

CLOSED

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ments hold executive sessions.

We examined Aberdeen, Brookings, Huron, Mitchell, Pierre, Rapid City, Spearfish, Vermillion, Watertown and Yankton. A decision was made to exclude Sioux Falls because it is difficult to compare it to other communities by the standard we used. Many of its executive sessions are held during informational meetings held prior to regular commission meetings.

Between 2005-2009, Rapid City adjourned into executive session during more than 81 percent of its regular meetings. In two of those individual years, it was as high as 95 percent.

Meanwhile, Aberdeen had the lowest average rate for those

five years with just more than 23 percent. During two of those years, it was below 10 percent.

In looking at the sheer number of executive sessions held, Huron and Pierre had the most with 154 and 138, respectively. Spearfish had the fewest with 36. If officials convened more than one executive session during a meeting, it was still only counted as one for our purposes.

The frequency of executive sessions in Yankton was in the mid-range compared to other communities. It logged 58 executive sessions during the five-year period, which translated into closed doors at 48 percent of its regular meetings. During individual years, the Yankton City Commission had executive sessions from anywhere between 12 percent to 70 percent of its meetings.

In addition to the inconsistency between cities when it comes to the frequency of executive

sessions, there was also a great deal of disparity when it came to the reasons they held closed meetings.

According to state statute, executive or closed meetings may be held for:

- 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;
- discussing the expulsion, suspension, discipline, assignment of or the educational program of a student;
- consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;
- preparing for contract negotiations or negotiating with employees or employee representatives;
- 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.

Furthermore, the law states that 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.

Multiple reasons may be cited for holding an executive session, meaning that a governing body could say it is for both personnel and legal reasons, for example.

Among the 10 cities surveyed, Watertown met for contractual reasons 81 percent of the time, while Pierre cited contractual reasons less than 1 per-

cent of the time.

Economic development was rarely cited. For half the communities, it was not invoked once. Meanwhile, Spearfish met for that reason the most at 5 percent.

Legal reasons were the given reason at a low of 13 percent in Yankton, and at a high of 50 percent in Spearfish.

Personnel reasons were cited between 10 percent and 70 percent of the time, with Watertown at the low end and Pierre at the high end.

Only one city, Brookings, held executive sessions for marketing or pricing strategies.

Some communities also failed to specify why they had gone into executive session in their meeting minutes. Rapid City did so 52 percent of the time.

Instead of giving a specific reason, the general statute — SDCL 1-25-2 — was cited. Pierre did not give a reason 18 percent of

the time, and other communities did so 2 percent or less of the time.

Further information about executive sessions also varied between communities. Huron at times records in its minutes when the executive session began and ended. Brookings will not only record those times, but also mention who besides the City Council members were present. For example, it may say "City Manager, City Clerk, Community Development Director, City Attorney and BEDC Director present for purposes of consulting with legal counsel about proposed or pending contractual matters pursuant to SDCL 1-25-2(3)."

Overall, our research shows the only consistency when it comes to how often executive sessions are held and why in South Dakota's largest cities is inconsistency.

MIXED

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board's culture regarding openness and transparency in conducting its business.

Of the 27 cases brought before the South Dakota Open Meetings Commission since it began considering alleged open meetings law infractions in 2004, 18 have been determined as violations. A public reprimand is the only penalty the commission can levy against offenders.

Five complaints have been made specifically against cities. Of those, the communities have been reprimanded for violations in three cases. Only two of the cities against which complaints have been made were included in the *Press & Dakotan* survey, Mitchell and Watertown. Neither one was found to have been in violation of the open meetings law.

Yvonne Taylor, executive director of the South Dakota Municipal League, said it would be a mistake to extrapolate much meaning from the number of executive sessions held by a city commission or council.

"There are very limited reasons for the use of executive sessions, and local circumstances are most likely the reason for use/non-use," she said. "Brookings, with extensive municipal utilities, will obviously have more for executive sessions to discuss 'marketing/pricing.' A city that is in the middle of employee issues, salary reviews or other employee-specific items may need more time for personnel sessions; or a major lawsuit could impact the number of legal sessions."

Yankton, for example, had its highest frequency of executive sessions during 2008. At the time, it was searching for a new city manager and dealing with a lawsuit with the B-Y Rural Water District.

Yankton City Manager Doug Russell agreed with Taylor, saying that executive sessions in and of themselves don't necessarily say much about the transparency of a local government.

