

## **MEMORANDUM OF LAW**

**DATE:** March 29, 2002  
**TO:** Frank Belock, Jr., Director, Capital and Engineering Projects  
**FROM:** City Attorney  
**SUBJECT:** Fingerprinting of Contractors and Consultants

### **QUESTION PRESENTED**

May the City fingerprint its contractors and consultants and transmit such data to the Department of Justice for the purpose of obtaining criminal history information?

### **SHORT ANSWER**

The City may fingerprint its contractors and consultants and transmit such data to the Department of Justice for the purpose of obtaining criminal history information provided that the City complies with the following: (1) the City can demonstrate a compelling interest for fingerprint screening and no other less intrusive means of achieving the same goal exists; (2) the City Council adopts a resolution authorizing the submission of fingerprints to the Department of Justice for the purpose of obtaining summary criminal history information; (3) the City Council adopts an ordinance that expressly refers to specific criminal conduct and contains requirements or exclusions, or both, expressly based upon that specified conduct; and (4) the City complies with California statutes regulating the management and dissemination of fingerprint data and criminal history information.

## **BACKGROUND**

In an October 26, 2001, memorandum to the Civil Service Commission, the City of San Diego's Personnel Director recommended the fingerprinting of new City employees and existing employees in certain security sensitive positions. *See* Exhibit 1, October 26, 2001, Memorandum from Personnel Director to Civil Service Commission. On November 1, 2001, the Civil Service Commission approved a program to fingerprint current employees in certain classifications and all new employees hired by the City. After the Commission's approval, City staff from the Personnel Department met several times with labor organizations regarding their concerns. As a result of those meetings, the Personnel Director issued a second memorandum, dated January 4, 2002, to the Civil Service Commission, recommending the expansion of the fingerprint requirement to all current and future employees, along with "contractors and consultants." *See* Exhibit 2, January 4, 2002, Memorandum from Personnel Director to Civil Service Commission.

The January 4, 2002, memorandum outlines the procedure for fingerprinting as follows:

All current and future employees, along with contractors and consultants, will be fingerprinted on a computerized machine installed in the Personnel Department and those prints along with name, social security number, date of birth, place of birth, and other information would be transmitted to the [Department of Justice (DOJ)]. The DOJ computers will analyze the prints and information then send a report back generally within 48-hours via a secure dedicated computer cable. Additionally, at the time of the fingerprinting, digital photographs will be taken and stored electronically.

The DOJ reports are to be reviewed by authorized Personnel Department staff. The January 4, 2002, memorandum states that a failure to submit to fingerprinting "will be deemed, on its face, to be a security issue requiring appropriate remedial action which could result in discipline, including termination." The memorandum proposes a procedure for existing City employees to appeal any remedial action, but does not propose or reference any procedure to appeal a remedial action affecting an independent contractor or consultant. Nor does the memorandum specify the types of criminal convictions that could be used to deny a contractor or consultant access to City job sites.

The purpose of this memorandum is to address the issues of whether and under what circumstances the City may fingerprint its contractors and consultants for screening purposes. This memorandum will also address the preliminary issue of identifying which City officials or departments have jurisdiction to authorize and enforce the fingerprinting and screening of contractors and consultants.

## **LEGAL ANALYSIS**

### **I**

**ONLY THE CITY COUNCIL AND THE CITY MANAGER HAVE  
JURISDICTION TO AUTHORIZE AND ENFORCE CONDITIONS**

## **RELATING TO CONTRACTORS AND CONSULTANTS.**

Given that the City's Personnel Director has made recommendations to the City's Civil Service Commission pertaining to the fingerprinting of contractors and consultants, a preliminary issue arises as to which City departments or officials have jurisdiction to make or enforce such a requirement.

Municipalities receive their power from the California Constitution and/or applicable general laws. *Long v. City of Fresno*, 225 Cal. App. 2d 59, 65 (1964). Article XI, section 3(a) of the California Constitution provides that a city may adopt a charter, which allows the city to supersede certain laws that are inconsistent with its charter. In particular, charter cities enjoy autonomous rule over "municipal affairs" pursuant to article XI, section 5 of the California Constitution, "subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law." *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994); *Johnson v. Bradley*, 4 Cal. 4th 389, 397 (1992); *California Fed. Savings & Loan Assn. v. City of Los Angeles*, 54 Cal. 3d 1, 12 (1991).

The City of San Diego is a charter city. *Mira Development Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1214 (1988). Like the California Constitution, the San Diego City Charter operates as a limitation of power. *See Miller v. City of Sacramento*, 66 Cal. App. 3d 863, 867 (1977). Thus, the City may not enact ordinances governing subject matter in conflict with its charter.

