

June 7, 2018

STATE OF SOUTH DAKOTA
OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN)	OMC 2017-01
MEETINGS COMPLAINT AGAINST)	
SOUTH DAKOTA WATER)	FINDINGS OF FACT,
MANAGEMENT BOARD – HUGHES)	CONCLUSIONS OF LAW, AND
COUNTY)	DECISION

The above-captioned matter was heard before the South Dakota Open Meetings Commission (“Commission”) on February 2, 2018. Complainant Mr. George W. Ferebee appeared in person. The South Dakota Water Management Board appeared through counsel, Assistant Attorney General Ann F. Mines Bailey. Prior to the hearing, the Commission reviewed the written submissions of the parties as well as any other exhibit, pleading, or paper on file herein. Based upon the materials submitted and the arguments of the parties, the Commission enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Commission takes official notice that the Water Management Board (“Board”) is a public body of the State of South Dakota created by the Legislature and duly organized and operated according to applicable provisions of South Dakota Codified Law.

2. On October 27, 2016, George W. Ferebee submitted an open meetings complaint regarding the Board to the Hughes County State's Attorney.

3. On May 2, 2017, the State's Attorney forwarded the complaint to the Commission pursuant to SDCL 1-25-6(3) for the Commission's review.

4. Mr. Ferebee alleged in his complaint that during a meeting held on October 13, 2016, the Board improperly entered executive session and thereby violated SDCL 1-25-2.

5. SDCL 1-25-2 states in pertinent part:

Executive or closed meetings may be held for the sole purpose of:

(3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;

.....

Nothing in § 1-25-1 or this section may be construed to prevent an executive or closed meeting if the federal or state Constitution or the federal or state statutes require or permit it.

6. On October 13, 2016, the Board's agenda included consideration of two petitions for declaratory rulings filed by Mr. Ferebee. Several parties intervened in opposition to the declaratory ruling requests. One of the parties moved to dismiss the petitions due to a lack of a factual situation presented with the petitions. After hearing arguments from the parties regarding the motion, Board member Rodney Freeman made inquiry of Board legal counsel on the record. Mr. Freeman then moved to grant the motion to dismiss, but

withdrew his motion after further discussion with another Board member.

Mr. Freeman then moved to go into executive session.

7. The parties both agree that in moving to go into executive session Mr. Freeman stated, “I am going to make a motion to go into executive session under the provisions of SDCL ch. 1-26 and SDCL 1-25-2(3) for the purpose of deliberation and to consult with the Board’s legal counsel on this particular motion.”

8. After returning from executive session Mr. Freeman again moved to grant the motion to dismiss the petitions; the Board unanimously voted to approve Mr. Freeman’s motion.

9. Mr. Ferebee’s complaint concluded that the Board’s use of executive session was improper. The complaint stated that “[a]bsent a ‘contractual matter,’ and absent any ‘proposed or pending litigation,’ the Board erred by deliberating Mr. Freeman’s Motion to Dismiss behind closed doors.”

10. In submitting this matter for consideration by the Commission, the Hughes County State’s Attorney’s Office framed the issue as whether SDCL 1-25-2(3) allows for the use of executive session to consult with legal counsel for any matter, or only to discuss pending litigation or contractual matters.

11. In responding to Mr. Ferebee’s complaint, the Board asserted that the petitions pending before the Board should properly be considered “proposed or pending litigation” as referenced in SDCL 1-25-2(3), and as such the Board was authorized to consult with legal counsel in executive session regarding those matters.

12. Mr. Freeman stated in an affidavit provided in response to Mr. Ferebee's complaint that he moved to go into executive session:

in order to discuss this legal matter with the Board's counsel. I wanted to obtain legal advice from Board counsel regarding how the failure of Mr. Ferebee to include a factual scenario in his petition for declaratory relief affected other parties and unknown potential parties.

