

(DRAFT)

SOUTH DAKOTA OPEN MEETINGS COMMISSION

MINUTES OF MEETING

JUNE 7, 2018

Members participating: Kevin Krull, Meade County State's Attorney (Chair); Emily Sovell, Sully County State's Attorney; John Steele, Aurora County State's Attorney; Mark Reedstrom, Grant County State's Attorney; and Lisa Rothschadl, Bon Homme County State's Attorney. Steve Blair and Jenna McFarlane, Office of the Attorney General, assisted the Commission.

Chair Krull called the meeting to order at 1:30 p.m. Mr. Reedstrom moved to approve the proposed agenda; Ms. Sovell seconded. A roll call vote was held: Ms. Rothschadl, Mr. Steele, Mr. Reedstrom, Chair Krull, and Ms. Sovell all voted aye.

The following is a summary (not verbatim) of the matters discussed.

February 2, 2018

Ms. Rothschadl moved to approve the draft minutes of the February 2, 2018, meeting. Mr. Steele seconded. A roll call vote was held: Ms. Rothschadl, Mr. Steele, Mr. Reedstrom, Chair Krull, and Ms. Sovell all voted aye.

In the Matter of Open Meeting Complaint 17-04, Canton City Commission

Mr. Andy E. Wilcox, Sioux Valley News, appeared as the Complainant. Mr. Larry A. Nelson appeared as counsel on behalf of the Canton City Commission.

Mr. Wilcox stated that on September 13 the City Manager of Canton sent an email to each Canton City Commissioner regarding a change order for horizontal drilling to be carried out as part of a city project. The City Manager directed the City Commission not to "reply all" with their individual responses to the email. The City Commission members approved the indicated work through their responses and the work was done.

Mr. Wilcox continued by stating that at the September 18 meeting, the Commission asked for approval of the change order for the work that had already been finished. Mr. Wilcox felt that the email communications constituted a meeting, and the Commission had approved funds during that communication.

Responding for the City Commission, Mr. Nelson stated the City had two major construction projects. Mr. Nelson asserted that during the construction things got a little behind and the City found out that they had missed some water lines and the City needed to correct that mistake.

Mr. Nelson continued by stating that the City Manager did send out an email asking for a verbal go ahead to start the process, and that it was intended for the change order to be voted on at the City Commission meeting. Mr. Nelson argued there were no discussions, questions, or motions in the email by the City Manager; the email responses were simply “yeah this is okay.” Mr. Nelson then stated that when going through the statutes, it states we not only have to have a quorum of the members present, but also they have to be discussing some business for there to be a violation of the open meetings laws. Mr. Nelson doesn’t believe there was a discussion among the quorum or any members of the Commission, and that all communication was directly with the City Manager. After receiving the responses, the City Manager then told the engineer to proceed, and the change order was to be processed at the September 18 meeting.

Mr. Nelson concluded that he did not think an open meeting violation occurred. According to Mr. Nelson, there had never been a quorum of the Commission members present at the same time and place. Nor was official business discussed. As a result, Mr. Nelson stated the City Commission did not believe a violation occurred.

Mr. Krull said he was looking at the last sentence of the first paragraph in SDCL 1-25-1, which states, “an official meeting is any meeting of a quorum of a public body at which official business of that public body is discussed or decided.” Mr. Krull inquired if Mr. Nelson would agree that official business was decided through the email sent by the City Manager on September 13? Mr. Nelson believed there was authorization to go forward with the drilling project.

Mr. Steele asked if the City Commission, at its September 18 meeting, could have declined to pay the bill because it wasn’t legally authorized. Mr. Nelson responded that the City Commission could have done that. Mr. Nelson indicated that he didn’t believe the City Manager had any ability to bind the City.

Mr. Steele then asked Mr. Wilcox a hypothetical question: Would he still say a meeting occurred if the City Manager would have put the request on a piece of paper and personally hand delivered it to each City Commissioner. Mr. Wilcox said yes—the key was the communications. He continued, saying that in order for the City Manager to approve the change order, she would still need action from the City Commission: the City Manager is only allowed to spend \$200

without permission. Mr. Nelson chimed in, saying the City Manager would have to have the City Commission approval to pay the change order.

