

# SOUTH DAKOTA OPEN MEETINGS COMMISSION

## MINUTES OF MEETING

July 31, 2008  
Conference Room 2  
Ramkota Inn  
Sioux Falls, South Dakota

Members present: John Steele, Chairman, Aurora County State's Attorney; Lisa Rothschadl, Bon Homme County State's Attorney; Vaughn Beck, Edmunds County State's Attorney. Glenn Brenner, Pennington County State's Attorney and Mark Reedstrom, Grant County State's Attorney. Also present was Diane Best, Assistant Attorney General, and Andrew Johnson, AG Intern.

The meeting was called to order by Chairman John Steele.

The first matter of business was the oral argument regarding the complaint filed by Minnehaha County State's Attorney David Nelson against Minnehaha County Commissioners Anne Hajek, Carol Twedt, and Jeff Barth.

Mr. Nelson addressed the Commission. He stated that he had declined to bring criminal charges as he doesn't believe this to be a flagrant violation with intent to violate open meeting laws. He states that the facts are solid, with no factual disputes.

The Sioux Empire Fairgrounds is owned by the county, operated by the Sioux Empire Fair Association, and managed by Matt Adamski. The Fair Association booked an event called "Night Storm Dances."

Hajek and Twedt approached Adamski to arrange to meet regarding the upcoming Night Storm concert. Without notice, the meeting was held in the County Administration Building on November 8. A quorum of the County Commission was present. Adamski acquiesced with a request by Hajek and Twedt to cancel the Night Storm concert.

According to Nelson, the only issue is: was the November 8 meeting an official meeting under AGO 89-09? The meeting was not noticed in 24 hours; there was a majority or quorum present; official business within the jurisdiction of the association was discussed. Nelson argues that there is no requirement that official action be taken, simply that the open meeting law applies if there is a discussion of association business by the board members present.

Nelson stated that the expression of disapproval by the board of the Night Storm concert could be considered "action," as could Adamski's agreement. There is a fair implication that action was, in fact, taken. Barth brought the meeting to the attention of the State's Attorney.

The DCI report does contain statements that there was not any “action taken.”

This concluded Mr. Nelson’s presentation.

John Steele asked Nelson how members of the Fair Association were selected or appointed.

Mr. Nelson answered: I don’t know.

Glenn Brenner asked if the Commissioners discussed a breach of the Night Storm contract before the meeting.

Mr. Nelson’s answer: Only a potential breach was mentioned.

Glenn then asked if Night Storm was invited to the meeting. Answer: No.

Anne Hajek, a commissioner and respondent, addressed the Commission. She said that she had read the DCI report page 5. The Night Storm Mardi Gras Dance worried her. She hurriedly set up a meeting. Hajek is relying on AGO 89-08, concerning an official meeting conducting official business “within the jurisdiction.” SDCL 7-27-10 gives authority to a county fair board. Minnehaha County set up the nonprofit Fair Association corporation, with the fairgrounds as their jurisdiction. Funds to the fair are “outside expenditures” of the fair association.

Adamski had total discretion. “We couldn’t stop cage fighting.” Ms. Hajek stated that the Minnehaha County Commissioners had no jurisdiction over the fair.

Ms. Hajek referred the Commission to Enclosure 4, page 9, a Carol Twedt e-mail to Superintendent Holman, wherein she said it is culturally inappropriate to have Night Storm on county property.”

Ms. Hajek continued that Mr. Barth didn’t have a problem at the time, and is abusing the Open Meeting Commission. Mr. Nelson assents that this conduct was inappropriate.

Chairman Steele asked if the Sioux Empire Fair Association was a separate corporation or a county board.

Mr. Nelson responded that it was a separate corporation, and that the county has a contract with the association.

Mr. Brenner: Was there a question about breach of contract with the fair board?

Mr. Nelson answered that there could be a breach of contract, if proven, and such action could result in damages for lost profits.

Ms. Hajek continued that she and Ms. Twedt were informed by Holman that night dances would occur. She called Adamski and they discussed teen dances. Ms. Hajek stated that the meeting was not official business "within the jurisdiction" of the county commission. That commission does not have the authority to manage the fair. That authority lies with the fair board, created under SDCL 7-27-10, which is incorporated. Its by-laws allow for designated representatives on the fair board, one of which is a county commission official. The county owns the property. The fair board has the authority to hold the fair, not the county. The county provides money to the fair, but has no more authority to govern the fair board than it does other non-profit organizations to which it gives.

Mr. Reedstrom: If the county had discussions re the budget of the fair at this meeting, would it have been a violation?

