THOMAS R. WOLLMAN
STATE'S ATTORNEY

OFFICE OF THE STATE'S ATTORNEY
LINCOLN COUNTY, SD
104 N. Main St., Suite 200
Canton, SD 57013
Phone (605) 764-5732
Fax (605) 764-2931

Chief Civil Deputy
Michael F. Nadolski

Deputy State's Attorneys
Ryan D. Wiese
Daniel K. Haggar
Drew W. DeGroot
Amanda Eden

705168
Attorney General
OCT 30 2017

October 26, 2017

Open Meetings Commission
South Dakota Attorney General's Office
1302 E. Highway 14, Ste. 1
Pierre, SD 57501

Re: In the Matter of Open Meetings Violation: Canton City Commission
Complaint of Andy E. Wilcox

Dear Commission:

Pursuant to SDCL 1-25-6(3), I am sending the complaint of Andy E. Wilcox & our investigation file to you for further action. In that regard, please note the following:

1. Statement of Material Facts. On Wednesday, September 13, 2017, Canton City Manager Amanda Mack sent an email to each of the city's commissioners. This email is attached as Exhibit A of *Response of the Canton City Commission*. In summary, work on a water main project had unintentionally disconnected services to two residences, & as a consequence, Mack's email apprised the commissioners of the need to do unanticipated work to correct the situation, the approximate cost of such work, & a request for a "verbal go ahead from the Commission so we can take care of this ASAP." The actual change order was to be placed on the agenda for the following Monday, September 18, 2017. Lastly, the email directed recipients to: "Please respond yes or no and remember not to reply all." The City Manager received various email responses & thereafter provided a "go-ahead" to the contractor. Two days after the City Manager provided such directive to the contractor, one commissioner apparently responded to her email by responding to the sender as well as all recipients. On Monday, September 18, 2017, the Canton City Commission approved the corresponding change order. The complainant has attached this portion of the agenda as Exhibit A of *Complaint of Andy E. Wilcox*. Referencing Exhibit A, the last sentence of Item 3.2 reads: "This work has been

completed and verbal authorization was given from Commissioners via email on September 13, 2017."

2. Statement of Legal Issue. Whether separate & successive email responses by commissioners constitute official action of the public body under these facts. This is the sole issue presented for further action pursuant to SDCL 1-25-6(3).
3. I am unaware of other litigation pending on the same subject.

Best regards.

Sincerely yours,

Michael F. Nadolski
Deputy State's Attorney

Enclosures

Copy: Andy E. Wilcox
Larry A. Nelson

STATE OF SOUTH DAKOTA

COUNTY OF LINCOLN

IN THE MATTER OF OPEN MEETING VIOLATION: CANTON CITY COMMISSION	))	COMPLAINT OF ANDY E. WILCOX

I, Andy E. Wilcox, being first duly sworn on oath, charges that on or about September 18, 2017, in the County of Lincoln, State of South Dakota, the Canton City Commission committed a violation of SDCL § 1-25-[illegible] such sworn complaint being based upon the following:

AW

1. Under Agenda Item C, Item 3.2: Horizontally Directional...(See Exhibit A). The Canton City Commission gave verbal authorization via email on September 13, 2017, to the change order in the amount of $6,300. As presented, the formal wording was: "This work has been completed and verbal authorization was given from Commissioners via email on September 13, 2017."

2. SDCL 1-25-1 requires that official meetings of public bodies must be public and notice is to be given of such meetings 24 hours in advance of the meetings. The statute defines an "official meeting" as one where a quorum of the public body is present and at which official business of the body is discussed or decided, or where public policy is formulated.

3. In this regard, the communication method, email, refers to SDCL 1-25-1.2: includes the exchange of information via the internet or any other electronic medium. The analysis of these two definitions leads to the conclusion that email discussions that include a quorum (as indicated in Exhibit A) of a public body and which discuss the official business of that body would be considered "meetings" for purposes of the open meeting laws.

4. **Improper notice of meeting.** In accordance with SDCL 1-25-1.1 Public Notice: "All public bodies, except the state and each state board, commission, or department as provided in § 1-25-1.3, shall provide public notice, with proposed agenda, that is visible, readable, and accessible for at least an entire, continuous twenty-four hours immediately preceding any meeting, by posting a copy of the notice, visible to the public, at the principal office of the public body holding the meeting. The proposed agenda shall include the date, time, and location of the meeting. The notice shall also be posted on the public body's website upon dissemination of the notice, if such a website exists. For special or rescheduled meetings, the information in the notice shall be delivered in person, by mail, by email, or by telephone, to members of the local news media, who have requested notice. For special or rescheduled meetings, all

public bodies shall also comply with the public notice provisions of this section for regular meetings to the extent that circumstances permit. A violation of this section is a Class 2 misdemeanor."

5. The two violations center around improper notice of a meeting and conducting business outside of a public meeting.

Dated at Canton, South Dakota on this the 20th day of September 2017.

Andy E. Wilcox

Subscribed and sworn to me on this 20th day of September, 2017.

Jessica K. Sommervold

Notary Public
My commission expires: 7/13/23

JESSICA K. SOMMERVOLD NOTARY Seal PUBLIC STATE OF SOUTH DAKOTA

Canton
SOUTH DAKOTA
Can Live. Can Dream. Can Do.

