

Disclaimer

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THE RULES AND THE RECOMMENDATIONS

THE OPEN MEETINGS LAWS

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SDCL 1-25-1

- “Official meetings are open to the public ...
- unless a specific law is cited by the state or the political subdivision to close the official meeting to the public.”

SDCL 1-25-12(3)

OFFICIAL MEETING DEFINED

- "any meeting of a quorum of a public body
- at which official business or public policy of that public body
- *is discussed or decided* by the public body,
- *whether in person or by means of teleconference.*"

SDCL 1-25-1

Official meetings are open to the public unless a specific law is cited to close the official meeting to the public.

- **OMC reprimanded Groton City Council after the Council went into executive session without a motion, second and vote. (16-01)**
- **When a motion is made to go into executive session, SDCL 1-25-2 (the executive session statute) and specific subsection must be identified in the motion.**

SD Attorney General Open Meetings Brochure

“Motions for executive sessions must refer to the specific state or federal law allowing for the executive session i.e. ‘pursuant to SDCL 1-25-2(3).’ Also, best practice to avoid public confusion would be that public bodies explain the reason for going into executive session.”

(Emphasis added).

Motions to go into Executive Session - RECOMMENDATIONS

- **“motion to go into executive session” -- NO**
- **“motion to go into executive session pursuant to SDCL 1-25-2” -- NO**
- **“motion to go into executive session for personnel/student matter/consult with legal counsel” -- NO**
- **“motion to go into executive session pursuant to SDCL 1-25-2(1)” -- YES**
- **“motion to go into executive session pursuant to SDCL 1-25-2(1), personnel personnel/ (2) student matter/(3) consult with legal counsel” -- YES**

**SDCL 1-25-2 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, employee or prospective public officer or employee; DOES NOT include independent contractor;**
- Individual specific;**
- current or potential employee; current Board member or potential appointee;**
- Not to be used for interviewing, choosing or discussing performance of an independent contractor.**

Executive Session - SDCL 1-25-2(1)

OMC Decisions:

- **Executive session cannot be used to discuss reorganizing city departments. *City of Lead (04-01)***
- **It was permissible for the school board to go into executive session to discuss the qualifications and competency of school district personnel during staff reduction discussions. *Hot Springs School Board (18-02)***

Executive Session - SDCL 1-25-2(2)

(2) Discussing the expulsion, suspension, discipline, assignment of or the educational program of a student or the eligibility of a student to participate in interscholastic activities provided by the South Dakota High School Activities Association;

- must be individual student specific;**
- not to be used to discuss policy, such as a bullying policy or transgender policy.**

Executive Session - SDCL 1-25-2(3)

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

- Direct school attorney involvement is required, through presence in executive session, in person or by phone/zoom, etc., or from/through attorney written communications, or Superintendent/Board member meeting/conference notes.**

SDCL 1-25-2(3) Consulting with legal counsel or reviewing legal counsel communications about proposed/pending litigation/contractual matters;

“Discussion of contracts is not, by itself, a proper basis for executive session.”

“If there is a general exception for contractual matters, it would gut the open meetings law because a very large portion of what is discussed and decided by most public bodies on a routine basis could be classified as a contract matter.”

SD Science & Technology Authority (2.20.07)

SDCL 1-25-2(3) Consulting with legal counsel or reviewing legal counsel communications about proposed/pending litigation/contractual matters;

“Such an exception would be, as the cliché goes, a hole in the law that you could drive a truck through. Or perhaps a school bus.”

SD Science & Technology Authority (2.20.07)

SDCL 1-25-2(3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation

OMC Decision: *City of Mitchell* (08-01)

- **“The commission in *Melrose* also held that attorney-client privilege is a permissible use of the executive session....”**
- **“ To hold otherwise ‘The end result would be that every entity or person except a public board could exercise the attorney-client privilege.’”**

SDCL 1-2-2(3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation

- **The phrase “legal issues” encompasses SDCL 1-25-2(3) and SDCL 19-13-3 [now SDCL 19-19-502]” (the Lawyer-Client privilege).**

OMC Decision: *08-01 City of Mitchell*

RECOMMENDATION: Consider citing SDCL 19-19-502 in addition to SDCL 1-25-2(3) when going into executive session to talk with/review communications from the school attorney.

