

SOUTH DAKOTA OPEN MEETINGS COMMISSION

MINUTES OF MEETING

November 25, 2024

Members participating: Emily Sovell, Sully County State's Attorney (Chair); Katelynn Hoffman, Turner County State's Attorney (Co-Chair); Austin Hoffman, McPherson County State's Attorney; Lance Russell, Fall River/Oglala Lakota County State's Attorney (appeared by Teams); and Michael Smith, Clay County State's Attorney. Steve Blair and Jenna McFarlane, Office of the Attorney General, assisted the Commission.

Chair Sovell called the meeting to order at approximately 9:00 a.m. Mr. Hoffman moved to approve the proposed agenda; Mr. Smith seconded. A roll call vote was held; the agenda was approved by unanimous vote.

A time was provided for public comment as required by SDCL 1-25-1; no member of the public provided comment to the Commission.

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

In the Matter of Open Meeting Complaint 24-06, Carlyle Township

Mr. Terry Koerner and Mr. Todd Koerner appeared as the Complainants. Mr. Adam Ochsner appeared as counsel on behalf of the Canton City Commission.

Mr. Terry Koerner believed on October 24 the Township held a meeting that none of the residents were aware of, and the Township made decisions on culvert installations, as well as other matters.

Mr. Todd Koerner stated Mr. Terry Koerner spoke on his behalf.

Mr. Ochsner acknowledged that Mr. Koerner was correct, the October 24 meeting was never posted as they had problems with their secretary having personal matters that required her attention. Mr. Ochsner claimed they had sent the agenda to their secretary on October 3rd and then showed up for the meeting. Mr. Ochsner continued that the Township did not know the agenda wasn't posted until February when the complaint was filed.

Mr. Ochsner stated that after finding out the agenda wasn't posted the Township redid the votes from the October meeting at its March 26 meeting.

Mr. Ochsner concluded that the Township didn't know they made the mistake, but once they found out they did their best to correct the issue.

The Commission went into deliberations.

Ms. Sovell stated that it appeared that the Township was cognizant an error was made.

Mr. Hoffman appreciated the fact that the error was realized, and the October 24 meeting was redone, but noted that unfortunately a violation occurred.

Mr. Hoffman made a motion to find there had been a violation of the open meetings laws notice requirements. Ms. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-07, Pennington County Board of Commissioners

Pennington County Commissioner Travis Lasseter and Pennington County Commissioner Deb Hadcock appeared as the Complainants. Pennington County Commissioner Lloyd LaCroix, Chairman, appeared on behalf of the Pennington County Board of Commissioners.

Mr. Lasseter stated that after reviewing his complaint and materials he maintained that the facts and evidence they have presented are solid. Mr. Lasseter mentioned that part of the complaint deals with stuff that has gone on for many different meetings.

Ms. Hadcock stated that the official complaint against the Board was not the first course of action. Ms. Hadcock and Mr. Lasseter had expressed their concerns to fellow Board members about what they believed were continuous and ongoing violations of open meeting laws.

Ms. Hadcock mentioned they would question the Board's approach to executive session and felt it was the Board's way of stifling public input. Their concerns were consistently dismissed by the Board and the Pennington County State's Attorney Office.

Ms. Hadcock pointed out in the response packet from the Board there was a memorandum dated June 6, 2023, which indicated she had authored it, but she in fact had not. She wanted to make sure the Commission knew she did not author, write or sign the memorandum.

Ms. Hadcock also referred to a document titled Executive Session Procedures as of October 2023, personnel items, number one, executive session is used when discussing a specific employee or employees and/or their challenges. Ms. Hadcock alleged that during the November 7, 2023, executive session

meeting, the Board was presented with a market analysis on wages that did not discuss the employee's qualifications for the Assistant Highway Superintendent.

Ms. Hadcock mentioned the executive guidelines were updated in January 2024, personnel items, number one, in executive session under personnel is used to discuss a specific employee/employees and their qualifications, competence, performance, character or fitness, which includes compensation request for specific individuals. Ms. Hadcock felt it was not used to discuss job positions or group compensation requests. Ms. Hadcock believed it was amended because the Board had previously been in noncompliance with open meeting laws.

Ms. Hadcock concluded that that she concurred with the investigation from the Lincoln County Chief Deputy that this warranted an open meetings violation.

Mr. LaCroix had with him Pennington County Commissioner Gary Drewes, Vice-Chairman Ron Rossknecht, Commission manager Holli Hennies and the HR director.

Mr. Drewes stated the alleged open meeting violations occurred at the Pennington County Board of Commission meetings on June 6, 2023, and November 7, 2023.

Mr. Drewes started with the June 6 meeting stating the Board of Commissioners went into executive session for personnel matters under SDCL 1-25-2(1) to conduct annual department head evaluations. Prior to the meeting a drafted memo was included in the executive session packet requesting that a department head compensation wage review be completed by HR.

Mr. Drewes continued that there were also claims the Board took official action while in executive session by directing HR to conduct a wage study and market analysis for department heads.

Mr. Drewes responded that 1-25-2(1) allows executive session discussion relevant to the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. Mr. Drewes felt conducting annual department head evaluations in executive session fell within the scope of allowable personnel discussion under statute.

Mr. Drewes insisted no official action or votes were taken during executive session approving or adopting the new wage study and that the Board held a regularly scheduled meeting with proper notice and agenda for executive session on June 6, 2023.

Mr. Drewes switched to the alleged November 7, 2023 Board meeting, stating the Board went into executive session for personnel matters under SDCL 1-25-2(1) to conduct the annual department head evaluation of Pennington County Highway Superintendent.

Mr. Drewes stated the Superintendent requested a wage adjustment for himself and his assistant superintendent and brought with him comparable wage documentation for the Board to consider. At the conclusion of the executive session the Board returned to open session and voted. Mr. Drewes insisted the Board took no action on the request of the wage adjustment for the assistant highway superintendent.

Mr. Drewes stated the Complainants did not believe it was allowed in executive session to review comparable compensation documentation and claimed the vote in open session by the Board was improper for failure to have a separate item listed on the agenda.

