

(DRAFT)

SOUTH DAKOTA OPEN MEETINGS COMMISSION

MINUTES OF MEETING

August 31, 2017

Mitchell, South Dakota

Members participating: Kevin Krull, Meade County State's Attorney (Chair); 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. Emily Sovell, Sully County State's Attorney was absent from the meeting.

Chair Kevin Krull called the meeting to order at 1:00 p.m. Mr. Reedstrom moved to approve the proposed agenda; Mr. Steele seconded. All members voted by roll call in favor of the motion to approve the agenda.

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

October 14, 2016 minutes.

Mr. Steele moved to approve the draft minutes of the October 14, 2016, meeting. Ms. Rothschadl seconded. All members voted by roll call in favor of the motion to approve the minutes.

In the Matter of Open Meeting Complaint 16-02, Kulm Township Board of Commissioners.

Ms. Deb Nyenhuis appeared as the Complainant. Doug Fischer, Paul Baumiller, and Jerrod Nuss appeared on behalf of the Kulm Township Board of Commissioners.

Ms. Nyenhuis stated the complaint against the Kulm Township Board alleged a closed meeting was held on July 20, 2016, when the Township decided to remove her driveway that had been in that location since August of 1999. Ms. Nyenhuis looked in local newspapers for any notices that may have been published during the timeframe and found no notice of a meeting. Ms. Nyenhuis felt that the Township held a meeting without providing adequate notice, thereby constituting a closed meeting.

As a result, Ms. Nyenhuis concluded that the Kulm Township Board violated her rights and other residents by holding a closed meeting on July 20, 2016, stating the meeting was attended by a quorum of potential Board members, official business was conducted and contracts for work to an interested party, which the Township was unable to provide proof of notice, proposed agenda or meeting minutes.

Mr. Steele inquired what notice Ms. Nyenhuis believed the law required the Township to do before the meeting held on July 20. Ms. Nyenhuis replied statute 31-21. Mr. Steele informed Ms. Nyenhuis that particular provision is not within the scope of the Commission's authority and that the Commission's authority is under SDCL 1-25.

Mr. Steel inquired if there are any requirements that the Township publish a notice they were going to hold a meeting in the newspaper. Ms. Nyenhuis stated that from reading all the South Dakota statutes it was her understanding there should be notification to land owners and to the public when a public meeting is being held.

Mr. Reedstrom informed Ms. Nyenhuis that 1-25-1 exempts township boards of supervisors that meet to perform ministerial functions. Mr. Reedstrom inquired what made Ms. Nyenhuis believe the Township wasn't exempt from the open meeting law. Ms. Nyenhuis stated she did not believe they were performing simple ministerial functions. Mr. Reedstrom inquired if the inspections of the approaches were due to water issues in the area. Ms. Nyenhuis stated that she did not know. Lastly, Mr. Reedstrom inquired if they replaced the culverts in those approaches with bigger culverts. Ms. Nyenhuis stated yes.

Mr. Fischer, responding for the Township, stated it was the Township's job to maintain the integrity of the road. Mr. Fischer informed the Commission that the Township holds four meetings a year. At the annual meeting Mr. Fischer stated a gentleman informed the Township that he was having a water problem. In addition, Mr. Fischer stated the water was starting to flood the property of the gentleman, so the Township had to put a bigger culvert to keep the water moving.

Finally, Mr. Fischer informed the Commission he had served on the Township for many years, and the Township did not go to the corner with anything other than the integrity of the road. Mr. Fischer believed on July 20, 2016, the Township was doing their job driving around checking all the roads and a meeting was never held that day.

Mr. Krull asked how the decision was made and if all three members were present at the time the decision was made. Mr. Fischer stated yes all three members were present and Ms. Nyenhuis did not need a driveway in that section.

Mr. Steele inquired what claims exempted the Township from the notice requirements as to the July 20 get together. Mr. Fischer stated the Township has always conducted business when they were out checking the roads.

In rebuttal, Ms. Nyenhuis stated that she believed the Township was going beyond the normal scope of undertaking factual investigations of conditions relating to public safety.

Ms. Rothschadl stated that she did not consider this a meeting that required proper notice and believed the statute would exempt the Township under their ministerial duties. Mr. Krull agreed with Ms. Rothschadl.

Mr. Reedstrom indicated the exception of public safety is applicable, too, because the Township does have the responsibility for the roads and water issues can cause public safety concerns.

