

Comments on August 14, 2018, City Manager Items

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

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Item 23. Appointment of a New City Manager

The staff report for this item begins with the (to me) remarkable statement that “***the City Council has undertaken an open and transparent recruitment process to hire a new City Manager consistent with industry practices.***”

I don’t know how to respond politely to that.

The process may seem “open and transparent” to the Council members and City staff involved in the process, but it certainly ***doesn’t*** seem that way from the perspective of the public – which is the only perspective from which the assessment of openness and transparency is meaningful (and despite which, from what I’ve heard, not even all the Council members may feel fully informed about what has and is going on).

Apparently “*industry practices*” (since when was Newport Beach an “industry”?) set such a low bar for openness that they allow the public to be kept in the dark as to who is being considered, what qualifications the applicants have, what standards are being used to evaluate them, and how the individual Council members voted at the various decision points along the way.

In fact the process is so opaque that a carefully crafted statement about the status of the process (that could be read several ways) posted as a “News Splash” after the Council’s July 30, 2018, special meeting – one of the few morsels of information provided to the public -- has been deleted by from the City’s website (while we are regaled, instead, with news of “upcoming” [CERT events from August 2016](#)). [note: since the initial writing of this, the [July 30 Press Release](#) has been reposted to the City’s Laserfiche archive of that meeting]

To me, this secrecy is neither necessary nor in the public’s best interest.

If I recall the now deleted statement correctly it said the idea originated with the paid outside recruiter, and that the Council had, at some undisclosed time and place and by some undisclosed vote, decided to honor that recruiter’s promise that the names and applications of the candidates would be kept secret – even if communicated to the City. [“*The City Council agreed unanimously in Closed Session to respect confidentiality.*”]

Such promises aren’t actually valid unless they can be separately justified since they are contrary to the fundamental Constitutional principle that “*The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.*” (Cal. Const. [Art. I, Sec. 3\(b\)\(1\)](#)) as well as the Brown Act principle that “*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. The people insist on remaining informed so that they may retain control over the instruments they have created.*” (Gov. Code [Sec.](#)

[54950](#)) and the Public Records Act principle that “*access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.*” (Gov. Code. [Sec. 6250](#)).

On August 2, 2018, City staff rejected a request from the *Daily Pilot* for the names and resumes of the three finalists whose selection had been announced after a July 24 closed session. Staff’s [rejection letter](#) says that information does not need to be released because “*Based on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.*” (citing the “catch-all” exemption of Gov. Code [Sec. 6255\(a\)](#)). The letter does not explain what the public interest in non-disclosure is, or why that “clearly” outweighs the public interest in seeing (and possibly refuting or otherwise challenging?) the information that has apparently been seen by the Council. It would seem that if the *Daily Pilot* wants to know what interest staff sees as outweighing another they will have to sue the City and listen while the City explains their theory to a judge.

Based on my recollection of the deleted closed session statement, the Council has bought into the recruiter’s claim that “good candidates” are hard to attract when they may be afraid the disclosure of their interest in Newport Beach would jeopardize their position with their current employer.

Not only is that an unproven theory, but I would submit that *what is being protected is primarily a private interest of the applicant* and not a public interest. The **public** interests (which are all that is supposed to be weighed in Section 6255(a)) are quite different.

It is clearly in the interest of the Newport Beach public to know all they can about the applicants for city manager: given that information, they can participate, inform and guide their elected representatives. It is likewise clearly in the interest of the public served by the agency where the applicant is currently employed to know the person is considering a career change: given that information, the public there can prepare for the possibility of a disruptive change (as Newport Beach has been doing since March) and possibly correct a situation that is causing the person in question to consider moving.

Given this very large and clear public interest in disclosure, the possibility that an expectation of disclosure *might* seriously diminish the applicant pool seems a small one, at best – clearly too small to tip the scale in favor of non-disclosure (quite setting aside the question of whether the finalists were even asked if they would mind having their names disclosed – and if we would want ones who refused).

The illogic of the City’s descent into secrecy is further illuminated by the present agenda Item 23.

In this item, the public sees a completed contract with an undisclosed person being presented for approval by the Council. According to the terms of that contract, the unknown person must commit to starting work in Newport Beach on September 4, 2018. If their contract with their current employer is anything like the contract we have with our current City Manager, this means the unknown person must have **already** given their current employer a notice of their

intent to leave. That, in turn, suggests the Newport Beach City Council must have given the unknown person assurances they *would* be hired here – possibly at, or soon after the July 30, 2018, special meeting.

This despite the [July 30 Press Release](#) having been widely reported in the press to mean the Council was still actively considering two candidates and had not decided between them.

In other words, the Council knows who they chose on July 30, the future manager knows they have been chosen, the future manager's employer knows the unknown person, and quite possibly the public served by that agency knows he or she is leaving. The only ones left in the dark are the people of Newport Beach, who still don't know and who will have had little or no chance to influence the Council's selection in any meaningful way.

All this to protect the private interests of an unknown person who, from their voluntary decision to serve in a public role, should have lessened expectations of privacy.

In my view, this process has not served, and continues to not serve, the public's interest.

Beyond that, regarding this specific agenda item, it bothers me that a new and unproven city manager is being offered a *starting* salary essentially equal to the *final* salary being paid to the current manager – which one assumes was earned only as the result of nearly nine years of exemplary service.

Item D. PUBLIC EMPLOYEE APPOINTMENT

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

Title: City Manager

It is unclear to me what the intended purpose of this closed session agenda item is.

Given the existence of agenda Item 23 (see above), it seems very unlikely the Council has a need to choose between two applicants, both of whom have given notice to start work with Newport Beach on September 4 and are prepared to sign the Item 23 contract.

The agenda announcement appears to brace the public for the possibility that the announcement of a reportable action will not be made even now, but it seems the reportable action – namely the Council reaching concurrence on its selection of a new manager – occurred at the July 30, 2018, special meeting closed session.

The idea that a selection and a commitment to a future employee is not an “appointment” seems to me a splitting of hairs not worthy of the words “open” or “transparent.”

Item E. CONFERENCE WITH LABOR NEGOTIATOR

(Government Code § 54957.6 (a)): 1 matter

Agency Designated Representative: Marshall “Duffy” Duffield, Mayor

Unrepresented Employee: City Manager

Closed sessions under this heading are allowed *only* for the purpose of instructing the agency’s negotiator. (Gov. Code [Section 54957.6](#))

Given that a complete, negotiated contract has been presented to the Council and public as Item 23 on the open meeting agenda, it does not appear any further “instruction” would be necessary.

Instead, it would appear this heading is being used to reach Council consensus on the final terms achieved by the negotiator, thus avoiding the Brown Act requirement that final action on executive compensation be discussed and debated in public – and, to the contrary, allowing the contract to be approved on the open agenda without comment.

Again, such a willful evasion of the law does not seem worthy of the words “open” or “transparent.”