Ms. Hajek responded that even if it was discussed, there was not any official action taken, so the county wouldn't have been exercising its jurisdiction.

Mr. Reedstrom asked if there had been budget discussions, would that have been an official meeting?

Ms. Hajek answered that it was she alone that made a statement during the meeting regarding pulling funding. There was no discussion.

Chairman Steele asked whether this discussion with the commission would carry more import with the Fair Association than other discussion with community members?

Ms. Hajek stated that there is a difference of opinion with Barth, not a concerted action with 3 commissioners.

Ms. Hajek stated that Adamski does his own thing. Barth is mad that Adamski backed down. This was discussion, not budget talks.

Mr. Brenner: Adamski does come before the board regularly?

Ms. Hajek responded that Adamski does come before the Commission 2-3 times per year to request funds or liquor license.

Mr. Brenner: Adamski comes for more than budget?

Ms. Hajek stated that it wasn't regular business, but maybe reporting a couple times a year.

Ms. Rothschadl: What was the Adamski discussion relating to canceling the dances? Adamski said he'd review it?

Ms. Hajek answered she wishes it would have been just 2 commissioners and not asked Barth.

Ms. Rothschadl: Contract problems discussed at meeting? Did you have an answer at the end of the meeting?

Ms. Hajek: We discussed his options...

Mr. Beck: How long after the meeting were dances cancelled?

Ms. Hajek: The same or the next day.

This concluded Ms. Hajek's presentation.

Mr. Barth also made his statement. He is the County Commission member appointed to the Fair Board. He stated that he thinks there was an open meeting violation and that he was swept along. He reported the matter later. He was mad because the other commissioners' minds were made up and Adamski had no choice. Mr. Barth also stated that the Association does come before the board for licenses and contracts and various things. He further stated that when public meetings are only a forum to follow up on decisions worked out in private, that is not fair. He stated that he thinks decisions should be based on full knowledge and not just reactions from a few board members. He didn't want to be part of a cover-up, wanted to get the other side's views, but it was not allowed.

There were no further questions.

Chairman Steele asked Mr. Nelson to present a summary of the legal points.

Mr. Nelson stated that the County Commission does have authority over the fair. Nobody with the county said they had no control. They were urging a change in conduct. This was official business. According to the DCI report, Adamski didn't feel pressured. It was a business decision. Mr. Nelson further stated that the Commission exercises jurisdiction with money. No one was told that they didn't have jurisdiction. The county is Adamski's landlord. The money gave the county more authority but now they say they don't have it. Further, regardless of how one feels about the dances, the proponents need a chance to speak.

Mr. Brenner opened discussion on whether commission should issue an oral ruling and order written findings afterward. He stated that he would find Minnehaha County in violation.

Chairman Steele: Procedural issue. Let's do that later and stay on schedule for now.

Ms. Hajek inquired why the timing for arguments provided 30 minutes for one argument and 10 minutes for the other.

Ms. Best stated that it was a rough model of the Supreme Court.

The second matter to come before the Commission concerned the complaint filed by Justin Wolfgang regarding the USD Student Association.

Chairman Steele stated that Jim Shekleton was present and the complainant was not. Wolfgang made a request to rescind the complaint via e-mail and the first issue to address is whether a rescission is proper. Steele stated that he didn't believe the Open Meetings Commission is bound by the rescission. He stated that once the State's Attorney makes a referral, the State's Attorney has the responsibility and complainant cannot rescind.

Mr. Reedstrom: I agree. The State's Attorney has the ball and he referred the matter to the Open Meetings Commission.

Mr. Brenner agreed.

Chairman Steele called for a motion to deny the request.

Mr. Reedstrom made the motion to deny Wolfgang's request. Mr. Beck seconded the motion. The vote was unanimous to deny.

Counsel for the Board of Regents, James Shekleton, addressed the Commission. He pointed out that student newspapers and student governments lock horns regularly. This is common. He stated that the legislature did not intend to include Student Government Associations to be controlled by the Open Meetings Commission.

SDCL 1-25-1 has 3 thresholds and Dr. Shekleton discussed each. The first is whether SGA is a board, commission or agency? No. It is an activity, one of a large number of university organizations for students to learn how boards work, a living laboratory. There has been no delegation of government authority to the students. Any action on the part of SGA requires further university action.

Dr. Shekleton explained that the next part of the statute at issue is the funding piece, i.e. the statutory language, "derive a source of revenue directly from public funds." Student activity fees fund the student organizations, but they must submit expenditure requests to central university administration, and the State Treasurer must disburse funds. According to Dr. Shekleton, student

organizations don't actually receive funds. SGA funds are receipted to custodial accounts and to universities and are not directly spent by SGA. As part of the funding inquiry, the next part is whether student organizations are "non-tax paying?" The university is not tax paying, like all other student government entities.

