

SOUTH DAKOTA OPEN MEETING COMMISSION

MINUTES OF MEETING

October 29, 2012

Sioux Falls Holiday Inn

Members present: Lisa Rothschadl, Bon Homme County State's Attorney (Chair); Mark Reedstrom, Grant County State's Attorney; Glenn Brenner, Pennington County State's Attorney. Emily Sovell, Sully County State's Attorney. John Steele, Aurora County States Attorney, was absent due to illness.

Jeff Hallem, Assistant Attorney General from Pierre participated as counsel for the OMC on the first hearing regarding the South Dakota Board of Medical and Osteopathic Examiners (BMOE). Diane Best assisted the OMC as to other matters, having disqualified herself from the BMOE matter.

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

In the Matter of Open Meeting Complaint 12-02, South Dakota Board of Medical and Osteopathic Examiners

Chad Haber, the complaining party, addressed the OMC.

Haber said he had not been to a BMOE meeting and not understood their rulings, so he went to a meeting. He provided a copy of the BMOE agenda for March 27-28, 2012 as it was posted on the Board's website. Brenner noted that this agenda was already in the record.

Mr. Haber stated that he arrived at the meeting the first day at 9 am, was escorted out by Mr. Golden, and was told it was not a public part of the meeting. He said he sat in a small windowless room all day and was never notified of any public part of the meeting. The next day he came at 9 am and was in the same room. He said he sat there until he got a call at 1:33 pm and was the last one to arrive at the public meeting even though he had been in the windowless closet in the building.

Haber stated that when he was allowed into the meeting items were on an overhead projector, but he was not given copies. He said that the State's Attorney reviewing the Complaint was also unable to get the exact copies. He said that he was told the Board did not even get copies.

Haber stated that an executive session was held. He said that even the State's Attorney reviewing the Complaint could not understand the difference between the BMOE closed meeting and an executive session.

Haber stated that the next part was for board actions. He was not informed until 1:33 that the public portion was happening, but a Dr. Jerstad chartered a plane and had time to get there. Also, they started to go through the names, including a person that has the same name as a board member. He stated that the recusal of the Board member with the same name was not in proper form.

Haber stated that the Board also accused a licensee of murder and stripped her of her license. Haber stated that at the last board meeting they admitted they made a mistake based on lack of information.

He stated that the Board referred to SDCL 36-4-31.5. He said that it applies to a request for discovery in a civil lawsuit, but he was attempting to attend a public meeting. He stated that none of the exceptions in SDCL 1-25-2 applies and that AG Opinion 83-19 does not apply.

Reedstrom asked about SDCL 36-4-31.5. Reedstrom interprets it to apply to more than discovery. He said it is designed to protect the confidentiality of doctors and patients at hearings on licenses and the statute provides that the confidentiality provisions address matters that transpire at such hearings. He assumes that hearings would involve discussions of patients and the care or neglect of patients. Patients and doctors have confidentiality and they are primarily to protect patients. If the meetings are open wouldn't that jeopardize patient confidentiality, particularly as it pertains to HIPAA requirements and so forth? If these hearings are open wouldn't that jeopardize confidentiality?

Haber stated that the bigger issue is open meetings which are to let the sunshine in. He said that when they are behind closed doors it is very mysterious. The intent is to allow people to at least witness what is happening. The BMOE law points to discovery in a civil matter. Haber said that they can't force him to testify about what was said if he is present.

Rothschadl inquired whether as a practical matter putting the testimony out to the public, would make the information be available for discovery as a public record? Isn't the provision to protect against that?

Haber stated that public safety is at issue. He said that people should be aware of doctors with issues. Haber said that this doesn't protect doctors either. He further stated that the statute at issue pertains to doctors but was applied to others that were not doctors, including a board member's son that is a physicians' assistant.

Brenner inquired whether the BMOE had conceded that they are subject to the open meeting laws? Reedstrom said that BMOE had conceded that. The issue is the different sections of the open meeting law are enumerated, but there is a section which allows meetings to be closed if they are required or permitted to be closed.

William Golden appeared regarding the BMOE position. He is the staff attorney that presents cases to the BMOE. He referred to the State's Attorneys statement that this is a factual dispute. The complaining party has the burden of proof. And the State's Attorney had outlined three areas where there were factual disputes and he was unable to conclude that there were violations. The factual burden had not been met.

