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SOUTH DAKOTA
OPEN MEETINGS COMMISSION

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IN THE MATTER OF OPEN MEETING
COMPLAINT 2024-08 STURGIS
CITY COUNCIL

=====

MONDAY, NOVEMBER 25, 2024
MATTHEWS TRAINING CENTER
523 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA 57501

COMMISSION MEMBERS PRESENT:

EMILY SOVELL, CHAIR
KATELYNN HOFFMAN
LANCE RUSSELL (by Teams)
MICHAEL SMITH
AUSTIN HOFFMAN

APPEARANCES:

As Counsel to the Commission: STEVEN R. BLAIR
Attorney General's Office
PO Box 70
Rapid City, SD 57702

1 MONDAY, NOVEMBER 25, 2024

2 CHAIRWOMAN SOVELL: We will get started back up here,
3 keep the meeting rolling forward. The next matter on the
4 agenda is Complaint Number 2024-08, it's the Sturgis City
5 Council meeting. Complainant is Tammy Bohn, represented by
6 Kellen Willert. Is Mr. Willert either on or here in person?

7 MR. WILLERT: Yes, this is Kellen Willert, I'm here
8 with my client.

9 CHAIRWOMAN SOVELL: Am I pronouncing it right, Bohn,
10 B-O-H-N?

11 MR. WILLERT: Bohn, think of John with a B.

12 CHAIRWOMAN SOVELL: Sorry about that. I will then go
13 ahead, and we will give you 15 minutes to present during the
14 oral presentation portion. A portion of that may be reserved
15 for rebuttal, if you are so inclined. And we will see if Mr.
16 Blair is ready with our timer here, and he is. So we will go
17 ahead and ask that the complainant go ahead and present. Thank
18 you.

19 MR. WILLERT: Before I get into it, can I clarify
20 whether anyone is appearing on behalf of Sturgis?

21 CHAIRWOMAN SOVELL: Is anyone personally present here
22 in the room or on line anywhere?

23 MR. BLAIR: This is Steve Blair. I did receive
24 communication from the City of Sturgis that they would not be
25 appearing and did not have counsel retained at this time.

1 MR. WILLERT: Okay, I'll just proceed and not -- won't
2 need to reserve any rebuttal time then. May it please the
3 board, again, my name is Kellen Willert. We have appeared
4 before you today on really two affidavits. There's six total
5 complaints in the two affidavits. The document titled
6 affidavit number one deals with two issues regarding taking
7 votes by a secret ballot. The first one, there was the mayor
8 of Sturgis abruptly resigned, and the council filled that
9 vacancy by voting by secret ballot. That was on March 4th, and
10 the votes were taken and counted by the finance officer and the
11 finance officer simply revealed the vote.

12 The next issue -- I guess there is two, but they also
13 installed the president and vice-president of the council on
14 May 6 by secret ballot as well. If you look at Exhibit 2
15 attached to affidavit number one, I have given you a copy of an
16 Ohio state Supreme Court case --

17 CHAIRWOMAN SOVELL: I'm going to hit pause. I'm
18 sorry, I'm going to hit pause here one moment. I should have
19 clarified this at the inception of the hearing here. There was
20 only one official action that was, as I read it, that was
21 turned over by the state's attorney for review. The others he
22 had determined there was no violations. Maybe I'll just ask
23 for point of clarification from you, is that what you
24 understood as well or did you understand that to be something
25 else?

1 MR. WILLERT: I understood that the state's attorney
2 found no merit on the two issues raised in affidavit number one
3 and that the state's attorney found merit in issues one and
4 four on affidavit number two. And it's my position that under
5 SDCL 1-25, I believe it's 7, because the state's attorney
6 forwarded you these materials, even though the state's attorney
7 did not see merit to some of the actions, this board still has
8 jurisdiction to address them, if it sees fit. That again is
9 1-25-7.

10 CHAIRWOMAN SOVELL: And maybe I misunderstood the
11 reference by the state's attorney on what was being referred
12 over for our review. Mr. Blair, point of clarification here,
13 if you would, to make sure we are all on the same page.

14 MR. BLAIR: Well, what Mr. Willert indicated as far as
15 the issues that were submitted by the state's attorney to have
16 merit is correct. The two issues that were forwarded to the
17 Commission for review were the first and the fourth on the
18 second complaint affidavit.