Mr. Drewes responded stating SDCL 1-25-2(1) allows executive session discussion relevant to the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. During the Superintendent's annual evaluation, the Superintendent requested a wage adjustment giving his work performance and level of responsibilities comparable to other jurisdictions. Mr. Drewes felt that was well within the scope and subject matter allowed under SDCL 1-25-2(1).

Mr. Drewes felt the November 7, 2023, meeting agenda item for executive session was properly identified as a personal matter under SDCL 1-25-2(1). Mr. Drewes stated it is standard practice for the Board to list annual department head evaluations, but inadvertently left the additional verbiage out.

Mr. Drewes noted there is no specification required as per South Dakota Attorney General's guide to South Dakota's open meeting laws, revised 2023. Mr. Drewes stated the guide indicated that public body may close the meeting under 1-25-2 for purposes of discussing personnel matter 1-25-2(1) and a motion to that effect is sufficient. Mr. Drewes felt the November 7, 2023, meeting agenda identified both the correct statute and purpose for executive session.

Mr. Drewes requested the Open Meeting Commission find the open meeting complaints without merit.

Mr. LaCroix stated the Board is dealing with public employees and it is with the utmost respect to bring that out into the public to create anxiety and hardship for public employees, whether it's good or bad that's why they hold personal items in executive session. Mr. LaCoix felt the Board did not violate open meeting law.

Mr. Lasseter believed when the Board was discussing the annual review with qualifications with the Superintendent, the assistant superintendent was also in the room, so they could not have been an annual evaluation instead the Board was talking about market analysis. The assistant superintendent stepped out and then there was an annual review done. Mr. Lasseter insisted the market analysis for the position of highway superintendent should have been discussed in the public.

Ms. Sovell looked for clarification if there was any vote in executive session that was directly related to the salary increase. Mr. Lasseter answered no and stated there was no vote for directing a wage study either.

Ms. Hadcock believed the wage comparable and market analysis should not have been in executive session. Ms. Hadcock stated that after herself and Mr. Lasseter spoke up stating wage comparable and market analysis are supposed to be up front with the public the Board continued to discuss it in executive session.

Ms. Hoffman inquired about the two motions the Superintendent made during executive session. Ms. Hadcock stated his motions were basically on paper that the Superintendent wanted us to make when we came out of executive session.

Mr. Smith asked if the motions were made by the Superintendent or by someone else in executive session. Ms. Hadcock responded by stating the Superintendent had the motions on a piece of paper in executive session.

Ms. Hoffman then inquired if it was the Board's practice for employees of the county to propose a motion for what is being discussed in executive session, but no formal board action was taken in the executive session on the proposed motion that the superintendent made as to the compensation. Ms. Hadcock answered what happened in executive session was discussion of the Superintendents paperwork, but she had thought it was a department head review. She stated it got turned into a conversation about raises and Ms. Hadcock felt it was not appropriate as the personnel matter was about the review.

Ms. Hoffman asked if it was customary for the Board to have market analysis done from time to time. Ms. Hadcock replied that market analysis and wage adjustments should not be done in executive session because the Board was doing a wage study, and at that point the Board didn't have the information.

Ms. Hoffman continued questioning what the reason for the change in policy when it changed in January 2024. Ms. Hadcock believed it was because

herself and Mr. Lasseter were complaining about the Board's process, so the Board changed the policy.

Ms. Sovell inquired if the determination to conduct the wage study was initiated in executive session and decided in executive session. Ms. Hadcock answered it should have been done on compensation committee who then would've brought it to the Board. At the time of the meeting Ms. Hadcock stated it was about department head reviews and evaluations.

Ms. Hadcock concluded she was just looking for some resolution out of this so the Board can move forward and make sure the public's business is done in the public.

The Commission went into deliberations.

Ms. Sovell felt it is difficult to parse and parcel employee review and compensation as a lot of time they do end up merging. Ms. Sovell continued stating here there is a full-blown discussion on the analysis, wage, and salary assessment. Ms. Sovell asked if it's appropriate to hold that in executive session where discussion about an individual's performance is being discussed.

Mr. Hoffman inquired if talking about wages considered a contract negotiation with the employee and felt it would be a valid reason to discuss in executive session. Ms. Sovell stated she did not know that it's a contract. She felt it was more personnel.

Mr. Smith stated if there was anything as it related to contractual it would potentially apply but questioned if that analysis changes on elected department heads. Ms. Sovell thought you would have to articulate your reason for entering executive session outside of personnel.

Ms. Sovell stated there were three different concerns that were expressed, and the Commission will address each of them one at a time. The first being whether directing the human resources director to conduct a department head wage study and market analysis would constitute an official action outside an open official meeting in violation of SDCL 1-25-2.

Mr. Hoffman asked if there was no motion, or vote does that mean it was not an official action. Mr. Hoffman stated there was a consensus among the Board telling the HR representative to do something during executive session even though there was no motion or vote. Mr. Hoffman felt that seemed like an official action.

Ms. Hoffman felt if the wage studies and market analysis was something customarily done by the position then it didn't raise to the level of telling them during executive session.

Ms. Sovell agreed with both statements and the Board obviously agreed that a wage study and analysis should take place and very often it happens during employee reviews. Ms. Sovell mentioned it was an information seeking directive with no official action being taken.

Mr. Hoffman felt the information seeking point was very good. Mr. Hoffman continued stating they were seeking information about wages that other highway superintendents across the state and maybe country make. Mr. Hoffman stated it was not a vote on whether the highway superintendent was going to be making a certain amount of money or not. Mr. Hoffman pointed out there was no testimony saying any kind of vote on a salary was taken.

Ms. Sovell understood the conundrum from the public that are saying we are talking about money, we are talking about public dollars, should we not be laying this table for the taxpayers to be looking at. Ms. Sovell felt as a board you get the information to present to the public as a whole, but also felt you could also do that during open session. To which, Ms. Hoffman agreed.

