

**STATE OF SOUTH DAKOTA  
SOUTH DAKOTA OPEN MEETINGS COMMISSION**

IN THE MATTER OF OPEN MEETINGS	)	
COMPLAINT 2017-01, WATER MANAGEMENT	)	MOTION FOR LEAVE TO
BOARD, HUGHES COUNTY	)	FILE AND AMICI CURIAE
	)	BRIEF OF ASSOCIATED
	)	SCHOOL BOARDS OF
	)	SOUTH DAKOTA IN
	)	SUPPORT OF WATER
	)	MANAGEMENT BOARD

**MOTION FOR LEAVE TO FILE AND AMICI CURIAE BRIEF OF  
ASSOCIATED SCHOOL BOARDS OF SOUTH DAKOTA  
IN SUPPORT OF WATER MANAGEMENT BOARD**

The Associated School Boards of South Dakota (“ASBSD”) respectfully moves the Open Meetings Commission for leave to participate in the above-entitled matter as amici curiae herein for the purpose of filing the attached brief. In support of its motion, Amici state the following: The parties are receiving notice of Amici’s motion to file the attached brief as said motion and brief are being mailed on this date by first class mail, postage pre-paid, to the parties. All one hundred forty-nine (149) public school districts are members of ASBSD. ASBSD is a non-profit corporation providing assistance to the 149 South Dakota public school district boards of education. SDCL 1-25-2 significantly affects the ability of school boards to carry out their responsibility in governing their respective public school districts.

ASBSD respectfully urges the Open Meetings Commission to grant this motion and allow ASBSD provide additional information that may assist the Commission in determining that it is not a violation of SDCL 1-25-2 for the governing board of a political subdivision such as a school board or city commission, or a State Board such as the Water Management Board or South Dakota Board of Education, to conduct deliberations in executive session.

Dated this 29<sup>th</sup> day of November, 2017.

Respectfully submitted,



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### **QUESTION PRESENTED**

Whether SDCL 1-25-2 prohibits State Boards and governing boards of political subdivisions  
from deliberating in executive session?

### **INTERESTS OF AMICI CURIAE**

ASBSD has an extreme interest in the Water Management Board matter currently pending before the Open Meetings Commission. ASBSD is concerned that an Open Meetings Commission decision to prohibit local school boards (as well as State Boards and other political subdivisions) the right to deliberate on matters in executive session would be for the Open Meetings Commission to prohibit something which is not prohibited by SDCL 1-25-2. ASBSD respectfully submits that under the rules of statutory construction a school board is authorized to deliberate while in executive session, if not by the express language of SDCL 1-25-2 then it is necessarily implied by statute (Dillon's Rule). In the Matter of the Petition for Writ of Certiorari, 2003 SD 101, ¶10 (School boards are creatures of statute with limited powers. Therefore, a school board cannot exercise power unless it is expressly granted or necessarily implied by statute.")

ASBSD is also concerned if the wording in a motion to go into executive session (whether the actual words used by the speaker or the words recorded by whomever records the minutes) becomes the Open Meetings Commission's sole basis for determining whether a school board, State Board or governing board of another political subdivision violated SDCL 1-25-2. If the wording in a motion to go into executive session becomes the sole basis for determining whether a school board violated SDCL 1-25-2, school boards likely will consider only identifying the statute which is the basis for going into executive session (SDCL 1-25-1 states that meetings "are open to the public unless a specific law is cited") and not give an explanation as to the reason for going into executive session. See Guide to South Dakota's Open Meeting Law<sup>1</sup> ("best practice to avoid public confusion would be that public bodies explain the reason for going into executive session").

### SUMMARY OF THE ARGUMENT

SDCL 1-25-2 does not prohibit a state board or the governing body of a political subdivision of the state from deliberating in executive session. "Deliberate" means "to weigh in the mind; consider: *to deliberate a question*," "to think carefully or attentively; reflect: *She deliberated for a long time before giving her decision*," and "to consult or confer formally: *The jury deliberated for three hours*." <http://www.dictionary.com/browse/deliberate>

SDCL 1-25-2 sets forth the permissible reasons for going into executive session, and in doing so the statute uses the terms "discussing", "consulting", and "preparing" in listing the permissible and authorized reasons for entering executive session.