Pursuant to City Charter sections 37 and 116, the City's Personnel Director shall supervise the City's civil service classifications, examinations, and employment policy. The Personnel Director shall also investigate the working conditions of City service as they affect health, welfare, efficiency, and esprit de corps of the employees. Charter section 115 provides that the Civil Service Commission shall have supervision over the selection, promotion, and removal of all employees of the City subject to the Civil Service provisions of the Charter. Therefore, the City Charter clearly provides that the Personnel Director or the Civil Service Commission has jurisdiction over conditions and procedures affecting City employees.

Pursuant to Charter section 94, the City Council, on the recommendation of the Department in charge, if not under the City Manager's jurisdiction, has the duty of letting contracts for public works to contractors and consultants. Therefore, the Charter also provides that the City Manager or the City Council has jurisdiction over conditions and procedures relating to the City's public works contracts.

The Charter contains express provisions prescribing the duties of the Personnel Director and the Civil Service Commission, with respect to civil service employees, and the City Council and City Manager, with respect to public works contracts. Therefore, the City would be acting in conflict with the Charter if it allowed the Personnel Director or Civil Service Commission to regulate the City's contractors and consultants. Consequently, only the City Council and City Manager have jurisdiction to authorize and enforce the fingerprint screening of the City's contractors and consultants.

## II

### **THE CITY MUST HAVE A COMPELLING REASON FOR FINGERPRINT SCREENING ITS CONTRACTORS AND CONSULTANTS AND NO OTHER LESS INTRUSIVE MEANS OF ACHIEVING THE SAME GOAL**

#### **A. The City may fingerprint contractors pursuant to its police power authority.**

The City may enact an ordinance to require fingerprinting of its contractors and consultants pursuant to its police power authority. Those ordinance provisions may then be enforced through the City's public works contracts.

Article XI, section 7 of the California Constitution authorizes cities to exercise police power to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not preempted by general laws. The police power of a state is its right to adopt regulations designed to promote "the public health, the public morals, or the public safety." *C.B. & Q Railway v. Drainage Comm'rs.*, 200 U.S. 561, 592 (1906). A city has broad discretion to determine what is reasonable to protect the public health, safety, morals, and general welfare. *Carlin v. City of Palm Springs*, 14 Cal. App. 3d 706, 711 (1971). However, in evaluating whether a city has properly exercised its police powers, courts will examine whether the exercise of such power violates a fundamental or constitutionally protected right, the legitimacy of the city's goal in exercising such power, and the logical relationship between the exercise of such power and the city's goal.

In the context of fingerprinting, California courts have unanimously opined that a city may enact a local ordinance requiring fingerprinting if the city has a rational basis for making such a requirement. *See, e.g., Murray Miller et al. v. Cornelius P. Murphy*, 143 Cal. App. 3d 337 (1983)(holding that the City of San Francisco could enact regulations requiring fingerprinting of pawnbroker customers); *People v. Stuller*, 10 Cal. App. 3d 582 (1970)(upholding a Palm Springs ordinance that required transient employees and contractors to submit fingerprints to the local police department); *Harriman v. City of Beverly Hills*, 275 Cal. App. 2d 918 (1969)(holding that the City of Beverly Hills could enact regulations requiring fingerprinting of telephone answering service operators). However, the California Supreme Court has also held that *the dissemination of fingerprint data to third parties* may infringe upon an individual's constitutionally protected right to privacy. *Christopher Ann Perkey v. Department of Motor Vehicles*, 42 Cal. 3d 185 (1986). Therefore, courts are likely to scrutinize the dissemination of fingerprint data to law enforcement agencies very closely.

#### **B. The City may only send fingerprint data to the DOJ if it has a compelling reason for doing so and no other less intrusive means of achieving the same goal.**

The California Supreme Court has held that the dissemination of fingerprints to third parties may infringe upon an individual's constitutionally protected right to privacy. *Christopher Ann Perkey v. Department of Motor Vehicles*, 42 Cal. 3d 185 (1986).

The right to privacy protects a persons's interest in being free from governmental invasions "of the sanctity of a man's home and the privacies of life." *Murray Miller v. Cornelius P. Murphy*, 143 Cal. App. 3d 337, 343 (1983)(citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Although the United States Constitution does not expressly guarantee the right of privacy, numerous United States Supreme Court decisions have implied this protection from a combination of other expressly guaranteed constitutional rights. *See, e.g., Roe v. Wade*, 410 U.S., 113 (1973); *Griswald v. Connecticut*, 381 U.S. 479 (1965).

The California Constitution specifically guarantees the right of privacy. Article I, section 1 of the California Constitution provides as follows: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." (Emphasis added.) In *White v. Davis*, 13 Cal. 3d 757, 775 (1975), the California Supreme Court described the goals of this express right as follows: (1) to prevent "government snooping" and the secret gathering of secret information; (2) to prevent the overbroad collection and retention of unnecessary personal information by government and business interests; (3) to prevent the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) to prevent the lack of a reasonable check on the accuracy of existing records.

