

**(DRAFT)**

SOUTH DAKOTA OPEN MEETINGS COMMISSION

MINUTES OF MEETING

February 2, 2018

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

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

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

January 5, 2018 minutes.

Mr. Reedstrom moved to approve the draft minutes of the January 5, 2018 meeting. Ms. Sovell seconded. A roll call vote was held with Ms. Rothschadl, Mr. Steele, Ms. Sovell, Mr. Reedstrom, and Chair Krull all voting aye.

Discussion of Jon Arneson's Letter dated January 16, 2018.

Chair Krull gave a brief background on the letter stating Mr. Arneson was involved in an Open Meetings complaint in 2015 against the Mitchell City Council. The Commission heard the complaint, issued a ruling and at a later date one of the parties brought new or additional evidence forward. At the time the information was brought forward, the Commission voted to deny a motion to reconsider. Mr. Arneson was aware of the Commission's decision at its January 5, 2018 meeting where the amicus brief submitted by the Associated School Boards of South Dakota was accepted. In his letter, Mr. Arneson stated that he believed there was an inconsistency between the two rulings.

Chair Krull stated he felt that if the Commission has heard all the evidence that is available at the time of a hearing and makes a final decision then the case should be concluded. Chair Krull felt that the current case regarding the Water Management complaint was different as the complaint had not yet been resolved by the Commission.

Mr. Steele noted that Mr. Arneson's motion was based on a claim of newly discovered evidence. The Commission does not have fact finding authority. Mr. Steele agreed with Mr. Krull that Mr. Arneson's situation and the situation with the Water Management Board were different. Mr. Steele commented that perhaps the Legislature may need to fine tune the statutes the Commission operates under, or it should be emphasized to the States Attorneys that it is their role to investigate and determine the facts of a matter before they submit a complaint to the Commission.

Mr. Ferebee was allowed to comment on this matter, and stated that he believed his case had already been heard on its merits and the amicus brief should have been denied. Mr. Krull agreed Mr. Ferebee's complaint had been heard on its merits, but it was not decided on its merits at that time; which distinguished the matter from Mr. Arneson's situation.

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

Mr. George Ferebee appeared as the Complainant. Ms. Ann Mines Bailey appeared as legal counsel on behalf of the South Dakota Water Management Board. Mr. Gerald L. (Gerry) Kaufman Jr., appeared as legal counsel on behalf of Amicus Curiae Associated School Boards of South Dakota (ASBSD).

Mr. Krull noted that Mr. Ferebee had filed a motion to reconsider the Commission's ruling allowing the amicus brief from ASBSD. Mr. Steele moved to deny the motion to reconsider. Ms. Sovell seconded the motion.

Mr. Ferebee asked if he had equal time after Mr. Kaufman spoke. Mr. Krull stated that everyone had equal time, but Mr. Ferebee could reserve time for rebuttal. Mr. Steele voiced that he did not believe Mr. Kaufman was a party to the complaint. Ms. Rothschadl agreed with Mr. Steele. Ms. Sovell moved to amend the agenda to remove the fifteen minutes of oral presentation for ASBSD. Mr. Reedstrom seconded. A roll call vote was held with Ms. Rothschadl, Mr. Steele, Ms. Sovell, Mr. Reedstrom, and Chair Krull all voting aye.

Mr. Ferebee provided the Commission with a copy of the Water Management Board Minutes and his complaint stating that the minutes were not accurate and wanted to know how to correct the record. Mr. Krull stated that what was before the Commission today was whether the Water Management Board went into executive session without authority. Mr. Ferebee stated he did not know whether the decision by the Board back at the hearing in Mitchell was based at all upon the inaccurate minutes.

Mr. Ferebee argued that Mr. Freeman (a Water Management Board member) made a motion to dismiss Ferebee's petition before the Water Management

Board, withdrew that motion, and then proceeded with a motion to go into executive session for the purpose of deliberation and to consult with the Board's legal counsel. Mr. Ferebee believed there was no authority to go into executive session for the purpose indicated and that the public had a right to know what was being discussed by the Board.

Ms. Mines Bailey, responding for the Water Management Board, stated the Water Management Board is a citizen board and by statute an attorney from the Attorney General's Office is to provide legal counsel to the Board. In this particular instance, Mr. Ferebee had brought a declaratory ruling request, which is not a common procedure seen before the Water Management Board. Ms. Mines Bailey continued that several petitioners had moved for a motion for dismissal based on the fact that Mr. Ferebee had not presented a factual statement with his petition.