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<sup>1</sup> CONDUCTING THE PUBLIC'S BUSINESS IN PUBLIC - A guide to South Dakota's Open Meetings Law (Revised Fall 2015) Prepared by representatives of the: S.D. Attorney General's Office, S.D. Municipal League, Associated School Boards of S.D., Association of County Commissioners, S.D. Association of County Officials, S.D. Newspaper Association, S.D. Broadcasters Association, S.D. Association of Towns and Townships.

SDCL 1-25-2. Executive or closed meetings--Purposes--Authorization--Violation as misdemeanor. Executive or closed meetings may be held for the sole purposes of:

- (1) Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. The term "employee" does not include any independent contractor;
- (2) Discussing the expulsion, suspension, discipline, assignment of or the educational program of a student or the eligibility of a student to participate in interscholastic activities provided by the South Dakota High School Activities Association;
- (3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;
- (4) Preparing for contract negotiations or negotiating with employees or employee representatives;
- (5) Discussing marketing or pricing strategies by a board or commission of a business owned by the state or any of its political subdivisions, when public discussion may be harmful to the competitive position of the business.

However, any official action concerning such matters shall be made at an open official meeting. An executive or closed meeting shall be held only upon a majority vote of the members of such body present and voting, and discussion during the closed meeting is restricted to the purpose specified in the closure motion. Nothing in § 1-25-1 or this section may be construed to prevent an executive or closed meeting if the federal or state Constitution or the federal or state statutes require or permit it. A violation of this section is a Class 2 misdemeanor.

“Discuss” means “to consider or examine by argument, comment, etc.; talk over or write about, especially to explore solutions; debate. - <http://www.dictionary.com/browse/discuss>  
Synonyms for “discuss” include argue, confer, consider, debate, *deliberate*, examine, explain, and review. <http://www.thesaurus.com/browse/discuss>

“Consult” means “to consider or deliberate; take counsel; confer (usually followed by *with*): *He consulted with his doctor.*” <http://www.dictionary.com/browse/consult> Synonyms for consult include argue, brainstorm, call in, consider, *deliberate*, discuss, examine, huddle, interview, seek opinion of, take a meeting, take account of, take counsel, talk over, toss ideas around, negotiate, respect, and review. <http://www.thesaurus.com/browse/consult>

Definitions of “prepare” include “to put in proper condition or readiness, to

manufacture, compounds or compose,” and “to put things or oneself in readiness; get ready.” <http://www.dictionary.com/browse/prepare> Synonyms for “prepare” include arrange, develop, formulate, plan, ready, and lay the groundwork. <http://www.thesaurus.com/browse/prepare>

It is respectfully submitted that the right of a governing board of a political subdivision, or a state board, to deliberate in executive session is expressly granted or necessarily implied by statute. In the Matter of the Petition for Writ of Certiorari, 2003 SD 101, ¶10. If not expressly granted by SDCL 1-25-2 (“to discuss” is synonymous with “to deliberate”), the right to deliberate in executive session is certainly implied “from the necessities of some power actually conferred.” *Id.* (quoting *State ex rel. Bell v. Board of County Comm’rs of Beadle County*, 68 SD 237, 241-242, 300 NW 832, 834 (1941).

To deliberate on a matter in executive session should not be construed as or interpreted to be the same as making a final decision. SDCL 1-25-2 states in part “[h]owever, any official action concerning such matters shall be made at an open official meeting.” The Guide to South Dakota’s Open Meeting Law also states “[n]o official votes may be taken on any matter during an executive session... The public body must return to open session before any official action can be taken.” While both SDCL 1-25-2 and the Guide to South Dakota’s Open Meeting state that no official action may be taken in executive session, neither say the governmental entity cannot deliberate while in executive session.

In a school context, for a school board to be prohibited from deliberating in executive session on student matters, employee matters, legal matters and negotiations would be inconsistent with and counter to the very purpose for authorizing executive sessions.

Additionally, for the Open Meeting Commission to make a ruling on whether or not the

entity violated the executive session statute based on two words (“deliberate and”) in the motion for going into executive session would be to put form over substance, which in the past the Commission has refused to do.

