

July 2, 2007

ATTORNEY GENERAL'S REPORT

STATUS OF OPEN GOVERNMENT IN SOUTH DAKOTA

SUMMARY

This report complies with the 2006 Legislative requirement (SB 142) that the Attorney General study open government issues in South Dakota. Both public records and open meeting issues are addressed in this report. Along with this report is a CD-ROM with several appendices.

A. Public Records

In part, this report explains the nature and scope of the existing public records law. Existing law provides that records that are “required to be kept by state statute” are public unless state or federal laws require them to be held confidential. SDCL 1-27-1, et. seq. Appendix A contains several examples. In addition, there are a large number of state and federal laws that provide for the confidentiality of or limited access to records. Appendix B. Further, there are a number of state laws that expressly provide for public access beyond general law. Appendix C.

A significant number of records maintained by state agencies and by local governments are not “required to be kept by state statute” and fall outside

the scope of SDCL 1-27-1. Accordingly, public entities at various levels hold a great deal of discretion in determining whether to release such records.

The second part of this report explains results of a one-year study of state and local government agencies subject to the study. The study first identified the types of records maintained by these entities by using existing Records Retention Manuals. These manuals describe each record type, list the retention period, and address the destruction policy or microfilming requirements for agency records. Although created for purposes of records retention alone, the manuals form a suitable uniform list of documents to form the basis of the study.

Using the listed document types in the manuals, the study then analyzed the legal requirements for each type of record. In addition, the Office of Attorney General interviewed representative personnel regarding the status of such records (i.e. whether such documents are released to the public or not). This included state personnel as well as employees of the city of Brookings, Hughes County, and the Freeman and Huron School Districts. Each document type and its status were entered into a web-based computer database formed for this project. Click here to view the results. <http://agrecords.sd.gov/login/>

In using the Records Retention Manuals, some institutions governed by the South Dakota Board of Regents and some Executive Branch agencies discovered that their manuals were outdated. Each of those entities has

indicated that it is currently engaged in, or plans to engage in, an update to the manuals.

For the Board of Regents, the SDSU manual was newly revised and was, therefore, used as a representative manual for the several institutions of higher education that had not yet completed new manuals.

Various entities within the Executive Branch also had outdated manuals. The Executive Branch used this opportunity to engage in a comprehensive update of all Records Retention Manuals. As part of the update project, the Executive Branch reviewed all records maintained by Executive Branch agencies and all public records statutes pertaining to those records. The Executive Branch information responding to this study is approximately 2000 pages and is included on the CD-ROM version of this report. Appendix D.

The third part of the study identifies substantive areas that require analysis or consideration. Based upon the matters discussed in detail in this report, I anticipate making several recommendations to the Legislature. These include:

- A more standardized definition of public record should be developed which does not depend entirely upon the “being kept” provision of current law.
- To the extent that discretion is to be exercised by governmental entities in determining whether to release documents, standards should be developed. Such standards would require weighing the

factors in favor of public disclosure against factors promoting confidentiality of information for personal, security, investigatory, federal compliance, or other reasons.

- Uniform definitions for confidential or limited access records should be crafted based on content to protect legitimate expectations of privacy as well as matters involving security of government facilities and state created procedures, innovations, and inventions.
- A method should be adopted that provides for redaction of personal identifying information (such as social security numbers, taxpayer identification numbers, bank account numbers, and other personal information) from documents thus allowing the documents to be otherwise released to the public when possible.
- A method should be developed to reliably satisfy federal privacy requirements imposed on custodians of state records.
- The law should be clarified regarding access to predecisional deliberative process documents, i.e. documents crafted by staff members to assist decision makers in making legislative type decisions.
- A standard method should be adopted to allow governmental entities at all levels to recover reasonable fees for data retrieval, redaction, production of copies and delivery of document requests.

- A method should be developed for distinguishing between commercial and individual requests for data, taking care to ensure that commercial interests pay the full costs of such data requests.
- A procedure should be developed for quickly and economically resolving disputes when access to records is denied by the agency maintaining the records.

B. Open Meetings

This portion of the report explains the nature and scope of the existing open meetings laws. The report also summarizes each of the various decisions issued by the South Dakota Open Meetings Commission, a body created by the South Dakota Legislature in 2004. Finally, the report identifies substantive areas that merit analysis or consideration. Based upon the matters discussed in detail in this report, I do not anticipate making sweeping recommendations to the Legislature in this regard. The recommendations consist of the following:

- The South Dakota Open Meetings Commission should remain in place with the same budget for FY 2009 as that authorized for FY 2008.
- State legislation should be considered that would clarify government decision makers' ability to hold limited confidential discussions among themselves and with key executive staff

personnel (a) to promote the free flow of internal policy analysis for legislative decision making and (b) for consideration of evidence in adjudicatory matters. This legislation should reflect federal court decisions and law in other states. In developing such legislation, care should be taken to continue to fully protect the public interest in access to comments and testimony from members of the public and, at the same time, ensure that all votes are undertaken publicly.

PUBLIC RECORDS ANALYSIS

A. Existing Public Records Law

The general public record laws are contained in SDCL ch. 1-27.

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=1-27&Type=Statute>

In pertinent part, SDCL 1-27-1 provides as follows:

“If the keeping of a record or the preservation of a document or other instrument is required of an officer or public servant under any statute of this state, the officer or public servant shall keep the record, document, or other instrument available and open to public inspection by any person during normal business hours.”

Under SDCL 1-27-9, a record is defined as a “document, book, paper, photograph, sound recording, or other material regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business.” A “public record” is “any document officially compiled, published, or recorded by the state including deeds, publicly probated wills, records of births, deaths and marriages...SDCL 1-27-21.

Documents specifically addressed in SDCL ch. 1-27. In addition to the general provisions above, the status of some documents is specifically listed in SDCL ch. 1-27. For example, SDCL 1-27-1 provides that any subscription or license holder list maintained by the Department of Game, Fish and Parks may be made available to the public for a reasonable fee.

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=1-27-1>

In addition, this chapter addresses drivers’ license lists. Further, any automobile liability insurer licensed in the state or any certified authorized agent may have access to the person’s name and address that is licensed or permitted to drive a motor vehicle. This information is to be provided for the sole purpose of verifying policyholder information. Access is subject to a reasonable fee.

The laws in SDCL ch. 1-27 address certain privacy and/or confidentiality issues. SDCL 1-27-1 provides that any employment examination or

performance appraisal record maintained by the state Bureau of Personnel is excluded from the public records requirement. This protects the privacy of individual government employees.

SDCL 1-27 contains provisions pertaining to financial investigations conducted by the state. SDCL 1-27-28 through SDCL 1-27-31. This set of laws provides that financial information obtained from a private entity is not public while an audit or investigation is conducted by government entities. The results of the investigation generally will be made public in the course of legal proceedings if the results are brought to court or a hearing. Even then, some documents (such as trade secret information) may be privileged and oftentimes cannot even be released in court. (The “privilege” issue is discussed below.)

This set of laws was updated in 2004 to narrow a broad restriction on public records that had been in place since 1996 (then referred to by the press as the “gag law”). The 1996 law had barred state employees from revealing any information obtained through a state investigation or even confirming the existence of any state investigation.

The 2004 change narrowed SDCL 1-27-28 through SDCL 1-27-31 to apply only to audits or investigations that include trade secret and proprietary information. The term “trade secret” is the same as that used for the trade secret privilege defined in 37-29-1 the Uniform Trade Secrets Act.

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=37-29-1>

The term “proprietary information” means “information on pricing, costs,

revenue, taxes, market share, customers, and personnel held by private entities and used for that private entity's business purposes." SDCL 1-27-28.

The 1996 law had included a number of exceptions, many of which remain in place. For example, the law continues to allow for release of information upon consent of the entity investigated or to other government agencies. Another exception allows for release "to any administrative or judicial body if the information is directly related to the resolution of an issue in the proceeding or pursuant to an administrative or judicial order." SDCL 1-27-31(4). The 2004 revision added an exception that would also allow immediate release pursuant to a temporary restraining order "to protect the health and welfare of the citizens of this state or nation." SDCL 1-27-31(11).

Unique state laws pertaining to specific records. Although SDCL ch. 1-27 addresses several types of documents, it also recognizes that there are other specific laws that may bear on the question of whether documents are public. SDCL 1-27-3. These other laws are found throughout various parts of the state and federal law. A large number of such state and federal laws provide for confidentiality or for limited access to records. Those laws are set forth in Appendix B. In addition, a number of state laws expressly provide for public access in addition to the general law. Appendix C.

