

October 5, 2021

The Honorable Carol Dutra-Vernaci
Mayor of Union City
Union City – City Hall
34009 Alvarado-Niles Road
Union City, CA 94587

via email

Ms. Joan Malloy
City Manager
Union City – City Hall
34009 Alvarado-Niles Road
Union City, CA 94587

Mr. Mark Evanoff
Deputy City Manager
Union City – City Hall
34009 Alvarado-Niles Road
Union City, CA 94587

Chief Jared Rinetti
Union City Chief of Police
Union City – City Hall
34009 Alvarado-Niles Road
Union City, CA 94587

Deputy Fire Marshal Stan Fernandez
Alameda County Fire Department
6363 Clark Ave
Dublin, CA 94568

Mr. Mark Camfield
Public Works Superintendent
Union City – City Hall
34009 Alvarado-Niles Road
Union City, CA 94587

Ms. Anna Brown
City Clerk
Union City – City Hall
34009 Alvarado-Niles Road
Union City, CA 94587

RE: Our Client: American Promotional Events, Inc. (TNT Fireworks)

SUBJECT: Request for Summaries, Correspondence, Notes, Emails, Financial Records, Text Messages, Staff Reports and Other Administrative Records that relate to the “Fee” and “Fee Calculation” on page 5 of the Exhibit A attached to Union City Resolution No. 5405-18 dated November 13, 2018, Sections 5614.1 and 5614.2 of Union City Municipal Code 15.20.140, and Slides 23 and 26 of the City’s Power Point Presentation at the August 10, 2021, City Council meeting regarding fireworks, and Projected New Costs which the City will seek full reimbursement moving forward; Pursuant to the California Public Records Act (CPRA) and the Ralph M. Brown Act (Brown Act)

Ladies and Gentlemen:

As you are aware, since 1989 Revell Communications has served as the public relations/public affairs representative for American Promotional Events, Inc. (TNT Fireworks), the state’s leading wholesale distributor of State Fire Marshal-Approved, Safe and Sane Fireworks. We assist TNT Fireworks with its community liaison activities as well as with the development and implementation of both local and statewide Fireworks Safety & Education Programs that it coordinates and/or underwrites in conjunction with local and state fire departments and law enforcement agencies. We also assist our client as well as the State of California and many local communities with the collection, tabulation and analysis of local fire and injury data as it relates to illegal, state-approved and unknown fireworks and act as a resource library for those same entities on emerging enforcement and public education techniques throughout the country as we all battle with the growing, menacing problem of illegal fireworks.

At the August 10, 2021, City Council meeting, Deputy City Manager, Mark Evanoff, presented an 8-page staff report entitled, “Receive Information and Provide Direction Regarding Fireworks Regulations and Potential Options Related to Same” as well as a 30-page Power Point Presentation entitled, “Fireworks Overview - August 10, 2021”.

Per Mr. Evanoff’s oral presentation and Power Point Presentation at the August 10, 2021, City Council meeting, 15.20.140 of Union City Municipal Code was amended in 2003 to add, among other Sections, “Section 5614.1-Fireworks Regulations” and “Section 5614.2 – Fees”. (Please see attached Exhibit A). Section 5614.2 – Fees, references “Resolution No. 2537-03” adopted by the City Council in 2003 and to be amended from time to time. At Exhibit B attached hereto, please find what we believe to be the latest iteration of that Resolution dated November 13, 2018 along with the Resolution’s Exhibit A which is incorporated by reference in that Resolution. According to Section D. General Provisions, Subsections 4. Fee and 5. Fee Calculations, fireworks wholesalers shall receive an invoice for the permit fee as calculated in Section D. 5 directly from the City for each respective nonprofit organization receiving fireworks from that wholesaler. The invoice must be paid within 30 days of the date of the invoice. Permittees forfeit any permit issued for a distributor’s failure to pay within 30 days of the date of the invoice. Nothing herein shall prevent the organization from paying the invoice in lieu of the distributor. Nonprofit organizations may reapply for a permit only after payment of the invoice in full.

