

STATE OF SOUTH DAKOTA  
SOUTH DAKOTA OPEN MEETINGS COMMISSION

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

MOTION TO RECONSIDER  
THE OPEN MEETINGS  
COMMISSION'S RULING  
ALLOWING AN AMICUS  
CURIAE BRIEF BY THE  
ASSOCIATED SCHOOL  
BOARDS OF SOUTH DAKOTA

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On January 5, 2018, The South Dakota Open Meetings Commission held a meeting by teleconference for the express purpose of addressing an Amicus Curiae motion made by the Associated School Boards of South Dakota (hereinafter School Boards). Complainant Ferebee was allowed to participate, telephonically, and opposed granting the School Boards' request. Complainant hereby continues his objection to the School Boards' Amicus Curiae motion and submits the following comments for consideration by this Commission.

**INFORMATION**

The only discernible reason given by the School Boards in their motion for allowing an Amicus Curiae brief is to "provide additional information." Full text follows:

[P]rovide 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, to conduct deliberations in executive session.

*Dictionary.com* provides the following definition of the word "information:"

Knowledge communicated or received concerning a particular fact or circumstance;  
news:

*Information concerning a crime*

Inasmuch as School Boards present no evidence of attendance at the meeting wherein the

“crime” occurred, how can they be in any position to provide “any information” much less to “provide additional information,” *concerning a particular fact or circumstance?* In this instance, the “particular circumstance” was the October 13, 2016, SD Water Management Board hearing wherein an executive session was called for and held, which action prompted the complaint which, in turn, is the issue now before the South Dakota Open Meetings Commission.

Absent any evident reason besides the previously discussed “additional information” assertion by the School Boards, the Open Meetings Commission is without any basis in law or fact to allow the School Boards’ brief to be part of the record of this matter. Hence, complainant respectfully requests that this commission reverse its oral ruling made during the January 5, 2018, teleconference. Further comments follow:

#### **AUTHORITY**

The issue of authority was raised during the January 5, 2018, hearing by teleconference. School Boards offered Dillon’s rule. At one point in the teleconference asserting its (their) authority to submit an Amicus Curiae brief by saying: “[R]easonably implied from existing statutes that grant governmental bodies certain authorities.”

Later in the teleconference Complainant asked: “What statutes?” The question remains. Inasmuch as School Boards cited Dillon’s rule and emphasized the “implied” provision, it seems only fair that it (they) should supply the specific statute(s). Without such identification, what basis would one have for determining “reasonableness?” Remember School Boards asserted: “[R]easonably implied from existing statutes.” Such assertion suggests something more than thin air (hot air).

In one instance, The South Dakota Supreme Court wrote: “It [county] has only such powers as are expressly conferred upon it by **statute** and such as may be reasonably implied

from those expressly granted.” [Emphasis added] (Pennington County v. Moore, 525 N.W.2d 257 (S.D. 1994)) Certainly, “those” referred to above must be “statutes.” Complainant’s query to the School Boards remains unanswered: “What statutes?”

### **TIMELINESS**

Rather ironic as to how the South Dakota Water Management Board imposes deadlines, at least to the Complainant back when he merely exercised, attempted to that is, his rights under SDCL 1-26-15 for a “declaratory ruling” (not judgment) by an agency of the State of South Dakota. Now, however, when a “friend so to speak” appears, literally out of nowhere and at the eleventh hour, not a peep of protest/resistance from the Water Management Board’s attorney. Just out of curiosity has anyone pondered the question of timeliness in situations like these? What is the cutoff? Day of the hearing? Day before?

During the teleconference, the School Boards suggested that its (their) entry at this point was not of any particular consequence because this matter had yet to be heard on its merits. Wrong! Clearly, this matter would have been in the history books (archived) on October 31, 2017, except for a two- to- two vote.

**WHEREFORE:** Complainant respectfully requests that this Commission reconsider its earlier decision and disallow the School Boards’ Amicus Curiae brief from becoming part of the permanent record in this matter.

Respectfully submitted this \_\_\_\_ day of January, 2018.

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