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August 28, 2009

Robert A. Amundson
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Re: *Request for Letter Opinion/City Audit Committee/Open Meeting Law*

Dear City Attorney Amundson:

You have requested an opinion regarding the following factual situation:

FACTS:

The City of Sioux Falls has, by ordinance, created an "Audit Committee" consisting of five members. Two members are city council members. The others are members of the public with knowledge of accounting practices and procedures. The chairperson of the committee must be a member of the public. The general duties of the Audit Committee are prescribed by ordinance. Sec. 2-140. There is also a charter.

The committee directs the work of the city's internal auditors who conduct compliance and other audits of city executive branch agencies and contract service providers. As audits are conducted, the internal auditors share preliminary drafts and findings with the Audit Committee and receive directions from the committee. These drafts are not final audits.

> Following review by the Audit Committee, the department or agency involved receives draft audits and is given an opportunity to comment on the drafts. Ultimately, the final audit reports are released to the Mayor and City Council at public meetings.
>
> The Audit Committee wishes to discuss the progress and content of audits with the internal auditors as they are underway and is concerned that public discussion of preliminary drafts may lead to incomplete or incorrect information being provided to the public.

In light of the foregoing facts, you have asked three questions:

1. You have inquired whether the Sioux Falls Audit Committee is a "related board, commission or other agency of a political subdivision of the state" within the meaning of SDCL 1-25-1 and thus subject to the state's open meeting statutes.
2. If the answer to your first question is "yes" you inquire whether meetings of the Audit Committee to discuss preliminary audit reports would be appropriate for executive session.
3. If the answer to your second question is "no," you inquire whether 2009 Senate Bill 147 would provide new or additional rationale for executive session meetings of the Audit Committee.

The authority and structure of the Audit Committee as constituted by the City of Sioux Falls appears to be unique. Notwithstanding this uniqueness, however, the answer to your initial question is "NO." In my opinion the Audit Committee does not exercise such a part of the sovereign functions of the city that it is a "related board, commission or other agency of a political subdivision of the state" within the meaning of SDCL ch. 1-25.

The South Dakota Open Meetings Commission (OMC), created by SDCL ch. 1-25, has recently issued a decision in a similar municipal matter. *In the Matter of Open Meeting Complaint 07-02, City of Watertown* (November 12, 2008). I rely on the OMC decision. In the Watertown case, the OMC held that there are two determining factors in considering whether city committees are subject to the open meeting laws.

The first factor is not involved here. That factor is whether a quorum of the city council itself is on the committee. If a quorum of the city council is on the committee (or even present), then the open meeting laws apply

the same as if the city council itself was holding the meeting. As stated in *Olson v. Cass*, 349 N.W.2d 435 (S.D. 1984), the Open Meeting Law is invoked when (a) a quorum of a public entity gathers together and (b) official business is discussed. The fact that a quorum of a city council meets and discusses official business as a committee (or even informally) would not avoid the open meeting law. The Audit Committee is structured so there is not a quorum of the city council on the committee and there is no indication that a quorum intends to attend the meetings of the committee.

The second factor is involved here. This factor is whether the city committee (even without a quorum of the city council) has its own authority to "take action" on behalf of the city. In *City of Watertown*, the finance committee at issue had authority to make recommendations to city officials, but the recommendations were advisory only. Thus the makeup of the city committee was such that it was not subject to the open meeting laws.

Based on a review of Sioux Falls Ordinances Article XIII. Audit Committee, the Sioux Falls Internal Audit Charter and your letter, the Audit Committee's authority is to develop an audit program to be approved by the city council and supervise the internal audit activities of the Lead Internal Auditor, a city employee. Further, the Internal Audit Charter provides that the Lead Internal Auditor is to "assist the Audit Committee in the development of a flexible Annual Audit Plan using appropriate risk-based methodology, including any risks or control concerns identified by management and submit all findings to the Audit Committee for their review." However, City Council approves the audit plan

Clearly the Audit Committee has some supervisory authority in addition to advisory authority. The question is whether the Committee has been delegated such sovereign authority that it is a "related committee" for purposes of SDCL ch. 1-25.

