McFarlane, Jenna

From: Blair, Steven
Sent: Monday, November 13, 2017 4:02 PM
To: 'carol ferebee'; Naasz, Matthew
Cc: McFarlane, Jenna
Subject: RE: [EXT] In re Water Management Board, OMC 2017-01

Mr. Ferebee and Mr. Naasz,

The Commission has no formal or informal procedures designating when parties are allowed to file supplemental pleadings with the Commission. Based upon the emails below, I believe all are in agreement that Mr. Ferebee may file his supplemental written material by the end of the day this Friday (11/17). Thereafter, the Water Management Board may file a written response to Mr. Ferebee's materials by the end of the day December 1. Mr. Ferebee, if you feel that any further written reply is needed, you may submit that reply no later than December 15. That will allow us to timely submit the materials to the Commission for their consideration.

Please let me know if anyone disagrees with any of the above.

Ms. McFarlane and I have not yet determined if the Commission is available on Dec 21st, but we hope to do that as soon as possible. I will be back in touch with both of you regarding scheduling, but please keep Dec. 21 clear on your calendars.

Thanks!

Steve Blair – AAG

From: carol ferebee [mailto:silverfoxdriver@msn.com]
Sent: Wednesday, November 08, 2017 9:52 PM
To: Blair, Steven
Subject: Re: [EXT] In re Water Management Board, OMC 2017-01

Howdy Mr. Blair: Response to your first question: No objection to Mr. Naasz's request with a proviso which is, if Mr. Naasz responds to my submission with a huge dose of BALDERDASH like his ten plus page submission to you dated July 21, 2017, I would like to reply. Said another way, I will only agree to Mr. Naasz's request if I have the option to respond/reply to a "faulty" submission (response) by him. By the way, his ten plus page submission mentioned above was beyond "faulty."

Second question: At this point, I am available on December 21st.

From: Blair, Steven <Steven.Blair@state.sd.us>
Sent: Monday, November 6, 2017 1:37 PM
To: Naasz, Matthew; 'silverfoxdriver@msn.com'
Cc: McFarlane, Jenna
Subject: RE: In re Water Management Board, OMC 2017-01

Mr. Ferebee,

Do you object to Mr. Naasz's request for 2 weeks after you submit supplemental materials to file any response? If so, I will pass Mr. Naasz's request and your objection to States Attorney Krull for his determination as Chair of the Commission. If you do not object I think we can move forward with your supplemental materials due 11/17, and any response by the Water Mgt. Brd. due 12/1.

Also, are you available on December 21st? We have not yet reached out to the Commission to determine whether they are available that day.

Thanks!

Steve Blair – AAG

From: Naasz, Matthew
Sent: Monday, November 06, 2017 11:21 AM
To: Blair, Steven; 'silverfoxdriver@msn.com'
Cc: McFarlane, Jenna
Subject: RE: In re Water Management Board, OMC 2017-01

Mr. Blair and Mr. Ferebee,

I will not be able to provide written submissions by November 17. I am in trial Tuesday (November 14) through Friday (November 17). Additionally, as Respondent in this matter, the South Dakota Water Management Board should have the right to respond in writing to any supplemental written submission provided by Mr. Ferebee. I request two weeks from the date of Mr. Ferebee's supplemental written submission within which to provide the response of the South Dakota Water Management Board.

Additionally, of the dates listed below, the only date that will work for me is Thursday, December 21.

Sincerely,

Matt Naasz
Assistant Attorney General
Counsel for the South Dakota Water Management Board
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

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From: Blair, Steven
Sent: Friday, November 03, 2017 3:56 PM
To: 'silverfoxdriver@msn.com'; Naasz, Matthew
Cc: McFarlane, Jenna
Subject: In re Water Management Board, OMC 2017-01

Mr. Naasz and Mr. Ferebee,

This email is to memorialize the discussion that was had before the Commission this afternoon regarding supplementation of the record of the above referenced matter. Both parties are to have until November 17, 2017, to file whatever supplemental materials or responses they wish the Commission to consider. Those materials, if any, must be submitted to my office at the address listed below.

Further, Please let me know if you are not available for a teleconference meeting on any of the following dates.

Thurs. November 30th
Fri. December 1st

Thurs. December 7th

Friday December 15th

Thurs. December 21st
Friday December 22nd

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

Sincerely,

Steven R. Blair
Assistant Attorney General

Office of the Attorney General
Mickelson Criminal Justice Center
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Fax: (605) 773-4106
Email: steven.blair@state.sd.us

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SRB ✓ Attorney General
MATT N NOV 20 2017 405756

11495 Gillette Prairie Rd
Hill City, SD 57745
November 17, 2017

Mr. Steve Blair
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501

RE: Open Meeting Complainant

Dear Mr. Blair:

Enclosed please find the original and a copy of *COMPLAINANT FEREBEE'S RESPONSE TO THE HUGHES COUNTY'S MAY 2ND, 2017, LETTER WITH ATTACHED POLICE REPORT SUBMITTED TO THE SOUTH DAKOTA OPEN MEETINGS COMMISSION.* The copy is for Mr. Matt Naasz at your location. If you would be so kind please deliver the enclosed copy to him. Thank you.

