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# Transparency in the balance: An examination of the implementation of the open meetings law in the state of South Dakota

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**Transparency in the balance: An examination of the implementation  
of the open meetings law in the state of South Dakota**

by

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A thesis submitted to the graduate faculty  
in partial fulfillment of the requirements for the degree of

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**TABLE OF CONTENTS**

CHAPTER 1. OVERVIEW	1
CHAPTER 2. REVIEW OF LITERATURE	7
History of Sunshine Laws	7
The Purpose of Participation	9
The Role of Government	18
Press Freedom Theory	19
Social Responsibility Theory	20
1976 Government in Sunshine Act	21
South Dakota Open Meetings Statute	23
Research Questions	26
CHAPTER 3. METHODS AND PROCEDURES	27
The Study Design	38
Answering the Research Questions	31
CHAPTER 4. RESULTS AND DISCUSSION	34
Research Question 1	34
Research Question 2	38
Research Question 3	40
Research Question 4	41
Research Question 5	46
CHAPTER 5. CONCLUSION	62
Implications of Finding to Theory	64

Implications of Finding to Open Government in South Dakota	64
Limitations of Study	65
Suggestions for Future Research	66
APPENDIX A. IN-DEPTH SEMI-STRUCTURED QUESTIONNAIRE	67
APPENDIX B. DIALOGUE WITH PARTICIPANTS	70
APPENDIX C. INSTITUTIONAL REVIEW BOARD APPROVAL	71
APPENDIX D. INFORMED CONSENT DOCUMENT	72
APPENDIX E. SOUTH DAKOTA CODIFIED LAW 1.25.1-1.25.10	74
APPENDIX F. SOUTH DAKOTA CODIFIED LAW 23.5.11 AND 1.27.1.5	78
APPENDIX G. TIMELINE OF OPEN MEETINGS COMMISSION PROCESS	79
APPENDIX H. NUMBER OF DAYS FROM COMMISSION TO HEARING/ DELIBERATIONS	81
APPENDIX I. NUMBER OF DAYS FROM HEARING TO RESOLUTION	83
APPENDIX J. TOTAL NUMBER OF DAYS FROM COMPLAINT TO RESOLUTION	84
REFERENCES CITED	86

## Chapter 1. OVERVIEW

Transparency in government, or the “governing institution’s openness to the gaze of others,” is a significant function of a successful society (Fenster, 2006, p. 888). A key objective of freedom of information laws is to promote governmental accountability and inform citizens of government activity, as well as to ensure their participation in public matters (Relly & Sabharwal, 2009). Proponents of openness in government argue that freedom of information creates a more effective government attuned to the demands of a well-informed citizenry (Fenster, 2006, p. 894). This conclusion is supported by modern liberal democratic theory, which “requires the state to give an account of itself to its public and to justify its actions to the individual and [to the] community” (p. 897). By providing information about government activity to voters, advocates argue, citizens are given the ability to carefully scrutinize and voice their opinions on government actions.

Citizen participation is important to the democratic process in all levels of government, but it is especially relevant at the state and local level. According to Michael Hofferber, a former small-town newspaper reporter, it is at the local level where “the democratic principles of self-determination and representative government are more visible. Here a determined individual can affect his government” (1995, para. 10). Hofferber argues that the reward of participation in government - that is, the ability to effect change in policy - is much greater at the local level of government. He asserts,

Local councils, school boards, and commissions are deciding where roads will be built, how school will be taught, and what water will cost. Such decisions affect the day-to-day lives of their communities far more than

the machinations of Congress or the changing tide of stock-market trading.  
(para. 5)

Individuals can effect change when governments act in the public eye, Hofferber contends. Citizen participation in government is dependent upon the ability of citizens to clearly see what their government is doing. This transparency can be achieved when citizens have access to public records and are allowed to attend public meetings. Therefore, according to Hofferber, openness in government is key in creating responsible elected representatives and a participatory citizenry.

This study examines a specific application of transparency in government—the implementation of the open meetings law statute of South Dakota — SDCL 1.25.1 - 1.25.10 — and reviews the efficacy of the state’s unique model of handling open meeting complaints.

South Dakota is a rural state comprising 66 counties with 814,180 people (U.S. Census Bureau, 2011), ranking 46 out of 50 states in terms of size of resident population (U.S. Census Bureau, 2009). The state has ranked in the lower half of “transparency audits” conducted by both government and media organizations during the last five years. In 2008, the Better Government Association (BGA), an independent, non-partisan government watchdog group, in cooperation with the Center for Public Integrity, a nonprofit organization dedicated to producing responsible investigative journalism on issues of public concern, ranked South Dakota last of the 50 states in terms of the BGA-Alper Integrity Index, the only available method of measuring open government procedures (Stewart, 2008). To arrive at this index, BGA uses a scoring system for each state law related to open records, whistleblower

protection, campaign finance, open meetings, and conflicts of interest (Stewart, 2008). In 2008, the lowest-ranking five states in this index were Montana (46), Tennessee (47), Alabama (48), Vermont (49), and South Dakota (50). On the other hand, the top five states in this index were New Jersey, Rhode Island, Hawaii, Washington, and Louisiana. It should be noted that New Jersey, the top-scoring state, received only a 65 percent rating on the index, suggesting that the general performance of states in this regard is low. These rankings were similar to the results of a 2007 audit conducted by the BGA and the National Freedom of Information Coalition that considered responsiveness to freedom of information requests. Consistent with the 2008 BGA-Alper Integrity Index results, South Dakota sank to the bottom of the list, scoring zero out of four in every category, including response time, appeals, expedited review, fees, and sanctions (Davis, 2010). States comparable to South Dakota in size and geography, such as Wyoming and North Dakota, also rank in the mid-to-lower percentiles. Wyoming, a large rural state with approximately 544,270 residents, ranked 45 out of 50 in the same 2008 BGA-Alper Integrity Index, and 46 out of 50 in the 2007 BGA-NFOIC report (U.S. Census Bureau, 2010; Sunshine Review, n.d.). North Dakota, which borders South Dakota and claims 646,844 residents, ranked 34 out of 50 in the 2008 BGA-Alper Integrity Index and 30 out of 50 in the BGA-NFOIC report (U.S. Census Bureau, 2009; Sunshine Review). After the BGA's 2008 ranking of South Dakota as last in the nation for transparency, SB 147 was signed by South Dakota's governor, which reversed a "prevailing presumption" that "all public records were confidential with the burden of proof resting on a requestor to prove that he or she should have access to a certain record" ("South Dakota Transparency Legislation," n.d., para. 7). Now, South Dakota is among the majority

of states where the presumption is openness “unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public” (SDCL 1-27-1.1, 2011, para. 1).

South Dakota’s last-place rankings make it a worthwhile study for open government scholars. In-depth examinations of the various challenges South Dakota faces are crucial in improving openness in government in the state because they help identify problematic areas that could be resolved to enhance the functioning of government. As a solution to complaints regarding its policies of open government, South Dakota created a unique commission designed to address open meeting complaints in the state. This study examines the operation of the South Dakota Open Meetings Commission from the time of its inception in 2004 to cases resolved as of late 2010.

South Dakota’s codified law defines a meeting as “any meeting or proceeding required to be open to the public pursuant to Chapter 1-25” (SDCL 1-27-21, 2010, para. 1). Open meetings complaints in South Dakota are lodged by citizens, members of the media, students, advocacy groups, and other members of society. To alleviate such concerns, then-Attorney General of South Dakota Larry Long created an *ad-hoc* open government task force in 2003 comprising 42 citizens, including members of the media, governmental entities, regulated entities, and law enforcement (South Dakota Office of the Attorney General, n.d., para. 4). The task force studied and debated open government issues (“Gregory School Board,” 2005, p. 1). The discussion yielded a common complaint of the difficulty in punishing open meetings violations (“Government Openness Task Force Notes: Meeting #9,”



p. 4). During the task force meetings, Long suggested that the open meetings law was not “consistently applied across the state” and that there was “no realistic enforcement mechanism” because of the law’s criminal penalty (p. 4).

Prior to new legislation in 2004, state’s attorneys who represent each county were supposed to enforce open meetings violations either by confronting the offender and attempting to explain the law, or by prosecuting such offenses as Class 2 misdemeanors punishable by 30 days in jail and/or a \$200 fine (South Dakota Association of County Commissioners, n.d., para. 1). However, no South Dakota citizen had ever been prosecuted for violating the open meetings law since the law was initially implemented in 1965 (“Conducting the public’s business in public,” 2006). Because the law had never been enforced, open government advocates argued that the law was stripped of any legitimacy (“Government Openness Task Force Notes: Meeting #5,” p. 7).

To combat this problem, former Attorney General Long suggested creating an Open Meetings Commission, a group of five state’s attorneys appointed by the Attorney General, designated to review complaints of open meetings violations (South Dakota Office of the Attorney General, n.d., para. 1). Initial complaints of open meetings law violations must still be brought to the local state’s attorney, who has three options: dismiss the complaint, prosecute as a Class 2 misdemeanor, now punishable by 30 days in jail and/or a \$500 fine, or send the complaint to the Open Meetings Commission for possible public reprimand (“Conducting the Public’s Business in Public,” 2010, p. 2). According to South Dakota Codified Law 1-25-7, “no violation found by the commission may be subsequently prosecuted by the state’s attorney or the attorney general” (“SDCL 1-25-7,” 2011, para. 1).

By providing the option of a public reprimand, which is a written decision by the Open Meetings Commission that is made public and publicized by local media, governmental entities can still be punished for improperly closing meetings without facing criminal charges or a fine. State's attorneys still possess the power to prosecute in circuit court if they believe the offense was a willful act. By establishing a public body of decisions, the Commission fulfills an educative function that helps governmental officials understand South Dakota's open meetings laws.

This study asks: What are the most common problems journalists, citizens, organizations, and other members of South Dakota society encounter when alleging violations of open meetings laws? Do most violations occur at the municipal, county, or state level of government? In how many cases did the Commission find a violation? This study examines who or what entities bring complaints of open meetings laws violations to the Open Meetings Commission, and how long it takes this appointed body to resolve each complaint. In doing so, the study explores the function of government in serving its citizens, as well as the role citizens and media play in achieving good government.

The results of this study will benefit all South Dakota citizens because it will enable them to understand the openness, or lack thereof, of their government. The results may also provide evidence contrary to or confirming South Dakota's last-place ranking in open-government standard. This study might also benefit other states by offering evidence and analysis of the effectiveness of the Open Meetings Commission, thereby providing an example for them to either follow or avoid.

## **Chapter 2. REVIEW OF LITERATURE**

This chapter discusses the history and characteristics of so-called “sunshine laws” in the United States, and discusses the importance of these freedom of information laws in keeping the government accountable to its citizens. The ideals of good government and citizen involvement in governance can be seen in theoretical frameworks such as participatory democratic theory, classical republican theory, classical liberalism political theory, social responsibility theory, and press freedom theory. These theories will be reviewed and their tenets applied to South Dakota’s open meetings law. This chapter examines the purpose of citizen participation in government, as delineated by classical republican theory and participatory democratic theory, the role government should play in citizens’ lives, and the responsibility media have in keeping government accountable to its citizens. This interpretive study, which focuses specifically on the South Dakota Open Meetings Commission, expects to add to the body of knowledge that lacks information specific to state government transparency.

### **History of Sunshine Laws**

The origins of open meetings laws extend as far back as the late 1800s, although most states did not require public meetings to be open to constituents until the mid-20<sup>th</sup> century (Lee, n.d., para. 2). One of the first sunshine law cases, *Accord v. Booth*, occurred in Utah in 1908 when a citizen was removed from a public meeting, despite an 1898 statute that mandated the city council to “sit with open doors and keep a journal of its own proceedings” (*Accord v. Booth*, 1908, p. 2). Over the next several decades, each state formed its own open meetings provisions and endured its own legal battles as each state attempted to

define what open meetings entailed (Baird, 1977, p. 565). On the national front, it took until the passage of the 1976 Government in Sunshine Act to hold the federal government accountable to its people. The law mandated that “all portions of all meetings conducted by federal agencies be open to the public unless they fit within one of ten exemptions” (p. 565). Today, each state, the District of Columbia, and the federal government all have adopted laws concerning open meetings (Lee, n.d., para. 2). The First Amendment does not mandate open meetings, so there is no national, legal standard with which each state must comply. Laws differ slightly from state to state, providing no standardized rules on what constitutes openness (para. 3).

While there is no uniform definition of open meetings laws, these laws typically demand that most legislative, executive and administrative bodies of government “deliberate and act in public view” (Lee, n.d., para. 4). In South Dakota, “an official public meeting is any meeting or proceeding required to be open to the public pursuant to Chapter 1-25” (“SDCL 1-27-21,” 2010, para. 1). Perhaps the most pragmatic reason that transparency in government is important is that governmental actions affect citizens. According to the Society of Professional Journalists, which describes itself as the nation’s most broad-based journalism organization,

[governmental actions] determine the amount of taxes you pay and the kinds of government services you receive. Governments and their agencies regulate many activities in your home and business life. Your ability to participate in, monitor, and perhaps, protest government decisions relates directly to your ability to know what your government is doing. (Society of Professional Journalists, para. 3)

This idea is intrinsic to the United States' political system, which is "based on the principle that sovereignty inheres in the people" (Birch, 1993, p. 49). As Birch notes, every person in the political process, from the President to county judges, all "[derive] their authority from the people" (p. 49).

### **The Purpose of Participation in Government**

The importance of freedom of information, public access laws, and participation in government can be effectively examined by comparing and contrasting the tenets of classical republican theory and participatory democratic theory.