According to Section D.5:

“The permit fee shall be calculated each year by the City and shall be based on a percentage of the permittee’s (or it’s predecessor’s) gross revenues during the current year from the sale of fireworks. The percentage shall be derived from the City’s estimated reasonable cost of public services for administering the permits and shall include, but not be limited to, staff time administering the permits, staff time preparing the Public Education Plan and related materials, staff time related to the regulation of the sales, use, and clean-up of fireworks in the City, and business license fees for the organization, divided by the gross revenues derived from the sale of fireworks, as disclosed by the applications for fireworks-sales permits for the current year. *Example:* The City’s costs for staff time related to the permits is \$51,500. Gross revenues derived from fireworks sales in the City is calculated at \$1,000,000. The permit fee would be 5.15% of each permittee’s gross revenues.” (emphasis added)

Attached hereto at Exhibit C, please find invoices sent by the City to TNT Fireworks on behalf of the nonprofit organizations which TNT Fireworks services for the years 2015 through 2021, inclusive. Beginning in 2003 the 20 nonprofit organizations serviced by TNT Fireworks originally imposed an 8% surcharge on all retail sales of fireworks from their stand. It is our understanding that the nonprofits operating Phantom Fireworks stands imposed a 7% surcharge on all retail sales. Upon receiving the City’s invoice for each group, TNT Fireworks would deduct said amount from the 8% surcharge collected by the groups and promptly forward payment to the City of the requested amount listed on the invoice for each group. The balance of the surcharge collected was then refunded to each group. As you can see from the summary and year-by-year charts attached hereto at Exhibit D, in 2013 and 2014 TNT was having refund to each group as much as 59% of the surcharge amount the nonprofit groups collected. Beginning in 2015 the nonprofit organizations serviced by TNT Fireworks reduced their surcharge amount to 6%. As you can see from the year-to-year overview, the amount charged by the City dropped dramatically in 2016 and has never recovered or approached the sums billed by the City in 2014 and 2015.

During the August 10, 2021, City Council meeting, Mark Evanoff presented and discussed Slide #23 of his Power Point Presentation (please see Exhibit E attached hereto) outlining the City’s costs, including suggesting that there were 23 Union City sworn, and non-sworn police personnel deployed exclusively for fireworks enforcement along with 7 Alameda County Fire and 2 Public Works staff. At Exhibit F attached hereto, Mr. Evanoff’s Slide #26 from his August 10, 2021, Power Point Presentation, he lists the income to the City for sales tax, business license fees, fireworks application fees and then states that the staff time for processing applications, inspecting booths, Finance Department, City Manager time was estimated to be at \$15,000. At no point in the invoices provided to the Union City nonprofit organizations, TNT Fireworks and/or Phantom Fireworks are the costs ever enumerated by department, service, or personnel nor any details or specifics provided on how this sum was arrived at. At the August 10, 2021, City Council meeting Mr. Evanoff stated while discussing Slide #40 of his Power Point

Presentation that the City wanted to conduct a “Complete cost analysis for processing fireworks and present proposal to the City Council for full cost recovery.”

California statutory and case law is quite clear that, unlike private organizations, making a profit in providing services to the public is not a legally allowable objective for local governments. The City may only set fees at a level to recover the full cost of providing the service.

As a result of the ruling in the “Sinclair Paint Case” and Proposition 26, which was adopted by California voters in November 2010, the City of Union City is limited to imposing or requiring a fireworks retail permittee to pay a fee as described in Section 1(e)(3) of Article XIIIc of the California Constitution to recover that permittee’s pro rata share of the costs that the local jurisdiction incurred related to any of the following:

- (1) Processing and issuing permits;
- (2) Inspection of firework stands;
- (3) Public education and awareness campaign regarding the safe and responsible use of Safe and Sane Fireworks and the dangers and risks posed by the use of illegal fireworks;
- (4) Enforcing the provisions of the code of the charter city, city, county, or city and county with respect to the sale and use of Safe and Sane Fireworks, including extra personnel time, and cleanup of the fireworks trash and debris. “Extra personnel time” shall be defined as employee or contracted employee time that the charter city, city, county, fire district, or city and county would not otherwise incur but for the sale and use of Safe and Sane Fireworks;
- (5) Fire operation and suppression efforts that are directly related to Safe and Sane Fireworks.