George W. Ferebee
George W. Ferebee
Complainant

Cc: Mr. Matt Naasz

STATE OF SOUTH DAKOTA

SOUTH DAKOTA OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN MEETING COMPLAINT 2017-01 WATER MANAGEMENT BOARD, HUGHES COUNTY	))))))	COMPLAINANT FEREBEE'S RESPONSE TO THE HUGHES COUNTY'S MAY 2ND, 2017 LETTER WITH ATTACHED POLICE REPORT SUBMITTED TO THE SOUTH DAKOTA OPEN MEETINGS COMMISSION

As discussed on November 3, 2017, during the South Dakota Open Meetings Commission meeting, Complainant Ferebee (hereinafter Complainant) submits the following response to the May 2nd, 2017, Hughes County State's Attorney's letter with attached Pierre Police Department report. First, two preliminary matters.

PRELIMINARY MATTER # 1
(Jurisdiction)

To the extent that the South Dakota Open Meetings Commission (OMC) is governed by statutory law, SDCL 1-25-7, Complainant posits the notion that the jurisdiction (scope of authority) granted to and exercised by the OMC should be constrained as much as reasonably possible to provisions set forth in statute. As Complainant recalls from the OMC hearing for the folks preceding him in Mitchell on August 31, 2017, OMC member, Mr. Steele, made a comment or two about jurisdictional limitations.

Complainant wholeheartedly agrees with the proposition that the OMC should not tackle any issue other than that of "determining whether the conduct [alleged] violates this chapter." In that light, any "written submissions by the persons or entities that are directly involved," should be restricted/limited to material pertaining directly to the OMC's tasking: Up

or down determination regarding the violation alleged. No more, no less. Any material submitted which deviates from the very narrowly crafted tasking of the OMC should be summarily rejected.

Previously, submissions by the South Dakota Water Management Board in this matter, had little, if any, bearing on the issue before the OMC as submitted by Complainant: "The Board voted to go into executive session without authority to do so." Instead of sticking to, for that matter even addressing, the issue before the OMC, Mr. Naasz representing the Board, first submitted ten (10) pages of absolute *balderdash* captioned RESPONDENT WATER MANAGEMENT BOARD'S RESPONSE TO COMPLAINT, dated July 21, 2017. Then, Mr. Naasz followed with a letter to Mr. Blair dated August 23, 2017, in which he offered a *MEMORANDUM OPINION AND ORDER OF AFFIRMANCE* to supplement the record of Mr. Ferebee's Open Meeting Complaint 2017-01. Mr. Naasz's supplement request to Mr. Blair and the OMC had/has no conceivable bearing on whether the Water Management Board went behind closed doors in violation of statutory law, SDCL 1-25-2.

Concerning Mr. Naasz's first submission, the ten (10) pager, it is loaded with "excuses," "misleads," "deceptions," "faulty assertions," and other questionable efforts to obviously provide distraction from the Board's misdeed. For now, Complainant draws the OMC's attention to one literally unbelievable proposition set forth by Mr. Naasz. On page 4, footnote 5, Mr. Naasz states: "As Complainant in this matter, Mr. Ferebee must shoulder the burden of proof." He, Mr. Naasz, then quotes a passage from *In the Matter of Open Meetings Complaint 12-01,* Sioux Falls City Council (South Dakota Open Meetings Commission, November 7, 2012) (Brenner, Commissioner, dissenting). Yes, according to the OMC write-up, Commissioner Brenner in dissent set forth the notion of the heavy lifting required by anyone alleging a violation

of the Open Meetings Law. In relying on then Commissioner Brenner's assertion, Mr. Naasz apparently overlooked the fact that the assertion was offered in dissent. The majority apparently did not agree with Commissioner Brenner.

Enough of "factual situations," "intervenors," "notice requirements," "procedural questions," and so forth. No more distractions. The OMC should only hear and see arguments bearing on its tasking: Did the SD Water Management Board violate the Open Meetings Law? To that end, Complainant will not comment further about Mr. Naasz's ten pages of extraneous matters, if he strictly limits any further submittals/comments to the issue before the OMC.

PRELIMINARY MATTER #2
(Commendation)

Please accept a commendation. Hats off to the members of this Commission for your professionalism. During both the August meeting in Mitchell and the recent meeting in Pierre this observer noted congeniality, cordiality, caring and thoughtfulness by all of the members. Disagreements yes, but absent any showing of fangs. Cool, calm and collected without a hint of temptation to go behind closed doors for "discussions" (deliberations). Kudos.

