

December 18, 2018

STATE OF SOUTH DAKOTA
OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN)	OMC 2017-04
MEETINGS COMPLAINT AGAINST)	
CANTON CITY COMMISSION –)	FINDINGS OF FACT,
LINCOLN COUNTY)	CONCLUSIONS OF LAW, AND
)	DECISION

The above captioned matter was heard before the South Dakota Open Meetings Commission (Commission) on June 7, 2018. Complainant, Mr. Andy Wilcox, appeared in person. The Canton City Commission appeared through counsel, Mr. Larry A. Nelson. 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 Canton is located in Lincoln County, South Dakota, and categorized as a second-class municipality.

2. The Commission further takes notice that the Canton City Commission is a duly-organized public body organized pursuant to applicable provisions of state law and municipal ordinance to govern the City of Canton.

3. At all times relevant to the complaint, the City of Canton employed a City Manager with commission form of government. The Canton City Commission consisted of nine members.

4. On September 13, 2017, the Canton City Manager, Amanda Mack, sent an e-mail addressed to all of the City Commissioners. The e-mail informed the Commissioners that work on a water main project had unintentionally disconnected services to two residences. The disconnection required unanticipated work to correct the situation. Mack requested “[a] verbal go ahead from the City Commission” to begin work to correct the situation as soon as possible. The e-mail directed recipients to “[p]lease respond yes or no and remember not to reply all.”

5. The stated cost for the change order requested in the City Manager’s e-mail was \$45/foot, not to exceed 140 feet, with the maximum cost totaling \$6,300.

6. City Manager Mack received e-mail responses from eight of the City Commissioners sent directly to her approving the change order. Two days after Mack’s e-mail, one commissioner “replied all” to the e-mail.

7. After receiving the e-mail responses, City Manager Mack informed the engineer of the Commission’s response and, based upon that response, the engineer told the contractor to move forward with work under the change order.

8. The City Manager for the City of Canton was not authorized to approve purchases over \$200. The City Manager was authorized to put

together change orders but did not have the authority to authorize any individual change order without direction from the City Commission.

9. On September 18, 2017, the City Commission held a public meeting. During the meeting, the City Commission considered the change order for the completed work that corresponded to City Manager Mack's September 13 e-mail. In the meeting's agenda, the last sentence of Item 3.2, read "[t]his work has been completed and verbal authorization was given from Commissioners via email on September 13, 2017." The change order for this work was approved by a formal public vote of the City Commission at its October 2, 2017, meeting.

10. On September 20, 2017, Andy E. Wilcox submitted an open meetings complaint to the Lincoln County State's Attorney alleging the City of Canton had violated the state open meetings statutes.

11. Mr. Wilcox specifically alleged that during an e-mail exchange on September 13, 2017, the City Commission gave authorization for a change order in the amount of \$6300 without engaging in said official action in a properly noticed public meeting thereby violating SDCL 1-25-1 and 1-25-1.1. Essentially Mr. Wilcox alleged that the e-mail communications constituted a meeting and through the e-mail communications public funds were approved for expenditure.

12. On October 13, 2017, the City Commission responded to Mr. Wilcox's complaint asserting a meeting did not occur because there was no

discussion between a quorum of the City Commission, and no final action on the change order was taken by a quorum of the City Commission.

13. On October 26, 2017, the Lincoln County State's Attorney's Office forwarded the complaint to the Commission, pursuant to SDCL 1-25-6(3), for the Commission's review and further action.

14. At arguments before the Open Meetings Commission, the City Commission asserted that no final action took place regarding the change order until the City Commission formally approved the change order at its October 2 meeting.

15. It was also acknowledged at oral arguments in this matter that the engineer working on the City's project was an agent of the City. The City Commission agreed that the engineer had authority to bind the City when the engineer directed a contractor to commence work the change order based upon the City Commissioner's e-mail approval.

16. 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 Canton City Commission, as the governing body of the City of Canton, Lincoln 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 1-25-1 defines an official meeting of a public body to be "any meeting of a quorum of a public body at which official business of the public

body is discussed or decided, or public policy is formulated, whether in person or by means of teleconference.” The statute requires official meetings of public bodies to be open to the public except under certain circumstances. SDCL 1-25-1.1 requires that proper notice be given of all official meetings of all local government public bodies.

3. SDCL 1-25-1 clearly contemplates and requires that official action of a public body may only be taken at a properly noticed official meeting of the public body. The open meeting statutes are intended to afford members of the public the ability to know when official action of a public body may occur.

4. A majority of the City Commissioners e-mailed the City Manager approving the change order. The City Manager then contacted the engineer providing a “go-ahead” for the work. The engineer, acting as an agent of the City, contacted the contractor who then completed the work under the change order. The City Commission’s approval of the change order over e-mail bound the City to spend taxpayer funds and was official action of the City.

5. Based upon the materials in the record, and the testimony presented at the hearing of this matter, the Commission concludes the Canton City Commission did violate the South Dakota Open Meetings Laws. The City Commission violated SDCL 1-25-1 by approving the expenditure of up to \$6300.00 in public funds outside of an official public meeting.

6. Any Conclusions 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 REPRIMANDS the Canton City Commission in that the City Commission took official action of the City of Canton outside a public meeting in violation of SDCL 1-25-1.

Decision entered by Commissioners **Krull** (Chair), **Reedstrom**, **Rothschadl, & Steele**.