Ms. Sovell specified the second issue was whether the discussion of the highway superintendent's compensation exception request, in addition to his annual review, violated SDCL 1-25-2(1). Ms. Sovell inquired whether with no formal action being taken, these discussion on the compensation exception request should those be out in the open where the taxpayers are able to see it or are those appropriate for personnel within SDCL 1-25-2.

Ms. Hoffman asked if the highway superintendent's compensation exception was on the agenda specifically. Ms. Sovell asked the parties if it was officially on the agenda. Ms. Hadcock replied no. Ms. Hoffman stated she had the November 7 agenda pulled up and all she could see was item 19 county employee wage study update, nothing specific to the highway superintendent.

Mr. Russell asked the Board if they were disputing that the exception request was essentially front and center for the highway superintendent and his deputy, then after the deputy left further discussion continued. Mr. Drewes believed the item that went to executive session for in regard to annual review of the highway superintendent. Mr. Drewes stated the superintendent was the one who brought the comparable information.

Mr. Smith inquired if this was before the wage study that had been ordered in June was still pending and not complete. Mr. Drewes answered correct.

Mr. Hoffman questioned if the superintendent and assistant were both in executive session when the wage study was brought up and one of them left and then the department head evaluation was completed. Mr. Drewes replied he believe that the presentation of the information was done by the

Superintendent and his assistant both in the room, then the assistant left, and the Superintendent's annual evaluation was completed.

Ms. Sovell asked if either complainant wanted to respond. Mr. Lasseter stated he felt Mr. Drewes had stated everything he had already stated.

Mr. Smith felt it was the highway superintendent who brought forth the request not the Board. Mr. Smith inquired whether that specifically ties to the discussions of qualifications, competency, performance, character or fitness discussed in SDCL 1-25-2(1). Ms. Sovell responded when talking about performance and someone comes into executive session stating they want a salary adjustment it's very hard to separate those two things for general discussion when dealing with public funds.

Mr. Hoffman felt it was very difficult when having a review to not have some form of salary discussion. Mr. Hoffman stated it didn't seem like any decisions were made they came out of executive session and then held a vote. Mr. Smith agreed with the statement and felt if you are doing an annual review without discussing the future and the value the person hold and part of that is what you pay them.

Ms. Hoffman stated she didn't disagree that discussion of wage is brought up during annual reviews but felt looking at the statute and the subsection specifically in SDCL 1-25-2(1) it says that executive session may be held to discuss the qualifications, competence, performance, character or fitness and it doesn't talk about wages. Ms. Hoffman believed it specifically excludes wages.

Ms. Hoffman continued pointing out that statements were made during the investigation that when the commission members were interviewed about the complaint, they indicated right away that the complaint was related to meetings involving pay increases for individual employees, specifically department heads. Ms. Hoffman stated it was apparent what was being discussed and didn't believe there was a disagreement with what was being discussed in executive session. Ms. Hoffman felt the Board did in fact discuss specific wages and because that is not listed as a permissible reason to be in executive session she tilted the other way.

Ms. Sovell stated there was one last issue whether the board violated SDCL ch. 1-25 by taking on a non-agenda item during the November 7, 2023, commission meeting. Ms. Sovell didn't know the specific agenda item, but the Board had a general line item regarding employees.

Ms. Sovell asked the Commission if they felt as though if you are going to go into vote on employee increase or decrease should they be separated. Ms. Sovell felt it would be impossible to put every single employee issue on an agenda. Ms. Sovell pointed out in the complaint it stated pursuant to the

meeting minutes, formal action was taken after executive session, the board voted to deny Superintendent's request for salary increase. The action was not on the Board's proposed agenda nor do the meeting minutes reflect an amendment to the proposed agenda prior to the agenda's approval.

Ms. Hoffman stated when she looks at the November 7, 2023, agenda item number 19 it said items from compensation committee, and then subsection a - read county employee wage study update and then the corresponding minutes sub part A, county employee wage study update specifically reads information only with a motion being made. Ms. Hoffman felt the agenda made it appear it was simply an update and didn't think it was appropriate when you have it worded that way on the agenda, but then the minutes reflect that you took Board action on it. Ms. Sovell and Mr. Hoffman agreed.

Mr. Smith brought up a Commission decision, Deadwood City Commission #15-03, that official action may only be taken at a properly noticed official meeting. Mr. Smith asked if items 19 for compensation committee and 26 for executive session were they properly noticed to the public. Mr. Smith felt there was not enough notice given to the public.

Mr. Hoffman made a motion to find no violation of SDCL 1-25-2 for telling the human resource director to conduct a department head wage study and market analysis. Mr. Smith seconded. A roll call vote was held: all Commissioners voted aye.

Ms. Hoffman made a motion to find a violation in regard to SDCL 1-25-2(1).

Mr. Russell stated he did not hear any information that there was any kind of communication from legal counsel or legal counsel was present as it relates to SDCL 1-25-2(3) so under that circumstance he supports the motion. Ms. Sovell asked if that was a second. Mr. Russell responded no, but he supported it.

Mr. Hoffman stated he understood Ms. Hoffman's view, but from his understanding of the testimony it was not the Board that begun the conversation it was the HR director and the superintendent himself. Mr. Smith agreed with the statement. Ms. Hoffman pointed out it would be the responsibility of the Board to get it out of executive session stating it exceeds the scope. Instead, the Board continued with the discussion about wages which is not included in the statute for a reason to be in executive session.

Mr. Russell stated the only way it could fit the statute was under subsection 3. Mr. Russell was interested in knowing if the Board got a writing to this effect prior to the consideration of this exception request. Mr. Smith stated in the packet there was a memo written from the Superintendent to HR dated October 31 reference compensation exception request.

Ms. Sovell asked the parties if the information was available prior to the meeting. Mr. Lasseter replied correct. Mr. Drewes replied with yes.

Mr. Russell asked if legal counsel was present or there was any kind of written communication from legal counsel. Mr. Drewes believed HR presented a written statement being opposed to an adjustment to wages. Mr. Lasseter didn't remember the Board's legal counsel being there.

Ms. Sovell stated there was still a motion pending and asked for a second. Mr. Hoffman seconded Ms. Hoffman's motion to find a violation in regard to SDCL 1-25-2(1).