Back in May of last year, four of us appeared at a hearing before the SD Public Utilities Commission (PUC) over a formal complaint against our monopoly telephone provider, Century Link. After years, yes years, of horrible telephone service, the four of us, Complainant and his wife along with another couple had had enough and filed a formal complaint with the PUC. A hearing was scheduled, and despite efforts by Century Link to get us to back off, we were determined and ventured to Pierre. None of us had a clue as to what to expect. To say that we were pleasantly surprised would be a huge understatement. Professional, cordial, congenial, caring, thoughtful, and more. After roughly two (2) hours during which time all four (4) of us took the hot seat at least twice, and Century Link filled the room with many assertions, some of

which just plain lacked veracity, all three PUC commissioners voted to keep our complaint open until Century Link provides satisfactory service. Reminiscing about our trip to Pierre to be heard by the SD PUC certainly brings on pleasant feelings. Kudos to the SD PUC.

Two out of three administrative proeedings, not bad. After the May 2016 hearing before the SD PUC, Complainant appeared before the SD Water Management Board on his requests (two) for declaratory rulings as provided for by SDCL 1-26-15. What a contrast. As opposed to the welcoming but still professional "atmosphere" sensed by Complainant at the PUC hearing, the SD Water Management Board on October 13, 2016, was the opposite. Animosity was in the air for Complainant (at that time petitioner/requestor), but "welcoming" for the attorneys claiming presence for Pennington County, Rapid City, Sioux Falls, along with an attorney claiming the counties and municipalities for his paycheck. (Note: Those four attorneys butted into this matter without statutory authority.) Suffice it to say for now that the behavior of the SD Water Management Board and the assigned attorney during the October 13, 2016, hearing was despicable.

ABSOLUTELY BLIND-SIDED

During the October 13, 2016, hearing SD Water Management Board member Rodney Freeman said the following:

> I've got to rethink things again because of the notice requirement. If, if, they are permitted the opportunity to establish a factual situation now, none of the other parties have had an opportunity to prepare for (inaudible) or countering or even cross-examining. They are being caught ***absolutely blind-sided*** if we now have a whole bunch of new facts brought in that were not in the petition. How do they get ready for the hearing Ev [Everett Hoyt, board member], if, if, there are no facts in the petition and now they come in and create a factual situation that nobody's had an opportunity to get ready for? [Emphasis added] [Taken from the archived audio recording of the October 13, 2016, Water Management Board hearing, at approximately seventy (70) minutes]

How ironic. As noted by the quote above, Water Management Board member Freeman expressed considerable concern about ***notice*** to those purporting to be "intervenors" who in actuality could be more appropriately labeled "meddlers." Clearly, attorneys Kinsley Groote, Wade Nyberg, Eric Erickson, and Diane Best were not "intervenors" by statutory law, but rather nothing more than mere meddlers. During the October 13, 2016, hearing the point was clearly made but obviously ignored regarding the "factual situation" question ruling by the South Dakota Supreme Court. See, *IN RE: PETITION FOR DECLARATORY RULING RE: SDCL 62-1-1(6)*, 2016 S.D. 21, ¶ 9. [Attorney Leach's request for declaratory ruling.] Clearly, by the SD Supreme Court's ruling in *Leach* a "factual situation" is not required to request a declaratory ruling as opposed to a declaratory judgment. As noted above, Board member Freeman was not about to give up his mistaken notion. Recall Freeman's comments above: "They are being caught **absolutely blind-sided ... nobody's had an opportunity to get ready for**."

Seems as though a sense of fairness would have prompted Board member Everett Hoyt (Ev) to inquire of Board member Rodney Freeman: Rod how about the eleventh hour submission on behalf of the City of Sioux Falls by Ms. Diane Best? Prudence on the part of the other Board members should have prompted a robust ***transparent*** "discussion" of "factual situation," "notice," 'intervention," and more. Instead, the Board essentially ran for cover.

One should wonder how Board member Freeman would have reacted in Mitchell, SD, during the OPEN MEETINGS COMMISSION hearing when Complainant was **absolutely blind-sided** by Mr. Naasz's references to Sergeant Walz and the Pierre Police Department. The transcript of the OPEN MEETINGS COMMISSION hearing of August 31, 2017, has not one, but at least four references to a document not provided to the principal party, Complainant, in

this matter. During the hearing, the Water Management Board's assigned attorney, Mr. Naasz, referenced the Pierre Police Department, or Sergeant Walz, or both at least four (4) times. Mr. Naasz's hearing comments follow:

> First comment from August 31, 2017, hearing: "His [Mr. Rodney Freeman's] Affidavit supports that, comments to Sergeant Walz with the Pierre Police Department support that the audio recording clearly supports that." [Page 6, lines 16-18]
>
> Second comment: "I think it's clear from Mr. Freeman's Affidavit that he's quite in connection with this matter as well as the comments to Sergeant Walz he made the motion to go into executive session in order to seek legal counsel on the--." [Page 8, lines16-19]
>
> Third comment: "And I understand your concern Mr. Steele, I and I would again point to the Affidavit made by Mr. Freeman. I would point you to the comments he made to Sergeant Walz from the Pierre Police Department … ." [Page 8, lines 45-46 and page 9, line 1]
>
> Fourth comment: "[B]ut the best I can do is tell you that I understand your concern and would point you to Mr. Freeman's Affidavit as well as his comments to Sergeant Walz regarding the reason he made the motion." [Page 9, lines 6-9]

As Mr. Naasz made each of the above comments during the August 31, 2017, OMC hearing, Complainant became more and more uneasy and concerned about what the OMC might have before them that he didn't have. Objection(s) did not seem to be appropriate with the hearing format prescribed by the Chairman. In any event, rest assured that Mr. Freeman's words from the October 13, 2016, SD Water Management Board hearing "**absolutely blind-sided**," hit a nerve with Complainant each time Mr. Naasz mentioned Sergeant Walz and/or the Pierre Police Department. Difference, in fact critical difference, when Mr. Freeman proclaimed **blind-sided**, his foundation was "**other parties,**" whom he did not even identify. Just a shotgun blast of sorts. Whereas, in this instance, OMC hearing, Complainant is not only a real party but brought the issue forward.

AFFIDAVIT(S)

Seven member board? Maybe, maybe not. From all outward appearances one member, Rodney Freeman runs the show and the others appear to defer to him, in other words-- tag along so to speak. If not, where were "motions" by the other Board members? Where are their Affidavits? Where are their interviews by Sergeant Walz? The obvious question then: Why the Board? (Note: Board member Freeman's Affidavit was included as Exhibit D to Mr. Naasz's July 21, 2017, submittal to this Commission captioned: RESPONDENT WATER MANAGEMENT BOARD'S RESPONSE TO COMPLAINT.) Even a casual observer at the October 13, 2016, SD Water Management Board hearing could easily sense that Board member Freeman dominated and the others deferred.

PIERRE POLICE DEPARTMENT REPORT (Sergeant Walz)

Over two (2) pages of narrative by Sergeant Walz. Single spaced no less with quite small type (font?). Complainant certainly has no objection to the "facts" of the October 13, 2016, SD Water Management Board hearing as detailed in Sergeant Walz's narrative. On the other hand, Sergeant Walz's narrative contains more than a few opinions and faulty assertions to which Complainant squarely objects.

First, however, Complainant's reaction to Sergeant Walz's allusion, and attendant intimations, to telephone contact with Complainant. Sergeant Walz wrote:

> I informed him [Ferebee] I had been asked to look into the complaint he had made. Ferebee was asked if there was anything he wished to add that was not in the letter he had sent to the Hughes County State's Attorney or the accompanying complaint. Ferebee informed me there was nothing he wished to add. [Page 4, last paragraph]

Add to what? Complainant firmly believes that his letter to the Hughes County State's Attorney accompanied by a notarized Complaint provided sufficient detail to proceed with a finding of error by the South Dakota Water Management Board. With that mindset, what could be added without further information/knowledge "discovered" by and set forth by Sergeant Walz? Any notion whatsoever that Sergeant Walz's "investigation" had veered off into the land of "excuses," Complainant would have vigorously pursued a copy of the narrative. Aren't "investigations" supposed to be about the "facts?" Had he known of Sergeant Walz's written words, Complainant would have vigorously resisted any notion of that which could be perceived as acquiescence, no matter how slight. Understandably, the damage has been done, the bell cannot be unrung. (How many juries pay heed to "strike or disregard that"?) Hopefully, this Commission's members will reread Sergeant Walz's narrative guided by conceded knowledge of failure to serve along with Complainant's following comments regarding Sergeant Walz's narrative:

To begin, on page three over half way down: "In addition, conversation had between he [Mr. Naasz] and Hutmacher [Board chairman] during the board meeting would also be privileged." **Really**! Mr. Naasz and Chairman Hutmacher rudely whispered during Mr. Jasper's comments. Even if "whispering" is O.K., which Complainant adamantly disagrees with, how can any rational thinking individual consider any utterances whatsoever made in a "public proceeding" as attorney-client privileged? On that day, October 13, 2016, the whispering was close, oh so close, to being exposed by Complainant, albeit not pleasantly. If one listens carefully to the audio recording, whispering is clearly detectable. How absolutely horrible, just plain rude.