In my opinion the "takes action" criteria utilized by the Open Meeting Commission means sovereign or official action of the type that only the governing body or its officers have. Authority to "take action" does not mean advisory authority or the type of limited authority that employees, even supervisory employees, may have. An analogy to this situation was addressed in *Seymour v. Western Dakota Vocational Technical Institute*, 419 N.W.2d 206 (S.D. 1988). There the court found that an instructor, farm supervisor and department head was not a public officer of Western Dakota for purposes of SDCL 3-16-7.

In this situation it appears, with a few limited exceptions, that the Audit Committee authority is advisory and oriented towards tasks rather than policy. All truly sovereign activities are performed by the City Council or the City Clerk. Though the committee members may be appointed, the type of authority that goes with the appointment is not enough to make them public officers. The hallmark of the exercise of sovereign power is the ability to make final policy decisions that direct the operations of the governmental entity or the conduct of the citizens at large. The Audit Committee does not have this type of authority. Though the City has adopted some unique provisions in constituting the Audit Committee that would lend support to the conclusion that it "takes action," I must conclude as a whole the delegated authority is insufficient to create a "related committee" within the meaning of SDCL ch. 1-25.

Correct, only City Council takes action-

In light of the foregoing there is a judgment call as to whether the Audit Committee "takes action." Because the City of Sioux Falls' adoption of some unique provisions in creating the Audit Committee, reasonable people may disagree with the answer to your first question. As such, I will answer your second question. You have asked whether meetings of the Audit Committee to discuss the progress and content of preliminary audit reports would be appropriate for executive session. There is no general provision that would be applicable to all such meetings. There are, however, several exceptions that may apply depending on the type of audit performed and discussions held.

There are specific reasons for executive sessions listed in SDCL 1-25-2. If the Audit Committee meets to consult with or review communications from counsel regarding proposed or pending litigation or contractual matters, it may rely on SDCL 1-25-2(3). Further, SDCL 1-25-2(5) may allow for executive sessions if the audit issues to be discussed concern marketing or pricing strategies of a business owned by the city and public discussion would be harmful to the competitive position of the city-owned business.

In addition to the specific reasons listed in SDCL 1-25-2, there is a general exception in the final sentence at the end of that statute providing that "nothing in SDCL 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." Among other things, this language defers to the privileges found in SDCL ch. 19-13, the attorney work product privilege in SDCL 15-6-26(b), and privileges in federal law. *See also*, AGO 90-31(attorney-client privilege).

To the extent that the Audit Committee discusses audits prepared at the request of counsel for purposes of litigation or anticipated litigation, the work product privilege may apply and executive sessions are proper in light of SDCL 15-6-26(b) and SDCL 1-25-2. Further, to the extent that the Audit Committee engages in communications with a lawyer or lawyer's representative as contemplated by SDCL 19-13-3, the attorney-client privilege applies and the Audit Committee may meet in executive session. This privilege is broader than SDCL 1-25-2(3). AGO 90-31; *In the Matter of Open Meeting Complaint 08-01, City of Mitchell* (November 12, 2008).

The language in the final part of SDCL 1-25-2 allows for executive sessions to address confidential communications made to the Audit Committee or shared with the committee as part of its functions. The applicable statute is SDCL 19-13-21:

> A public officer cannot be examined as to communications made to him in an official confidence, when the public interest would suffer by the disclosure.

Under this statute, the four factors that must be considered are: (a) whether the communications originated in confidence, (b) whether confidentiality is essential to the maintenance of the relation between the parties, (c) whether the relation between the parties is one that ought to be "sedulously fostered" and (d) whether injury that would inure to the relation by the disclosure of the communications would be "greater than the benefit thereby gained for the correct disposal of the litigation." *Agnew v. Agnew*, 52 S.D. 472, 218 N.W. 633, 637 (1928).

As noted in the *Agnew* decision, South Dakota's provision is also identical with those in other states such as Minnesota and Utah. Although there are not more recent South Dakota cases that define the scope of this privilege, there are recent decisions in other states. *Madsen v. United Television, Inc,*. 801 P.2d 912, 915-916 (Utah 1990) explains that the privilege is narrow and careful review must be undertaken to ensure that only the information actually privileged is held confidential.