Dr. Shekleton continued that of larger concern is the complainant's nonappearance at the Open Meeting Commission, a symptom of a greater problem. Regents are the body charged with sorting through student conduct. To hold otherwise would interfere with student administration. Dr. Shekleton believes that the Open Meeting Commission process is to protect the integrity of the process, and it is ill suited due to the transient nature of SGA. It would be like lecturing to a parade. This is not part of the learning process that SGA and Volante were designed for.

This concluded Dr. Shekleton's statement.

Mr. Reedstrom: If SGA is a body, would a ruling by this board apply to all groups with a governing board?

Dr. Shekleton stated that it very well could and that the statute is unclear. He suggested that if the SGA had to comply that because it receives state funds, then, maybe all similar organizations must post every meeting. Hospitals? They have contracts with the State. They get State funds. Do they have to comply, too? The law was intended to apply to SDHAA type organizations. The SGA is, however, a living laboratory to learn Robert's Rules of Order and civic duties and it is not an attempt to govern. This is Pandora's box. If this happens, we may have to go back with legislation to sort it out.

Ms. Rothschadl: How does the SGA budget authority work? Is funding only from activity fees?

Dr. Shekleton stated that funding is from student fees paid to the university, and some portion is dedicated to these associations. The Regents have rules as to how student organizations receive these activity fees.

Chairman Steele inquired whether the SGA students have budget allocations. When the Student Senate makes their budget request, don't they have authority to spend money as long as they meet the rules?

Dr. Shekleton stated that the SGA must make requests, subject to audit and review.

Chairman Steele asked whether the county extension board is treated the same way.

Dr. Shekleton indicated that it is not. He stated that the extension service has jurisdiction to take government action by law. The Regents make decisions on oversight of student funds.

Chairman Steele commented that the SGA is spending public money to carry out educational functions. He inquired how this is really different from an extension board.

Dr. Shekleton replied that the Regents don't delegate responsibility to exercise educational functions. Service on the board is education itself.

Ms. Rothschadl: Is the SGA really the same as the football team?

Dr. Shekleton stated that the overall education engagement in student involvement occurs in both and both are funded the same way. Both are funded for educational purposes only.

Ms. Best: Do the Regents have a policy for student boards?

Dr. Shekleton stated that there is no policy at Regent level.

Ms. Best asked whether the USD administration has a policy on open meetings governed by USD.

Dr. Shekleton: It is in the constitution of each organization to have a policy on open meetings.

Chairman Steele inquired whether all students on the SGA are of legal age to be public officials?

Dr. Shekleton: Yes.

Mr. Brenner stated that Dr. Shekleton's Pandora's box argument makes sense. However, he is concerned about the revenue language of SDCL 1-25-1. Do USD funds fully finance the organization? How important is it? Would withdrawal crush the organization? Could USD amend funding?

Dr. Shekleton stated that the answer to each of Mr. Brenner's questions is "yes."

Chairman Steele: Does SGA budget for other programs within student affairs?

Dr. Shekleton: Yes.

Mr. Reedstrom indicated that the SGA could easily be a body subject to the statute, but that does open a problem. He stated that the only way out is a finding that the SGA is a group, is a program, and not a board.

Chairman Steele: Directed proposed findings and conclusions by Shekleton.

Dr. Shekleton agreed to prepare proposed findings and conclusions.

The next matter to come before the Commission concerned the complaint filed by the Daily Republic against the City of Mitchell.

Mr. Jon Arneson addressed the Commission, representing the Mitchell Daily Republic, Ross Ulrich, its publisher, Korrie Wenzel its editor, and reporter Seth Tupper. He stated that at a city council meeting, with a published agenda containing park designation rescission, City Attorney Randolph Stiles took the meeting to executive session on "legal matters." Mr. Arneson inquired whether it is enough to say "legal matters?" Mr. Stiles acknowledges he "caused" the executive session on the agenda, because of a privileged communication issue. Mr. Arneson is asking for a procedural and substance ruling on this executive decision.

Mr. Arneson continued by stating that the Open Meetings Commission has a brochure with a reference encouraging open meetings. It is up to the City, not mandatory or presumptive, to have exceptions to do so. The whole process is to get bodies thinking. Arneson stated that public bodies need to think of more specific parameters than "legal matters." Executive sessions should have clearly articulated parameters. He takes issue with an AG opinion that it is sufficient to refer to SDCL 1-25-2(3). He believes bodies ought to address reasons for going into executive session instead. That would keep boards so that they stay with the issues recited when going into executive session.

