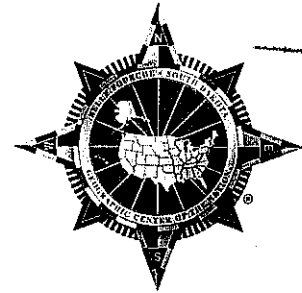


Attorney General  
428598  
MAR - 9 2020

**OFFICE OF THE STATE'S ATTORNEY  
BUTTE COUNTY, SOUTH DAKOTA**

**CASSIE J. WENDT**

839 5TH AVENUE  
BELLE FOURCHE, SOUTH DAKOTA 57717  
TEL. (605)-892-3337  
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BCSA@BUTTESD.ORG



**LEELLEN MCCARTNEY**  
DEPUTY STATE'S ATTORNEY  
DEPUTYBCSA@BUTTESD.ORG

7 March 2020


South Dakota Attorney General's Office  
Attn: Open Meetings Commission  
1302 E. Hwy 14  
Suite 1  
Pierre, SD 57501-8501

RE: Open Meeting Complaint—Belle Fourche City Council

Dear Sir / Ma'am,

On 13 January 2020, we received a notarized complaint from the editor of the Black Hills Pioneer alleging that Belle Fourche City Council committed an open meeting violation at a City Council Meeting on 16 December 2019. We have inquired into the complaint and concluded there was an unintentional violation of SDCL 1-25-2. We do not recommend criminal prosecution, but since there is a violation have forwarded the complaint to you for action. A copy of the Inquiry Report, and its exhibits, is attached. We have made a recommendation for disposition, which is also contained in the Inquiry Report. Please let me know if you have any questions or concerns.

Sincerely

  
LeEllen McCartney  
Butte County Deputy State's Attorney

### ***Inquiry into Open Meeting Complaint—Belle Fourche City Council***

On 10 January 2020, the Black Hills Pioneer, a local newspaper, sent a written letter to the Butte County State's Attorney alleging the Belle Fourche City Council had violated the Open Meeting Act. A copy of the letter is attached as Exhibit 1. The letter asked for an Open Meetings Inquiry into an Executive Session held during a regularly scheduled City Council meeting on 16 December 2019. A copy of the minutes of that meeting is attached as Exhibit 2. The Butte County State's Attorney received the letter on 13 January 2020, and immediately opened the inquiry and began to gather information. The Butte County State's Attorney's Office met with and interviewed two City Councilmen, the City Mayor, and a reporter from the newspaper. Summaries of those interviews are attached as Exhibits 3-6. Exhibit 7 is a copy of a letter describing the HVAC issues.

***Date of Violation:*** The complaint alleges the violation occurred at the 16 December 2019 Belle Fourche City Council Meeting.

***Statement of Material Facts:*** The Belle Fourche City Council voted to go into Executive Session toward the end of their regularly scheduled meeting on 16 December 2019. The Minutes describe the Session as one for "Contractual/Public Safety" citing SDCL 1-25-2(4) & (6). The Executive Session lasted thirty minutes. After returning to regular session, the City Council voted to declare the Belle Fourche Area Community Center (Belle Fourche Recreation Center) HVAC System needed emergency repairs "in the name of public health and safety." The Council also voted to award an emergency repair contract for the HVAC work to a firm that had an existing maintenance contract with the City.

The Newspaper alleges that the Executive Session was not authorized by statute as an emergency meeting to discuss public safety. The Newspaper also alleges two Councilmen, Troy Shockey and James Ager, questioned whether the Executive Session was proper. The two Councilmen deny they questioned the propriety of the Executive Session to anyone.

Councilman Troy Shockey was not present at the 16 December 2019 meeting and had no information about why the session was closed. Councilman James Ager said the Executive Session was appropriate to discuss emergency repairs to the Recreation Center's HVAC system, because failure of the system could potentially cause danger or damage to the Center and to surrounding neighborhoods. Mr. Ager does not recall anyone objecting to the Executive Session. Mr. Ager believes it is the first time the City used the "new" emergency provision found in SDCL 1-25-2 as the basis for an Executive Session. Belle Fourche Mayor, Gloria Landphere, also said the Executive Session was called to discuss the HVAC system, since the failure of the system could constitute an emergency. Ms Landphere said an Executive Session was necessary to fully and freely discuss the problems with the failing HVAC system without releasing information that would panic the public, given there were potentially harmful chemicals, such as chlorine, involved. She felt there could have been catastrophic harm to the public if the emergency had not been resolved with an emergency maintenance contract.

Ms Lacey Peterson is a reporter for the Black Hills Pioneer. She normally covers Belle Fourche City Council meetings, although she was not present at the meeting on 16 December 2019. Ms Peterson became concerned about the Executive Session after reviewing the public tapes of the City Council meeting and approached her Editor about her concerns. She also approached city council members and the Mayor about the meeting. According to Ms Peterson, Councilman

Ager expressed concerns about the purpose of the meeting in text messages. She also met with the Mayor, the City Finance Officer and the City Engineer and was told that the reason an Executive Session was appropriate was because the topic involved the public and the safety of the public.

***Concise Statement of Legal Issues Presented:*** At issue is the interpretation of SDCL 1-25-2 and SDCL 1-27-1.5(8) and (17) which are cited in subsection (6) of SDCL 1-25-2. The City Council minutes cite subsections 4 and 6 of SDCL 1-25-2 as the reason for going into Executive Session. Subsection 4 permits executive sessions when there is a need to prepare for contact negotiations with employees or employee representatives. This subsection is commonly used to close official meetings for discussions regarding collective bargaining agreements, not to discuss negotiations for a contract to perform emergency maintenance on a public building. Subsection 6 of SDCL 1-25-2 authorizes an Executive Session to discuss information listed in SDCL 1-27-1.5(8) and (17). SDCL 1-27-1.5(17) is not applicable to the discussion here, as there was apparently no discussion of emergency or disaster response plans or protocols, nor did the Council discuss safety or security audits, reviews, emergency response personnel or the location of weapons or ammunition or nuclear, chemical, or biological agents or military or law enforcement personnel. SDCL 1-27-1.5(8) concerns “information pertaining to the protection of the public or private property and any person on or within public or private property” and has a list of inclusive items. The primary issue here is whether the City Council’s decision to go into Executive Session to discuss the HVAC system at the City’s Recreation Center falls within this subsection.

***Other Pending Litigation:*** There is no litigation pending on this issue. The law firm of Bennett Main Gubbrud & Willert, P.C. represents the City as City Council.

***State’s Attorney’s Conclusions:*** We conclude there has been a technical violation of SDCL 1-25-2, however the violation was unintentional and was a result of a misinterpretation of statute.

The South Dakota Legislature amended SDCL 1-25-2 in 2019, adding subsection (6). (HB 1048, signed 13 February 2019.) Subsection (6) refers to SDCL 1-27.1.5, which is a statute regarding public records and delineates those records not subject to the release under the requirements of the Public Records Act. The Legislature also amended this statute in 2019, amending subsection (8), the subsection referenced in SDCL 1-25-2. (SB 59, signed 21 March 2019.) Together, these sections protect information, the release of which would constitute a harm to public or private property, or to any person “on or within” public or private property. Since these additions and amendments are recent, there are no cases or administrative decisions interpreting the scope of the requirements.

Several States have passed similar statutes authorizing Executive Sessions to discuss and address emergency communications, security issues, natural disasters, or public health and safety issues. *See*, Ann Taylor Schwing, *Open Meetings Laws*, 3d Ed., Fathom Publishing, 2011, §§ 7.82-7.84, p. 782-4, and statutes cited therein. The discussion of these statutes leads to the conclusion that similar statutes passed by other States permit closing governmental meetings to address certain information, when disclosure of that information would result in some harm to the public or when there would be a discussion of sensitive information that may harm the public, should the information be generally released. South Dakota’s statute appears to have the same focus. SDCL 1-27-1.5(8) reads:

(8) Information pertaining to the protection of public or private property and any person on or within public or private property including:

- (a) Any vulnerability assessment or response plan intended to prevent or mitigate criminal acts;
- (b) Emergency management or response;
- (c) Public safety information that would create a substantial likelihood of endangering public safety or property, if disclosed;
- (d) Computer or communications network schema, passwords, or user identification names;
- (e) Guard schedules;
- (f) Lock combinations; and
- (g) Any blueprint, building plan, or infrastructure record, regarding any building or facility that would expose or create vulnerability through disclosure of the location, configuration, or security of critical systems of the building or facility.

It is our opinion that a discussion of existing problems with the Recreation Center's HVAC system that necessitated issuing an emergency contract for repairs does not fall under any of the categories of information listed in SDCL 1-27-1.5(8). That there were problems with the HVAC system was general knowledge. That the HVAC problems may have been severe and may have necessitated emergency repairs, however it does not appear that a discussion of those problems would have disclosed any vulnerability that would mitigate or prevent criminal acts, nor was that information that required an emergency management response, disclosed computer information, guard scheduled, or lock combinations. (SDCL 1-27-1.5(8)(a)-(b) and (d)-(f)). Nor did the discussion in the Executive Session have the potential for exposing vulnerabilities or the security of critical systems in the Recreation Center. (SDCL 1-27-1.5(8)(g)).

