

November 13, 2009

STATE OF SOUTH DAKOTA
OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN MEETING)	FINDINGS OF FACT
MEETING COMPLAINT 09-01)	CONCLUSIONS OF LAW
CITY OF MARTIN (December 29, 2008))	AND REPRIMAND

The Complaint in the above entitled matter was referred to the Open Meetings Commission (OMC) by the Bennett County State’s Attorney under SDCL 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.¹

The Complaint alleges that the Martin City Council met and participated in a special meeting on December 29, 2008 (a) when its agenda had been posted less than 24 hours in advance of the meeting and (b) when an amended agenda with another agenda item was posted with even less notice for the same meeting. After receiving the Complaint, the OMC provided the City Council with an opportunity to respond. City Attorney Sandy Steffen 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. City Attorney Sandy Steffen provided the City’s oral response. Immediately following the oral presentations, the OMC conducted its deliberations in public and determined that the conduct involved in this matter warranted a reprimand.

¹ Fogg filed two unrelated Complaints. The other relates to a City of Martin meeting held on January 14, 2009 and is the subject of subject of separate Findings of Fact and Conclusions of Law.

Based on all the written documentation received 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 SDCL 1-25-1.

2. A quorum of the City Council met on the evening of Monday December 29, 2008 for a special meeting associated with finalizing the city's fiscal business at the end of the calendar year. The City typically conducts a year-end meeting of this nature, although the date and exact nature of the business varies from year to year.

3. The date for the city's year end meeting was difficult to schedule due to the schedules of some of the City Council members. It is undisputed however, that city officials knew by sometime on Friday December 26 that the meeting would be conducted on the following Monday, December 29.

4. The exact nature of the business to be discussed was not fully listed or fleshed out until sometime on Monday December 29 and an agenda was posted during the morning. After the first agenda was posted, the finance officer for the City of Martin notice that an item had been left off the agenda. It related to the second reading of an ordinance. The finance officer then posted a revised agenda containing this item. Both agendas were posted less than 24 hours in advance of the meeting that night.

5. City asserts that Fogg was present in the city business office for a lengthy period during the day on December 29, that he had several questions or issues with the agenda to be posted, and that the City officials were hampered in their ability to get the agenda finished and posted on that day.

6. The OMC makes no findings on whether Mr. Fogg hampered the ability of the city officials to conduct business of December 29. It is not necessary to make any finding regarding this issue because it would not resolve the ultimate question here. Even if the agenda had been posted at the very start of business on December 29 it would not have met the 24 hour deadline.

7. The OMC notes that the particular meeting involved was a special meeting. Special meetings are sometimes called on short notice, particularly when emergencies are at issue, or abrupt changes must sometimes be made due to unavoidable sudden conflicts in scheduling or weather issues. In those situations the 24 notice requirement is not entirely inflexible. SDCL 1-25-1.1 states that “for special or rescheduled meetings, all public bodies shall also comply with the public notice provision of this section for regular meetings *to the extent that circumstances permit.*” In this particular case, however, there is no indication that the 24 notice requirement could not have been met. The day of the meeting was scheduled in advance. Although the agenda items had not been listed or fully fleshed out until December 29, there was no information presented to the OMC that would indicate that any of the agenda items were emergency items or otherwise not capable of being listed or fleshed out previous to December 29. The city was unable to identify any unique circumstances that prevented the city from meeting the general 24 hour requirement.

8. There is no indication whatsoever that the City of Martin’s failure to post the agenda 24 hours in advance of the meeting was willful, resulted in any deprivation of an opportunity to participate in the meeting, caused any deprivation of any due process rights, or discriminated against anyone. Indeed, the person who filed the complaint was a

city council member who obviously was not harmed. He was present in the city offices during the day on September 29, 2008 while the agenda was prepared and was present during the meeting on the same evening. He was one of the city council members engaged in the meeting at issue. As set forth in the Conclusions of Law below, however, the presence of good faith, the lack of intent, and the lack of damages do not bear on decisions made under the Open Meeting Laws.

9. In light of the foregoing Findings of Fact, the OMC makes the following:

CONCLUSIONS OF LAW

1. The City of Martin and its City Council is an entity subject to the provisions of the Open Meetings Laws found at SDCL Chapter 1-25.

2. Under SDCL 1-25-1.1, the Martin City Council is required to prepare and post notice of its regular 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. SDCL 1-25-1.1 further provides that “for special or rescheduled meetings, all public bodies shall also comply with the public notice provision of this section for regular meetings *to the extent that circumstances permit.*”

3. The meeting held by the Martin City Council on December 29, 2009 was a special meeting. Based on the facts involved here, there were no circumstances that required or allowed for posting the agenda less than 24 hours in advance.

9. The presence of good faith, the lack of intent, and the lack of damages do not bear on the decision in this matter. The statutory requirements of SDCL 1-25-1 and SDCL 1-25-1.1 do not allow for inclusion of those considerations.

10. The law, when applied to the foregoing facts, demonstrates that a reprimand is warranted in this matter.

11. Although City Council member Fogg filed the Complaint in this matter, it is apparent that he was part of the City Council holding the meeting without proper notice. He, like the other City Council members, is responsible for holding the meeting without proper notice.

REPRIMAND

The Martin City Council, as constituted on December 29, 2008, is hereby publicly reprimanded for violating SDCL 1-25-1 and SDCL 1-25-1.1.

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