Executive Session - SDCL 1-25-2(4)

(4) Preparing for contract negotiations or negotiating with employees or employee representatives;

**“The Commission finds, however, that this exception [SDCL 1-25-2(4)] applies only to employee relations and not to other general contractual matters.”
(Emphasis added).**

OMC Decision: *South Dakota Science & Technology Authority (2.20.07)*

Executive Session - SDCL 1-25-2(5)

(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;

– Applicability to schools ??

- Contracted bus service ?**

- Contracted food service ?**

RECOMMENDATION - Discuss with your school attorney

Executive Session - SDCL 1-25-2(6)

(6) Discussing information pertaining to the protection of public or private property and any person on or within public or private property specific to:

(a) Any vulnerability assessment or response plan intended to prevent or mitigate criminal acts;

(b) Emergency management or response;

(c) Public safety information that would create a substantial likelihood of endangering public safety or property, if disclosed;

Executive Session - SDCL 1-25-2(6)

- (d) Cyber security plans, computer, communications network schema, passwords, or user identification names;***
- (e) Guard schedules;***
- (f) Lock combinations;***
- (g) Any blueprint, building plan, or infrastructure record regarding any building or facility that would expose or create vulnerability through disclosure of the location, configuration, or security of critical systems of the building or facility; and***

Executive Session - SDCL 1-25-2(6)

(h) Any emergency or disaster response plans or protocols, safety or security audits or reviews, or lists of emergency or disaster response personnel or material; any location or listing of weapons or ammunition; nuclear, chemical, or biological agents; or other military or law enforcement equipment or personnel.

Executive Session - SDCL 1-25-2

Discussion during the executive session is limited to the purpose specified in the closure motion.

- OMC reprimanded a governing board after it, while in executive session for a permissible reason (personnel), strayed onto another topic which was not a permissible executive session topic.**

Executive Session - SDCL 1-25-2

All official action concerning the matters held in executive session must be made in open session.

- ***Sioux Falls Ethics Board (10-03)*** - OMC reprimanded the Ethics Board for making a decision in executive session and not in open session.
- ***City of Sioux Falls (12-01)*** - OMC reprimanded the City of Sioux Falls for passing a motion concerning a personnel matter that had been discussed in executive session when the motion did not fully disclose the subject matter of the action being taken.

Executive Session - SDCL 1-25-2

- When in executive session, **DO NOT** vote to come out of executive session.
- The Board President/Chair declares the Board out of executive session.

SDCL 1-25-1

Official meetings which are open to the public ...

- **“It is not an official meeting of one public body if its members provide information or attend the official meeting of another public body for which the notice requirements of § 1-25-1.1 has been met.” EXAMPLE**
- **“It is not an official meeting of a public body if its members attend a press conference called by a representative of the public body.” EXAMPLE**

SDCL 1-25-1

Official meetings which are open to the public ...

- It is not an official meeting of a public body “for any event hosted by a nongovernmental entity to which a quorum of the public body is invited and public policy may be discussed, but the public body does not control the agenda, the political subdivision may post a public notice of a quorum, in lieu of an agenda. *The notice of a quorum shall meet the posting requirements of § 1-25-1.1 and shall contain, at a minimum, the date, time, and location of the event.*”

EXAMPLE

SDCL 1-25-1 PUBLIC COMMENT

- The Board must reserve at every official meeting a period for public comment, limited at the Board's discretion as to the time allowed for each topic and the total time allowed for public comment, but not so limited as to provide for no public comment.
- Exceptions: Public comment is not required at official meetings held *solely for the purpose of meeting in executive session*, an inauguration, swearing in of newly elected officials, or presentation of an annual report to the governing body, regardless of whether the activity takes place at the time and place usually reserved for an official meeting.

Public comment is not required at meetings held *only for purposes of having an executive session.*

- **EXAMPLES:** hearings on student expulsions, employee grievances, terminating contracts;
- **KEY –** the Hearing must be the only item on the agenda when the agenda is approved at the beginning of the board meeting. If there is any other business item on the agenda, the Board must have a public comment period.
- **RECOMMENDATION -** DO NOT add anything to the agenda when the sole purpose of the meeting is to meet in executive session.