Agenda Item Details

Meeting	Sep 18, 2017 - Canton City Commission Meeting Agenda
Category	6. New Business
Subject	C. Dakota Street Change Orders
Type	Action (Consent)
Recommended Action	Motion to approve change orders and authorize the Mayor's signature.

Item 3.1: Core drill sanitary sewer manhole at 2nd St and Dakota Street
Cost: $2,150.00
This was completed on June 20.
This item was necessitated during construction because the existing buried sanitary sewer main on 2nd Street unknowingly changed from an 8" diameter pipe to a 10" diameter pipe. This change in pipe size was found while digging up the sewer main approximately 50 feet west of the manhole on Dakota St. When the contractor found the change in pipe size, two options were available to meet SD DENR requirements:
1. Furnish and install a new manhole where the pipe changes size. Cost: $3,295 and no change order needed
2. Core drill into the manhole at Dakota Street and 2nd intersection. Cost: $2,150 and change order required.

Item 3.2: Horizontally Directional Drill 8" Restrained Joint PVC Pipe at Maple St and Dakota St
Cost: Not to exceed $6,300 ($45.00/linear foot x 140 feet)
This is in regards to a situation on Dakota and Maple St. The new water line has been installed, but when the old water line was disconnected it was unknown at the time that there were homes connected to that waterline from Maple Street. There are two homes affected. One has temporary water to it, but the other is without water (it is not occupied at this point), we need re-dig the water main and add to the water main that we didn't know needed to be added. Because the storm sewer has already been installed, we need to bore under it rather than dig it up. This work has been completed and verbal authorization was given from Commissioners via email on September 13, 2017.

Item 3.3: Replace the existing sanitary sewer main on Lynn Ave from Dakota St. to Kimball St.
Cost: $39,861.00
Myron Adam will explain the need and rational for replacing this sanitary sewer main.

Draft CCO3 Summary of Work.pdf (67 KB)

Canton City Commission's Mission
The mission of the City of Canton is to be a premier South Dakota Community.

Vision
Provide quality recreational and employment opportunities, a commitment to City owned infrastructure and housing growth, while focusing on an enhanced quality of life in the downtown and for people of all ages.

Summary of Items to be Included in Change Order No. 3

Prepared by JSA Engineers/Land Surveyors September 13, 2017

Project: **Dakota Street Improvements**	Owner: **City of Canton, SD**	Owner's Contract No.: N/A SRF No.: **C461039-05 and C462039-03** SDDOT No.: **CA 016D PCN 05N5**
Contract: **Dakota Street Improvements**		Date of Contract: February 6, 2017
Contractor: **Hulstein Excavating, Inc.**		Engineer's Project No.: 92140

Summary of Items

Item No.	Item Description	Increase Contract Price	Increase Contract Time
3.1	Core drill sanitary sewer manhole at 2nd St and Dakota St.	$2,150.00	1 Working Day
3.2	Horizontally Directional Drill 8" Restrained Joint PVC Pipe at Maple St and Dakota St.	$45.00 per linear foot x 140 feet = $6,300.00	1 Working Day
3.3 **	Replace the existing sanitary sewer main on Lynn Ave from Dakota St to Kimball St.	$39,861.00	5 Working Days

** Item 3.3 will also require $6,000.00 in additional engineering and construction administration to complete.

THOMAS R. WOLLMAN
STATE'S ATTORNEY

OFFICE OF THE STATE'S ATTORNEY
LINCOLN COUNTY, SD
104 N. Main St., Suite 200
Canton, SD 57013
Phone (605) 764-5732
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Chief Civil Deputy
Michael F. Nadolski

Deputy State's Attorneys
Ryan D. Wiese
Daniel K. Haggar
Drew W. DeGroot
Amanda D. Eden

September 28, 2017

FILE COPY

Larry A. Nelson
Frieberg, Nelson & Ask
P.O. Box 38
Canton, SD 57013

Re: Meetings of Public Agencies – City of Canton

Dear Larry:

Please be advised that our office has received a complaint alleging a violation of SDCL ch 1-25, a copy of which I have attached for your review. As part of our investigation, I wanted to give the municipality an opportunity to respond as it deems appropriate, and as such, I am notifying you. Once the investigation is completed, we will determine an appropriate course of action as provided in SDCL 1-25-6. I will, of course, keep you informed of any decision made regarding this matter.

Best regards.

Sincerely yours,

Michael F. Nadolski
Deputy State's Attorney

Enclosure

FRIEBERG, NELSON & ASK, L.L.P.