Our client and the Union City nonprofit organizations stand prepared to assist in providing those reasonable sums necessary to assist in underwriting the costs of these permitted areas of service in Union City. We have been provided no details on the charges by City staff over the years and given the fluctuating amounts that have been invoiced, have little confidence that the City actually knows what the true cost of its services that are strictly dedicated to the sale and use of State-Approved Fireworks in Union City have been or that the new calculations they are going to arrive at are consistent with the limitations set forth by the Sinclair Paint case, the California Constitution and Proposition 26.

In the interest of providing the Union City-City Council and the constituents it represents, along with the Union City nonprofit organizations and their members who would like to continue to sell State-Approved Fireworks each 4th of July as a way of funding their critical programs in their community, with as complete and accurate assessment of the

situation as possible; the purpose of this correspondence is to respectfully request that all of the departments of and for the City of Union City and their employees and/or agents, and most particularly the individuals to whom this records request is addressed to, pursuant to the California Public Records Act (CPRA) (California Government Code Section 6250, et seq.); the Ralph M. Brown Act (Brown Act) (California Government Code Section 54950, et seq.); and all other relevant local and state statutes and regulations, provide us an opportunity to inspect and/or copy all of the following documents and materials:

Preface: In responding to Request 1 through Request 10 below, inclusive, please be advised that the individuals to whom this Records Request is addressed as well as your department, agency and/or staff members are being requested to produce any and all records, reports, notations, memoranda, internal memos, interoffice memoranda, directives, financial documents, invoices, purchase orders, reimbursement agreements, expenditures, expense statements, general ledgers, papers, documents, e-mails, social media, photographs, text messages, electronic messages, instant messages, books, letters, notes, typed materials, memorandum of telephone conversations, multi-media presentations, Power Point Presentations, Zoom or other webinar video footage or audio recordings/transcriptions/notes, raw video footage, reports, records, and any and all other writings, records and/or correspondence relating to the requests listed below. These materials should include, without limitation, unless exempt by an express provision of law, all file copies prepared in connection with such writings, in written, electronic or any other form, whether used or not. For the purposes of the following 10 requests, the term “Records” shall include, but not be limited to, all of the above.

SECTION ONE

Subject: The subject matter of this request seeks to identify information contained in, relied upon and/or include or excluded from the, content and/or implementation of Resolution No. 2537-03 and its Exhibit A from the point of its adoption in 2003 through and including the date of your final response to this “Records” request.

Request #1: Copies of any and all iterations of Resolution No. 2537-03 attached hereto at Exhibit B as well as all summaries, reports, memoranda, emails, text messages, correspondence and/or “records” maintained by, or originating from the Office of City Manager, Deputy City Manager, Finance Department, Public Works Department, Union City Police Department and/or Union City Fire Departments (including Alameda County Fire Department) which delineate and/or discuss how the respective departments track and allocate expenses and/or staff time in order to arrive at their respective fee calculations mandated by this resolution as well as what supporting documentation would have to be submitted with those expenses and/or time allocations.

Request #2: For Resolution No. 2537-03 or any similar resolution before or after that which is attached hereto at Exhibit B, please provide any summaries, reports, memoranda, emails, text messages, correspondence and/or “Records” instructing departments, staff and/or contract entities on any legal or administrative limitations on what they should and can legally allocate as expenses to be billed to the nonprofit fireworks retailers and still be consistent with the Sinclair Paint case and/or Proposition 26.

Request #3: Subsection D.5 of Resolution No. 2537-03 states that, “The permit fee shall be calculated each year by The City and shall be based on a percentage of the permittee’s (or its predecessor’s) gross revenues during the current year from the sale of fireworks. The percentage shall be derived from the City’s estimated reasonable cost of public services for administering the permits and shall include, but not be limited to, staff time administering permits, staff time preparing the Public Education Plan and related materials, staff time related to the regulation of the sales, use, and cleanup of fireworks in the City, and business license fees for the organization, divided by the gross revenue derived from the sale of fireworks, as disclosed by the application for fireworks-sales permits for the current year.” (See Exhibit B attached hereto). Please provide any summaries, reports, memoranda, emails, text messages, correspondence, guidelines, mandates and/or “Records” instructing departments, staff and/or contract entities on the definition of the word “estimated” and how it should be applied to determining what costs and expenses should be allocated to the nonprofit groups pursuant to Section D.4 and D.5 of Exhibit A of Resolution No. 2537-03. Please provide this information beginning with the year 2003 moving forward to and including your final response to this “Records” request.

