



# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

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### MEMORANDUM

TO: Rapid City Common Council  
FROM: Jason E. Green, City Attorney  
DATE: July 12, 2011  
RE: Request for Options to Reform Use of Executive Sessions

### INTRODUCTION

This memo is intended to provide written recommendations to the Council on possible ways in which the use of executive sessions could be improved. In short, the Council has the ability to provide as much information as it chooses. I will offer several suggestions for consideration by the Council through which the process of the communication between the Council and its attorney could be altered, with an eye towards reducing the number of executive sessions and providing documentation of executive session items and actions.

### DISCUSSION

At the outset, I believe it is important to keep two statutory provisions in mind. First is SDCL § 1-25-2 which sets out the permissible purposes for entering an executive session. SDCL § 1-25-2 reads as follows:

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

- (1) Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or



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employee. The term "employee" does not include any independent contractor;

(2) Discussing the expulsion, suspension, discipline, assignment of or the educational program of a student;

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

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

(5) Discussing marketing or pricing strategies by a board or commission of a business owned by the state or any of its political subdivisions, when public discussion may be harmful to the competitive position of the business.

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

Next, is the requirement to faithfully perform the duties of office contained in SDCL § 3-16-1.

SDCL § 3-16-1. Willful failure to perform official duty as misdemeanor. Where any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every intentional omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is a Class 2 misdemeanor.

In combination, these statutes impose the duty on each member of the Common Council to use the executive session for the purposes permitted and to maintain the confidence of those communications. In addition to these statutes, the City Attorney also has a professional obligation to maintain the confidence of communications with the Council. *See*, Rule 1.6 of the South Dakota Rules of Professional Conduct.

A corollary to the discussion regarding the motion to enter executive session pertains to actions taken following an executive session. In Attorney General Opinion 90-31, the Attorney General addressed this question by stating,

For example, if the board and attorney discuss possible settlement options in executive session and establish upper or lower limits of settlement, it is

my opinion that the board could adopt a resolution or motion stating that the board's attorney is authorized to settle, or not settle, a particular suit "according to the terms discussed with the board."

*Id.* The Attorney General went on to state:

The effect of a motion or resolution of this sort would be to authorize the attorney to settle a case but not "tip his or her hand." The elliptical or veiled reference to the precise terms gives effect to the confidential communication statute, which specifically gives the board the privilege to refuse to disclose confidential communications, while honoring the open meeting law to the extent that the public is generally aware that a matter justifying privileged communications with legal counsel has arisen.

*Id.* Thus, it has long been recognized that references to the discussion in executive session are sufficient for purposes of a motion directing action following an executive session.

I have several suggestions that I believe can address some of the concerns that have been raised, without jeopardizing the confidentiality of executive session discussions.

### **Suggestions**

***1. Include the Text of the Statute on the Agenda When an Executive Session Is Possible.***

The first suggestion is to include on the printed agenda the text of the three subsections of the statute (1, 3 & 5) that authorize the Council to enter an executive session. Upon approval by the Council, this additional language would be included whenever an executive session is on the agenda. This suggestion provides some additional information about the permissible purposes of an executive session, but limits the potential disclosure of confidential information.

***2. Assign a Tracking Number to Each Executive Session Item***

My second suggestion is to have the City Attorney assign every item discussed in executive session an identification number. The identification number could be referenced on the agenda without disclosing the matter, thus preserving the confidentiality of communications. In addition, the City Attorney's Office would maintain a database of these identifiers so that in combination with the Council's minutes, the action taken following and executive session could be reviewed in the future.

***3. Require the City Attorney to Put Each Request For Formal Council Action in Writing***

The third suggestion that I would make to the Council could significantly decrease the number of executive sessions. The suggestion is to require all formal communications from the City Attorney's Office to the Council, including requests for direction from the Council, be in written form by way of a letter to the Council President. The Council President would then

discuss the matters contained in the letter with the rest of the members of the Council and determine whether or not an executive session was necessary. As a part of the written communication, I would offer my recommendation as well as other alternatives for the Council's consideration. Assuming suggestion number 2 above is adopted, each item contained within the letter would have an identification number associated with it. This would lead to motions under the "Direction to Staff" portion of the agenda (either with or without an executive session) such as "Move to approve alternative #2 in regard to item CA 2011-32." The resulting vote on the item will be in the minutes. This suggestion has the virtue of preserving the confidentiality of communications and it puts the Council in full control of the decision whether or not to have an executive session. In addition, there would be written documentation of the action directed by the Council for each item formally communicated to the Council. I believe this would improve communication between my office and the Council and eliminate the problem of fading memories over time.

In cases where the Council decides discussion among its members is necessary, the Council President (or another member of the Council) could move for an executive session. Under this procedure, it would not be necessary for the City staff to enter executive session with the Council because the matter requiring action would be in written form. Upon exiting the executive session, the Council would vote to accept, reject or modify the recommendation of the City Attorney. Notwithstanding the suggestion that the Council enter executive session without staff members, I do not mean to imply that in all instances, staff must be excluded from an executive session. Rather, I am suggesting that the staff be available for questions only, and that the Council's deliberations would be based upon the written submissions from the City Attorney. In this way, any confusion about the request could be significantly limited.

### **Conclusion**

The decision about what to disclose regarding an executive session belongs to the Council. I have made the suggestions contained in this memo to provide a mechanism to allow the Council to avail itself of professional advice while providing additional information to the public. In addition, implementation of suggestion number 3 could reduce the number of executive sessions without impairing the Council's ability to direct actions of the City Attorney's Office.