The right of privacy is not absolute, however. *See Loder v. Municipal Court*, 17 Cal. 3d 359, 364 (1976). A government may enact a statute or regulation that infringes upon an individual's right of privacy if it has a compelling reason for doing so and no other less intrusive means of accomplishing the same goal. *White v. Davis*, 13 Cal. 3d 757, 772 (1975). Therefore, the City may adopt an ordinance to require fingerprint screening of its contractors and consultants if it has a compelling reason for doing so and no other less intrusive means of achieving the same goal.

The City's purported compelling interest will be strictly scrutinized by the courts. Therefore, the City should carefully evaluate each contract to determine whether the contractors and consultants will require fingerprint screening. At a minimum, the evaluation should include an analysis of the following factors: the length of time contractors or consultants will be on City property, alternative security measures in place that may adequately protect City property short of fingerprint screening, the proximity of the contractors or consultants to sensitive information or areas, the nature of services provided by the contractors and consultants, and whether contractors and consultants will be working under the close supervision of City employees.

The City should also be mindful of the discriminatory impact that may result from screening contractors with criminal history backgrounds. For example, the City may not predicate employment on the absence of criminal history or deny employment based upon a record of conviction that has no relation to the City's goal of security. *See Exhibit 3, City Att'y MOL No. 91-42* (May 29, 1991).

### III

#### THE CITY COUNCIL MUST ADOPT A RESOLUTION AND

## **ORDINANCE AUTHORIZING THE SUBMISSION OF FINGERPRINTS TO THE DEPARTMENT OF JUSTICE**

### **A. The City may obtain summary criminal history information pursuant to California Penal Code section 11105(b)(10).**

The constitutional privacy concerns implicated by the dissemination of fingerprints to third parties also applies to the dissemination of criminal history background data. California courts have, therefore, deemed the dissemination of criminal history data to be a matter of statewide importance, preempting local regulation. *See Housing Authority v. Van de Kamp*, 223 Cal. App. 3d 109, 117 (1990). To address the constitutional concerns caused by the dissemination of criminal history data, the California Legislature has narrowly defined the instances in which criminal history summaries may be disseminated and has established criminal sanctions for unauthorized dissemination. *See, e.g.*, Cal. Pen. Code 11140-11144.

California Penal Code section 11105(a)(1) authorizes the DOJ to maintain state summary criminal history information, including the name, date of birth, physical description, fingerprints, photographs dates of arrests, arresting agencies and booking numbers, charges, and dispositions. California Penal Code section 11105(b)(10) authorizes the Attorney General to furnish state summary criminal history information to any city under the following circumstances: (1) access is needed in order to assist that agency, officer, or official in fulfilling *employment, certification, or licensing* duties; (2) the access is specifically authorized by the city council; and (3) the criminal history information is required to implement a statute, ordinance, or regulation that expressly refers to specific criminal conduct applicable to the subject person of the state summary criminal history information, and contains requirements of exclusions, or both, expressly based upon that specified criminal conduct. California Penal Code section 11105(i) specifically authorizes the DOJ to require the submission of fingerprints for the purpose of conducting summary criminal history checks that are authorized by law.

### **A. The applicability of section 11105(b)(10) depends on whether the City's retention of contractors and consultants fulfills an employment function.**

Because contractors and consultants are not City employees, a question arises as to whether the screening of contractors and consultants can be fairly characterized as necessary to fulfill "employment, certification, or licensing" duties within the meaning of section 11105(b)(10). In interpreting a statute, a court will first look at the language of the statute. If the text is clear as applied to a given case, then a court need not inquire further. *J.A. Jones Construction Co. v. Superior Court*, 27 Cal. App. 4th 1568, 1575 (1994). On the other hand, if the application of the text is ambiguous, then the court must follow rules of statutory construction. *Id* at 1576. The application of 11105(b)(10) is ambiguous in that "employment" can be viewed as descriptive (to describe an employer-employee relationship) or functional (as synonymous with retention or engagement). As such, the rules of statutory construction must be applied to determine the meaning of section 11105(b)(10).

The fundamental rules of statutory construction are as follows: (1) ascertain the intent of the Legislature so as to effectuate the purpose of the law; (2) give a provision a reasonable and

common sense interpretation consistent with the apparent purpose, which will result in wise policy rather than mischief or absurdity; (3) give significance, if possible, to every word or part, and harmonize the parts by considering a particular clause or section in the context of the whole; (4) take into account matters such as context, object in view, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction; and (5) give great weight to consistent administrative construction. Witkin, Summary of Law, vol. 7, *Constitutional Law* 94 (9th ed. 1988).