Next, on page three second to last paragraph: "***what his*** [Mr. Freeman's] ***intent was.***"

Double really!! Absolutely incredible! So let's see, violation of the law is no big deal if the "intent" was such and such. (Note: For example, if one was to dispatch an elk without a license with the *intent* of feeding the hungry, that would be hunky-dory. No dice, at least the story of a few years ago related to the Complainant about an elk shot illegally had consequences.) No matter the excuse, barring coercion, the deed was done, the South Dakota Water Management Board violated the law, SDCL 1-25-2. The consequences set forth by the Legislature should be adhered to. Unfortunately, the Hughes County State's Attorney did not avail herself of Complainant's preferred consequence: Prosecution.

Next, on page four, lines 1-3: "This [motion to go into executive session] was done **in an attempt** to seek legal advice from counsel regarding the motion to dismiss and whether or not the legal requirements were met regarding giving proper notification." [Emphasis added] Certainly not artful; especially the phrase, **in an attempt.** Why would Board member Freeman say or Sergeant Walz write in that manner? In an **attempt,** like a steer? Or, words chosen in an attempt to **soften** the impact of doing an unlawful act? Or, what? If known to the Complainant when asked by Sergeant Walz, anything he wished to add, the response would have been a resounding yes! First, of course, why those particular words? "In an attempt." Either "legal advice" was being sought or not. Second, what words in SDCL 1-25-2(3) did Mr. Freeman use to justify talking about a "motion to dismiss" and/or "proper notification," without the public in earshot? Rest assured that Complainant would have pursued such dialogue with Sergeant Walz until convinced one way or another or turned away. The words "proposed" or "pending" and/or "litigation," taken as normally defined just cannot be stretched to provide cover for the South Dakota Water Management Board's obvious reluctance to be "open" and "transparent." Please

note that the South Dakota Supreme Court has admonished over and over and over about "words" and their "plain meaning." Recently in *IN RE: PETITION FOR DECLARATORY RULING RE; SDCL 62-1-1(6)*, 2016 S.D. 21, ¶ 9, "When engaging in statutory interpretation, we give words their plain meaning and effect . ..."

Next, on page four, lines 3-4, Sergeant Walz writes: "Freeman explained it was believed Ferebee failed to meet the threshold requirements." As noted above, if only Complainant would have been aware in a timely manner. So many questions, comments, retorts, responses. Question: "It was believed by who (whom)"? Question: What are the threshold requirements? Question: Did Board member Freeman cite any authority for threshold requirements? Question: Did Sergeant Walz forget to quote Board member Freeman or was he paraphrasing. Question: Did Board member Freeman use the word "threshold" during the interview? Question: Did Board member Freeman ever use or even allude to the words from statute, SDCL 1-25-2(3), "proposed," "pending," and/or "litigation?" Apparently not.

Finally, at least for now, on page 4, lines 6-8: "It appears the **intent** for the motion to enter executive session made by Freeman was done as so to meet and discuss with legal counsel (Naasz) regarding a question of legal procedure as it related to the aforementioned petition." [Emphasis added] A grammarian's nightmare: "**[W]as done as so to.**" Anyway, Sergeant Walz set forth: "It appears the intent?" Complainant would have peppered Sergeant Walz. Absolutely unbelievable! Were any of the above words actually spoken by Board member Freeman or was the entire passage penned by Sergeant Walz from his vantage point? Most specifically, did Board member Freeman utter the phraseology, "regarding a question of legal procedure?" Please note: Complainant certainly recognizes the right of an entity of South Dakota government to discuss legal procedure with counsel, in public. To the best of

Complainant's knowledge and experience the Pennington County Board of Commissioners questions/discusses "legal procedure" with the State's Attorney in OPEN session, repeat OPEN session, unless, of course, the county is actually being sued or is suing.

CONCLUSION

Sadly, Complainant was not a timely recipient of the narrative submitted to the Hughes County State's Attorney by Sergeant Walz of the Pierre Police Department. Moreover, Complainant was **blind-sided** during the August 31, 2017, Open Meetings Commission (OMC) hearing. Assistant attorney general, Mr. Matt Naasz, assigned as counsel to the South Dakota Water Management Board cited the Pierre Police Department, Sergeant Walz, narrative at least four (4) different times during the August 31, 2017, OMC hearing held in Mitchell, SD.

As noted, Complainant would have had more than a few responses to Sergeant Walz's narrative, if known when asked: "If there was anything he [Complainant Ferebee] wished to add that was not in the letter he had sent to the Hughes County State's Attorney or the accompanying complaint?" Of course, at this point, the dispositive inquiry: Would the outcome in Mitchell, SD on August 31, 2017, been different had Complainant had all the knowledge legally available to him along with adequate opportunity to respond?