#### **Classical Republican Theory**

Early examples of republican governments can be seen in Italy during the Middle Ages, in which its political system consisted of "no princes and no kings but citizens living together under common laws and statutes, even if citizenship in its fullest sense was the privilege of only a minority of them" (Viroli, 1999, p. 3). Hundreds of years later, early American colonists sought to form their own system of government free of England's monarchical rule and declared in Article 4, Section 4, of the U.S. Constitution that "the United States shall guarantee to every state in this Union a Republican form of government" (U.S. Constitution, para. 1). In James Madison's 1788 essay, "The Federalist 57," Madison asserts that representative government through election is the foundation of republican government ("The Federalist No. 57," para. 3; Goodwin, 1995, p. 1). The people responsible for electing representatives would

not [be] the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the

people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State. (“The Federalist No. 57,” para. 5)

Madison’s vision of the United States as a republic was of a “representative self-government within constitutional boundaries” (Viroli, 1999, p. 6). Under the tenets of republican theory, representatives and citizens participate in government in different, but complementary, ways.

Viroli (1999) maintains that while

participation in the life of the republic was important both to preserve liberty and to give civic education to its citizens, and therefore that it should be encouraged in all reasonable ways . . . it was not the main value or objective of the republic; it was a means to protect liberty and to select the best citizens for positions of responsibility. It is often more important to have good rules than to have citizens participate in every decision. What counts is that those who govern and decide wish to serve the common good. (p. 66)

In other words, citizens play a vital role in preparing high-caliber representatives to serve the public and preserve the liberty of all citizens as part of the political process.

The classical republican theoretical framework demonstrates how America’s founders intended citizens to participate in government. The idea of representation is crucial to republican theory, which differs from a true democracy in that a republican form of government selects representatives who, by virtue of their political role, must accommodate plural views and interests. Republican theorist Bellamy argues that “directly deliberative forums are implausible mechanisms for making the key decisions in large-scale and complex mass democracies” (Bellamy, 2008, p. 162). In “The Federalist No. 10,” Madison articulates the benefits of a republican form of government over a pure democracy. Electing a small number of citizens as representatives results in

refin[ing] and enlarg[ing] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. (1787, para. 16)

Madison argues that true democracy fails because each person only considers his or her own personal needs, as opposed to a true republican form of government, in which representatives consider the collective needs of their constituencies.

Although Americans often refer to their government as a democracy, the term is used loosely to actually describe a representative government. American democracy typically has, to some degree, meant “government by the people” (Pennock, 1950, p. 98). Classical republican theory does not preclude the possibility of citizen participation in government; indeed, in a republican government, citizens are considered an essential part of government, though they play a different role than their elected representatives.

### **Participatory Democratic Theory**

Classical republican theory differs from participatory democratic theory, in which political participation requires “substantial numbers of private citizens (as distinct from public officials or elected politicians) to play a part in the process by which political leaders are chosen and/or government policies are shaped and implemented” (Birch, 1993, p. 80). The theory suggests that individuals and governments must be considered as two pieces of a whole (Pateman, 1970, p. 42). Pateman (1970) goes so far as to say that “a democratic society cannot exist without public participation” (p. 43). By extension, one can argue that

public participation cannot occur without an open government, which means a democratic society cannot exist without open government (Barrett, 1988).

Classical participatory democratic theorists such as James Mill and Jeremy Bentham assert that public participation in politics plays a major role; that is, to ensure that “good government” is achieved (Pateman, 1970, p. 19). Bentham lauds the participation of the press in its watchdog role, writing,

to place on any more advantageous footing the official reputation of a public functionary, is to destroy, or proportionably to weaken, that liberty, which, under the name of the *liberty of the press*, operates as a check upon the conduct of the ruling few; and in that character constitutes a controuling [sic] power, indispensably necessary to the maintenance of good government (1843, Vol. 2, p. 279, emphasis his).

Bentham goes even further, asserting that “whatsoever evil can ever result from this liberty [of the press], is everywhere, and at all times, greatly outweighed by the good” (p. 279).

Similarly, in his 1820 work *Essay on Government*, Mill argues that although a democratic society does not allow citizens to govern themselves and “must entrust [the powers of government] to some one individual or set of individuals, and such individuals will infallibly have the strongest motives to make a bad use of them,” good government is possible through “the doctrine of checks” (Lively & Rees, 1978, p. 72). This system of checks is only possible, Mill argues, when the community participates in government (p. 73). Pateman suggest that the most important function of participatory democracy is to protect and guarantee “that the private interests of each citizen [are] protected” (1970, p. 19-20).

Through participation in government, citizens can help create a more fair and scrupulous government that is better equipped to serve and benefit its constituents.



### *A Protective Function*

Although participatory democratic theory is a normative concept, it has an inherently practical application. Certainly, the utility of any political theory is rooted in its ability to “illuminate and guide behavior with respect to our own political system” (Mayo, 1960, p. 17). Mill and Bentham (as cited by Pateman, 1970) argue that direct citizen participation in politics ensures good government. It is reasonable to conclude, therefore, that a government working in the public eye is much more likely to practice fair and ethical behavior than one that is hidden from view. Pennock (1950) suggests that each man “is, normally, the best *respector* of his own interest and the best defender of his own rights. Insofar as men are self-seeking, they cannot be trusted, unchecked, to handle the affairs of others” (p. 108).

The “watchdog” function Mill and Bentham (as cited by Pateman, 1970) describe is particularly relevant when considering freedom of information and open government. Increased participation in public affairs is crucial to requiring government officials to be accountable for their actions. Barrett (1988) argues that this increased accountability “tempers the insensitivities of officials to the needs of the general public and checks abuses that are more likely to occur ‘in the dark’” (p. 1196). Pennock (1950) observes that individual political power protects citizens against government “mistreatment and tyranny” (p. 106). Without the opportunity to participate and obtain some political influence through that engagement, citizens are more vulnerable to state action that could infringe on their liberties.

### *A Self-Governance Function*

In addition to protecting citizens from corrupt government, participatory democratic principles also enable citizens to exert more influence over policies and government actions

that directly affect their lives. According to Pateman (1970), if individuals want to have power over their lives, then “authority structures in these areas must be so organized that they can participate in decision making” (p. 43). And citizens should have control over their own lives, Lucas (1976) notes. He argues that as human beings, citizens deserve to be consulted about policies that are going to affect them and to which they are going to have to follow. Without citizen participation, government is “merely pushing people around, as if they are things, not men” (p. 152). Because men are “rational agents” and can be reasoned with, government shows “disrespect to man’s rationality if we expect one to hearken to our laws but are not prepared to listen to his views” (p. 152). While the state has a vested interest in its citizens, it does not always take their needs and wants into account. Lucas (1976) thinks this is unwise, because a state’s success in serving its citizens is directly linked with the citizens’ ability to participate and provide feedback (p. 143).

Pateman (1970) argues that by enabling citizens to participate in political processes, their freedoms and their perceptions of their freedoms are expanded (p. 26). This increased participation guarantees that “no man, or group, is master of another,” while at the same time ensuring that “all are equally dependent on each other and equally subject to the law” (p. 27). This vein of participatory democratic theory reflects classical political liberalism’s philosophy of natural rights, what Pennock describes as “the inalienable and imprescriptible rights of man” (1950, p. 12). By providing equal rights to each citizen, and allowing them to participate in democratic processes, citizens can have real and substantial influence over the policies made to govern them. According to Pennock (1950), citizens must participate if they want to sustain their democratic rights, because “with the right to self-government go the

duties of active citizenship” (p. 212). Barrett (1988) contends that before citizens can assess governmental actions, they must first be educated about the decision-making processes (p. 1,195). To do this, governments must be open about their activities and allow citizens to participate and express opinions.

### *A Psychological Function*

Pennock (1950) suggests that “public spirit” is key to nurturing community. This public spirit sentiment results from community members who have fostered feelings of responsibility for others and who are willing to work for the common good. This feeling is derived from an individual’s participation in public matters. Pennock argues that “it is a common experience that people tend to take an interest in things for which they are given responsibility, and that the converse holds as well” (p. 106). According to John Stuart Mill, the only way to achieve an active citizenry working toward the common good is to allow citizens to participate in their government (Pateman, 1970, p. 29). In *Considerations on Representative Government*, J.S. Mill argues that good government is achieved through the people, and if

the agents, or those who choose the agents, or those to whom the agents are responsible, or the lookers-on whose opinion ought to influence and check all these, are mere masses of ignorance, stupidity, and baleful prejudice, [then] every operation of government will go wrong.” (1895, p. 29)

Any level of participation is useful, Mill suggests, “even in the smallest public function” (p. 69). The active component of participation is key to Mill’s argument, according to Pateman. Pateman asserts that “where the individual is concerned solely with his own private affairs and does not participate in public affairs, then the ‘self-regarding’ virtues suffer, and the

capacities for responsible public action remain undeveloped” (1970, p. 30). This changes when citizens engage in public affairs. Participation not only helps citizens protect their interests, but also affords them a civic education (Birch, 1993, p. 63).

Participatory democratic theorists contend that community members and public officials *jointly* benefit from participation because it allows citizens to witness and comprehend the reason and manner in which a decision was made. According to Lucas, (1970),

We construe actions and respond to them not simply as bare, unintelligible alterations in the world around us, but as manifestations of a mind with a conscious purpose. If we do not know what the reasoning is that lies behind some decisions, we are liable to misconstrue it as something alien, and possibly hostile, to us...A decision publicly arrived at is better understood and likely, therefore, to be better carried out. Even when a decision is not wholly agreeable, we may be more willing to accept it for having had some part in the discussions which had preceded it. (p. 141)

By allowing private citizens to participate in the political process and listening to their concerns, governmental bodies can function more effectively. Lucas (1970) suggests that “if everyone participates, we maximize the chances of our having second thoughts about any scheme that may be unwise, and by the time the final decision is made, we shall have had the opportunity to ponder every serious argument on either side” (p. 140). Consequently, participation benefits democratic societies because a full spectrum of ideas can be considered before policies are put into place. Barrett (1988) suggests that openness in government allows elected officials to better serve the public by providing private citizens the same opportunities special interest groups have to influence public policy. This participation could not occur without government transparency. At the same time, participation creates better communities

because citizens now possess a “public spirit” and presumably are more attuned to the needs of others as well as themselves. Additionally, Barrett proposes that openness in government will result in a more effective government. According to him, a more attentive and participative citizenry results in better attendance at meetings, more efficient meetings, and more thorough debate by public officials (p. 1196-1197).

### **Challenges with Participatory Democracy**

One of the primary challenges presented in participatory democratic theory is that it espouses the idea that each citizen participates in government only to get his or her voice heard. As Pennock (1950) notes, each man “is, normally, the best *respector* of his own interest and the best defender of his own rights. Insofar as men are self-seeking, they cannot be trusted, unchecked, to handle the affairs of others” (p. 108). Furthermore, in order for a participatory democracy to function, a significant portion of citizens must be willing to participate, which does not occur in today’s society. The founders of the United States constructed the idea of a republican government, which uses elected representatives to accomplish what is best for the public good. In a republican government, publicness is valued because at its core, republican theory argues that there should never be an inherent separation between government and its people. Government *is* the people, according to this theory, and therefore no barrier should exist between people and their government.

The idea of a free press that has a responsibility to serve as a check on government has a much greater importance under classical republican theory. If people are equally participating in the political process, as participatory democratic theory suggests they should, then there is little reason for the press to serve a watchdog function. However, people do not

equally participate in the political process in its current form. Civic participation in the current American political process is much more reflective of its original republican form of government, in which citizens elect representatives who are supposed to work toward the public good.

### **The Role of Government**

The role government plays in the lives of its citizens can be understood through classical political liberalism theory. This theory is based on the philosophy of natural rights, or “the inalienable and imprescriptible rights of man” (Pennock, 1950, p. 12). These rights are found in the U.S. Bill of Rights; that is, “the right to freedom of religious belief and observance; the right to freedom of speech and of the press and freedom of assembly; the right to petition for the redress of grievances, and the right to own property and to be protected in its use and disposal” (p. 14). In addition to the idea of inalienable rights, classical liberalism espouses the idea of “government by the people,” which means the citizens through their elected representatives establish major governmental policies, and the government is accountable to its people (Pennock, 1950, p. 98).

Classical liberalism undergirds some of the most important documents in U.S. history, including the Declaration of Independence and the Constitution (Goodman, 2005, p. 1). At its core, classical liberalism represents the belief that “people have rights apart from government, as part of their nature” and that the “only legitimate purpose of government is to protect these rights” (p. 1). This theory is significant when examining freedom of information issues because the underlying notion behind a person’s right to know is that government

serves people, not the other way around. Citizens have a right to open meetings and open records, and they should be able to hold a government accountable for its actions.

### **Press Freedom Theory**

McQuail (2005) asserts that in order to report freely and to serve the public, the media must be free of “advanced censorship or licensing, or punishment after the event for publication that is not otherwise unlawful” (p. 166). Additionally, the public must have the freedom to choose media based on its needs (p. 166). This idea of press freedom is the “only fully respected theory of the press,” according to McQuail (2005, p. 169). Supporters of press freedom argue that a democracy cannot exist without the free expression of ideas. John Stuart Mill (1869) emphasizes this point in his declaration of the need for press liberty:

The peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation, those who dissent from the opinion even more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. (“Chapter 2,” para. 1).

In short, Mill argues that truth will ultimately prevail when all opinions are expressed, an idea similar to the “free marketplace of ideas” that is central to the idea of a liberal democracy (McQuail, 2005; Smith, 1960). However, it is impossible to have a free marketplace of ideas without allowing public discourse and debate. Open government is essential to this notion because it provides private citizens with the knowledge they need to make informed, rational decisions and defend those opinions based on substantial information.