19 CHAIRWOMAN SOVELL: I didn't mean to cut you off, I'm
20 sorry. I wanted to make sure we all knew what we were dealing
21 with. If we could hone in on the two affidavits that were
22 referred by the State's Attorneys Office. Go ahead and
23 proceed, I'm sorry.

24 MR. WILLERT: Did you say two affidavits or affidavit
25 number two?

1 CHAIRWOMANN SOVELL: Steve, help me out here.

2 MR. BLAIR: It would be the two items on the second
3 affidavit that the state's attorney found merit to, which would
4 be item number one, my notes paraphrased, the May 6, 2024,
5 meeting where the Sturgis City Council went into executive
6 session without stating a purpose to the executive session,
7 that's what the state's attorney referred for one issue.

8 The other one dealt with the February 16th, 2023,
9 special meeting where there was an alleged violation of the
10 executive session. The special meeting executive session was
11 called for personnel, and there was some comments made by the
12 mayor about we will see what develops here tonight. The
13 executive session was held, after which the council adjourned
14 without comment. And I think the state's attorney essentially
15 was questioning whether there was actually a discussion of
16 competence, et cetera, of a public employee.

17 I would address Mr. Willert's previous point about the
18 Commission having jurisdiction over all the items, even the
19 items that the state's attorney has found no merit to. And the
20 Commission has never interpreted their statutes that way. The
21 decision by the state's attorney is an election whether to
22 prosecute criminally or forward to the Commission, and once
23 that election is made, the Commission believes it has
24 jurisdiction only over those issues that the state's attorney
25 has found merit.

1 MR. WILLERT: Okay, I understand that position. Thank
2 you, Mr. Blair. I would just urge the Commission to consider
3 or reconsider taking up those other matters in the
4 investigatory file, but I'll move on.

5 So in terms of affidavit number two, number one, the
6 first issue raised related to multiple reasons, different
7 reasons for entering into executive session. A plain reading
8 of SDCL 1-25-2, the bottom paragraph in there, I think it's the
9 second to last -- excuse me, third to last sentence in that
10 statute indicates that it's a closed meeting and it, quote, is
11 restricted to the purpose specified in the closure motion,
12 period, end quote. That's not plural, and that makes sense.
13 If you are going to go into executive session, you should state
14 the purpose, go into exec, stay within that topic. If you have
15 another reason to go into exec, then you should come out and
16 back in.

17 In this Commission's determination in 2005-03 relating
18 to the City of Gregory, you were very clear that you cannot
19 deviate from the topic. So again, you cannot enter into
20 executive session for multiple reasons. And the motion itself,
21 if you review the materials, was simply insufficient. They
22 need to state that motion. That's why that third to last
23 sentence in the statute is there, so that the public knows at
24 least the category that they are discussing.

25 Now, this particular executive session lasted one and

1 a half hours. The city's written response dated September 26th
2 argues that the purpose of that meeting was reflected in the
3 meeting minutes, and he includes the meeting minutes. But I
4 ask you how can it be in the minutes when that's not what
5 happened in the open session? Certainly a municipality cannot
6 cure a violation of the open meetings complaint by doctored
7 minutes. On issue number one for affidavit number two, I ask
8 that this body find a violation and issue an appropriate
9 reprimand.

10 I'll move on to the issue number four in the second
11 affidavit relating to the February 16th, 2023, executive
12 session. Also in your materials is a letter from me dated May
13 13th of this year that outlines our position. I will try not
14 to beat a dead horse too badly for you. However, the city
15 released a press release and made it very public in Exhibit 11
16 that you have, saying that they would have this special meeting
17 and the council would be looking at the question of whether or
18 not to hire a new city manager or a city administrator.

19 Then the chair at the meeting, Beka Zerbst, she
20 expressly stated, this is the last page of that letter of mine,
21 quote, as shown in the agenda, no anticipated action, I think
22 it's fair to say that, you know, there is action coming down on
23 Tuesday, I imagine, but we will see what develops here tonight
24 and see which direction the council desires to go.