"Personally, I'm not sure if (the number of executive sessions) is a good measure of transparency without knowing the specific issues a municipality is dealing with," he stated. "Moreover, I think the term 'transparency' has many more components to consider when evaluating a municipality's efforts."

However, the disparity between cities can be quite large. During the five-year period that was analyzed, Rapid City and Watertown averaged executive sessions at more than three quarters of their meetings. Pierre and Huron have the most executive sessions with 138 and 154, respectively.

In comparison, Aberdeen had executive sessions during just more than 23 percent of its regular meetings. Spearfish had the fewest number of actual executive sessions with 36, or about 29 percent of its regular meetings.

"I think people should be concerned when they see a consecutive pattern of executive sessions, period," said Jon Arneson, a Sioux Falls lawyer who acts as legal counsel for the South Dakota Newspaper Association. "The public needs to be aware this is happening. Even if it's legitimate, I think it's a matter of concern."

"In Rapid City, you've really got to be second-guessing what is going on relative to the needs of other communities," he continued. "Rapid City is not unique. Clearly, they've got a philosophy out there that is even more restrictive than Aberdeen."

Rapid City Mayor Alan Hanks did not respond to requests from the *Press & Dakotan* for comment.

Four of the five cities with the lowest percentage of executive sessions have a city manager form of government.

Taylor said it's possible that could be no accident. "It certainly could be related," she stated. "In the city manager form, personnel issues would be primarily handled in that office, rather than by the elected officials."

Bordewyk added that a city manager may be more knowledgeable about open meetings laws.

"On the other hand, I think whether or not a city has more or fewer closed-door meetings has to do with that public entity's attitude about open government overall and a sensitivity toward making sure the public is fully informed," he said.

Data on the number of executive sessions held in South Dakota's cities shows that stronger open meetings laws are needed, according to Bordewyk.

"We need provisions in the law that require executive sessions to be recorded," he said. "It would protect public officials as well as the public. We need stronger penalty provisions for violating the open meetings law. The Legislature just passed a penalty provision for violating the open records laws. Perhaps a similar penalty needs to be adopted for violating the open meetings laws. And, just as important, we need more education and training for public officials about the open meetings laws and open records laws in South Dakota. That, in itself, would reduce the number of secret meetings overall, I believe."

"I think some public boards are under the impression that anytime their attorney is meeting with them or anytime a personnel issue arises, they must take the discussion behind closed doors," Bordewyk continued. "That's simply not true. The open meetings law spells out the reasons for when a public board may meet in secret, but in many instances it does not mandate it."

Arneson agrees. "Public bodies in South Dakota, and probably anywhere, tend to view access as a matter of privilege, not of right," he stated. "They would just as soon do things without public scrutiny. It's a lot easier. It's faster. The tendency is to do what you can that way. I'm not saying it's really underhanded, unethical or corrupt, but it's easy. They fall into that pattern. They use the open meetings exceptions to carve out a wider space than they really need."

Going back to his belief that open government is more than open meetings, Russell said many communities are pursuing efforts to be more open to the citizens they serve.

"To be open, in my mind, means an overall effort to interact with the community and to develop communication avenues," he said. "As technologies continue to develop, I believe the trend will allow governing entities to bring operations closer to the community level in order to engage the community in an open framework that maximizes the delivery of services."

Taylor agreed, pointing out that many city governments now broadcast their meetings and have extensive websites that include meeting minutes.

"I believe our cities and towns are comfortable with the very limited circumstances under which a council/commission may use executive session, and use them well and responsibly," she said. "The cities in your survey have excellent attorneys, whom I know are advising the elected officials on the use of the executive session. Additionally, it is quite easy to access the Open Meetings Commission if there are concerns, and cities are very aware of the guidance that is provided by that commission."

For more information on South Dakota's open meetings laws, visit <http://atg.sd.gov/OpenGovernment/OpenMeetingsCommission.spx>.

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SOUTH DAKOTA: ABERDEEN, BRITTON, DELL RAPIDS, DE SMET, EUREKA, FLANDREAU, GREGORY,

IOWA: ESTHERVILLE, LE MARS, ROCK VALLEY, SIBLEY, SIOUX CENTER MINNESOTA: MARSHALL, PIPESTONE, TYLER NEBRASKA: CREIGHTON, O'NEILL



MILBANK, MILLER, MITCHELL, PARKSTON, PLATTE, SCOTLAND, SIOUX FALLS, TYNDALL, WAGNER, WESSINGTON SPRINGS, YANKTON FURTHER ON KOOL

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