PUBLIC COMMENT

When should the “public comment” time be on the agenda?

Options:

Before agenda approval?

After agenda approval?

At end of meeting?

PUBLIC COMMENT PERIOD

Does your District have a policy governing the public comment period which addresses:

- when is the public comment period on the agenda?**
- prior notification/sign up (name and topic)?**
- length of time for public comments (total/ individual speaker time, time extensions)?**
- Notification of policy (on agenda/link)?**

ASBSD Sample Policy

RECOMMENDATION

KEEP IN MIND SDCL 22-18-35(3)

“Any person who intentionally causes serious public inconvenience, annoyance, or alarm to any other person, or creates a risk thereof by disturbing any lawful assembly or meeting of persons without lawful authority, is guilty of disorderly conduct, a Class 2 misdemeanor.

SDCL 1-25-1.1

The Board must provide public notice of meeting, with proposed agenda,

- that is visible, readable, and accessible**
- for at least an entire, continuous twenty-four hours immediately preceding any official meeting**
- by posting a copy of the notice, visible to the public, at the principal office of District.**

AND

SDCL 1-25-1.1

- **The proposed agenda must include the date, time, and (specific) location of the meeting.**
- **The notice must be posted on the District's website.**

Notice of Meetings – violations OMC Decisions

- **Minnehaha County reprimanded.**
- **Kingsburg County reprimanded.**
- **Deadwood City Commission reprimanded.**
- **Canton City Commission reprimanded.**
- **Potter County reprimanded.**
- **AND the OMC has twice reprimanded political subdivisions for failing to post their meeting notice and agenda on their website.**

SDCL 1-25-1.1

“For any special or rescheduled meeting, the information in the notice shall be delivered in person, by mail, by email, or by telephone, to members of the local news media who have requested notice. For any special or rescheduled meeting, the Board must also comply with the public notice provisions of this section for a regular meeting to the extent that circumstances permit.”

AGENDA ISSUES

- **Agenda specificity**
- **Proposed Agenda as compared to Final Agenda**

AGENDA SPECIFICITY

- ***05-07 Lawrence County*** “the law does not require that agendas meet the highest possible level of specificity.”
- ***08-04 Butte County*** “Accordingly, the agenda must contain sufficient information to advise the public as to each of the issues that will be addressed. In the situation here, the agenda did contain sufficient information so as to advise the public of the time, place, and subject matter of the meeting. [case involved interviewing and hiring]

AGENDA SPECIFICITY RECOMMENDATIONS

Use of :

- “old business” and “new business” without identifying the business to be discussed**
- “executive session (if needed)”**
- Denoting topic as an “Action Item”**

Proposed Agenda as compared to Final Agenda: *SD Attorney General Open Meetings Brochure*

“Typically the public body adopts the final agenda upon convening the meeting. At this time, the governing body may add or delete agenda items and may also change the order of business. In 2012, the South Dakota Supreme Court affirmed a South Dakota Circuit Court decision which held that a preliminary agenda may be amended when the board takes action to formally adopt the meeting agenda.”

Proposed Agenda as compared to Final Agenda:

SD Attorney General Open Meetings Brochure

- **“It is recognized that public bodies may add items to their agendas at the time the agenda is finalized.”**
- **“ There is nothing in state law that precludes taking action on those items at the same meeting where they are added to the agenda.”**
- **“However, it is recommended that unless emergency action is needed on an item, a public body put off until its next meeting action on items added to a proposed agenda at the time the agenda is finalized.”**

Proposed Agenda as compared to Final Agenda: **RECOMMENDATIONS**

- **DO NOT** use the right to amend the agenda at the time to amend the agenda at the time of agenda approval to circumvent the intent behind the requirement to post the proposed agenda.
- The more sensitive/controversial a topic is the more caution should be used to add it to the proposed agenda at the time of agenda approval, and even more caution should be used, if added to the agenda, on taking action on the topic.

**Proposed Agenda as compared to Final Agenda:
*SD Attorney General Open Meetings Brochure***

“New items cannot be added after the agenda has been adopted by the governing body.”