25 So again, everything that was known by the public at

1 the time related to the council discussing whether or not they
2 should hire a city manager or city administrator, which as we
3 all know do have some similarities but a lot of very important
4 differences as well. Can I get a check on my time please?

5 MR. BLAIR: 10 minutes remaining.

6 MR. WILLERT: Thank you. So this particular executive
7 session lasted for about two hours and 42 minutes, two hours
8 and 42 minutes for an executive session on what the public knew
9 was a policy matter, do we do a city manager or city
10 administrator. There is no exceptions in 1-25-2 to have this
11 secret meeting and hold these discussions.

12 Now, the city's written response dated September 26th
13 raises more questions than it does answers. In their response,
14 they say, well, what really was discussed was not what was
15 presented to the public, not what was portrayed to the public,
16 but instead they were looking at the former city manager,
17 Daniel Ainslie's two letters of resignation, apparently one was
18 public, one was confidential.

19 So nowhere in their closure motion do they indicate
20 this is what's going to be discussed. Certainly there's no
21 express provision to have executive session on a severance
22 discussion. And it's also worth pointing out that the letter
23 attached is not evidence, they are not official minutes or
24 anything like that, that we have presented, it's not
25 substantiated by any supporting affidavit.

1 There is some fairly bare bones allegations in the
2 city's written response. It also says that in Mr. Ainslie's
3 letter, which is attached for you, he was demanding severance.
4 I could not find the word severance in that attached letter.
5 It's not in there. There is no provision for negotiating
6 resignation terms, and it's also confusing whether he's
7 resigning or if he's firing himself. He basically says in the
8 letter I consider myself to have been terminated.

9 So that letter presented by the city, like I said,
10 raises more questions than answers. Either the city spoke
11 about and held discussions in executive session relating to
12 city manager versus city administrator policy decisions. That
13 was inappropriate. If the city held executive session and
14 discussed Mr. Ainslie's resignation or termination or however
15 they want to coin it, severance, that was also impermissible
16 based on the procedure that they used.

17 In direct disregard to the press release and the
18 statements that Ms. Zerbst said at the meeting, they either
19 entered into executive session for two hours and 42 minutes for
20 a totally improper purpose or they completely misled the public
21 by saying they were entering for an improper purpose but then
22 actually entering for a different improper purpose.

23 So that's all that I have on issues one and four in
24 terms of affidavit number two. Again, if you are willing to
25 consider some of those other issues raised, I would be happy to

1 address those. Besides that, I'm happy to answer any questions
2 you may have.

3 CHAIRWOMAN SOVELL: Commission, do we have any
4 questions as you are reviewing through your materials after
5 hearing that oral presentation? Hearing no questions and
6 having no one to present at this portion of the hearing on
7 behalf of the city, we will move into deliberation.

8 Commission members, anybody have any concerns or
9 further information they want to explore? If not, are we
10 inclined -- do you want this to be voted on in separate
11 sections as well or do you want this as a whole?

12 MR. BLAIR: I think, based on the precedent we
13 established in the last matter, we should vote on them
14 separately.

15 CHAIRWOMAN SOVELL: Let's go ahead then, Commission,
16 let's discuss them in the order of those that the state's
17 attorney referred to us for review. The first was the
18 violation at the May 6, 2024, when the Sturgis City Council
19 went into executive session without stating the purpose. A
20 review of that video per the state's attorney's investigation
21 did confirm that fact. I think that the information presented
22 by counsel here today confirms that as well. Is someone
23 inclined on that particular issue to make a motion?

24 MR. HOFFMAN: The thing that I'm struggling with is
25 not whether there was a reason or not a reason stated to go

1 into executive session. Frankly, it's the statute, this might
2 be something that needs to be possibly looked at, I think this
3 next session. When you read the statute specifically, that
4 last paragraph, an executive or closed meeting must be held --
5 an executive or closed meeting must be held only upon a
6 majority vote of the members of the public body present, and
7 voting and discussion during the closed meeting is restricted
8 to the purpose specified in the closure motion.

9 What it doesn't say -- you can infer there that there
10 should be something specified in the closure motion, but I
11 think when you take a pretty strict reading of that, it doesn't
12 say that there has to be a purpose specified in the closure
13 motion. I would like to see that language in that statute, but
14 I think if we are going to infer, which I think is a fair thing
15 to do, that there is supposed to be a purpose specified in the
16 closure motion, there was not. So because of that, I will make
17 a motion that they did violate the open meetings law because a
18 reason was not specified.

