

November 13, 2009

STATE OF SOUTH DAKOTA  
OPEN MEETING COMMISSION

|                                   |   |                             |
|-----------------------------------|---|-----------------------------|
| IN THE MATTER OF OPEN MEETING     | ) | <b>FINDINGS OF FACT AND</b> |
| COMPLAINT 09-01                   | ) | <b>CONCLUSIONS OF LAW</b>   |
| CITY OF MARTIN (January 14, 2009) | ) |                             |

The above-entitled matter was referred to the Open Meetings Commission (“OMC”) by the Bennett County State’s Attorney under S.D.C.L. § 1-25-6, the State’s Attorney having received a notarized complaint filed under oath by Robert Fogg, Jr., a member of the Martin City Council.<sup>1</sup>

The Complaint alleged that the Martin City Council met on January 14, 2009, and entered into an executive session without stating a reason. The Complaint further alleged that a city council member stated “no action was taken” upon the conclusion of the executive session which “likely mislead[ed] the public of potential actions subsequent.” After receiving the Complaint, the OMC provided the City Council with an opportunity to respond. The City’s litigation attorney Sara Frankenstein filed a written response. The response was provided to Mr. Fogg by the OMC.

Oral presentations were held on August 21, 2009. Mr. Fogg appeared *pro se* and made his presentation. Litigation attorney Sara Frankenstein provided the City’s oral response. Immediately following the oral presentations, the OMC conducted its deliberations in public and determined that the Martin City Council did not violate South Dakota’s Open Meeting’s laws

---

<sup>1</sup> Fogg filed another Complaint with the Bennett County State’s Attorney regarding a December 29, 2009 meeting of the City of Martin City Council. The issues raised in that Complaint are the subject to separate Findings of Fact and Conclusions of Law.

with regard to these complaints. Based on all the written submissions, as well as the oral presentations, the OMC makes the following:

### **FINDINGS OF FACT**

1. The City of Martin and its City Council constitute a political subdivision of the State of South Dakota, as referred to in S.D.C.L. § 1-25-1.
2. A quorum of the City Council met on January 14, 2009, for a regularly-scheduled meeting. The agenda included the item “litigation conflict.”
3. When the agenda item of litigation was reached, attorney Sara Frankenstein asked that a councilmember move to enter into executive session, but before that happened, she wanted to explain a few issues. Attorney Frankenstein explained to the city council, as well as the public, that executive session was proper in order to discuss litigation pending. Attorney Frankenstein further explained that executive sessions exclude the public, and in this specific case, it also excluded Robert Fogg. Attorney Frankenstein handed Mr. Fogg a copy of correspondence explaining the same, which had been previously issued to Mr. Fogg on several previous occasions.
4. A city councilperson moved to enter into executive session. At that time, Mr. Fogg asked for the rationale for a change of government, alluding to his exclusion from the executive session.
5. Attorney Frankenstein explained that executive session would include a discussion on pending litigation and conflicted parties such as Mr. Fogg are excluded.
6. Fogg then requested an audio copy of that night’s meeting.
7. The motion to enter into executive session passed, and executive session was held.

8. Executive session was concluded and upon resuming the open meeting, a councilmember stated for the record that no official action was taken by the council.

9. City asserts that Fogg was properly excluded from executive session, and supplied numerous documents indicating his conflict of interest with the litigation discussed at the city council meeting in question. Fogg has not contested that he was properly excluded from the executive session at issue.

10. Attorney Frankenstein called for the motion for executive session to discuss litigation. It was clear from the discussion between attorney Frankenstein, councilmember Fogg, and the rest of the council that the executive session would discuss litigation. The agenda also so reflected.

11. It was clear that the motion to enter into executive session was based upon such discussion and such discussion is construed as a part of the motion calling for executive session.

12. The minutes of the January 14, 2009, meeting also clearly reflected that executive session was to discuss litigation.

13. No vote or consensus was taken in the executive session.

In light of the foregoing findings of fact, the OMC makes the following:

### **CONCLUSIONS OF LAW**

14. The City of Martin and its City Council is an entity subject to the provisions of the Open Meetings laws found at S.D.C.L. Chp. 1-25.

15. Under S.D.C.L. § 1-25-2, executive or closed meetings may be held for consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation. The law does not require any statement in particular to be made when a public entity moves to enter into executive session.

16. Attorney Frankenstein and the City went above and beyond the requirements of the law by indicating to the public that an executive session was needed to discuss litigation and that the public and conflicted parties are excluded under the law.

17. The city council properly excluded Robert Fogg from the executive session regarding the litigation due to a conflict of interest.

18. The legislative intent behind the South Dakota open meetings laws protects an attorney's discussion with their clients regarding litigation.

19. S.D.C.L. § 1-25-2 prohibits official action from taking place in executive session. All evidence presented to the OMC indicated that indeed no official action was taken.

20. It is proper to announce in the open meeting that no official action was taken in the executive session, and such a statement was not a violation of law.

21. Mr. Fogg's Complaint regarding the city council stating that no official action was taken fails to state a cause of action under the law and as such does not properly allege an open meetings law violation.

Based on the foregoing Findings and Fact and Conclusions of Law, the OMC finds the Martin City Council did not violate open meetings laws during their January 14, 2009, meeting. Specifically, Mr. Fogg's "no action taken" complaint is dismissed for failure to state a claim under South Dakota's open meetings laws. Mr. Fogg's Complaint regarding no reason given for the executive session is found to not be a violation of South Dakota's open meetings laws under the totality of the circumstances.

Issued by Chairman Glenn Brenner and Commission Members Lisa Rothschadl, Mark Reedstrom, Emily Sovell and John Steele.