

SOUTH DAKOTA OPEN MEETING COMMISSION

MINUTES OF MEETING

March 8, 2012

Sioux Falls Holiday Inn -100 W. 8th Street.

Members present: Lisa Rothschadl, Bon Homme County State's Attorney (Chair); Mark Reedstrom, Grant County State's Attorney; Glenn Brenner, Pennington County State's Attorney. Emily Sovell, Sully County State's Attorney appeared by telephone. Diane Best assisted the Commission.

Best explained the meeting was scheduled in the city library, but was moved across the street to the Holiday Inn to have a larger room for the Sioux Falls item on the agenda. Notice of the change was posted at the library, mailed to parties giving presentations at the meeting, and emailed to the OMC email mailing list. The AG's office sent a notice to the media.

Best asked the OMC to change the order of the agenda to have the Aberdeen item first to accommodate Betty Breck who was appearing by telephone and to delay the Sioux Falls item to accommodate timing for any member of the public who might go to the city library for the Sioux Falls item and be redirected to the Holiday Inn.

A motion was made by Brenner and seconded by Steele to move the Aberdeen item to the first item on the agenda. The motion carried.

Ms. Breck said she would like the opportunity to hear the legislative update. A motion was made by Reedstrom and seconded by Steele to move the legislative update to the first item on the agenda. The motion carried.

Legislative update

Best gave the 2012 Legislative update. HB 1131 was signed by the governor on March 2 and it will be effective July 1. This bill revises the law to require:

- 1) agendas to be posted in a manner that is "visible, readable, and accessible for at least an entire 24 hours before any meeting
- 2) posting agendas on the public body's website.
- 3) adds Email as an option for delivery of notice of rescheduled or special meetings -the other choices are mail or telephone

SB 161 was delivered to the Governor on March 1. It revises the law by providing that "For any official meeting held by teleconference, which has less than a quorum of the members of the public body participating in the meeting

who are present at the location open to the public, arrangements shall be provided for the public to listen to the meeting via telephone or internet.”

HB 1184 was deferred to the last legislative day. It would have required public bodies to keep minutes while they meet in executive session. The minutes would not have been public records, but could be reviewed by any member of the governing body. The deferral effectively killed the bill.

Brenner noted that HB 1131 does not clear up the issue of whether the agenda has to be posted in a place that would be visible 24 hours including nonbusiness hours.

In the Matter of Open Meeting Complaint 11-06, Aberdeen City Council and Aberdeen Planning Commission (September 15 and 16 2008 meetings) and Matter of Open Meeting Complaint 11-07, Aberdeen City Council and Aberdeen Planning Commission (July 27 and September 8, 2009 meetings)

Adam Altman appeared on behalf of the City of Aberdeen.
Ms. Breck is the Complainant.

Chairman Rothschadl noted that Ms. Breck was asking for additional action with respect to the City of Aberdeen matter.

Ms. Breck explained that her arguments remain the same as in December. Her contention is the same that the City and Planning commission violated the law. In December the City attorney had relied on OMC Findings in 08-03 relating to Brown County, but this matter involves meetings that occurred before 08-03 was issued. She said the OMC had not ruled on Count 4 of her Complaint and she relied on her earlier letter submitted to the OMC, so she was requested a decision on that matter. However, she would have no objection to dismissing Counts 1, 2, and 4 of the previous allegations in light of the passage of HB 1131.

Steele asked whether Count 4 related to a meeting right after Labor Day and when the agenda was posted for that meeting. Breck said she believed it was posted at the last minute on Friday. But she had no evidence it was posted at any specific time. Reedstrom moved to declare counts 1, 2, and 4 moot.

Brenner said the OMC isn't called upon to interpret HB 1131 for this case. It isn't clear, but it could be interpreted to require the agendas to be visible the entire 24 hours, but there will be complaints in the future when snow causes visibility issues or lighting is not proper. Brenner also seconded the motion.