Ms. Rothschadl moved to find the Kulm Township Board did not violate the open meetings law. Mr. Reedstrom seconded, adding that the meeting that took place on the gravel road on July 20, 2016, was not a public meeting. Mr. Steele inquired if they could say it was exempt and stated he was hesitant to say it was not a meeting because he thought it was a meeting just not one that required notice.

Ms. Rothschadl amended her motion to find the Kulm Township Board did not violate the open meetings law at their July 20, 2016, meeting because the Township was exempt from the requirements listed in SDCL 1-25-1. Mr. Reedstrom seconded. Roll call was made with Ms. Rothschadl, Mr. Steele, Mr. Reedstrom, and Mr. Krull voting aye.

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

Mr. George Ferebee appeared as the Complainant. Attorney Mr. Matt Naasz appeared on behalf of the South Dakota Water Management Board.

Mr. Ferebee stated there was no dispute about the facts of his complaint, but that a dispute remained as to whether a violation of SDCL 1-25-2(3) occurred. Mr. Ferebee felt it was not what the Water Management Board did that day, but

how they decided it. Mr. Ferebee went on to state he felt the Water Management Board's decision to talk about his declaratory ruling should've been made public.

Mr. Reedstrom inquired if Mr. Ferebee believed the matter pending before the Board on these petitions for declaratory rulings were or were not litigation as the term is defined. Mr. Ferebee stated he did not believe it was litigation and believed he was exercising his right.

Mr. Naasz stated that Mr. Ferebee's complaint raises the issue of whether or not the Water Management Board properly went into executive session pursuant to SDCL 1-25-2(3), and whether or not the proceedings before the Water management Board was litigation. Mr. Naasz felt that it was litigation based on how he read the statute and that the Water Management Board had the opportunity to go into executive session to discuss legal issues with its attorney.

Additionally, Mr. Naasz stated Mr. Freeman made a motion to go into executive session and explained why he had made the motion—to address a legal issue.

Mr. Steele noted the motion was for the purpose of deliberation and consulting with legal counsel. Mr. Steele inquired if Mr. Naasz thinks there's a deliberative privilege. Mr. Naasz responded Mr. Freeman made that motion to go into executive session and withdrew his motion to dismiss, so there was no pending motion to deliberate. Mr. Naasz stated the word deliberate was used, but what was intended was to seek legal counsel.

Mr. Steele stated he was concerned as to how the motion was phrased and the Commission can't inquire as to what actually was discussed in executive session, so the Commission needed to make their judgment as to whether executive session was done in compliance with the open meetings laws based on the wording of the motion.

Mr. Krull inquired if Mr. Freeman made a motion to dismiss and then withdrew it. Mr. Naasz stated that was correct. Mr. Krull inquired if right after Mr. Freeman withdrew the motion to dismiss if he made the motion to go into executive session. Mr. Naasz explained Mr. Freeman made the motion, then withdrew his motion to dismiss and made the motion to go into executive session. Mr. Krull inquired what happened immediately after the Water Management Board came out of executive session. Mr. Naasz stated there was some conversation regarding alternative grounds for granting a motion to

dismiss, and then Mr. Freeman again made a motion to dismiss and it was seconded, votes taken, and it was granted.

In rebuttal, Mr. Ferebee stated Mr. Freeman's motion did not say what the statute says about pending or proposed litigation. Mr. Ferebee continued stating words pending and proposed are the modifiers for litigation. Mr. Ferebee stated that again it was not what the Board did it was how they did it, and they did so behind closed doors.

Mr. Steele moved that the Commission make the determination that the Water Management Board went into executive session for two distinct purposes: one was deliberation, and the other was to consult with legal counsel on the motion to dismiss. That, he reasoned, violated the open meetings law because they may not deliberate behind closed doors. Mr. Steele noted the Water Management Board may consult with legal counsel on such matters deemed appropriate, but not deliberate. Ms. Rothschadl seconded.

Mr. Reedstrom stated that he did construe this as consultation with legal counsel over a matter being litigated. Mr. Reedstrom stated when the closure motion was made the word deliberate was said and he understood the factual situation differently. Mr. Reedstrom stated he believed it was a proper executive session.