The City asserts that the information discussed in the Executive Session was such that it would create the substantial likelihood of endangering public safety or property, if disclosed. (SDCL 1-27-1.5(8)(c)). The City claims that a discussion of the potential for harm to persons and property because swimming pool chemicals are used in the swimming pool and that the HVAC system may have had an impact on those chemicals was sufficient to trigger need for the Executive Session. As Mayor Landphere said, there was a need to discuss an emergency contract without creating public panic.

Given the presumption that meetings should be public, especially when addressing fiscal issues, we do not believe that the need to discuss the reasons for an emergency maintenance contract is sufficient grounds for an Executive Session. SDCL 1-27-1.5(8)(c) is designed to prevent release of information that would "create a substantial likelihood" of "endangering public safety or property." The need to avoid public panic, or to prevent information about pool chemicals used in a building with a public pool is not sufficient to trigger this provision, especially when the discussion is more geared toward the need for an emergency maintenance contract.

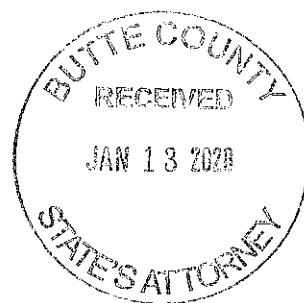
It is also our conclusion that there was no intent to violate the Open Meeting Act. The City misunderstood the provisions of the newly enacted SDCL 1-25-2 and how the incorporated

statute (SDCL 1-27-1.5(8)) is restricted to situations where there is a real and present danger to the public or the threat of that danger from the release of certain categories of information. It is our belief that the City interpreted the “public danger” justification for an Executive Session too broadly and used that to close the meeting. Under the City’s interpretation, any information that could have a negative impact on the public, or could cause “panic,” would be reason for closing an open meeting. In our opinion, the proper remedy for this misinterpretation would be a requirement for open meeting training for the City Council, at a regularly scheduled City Council Meeting, so that the Council would be properly trained on the reasons an open meeting can be closed. This training would encompass both old and new provisions and would be beneficial in ensuring that technical violations of the Open Meeting Act, such as occurred here, do not reoccur.

***State’s Attorney Statement of Legal Issues to be Considered by the Commission:***

Whether a discussion regarding the need for an emergency contract for critical repairs to the infrastructure of a public building is sufficient to trigger the provisions of SDCL 1-25-2, which incorporates SDCL 1-27-1.5(8)©, so as to permit a City Council to convene an Executive Session; or does the statute require a specific finding that the discussion would necessarily disclose information that would create a substantial likelihood of endangering public safety or property.

## Exhibit 1



Jan. 10, 2020

Ms. Cassie Wendt  
Butte County State's Attorney  
849 5th Ave.  
Belle Fourche SD 57717

Dear Ms. Wendt

I am writing you on behalf of the Black Hills Pioneer, to formally request you begin an open meetings violation complaint inquiry against the city of Belle Fourche.

On Dec. 16, the Belle Fourche City Council held a regularly-scheduled meeting. During this meeting the board went into executive session for contractual and public safety matters citing SDCL 1-25-2(4) and SDCL 1-25-2(6). The board was in executive session for approximately ½ hour.

Upon its return to regular session the council voted to declare the Belle Fourche Area Community Center HVAC system in need of emergency repairs for public health and public safety due to the premature failure of the system. Additionally, the council approved the signing of an emergency repair contract with Rasmussen Mechanical.

- SDCL 1-25-2(4) permits going into executive session for, "Preparing for contract negotiations or negotiating with employees or employee representatives." However, during the executive session, no negotiations were held. Councilmen James Ager and Troy Shockey confirmed this.
- SDCL 1-25-2(6) cites 1-27-1.5(8) and 1-27-1.5(17). These statutes pertain to public safety.

1-27-1.5(8) lists a number of exemptions from the public regarding public safety including response plans, emergency management, schedules, public safety information that would create a substantial likelihood of endangering public safety or property, if disclosed, and more.

1-27-1.5(17) exempts the public disclosure of response plans, locations of sensitive items, and safety reviews.

We believe that the unexpected failure of an HVAC system at the BFACC does not rise to the level of burden allowed in these exemptions.

Upon further discussion with Ager and Shockey, both said they believe the executive session was not warranted and the discussion should have been held in open session.

I respectfully request that you open an open meetings investigation. I understand that you can also pass the issue along to the Open Meetings Commission for investigation.

Please inform me to the status of this investigation in a timely manner.

Thank you for your consideration.

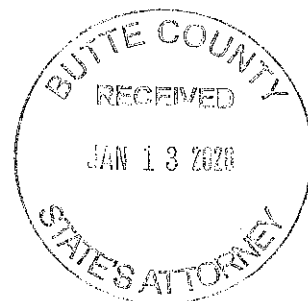
Respectfully



Mark Watson  
Managing editor, Black Hills Pioneer

Jami Allert  
Butte County  
My Commission expires  
3-21-2023

Jan. 10<sup>th</sup> 2020





## Exhibit 2

Minutes for the City of Belle Fourche  
511 6<sup>th</sup> Ave  
Belle Fourche, SD 57717

The Common Council of the City of Belle Fourche met in Regular Session with Mayor Gloria Landphere presiding.

Members present were:

First Ward Council Members: Monte Talkington

Second Ward Council Members: Travis Martin and Annie Reich

Third Ward Council Members: James Ager and Vern Hintz

Fourth Ward Council Members: Randy Schmidt and Bob Somervold

Absent: Troy Shockey

Also present: City Attorney Kellen Willert, Interim City Engineer Steve Nafus, Police Lieutenant Ryan Cherveney, Public Works Director Dirk Hoffman, Tri-State Museum Director Kristi Thielen, Airport Board President Stan Harms, Black Hills Roundup Chairman Keith Anderson, Project Manager Jason Carlson with Rasmussen Mechanical and Assistant Finance Officer Jason LaFayette

### AGENDA

1. The meeting was opened with the Pledge of Allegiance.
2. Motion Schmidt, second Martin to adopt the Agenda. Motion carried.
3. Motion Reich, second Somervold to approve the minutes for the Regular Meeting of December 2, 2019. Motion carried.
4. Mayor's Report.
  - A. Black Hills Roundup Chairman Keith Anderson announced that for the second year in a row the Black Hills Roundup won the PCRA Medium Outdoor Rodeo award for 2019 at Las Vegas last week. While in Las Vegas committee members attended several seminars and conferences and were able to book several acts through the 2023 BHR.
  - B. Light up the Night will be Saturday, December 21<sup>st</sup> with Stagecoach rides beginning at 4:15 P.M., the Cowboy Band Community Chili Feed and Tri-State Museum & Visitor Center Open House at 5:00 P.M., Parade of Lights at 6:00 P.M. and Fireworks at 7:00 P.M.
5. Community Input.

### Next Meeting Date/Reports

**City Council** – Special End of Year Meeting Friday, December 20, 2019 at 5:00 P.M. – Council Chambers

**Airport** – Third Wednesday Quarterly, January 15, 2020 at 6:00 P.M. – City Hall Conference Room

**Ambulance** – Third Thursday, December 19, 2019 at 5:30 P.M. – Ambulance Hall

**Community Center** – TBD

**Chamber of Commerce** – Wednesday, January 8, 2020 at 7:00 A.M. – Chamber

**CoNBA** – First and Third Tuesday, January 7, 2020 at 5:30 P.M. – AmericInn Breakfast Room

**\*Visitor's Center & Museum** – Second Tuesday, January 14, 2020 at 5:00 P.M. – Council Chambers – Council Chambers - In November there were 398 visitors. The November First Saturday Brunch, "Water Wars of Butte County" had 95 people in attendance. Family Fun Day, "Farmer and Food," was on November 17<sup>th</sup> and had several Hills Area families attending. The new mini exhibit "Let it Snow! Let it Snow! Let it Snow!" has had a good response. The Museum and Visitor Center is undergoing a reorganization and realignment process to become ADA compliant and better serve all their visitors. The Museum will be closed on January 2<sup>nd</sup> and 3<sup>rd</sup> for annual cleaning and will reopen for First Saturday Brunch, "First Strike Doolittle Raiders" on January 4<sup>th</sup> at 10:00 A.M.

**\*Revitalization** – Second Thursday, January 9, 2020 at 12:00 P.M. – City Hall Conference Room – Several nominations were received for the Annual Christmas Lighting Contest and three winners have been announced. 1<sup>st</sup> place: David and Crystal Sowell, 2<sup>nd</sup> place: John and Brenda Chayka, and 3<sup>rd</sup> place: Scott and Christine Biegert.