The Chair called on City Attorney Altman. Altman said it should not be assumed that the City posts the agendas on late afternoons on Friday. The City posts the agendas every Thursday around 4 pm and routinely does so. They were properly posted. For the issue pertaining to Labor Day, the agenda would

have been available all day Friday for the matter at issue on the Tuesday after Labor Day. He also said he has no objection to the motion.

Steele said by adopting HB 1131 the legislature stated that the agendas must be posted so they are visible from the exterior of the building and at least for a longer period of time than a single business day if they are at an inside location. He didn't think the OMC was reaching the issue but it appears that the legislature was acknowledging what the law was before and it would be appropriate to dismiss the counts as noted.

Reedstrom agreed. The choice of words in HB 1131 requires the agenda to be visible, readable and available to the public for the entire 24 hours period of time. This is exactly what the Breck complaint was all about. Previously, the OMC felt the agendas should be visible this entire time, but that is not what the state law required and the OMC could not find city of Aberdeen to be in violation. He stated that HB 1131 fixes that and solves the concerns.

Chair Rothschadl stated that she was grateful to see HB 1131. She said she understood the concerns that may arise concerning snow removal and lighting, but the entities involved should be able to figure out ways to overcome those concerns. Brenner said there is also a concern regarding township meetings and how this law will be met when meetings are held at people's homes. The law could be rewritten to provide for 48 hours so as to provide more notice instead of the way it was written. Then it could still be at the courthouse or whatever facility is open during normal business hours for a more extended period of time. Also chapter 17-03 deals with county provisions and where they choose to give notices and their bulletin board and that could be another issue in the future.

The Chair conducted a roll call vote on the motion and all members voted in favor.

Chair Rothschadl asked Diane Best for a recommendation on the wording of Findings. Best recommended that the Altman proposed Findings be adopted, except for:

- 1) Deletion of Conclusions 2, 3, and 4.
- 2) Insertion of a new Paragraph:
The Complaints regarding the September 15 and 16, 2008 and September 8, 2009 meetings should be dismissed because the legislature has enacted HB 1131 and the Complainant Betty Breck has conceded they may be dismissed.
- 3) That the Final Decision be drafted to show that July 27, 2009 reprimand be issued and the remaining claims be dismissed.

Steele moved to issue Findings and Conclusions accordingly. Brenner suggested deleting Altman findings 2, 3, and 4. Reedstrom and Rothschadl said Findings 2, 3, and 4 should remain. Brenner then seconded the Steele motion.

The Chair conducted a roll call vote and all members moved in favor of this motion. Ms. Breck terminated her telephone connection.

In the Matter of Open Meeting Complaint 12-01, Sioux Falls City Council.

Jon Arneson appeared on behalf of the complainant, Sioux Falls Argus Leader. David Pfeifle represented the City.

Mr. Arneson said the City Council held a special meeting on September 14, 2011 to address a personnel matter. It was the only item on the agenda. Upon motion, the Council voted to go into executive session to “discuss a personnel matter.” At the conclusion of the executive session, the Council reconvened in public form “to take the personnel action that was discussed in executive session and vote.” The vote was taken and passed 5-3. He said it became apparent that the personnel matter was the performance or competence of the city clerk, a position for which the Council had the authority to hire and fire. He said it was apparent the purpose of the meeting was to present Clerk Debra Owen with the ultimatum to resign or be fired.

Arneson recited from the Feb. 21 letter submitted to the OMC by the City Attorney: “upon reconvening in public session the City Council by motion and affirmative vote of a majority of its members, officially authorized three City Councilors to take the personnel action ‘as discussed in the executive session.’”

Arneson said SDCL 1-25-2 permits (but does not require) executive sessions for discussion of competence, character, or fitness for office. The statute says official action is to be made in an official open meeting. He said there was action and it certainly wasn’t unofficial. He said it is disingenuous to argue this is not official action.