RECOMMENDATION

Complainant recommends that the South Dakota Open Meetings Commission strike the entirety of the Pierre Police Department report by Sergeant Walz dated February 16, 2017, from the record in this matter. The "facts" in this matter have been conceded. Sergeant Walz's "opinions" and/or reporting of Mr. Freeman's "opinion" should not have appeared, if at all, without an opportunity for Complainant's responses to be included. Additionally, Complainant

recommends striking findings #5 and #6, from the Hughes County State's Attorney's letter dated May 2, 2017, to the Open Meetings Commission. "Finding" # 5: "According to Matthew Naasz ..." **Really!** "Finding # 6: "Rodney Freeman, ...says ..." **Really!**

Further, paragraph 10 of Board member Freeman's Affidavit should be stricken. He begins with: "It is my view ..." Clearly, prefatory words to an opinion which of course he goes on to proclaim. To the extent that Affidavits, as commonly used, are exclusive of affiant's "opinions," Mr. Freeman's # 10 should be stricken.

Respectfully submitted this 17th day of November, 2017.

George W. Ferebee

George W. Ferebee
11495 Gillette Prairie Road
Hill City, SD 57745
(605) 574-2637

AFFIDAVIT OF MAILING

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF PENNINGTON)

George W. Ferebee being first duly sworn upon oath, deposes and states: That he served the original along with a true and correct copy to be given to Mr. Matt Naasz of *COMPLAINANT FEREBEE'S RESPONSE TO THE HUGHES COUNTY'S MAY 2ND, 2017, LETTER WITH ATTACHED POLICE REPORT SUBMITTED TO THE SOUTH DAKOTA OPEN MEETINGS COMMISSION* upon the persons herein next designated, on the date shown below, by depositing in the United States Mail, first class postage prepaid, at Hill City, South Dakota, addressed to said addressees, to-wit:

Steve Blair
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501

Dated this 17th day of November, 2017.

George W. Ferebee
11495 Gillette Prairie Rd
Hill City, SD 57745

Subscribed and sworn to before me, the undersigned Officer, this 17 day of November, 2017.

SEAL LYNADA SPENCER NOTARY PUBLIC State of South Dakota SEAL

Lynada Spencer
Notary Public

(SEAL)
My Commission Expires: 06/12/2023

McFarlane, Jenna

From: Blair, Steven
Sent: Thursday, November 30, 2017 10:34 AM
To: silverfoxdriver@msn.com; Naasz, Matthew
Cc: McFarlane, Jenna
Subject: In re Water Management Board, OMC 2017-01
Attachments: SKM_36817112916221.pdf

Gentlemen,

The attached motion and brief were submitted yesterday by the Associated School Boards of South Dakota seeking amicus status in the Water Management Board matter. I note that hard copies were delivered or mailed to each of you. I wanted to let both of you know, after consultation with Chairman Krull, that the motion and brief will not be forwarded to the Commission members until a decision has been made as to whether the Commission has authority to accept amicus filings. The plan currently is for the Commission to discuss the matter at the beginning of the teleconference held regarding the WMB file, and if the Commission decides they have the authority to accept amicus filings at that time the brief will be emailed to each member for their review. This may necessitate a recess of some amount of time during the teleconference for Commission members to review the ASBSD brief.

Regarding scheduling, Chairman Krull currently has jury trials scheduled on December 21st, but he should know in the next day or two if he will have 12/21 available. If he is not able to clear his schedule, I will be in contact with you about scheduling alternate dates in January or February.

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

Sincerely,

Steven R. Blair
Assistant Attorney General

Office of the Attorney General
Mickelson Criminal Justice Center
1302 E. Highway 14, Suite 1
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MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

December 1, 2017

Steve Blair
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
BY HAND DELIVERY

Re: *In the Matter of Open Meeting Complaint 2017-01, Water Management Board – Hughes County*

Dear Mr. Blair:

Enclosed please find the South Dakota Water Management Board's Response to George Ferebee's November 17, 2017, submission. Mr. Ferebee has been sent a copy of this letter and the accompanying response.

Sincerely,

Matt Naasz
Assistant Attorney General

MN/jmm
Enclosure
cc w/enc: George Ferebee

STATE OF SOUTH DAKOTA

SOUTH DAKOTA OPEN MEETING COMMISSION

IN THE MATTER OF OPEN MEETING COMPLAINT 2017-01, WATER MANAGEMENT BOARD, HUGHES COUNTY	))))	WATER MANAGEMENT BOARD'S RESPONSE TO GEORGE FEREBEE'S NOVEMBER 17, 2017 SUBMISSION

Comes now the South Dakota Water Management Board ("Board"), through its undersigned counsel, and submits its Response to George Ferebee's November 17, 2017 submission. At the November hearing on this matter, this Commission granted Mr. Ferebee's motion for a continuance so that Mr. Ferebee could review the report of Sgt. Walz that was a part of this file. Apparently later at the hearing, the Commission and Mr. Ferebee engaged in scheduling conversation. Mr. Ferebee's submittal, and consequently this response, are results of that conversation.