A number of the existing laws are designed to balance competing interests and provide for limited public access. One example of this document type is "confidential criminal justice information." A specific law provides that

criminal investigatory files are not subject to the public records laws. SDCL 23-5-11.

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=23-5-11> Regardless of this statute defense attorneys, however, have a right to examine some criminal investigatory files once the defendant is charged with a crime. This right extends only to the defendant and is derived from the federal Constitution as interpreted by the courts. Further, victims have the right to examine certain types of law enforcement information at the discretion of state's attorneys. SDCL 23A-28C-1.

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=23A-28C-1>

Generally, the public does not have a general right to obtain access to "criminal justice information." However, SDCL 23-5-11 allows for limited public access to some basic information regarding police "calls for service." This exception, enacted in 2004, provides that "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." Thus, the media and the public are allowed to become informed about police calls. SDCL 23-5-11. The information is to be given out at the discretion of the law enforcement agency but cannot be released if it would jeopardize an ongoing investigation. SDCL 23-5-11.

Vital records are an area that has recently been subject to changes to address competing needs. Vital records are “records of birth, death, fetal death, burial, marriage, divorce, and data related thereto as entered on forms prescribed by the department of health.” SDCL 34-25-1.1(16). Certified copies of vital records may be provided to limited persons due to identity theft issues. <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=34-25-52> At the same time, uncertified copies are available for general research and genealogy purposes.

Specific statutes exist for juvenile court records. Court records involving juveniles under the age of sixteen are not public unless the juvenile is “summoned into court for an offense which if committed by an adult would constitute a crime of violence” or the juvenile is charged with a drug offense. The court may allow access to parents, guardians, and parties having a legitimate interest in the proceedings and to parties conducting pertinent research studies. SDCL 26-7A-36 through SDCL 26-7A-38.

In addition to limiting access to pending juvenile proceedings, the judge also has authority to “seal” records pertaining to abused and neglected children, children in need of supervision, and juvenile delinquents once the case is completed. The Department of Social Services and the juvenile’s parents, guardians, and attorneys may be able to obtain access to these sealed documents if it is in the best interest of the child and with court consent. The juvenile, the state’s attorney involved, and court services officers may also

petition the court and receive permission to view these documents. Court personnel necessarily have access to the records in order to carry out their duties. Otherwise, no other access is allowed unless it is necessary for future court proceedings and the judge approves. SDCL 26-7A-113, SDCL 26-7A-114 and SDCL 26-7A-116. For juvenile delinquency matters, the judge cannot order the records to be sealed if a new delinquency case is pending against the juvenile or if a felony criminal case, sexual contact case, or case involving a crime of “moral turpitude” is pending against the juvenile.

The foregoing areas are examples of the specific consideration the Legislature has made that balance the public interest in obtaining information against the privacy interests of individual citizens. Examples of other specific records are in both Appendix D and in <http://agrecords.sd.gov/login/>

Privileged documents - Privileges are addressed in SDCL ch. 19-13. <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=19-13> For these documents, access is more limited than for other types of confidential documents. Privileged documents generally cannot be released to anyone unless the person holding the privilege agrees. In other words, the documents are not only protected from public inspection, but also cannot be released in litigation (unless ordered by a judge). On rare occasions, a judge may require that some privileged documents be released when necessary for court action. There are many court decisions dealing with the extent of access to privileged documents. Examples are conversations with an individual’s

physician or clergy. SDCL 19-13-6; SDCL 19-13-17. Another example is a voter's general right to hold his or her vote confidential. Further, another privilege is the trade secret privilege. SDCL 19-13-19.

The deliberative process privilege is one of several recognized by common law; it has been recognized in South Dakota by the U.S. District Court. See Bone Shirt v. Hazeltine, (challenging South Dakota's 2000 legislative redistricting as violation of the Voting Rights Act) (privilege held to apply to documents prepared by the Legislative Research Council for and supplied to the Executive Board of the South Dakota Legislature). Appendix E. The deliberative process privilege protects (A) communications and documents provided to government officials to assist them with policy or adjudicatory decision making; and (B) to allow governing bodies to deliberate upon evidence presented at a judicial or quasi-judicial hearing, as a jury would. SDCL 19-13-21 addresses this privilege, in part, stating "a public officer cannot be examined as to communications made to him in an official confidence, when the public interests would suffer by the disclosure." Arguably, this privilege incorporated as an exemption to the South Dakota Open Meetings because SDCL 1-25-2 provided in part as follows: "...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..." This privilege should be clarified and placed in Title 19 along with other common law privileges that have been codified.

Confidential informants are an additional subject of a privilege. The United States, a state, or a subdivision has the privilege to refuse to disclose a confidential informant's identity. No privilege exists if the informant appears in open court as a government witness or if the informant's name has already been released by other means so that the protection is no longer necessary. SDCL 19-13-22, SDCL 19-13-24. State and federal law are consistent.

The attorney client privilege is located at SDCL 19-13-3. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications to the client's attorney. There are specific exceptions to the privilege, such as when communication involves information about an issue of breach of duty by the lawyer to his client. SDCL 19-13-3; SDCL 19-13-5. These laws apply the same in both state and federal court.

Documents not required to be kept by state statute. As seen by the previous discussion, the status of many government records is governed by either SDCL ch. 1-27 or by specific statutes. A large number of records, perhaps a majority of the actual documents, are simply not addressed in such statutes at all.

Many documents maintained by governmental entities are not defined as public records because no state statute requires that they ever be kept or filed by the state or local government agency involved. Such records do not, therefore, meet the definition in SDCL 1-27-1.

For example, many statutes require “filing” documents by various entities, but do not necessarily require the agency to “keep” documents. A list of the various statutes applying to South Dakota Department of Agriculture records serves as an example. Appendix F. This list of statutes provides for various treatment depending on the type of record involved. A number of the statutes simply provide, however, that a regulated entity must file a document with the agency and do not impose a corresponding duty on the agency to keep the document.

Another example is joint powers agreements among state and local entities. They are required to be filed with the LRC and the Office of Attorney General, but there is no specific requirement that they be “kept.”

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=1-24-6.1> Strictly speaking, these documents would not be subject to the public records laws and the custodians of these records would have discretion on whether to release them to the public. In practice, these joint powers agreements are routinely released to the public.

In addition, part of the current definition relates to keeping records as required by state statute. This does not, however, include state and federal administrative rules and federal statutes that require documents to be maintained by state and local governmental entities.

Despite the narrow definition, many governmental entities do maintain such documents. Based on the interviews performed for this project, it is

apparent that governmental agencies at each level studied do exercise their discretion to provide many of these documents to the public regardless of the definition in SDCL ch. 1-27-1.

Effect of Federal Laws on State and Local Records. In addition to state law, there are several federal laws that apply to state or local records. Depending on the federal law involved, state law may be preempted or state or local government may be required to implement specific provisions regarding records. In some instances, federal law may apply only to federal documents. Consequently, any record type analyzed must be considered in light of applicable federal law. Some of the applicable federal laws follow.

Freedom of Information Act (FOIA) - The federal Freedom of Information act applies to federal documents and does not directly apply to state or local records. 5 U.S.C. 552. On the other hand, if state or local documents are filed with federal agencies, they become federal documents subject to federal law. For example, a letter to the Federal Energy Regulatory Commission or USDA may not be required to be kept by state statute or otherwise be made public under state law, but may be released to the public by a federal agency under FOIA.

Family Educational Rights and Privacy Act (FERPA) - School districts may not release student records to the public. 20 U.S.C. 1232(g). Education records include records, files, and documents that are directly related to a student and are maintained by or on behalf of an educational agency. Directory information

(such as names and addresses of students, dates of attendance, the height and weight of contestants in athletic events or honor roll lists) may be made available to the public unless the parents object. This law directly applies to South Dakota school districts and our post-secondary schools and universities since all receive federal funds

By contrast, other records pertaining to the schools themselves are public. Those include school district business records such as reports, books, records and contracts. All papers in the office of the business manager are available to any voter or taxpayer. SDCL 13-8-43.

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=13-8-43> This matter is controlled strictly by state law. Similarly, minutes of school board meetings are public and must also be published. SDCL 13-8-35.