Brenner asked about Arneson’s Complaint at p. 3: “the purpose of the open meetings law is circumvented if public bodies are allowed not only to discuss the matter in a closed meeting, but then to take official action with respect to the matter discussed without identifying” the subject. He said that if the law allows the body to go into executive session to discuss competency or performance, it is to protect the individual from having their work performance or criticism of it from being broadcast in a public arena?

Arneson said hiring or firing is not a secret. Debra Owen knew when she got hired that she lived by the sword and died by the sword. He said there is nothing in the law that termination should be secret. He said discussing why

you want to fire someone can be open too, but as a courtesy executive session is allowed. If you are going to say that Jane Doe or John Doe is a mental moron or if Jane Doe has 3 martini lunches you might be more candid in executive session and also to protect some of those areas of privacy that might not otherwise be protected. He said the actual fact of termination is not to be protected. He said she needed to be fired in public. The law allows for discussion and deliberation like a jury, but juries make the decisions in public.

Brenner asked if it would have been sufficient if the Council had said their decision was to offer an ultimatum or whether they would have had to give the reasons.

Arneson said if the Council votes on a course of action, it is official action. He said it not necessary to wait until her head is in the basket. He said the public body doesn't have to give the reason.

Brenner stated that giving a person the opportunity to resign is done every day. Both sides benefit. The employee can resign and the city avoids a wrongful termination action. He inquired whether that should have to happen in an open meeting or whether it takes away the choice of doing so.

Arneson said that doesn't apply for government employees. Ms. Owen was directly a city council employee. The employee's head does not need to be in a basket before the public is brought in. He said there does not need to be "final" action to be considered "action" itself. He said the ultimatum is public and the public is entitled to know.

Reedstrom asked about situations where the areas of discussion involve issues like martinis at lunch and they are intertwined with the final personnel action. What if there is an ultimatum that the employee has to go into alcohol or drug treatment or be fired? Or maybe there is a medical issue affected by HIPAA and that sort of thing? Then the public knows about a medical problem or disease. How do you reconcile that?

Arneson said there are delicate issues; there is no perfect path. Public employees sacrifice some privacy. Sometimes personal issues do get exposed. He said if the ultimatum is "go to treatment or be fired" the body can just say "we have an alternative plan for you" and not specify a place of treatment. There are ways to protect the person as much as possible, but it should not be pretended the city is the benevolent ruler. Arneson said he wouldn't want to say the treatment issue is the reason here. He wasn't quite sure Debra Owens' interest was the real reason for the confidentiality. He said that is why we have public bodies—because they represent and serve the public.

Rothschadl stated that she didn't know if Debra Owen was at the meeting. But what if she wasn't there and the motion was made on a televised meeting or webcast and Ms. Owen was sitting home watching it. Isn't that an issue?

Arneson said it is possible. She chose to be the city clerk. He said the sensibilities of an individual are important, but not as important as the public's right to know (and not as important as the City Council's accountability to the public). He said there is a danger with public bodies talking about anything they want in executive session and then stating "we're gonna vote on what we talked about in there and nobody knows what it was."

David Pfeifle addressed the OMC. This is a question of what is in the public interest. A majority of legislatures around the country and all the courts that have looked at this have held the public is best served when personnel matters take place in confidential closed executive sessions. The privacy of individual employees and allowing public bodies to organize and staff themselves are best served.

He referred to a 1990 Attorney General opinion on a Board of Regents issue. They sought clarification on how to take official action and maintain confidentiality. Pfeifle said that based on the 1990 opinion you can come out of executive session and refer back to the item discussed in executive session without identifying the employee. The legislature could have changed the law after the AG opinion, but did not do so during the intervening 22 years.

Pfeifle said he had appeared before the OMC in November 2010 and the City admitted that action cannot occur during executive session. Pfeifle said the OMC either talked or nodded their heads that the 1990 opinion was the proper method. He said the actions were on behalf of Ms. Owen's welfare. The choice to resign or be terminated is done on a daily basis around the country. With the personnel exception in the open meeting statute, the legislature placed the government employer on the same footing as the private employer. If you were to announce that choice publically, it would be a meaningless choice.