### ARGUMENT

The above-entitled matter is currently pending before the Open Meetings Commission after the Commission granted a continuance request by George Ferebee, Complainant. The Commission had initially held a hearing on August 31, 2017, related Mr. Ferebee’s Complaint, and the Commission failed to reach a decision on the merits of the complaint.<sup>2</sup> At the heart of the complaint is a motion made during the October 13, 2016, meeting of the Water Management Board. That motion, as reflected in the October 13, 2016, minutes, of the Water Management Board, is as follows:

Motion for the board to enter into an executive session by Freeman under the provisions of SDCL 1-26 and SDCL 1-25-2(3) for the purpose of deliberation and to consult with legal counsel, second by Bjork.

It was the different interpretations and application by the Commissioners at the August 31, 2017, Commission hearing of the phrase “for the purpose of deliberation and to consult with legal counsel,” and more specifically the use of the word “deliberation” in the motion, that resulted in the Commission on August 31, 2017, being unable to find the Water Management Board had violated the open meetings laws or had not violated the open meeting laws.

The different interpretations and applications of the law by members of the Open

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<sup>2</sup> One of the five Open Meeting Commissioners was not at the August 31, 2017 Commission meeting. Two motions related to the Complaint filed by Mr. Ferebee failed on 2-2 votes. The Commission then scheduled another hearing in order that all Commissioners may participate in the hearing and make a decision. That re-hearing was scheduled for November 3, 2017, and at the time and date of the re-hearing Mr. Ferebee requested and was granted a continuance.

Meetings Commission related to authorized purposes of executive sessions is clearly shown in the transcript of the August 31, 2017 hearing.

“However, the motion was for the purpose of deliberation and consulting with legal counsel and deliberation to my mind means something different from consulting with legal counsel and – and that troubles me that they went into executive session for two purposes one was deliberating and the other was consulting with legal counsel.” Commissioner Steele, Hearing Transcript, p. 8.

“I think we have to judge why they went into executive session based on the motion itself. It may well be that it was merely inartfully phrased we don’t know we can’t know. I think we have to judge it based on the motion itself and it appears from the face of the motion that they went into executive session for two distinct reasons....but when it gets to point of deliberation I think it has to be done in public session.” Commissioner Steele, Hearing Transcript p.15.

“They can consult with their attorney, they can get his advice on points of law and his [interpretation] of the law and that type of thing, but when they’re having their round robin discussion as to various other things what’s right, what’s fair, whether or not they want to follow the legal advice, which is certainly something a board can choose to do or not I think that all has to be in public session that’s – so it’s deliberation and to consult with the board’s legal counsel that’s what I hang up on.” Commissioner Steele, Hearing Transcript p.16

“... it [going into executive session] was on notice and they wanted to make sure that they hadn’t violated some other procedural requirement before going ahead and proceeding to resolve the motion to dismiss the petition for declaratory judgment... They came out of executive session into open session the motion was then made you know the second motion to dismiss was then made it was seconded there was an opportunity for discussion and – and it was voted on all in open session. I think that this falls within an exception I believe that this was a proper executive session that’s my take on it.” Commissioner Reedstrom, Hearing Transcript pp. 14-15.

“I think we’re somehow, you know, subscribing a certain meaning to the term deliberation you know because we’re attorneys we’re trial attorneys we know that jurors go back and they deliberate and they come back with a decision, but doesn’t-doesn’t the word deliberate also mean that you’re just going back to discuss something? You’re going to talk with – you’re just going to talk to somebody like your attorney about a subject and you’re going to discuss it you’re going to deliberate it. Deliberation means that you’re exchanging ideas, you’re sharing information back and forth with an eye towards figuring something out which in this case was whether or not the notice requirements or these procedural things had been met.” Commissioner Reedstrom, Hearing Transcript p. 16.

It is respectfully submitted that a review of previous decisions of the Open Meetings Commission supports a conclusion that the use of the word “deliberate” in the motion to go into executive session does not constitute a violation of the open meetings laws.