## Social Responsibility Theory

The social responsibility theory, according to the 1947 Commission on the Freedom of the Press, maintains that because the press benefits from certain rights, it is also “responsible to society for carrying out certain essential functions of mass communication in contemporary society” (Gunaratne & Hasim, 1996, p. 103). The Commission on the Freedom of the Press was a private group formed to examine the failures and successes of the U.S. press and whether free expression was limited (McQuail, 2005). It found that the press often limited its reporting to “the circle of a privileged and powerful minority” (McQuail, 2005, p. 171). To combat this failing, the Commission developed the theory of social responsibility and suggested five important functions the press must perform to be socially responsible:

1. Provide “a truthful, comprehensive, and intelligent account of the day’s events in a context which gives them meaning.”
2. “Serves as a forum for the exchange of comment and criticism.”
3. Project “a representative picture of the constituent groups in society.”
4. Be responsible for “the presentation and clarification of the goals and values of the society.”
5. Provide “full access to the day’s intelligence” (as cited in Gunaratne & Hasim, 1996, p. 104).

Under the social responsibility framework, the media are designed to serve the public, and must do so by being truthful, objective and diverse in their views. This, in turn, makes media “more relevant to readers, viewers and listeners in a democracy that promotes participation” (Gunaratne & Hasim, 1996, p.105). That is, when audience members are allowed to communicate their opinions and be fairly represented in media coverage, they are much more likely to engage in decision-making processes and cultivate a public spirit.



In order to serve as a socially responsible press, however, governments must grant the media certain rights, such as open access to meetings and records (Lee, n.d., para. 3). Without access to this information, the media cannot accomplish their task of informing citizens (Lee, n.d., para. 3). These rights, once achieved, must be protected with the utmost care. As Pennock (1950) notes, if freedom of speech and press and other political activities are taken away, their return is all but impossible (p. 118). Thus, for the social responsibility theory to fully function, a balance must be achieved between giving media rights and privileges and expecting media to use those rights to serve the public.

### **1976 Government in Sunshine Act**

The elements of these theories can be seen in the 1976 Government in Sunshine Act, a federal act that requires federal agencies to open meetings to the public. The act covers the same agencies as the Freedom of Information Act (Reporters Committee for Freedom of the Press [RCFP], 2009, para. 1). The law requires that “every portion of every meeting of an agency shall be open to public observation” unless the open meeting would violate one of the following 10 exemptions outlined by Congress:

1. Disclose matters ordered confidential by executive order and properly classified as such on the basis of national defense or foreign policy
2. Relate solely to internal personnel rules and practices of the agency
3. Disclose matters exempted by statute, ‘provided that such statute (a) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld
4. Discloses trade secrets
5. Involves criminal accusation or official censure
6. Constitute a ‘clearly unwarranted invasion of personal privacy’

7. Disclose investigatory records that might interfere with enforcement proceedings, deprive a person of due process, disclose a confidential source, disclose investigative procedures, or endanger the life and safety of law enforcement personnel
8. Disclose information regarding regulation or supervision of financial institutions
9. Disclose information the premature disclosure of which would (a) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to lead to significant financial speculation in currencies, securities, or commodities, or significantly endanger the stability of any financial institution; or (b) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action
10. Specifically concern the agency's issuance of a subpoena, the agency's participation in a civil action, conduct relating to a proceeding of a 'particular case of formal agency adjudication,' or conduct relating to an agency determination on the record after the opportunity for a hearing. (RCFP, 2009, paras. 2, 19)

Unless it meets one of these exemptions, the meeting is considered to be open to the public.

Under the law, federal agencies are required to "publicly announce the time, place and subject matter of the open meeting at least one week prior to the meeting date" and publish the information through the Office of the Federal Register (RCFP, 2009, para. 3). If an agency believes it meets one of the 10 exemptions, it can vote to close the meeting, and upon reaching a majority decision, it must publicize this vote within one day and submit the time, place, and subject matter of the meeting to the Office of the Federal Register with a notification that the meeting is closed to the public (RCFP, 2009). If an agency does not comply or improperly complies with the federal statute, citizens (often journalists) may protest by suing in federal court (RCFP, 2009). By using legal action, journalists can obtain official documentation that an agency is breaking the law, stop an agency from wrongfully

closing meetings that should be open to the public, or force an agency to release meeting transcripts (RCFP, 2009). In order to file a complaint, a person must bring legal action within 60 days after the meeting occurs (RCFP, 2009). If an agency is convicted of breaking the openness statute, it may be mandated to provide a detailed transcript to the public (RCFP, 2009). Because there is little oversight from Congress, it is vital for members of the mass media to “operate as government watchdogs to oversee enforcement of the Act” (RCFP, 2009). As classical republican theory argues, although government works best when citizens elect other high-caliber citizens to serve as representatives, there is still a significant need for media to act as a check on those elected officials because not all citizens participate in the political process. Open meetings are vital in keeping government accountable to its citizens and creating the best government possible.

### **South Dakota Open Meetings Statute**

South Dakota codified law 1-25-1 requires that all “official meetings of the state, its political subdivisions, and any public body of the state or its political subdivisions” be open to the public (SDCL 1-25-1, 2011, para. 1). The law defines a political subdivision or a public body of a political subdivision as

any association, authority, board, commission, committee, council, task force, school district, county, city, town, township, or other agency of the state, which is created or appointed by statute, ordinance, or resolution and is vested with the authority to exercise any sovereign power derived from state law.  
(para.1)

Governments at all levels – state, county, and local – are subject to the law. In order for a meeting to be considered official, a quorum must be present (RCFP, 2006). While meetings aren’t specifically defined, the statute does include e-conference calls as meetings, although

email correspondence is not addressed. Unlike the federal law, the South Dakota statute only requires that agencies give 24 hours notice before a public meeting (RCFP, 2006). The notice must be “visible to the public” and a proposed agenda must be given (“SDCL 1-25-1.1,” 2011, para. 1). If an agency breaks the openness statute, it can be charged with a Class 2 misdemeanor, which results in 30 days in jail and/or a \$500 fine. Additionally, any actions that occur at an improper meeting could be determined void in circuit court (“Conducting the public’s business in public”, 2006).

If an agency opts to go into executive session, South Dakota law requires that the discussion be limited to the “purpose specified in the closure motion” and proscribes any action taken in executive session (RCFP, 2006, “Definition”). If an agency plans to go into an executive session, it must indicate this in its agenda.

When a complaint is filed against an agency, the South Dakota Open Meetings Commission examines the facts and decides whether a violation of the statute occurred. If the Commission determines that a violation has occurred, it issues a public reprimand (“SDCL 1-25-7,” 2011, para.1).

### **Exemptions in Open Meetings**

Under the South Dakota statute, five exemptions exist that bar an agency from discussing a matter in public. These exemptions include:

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 or 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. (SDCL 1-25-2, 2011, para. 1)

### **Challenging a Closed Meeting**

If citizens or journalists feel that a meeting should be open to the public, there are steps they can take before bringing a complaint to their local state's attorney. The Reporters Committee for Freedom of the Press (RCFP) suggests confronting the agency and attempting to persuade its members that the meeting should be open, citing a specific reason under the law. Before the formation of the Commission, a violation of the open meetings law was technically a Class 2 misdemeanor, but there was no prosecution. In other words, "although a complaint could be filed with the local states attorney, nothing was likely to come out of it" (RCFP, 2006, "State attorney general"). Today, a state's attorney can prosecute the agency, determine that no violation has occurred, allow the case to be decided by the South Dakota Open Meetings Commission, or forward the complaint to another state's attorney or to the Attorney General ("SDCL 1-25-6.1," 2011, para. 1). Citizen complaints must be brought to the Commission through the state's attorney of the county where the supposed open meetings infringement occurred (South Dakota Office of the Attorney General, n.d., "Frequently Asked Questions").

## **Research Questions**

Considering the above-mentioned literature, this study seeks to answer the following questions:

**RQ1:** At what level of government do most violations in open meetings laws occur in South Dakota (local or state level?)

**RQ2:** What type of persons and/or entities participate by bringing complaints of open meetings laws violations to the South Dakota Open Meetings Commission (e.g., journalists, citizens, organizations, or other sectors of South Dakota society)?

**RQ3:** In how many cases did the Open Meetings Commission find a violation of South Dakota's open meetings law?

**RQ4:** How long does it take the appointed South Dakota Open Meetings Commission to resolve each complaint?

**RQ5:** How do advocates of open government and other experts evaluate the performance of South Dakota elected officials in the implementation of its open meetings law?

### **Chapter 3. METHODS AND PROCEDURES**

To address the research questions, in-depth interviews of advocates of the open meetings laws in the state will be conducted. This will be supplemented by a data analysis of open meetings complaints brought to the South Dakota Open Meetings Commission.

#### **Qualitative Communication Research**

Wimmer and Dominick (2006) cite three approaches to conducting social science research: positivist, interpretive, and critical (p. 113). This study will adopt the interpretive paradigm, which aims to “understand how people in everyday natural settings create meaning and interpret the events of their world” (p. 113). Wimmer & Dominick (2006) note that a qualitative researcher often uses elements that are typically attributed to quantitative methodologies, and vice versa (p. 115).

The cases that have already been resolved by the South Dakota Open Meetings Commission will be analyzed to determine whether any trends in the maintenance of transparency can be detected in the ways these cases have been decided. Intensive interviews with people of importance in South Dakota’s open government movement, and those actively involved in the formation of the South Dakota Open Meetings Commission in 2004, also will be conducted. These in-depth interviews will draw evidence concerning the effectiveness of the Commission from the opinions of South Dakota journalists, citizens, and open government advocates concerning the level of transparency that exists in the South Dakota state government.

## The Study Design

### Intensive Interviews

This study seeks to establish how South Dakotans feel about transparency in their state, specifically regarding the South Dakota Open Meetings Commission, and whether participants feel the appointed commission has been helpful in producing more government openness. To do so, the opinions of key players in South Dakota open government issues will be solicited through in-person intensive interviews. The sample of interviewees will include those who are intimately involved or have experience with the Open Meetings Commission and the preceding South Dakota Open Government Task Force. A semi-structured interview questionnaire will be devised. Wimmer & Dominick (2006) say that in-depth interviews are unique for six reasons:

- 1) They generally use smaller samples.
  - 2) They provide detailed background about the reasons why respondents give specific answers. Elaborate data concerning respondents' opinions, values, motivations, recollections, experiences, and feelings are obtained.
  - 3) They allow for lengthy observation of respondents' nonverbal responses.
  - 4) They are usually very long. Unlike personal interviews used in survey research that may last only a few minutes, an intensive interview may last several hours and may take more than one session.
  - 5) They can be customized to individual respondents. In a personal interview, all respondents are usually asked the same question. Intensive interviews allow interviewers to form questions based on each respondent's answers.
  - 6) They can be influenced by the interview climate. To a greater extent than with personal interviews, the success of intensive interviews depends on the rapport established between the interviewer and the respondent.
- (p. 135)



These characteristics of in-depth interview techniques provide many advantages that enable a researcher to obtain data. As a result of the length of time and manner in which an in-depth interview is conducted, detailed information can be obtained that would be difficult, if not impossible, to achieve in any other manner. Wimmer & Dominick (2006) also posit that more truthful responses may be obtained as a consequence of the relationship built between the interviewer and the respondent. However, because the questions may be asked slightly differently, or the line of questioning can change altogether based on a respondent's answers, it may be difficult to generalize the results. Additionally, because respondents can conceivably spend several hours with the interviewer, this method is very susceptible to interview bias. Some interviewers may reveal personal opinions about a subject through "loaded questions, nonverbal cues, or tone of voice," which could affect the validity of the data collected (p. 136).

This study assumes the interpretive approach, which is designed to "understand how people in everyday natural settings create meaning and interpret the events of their world" (Wimmer & Dominick, 2006, p. 113). The role of the researcher in a study using the interpretative approach is significant; Wimmer & Dominick (2006) contend that without the "active participation of the researcher, no data exist" (p. 114). Interpretive studies allow for flexibility in design adjustment during the course of the research, and consider the researcher an integral part of the study, as the researcher *is* the measurement instrument, in which "no other individual can substitute" to achieve the same results (p. 114). A significant function of

the interpretive researcher is to examine participants' remarks and use "induction to find commonalities or general themes" (p. 115).

Because this study seeks the opinions and perceptions concerning South Dakota state government transparency, in-depth interviews will be conducted with the following sources:

- 1) Hon. Lawrence (Larry) Long, former attorney general who formed the South Dakota Open Government Task Force and developed the idea for the Open Meetings Commission. Long currently serves as a judge for the second judicial circuit court in Sioux Falls, S.D. Long can provide information regarding the origins of the Commission and his perception regarding the effectiveness of the Commission.
- 2) Hon. Vincent A. Foley, first chairman of the Open Meetings Commission and currently a third judicial circuit judge in Brookings, S.D. Foley may provide historical background regarding the Commission, as well as information regarding the processes of the Commission and his opinion regarding ways to improve the functioning of the Commission.
- 3) David Bordewyk, general manager of the South Dakota Newspaper Association. The South Dakota Newspaper Association is the trade association for every newspaper in the state, which includes 119 weekly publications and 11 daily publications. Bordewyk is experienced in matters of open meetings complaints and also served on the former South Dakotans for Open Government (SDOG) Committee.
- 4) Betty Breck, a concerned citizen from Groton, South Dakota, who has a substantial amount of experience filing open meetings complaints. Breck is the complainant in four of the 27 cases that have been heard by the Open Meetings Commission since its formation in 2004. Breck's inclusion in this qualitative research will provide insight from a citizen's perspective regarding the openness of government in South Dakota and what kind of challenges the state faces in terms of transparency in government.
- 5) Tena Haraldson, the South Dakota Associated Press bureau chief. Haraldson instigated an open records audit across South Dakota in 2002 and serves on the South Dakota First Amendment Committee, Media of Nebraska, and National Freedom of Information Coalition.

6) Diane Best, the Assistant Attorney General for the South Dakota Office of the Attorney General. Best aids the South Dakota Open Meetings Commission by setting up meetings and processing complaints that go before the body. Best was also one of 30 members involved in the Open Government Task Force, an ad hoc group created by former Attorney General Long. Best can provide insight into the functioning of the Open Meetings Commission, offer possible recommendations to improve the Commission, and release statistical data regarding Commission's decisions.