ATTORNEYS AT LAW

ROBERT B. FRIEBERG
THOMAS H. FRIEBERG
LARRY A. NELSON
BRENDA M. ASK (SD & IA)
SAMUEL J. NELSON

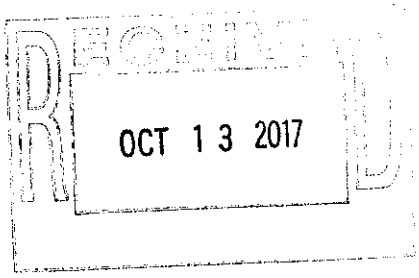
AUGUST FRIEBERG (1863-1932)
ROSCOE A. FRIEBERG (1903-1982)
BLAINE O. RUDOLPH (1925-2016)

Sender's Address:
206 E. 5th Street
P.O. Box 38
Canton, SD 57013-0038

PHONE: (605) 987-2686
FAX: (605) 987-5779
EMAIL: lnelson@frieberglaw.com

October 13, 2017

Michael Nadolski
Lincoln County State's Attorney
104 N Main Street #200
Canton, SD 57013



Re: *Open Meeting Complaint by Andy E. Wilcox*

Dear Mr. Nadolski:

Enclosed please find the Response of the Canton City Commission in regards to the matter of the open meeting complaint filed by Andy E. Wilcox. If you have any questions please give me a call.

Sincerely,

FRIEBERG, NELSON & ASK, L.L.P.

BY

LARRY A. NELSON

LAN/src
Encls.
CC: Canton City Commission
Amanda Mack, City Manager

BY HAND DELIVERY

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF LINCOLN)

IN THE MATTER OF OPEN MEETING) RESPONSE OF THE CANTON
COMPLAINT: CANTON CITY COMMISSION) CITY COMMISSION

COMES NOW, Canton City Commission, by and through its attorney of record, Larry A. Nelson, City Attorney for the City of Canton, South Dakota, and provides the following response to the Complaint filed by Andy E. Wilcox dated September 20, 2017.

1. Attached hereto as Exhibit A is an email sent by City Manager Amanda Mack to each individual City Commissioner on September 13, 2017, at 8:52 a.m.

2. The email alerted each individual city commissioner to a situation at Dakota and Maple Street concerning construction on the Dakota Street Project and the need to add a water main to provide water service to two residential structures that had previously been thought unnecessary. Each individual commissioner was informed that since the storm sewer had already been installed it would be necessary to bore in the additional water line. Each individual commissioner was informed that the water line cost was estimated to cost $45/foot, that it was unknown what the final number of feet that would need to be bored, that it would not to exceed a maximum of 140 feet, and the maximum price would be $6,300.00.

3. The email sought a "verbal go ahead" to the City Manager from each individual commissioner so that the boring could be taken care of a soon as possible followed by the subsequent approval of a properly submitted change order acted

on by the commission members on Monday, September 18, 2017, at the regularly scheduled city commission meeting.

4. Each individual commissioner contacted by Amanda Mack was requested to please respond to her yes or no to the request to move forward with the boring, but to not reply all. The City Manager also requested that any individual questions be addressed to her by a phone call.

5. There were no discussions, questions, or motions, made or exchanged between a quorum of the governing body. All reply communications went directly to the City Manager, with the exception of one commissioner who replied to all two days after the go-ahead was given by City Manager Amanda Mack to the contractor to proceed with the necessary work.

6. The City of Canton employs a City Manager with commission form of government. SDCL § 9-10-5 provides that in municipalities employing a city manager with a commission form of government the number of commissioners shall be nine, whose terms of office shall be three years. Under the city manager form of government a quorum is five members of the city commission.

7. SDCL § 9-10-15 provides a list of the general powers of the city manager. The city manager is authorized to "…make such recommendations to the governing body concerning the affairs of the first or second class municipality as may seem to him desirable" *SDCL § 9-10-15(3)*; and to "…sign all warrants for the payment of money, and the same shall be countersigned by the auditor, but no warrant shall be issued until the claim therefor has been approved by the governing body, except as may be otherwise provided by ordinance or resolution" *SDCL §9-10-15(8)*.

As it relates to the emails exchanged between each individual commissioner and Amanda Mack there was no motion, action or authorization as it relates to warrants, payments, change orders, or otherwise.

8. Under South Dakota Law for there to be an official meeting there must be:

a) a legal quorum of the public body present at the same place at the same time; and

b) official business must be discussed or decided.

9. SDCL § 1-25-1 provides that official meetings of political subdivisions, in this case a city, are open to the public and provides "an official meeting is any meeting of a quorum of a public body at which official business of that public body is discussed or decided, or public policy is formulated, whether in person or by means of teleconference." SDCL § 1-25-1 does not provide that official meetings of public bodies must provide notice of official meetings 24 hours in advance as suggested by Andy Wilcox in his complaint. The correct citation for 24 hour advance notice is SDCL § 1-25-1.1, which provides, in part, that public notice shall be visible, readable and accessible for at least 24 hours preceding any meeting.

10. SDCL § 9-9-14 provides that a quorum of a board of city commission members is necessary for the transaction of business on behalf of the governing body. An official meeting requires a quorum of the city commission members.

11. Teleconference is defined in SDCL § 1-25-1.2, which provides "For the purposes of this chapter, a teleconference is information exchanged by any audio, video, or electronic medium, including the internet." An official meeting may be held by teleconference.