Social Security numbers -Some state agencies may request that license applicants provide social security numbers for various purposes in processing licenses. Under federal law, state government must generally hold such information confidential. 42 USC 405. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+42USC405 This applies to all types of state licenses.

Driver's Privacy Protection Act (DPPA) -Under federal law, personal information contained in motor vehicle license or driver's license records is confidential and may not be released to the public by state agencies. 18 USCA 2721. http://www.access.gpo.gov/uscode/title18/parti_chapter123_.html For

this purpose, “personal information” means “information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver’s status.” 18 USC 2725(4). This law has been implemented in South Dakota through SDCL 32-5-144.

Health Insurance Portability and Accountability Act (HIPAA) – In a 1996 health reform act, Congress required Department of Health and Human Services to promulgate rules regarding the privacy of patient health records. P.L. 104-91. Under these rules hospitals and other health care institutions are barred from making patient records public. 45 CFR 164 http://www.access.gpo.gov/nara/cfr/waisidx_06/45cfr164_06.html

A patient, the patient’s designee, or personal representative of a deceased patient may access the records, and other exceptions allow release of records to courts and government agencies. These rules also directly control access to the records held by health care providers. The health care institutions may charge a fee for providing the records. To the extent that governmental entities own health care institutions or provide health care benefits they are foreclosed from releasing certain types of medical information. These rules apply to health care provided in state institutions governed by the Board of Regents, Department of Human Services, and Department of Corrections as well as county jails, city

and county hospitals, and government-owned nursing homes. Further county funding for indigent health care is implicated by these laws. Local governments that self-insure for health care of their employees fall under HIPAA as well.

Obtaining Access to State and Local Records. If a document is public under SDCL ch. 1-27, the governmental entity is legally required to make the record available and open to inspection at its business offices.

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=1-27-1> State and local agencies have authority to provide copies rather than making the original document available for inspection.

Fees for copies. Some offices are subject to statutory fees, including the South Dakota Secretary of State, Unified Judicial System, and County Registers of Deeds. Examples of fees are as follows:

Office	Document	Fee	Authority
Register of Deeds	Certified copy of any instrument of record	\$2.00 plus twenty cents per page after five pages	SDCL 7-9-15
Register of Deeds	Uncertified copy of any instrument of record	\$1.00 plus twenty cents per page after five pages	SDCL 7-9-15
Register of Deeds	Duplicate microfilm copies	Fee established by the county commissioners	SDCL 7-9-15
Register of Deeds	Certified copy of a birth record	In addition to the above fee, a fee of \$2.00 for the Children's Trust Fund	SDCL 7-9-15
Secretary of State	Copies of records or papers except campaign finance reports	\$1.00 per page	SDCL 1-8-10
Secretary of State	Certified copy of any document on file	\$1.00 per page and \$10.00 for certificate & seal	SDCL 1-8-10

Unified Judicial System	Copies of documents on file with the Clerks of Courts	Reasonable fee not to exceed actual cost	SDCL 15-15A-15
Clerk of Courts	Reproducing an authenticated, exemplified, or double certificate of a record on file.	\$2.00	SDCL 16-2-29
Clerk of Courts and Supreme Court Clerk	Fax transmission of an opinion or record.	\$1.00 per page, but the minimum charge shall be \$5.00	SDCL 16-2-29 SDCL 16-2-29.1
Clerk of Courts	Search for records requested by a person who is not a party in the case	\$15.00 A separate fee is charged for each name requested	SDCL 16-2-29.5
Clerk of Courts	Search for records if in conjunction with a pending state or federal case	\$5.00 A separate fee is charged for each name requested	SDCL 16-2-29.5
Clerk of Courts	Searches requested by an attorney of record or their staff	No charge.	SDCL 16-2-29.5
Supreme Court Clerk	Any opinion, record or paper from an active file in the clerk's custody	Fifty cents per page, provided, however, that the minimum charge shall be \$2.00	SDCL 16-2-29.1
Supreme Court Clerk	Any opinion, record or paper from an inactive file in the clerk's custody	Fifty cents per page, provided, however, that the minimum charge shall be \$5.00	SDCL 16-2-29.1

Unless such fees are required by law, “reasonable costs” may be imposed for copies of records. This legal standard is reflected in 88 AGR 47.

<http://www.state.sd.us/attorney/applications/documents/oneDocument.asp?documentID=383&docType=3&bCameFromSearch=1>

In that opinion, my predecessor relied on a dictionary definition of the term "actual cost" and stated that actual cost means “the exact sum expended or loss sustained rather than the average or proportional part of the cost.” The opinion further stated that custodian of the record, along with the governing body, may determine the actual cost for copies.

In practice, some state and local agencies have a policy of providing a small number of free copies and charging for large document requests.

Time for response. There is no general state law fixing time frames for making records available or for making copies. In many situations where old records are requested, time is necessary to search and find the document. The requested item may not be immediately available on the day of the request. In addition, if there is a legal question as to whether a document is public, additional time may be necessary for legal consultation.

Further, if a large volume of documents is requested, time is necessary for copying. Some records may be open but contain information that is confidential (i.e. social security numbers). In that case, additional time may be required in order to allow the agency to redact the portions of the records that are confidential. Redacting the confidential information can be time consuming.

Providing lists of documents State or local entities are not required to develop *new* lists or compile information in a particular format which does not otherwise exist to respond to public information requests. Public records are available in the format required to be kept by the public agency.

Archived records. Once state and local records are no longer retained, the State archivist is authorized to acquire records that have informational or historical significance. Those records are maintained at the State Archives in Pierre and may be available to the public at that institution. The state

archivist has, by rule, developed a fee schedule for reproduction of paper documents, microfilm, and photographs.

<http://legis.state.sd.us/rules/DisplayRule.aspx?Rule=24:52:05:02&Type=Rule>

By law, public access to documents at the state archives is restricted if the law requires such restrictions or such restrictions are necessary for security or public interest reasons. Under SDCL 1-18C-9 the State archivist is required to “take all precautions necessary to ensure that records placed in his custody, the use of which is restricted by or pursuant to law or for reasons of security and the public interest, shall be inspected, surveyed, or otherwise used only in accordance with law and the rules and regulations imposed by the archivist in consultation with the agency of origin. “

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=1-18C-9>

Dispute Resolution. At present there is no general statewide procedure (other than litigation) for determining whether documents should be released to the public.

Parties to legal proceedings before state agencies, the Office of Administrative Hearings, or the courts, may be entitled to a determination whether documents are available to them, as litigants. This process is known as discovery.

A citizen may also initiate a lawsuit solely to obtain a document or to prevent the release of a document to the public. Courts will interpret the laws and determine whether the documents are public or private. In some unique cases the decision even involves state constitution analysis. Doe v. Nelson, 680 NW2d 302 (2004) (Governor's pardons). The Doe case is linked here.

<http://www.sdjudicial.com/index.asp?category=opinions&nav=5391&year=2004&month=5&record=1288>

One state agency, the Public Utilities Commission, has developed rules in this regard. ARSD 20:10:01:39 to ARSD 20:10:01:40.

<http://legis.state.sd.us/rules/DisplayRule.aspx?Rule=20:10:01>

Documents may be filed with the PUC in sealed envelopes and stamped confidential. ARSD 20:10:01:40. Among other things, the entity filing information under these rules must explain the rationale for treating the documents as confidential. By rule, the documents remain confidential until access is requested by any party to a pending case or by a member of the public. ARSD 20:20:01:42. A request for confidentiality requires confidential treatment of information pursuant to § 20:10:01:40, but it does not constitute a determination that the information is or is not confidential. If a request for access is made, the Commission will determine whether the document is confidential. The party requesting confidentiality has the burden of proving by a preponderance of the evidence that the information qualifies as confidential information by showing that disclosure would result in material damage to its

financial or competitive position, reveal a trade secret, or impair the public interest.

B. Methods This part of the report explains the results of a one-year study of state and local government agencies. The study reviewed the statutes under which various state agencies and local government entities (cities, counties, and school districts) operate with respect to documents and data.

With one exception noted below, the list of records studied was based on Records Retention Manuals. These manuals are part of the Records Management Program administered by the state Bureau of Administration as set forth in SDCL 1-27-12 et seq. The Legislature established the Records Management Program in the 1980s as a procedure for assisting state and local agencies in managing the rapidly growing accumulation of records. In carrying out this program, the state created records retention and destruction schedules for each type of record maintained by state and local governmental agencies. Appendix G contains the Records Management Manual for the Office of Attorney General. Appendix H contains the manual for local school districts.