Mr. Reedstrom also posed a hypothetical question: would it be a violation of the open-meeting laws if the City Manager sent a group email to the Commission asking for their availability to hold a special meeting. Mr. Wilcox answered that such an email, in his estimation, would not be a violation.

Mr. Krull asked whether all nine City Commissioners got the email from the City Manager and if all nine of them responded. Mr. Nelson replied that all City Commissioners received the email, though only eight responded.

Ms. Sovell made a motion to find no violation occurred. She supported the motion by saying the City could vote at its official meeting not to approve the payment on the change order if it chose. There was no second. Mr. Steele asked for some more discussion on the matter. Mr. Steele stated he believed Mr. Nelson was correct there was no meeting, but official action was taken outside a public meeting—and that was a violation.

Mr. Reedstrom asked Mr. Nelson if the City Manager would have had the authority to authorize the work without first contacting any member of the City Commission. Mr. Nelson said he did not think the City Manager could have authorized the work on the change order without contacting the City Commission. Mr. Steele then asked if the engineer has the authority under the contract to bind the city. Mr. Nelson stated yes. Mr. Steele stated that he believed the City was bound by the action when the City Manager gave the instruction to the engineer to move ahead and let the contractor know. Mr. Steele believed that was official action.

Ms. Rothschadl stated she found the email interesting: the City Manager, in her view, asked for official action, because the City Manager specifically stated please respond yes or no and remember not to reply all. Ms. Rothschadl agreed with Mr. Steele that official action had been taken.

Mr. Steele moved to find that a violation of the open meetings laws occurred—the City of Canton took official action outside of a public meeting. Ms. Rothschadl seconded. A roll call vote was held: Ms. Rothschadl, Mr. Steele, Mr. Reedstrom, and Chair Krull all voted aye; Ms. Sovell voted nay.

In the Matter of Open Meeting Complaint 18-01, Potter County Commissioners

Ms. Molly McRoberts, Potter County News, appeared as the Complainant. State's Attorney Craig Smith appeared as the fact finder. Bill Frost appeared on behalf of the Potter County Commission. Ken Iverson, a Potter County Commissioner, also appeared.

Ms. McRoberts stated that on December 28, 2017, a staff member of the Potter County News attended and recorded the open portion of the County Commission meeting. Once the meeting adjourned, the staff member and the City Auditor left the meeting. The County Commissioners and the Sheriff remained to discuss County business off the record, with a quorum present, and without any recording or minutes being taken.

Ms. McRoberts continued, saying the County Commission, at the meeting, had made plans to discuss County business regarding law enforcement after the regular meeting adjourned. Ms. McRoberts felt the recorded portion and transcript of the meeting clearly showed the intent to meet after the regular session adjourned. Ms. McRoberts reiterated that the County Commission adjourned the public meeting, but then remained in the meeting room with a full quorum where they discussed County business with the Sheriff. She contends the County Commission violated the open-meetings laws.

Mr. Krull asked if the newspaper's staff member stopped recording when the official meeting was adjourned and how long that staff member stuck around afterwards. Ms. McRoberts said the recording stopped once the public meeting had adjourned and that the staff member left immediately after the adjournment. Mr. Krull asked if the five County Commissioners and the Sheriff stuck around after the meeting. Yes, Ms. McRoberts said. Mr. Krull asked if action was taken. Ms. McRoberts stated that she was not aware of any action taken.

Mr. Steele asked if a motion to adjourn had been made. To that, Ms. McRoberts said yes. Mr. Reedstrom asked whether Ms. McRoberts knew what had been discussed after the meeting adjourned. Ms. McRoberts indicated that she did not know. Mr. Reedstrom asked if she knew what County business was being discussed. Ms. McRoberts stated the only information she has was what the County Commission said during the official meeting: the County Commission said they would discuss law-enforcement information after the meeting concluded. Ms. McRoberts indicated this information is what led her to believe that was, in fact, what the County Commission discussed.