**\*Economic Development** – Second Wednesday, January 22, 2020 at 7:00 A.M. – 5th & Grant Plaza – The annual meeting will be on January 15<sup>th</sup>, 2020 at Grap's Burgers & Brews. Social hour starts at 5:00 P.M. and dinner will be at 6:00 P.M., new officers will be elected at this time. The membership campaign is in full swing, and the student build home on Ridgeview Road is progressing well. Economic Development contributed \$1,500 to the high school's dual credit scholarship program which equates to ten \$150 scholarships for Belle Fourche students.

**Legal-Finance** – Second and Fourth Monday, December 23, 2019 at 5:15 P.M. – City Hall Conference Room

**\*Library** – First Tuesday, January 7, 2020 at 5:00 P.M. – City Hall Conference Room – November circulation was 12,209. December Storytime was held on December 10<sup>th</sup> had approximately 25 in attendance.

**Planning & Zoning** – Wednesday, January 8, 2020 at 4:00 P.M. – Council Chambers

**Police** – Second Tuesday, January 14, 2020 at 5:15 P.M. – Council Chambers

**Public Works** – Second and Fourth Monday, December 23, 2019 at 6:00 P.M. – Council Chambers

**Rail Authority** – Annual Meeting, January 8, 2020 at 3:00 P.M. – 5<sup>th</sup> & Grant Plaza

### **PUBLIC HEARINGS**

1. Public Hearing for The Leaky Pot Café's Special Malt Beverage License for the Great Gatsby New Year's Eve Celebration to be held at Venue 519 on December 31, 2019. No one present in support or against.
2. Public Hearing for Renewal of Pawn Broker License: Owner/Applicant: Keith Rodgers/KCR Enterprises DBA Dakota Pawn, 836 5th Avenue, N50'S200', Block 61, Original Townsite, City of Belle Fourche, Butte County, South Dakota. No one present in support or against.
3. Public Hearing for renewal of Taxicab Service and Taxicab License: Owner/Applicant: Amanda Cole DBA Anytime Taxi. No one present in support or against.
4. Public Hearing for renewal of Taxicab Service and Taxicab License: Owner/Applicant: Krystel Frasier DBA Lyft. No one present in support or against.
5. Public Hearing for renewal of Taxicab Service and Taxicab License: Owner/Applicant: Derrick Lehto DBA Canyon Cab Co. No one present in support or against.

### **CONSENT AGENDA**

The following items were discussed by the appropriate Council Appointed Committee / Board, with membership including at least one City Council Member, and unanimously recommended, by the quorum, for approval, and placed on the consent agenda for final action to be taken on all items by a single vote. Any item may be removed from the consent agenda by the Mayor or a Councilperson for separate consideration.

#### **Airport Board**

Nothing at this time.

#### **Community Center Committee**

1. Recommend approval to hire Nathan Velander as full-time director of the Belle Fourche Area Community Center upon successful completion of a background check and drug screen. It is further recommended Mr. Velander be hired at Grade D12, S3 – \$46305.24 annual salary with the possibility of a step upon a satisfactory training review. Mr. Velander will begin in this position as soon as possible after January 1, 2020. (Item pulled and placed on Regular Agenda as Item .5)

#### **Legal Finance Committee**

Nothing at this time.

#### **Library Board**

Nothing at this time.

#### **Museum Board**

Nothing at this time.

### Planning and Zoning Board

Nothing at this time.

### Police Committee

2. Recommend approval to order a Stalker Dual DSR Radar in the amount of \$2,895. This is a 2020 budgeted item and a portion of the amount will be reimbursed from the 2020 Highway Safety Grant.
3. Recommend approval to purchase a Whelen Legacy Duo Light Bar in the amount of \$3,300 from MES Companies in Sioux Falls, South Dakota. This is a state bid item and budgeted for 2020.
4. Recommend approval to purchase 12 Officer Body Cameras from Martel Electronics. The body cameras will come with a 24-terabyte storage system. The purchase amount will be \$7,999 and is a budgeted item for 2020. The current body camera system is three (3) years old and contracts will require paid storage going forward.

### Public Works Committee

5. Recommend authorization for the City Attorney to draw up a permit to occupy the right-of-way on Wood Road.
6. Recommend approval for the Mayor to sign application for Bridge Improvement Grant Funds.
7. Recommend approval of Resolution 31-2019: Authorizing Submission of Applications.

#### BRIDGE IMPROVEMENT GRANT PROGRAM RESOLUTION 31-2019 AUTHORIZING SUBMISSION OF APPLICATIONS

**WHEREAS**, City of Belle Fourche wishes to submit an application(s) for consideration of award for the Bridge Improvement Grant Program:

STRUCTURE NUMBER(S) AND LOCATION(S):

SN 10-096-374 located at the End of Roundup Street in Belle Fourche, SD

and **WHEREAS**, NA certifies that the project(s) are listed in the county's Five-Year County Highway and Bridge Improvement Plan\*;

and **WHEREAS**, City of Belle Fourche agrees to pay the 20% match on the Bridge Improvement Grant funds;

and **WHEREAS**, City of Belle Fourche hereby authorizes the Bridge Improvement Grant application(s) and any required funding commitments.

**NOW THEREFORE BE IT RESOLVED:** That the South Dakota Department of Transportation be and hereby is requested to accept the attached Bridge Improvement Grant application(s).

Vote of Commissioners/Council: Yes X No       

Dated at Belle Fourche, SD, this 16<sup>th</sup> day of December 2019.

\*NOTE — not applicable for cities applying for the grant — simply mark 'NA' Minimum required is 20%; must match percent shown on application.

8. Recommend approval for the Mayor to sign the DOT funding agreement for structure 10-096-374.

Motion Talkington, second Reich to approve the consent agenda. Councilman Martin requested to move item number 1 to the Regular Agenda. Motion carried.

### REGULAR AGENDA

- 0.5 Motion Martin, second Talkington to recommend approval to hire Nathan Velander as full-time director of the Belle Fourche Area Community Center upon successful completion of a background check and drug screen. It is further recommended Mr. Velander be hired at Grade D12, S3 – \$46305.24 annual salary with the possibility of a step upon a satisfactory training review. Mr. Velander will begin in this position as soon as possible after January 1, 2020. Motion carried.
1. Motion Schmidt, second Hintz to approve The Leaky Pot Café's Special Malt Beverage License to serve at the Great Gatsby New Year's Eve Celebration December 31, 2019 at the Venue 519. Motion carried.

2. Motion Reich, second Somervold to approve Keith Rodger's (KCR Enterprises – DBA Dakota Pawn) Pawn Broker License renewal for the 2020 Licensing period. Motion carried.
3. Motion Talkington, second Hintz to approve Amanda Cole's (DBA Anytime Taxi) Taxicab Service Taxicab License renewal for the 2020 Licensing period. Motion carried.
4. Motion Somervold, second Martin to approve Krystel Frasier's (DBA Lyft) Taxicab Service Taxicab License renewal for the 2020 Licensing period. Motion carried.
5. Motion Somervold, second Hintz to approve Derrick Lehto's (DBA Canyon Cab Co.) Taxicab Service Taxicab License renewal for the 2020 Licensing period. Motion carried.
6. Motion Talkington, second Reich to approve the annual renewals for Mobile Home Court and Campground Licenses for the 2020 Licensing period, contingent upon receipt of renewal fees. The Building Inspector has inspected each location and signed off on renewals. Motion carried.
7. First reading of Ordinance 13-2019 – An Ordinance Amending 15.04.060 Right of Appeal – Composition of Board.
8. Motion Talkington, second Somervold to approve the second reading of Ordinance 14-2019 – An Ordinance Supplementing the Annual Appropriation Ordinance for the City of Belle Fourche, Butte County, South Dakota for the Year 2019. Roll Call: Schmidt; aye, Ager; aye, Martin; aye, Talkington; aye, Reich; aye, Hintz; aye, Somervold; aye. Motion carried.
9. Motion Schmidt, second Reich to approve hiring of Kendal Schreier as a seasonal building manager of the Belle Fourche Area Community Center – Administration division. This is effective during his Christmas break. It is further recommended Mr. Schreier be hired at Grade A1, S3 - \$9.49 per hour. Motion carried.
10. Motion Talkington, second Hintz to approve that Policy 8 – Personnel Records be amended as presented. Section 8.4 was added on Retention and Destruction of Records. Motion carried.
11. Motion Talkington, second Somervold to approve the Public Works Committee's recommendation to approve amendment to Engineering agreement for Project 2018-19 Day Street Lift Station construction administration in the amount of \$117,680.00. Motion carried.
12. Recognition that the following applicants were hired to work at the Belle Fourche Area Community Center:  
Brittany Case – \$9.98 per hour (GA1, S5). This is the third hiring into the pool.  
Kristyn Stahlecker – \$9.49 per hour (GA1, S3). This is the fourth hiring into the pool.  
They will begin work as soon as the drug screens are completed, and they are available.
13. Motion Martin, second Somervold to approve moving Council meeting dates due to Monday holidays in the year 2020:  
From January 20 to January 21, 2020 due to Martin Luther King, Jr. Day Observance  
From February 17 to February 18, 2020 due to Presidents' Day  
From September 7 to September 8, 2020 due to Labor Day  
Motion carried.
14. Motion Reich, second Hintz to acknowledge Chutes for Charity Progressive Bingo nights at the Branding Iron Steakhouse and Social Club. Tentative dates for these events are January 28th, February 11th and 25th, March 10th and 24th, and April 7th. Contact person is Barb Williamson (605) 641-0473. Motion carried.
15. Motion Talkington, second Somervold to approve City of Belle Fourche departments that can be closed Wednesday, December 24, 2019 (the day before Christmas) be closed, with employees taking personal paid leave. Some departments will be open (such as the Police Department) or covered by on-call staff. Motion carried.
16. Motion Somervold, second Hintz to approve the bills as presented. Motion carried.
17. Informational.
  - A. The mayor would like council members to review their January calendars for a Saturday morning that works to hold the Annual Council Retreat. This retreat will be used as an opportunity to review protocols and code of ethics. The selected date will be announced during the next council meeting on January 7, 2020.

