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**MEMORANDUM OF LAW**

**DATE:** January 11, 2013

**TO:** Robbin Kulek, Deputy Director of Treasury Operations

**FROM:** City Attorney

**SUBJECT:** Disclosure of Electronic Mail Addresses Provided by Applicants on an Application for a Business Tax Certificate

**INTRODUCTION**

Business Improvement District associations (BID) established in the City of San Diego have asked the City Treasurer to provide them with the electronic mail (e-mail) address of each person or entity who holds a business tax certificate.

**QUESTION PRESENTED**

May the City Treasurer produce e-mail addresses provided to the City by applicants on an application for a Business Tax Certificate to the BID?

**SHORT ANSWER**

The City Treasurer may produce e-mail addresses provided to the City by applicants on an application for a Business Tax Certificate to the BID so long as the e-mail address is used by the certificate holder for business, and not personal, purposes.

**ANALYSIS**

**I. THE BUSINESS TAX CODE DISCUSSES WHICH RECORDS ARE SUBJECT TO PUBLIC INSPECTION.**

The City's business tax provisions are described in San Diego Municipal Code (SDMC) sections 31.0101 through 31.0311, commonly referred to as the Business Tax Code. Business tax is imposed "solely to raise revenue for municipal purposes," and not for purposes of regulation. SDMC § 31.0101.

The Business Tax Code specifies the types of information collected by the City Treasurer, the manner in which this information will be used, as well as the circumstances in which it will be disclosed. SDMC section 31.0140 states in pertinent part as follows:

Every person required to pay a tax under this Article shall furnish to the City Treasurer, on forms approved by the office of the Treasurer, a sworn Declaration of Business Tax, accompanied by the tax amount due and setting forth the following:

- (a) The name and address of the business and whether a sole proprietorship, partnership, corporation or other business entity;
- (b) The exact nature or kind of business;
- (c) The place where such business is conducted or to be conducted;
- (d) The names and residence address of the owners of the business, and if a corporation, the names and residence addresses of the principal officers thereof;
- (e) The number of persons employed by the business....
- (f) Such other information as the Treasurer may require.

All declarations shall be signed by the owner of the business, or if a corporation, at least one officer of the business or by another authorized person as may be approved by the City Treasurer....

*The information or data obtained from an examination or audit, or from any statement required hereunder, shall be used for official City purposes only, and shall not be provided to any person for any other purpose except as provided for in this section, or as required by state or federal law.*

*Nothing in this section shall prohibit the City Treasurer from furnishing to any citizen upon request the name under which the business is conducted, the address and type of business and the name of owner of the business, including the names of partners, if a partnership, or the names of officers, if a corporation.*

(Emphasis added.)

Thus, the Business Tax Code authorizes the City Treasurer to furnish “to any citizen upon request the name under which the business is conducted, the address and type of business and the name of owner of the business, including the names of partners, if a partnership, or the names of officers, if a corporation.” E-mail addresses are not mentioned, although the business tax application requests the applicant’s e-mail address.

## II. PRIOR CITY ATTORNEY OPINIONS ADVISED AGAINST DISCLOSURE OF APPLICANT INFORMATION UNLESS DISCLOSURE WAS FOR ENFORCEMENT OF THE BUSINESS TAX CODE.

In 1976, this Office concluded that it was not legally permissible for the City Treasurer to furnish copies of business license applications to the general public because of the wording in SDMC section 31.0140. 1976 City Att’y MOL 382 (May 27, 1976), enclosed. In 1976, SDMC section 31.0140 stated:

The information or data obtained from such examination or audit or from any statement required hereunder *shall be used for the purpose of enforcing the provisions of this Article and for no other purpose.*

(Emphasis added.)

Further, we determined that although business tax applications are public records under the California Public Records Act (CPRA), such records would be exempt under California Government Code section 6254(f) because the records were collected for licensing purposes.

In 1983, we were asked whether the City Treasurer could release records to the Central City Association (CCA) concerning the amount of business license fees collected and the numbers of persons employed by businesses in the Downtown Improvement Area. 1983 City Att’y MOL 87 (April 15, 1983), enclosed. The question was asked in light of revisions to the Business Tax Code in 1977. San Diego Ordinance 11980 (Jan. 5, 1977.) The 1977 revision to the Business Tax Code said:

Nothing in this section shall prohibit the City Treasurer from furnishing to any citizen upon request the name under which the business is conducted, the address and type of business, and the name of owner of the business, including the names of partners, if a partnership or the names of officers if a corporation.

However, the Business Tax Code still stated that business tax information could only be disclosed “for the purpose of enforcing the provisions of this Article and for no other purpose.” Our Office determined that the City Council did not wish to disclose anything other than the business’ name, address, type, status, and ownership, and that the City could not share additional information with the CCA because the CCA had no authority to enforce the Business Tax Code. The City Council removed this disclosure limitation in 1987, and added a new criterion:

The information or data obtained from an examination or audit, or from any statement required hereunder, shall be used for official City purposes only, and shall not be provided to any person for any other purpose except as provided for in this section, or as required by state or federal law.