These manuals describe each record type, list the retention period, and address the destruction policy or microfilming requirements for that record type. Although created for records retention purposes, the manuals form a suitable uniform list of documents to study the various records maintained by the government entities subject to the study.

The South Dakota Unified Judicial System recently completed its own study of its own records. From that study, the Supreme Court promulgated public access rules, now codified at SDCL 15-ch. 15A.

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=>

[15-15A](#) Because the new UJS rules are comprehensive with respect to the UJS records and specifically address public access they provide a better basis for studying UJS public access than their Records Retention Manual would provide. This document does not attempt to independently address UJS records.

For governmental entities where the Records Retention Manual was used, lists of the record types were made on computer databases. On each database, the legal requirements for access to each type of record were noted. One of the databases was created by the Office of Attorney General for the instant project. For this facet of the project, an example of the data entry page is [linked here](#).

The other list of records was generated by the Executive Branch. The Executive Branch is engaged in a comprehensive update of all records retention manuals. As part of the update, the Executive Branch agreed to also review the public records status for all records maintained by Executive Branch agencies. An example of the data entry page is [linked here](#).

In each case, the government agency involved was asked to provide information regarding whether the records were public or not and explain

unique statutes, rules, or federal requirements that would be applicable. This information is included in the respective documents. Ultimately, the two lists resulted in the creation of the documents in Appendix D and in the Attorney General Records Catalog. <http://agrecords.sd.gov/login/>

To the extent possible, the Office of Attorney General interviewed representative personnel regarding the agency's actual practice concerning the records and to verify records descriptions or status.

Representative local government entities were selected for interviews. County governments are controlled by the same set of laws and keep identical records for core county functions. Hughes County was selected for interviews regarding county government records. City and school district document types were analyzed similarly. The city of Brookings was interviewed over a four-day period in Brookings. Two school districts (Freeman and Huron) participated via mail.

Personal interviews were conducted by the Office of Attorney General for the Secretary of State, State Treasurer, State Auditor, Office of School and Public Lands, South Dakota Retirement System, Public Utilities Commission, and South Dakota State University. Other entities provided comments by mail, including the South Dakota Investment Council.

Several institutions under the Board of Regents (including higher education, the School for the Deaf, the School for the Visually Impaired, and Extension Service) had Records Retention Manuals that were several years old.

Although there is no specific requirement for the timing of updates to the Records Retention Manuals, it was determined that these manuals would not be representative of the current status of records in these institutions. The SDSU Manual has been, however, newly revised and was therefore used as a representative manual for the several institutions of higher education.

The School for the Deaf and the School for the Visually Impaired were excluded from this study, in part, because their records retention manuals are several years old. In addition, these institutions hold custodial responsibility for juveniles with extensive medical and educational needs and, therefore, the institutions must be accountable under several stringent state and federal confidentiality laws. Thus, due to their unique status, as well as the time constraints involved in this study, their records were not analyzed for this general study.

Another entity under the control of the Board of Regents is the Extension Service. It is currently engaged in an update of its retention manual and provided assistance with this project from the perspective of county extension offices.

As indicated, information was gathered from Records Retention Manuals, interviews of government personnel, and state statutes and listed in one of two documents. The Executive Branch information is in Appendix D to the CD-ROM included with this report. The information gathered by the office of

Attorney General is called the South Dakota Records Catalog and is web-based. It may be accessed at <http://agrecords.sd.gov/login/>.

For the Attorney General database, the various governmental entities were asked to identify whether they treated the particular class of document as “public,” “not public,” or “conditional.” If the classification was identified as public, little or no further analysis was made. If the category of document was classified as not-public or conditional, the agency was requested to indicate the basis for keeping the document private and, in the case of conditional documents, to identify the conditions under which the document would either be protected or released. This records catalog is organized according to agency and is also searchable by word. This database does not contain imaged documents and should be viewed as an electronic “card catalog.”

The Executive Branch document included in the CD-ROM is a different format, but gathered substantially similar information. This database lists the document types for each executive branch agency that are required to be kept by state law, that are required to be held confidential, and that are required to be open to public inspection. The list is made by agency and is also easily searchable by word.

In addition to reviewing the information listed above, the Office of Attorney General examined statutory schemes from other states regarding their records access programs, particularly with regard to other states’ fee mechanisms and systems for dispute resolution.

C. Analysis and Recommendations As noted above, the touchstone of public records in South Dakota is found in SDCL ch. 1-27. The key provision is in the first sentence of SDCL 1-27-1 providing *“If the keeping of a record, or the preservation of a document or other instrument is required of an officer or public servant under any statute of this state, the officer or public servant shall keep the record, document, or other instrument available and open to inspection by any person during normal business hours.”*

Clarification of SDCL 1-27-1 is warranted. Many statutes require that documents be filed with various offices for various purposes. Nowhere does the code state that such documents, once “filed,” must be “kept” by that office. As an example, Appendix F contains several statutes applying to the South Dakota Department of Agriculture that require documents to be “filed” with various entities, but do not necessarily require the agency to “keep” such documents. As a practical matter, the office which receives the “filing” typically “keeps” the documents for several years. Logic provides that that a document required to be “filed” should be treated the same as a document required to be “kept.”

In addition, SDCL 1-27-1 focuses on records required to be kept by state statute. Conversely, many state and federal administrative rules and federal statutes require documents to be filed with or maintained by the state. Again, logic suggests that records which are “kept” or “filed” because of administrative rule or federal mandate be treated the same as documents “kept” under SDCL 1-27-1. It is recommended that all documents required to be “kept” or “filed”

be treated the same, whether the requirement is found in state or federal statute or rule.

To the extent that agencies are required to exercise discretion, guidelines should be adopted for weighing the relative interests at stake. Current law provides for a general standard (as addressed above) for public records. However, as to those records which are neither “public” or “confidential,” the absence of guidance in rules or statutes affords considerable discretion to governmental custodians of records. In some cases, statutes provide specific guidance to agencies; in many cases the statutes are silent. Accordingly, to the extent that government agencies have discretion whether to release records, uniform standards should be developed for agencies to use when exercising such discretion. The standards should be designed to protect legitimate expectations of privacy as well as matters involving security of state facilities and state created procedures, innovations, and inventions.

A uniform list of limited access documents should be developed. In addition (or in the alternative to the foregoing standards), a list of specific types of documents that merit confidentiality would be warranted. Such a list, like the foregoing standards, should be crafted to protect legitimate expectations of privacy as well as matters involving security issues. At present, many exemptions exist at various places in state law. While they are not necessarily inconsistent they do use different language and some are clearer than others. Uniformity and clarity would enhance understanding of these laws, both for the

public and the custodians. Accordingly, any changes in current law should be crafted to promote comprehension of public records law by using uniform nomenclature and the inclusion of existing statutory exceptions into one area to the extent practical.

Legitimate expectations to personal privacy should be respected. An entire industry has now become devoted to what is referred to as “data harvesting.” Persons involved in this activity seek to compile as much information as possible about each of us in order that they can sell this information.

Personally identifiable information is contained in many government records ranging from school records, mental health records, personal financial information, and similar matters. Many governmental programs require that intimate details of our lives be shared with program administrators in order that deserving citizens receive appropriate consideration from the program administrators and unqualified persons are identified and excluded.

In addition to personal information obtained from citizens, government files contain personal employment information of government employees. Currently, the name, salary, and classification of governmental employees are public. Other information in personnel files is not released. These files contain social security numbers, date of birth, background information, and other personal identifying information.

Confidentiality should be maintained for personal information regardless of the size of the request. Voluminous requests, however, undeniably magnify the need to clarify any issues related to personal information. To avoid improper use of personal information, avoid misunderstandings on release of such information, and for consistency, it is advisable to address this situation through a general statute delineating whether and to what extent personal information should be released to the public.

In particular, a method should be adopted that provides for disclosure of copies of documents in a format that allows for redaction of personally identifying information such as social security numbers, taxpayer identification numbers, bank account numbers, and other personal information. A workable and uniform redaction protocol would allow for public access to documents while respecting legitimate privacy interests.