18. Motion Talkington, second Reich to go into Executive Session – Contractual/Public Safety – SDCL 1-25-2(4)(6) at 6:46 P.M. Motion carried.

Mayor Landphere declared to return to Regular Session at 7:16 P.M.

Motion Talkington, second Reich to declare the BFACC HVAC system in need of emergency repairs in the name of public health and safety due to the premature failure of the system. Motion carried.

Motion Talkington, second Martin to sign an emergency repair contract for emergency work on the BFACC HVAC system with Rasmussen Mechanical in the amount of \$297,319, quote number Q1905923, due to the City already having existing maintenance contracts with this firm. Motion carried.

19. Motion Somervold, second Schmidt to adjourn at 7:18 P.M. Motion carried.

### Bills

A & B BUS; EQUIP LSES \$280.47; ACCUSOURCE; DRUG TESTING \$148.65; ALL NET CONN; CONT SERVICES \$261.71; ARCTIC GLACIER; OTHER-RESALE \$39.00; AT&T; TELE/INTERNET \$50.66; AUGUSTA HERMAN; REFUND \$69.88; BANYON; COMP/SWARE \$2,780.00; BF BEACON; CONT SERVICES \$61.74; BELLE LAUNDRY; UNIFORMS \$129.00; BENNET MAIN GUBBRUD & WILLERT; LEGAL SERVICES \$2,698.00; BFFVD; TRAV/CONF \$1,548.00; BH ENERGY; UTILITIES \$25,118.76; BH PIONEER; LEGAL NOTICES \$665.13; BH TRUCK; REP/MAINT \$72.45; BICKLE TRUCK; REP/MAINT \$84.27; BH URGENT CARE; DRUG TESTING \$105.00; BUTLER MACH; REP/MAINT \$92.39; BUTTE COUNTY REG; OTHER CURRENT \$151.00; BUTTE ELEC; UTILITIES \$2,712.24; CBH; GAS/FUEL/OIL \$13,198.98; CENTURY BUS; EQUIP LSES \$299.18; CENTURY LINK; TELE/INTERNET \$507.73; CHRISSY MONTGOMERY; REFUND \$69.88; COCA COLA; OTHER-RESALE \$417.75; COWBOY CO STORE; GAS/FUEL/OIL \$29.08; CWD; FREIGHT \$1,706.35; DAVID PROZELLER; CONT SERVICES \$630.00; DIMOCK DAIRY; OTHER-RESALE \$100.80; EVERGREEN MEDIA; ADV \$325.00; EZ FAB; REP/MAINT \$4,341.43; FAST BREAK; SUPPLIES \$464.50; FEDEX; POSTAGE \$13.97; FELD FIRE; EQUIPMENT \$7,112.00; FIRST INTERSTATE BANK; SUPPLIES \$7369.17; FISHER BEV; BEER-RESALE \$11,404.50; GOLD WEST; CONT SERVICES \$365.00; GOVT FINANCE OFF; DUES & FEES \$170.00; GREG KRAJEWSKI; MEETING STIPEND \$162.00; HAWKINS; CHEMICALS \$3,614.04; HELEN HENDRICKSON; REFUND \$200.00; HIGH POINT NETWORKS; COMP/SWARE \$74.25; HILL'S INTERIORS; REP/MAINT \$1,030.04; HILLYARD; SUPPLIES \$426.65; HR LAWS; PUB \$1,592.18; INTOXIMETERS; SUPPLIES \$80.00; JENNER EQUIPMENT SUPPLIES \$96.10; JIM WRIGHT; REP/MAINT \$105.00; JOHNER GRAVEL; SUPPLIES \$414.40; JOHNSON BROS; WINE-RESALE \$10,987.76; JOHNSON ELEC; REP/MAINT \$1,500.20; KACEE SPAULDING; REFUND \$200.00; KBFS; ADV \$170.00; KIM SMOOT; UNIFORMS \$89.97; LAKOTA CONTR; UNIFORMS \$338.00; LIGHTING MAIN; REP/MAINT \$348.46; LINCOLN MARKETING; ADV \$449.00; LUCY RUBY; SUPPLIES \$36.98; LYNN'S DAKOTA; AWARDS \$393.48; MAGUIRE IRON; IMP PROJECT \$7,171.00; MARK'S; REP/MAINT \$774.46; MASON'S; GAS/FUEL/OIL \$7.40; MCGAS; GAS/FUEL/OIL \$385.94; MID CONTINENT; TESTING \$314.50; MIDCONTINENT BUS; TELE/INTERNET \$113.24; MDU; UTILITIES \$5,205.31; MUNICIPAL CODE; DUES & FEES \$275.00; NEBRASKA SALT & GRAIN; SUPPLIES \$12,875.38; NORTHWEST PIPE FITTINGS; REP/MAINT \$2,989.44; OFFICE EMP; SUPPLIES \$143.67; O'REILLY AUTO; REP/MAINT \$101.69; PAUL A TURBIVILLE; REP/MAINT \$990.00; PEPSI; OTHER-RESALE \$145.50; PETTY CASH – FO; CONT SERVICES \$240.72; PITNEY BOWES; EQUIP LSES \$487.83; PORTERFIELD ELEC; REP/MAINT \$458.46; PRAIRIE AUTO; SUPPLIES \$603.81; PRAIRIE BERRY; WINE-RESALE \$669.00; QUALITY BRANDS; BEER-RESALE \$13,678.78; QUILL; SUPPLIES \$825.81; RAPID DELIVERY; POSTAGE \$26.46; RASMUSSEN MECH; REP/MAINT \$489.67; RASMUSSEN MECH; REP/MAINT \$49.69; REFUSE SOL; CONT SERVICES \$44.50; REPUBLIC; LIQUOR-RESALE \$14,692.59; RIVERFRONT BROADCASTING; ADV \$360.00; ROSS EQUIP; REP/MAINT \$413.00; ROUNDUP BUILD; IMP PROJECT \$9,836.08; ROYAL LAWN CARE; CONT SERVICES \$75.00; SAND CREEK; SUPPLIES \$433.61; SANITATION PROD; SUPPLIES \$3,322.80; SANTA BARBARA CONTROL; REP/MAINT \$5,475.00; SCOTT PETERSON MOTORS; REP/MAINT \$939.89; SD HISTORICAL SOC; OTHER-RESALE \$231.55; SD DENR FEES; DUES & FEES \$2,310.30; SD DEPT OF PUBLIC SAFETY; DUES & FEES \$5.00; SD DIV OF CRIMINAL INV; DUES & FEES \$26.75; SD RETAILERS ASSO; DUES & FEES \$510.00; SD SOC OF PROF LAND SURVEYORS; ADV \$50.00; SERVALL; CONT SERVICES \$592.58; SKI S PIZZERIA; SUPPLIES \$66.95; SME'S TREATS; CONT SERVICES \$37.50; SD ONE CALL; CONT SERVICES \$31.50; SOUTHERN GLAZER'S; FREIGHT \$1,640.06; STEREO'S N STUFF; SUPPLIES \$44.98; STRAWBALE; WINE-RESALE \$313.18; STREET IMAGE; EQUIPMENT \$495.03; STURDEVANT'S; REP/MAINT \$1,362.03; TECHNOLOGY; COMP/SWARE \$470.00; TEMPERATURE TECH; REP/MAINT \$510.50; TRI STATE CONST; GRAVEL/ASPHALT \$2,279.24; ULINE SHIPPING; SUPPLIES \$193.37; VANWAY TROPHY; SUPPLIES \$138.20; VAST; TELE/INTERNET \$126.30; VERIZON; TELE/INTERNET \$82.15; WAYNE GILBERT; MEETING STIPEND \$180.00; WELL'S PLUMB; REP/MAINT \$6,730.90; WEST TIRE; SUPPLIES \$6,809.67; WESTERN STAR; EQUIP LSES \$341.61; LIBRARY: A & B BUS; EQUIP LSES \$53.17; BH ENERGY; UTILITIES \$426.90; BOOK SYSTEMS; SUPPLIES \$154.00; DEMCO; SUPPLIES \$412.82; EMERY PRATT; BOOKS \$596.30; FIRST INTERSTATE BANK; SUPPLIES \$812.12; GALE; BOOKS \$127.93; GARDNER MEDIA; BOOKS \$212.33; GUIDPOSTS; BOOKS \$19.94; MDU; UTILITIES \$210.30; SAND CREEK; SUPPLIES \$59.95; November 2019 Payroll: Mayor/Council: \$5758.40; Finance: \$11795.82; Payroll/HR: \$4306.22; Cust/Mntnc: \$20651.80; Engineer: \$3807.24; Police: \$75129.74; Bldg Ins/ADA: \$1533.71; Code Enfor/ACO: \$4763.84; Str/Shop: \$9580.76; SW Coll: \$6407.80; SW Disp: \$55766.65; Sewer: \$34677.77; Water: \$43812.52; Cemetery: \$9073.50; BFACC-AD: \$2688.39; BFACC-PG: \$15070.28; BFACC-AQ: \$1336.19; BFACC-CS: \$8953.18; Parks: \$13420.53; Library: \$17787.97; Museum/Vstr Ctr: \$17433.35; LQ Store: \$13087.15. Grand Total: \$388542.81.

