

SOUTH DAKOTA OPEN MEETINGS COMMISSION

MINUTES OF MEETING

November 18, 2024

Members participating: Emily Sovell, Sully County State's Attorney (Chair); Katelynn Hoffman, Turner County State's Attorney (Co-Chair); Lance Russell, Fall River/Oglala Lakota County State's Attorney; Michael Smith, Clay County State's Attorney; and Austin Hoffman, McPherson County State's Attorney (appeared by Teams). Steve Blair and Jenna McFarlane, Office of the Attorney General, assisted the Commission.

Steve Blair called the meeting to order at approximately 9:00 a.m. Ms. Sovell moved to approve the proposed agenda; Mr. Smith seconded. A roll call vote was held; the agenda was approved by unanimous vote.

A time was provided for public comment as required by SDCL 1-25-1; no member of the public provided comment to the Commission.

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

Commissioner Introductions

Commissioners gave a brief introduction to the public.

Election of Officers

Ms. Hoffman nominated Ms. Sovell as the Chair. Mr. Russell seconded. A roll call vote was held: all Commissioners voted aye.

Mr. Smith nominated Ms. Hoffman as the Co-Chair. Mr. Russell seconded. A roll call vote was held: all Commissioners voted aye.

Discussion of Procedures

Brief discussion on the Commission's procedure for complaints.

In the Matter of Open Meeting Complaint 21-02, Bennett County Board of Commissioners

Ms. Jolene Donovan, the Complainant, was not present for the hearing. The Bennett County Board of Commissioners filed a written response to the complaint. But no representative or legal counsel appeared on behalf of the Bennett County Board of Commissioners.

The Commission relied on the written submissions in the file and entered deliberations.

Ms. Sovell noted that the Bennett County State's Attorney Office provided a letter setting forth the concern that there was an agenda mentioning executive session with the Sheriff and the audio recordings of the July 7, 2021, meeting where the County Commissioners came out of executive session with the Sheriff and took action for a raise.

Ms. Sovell continued that the County Commission responded it was brought to their attention after the County Commission meeting that they had taken action on a matter that was not listed on the agenda for July 7, 2021. The County Commission had taken action by making and approving a motion to give a pay raise to a county employee. The County Commission did put the item of the employee's wage on the agenda for the July 21, 2021, meeting so it could properly be addressed.

Ms. Sovell felt it was a technical violation. Ms. Hoffman agreed.

Mr. Russell made a motion to find there had been a violation. Mr. Smith seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-01, Martin City Council

Mr. Robert Fogg, Jr., appeared as the Complainant. Sarah Frankenstein appeared as counsel on behalf of the Martin City Council.

Mr. Fogg brought the complaint against the Martin City Council alleging their February 8, 2023, meeting was in violation of SDCL 1-25-1.1. Mr. Fogg noted at the beginning of the meeting a City Council member moved to approve the agenda with flexibility, however, the agenda that was approved did not include two agenda items: the combining of City and County Law Departments, or discussion of the Cozad Property.

Mr. Fogg referred the Commission to the language of SDCL 1-25-1.1. Mr. Fogg claimed the February 8, 2023, City Council agenda did not include reference to the combining of the City and County law departments nor the Cozad property.

Ms. Frankenstein, appearing for the City, stated that the February 8, 2023, City of Martin agenda had the word "Law" which was historically known in Martin to be short for law enforcement.

Ms. Frankenstein claimed that at the February 8, 2023, meeting the topic of the City potentially contracting with the County to provide law enforcement within City limits came up mid-discussion with members of the community,

mayor, City Council, and county commissioners. Ms. Frankenstein stated that the topic had been discussed at meetings prior to February 8, 2023, as well.

Ms. Frankenstein declared since the February 8, 2023, meeting, discussion on the topic had taken place at City Council meetings for roughly a year and seven months. Ms. Frankenstein believed in total the topic had been discussed for two years and the public had opportunity to weigh in on the subject.

Ms. Frankenstein asserted that Mr. Fogg's issue with using a shortened statement like "Law" on the agenda is because he believes the topic of contracting with the County for law enforcement should have been listed separately on the agenda. Ms. Frankenstein stated that the Open Meetings Commission has not previously indicated that an item must be listed on an agenda, or it cannot be discussed. Ms. Frankenstein argued that if the law is interpreted in that manner, then discussion must be shut down if a member of the public, or member of a governing body, throws an idea out that was not specifically listed on the agenda.