These individuals have been key players in South Dakota's ongoing battle for transparency in government. They not only have unmatched knowledge concerning sunshine laws, but also have an understanding of how other South Dakotans view and experience open meetings laws.

The resolutions made by the Open Meetings Commission regarding open meetings complaints will be evaluated to determine a) the number of days between when a state's attorney files an official complaint and when the Open Meetings Commission receives that complaint; b) the number of days between when the Open Meetings Commission receives an official complaint and when a public hearing is held; and c) the number of days between when a public hearing is held and when a resolution is issued by the Commission. The summaries of the cases can be accessed through the South Dakota Attorney General's office or online at its state Web site, <http://www.state.sd.us/attorney/office/openmtg/pendingcases.asp>. The Web site currently lists 27 open meetings complaints and their resolutions, with two cases pending.

### **Answering the Research Questions**

**Research Question 1** asks: At what level of government do most violations occur in South Dakota?

By examining the open meeting complaints brought to the South Dakota Open Meetings Commission, this study will be able to determine whether most open meeting violations occur at the state or local level. Each case will be examined to determine whether the alleged violation occurred at the local or state level.

**Research Question 2** asks: What types of persons or entities bring complaints of open meetings laws violations to the South Dakota Open Meetings Commission?

This question will be answered by organizing complainants as having filed by individuals or entities falling under four categories: (1) journalists, (2) citizens, (3) organizations, or (4) other sectors of South Dakota society. By knowing who or what entities bring complaints, this study attempts to determine what types of people or organizations are considered typical defenders of open government.

**Research Question 3** asks: In how many cases did the Open Meetings Commission find a violation of South Dakota's open meetings law?

This question will be answered by determining how many complaints were resolved with a public reprimand, and how many complaints were dismissed.

**Research Question 4** asks: How long does it take the appointed South Dakota Open Meetings Commission to resolve each complaint?

This variable will be measured in terms of days, weeks, months or years. The process will be broken down into three segments: 1) the number of days between when a state's attorney files an official complaint and when the Open Meetings Commission receives that complaint; 2) the number of days between when the Open Meetings Commission receives an official complaint and when a public hearing is held; and 3) the number of days between

when a public hearing is held and when a resolution is issued by the Commission. The purpose of this research question is to construct a timeline for how long it takes an open meetings complaint to be processed by the South Dakota Open Meetings Commission. This serves as an indicator of whether the commission is effective in resolving open meetings complaints in a timely manner.

**Research Question 5** asks: How do advocates of open government and other experts evaluate the performance of South Dakota in its implementation of open meetings laws?

This will be determined by the answers obtained in the intensive interview process. The purpose of this research question is to establish how open government advocates perceive the effectiveness of the Commission and evaluate its usefulness.

### **Reliability and Validity**

Qualitative studies can run the risk of drawing incorrect interpretations or not providing accurate, complete information (Wimmer & Dominick, 2006, p. 119). To offset this, the in-depth interviews will be audio-taped and later transcribed for analysis. This record will be supplemented by notes taken during the interviews. To enhance representativeness, credibility, and meaning, a summary of each participant's comments will be submitted to them for review to verify completeness and accuracy. In addition, regular consultations with the program of study committee will help clarify issues in interpretation.

## **Chapter 4. RESULTS AND DISCUSSION**

This study explores the effectiveness of the South Dakota Open Meetings Commission and attempts to offer evaluation and provide recommendations to improve the functioning of the commission. Empirical data and anecdotal evidence were obtained by reviewing 27 decisions made since the Commission's inception in 2004 and through in-depth interviews with people of importance in South Dakota's open government movement. Six interviews were conducted; five of which were held face-to-face at a location of the participant's choosing, and one of which was held via telephone due to distance. Each interview was audio-digitally recorded with the permission of the participant, transcribed, and submitted to the participant for review.

### **Research Question 1**

The first research question asks: At what level of government do most violations in open meetings laws occur in South Dakota (local or state level)?

Three complaints, or 20 percent of complaints, occurred at the state level, as compared to 24 complaints, or 80 percent, issued on the local level. Complaints regarding state entities were filed against:

- South Dakota Science and Technology Authority (Feb. 20, 2007; public reprimand)
- South Dakota Board of Regents (Dec. 3, 2007; public reprimand)
- University of South Dakota Student Government Association (Nov. 12, 2008; Clay County; no violation)

Of these three complaints, only the University of South Dakota Student Government Association complaint was found to be without violation.

Complaints regarding local entities were filed against:

### **County**

- Davison County Commission (July 11, 2005; Davison County; public reprimand)
- Brown County Commission (Nov. 28, 2007; Brown County; public reprimand)
- Lawrence County Commission (Aug. 2, 2008; Lawrence County; no violation)
- Anne Hajek, Jeff Barth, and Carol Twedt of the Minnehaha County Board of Commissioners (Nov. 12, 2008; Minnehaha County; public reprimand)
- Kingsbury County Commission (Schoenfelder, Lee, and Madison), (June 22, 2009; Kingsbury County; public reprimand)
- Butte County Commission (June 23, 2009; Butte County; no violation)
- Brown County Commission (June 23, 2009; Brown County; no violation)
- Roberts County Commission (Aug. 24, 2009; Roberts County; public reprimand)

### **City**

- Town of Herrick Board of Trustees (July 11, 2005; Gregory County; public reprimand)
- City of Lead Commission (Nov. 1, 2005; Lawrence County; public reprimand)
- Tripp City Council (Nov. 20, 2007; Hutchinson County; public reprimand)
- City of Mitchell (Nov. 12, 2008; Davison County; no violation)
- City of Watertown Finance Committee (Nov. 12, 2008; Codington County; no violation)

- Martin City Council (Nov. 13, 2009; Bennett County; public reprimand)
- Martin City Council (2) (Nov. 13, 2009; Bennett County; no violation)

### **School**

- Gregory School District Board (July 11, 2005; Gregory County; public reprimand)
- Faulkton Area School District Board (Sept. 21, 2006; Faulk County; no violation)
- Groton Area School District (May 7, 2010; Brown County; public reprimand)

### **Other**

- Melrose Township Board of Supervisors (Sept. 29, 2006; Grant County State's Attorney; no violation)
- Melrose Township Board of Supervisors (Dec. 31, 2006; Grant County State's Attorney; public reprimand)
- Board of Supervisors for Arcade Township (Nov. 20, 2007; Faulk County; public reprimand)
- Rapid City Regional Airport Board (March 7, 2007; Pennington County; public reprimand)
- Black Hawk Fire District (Aug. 12, 2008; Meade County; public reprimand)
- Indian Hills Sanitary District Board of Trustees (Nov. 21, 2010; Meade County; public reprimand)

Of these 24 local entities, 18 were found in violation of South Dakota's open meetings law and received public reprimands.



Of the local entities, Brown County, City of Martin, and Melrose Township were complained against twice. Of these three entities, each was reprimanded once.

It is important to understand at which level of government most complaints occur because it allows a close examination of where educative efforts should be directed. The primary function of the Open Meetings Commission is to educate governmental entities on how to better comply with the open meetings law by creating a body of decisions that are used to reprimand entities when they have violated the law (Foley, Personal Interview, Feb. 11, 2011). As Bordewyk (Personal Interview, Feb. 4, 2011) notes, establishing a body of decisions “gives public entities a road map when trying to determine how they should conduct meetings and whether they are complying with the open meetings law.” Foley agrees with Bordewyk, suggesting that

that’s part of the magic of the Open Meetings Commission. We’re creating a body of law that the local government officials can use as guides. So now you have this body of law that says, “You shall not do X,Y, and Z,” and if they say, “I don’t care, I’m still going to do X,” then you have a mens rea, an evil intent, which might more likely lead to a prosecution. A state’s attorney says, you violated law on purpose and you knew because of all of these Open Meeting Commission violations that it wasn’t appropriate. And whether that happens or not - at least that’s something that is there, it’s a situation where the local officials are more at risk if they don’t pay attention to the Open Meeting Commission decisions. (Personal Interview, February 11, 2011)

In other words, the precedents set by the Open Meetings Commission give public agencies a clearer understanding of what types of behavior could constitute a public reprimand or criminal penalty. The vast majority of violations come from local governmental entities, which indicates that more education is needed for members of these boards. The South Dakota Attorney General’s office makes more than a dozen visits to entities across the state

each year to provide educational training regarding open government (Best, Personal Interview, Feb. 4, 2011). While these proactive efforts likely prevent many open meeting violations from occurring, additional training could improve adherence to the law. According to Haraldson, South Dakota has the worst compliance toward openness in the states with which she is familiar. She posits that the state's small, rural nature factors into its attitudes concerning openness in government. Haraldson suggests that

A lot of us know each other, we're working with our friends and our neighbors, [and] no matter where we turn there is somebody that we know. I think probably there is just a lingering 'good ol' boys' system in South Dakota, just due to the fact that we're very neighborly ... people just never felt the need for a more formalized policy on openness. I'm hoping that's the benign reason for why South Dakota was so backward [before the development of the Open Meetings Commission] in freedom of information and openness laws - because we are decades behind what other states have done in transparency and openness. (Personal Interview, Jan. 28, 2011)

These violations suggest that South Dakota needs to spend more time educating local board members on what constitutes an open meetings violation. If South Dakota is seriously concerned with improving adherence to its open meetings law, thereby increasing the level transparency in the state, it should bolster its educative efforts and require every public board member to undergo training that teaches them about South Dakota's open meetings law.

## **Research Question 2**

The second research question asks: What types of persons and/or entities participate by bringing complaints of open meetings law violations to the South Dakota Open Meetings Commission (e.g., journalists, citizens, organizations, or other sectors of South Dakota society)?

Out of the 27 complaints brought to the Open Meetings Commission, seven were filed by members of the press, one was by an open government group, four were filed by members of governmental bodies, and 15 were filed by private citizens.

This questions offers valuable information that points to who or what entities are typical defenders of open government in South Dakota. The number of complaints brought by South Dakota citizens (roughly 55 percent of all complaints) demonstrates that at least some citizens consider participation in the political process important. However, the relatively low number of complaints brought by the press (roughly 26 percent) is somewhat surprising and concerning. Under the social responsibility theoretical framework, members of the press are “responsible to society for carrying out certain essential functions of mass communication in contemporary society” (Gunaratne & Hasim, 1996, p. 103). One of the five functions is to provide “full access to the day’s intelligence” (as cited in Gunaratne & Hasim, 1996, p. 104). The media are responsible for informing citizens about government activity, and thus are crucial to the advocacy for open government. This is especially true in a representative government, as characterized by classical republican theory, when media are much more needed as a check on government because there is less direct citizen participation in the political process. It is therefore alarming to see a dearth of media complaints when media play such a significant role in the fight for transparency and openness in government. In his position as general manager of the South Dakota Newspaper Association, Bordewyk observes that despite a steady stream of phone calls from members of the media regarding problems with open meeting violations, there is an absence of formal complaints to the state’s attorneys (Personal Interview, Feb. 4, 2011). He notes,

Oftentimes, [reporters and editors] don't take it to that step of filing a complaint. They may editorialize about it, or write about it in the news hole, but that's as far as it goes . . . [Filing complaints is important because it brings] more of these complaints forward [and] will build on that education process . . . It goes back to helping public officials better understand the law so they can better comply with the law. (Personal Interview, Feb. 4, 2011)

Haraldson, who serves as South Dakota's Associated Press chief of bureau, says the media's function of representing the public is crucial to promoting civic participation and creating good government, as suggested by social responsibility theory. The press has a responsibility to report on items of importance to the public, and open meetings offer members of the press the "opportunity to understand the process and the reasons behind decisions and to hear from all the stakeholders that are discussing the issue ... [The meeting] is the prime chance to see everybody in action and get their opinions on record" (Haraldson, Personal Interview, Jan. 28, 2011). The ability of the press to scrutinize and publicize the work of government directly affects the quality of government, according to open government advocates such as Bordewyk and Haraldson. According to Bordewyk, "I've come to understand and appreciate that the best decisions made by local governments are the ones where everyone is informed ... and once you have that [transparency], I think oftentimes you get the best government" (Personal Interview, Feb. 4, 2011).

### **Research Question 3**

The third research question asks: In how many cases did the Open Meetings Commission find a violation of South Dakota's open meetings law?

Public reprimands were issued in 19 of the 27 cases (approximately 70 percent), decided by the Open Meetings Commission.

Additionally, since the inception of the Open Meetings Commission, 25 “no merit” complaints have been filed by state’s attorneys in 10 counties (“Abstract,” Office of the South Dakota Attorney General, p. 1). No merit complaints are filed by state’s attorneys who “determine that there is no merit to prosecuting the case” and are submitted to the South Dakota Office of the Attorney General (p. 1). A large number of those complaints come from Brown County, which has forwarded 10 no merit complaints to the Attorney General’s office. All 10 complaints were submitted by Betty Breck, a citizen from Groton, South Dakota, who was interviewed for this study. Although information related to the investigation of no merit complaints is not available to the public, an abstract of each complaint is available through the Attorney General’s office. According to the abstracts, no merit complaints often involve entities that are not subject to South Dakota’s open meetings law or when there is insufficient evidence necessary to “support a prosecution or sending a Complaint to the Open Meeting Commission” (p. 5). However, because each no merit complaint is considered a criminal investigatory file and is required to be kept confidential in accordance with SDCL 23-5-11 and SDCL 1-27-1.5<sup>1</sup>, a public record of the complaint is not available.

#### **Research Question 4**

The fourth research question asks: How long does it take the appointed South Dakota Open Meetings Commission to resolve each complaint?