The Open Meetings Commission has previously stated that answering a question (i.e., coming to a conclusion or making a decision) in executive session is permissible. “Answering the question of whether anything improper was done by city personnel in the incident is a valid subject of inquiry in Executive Session.” *In the Matter of Open Meeting Complaint, City of Lead* (04-01). The Open Meetings Commission further stated in *City of Lead* “[a]lthough a matter standing alone should be considered in open session, when the facts are so intertwined with employee performance, those specific items as evidence of the performance are appropriately discussed as facts surrounding the performance issue. So long as the question remains the performance of the employee, and not whether the item itself should be approved or disapproved, executive session is a proper venue. Here, the City was considering an employee’s performance concerning the delivery of additional equipment. Thus, no violation occurred and we find in favor of the City.”

In *City of Lead* the Open Meetings Commission also stated “[w]hile we have noted that all materials in Executive Session must be covered by an exception for the closed discussion to be appropriate, Davison County, that restriction is met if the matters to be discussed are the factual circumstances which give justification for the exception to be applied.”

It is respectfully submitted that Lead stands for the following propositions which support a conclusion that it is permissible under SDCL 1-25-2 for the governing board of a political subdivision or a state board to deliberate in executive session: (1) answering a question of whether something was proper is a valid subject of inquiry in executive session, (2) as long as



the question to be addressed in executive session is a proper topic for executive session, executive session is a proper venue, and (3) the requirement for executive session is met if the matters to be discussed are the factual circumstances which give justification for the exception to be applied.

Commissioner Steele stated during the hearing on August 31, 2017, that while the Water Management Board can consult with its attorney and get his advice on points of law and his interpretation of the law and that type of thing, *but when they are discussing whether or not they want to follow the legal advice that has to be in public session.* Hearing Transcript p.16. To now require such a discussion in open session is inconsistent with what this Commission has previously recognized as the attorney-client privilege which attaches to governing boards.

In the Matter of Open Meeting Complaint, Melrose Township (06—01), the Open Meetings Commission stated

“[h]ere no dispute exists that an official meeting occurred and that an executive session discussion with an attorney revolved around the parliamentary steps necessary to reverse [a previous] decision....

An attorney's function is not only to handle a lawsuit filed, but to also provide advice to prevent violations of the law. Prevention of those violations protects the body from liability arising from the violation itself. Here, Melrose Township sought advice to consider the propriety of action sought by the petition. A variety of issues could have faced the Township based on the decisions made on March 16, 2006. Each of those issues, and related violations could have given rise to litigation. The advice of counsel to take measured steps allows any body to take action to protect itself. It is not only litigation already proposed by others as an attack that is a permitted topic, but also litigation that is proposed as a possibility by a board's own attorney. To hold otherwise could result in nonsensical findings that a board may only discuss with their own attorney issues that the attorney has identified as problems that need to be addressed to protect the public, or avoid liability, in public session. The end result would be that every entity or person except a public board could exercise the attorney-client privilege.”

See *In the Matter of Open Meetings Complaint 09-01A, City of Martin* (“Under S.D.C.L.

§ 1-25-2, executive or closed meetings may be held for consulting with legal counsel or

reviewing communications from legal counsel about proposed or pending litigation.” Conclusion of Law No. 15; See also *In the Matter of Open Meeting Complaint, City of Mitchell* (08-01)).

To require the governing board of a political subdivision, or a state board, to discuss in open session whether or not the board wants to follow the legal advice of its attorney would lead to the exact result rejected in *Melrose* - that every entity or person except a public board could exercise the attorney-client privilege. If, following an executive session with its attorney, the governing board was to deliberate in open session whether or not to accept its attorney’s advice related to litigation which had already started or related to the threat or possibility of litigation, the governing board would not be able to exercise its attorney-client privilege of confidentiality.

If the governing board of a political subdivision, or a state board, has to discuss whether or not they want to follow the legal advice that has to be in public session, consider this hypothetical: Litigation has been filed against the political subdivision. The posted notice of meeting with proposed agenda indicates that there will be an executive session authorized by SDCL 1-25-2(3). During the executive session the governing board’s attorney is present and discusses the litigation which has been filed, and gives his or her recommendation on how the governing board should proceed. The governing board then has to reconvene in open session and discuss (deliberate) in open session (with the attorney for the opposing side present) whether or not to accept their attorney’s recommendation. Requiring the governing board to deliberate in open session whether or not to accept their attorney’s recommendation would be to remove the very confidentiality protection that SDCL 1-25-2(3) and SDCL 19-19-3 authorizes.