12. For there to be an official meeting there must be present at the meeting a quorum of the public body. A quorum of the Canton City Commission was never present in this matter for the following reasons:

a) The information was sent to each individual commissioner with a specific instruction not to reply all. Although one Commissioner did reply all two days after the go-ahead was given by Amanda Mack to the Contractor to proceed with the necessary work, there were no discussions, questions, suggestions or motions exchanged between a quorum of the governing body prior to the go-ahead to proceed. All other communications occurred directly between the City Manager and each individual commissioner.

b) There was no discussion among a quorum of the governing members of the City Commission.

c) There was no final decision by a quorum of the members of the City Commission.

d) The cost estimate supplied to each individual commissioner was $45/foot but it was unknown how many actual feet would be needed to be bored. It was believed that the total boring would not exceed 140 feet and that the maximum cost would be $6,300.00.

e) The City Manager requested a verbal "go-ahead" to start the boring process.

f) The approval of a change order was set on the Agenda at the next City Council meeting held six days later.

g) Each individual Commission member was instructed not to reply to all. Each individual Commissioner was requested to call the City Manager if any individual commissioner had any questions.

13. The City Commission's position is that there was no quorum of the members of the commission who discussed or decided official business.

14. Mr. Wilcox also suggests in his Complaint that there was a violation of SDCL § 1-25-1.1, which requires that public bodies provide a 24 hour notice with the posting of the proposed agenda visible to the public at the principal office of the body holding the meeting, and furthermore that the notice be posted on the public bodies website upon dissemination of the notice, if such a website exists. The City Commission takes the position that there was no meeting held because there was no quorum of members present at the same place at the same time and that since no quorum of members were present there could be no official meeting which would require posting of such agenda.

15. For this and all other good and other reasons the City Commission requests that the State's Attorney determine that there is no merit to the complaint filed by Andy E. Wilcox in this matter.

WHEREFORE, the Canton City Commission requests that the Lincoln County State's Attorney determine there is no merit in the complaint and no merit in the prosecution of such complaint, and forward such determination to the Attorney General for statistical purposes only.

Dated this 13th day of October, 2017.

FRIEBERG, NELSON & ASK, L.L.P.

By _____

Larry A. Nelson
City Attorney
206 E. 5th St., P.O. Box 38
Canton, SD 57013-0038
(605) 987-2686

From: Amanda Mack
Sent: Wednesday, September 13, 2017 8:52 AM
To: Brian Alden; Eric Smart; Farrell W Anderson; Kristin Townsend (ktkayak605@gmail.com); Richard Eckle; Sara Steffensen; Sarah Carlson; Shelly Eich; Steve Ziebarth
Subject: Dakota Street Change Order-Reply Needed
Importance: High

Good morning,
We were alerted this morning to a situation on Dakota and Maple St. The new water line has been installed, but when the old water line was disconnected it was unknown at the time that there were homes connected to that waterline from Maple Street. There are two homes affected. One has temporary water to it, but the other is without water (it is not occupied at this point), we need re-dig the water main and add to the water main that we didn't know needed to be added. Because the storm sewer has already been installed, we need to bore under it rather than dig it up. The cost Hulstein has given is $45/foot. At this time we are unsure of exactly how many feet we need to bore, but the max would be 140 foot, so the max price would be $6300. I am looking for a verbal go ahead from the Commission so we can take care of this ASAP. The change order will be officially on the agenda for Monday.

Please respond yes or no and remember to not reply all. If you have any additional questions, please give me a call.

Thank you.

Amanda Mack
City Manager
City of Canton
amanda.mack@cantonsd.org
605-987-2881

EXHIBIT
tabbies
A

Mike Nadolski

From: Mike Nadolski
Sent: Monday, October 16, 2017 7:55 AM
To: 'SVNBVC'
Subject: RE: Progress

Andy – I sent a copy of the complaint to the City & provided it an opportunity to respond to the allegations. It has done so through its attorney. I will share a copy of that response with you at some point this week. Our office has not yet decided which way it will proceed. mfn

From: SVNBVC [mailto:svn@bvchallenger.com]
Sent: Monday, October 16, 2017 7:39 AM
To: Mike Nadolski <mnadolski@lincolncountysd.org>
Subject: Progress

Good morning Mike, I thought I'd drop a line to see how the investigation is going into the complaint vs the City Commission of Canton. I understand you may not be able to tell me anything besides the investigation is ongoing, but wanted to keep in touch.
Thank you, Mike. Hopefully you had a good weekend! I am ready for the 70s to be back now. Temperatures-not the decades!
Andy Wilcox
Sioux Valley News
Sioux Valley Advertiser
Greater Siouxland Phoenix
(605) 764-2000
(605) 764-6397 Fax
P.O. Box 255
Canton, S. Dak. 57013
www.siouxvalleynewsonline.com

Serving 46,502 readers every week through the Sioux Valley News, Greater Siouxland Phoenix, and the Sioux Valley Advertiser.

Mike Nadolski

From: Mike Nadolski
Sent: Thursday, October 19, 2017 10:06 AM
To: 'SVNBVC'
Subject: Progress
Attachments: doc00466720171019093931.pdf

Andy –

I have attached the response I received from the City of Canton. This document is part of our investigation file & not for distribution beyond you as the complainant. I want to give you an opportunity to review it, & then I would like to visit with you about it. Our office has not made a determination on this file but will do so once we have an opportunity to visit with you. Please let me know when you will be available sometime next week.

