

December 31, 2020

STATE OF SOUTH DAKOTA
OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN)	OMC 2020-02
MEETINGS COMPLAINT AGAINST)	
BELLE FOURCHE CITY COUNCIL)	FINDINGS OF FACT,
– BUTTE COUNTY)	CONCLUSIONS OF LAW, &
)	DECISION

The above captioned matter was heard before a quorum of the South Dakota Open Meetings Commission (Commission) on October 23, 2020. Complainant, Mark Watson, appeared personally and without counsel. The Belle Fourche City Council (City Council) appeared through counsel Dwight Gubbrud. Prior to the hearing, the Commission reviewed the written submissions of the parties as well as any other exhibit, pleading or paper on file herein. Based upon the materials submitted, and the arguments of the parties, the Commission enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Commission takes official notice that the City of Belle Fourche is located in Butte County, South Dakota, and has been organized and operated according to applicable provisions of South Dakota Codified Law.
2. The Commission further takes notice that the Belle Fourche City Council is a public body elected pursuant to applicable provisions of state law to govern the City of Belle Fourche.

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3. On December 14, 2019, the City Council received a letter from Rasmussen Mechanical indicating that the Belle Fourche Community Center HVAC system had failed and was beyond repair. Rasmussen Mechanical is the contractor the City uses to maintain the Community Center's HVAC system. Rasmussen informed the City Council that the HVAC system failure created an "extremely dangerous condition" for people in the building and was hard on the building and equipment in the building. Rasmussen further indicated that this constituted an "urgent public health threat." In its letter, Rasmussen also identified an issue with the Community Center's hot water system. A copy of the letter was provided to the Commission as part of its consideration of this matter.

4. At the hearing of this matter, the Commission was informed that the Belle Fourche Community Center is a multi-use facility consisting of a theater, gymnasium, meeting space, swimming pool, and other various fitness spaces. The Community Center also serves as an emergency shelter for the City of Belle Fourche and is available for use by the public during storms, tornadoes, floods, other natural disasters, pandemics, and civil emergencies.

5. On December 16, 2019, according to its meeting minutes, the Belle Fourche City Council voted to enter executive session for the purposes of "Contractual/Public Safety" and cited SDCL 1-25-2(4) & (6) as the statutory provisions allowing the executive session.

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6. After returning to public session, the City Council declared the Belle Fourche Area Community Center HVAC system in need of emergency repair for public health and safety reasons. The City Council voted to authorize an emergency contract to repair the Community Center HVAC system.

7. On January 13, 2020, Mark Watson submitted an open meetings complaint to the Butte County State's Attorney. Watson is the managing editor of the Black Hills Pioneer, a newspaper published in Spearfish, South Dakota, who provides regular coverage of actions taken by the Belle Fourche City Council.

8. Mr. Watson's complaint alleged that the City Council inappropriately entered executive session on December 16, 2019 for a purpose not authorized by the executive session provisions of SDCL 1-25-2. Specifically, Watson alleged that emergency repair of the Community Center HVAC system did not meet the requirements of 1-25-2(4) or (6) and, as such, the City Council should not have entered executive session to discuss the emergency repairs. Watson concluded that any discussion by the City Council of emergency HVAC repairs at the Community Center should have been held in open session.

9. On March 7, 2020, Butte County Deputy State's Attorney LeEllen McCartney forwarded the complaint to the Commission pursuant to SDCL 1-25-6(3).

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10. SDCL 1-25-1 states in pertinent part:

The official meetings of the state, its political subdivisions, and any public body of the state or its political subdivisions are open to the public unless a specific law is cited by the state, the political subdivision, or the public body to close the official meeting to the public.

11. SDCL 1-25-2 states in pertinent part:

Executive or closed meetings may be held for the sole purpose of:

(4) Preparing for contract negotiations or negotiating with employees or employee representatives; ... or

(6) Discussing information listed in subdivisions 1-27-1.5(8) and 1-27-1.5(17).

12. In its written response to the complaint, the City Council focused on application of SDCL 1-25-2(6) and, through that provision, application of SDCL 1-27-1.5(8) and 1-27-1.5(17).

13. SDCL 1-27-1.5 states in pertinent part:

The following records are not subject to §§ 1-27-1, 1-27-1.1, 1-27-1.3, and § 1-27-1.23:

(8) Information pertaining to the protection of public or private property and any person on or within public or private property including:

- (a) Any vulnerability assessment or response plan intended to prevent or mitigate criminal acts;
- (b) Emergency management or response;
- (c) Public safety information that would create a substantial likelihood of endangering public safety or property, if disclosed;
- (d) Computer or communications network schema, passwords, or user identification names;
- (e) Guard schedules;
- (f) Lock combinations; and

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(g) Any blueprint, building plan, or infrastructure record regarding any building or facility that would expose or create vulnerability through disclosure of the location, configuration, or security of critical systems of the building or facility;

(17) Any emergency or disaster response plans or protocols[.]