“The legislative intent behind the South Dakota open meetings laws protects an attorney’s discussion with their clients regarding litigation.” *In the Matter of Open Meeting*

*Complaint 09-01A, City of Martin, Conclusion of Law No. 18.*

As indicated previously, ASBSD is very concerned about the possibility that one word in a motion explaining the reason for an executive session when law only requires the statutory citation be given in the motion can result in a finding by the Open Meetings Commission that there was a violation of the open meetings laws. (“So we have to make our judgment as to whether it was done in compliance with the open meeting law I think based on the wording of the motion. That – that concerns me” Hearing Transcript p. 8; “I think we have to judge why they went into executive session based on the motion itself.” Hearing Transcript p.15).<sup>3</sup>

In the past, the Open Meetings Commission has not based its decision on only one word in the minutes. Instead, the Commission has clearly considered and based its decision on the totality of circumstances.

“It was clear that the motion to enter into executive session was based upon such discussion and such discussion is construed as a part of the motion calling for executive session.” *Open Meetings Complaint 09-01A, City of Martin* (Finding of Fact, No. 11). (Emphasis added).

“All evidence presented to the OMC indicated that indeed no official action was taken.” *In the Matter of Open Meetings Complaint 09-01A, City of Martin* (Conclusion of Law No. 19). (Emphasis added).

“Mr. Fogg’s Complaint regarding no reason given for the executive session is found to not be a violation of South Dakota’s open meetings laws under the totality of the circumstances.” *In the Matter of Open Meetings Complaint 09-01A, City of Martin*, p.4 (Emphasis added).

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<sup>3</sup> Attorney for Water Management Board, Matt Naasz, stated at the hearing on August 31, 2017, “[t]he use of the word deliberate there it was used it’s what he said, but I think the record is clear that what was intended was to be – seek legal counsel and that’s why the motion was made.” Hearing Transcript p. 8.

“Accordingly, it is apparent from the agenda as a whole that the county commission would also be conducting business in public later during the same meeting. The failure to include the hiring decision as a specific agenda item is not a violation of SDCL 1-25-1.” *In the Matter of Open Meeting Complaint Against Butte County Commission, 08-04* (Finding of Fact, No. 6). (Emphasis added).

“Based upon the materials in the record and the testimony presented at the hearing of this matter, the Commission concludes the Oldham City Council did violate the South Dakota Open Meetings Laws in that the Council held meetings on April 5, April 12, April 13, and April 17 of 2017, without providing the public notice required by SDCL 1-25-1.1.” *Open Meetings Complaint Against Oldham City Council, 2017-02* (Conclusion of Law No. 4). (Emphasis added).

In 2009, prior to the amendment in SDCL 1-25-1 which requires the governing board to cite a specific law authorizing an executive session, the Open Meetings Commission stated in *Matter of Open Meetings Complaint 09-01A, City of Martin* “[t]he law does not require any statement in particular to be made when a public entity moves to enter into executive session.” *City of Martin*, Conclusion of Law, No. 15. The Commission went on to conclude the City Attorney and City “went above and beyond the requirements of the law by indicating to the public that an executive session was needed to discuss litigation and that the public and conflicted parties are excluded under the law.” *City of Martin*, Conclusion of Law, No. 16. The same is applicable in the instant case. The statute authorizing the executive session was included in the motion. The law does not require a statement explaining the statute giving the authority to go into executive session. Like probably most political subdivision governing boards and state boards, the Water Management Board went above and beyond the requirements of the law when attempting to explain the reason for the executive session. The Water Management Board should not now be held in violation for attempting to follow the “best practice” as prescribed in the Guide to South Dakota’s Open Meeting Law.