Approved

Gloria Landphere, Mayor

Attest:

Breanna Schaefer, Finance Officer

Published once at the approx. cost of \_\_\_\_\_

## Exhibit 3

## TROY SHOCKEY

I interviewed Troy Shockey on 4 February 2020 at the law offices of Bennett Main Gubbrud & Willert, P.C. in Belle Fourche, South Dakota. Also present was Kellen Willert in his capacity as City Attorney. Troy Shockey is a City Council member for Belle Fourche, South Dakota. Mr. Shockey was not present at a City Council meeting in Belle Fourche on 16 December 2019, however he had read the minutes of the meeting. Mr. Shockey does not specifically recall why he wasn't present for the meeting but assumes that it had something to do with Christmas.

Mr. Shockey has no idea why the Council went into Executive Session, since he was not there. No one had discussed going into Executive Session with Mr. Shockey prior to the meeting, or for that matter after the meeting. Mr. Shockey does remember the Mayor and the City's Finance Officer talking with Lacey Peterson, a reporter, after the next Council meeting about the Executive Session held on 16 December 2019. He stopped and listened. Mr., Shockey explained he did so because he didn't know what happened and was interested in hearing how the discussion came out. Mr. Shockey recalls it was a general discussion and does not recall specifics of the discussion itself. Mr. Shockey did not participate in the discussion. He recalls the discussion was short, and the Mayor and Finance Officer went on to talk to other people who were waiting. Mr. Shockey wished Ms. Peterson a Merry Christmas, but that was all he recalls saying to her.

Mr. Shockey has not talked to anyone, other than his wife, about the Executive Session. He did not express an opinion to anyone that the Executive Session was wrongfully held. He does not know where that idea may have originated.



## Exhibit 4

## JAMES AGER

I interviewed James Ager on 4 February 2020 at the law offices of Bennett Main Gubbrud & Willert, P.C. in Belle Fourche, South Dakota. Also present was Kellen Willert in his capacity as City Attorney. James Ager serves as a City Council member for the Third Ward in Belle Fourche, South Dakota. He is also a Butte County Commissioner. Mr. Ager was present at a City Council meeting in Belle Fourche on 16 December 2019. During that meeting, the City Council voted to go into Executive Session, under the new statutory provisions for emergencies. Mr. Ager did not discuss the substance of the Executive Session. Generally, however, Mr. Ager said the Council did discuss the HVAC system at the Belle Fourche Recreation Center, the emergency problems the failure of that system could create, and the steps necessary to ensure that the problem was resolved. Mr. Ager agreed with the minutes of the Council Meeting, and said the minutes accurately reflect the purpose of the Executive Session.

Mr. Ager does not believe he is qualified to say the discussions during the Executive Session fall into the public safety reasons for going into an Executive Session. Topics such as personnel issues, finance, or litigation issues are easy to determine, but the statutory change for emergency situations is newer and Mr. Ager would rely on the City Attorney to advise the Council whether the Executive Session was appropriate.

Mr. Ager does not recall whether any City Council member asked whether the Executive Session was appropriate. He did not. Most of the time, when the City Council goes into Executive Session, it is because of committee work, that results in a need for an Executive Session. Mr. Ager voted in favor of an Executive Session, although he says he did not have a good understanding of that the Session was about. This is the first time Mr. Ager recalls the Council using this particular "emergency" provision as a basis for an Executive Session.

Mr. Ager does not recall any blueprints being displayed during the Executive Session, although the situation with the HVAC system at the Recreation Center was clearly an emergency. In Mr. Ager's opinion, if the HVAC failed it would cause major damage to the Recreation Center itself, and potentially major damage to the surrounding homes and properties. Mr. Ager explained that the Recreation Center has an indoor pool, and chemicals required for the pool and the HVAC system must operate properly to avoid a potential release of those dangerous chemicals as well as mitigate any exposure to other items in the Recreation Center. For example, if the HVAC was not working properly, there could have been an explosion due to overpressure or other causes. Mr. Ager felt the result would have been catastrophic to the city and its citizens.

Mr. Ager also explained that the HVAC failure was not the first system failure the Recreation Center has had in recent years. For example, the boiler failed last year. The City Council decided to award a contract to repair the HVAC system to the existing maintenance company on an emergency basis, because that company had experience in dealing with the Recreation

Center's prior infrastructure failures and the Council felt that the requirements for an emergency procurement had been met.

Mr. Ager said the results of our Executive Session are documented in the Council minutes for 16 December 2019. The City Council voted to declare the HVAC system in need of emergency repairs due to public health and safety, and the Council voted to sign an emergency repair contract to resolve the HVAC system problems.

Mr. Ager did not tell anyone that the Executive Session vote was improper. Mr. Ager does not recall talking with anyone about the Executive Session. After the 16 December 2019 meeting, Lacey Peterson, a reporter with the Black Hills Pioneer, asked Mr. Ager if the Executive Session was about contract negotiations. Mr. Ager thought the question was very vague, and he replied "no." Mr. Ager stated that he would not talk about what happened in an Executive Session to anyone. Mr. Ager said he has never expressed an opinion that the Executive Session held that evening was unwarranted or that the business discussed during that meeting should have been heard in open session. Mr. Ager said he told Ms. Peterson that if she had any more questions, she should ask the Mayor.

:

## Exhibit 5

## GLORIA LANDPHERE

I interviewed Gloria Landphere on 4 February 2020 at the law offices of Bennett Main Gubbrud & Willert, P.C. in Belle Fourche, South Dakota. Also present was Kellen Willert in his capacity as City Attorney. Ms. Landphere is the Mayor for Belle Fourche, South Dakota. She attended and chaired a City Council meeting in Belle Fourche on 16 December 2019. Minutes of the meeting were kept by Jason LaFayette, the Assistant Finance Officer. Ms. Landphere indicated she had read the minutes of the meeting, and they accurately reflect what happened during the meeting. As reflected in the minutes, toward the end of the meeting the Council voted to go into Executive Session to discuss problems with the HVAC system at the Belle Fourche Recreation Center. The vote to go into Executive Session was based on the nature of the problem as a public emergency.

The City had been having problems with infrastructure in the Recreation Center for some time. The City had just replaced the boiler, and the continued problems with the HVAC created health concerns for the customers and clients of the Recreation Center. Although there are four banks of heating at the Center, only one bank was working properly. According to Ms. Landphere, this created problems with regulating appropriate temperatures inside the Center, including inside the area containing an indoor pool. The problems with the heat created a high level of condensation. There was a potential for mold growth, a degradation of air quality within the center, and even the possibility of pipes or water heaters exploding. The City was also concerned with the chemicals needed for the pool, and how the HVAC problems were impacting those chemicals.

Ms. Landphere believed if these issues were not addressed immediately, there could have been irreparable damage to public buildings (the Recreation Center) and could possibly have a situation where there was a danger to the public. As a result, the City Council decided to address the problems in an Executive Session. Ms. Landphere believed an Executive Session was necessary as an emergency response for the safety and security of the public, and to discuss an emergency contract for repairs. Her rationale was based, primarily, on the idea that the City did not want the discussion public for the safety of the building and the people using the building.

Ms. Landphere did not discuss her rationale for the Executive Session with anyone on 16 December 2019. On 6 January 2020 a reporter, Ms. Lacey Peterson, called Ms. Landphere at her home about the Executive Session. Ms. Landphere told Ms. Peterson that Ms. Landphere did not have information with her, but that the two could talk after the regularly scheduled City Council meeting that evening. After the Council meeting, the Finance Officer, the City Engineer, and Ms. Landphere sat down with Ms. Peterson. Mr. Shockey, a city councilman, asked if he could join the group, and did. Ms. Peterson asked Ms. Landphere about the reasons for the Executive Session. Ms. Landphere referred Ms. Peterson to the minutes of the meeting for the answers. Ms. Landphere expressed an opinion that she did not believe Ms. Peterson understood that the

statue regarding Executive Sessions had been amended to add a provision about Emergency meetings. Ms. Landphere affirmed that at no time did she, or anyone else, express a belief that the Executive Session was improper. Specifically, Ms. Landphere did not hear Mr. Shockey express doubt about the Executive Session.