Government security procedures and facility plans should be secure. South Dakota has not adopted specific “homeland security” legislation pertaining to government records. Most states have enacted this type of legislation. Only a handful of states have yet to pass this type of legislation, and include: Hawaii, Idaho, Minnesota, Mississippi, Montana, Oregon, Pennsylvania, South Dakota, Rhode Island, and Vermont.

States that have enacted homeland security legislation pertaining to public records use similar language. The statutes generally provide that records concerning security plans, procedures, assessments, measures, or

systems, and any other records relating to safety issues are to be held confidential. Under these statutes, documents containing information that may be detrimental to public safety, welfare, and interests, or people is exempted from public records.

Furthermore, these statutes provide that plans and designs for critical structures involving energy, water, telecommunications, or other important infrastructures are not considered public records. As an example, Florida specifically exempts “security system plans” from its public records laws. Fla. Stat. Annot. 119.071 Under Florida law, “Security system plans” include “all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations, or portions thereof relating directly to the physical security of the facility or revealing security systems.”

Similar types of records are generally covered by the various statutes. The language varies from state to state, with some states using more specific language than others. For example, Texas lists a number of detailed sections in its law, while other states appear to capture essentially the same information in one or more general provisions. *See* Vernon’s Texas Statutes and Code Annotated § 418.175-418.182.

One section in Texas law provides for the confidentiality of any information that is collected, assembled, or maintained by or for a governmental entity, and (1) is more than likely to assist in the construction or

assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or (2) indicates the specific location of: (A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or (B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins. Other states provisions appear to cover this area with a more general “public safety” provision.

South Dakota should enact a statutory scheme to limit access to the foregoing types of government records.

State created procedures, innovations, and inventions should be protected.

The Board of Regents employs researchers and scientists who are encouraged to conduct original research. There are contractual relationships between the Board and these employees relating to scientific discovery and patent protection. Although these arrangements sometimes address confidentiality of scientific research and information, statutes are needed in this area. In addition, other governmental agencies develop procedures for use in our schools, agriculture endeavors and the like. Both the state and the creative employee have interests that deserve protection that are not present in our current statutes.

Broad exemption from public access has been granted to the Science and Technology Authority pursuant to SDCL 1-16H-28 due to the fact that the

Underground Laboratory will deal with science discovery issues.

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=1-16H-28> Similar language should be considered for other areas of government where innovation and discovery is occurring.

Federal statutory requirements should be observed. Federal mandates covering a wide range of activity (i.e. Medicaid, child care, environmental protection, transportation) require that a large number of documents be filed with states. Federal mandates often limit public access to documents (or to information imbedded within the documents). Based on the document types reviewed for this study, it is apparent that a number of the existing statutes rely on or mirror federal requirements. Consequently, any South Dakota statutory changes must account for compliance with these federal provisions.

Data Retrieval and Copying Costs should be addressed. This report recommends that a law be enacted to address data retrieval and copying costs. As addressed above, some offices have fees established by statute, including the South Dakota Secretary of State, Unified Judicial System, and County Registers of Deeds. Those fees are generally based on the number of pages of paper documents requested and range from 20 cents per page (Register of Deeds) to \$1.00 per page (Secretary of State and Supreme Court). UJS charges a retrieval fee of up to \$15.00. Further, a limited number of agencies such as the State Archives, have statutory authority to promulgate rules in this area.

<http://legis.state.sd.us/rules/DisplayRule.aspx?Rule=24:52:05:02&Type=Rule>

Although this limited group of governmental entities have fees have been established by statute or rule, there is no general uniform statutory guidance for imposing or calculating charges for data retrieval, redaction, copying, and delivery at the state or local level.

Unless a different fee is specified by statute, the general legal requirement is that “reasonable costs” may be imposed for copies of records. This legal standard is reflected in 88 AGR 47 to include “actual costs” for copies. A general standard ought to be placed in statute to afford more specific guidance to state and local government workers and more certainty to the public. Further, requests are being made for obtaining data via computer transmission (disks, thumb drives, and email transmission). Accordingly, a fee statute based on paper copies alone would not reflect the actual costs involved in retrieving information and relaying information to the person requesting the information.

Further, while waivers or reduced charges may be appropriate for some small requests, voluminous requests and requests made for commercial reasons require unique treatment and full payment of costs. In cases where personally identifying information must be redacted from documents in order to provide public access, government offices may be required to use many hours of employee time responding to such requests. This is even more important if a decision is made to increase the number of types of documents that are made available to the public. For example, North Dakota authorities report that one division recently received a request for copies of 350 personnel

records. Responding to such requests would take many hours since social security numbers and health care information would need to be redacted as required by federal law. Appropriate fees are warranted.

Several states have responded to these various issues or are currently addressing them.

Actual Cost	Reasonable Fee	Commercial Requests Addressed	Technology Access Costs Addressed	Current or Recent Proposed changes
* specific fees may apply, but may be adjusted for actual cost	*specific fees may apply but may be adjusted so that a reasonable fee is charged			
Arkansas	Alabama	<u>Restricted access if competitive advantage or disadvantage is possible result of disclosure:</u> Arkansas California New York North Dakota Oklahoma West Virginia <u>Higher cost for commercial requests and fines for not revealing commercial purposes:</u> Arizona D.C. Indiana <u>Higher cost:</u> Minnesota <u>Fee waived for noncommercial purposes benefiting the public:</u> Missouri	Alaska	Arkansas
Alaska	Arizona		Arizona	Colorado
California	Delaware		Arkansas	Florida
Colorado*	Georgia*		California	Hawaii
Connecticut*	Hawaii*		Colorado	Indiana (passed)
D.C.	Indiana*		Connecticut	Maine
Florida*	Kentucky		D.C.	Mass.
Idaho	Louisiana		Florida	Minnesota
Illinois	Maine		Georgia	Mississippi
Iowa	Maryland		Hawaii	Montana
Kansas	Massachusetts*		Indiana	New Hampshire
Michigan	Missouri		Iowa	New Jersey
Minnesota*	Montana		Kentucky	New York
Mississippi	New Mexico*		Minnesota	N. Dakota
Nebraska	North Dakota*		Mississippi	Ohio
New Hampshire	Oklahoma *		Missouri	Oklahoma
New Jersey*	Pennsylvania		Montana	Penn.
New York*	South Dakota		Nebraska	Virginia
Nevada	Tennessee		New Hampshire	West Va. (passed)
North Carolina*	Texas*		New York	

Ohio	Utah	<u>Commercial purpose irrelevant</u> : Louisiana	North Carolina	
Oregon	Washington*		North Dakota	
Rhode Island	West Virginia		Oklahoma	
South Carolina*	Wyoming		Pennsylvania	
Vermont			Utah	
Virginia			Vermont	
Wisconsin			Virginia	
			Wisconsin	

Generally speaking, the “actual cost” standard is, as it suggests, the actual cost to reproduce the requested record. This cost often includes fees associated with staff time for record retrieval. For example, Alaska may charge for labor fees if the cost associated with location, retrieval and duplication of the record exceeds five man hours. Alternatively, some states like Arizona have developed laws to prohibit inclusion of personnel time in calculating such costs.

The “reasonable fee” standard is somewhat more general, but may also be related to the cost of production and duplication of a record. The “reasonable fee” standard is largely left to agency discretion. In at least one state (Georgia), the reasonable fee standard is modified to also require that requested documents be duplicated in the most economical fashion possible for the person requesting the record--less the request results in an undue burden on the agency. Thus, if document reproduction becomes cumbersome, additional fees may apply.

As seen, the resolution of the issue of fees for production of documents varies considerably by state. Consideration should be given to a method that is workable for South Dakota.

An alternative dispute resolution procedure should be developed. A procedure should be developed that is designed to quickly, economically and fairly review requests for access to records that are denied by the agency maintaining the record. In South Dakota, the courts are the forum for such dispute resolution, with the exception of the PUC process outlined above. Many states also rely only on the courts.

There are, however, at least twelve states that have alternative procedures. Seven states involve the Attorney General in this process. Those states are Delaware, Florida, Kentucky, North Dakota, Oregon, Rhode Island, and Texas. The North Dakota Attorney General's Office reports that its program is not a separate budget item within the Attorney General budget, but that the service requires use of two FTEs. One FTE is for legal services. The other is for a paralegal or administrative aide. The North Dakota office processes approximately 150 requests per year, most of which are informally resolved by that office. Approximately 25 official opinions on this issue are issued each year by the North Dakota Attorney General's Office. This process is based on written submissions and no hearings are held. The two FTEs also include various public information efforts including educational forums and presenting information on the North Dakota Attorney General's website.