He responded to Habers' statement about why he was at the BMOE meeting. Golden stated that Haber's wife is a doctor and has kept some of her proceedings confidential. Doctors have authority to do that. Haber's wife exercised the confidentiality on a portion of her proceedings. The BMOE statute provides that doctors have the privilege of having the hearings confidential. He referred to *Martinmaas v. Engelman*, a state Supreme Court case involving the BMOE confidentiality statute.

Golden explained that Haber was excluded under the BMOE statute from physician discipline matters. He noted that Haber acknowledged the statute and wished to talk to the licensee to get permission to come into the meeting. That didn't happen, but Haber had knowledge of the privilege. The BMOE statute applies. Also SDCL 1-25-2 provides that if any other statute allows the meetings to be closed they can be closed.

Golden stated that the only hearings that were closed were for physicians. The BMOE board member's relative was a physician's assistant and a stipulated agreement was presented to the BMOE for approval as were other stipulated agreements pertaining to physician's assistants. This included a physician's assistant working for Dr. Bosworth.

Golden stated that there was no executive session. There was part of the meeting closed under SDCL 36-4-35.1. There was a specific discussion as to how the procedure works under SDCL 36-4-35.1 since the vice president of the Board was running the hearing and had asked for information. Haber was present for that part. Golden personally explained to him what was going on. Haber was given the choice of the room he sat in or a break room. Haber was also offered the option of leaving his phone number and getting a call when the public session began.

The agenda was posted at the outside of the bank building where the meeting was held. It was the only agenda. It was also posted in the offices of the medical board. There were not two agendas. Meeting materials are put into two binders at the office. The public can have access. The materials are given to the board and are projected on an overhead. That includes public comments and other materials. The stipulations are on the overhead. The materials are also in a 3-ring binder in the room.

Rothschadl asked if an agenda was presented on the overhead. Golden responded the information on the overhead was meeting material, not the agenda.

Golden stated that when there were non-physician hearings, the agreements were put up on the screen for everybody to see. The BMOE is trying to go paperless as possible and uses an overhead. He said this is not a second agenda.

Reedstrom asked whether the meeting materials on the projector the same as those in 3 ring binders. Golden answered in the affirmative. Reedstrom asked if they were available for the public to inspect during the meeting. Golden answered in the affirmative.

Sovell and Reedstrom asked about the process for making non-physician stipulations public. Golden said that presenting the stipulations are public. Golden explained that stipulations are reached between the licensee regarding a disciplinary action and the board staff (staff that performs the investigation). One of the BMOE members (a member assigned to review the staff investigation) makes a recommendation. The stipulation is presented to the Board and the Board member making the recommendation does not participate in deciding the matter.

Brenner asked what non physicians are involved. Golden explained that it includes EMTS and for physicians' assistants. Golden explained that hearings for EMTS and physicians are not covered in the same chapter as the specific BMOE confidentiality statute. For those entities there must be other means of maintaining confidentiality of patient matters like requests to seal records in hearings. He said that those records may be sealed under SDCL 15-6.

Brenner inquired whether the BMOE agenda that is posted indicates or hints that some items are confidential. Golden replied that the public did not generally attend in the past, but that the Board now refers to confidentiality in its agendas. Golden explained that he had explained the confidentiality requirement to Haber at the meeting in question.

Haber responded. He said the second day he was there he had two DCI escorts who followed him for the day and it was intimidating. He stated that the DCI agents were getting instructions from a Board staff member. He also stated that the States' Attorney did try to get the Board's tapes to verify their version. The meetings were recorded.

Haber said that when the BMOE's relative was being sentenced or stipulated, he was asked to leave the room. Rothschadl then Golden whether the matter was closed that pertained to the BMOE Board member's relative. Golden explained that when people were asked to leave the room it was dealing with a

physician, not the Board member's relative. The matter was closed for that reason. It was a hearing taken out of order.

Reedstrom inquired whether Haber was required to leave during the agenda item pertaining to the Board member's relative. Golden explained that Haber was not required to leave then. But for a matter involving a stipulated agreement with a physician, Haber was required to leave. Then everyone was invited back in and the Board went back to work on other matters.