Ms. Landphere said, as Mayor, she spends a lot of time validating the City Council's actions. She asserted that she tries to keep things "by the book." According to Ms. Landphere, when the City found out what was happening with the Recreation Center's HVAC, the City Council needed to address a serious issue, and needed to address it quickly, without causing undue concern with the public patrons who use the facility daily. Ms. Landphere said that the focus with the Executive Session was to have the necessary free and open discussions about the problems, the potential consequences, and the need for an emergency contract without creating panic with the public. She said they also didn't want to face additional damage and potential harm to the public if the emergency was not properly addressed. Ms. Landphere expressed the opinion that the harm to the public could have been catastrophic if the issue had not been immediately addressed.

## Exhibit 6

## STATEMENT OF LACEY PETERSON

I am Lacey Peterson. I am a reporter for the Black Hills Pioneer newspaper. I normally cover governmental meetings in Belle Fourche and Butte County, South Dakota. I was not, however, in attendance at the 16 December 2019 Belle Fourche City Council meeting. As a part of my job, I did review and listen to the recorded meeting on the Belle Fourche website. I became aware that the City Council closed their meeting and went into Executive Session when I reviewed the tape. At the time, I did not have concern about the reasons for closing the meeting. I did want to explore the reason for the closure, because it may have been a story for the paper. I talked to my managing editor, Mark Watson, about the closure. He asked me if I knew the purpose for the closure. We have had questions in the past about the City Council's justifications for using Executive Sessions during their meetings. For this reason, I decided to ask questions about the closure, as a part of my responsibility for due diligence. I wanted to know if the reason for the Executive Session was based on statute. I did have an underlying concern that the City tends to use Executive Sessions freely. Their free use of Executive Sessions does give a "tinge" that the City is trying to hide something from the public, however I do not believe they do so maliciously.

To engage in my required "due diligence," I reached out to City Council members, the City Attorney, and the Mayor about the Executive Session. The City Attorney did not return my calls, but I did speak to James Ager, a City Council member. He told me, via text message, that he didn't think that the Executive Session was necessary. I believe I have a copy of the text message, but do not have it available at this moment. I also talked to the Mayor, Gloria Landphere. She agreed to meet with me to discuss the justifications for the Executive Session after a regularly scheduled City Council meeting in January 2020. I met with her, the City Finance Officer, and the City Engineer. There may have been others around, but I did not note them. During that meeting, the Mayor told me that anything related to contracts goes into an Executive Session. The Finance Officer and the City Engineer brought up the public safety justification for closing a meeting. They said that the Executive Session was justified because the issues discussed involved public and the safety of the public.

In the letter requesting an open meetings investigation, my managing editor mentioned that another city councilman, Troy Shockey, also expressed concerns about closing their meeting. That was a mistake. He was not at the December meeting. I did express my concerns to him, and he generally agreed with me. I told my editor about this conversation, and I believe he misunderstood me and that's why he indicated in the letter that Mr. Shockey said the meeting should have been open.

In my opinion, the City Council has a history of being a bit loose with the use of Executive Sessions. I believe they simply read the law too broadly, or don't understand what the statute says. I believe the Council needs education on the proper reasons for closing a meeting. I do not




think that the Council wanted to close their meeting for an improper purpose, but I believe they did not have statutory justification for going into Executive Session. I am willing to answer questions about this matter in the future.

Signed and sworn to by me, Lacey Peterson, on the 20 day of February 2020.

  
\_\_\_\_\_  
LACEY PETERSON  
Reporter, Black Hills Pioneer

STATE OF SOUTH DAKOTA     )  
  ) ss  
COUNTY OF BUTTE            )

On the 20<sup>th</sup> day of February 2020, before me personally appeared Lacey Peterson, to me known to be the person who executed the foregoing statement and acknowledged that he executed the same of his own free act, and deed.

  
\_\_\_\_\_  
NOTARY PUBLIC  
My Commission Expires: 3-21-2023

## Exhibit 7

Your Single Source Service Provider



Council Bluffs/Omaha | Sioux City | Kearney | Sturgis | Lincoln | Denver

12-14-19

To: Belle Fourche City Council and it's residents

Re: Community Center HVAC emergency

The pool air heating, cooling, ventilation, and de-humidification system has failed and is beyond repair, only 1 of the 4 heating units is operational. None of the ventilation is operational. The one heating system can barely heat the air in the pool to 70 degrees. The pool water temperature is 84 degrees. When you have that difference in temperature the pool water evaporates and heats the air. All of this evaporation causes an increase in humidity, which the ventilation system can not get rid of in it's current state. On top of being uncomfortable, this is an extremely dangerous condition for the people in the building (perfect conditions for mold growth) and is extremely hard on other equipment in the building, and the building itself. Walls, paint, windows, pumps, boilers, and all other equipment in the facility are in grave danger of failing and/or becoming rusty in these conditions, on top of the potential for mold growth. This is an urgent public health threat that must be addressed very soon.

Along with the HVAC issues, the domestic hot water system (for showers and sinks) is in danger of bursting and is well beyond it's expected usable life cycle and must be replaced. If the existing water heaters are left and not replaced until they have a major burst this will be a major repair as the water heaters are on the 2<sup>nd</sup> floor. This will be a catastrophic event, best case scenario someone is there and can get it shut off with only a thousand gallons or so lost. Worst case is the water heaters burst in the night when no one is there, this would be absolutely catastrophic to say the least. On top of the bulging vessel of the water heaters, the electric elements that heat the water are failing from many years of use, and they are not easily found/replaced. At this moment, the water heaters are working. For how much longer, we can not say. What we can say is that when they do burst and fail, it will be a very bad situation for all involved. We believe being proactive on this is the only option left.

Long term, changing this entire structure to gas heat and water heat instead of the electric heat and water heat will save dramatically on the operating costs of the facility. We estimate the energy savings to be roughly \$4,000 per month (based on average electrical usage, subject to change and not guaranteed because of different weather patterns and building use). When the equipment is failing is the right time to make this switch.

Jason Carlson  
Project Manager  
C) 605.496.2249  
O) 605.343.7800

Jason.Carlson@RasMech.com

A handwritten signature in black ink, appearing to read "Jason Carlson", is written over the printed contact information.

rasmech.com | 800.237.3141

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

[www.atg.sd.gov](http://www.atg.sd.gov)

**JASON R. RAVNSBORG**  
ATTORNEY GENERAL

**CHARLES D. McGUIGAN**  
CHIEF DEPUTY ATTORNEY GENERAL

March 9, 2020

Mark Watson  
Black Hills Pioneer  
PO Box 7  
Spearfish, SD 57783

Re: In the Matter of Open Meeting Complaint 2020-02, Belle Fourche City Council –  
Butte County

Dear Mr. Watson,

This letter is to acknowledge receipt of an open meetings complaint filed by you against the Belle Fourche City Council. Butte County Deputy State's Attorney LeEllen McCartney 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 for their response. I have asked the City to file a response no later than April 10, 2020. I have also requested that the City 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: Kellen Willert, Attorney for the City of Belle Fourche  
LeEllen McCartney – Butte County Deputy State's Attorney

STATE OF SOUTH DAKOTA



**OFFICE OF ATTORNEY GENERAL**

1302 East Highway 14, Suite 1  
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**JASON R. RAVNSBORG**  
ATTORNEY GENERAL

**CHARLES D. McGUIGAN**  
CHIEF DEPUTY ATTORNEY GENERAL

March 9, 2020

Kellen Willert  
Attorney for the City of Belle Fourche  
618 State St.  
Belle Fourche, SD 57717

Re: In the Matter of Open Meeting Complaint 2020-01, Belle Fourche City Council –  
Butte County

Dear Kellen,

I assist the South Dakota Open Meetings Commission with their duties. Butte County Deputy State's Attorney LeEllen McCartney has forwarded to the Commission, pursuant to SDCL 1-25-6(3), a complaint concerning the Belle Fourche City Council. The complaint was signed by Mark Watson. Enclosed is a copy of all the materials I have received.

If the City wishes to file a response to the complaint, please send it to the above address on or before April 10, 2020. Please also send copies of any response to Mark Watson, Black Hills Pioneer, PO Box 7, Spearfish, SD 57783 and to Deputy State's Attorney LeEllen McCartney.

