November 7, 2011

STATE OF SOUTH DAKOTA

OPEN MEETINGS COMMISSION

In the Matter of Open Meeting Complaint 12-01, Sioux Falls City Council	)))	FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 24, 2012 the *Argus Leader* filed an open meeting complaint with the Minnehaha County State's Attorney. The matter was referred to the (OMC) on January 27, 2012 by the Minnehaha County States Attorney. The Complaint alleged that the Sioux Falls City Council ["Council"] violated SDCL §1-25-2 in making a motion concerning a personnel matter that had been discussed in executive session when the motion did not fully disclose the subject matter of the action being taken. The matter was heard by the (OMC) on March 8, 2012.

FINDINGS OF FACT

1. The City of Sioux Falls is a home-rule charter entity organized under the South Dakota State Constitution and the laws of South Dakota, and utilizes a form of government similar to an aldermanic form of government, having eight City Council members and a Mayor, who is considered a part of the City Council but votes as a council member only when needed to break a tie.

2. Sioux Falls is a political subdivision of the State of South Dakota, and the Council, its public governing body, is bound by the provisions of SDCL Chapter 1-25 "Meetings of Public Agencies."

3. On September 14, 2011, the Council held a special meeting to consider the only matter on the agenda--described only as a "personnel matter." This agenda and specific statutory reference were in compliance with the recommended practice of identifying the statutory exception as well as the general subject of the discussion for a proposed executive session.

4. Upon motion and vote, the Council went into executive session.

5. After going out of the executive session, the Council reconvened in public, whereupon a motion was made and seconded "to authorize [three Councilors] to take the personnel action that was discussed in the executive session."

6. The Council then voted, by 5-3 roll-call, in favor, thereby adopting the motion "to take the [unspecified] personnel action."

7. The Council then adjourned the special meeting.

8. Only after the adjournment did the public discover that the "personnel matter" upon which the Council had just voted pertained to the termination of the Chief of Council Operations and City Clerk, Debra Owen (City Clerk Owen).

9. Specifically, the public learned that the Council's undisclosed "personnel action" was the issuance of an ultimatum to City Clerk Owen, to either resign or be fired.

10. The Council has the sole authority to hire and fire the City Clerk.

11. The City Attorney has admitted that the Council considered its decision "to authorize [three Councilors] to take the personnel action that was discussed in the executive session" to be an official action concerning the undisclosed personnel matter discussed in the executive session.

12. That Council followed through with this action by firing City Clerk Owen after she refused the resignation option is further confirmation that the Council assumed that as a public body it had taken official action regarding a "personnel matter" in a legal manner, despite having intentionally kept the subject matter of the action confidential in the course of the public meeting on September 14, 2011.

CONCLUSIONS OF LAW

1. SDCL §1-25-1 requires that the Council's official meetings be "open to the public unless a specific law is cited…to close the meeting to the public…."

2. SDCL §1-25-2 permits the Council, in the course of an open official meeting, to go into executive session for certain limited purposes, but "only upon a majority vote" on a closure motion.

3. SDCL §1-25-2 restricts the Council's "discussion during [a properly held] closed meeting…to the purpose specified in the closure motion."

4. SDCL §1-25-2(1) permits the Council to move into executive session for the purpose of "[d]iscussing qualifications, competence, performance, character or fitness of any public officer or employee…."

5. SDCL §1-25-2 expressly mandates that in order for the Council to take official action on permissible executive session matters—those listed at SDCL §1-25-2(1)-(5)—the action must "be made in an open official meeting."

6. The purpose of requiring the Council and other public bodies to take official action in a public forum is to keep the public informed of the governing bodies' decisions and to keep the governing bodies accountable for those decisions.

7. To comply with the South Dakota Open Meetings Law, a public body must reveal—not conceal—the subject matter of the official action upon which it is voting.

8. South Dakota's Open Meetings Law has conferred a statutory right on the public to attend public meetings of a public body.

9. Many states, including South Dakota have created an exception to their Open Meetings Law to shield personnel matters from public discussion and allowed closed or executive sessions to discuss such matters. SDCL 1-25-2(1).

10. SDCL 1-25-2(1) provides confidential protection to certain personnel matters.

11. The confidential protection afforded personnel matters is motivated by protecting the privacy interest of employees and also the public interest in maintaining efficient public personnel management and public employee morale.

12. This Commission publicly reprimands the City Council as required by SDCL 1-25-7.

13. This Commission has no statutory authority and no jurisdiction to invalidate an official action taken by the City Council on September 14, 2011.

DECISION

Under the South Dakota Open Meetings Law a public body must take its official actions in public. Compliance with this requirement necessitates that the subject matter of the action be disclosed during the meeting. Therefore, official action that conceals the subject matter on which action is taken is a violation of the Open Meetings Law.

REPRIMAND

The Sioux Falls City Council is hereby publicly reprimanded for its violation of the South Dakota Open Meetings Law. Issued by Commissioners Rothschadl (Chair), Reedstrom, and Sovell.

Commissioner Steele (concurring):

The reason why the action of the council was a violation of the Open Meeting law is that the law requires that they take official action in a public meeting. The question of the validity of the official action is beyond the OMC's jurisdiction, so we have to assume that they "officially" did what they did in fact do--- they fired Ms. Owen. Yet, the public motion was indecipherable standing alone. No one could tell from the motion as presented in the minutes of the

public session what they had actually done. The OMC certainly could not tell, nor could a reviewing court, nor the Argus Leader, nor Ms. Bowen ascertain that she had been fired by vote of the council, nor could the finance office that had to take Ms. Bowen off the payroll and do the other things incident to a termination. Only by knowing what had been discussed in the executive session could a person have been able to understand what action the council actually took in its public meeting and act accordingly. That leads to the conclusion that the council's action was, in a sense, bifurcated: they tried to split their action into two parts, one part in public session and one part in executive session, because neither portion of it was coherent without the other. Therefore, they took some part of an official action in an executive session and thereby ran afoul of the open meetings requirement that ALL official action take place in a public session.

Commissioner Brenner (dissenting).

Unfortunately, the majority opinion seems to have misplaced and shifted the burden so as to require the non-complaining party to prove its compliance with the governing statutes in the area. The Open Meeting Commission should require that the complaining party offer some standard of proof that a violation occurred before it makes a finding of reprimand. This decision also flies in the face of the very laws protecting personal information of a public officer or employee. SDCL §1-25-2 states:

> 1-25-2. 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.

Specifically, subsection (1) and subsection (2) deal with the facts that we have in the instant case. Here, the city went into executive session for a "personnel

matter." There is no allegation or suggestion that there was anything improper regarding the motion or how the council adjourned to executive session. Moreover, there is no allegation or suggestion that the topic of that executive session was improper. Because of this action in front of the Open Meeting Commission, we have come to find out that the matter gave the City's Clerk, Debra Owen, a choice to resign or be terminated. This information is clearly protected by the statute as personnel. The Clerk only joins the action against the council because of the result. I submit had she merely been reprimanded, and allowed to keep her job, she would be very pleased that the matter was kept confidential by the governing statutes and the executive session.

To suggest that there exists a requirement to disclose the decision, couching it in terms of it being "official action," flies in the face of the SDCL§1-25-2(1), and (2) that affords the protection in the first place. If the council was properly in executive session under the right motion, and they properly discussed matters, allowed by applicable law, in that executive session; but, then were forced to disclose the result upon returning, it renders the statute, and the legislative intent of the same, useless.

The decision improperly puts the burden on the defending party, and nullifies the protective statute that governs a personnel matter, and personal privacy. And, accordingly, I dissent.