Sovell inquired whether it was made clear to those that were present the reason for excluding them at the time they were asked to leave? Golden said that he and the Board's attorney explained the reason and had an open conversation with the vice president of the Board. Sovell asked whether the minutes reflect the transition? Golden explained that the BMOE gave the State's Attorneys office everything they requested. The minutes had not been finalized yet when the State's Attorney obtained materials. The issue on the tapes is that they include confidential materials and they would have had to be edited. The State's Attorney chose not to get them.

Rothschadl asked about another document in the file called "summary" and asked whether this was the minutes. Golden explained that it was not the minutes. It was sent in by the BMOE to the State's Attorney. The actual minutes were approved later after the State's Attorney's investigation.

As for stipulations the BMOE sits on them at every meeting and the Board moves through and asks questions and proceeds through them at a rapid rate. They are stipulations.

Chairman Rothschadl initiated the deliberations on each count.

Posting the agenda. Sovell stated that she didn't hear anything that there was anything on the timing on the agenda and that she was satisfied by the explanation regarding the materials provided to the Board. Brenner stated that as it relates to SDCL 1-25-2, there is to be a citation to the statute. There is no such legal requirement here due to it being a different statute. He stated that he was satisfied that the agenda was properly posted. Rothschadl agreed.

Executive session. Rothschadl stated that perhaps it was not called an executive session. Reedstrom stated that the BMOE statute involves a doctor exercising a privilege on confidentiality under SDCL 36-4-35.1 and is not the Board's call; it is the doctor's call. There is not an open meeting violation as it applies to executive sessions.

Rothschadl, Reedstrom, and Brenner discussed whether the record showed that BMOE is subject to the open meeting law. Hallem explained that the Board is a licensing board and is created by statute. They are a public agency.

Brenner stated that he finds no violation. The area needs to be cleaned up by the legislature. There is a public policy argument on protecting citizen's medical records, but physicians' assistant matters are not closed. Yet the patient records are involved there too. Also a doctor has the privilege to close hearings pertaining to doctors and doing so could allow the patient matters to be made public. But that is an issue for another day. The burden has not been met to show there is a violation.

Materials not provided to the public at the meeting. Rothschild stated that she saw no violation of that. Binders were provided.

Sovell moved to find that no violations occurred. Reedstrom seconded. A roll call vote was made and all members voted in favor.

Golden was given two weeks to provide proposed Findings of Fact and Conclusions of Law to the Board Counsel Hallem and to Mr. Haber. After the Golden proposals are submitted, Haber has two weeks to file objections.

In the Matter of Open Meeting Complaint 12-03, Union County Weed Board.

Ross Jordan, the complaining party, addressed the OMC. He explained that he was there as a Union County Commissioner. The Union County Weed Board held a meeting after a Union County Commission meeting. The Weed Board did not post an agenda.

The Weed Board did not appear, having previously filed a response admitting to the violation.

Reedstrom moved to find the Weed Board in violation. Brenner seconded the motion. Reedstrom seconded. A roll call vote was made and all members voted in favor.

After discussion, Diane Best agreed to prepare proposed Findings of Fact and Conclusions of Law within two weeks.

In the Matter of Open Meeting Complaint 12-04, South Dakota Board of Massage Therapy (BMT or Board).

Rhanda Heller, the complaining party, addressed the OMC. Her prepared statement is attached to these minutes.

James Carlon, Counsel for the BMT addressed the OMC. He noted that he had submitted a written response. He stated that the BMT is a 5 member board including one lay member. Through the three years he has been involved, no member of the public has attended a board meeting.

He agreed with State's Attorney Maher's statement in the referral to the OMC with one exception. There was a financial document mailed out to the BMT board in advance of the meeting. It was furnished to the Board. One was available at the Board's office along with the agenda. There was also one at the meeting. Generally the Board packet is on a table. On this day, it was on a chair at the meeting. When Heller mentioned that she had not received a copy, the executive secretary took the copy and put it on the board's table and was about to give it to Heller, but Carlon advised her not to interrupt Heller from speaking. The copy was the only copy available; they did not give her one at the meeting but made arrangements to send it afterward. No action was taken regarding this informational document.

There was a question about the minutes. The Board relies on Roberts Rules. A reasonable person would do that. There has been a good deal of litigation when executive secretaries try to characterize the comments of others. Roberts cautions against doing that.

There was a reference to a copy of a document not being available. There was a copy available but not a copy to take along home. She was offered to have one sent to her or there may have been one on the website.

There was a reference to the website. The meeting time changed, but it wasn't placed on the website. The Department of Health handles that, not the BMT.