According to Mr. Arneson, in later discussion with reporters, it came out that the council was notified that the ordinance process of park designation would have to be subject to vote and any other process was not valid as planned. Arneson stated that according to this discussion with a reporter, the City Attorney was concerned that the ordinance wouldn't hold up. Mr. Arneson stated that no trial strategy was discussed at the meeting. The exception is limited. Case and common law direct toward specific controls. SDCL 1-25-3 overrides attorney/client privilege. Morales v. TWA, 504 U.S. 374 (1992) establishes that general remedies cannot supersede specific.

Mr. Brenner pointed out that the Attorney General stated in the brochure that "for SDCL 1-25-2(3)" or other general language is enough for a motion.

Chairman Steele asked "How much specificity?"



Mr. Arneson responded "As much as possible without harming your position." This ended his presentation.

Randolph Stiles, City Attorney for the City of Mitchell, addressed the Commission. Mr. Stiles said there are no legal requirements that reference to executive session must be made by statute number. When discussions are to advise as to the consequences of potential action, being more specific may open the door to privileged information. According to Stiles, two items at issue were definitely trial strategy and privileged, and one was otherwise privileged. Potential litigation is not pending. He stated that the one matter was so privileged he could not reveal the type of issue. The council had to know that they might get sued. If he was too specific, he might open the door to potential suits. Maybe the generic statement was wrong, but SDCL 1-25-2(3) fit their needs and this executive meeting was proper.

Mr. Stiles continued that he strongly believes in open meetings. And he doesn't like situations where decisions are *fait accompli*. He was operating within privilege, which affords fuel for debate.

Mr. Steele asked if there was a public statement by board members concerning the parks issue.

Mr. Stiles confirmed that the parks issue was discussed publicly, but also stated that there was also defense strategy in executive session as to how matters would be defended if litigation occurred.

This concluded Mr. Stiles' testimony.

Mr. Reedstrom asked generally if a pending or looming lawsuit is a requirement for executive session. He stated that in the Melrose Township decision, executive session was allowed for a potential litigation discussion.

Mr. Brenner related that for the airport board decision, it was pointed out to him that the AG brochure on SDCL 1-25-2(3) stated that general language is okay for a motion.

Ms. Best interjected that the brochure was a compromise document among various groups, but the language is probably not binding.

Mr. Arneson stated that the attorney needed to be conscious for as much openness as possible. SDCL 1-25-2(3) needs to be reviewed in a public context, even though attorney/client privilege might otherwise apply. This looks like Stiles wanted to move to executive session to save the board from having its factual discussion become public. This is the information the public needs to know. Secrecy is not imperative here. A possible lawsuit is not

enough when no one is proposing litigation. Arneson stated that suggestion is ethereal.

Chairman Steele stated that the issues here with the park board may invite litigation and potential litigation could occur.

Mr. Arneson stated that potential litigation, as opposed to anticipated litigation, should not be included. There is a duty to client citizens to be open.

Chairman Steele stated that the client is the board, not citizens.

Mr. Stiles referred to a case at 217 Conn. 153. The case states that claims need not be formally under litigation. The extent of the privilege ought to be the extent of the exclusionary process.

Mr. Arneson says if the statute is preempted by attorney/client privilege, then he concedes. He suggested that such a decision would be to tell city council members first that if there is a problem, make it legal advice.

Chairman Steele inquired whether Arneson believes that the City Attorney has to advise the council in public session that he has determined if the city is exposed to liability.

Mr. Arneson stated that he thinks the additional exposure is the risk public servants run, and we should err on the side of openness. But that isn't occurring here. This is not an advice about exposure to liability. Ultimately however, "potential litigation" should not be the guide.

Ms. Rothschadl: Is "proposed litigation" enough information for a motion?

Mr. Arneson: Page 47 of the Attorney General's report on the status of open government addresses helps with the process. Motion for executive session ought to provide for some guidance on what is going on.

Ms. Rothschadl inquired whether having more specificity would invite potential suits.

Mr. Arneson suggested that the better way would be open to start with.

Mr. Brenner: So the questions are, #1, was there a violation? And #2, do we need non-specificity on execution session. A motion for "contract matters" is not enough. Is "legal matters" enough?

Mr. Reedstrom: This is different from the science and technology case. Contracts alone are not enough. The legal matters privilege is different. Legal

matters aren't always clear. What if legal advice is "Let's not tell everyone." You can't do that in the open.

