

April 24, 2018, Council Agenda Item IV.A Comments

The following comments on an item on the Newport Beach City Council [agenda](#) are submitted by:

Jim Mosher (jimmosher@yahoo.com), 2210 Private Road, Newport Beach 92660 (949-548-6229)

Item IV.A. PUBLIC EMPLOYEE APPOINTMENT

1. There is a Serious Problem with this Item

While I believe the appointment of a city manager is one of the most important decisions a City Council ever makes, and while I strongly encourage extensive discussion of it, I object equally strongly to this item as noticed:

IV. CLOSED SESSION

A. PUBLIC EMPLOYEE APPOINTMENT

(Government Code Section 54957(b)(1)): 1 matter

Title: Initiation of Recruitment Process for New City Manager

“**Initiation of Recruitment Process for New City Manager**” is neither a job title nor, to the best of my knowledge, a topic that the Brown Act allows to be discussed in private. Yet from the agenda it appears that is precisely what the Council is being invited to do -- and for more than two hours (and possibly with unknown parties present?), as supposedly allowed by Government Code [Section 54957\(b\)\(1\)](#).

2. Explanation of the Problem

Among other things, the **recruitment process** was already initiated, in public, by [Item 12](#) (“City Manager Employment Agreement Amendment and Commencement of Process for Recruitment of New City Manager”) on the April 10, 2018, agenda, and until actual **candidates** have been identified for evaluation, I believe *all* discussion of the recruitment **process** should be, and I think is legally *required* to take place in public -- as, for example, in **Item 11** (“Selection of an Executive Search Firm to Assist in the Recruitment of a New City Manager”) on the present agenda.

Specifically, Government Code Section 54957(b)(1) reads as follows:

(b) (1) Subject to paragraph (2) [expanding on the handling of the “complaints or charges” mentioned later in the sentence], this chapter shall not be construed to prevent the legislative body of a local agency from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.

It is one of the very limited exceptions to the general rule that of city councils “*It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly*” and “*The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know*” (Gov. Code Sec. 54950).

It has been long recognized in both case law and commentary that the Brown Act’s employment/appointment exception applies *only* to specific, identifiable *persons*.

As explained in the League of California Cities' [Open & Public V: A Guide To The Ralph M Brown Act](#) (2016, page 46): "***The purpose of this exception — commonly referred to as the “personnel exception” — is to avoid undue publicity or embarrassment for an employee or applicant for employment and to allow full and candid discussion by the legislative body; thus, it is restricted to discussing individuals, not general personnel policies***" [*San Diego Union v. City Council* (1983) [146 Cal.App.3d 947](#), 955]

In the present case, where the proposed discussion is about “process” not people, there is no identifiable individual being considered for appointment (either employee or applicant), and hence no one who needs to be protected from embarrassment or from public exposure of candid conversation about him or her.

While I appreciate the Council members may feel they can speak more freely in private about a hot-button issue like the eventual selection of a new City Manager, as explained in the California Attorney General's 2003 [Brown Act pamphlet](#) (Sec. VI.1.A): "***The fact that material may be sensitive, embarrassing or controversial does not justify application of a closed session unless it is authorized by some specific exception.*** (*Rowen v. Santa Clara Unified School District* (1981) [121 Cal.App.3d 231](#), 235.) ***Rather, in many circumstances these characteristics may be further evidence of the need for public scrutiny and participation in discussing such matters.***"

The case cited (*Rowen*), incidentally, disposed of the question of whether the “personnel exception” could be used to allow private discussion of the qualifications of outside contractors, much like the recruiters being considered in the present agenda Item 11. It *cannot*, because most contractors are not being hired to act as government employees.

A later case, *Duval v. Board of Trustees* (2001) [93 Cal.App.4th 902](#), considered whether the “employee evaluation” exception could be used to formulate the questions to be explored during a future evaluation. It held that *it could*, but, again, only because the questions were targeted at the evaluation of a specific current employee, the privacy of whose personnel record could be compromised by revelation of the questions being asked about him in closed session.

And while the *Duval* court reached even that limited conclusion only after opining that the plaintiffs in their case interpreted the Brown Act personnel exceptions too narrowly, it should be noted that the idea the Brown Act exceptions ***are*** to be construed narrowly has since been enshrined in the California Constitution with the overwhelming passage of [Proposition 42](#) in 2014, which added [Section 3\(b\)\(2\)](#) to Article 1 (the California Declaration of Rights): "***A statute ... shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.***"

Hence any expansion of the Brown Act's “personnel exception” beyond the present understanding of it¹ as applying *only* to discussion related to specific individuals is highly disfavored.