San Diego Ordinance O-16815 (Feb. 23, 1987).

Accordingly, information from a business tax application must be used for official City purposes only, and could not be provided to a third party except as described in the Business Tax Code or as required by state or federal law. As e-mail addresses are not discussed in the Business Tax Code, the query rests on whether the City is required under state or federal law to disclose the e-mail addresses of business tax certificate holders to the BID.

### **III. THE CITY MAY DISCLOSE E-MAIL ADDRESSES PROVIDED BY AN APPLICANT ON A BUSINESS TAX APPLICATION SO LONG AS THE E-MAIL ADDRESS IS USED FOR BUSINESS PURPOSES.**

The CPRA, codified at California Government Code sections 6250 through 6270, requires state and local agencies to disclose government records to the public, upon request, unless the record is exempt from disclosure. CPRA exemptions are generally based on an individual's right to privacy (e.g., privacy in personnel, medical, or similar records), or the government's need to perform its responsibilities (e.g., maintaining confidentiality of investigative records, official information, records related to pending litigation, and preliminary notes or memoranda).

A business tax application is a "public record" because it relates to the conduct of the public's business, and is used and retained by the City, which registers all persons who do business in the City of San Diego. The question therefore is whether a business' e-mail address, which is provided on an application, is exempt from disclosure.

In accordance with California Government Code section 6255, this Office has advised that personal e-mail addresses are exempt from disclosure when the public's interest in that information is outweighed by the individual's privacy interests. While we could argue that a person who registers a business with the City is providing a business' contact information, such as one would an address, we understand that a significant number of persons operate small businesses out of their homes.<sup>1</sup> Such persons may be using their personal e-mail address for the limited purpose of communicating with the City about their business tax account, and would not consent to the sharing of this personal information with third parties.

We further note that the business tax application does not advise applicants that their e-mail addresses may be disclosed and, as previously mentioned, the SDMC does not include e-mail addresses when describing the categories of information subject to disclosure upon request.

As there are no cases on point, we recommend a conservative approach due to the possibility that some persons may be providing the City with a personal e-mail address with the belief that the address will not be disclosed to a third party. If an e-mail address is obviously that of a business,<sup>2</sup> then we believe disclosure of that e-mail address is permissible. The e-mail address should not be disclosed if, following a cursory review, one cannot ascertain whether the e-mail address is personal or that of a business.

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<sup>1</sup> For instance, a student who babysits, a stay-at-home parent who works on typing assignments from time to time, an occasional dog walker, or a person who prepares a limited number of tax returns each year.

<sup>2</sup> For example, City personnel have e-mail addresses that include the City's name (e.g., employee@sandiego.gov), and are obviously not personal e-mail addresses. Similarly, business e-mail addresses commonly end in ".com," ".org," or ".net." This can be verified with a quick Internet search.

**CONCLUSION**

The City Treasurer may produce e-mail addresses provided to the City by applicants on an application for a Business Tax Certificate to the BID so long as the e-mail address is used for business, and not personal, purposes. This will require City Treasurer staff to review each e-mail address prior to disclosure.

JAN I. GOLDSMITH, CITY ATTORNEY

By     /s/ Mara W. Elliott      
Mara W. Elliott  
Deputy City Attorney

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Enclosures  
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JOHN W. WITT  
CITY ATTORNEY

MEMORANDUM OF LAW

Date: May 27, 1976  
To: Gordon Feeley, City Treasurer  
From: City Attorney  
Subject: Disclosure of Business License Applications

By memorandum of April 27, 1976, you asked the following question:

Is it legally permissible for the City Treasurer to furnish copies of business license applications to members of the public?

Our conclusion is that because of wording found in the San Diego Municipal Code, Section 31.0140, it is not legally permissible to distribute copies of these applications to the general public.

Section 31.0140, Municipal Code, reads in pertinent part:

The information or data obtained from such examination or audit or from any statement required hereunder shall be used for the purpose of enforcing the provisions of this Article and for no other purpose.

[Emphasis added.]

The above wording is clear that the City's intent is not to make applications for business licenses public records and thus available to the public upon request.

The analysis cannot stop here since the State Legislature enacted Chapter 3.5 of Division 7 of Title 1 of the Government Code, commonly referred to as the California Public Records Act (hereinafter referred to as Act).

The intent of the Legislature in regard to the Act can be found in Section 6250, Government Code:

In enacting this chapter, the Legislature, mindful of the rights of individuals to privacy, finds and declares that access

Gordon Feeley  
City Treasurer

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May 27, 1976

to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

Thus, unless an exemption can be found, the Act makes an application for a business license a public record.

Section 6254, Government Code, does exempt particular records from disclosure if the public agency chooses to assert the privilege provided. Specifically, Section 6254(f), Government Code provides an exempt status for the business license applications submitted to the City:

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;

Since business license applications are compiled by the City Treasurer's office for licensing purposes, they fall neatly within the above section. (See also Section 6254(n), Government Code, which exempts certain financial data of the applicant that may be required by the licensing authority.)