In the recent submittal, Mr. Ferebee does nothing to address the propriety of the Board's motion to go into executive session. In fact, Mr. Ferebee does not believe that a state board such as the South Dakota Water Management Board should have the opportunity to discuss legal issues with an attorney in executive session. "Please note: Complainant certainly recognizes the right of an entity of South Dakota government to discuss legal procedure with counsel, in public." November 17 submission at 10.

The South Dakota Water Management Board requests this Commission to make its decision based on the record before it and the applicable law. The

Board will make every attempt to avoid the temptation of responding to Mr. Ferebee's rhetoric, focusing instead on the issue before this Commission.

One of Mr. Ferebee's comments must be addressed however. Mr. Ferebee requests the Commission "strike" portions of Sgt. Walz's report and portions of Mr. Freeman's affidavit. Mr. Ferebee presents no logical argument or legal authority for striking those portions of the record. The record before this Commission is complete, and there is absolutely no reason or authority for changing that at this point.

The background for this complaint is adequately set forth in the Board's initial response to the Complaint. In what will likely prove a Sisyphean effort to save the Commission's and parties' time, the background will not be set out in detail again.

At the August 31, 2017 hearing on this matter, it became evident that the relevant issue was the use of the phrase "for purposes of deliberation" in the motion to go into executive session made by Board member Rodney Freeman. None of the Commissioners seemed alarmed by the use of executive session by the Board to discuss with counsel the legal issue at hand. "They [Water Management Board] may consult with legal counsel and I don't believe the issue of whether it was pending or proposed litigation is relevant I think they can consult with legal counsel on such matters as they deem appropriate[.]" Hearing Transcript, p. 13, August 13, 2017. It was the phraseology of the motion that garnered concern.

Rodney Freeman made the motion to go into executive session. As his affidavit states, and his comments to Sgt. Walz support, the motion was made "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 parties." The record is clear that the "deliberation" intended in the motion was a conversation with counsel about the legal issues inherent in the pending motion to dismiss. It is this "deliberation" that has caused this Commission pause.

The record clearly reflects that the motion to go into executive session was made for the purpose of discussing a legal issue with the Water Management Board's attorney. To reprimand the Water Management Board for going into executive session to "deliberate" with legal counsel would be to unnecessarily elevate form over function. This Commission has previously refused to elevate form over function in such manner. *See e.g.*, In the Matter of Open Meetings Complaint 09-01A, City of Martin (South Dakota Open Meeting Commision, November 13, 2009) ("The law does not require any statement in particular to be made when a public entity moves to enter into executive session.").

A public body can go into executive session to discuss legal issues with the body's attorney. The relevant statute uses the word "consulting" with legal counsel. SDCL 1-25-2(3). This word implies a two-way street – a give and take regarding the legal issue being discussed. "Deliberate" carries the same

connotation. In fact, thesaurus.com includes "consult" as a synonym for the definition of "deliberate" meaning "to think about seriously, discuss." Thesaurus.com, http://www.thesaurus.com/browse/deliberate, last visited November 28, 2017. And one of the definitions of "consult" is: "to deliberate together." Merriam Webster's Collegiate Dictionary, at 248 (10th ed. 1996). The difference between "consulting" and "deliberating" is one of semantics.

It cannot be the case that public bodies are prohibited from discussing in executive session the legal advice they receive from counsel. Should it be this Commission's decision that executive session discussions with legal counsel are merely for the purpose of asking the attorney a question, and then returning into open session to discuss the attorney's answer – the protections of the attorney-client privilege will have been dissolved. A discussion in open session regarding the attorney's advice would necessarily lead to the disclosure of the attorney's communication. There would be no appropriate manner in which to maintain the confidentiality of attorney-client communications with public bodies. This Commission has made clear that it does not intend to interpret the open meetings laws in that manner. "To hold otherwise could result in nonsensical findings that a board may only discuss with their own attorney issues that the attorney has identified as problems that need to be addressed to protect the public, or avoid liability, in public session. The end result would be that every entity or person except a public board could exercise the attorney client privilege." In the Matter of Open Meeting Complaint 06-01,

Melrose Township (South Dakota Open Meetings Commission, September 29, 2006).

As pointed out in the Board's initial filing in this matter, no official action was taken during the executive session. There was no Board-member motion pending when the motion to go into executive session was made.[1] Following the executive session, a motion was made by Mr. Freeman to grant the motion to dismiss Mr. Ferebee's petitions for declaratory ruling. This motion passed unanimously. SDCL 1-25-2 prohibits official action in executive session. The Board clearly did not violate this prohibition. Instead, the Board returned to open session before any final action was taken. The conduct of the Board in this regard did not violate South Dakota's open meetings laws.