Ms. Mines Bailey stated that Mr. Freeman, an attorney himself, was very concerned with due process rights and Mr. Freeman wanted to make sure that the proceeding with the Water Management Board was fair to everyone involved. Mr. Freeman then made a motion to go into executive session in which he did use the term deliberation. Ms. Mines Bailey noted that when Mr. Freeman came back from executive session he did move to dismiss the matter for the reason set forth by the opponents to the petition for declaratory ruling.

Ms. Mines Bailey stated that the Board believed the matter pending before them was litigation. Ms. Mines Bailey indicated the Board's position was that Mr. Freeman and the other Board members were free to talk to their legal counsel, ask questions, and have a discussion in executive session because SDCL 1-25-5(3) allows for executive session to seek legal counsel and discuss litigation.

Mr. Ferebee during rebuttal commented on the need for a factual statement on a petition for a declaratory ruling before an administrative agency. Ferebee also stated that he felt the Board should have talked about the motion in public, but they were uncomfortable.

The Commission moved into deliberations. Mr. Reedstrom did not feel there was any dispute as to why the Board went into executive session. Mr. Reedstrom stated that he felt it was proper for a board to go into executive session to consult with their attorney about legal procedural issues. Secondarily, Mr. Reedstrom stated that he did not believe there was any question that the proceedings before the Board were litigation.

Mr. Reedstrom believed the question before the Commission was whether SDCL 1-25-2 prohibits public bodies from deliberating in executive session. Mr. Reedstrom indicated that he construed the word deliberation broadly. He

felt deliberation included in its definition discussion, debate, the sharing of opinions, and argument between the members of a body in an attempt to reach a decision or consensus. Mr. Reedstrom asserted that the subject matter of a particular deliberation could make it appropriate for executive session, such as advice and counsel on a legal matter, student or employee discipline, contract negotiations etc. Mr. Reedstrom further stated that lawyers representing public bodies need to be able to discuss openly and frankly with their clients information that should be protected by the attorney-client privilege. Mr. Reedstrom concluded that it was proper for public bodies to deliberate in executive session if the subject matter is appropriate.

Ms. Sovell agreed with Mr. Reedstrom's comments and agreed that public bodies need to be able to deliberate in executive session on appropriate topics with legal counsel.

Mr. Reedstrom followed up that if the Commission were to rule there cannot be a deliberative process in executive session the Commission then would be making a very confusing ruling for public bodies across the state to follow. Such a ruling might inhibit lively and robust conversation on issues.

Mr. Steele stated he also agreed with Mr. Reedstrom. Mr. Steele stated that he believed public bodies have every right to consult with their attorney on any matter they believe they need to consult with legal counsel on. Mr. Steele specifically noted that he believed consultation includes a discussion back and forth. Mr. Steele stated that he believes there is not a general deliberative process for public bodies, and that deliberations should normally be in public. However, a public body may enter executive session for any reason covered by the statute. Mr. Steele stated that upon rehearing he believed the Board entered executive session to discuss the legal aspects of a motion to dismiss with their legal counsel. Mr. Steele concluded that was proper, and the Board had every right to talk to their attorney about the legal implications and the legal basis of what they were about to do.

Ms. Rothschadl admitted she was initially caught up on the word deliberate at the August meeting. After reading through ASBSD's brief, as well as conducting her own research, and hearing the additional oral presentations, Mr. Rothschadl stated she had changed her mind. Ms. Rothschadl concluded that as long as there is an adequate reason to enter executive session it was not improper to do so.

Mr. Krull stated he had nothing more to add and agreed with the other Commissioners. Mr. Krull voiced that to rule that this was a violation would place quite a restriction on what public bodies could and could not discuss in executive session. Mr. Krull also noted that he was worried about what effect such a ruling would have on the attorney-client privilege.

Mr. Steele moved to find no violation against the Water Management Board. Mr. Reedstrom seconded. A roll call vote was held with Ms. Rothschadl, Mr. Steele, Ms. Sovell, Mr. Reedstrom, and Chair Krull all voting aye.

Scheduling.

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

Adjournment.

A motion to adjourn was made by Mr. Steele, seconded by Ms. Rothschadl, at approximately 2:50 p.m. A roll call vote was held with Ms. Rothschadl, Mr. Steele, Ms. Sovell, Mr. Reedstrom, and Chair Krull all voting aye and the Commission adjourned.

Approved on \_\_\_\_\_, 2018.

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Kevin Krull, Chair  
On behalf of the Open Meeting Commission