Mr. Brenner stated that having legal matters in executive session avoids tipping off the other side. "Personnel matters" is adequate to protect the confidentiality of employees.

Mr. Stiles: The issue at hand is still in process.

Mr. Arneson: "Legal matters" is an issue. The more openness the better.

The Mitchell presentations were concluded.

Chairman Steele asked for a possible procedure changing the time allocation for oral presentations in the future. He suggested giving each side 20 minutes, divided however they like. He also suggested allowing for putting decision making on the agenda for a later time, or ruling from the bench. Mr. Reedstrom commented that he didn't see why we can't rule from the bench. Mr. Brenner moved to rule at the end of the discussion. Chairman Steele pointed out that they would need to schedule deliberating time. Mr. Brenner said it would be good for the parties and for timely opinions. Mr. Brenner moved to set 20 minutes for each side, and that the Commission would take a half hour after each hearing for deliberations and making their decision. Ms. Rothschadl seconded the motion. Motion carried on vote.

Chairman Steele asked for deliberations on the cases of the morning. The Commission agreed to deliberate on Minnehaha County first.

Mr. Brenner said he did not believe there was criminal intent in this case. The County Commissioners had good intent. However, there were 3 board members present, and there was county business discussed. That there was no official action taken does not carry the day. There was in fact a violation. He didn't like using this as retribution or engaging in personal debate, but can't order civility. So maybe they need an admonishment. There was a technical violation.

Ms. Rothschadl agreed. The County is the landowner. County officials influenced the fair association.

Mr. Beck stated that the County Commission did get the attention of the fair manager.

Mr. Reedstrom said this is not difficult to decide. The parties were candid and the facts are clear. It was unfortunate how it came to the Commission, but this is county business. The county had the right to be interested. Nexus with money makes it county business. There was a quorum. There was no notice.

Chairman Steele asked if everyone was in agreement, that the jurisdiction argument was overbroad.

Ms. Rothschadl moved for a reprimand. The motion was seconded. Motion carried.

Mr. Beck: Move to deliberate Mitchell. Mr. Reedstrom seconded. Motion carried.

Mr. Reedstrom remarked that this is a tough case. Passing a motion for executive session stating "pursuant to SDCL 1-25-2(3)" is no more specific than "contractual matters." We need to cause government entities to think about why they are going into executive session. There is a question of how to set the standard. We have to let them be general if there is no standard for specificity on the subject matter. We also need to respect the attorney client- privilege.

Ms. Rothschadl: Where's the responsibility of the members? Ethics of disclosure to newspapers is an issue.

Mr. Reedstrom: This is a case of "we discussed what we discussed."

Chairman Steele: The councilmen may have disclosed only the part of the discussion they thought could be revealed.

Mr. Beck: The statute for general agenda items doesn't require more detail. It's not our job to look into it that far. The Commission would be setting policy to go further.

Mr. Brenner says he's changed his mind. He agrees that closure can be general based on Reedstrom's and Beck's analysis. It ought to be more specific, if possible, but doesn't have to be. You can sometimes tell based on board action, but we can't ascertain here whether the evidence is sufficient.

Mr. Beck moves for a finding of no violation. Mr. Reedstrom seconds.

Ms. Rothschadl asks if they are going to address that statute numbers are just as vague.

The no violation vote carries.

Mr. Steele asks Ms. Best to contact Mr. Stiles and ask for written Findings of Fact and Conclusions of Law.

Ms. Best gave a status report on the pending cases, starting with the Lawrence County case. She stated that this involved the fire board and several issues

were presented. A draft had been reviewed several times, but the decision was still under "pending matters." The proposed decision was a finding of no violation and a quorum had agreed in writing when the opinion circulated.

Chairman Steele referred to a past written comment he had made in response to the proposed decision. He indicated he wanted to dissent and referred to his written comments.

Ms. Best next said that Mr. Reedstrom had a proposed decision on Black Hawk and it is circulating.

Chairman Steele called for discussion on Roberts County.

Ms. Best answered that no decision has been issued yet. She referred to Mr. Brenner. Mr. Brenner asked for the tapes of the meeting. Ms. Best has video tapes.

Ms. Best stated that she has not received a draft on the City of Watertown matter.

Mr. Steele calls for final item on the agenda, the approval of the minutes of the last meeting. Motion for approval made, seconded, and carried.

The meeting was adjourned.

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John R. Steele, Chairman  
South Dakota Open Meetings Commission

Note: The foregoing minutes are not verbatim transcripts, and are not intended to be used as such.