Emphasis added

SDCL 1-25-11 --- Recording an open official meeting by the public or press.

- Any person may record (through audio or video technology) an official meeting which is open to the public,**
- as long as the recording is reasonable, obvious, and not disruptive.**

Recording meetings - Policy RECOMMENDATIONS

- **[based on SD Supreme Court rules]**
 - **must inform the board president or supt. before the meeting;**
 - **inform people who are present of the meeting being recording;**
 - **equipment/artificial light which may be used;**
 - **obstructing vision and distracting;**
 - **right to prohibit/terminate recording if rules are violated.**
- **ASBSD Sample Policy**
- **SDCL 22-18-35(3)**

SDCL 1-25-1.5. Teleconference meeting

- Any official meeting may be conducted by teleconference.**
- “Teleconference” means information exchanged by any audio, video, or electronic medium, including the internet. SDCL 1-25-12(4)**
- Teleconference may be used to conduct a hearing.**

SDCL 1-25-1.5. Teleconference meeting

- A member is deemed present if the member answers present to the roll call for the purpose of determining a quorum.**
- Each vote at an official meeting held by teleconference may be taken by voice vote. If any member votes in the negative, the vote shall proceed to a roll call vote.**

Teleconferences (SDCL 1-25-1.6). Public participation in teleconference meeting.

- At a teleconference meeting, there must at least one place where the public may listen to and participate in the teleconference meeting.**
- If there is less than a majority of board members physically present at the meeting location, arrangements shall be provided for the public to listen to the meeting via telephone or internet.**
- The requirement to provide at least one place for the public to listen to the teleconference does not apply to executive sessions.**

Teleconferences

RECOMMENDATIONS related to conducting an open meeting teleconference meeting, going into executive session, and then returning to the open meeting.

IF MAJORITY OF BOARD MEMBERS ARE ON-SITE, ONE+ MEMBER CALLED FOR THE EXECUTIVE SESSION:

- Before making the motion to go into executive session, Board President/Chair informs the public the absent member will be joining the meeting for purposes of the executive session, then call the absent board member;
- Motion, second and vote to go into executive session, and public leaves the meeting room.
- President/Chair declares out of executive session; public back in; absent member stays on the line until meeting reconvenes in open session, the disconnects.

IF MAJORITY OF BOARD MEMBERS ARE OFF-SITE:

- **At beginning of meeting, inform the public as to the procedure to be followed for executive session and reconvening in open session;**
- **Use 2 conference call-in numbers & ID's; 1 for open meeting, 1 for executive session; post call-in # and ID in notice of meeting and proposed agenda.**
- **In open meeting, motion for executive session; members call 2nd conference call number; conduct executive session; declare out; recess; call 1st conference number to re-enter and reconvene open meeting with public present.**

OPEN MEETINGS COMMISSION

- **OMC Summary of Decisions**

<https://atg.sd.gov/docs/OMC%20summary%20of%20decisions.current%20through%2012%2031%2020.pdf>

- **OMC “No Merits” Abstracts**

<https://atg.sd.gov/docs/OMC%20no%20merits%20filings%20abstract.current%2001%2031%2021.pdf>

- **OMC Process**

<https://atg.sd.gov/legal/opengovernment/faqs.aspx>

CLOSING COMMENT #1

CONSEQUENCES FOR FAILURE TO FOLLOW THE OPEN MEETINGS LAWS

- PUBLIC REPRIMAND FROM OPEN MEETINGS COMMISSION; AND/OR**
- CLASS 2 MISDEMEANOR = UP TO 30 DAYS IN JAIL OR \$500 FINE, OR BOTH;**
OR
- INVALIDATE/VOID THE SCHOOL BOARD VOTE/ACTION**

CLOSING COMMENT # 2

**OMC HAS HELD SEVERAL TIMES
THERE IS NO “GOOD FAITH” OR
“INADVERTENT ERROR” EXCEPTION
TO THE OPEN MEETING LAW.**

CLOSING COMMENT #3

IF SOMEONE WANTS TO THROW

A ROCK AT YOU

AND/OR THE BOARD,

DO NOT GIVE THEM THE ROCK -

BY VIOLATING THE OPEN

MEETINGS LAWS !!

QUESTIONS ??