A roll call vote was held: Ms. Hoffman, Mr. Russell, Mr. Smith and Mr. Hoffman all voted aye. Ms. Sovell voted nay.

Mr. Smith made a motion for violation that there as action taken on a non-agenda item without notice. Mr. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-08, Sturgis City Council

Ms. Tammy Bohn, Complainant, appeared personally and with legal counsel, Mr. Kellen Willert. The Sturgis City Council filed a written response to the complaint, but no representative appeared on behalf of the Sturgis City Council.

Mr. Willert wanted clarification if anyone from the City was present. Mr. Blair indicated he had received communication from the City that they would not be appearing and did not have counsel retained at this time.

Mr. Willert stated affidavit number one deals with two issues regarding taking vote by secret ballot on March 4th for the mayor. Mr. Willert mentioned the next issue was a May 6 secret ballot as well. Ms. Sovell paused and clarified there was only one official action that was turned over by the State's Attorney for review. Ms. Sovell asked if that was what Mr. Willert understood as well. Mr. Willert answered he understood that the State's Attorney found no merit on the two issues raised in Affidavit number one and merit was found on issues one and four on affidavit number two. Mr. Willert asserted under SDCL 1-25-7 even though the state's attorney did not see merit to some of the actions, the Commission still has jurisdiction to address them as they see fit.

Ms. Sovell asked Mr. Blair for a point of clarification. Mr. Blair stated Mr. Willert was correct the two issues that were forward to the Commission for review were the first and fourth on the second complaint affidavit which were the May 6, 2024, meeting where Sturgis City Council went into executive

session without stating a purpose to the executive session and the February 16, 2023 special meeting where there was an alleged violation of the executive session.

Mr. Blair also addressed Mr. Willert's previous comment about the Commission having jurisdiction over all the issues and informed Mr. Willert the Commission has never interpreted their statutes in that way. Mr. Blair believed the Commission only had jurisdiction over the issues that the state's attorney had found merit.

Mr. Willert stated the first issue raised related to multiple reasons for entering into executive session on May 6, 2024. Mr. Willert felt SDCL 1-25-2 indicated that it's a closed meeting and is restricted to the purpose specified in the closure motion. Mr. Willert believed you should state the purpose, go into executive session and stay within the topic and if another reason to go into executive session, then the public body should come out and go back in.

Mr. Willert argued that the Commission has been very clear in the past, citing the Commission's decision in *In re City of Gregory*, # 2005-03, that you cannot deviate from the topic and you cannot enter into executive session for multiple reasons. Mr. Willert felt it was stated in the statute so that the public is aware of the category that will be discussed in executive session.

Mr. Willert noted the May 6, 2024, executive session lasted one hour and thirty minutes. Mr. Willert pointed out the City's written response argued the purpose of that meeting was reflected in the meeting minutes, but how can it be in the minutes when that's not what happened in open session.

Mr. Willert concluded that as to issue number one the Commission find a violation and issue an appropriate reprimand.

Mr. Willert moved along to issue four relating to the February 16, 2023, executive session. Mr. Willert stated the City released a press release saying they were holding a special meeting and council would be looking at whether or not to hire a new city manager or city administrator, but then at the meeting the City would see what developed and what direction the City desired to go.

Mr. Willert asserted that this particular executive session lasted two hours and forty-two minutes on a policy matter. Mr. Willert felt there was no exceptions in 1-25-2 to have a secret meeting and hold the discussion.

Mr. Willert stated that the City's September 26 response stated the City discussion was not portrayed correctly to the public but instead the City was looking at two letters of resignation of the former city manager. Mr. Willert pointed out that nowhere in the closure motion did they indicate that was going to be discussed.

Mr. Willert continued that either the city spoke about and held discussion in executive session relating to the city manager versus city administrator policy decision, which he felt was inappropriate, or the City held executive session and discussed the former city manager resignation or termination, which was also impermissible.

Mr. Willert concluded by asking the Commission to consider some of the other issues that were raised that the State's Attorney found no merit with.

The Commission went into deliberations.

Ms. Sovell started with the first violation of May 6, 2024, the City went into executive session without stating a purpose and asked if any of the Commission members were inclined to make a motion.

Mr. Hoffman felt there is supposed to be a purpose specified in the closure motion and since there was not one the City did violate the open meetings law. Ms. Hoffman agreed and pointed out that last paragraph of the statute, as well as the response letter from the City where they admitted that they failed to announce the purpose of the executive session.

Mr. Hoffman made a motion to find a violation in regard to SDCL 1-25-2. Ms. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

Ms. Sovell concluded with the second allegation which was the allegation of the violation of executive session at the February 16, 2023, special meeting, indicting the special meeting was announced for personnel, but also discussed consideration of hiring either a city manager or city administrator. When executive session was over the meeting was adjourned without any comment on the executive session.

Mr. Smith stated 1-25-2(1) is intended to protect people, either employees or prospective employees and was struggling to figure out how it fits. Mr. Smith felt the reason for the special meeting was to determine the type of government to set up, rather than a specific person as it related to their ability to handle the duties.

Ms. Sovell agreed stating that with executive session you are looking at the protection of those individual items or individual persons or contracts and not the boarder topic that appeared to be presented at the special meeting and there was nothing that refuted that.

Mr. Smith made a motion to find there was a violation. Mr. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-09, City of Lead Commission

Mr. Gordon Phillips appeared as the Complainant. Mr. Tim Johns appeared as counsel on behalf of the City of Lead.

Mr. Phillips stated that he believed the City acted without the public's knowledge to raise funds for a community center. Mr. Phillips noted that in the Black Hills Pioneer certain City staff were reported as going to the State Legislature to lobby under the Community Center Foundation. Mr. Phillips searched to see if the City staff had registered as lobbyists for the Community Center Foundation, but found they were registered as lobbyists for the City.

Mr. Phillips stated that he sent an email asking specifically when in a City meeting were the employees authorized to act as lobbyists for the City. Mr. Phillips said that the response he received indicated an email poll had been taken to authorize, but that no funds were to be spent.

