

June 23, 2009

**STATE OF SOUTH DAKOTA**  
**OPEN MEETINGS COMMISSION**

IN THE MATTER OF OPEN MEETING )	FINDINGS OF FACT,
COMPLAINT 08-04 )	CONCLUSIONS OF LAW
BUTTE COUNTY COMMISSION )	AND FINDING OF NO VIOLATION

The Complaint in the above entitled matter was referred to the Open Meetings Commission by the Butte County States Attorney under SDCL 1-25-6, the State's Attorney having received a notarized complaint filed under oath by Milo Dailey.

The Dailey Complaint was filed with the State's Attorney in September 2008. It alleges that a Butte County Commission meeting held on September 3, 2008, violated SDCL 1-25-1, et. seq. More specifically, the Dailey complaint asserts that (a) the agenda was not adequate and (b) no notice or agenda was provided to the public. The Butte County State's Attorney referred the matter to the Open Meetings Commission under SDCL 1-25-6, asking the Open Meetings Commission to specifically consider the issue of whether the agenda was drafted adequately.

The Open Meeting Commission scheduled oral presentations on this matter for November 12, 2008. Neither Mr. Dailey nor any representative of Butte County appeared. The Open Meeting Commission considered the written documents in the file and made an oral determination that a violation had not occurred; i.e., that the agenda for the September 3 meeting was drafted adequately.

Subsequent to the Open Meeting Commission's oral determination, Mr. Dailey submitted a letter to clarify his position. These Findings of Fact and Conclusions of Law confirm the earlier oral determination and also address the subsequent letter. The

subsequent letter is addressed only because it raises a unique issue and does not indicate that the Open Meetings Commission will invite or address such letters in the future.

As set forth below, the evidence presented does not show that a violation occurred.

### **FINDINGS OF FACT**

1. Butte County and its Board of Commissioners constitute a political subdivision of the State of South Dakota as referred to in SDCL 1-25-1.
2. The Butte County Commissioners met on September 3, 2008. An agenda provided with the Dailey Complaint shows that the meeting was a special meeting and lists the items as “Executive Session regarding Personnel” and “The Commissioners will be conducting interviews for the Director of Equalization Position.” In a letter contained in his referral to the Open Meetings Commission, the State’s Attorney concluded that the agenda was properly posted more than 24 hours in advance of the meeting as required by law.
3. It is undisputed that the Butte County Commissioners met in executive session and conducted interviews for the Director of Equalization position. The Commission then actually offered the position to an applicant. Any vote of a county commission must, of course, be made publicly outside of an executive session. In this case, neither the State’s Attorney nor Mr. Dailey assert that the vote was conducted in executive session and it is therefore assumed for purposes of this proceeding that the vote was properly made in public.
4. A letter written by the State’s Attorney (and included within the material submitted to the Open Meetings Commission) indicates that the State’s Attorney seeks a ruling on one of the issues raised by Mr. Dailey: the question of whether the agenda was

drafted sufficiently; i.e., whether it included both the interview process and also the actual hiring decision.

5. The language of SDCL 1-25-1.1 contains no information as to how specific an agenda should be. In particular there is no requirement in SDCL 1-25-1.1 that the agenda is to indicate whether the listed items are for discussion only or whether the items require a vote at the meeting. Obviously the reason for requiring the posting of an agenda is to apprise the public of the time, place, and nature of the meetings.

Accordingly, the agenda must contain sufficient information to advise the public as to each of the issues that will be addressed. In the situation here, the agenda did contain sufficient information so as to advise the public of the time, place, and subject matter of the meeting. The agenda was adequate. In particular, it should be noted that an agenda item stating that interviews would be conducted affords the public with sufficient information to conclude that a hiring decision may be conducted at the meeting.

6. Although the Butte County agenda refers to the executive session for personnel purposes, the agenda did not list the executive session as the only business item. Accordingly, it is apparent from the agenda as a whole that the county commission would also be conducting business in public later during the same meeting. The failure to include the hiring decision as a specific agenda item is not a violation of SDCL 1-25-1.

7. In his complaint, Mr. Dailey also asserted that the Butte County Commission had erred in failing to provide notice of the Commission meetings to media. According to the letter from the State's Attorney in the filed materials, the State's Attorney appeared to have determined that no violation of SDCL 1-25-1.1 had occurred in that regard and it appeared that he had chosen not to refer that matter to the Open Meetings Commission. Accordingly the Open Meetings Commission made no oral

ruling on this matter on November 12, 2008. Mr. Dailey's subsequent letter asserts that the Open Meetings Commission had missed the crux of the complaint by failing to address this matter. The Open Meetings Commission finds that it lacked jurisdiction to consider this issue because it did not receive a referral on that question from the Butte County State's Attorney.

8. If the Open Meeting Commission did have jurisdiction to rule on the media question raised, it would rule that no violation had occurred based on the facts of this particular case. SDCL 1-25-1.1 expressly provides that the public body must provide notice to the media "if the media requests." There is no allegation in the complaint or the subsequent letter by Mr. Dailey that the media had affirmatively made such a request. Although it may be customary to provide such notices to the media without having received such requests, the media lacks standing to complain unless they actually do make such requests. The State's Attorney involved here has advised Mr. Dailey to make such requests, in writing on an annual basis. This is prudent advice.

9. The information presented to the Open Meetings Commission does not demonstrate that a violation of SDCL 1-25-1 has occurred.

### **CONCLUSIONS OF LAW**

1. Butte County is an entity subject to the provisions of the open meetings law found at SDCL Chapter 1-25.

2. Under SDCL 1-25-1.1, Butte County is required to prepare and post notice of its meetings, with a proposed agenda, at least 24 hours prior to any meeting where a quorum will be present and official business will be discussed.

3. Although not stated in SDCL 1-25-1.1, the overall purpose and intent of that statute is that agenda must be sufficient to generally advise the public of the time,

place, and nature of the items to be addressed at the meeting. SDCL 1-25-1.1 does not require that agendas must list whether the item listed is for discussion only or whether a vote will be taken at the meeting in question.

4. The Open Meetings Commission lacks jurisdiction to consider whether Butte County erred when it failed to provide notice of its meeting to the media. The Open Meetings Commission cannot exercise jurisdiction on matters not referred to it by a State's Attorney. SDCL 1-25-6.

5. SDCL 1-25-1.1 expressly provides that the public body must provide notice to the media "if the media requests." As a matter of law, the media lacks standing to complain unless they actually do make such requests and are able to demonstrate that is the case when they make such complaints.

6. Based on the facts presented, no violation of the SDCL 1-25-1 et. seq. occurred.

Entered by Open Meeting Commissioners Brenner (Chairman), Beck, Reedstrom, Rothschadl and Steele