Carlon explained that the meeting at issue was a rescheduled meeting and the time was moved up to 8:30 instead of 9:00 am. There were conflicts and it was moved up. The revised agenda was posted at the BMT board offices in Sioux Falls more than 24 hours in advance. It did not make it on the website.

The early part of the meeting was to meet with Dept. of Health Secretary Hollingsworth. There were introductions and introductory comments she made concerning complaints about the performance of the board. This seemed to coincide with some activity about unlicensed activity and notices to cease and desist.

Brenner asked whether there was adequate posting of the rescheduled times? Carlon stated that it was. He even received an agenda on Wednesday or Thursday prior to the April 20, 2012 meeting (a Monday).

Statutes allow rescheduled meetings to be held and notice to be given to the extent circumstances permit. Everything the statute requires was done, but the webpage was not changed.

Reedstrom inquired whether the materials that the Board reviewed were all available at the business office at least 24 hours in advance of the meeting. Carlon stated that they were available at the BMT board's office in advance

when they were sent out to the Board members. And that included the financial information that Ms. Heller referred to. At the meeting there was at least one copy available. The question did not get asked until Ms. Heller made reference to it. They did not interrupt the Heller presentation. Carlon said there was discussion after the meeting about getting Ms. Heller a copy.

Upon questioning by Brenner, Carlon agreed that if anyone asked there was a copy available.

Reedstrom inquired about the claim that the Board improperly went into executive session without a closure motion specifying the reason or statutory cite. The meeting minutes are really kind of silent on the closure motion. Carlon said that Secretary Hollingsworth addressed the Board and made several comments about the Board and asked that there be an executive session with the Board's attorney. Immediately after that a board member moved to go into the executive session and may have stated "so moved."

Reedstrom asked which exemptions to the open meeting law apply for the executive session. Carlon responded that this falls under the first one for discussions of public officials. It also falls under the discussion of contracts with the Board's attorney. Also the one involving contracts and referring to unions may apply; it is kind of ambiguous.

[end first tape]

Carlon commented on the threshold provision that the legislature anticipated that meetings should be closed for various reasons including under the US constitution. Due process can require closure where individual performance is discussed or might be discussed. Whether it is a contract or employee matter doesn't matter. There is settled personnel law.

Reedstrom asked if Secretary Hollingsworth had stated why she had asked for a closure motion before going into executive session. Carlon stated that she made reference to complaints and to contracts that the board would be negotiating and she felt the board members needed legal advice on that. It should have been put in the minutes that the board would be meeting with attorneys to discuss complaints about the board's performance and how they affect the contacts.

Reedstrom asked if the board was relying on discussing the personnel exception SDCL 1-25-2(1) performance or fitness of officers or employees. And also preparing for contract negotiations under (4).

Carlon said it was certainly discussion of a contract. The contract negotiation section is a little ambiguous. It comes under a section dealing with public employee unions. Whether it is limited to that, it doesn't say it is limited. But

read in context with the final provision that providing that meetings may be closed when permitted or required by other laws, it may be closed in this situation. And the attorney client privilege applies.

Rothschadl asked if the minutes show the reasons. Carlon stated that the minutes do not explain the reason for going into executive session. But the secretary had asked for the executive session, explaining the need for one. And the board had said "so moved" or something to that effect. The minutes should be corrected because the reason was stated by Hollingsworth at the meeting. At the next meeting of the BMT he intends to ask them to correct the minutes.

Rothschadl and Reedstrom asked about the nature of the executive session. What is the nature of the public officers or employees involved? Was it complaints about the Board itself? Carlon explained that it was to discuss complaints about the BMT board members and they are public officers.

Rothschadl asked whether the agenda was there and was posted? Carlon explained that it was. He stated that the original complaint was that the agenda was not on the website, but the law did not require an agenda to be on the website at the time. The notice of the meeting was on the website, but the agenda was on hard copy in the executive secretary's office. The law has now changed.

Rothschadl asked about the allegations there was a failure to provide detailed minutes. Carlon stated that the kind of detail she is asking for would not be advisable. It would result in the executive secretary characterizing the speech of others. And this has resulted in litigation. He advises using Roberts Rules of Order and is considered to be a reasonable method. So there are no comments in the minutes unless a person submits them in writing.