Best regards.
Mike Nadolski

From: Mike Nadolski
Sent: Monday, October 16, 2017 7:55 AM
To: 'SVNBVC' <svn@bvchallenger.com>
Subject: RE: Progress

Andy – I sent a copy of the complaint to the City & provided it an opportunity to respond to the allegations. It has done so through its attorney. I will share a copy of that response with you at some point this week. Our office has not yet decided which way it will proceed. mfn

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To: Mike Nadolski <mnadolski@lincolncountysd.org>
Subject: Progress

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Thank you, Mike. Hopefully you had a good weekend! I am ready for the 70s to be back now. Temperatures-not the decades!
Andy Wilcox
Sioux Valley News
Sioux Valley Advertiser
Greater Siouxland Phoenix
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STATE OF SOUTH DAKOTA

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TTY (605) 773-6585
http://atg.sd.gov/

MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

November 7, 2017

Andy Wilcox
Sioux Valley News
PO Box 225
Canton, South Dakota 57013

Re: In the Matter of Open Meeting Complaint 2017-04, Canton City Commission – Lincoln County

Dear Mr. Wilcox,

This letter is to acknowledge receipt of an open meetings complaint filed by you against the Canton City Commission. Lincoln County Deputy State's Attorney Michael F. Nadolski forwarded the complaint to the Open Meetings Commission for its review. Enclosed is a copy of all the materials I have received. A copy of the complaint materials has also been submitted to the City Commission for their response. I have asked the City Commission to file a response no later than December 7, 2017. I have also requested that the City Commission mail you a copy of any response they file.

The Open Meetings Commission meets periodically and has not scheduled its next meeting. I will notify you of the date, time and location of the next Commission meeting.

If you have any questions please don't hesitate to contact me.

Sincerely,

Steven R. Blair
Assistant Attorney General

SRB/jm
Enclosures
Cc w/o Encl: Larry A. Nelson, Canton City Attorney
Michael F. Nadolski – Lincoln County Deputy State's Attorney

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
http://atg.sd.gov/

MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

November 7, 2017

Larry A. Nelson
Canton City Attorney
206 E. 5th St.
PO Box 38
Canton, SD 57013-0038

Re: In the Matter of Open Meeting Complaint 2017-04, Canton City Commission – Lincoln County

Dear Mr. Nelson,

I assist the South Dakota Open Meetings Commission with their duties. Lincoln County Deputy State's Attorney Michael F. Nadolski has forwarded to the Commission, pursuant to SDCL 1-25-6(3), a complaint concerning the Canton City Commission. The complaint was signed by Andy Wilcox. Enclosed is a copy of all the materials I have received.

If the Canton City Commission wishes to file a response to the complaint, please send it to the above address on or before December 7, 2017. Please also send copies of any response to Andy Wilcox, Sioux Valley News, PO Box 225, Canton, South Dakota 57013 and to Deputy State's Attorney Michael F. Nadolski.

After I have received your response, all materials will be sent to the members of the Commission for their review. The Commission meets periodically and has not yet scheduled its next meeting. You will be given further notice of the meeting date, location, and time once the meeting has been scheduled.

If you have any questions please don't hesitate to contact me.

Sincerely,

Steven R. Blair
Assistant Attorney General

SRB/jm

Enclosures

Cc w/o Encl: Andy Wilcox
Michael F. Nadolski – Lincoln County Deputy State's Attorney

406383

Attorney General

DEC 11 2017

FRIEBERG, NELSON & ASK, L.L.P.

ATTORNEYS AT LAW

ROBERT B. FRIEBERG
THOMAS H. FRIEBERG
LARRY A. NELSON
BRENDA M. ASK (SD & IA)
SAMUEL J. NELSON

AUGUST FRIEBERG (1863-1932)
ROSCOE A. FRIEBERG (1903-1982)
BLAINE O. RUDOLPH (1925-2016)

Sender's Address:
206 E. 5th Street
P.O. Box 38
Canton, SD 57013-0038

PHONE: (605) 987-2686
FAX: (605) 987-5779
EMAIL: lnelson@frieberglaw.com

December 6, 2017

Steven R. Blair
Assistant Attorney General
1302 East Highway 14
Suite 1
Pierre, SD 57501-8501

Re: *In the Matter of Open Meeting Complaint 2017-04, Canton City Commission - Lincoln County*

Dear Mr. Blair:

Enclosed please find the Response of the Canton City Commission to the Complaint of Mr. Andy Wilcox which has been forwarded by Deputy State's Attorney Michael F. Nadolski to the Open Meetings Commission. I have also mailed a copy of this letter and the enclosed response to Complainant Andy Wilcox, and Lincoln County Deputy State's Attorney Michael Nadolski.

Please let me know the date of the scheduled review. Thank you for your time.

Sincerely,

FRIEBERG, NELSON & ASK, L.L.P.

BY

LARRY A. NELSON

LAN/src
Encls.
Cc: Canton City Commissioners,
Amanda Mack, City Manager

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF LINCOLN)

IN THE MATTER OF OPEN MEETING) RESPONSE OF THE CANTON
COMPLAINT: CANTON CITY COMMISSION) CITY COMMISSION

COMES NOW, Canton City Commission, by and through its attorney of record, Larry A. Nelson, City Attorney for the City of Canton, South Dakota, and provides the following response to the Complaint filed by Andy E. Wilcox dated September 20, 2017.