The City Council wants members of the public to be able to throw out ideas without having to stifle discussion because the item was not included on the agenda for that meeting.

Ms. Frankenstein cited to *Olson v. Cass*, 349 N.W.2d 435, 438 (S.D. 1984). There the State Supreme Court found that the open meetings law was substantially complied with that the spirit of the law required adequate opportunity and notice to discuss an issue and public involvement in the decision making.

Ms. Frankenstein concluded that the City Council believed the goal of allowing the public citizens of Martin to be involved in the decision-making process were met.

Ms. Sovell asked for clarification as to whether formal action was taken on the law enforcement issue at the February 8, 2023, meeting. Ms. Frankenstein answered that there was no formal action at that meeting, just discussion.

Ms. Sovell inquired if the discussion was had under the public comment period or under "Law" on the agenda. Ms. Frankenstein indicated the discussion happened under the "Law" topic on the agenda.

Ms. Sovell asked Ms. Frankenstein would address the second issue raised by Mr. Fogg concerning the Cozad property not being included on the agenda.

Ms. Frankenstein claimed a public citizen asked during the City Council meeting what was happening with the Cozad property. The Cozad property was gifted by Mr. Fred Cozad to both the City and County. Once the citizen

raised the topic it led to a discussion during the meeting. Ms. Frankenstein stated there is often discussion on what the two governments are going to do to utilize or sell the property.

Ms. Frankenstein pointed to a 2006 decision by the Commission, In re City of Tripp, which dealt with the same issue. Ms. Frankenstein stated the City of Tripp heard the concerns and comments from a taxpayer but took no action therefore the Commission found no violation of the law existed. Ms. Frankenstein believed the same would be true of this situation.

Mr. Russell asked if the City Council had made the agenda items more specific since the February 8, 2023, meeting and the complaint filed by Mr. Fogg. Ms. Frankenstein did not know the answer.

Mr. Russell inquired if the Commission were to issue an opinion that said “Law” in a general sense is sufficient, what is the precedential value of that going forward. Ms. Frankenstein answered the Commission should look at the historical nature of the words used in a political area – for instance in some other town or county “Law” might not always mean law enforcement. The Commission should look at the facts specific to each particular body.

Mr. Russell questioned whether a brightline rule should be set requiring some kind of specificity for agenda items, so the public actually has meaningful notice of what is on an agenda. Ms. Frankenstein claimed if a brightline rule were to be created it should only be if action was taken at the meeting. Ms. Frankenstein pointed out the City of Martin had two years of discussion at meeting after meeting on the issue of what to do to provide better law enforcement including contracting with the county.

Ms. Hoffman asked if it was safe to assume that when the City Council did take action and approve the contract between the City and County that there was more specific verbiage on the agenda. Ms. Frankenstein could not recall..

Ms. Hoffman inquired if the County and City decided to contract was that more specific than decisions that took place under “Law”. Ms. Frankenstein did not recall what was on the agenda.

Mr. Russell asked if there was a written contract at the time under consideration on February 8, 2023. Ms. Frankenstein answered no.

Mr. Smith questioned if the February 8 meeting was the first time the contract was discussed, and whether at previous meetings the topic was discussed under the “Law” agenda item. Ms. Frankenstein answered she was fairly certain it was discussed before the February meeting and probably listed under “Law”.

Mr. Smith asked if Ms. Frankenstein recalled there ever being any votes casted in regard to this topic prior to the February 8 meeting. Ms. Frankenstein stated she was not sure if there was a vote, but there had been much discussion on the topic.

Mr. Fogg was provided an opportunity for rebuttal. Mr. Fogg asserted that there had been times that the topic of combined law enforcement did appear on the City's agendas. Ms. Fogg stated there are times when salary of law enforcement may come into play, there may be hiring or discipline, but it is not uncommon on a city agenda with "Law" and beneath it tabbed in you might see executive session citing to an appropriate reasoning that the legislature had authorized.

Mr. Fogg felt the brightline rule is made clear in SDCL 1-25-1.1, and that the City Council did not give the citizens appropriate notice on the agenda as required by the statute.

Ms. Sovell asked what would happen with public interplay at local government meetings if the Commission were to say that anything for public discussion must be specifically listed on the agenda? Mr. Fogg stated at the top of agenda the City Council typically has an opportunity for public comment and at the bottom of the agenda there is a topic for people to complain.

Mr. Sovell questioned if it would have made any difference to Mr. Fogg's position if the agenda has had said "law enforcement" vs "law"? Mr. Fogg answered no.