The promptness of the Open Meetings Commission’s decisions is important in evaluating the effectiveness and value of the Commission. It is difficult to pinpoint a length of time it takes the Open Meetings Commission to resolve each complaint due to the extreme

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<sup>1</sup> See appendix F

variances in time. The typical process starts with an alleged violation brought to the county state's attorney, which is then investigated and determined if it has merit to be forwarded to the Commission. If it has merit, a response is gathered from the public entity involved and paperwork from both sides is then sent to the Open Meetings Commission. The Commission reviews the complaint, holds a hearing in which oral presentations are delivered or written evidence considered, and makes a resolution. The Commission then circulates an opinion amongst its members and publishes the opinion on the South Dakota Attorney General's website.

Because this research is concerned with evaluating the process of the Open Meetings Commission, the actual date of violation is not considered in data analysis. Rather, the process is broken down into four sections: 1) the number of days between when a state's attorney files an official complaint and when the Open Meetings Commission receives that complaint; 2) the number of days between when the Open Meetings Commission receives an official complaint and when a public hearing or deliberation is held; 3) the number of days between when a public hearing is held and when a resolution is issued by the Commission; and 4) the total number of days between when a state's attorney files an official complaint and when the resolution is issued by the Open Meetings Commission. These dates are not averaged because the wide variance would provide a distorted depiction of how long it actually takes the Commission to resolve a complaint.

### **Number of Days from Notarized Complaint to Commission**

The first set of data concerns the number of days between when a state's attorney files an official complaint and when the Open Meetings Commission receives that complaint. This

information is important because it identifies if there are any significant time delays that are caused by the local state's attorney. Because there are no legal time constraints for state's attorneys to refer a complaint to the Open Meetings Commission, they can hinder the process that citizens and media must follow to complain about open meeting violations. In seven of the 27 complaints, complaints were forwarded to the Open Meetings Commission on the same day they were officially filed. Six complaints were forwarded within a week or less, seven were forwarded in less than a month, three were forwarded in less than two months, and four were forwarded in less than seven months.

Overall, most state's attorneys forward the official complaint within a month of its notarization (20 of the 27 complaints). However, the length of time it took for several complaints to be officially filed can be significant— in one complaint, it took up to 1,695 days, or nearly five years, for a citizen complaint to be officially filed and then forwarded to the Open Meetings Commission <sup>2</sup>(“In the Matter of Open Meetings Complaint 10-01, Groton Area School District”). Two other complaints regarding the Lawrence County Commission and the Roberts County Commission took 196 days and 204 days, respectively, for the state's attorney to forward the notarized complaint. While most state's attorneys are forwarding the complaints in a timely matter, those instances in which there are inordinate delays clearly demonstrate a need for time limits for public bodies to submit evidence and state's attorneys to file complaints.

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<sup>2</sup> Although it took 1,695 days from the time the citizen complained to the time it was officially filed, the state's attorney did forward the notarized complaint on the same day it was officially signed under oath.

### **Number of Days from Commission to Hearing/Deliberations**

The second set of data concerns the number of days between when the Open Meetings Commission receives a complaint and when a hearing or deliberation is held. During a hearing, witnesses present evidence and/or members of the Commission consider written testimony. This testimony or written evidence is important in determining whether the public body has violated South Dakota's open meeting law and whether a public reprimand will be issued.

This information is helpful because it demonstrates if there is a significant time gap from when the Commission receives the notarized complaint and when it chooses to have a hearing. Out of the 27 cases, it took less than one month for one complaint, less than two months for four complaints, less than four months for seven complaints, less than six months for 11 complaints, less than nine months for three complaints, and more than a year for one complaint.<sup>3</sup> Most complaints take less than nine months to be discussed in a hearing or deliberation. This appears to be one of the primary delays in the process. Part of this is because members of the Open Meetings Commission tend to meet four times a year during training sessions and state bar conventions (Best, Personal Interview, Feb. 4, 2011). Assistant Attorney General Best, who assists the Commission in its functioning, says the low number of complaints each year results in more infrequent meetings in which the Commission may tackle several complaints at once for efficiency. However, this is proving to be a significant delay in the process citizens and media must go through to get their open meeting violation allegations addressed and resolved.

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<sup>3</sup> See appendix H



### **Number of Days from Hearing/Deliberations to Resolution**

The third set of data concerns the number of days between when the Open Meetings Commission holds an oral hearing or considers written material and when a resolution is publicly issued. This data provides information that demonstrates how long it takes the Commission to issue a resolution in each case. The length of time between hearing and resolution varies greatly, from same-day resolutions to decisions that take up to 815 days, or more than two years.

Out of the 27 complaints, it took less than a week for three complaints, less than two months for two complaints, less than six months for eight complaints, less than a year for eight complaints, less than two years for four complaints, and more than three years for two complaints.<sup>4</sup> This process has been improved somewhat over the course of the Commission's history, according to Best. When the Commission first began, it waited until the next meeting before approving a decision. Now, the Commission makes an oral ruling at the end of the presentation instead of circulating an opinion amongst Commission members in between meetings. This change in procedure has helped to streamline the process and result in more prompt resolutions, according to Best (Personal Interview, Feb. 4, 2011).

### **Total Number of Days from Notarized Complaint to Resolution**

The last set of data concerns the number of days between when the state's attorney files a notarized complaint and when the Open Meetings Commission issues a resolution. These data provides information that illustrates the amount of time the process can take from

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<sup>4</sup> See appendix I

beginning to end. The quickest turnaround in the Commission's 27-decision history occurred in the second complaint against the Melrose Township Board of Supervisors (reprimanded Dec. 31, 2006), which took 100 days from the time of the notarized complaint to the resolution issued by the Commission.<sup>5</sup> In contrast, the complaint against the Roberts County Commission (reprimand issued Aug. 24, 2009) took 1,469 days, or more than four years, to be completely resolved.

Out of the 27 complaints, six complaints were resolved in less than six months, eight complaints were resolved in less than one year, seven complaints were resolved in less than two years, one complaint was resolved in less than three years, and three complaints took more than four years to resolve.<sup>6</sup>

These data show that there are significant delays in the process that are limiting its success. Open government advocates in the state have identified the amount of time the process takes as a substantial concern they have with the system. These concerns and possible solutions will be discussed in the first section of research question five.

### **Research Question 5**

The fifth research question asks: How do advocates of open government and other experts evaluate the performance of South Dakota in the implementation of open meetings laws?

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<sup>5</sup> It should be noted that a complaint against the Brown County Commission (public reprimand issued Nov. 28, 2007) forwarded by the Brown County State's Attorney took 57 days to resolve; however, the complaint took nearly two years to be successfully filed as a complaint. Therefore, it is not considered as the quickest turnaround in the history of the Commission.

<sup>6</sup> See appendix J

There are four areas that have been identified by open government advocates interviewed for this study as potential roadblocks for the Commission. These areas include 1) promptness of the Commission's decisions; 2) efficacy of the public reprimand; 3) absence of an archival system during executive sessions; and 4) lack of diversity in the Commission. Advocates of open government and other experts also pinpoint education and increased awareness of South Dakota's open meetings law as primary accomplishments of the Open Meetings Commission.

### **Promptness of Commission Decisions**

A major source of contention among critics of the Open Meetings Commission is the lack of prompt resolutions for open meetings complaints. The process can take months, even years, to complete. Part of this problem can be attributed to a lack of time limits set upon state's attorneys and members of the Open Meetings Commission. Although guidelines on the Attorney General's website recommends requesting a response from public agencies within 15 days, the agency can seek additional time and "an extension will be freely granted by the Commission Chair if such time is appropriate in order to allow for an adequate response" ("Frequently Asked Questions," para. 3). In the *Groton Area School District* case, the state's attorney took nearly five years to file an official complaint and forward it to the Open Meetings Commission. In situations such as this, Haraldson notes, by the time a decision or reprimand is delivered, citizens may have already lost interest in the issue and public officials who served on the violating board may have completed their term, neutering the effectiveness of the reprimand. Even more alarming, "If it's a burning public issue that comes up and [the public body] just decide[s] to have a closed meeting, you won't get it

resolved in time before that issue has been decided and moved on” (Haraldson, Personal Interview, Jan. 28, 2011).

Another major factor that impacts the promptness of resolutions can be traced back to the composition of the Commission. The Open Meetings Commission is comprised of five state’s attorneys located in different areas of the state. As a result of their geographic disparity, members of the Commission try to meet during times they would already be together, such as training conventions and the state bar convention (Best, Personal Interview, Feb. 4, 2011). However, this greatly affects the promptness of the Commission’s decision-making process. This indicates that the subject of open government is perhaps not taken as seriously as classical liberalism theory suggests it should be. Classical liberalism theory supports the idea that “the only legitimate purpose of government is to protect [the rights of the people]” (Goodman, 2005, p. 1). Under this theoretical framework, government has no other function except to serve its people. If the Commission truly wants to serve its people and ensure they have proper access to their government as the law requires, it should make resolving open meeting complaints in a timely manner a high priority. As Breck argues, “there is no reason it should take up to five years for the state’s attorney to make a decision on a simple thing [such as] whether an agenda was visible or not. The law is not that complicated” (Personal Interview, March 19). The apparent ambivalence of the state’s attorneys who serve on the Commission regarding the speediness of the process indicates that they do not consider the issue of open government to be as important as other crimes that they make a point to prosecute. The lack of immediate action in resolving a complaint makes

it difficult for citizens and media to hold government accountable for its failures as they should, in accordance with classical liberalism theory.

Others argue that while the promptness is a disadvantage of the Commission's process, it does not present a barrier to its effectiveness. Foley, who served as the Commission's first chairperson, asserts that the most important function of the Commission is not issuing a reprimand but providing education. Foley contends that "as to one item, and the resolution [of] that one item, that might not be timely. But whenever the [Commission's] opinion comes out, it provides guidance for all of those that come in the future" (Personal Interview, Feb. 11, 2011). Assistant Attorney General Best suggests that although the delays can cause the issues to lose importance, they also result in more negative publicity for public officials who have violated the law - once when the press publishes the incident, and another when a resolution is made. She argues that the delays can make "public officials feel like they've been hit twice," which could provide a more powerful incentive to avoid violating the law in the future (Personal Interview, Feb. 4, 2011). Best contends that she is "not dissatisfied with the process," and suggests that the process works well for the number of complaints that are currently being filed each year. She says,

if we had 100 complaints a year, we'd have to come up with something different . . . some of these years, we're only having two or three complaints. To me, I can't justify asking this group to meet for each complaint. But if we had 100 of them, I think we'd have to be looking at doing something to have them meet more often. (Personal Interview, Feb. 4, 2011)

This idea that citizens should be put on hold when trying to hold its government accountable for its actions is counterproductive to the goals and function of government, as outlined by participatory democratic theory and classical liberalism theory. If the best way to ensure good

government is to have citizens and media involved, as participatory democratic theory and social responsibility theory suggest, then policymakers should avoid giving these stakeholders a reason to not participate. Groton resident Betty Breck complains that the Open Meetings Commission process is “slow, complicated, [and] intimidating” (Personal Interview, March 19). If a citizen or member of the media knows that their complaint might not be resolved for years, it could discourage them from filing a complaint, thus preventing the advancement of openness in the state and the achievement of good government. Journalists and citizens interviewed for this study make it clear that change is needed if the Open Meetings Commission wants to achieve public participation in its process and serve as a means for citizens and media to hold government accountable. Therefore, the Commission should reconsider its current system and evaluate whether the delays that occur as a result of the process are interfering with the public’s ability to have timely resolutions to their complaints.

### **Public Reprimand**

The public reprimand remains a source of debate amongst those involved in the open government movement. Journalists tend to favor a stronger punishment for violators, particularly repeat offenders. Others, particularly legislators and those who represent governmental entities, fear a harsher penalty would discourage citizen participation and unfairly penalize those who volunteer to serve their community. Prior to the inception of the Open Meetings Commission in 2004, there was no realistic enforcement mechanism because local state’s attorneys considered the criminal penalty too severe (Long, Personal interview, Feb. 11, 2011). Former Attorney General Long, who served as a state’s attorney in South Dakota for 18 years, explains that because most compliance issues were related to school

boards, city councils, and county commissions, state's attorneys were reluctant to prosecute unintentional open meeting violations as a Class 2 misdemeanor because "almost without exception, the people who serve on those boards are responsible members of the community who are [serving] not to make money but out of a sense of civic obligation, out of a sense of responsibility" (Long, Personal Interview, Feb. 11, 2011). When the Open Government Task Force tackled the issue in 2003, the public reprimand was a compromise between those in favor of a stronger penalty and those concerned with protecting public servants from punishment (Long, Personal Interview, Feb. 11, 2011).

Foley, who served as the Commission's first chairperson, argues that the public reprimand maintains its effectiveness because South Dakota's media make it a priority to publish public reprimands, and public officials want to avoid public criticism. He suggests that the public reprimand is effective in a rural state like South Dakota, whose media tend to publicize low level criminal offenses. However, Foley cautions other states that "[the public reprimand] is only effective if it's reported in the press" (Personal Interview, Feb. 11, 2011). Both Long and Foley maintain that the embarrassment of a public reprimand is sufficient to deter public officials from intentionally violating the open meetings law. Long points to the hearing process as evidence of the efficacy of the public reprimand. He asserts,

even though the worst that can happen to you is a public scolding, you'll end up with agencies or boards who hire lawyers and spend a lot of money to make their case in front of the Commission so they don't get this headline in the paper saying, 'These people violated the open meetings law.' If the sanction doesn't have any impact, why in God's name would you spend three or four grand on a lawyer to avoid it? (Personal Interview, Feb. 11, 2011)

However, Haraldson and Bordewyk suggest that the public reprimand may not be enough to ensure that public officials abide by South Dakota's open meetings law, which according to classical republican theory, is crucial in preserving the liberty of citizens. Bordewyk argues that the public reprimand serves as too weak an enforcement mechanism for the open meetings law. He contends that concerns about discouraging citizens from serving in local government are "overblown" and "a smokescreen put up ... [to avoid] a stronger penalty provision [for] a public board" (Personal Interview, Feb. 4, 2011). Bordewyk questions whether the public reprimand still maintains the same effect today as it did six years ago when the Commission was formed, and says he believe the punishment has lost some of its "toughness," making it less effective.