Mr. Phillips asserted the City Administrator gave testimony that at no time did he nor the City Commission ever authorize those employees to be lobbyists for the City.

Mr. Johns stated the alleged violation had to do with whether an email poll of the City was a violation of the open meeting laws and noted that the State's Attorney was unable to reach a conclusion whether the City approved expenditure of public funds outside an official public meeting in violation of SDCL 1-25-1.

Mr. Johns denied the City polling itself resulted in any meeting and expenditures of public funds for a trip to Pierre by two City employees to give testimony before a legislative committee in support of a bill for funding a replacement community center.

Mr. Johns continued stating the email poll was never answered by any of the City Commissioners besides the Mayor. Mr. Johns also noted that the City Administrator has authority to approve the absence of any employees. Mr. Johns added the employees were only allowed to attend using their own personal leave time and were denied any travel expenditures. Mr. Johns argued that no public funds were ever expended by the City.

Mr. Johns insisted that it was under the City Administrator's authority the employees were authorized to take personal leave to go to Pierre to speak on behalf of the Community Center Foundation. The employees were advised that they City would not be paying any of their expenses.

Mr. Johns stated that following the City administrator's poll email a letter was drafted on January 11, 2024, from the Mayor and City and addressed to the

South Dakota Legislators. Mr. Johns continued stating the letter was set as an agenda item for the January 16, 2024, City meeting and at the meeting a motion approving the signature on the letter of support was passed. It was then on January 25, 2024, that authorization was given for the City employees to register with the Secretary of State as lobbyists for the City.

Mr. Johns concluded that the City administrator never received the required responses to the email poll, and it was his decision to authorize City employees to attend the January 25 legislative hearing in Pierre on the condition they use personal leave time and receive no reimbursement from the City for the trip. Mr. Johns felt for those reasons there was no violation of the State open meetings laws.

Mr. Phillips brought with him an Attorney General Office Opinion Number 88-28, as well as *Stanson v. Mott*, 551 P.2d at 9, stating that public agency lobbying efforts undeniably involve the use of public funds. Mr. Phillips stated the mayor signed a document he was not authorized by the elected body to do.

Mr. Phillips asserted that the public has a right to know what its elected officials are doing. Mr. Phillips again brought up how the City has not provided the email poll to prove only one member responded.

The Commission went into deliberations.

Mr. Smith noted that there were similar facts in Open Meetings Commission decision #17-04, In re Canton City Commission. There an email was sent out and responses made to utilize taxpayer funds. Mr. Smith noted that the difference in this case was that the email here had no responses. He questioned if the email being sent was a violation or whether the responses made by the commissioners in the Canton City Commission decision are what led in the violation.

Ms. Hoffman agreed with Mr. Smith's comments. Ms. Hoffman asked whether it bound the city to spend taxpayer funds and noted the investigation left a lot of that to question.

Mr. Hoffman stated that he believed the testimony from the City was that there were no public funds used for the trip. Mr. Hoffman felt to find a violation for the email sent to the City Commission would be to find violation of the open meetings laws every time the entirety of a public body got an email from one person. Mr. Hoffman didn't think you could hold a public body accountable for emails sent to them by someone else.

Mr. Hoffman continued stating yes, the City employees filed as lobbyist on behalf of the City, but going back there was a vote by the City to support the

community center so because of that they probably had the right to lobby on behalf of the City.

Ms. Sovell stated that she felt the City employees were authorized but not by the City Commission as a whole. Ms. Sovell questioned if there was a violation of the open meeting laws by the action taken by the City officials and stated that she was leaning towards no.

Mr. Smith agreed with Mr. Hoffman. Mr. Smith stated that it's not within the City's control regarding what is sent to them via email. Mr. Smith was hesitant to say there was no violation due to two things; the City Administrator sent the poll rather than a citizen, and secondly the complaint alleges a City Commissioner stated the City authorized the employees to go support the bill.

Mr. Smith continued that at the meeting held today statements were made under oath that there were no responses. Mr. Smith continued because there was no response it was up to the City Administrator's sole decision to make.

Mr. Smith questioned if no response in fact means no or did no response mean it was up to the City Administrator. Mr. Hoffman asked if there was one response to the email. Mr. Smith answered he believed the mayor responded.

Mr. Russell stated in the sworn statement regarding the facts, it appeared that the City Commission authorized on January 2 they would support the community center, and no public funds were appropriated. Mr. Russell indicated he was leaning towards finding no violation based on the previous decision by the City Commission and the fact there were no responses to the email other than the mayor he was leaning towards findings no violation of the statute.

Mr. Smith felt the difference between the City of Lead Commissioners and the Canton City Commission was the Canton complaint involved official action spending taxpayer funds and that did not seem to be the case with the City of Lead.

Ms. Hoffman stated that she was looking at the language about binding the city to spend taxpayer funds and she didn't believe that was in this complaint. Ms. Hoffman believed all the evidence provided indicated no funds were spent on the two employees.

Mr. Hoffman questioned if the email constituted a public meeting. Mr. Smith noted that SDCL 1-25-12 states that an official meeting is any meeting of a quorum of a public body at which official business or public policy of that public body is discussed or decided by the public body, whether in person or by means of teleconference, teleconference being any exchange of audio, video, or electronic medium, including the Internet.

Mr. Hoffman felt it would be fair to say that an email meets that criteria, but going back to the official meeting discussion, there was nothing discussed or decided in the poll email.

Mr. Hoffman made a motion to find there had been no violation. Ms. Smith seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-10, Green Valley Sanitary District

Mr. Steven Myers appeared as the Complainant. Ms. Erika Olson appeared as counsel on behalf of Green Valley Sanitary District.

Mr. Myers started out by stating approximately in 2008, residents of Rapid Valley, South Dakota, voted for clean drinking water with a 25-year rural development loan with a special annual assessment of \$424.68 per home. Mr. Myers stated the current bylaws of Green Valley Sanitary District (GVSD) were signed April 16, 2021, by then board president and secretary.

