

May 4, 2016

STATE OF SOUTH DAKOTA  
OPEN MEETINGS COMMISSION

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IN THE MATTER OF OPEN	)	OMC 2015-01
MEETINGS COMPLAINT AGAINST	)	
THE MITCHELL CITY COUNCIL	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW AND
	)	DECISION

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The above captioned matter was heard telephonically before the South Dakota Open Meetings Commission (Commission) on December 14, 2015. Managing Editor Luke Hagen and Complainant Evan Hendershot with the Mitchell Daily Republic, appeared telephonically and were represented by legal counsel Jon E. Arneson who also appeared telephonically. The Mitchell City Council, Respondent, was represented by legal counsel Carl J. Koch who appeared telephonically along with Mitchell Mayor Jerry Toomey and City Administrator Stephanie Ellwein. Prior to the hearing, the Commission reviewed the written submissions of the parties as well as any other exhibits, pleadings or papers 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 Mitchell is located in Davison County, South Dakota, and categorized as a first class municipality operated under an aldermanic form of government. The City of

Mitchell has been organized and operated according to applicable provisions of South Dakota Codified Law.

2. The Commission also takes official notice that the Mitchell City Council is a public body elected pursuant to applicable provisions of state law to govern the City of Mitchell.

3. On September 29, 2015, Mr. Evan Hendershot, Mitchell Daily Republic, submitted an open meetings complaint to the Davison County State's Attorney regarding the Mitchell City Council.

4. On October 2, 2015, Davison County State's Attorney James A. Miskimins forwarded the complaint to the Commission pursuant to SDCL 1-25-6(3).

5. On September 10, 2015, the Director of the Corn Palace, Dan Sabers, orally resigned his position.

6. On September 15, 2015, Mr. Sabers dated a letter to be submitted to Mayor Jerry Toomey rescinding the oral resignation and indicating that Sabers would be attending the September 21, 2015, City Council meeting to advise the Council of the withdrawal of the resignation.

7. The parties agree that the position of Corn Palace Director remained vacant as of September 21, 2015.

8. On September 21, 2015, the Mitchell City Council held a regular meeting of the Council. The agenda for this meeting noticed an executive session, pursuant to SDCL 1-25-2(1) to discuss a personnel matter.

9. At the meeting the City Council entered executive session to receive input from numerous members of the public regarding the recent resignation Mr. Sabers. The City asserted during the hearing of this matter that these citizens were present at the September 21st meeting to advocate for the re-instatement of Mr. Sabers as Corn Palace Director.

10. At the meeting Mayor Toomey advised those in attendance that it was the policy of the City of Mitchell to address personnel issues only during executive session. Mayor Toomey also stated “if anyone wishes to address the Council you are more than welcome to attend the executive session after the regular meeting and will have the opportunity to state your concerns at that time. We will have individuals address the executive session one person at a time.”

11. The parties do not dispute that the agenda for the Council meeting did contain sufficient notification of an executive session to discuss personnel matters planned for the identified meeting of the Council.

12. SDCL 1-25-2(1) allows a public body to enter into executive session to discuss “the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee.”

13. Mr. Hendershot alleged in bringing his complaint that the executive session was not held for the purpose of 1.) a “discussion” between the Council and any other person, and 2.) the executive session was not held for the purpose of discussing a “prospective” public officer.

14. It was argued by counsel for Mr. Hendershot that the City Council merely listened to the members of the public who addressed the Council in the executive session and did not respond in any way.

15. It was also argued that Mr. Sabers was in no way a prospective officer or employee because there was no indication that he was going to be allowed to withdraw his resignation.

16. The City stated in responding to this matter that the term “discussion” is a broad term that could essentially encompass any communication between two or more people. The City asserted that what occurred in executive session between the members of the public and the City Council was a discussion.

17. Further, the City asserted that Mr. Sabers was properly considered a prospective employee in that no new person had yet been hired for the position at the time meeting occurred on September 21st.

18. 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 Mitchell City Council, as the governing body of City of Mitchell, Davison 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. The Commission notes that SDCL 1-25-2 states that “executive or closed meetings *may* be held” for the purposes listed in the statute. The language of the statute is permissive and not mandatory; nothing in SDCL ch. 1-25 prevented the City Council from conducting the discussion held in executive session as part of the public portion of its agenda.

3. The Commission concludes that as of September 21, 2015, Mr. Sabers was properly considered a prospective employee in that he had asked to withdraw his resignation, no evidence of a formal denial of that request was presented to the Commission, and the position of Corn Palace Director remained vacant at the time of the meeting.

4. The Commission further concludes that the term “discuss” as it is used in SDCL 1-25-2(3) includes a factual situation where a majority of a public body is in one location listening to information presented by citizens and with minimal response from any member of the public body.

5. Based upon the materials in the record and the testimony presented at the hearing of this matter, the Commission concludes the Mitchell City Council did not violate the South Dakota Open Meetings Laws in relation to the executive session held on September 21, 2015.

4. 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 Mitchell City Council did not violate the South Dakota Open Meetings Laws in regards to the facts and allegations raised by the complaint filed in this matter.

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