

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: April 16, 2012

TO: Donna Wallace, Assistant Personnel Director, Personnel

FROM: City Attorney

SUBJECT: Proposition 26 Review of Proposed Personnel User Fees for FY 2013

INTRODUCTION

Under Council Policy 100-05, general fund departments are required to conduct comprehensive user fee studies every three years. These fee studies ensure City departments identify and recover all reasonable and allowable costs incurred in providing government services.

Financial Management staff has asked participating departments to obtain an opinion on the legality of their proposed user fee adjustments and additions from the Office of the City Attorney in light of Proposition 26. Approved by the voters in 2010, Proposition 26 amends articles XIII A and XIII C of the California Constitution to provide that a levy, charge, or exaction of any kind imposed, increased, or extended by a local government is a tax unless an exception applies. Exceptions to Proposition 26 include user fees; government service or product fees; regulatory fees; government property entrance fees; fines and penalties imposed by a court or local government; property development impact fees; and assessments and property-related fees governed by Proposition 218.¹

Each Proposition 26 exception involves its own legal standard for determining the amount of a legally permissible fee. Under article XIII C, section 1(e)(1)(2)(3) of the California Constitution, which discusses some of the exceptions to Proposition 26, no fee may exceed the reasonable cost of providing the service. However, such fees should reimburse the government entity for all reasonable direct and indirect expenses incurred. *United Business Commission v. City of San Diego*, 91 Cal. App. 3d 156, 166 (1979). As noted in *United Business Commission*, “. . . the municipality need only apply sound judgment and consider ‘probabilities according to the best honest viewpoint of informed officials’ in determining the amount of the fee.” *Id.* This Office has advised City staff to explain the link between the cost and the service provided and justify all fee calculations based on a study of the costs associated with the fee for Council’s consideration

¹ For a fuller discussion of Proposition 26, see City Att’y MOL No. 11-3 (Mar. 4, 2011), “Proposition 26 and Its Impact on City Fees and Charges.”

and approval. Therefore, depending on the particular type of fee and individual department activities, staff for each City department developed their proposed user fee adjustments using the comprehensive Citywide method developed by Financial Management and Comptroller staff.²

We have reviewed a detailed summary of the Personnel Department's cost recovery calculations as described in Exhibit A and proposed fee adjustment described in Exhibit B. Our Proposition 26 analysis of the Livescan Fingerprinting Fee is discussed below.

DISCUSSION

The User Fee Summary for the Personnel Department describes a fee for providing fingerprinting of Rural Metro employees and contractors doing business with the City for background checks. The User Fee Summary indicates that the Personnel Department does not propose any change to the existing fee. Proposition 26 does not apply to fees that are not being modified so long as the authority for the fee has not expired or been rescinded. Accordingly, the fingerprint fee does not implicate the provisions of Proposition 26.

Nonetheless, we note that the above described fee is not a "tax" under Proposition 26 because two exceptions apply: the "user fee" exception and the "government service or product" exception. The "user fee" exception relates to a charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege. Similarly, the "government service or product" exception relates to the imposition of a fee for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product. The fingerprint fee falls under the "user fee" and/or "government service or product" exception because it is imposed for a specific benefit, privilege, service or product that is not provided to those not charged, and does not exceed the Department's reasonable costs of providing the service.

² The method was approved by Financial Management and the Comptroller and provided to the departments by Financial Management. The number (budget item) used to apportion rates (overhead and load) against direct cost is the responsibility of each department based on the contents and knowledge of their individual department activities. This Office did not independently verify or recalculate the numbers provided or the validity of the methodology.

Donna Wallace, Assistant Personnel Director

April 16, 2012

Page 3

CONCLUSION

Proposition 26 is not triggered because the Personnel Department is not proposing a modification to its fees. Additionally, the above described fee is exempt from the definition of "tax" under Proposition 26.

JAN I. GOLDSMITH, CITY ATTORNEY

By 
Lori Thacker
Deputy City Attorney

LT:ccm:amt

Attachments: User Fee Departmental Cost Recovery Calculations
User Fee Summary

cc: Mark Leonard, Department Director, Financial Management
MS-2012-13

Exhibit A

Fiscal Year 2013 Proposed User Fee Adjustments

Cost Recovery Calculations

Exhibit B
Fiscal Year 2013 Proposed User Fee Adjustments
Department Summary