Ms. Hoffman asked if it was Mr. Fogg's position that if something is not specifically listed on an agenda it should not be talked about at all at a public meeting. Mr. Fogg believes the statute requires a governing body to provide twenty-four-hour notice if the public body is going to discuss a topic.

The Commission went into deliberations.

Ms. Sovell wondered whether by simply listing "Law" on the agenda the City was giving the community the opportunity to know what is going to be talked about at a meeting. Ms. Sovell recognized, however, that the community knows that "Law" on the agenda is going to focus on law enforcement or state's attorney issues, and city attorney issues. Ms. Sovell acknowledged she was leaning towards there being sufficient notice to the public because there was no official action taken.

Ms. Hoffman agreed. Ms. Hoffman thought it was hard to sub categorize things because items of discussion are going to come up that a public body did not anticipate.

Mr. Smith also agreed. Mr. Smith felt if there had been any formal action, he would feel differently. Mr. Smith thought the people who were committed to being involved with the discussion likely had recognized that the “Law” category was the opportunity that if something was to occur that was going to be the moment during the meeting where it would occur.

Mr. Russell stated that he understood Mr. Fogg’s concern as it related to the vagueness of the agenda item. Mr. Russell acknowledged he agreed with the other Commissioners because there was no formal action taken. However, Mr. Russell felt that the language of the statute could be improved.

Mr. Russell made a motion to find there had been no violation of SDCL 1-25-1.1. Ms. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-02, Bennett County Board of County Board of Commissioners

Mr. Robert Fogg, Jr., appeared as the Complainant. There was no written response filed by the Bennett County Board of Commissioners. There was no appearance by a representative, or legal counsel, on behalf of the Bennett County Board of Commissioners.

Mr. Fogg asserted that the Board of Commissioners’ disinterest in defending itself is an admission to the facts and requested they be found in default.

Ms. Sovell stated the statute allowed the Commission to proceed on written submissions and denied the request to find the Board of Commissioners in default.

Mr. Fogg stood by his written submission to the Commission, along with the letter from the Bennett County State’s Attorney.

Ms. Sovell asked Mr. Fogg to clarify the issue before the Commission. Mr. Fogg answered that the complaint is based on the County Commission entering executive session without a second to the motion to enter and no vote on the motion.

The Commission went into deliberations.

Ms. Hoffman stated there appeared to be a violation. Ms. Hoffman felt it was documented in the minutes, and the State’s Attorney’s referral, that there was action taken to enter executive session with no second made to the motion to go into executive session and with no vote taken. Ms. Hoffman pointed out there were additional minutes that had been corrected at next scheduled meeting, but they also indicated a motion was made to enter executive session

with no second. Ms. Hoffman believed the motion is the basis that sets out the question, but you need the second to be acted on.

Mr. Smith agreed. Mr. Smith felt regardless of the original minutes or the corrected minutes, it was clear just one motion was made on the record with no second made to enter into executive session.

Ms. Sovell inquired whether it was a procedural issue or an open meeting issue. Ms. Hoffman answered that she thought it becomes an open meeting violation when they do not follow the procedure and then still enter into the executive session.

Mr. Hoffman felt there were two parts to the complaint; first being entering into executive session and the second was the reason stated for executive session. Mr. Hoffman didn't think there was an issue saying you're entering for contractual reasons. As specified in SDCL 1-25-2 that would be a legitimate reason, but when the last paragraph of 1-25-2 does require a vote to enter into executive session. Ms. Hoffman agreed.

Ms. Hoffman made a motion to find there had been a violation of SDCL 1-25-2. Mr. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-03, Piedmont Board of Trustees

Mr. Ky Gossard, the Complainant, was not present for the hearing. Jacob Stewart appeared as counsel on behalf of the City of Piedmont.

Ms. Sovell stated, with no appearance by the Complainant, the Commission would be considering the written complaint. Ms. Gossard alleged a violation of SDCL 1-25-1.1 by the City of Piedmont for posting a meeting agenda at their offices, but not posting the agenda on their website.

Mr. Stewart pointed out the City of Piedmont did admit the technical violation but wanted to give a fuller explanation as to what happened. Mr. Stewart felt it was undisputed that the physical notice of the proposed agenda was indeed put on the principal location for a full continuous 24 hours where it was readable and visible. The agenda indicated the time, date, and meeting location. Mr. Stewart acknowledged that the statute requires political subdivisions that maintain a website to also post the agenda on their website.

The Commission went into deliberations.