The foregoing statute is sometimes referred to as the deliberative process privilege. The deliberative process privilege is also a common law doctrine recognized in federal court. *Bone Shirt v. Hazeltine*, (D.S.D. Dec. 30, 2003). In *Boneshirt*, the court held that predecisional records of the South Dakota legislature's executive board that would reveal advisory opinions, recommendations or deliberations comprising part of the

process by which governmental decisions and policies are formulated are privileged under the deliberative process privilege. In Boneshirt, District Court Judge Shreier ruled that advisory discussions between the South Dakota Legislative Research Council and the South Dakota Legislature's Executive Board could not be revealed in litigation.

In addition a number of state courts have recognized a similar common law deliberative process privilege. *DR Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 6 P.3d 465 (2000); *New England Coalition for Energy Efficiency and Environment v. Office of the Governor*, 164 Vt. 357, 670 A.2d 815 (Vt. 1995); *Times Mirror Company v. Superior Court*, 53 Cal. 3d 1325, 813 P.2d 240 (1991); *City of Colorado Springs v. White*, 967 P.2d 1042 (Co. 1998).

In *DR Partners*, the Nevada Supreme Court held that the "deliberative process privilege is one of the traditional mechanisms that provide protection to the deliberative and decision-making processes of the executive branch. " Id. at 469. It is not designed to protect purely factual matters, but the actual decision making process of the governmental decision maker involved. The Nevada court noted that the privilege permits agency decision-makers "to engage in frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure." *Id.* (citing *Paisley v. C.I.A.*, 712 F.2d 686, 697 (D.C. Cir. 1983)).

Courts addressing the deliberative process privilege have explained that the privilege covers both draft documents and the mental processes of decision makers. *City of Colorado Springs*, 967 P.2d at 1047, 1052 (noting that although the privilege has been referred to by various names such as executive privilege or deliberative process privilege it is designed to protect both the mental process of the decision maker as well as materials and communications that are part of the deliberative process.)

In answer to your second question, some recognized exceptions to the open meeting law may apply to some meetings of the Audit Committee. In addition, there is an argument that to the extent that governmental groups discuss confidential documents, executive sessions may be necessary to protect the confidential nature of the document itself. In other words if state or federal law requires or permits documents to be confidential under SDCL 1-27-1 (pertaining to public records), then it may be necessary for public bodies to hold executive sessions to maintain the confidentiality of such documents. This argument is a practical one. If public discussion would destroy the statutorily protected confidentiality of

Not confidential as we eventually post on line

a document, then common sense would dictate that it is necessary to go into executive session. An executive session to confidentiality of a document would be limited to discussion of the document itself and would not justify an entire session be closed from the public. Further, it should be noted that there is no South Dakota case on this subject. Accordingly, application of this analysis is an issue for you to discuss with the committee.

In answer to your second question, there is no wholesale exception to the open meetings law that would enable the Audit Committee to go into executive session for all of its meetings, but some sessions or portions of sessions may be held in executive session depending on the nature of the discussion.

Based on the foregoing, it is necessary to answer your third question. You have asked whether Senate Bill 147 (now codified at SDCL 1 27 1.1 through SDCL 1 27 1.15) would provide new or additional rationale for executive session meetings of the Audit Committee.

There is no language in Senate Bill 147 that addresses public meetings, but the public records law is implicated since it addresses the paperwork associated with audits. SDCL 1-27-1.5(12) provides that working papers of public officials or employees are not required to be released to the public. This includes draft audits and draft audit plans. Further, the deliberative process privilege expressly applies to documents maintained by government entities. SDCL 1-27-1.9 Also records that are subject to evidentiary privileges are not public. SDCL 1-27-1.5(4). These statutes could provide a basis for a practical exception to the open meeting laws as discussed in the answer to your previous question.

In answer to your third question, there is no explicit statutory exception set forth in Senate Bill 147 that addresses executive sessions to discuss non-public documents. If an executive session is conducted for this purpose caution is recommended and the executive session must be no broader in scope than is necessary to maintain the confidentiality of the documents or information discussed.

As stated in your written request and addressed herein, the issue here is somewhat unique to Sioux Falls. Other municipalities likely do not have audit committees similarly constituted and therefore may not be faced with this decision. Given the fact specific nature of this opinion your questions are being addressed in a letter opinion rather than in an

opinion of the Attorney General. The opinion will be treated as a public document by this office.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:js