

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: April 16, 2012
TO: Mark Leonard, Director, Financial Management
FROM: City Attorney
SUBJECT: Proposition 26 Review of Proposed Citywide 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

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.”

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 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 Financial Management Department's cost recovery calculations as described in Exhibit A and proposed fee adjustments as described in Exhibit B. Our Proposition 26 analysis of each fee is discussed below.

Citywide Computer Services Fee

The Citywide computer services fee would establish a consistent charge associated with compiling, extracting, and programming data in response to a request for a public record as allowed under the Public Records Act (Act). Cal. Gov't Code § 6253.9.

There are two types of electronic documents available to the public under California Government Code section 6253.9: (1) identifiable records that are not exempt and are kept in an electronic format; and (2) electronic documents compiled, extracted, or created by staff using a program.

In the first instance, California Government Code section 6253.9 requires a local agency to produce an identifiable, non-exempt public record in an electronic format when the requested document is kept in an electronic format and the requestor wants the document in electronic format. In such case, the cost of duplication is limited to the direct cost of producing a copy of the record in an electronic format.

In the second instance, the information is produced at regularly scheduled intervals and is requested at a time when it is not slated for production, or the information is stored electronically but may not be accessed unless City staff compiles the information; extracts the information; or creates a program that will allow staff to retrieve the sought-after information. In either case, the Act allows the City to require the requestor to bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record. The proposed fee allows the City to recover its production costs.

The Citywide computer services fee is a \$.70 per minute fee charged to those who request computer services that require data compilation, extraction, or programming to produce a copy of a record. The requestor would be required to pay a 50% deposit of the estimated charge before services are performed. The remainder would be paid upon completion of services. The labor

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.

cost is based on the combined average hourly rate of pay of an Information Systems Analyst I and a Deputy City Clerk.

This fee is not a tax under Proposition 26 because it falls under the user fee and government service/product exceptions. The user fee exemption 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 permits 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. Accordingly, voter approval is not required because the fee is limited to the actual administrative cost of producing the requested record.

Citywide Paper Copy Fee

The Act permits a local agency to charge a person who requests an agency record for the direct cost of duplication. Cal. Gov't Code § 6253(b).³ City departments have established inconsistent copying fees. The Library, for instance, charges \$.20 per copy, and the City Clerk charges \$.25 per copy. A Citywide copy fee would ensure that all departments charge the same copy fee.

Financial Management performed a study to determine the amount each department should charge to make a copy. The \$.25 per page fee is based on copier costs as described in the contract between the City and Sharp Business Systems; the 20 seconds it would take for a Deputy City Clerk and Administrative Aide II to make a copy based on their average hourly rates; and the \$.01 cost for a sheet of paper.

This fee is not a tax under Proposition 26 because it falls under the user fee and government service/product exceptions. The copy fee relates to a charge imposed for a City service and product provided directly to the requestor that is not provided to those who do not pay. Further, the \$.25 fee does not exceed the City's reasonable cost of making and providing the requested copy.

Citywide PDF Fee

The City often provides a PDF copy by electronic mail (e-mail) to those who request public records. This requires a City employee to scan the requested record using the copy machine; to send the PDF to his or her e-mail account; and to then electronically mail the PDF to the requestor.

³ The direct cost of duplication is the cost of running the copy machine and operating it. *North County Parents Organization for Children with Special Needs v. the Department of Education*, 23 Cal. App. 4th 144, 148 (1994). Direct costs do not include the ancillary tasks associated with the retrieval, inspection, and handling of the file from which the copy is extracted. *Id.*

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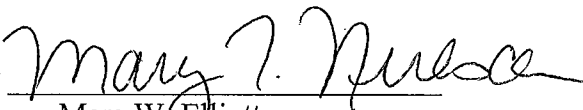
The creation of a PDF involves the same resources as the creation of a copy. The City may recover its cost under California Government Code section 6253(b), which allows public entities to recover from the requestor the direct cost associated with duplication. Cal. Gov't Code § 6253(b); *North County Parents Organization for Children with Special Needs v. the Department of Education*, 23 Cal. App. 4th 144, 148 (1994).

Financial Management applied the same analysis to PDF since the effort and costs are the same. Accordingly, this fee is not a tax under Proposition 26 because it falls under the user fee and government service/product exceptions. The PDF fee relates to a charge imposed for a City service and product provided directly to the requestor that is not provided to those who do not pay. Further, the \$.25 fee does not exceed the City's reasonable cost of making and providing the requested PDF.

CONCLUSION

The proposed Citywide fees fall within the user fee and government service/product exceptions to Proposition 26 and are based on actual administrative cost. Accordingly, this Office concludes the proposed fees are exempt from the definition of "tax" contained in Proposition 26.

JAN I. GOLDSMITH, CITY ATTORNEY

By 
Mara W. Elliott
Deputy City Attorney

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Attachment: Exhibits A and B

MS-2012-8

Exhibit A

Fiscal Year 2013 Proposed User Fee Adjustments

Cost Recovery Calculations

Exhibit B

Fiscal Year 2013 Proposed User Fee Adjustments

Department Summary

FY 2013 User Fee Analysis - Proposed Fee Adjustments

Department	Fee Title	Unit of Measurement	Current Fee	Current Cost Recovery %	Proposed Fee	Proposed Cost Recovery %
Citywide	Citywide Computer Services Fee	Per Minute	\$ -	n/a	\$ 0.70	96%
	Citywide Paper Copy Fee	Per Page	\$ -	n/a	\$ 0.25	95%
	Citywide PDF Copy Fee	Per Page	\$ -	n/a	\$ 0.25	99%

Citywide - Estimated Revenue Variation of Proposed Fee Adjustments: \$ -