The apparent legislative intent of California Penal Code section 11105 is to balance an individual's privacy rights against the recognized need of public agencies to review an individual's criminal background history for security purposes. See *Housing Authority v. Van de Kamp*, 223 Cal. App. 3d 109, 112 (1990). Consequently, the Legislature has narrowly defined the instances in which such information may be disseminated. *Id.* A California appellate court has already determined that the terms "certification" and "licensing" in section 11105(b)(10) refer solely to "occupational certification and licensing functions." *Id.* at 114. (Emphasis added.) The City does not certify or license contractors and consultants. Therefore, our focus is on whether the City's retention of contractors and consultants fulfills an "employment" function.

**A. Because contractors and consultants may pose the same security risks as City employees in carrying out their services, the term "employment" should be viewed in its functional sense.**

A City contractor or consultant fulfills tasks and services required by the City in the exercise of its municipal duties. Because a City contractor or consultant performs services without the controls or protections typically associated with City employees, the contractor or consultant is deemed to be an "independent contractor," a term of art with numerous legal ramifications, particularly in the areas of labor relations, workers' compensation, wage laws, and government tort liability. See Witkin, Summary of Law, vol. 2, *Agency and Employment* 12-17 (9th ed. 1988).

The California Supreme Court has stated that "[a]n independent contractor is one who, in rendering services, exercises an independent employment or occupation and represents his employer only as to the results of his work, and not as to the means where it is accomplished.... The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for." *Green v. Soule*, 145 Cal. 96, 99 (1904). Because the distinctions between an independent contractor and employee are not based upon the nature of services performed and independent contractors may pose the same security risks as City employees in carrying out their services, a court is likely to view "employment" as synonymous with retention or engagement. Any other interpretation of section 11105(b)(10) would produce absurd consequences, particularly where contractors and consultants have the same access or exposure to City property as City employees.

The fingerprint screening of contractors and consultants comports with the legislative intent of California Penal Code section 11105(b)(10). Therefore, the City may obtain criminal history data from the DOJ as long as the City complies with the requirements of that section. That is, the City Council must (1) specifically authorize access of criminal history backgrounds from the DOJ by resolution and (2) enact an ordinance that expressly refers to criminal conduct

applicable to the subject person of the state summary criminal history information, with requirements, or exclusions, or both, expressly based upon that specified conduct. Attached to this memorandum are a sample resolution and ordinance that comply with California Penal Code section 11105(b)(10). *See* Exhibit 4.

#### **IV**

#### **THE CITY MUST COMPLY WITH CALIFORNIA STATUTES RESTRICTING THE MANAGEMENT AND DISSEMINATION OF CRIMINAL HISTORY INFORMATION**

If the City Council chooses to implement a fingerprint screening process, the City must comply with the following California statutes pertaining to the management and dissemination of criminal history data:

California Labor Code section 432.7(a) prohibits the City from asking any applicant for employment to disclose information concerning an arrest or detention that did not result in a conviction, or information concerning a referral to, and participation in, any pretrial or posttrial diversion program. A conviction includes a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court. Nothing in this section prevents the City from asking an applicant about an arrest for which the applicant is out on bail or on his or her own recognizance pending trial.

California Labor Code section 432.8 prohibits the City from using marijuana convictions, two years or older (Health and Safety Code sections 11357(b) or (c), 11360(c), 11364, 11365, or 11550, as they related to marijuana prior to January 1, 1976, or a statutory predecessors thereof).

California Penal Code section 11076 prohibits the City from disseminating any criminal record information, whether directly or through any intermediary, except where authorized by statute. California Penal Code section 11078 provides that the City, if it holds or receives criminal offender record information in a computerized system, shall maintain, for such period as is found by the Attorney General to be appropriate, a listing of agencies to which it has released or communicated information. California Penal Code section 11079 authorizes the Attorney General to conduct inquiries and investigations of any agencies that receive criminal history information. We therefore recommended that the City Manager draft administrative regulations governing the handling of fingerprint data and criminal record information and submit the draft regulations to the City Attorney's Office for review and comment.

#### **CONCLUSION**

The City may fingerprint screen its contractors and consultants provided that: (1) the City can demonstrate a compelling interest for fingerprint screening and no other less intrusive means of achieving the same goal; (2) the City Council adopts a resolution authorizing the submission of fingerprints to the Department of Justice for the purpose of obtaining summary criminal history information; (3) the City Council adopts an ordinance that expressly refers to specific



criminal conduct and contains requirements or exclusions, or both, expressly based upon that specified conduct; and (4) the City complies with California statutes regulating the management and dissemination of fingerprint data and criminal history information.

CASEY GWINN, City Attorney

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By

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Attachments  
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