Haraldson says the public reprimand penalty is "probably not as effective as [the penalty of ] some other states, but it's better than nothing" (Personal Interview, Jan. 28, 2011). She also acknowledges that the purpose of the Open Meetings Commission was not to deliver punishment, as "it was not our belief that there was widespread corruption or illegal practices going on." Rather, the goal was to achieve "education and voluntary compliance" from public officials, she said. While the solution of a public reprimand delivered by the Open Meetings Commission is "not perfect," she emphasizes that the new system is "100 percent better than nothing" for citizens and journalists (Jan. 28, 2011).

Both Haraldson and Bordewyk make strong arguments toward modifying current disciplinary methods, suggesting that its six-year tenure has given the Commission ample time to create a body of decisions that allows officials to consult when necessary. Haraldson asserts that reconsideration of the effectiveness of a public reprimand may be necessary as



expectations of public officials rise due to the educative process delivered by the Open Meetings Commission (Personal Interview, Jan. 28, 2011).

### **Absence of Sealed Records**

South Dakota, unlike many other states, including neighboring states like Iowa, North Dakota, and Minnesota, does not require minutes to be kept for closed executive sessions. Iowa requires closed sessions to be tape recorded, and the minutes and tape recording of the closed session must be sealed and archived for at least one year (“Open Meetings Law Iowa Code,” 2010, p. 14). North Dakota requires closed sessions to be recorded electronically and retained for at least six months (“Chapter 44-04,” p. 16). Minnesota requires tape recording of closed sessions that deal with property sales, and that recording “must be preserved for eight years after the date of the meeting and made available to the public after all property discussed at the meeting has been purchased or sold or the governing body has abandoned the purchase or sale” (“Minnesota Open Meetings Law,” 2008, p. 10). These minutes are not considered public records, and are not available to the public (“Open Meetings Law Iowa Code,” 2010, p. 11).

Minutes and electronic recordings of closed sessions are helpful because they can be used for private administrative review to determine whether a violation of the open meetings law has occurred. In the matter of *South Dakotans for Open Government v. the South Dakota Science and Technology Authority (The “Authority”)*, the complainant argues that the Authority went into “executive session on multiple occasions without stating a proper reason for such executive sessions and that, while in executive session, it discussed matters and made decisions that were not authorized to be made in executive session” (Open Meetings

Commission, 2007, p. 1). In the Commission's findings, it notes that the Commission does not have the tools to determine "whether what really happened at the meeting was accurately reflected in the minutes submitted to us or whether the version submitted by SDOG more accurately reflects the true course of events" (p. 3). In situations such as this, sealed, archived records would be helpful to both advocates of open government and to the public entities themselves because evidence could prove whether a violation had occurred or not. According to former Attorney General Long, the Government Openness Task Force debated the idea of mandating recorded executive sessions at length, but could not reach a consensus from governmental entities and members of the media; therefore, it was not drafted into the task force's legislative proposal (Personal Interview, Feb. 11, 2011). Thus, sealed archived records both promote openness in government and protect public entities against false accusations of illegal executive sessions.

Most recently, a bill, HB-1117, was proposed in the South Dakota House of Representatives, which stated that

any county, municipality, school district, or other political subdivision of the state may keep minutes while meeting in executive session. If minutes are taken and kept at any executive session of a political subdivision, the minutes are not a public record. However, the minutes may be reviewed by any member of the governing body of such political subdivision. (State of South Dakota Eighty-Sixth Session Legislative Assembly, 2011)

While this bill clarified whether public bodies are allowed to keep minutes during executive session, it did not clarify whether electronic recordings or allowed, and more importantly, did not mandate the use of sealed archived records. A stronger open meetings law that required minutes and/or electronic recording would allow the Open Meetings Commission to make

more informed decisions regarding open meeting violations. Although HB-1117 sought to clarify how public entities should conduct executive sessions, it was ultimately deferred and not heard again in the 2011 legislative session (South Dakota Legislature).

### **Lack of Commission Diversity**

The composition of the Open Meetings Commission, which currently requires five state's attorneys, selected from across the state by the Attorney General, was deliberately constructed to include law-trained professionals who could provide a legal analysis to facts applied to a criminal statute (Foley, Personal Interview, Feb. 11, 2011). According to Foley, who served as the Commission's first chairman, "This isn't a matter of just simply whether someone thinks something is good or bad. It requires a legal analysis. And if we have outside members that are not law-trained, we might end up with decisions that are unnecessarily split" (Personal Interview, Feb. 11, 2011). Foley asserts that members of the Commission approach allegations of violations with the mindset of a prosecutor, whose job is to "do justice" (Personal Interview, Feb. 11, 2011). Long, who came up with the idea of the Open Meetings Commission, maintains that he does not believe the Commission is broken, and it does not "need to be fixed" (Personal Interview, Feb. 11, 2011). He goes on to say he thinks the Commission "has done really, really well," and that he does not think "there are a lot of people who will say that it's not working," though he acknowledges that more prompt decisions would enhance the process.

Foley is correct in his assertion that a member of the Open Meetings Commission must be well-versed in South Dakota's open meetings law. However, once a complaint is referred to the Open Meetings Commission, the violation can no longer be prosecuted as a

Class 2 misdemeanor (“Conducting the public’s business in public”). Because the objective of the Commission is to either issue a public reprimand or dismiss an alleged violation, it appears that the primary function is not intended to be prosecutorial but educative. The function of the Commission is designed to yield better government processes and to educate public servants; therefore, it makes sense to include a broader representation that includes members of the public. The open meetings law is intended to be understood, followed, and accessed by non-lawyers; thus, it may be beneficial to add perspective to the Commission with others such as members of the media, private citizens, and other open government advocates (Bordewyk, Personal Interview, Feb. 4, 2011). Additionally, journalists could provide unique perspective as stakeholders who routinely rely on freedom of information laws to fulfill the duties laid out under the social responsibility theoretical framework; that is, to provide a truthful account of the day’s events, to serve as a forum, and to provide “full access to the day’s intelligence” (Gunaratne & Hasim, 1996, p. 104). Journalists have an inherent need for openness in government and as such frequently depend on the open meetings law. Therefore, they could be beneficial resources not only in understanding the routine violations brought to the Commission, but also in providing some sense of urgency that may be lacking in the Commission’s attitude toward resolving complaints.

A diversified Commission could also alleviate concerns from citizens like Groton resident Betty Breck, who suggests that the process of the Open Meetings Commission, in which citizens must submit a verified complaint to their local state’s attorney and then present testimony to a panel of state’s attorneys, is “complicated and intimidating” for those with little experience in legal matters (Breck, Personal Interview, March 19). By diversifying

the Commission, citizens may feel less intimidation and be more likely to participate in the process, which according to participatory democratic theory would result in better government. If the structure of the Commission was to be amended, the analysis and resolution would still have to be rooted in South Dakota's open meetings law. However, a number of precedents have been set in the past six years that a more diverse Commission could use to decide subsequent cases.

Furthermore, a Commission that does not require the time of five state's attorneys - officials who are incredibly busy representing the state in criminal prosecutions that often take precedence over other duties - may serve as a solution to provide more prompt resolutions (Haraldson, Personal Interview, Jan. 28, 2011). Foley also acknowledges that the demanding schedule of a state's attorney can limit their ability to process complaints and issue resolutions in a timely manner. He contends that "the Open Meetings Commission is a group of five prosecutors ... and when you've got an Open Meetings Commission opinion to work on, and somebody stabs somebody else that day, that gets pushed into the pile and you work on the stabbing" (Personal Interview, Feb. 11, 2011). While the use of state's attorneys on the Commission has served a distinctively valuable role in advancing the open government movement in South Dakota, it may be beneficial for policymakers to reconsider the composition of the Commission and evaluate whether a more diverse Commission could better serve the public.

### **Educative Function**

Open government advocates and other experts agree the most beneficial aspect of the Open Meetings Commission is its educative function to members of public bodies. Experts

including Bordewyk, Haraldson, and Foley maintain that most violations of the open meetings law do not appear intentional but are likely caused by a misunderstanding of the law. Bordewyk suggests that many violations are caused by an overly-broad interpretation of the law, in which government officials reasoned that if their attorney was present, the meeting automatically had to go into executive session, which is not in accordance with the language of the law (Personal Interview, Feb. 4, 2011). The development of the Open Meetings Commission provided a solution for this, because for the first time there were definitive answers on what constituted an open meetings violation and what did not. This information gave public bodies guidance when trying to determine how to conduct meetings and whether they are complying with the open meetings law (Bordewyk, Personal Interview, Feb. 4, 2011). Haraldson contends that the education provided by the resolutions of the Open Meetings Commission has resulted in change in openness in government in South Dakota; namely, that dialogue has been initiated regarding the importance of openness in government. She suggests that “the more people become educated about the whole concept [of openness in government], the less willing they are to try to hide behind old habits or try to do things out of the public eye” (Personal Interview, Jan. 28, 2011). The education results in not only better comprehension of the law, but also an understanding of how openness in government jointly benefits citizens and public officials, according to Haraldson. This concept of open government as mutually beneficial to citizens and public officials can be seen in the participatory democratic theory, which argues that government functions more effectively when citizens participate and offer input on decisions.

Additionally, Assistant Attorney General Diane Best notes that the compilation of the decisions from the Open Meetings Commission helps the Attorney General's office determine at which level of government problems exist and which public body to educate (Personal Interview, Feb. 4, 2011). The South Dakota Office of the Attorney General has also observed a significant increase in inquiries from public officials and lawyers seeking answers and advice regarding open meeting conduct to avoid receiving a public reprimand (Long, Personal Interview, Feb. 4, 2011). And despite Breck's opinion that the Commission suffers from serious flaws, she acknowledges that since its implementation her local governmental bodies are "much more aware of the open meetings requirements than they were and they are definitely taking steps to abide by them" (Personal Interview, March 19, 2011). Though improvements could be made to enhance the functioning of the Open Meetings Commission, open government advocates seem to agree that it has played a pivotal role in educating public servants and citizens on the requirements of the South Dakota open meetings law.

Not only has the Commission been beneficial in creating a body of decisions that was being built, but the publication of reprimands through South Dakota media has also focused attention on the open government movement and made citizens more aware of avenues available to them for bringing attention to violators of the open meetings law. This awareness has encouraged civic participation in government, which results in a marketplace of ideas that produces the best forms of government (Bordewyk, Personal Interview, Feb. 4, 2011). Assistant Attorney General Best concurs, noting that, "The more citizens are involved in government, the more government gets it right" (Personal Interview, Feb. 4, 2011). And open

government advocates champion the importance of transparency because they believe it is an integral function of democracy. As Haraldson asserts,

It's easier and more convenient to not have to do things in the public and explain everything. It's faster, it's more efficient, nobody's feelings get hurt, and nobody gets mad. And that's probably true, but nobody ever said democracy was going to be the most efficient form of government, or the most expedient form of government . . . Democracy is cluttered and clumsy and slow, but hopefully, in the end, it is stronger because people realize that what's being done [is] for the public good. (Personal Interview, Jan. 28, 2011)

The strength of public participation in government is reliant on the public's right to know, and despite its flaws - particularly the significant delays in the process - the South Dakota Open Meetings Commission has dramatically increased the awareness of South Dakota citizens regarding the state's open meetings law and is leading it in the right direction for greater transparency in its state and local government.

The development and composition of the Open Meetings Commission is rooted in republican theory and the idea of representative government. The appointment of a group of state's attorneys provides representation for citizens and preserves their liberty through the enforcement of the open meetings law without forcing the majority of citizens to be involved in the political process. However, although the makeup and procedures of the Commission reflect republican theory, citizen participation in the process, as characterized by participatory democratic theory, enhances its success. Citizens have a right to know what is going on in their government, as demonstrated through classical liberalism theory, and through interaction with the Open Meetings Commission, they have expanded their knowledge of South Dakota's open meetings law and learned the means in which they can hold their government responsible for its actions. Additionally, the Open Meetings



Commission provides an opportunity for citizens to participate in the political process and help ensure good government. Before the creation of the Commission, citizens had no realistic way to enforce open meetings law because of an excessively-severe criminal penalty. Now, citizen and media complaints are not only heard but also acted upon. The Open Meetings Commission could not function without the participation of those media and citizens who value the importance of serving as watchdogs for government actions. Classical participatory democratic theorists Jeremy Bentham and James Mill assert that the participation of citizens and the press is crucial to achieving good government by serving as a “check upon the conduct of the ruling few” (Bentham, 1843, Vol. 2, p. 279). Media in South Dakota can provide this check by not only filing complaints with the Open Meetings Commission when they are wrongfully excluded from open meetings, but also publicizing the public reprimands when issued. Furthermore, as Barrett suggests, citizens can only effectively assess government actions if they are first educated about the decision-making process, and the only way to be informed is through openness in government (1988, p. 1195). The development of the Open Meetings Commission, which encourages openness in public meetings through a realistically enforceable penalty, increases citizen involvement in the decision-making process. By making public bodies aware of the requirements of the open meetings law, public bodies have become more compliant with posting notices and agendas and avoiding illegal executive sessions. All of these actions increase citizen and media participation and trust in the political process and in turn help governmental bodies function more effectively, resulting in better government.

## Chapter 5. CONCLUSIONS

The purpose of this study is to examine the effectiveness of the South Dakota Open Meetings Commission, provide recommendations to enhance the functioning of the Commission, and evaluate the role the Commission plays in improving transparency in South Dakota. Its practical implications are supported by its theoretical frameworks, namely 1) participatory democratic theory, which emphasizes the importance of citizen participation in the decision-making process in a political system; 2) classical republican theory, which purports that a representative form of government provides the best form of government, and that the media play an important role in serving as a check on those representatives; 3) classical liberalism theory, which offers the idea that the only function of government is to serve its people; 4) press freedom theory, which contends that a free press is crucial to a democratic society; and 5) social responsibility theory, which posits that media have certain responsibilities to the society they serve . These theories work together to demonstrate the importance of openness in government, and to suggest the role media and citizens should play in government.