14. The City Council’s written response asserted that executive session was appropriate under SDCL 1-25-2(6) because the information discussed in executive session constituted information related to an emergency management response (as allowed by SDCL 1-27-1.5(8)(b)) and information related to any emergency response plan or protocol (as allowed by SDCL 1-27-1.5(17)).

15. At the hearing of this matter, Mr. Watson acknowledged that the Community Center HVAC system need to be replaced in an emergency manner. Watson indicated that the entire community was aware of issues with the Community Center HVAC system. Mr. Watson, however, asserted that this was not sufficient enough reason to enter executive session – that the City Council had interpreted 1-25-2(6) too broadly.

16. At the hearing of this matter, the City Council reaffirmed its position that executive session was allowed under SDCL 1-25-2(6) and 1-27-1.5(8). The City Council focused on the assertion that executive session was held to discuss “[i]nformation pertaining to the protection of public or private property and any person on or within public or private property.” SDCL 1-27-1.5(8).

17. Any Finding of Fact more appropriately labeled as a Conclusion of Law is hereby re-designated as such and incorporated below therein.

CONCLUSIONS OF LAW

1. The Belle Fourche City Council, as the governing body of the City of Belle Fourche, Butte County, South Dakota, is a public body subject to the open meeting requirements of SDCL ch. 1-25. The Open Meeting Commission has jurisdiction over this matter pursuant to SDCL ch. 1-25.

2. SDCL 1-25-2 provides an exception to the open meeting requirements set forth in SDCL 1-25-1. SDCL 1-25-2 permits governing bodies to enter executive session to discuss those items specifically enumerated by the statute, as well as any other item that is deemed privileged or confidential by state or federal law.

3. SDCL 1-25-2(4), allowing executive session to “[prepare] for contract negotiations or negotiating with employees or employee representatives” is not applicable to the facts of this matter. The Commission has previously concluded that both clauses of the subsection must be read together – executive session is only proper under SDCL 1-25-2(4) to prepare for contract negotiations with employees or their representative, or for negotiations with employees and their representatives. *See Matter of South Dakota Science and Technology Authority*, Open Meetings Commission, February 20, 2007. SDCL 1-25-2(4) should be interpreted narrowly and should not be interpreted as allowing executive session to prepare for general contractual matters.

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4. The opening clause of SDCL 1-27-1.5(8) states that it applies to “information pertaining to the protection of public or private property and any person on or within public or private property *including:*” the items listed in subsections (a) through (g). (emphasis added). The term “including,” when used in a statutory list, is generally interpreted as establishing legislative intent that the list is not exclusive or exhaustive. *See Peterson v. Peterson*, 2000 S.D. 58, ¶ 21. Therefore, the plain language of SDCL 1-27-1.5(8) (as incorporated by reference in SDCL 1-25-2(6)) authorizes a public body to enter executive session to discuss information related to the protection of public or private property and any person on public or private property.

5. Based upon the materials in the record and the testimony presented at the hearing of this matter, the Commission concludes the Belle Fourche City Council did not violate the South Dakota Open Meetings Laws. SDCL 1-25-2(6) authorizes a public body to enter executive session to discuss information listed in SDCL 1-27-1.5(8). The executive session conducted by the City Council on December 16, 2019 was held to discuss “the protection of public or private property and any person on or within public or private property[.]” SDCL 1-27-1.5(8). The executive session conducted by the City Council complied with the provisions of SDCL 1-25-2.

6. While no violation of the open meetings statutes is found by the Commission, it is important to note that executive session, as allowed by SDCL 1-25-2, is permissive and not mandatory. The statute does not require

executive session, the statute grants public bodies the discretion to enter executive session for privileged or confidential matters. The use of that discretion should be weighed against the goal of openness in public meetings.

7. Any Conclusion of Law more appropriately labeled as a Finding of Fact is hereby re-designated as such and incorporated above therein.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the South Dakota Open Meetings Commission hereby determines the Belle Fourche City Council did not violate the South Dakota Open Meetings Laws in regard to the facts and allegations raised by the complaint filed in this matter.

Decision entered by Commissioners **Reedstrom (Chair), Hoffman, & Tracy.**

Commissioner **Wendt** recused herself from the discussion and consideration of this matter and abstained from any final action taken by the Commission.

Commissioner **Sovell** was absent from the meeting when the matter was heard and abstained from any final action taken by the Commission