13. On August 31, 2017, the Commission initially heard this matter. Commissioner Sovell was not able to attend this meeting. The Commission deadlocked in a 2-2 tie vote as to whether the Board had violated SDCL 1-25-2(3). It was indicated that there was concern over the use of the word "deliberate" in the motion to enter executive session. It was determined that the matter would be re-heard by the Commission at a time when Commissioner Sovell could be present.

14. The matter was re-scheduled for November 3, 2017; December 21, 2017; and was finally heard by the Commission on February 2, 2018.

15. On November 29, 2017, before a final hearing on this matter was held, the Associated School Boards of South Dakota ("ASBSD") filed a motion to file an *amicus curiae* brief in support of the Board.

16. The Commission, at a teleconference held on January 5, 2018, considered the *amicus curiae* motion filed by the ASBSD. Mr. Ferebee opposed the motion arguing that the motion was untimely, and that the Commission did not have statutory authority to consider the ASBSD's filing. The Board did not oppose the motion. The Commission determined the motion was timely, and that it had implied authority to establish the procedure to be used to

review matters that come before the Commission. The Commission granted *amicus curiae* status to the ASBSD, and ordered that the brief submitted by the ASBSD be distributed to the Commission members for consideration.

17. Any Finding of Fact more appropriately labeled as a Conclusion of Law is hereby re-designated as such and incorporated below therein.

CONCLUSIONS OF LAW

1. The South Dakota Water Management Board is a public body subject to the open meeting requirements of SDCL ch. 1-25. The Open Meeting Commission has jurisdiction over this matter pursuant to SDCL ch. 1-25.

2. SDCL 1-25-2 allows public bodies to use executive session for any purpose specifically enumerated in the statute. The statute also allows the use of executive session for any purpose required or permitted by the federal or state Constitutions, or federal or state statutes.

3. A public body may enter executive session if the subject matter of what is to be discussed in executive session is appropriate in that the subject matter embraces one of the areas specifically enumerated in SDCL 1-25-2 or is otherwise covered by some constitutional or statutory grant of confidentiality or privilege.

4. The Commission has previously held that the language of SDCL 1-25-2(3) allows a public body to enter executive session to 1) consult with legal counsel, or 2) review communications from legal counsel about proposed or pending litigation. *In re City of Parkston et al*, OMC 2011-01.

5. The attorney-client privilege, as contained in SDCL 19-19-502(b), establishes that a client has a privilege to refuse the disclosure of confidential communications between the client and the client's attorney that are made for the purpose rendering legal services to the client.

6. The Commission has also previously held that a public body may enter executive session based upon the attorney-client privilege for the purposes of privileged communication with the body's attorney. *In re City of Mitchell*, OMC 2008-01; *In re South Dakota Board of Massage Therapy*, OMC 2012-04.

7. Based upon the materials presented to the Commission, it is clear that the matters pending before the Board were litigation. It is also clear that the Board entered executive session to consult with their attorney about a procedural legal issue raised by that litigation. This consultation was a privileged attorney-client communication. An executive session for this purpose is proper under SDCL 1-25-2.

8. While Mr. Freeman used the word "deliberate" in the executive session motion, the use of that term is not determinative of whether an open meetings violation occurred. The term "deliberate" encompasses the concept of a consultation, discussion, explanation, or sharing of opinions between individuals. In that sense, a public body may deliberate in executive session on any subject matter that is appropriate for executive session pursuant to SDCL 1-25-2. A public body, however, is prohibited from taking official action on any matter in executive session.

9. Based upon the materials in the record, and the testimony presented at the hearing of this matter, the Commission concludes the Board did not violate the South Dakota Open Meetings Laws in relation to the executive session held on October 13, 2016.

10. Any Conclusion of Law more appropriately labeled as a Finding of Fact is hereby re-designated as such and incorporated above therein.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the South Dakota Open Meetings Commission hereby determines that the South Dakota Water Management Board did not violate the South Dakota Open Meetings Laws in regards to the facts and allegations raised by the complaint filed in this matter.

Decision entered by Commissioners **Krull** (Chair), **Reedstrom**, **Rothschadl**, **Sovell**, & **Steele**.