SECTION TWO

Subject: **The subject matter of this request is to identify information relied and/or included or excluded from the City’s invoices for each of the seven years that are reflected on the City’s invoices at Exhibit C attached hereto. Please provide financial documents and documentation, including, but not limited to, income statements, general ledgers (meaning a report showing all transactions that occurred over a specific period of time), executed contract for services, invoices, purchase orders any and all other “records” that show how each department’s expenditures and/or staff time related to the amount that was billed to each nonprofit group was arrived at. If any of these expenses were for personnel and services that were other than those exclusively dedicated to safe and sane fireworks, please indicate what those expenses or services were and their relevant detail of time spent other than on dedicated to safe and sane fireworks.**

Request #4: All “Records” that were collected, gathered, and/or obtained that were reviewed and relied upon and/or used, in whole or in part, in developing each invoice listed in Exhibit C attached hereto.

Request #5: All “Records” that were collected, gathered, and/or obtained that were reviewed but not relied upon and were excluded from use or inclusion, in whole or in part, to produce the invoices listed in Exhibit C attached hereto.

Request #6: Section D.5 of Resolution No. 2537-03 states that each city department or service “shall include, but not be limited to, staff time administrating permits, staff time preparing the Public Education Plan and related materials, staff time related to the regulation of the sales, use, and cleanup of fireworks in the City, and business license fees for the organization.” For each invoice listed in Exhibit C, attached hereto, please provide the above mandatory information required by Section D.5 for each department or contract agency for services billed to the nonprofit organizations, and the list of individuals performing each service, the hours and shifts worked, etc.

SECTION THREE

Subject: **The subject matter of this request is to identify information relied upon and/or included or excluded from Mark Evanoff’s slide # 23 of his Power Point Presentation on August 10, 2021, before the Union City-City Council (please see Exhibit E attached hereto)**

Request #7: Any and all “Records”, particularly staff logs and time sheets for the 23 UCPD sworn, non-sworn and dispatcher personnel, 7 Alameda County Fire personnel, 2 Public Works staff personnel whose time and expenses were billed to the nonprofit organizations operating fireworks stands. If any of those expenses were for personnel and services that were other than those exclusively dedicated to safe and sane fireworks, please indicate what those expenses or services were and the relevant detail of time spent other than on dedicated safe and sane fireworks issues.

Request #8: Section D.5 of Resolution No. 2537-03 states that each city department or service “shall include, but not be limited to, staff time administrating permits, staff time preparing the Public Education Plan and related materials, staff time related to the regulation of the sales, use, and cleanup of fireworks in the City, and business license fees for the organization.” For each City expense listed in Exhibit E, attached hereto, please provide the above mandatory information required by Section D.5 for each department or contract agency for services billed to the nonprofit organizations.

SECTION FOUR

Subject: The subject matter of this request is to identify staff time for administering permits, staff time preparing the Public Education Plan and related materials, staff time related to the clean-up of safe and sane fireworks in the City and staff time required to issue business licenses for each organization. Please keep in mind that there are 21 nonprofit organizations which have been grandfathered since 2003 and each organizations operates a firework stand on virtually the same location, year in and year out

Request #9: Please specify what activities are performed on a routine basis plus what unusual or otherwise nonroutine activities have to be performed each year to administer permits and stand operations for these nonprofit organizations.

Request #10: Furthermore, each wholesaler submits its own Public Education Plan as required by the ordinance. Please indicate what specific Public Education activities and related materials or expenses are incurred by any City Department or contract agency of the City, as it relates to safe and sane fireworks, from 2015 through and including your final response to this “Records” request.

The requests enumerated above have been narrowly construed, as much as possible, so as to not impose any undue burden on the City with the exemptions included in the California Public Records Act in mind. Any perceived ambiguities in a request should be construed in favor of being inclusive rather than exclusive.