It also should be noted that the South Dakota Attorney General has previously addressed

the sufficiency of minutes. “A school board speaks through its records and such records constitute prima facie evidence of its actions. In general, the minutes of a school board need not be formal or technical in nature. The minutes should show what actions were taken by the board and should show that the board acted within the requirements of the statutes.” South Dakota Attorney General Opinion 74-11. A decision by the Open Meetings Law that there is a violation of the open meetings laws because the word “deliberate” was used in the minutes makes the wording of the minutes very formal and technical, something which the Attorney General said is not the case.

Sole reliance by the Open Meetings Commission on one or two words in a motion (spoken or recorded for the minutes) is a very risky proposition. Minutes may or may not be 100% complete when it comes to recording what happened at a governing board meeting. There may be slight differences in what is actually said in a motion to go into executive session and what is recorded in the minutes. What was actually said at the Open Meetings Commission meeting on August 31, 2017, and what is recorded in the minutes, is a clear example of how what is recorded in the minutes may be different than the words used in the motion.<sup>4</sup>

Hearing Transcript, p. 13, August 13, 2017 Open Meetings Commission, Motion made by Commissioner Steele: “I would move that we make the determination that the Water Management Board went into executive session for two distinct purposes one was deliberation and one was to consult with legal counsel on the motion to dismiss that had been made by one of the interveners before the Board and that violated the open meetings law because they may not deliberate behind closed doors. They may consult with legal counsel and I don’t believe the issue of whether it was pending or proposed litigation is relevant I think they can consult with legal counsel on such matters as they deem appropriate, but not deliberation so I would move that we find on that basis that there was a violation of the open meetings law because they went into executive session to deliberate on a matter before them.”

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<sup>4</sup> Those portions of the motion as found in the Hearing Transcript which are underlined are not found in the Commission’s minutes.

Open Meetings Commission Minutes of August 31, 2017, meeting: “Mr. Steele moved that the Commission make the determination that the Water Management Board went into executive session for two distinct purposes: one was deliberation, and the other was to consult with legal counsel on the motion to dismiss. That, he reasoned, violated the open meetings law because they may not deliberate behind closed doors. Mr. Steele noted the Water Management Board may consult with legal counsel on such matters as they deem appropriate, but not deliberate.

The Open Meetings Commission previously addressed the accuracy in minutes in *Matter of the Complaint Against the South Dakota Science and Technology Authority*, February 20, 2007. The Commission stated “[w]e are left then, initially, with the question of whether what really happened at the meeting was accurately reflected in the minutes submitted to us or whether the version submitted by SDOG more accurately reflects the true course of events... However, in this case, as to this issue, we do not have to resolve the disputed factual question, because we conclude that, even if the minutes accurately reflect what took place at the Authority’s meeting, there was not compliance with the statute.” (Emphasis added).

Although there was an audio recording of the Water Management Board meeting on October 13, 2016, many political subdivisions do not record (audio or video) their meetings. Notes are made during the meeting and meeting minutes are then written. To hold the note-taker to the same degree of accuracy to which a court reporter is held would be to make those minutes very formal and technical, which the SD Attorney General said is not the case.

A word or phrase in a motion (actually spoken or recorded for purposes of the minutes) should not be considered in isolation. As this Commission did in the Matter of Open Meetings Complaint 09-01A, City of Martin, the Commission should consider the totality of the circumstances when making a decision as to whether or not there was a violation of the open meetings law.

During the hearing on August 31, 2017, the attorney for the Water Management Board

was asked if any official action was taken after the Board came out of executive session. The answer was yes, a motion was made to grant the motion to dismiss and that motion was adopted by the Board. Hearing Transcript, p. 11. SDCL 1-25-2 states “[h]owever, any official action concerning such matters shall be made at an open official meeting.” This Commission has repeatedly emphasized the requirement that official action concerning the executive session matter shall be made in open session.

“The Commission also concludes that the plain language of SDCL 1-25-2 requires a public body to come out of executive session and into general or open session to take official action on matters discussed or considered in executive session.” *Open Meetings Complaint Against Oldham City Council, 2017-02* (Conclusion of Law, No. 3).

“No vote or consensus was taken in the executive session.” *In the Matter of Open Meeting Complaint 09-01, City of Martin* (Findings of Fact, No. 13).