Other Attorney General offices provide information on public records or assist in other ways. The Washington State Attorney General acts as an informal ombudsman, providing written determinations on whether state agency records should be open to the public. The determinations are not binding. This service is limited to state records only.

Several states have dispute resolution processes that involve state boards or committees. For example, a Nebraska statute provides for a Records Board composed of the Governor, Attorney General, Auditor of Public Accounts, State Treasurer, Director of Administrative Services, three representatives with banking, insurance or legal background, and three persons representative of the general public, libraries and the news media.

In Utah appeals are lodged with a seven member committee. Four members are appointed by the governor and three are elected state officials (State Auditor, Director of the Division of History, and Governor). A hearing is required between 14-50 days after the appeal is lodged and decisions are to be issued within five days thereafter.

In New Jersey, the dispute resolution process is handled by a council composed of the Commissioner of Community Affairs, the Commissioner of Education, and three public members appointed by the Governor. The council's first step is to invite mediation. If the mediation does not resolve the issue, a hearing is held by the council. The council has authority to impose penalties.

Connecticut has a Freedom of Information Commission. The Commission consists of five members who are appointed by the governor. Each member serves for four years with a new member being appointed every year. The governor also appoints the chairperson of the commission.

In Alaska, enforcement of the open records statute is delegated to individual committees or members of each of the state branches of government: Legislative Branch, Department of Administration for the Executive Branch, Judicial Branch, and the Board of Regents for the University of Alaska. The statute requires that each “overseer” establish an administrative appeal process for the action of each department.

In Indiana, the authority is vested in one independent position. A public access person is appointed by the Governor, serves for a term of four years, and receives a fixed salary set by the Governor. This person must be a practicing attorney, but cannot have other jobs or do work that is unrelated to the office. The appointed individual has the responsibility to train and inform public officials on the public access laws, to research public access laws, to make recommendations to the general assembly for improving the laws, to respond to informal inquiries regarding public access laws, and to issue opinions in disputes over public records. This person also has the authority to hire additional personnel to help with the duties of the office, as the budget provides.

Arizona recently expanded an existing Ombudsman-Citizens' Aide office. The office was established several years ago to mediate disputes between citizens and state government. Last year the office expanded to include public records complaints involving counties, cities, towns and school districts. The expansion included \$185,000 to hire two full-time employees, including an attorney, who can investigate citizens' complaints and advise officials about access to public records.

In Massachusetts, the Secretary of State is the supervisor of public records and appeals may be lodged in that office.

At least two states, Tennessee and Pennsylvania, have recently engaged in legislative debate concerning this issue. The Tennessee proposal would place an ombudsman in the comptroller's office. No legislation has been enacted in either state.

As seen, there are a variety of ways that dispute resolution is handled in various states.

OPEN MEETINGS ANALYSIS

A. Current Law.

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

Public Meetings SDCL 1-25-1, requires that official meetings of the State and its political subdivisions, including cities, counties, school boards and all related boards and commissions be open to the public. It is a Class 2 misdemeanor to break this law. A Class 2 misdemeanor is punishable by a penalty of 30 days in jail, a \$500 fine or both (SDCL 22-6-2). Alternatively, violation of this law could result in a public reprimand by the Open Meetings Commission.

The open meetings law does not define the term “official meeting,” but statutes relating to cities, counties, and school districts do provide guidance. Also, a 1989 Attorney General opinion explains the general law. AGR 89-08. <http://www.state.sd.us/attorney/applications/documents/oneDocument.asp?documentID=37&docType=3&bCameFromSearch=1>

The opinion provides that a gathering is an open meeting if it meets the following two criteria:

1. A legal quorum of the governing body is present at the same place at the same time; and
2. Public business, meaning any matter relating to the activities of the entity, is discussed.

Entities subject to the open meeting law.

The open meetings law is applicable to a large group of entities. These entities are divided into three categories.

Category I is “the state and the political subdivisions thereof, including all related boards, commissions and agencies,”...

Category II is “boards, commissions and agencies created by statute”....

Category III is “boards, commissions and agencies...which are non-taxpaying and derive a source of revenue directly from public funds”...

Generally all units of local government—including school boards, city and county commissions—and state government boards and commissions are bound by the open meetings law. Generally speaking, any unit of government that receives public funds as revenue is subject to the open meetings law.

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

The law’s applicability becomes less clear when it comes to the Legislature, the governor, the constitutional officers and special committees appointed by local governments. For example, the constitution grants exclusion authority to the Legislature to create rules regarding its own activities.

Another example is the Attorney General. The open meetings law is not applicable to internal attorney general staff meetings or to meetings with constituents, since these are executive functions of the officeholder and not agency actions. If, however, the Attorney General uses his authority to hold a

hearing regarding the grant or denial of a polygraph examiner's permit, he is acting as an agency, and not as Attorney General, putting the open meetings law into play.

Public Notice. SDCL 1-25-1.1 pertains to public notice for meetings. It requires that all public bodies prominently post a notice and copy of the proposed agenda at the organization's principal office at least 24 hours PRIOR to the meeting. In the case of special or rescheduled meetings, public bodies must comply with the regular meeting notice requirements as much as circumstances will permit. The notice must be delivered in person, by mail or over the telephone to all local news media who have asked to be notified. While the law is silent on the issue, it is recommended that local media renew requests for notification annually as a means of reminding the entity of ongoing media interest.

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

Agendas for public meetings must be posted at least 24 hours in advance. The rationale is that the public and media should have some time to determine whether to come to the meeting. Adding agenda items right before meetings (or during the meetings) frustrates that purpose. Although the open meeting law in our state does not address the content of an entity's agenda, in one court case, a personnel issue was not posted as part of the agenda and the

local circuit court held that the personnel decision was void. McElhaney v. City of Edgemont (Fall River County Civ. 98-44).

The South Dakota Supreme Court has not spoken on the issue of whether actions taken in improper meetings have any legal validity. The Attorney General believes that any action taken during any meeting that has not been properly noticed could, if challenged, be declared null and void. It could even result in personal liability for members of the governing body involved, depending upon the action taken.

Executive Sessions. SDCL 1-25-2 allows a majority of the body present to vote to close a meeting when the governing body needs to discuss personnel, employees, student performance, legal matters, employee contract negotiations, or pricing strategies by publicly-owned competitive businesses. Meetings may also be closed for certain economic development matters involving cities and counties. SDCL 9-34-19.

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

Federal legislation regarding student records and medical records often requires school districts and cities or counties to conduct executive sessions or conduct meetings so as to refrain from releasing data regarding student records or medical records.

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

No official action be taken on any matter during an executive session. The governing body must adjourn the executive session and return to open session before any official action can be taken. Board members could be held personally liable for the results of an official action taken illegally during an executive session. For example, a contract approved only during an executive session could be found void and the board members could be required to repay any public funds spent under the contract.

Excluding the media or public from a meeting that has not been properly closed subjects the officers to (a) prosecution as a Class 2 misdemeanor punishable by a maximum sentence of 30 days in jail, a \$500 fine or both or (b) a public reprimand by the Open Meetings Commission.

Teleconference Meetings. The open meetings law allows meetings, including executive or closed meetings, to be conducted by teleconference--an information exchange by audio or video medium—if a place is provided for the public to listen and participate by speaker phone. State agencies must provide two speaker phones for the public. The media and public must be notified of telephone conference call meetings under the same notice requirements as any

other meeting. All votes shall be taken by roll call during a teleconference. A teleconference cannot be used for hearings or final action for state administrative rules.

Email communications. Courts of other states have held that contemporaneous email communications conducted among a quorum of the governing members of a public body constitute a “meeting” of the public body when the members discuss the merits of pending issues. Email participation in scheduling or similar activity would not, under this analysis, constitute a public meeting. For additional reference see Wood v. Battle Ground School District, 27 P.3d 1208 (Wash. 2001); 1998 N.D. Op. Atty. Gen. 0-5. There has not been a ruling in South Dakota on this subject.

B. Dispute Resolution

The law has historically provided that a person violating the open meetings laws was subject to criminal prosecution. Criminal prosecutions were rarely filed by the states attorneys and matters were often handled informally, but the resolution was not made public.