19 CHAIRWOMAN SOVELL: We have a motion pending. Is
20 there further discussion on the motion? If none, I would ask
21 for a second. Is there anyone inclined to second?

22 MS. HOFFMAN: I agree, this is Kate Hoffman, I agree
23 with the comments made by Mr. Hoffman. And I think as counsel
24 pointed out, that last paragraph, that specific sentence, there
25 is also a response letter that essentially admitted that they

1 failed to announce the purpose of the executive session. And I
2 think if you strictly read that statute, that a violation did
3 occur here; so for that reason, I would second Mr. Hoffman's
4 motion.

5 CHAIRWOMAN SOVELL: We have a motion, we have a
6 second. I will call for a vote on that. All in favor of the
7 motion, signify by saying "aye."

8 (Motion passed unanimously.)

9 CHAIRWOMAN SOVELL: Anyone opposed, signify by saying
10 "aye." There being none, unanimous vote supports the motion
11 and it is passed.

12 On the second allegation that was presented for our
13 review by the State's Attorneys Office, that was the allegation
14 of the violation of executive session at the February 16th,
15 2023, special meeting. The special meeting was announced for
16 personnel, but also stated it will be important to consider
17 questions of hiring either a city manager or city
18 administrator.

19 There was a review of the videos by the state's
20 attorney. Review of the video of the opening of the meeting
21 finds the mayor stating I think it is fair to say, you know,
22 there is action coming down on Tuesday, as was already
23 reiterated by counsel, I imagine, but we will see what develops
24 here tonight and see which direction the council decides to go.

25 After the executive session, the meeting was adjourned

1 without any comment on that executive session, and it goes
2 forward and elaborates that was the other allegation made that
3 was for our review and determination of whether a violation
4 occurred. I will open that up for discussion.

5 MR. SMITH: Michael Smith. I think as I looked
6 through it, 1-25-2(1) is intended to protect people, either
7 employees or prospective employees. What I am struggling with
8 is figuring out how to fit in, it seems as if one of the major
9 components of the reason for having the special meeting was to
10 determine what type of government to set up, rather than a
11 specific person as it related to their ability to handle the
12 duties, whichever route they decided to go.

13 For that reason, I think the statement of the mayor
14 himself as they went into executive session confirms that. For
15 that reason, I think I'm struggling finding a way that this
16 could fit squarely into 1-25-2(1).

17 CHAIRWOMAN SOVELL: I also agree with that. I think
18 you are right, I think we are looking at the protection of
19 those individual items or individual persons or individual
20 contracts and not the broader topic that was presented or
21 appears to have been presented at this particular meeting, and
22 there is nothing that refutes that. I agree.

23 MR. SMITH: Then I guess I will then at that point
24 make a motion that a violation occurred.

25 CHAIRWOMAN SOVELL: We have a motion. Any further

1 discussion? If none, I will call for a second on that motion.

2 MR. HOFFMAN: I will second that.

3 CHAIRWOMAN SOVELL: We have a motion, we have a
4 second. All of those in favor of the motion pending, signify
5 by saying "aye."

6 (Motion passed unanimously.)

7 CHAIRWOMAN SOVELL: Those opposed, signify by saying
8 "aye." Hearing none, the motion passes by unanimous vote, and
9 we will ask Mr. Blair to proceed with the findings and issue
10 the appropriate public reprimand associated there with, and we
11 will review those at our next meeting.

12 (Whereupon, the proceedings were concluded.)

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C E R T I F I C A T E

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Carla A. Bachand, RMR, CRR, Freelance Court
Reporter for the State of South Dakota, residing in Pierre,
South Dakota, do hereby certify:

That I was duly authorized to and did report the
proceedings in the above-entitled cause;

I further certify that the foregoing pages of this
transcript represents a true and accurate transcription of my
stenotype notes.

Dated this 5th day of December 2024.

/s/ Carla A. Bachand
Carla A. Bachand, RMR, CRR
Notary Public
My commission expires: June 10, 2030