Mr. Krull asked what, besides what was in the transcript of the December 28 meeting, made Ms. McRoberts think that county business was going to be discussed after the adjournment. Ms. McRoberts stated nothing. Mr. Steele pointed out to Mr. Krull that the Potter County State's Attorney did provide a finding that County business was discussed with the County Sheriff after the adjournment. Ms. Sovell also pointed out that a statement from the County Commission, made on April 13, 2018, explicitly states the County Commission briefly discussed county business.

Responding for the Potter County Commission, Mr. Frost said the only county business the County Commission and the Sheriff briefly discussed concerned

the City of Gettysburg potentially going with county-wide law enforcement and the Sheriff's discussion with the City of Gettysburg about that issue. Mr. Frost explained the majority of the conversation was about a personal matter with the Sheriff and that no official decisions were made after the regular session had adjourned.

Mr. Frost felt the meeting was more of an impromptu meeting that lasted, at most, ten or twelve minutes after the public meeting adjourned. That impromptu meeting, according to Mr. Frost, dealt with how and what the City did as far as hiring people.

Mr. Krull asked whether the factual statement proved it is undisputed that county-wide law enforcement had been discussed during the time period after the regular session adjourned. Mr. Frost responded that was probably correct. Mr. Krull then asked whether any action had been taken. Mr. Frost noted that no action was taken and no money was spent.

Ms. Rothschadl motioned to find a violation of the open meetings laws. Mr. Steele seconded. A roll call vote was held: Ms. Rothschadl, Mr. Steele, Mr. Reedstrom, Chair Krull, and Ms. Sovell all voted aye.

In the Matter of Open Meeting Complaint 18-02, Hot Springs School Board

Ms. Stachia Walker appeared as the Complainant. Deputy State's Attorney Brian Ahrendt also appeared. Mr. Patrick M. Ginsbach appeared as counsel on behalf of the Hot Springs School Board. Kevin Coles, Scott Thompson and, Kim Henningson, of the Hot Springs School Board, also appeared.

Before oral presentation, Mr. Ahrendt inquired whether the response received from the Hot Springs School Board was timely. The response was originally due on May 10, but Ms. Walker did not receive a response from the School Board until June 4. That response, he said, was unsigned; and, as a result, he wasn't sure if Ms. Walker had received the official response. Mr. Blair said that when Mr. Ginsbach submitted his Answer the Certificate of Service was signed, but the signature block for the Answer itself was not signed. Mr. Blair stated that to ensure that the file contained a signed copy of the Answer, he did have Mr. Ginsbach sign the Answer when he got to the meeting. Mr. Blair continued, stating the Commission does not have any statute or rule establishing when a response to a complaint must be filed. Mr. Blair indicated that typically a thirty-day response time is given, but the Commission has historically been forgiving or lenient with late filing of pleadings—that is, the Commission accepts and files the late pleadings rather than keeping them out of the record. Mr. Krull asked whether Ms. Walker felt she had enough time to review Mr. Ginsbach's response, or if she would like a continuance to the next meeting. Ms. Walker said she was ready to move forward.

Ms. Walker said the complaint stemmed from a School Board meeting held on March 12. At that meeting, the School Board went into executive session after a motion. Ms. Walker said the School Board neglected to identify the reason for executive session in their motion. But the reason became apparent after the School Board came out of executive session: four motions were made to not renew contracts as a result of a reduction of force.

Ms. Walker continued by stating that no discussion on any of those four motions took place before the School Board voted unanimously to cut the Spanish program, counseling program, and eliminate the position of librarian. Based on the School Board's answer, Ms. Walker felt the School Board was going to claim the executive session was to discuss qualifications, competence, performance, character or fitness of teachers due to the reduction in force policy; but the School Board was confusing the master contract with the executive-session laws. In Ms. Walker's view, the School Board inappropriately used executive session.

