CITY OF RAPID CITY

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MEMORANDUM

TO: Legal and Finance Committee

FROM: Jason E. Green
City Attorney

DATE: January 16, 2008

RE: Executive Sessions

At the January 2, 2008, Legal and Finance Committee, Alderman Kooiker brought up an issue regarding rules for executive sessions. The item was continued by the Committee to the January 16th meeting to allow the City Attorney's office to do some research on the issues. Specifically, Alderman Kooiker indicated that the rules have changed in that there is not as much information about the reasons for executive session that is made publicly available. Further, Alderman Kooiker has indicated that he has a concern that often times upon leaving executive session and reconvening an open session a motion is approved directing staff to proceed, "in accordance with the discussions in executive session". Further, Alderman Kooiker indicated that the State of Iowa and other states require local boards to keep minutes of executive sessions which are sealed and can be released if there is ever an issue. I will address each of these issues.

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First, the statutes pertaining to executive or closed meetings are set out at SDCL § 1-25-2. The text of that statute is as follows:

> Executive or closed meetings--Purposes--Authorization--Misdemeanor. Executive or closed meetings may be held for the sole purposes of:
>
> (1) Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. The term "employee" does not include any independent contractor;
>
> (2) Discussing the expulsion, suspension, discipline, assignment of or the educational program of a student;
>
> (3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;
>
> (4) Preparing for contract negotiations or negotiating with employees or employee representatives;
>
> (5) Discussing marketing or pricing strategies by a board or commission of a business owned by the state or any of its political subdivisions, when public discussion may be harmful to the competitive position of the business.
>
> However, any official action concerning such matters shall be made at an open official meeting. An executive or closed meeting shall be held only upon a majority vote of the members of such body present and voting, and discussion during the closed meeting is restricted to the purpose specified in the closure motion. Nothing in § 1-25-1 or this section may be construed to prevent an executive or closed meeting if the federal or state Constitution or the federal or state statutes require or permit it. A violation of this section is a Class 2 misdemeanor.

In addition to the statutory reasons for executive session, several Attorney General's opinions have set forth that public boards enjoy an attorney/client privilege and that the attorney/client privilege is a sufficient basis to allow a meeting of a public board to be closed. *See* Official Opinions 90-31 and 79-48.

Closely related to the question of appropriate use of an executive session, is the requirement to take official action in public. The practice of the Council to give direction to the staff "in accordance with the discussion in executive session" is directly related to the goal of

maintaining the confidentiality of those discussions. Attorney General Tellinghuisen specifically addressed this matter in Official Opinion 90-31:

> [The] question calls into play the open meeting law and the law of confidential communication, commonly known as lawyer client privilege. I believe that both can be given effect by restricting the information contained in board resolutions or motions made in open session to general terms and by reference to privileged communication in the resolution. 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.'

The primary purpose of conducting discussions in executive session is to maintain confidentiality. Particularly, in regard to communications with the Council's attorney, maintaining confidentiality is of the utmost importance. Attorneys have an obligation to maintain the confidence of their communications with their client. In the case of the City Council, the client is the Council acting as a whole, not the individual aldermen. Therefore, in order to communicate about matters which must be held in confidence, such as litigation strategy, it is necessary to have those discussions without the public present.

The next question regarding information provided prior to going into executive session has been addressed by the South Dakota Open Meetings Commission. As a preliminary matter, I note that the statute requires the Council to state the reason for the executive session as a part of the motion to go into executive session. This is a long standing practice of the Council. More specifically, the Open Meetings Commission has held that a statement to the effect that the purpose of the executive session is to discuss 'contractual matters' or 'personnel' is insufficient. Therefore, it is my opinion that the best practice is to cite the statutory purposes for which an executive session is allowed as a part of the motion to go into executive session. In this way, there can be no confusion about the purpose of the closed meeting.

The final question raised is about the requirement that some states impose on local boards to keep minutes of executive sessions. The minutes are then sealed and can be released in certain circumstances. I strongly advise the Council not to adopt such a procedure. First of all, the statutes in South Dakota do not authorize keeping of minutes of an executive session and the Supreme Court has been very strict in its interpretation of Dillon's rule (the rule that requires a municipality to have specific statutory authorization for all of its actions.) In all fairness, the statutes do not prohibit the keeping of minutes in an executive session, either. Nonetheless, maintaining minutes of discussions that are intended to be confidential creates a significant risk that the confidentiality of those discussions will be breached. This may have far reaching impacts, especially if the breach of confidentiality also constitutes a waiver of the Council's

attorney/client privilege. The purpose of an executive session is to maintain confidentiality; however, maintaining minutes of those discussions imperils the viability of that confidentiality.

More seriously, minutes of a meeting of the Council appear to be public records that must be held open for public inspection. Until such time as there is a specific statutory requirement to keep minutes and more importantly, specific statutory prohibition on public dissemination of such minutes, I can not recommend that the Council risk the loss of confidentiality created by the practice of keeping minutes of an executive session.

For these reasons, I strongly suggest that the Council not do more than is statutorily required.

JEG/map

cc: Public Works Committee
Mayor Hanks