1. Attached hereto as Exhibit A is an email sent by City Manager Amanda Mack to each individual City Commissioner on September 13, 2017, at 8:52 a.m.[1]

2. The email alerted each individual city commissioner to a situation at Dakota and Maple Street concerning construction on the Dakota Street Project and the need to add a water main to provide water service to two residential structures that had previously been thought unnecessary. Each individual commissioner was informed that since the storm sewer had already been installed it would be necessary to bore in the additional water line. Each individual commissioner was informed that the water line cost was estimated to cost $45/foot, that it was unknown what the final number of feet would need to be bored, that it would not to exceed a maximum of 140 feet, and the maximum price would be $6,300.00.

3. The email sought a "verbal go ahead" to the City Manager from each individual commissioner so that the boring could be taken care of a soon as possible followed by the

[1]Electronic Mail dated Wednesday, September 13, 2017, 8:52 AM from Amanda.Mack@cantonsd.org

subsequent approval of a properly submitted change order acted on by the commission members on Monday, September 18, 2017, at the regularly scheduled city commission meeting.

4. Each individual commissioner contacted by City Manager Amanda Mack was requested to please respond to her yes or no to the request to move forward with the boring, but to not reply all. The City Manager also requested that any individual questions be addressed to her by a phone call.

5. There were no discussions, questions, or motions, made or exchanged between a quorum of the governing body. All reply communications went directly to the City Manager, with the exception of one commissioner who replied to all two days after the go-ahead was given by City Manager Amanda Mack to proceed with the necessary work.

6. On September 15, 2017, the agenda for the September 18, 2017, City Commission meeting was posted on the City of Canton website as well as posted on the outside of City Hall. The agenda detailed the requested official action by the governing board on three separate change orders.[2] A motion was made and was seconded to bring change order items 3.1, 3.2, and 3.3 up for approval by a vote. A vote to approve change order items 3.1 and 3.3 passed. A vote was not taken on change order 3.2 when Andy E. Wilcox, the complainant, publicly alleged an open meeting violation.

On September 29, 2017, the agenda for the October 2, 2017, City Commission meeting was posted on the City of Canton website as well as posted on the outside of City Hall. The agenda detailed the requested official action by the governing body on

[2]Monday, September 18, 2017 Canton City Commission Meeting Agenda, 6. New Business C. Dakota Street Change Orders

change order 3.2.[3] A vote was taken to approve change order 3.2 and approve payment of the work. Prior to October 2, 2017, no vote had been taken by the City Commission to approve change order 3.2, or to approve payment for the work on change order 3.2.

7. The City Commission takes the position that there was no meeting held as alleged by the complainant because there was no quorum of members present and for the further reason that there was no simultaneous exchange of information among a quorum of the governing board. The receipt of information by a commission member regarding issues of the City is not an open meetings violation.

There was no discussion among a quorum of the members of the City Commission. All discussions and replies were directly with the City Manager. The City Manager then gave the authorization to proceed with the work. There were no contemporaneous communications among a quorum of the governing members.

8. The City of Canton employs a City Manager with commission form of government. SDCL § 9-10-5 provides that in municipalities employing a city manager with a commission form of government the number of commissioners shall be nine, whose terms of office shall be three years. Under the city manager form of government a quorum is five members of the city commission.

9. SDCL § 9-10-15 provides a list of the general powers of the city manager. The city manager is authorized to "…make such recommendations to the governing body concerning the affairs of the first or second class municipality as may seem to

[3] Monday, October 2, 2017 Canton City Commission Meeting Agenda, 5. Old Business A. Dakota Street Change Orders

him desirable" *SDCL § 9-10-15(3)*; and to "…sign all warrants for the payment of money, and the same shall be countersigned by the auditor, but no warrant shall be issued until the claim therefor has been approved by the governing body, except as may be otherwise provided by ordinance or resolution" *SDCL §9-10-15(8)*.

As it relates to the emails exchanged between each individual commissioner and City Manager Amanda Mack there was no motion, action or authorization as it relates to warrants, payments, change orders, or otherwise.

10. Under South Dakota Law for there to be an official meeting there must be:

a) a legal quorum of the public body present at the same place at the same time; and

b) official business must be discussed or decided.

11. SDCL § 1-25-1 provides that official meetings of political subdivisions, in this case a city, are open to the public and provides "an official meeting is any meeting of a quorum of a public body at which official business of that public body is discussed or decided, or public policy is formulated, whether in person or by means of teleconference." SDCL § 1-25-1 does not provide that official meetings of public bodies must provide notice of official meetings 24 hours in advance as suggested by Andy Wilcox in his complaint. The correct citation for 24 hour advance notice is SDCL § 1-25-1.1, which provides, in part, that public notice shall be visible, readable and accessible for at least 24 hours preceding any meeting.

12. SDCL § 9-9-14 provides that a quorum of a board of city commission members is necessary for the transaction of

business on behalf of the governing body. An official meeting requires a quorum of the city commission members.

