

CONFIDENTIAL – ATTORNEY CLIENT PRIVILEGE*Memorandum*

To: Nederland Fire Protection District, Board of Directors

From: John Chmil

Re: Fire Chief Search Process

Date: August 31, 2021

1. INTRODUCTION. The following is intended as a guide to assist the District's Board of Directors and its consultants in its search for a new Fire Chief when it is ready to begin that process.

2. COLORADO OPEN MEETINGS LAW (SUNSHINE LAW) CONTROLS SEARCH FOR NEW FIRE CHIEF. Section 24-6-402(3.5), C.R.S., governs the search and selection process of all local governments for chief executive officers. The District Board must determine whether a separate search committee will be formed or if the District Board will serve as the search committee. Once the search committee is set, the Open Meetings Law requires that the search committee establish each of the following in an open session of a public meeting before beginning the search process:

2.1 A detailed job description.

2.2 Requirements for applicants.

2.3 Deadlines for submittal of applications.

2.4 Selection procedures (including who constitutes the "search committee.") Note: the committee may consist of only the Board, a subcommittee of the Board, or the initial search process can be delegated to a committee that may include non-Board members (such as staff, community members, etc.)

2.5 Time frame for reaching a final decision and appointing the new chief executive officer.

3. "IN-HOUSE" SEARCHES PERMITTED. Although not specifically provided for by the statute, it is this firm's opinion that an "in-house" search may be conducted initially, by using a bifurcated process: an initial "in house" search and, if no one submits an application, or if no one is hired after interviewing the in-house applicants, then the process would be posted/advertised as being open to applicants that are not current employees of the District. If the District decides to use this two-step process, it should be expressly stated in the motion when the entire process and the other issues that must be established (paragraphs 2.1 through 2.5 above) are established by the Board. For example, when establishing "requirements" the Board could insert the

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requirement of “familiarity with the District” as a pre-requisite. If an in-house search is conducted, the requirements of disclosure as set forth below are still applicable (i.e., disclosing the name of the finalist and not offering a contract prior to 14 days after the name made is made public.)

4. THE ISSUE OF CONFIDENTIALITY. Often, applicants will submit an application and request that it be kept confidential. The District can, and should, comply with this request because until the finalists are made public, the names of applicants and their application materials are not public records. However, the District must make public the list of the finalists that are under consideration for the position no later than 14 days PRIOR to appointment/employment of the one selected. Pursuant to the Colorado Open Records Act, once an applicant is deemed a finalist, their identity and most of their application materials are deemed matters of public record. Those applicants that are not announced as finalists remain anonymous, their names are not disclosed, and their applications are not public records. If only three or less applicants/candidates possess the minimum qualifications for the job, then all of the applicants/candidates are automatically deemed finalists and the process must be completed entirely in public session. No offer of appointment or employment can be made until after the finalists are made public. The names of the finalists need not be published, but rather just made public (e.g., a list posted at the place designated for posting meeting notices/agendas, or on the website).

5. MEETINGS OF THE SEARCH COMMITTEE MUST BE PUBLIC MEETINGS. All of the meetings of the search committee (regardless of whether the search committee is the full District Board or not) are deemed “meetings” under the Open Meetings Law and must be properly noticed and open to the public. The Colorado Open Meetings Law requires public meetings and proper notice for all local governmental entities as well as for all committees to which a board has delegated a specific public function. Therefore, search committee meetings must be posted in the same manner as regular or special board meetings of the Board. The posting would be a “Notice of a Special Meeting of the Search Committee” (if non-Board members are on the committee) or “. . .of the Board” (if no non-Board members are on the committee). The meeting requirements apply even if there are members of the public/staff on the search committee.

6. THE SEARCH COMMITTEE CAN GO INTO AN EXECUTIVE SESSION. After calling a meeting of the search committee to order, taking roll call, etc., a formal motion may be made, seconded, and approved for the search committee to go into an executive session, but only to consider the application materials of non-finalist candidates. The motion would read as follows:

“I move that we go into an executive session pursuant to Sec. 24-6-402(4)(g), C.R.S., for the consideration of the applications of non-finalist candidates for the position of fire chief, which are exempt from disclosure under the provision of the Colorado Open Records Act, Sec. 24-72-204(3)(a)(XI), C.R.S.”