Heller responded, stating that there were eight tables around. There were no materials on the chairs or tables. She read from attorney Carlon's written response. She disagreed that the materials were available. She referred to Carlon's statements that the materials were not provided to Heller since it would have interrupted Heller's presentation. She noted that she had asked for the materials much earlier in the meeting. She also noted that her speech was interrupted otherwise.

The Board has experienced members and their attorney is there every time.

She stated she does not have a legal problem with this Board; she has always been compliant. The complaint is for the profession.

Reedstrom asked about the minutes. There are no details on the closure for executive session. He referred to Carlon's statement that Secretary Hollingsworth addressed the reason for going into executive session during the

meeting and the Board had said “so moved.” Reedstrom asked Heller for her recollection about the motion.

She referred to the notes she submitted on that. She stated that Ms. Hollingsworth had said the executive session was to “to discuss administrative staff.” She was at the meeting and recognizes that the executive session was to discuss administrative staff. She was there and was escorted out at the time. However, other people would not have known that.

On the website issue, the time had been changed days earlier. She noted that when the Board wishes to take something off the internet, they do so the same day.

She asked that the OMC give a strong message. They should not be given a warning ticket. She said that it needs to be a full on speeding ticket.

On the issue of detailed minutes, she noted that the more recent minutes of the BMT are more detailed now since this issue occurred. They have changed. She referred to the statement that there is no need for detail, but noted that more detail is now being provided.

Chairman Rothschadl initiated the deliberations.

Posting the agenda. Rothschadl stated there was in fact an agenda and it was probably posted. Reedstrom stated that there was no violation. Brenner concurred stating that there was no requirement to have it on the website at the time that this meeting took place.

Executive session. Brenner stated that there is no violation. The open meeting pamphlet suggests that the motion need only state “pursuant to SDCL 1-25-2” and not provide more detail. This allows vagueness. The law does not require more. In this particular case there is no evidence that there was something discussed in the executive session that was not privileged. Sometimes those allegations are made, but not here. The law on making the motion is general and there is not a clear violation.

Sovell and Reedstrom agreed with Brenner.

Rothschadl agreed but stated that she wishes Boards would be more specific going in.

Written materials. Sovell stated it was a tougher one. She wasn’t entirely clear. Are they always left on the table? Are they always left on a chair? We ought to let the public know materials are available. Should there be someone jumping up and down that they are available? They should be available.

Rothschadl stated that the purpose is that the materials be visible. There isn't a need for waving a red flag that they are available. But people shouldn't have to ask for the materials. Not left in a briefcase. Heller did ask for them. She stated that she would lean toward finding there was a violation.

Reedstrom stated that he understood there was at least copy that was available.

Heller stated that there was a copy at the meeting but it was not available until much later in the meeting.

Reedstrom referred to Mr. Carlon's statement that there was an additional copy and he relies on that.

Sovell said there is not enough information. Technically if they are there, there is not a violation. But if they are hidden that is another matter.

Reedstrom said the practice should be that the materials should be at a table at the back. But in terms of a violation the statute only requires that there be one copy available. Based on the information he heard, there was one copy available.

Brenner said this is a question of fact. One side says one copy is available; another said there is was not. There questions as when the request for the copy was made. What is our burden? Has the complaining party met her burden? If a copy was there and if a copy was asked for it should have been given.

Rothschadl stated that the requirement on making material available is in SDCL ch. 1-27 pertaining to open records. Brenner asked Best to elaborate on that issue. Best stated that the state's attorneys have authority to refer matters to the OMC if they arise under chapter SDCL ch. 1-25, but the requirement for materials to be available is under SDCL ch. 1-27. While making material available has something to do with an open meeting, there is a question on whether it applies to issues before the OMC. The procedure on matters under ch. 1-27 is to go to the Office of Hearing Examiners (OHE). The punishment for at least some violations is a fifty dollar fine.

Sovell stated that because there is a factual dispute and a question of jurisdiction, the entity that can take evidence on that issue can serve the public better. The OHE can take testimony on the factual issue.

Detailed minutes. Sovell stated that she understands both positions on this. There is frustration with not having a play by play of what happens. She stated that there is also reason to have caution with keeping detailed minutes as the attorney mentioned. They don't result in a violation here.

Brenner stated that they followed Roberts Rules of Order. He stated that he can envision a situation where there is a blatant and purposeful refusal to keep accurate minutes. "How detailed is too detailed?" The statute requires minutes. There is not enough here to say there is a violation.