Pfeifle said that statutes should be read to avoid the unreasonable and absurd construction. It would be unreasonable and absurd if a public body could not present that choice at issue here in private first to give her respect.

Steele asked hypothetically if the way to handle this would have been to give her the offer in private-- in an executive session.

Pfeifle said he was not allowed to discuss what transpired in the executive session.

He stated that the city council authorized a committee to make the offer in private. As for the council there was no straw poll and no vote in private.

Pfeifle referred to a Washington case stating that delegating authority to deal with such a matter is in compliance with the open meeting laws even if the public action did not specifically state what action would take place. He said the Massachusetts Supreme Court case went further and said no official action needs to be taken in public and that is to protect confidentiality. Pfeifle said that doing this is a matter that has been advocated for 22 years through the 1990 Attorney General's Opinion and submitted that the OMC accept that method.

Reedstrom said it is the essence of the open meeting laws that government actions be made in public. While he respects that a body may discuss certain sensitive matters in private, there was official government action here. The motion was placed on the record in open meeting format after the executive session, but no information was provided to the public. Why would the law require a vote if the motion was just to say that the item as discussed in executive session should be adopted-- without more? He said it defeats the purpose of the spirit of open government.

Pfeifle said that South Dakota doesn't have a clear court decision, but a couple of statutes apply. There is the confidential protection given to personnel matters along with the 5 exceptions in the open meeting law. There is an executive session exception for personnel in the open meeting laws and there is the 1990 AG Opinion. The AG opinion is not binding on a court but is instructive and is persuasive authority for the OMC. The legislature could have said that the employee should have been identified and did not do so. This is not just a termination; it the choice would be presented to the employee. Out of respect to Ms. Owen the City Council followed the 1990 AG Opinion.

Brenner stated that SDCL 1-25-2 requires official action to be made at an official open meeting but does not address the detail for making the motion in terms of disclosing the nature of the executive session. It is general. He asked whether there is anywhere in the statutes that an official action must be taken in this circumstance. What if they were to take no official action at the meeting?

Pfeifle said the Council was as cautious as could be. If it would have been any other employee this type of official action would not have been necessary. The City Council does not directly make the decision in other cases. This is unique because Ms. Owen was the Chief and worked directly for the Council. There was a need for the Council to delegate this matter to 3 Council members.

Rothschadl asked if this was official action. Pfeifle stated that it was official action according to the 1990 AG Opinion.

Steele said that Owen subsequently said publicly she had been terminated, but aside from that, in what sense did the official action terminate the employment? There was nothing in the city minutes.

Pfeifle said the Council had discussed the issue of resigning or having her employment terminated, And the authority to offer that choice was delegated to the 3 Council members.

Steele stated that he can't image advising his County commission that they could fire someone without saying they are firing someone.

Pfeifle referred to the 1990 AG Opinion stating that confidential matters can be addressed by not revealing confidential information. It was a personnel matter.

Steele said that concerns about job performance are confidential, but the fact that an employee is fired is not confidential.

Pfeifle said making this offer in public would have robbed the employee of a choice.

Rothschadl said that based on the motion no one knows that she would be given the choice. She asked Pfeifle whether he had an answer to the statement that public employees lived by the sword and died by the sword.

Pfeifle said the legislature created a personnel exception. The public records law was changed in 2009 and it reflects that. As a public employee you are in a fishbowl on so many levels, but when it comes to termination they shouldn't have to be. The legislature carved out a distinction. To require otherwise would be to ignore legislative intent.

Brenner commented that if there was no official action, there would be no complaint. In Paragraph 17 the Complaint says that there was essentially no official action. The Council moved to "authorize councilors Erpenbach, Anderson Jr. and Enteman to take personnel action that was discussed in executive session" and there was a roll call and vote. But if they are having a roll call and vote, wouldn't there necessarily be public action? He said if there was no public official action there wasn't a violation of the open meeting law. That is another angle.