Mr. Steele stated the Commission had to judge why they went into executive session based solely on the motion itself. Mr. Krull stated he agreed with Mr. Reedstrom and believed that the Board had a number of procedural questions and Mr. Freeman did use the term deliberation, but the context of the meeting before the executive session and after the executive session makes him believe it was for consultation of the counsel.

Ms. Rothschadl stated it bothered her that in the minutes it states there were two purposes behind the executive session and one was deliberation. Mr. Reedstrom felt the Commission was interpreting the word deliberation in a narrower sense than it was intended to be used when the closure motion was made.

Roll call was made with Ms. Rothschadl and Mr. Steele voting aye. Mr. Reedstrom, and Mr. Krull voting nay.

Mr. Reedstrom made a motion to find there was no violation of the South Dakota Open Meeting law, and that executive session was proper in this

matter. Mr. Krull seconded. Roll call was made with Ms. Rothschadl and Mr. Steele voting nay. Mr. Reedstrom and Mr. Krull voting aye.

Majority vote of the members is needed to pass a motion, so neither motion carried. It was decided that the Commission would be rehearing this matter at the next meeting. Mr. Krull made a motion to continue the hearing to the next meeting. Mr. Reedstrom seconded. Roll call was made with Ms. Rothschadl, Mr. Steele, Mr. Reedstrom, and Mr. Krull voting aye.

In the Matter of Open Meeting Complaint 17-02, Oldham City Council.

Ms. Sandra Smith, Ms. Marilou Scheafer, and Ms. Chandra Waikel appeared as the Complainants. Attorney Mr. Jesse Ronning appeared on behalf of the Oldham City Council. Paul Hoy, Dave Holmvick, and John Pester, of the Oldham City Council, also appeared.

Ms. Waikel stated the reason for the complaints against that the Oldham City Council stemmed from no notice being posted for the meeting held on April 14 and April 17, and while the meeting for April 5 was published in the paper, no posting of the meeting was on the door of the fire hall or the city bulletin board.

Ms. Waikel went on to say that on April 13 the door of the fire hall, where the meeting was being held, was locked and you could see council members meeting in the backroom. Ms. Waikel stated that when official city business is being conducted the door should be open so all community members can assess the meeting.

Ms. Waikel continued, stating the April 5 meeting there was a motion to enter into executive session and thereafter executive session motions were made, but never published in the meeting minutes. Ms. Waikel noted that no meeting minutes have ever been published to reflect meetings held on April 13, April 17, or the meeting held at Mr. Hoy's residence. Ms. Waikel also pointed out that during the April 1 through May 12 timeframe the City signed contracts, fired city employees, hired new city employees, held an election, and went from a three person council to a five person council. Ms. Waikel believes City Council meetings are meant to be open to the public and they need to be.

Ms. Smith stated she also attended the April 5 meeting and was interrupted numerous times, was not allowed to mention certain items, and was told to get out. Ms. Smith noted this was the same night they fired numerous city employees and no motions were made or published in the minutes.

Ms. Smith noted on April 13 no notice was published of the meeting being held to contract Kingbrook Rural Water and no minutes have ever been posted. Ms. Smith stated April 17 when she arrived to the meeting at the fire hall the doors were locked and the results of the election held that day were never published.

Ms. Scheafer disclosed she was in fact one of the city employees that was fired at the April 5 meeting. Ms. Scheafer stated the meeting held at Mr. Hoy's on April 12 was claimed to be authorized under SDCL 1-25-2 as the contents of the meeting was to consult with legal counsel regarding contractual matters. Ms. Scheafer agreed the City Council could meet with legal counsel and discuss personnel matters, but didn't think consulting on proposed water project and not even discuss it with the community at the April 14 meeting was acceptable. Ms. Scheafer noted that neither the April 13 meeting nor the April 14 meetings were ever posted.

Mr. Krull stated the signed complaints listed the dates of April 5, 13 and 18. Mr. Krull inquired of Ms. Waikel if when she stated April 17 if she had meant April 18. Ms. Waikel confirmed she meant April 18.

Further, Mr. Krull inquired of Ms. Smith if the April 5 meeting was different than the closed meeting at Mr. Hoy's house. Ms. Smith stated as far as she knew it was. Mr. Krull inquired if notice was posted in regard to the April 5 meeting. Ms. Waikel stated it had been posted in the paper. Mr. Krull inquired if it was posted on the place of business. Ms. Waikel stated no. Mr. Steele then inquired if there was a proposed agenda posted for that matter. Ms. Waikel stated no.