The privilege provided in Section 6254(f), Government Code, is not absolute. The public agency can, if it sees fit, waive the privilege and disclose the information contained in the public documents.

Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.  
[Emphasis added.]

California Government Code, Section 6254.

Because of the adoption of Section 31.0140 of the San Diego Municipal Code, the City Treasurer is precluded from waiving the privilege provided by Section 6254(f), Government Code.

Gordon Feeley  
City Treasurer

May 27, 1976

The intent of the City Council is clear, from the language of Section 31.0140, Municipal Code, that the information contained in the business license applications will remain confidential and will not be distributed to the public.

Thus, using the language of Section 6254 of the California Government Code, "disclosure is otherwise prohibited by law."

JOHN W. WITT, City Attorney

By Paul E. Robinson  
Paul E. Robinson  
Deputy City Attorney

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CITY ATTORNEYROBERT S. TEAZE  
ASSISTANT CITY ATTORNEY  
CURTIS M. FITZPATRICK  
SENIOR CHIEF DEPUTY CITY ATTORNEYMEMORANDUM OF LAW

DATE: April 15, 1983

TO: City Treasurer

FROM: City Attorney

SUBJECT: Disclosure of Business License Records

By memorandum of January 12, 1983, you ask whether the Treasurer's Office may release certain business license records to the Central City Association ("The Association"). Specifically, you ask whether your office may provide The Association with the amounts of the business license fees and the numbers of persons employed by businesses in the Downtown Improvement Area.

It is the opinion of this office that the records in question should not be disclosed.

As you point out, the disclosure of information furnished by business licensees is governed by Section 31.0140 of the Municipal Code. The provisions of this section which protect the confidentiality of certain information represent a specific exception to the usual disclosure requirements of the California Public Records Act, Government Code Section 6250, et seq. See the Memorandum of Law dated May 27, 1976, from the City Attorney to the City Treasurer.

In the memorandum dated November 18, 1976, to which you refer in your inquiry, the City Attorney advised the Mayor and City Council that information obtained from license applicants pursuant to Section 31.0140 could be used only for enforcement of the Code; all other uses were precluded. The key portion of Section 31.0140 upon which this opinion was based read as follows:

The information or data obtained from such examination or audit or from any statement required hereunder shall be used for the purpose of enforcing the provisions of this Article and for no other purpose.

City Treasurer

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April 15, 1983

As you mention in your memorandum, Section 31.0140 has since been revised. On January 5, 1977, the Municipal Code was amended by Ordinance No. 11980 N.S. to delete the words, "or from any statement required hereunder," from the paragraph quoted above and to add the following paragraph:

Nothing in this section shall prohibit the City Treasurer from furnishing to any citizen upon request the name under which the business is conducted, the address and type of business, and the name of owner of the business, including the names of partners if a partnership or the names of officers if a corporation.

Although Section 31.0140 has been amended two more times since 1977, the portions quoted above remain essentially unchanged.

Your inquiry concerning The Association actually involves two questions. The first is whether the 1977 amendment to the Code authorizes the disclosure of the amounts of individual license fees and the numbers of persons employed by licensees to the public in general. It would appear that it does not.

By its 1977 action the City Council left intact the basic scheme protecting from disclosure information obtained from business licensees. Certain exceptions to this general rule of nondisclosure were enumerated in the paragraph added by the amendment. They are limited to the name, address, and type of business, and the name of the owner. If the Council had wished to make more of the information on file available to the public it could have done so. However, it did not.

The second question is whether there is any legal basis for disclosing to The Association information that would not be available to the public in general. There does not appear to be any legal basis for making such a distinction. The Code specifies that the sort of information in question, "shall be used for the purpose of enforcing the provisions of this Article and for no other purpose." The Association has neither the responsibility nor the authority to enforce the business license provisions of the Municipal Code.

Even if, for the sake of the argument, The Association were viewed as an adjunct to the City's business license enforcement effort, release of the information in question would create two significant problems. First, the City would have to make certain that the information was used for no purpose other than enforcement of Chapter III, Article 1, of the San Diego Code. As a practical matter, this would be impossible, and would very likely create a situation that would be unacceptable to The Association.

City Treasurer

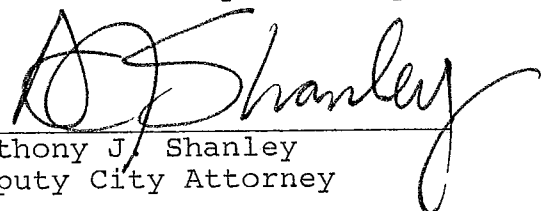
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April 15, 1983

Finally, if the information in question were provided to The Association, a reasonable argument could be made that Section 6254.5 of the Government Code, a portion of the California Public Records Act, would require disclosure to the public at large. If such an argument were successful it would entirely defeat the apparent intent of the City Council with regard to information of this kind.

JOHN W. WITT, City Attorney

By

  
Anthony J. Shanley  
Deputy City Attorney

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