Mr. Myers quoted Article 1, section 23, stating the district created and established under this chapter shall be a government subdivision of this state and a public body. Mr. Myers continued quoting Article 5, section 2 under loan stating no loan shall be contracted on behalf of the district and no evidence of indebtedness shall be issued in its name unless authorized by a resolution from the Board of Trustees.

Mr. Myers stated there was no vote by the Sanitary District to approve sewer projects, yet a check was written to Interstate Engineering on August 15, 2017, and by early November 2021 GVSD had paid Interstate Engineering over \$130,000 with another \$113,000 owed by mid November 2021. Mr. Myers continued that on January 4, 2022, GVSD board president, vice-president, and treasurer went to Black Hills Federal Credit Union and each signed a \$200,000 loan. Mr. Myers noted individual was written behind each signature.

Mr. Myers stated in the months before securing the loan at Black Hills Federal Credit Union they had held four meetings about obtaining a loan, three of them were public. Mr. Myers felt at no time was there a resolution before the board for a vote on the loan or the two renewals, which left residents with no say.

Mr. Myers relayed that he had been attending the GVSD meetings regarding the sewer projects since 2021 and was appointed trustee at large on January 11, 2023. The March 8, 2023, meeting was the first-time hearing of the loan. Mr. Myers stated that shelving the project had come up with the president asking how the \$200,000 loan would be repaid.

Mr. Myers confessed the numerous residents he had spoken with had thought it was a personal loan and the board members were responsible. Mr. Myers believed the board president tried to change that belief around October 2023 when the board president noted he had talked with the board's attorney, Erika Olson, and was told there was nothing to worry about the loan had been taken out in good faith.

Mr. Myers stated at the November 8, 2023, meeting the treasurer resigned and he was appointed to fill the position. During his time as treasurer Mr. Myers discovered many items of concern which were brought to the board and residents at a December 13, 2023, meeting where he resigned.

Mr. Myers continued stating at a February 14, 2024, meeting a resident asked about the \$200,000 loan and was told it was to pay bills. When asked how the loan was going to get repaid the vice-president/treasurer told the residents when the project gets going, rural development will pay GVSD back the amount that was paid to Interstate Engineering. Mr. Myers stated next question was what if the sewer project doesn't happen and believed the reply was residents would be taxed through a special assessment to pay the loan.

Mr. Myers noted now GVSD has a loan that was taken out and renewed twice without an approved resolution of the board, a credit union holding as collateral for a sewer project tax dollars that were paid by the residents for their water system, a short term loan that is three years old, a loan that some residents didn't know or have any say in, a loan with a lot of interest, and no payment on the principal.

Mr. Myers felt the GVSD trustees had put the district into such debt and believed the burden should be put back on to the signees.

Ms. Olson announced she had the current president of the Board of Trustees of GVSD present with her and they objected to the extensive materials provided by Mr. Myers as they were not part of the original investigation.

Ms. Olson stated the issue sent for consideration involve GVSD's obtaining of a bank loan of \$200,000 on or about January 4, 2022, through Black Hills Federal Credit Union without taking formal action at a formal meeting, in violation of GVSD's bylaws and in potential violation of state law.

Ms. Olson believed a complete review of relevant actions, documents, and the applicable statutes confirmed no violation of the South Dakota open meeting laws had occurred. Ms. Olson felt the agendas and minutes had confirmed the loan had been discussed at regular GVSD meetings, which were open to the public.

Ms. Olson continued that the affidavits of the past and current board members confirmed that the agendas for the monthly board meetings are posted by the president on the exterior door of the meeting room at Rapid Valley Sanitary District's office in advance of meetings. Mr. Olson stated a majority of the trustees recalled discussing the loan at various meetings and the consensus that it was needed.

Ms. Olson felt South Dakota Open Meeting Commission was created by statute and only has jurisdiction and authority granted to it by legislature under SDCL 1-25-7, whether the alleged conduct violated the open meetings under Title 1-25. Other issues such as compliance with other laws, rules, or bylaws of the entity, are not within the Commission's authority.

Ms. Olson noted that not all the provisions of SDCL 1-25 applied to all types of entities based on the definitions found in SDCL 1-25-12

Ms. Olson continued the provisions of SDCL 1-25-1.3 regarding notices of the meetings and 1-25-3 regarding minutes of proceedings applied only to the State and thus did not apply to a political subdivision such as GVSD. Ms. Olson felt the record reflected all meeting in question were open to the public in compliance with SDCL 1-25-1 and all agendas for the meeting were posted in advance of the meeting in compliance with 1-25-1.1 as well.

Ms. Olson stated the agendas included information about the loan being considered, giving the public notice that the loan would be discussed at the meetings.

Ms. Olson believed that while the minutes of the meetings do not document a specific vote, the trustees acting at the time confirmed consensus, as evidenced by the documents signed with the bank and provisions of SDCL 1-25-3 requiring minutes to document the voting do not apply to a sanitary district.

Ms. Olson asserted that other matters which the state's attorney asked this Commission to consider, including compliance with other state laws, are outside the authority and jurisdiction of this Commission and should not be considered by the Commission. Ms. Olson also noted that the complaint that was filed was not administered under oath.

Ms. Olson concluded GVSD considered the loan with Black Hills Federal Credit Union during several meetings, which were noticed and held publicly in compliance with SDCL Chapter 1-25, and there was consensus among the board to approve the loan. Ms. Olson believed no violation of the South Dakota Open Meeting law had occurred in this complaint.

Mr. Myers claimed there were only three meetings that were public with one not being held publicly. Mr. Myers insisted there were never agendas posted

on the door until February of 2024. Mr. Myers noted that when he was trustee the agendas were emailed and never posted anywhere.

Mr. Myers concluded he stood by everything he had submitted.

The Commission went into deliberations.

Ms. Sovell noted the Commission would specifically be focusing on whether or not there is any violation of the open meetings laws and if there were other legal concerns or issues then the Commission would not be the right forum. She asked if the other members agreed. All members of the Commission agreed.