Ms. Rothschadl inquired if there was a city office. Ms. Scheafer stated the city office was in the process of being moved during that time, so City Council meetings were held at the fire hall.

Mr. Krull confirmed that there were meetings held on April 5, April 13, and April 18 at the fire hall. Mr. Krull inquired if anyone had checked to see if an agenda or notice were posted in a conspicuous place for a 24-hour period immediately prior to those meetings. Ms. Waikel stated she did check before all three and nothing was posted.

Mr. Ronning, responding for the City Council, stated he was hired in the middle of April. Mr. Ronning stated the April 5 meeting in which the City Council went into executive session was proper pursuant to SDCL 1-25-2 for purposes of personnel matters. Mr. Ronning continued stating that community members were asked to leave and executive session commenced. Mr. Ronning

confirmed that city employees were fired at the April 5 meeting and the minutes did not reflect the firings, but were amended in the minutes to reflect some of those decisions at the May 8 meeting.

Further, Mr. Ronning stated the April 13 meeting was to speak with Kingbrook Rural Water no notice was given and no minutes were ever published. Mr. Ronning argued that no contract was signed that day with Kingbrook Rural Water.

Finally, Mr. Ronning stated the April 18 canvass to vote meeting was included in the minutes from the April 5 meeting, however, unfortunately in the minutes it stated April 14 not the 18. Mr. Ronning continued stating the meeting was held on April 18 and the doors were open and made available to the public and the canvass vote results were taken and published, but certainly not in the time period they are to be published.

Mr. Steele inquired if he understood correctly that Mr. Ronning was conceding that there was no notice, no proposed agenda, and the decision to fire city employees after executive session even though the minutes did not reflect it all occurred on April 5 in violation of the open meetings law. Mr. Ronning stated he was correct.

Mr. Steele inquired if the April 13 meeting site was the fire hall and if the door was locked. Mr. Ronning stated yes and the door automatically locks. Mr. Steele inquired further if no notice or proposed agenda were posted. Mr. Ronning stated he didn't believe an agenda or notice was posted.

Mr. Steele inquired if the April 12 meeting that was not part of the complaints, but held at Mr. Hoy's house was with Mr. Ronning. Mr. Ronning stated that was correct the meeting was to discuss employment as the City attorney, but did not commit to anything on that date. Mr. Steele inquired if a notice was posted or agenda posted for the April 12 meeting. Mr. Ronning stated Mr. Steele was correct no notice or agenda was ever posted. Mr. Steele asked if Mr. Ronning considered this a meeting. Mr. Ronning stated that pursuant to SDCL 1-25-2(3) the City Council was consulting with potentially employing legal counsel. Mr. Steele noted that the proper way to hold a meeting with an executive session is you call the meeting to order in public session then there's a proper motion made under the section of the statute to go into executive session for the stated reason and after executive session if there is business to transact they do so and adjourn the meeting. Mr. Steele inquired if that was done on April 12. Mr. Ronning stated it was not done.

Mr. Steele inquired about the April 18 meeting if notice was posted, an agenda was posted, or minutes published. Mr. Ronning stated minutes were taken and didn't believe they had been published. Mr. Steele inquired if action was taken to approve the election. Mr. Ronning stated he did not believe so.

Mr. Steele moved to find multiple violations of the open meeting law by the Oldham City Council for the April 5, 12, 13 and 18 for no proper notice, no proposed agenda posted, no minutes, and illegal action during an executive session. Mr. Reedstrom seconded. Roll call was made with Ms. Rothschadl, Mr. Steele, Mr. Reedstrom, and Mr. Krull voting aye.

In the Matter of Open Meeting Complaint 16-01, Groton City Council.

The Commission considered proposed Findings of Fact and Conclusions of Law drafted in regards to this matter. Mr. Reedstrom made a motion to approve the Findings of Fact and Conclusions of Law as drafted which was seconded by Mr. Steele. A roll call was conducted and all members voted aye.

Adjournment.

A motion to adjourn was made by Ms. Rothschadl, seconded by Mr. Steele, at approximately 3:47 p.m. All members voted aye by roll call and the Commission adjourned.

Approved on ____ of _____ 2017.

Kevin Krull, Chair
On behalf of the Open Meeting Commission