Furthermore, reprimanding the Water Management Board for going into executive session for the purposes of "deliberation" would chill state boards from going into executive session in order to obtain legal advice from their attorneys. Not only would public bodies be put on notice that the wording of their motions would be subjected to technical review by the Open Meetings Commission; but they would also be left to wonder whether or not there could be any discussion with their attorney in executive session. Such a determination would likely lead to public boards foregoing the use of executive session, even when appropriate, to obtain legal advice from their attorney. The result would be that public bodies of this State would be left to make legal

[1] This alone prevents a finding that the Board entered into executive session to "deliberate" as that word is used in the context of jury deliberations.

decisions without advice of counsel. South Dakota's open meetings laws do not suggest such a result.

The South Dakota Water Management Board respectfully requests this Commission dismiss the Complaint of Mr. Ferebee without issuing a reprimand.

Dated this 1st day of December 2017.

Matt Naasz
Assistant Attorney General

Attorney for Water Management Board

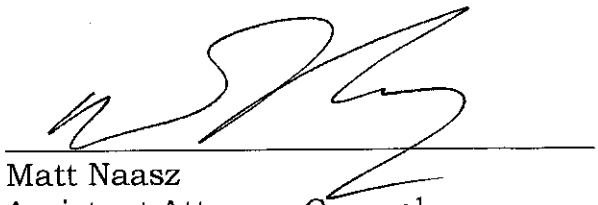
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 1, 2017, a true and correct copy of the Respondent Water Management Board's Response to George Ferebee's November 17, 2017 submission was served on the following by U.S. Mail, first class postage to:

George Ferebee
11495 Gillette Prairie Road
Hill City, SD 57745

and hand-delivered to:

Steve Blair
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501



Matt Naasz
Assistant Attorney General

Attorney for Water Management Board

STATE OF SOUTH DAKOTA

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MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

December 5, 2017

George W. Ferebee
11495 Gillette Prairie Road
Hill City South Dakota 57745

Matt Naasz
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501

Re: In the Matter of Open Meetings Complaint 2017-01, Water Management Board – Hughes County

Dear Mr. Ferebee & Mr. Naasz,

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 December 21st meeting. As you can see from the agenda, presentations regarding complaints will begin at 2:30 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 WATER MANAGEMENT BOARD – HUGHES COUNTY	)))))	OMC 2017-01 NOTICE OF HEARING

TO: George W. Ferebee, 11495 Gillette Prairie Road, Hill City, South Dakota 57745; Matt Naasz, 1302 E. Highway 14, Suite 1, Pierre, South Dakota 57501; Gerald L. (Gerry) Kaufman, Jr., Director of Policy and Legal Services, Associated School Boards of South Dakota, 306 E. Capitol Ave., Pierre, South Dakota 57501:

Please take notice that a telephonic hearing regarding the above referenced open meetings complaint will be held before the South Dakota Open Meetings Commission, on Thursday, December 21, 2017. Oral presentations regarding pending complaints will commence at 2:30 P.M. central time, or soon thereafter as matters may be heard, and proceed in the order noted in the attached agenda. The information necessary to access the teleconference is also included in the attached agenda.

Dated this 5th day of December, 2017.

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 WATER MANAGEMENT BOARD – HUGHES COUNTY	)))))	OMC 2017-01 CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Notice of Hearing issued in the above-captioned matter, was served by United States mail, first class, postage prepaid upon George W. Ferebee, 11495 Gillette Prairie Road, Hill City, South Dakota 57745, Gerald L. (Gerry) Kaufman, Jr., Director of Policy and Legal Services, Associated School Boards of South Dakota, 306 E. Capitol Ave., Pierre, South Dakota 57501; and personally served upon Matt Naasz, 1302 E. Highway 14, Suite 1, Pierre, South Dakota 57501.

Dated this 5th day of December, 2017.

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

Teleconference Meeting
December 21, 2017
2:30 p.m. Central Time

1. Approval of the Agenda

2. Approval of the Minutes of November 3, 2017 meeting.

3. Consideration of Pending Complaints

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

      Consideration of motion filed by Associated School Boards of South Dakota for leave to file as *amicus curiae*

      Oral Presentations:

      Complainant George W. Ferebee -15 minutes (a portion of this time may be reserved for rebuttal)

      South Dakota Water Management Board -15 minutes

4. Consideration of Findings of Fact and Conclusions of Law

   A. *In the Matter of Open Meeting Complaint 17-03, Edmunds County Board of Commissioners*

All items are scheduled for 02:30 P.M. Central Time. Scheduled items may be delayed or moved to a later agenda item at the discretion of the OMC.

If you wish to join this meeting by conference call please dial (312) 757-3121. You may attend the meeting in person at the Office of Attorney General, at 1302 E. Highway 14, Pierre, South Dakota.

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.