After the Motion is made and seconded, a vote must be taken to go into executive session. Two-thirds of the Board must approve the motion.

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7. THE BOARD/COMMITTEE CAN NOT GO INTO AN EXECUTIVE SESSION AFTER ANNOUNCING THE FINALISTS. Once the finalists have been made public, the applications of the finalists become public records and are then open to public inspection (except for letters of reference). As a result, the use of subsection § 24-6-402 (4)(g) for justifying an executive session is no longer applicable because the records of a finalist are no longer protected by CORA. That leaves only the personnel matters exception in the Open Meetings Law for possible justification for an executive session to interview a finalist. The Colorado Press Association is of the opinion that all discussions of the finalists, including interviews, must be conducted in public session, not in an executive session. After careful review of the Open Meetings Law, and several court rulings, we concur. There is no specific provision that grants a local public body the ability to use the personnel matter exception for hiring processes. There has not been an appellate decision on this issue but there have been several trial court decisions specifically on point, with one judge in Colorado Springs explaining that a candidate is not yet an “employee” of the district and, therefore, the “personnel” exception to justify an executive session is not applicable. Finally, the decision to appoint or employ the selected finalist must be made in open session at a public meeting. No formal action should be made or taken in executive session. As a reminder, the failure to use executive sessions correctly can open the door to a challenge under Open Meetings Law and result in some or all recordings made during executive sessions becoming “open” and discoverable.

8. PROCEDURE. Because the search process is governed by the Open Meetings Law, it is important to strictly follow the procedure and to avoid using terms or phrases that could suggest to the public that the Board has determined who the finalist(s) are prior to their announcement. We urge you not to use terms like “short list” or “preferred candidates” when reviewing applications in order to determine who the finalist(s) will be. The Open Meetings Law contains a fee-shifting provision that would require the District to pay a citizen’s attorneys’ fees if they are successful in proving that the search process was violated or if an executive session(s) was convened improperly. In addition, if an executive session is convened improperly, the recording of the discussion becomes a public record which can be a difficult public relations issue among other potential concerns. As stated above, it is important to respect and maintain the confidentiality of non-finalist candidates, so care should be taken to ensure that the search process is followed and that all executive sessions are convened properly with the appropriate statutory justification. We encourage you to keep us informed of the progress of the search process and notify us prior to any meeting at which an executive session is planned.

9. REFERENCE CHECKS. We highly recommend that you perform checks on personal references based upon information provided by the candidate and other information gleaned during the hiring process. Thorough reference checking is a crucial element in the process.

10. NEGOTIATING THE EMPLOYMENT CONTRACT. The Board should address important elements in the model employment contract with the finalists to see if there are any “deal breakers” before the Board makes its final selection. It is embarrassing for both the Board and the prospective district manager if his/her selection is announced and then the parties are unable to get together on the terms of an employment agreement. (This happens more often than you would think!) Determine which one or two Board members will be assigned the responsibility for negotiating the employment contract between the District and the final candidate. The Board should, in an executive session under the negotiation’s exception (§24-6-402(4)(e), C.R.S.),

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establish parameters for its negotiators in negotiating that contract. We recommend that the essential terms of the contract be determined early in the process and that, prior to the Board announcing the finalists, the potential finalists should be furnished a draft of the proposed contract.¹ This procedure will avoid subsequent misunderstanding regarding key provisions in the contract and allow a chance to identify and “deal breakers”.

11. FOURTEEN DAYS. After the finalist(s) are named, the District must wait at least 14 days before executing the employment contract.

12. CONCLUSION. Please contact us if we can be of any assistance in the process or if you have any questions.

¹ This would be a good time to update the contract that you have been using. We would like the opportunity to update the legal format with any statutory or legal changes.