To arrive at these conclusions, in-depth interviews were performed with the people of importance in the state's open government movement and used to gather historical perspective about the formation of the Commission, as well as opinions regarding effectiveness of the Commission and the level of transparency that exists in South Dakota. Following each in-depth interview, audio recordings were transcribed and analyzed to detect common responses, such as barriers the Open Meetings Commission faces, how the current system could be adjusted and whether other states should adopt South Dakota's model.

Open government advocates from a broad spectrum of professions agree that the formation of the Open Meetings Commission was a significant step forward in the right direction for transparency and openness in South Dakota. Before the Commission was developed, journalists and citizens had few options to pursue when a violation of the open meetings law occurred. The severity of the Class 2 misdemeanor for public servants hindered the likelihood of punishing and in turn correcting and educating violators of South Dakota's open meetings law. Additionally, the lack of enforcement also meant there were no set precedents that public entities could look to for guidance when determining how to conduct their meetings.

However, some real problems exist that limit its success, and also point to a larger problem that still exists in South Dakota. Some of the problems could be remedied through new policies or procedures. For example, the system could be faster by enforcing time limits in each step of the Commission process. Similarly, the process would be more effective if South Dakota implemented a law that mandates the use of an archival system during executive session. Furthermore, it may be worthwhile to revisit the idea of the public reprimand to determine whether it has lost any of its effectiveness since the formation of the Open Meetings Commission. However, it is not just the processes of government that need to be evaluated. The findings of this study, through interviews of open government advocates, suggest that open government may still not be considered as high a priority as it should be, if the theoretical assumption that open government creates good government is held to be true. This demands further study into why South Dakota society does not place a higher value on openness in government, and what steps can be taken to reverse this trend.

### **Implications of Findings to Theory**

While this research is primarily interpretive, it does lend support for both participatory democratic theory and classical republican theory, and suggests that a balance between the two can be found to achieve the best government. Classical republican theory asserts that a representative government is the best way to promote the public good. Participatory democratic theory contends that individual participation is critical to creating good government. The findings of this study demonstrate the importance of public participation, both through media and citizenry, in nurturing good government and keeping government officials accountable for their actions. American government is designed to function as a representative government, yet it functions best when there is also civic participation. As evidenced in interviews with open government advocates and other experts in South Dakota, citizen and media participation in government has been crucial in advancing openness in government in South Dakota and leading to improved adherence to South Dakota's open meetings law. These findings demonstrate that a republican government is useful in creating a society where those who are best at government serve their fellow citizens through representation. At the same time, the findings suggest that those who do not serve as representatives can still fulfill a vital function and participate in government by serving as a check to keep government accountable for its actions.

### **Implications of Findings to Open Government in South Dakota**

This study offers data and analysis that allows citizens and government officials to better understand the South Dakota Open Meetings Commission process and learn about the improvements in compliance with the open meetings law that have occurred as a result of the

Commission. It also offers an evaluation of the process, and identifies several significant challenges that the Commission faces, particularly concerning promptness of resolutions. Open government in South Dakota, specifically for open meetings, has improved since the implementation of the Commission; however, room for improvement exists. The results of this study could help identify those problems for open government advocates and policymakers to aid in their efforts to push for transparency in government. This study also intends to bring awareness to the South Dakota open government movement and hopefully initiate dialogue about ways the process could be enhanced.

### **Study Limitations**

The participants for this study all came from the state of South Dakota. While these participants were selected because of their knowledge of South Dakota and their association to the open government movement, additional participants from other states could have provided an outside perspective on transparency in South Dakota and insight into how other states handle open meetings law violations. A larger sample of participants would also have provided more perspective on opinions regarding openness in government and the effectiveness of the Open Meetings Commission. Additionally, more data could have been gathered from other states that would provide a better illustration of how South Dakota compares in terms of openness in government. This study provides some comparisons to other Midwestern states; however, examinations of open meeting laws in other parts of the country would provide valuable information that would distinguish South Dakota open meetings law and its model for processing complaints from other states. Furthermore, because no merit complaints filed by state's attorneys are considered criminal investigatory

files and are required to be kept confidential in accordance with SDL 23-5-11 and SDCL 1-27-1.5, public records of the complaints are not available. This limits the ability to examine no merit complaints and determine whether each complainant is receiving uniform treatment under the law and obtaining equal access to the Open Meetings Commission as complainants from other counties.

### **Suggestions for Future Research**

Future investigations could include a wider comparison across other states that would provide insight into South Dakota's level of openness. Comparing openness in government in specific geographic regions in the United States, such as the Midwest versus the East Coast, could provide useful data that would help illuminate where problems exist, or in which states openness thrives. Additionally, it would be interesting to investigate educative efforts from government entities and the judicial branch in each state to determine if compliance to open meeting laws improves in relation to the amount of training provided to local and state entities. For more South Dakota-specific research into openness in government, an examination of adherence to open records laws would provide a more complete understanding of transparency in South Dakota government.

## **APPENDIX A:**

### **IN-DEPTH INTERVIEW SEMI-STRUCTURED QUESTIONNAIRE**

#### **INTRODUCTION. Work/Associations**

- 1.) Where do you work? What are your responsibilities?
- 2.) Do you belong to any civic organizations (including, but not limited to, open government committees or organizations)?

#### **PART 1. Opinions Regarding Openness in Government**

- 1.) What are your personal beliefs regarding openness in government? Why do you feel this way? Why is it important?
- 2.) Do you believe public meetings should be open or closed? Do you believe there are any circumstances where it is OK to close a public meeting?
- 3.) Do you believe South Dakota has a good or bad track record for openness in government? Explain.
- 4.) Do you believe most South Dakotans regard their state as transparent or secretive?
- 5.) Who or what entities do you believe file the most open meeting complaints in the state?
- 6.) Who do you believe are the most common violators of open meeting laws?

#### **PART 2. Experience in Open Meetings**

- 1.) Have you ever experienced a situation where a meeting should have been open to the public but wasn't? If so, can you describe it?

- 2.) Have you ever filed an open meetings complaint in South Dakota? If so, where did you file it? Why did you decide to file a complaint? What was the process? Where there any challenges?

### **PART 3. Perceptions of Participation**

- 1.) Do you believe citizens should be involved in the democratic decision-making process? Why or why not? What are the benefits? Does participation ensure “good government”?
- 2.) Do you believe most citizens participate in this decision-making process? Why or why not?
- 3.) How do you think South Dakota citizens compare with other states with regard to their participation level?
- 4.) What are the benefits to public participation? What are the disadvantages?

### **PART 4. Perceptions Regarding the South Dakota Open Meetings Commission**

- 1.) How was the Open Meetings Commission developed? How does it function? How did this new process change it from how it functioned before the development of the Commission?
- 2.) Do you think that most South Dakotans are aware that an open meetings Commission exists?
- 3.) Do you consider the South Dakota Open Meetings Commission effective? Why or why not? What are some of the biggest barriers to its success?



- 4.) Has the Open Meetings Commission improved openness or knowledge of open meetings laws?
- 5.) Do you think that most South Dakotans consider the Open Meetings Commission effective?
- 6.) Is it helpful that the Open Meetings Commission can reprimand public bodies, even if it can't bring criminal charges? How could the process be improved?
- 7.) Do you think other states should also have an open meetings commission?
- 8.) Do you believe the Open Meetings Commission offers a timely resolution to open meetings complaints?
- 9.) What steps do you think need to be taken to improve South Dakota's openness in government?

**APPENDIX B:****DIALOGUE WITH PARTICIPANTS**

Dear \_\_\_\_\_,

My name is Michelle Rydell, and I am a graduate student in the Greenlee School of Journalism and Communication at Iowa State University. For my Master's thesis project, I am studying open government in South Dakota; specifically, the Open Meetings Commission formed in 2004. I am seeking to conduct interviews with people of importance in South Dakota's open government movement and those actively involved in the formation of the South Dakota Open Meetings Commission. I am requesting an interview with you to discuss the level of transparency that exists in the South Dakota state government. Please respond no later than \_\_\_\_\_, indicating if you wish to participate in this study.

Please contact me if you have any questions regarding the study.

Sincerely,

Michelle L. Rydell

[mlrydell@gmail.com](mailto:mlrydell@gmail.com)

605-670-3537

## APPENDIX C:

## INSTITUTIONAL REVIEW BOARD APPROVAL

IOWA STATE UNIVERSITY  
OF SCIENCE AND TECHNOLOGY

Institutional Review Board  
Office for Responsible Research  
Vice President for Research  
1138 Pearson Hall  
Ames, Iowa 50011-2207  
515 294-4566  
FAX 515 294-4267

**Date:** 1/12/2011

**To:** Michelle Lea Rydell  
1311 Mayfield Dr #102  
Ames, IA 50014

**CC:** Dr. Barbara Mack  
213 Hamilton Hall

**From:** Office for Responsible Research

**Title:** Transparency in the Balance: A Critical Analysis of the Implementation of Open Meetings Laws in the State of South Dakota.

**IRB Num:** 10-556

**Submission Type:** New

**Exemption Date:** 1/12/2011

The project referenced above has undergone review by the Institutional Review Board (IRB) and has been declared exempt from the requirements of the human subject protections regulations as described in 45 CFR 46.101(b). The IRB determination of exemption means that:

- You do not need to submit an application for annual continuing review.
- You must carry out the research as proposed in the IRB application, including obtaining and documenting informed consent if you have stated in your application that you will do so or if required by the IRB.
- Any modification of this research should be submitted to the IRB on a Continuing Review and/or Modification form, prior to making any changes, to determine if the project still meets the federal criteria for exemption. If it is determined that exemption is no longer warranted, then an IRB proposal will need to be submitted and approved before proceeding with data collection.

Please be sure to use only the approved study materials in your research, including the recruitment materials and informed consent documents that have the IRB approval stamp.

Please note that you must submit all research involving human participants for review by the IRB. Only the IRB may make the determination of exemption, even if you conduct a study in the future that is exactly like this study.

## **APPENDIX D:**

### **INFORMED CONSENT DOCUMENT**

**Title of Study:**        **Transparency in the balance: A critical analysis of the implementation of open meetings laws in the state of South Dakota**

**Investigators:**        **Michelle Rydell, Barbara Mack**

This is a research study. Please take your time in deciding if you would like to participate. Please feel free to ask questions at any time.

#### **INTRODUCTION**

The purpose of this study is to learn more about transparency in government in the state of South Dakota, specifically concerning open meeting laws and the South Dakota Open Meetings Commission. You are being invited to participate in this study because you are recognized as an open government advocate in South Dakota.

#### **DESCRIPTION OF PROCEDURES**

If you agree to participate, you will be asked to discuss your knowledge, experience, and opinion of open meetings laws in the state of South Dakota. Questions will range from your work associations, opinions regarding openness in government, personal experience regarding open meetings, perceptions of citizen participation in government, and perceptions regarding the South Dakota Open Meetings Commission.

Audio tapes will be used to record participation.

Your participation will last for approximately 1 to 2 hours for an in-depth interview. Subsequent visits may be requested if additional information is needed. Participants may refuse to participate in any subsequent visits.

#### **RISKS**

There are no foreseeable risks at this time from participating in this study.

#### **BENEFITS**

If you decide to participate in this study there may be no direct benefit to you. It is hoped that the information gained in this study will benefit society by providing valuable information about open meetings laws in the state of South Dakota and the effectiveness of the Open Meetings Commission. The results of this study will benefit all South Dakota citizens because it will enable them to understand the openness, or lack thereof, of their government, and perhaps inspire them to make transformative changes in government. This study might also benefit other states by offering evidence and analysis of the effectiveness of the Open Meetings Commission, thereby providing a model for them to either follow or avoid.

### **COSTS AND COMPENSATION**

You will not have any costs from participating in this study. You will not be compensated for participating in this study.

### **PARTICIPANT RIGHTS**

Your participation in this study is completely voluntary and you may refuse to participate or leave the study at any time. If you decide to not participate in the study or leave the study early, it will not result in any penalty or loss of benefits to which you are otherwise entitled.

### **CONFIDENTIALITY**

Interviews will be tape-recorded and transcribed by principal investigator Michelle Rydell, and the contents of those interviews may be incorporated verbatim or in paraphrase in a thesis, in other scholarly work prepared by her, or in publications for a professional or lay audience. "Publication" may include publication either in print, or via any electronic medium, including television, the Internet, or radio. Direct quotes from recorded interviews may be used by Michelle Rydell, and quotes will be attributed to the source using name, title, and any other relevant background information.

### **QUESTIONS OR PROBLEMS**

You are encouraged to ask questions at any time during this study.

- For further information about the study contact Barbara Mack (515-294-0498).
- If you have any questions about the rights of research subjects or research-related injury, please contact the IRB Administrator, (515) 294-4566, [IRB@iastate.edu](mailto:IRB@iastate.edu), or Director, (515) 294-3115, Office for Responsible Research, Iowa State University, Ames, Iowa 50011.

\*\*\*\*\*  
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### **PARTICIPANT SIGNATURE**

Your signature indicates that you voluntarily agree to participate in this study, that the study has been explained to you, that you have been given the time to read the document, and that your questions have been satisfactorily answered. You will receive a copy of the written informed consent prior to your participation in the study.