Ms. Sovell pointed out the assertion that the complaint was not valid because it was not under oath. Ms. Sovell felt they could proceed on the complainant's notarized statement and asked the Commission members if anyone disagreed. All Commissioners agreed they could proceed.

Ms. Sovell stated they would be focusing solely on the bank loan and the execution of that on January 4, 2022. Ms. Sovell asked Ms. Olson to come forward and explain the assertion that the sanitary district did not have to comply with the normal recording of votes and the differences in the public entities.

Ms. Olson explained that SDCL 1-25 differentiates between the State and other political subdivisions, specifically if you look at SDCL 1-25-3 it specifies only the State, it does not include political subdivisions. Ms. Olson continued stating the same applies to 1-25-1.4, which only applies to State boards, commissions, or departments. Ms. Olson felt the statute was clear that there were some parts that applied to all types of bodies and some that applied to only certain types, based on the definitions set forth in statute.

Ms. Sovell asked Mr. Blair if the Commission had ever had the issue come up for this type of entity in the past. Mr. Blair answered they had not. Mr. Blair stated Ms. Olson was correct some provisions of the open meeting laws apply only to the State, but a majority of the provisions applied equally to both local government and state government. Ms. Sovell agreed.

Mr. Hoffman stated that SDCL 34A-5-14 says that any sanitary district established is a governmental subdivision of the state and a public body. Mr. Hoffman viewed that as meaning GVSD would be under the same open meeting laws as any other public body, meaning there had to be notice given of a meeting. Ms. Hoffman agreed the same rules applied, and GVSD should have provided public notice with the proposed agenda.

Mr. Hoffman believed there was a statute talking about sanitation districts have the right to make their own policies. Mr. Hoffman felt it was not a policy decision whether you must hold a vote on spending \$200,000 of taxpayer money.

Ms. Sovell agreed they should have the public vote like other public bodies. Ms. Sovell felt the Commission should give both sides a chance to respond to whether a vote is required. Mr. Myers stated yes. Ms. Olson felt the provided affidavit from board members involved it had clearly been discussed at public meetings and consensus amongst the board, but they may not have documented a formal vote.

Ms. Olson clarified GVSD was not saying they were not subject to the open meeting laws as a blanket matter, but there is general compliance that the discussion took place in a public meeting, notice was given, and there was consensus among the board to take action.

Mr. Hoffman questioned if a motion was made, and a vote taken on whether to take this loan out or not. Ms. Olson answered no documentation exists in the minutes of a vote or motion and the board members could not recall if a specific vote had been taken. Mr. Myers asked if he may address the question. Ms. Sovell stated he may.

Mr. Myers stated before he filed the complaint, he went to the secretary of the GVSD and asked the secretary to dig through her personal notes of the meeting and see if she could find anyplace at all where there had been a motion resolution or vote. The secretary could not find and claimed all the notes reflect exactly what's in the meeting minutes. Mr. Myers is convinced there was never a vote.

Ms. Sovell asked if an affirmation action is not required that would support subsequent execution of financial obligations, then how would the public know. Ms. Sovell continued asking how public funds would be tracked if there wasn't some way to say you are authorized to proceed in this fashion.

Mr. Smith thought Ms. Olson's argument was compelling that SDCL 1-25-3 does not apply to political subdivisions, that it only applies to the state, as defined in SDCL 1-25-12. Mr. Smith believed that stood for is that minutes were not absolutely mandatory to be kept by political subdivision or at least not in the same way expressed for the state under SDCL 1-25-3. Mr. Smith felt the decision would be easier to make if minutes articulated whether a vote was cast.

Ms. Sovell questioned if this was an issue for the legislators to look at to fix versus something the Commission can address. Mr. Smith also questioned

whether or not there was enough information for the Commission to make a determination as to the two issues brought forth.

Ms. Hoffman mentioned there were some minutes attached with talk about discussion being had about obtaining a loan but nothing to indicate there was a formal action taken.

Mr. Russell believed there is a requirement for publication of minutes of public meetings to be published in the newspaper. Mr. Russell wondered if that statute applied to this particular matter. Mr. Smith stated that Mr. Russell might be referencing SDCL 9-18-1 requiring municipalities to publish their minutes within 12 days. Mr. Smith wondered if that exists for other political subdivisions.

Mr. Hoffman believed there was a similar statute for county commission to publish their minutes within a certain time frame after the commission meeting. Ms. Sovell stated there was a distinction between those political subdivisions mentioned and the other statutorily authorized boards not all of them are required to publish their minutes.

Mr. Myers asked if he could briefly address the issues about the vote. Ms. Sovell allowed. Mr. Myers stated in two affidavits there was no recollection of a specific vote being held on approval of the loan at Black Hills Federal Credit Union, but he himself recalled it was discussed at several regular board meetings and the trustees agreed that they needed the money to pay for engineering costs.

Mr. Hoffman stated he could not find a statute that requires minutes to be published for GVSD. Mr. Hoffman believed if they were considered a political subdivision a vote would certainly be required to make any decision, but they were not sure a vote was made or not.

Ms. Sovell felt she was inclined to find GVSD should have record of votes for those expenditures, but there needs to be clarification from the legislature. Mr. Hoffman agreed.

Ms. Sovell stated that she understood Ms. Olson's argument but was concerned that the Commission would be opening a door they don't want to open if the Commission does not say there needed to be a vote.

Mr. Smith asked if there was a precedent as to the standard that the Commission is to use as it relates to the burden of proof. Mr. Blair stated he did not recall prior precedent establishing the burden of proof.

Ms. Sovell questioned if the Commission could address issue number two as to whether they violated open meeting laws by obtaining a bank loan without a

formal vote at a formal meeting. Ms. Sovell viewed it as the board members of GVSD were in attendance or gathered for purposes of executing those documents at the bank and that's a meeting.

Mr. Hoffman inquired if notice had been given to the meetings on the loan. Ms. Olson stated the discussion item appeared on more than one agenda. Mr. Hoffman asked how long before the meetings were the notices posted on the door. Ms. Olson answered that she believed it was generally 72 hours. Mr. Hoffman stated that he could not find any statute that required a vote to be made and minutes to be published.

