

**Cc:** Tena Haraldson

**Subject:** Thursday Task Force meeting

Diane:

I am sorry I am unable to attend tomorrow's task force meeting in Pierre. I know one of the items for discussion will be open meetings. It is a subject area that is very important to our 138 association members and one which I field numerous calls and complaints on throughout the year.

There are compliance problems with the open meetings law across South Dakota today. Many of those problems stem from a misunderstanding of or lack of education about the law. Much of that can be addressed by better training and more education about how the law applies to public officials and government entities covered by the law.

And then are compliance problems that go beyond a simple misunderstanding of the law. There are abuses of the open meetings law that get at the need to amend the law.

South Dakota's open meetings law is a law without any real teeth of enforcement in it. The criminal penalty provision in effect weakens the law. Our association has supported legislation in the past to change the penalty provision in the open meetings law to a civil action. Most states have this in their open meetings law. We believe this change would greatly strengthen our law. In fact, legislation to change the penalty to a civil action was debated and defeated in the 2003 legislative session. One of the arguments we heard from those opposing the legislation this year was that the Attorney General's Task Force will be looking at the open meetings law and therefore the legislature should wait to see what the task force suggests.

For those who would suggest that the law works well today and that there is no great clamor to change it, I am willing to share a file thick of complaints and problems we've seen in relation to the open meetings law. It's the number one government-access issue I field questions about from member newspapers -- weeklies and dailies, big cities and small towns alike.

Also, the purposes stated in the law (1-25-2) for which government boards may go behind closed doors for discussion are vague in their wording in some respects. We believe that work is needed to clarify the wording in the law and that this would lead to better compliance.

Specifically in need of clarification:

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;

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

Those two purposes are sometimes misinterpreted or stretched to include discussion items that should not fall under the area of closed-door discussions, I believe.

Also, there is little in our open meetings law today that addresses "virtual" meetings of government boards -- meetings that are conducted by back and forth e-mail correspondence.

Government has grown in the years since the open-meetings law came into existence. We have new forms of local governments (water districts, 911 boards, etc.) that didn't exist years ago. It's important that South Dakota's open meetings law adequately reflects that change and keeps pace with the needs of the public to be properly informed about the business of government.

Thank you.

David Bordewyk  
South Dakota Newspaper Association  
PO Box 8100 / Brookings, SD 57006  
(800) 658-3697 <http://www.sdna.com>  
April 22-24, '03: Native American Newspaper Career Conference  
May 1-3, '03: SDNA Convention, Rapid City Holiday Inn Rushmore Plaza

## Attachment #3

-----Original Message-----

**From:** Terry Lohr [mailto:wpdchief@watertownsd.com]

**Sent:** Monday, March 17, 2003 10:15 AM

**To:** Phil Youngdale; Patrick Callahan; Mike Leidholt; Larry Long; Kim Dohrer; Frank Scott; Doug Schmitt; Diane Best; Al Aden; Mark Roby; Mayor Barger

**Subject:** Law Enforcement/Media sub group meeting

Hello Everyone,

If you would, I would appreciate an acknowledgment of the receipt of this first e-mail so that I know everyone in the work group is receiving it.

Greetings,

At the direction of his honor the Attorney General, Larry Long. The subgroup (of the A.G. Task force on open records) representing media and law enforcement that was appointed by him, met in the Office of Hughes County Sheriff Mike Leidholt at 11:00 AM on Friday, March 14th 2003. The following is a synopsis of that meeting.

Present were: Sheriff Leidholt, Immediate past President, South Dakota Sheriffs Association, Patrick Callahan, Dakota Radio Group, Kim Dohrer, Mitchell Republic, Doug Schmitt, Vice President South Dakota Police Chiefs Association, Terry Lohr, President, South Dakota Police Chiefs Association.

Over the duration of the meeting several issues were discussed. The discussion was frank and very amicable and I feel progress was made.

1. A discussion ensued about the validity of the survey that was conducted last summer. The fact that this survey and the way it was conducted may have caused some strained law enforcement/ media relations across the State was discussed at length.

The group concluded that the survey was conducted in a manner not conducive to the original methodology. That some who went out to gather the data may not have followed their training. That the electronic media may not have been fully advised or necessarily agree that the survey should have been conducted in that fashion.

We then concluded that the best way to get past this issue was to invite a media panel to the joint Police Chief's/ Sheriffs Association meeting in Watertown May 28th, 29th and 30th. We will need to get the time etc. worked out with Brenda Sehr of the SD Sheriff's Association.

2. We discussed what the media's main concern was and it seemed as though the main issue would be consistency across the State. It was concluded that law enforcement agencies across the State give different levels of information to the media in as many methods. The media seemed satisfied with the very basic levels of information and would prefer to work in a personal way with the agencies in order to gather the level of information that they deem appropriate in their areas.

In other words, all media outlets and law enforcement agencies have varied levels of relationships. For the most part it was felt that media on a local level and their respective agencies have a very good relationship, a few may not be that good. It should be up to those agencies to find workable ground rather than create State Law that may encumber already good relationships on a local level.

It was suggested that each agency keep a log of calls and that the media would be afforded the following information; Nature of call, time of call. From there it would be up to the agency how much further information to release.

Conclusion: It was very apparent among the group that law enforcement and the media at times will be at odds on how much information to release. We cant fix that. It was understood that each entity, especially the local media is part of the community that they serve. They are a great ally to law informant for the most part and none would condone releasing information that would harm innocent people. On the other hand some law enforcement agencies could very well try to improve their relationships with the media.

The group felt that a frank discussion among the full associations will be very helpful and hopefully come out with some recommendations for the Attorney General in a timely manner.

Please understand that this report is written as I remember the discussion (they didn't tell me I was the secretary until we were ready to leave) I may not have given full detail for time's sake. Those of you in the group please feel free to e-mail me with additions or comments. Thanks much.

Respectfully submitted,  
Terry Lohr  
President South Dakota Police Chiefs' Association