13. Teleconference is defined in SDCL § 1-25-1.2, which provides "For the purposes of this chapter, a teleconference is information exchanged by any audio, video, or electronic medium, including the internet." An official meeting may be held by teleconference.

14. For there to be an official meeting there must be present at the meeting a quorum of the public body. A quorum of the Canton City Commission was never present in this matter for the following reasons:

a) The information was sent to each individual commissioner with a specific instruction not to reply all.[4] Although one Commissioner did reply all two days after the go-ahead was given by the City Manager to proceed with the necessary work, there were no discussions, questions, suggestions or motions exchanged between a quorum of the governing body prior to the go-ahead to proceed. All other communications occurred directly between the City Manager and each individual commissioner.

b) There was no discussion among a quorum of the governing members of the City Commission.

c) There was no final decision by a quorum of the members of the City Commission made prior to the October 2, 2017, meeting at which the Commission approved change order item 3.2: Horizontally Directional Drill 8" Restrained Joint PVC Pipe at Maple St and Dakota St.

d) The cost estimate supplied to each individual commissioner was $45/foot but it was unknown how many actual

[4] *Id*

feet would be needed to be bored. It was believed that the total boring would not exceed 140 feet and that the maximum cost would be $6,300.00.

e) The City Manager requested a verbal "go-ahead" to start the boring process which did not give final approval of the Change Order.

f) The approval of a change order was set on the Agenda at the next City Council meeting held six days later.

g) Each individual Commission member was instructed not to reply to all. Each individual Commissioner was requested to call the City Manager if any individual commissioner had any questions.

15. The City Commission's position is that there was no quorum of the members of the commission who discussed or decided official business until change order item 3.2 was formally approved by the City Commission during the official meeting on October 2, 2017.

16. Mr. Wilcox also suggests in his Complaint that there was a violation of SDCL § 1-25-1.1, which requires that public bodies provide a 24 hour notice with the posting of the proposed agenda visible to the public at the principal office of the body holding the meeting, and furthermore that the notice be posted on the public bodies website upon dissemination of the notice, if such a website exists. The City Commission takes the position that there was no meeting held because there was no quorum of members present at the same place at the same time and that since no quorum of members were present there could be no official meeting which would require posting of such agenda.

17. For this and all other good reasons the City Commission requests that the Open Meetings Commission determine

that there is no merit to the complaint filed by Andy E. Wilcox in this matter.

WHEREFORE, the Canton City Commission requests that the Open Meetings Commission determine there is no merit in the complaint and no merit in the prosecution of such complaint.

Dated this 6th day of December, 2017.

FRIEBERG, NELSON & ASK, L.L.P.

By _____

Larry A. Nelson
City Attorney
206 E. 5th St., P.O. Box 38
Canton, SD 57013-0038
(605) 987-2686

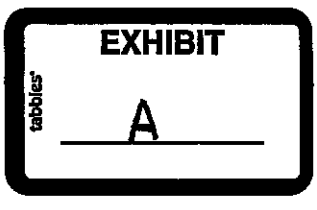
From: Amanda Mack
Sent: Wednesday, September 13, 2017 8:52 AM
To: Brian Alden; Eric Smart; Farrell W Anderson; Kristin Townsend (ktkayak605@gmail.com); Richard Eckle; Sara Steffensen; Sarah Carlson; Shelly Eich; Steve Ziebarth
Subject: Dakota Street Change Order-Reply Needed
Importance: High

Good morning,
We were alerted this morning to a situation on Dakota and Maple St. The new water line has been installed, but when the old water line was disconnected it was unknown at the time that there were homes connected to that waterline from Maple Street. There are two homes affected. One has temporary water to it, but the other is without water (it is not occupied at this point), we need re-dig the water main and add to the water main that we didn't know needed to be added. Because the storm sewer has already been installed, we need to bore under it rather than dig it up. The cost Hulstein has given is $45/foot. At this time we are unsure of exactly how many feet we need to bore, but the max would be 140 foot, so the max price would be $6300. I am looking for a verbal go ahead from the Commission so we can take care of this ASAP. The change order will be officially on the agenda for Monday.

Please respond yes or no and remember to not reply all. If you have any additional questions, please give me a call.

Thank you.

Amanda Mack
City Manager
City of Canton
amanda.mack@cantonsd.org
605-987-2881



FRIEBERG, NELSON & ASK, L.L.P.

ATTORNEYS AT LAW

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THOMAS H. FRIEBERG
LARRY A. NELSON
BRENDA M. ASK (SD & IA)
SAMUEL J. NELSON

AUGUST FRIEBERG (1863-1932)
ROSCOE A. FRIEBERG (1903-1982)
BLAINE O. RUDOLPH (1925-2016)

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FAX: (605) 987-5779
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December 6, 2017

Michael Nadolski
Lincoln County State's Attorney
104 N Main Street #200
Canton, SD 57013

Re: *Open Meeting Complaint by Andy E. Wilcox*

Dear Mr. Nadolski:

Enclosed please find a copy of Response of Canton City Commission that my office has sent to Assistant Attorney General Steven R. Blair. This is intended as service upon you by U.S. Postal mail.

Sincerely,

FRIEBERG, NELSON & ASK, L.L.P.