Mr. Blair stated that the Commission has held that SDCL 1-25-1 and SDCL 1-25-1.1 together require notice to the public of official actions or discussion that will be taken by a public body and that all official actions of the public body take place at properly noticed public meetings. Mr. Blair felt the question before the Commission was whether taking out the bank loan was an official action that should have been noticed for a public meeting with official action taken in an open public meeting.

Mr. Blair continued stating the two statutes have been interpreted together to require that a public body can only act through its official actions of a quorum and that a quorum requires a public meeting and so any official action of a public body must occur at a properly noticed public meeting.

Ms. Sovell felt that GVSD had to have something that gives the public notice that they have the authority to borrow those funds and saying anything other than that would be a disservice. Mr. Hoffman and Mr. Smith agreed.

Mr. Smith questioned whether or not there is authority for the Commission to go ahead and say that the Commission should follow what's best for public policy.

Mr. Russell quoted the first paragraph, after all of the subsections, in SDCL 1-25-2 which requires that any official action concerning the matters discussed in executive session shall be made at an open official meeting. Mr. Russell felt a little hesitant to make any kind of decision.

Mr. Russell inquired if the Commission could do a bit more legal research before taking action at a subsequent meeting. Mr. Blair answered he was not aware of anything that prevented the Commission from doing so. Mr. Hoffman stated that he would personally like to do more research on the issue.

Mr. Hoffman made a motion to table this complaint until the next regular Commission meeting. Mr. Smith seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-11, Charles Mix County Commission

Mr. Jeff Stewart and Ms. Jolene Stewart appeared as the Complainants. There was no written response filed by the Charles Mix County Commission. No one appeared on behalf of the Charles Mix County Commission.

Ms. Stewart stated that the complaint stemmed from a failure to post the May 23 County Commission agenda at the Charles Mix County Courthouse. Ms. Stewart alleged the agenda posted on the north and south doors of the Courthouse was the May 9 meeting agenda.

Mr. Stewart claimed that on March 3 he called the Charles Mix County Auditor's Office to talk about putting election integrity, specifically hand counting election ballots, on the County Commission agenda for the March 14 meeting. He was told no by the Auditor. Mr. Stewart alleged that over the following months he repeatedly asked two of the three County Commissioners, and the Auditor, to be put on the agenda to address election integrity. Mr. Stewart asserted he was not allowed on the agenda.

Mr. Stewart stated that after the March 14 meeting a hand count initiative petition was circulated and turned in on April 22 with 11% of the Charles Mix County voters signing the petition. Mr. Stewart claimed the May 9 agenda listed the initiative petition, so he attended the meeting where an anti-hand count slide presentation was played and the County Commissioners rejected the hand count petition.

Mr. Stewart alleged the twelve citizens who attended the meeting asked the County Commissioners to put hand counting on the next meeting agenda on May 23. Mr. Stewart had hoped with it listed on the agenda the County Commissioners could still vote for or against changing the county election system from machine counting to hand counting. Mr. Stewart claimed the attendees' understanding was the County Commissioners had agreed to put elections on the agenda for the May 23 meeting.

Mr. Stewart alleged that upon arrival for the May 23 County Commissioner meeting the agenda for that meeting was not on either door of the courthouse. Mr. Stewart stated that they informed one of the County Commissioners there was no agenda posted on the door. Mr. Stewart claimed the County Commissioners did not put elections or hand counting on the agenda and did not take a vote.

Mr. Blair noted that Charles Mix County State's Attorney Steve Cotton was available in the room if the Commissioners had any questions, but he was not at the meeting directly representing the County Commission.

The Commission went into deliberations.

Mr. Hoffman stated he thought there was an admission that the agenda had not been posted. Mr. Hoffman noted the statute requires posting at the principal office.

Mr. Smith noted the County Commission could have cured the mistake by postponing the meeting and felt because they continued forward with the meeting a violation had occurred.

Mr. Smith made a motion to find a violation. Ms. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 2024-12, Tripp City Council

Mr. Cody Fischer, Complainant, did not appear before the Commission. Mr. Mike Fink appeared as counsel on behalf of the Tripp City Council.

Ms. Sovell stated that with no presence from Mr. Fischer the Commission would his written complaint.

Mr. Fink stated that the mayor was under the mistaken impression that a special meeting did not need to be noticed. Mr. Fink indicated to the mayor that his understanding was incorrect. Mr. Fink acknowledged there is a violation.

Mr. Fink claimed the mayor indicated there was one item discussed outside of executive session and that item was whether to accept the resignation of a city police officer. Mr. Fink stated a motion was passed to accept the resignation.

Mr. Fink informed the mayor that at the next meeting they should include it as an agenda item and redo the motion which the City Council did. Mr. Fink concluded that the City Council understands that in the future all special meetings need to be noticed.

The Commission went into deliberations.

Ms. Sovell stated this issue is pretty straightforward, there is a complaint, an admission and fix.

Ms. Hoffman made a motion to find a violation that no agenda was posted. Mr. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

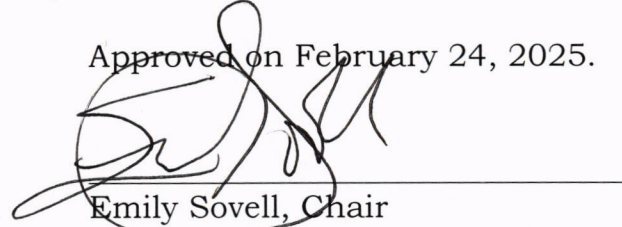
Discussion of future meetings

A discussion was held on scheduling the Commission's next meeting.

Adjournment

A motion to adjourn was made by Ms. Hoffman seconded by Mr. Smith, at approximately 1:25 p.m. Roll call was made with all Commissioners voting aye, and the Commission adjourned.

Approved on February 24, 2025.

A handwritten signature in black ink, appearing to be "Emily Sovell", is written over a horizontal line. The signature is fluid and cursive.

Emily Sovell, Chair

On behalf of the Open Meeting Commission