Ms. Sovell stated their appeared to be a technical violation.

Mr. Russell moved to find that there was a violation.

Mr. Hoffman wanted to add to the record that upon reviewing the report that the sheriff's office put together, not only was this a pretty blatant violation of the statute, but the way it was handled by Mr. Anderson was completely inappropriate. Mr. Hoffman agreed it was a violation.

Ms. Sovell noted that she too took note of the concerning comments made by Mr. Anderson in the Sheriff's report.

Mr. Russell again made a motion to find there had been a violation of the SDCL 1-25-1.1. Mr. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-04, Lincoln County Commission

Ms. Wendy Hogan appeared as the Complainant. Mr. Drew DeGroot, Lincoln County State's Attorney Office, appeared as counsel on behalf of the Lincoln County Commission.

Ms. Hogan pointed out that there were three Lincoln County Commissioners; (Arends, Poppens, and Jibben) who were invited, to visit Summit Carbon Solutions. Ms. Hogan asserted this was not a public meeting, but they went over issues that pertained to planning and zoning. The presence of the three Commissioners established a quorum. Ms. Hogan asserted this was a blatant violation of the open meetings laws.

Responding for the Lincoln County Commission, Mr. DeGroot stated that Commissioner Poppens was in attendance at the meeting for personal reasons and that Commissioner Poppens had recused himself from all pipeline related issues.

Mr. DeGroot pointed out the reason the complaint was forwarded to the Commission is because of paragraph 3 in SDCL 1-25-1 in regard to a quorum of a public body the discussion of public policy.

Ms. Sovell asked whether they anticipated that they would discuss public policy in relation to Lincoln County when they were in attendance at the meeting in question. Mr. DeGroot indicated that it was his understanding that the Lincoln County Commissioners were not sure they would be discussing specific policy or not. Ms. Sovell followed up by asking with whether those who were in attendance were aware that a quorum would be present. Mr. DeGroot responded that after the investigation, they were not sure whether there would be a quorum or not.

Ms. Sovell then asked if whether the potential attendance at this meeting was discussed at any public meeting or circulated among the Commission as a whole. Mr. DeGroot responded that based on the information he had the

Commission had received their invitation a day or two before the event, so it wasn't discussed. Mr. DeGroot continued that the Commission members did not discuss noticing it with himself or anyone with the Commission office. Mr. DeGroot stated that since this event the Lincoln County Commission office takes a proactive approach and notices all events, whether public policy is being discussed or not.

Mr. Smith inquired whether the address provided on the invitation by NuGen Energy was in Lincoln County. Mr. DeGroot responded he believed it was in Turner County.

Mr. Hoffman asked if Mr. DeGroot knew if everyone on the Commission was invited, or only certain members of the Commission. Mr. DeGroot believed the entirety of the Commission. Ms. Sovell followed up inquiring if others were also invited. Mr. DeGroot stated from his understanding the Commissioners were invited, members from the general public, and Legislator Karla Lems were also in attendance.

Ms. Hogan rebutted that the Commission knew there was a quorum when the three of them walked in and felt the ethical thing would have been for one of them to leave.

Mr. Russell asked Mr. DeGroot to articulate more as to why he believed that there was some ambiguity with SDCL 1-25-1. Mr. DeGroot responded that paragraph three of SDCL 1-25-1 references an event hosted by a nongovernmental entity in which a quorum of a public body is invited and public policy may be discussed. He felt that there was ambiguity concerning whether Lincoln County specific public policy was discussed during the event.

Mr. Russell inquired if the Commission had been dealing with a particular motion as it related to the pipeline going through Lincoln County at the time or previous to this meeting. Mr. DeGroot replied that shortly before the meeting the Commission had created a transmission pipeline committee to review Lincoln County proposed ordinances and they adopted a resolution to create that subcommittee.

Ms. Sovell asked Ms. Hogan how the Commission could know or prove public policy was actually addressed at this particular gathering. Ms. Hogan responded that Representative Karla Lems was in attendance and could tell you what was discussed.

The Commission went into deliberations.

For purposes of the record, Ms. Sovell read the language of SDCL 1-25-1. Ms. Sovell felt that looking the situation clearly involved a nongovernmental entity, there was an admission that a quorum of the public body was invited,

but that she wasn't sure about public policy being discussed. Ms. Hoffman stated that in her opinion, with the subject matter being the pipeline, that public policy very well may have been discussed.