¹ See, for example, Atkinson, Andelson, Loya, Ruud & Romo's [Open Public Meeting Requirements Under The Brown Act And California Education Code](#) (2016): "***The closed session discussion must relate to a particular individual***"

Nonetheless, as to the employment/appointment exception, Melissa H. Brown and Grant Herndon do observe in their [Brown Act Handbook for Personnel Administrators](#) (Schools Legal Service, August 2017, page F-10): “***A reasonable basis can be asserted to support discussion of interview questions in closed session, especially where they are maintained as a confidential part of the interview process and where the release of the information could give an unfair advantage to a candidate.***”

But the Council is presumably months away from formulating interview questions, so in the present case it is completely unclear what reason is being offered to justify the request for a closed session.

3. The Problem Restated

As noted in Part 1 and substantiated in Part 2, “**Initiation of Recruitment Process for New City Manager**” is a topic of great public interest, and one a city council is most welcome to discuss, but not in closed session. And certainly not under the specific open meetings exception cited, which applies only to the **evaluation of candidates**.

Since the public has to assume the Council has no specific candidates to discuss in closed session at this time, and even if it did, since the agenda notice clearly says the Council is planning to do something different from evaluating candidates (the “initiation of a recruitment process” will presumably lead to the production of candidates to evaluate at some time off in the future, but not now), it appears the Council is preparing to hold a closed session without statutory authorization, and hence to violate the Brown Act.

4. The Ask

In my view, the City Council, or the staff person who prepared the agenda, owes the public of Newport Beach a clearer explanation of what, exactly, the City Council proposes to do in closed session on April 24, how that differs from April 10’s open session Item 12 and this meeting’s open session Item 11, and what provision of the Brown Act allows that to be done behind closed doors (ideally with some case law supporting their interpretation if a closed session justification is claimed).

Since the present agenda announces a closed session topic that is not a valid topic for closed session, and since it is too late to amend the agenda, the clearer explanation will likely require re-noticing the item -- hopefully for discussion in open session at a later meeting.

From: Susan Skinner <susanskinner949@gmail.com>
Sent: Sunday, April 22, 2018 5:39 PM
To: Brown, Leilani
Subject: A letter for the April 24 city council meeting (PLEASE INCLUDE IT IN THE PACKET THIS TIME)

Dear City Council:

I object to having you initiate the search for a new city manager using the City Clerk instead of the Human Resources department.

Here are my thoughts:

At the April 10 City Council meeting, we learned that City Councilmen O'Neill and Duffield met with our well-respected city manager Dave Kiff and effectively forced his retirement. It is unclear if Councilmen Muldoon and Peotter were directly involved, but it is widely believed that they were.

Dave's new contract states that if an interim city manager is named, Dave will immediately be placed on administrative leave until August 31, the date of his retirement. Well-placed sources now say that an interim city manager will be named imminently. If these sources are correct, our new city manager will be... Assistant City Attorney Michael Torres. Mr. Torres has absolutely NO experience as a city manager and his current position has not even given him the opportunity to develop significant administrative or leadership skills.

It is hugely ironic that those councilmen who campaigned on fiscal responsibility are willing to throw away money on severance pay and administrative leave pay in order to ensure that Dave Kiff is no longer in charge. Why?

Why the 'Gang of 4' is so hot to remove Mr. Kiff? What do they want so badly that Dave Kiff will impede? What are they planning to accomplish once he is gone? Mr. Peotter is facing an uphill climb to hold on to his seat and the 'Gang of 4' likely know that once he is gone, they may not have the votes to make changes to the city that they want to make. What ARE those changes? Firing staff that they disagree with? Dave won't be able to protect city staff any longer. Making it easier for their campaign consultant Dave Ellis to influence planning decisions? Mr. Ellis was a lobbyist for the Museum House, a project widely rejected by the residents that was approved by his clients on the council despite an enormous outcry.

It was also revealed at the council meeting that Mr. Peotter had pushed multiple times for Mark Denny to get a position as an assistant city manager but was unsuccessful. It is believed that he was trying position Mr. Denny to take over the city manager position. So, let's learn a bit more about Mr. Denny. He worked for the County of Orange for a number of years after his conviction for voter fraud in the 1990s. While at the county, his

stewardship was questioned because of a million dollars spent on no bid contracts apparently awarded to friends of friends and without appropriate paperwork or oversight. In 2017, the city of Dana Point created a new position as head of the Parks and Recreation Department at a Tuesday meeting and by Friday, Mr. Denny had been offered the position and accepted it.