The terms utilized that are defined by the California Public Records Act should be given their full meaning. Thus, for example, a request for any “writing” includes a request for “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols or combinations thereof, in any records thereby created, regardless of the manner in which the record is stored” (California Government Codes Section 6252)(g). This also includes any “writings” (including any text messages) on personal computers, telephones, cellular phones, social media, etc., in which City of Union City business was conducted and in which “writings” within the definition of this request are stored.

This request reasonably describes identifiable records, or information produced therefrom, and we believe there’s no express provision of law exempting these records from disclosure. Accordingly, pursuant to Government Code Section 6257, we ask that you make these records “promptly available” to us (or our representative) based upon our payment of “fees covering direct costs of duplication or statutory fees, if applicable”.

To the extent that a portion of the information we have requested is exempt by express provision of law, Government Code Section 6257 additionally requires you to segregate and delete that material so that the remainder of the information may be provided to us to satisfy our requests.

In any case, if you determine that an express provision of law exempts from disclosure all or any portion of the materials we have requested, Government Code Section 6256 requires a determination and notification to us of “the reasons therefore” no later than ten (10) days from your receipt of this request. Government Code Section 6256.2 prohibits the use of the ten (10) day period, or any provision of the California Public Records Act, “to delay access for purposes of inspecting public records” and requires that you provide us with “names and titles or positions of each person responsible for the denial”.

The California Public Records Act requires the city to “reveal the general nature of the documents withheld,” and to “set forth the names and titles or positions of each person responsible for the denial.” (California Government Code Section 6253(d)). We respectfully emphasize our request for a specific response and all applicable exemptions to the request (California Government Code Section 6255(a)). A blanket list of exemptions that may or may not apply to the request coupled with the failure to indicate the existence of the documents responsive to the request denies us the ability to evaluate whether the City has justifiably withheld responsive documents. Denying us this opportunity frustrates the Legislature’s primary purpose in enacting the California Public Records Act, which is to “maximize public access to agency records.” (Haynie v. Superior Court, (2001) 26 Cal. 4th 1061,1073).

For each document that is responsive to our request that you claim is not required to be made available for inspection and copying, please state the date of the document; the name, job title, and address of the person who prepared it; the name, job title, and address of the person now in possession of the documents; a description of the subject matter of the document; and the present location and custodian for the document. Further, if the exemption you are claiming applies only to a portion of the records, please redact the portion and provide copies of the remainder of the records. If responsive documents no longer exist but are known to have been in existence, please state the circumstances under which they were either lost or destroyed, describe the documents to the fullest extent possible, state the request(s) to which they were responsive, and identify each person having knowledge of the content of such documents.

To assist us in determining your collective and individual responsiveness to this request, please segregate the records you provide us according to each of the individual requests enumerated above and, where appropriate, in whose possession those records resided (i.e., the department where the records resided and/or the individual who possessed any records, exclusively).

Under the California Public Records Act, an agency can charge fees covering the direct and actual cost of duplication unless a fee has been established for a specific record by law other than the CPRA. Fees can be charged only when copies of the records are requested and made, not for the time spent in searching, reviewing, locating, redacting and/or deleting documents by the City of Union City (California Government Code 6253(b)).

As you know, state law permits you to reduce or waive copying fees, particularly when the release of the requested information would be “in the public interest”. While we believe that this request plainly fits that category, we are not asking you to waive such fees given the current

budgetary problems facing most local governmental agencies. However, if the fee will exceed \$0.15 per page, please inform us of the total charges before you fill our request for copies.

Although we expect that you will agree that the materials requested are covered by, and are not exempt from, the California Public Records Act, we need not remind you that the Act is enforceable by court proceedings. When a lawsuit results in order to compel an agency to disclose information that has been improperly withheld, there is a mandatory award of court costs and reasonable attorney's fees to the plaintiff (Government Code Section 6258 and 6259).

If you have any questions regarding this request, please call the undersigned at (916) 443-3816. Thank you for your timely attention to our request.

Very Truly Yours,

REVELL

COMMUNICATIONS

Dennis C. Revell
President/CEO
Office 916-443-3816
Cell - 916-952-5351

Cc: Kristopher Kikotavlo, City Attorney