Mr. Smith agreed with both statements and noted that it really came down to whether or not public policy may have been discussed. He felt that if you removed the emotions of the pipeline and looked at it through a broader lens as to whether or not the meeting of a nongovernmental entity involved potential dealing of the county, he felt the answer to that would be a yes.

Mr. Hoffman stated that the first thing he tells his commissioners when they go to events like these is that they need to file a notice of a quorum because there's a high likelihood that public policy may be talked about. Mr. Hoffman felt there was a quorum of public body that were invited and a high likelihood that public policy was discussed.

Ms. Sovell felt there were too many question marks in her mind as to whether the County Commissioners knew that a quorum was going to be present.

Mr. Hoffman stated he saw it as the county commissioner's responsibility to see if a quorum is invited or not, especially when you have something that is such a hot button topic.

Mr. Russell felt it was an unfortunate situation but thought there was a violation of the statute.

Mr. Russell made a motion to find there had been a violation of SDCL 1-25-1.1. Mr. Smith seconded. A roll call vote was held: all Commissioners voted aye.

In the Matter of Open Meeting Complaint 24-05 North Sioux City City Council

Mr. Walter D. Johnson appeared as the Complainant. Ms. Stacy Kleber appeared as counsel on behalf of the North Sioux City City Council.

Mr. Johnson stated that he filed his open meeting complaint for repeatedly failings to post meeting agendas in a timely fashion. Mr. Johnson noted that Union County State's Attorney's letter to the Commission mentioned July 6, 2021, July 24, 2023, September 5, 2023, and December 4, 2023, meetings that were all violations of SDCL 1-25.1.1.

Mr. Johnson stated in the fall of 2023 he wanted to attend the December 4 meeting to hear more about an issue, but no agenda was put out 24 hours in advance. Mr. Johnson made the City aware when it came to public comment, but the Mayor responded that usually the agendas are posted on time and was not concerned.

Mr. Johnson told the Commission that he filed his complaint after three violations of continuing to fail to post agendas. Mr. Johnson felt the open meeting laws were designed to encourage public participation and the continued failure to post agendas in a timely manner warranted a reprimand.

Ms. Kleber, for the City, stated that she was hired as the City attorney in May 2024 so she was not present for any of the violations, nor for the initial investigation. Ms. Kleber also pointed out that individuals who had participated in the original investigation were not participating in the submission to the Commission because they were no longer with the City.

Ms. Kleber did not dispute State Attorney Miller's factual findings. Ms. Kleber acknowledged that there were four findings of technical violations of South Dakota statute 1-25-1.1.

Ms. Kleber also acknowledged all of the violations that were noted talked about the failure to publish an agenda more than 24 hours before that official meeting to the website.

Ms. Kleber continued by stating that three of the violations (July 6, 2021, September 5, 2023, and December 4, 2023) were meetings in which the agenda was not uploaded on a Friday before a Monday meeting. Instead, the agenda was posted to the website the morning of the meetings. The July 24, 2023, agenda was timely posted on the City's website, but in error was posted under the folder for 2022 instead of 2023.

Ms. Kleber stated all of the violations were inadvertent mistakes and errors made by the City. Ms. Kleber also stated that the City did proceed with the meetings rather than canceling and waiting until they could have published a notice 24 hours or more before the meeting.

Ms. Kleber mentioned corrective actions that the City has made. Ms. Kleber also said the City has cross-trained individuals to make sure that if someone is gone or absent there is another to post in a timely manner.

On September 26, 2023, Ms. Kleber personally completed training for the open meeting requirements that apply to elected city officials and employees.

Ms. Kleber concluded that the City intends to comply with the open meeting laws and asked that the Commission consider the good faith efforts of the City.

Mr. Johnson was pleased with recent efforts made by the City Council. Mr. Johnson concluded he stood by his complaint and hoped the Commission would consider a reprimand.

The Commission went into deliberations.

Ms. Sovell stated the City acknowledged the violations on July 6, 2021, July 24, 2023, September 5, 2023, and December 4, 2023, and believed they were all technical violations. Mr. Russell thanked the City members who cooperated so extensively with the investigation and the City attorney for all her remedial actions.

Mr. Russell made a motion to find there had been a violation of SDCL 1-25-1.1. Ms. Hoffman seconded. A roll call vote was held: all Commissioners voted aye.

Adjournment

A motion to adjourn was made by Mr. Russell seconded by Mr. Smith, at approximately 2:23 p.m. A roll call vote was held: all Commissioners voted aye.

Approved on _____, 2025.

Emily Sovell, Chair
On behalf of the Open Meeting Commission