“S.D.C.L. § 1-25-2 prohibits official action from taking place in executive session. All evidence presented to the OMC indicated that indeed no official action was taken.” *In the Matter of Open Meeting Complaint 09-01, City of Martin* (Conclusion of Law, No. 19).

“SDCL §1-25-2 expressly mandates that in order for the Council to take official action on permissible executive session matters—those listed at SDCL §1-25-2(1)-(5)—the action must ‘be made in an open official meeting.’ ” *In the Matter of Open Meeting Complaint 12-01, Sioux Falls* (Conclusion of Law, No. 5).

“The purpose of requiring the Council and other public bodies to take official action in a public forum is to keep the public informed of the governing bodies’ decisions and to keep the governing bodies accountable for those decisions. .” *In the Matter of Open Meeting Complaint 12-01, Sioux Falls* (Conclusion of Law, No. 6).

“To comply with the South Dakota Open Meetings Law, a public body must reveal—not conceal—the subject matter of the official action upon which it is voting.” *In the Matter of Open Meeting Complaint 12-01, Sioux Falls* (Conclusion of Law, No. 7).

There is no evidence in the record that the Water Management Board took any official action while in executive session. It is not “official action” for the governing board of a political subdivision or a state board to discuss while in executive session a matter authorized in SDCL 1-

25-2 and deliberate thereon.

During the hearing on August 31, 2017, Complainant George Ferebee stated “[I]et me repeat the precedent that you folks might be about to make could extend across the state to county commission, city councils, all the others of hundreds, and hundreds of boards, commission, etc. that are covered by 1-25-2.” Hearing Transcript, p. 13. How very true.

In a school context, the inability of a school board to deliberate while in executive session on a matter authorized by state law to be discussed in executive session results in a loss of confidentiality that the executive session law recognizes.

SDCL 1-25-2(1) authorizes a school board to go into executive session to discuss personnel matters. Assume the matter before the school board, in executive session, was the issue of whether or not an employee’s contract should be nonrenewed at the end of the current contract period or terminated, or an employee grievance. Under a “no deliberation” rule, the school board could hear the evidence while in executive session but would have to discuss – deliberate – in open session. If the executive session matter before the school board was a student expulsion, federal law (Family Educational Rights and Privacy Act) prohibits unauthorized disclosure of confidential student information. SDCL 1-25-2 recognizes the same (i.e., “[n]othing in 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”).

As noted above, whereas SDCL 1-25-2(3) and SDCL 19-13-3 recognize the attorney-client privilege afforded to local school boards when they meet in executive session with their attorney regarding pending or threatened litigation, a “no deliberation” rule would result in the privilege being lost. The school board would have to discuss (deliberate) in open session whether or not the school board should accept the recommendation of the school attorney.



Similarly, SDCL 1-25-2(4) authorizes school boards to go into executive session to prepare for contract negotiations with the recognized teacher bargaining unit. Under a “no deliberation” rule, while the school board could discuss its contract proposals and the teachers’ contract proposal, any discussion (deliberation) on what to present as board proposals or counter proposals would have to be in open session.

For the Open Meetings Commission to require discussions (deliberations) on personnel matters, matters involving litigation, and related to contract negotiations with an employee bargaining unit, be in open session would be counter to the recognized confidentiality afforded by SDCL 1-25-2 and SDCL 19-13-3.

At issue is whether or not the Water Management Board violated the open meetings law when the stated motion to go into executive session was under the provisions of SDCL 1-26 and SDCL 1-25-2(3) for the purpose of deliberation and to consult with legal counsel. Central to the issue is the use of the word “deliberate” when SDCL 1-25-3(2) only uses the word “consulting.” As noted above, “deliberate” is a synonym for “consult.”

It is fundamental in matters of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme. *In re Certification of a Questions of Law*, 2014 SD 57. [¶8.] “A statute’s language is given a practical and natural meaning to effect its purpose.” *Hofer v. Redstone Feeders, LLC*, 2015 SD 75 [¶15.] A statute is not to be construed which arrives “at a strained, impractical, or illogical conclusion.” *Rowley v. SD Bd. Of Pardons*, 2013 SD 6. [¶15.] Statutory interpretation should not reach an absurd result. *Klein v. Sanford USD Medical Center*, 2015 SD 95. [¶13.]