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: Mark Watson

LeEllen McCartney – Butte County Deputy State's Attorney

429467  
Attorney General  
APR 24 2020

LAW OFFICES OF  
**BENNETT MAIN GUBBRUD & WILLERT**  
A PROFESSIONAL CORPORATION  
618 STATE STREET  
**BELLE FOURCHE, SOUTH DAKOTA 57717-1419**  
TEL (605) 892-2011  
FAX (605) 892-4084  
Email: [bellelaw@bellelaw.com](mailto:bellelaw@bellelaw.com)

MAX MAIN\*  
DWIGHT A. GUBBRUD\*  
\*LICENSED in SOUTH DAKOTA and WYOMING

Est. 1908

KELLEN B. WILLERT\*\*  
\*\*LICENSED in SOUTH DAKOTA, WYOMING and COLORADO

April 22, 2020

By Email and U.S. Mail

([steven.blair@state.sd.us](mailto:steven.blair@state.sd.us))

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

**RE: In the Matter of Open Meeting Complaint 2020-01; Response;  
Our File No. 3285.307019.**

Dear Mr. Blair:

Enclosed with this letter and for consideration by the South Dakota Open Meetings Commission is a Response on behalf of the City for the above-described matter.

Courtesy copies of this letter and the enclosed Response are also being sent to Mr. Watson and Ms. McCartney.

At this time, my calendar is fairly open during mid-May to hold a hearing in the matter. Please do not hesitate to contact my office if you have any questions, comments, or concerns regarding this matter and to schedule the hearing dates and times. Thank you.

Sincerely,

BENNETT MAIN GUBBRUD & WILLERT, P.C.

A handwritten signature in black ink, appearing to read 'Kellen B. Willert', with a long horizontal flourish extending to the right.

Kellen B. Willert

KBW/ak

Enc.

cc: Mark Watson  
LeEllen McCartney  
Gloria Landphere (by email)  
Breanna Shaefer (by email)

STATE OF SOUTH DAKOTA )  
 )ss.  
 )

**OPEN MEETINGS COMMISSION**

**In the Matter of Open Meeting  
Complaint 2020-01, Belle Fourche  
City Council – Butte County**

**RESPONSE OF CITY OF BELLE  
FOURCHE CITY COUNCIL**

**COMES NOW**, the City of Belle Fourche, by and through its attorney, Kellen B. Willert, of Bennett Main Gubbrud & Willert, P.C., and respectfully submits its initial response in the above-described matter.

**PRELIMINARY STATEMENT**

The Complaint made by Mark Watson of Black Hills Pioneer dated January 10, 2020 will be referred to herein as “Complaint”. The Deputy State’s Attorney’s Inquiry Report will be referred to as “Inquiry”. The City of Belle Fourche City Council will be referred to as “City”. This Response will be referred to as “Response”. Exhibit 7 attached to the Inquiry (letter dated December 14, 2019 from Rasmussen Mechanical Services) will be referred to as “Letter from Professionals”.

This Response in no way admits to any of the allegations or discloses any information discussed by City in the executive session at issue. This Response merely responds to the allegations set forth in the Complaint and Inquiry that, even if true, do not equate to a violation of the Open Meetings Laws.

**STATE LAW**

South Dakota state law allows for public bodies to have executive sessions for various reasons. SDCL § 1-25-2.

Applicability of SDCL § 1-25-2(6) appears to be the primary issue in this matter. Executive sessions are statutorily authorized for “discussing **information listed** in subdivisions 1-27-1.5(8) and 1-27-1.5(17).” SDCL § 1-25-2(6) (emphasis added). A copy of SDCL § 1-25-2 is attached as Exhibit A.

SDCL § 1-27-1.5(8) lists, in part:



**[i]nformation pertaining to the protection of public or private property and any person on or within public or private property including:...**

**(b) Emergency management or response;....**

SDCL § 1-27-1.5(8).<sup>1</sup> A copy of SDCL § 1-27-1.5 is attached as Exhibit B.

SDCL § 1-27-1.5(17) lists, in part, information regarding “[a]ny emergency or disaster response plans”. SDCL § 1-27-1.5(17).

### **APPLICATION OF STATE LAW**

The executive session in question was held on December 16, 2019. *See* Inquiry, Exhibit 2. The Letter from Professionals reported:

- 1- “a system has failed and is beyond repair”;
- 2- “this is an extremely dangerous condition for the people in the building (perfect conditions for mold growth) and is extremely hard on other equipment in the building, and the building itself.”
- 3- “an urgent public health threat that must be addressed very soon”; and
- 4- that the domestic hot water system “is in danger of bursting”, which “will be a catastrophic event.”

*See* Letter from Professionals.

The Letter from Professionals expressly stated concerns for “**people** in the building”, “**equipment** in the building, and the **building** itself” in relation to a demonstrable “urgent public health threat”. Letter from Professionals (emphasis added). There are a variety of ways an entity could plan to react to the type of

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<sup>1</sup> The last paragraph on page 2 of the Inquiry asserts that SDCL § 1-27-1.5(8) only applies “when disclosure of that information would result in some **harm to the public** or when there would be a discussion of sensitive information that may **harm the public**.” Inquiry, page 2 (emphasis added). Page 4 of the Inquiry further concludes that SDCL § 1-27-1.5(8) “is restricted to situations where there is a **real and present danger to the public or the threat of that danger from the release of certain categories of information**.” Inquiry, page 4 (emphasis added).

Nowhere in SDCL § 1-27-105(8) does it require either a disclosure or a harm to public for the statute to apply – that simply is not the standard. The standard is simple: an executive session is authorized for “[d]iscussing information listed in subdivisions 1-27-1.5(8) and 1-27-1.5(17).” SDCL § 1-25-2(6).

emergency situation pointed out in the Letter from Professionals including, but not limited to, 1) doing nothing, 2) closing the entire facility, 3) closing portions of the facility, and/or 4) making emergency repairs to ensure the facility remains habitable.

If the Open Meetings Commission finds that an executive session for discussing the issues identified in the Letter from Professionals would be a violation of SDCL § 1-25-2(6), it will mean governmental entities are prohibited from meeting in executive session to discuss how to plan, respond to, and/or manage an emergency situation that is brought to its attention by independent Professionals relating to an “urgent public health threat” and a potentially “catastrophic event.” Letter from Professionals. Such a conclusion is contrary to the express statutory provisions that were amended in 2019.

If City discussed information relating to the Letter from Professionals in executive session, the executive session would be proper in order to discuss information expressly listed under SDCL § 1-27-1.5(8)(b) (to wit, “emergency management or response”), as well as SDCL § 1-27-1.5(17) (to wit, “any emergency or disaster response plans or protocols”).

Dated this 22nd day of April, 2020.

**BENNETT MAIN GUBBRUD & WILLERT,  
P.C.**

Attorneys for City of Belle Fourche

By



Kellen B. Willert  
618 State Street  
Belle Fourche, SD 57717-1489  
(605) 892-2011

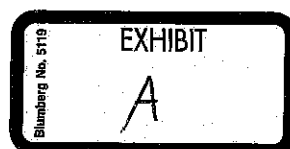
1-25-2. Executive or closed meetings--Purposes--Authorization--Violation as misdemeanor.

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

- (1) Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. The term, employee, does not include any independent contractor;
- (2) Discussing the expulsion, suspension, discipline, assignment of or the educational program of a student or the eligibility of a student to participate in interscholastic activities provided by the South Dakota High School Activities Association;
- (3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;
- (4) Preparing for contract negotiations or negotiating with employees or employee representatives;
- (5) Discussing marketing or pricing strategies by a board or commission of a business owned by the state or any of its political subdivisions, when public discussion may be harmful to the competitive position of the business; or
- (6) Discussing information listed in subdivisions 1-27-1.5(8) and 1-27-1.5(17).

However, any official action concerning such matters shall be made at an open official meeting. An executive or closed meeting shall be held only upon a majority vote of the members of the public body present and voting, and discussion during the closed meeting is restricted to the purpose specified in the closure motion. Nothing in § 1-25-1 or this section prevents an executive or closed meeting if the federal or state Constitution or the federal or state statutes require or permit it. A violation of this section is a Class 2 misdemeanor.

**Source:** SL 1965, ch 269; SL 1980, ch 24, § 10; SL 1987, ch 22, § 1; SL 2014, ch 90, § 2; SL 2019, ch 2, § 1.



1-27-1.5. Certain records not open to inspection and copying. The following records are not subject to §§ 1-27-1, 1-27-1.1, 1-27-1.3, and § 1-27-1.23:

(1) Personal information in records regarding any student, prospective student, or former student of any educational institution if such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public in accordance with 20 U.S.C. § 1232g as the law existed on January 1, 2009;

(2) Medical records, including all records of drug or alcohol testing, treatment, or counseling, other than records of births and deaths. This law in no way abrogates or changes existing state and federal law pertaining to birth and death records;

(3) Trade secrets, the specific details of bona fide research, applied research, or scholarly or creative artistic projects being conducted at a school, postsecondary institution or laboratory funded in whole or in part by the state, and other proprietary or commercial information which if released would infringe intellectual property rights, give advantage to business competitors, or serve no material public purpose;

(4) Records which consist of attorney work product or which are subject to any privilege recognized in article V of chapter 19-19;

(5) Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, if the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training. However, this subdivision does not apply to records so developed or received relating to the presence of and amount or concentration of alcohol or drugs in any body fluid of any person, and this subdivision does not apply to a 911 recording or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure. This law in no way abrogates or changes §§ 23-5-7 and 23-5-11 or testimonial privileges applying to the use of information from confidential informants;