In 2004, the Legislature created an additional process for handling open meeting issues. SDCL 1-25-6, et. seq. The goal was to (a) to provide a workable remedy and (b) to develop a body of decisions interpreting the open meeting laws. These decisions will provide guidance to entities required to comply with the law.

As in the past, the law now provides that state's attorneys are to handle complaints alleging violations of the Open Meetings Law. Unlike the past, however, the states attorney now has three options to resolve such complaints. Once a complaint is filed and the states' attorney conducts any necessary investigation, the state's attorney must : (1) undertake a criminal prosecution, (2) send the complaint and investigatory file to the Open Meetings Commission for further action or (3) determine that there is no merit to prosecuting the case. If the case is referred to the Open Meetings Commission, it cannot be prosecuted criminally.

The results of each of these methods are public. For criminal prosecutions, a public record showing the disposition of any criminal complaint is available at the courthouse where the prosecution occurred. A public record of the disposition of matters forwarded to the Open Meetings Commission is available at the website for the South Dakota Attorney General.

<http://www.state.sd.us/attorney/office/openmtg/default.asp>

Under SDCL 1-25-6 the Attorney General is also required to maintain abstracts of no merits filings "for public inspection."

<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=1-25-6>

Open Meeting Commission. The Commission consists of five state's attorneys appointed by the Attorney General.

The Open Meetings Commission resolves open meetings disputes when it receives Complaints referred from state's attorneys. Upon referral from a state's attorney, the Commission obtains the complaint file (and investigatory information) from the state's attorney.

The Commission also requests that the governmental entity involved submit a response. The Commission may hold a meeting so the parties have an opportunity to explain their position further. The Commission then issues a decision including findings of fact and conclusions of law. The Commission has authority to issue a reprimand or to determine that there was no violation. Once a decision has been issued, it is filed with the Attorney General. The Attorney General posts the decision on his website and the decision is a matter of public record.

The Commission's operating procedures and its decisions are posted online. <http://www.state.sd.us/attorney/office/openmtg/default.asp>

Following are summaries of cases decided by the Commission:

1. Town of Herrick. The open meetings law pertains to all meetings, including special meetings and "old business." It applies even when the only item is an executive session item. The law requires that votes be made in an open meeting after the executive session is concluded. A reprimand was issued.
<http://www.state.sd.us/attorney/office/openmtg/TownofHerrick.pdf>
2. Davison County. Presentations or reports are to be heard in open session except for specific executive session matters. Regardless of whether an ad hoc task force suggests the executive session, the county is responsible for complying with the law. The county should have had someone separately review a task force report in advance to split the

presentation into public and executive session matters. A reprimand was issued.

<http://www.state.sd.us/attorney/office/openmtg/DavisonCounty05-02.pdf>

3. Gregory School Board. During an executive session, the board cannot deviate from the topic for which it called the executive session. Further, the topic for an executive session must be covered by one of the exceptions listed in the open meeting law. A reprimand was issued.
<http://www.state.sd.us/attorney/office/openmtg/GregorySchoolBoard05-03.pdf>
4. City of Lead. This matter involved three items. First, although personnel matters are properly a matter of executive session, an executive session cannot be used to discuss reorganizing the functions of various divisions in the city. Second, a meeting where the city considered whether a city employee had acted improperly on a purchasing issue was properly the subject of an executive session for personnel reasons. Third, any official action must be publicly noticed through the agenda process. A reprimand was issued.
<http://www.state.sd.us/attorney/office/openmtg/cityoflead.pdf>
5. Faulkton Area School District. The school board went into executive session to address personnel issues. The district did not make a vote later in open session. The District asserts that no vote was taken; the Complainant asserts that a vote was taken privately in executive session and resulted in contract termination of teachers. The interpretation involves consideration of SDCL 13-43-6.3, a statute pertaining to teacher contracts. The Commission held that no violation occurred because no vote was taken in the executive session.
<http://www.state.sd.us/attorney/office/openmtg/FaulktonSchoolBoard.pdf>
6. Melrose Township. The complaint was filed in March 2006. It alleges that an executive session was improperly conducted. The Commission held that the executive session was conducted to discuss legal business with their attorney and the executive session was proper. The open meetings law allows for executive sessions for such legal discussions. No violation occurred.
<http://www.state.sd.us/attorney/office/openmtg/MelroseTownship.pdf>
7. Melrose Township II. The Complaint alleges that a quorum of the Melrose Township Board met without complying with the notice and posting requirements of the open meeting law. The township board met with the Grant County Commission. Even though the Grant County Commission complied with the notice and posting requirements, the

open meeting laws required the township to also comply since a quorum of the township board met to discuss official business at the same time. A reprimand was issued.

<http://www.state.sd.us/attorney/office/openmtg/MelroseTownship2.pdf>

8. South Dakota Science & Technology Authority. The complaint alleged that executive sessions conducted for discussing contracts were proper under the open meeting laws. The Commission held that discussion of contracts is not, in and of itself, adequate reason for executive session. Preparation for or participation in employee contract issues is a proper matter for an executive session. Also, consultation with legal counsel or consideration of advice from legal counsel about contractual matters is proper for an executive session.

<http://www.state.sd.us/attorney/office/openmtg/SDScienceTechnologyAuthority.pdf>

9. Rapid City Regional Airport Board. The complaint alleged that the Airport Board wrongly conducted executive sessions during several meetings. The Open Meetings Commission reiterated its ruling in the Science & Technology Authority decision (that executive sessions cannot be conducted for “contractual matters” unless the contractual matters otherwise fit one of the statutory exemptions). Further, including an interested party to a contract in an executive session was not proper in this case.

<http://www.state.sd.us/attorney/office/openmtg/RCRegionalAirport.pdf>

The following cases are now pending before the Commission:

1. Arcade Township. The complaint was filed December 20, 2005. It alleges that no agenda was posted for a meeting of Arcade Township, a township in Faulk County. The matter is being considered based on the submissions of the parties.
2. Lawrence County. The complaint was filed December 23, 2005. It alleges that Lawrence County violated the open meeting laws when it dissolved its Lawrence County Fire Advisory Board. The time is still pending for a response from the County. Oral presentations on this matter were held on May 10, 2006, and a decision will be issued in the future.
3. South Dakota Board of Regents. The complaint was filed in April 2006. It alleges that the Board of Regents conducted meetings improperly, including executive sessions, in considering a Sioux Falls campus for USDSU. Oral presentations were held in Watertown on July 24, 2006, and a decision has not been issued yet.

4. Roberts County. The complaint was filed in March 2006. It alleges that three Roberts County Commissioners held an informal meeting without complying with the open meeting laws. Oral presentations were held in Watertown on July 24, 2006, and a decision has not been issued yet.
5. City of Tripp. The complaint was filed in April 2006. It alleges several violations involving the Tripp City Council, including the failure to post agendas, failure to keep proper minutes, and failure to make minutes publicly available. Oral presentations were held in Watertown on July 24, 2006, and a decision has not been issued yet.

“No Merits” Filings. If a state’s attorney determines that there is no merit to undertaking a criminal prosecution or referring a case to the Open Meetings Commission, the state’s attorney shall submit the complaint and the file to the Attorney General. The Office of Attorney General “may publish abstracts of such information, including the name of the government body involved for purposes of public education.” SDCL 1-25-6(2) The list below is made pursuant to that authority and includes all such filings from July 1, 2004, to the date of this report.

Abstract: On May 25, 2005, Turner County State’s Attorney Landeen-Hoeke filed information on an investigation conducted in response to an anonymous caller. The allegation was that the school had had an unscheduled meeting that was not advertised in the newspaper or publicly announced. After investigation, it was concluded that the notice of the meeting and the agenda had, in fact, been undertaken properly. **Public Education Comment:** Anonymous complaints are not required by law to be filed with the Office of Attorney General.

Abstract: On November 1, 2006, Fall River County State’s Attorney Lance Russell filed information on an investigation conducted in response to letter

from Hot Springs City Attorney Pat Ginsbach. No complainants were identified in the letter. The allegation was that the Hot Springs City Council had sent out a letter, but there was no public notice of a city council meeting showing that this item of correspondence was being drafted. After investigation, it was concluded that a quorum of the City Council had not met regarding the letter and the letter had, instead, been circulated for signature. **Public Education Comments:** Complaints filed by attorneys that do not identify the actual complainant are considered anonymous complaints. The Open Meeting Law does not apply unless a quorum meets to discuss official business.