Ms. Rothschadl stated she was under the impression that violations 1-4 were being referred to the Open Meetings Commission, while the State's Attorney Sword retained jurisdiction over the other three violations. Mr. Krull confirmed her impressions were correct.

Mr. Reedstrom asked why personnel matters shouldn't be discussed in executive session. Those matters, he said, are typically handled during executive session. Ms. Walker responded by stating the motions concerned programs, not the competence and fitness of a particular person. Although Mr. Reedstrom understood that, he said the school district had a certain protocol it needed to follow in the reduction in force policy, which he felt was inherent in SDCL 1-25-2(1). In contrast, Mr. Krull said he wasn't sure he read SDCL 1-25-2 as broadly as Mr. Reedstrom. Mr. Krull asked Ms. Walker whether she was saying there was a difference between evaluating one's qualifications, competence, performance, character or fitness to teach in the school district versus should we have a government program? Ms. Walker replied that was correct.

Ms. Walker felt that if the Board was going to discuss an employee's competency, character, and fitness, then the employee should be made aware. The employees here were not made aware. So, according to Ms. Walker, the discussions should have been made public because it was about the school's programs being cut.

Responding for the Hot Springs School Board, Mr. Ginsbach said the Hot Springs School District was faced with a deficit, and once the school made cuts to the budget where it could, it was then forced to move forward with a reduction in force. Mr. Ginsbach explained that when the School Board met in executive session it discussed the qualifications and certifications of the

teachers being reduced to determine whether they could be placed somewhere else within the district once the reductions were made. He also gave an example: the Spanish teacher may have certificates to teach other areas, so the School Board would then need to see if they had a position open within the district in order for the teacher to retain his or her job.

Finally, Mr. Ginsbach felt, based on all the information the school district took into consideration, there were not any violations of the state open-meetings laws. Specifically, Mr. Ginsbach referenced the executive session in which the School Board discussed individual teacher's qualifications.

Mr. Reedstrom asked why the School Board felt it needed to go into executive session. Mr. Ginsbach replied that it needed to protect the reputation of the teachers when determining if they had the requisite qualifications. Mr. Steele then asked whether certifications were a public matter. Superintendent Coles informed Mr. Steele about a website where any member of the public can search teacher certifications.

Ms. Sovell felt the Board could not have gone through the process of cutting programs without going into some great detail on the qualifications of employees—a permissible use of executive session under the law. So for that reason, Ms. Sovell did not feel there was an open meetings violation. Mr. Krull agreed with Ms. Sovell.

Ms. Sovell made a motion to find there was no violation of the open-meetings laws on complaints 1 through 4. Mr. Reedstrom seconded. A roll call vote was held: Ms. Rothschadl, Mr. Reedstrom, Chair Krull and Ms. Sovell all voted aye. Mr. Steele voted nay.

In the Matter of Open Meeting Complaint 17-01, South Dakota Water Management Board

Mr. Blair went on record to state he had recused himself from preparing the Findings of Fact and Conclusions of law. He did so because he had been assigned to sit with the Water Management Board as their counsel as a result of staffing changes at the Attorney General's Office. Mr. Blair explained that Ann Mines Bailey, counsel for the Department of Environment & Natural Resources, who had appeared on behalf of the Water Management Board before the Commission, submitted the proposed Findings of Fact and Conclusions of Law to be considered by the Commission.

The Commission considered the proposed Findings of Fact and Conclusions of Law for this matter. Mr. Steele made a motion to approve them. Ms. Sovell seconded. All members voted in favor of adopting the Findings and Conclusions. A roll call vote was held: Ms. Rothschadl, Mr. Steele, Mr. Reedstrom, Chair Krull, and Ms. Sovell all voted aye.

Adjournment.

A motion to adjourn was made by Ms. Rothschadl and seconded by Mr. Reedstrom, at approximately 3:33 p.m. A roll call vote was held: Ms. Rothschadl, Mr. Steele, Mr. Reedstrom, Chair Krull, and Ms. Sovell all voted aye. The Commission then adjourned.

Approved on _____, 2018.

Kevin Krull, Chair
On behalf of the Open Meeting Commission