(6) Appraisals or appraisal information and negotiation records concerning the purchase or sale, by a public body, of any interest in real or personal property;

(7) Personnel information other than salaries and routine directory information. However, this subdivision does not apply to the public inspection or copying of any current or prior contract with any public employee and any related document that specifies the consideration to be paid to the employee;

(8) Information pertaining to the protection of public or private property and any person on or within public or private property including:

(a) Any vulnerability assessment or response plan intended to prevent or mitigate criminal acts;

(b) Emergency management or response;

(c) Public safety information that would create a substantial likelihood of endangering public safety or property, if disclosed;

(d) Computer or communications network schema, passwords, or user identification names;

(e) Guard schedules;

(f) Lock combinations; and

(g) Any blueprint, building plan, or infrastructure record regarding any building or facility that would expose or create vulnerability through disclosure of the location, configuration, or security of critical systems of the building or facility;

(9) The security standards, procedures, policies, plans, specifications, diagrams, access lists, and other security-related records of the Gaming Commission and those persons or entities with which the commission has entered into contractual relationships. Nothing in this subdivision allows the commission to withhold from the public any information relating to amounts paid persons or entities

with which the commission has entered into contractual relationships, amounts of prizes paid, the name of the prize winner, and the municipality, or county where the prize winner resides;

(10) Personally identified private citizen account payment information, credit information on others supplied in confidence, and customer lists;

(11) Records or portions of records kept by a publicly funded library which, when examined with or without other records, reveal the identity of any library patron using the library's materials or services;

(12) Correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees;

(13) Records or portions of records kept by public bodies which would reveal the location, character, or ownership of any known archaeological, historical, or paleontological site in South Dakota if necessary to protect the site from a reasonably held fear of theft, vandalism, or trespass. This subdivision does not apply to the release of information for the purpose of scholarly research, examination by other public bodies for the protection of the resource or by recognized tribes, or the federal Native American Graves Protection and Repatriation Act;

(14) Records or portions of records kept by public bodies which maintain collections of archeological, historical, or paleontological significance which nongovernmental donors have requested to remain closed or which reveal the names and addresses of donors of such articles of archaeological, historical, or paleontological significance unless the donor approves disclosure, except as the records or portions thereof may be needed to carry out the purposes of the federal Native American Graves Protection and Repatriation Act and the Archeological Resources Protection Act;

(15) Employment applications and related materials, except for applications and related materials submitted by individuals hired into executive or policymaking positions of any public body;

(16) Social security numbers; credit card, charge card, or debit card numbers and expiration dates; passport numbers, driver license numbers; or other personally identifying numbers or codes; and financial account numbers supplied to state and local governments by citizens or held by state and local governments regarding employees or contractors;

(17) Any emergency or disaster response plans or protocols, safety or security audits or reviews, or lists of emergency or disaster response personnel or material; any location or listing of weapons or ammunition; nuclear, chemical, or biological agents; or other military or law enforcement equipment or personnel;

(18) Any test questions, scoring keys, results, or other examination data for any examination to obtain licensure, employment, promotion or reclassification, or academic credit;

(19) Personal correspondence, memoranda, notes, calendars or appointment logs, or other personal records or documents of any public official or employee;

(20) Any document declared closed or confidential by court order, contract, or stipulation of the parties to any civil or criminal action or proceeding except as provided under § 1-27-1.23;

(21) Any list of names or other personally identifying data of occupants of camping or lodging facilities from the Department of Game, Fish and Parks;

(22) Records which, if disclosed, would constitute an unreasonable release of personal information;

(23) Records which, if released, could endanger the life or safety of any person;

(24) Internal agency record or information received by agencies that are not required to be filed with such agencies, if the records do not constitute final statistical or factual tabulations, final instructions to staff that affect the public, or final agency policy or determinations, or any completed state or federal audit and if the information is not otherwise public under other state law, including chapter 15-15A and § 1-26-21;

(25) Records of individual children regarding commitment to the Department of Corrections pursuant to chapters 26-8B and 26-8C;

- (26) Records regarding inmate disciplinary matters pursuant to § 1-15-20;
- (27) Any other record made closed or confidential by state or federal statute or rule or as necessary to participate in federal programs and benefits;
- (28) A record of a settlement agreement or litigation regarding investment or bankruptcy and involving the South Dakota Investment Council or the South Dakota Retirement System, or both, unless the settlement or litigation results in a finding of liability against the council or system, or both; and
- (29) A record of a settlement agreement or litigation regarding medical services involving any county hospital established under chapter 34-8 or any municipal hospital established under chapter 34-9.

**Source:** SL 2009, ch 10, § 6; SL 2012, ch 11, § 1; SL 2019, ch 5, § 2.

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STATE OF SOUTH DAKOTA



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**JASON R. RAVNSBORG**  
ATTORNEY GENERAL

**CHARLES D. McGUIGAN**  
CHIEF DEPUTY ATTORNEY GENERAL

October 9, 2020

Mark Watson  
Black Hills Pioneer  
PO Box 7  
Spearfish, SD 57783

Kellen Willert  
Attorney at Law  
618 State St.  
Belle Fourche, SD 57717

Re: In the Matter of Open Meeting Complaint 2020-02, Belle Fourche City  
Council – Butte County

Dear Mr. Watson & Mr. Willert:

Enclosed please find the Notice of Hearing, and proposed agenda, regarding the October 23rd teleconference meeting of the Open Meetings Commission. As you can see from the agenda, presentations regarding complaints will begin at 9:30 a.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,

A handwritten signature in black ink, appearing to read "SRB", followed by a horizontal line.

Steven R. Blair  
Assistant Attorney General

SRB/jm  
Enclosures

STATE OF SOUTH DAKOTA  
OPEN MEETINGS COMMISSION

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IN THE MATTER OF OPEN	)	OMC 2020-02
MEETINGS COMPLAINT AGAINST	)	
BELLE FOURCHE CITY COUNCIL	)	NOTICE OF HEARING
- BUTTE COUNTY	)	

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TO: Mark Watson, Black Hills Pioneer, Post Office Box 7, Spearfish, South Dakota 57783; Kellen Willert, Attorney for Belle Fourche City Council, 618 State Street, Belle Fourche, South Dakota 57717:

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 Friday, October 23, 2020. Oral presentations regarding pending complaints will commence at 9:30 A.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 9<sup>th</sup> day of October 2020.



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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 Only**

**Teleconference dial-in number: 669-224-3412**

**Teleconference Access Code: 719-192-885**

October 23, 2020  
9:30 a.m. Central Time

1. Approval of the Agenda
2. Public Comment period as per SDCL 1-25-1
3. Approval of the Minutes of December 5, 2019 meeting
4. Consideration of Pending Complaints
  - A. In the Matter of Open Meeting Complaint 20-01, Board of Trustees for the City of Ward

Oral Presentations:

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

Board of Trustees for the City of Ward -15 minutes

- B. In the Matter of Open Meeting Complaint 20-02, Belle Fourche City Council

Oral Presentations:

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

Belle Fourche City Council-15 minutes

- C. In the Matter of Open Meeting Complaint 20-03, Yankton County Commission

Oral Presentations:

Complainant Todd B. Woods-15 minutes (a portion of this time may be reserved for rebuttal)

Yankton County Commission-15 minutes

D. In the Matter of Open Meeting Complaint 20-04, Pierre City Commission

Oral Presentations:

Complainant Caleb Matthew Gilkerson-15 minutes (a portion of this time may be reserved for rebuttal)

Pierre City Commission-15 minutes

5. Discussion regarding preparation of the minutes
6. Discussion regarding potential open meetings legislation
7. Election of Commission Chair & Co-Chair
8. Scheduling future meetings

All items are scheduled for 09:30 A.M. Central Time. Scheduled items may be delayed or moved to a later agenda item at the discretion of the OMC.

Due to public health concerns relating to Covid-19, and in accord with SDCL 1-25-1.6 and Executive Orders 2020-14, 2020-16, & 2020-30, this meeting is being held via teleconference only – no physical location will be provided for the public to listen and participate. If you wish to listen or participate in this meeting please dial 669-224-3412 and enter the access code 719-192-885 when prompted.

STATE OF SOUTH DAKOTA  
OPEN MEETINGS COMMISSION

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IN THE MATTER OF OPEN	)	OMC 2020-02
MEETINGS COMPLAINT AGAINST	)	
BELLE FOURCHE CITY COUNCIL	)	CERTIFICATE OF SERVICE
- BUTTE COUNTY	)	

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The undersigned hereby certifies that a true and correct copy of the Notice of Hearing and proposed Agenda in the above-captioned matter, was served by United States mail, first class, postage prepaid upon Mark Watson, Black Hills Pioneer, Post Office Box 7, Spearfish, South Dakota 57783; Kellen Willert, Attorney for Belle Fourche City Council, 618 State Street, Belle Fourche, South Dakota 57717.

Dated this 9<sup>th</sup> day of October 2020.



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Steven R. Blair  
Assistant Attorney General  
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Pierre, South Dakota 57501  
Telephone: (605) 773-3215