Shortly after, the city manager of Dana Point announced his retirement and a professional recruiter was brought in. Three excellent candidates applied for the job but it went to Mr. Denny, a man with NO experience as a city manager. Mr. Denny never even applied for the job but was given it regardless. He now has exactly 10 months of experience as city manager and has been politely described as "learning on the job" by a city official in Dana Point. What Mr. Denny does have is a virtual web of political connections to the 'Gang of 4' on our council. The word on the street is that this is the man that Mr. O'Neill, Duffield, Peotter and Muldoon wish to replace Mr. Kiff.

I'm fearful for our city and for the ability of our city staff to act in an ethical and independent way. If unethical forces are working to have key staff positions filled with people who share their philosophy, what does that mean for the future?

At the city council meeting on Tuesday, April 24, the council will decide the process to replace Mr. Kiff. Although it is beyond obvious that the Human Resources department should be heading up this process, the 'Gang of 4' adamantly refused to allow that to occur and insisted that City Clerk Leilani Brown be put in charge of this process. You might ask yourself why? Might it be because Ms. Brown is an at will employee who serves at the pleasure of the 'Gang of 4'? Might it be precisely since she has NO experience in picking a city manager and might be manipulated to do what they want? Is that why Mr. Peotter said that he absolutely refused to have HR manage this process?

We cannot save Dave Kiff, but we are now looking at a bigger picture: saving the city from the 'Gang of 4'. For those reading this, please disseminate this information widely. The more people know about what is going on, the harder it is for the unethical things that are happening to our city to continue. All sides agree: The 'Gang of 4' must be stopped.

I hereby object to the City Clerk's office being the primary resource to find a new city manager rather than the Human Resources department.

Susan Skinner
susanskinner949@gmail.com

From: Susan Skinner <seskinner@me.com>
Sent: Monday, April 23, 2018 1:06 PM
To: Brown, Leilani
Subject: Fwd: Written comment objecting to Item IV.A (CC agenda, 4/24/2018)

Please also include this email train in the correspondence regarding council agenda item IV.A, the discussion of a new city manager.

Please confirm that you have received this.

Susan Skinner

Sent from my iPhone

Begin forwarded message:

From: Susan Skinner <seskinner@me.com>
Date: April 23, 2018 at 7:01:00 AM PDT
To: "Harp, Aaron" <aharp@newportbeachca.gov>
Cc: Jim Mosher <jimmosher@yahoo.com>, Hillary Davis <hillary.davis@latimes.com>, Sara Hall <sara@newportbeachindy.com>, Norberto Santana <nsantana@voiceofoc.org>, Joy Brenner <joybrenner@me.com>, Tim Stoaks <timstoaks@sbcglobal.net>, Phil Greer <surflaw@aol.com>, Thomas Johnson <tomjohnson@me.com>, "Tom@StuNewsNewport.com" <Tom@StuNewsNewport.com>, John Canalis <John.Canalis@latimes.com>, Christopher Trela - NB Indy <christopher@firebrandmediainc.com>, "Ray.Armstrong@da.ocgov.com" <Ray.Armstrong@da.ocgov.com>, Lauri Preedge <Lpreedge@gmail.com>, Dave Kiff <DKiff@newportbeachca.gov>, CityCouncil@newportbeachca.gov
Subject: Re: Written comment objecting to Item IV.A (CC agenda, 4/24/2018)

May I respectfully disagree.

In this guide to the Brown Act, <https://www.cacities.org/Resources-Documents/Resources-Section/Open-Government/Open-Public-2016.aspx>, the discussion of closed session is described as follows:

As summarized in Chapter 1 of this Guide, it is clear that the Brown Act must be interpreted liberally in favor of open meetings, and exceptions that limit public access (including the exceptions for closed session meetings) must be narrowly construed.² The most common purposes of the closed session provisions in the Brown Act are to avoid revealing confidential information (e.g., prejudicing the city's position in litigation or compromising the privacy interests of employees). Closed sessions should be conducted keeping those narrow purposes in mind. It is not enough that a subject is sensitive, embarrassing, or controversial. Without specific authority in the Brown Act for a closed session, a matter to be considered by a legislative body must be discussed in public. As an example, a board of police commissioners cannot meet in closed session to provide general policy guidance to a police chief, even though some matters are sensitive and the commission considers their disclosure contrary to the public interest.³

Using this description, you may not remove discussion such as how to pick the next city manager from the public purview and doing so appears to me to be a clear violation of the Brown Act (again).

I hereby request that the discussion of the next city manager be removed from the closed session and put into the public part of the meeting.

I notice that you removed the city council members from this discussion and I have put them back in. You believe that you are putting them at legal jeopardy by your actions.