Abstract: On August 9, 2005, Hughes County States Attorney Maher filed information on a letter of complaint from Betty Breck. The complaint involved a meeting that did not occur in Hughes County. Also, the Complaint was lodged against a private non-profit association. Ms. Breck later advised Maher that she understood that the entity involved was not subject to the open meeting law. **Public Education Comment:** The Open Meeting Law only applies to official meetings of the state and the political subdivisions of the state, commissions, boards, and agencies created by statute or which are non-taxpaying and derive a source of revenue directly from public funds. Also, any complaints regarding public meetings must be lodged in the place where the meeting occurred.

Abstract: On March 28, 2006, Brown County States Attorney McNeary filed information on a letter of complaint from Betty Breck. The complaint claimed that the Groton Area School Board had violated the open meeting laws and had also violated related school board policies. The state's attorney declined to prosecute various issues including the following. The state's attorney determined that based on the facts involved, general language in an agenda, i.e. "Homecoming and related activities" was adequate without requiring a more detailed or itemized agenda, i.e. "school mascot, school colors and school song." He also determined that a number of the allegations concerned school board policy and Roberts Rules of Order, matters that cannot be pursued under the Open Meeting Laws. Another

allegation was not based on firsthand knowledge. He further declined to prosecute claims that inadequate time was given for citizen comment or that the agenda was not in the proper order of discussion. In doing so, he explained that time was given for citizen input and that SDCL 1-25-1 does not provide guidelines on the extent of public participation. **Public Education Comment:** The Open Meeting Law cannot address allegations concerning board policies or Roberts Rules of Order. The Open Meeting Law does not specify the time period or extent of citizen participation at public meetings. Further, state's attorneys are to exercise their prosecutorial discretion in determining whether sufficient evidence exists to pursue further action concerning open meeting matters such as the adequacy of the language in an agenda.

Abstract: On March 22, 2006, Brown County States Attorney McNeary filed information on a letter of complaint from Betty Breck concerning the City of Aberdeen. The complaint made two allegations: (1) that the city did not post its agendas and make them available for a continuous 24 hour period in advance of a public meeting and (2) that work sessions of city officers should be noticed 24 hours in advance under Open Meeting Laws. The state's attorney determined that there was insufficient evidence to prosecute the matter. He noted that the City did have its agenda posted on Friday for a Monday meeting, but the agenda was not visible for public view over the weekend. He recognized that the city had agreed to also post the agenda on its website in the future thereby making it continuously available. As to work meetings held right before city council meetings, the state's attorney noted that work sessions were not regular sessions of the city council, that notice was allowed to the extent possible, that no official votes were taken, and that the public and media were allowed to be present. **Public Education Comment:** State's attorneys are to exercise their prosecutorial discretion in determining whether sufficient evidence exists to pursue criminal action or to refer the matter to the Open Meetings Commission.

Abstract: On March 22, 2006, Brown County States Attorney McNeary filed information on a letter of complaint from Betty Breck concerning the Groton

City Council. The complaint alleged that the City met without complying with the Open Meeting Law. The state's attorney determined that although a quorum was present, the City Council did not meet for the purpose of discussing official business. Accordingly, there was no official meeting within the meaning of the Open Meeting Law. **Public Education Comment:** The Open Meetings Commission applies when a quorum of a public body meets to conduct official business.

Abstract: On April 14, 2006, Brown County States Attorney McNeary filed information on a letter of complaint from Betty Breck concerning several actions of the Aberdeen School Board. The complaint alleged that the Board took action on an item at an official meeting without having placed the item on its agenda 24 hours in advance. The state's attorney declined to prosecute because the matter arose within the 24 hour period and involved a matter of urgency. The state's attorney also determined that another allegation concerned violation of school board policy and was not a matter that could be pursued under the Open Meeting Laws. Other allegations were determined to be without foundation or based on a clerical error in an agenda. **Public Education Comment:** The Open Meeting Law cannot address allegations concerning violations of board policies or Roberts Rules of Order. Further, state's attorneys are to exercise their prosecutorial discretion in determining whether sufficient evidence exists to pursue further action.

Abstract: On April 4, 2006, Brown County States Attorney McNeary filed information on a letter of complaint from Betty Breck concerning actions of the Aberdeen School Board. The Complaint alleges that the Board did not post an agenda and make it available for public viewing for a continuous 24 hour period in advance of a public meeting. The board did post its agenda, but not on an outside window. It has agreed to post the agenda on an outside window in the future. The state's attorney declined to prosecute. **Public Education Comment:** Although the Open Meeting Law does not require that an agenda be placed on an outside window, it must be posted so that it is visible to the public. Further, state's attorneys are to exercise

their prosecutorial discretion in determining whether sufficient evidence exists to pursue further action.

Abstract: On March 12, 2007, Hughes County States Attorney Maher filed information on a letter of complaint from Betty Breck concerning actions of the South Dakota Legislature's Government Operations and Audit Committee. The Complaint alleges that the GOAC should not have entered into executive session to discuss a Juvenile Corrections Monitor Report on December 4, 2006. The Legislative Research Council responded by stating that the GOAC, as a legislative committee, is not among the entities covered by SDCL ch. 1-25. The state's attorney declined to prosecute. **Public Education Comment:** The legislature and legislative committees rely on a legislative rule, Joint Rule 7.3 for its procedural requirements, including open meetings issues. The legislature does not rely on the Open Meeting Law in SDCL ch. 1-25.

C. Attorney General Recommendation. The foregoing procedure was enacted in 2004. As seen, a number of disputes have been resolved and a number of proceedings are pending. The process has not been in place long enough to demonstrate that either the procedure or the substantive law merits substantial change. The following recommendations do, however, warrant discussion.

Funding. In 2004 when Open Meetings Commission was created, no budget was requested. This was due to the fact that the number of complaints that the Commission would receive was unknown. This year the Office of Attorney General has requested and received \$6000 for payment of lodging, meals, and per diem for Commission members for FY 2008. This budgeted item applies

only to the Commission expenses for its meetings 2-4 times per year. Attorney General employee salary and expenses incurred to assist the Commission have been absorbed in the legal services budget of the Office of Attorney General. This includes attorney assistance and corresponding support staff services as well as travel and other incidental expenses. For the 2008 fiscal year, the Attorney General proposes the same budget.

Deliberative Process Privilege. This report recommends that legislation be enacted which would protect communications and documents prepared for government officials by key staff. Thus, this will allow the free flow of internal policy analysis for executive decision-making. Furthermore, governing bodies sitting as judicial panels or juries should be allowed to deliberate in private for consideration of evidence. This legislation should, at the same time, be narrowly drafted to fully protect public access to comments and testimony at hearings and to ensure that voting is undertaken publicly. In addition, this legislation should reflect federal law and consider provisions in other states.

Many state and local regulatory or governing bodies are occasionally required to act as judges or juries and hear evidence, consider legal argument, and craft decisions. Generally, the testimony and legal argument is public. The entities charged with crafting decisions often need to deliberate to share analysis and reach consensus on a decision if possible. Draft decisions are not currently required to be kept by state statute and are not released to the public. SDCL 1-27-1. In addition, decision-makers are entitled, by common

law and court decision, to engage in jury-type deliberation (see discussion at page 13, *infra*). However, because the deliberative process privilege is not expressly stated in statute, the use of jury-type deliberation is mixed. A carefully drafted privilege should limit jury-type deliberation only to situations when the governing body is acting in a judicial or quasi-judicial capacity. The public and the governing boards would benefit from a statute that gives more detailed guidance regarding the limits of this privilege than that which currently exists. This recommendation would further stipulate that the same law applies in state court as federal court.

Credits:

Since 1992, representatives of the S.D. Office of the Attorney General, S.D. Municipal League, Associated School Boards of S.D., and S.D. Association of County Commissioners, S.D. Association of County Officials, S.D. Newspaper Association, and S.D. Broadcasters Association have jointly authored and distributed a brochure concerning open meeting laws entitled “Conducting the Public’s Business in Public.” Portions of the brochure, updated in November 2006, were used in this report and credit is therefore given to the joint authors of the brochure.

We are grateful to the City of Brookings, Freeman School District, Huron School District, and Hughes County for allowing their personnel to assist us in preparation of the city, school district and county portions of this report.

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Additional Information

Is there a Departmental point of contact for Record? (list by position, not name):