BY

LARRY A. NELSON

LAN/src
Encls.
Cc: Canton City Commission;
Amanda Mack, City Manager;
Steven R. Blair, Asst. Attorney General

FRIEBERG, NELSON & ASK, L.L.P.

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EMAIL: lnelson@frieberglaw.com

December 6, 2017

Andy E. Wilcox
Sioux Valley News
P.O. Box 225
Canton, SD 57013

Re: *Open Meeting Complaint by Andy E. Wilcox*

Dear Mr. Wilcox:

Enclosed please find a copy of Response of Canton City Commission that my office has sent to Assistant Attorney General Steven R. Blair. This is intended as service upon you by U.S. Postal mail.

Sincerely,

FRIEBERG, NELSON & ASK, L.L.P.

BY

LARRY A. NELSON

LAN/src
Encls.
Cc: Canton City Commission;
Amanda Mack, City Manager;
Steven R. Blair, Asst. Attorney General

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL
1302 East Highway 14, Suite 1
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TTY (605) 773-6585
http://atg.sd.gov/

MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

May 1, 2018

Andy Wilcox
Sioux Valley News
PO Box 225
Canton, South Dakota 57103

Larry A. Nelson
Canton City Attorney
206 E. 5th St
PO Box 38
Canton, South Dakota 57013-0038

Re: In the Matter of Open Meeting Complaint 2017-04, Canton City Commission – Lincoln County

Dear Mr. Wilcox & Mr. Nelson:

Enclosed please find a Notice of Hearing regarding the above referenced open meetings complaint. Also enclosed, please find a courtesy copy of the proposed agenda for the Commission's June 7th meeting. As you can see from the agenda, presentations regarding complaints will begin at 1:30 p.m. central time, or as soon thereafter as matters may be heard.

If you have any questions please don't hesitate to contact me.

Sincerely,

Steven R. Blair
Assistant Attorney General

SRB/jm
Enclosures

STATE OF SOUTH DAKOTA

OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN MEETINGS COMPLAINT AGAINST SOUTH DAKOTA CANTON CITY COMMISSION – LINCOLN COUNTY	))))	OMC 2017-04 NOTICE OF HEARING

TO: Andy Wilcox, Sioux Valley News, PO Box 225, Canton, South Dakota 57103; Larry A. Nelson, Canton City Attorney, 206 E. 5th St, PO Box 38, Canton, South Dakota 57013-0038:

Please take notice that a hearing regarding the above referenced open meetings complaint will be held before the South Dakota Open Meetings Commission, at Matthews Training Center – Foss Building, 523 E. Capitol Avenue, Pierre, South Dakota, on Thursday, June 7, 2018. Oral presentations regarding pending complaints will commence at 1:30 P.M. central time, or soon thereafter as matters may be heard, and proceed in the order noted in the attached agenda.

Dated this 1st day of May 2018.

Steven R. Blair
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215

STATE OF SOUTH DAKOTA

OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN MEETINGS COMPLAINT AGAINST SOUTH DAKOTA CANTON CITY COMMISSION – LINCOLN COUNTY	))))	OMC 2017-04 CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Notice of Hearing and proposed Agenda in the above-captioned matter, were served by United States mail, first class, postage prepaid upon Andy Wilcox, Sioux Valley News, PO Box 225, Canton, South Dakota 57103; Larry A. Nelson, Canton City Attorney, 206 E. 5th St, PO Box 38, Canton, South Dakota 57013-0038.

Dated this 1st day of May 2018.

Steven R. Blair
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215

SOUTH DAKOTA OPEN MEETING COMMISSION

AGENDA

Matthews Training Center – Foss Building
523 E. Capitol Avenue
Pierre, South Dakota 57501

June 7, 2018
1:30 p.m. Central Time

1. Approval of the Agenda

2. Approval of the Minutes of February 2, 2018 meeting.

3. Consideration of Pending Complaints

   A. *In the Matter of Open Meeting Complaint 17-04 Canton City Commission*

      Oral Presentations:

      Complainant Andy Wilcox - 15 minutes (a portion of this time may be reserved for rebuttal)

      Canton City Commission - 15 minutes

   B. *In the Matter of Open Meeting Complaint 18-01, Potter County Commissioners*

      Oral Presentations:

      Complainant Molly McRoberts - 15 minutes (a portion of this time may be reserved for rebuttal)

      Potter County Commissioners -15 minutes

   C. *In the Matter of Open Meeting Complaint 18-02, Hot Springs School Board*

      Oral Presentations:

      Complainant Stachia Walker - 15 minutes (a portion of this time may be reserved for rebuttal)

      Hot Springs School Board -15 minutes

4. Consideration of Findings of Fact and Conclusions of Law

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

5. Discussion of HB 1172: Public Comment Period

6. Scheduling future meetings

All items are scheduled for 1:30 p.m. Central Time Scheduled items may be delayed or moved to a later agenda item at the discretion of the OMC.

For information call Steve Blair 605-773-3215.

Notice is given to individuals with disabilities that this meeting is being held in a physically accessible location. Please notify the Attorney General's Office, 605-773-3215, at least 48 hours before the meeting if you have a disability for which special arrangements must be made.