Participant's Name (printed) \_\_\_\_\_

\_\_\_\_\_  
(Participant's Signature)

\_\_\_\_\_  
(Date)

## APPENDIX E:

### SOUTH DAKOTA CODIFIED LAW 1.25.1 - 1.25.10

**1-25-1.** Official meetings open to the public--Exception--Teleconferences --Violation as misdemeanor. The official meetings of the state, its political subdivisions, and any public body of the state or its political subdivisions are open to the public unless a specific law is cited by the state, the political subdivision, or the public body to close the official meeting to the public. For the purposes of this section, a political subdivision or a public body of a political subdivision means any association, authority, board, commission, committee, council, task force, school district, county, city, town, township, or other agency of the state, which is created or appointed by statute, ordinance, or resolution and is vested with the authority to exercise any sovereign power derived from state law.

It is not an official meeting of one political subdivision or public body if its members provide information or attend the official meeting of another political subdivision or public body for which the notice requirements of § 1-25-1.1 have been met.

Any official meeting may be conducted by teleconference as defined in § 1-25-1.2. A teleconference may be used to conduct a hearing or take final disposition regarding an administrative rule pursuant to § 1-26-4. A member is deemed present if the member answers present to the roll call conducted by teleconference for the purpose of determining a quorum. Each vote at an official meeting held by teleconference shall be taken by roll call.

If the state, a political subdivision, or a public body conducts an official meeting by teleconference, the state, the political subdivision, or public body shall provide one or more places at which the public may listen to and participate in the teleconference meeting. The requirement to provide one or more places for the public to listen to the teleconference does not apply to an executive or closed meeting.

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; SL 2010, ch 9, § 2.

**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.

**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.

**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.

**1-25-4.** Repealed by SL 1996, ch 9, § 2.

**1-25-5.** Repealed by SL 1980, ch 24, § 12.

**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.

**1-25-6.1.** Duty of state's attorney on receipt of complaint alleging violation by board of county commissioners. If a complaint alleges a violation of this chapter by a board of county commissioners, 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. The attorney general shall use the information for statistical purposes and may publish abstracts of the information as provided by § 1-25-6;
- (3) Send the complaint and any investigation file to the South Dakota Open Meetings Commission for further action; or
- (4) Refer the complaint to another state's attorney or to the attorney general for action pursuant to § 1-25-6.

**Source:** SL 2010, ch 6, § 1.

**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 or the attorney general, the South Dakota Open Meetings Commission shall examine the complaint and investigatory file submitted by the state's attorney or the attorney general 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 or the attorney general and any written responses, the commission shall issue a written determination on whether the conduct violates this chapter, including a statement of the reasons therefore 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; SL 2010, ch 6, § 2.

**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.

**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.

**1-25-10.** State Investment Council may discuss certain matters in executive session. The State Investment Council, in executive session, may discuss and consider any document or information exempt from public disclosure requirements under the provisions of subdivision 1-27-1.6(5).

**Source:** SL 2010, ch 7, § 1.

**APPENDIX F:****SOUTH DAKOTA CODIFIED LAW 23-5-11 and 1-27-1.5**

**23-5-11.** Confidential criminal justice information not subject to inspection--Exception. Confidential criminal justice information and criminal history information are specifically exempt from disclosure pursuant to §§ 1-27-1 to 1-27-1.15, inclusive, and may be withheld by the lawful custodian of the records. Information about calls for service revealing the date, time, and general location and general subject matter of the call is not confidential criminal justice information and may be released to the public, at the discretion of the executive of the law enforcement agency involved, unless the information contains intelligence or identity information that would jeopardize an ongoing investigation. The provisions of this section do not supersede more specific provisions regarding public access or confidentiality elsewhere in state or federal law.

**Source:** SL 1986, ch 189, § 2; SL 2004, ch 161, § 2; SL 2009, ch 10, § 18.

**1-27-1.5** ... (5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, if the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training. However, this subdivision does not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person, and this subdivision does not apply to a 911 recording or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure. This law in no way abrogates or changes §§ 23-5-7 and 23-5-11 or testimonial privileges applying to the use of information from confidential informants.

## APPENDIX G:

### TIMELINE OF OPEN MEETINGS COMMISSION PROCESS

Entity	Complaint	Forward	Hearing	Resolution	Step 1	Step 2	Step 3	Total	R/NV
City of Lead	Oct. 4, 2004	Nov. 5, 2004	April 5, 2005	Nov. 1, 2005	32 days	150 days	210 days	392 days	R
SD S&T Authority	Oct. 15, 2004	Nov. 10, 2004	Nov. 17, 2005	Feb. 20, 2007	26 days	372 days	460 days	858 days	R
Town of Herrick	Jan. 17, 2005	Jan. 21, 2005	April 25, 2005	July 11, 2005	4 days	93 days	77 days	174 days	R
*Davison County	Feb. 15, 2005	Feb. 15, 2005	April 11, 2005	July 11, 2005	0 days	54 days	91 days	145 days	R
Gregory School Board	Feb. 1, 2005	Feb. 4, 2005	April 25, 2005	July 11, 2005	3 days	79 days	77 days	159 days	R
Faulkton School Board	July 8, 2005	July 8, 2005	Nov. 17, 2005	Sept. 21, 2006	0 days	132 days	307 days	439 days	NV
Arcade Township	Dec. 15, 2005	Dec. 19, 2005	May 10, 2006	Nov. 20, 2007	4 days	141 days	559 days	704 days	R
Rapid City Regional Airport Board	Nov. 21, 2005	Dec. 14, 2005	May 10, 2006	March 7, 2007	23 days	146 days	301 days	470 days	R
Lawrence County	June 9, 2005	Dec. 22, 2005	May 10, 2006	Aug. 2, 2008	196 days	138 days	815 days	1149 days	NV
Melrose Township	March 22, 2006	March 23, 2006	July 24, 2006	Sept. 29, 2006	1 day	122 days	67 days	190 days	NV
Roberts County	Aug. 15, 2005	March 7, 2006	July 24, 2006	Aug. 24, 2009	204 days	138 days	1127 days	1469 days	R
S.D. Board of Regents	Feb. 20, 2006	April 11, 2006	July 24, 2006	Dec. 3, 2007	49 days	104 days	497 days	650 days	R
City of Tripp	April 13, 2006	April 13, 2006	July 24, 2006	Nov. 20, 2007	0 days	102 days	484 days	586 days	R
Melrose Township (2)	Sept. 22, 2006	Oct. 3, 2006	Nov. 15, 2006	Dec. 31, 2006	11 days	43 days	46 days	100 days	R
Black Hawk Fire District	May 21, 2007	Aug. 24, 2007	Nov. 14, 2007	Aug. 12, 2008	95 days	82 days	271 days	448 days	R
City of Watertown	Aug. 20, 2007	Aug. 20, 2007	Nov. 14, 2007	Nov. 12, 2008	0 days	86 days	364 days	450 days	NV
** Brown County Commission	Oct. 02, 2007	Oct. 11, 2007	Nov. 14, 2007	Nov. 28, 2007	9 days	34 days	14 days	57 days	R
Anne Hajek, Jeff Barth, and Carol Twedt/Minnehaha	Nov. 27, 2007	Nov. 27, 2007	July 31, 2008	Nov. 12, 2008	0 days	246 days	104 days	350 days	R
USD SGA	Dec. 12, 2007	Dec. 13, 2007	July 13, 2008	Nov. 12, 2008	1 day	212 days	122 days	335 days	NV
City of Mitchell	June 9, 2008	June 16, 2008	Nov. 12, 2008	Nov. 12, 2008	7 days	149 days	0 days	156 days	NV
Kingsbury County Schoenfelder, Lee, and Madison	June 8, 2008	July 10, 2008	Nov. 12, 2008	June 22, 2009	32 days	125 days	221 days	378 days	R

<b>Entity</b>	<b>Complaint</b>	<b>Forward</b>	<b>Hearing</b>	<b>Resolution</b>	<b>Step 1</b>	<b>Step 2</b>	<b>Step 3</b>	<b>Total</b>	<b>R/NV</b>
Brown County Commission (2)	Sept. 18, 2008	Oct. 14, 2008	Nov. 12, 2008	June 23, 2009	26 days	29 days	222 days	277 days	NV
Butte County Commission	Sept. 1, 2008	Sept. 17, 2008	Nov. 12, 2008	June 23, 2009	16 days	56 days	222 days	294 days	NV
City of Martin	Feb. 10, 2009	March 10, 2009	Aug. 21, 2009	Nov. 13, 2009	27 days	164 days	84 days	275 days	R
City of Martin (2)	March 10, 2009	March 10, 2009	Aug. 21, 2009	Nov. 13, 2009	0 days	164 days	84 days	248 days	NV
***Groton Area School District	March 2, 2010	March 2, 2010	May 7, 2010	May 7, 2010	0 days	65 days	0 days	65 days	R
Indian Hills Sanitary District	March 5, 2010	May 19, 2010	Nov. 18, 2010	Nov. 21, 2010	74 days	183 days	3 days	260 days	R

\* Letter to state's attorney written Dec. 14, 2004; forwarded to OMC Jan. 26, 2005. Returned by OMC for no notarization Feb. 10, 2005; official complaint filed Feb. 15, 2005.

\*\* Original complaint submitted Sept. 28, 2005. Complaint sent by state's attorney to Diane Best/OMC April 5, 2006. State's attorney indicated she had a conflict of interest and was not deciding whether to refer to the OMC. Best returned complaint April 11, 2006 for clarification on whether it was a complaint or no-merit. Special deputy state's attorney was appointed, reviewed file, and filed with OMC Sept. 6, 2007. Returned again September 11, 2007, because complaint was not signed under oath. Officially filed Oct. 11, 2007.

\*\*\* Citizen complaint to the state's attorney was first made July 11, 2005. State's attorney first forwarded to OMC Dec. 16, 2009, but complaint had to be re-filed because it was not under oath. Complaint officially filed March 2, 2010.

## APPENDIX H:

### Number of Days from Commission to Hearing/Deliberations

Less than one month	Less than two months	Less than four months	Less than six months	Less than nine months	More than one year
Brown County Commission (2), 29 days	Brown County Commission, 34 days	Groton Area School District, 65 days	Melrose Township, 122 days	Indian Hills Sanitary District, 183 days	South Dakota Science and Technology Authority, 372 days
	Melrose Township (2), 43 days	Gregory School Board, 79 days	Kingsbury County Commission (Schoenfelder, Lee, and Madison), 125 days	University of South Dakota Student Government Association, 212 days	
	Davison County Commission, 54 days	Black Hawk Fire District, 82 days	Faulkton School Board, 132 days	Minnehaha County Board of Commissioners (Hajek, Barth, and Twedt), 246 days	
	Butte County Commission, 56 days	City of Watertown, 86 days	Lawrence County Commission, 138 days		
		Town of Herrick, 93 days	Roberts County Commission, 138 days		
		City of Tripp, 102 days	Arcade Township, 141 days		
		SD Board of Regents, 104 days	Rapid City Regional Airport Board, 146 days		
			City of Mitchell, 149 days		
			City of Lead, 150 days		

<b>Less than one month</b>	<b>Less than two months</b>	<b>Less than four months</b>	<b>Less than six months</b>	<b>Less than nine months</b>	<b>More than one year</b>
			City of Martin, 164 days		
			City of Martin (2), 164 days		

**APPENDIX I:****Number of Days from Hearing/Deliberations to Resolution**

<b>Less than a week</b>	<b>Less than two months</b>	<b>Less than six months</b>	<b>Less than one year</b>	<b>Less than two years</b>	<b>Three years or more</b>
City of Mitchell, 0 days	Melrose Township (2), 46 days	Melrose Township, 67 days	City of Lead, 210 days	South Dakota Science and Technology Authority, 460 days	Lawrence County Commission, 815 days
Groton Area School District, 0 days	Brown County Commission (1), 14 days	Town of Herrick, 77 days	Kingsbury County Commission (Schoenfelder, Lee, and Madison), 221 days	Arcade Township, 559 days	Roberts County Commission, 1127 days
Indian Hills Sanitary District, 3 days		Gregory School Board, 77 days	Brown County Commission (2), 222 days	City of Tripp, 586 days	
		City of Martin, 74 days	Butte County Commission, 222 days	SD Board of Regents, 650 days	
		City of Martin (2), 84 days	Black Hawk Fire District, 271 days		
		Davison County Commission, 91 days	Rapid City Regional Airport Board, 301 days		
		Minnehaha County Board of Commissioners (Hajek, Barth, and Twedt), 104 days	Faulkton School Board, 307 days		
		University of South Dakota Student Government Association, 122 days	City of Watertown, 364 days		

**APPENDIX J:**

**Total Number of Days from Notarized Complaint to Resolution**

<b>Two months or less</b>	<b>Four months or less</b>	<b>Six months or less</b>	<b>10 months or less</b>	<b>1.5 years or less</b>	<b>Less than 2 years</b>	<b>Less than 3 years</b>	<b>Four years or more</b>
Roberts County Commission, 57 days	Groton Area School District, 65 days	Davison County Commission, 145 days	Melrose Township Board of Supervisors (1), 190 days	University of South Dakota Student Government Association, 335 days	Arcade Township, 704 days	South Dakota Science and Technology Authority, 858 days	Lawrence County Commission, 1149 days
	Melrose Township Board of Supervisors (2), 100 days	City of Mitchell, 156 days	City of Martin (2), 248 days	Minnehaha County Board of Commissioners (Hajek, Barth, and Twedt), 350 days			Roberts County Commission, 1469 days
		Gregory School Board, 159 days	Indian Hills Sanitary District, 260 days	Kingsbury County Commissioners (Schoenfelder, Lee, and Madison), 378 days			
		Town of Herrick, 174 days	City of Martin (1), 275 days	City of Lead, 392 days			
			Brown County Commission (2), 277 days	Faulkton School Board, 439 days			
			Butte County Commission, 294 days	Black Hawk Fire District, 448 days			



Two months or less	Four months or less	Six months or less	10 months or less	1.5 years or less	Less than 2 years	Less than 3 years	Four years or more
				City of Watertown, 450 days			
				Rapid City Regional Airport Board, 470 days			

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