The authorized purposes stated in SDCL 1-25-2 of discussing, consulting and preparing on various topics also authorizes a school board to deliberate (discuss, consult and prepare) on

those same authorized purposes. To require deliberations in open session on employee contract matters and grievances, whether or not to follow the school attorney's recommendations or prepare for or strategize with the school attorney regarding pending litigation, or decide what proposals to make during employee contract negotiations, results in a strained, impractical, and illogical conclusion, and leads to an absurd result. SDCL 1-25-2 does not prohibit a school board from discussing and deliberating in executive session on a matter which is properly in executive session.

SDCL 1-25-2 expressly states that all official action concerning the matters addressed in executive session shall be made at an open official meeting. It is not a violation of the open meetings laws, if after a school board hears evidence in executive session related to a superintendent's recommendation to terminate an employee's contract the school board deliberate in executive session on the evidence, and the school board then reconvene in open session and make a motion to terminate the employee's contract.

Certainly a decision by a governing board of a political subdivision or a state board in executive session which is not formalized by official action (motion and vote) in open session would be in violation of SDCL 1-25-2 and warrant a reprimand from the Open Meetings Commission (or result in a criminal prosecution and/or court order voiding the decision made in executive session). However, as long as a school board, or governing board of another political subdivision, or a state board, is in executive session for a purpose and reason authorized by statute, that school board or other governing board, or the state board, should be able to discuss and deliberate on the matter which was the basis of the executive session, provided any official action on the matter be done in open session.

WHEREFORE, Associated School Boards of South Dakota, Amicus herein, respectfully

moves the Open Meetings Commission to conclude that it is not a violation of the open meetings laws for a state board, school board, or any other governing board of a political subdivision, to deliberate on a matter which is properly a matter which may be addressed in executive session.

Dated this 29<sup>th</sup> day of November, 2017.

Respectfully submitted,



Gerald L. (Gerry) Kaufman, Jr.  
Director of Policy and Legal Services  
Associated School Boards of South Dakota  
306 E. Capitol Ave.  
Pierre, South Dakota 57501  
605-773-2513

**STATE OF SOUTH DAKOTA**  
**OPEN MEETINGS COMMISSION**

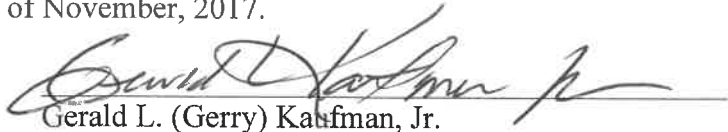
**IN THE MATTER OF OPEN**                    )  
**MEETING COMPLAINT 2017-01,**        )            **CERTIFICATE OF SERVICE**  
**WATER MANAGEMENT BOARD,**        )  
**HUGHES COUNTY**                         )

Comes now the undersigned, Gerald L. (Gerry) Kaufman, Jr., Director of Policy and Legal Services, Associated School Boards of South Dakota, and hereby certifies that he did on the 29<sup>th</sup> day of November, 2017, personally deliver to Steven R. Blair, Assistant Attorney General, Attorney for the Open Meetings Commission , at 1302 E. Hwy. 14 #1, Pierre, SD 57501, the original and six (6) true and correct copies of the Associated School Boards of South Dakota Motion for Leave to File and Amici Curiae Brief in the above-entitled matter,

and personally delivered to Matthew W. Naasz, Assistant Attorney General, Attorney for Water Management Board, at 1302 E. Hwy. 14 #1, Pierre, SD 57501, a true and correct copy of the Associated School Boards of South Dakota Motion for Leave to File and Amici Curiae Brief in the above-entitled matter,

and mailed by first class mail, postage pre-paid, a true and correct copy of the same to George Ferebee, 11495 Gillette Prairie Road, Hill City, SD 57745.

**Dated** this 29<sup>th</sup> day of November, 2017.

  
Gerald L. (Gerry) Kaufman, Jr.  
Director of Policy and Legal Services  
Associated School Boards of South Dakota  
306 E. Capitol Ave., Pierre, South Dakota 57501  
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