Steele said Ms. Owen was a fairly high level official as director of operations for the Council and that is of considerable public interest.

Pfeifle said there are 1079 city civil service employees under the administration of the Mayor. And 8 city Council employees. Owen is the chief of operations to handle all employment matters relating to the Council employees. This is a unique situation because Ms. Owen was the one at issue here.

Brenner asked if Owen resigned. Pfeifle stated that the employment terminated.

Reedstrom said the Council could have publicly offered Ms. Owen the opportunity to resign and she could have resigned. It is may be preferable to Owen to say she resigned to avoid the stigma. There is a balance on her personal preference and the sensitivity to feelings. He asked whether Ms. Owen's feelings outweigh the public's right to know.

Pfeifle said that the personnel exception has been adopted by legislatures and courts have said that respect for the employee's reputation is paramount and held these discussions should be confidential. Public bodies have to discuss personnel matters and also keep it confidential. The city council had to harmonize this. He referred to the AG opinion and the 2010 OMC discussions as a roadmap.

Arneson addressed the OMC again. He referred to item 17 of the Complaint. He said that while they attempted to take official action, it should be considered as not official action. He said he's not the lawyer for Ms. Owen, but if they did fire her outside of an open meeting he thinks she still has a job. He said public action was not taken correctly.

Arneson said the AG opinion pertains to a legal settlement, not this case. He disputed the legal analysis reached by Pfeifle. The Washington law says that an executive session may be held to review the performance of a public employee but final action shall be taken in an open meeting. That is the same law as South Dakota. There is good and bad with being a public employee. Arneson said Pfeifle referred to a Harvard Law Review casenote but it predates open meeting laws around the country. Some of the articles citing it have also promoted openness in government. He cited to a 2004 George Mason Law Review article and a 2008 Florida State University Law Review article.

Steele asked Pfeifle whether the Council could have hired someone the same way that it fired Ms. Owen. Could they discuss who they want to hire in executive session and then not make a motion to hire a particular person when they come out of executive session?

Pfeifle said it is different. Here the choice is being presented and it was delegated to three commissions to offer that choice. That is different. When the personal reputation issue is one of the interests, it is unique. This is a very different factual circumstance.

Brenner asked Arneson asked if job interviews for clerk should be public.

Arneson said they should be open, but don't have to be. He referred to a situation at SDSU issue where he took court action to open up the process on

hiring. Preferably it should be open, but not every interview is going to necessarily be open. But city clerk situation should be open.

Deliberations.

Chair Rothschadl opened up deliberations.

Best said she had been approached by others (not the parties or their lawyers). She isn't a member of the commission and doesn't vote. The fact that she received comments should make no difference. She did not relay the comments to the OMC members because the OMC should remain impartial. Brenner referred to the OMC 2005 decision in *Town of Herrick*. He said it involved an issue of the notice requirement and there was a note in the *Herrick* decision concerning whether the discussion in executive session actually constituted an official action and the OMC had said the discussion the Herrick city council had in executive session was in relation to an employee and was official action. But it is distinguished because it surrounded a notice requirement and the focus was not on the executive session.

Rothschadl said the Herrick case was distinguishable. Reedstrom said the Herrick issued focused on the notice issue and it does not provide a lot of guidance. He said he was torn and there is a balancing act. There is the interest of openness in government. And there is the legitimate interest to protect personnel and their reputations and the ability of board members to have a free and open environment to discuss sensitive issues. That fosters a better discussion concerning employees. There is this balance. Openness in government should outweigh employee's concerns over their privacy to a certain extent. There are certain things that are absolutely confidential, but in this matter the ultimatum should have been public.

Rothschadl said she had an issue with the wording of the motion and it should have been more specific. They could have named Ms. Owen, but not necessarily have gone any further. They did not know if she would resign or accept termination. Public employees are in a fishbowl.