Susan Skinner

On Apr 23, 2018, at 6:48 AM, Harp, Aaron <aharp@newportbeachca.gov> wrote:

Good Morning Ms. Skinner and Mr. Mosher,

As you know, the Brown Act provides standard language that can be used on agenda to make sure the public knows what is being discussed. In this circumstance, the only notice that needed to be provided was the following:

1. PUBLIC EMPLOYMENT
Title: City Manager

However, after giving this some thought, I decided to provide more notice (beyond that required by law) to make sure people didn't think the City Council was actually appointing a new City Manager at this meeting. I was a little surprised by Mr. Mosher's email because he has long been an advocate of over-noticing Closed Session matters.

I do appreciate your concern but please know that the noticing for the meeting as well as the items to be discussed in Closed Session are authorized by the Brown Act. Hope this helps clarify matters.

Aaron C. Harp

City Attorney

City of Newport Beach

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From: Susan Skinner <seskinner@me.com>
Sent: Monday, April 23, 2018 6:01 AM
To: Jim Mosher <jimmosher@yahoo.com>; John Canalis <John.Canalis@latimes.com>; Christopher Trela - NB Indy <christopher@firebrandmediainc.com>; Ray.Armstrong@da.ocgov.com; Harp, Aaron <aharp@newportbeachca.gov>; Lauri Preedge <Lpreedge@gmail.com>; Dept - City Council <CityCouncil@newportbeachca.gov>
Cc: Hillary Davis <hillary.davis@latimes.com>; Sara Hall <sara@newportbeachindy.com>; Norberto Santana <nsantana@voiceofoc.org>; Joy Brenner <joybrenner@me.com>; Tim Stoaks <timstoaks@sbcglobal.net>; Phil Greer <surflaw@aol.com>; Thomas Johnson <tomjohnson@me.com>; Tom@StuNewsNewport.com
Subject: Re: Written comment objecting to Item IV.A (CC agenda, 4/24/2018)

I received this Email last evening from Jim Mosher regarding another presumed violation of the Brown Act at the April 24 City Council meeting.

Mr. Harp: I believe that Mr. Mosher is correct. This action will require the council to discuss it in open session. I'm not sure if it will need to be re-noticed and postponed due to the short time frame. I also notice that you have not addressed the last 'cure and correct' letter in this council's agenda and request that you do so.

I am including Mr. Armstrong, the District Attorney who was notified of the prior Brown Act violation on this Email.

Lauri: Will you write and submit another 'cure and correct' letter for the council on this issue?

To the reporters: Please consider an independent investigation into the actions of this council. I have been including most of you in my Email trains about this, but if you have questions, I'm happy to talk with you.

To the City Council: Your actions thus far have been reprehensible and it is my intention to broadcast this latest issue far and wide. I have already posted it on Next Door and will be sending it out to my growing Email list of residents who are outraged by your actions. It is my hope that this action will finally become a politically career limiting move for the "Gang of 4".

Susan Skinner

On Apr 22, 2018, at 10:56 PM, Jim Mosher
<jimmosher@yahoo.com> wrote:

FYI –

As you may or may not know the City Council is scheduled to spend more than two hours behind closed doors this Tuesday afternoon discussing “the recruitment process” for the new city manager – before the possible selection of a recruitment firm at the end of the public evening meeting.

I am unable to find any justification for a closed session on that topic in the Brown Act, and if there is no statutory justification, then it’s illegal – compounding the questionable acts we witnessed at the April 10 meeting (where they met in closed session to evaluate the performance of the current City Manager *after* it had been announced he was leaving their employment, and met in closed session to instruct the Mayor regarding salary negotiations with the City Manager *after* the negotiations had clearly been completed and a contract signed).

While the Council is allowed (but not required) to interview candidates and make a selection in private, as far as I know everything about the process leading up to that is required to be open and public.

-- Jim Mosher

----- Forwarded Message -----

From: Jim Mosher <jimmosher@yahoo.com>
To: City Clerk's Office <cityclerk@newportbeachca.gov>
Cc: Newport Beach City Council <citycouncil@newportbeachca.gov>; Aaron Harp <aharp@newportbeachca.gov>
Sent: Sunday, April 22, 2018 10:27 PM
Subject: Written comment objecting to Item IV.A (CC agenda, 4/24/2018)

Madam Clerk,

Please find attached a written comment objecting to Item IV.A on the April 24, 2018, Newport Beach City Council agenda (announcing, I believe improperly, closed session

discussion of "Initiation of Recruitment Process for New City Manager").

Yours sincerely,

Jim Mosher

<2018Apr24_AgendaItem_IV.A_Comments_JimMosher.pdf>