Sovell stated that verbatim transcripts are not required. It may be helpful sometimes to have more detail. But she did not find a violation had occurred. Reedstrom agreed.

Rothschadl referred to Heller's comments that the BMT had improved their minutes. Maybe this issue brought their attention to the issue.

Brenner stated that there is nothing in the law that requires that the reason for executive sessions have to be in the minutes.

Brenner moved that the SD Board of Message Therapy, while it sounds like it has challenges and issues, for purposes of what is in front of this commission, I find no violations whatsoever substantiated in the complaint set forward by Ms. Heller. Rothschadl asked whether the item pertaining to open records should be handled separately. Sovell stated that the OMC should not rule on the public records issue in item C. Reedstrom made a substitute motion that "the open meeting commission does not find a violation as to A, B, and D and as to subsection C on the complaint, the board abstain from rendering any ruling one way or another as that complaint relates to a different chapter different chapter than the chapter that the open meetings laws are under."

Sovell seconded the motion. A roll call vote was made and all members voted in favor.

In the Matter of Open Meeting Complaint 12-01, Sioux Falls City Council.

Rothschadl pointed out that the Findings had been sent out and then John Steele had offered a different paragraph. She asked Diane Best for further explanation.

Best stated that at the May 23 OMC meeting revisions had been made to proposals made by the parties. An edited version as then provided to the parties afterward and to the OMC. Steele then drafted an addition paragraph and asked that it be included. She stated that this version had been given to counsel for the City and the *Argus Leader*. She noted that a majority of the Board had already approved the Findings, but this is to approve the edits and to determine whether to include the new paragraph.

Ms. Rothschadl noted that the City Attorney Pfeifle was in the audience and asked if he took any issue. He asked that paragraph 13 not be included. The

purpose is not to create a record for appeal but to succinctly state the facts and provide direction for how these matters should be handled.

Diane Best explained that Steele had stated that that the paragraph be included in the opinion as either part of the majority opinion or else a separate concurrence under his name.

Brenner noted that he would abstain from voting on the majority opinion; he will be filing a dissenting opinion. The complaining party did not meet their burden.

Sovell moved to move paragraph 13 into a concurrence. Reedstrom seconded the motion. Rothschadl, Reedstrom, and Sovell voted in favor. Brenner abstained.

Review of Open Government Task Force.

Best explained that the Attorney General and Governor had called a task force to address open meeting and public record issues. There about 30 people including members of various associations and media. Rothschadl and Steele actively participated on behalf of the OMC. Best was involved as the Attorney General's representative. There were three meetings. There were ten ideas for legislation. Of those items, a majority of the task force voted to move eight items forward for consideration by the Attorney General and Governor. Several are public records bills.

Rothschadl stated that there was a bill to require recording executive sessions, but it did not go forward from the task force. There was also one that would address situations where two members of three member board meet to handle routine matters and they would be exempt from the open meetings law in certain situations. Also, another bill addresses meetings conducted by twitter, Facebook and other electronic means. The bill would require such text colloquy meetings to be open to the public and the records maintained for one year.

Brenner commented that one of the bills relates to booking photos and he is in favor of making booking photos public.

Best stated that the bills have been submitted to the Attorney General and Governor and they are considering them.

Approval of May 23, 2012 minutes.

Sovell moved for approval. Reedstrom seconded. All present voted in favor.

Election of OMC Chairman

Reedstrom moved for election of John Steele as Chairman of the OMC. Sovell seconded it. All present voted in favor.

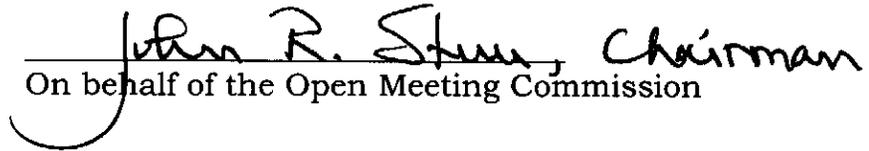
Scheduling.

After discussion the OMC agreed to hold the next meeting on Monday December 10, 2012 at 11 am at the Sioux Falls Public Library (Main Branch) in Sioux Falls.

Adjournment.

Sovell moved to adjourn. Reedstrom seconded the motion. All voted in favor.

Approved on December 10, 2012


On behalf of the Open Meeting Commission