Brenner said he would have advised they adjourn and then taken action later. There is a question whether this is official action and the Council doesn't appear to have come out and made an official action. There is a need to protect privacy for the person and also for the board since they are subject to a wrongful termination lawsuit. There should be protection for decency in dealing with alcohol issues and other kinds of issues.

Reedstrom offered a hypothetical situation where the city would have preferred the resignation and voted to offer an incentive ranging from \$5,000 to \$20,000 to resign. If the range is on the record, the Council would give up their

negotiation position. There is a conundrum as to how much action should be public.

Brenner said these "compensation damages" are done quite a bit.

Steele said the AG's opinion dealt more with that type of package than the situation Mr. Pfeifle is talking about. Reedstrom agreed.

Steele said he understood there was a concern that no official action was taken. But the substance is that the City did fire her and the motion was in actuality to fire here. Whether you want to say they made the decision in executive session or not, it is an official action. He said he didn't see how you can fire someone without naming them.

Steele moved that the City Council of Sioux Falls be reprimanded for illegal action under the open meetings law by failing to take action in a public open session.

Brenner inquired whether failing to take action was the issue?

Reedstrom stated that the City Council had the authority to fire Owen and they took action, just not on the record. But they took action. Reedstrom seconded the motion.

Steele stated that the City Council substantively operated to fire her.

Reedstrom stated that the Council's motion was "to have so and so act in executive session." That is meaningless.

Steele stated that action was made; the action to fire Owen occurred.

Brenner asked whether the firing must be public.

Steele said there was substantive action because the Council operated to terminate Owen's employment. They didn't tell anyone what they were doing. He would like to say it is void, but that is not the case.

Rothschadl asked "what if we say this is attempted action?"

Reedstrom said the action was meaningless.

A roll call vote was held and Sovell, Steel, Rothsadl and Reedstrom voted "aye". Brenner voted "no".

Brenner said he may write a dissent because the detail did not need to be disclosed. Later action on how the employee was ultimately dismissed might be a complaint, but that is not the case here.

Mr. Arneson was advised that he is to submit proposed Findings of Fact and Conclusions of Law to Best within 20 days and Mr. Pfeifle is to submit a response within 20 days thereafter.

Approval of Minutes

Reedstrom moved to approve the minutes of the December 7, 2011 minutes of the OMC. Second by Brenner. The motion carried.

Matter of Open Meeting Complaint 11-05, Willow Lake School Board

This matter was heard in December. Best informed the OMC that all parties were given a copy of the draft Findings and Conclusions and informed that they would be considered on March 8. None of the parties were present

Steele noted that the names of the three individuals involved were listed in Paragraph 2 of the final decision. He said it would be consistent with past practice to take out the names and state that it was a quorum.

Rothschadl suggested taking out the three names.

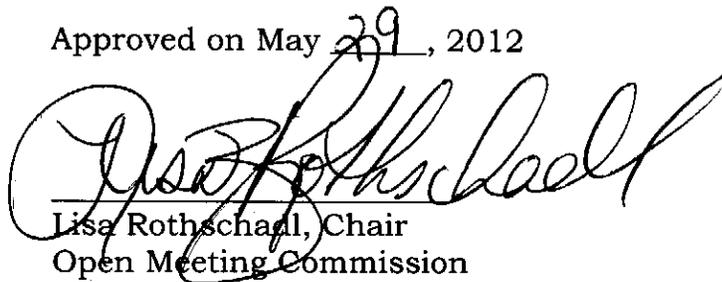
Reedstrom moved to adopt the proposed Findings and Conclusions as drafted with the exception of ¶ 2 of the Decision which should be amended by taking out the three names and referring to a quorum. Brenner seconded.

The Chair conducted a roll call vote and all voted in favor of the motion. This authorized the Findings to be issued.

Adjournment

Reedstrom moved to adjourn. Steele seconded. All voted in favor.

Approved on May 29, 2012



Lisa Rothschaedl, Chair
Open Meeting Commission