DATE: December 22, 1986

TO: Rich Snapper, Personnel Director
FROM: City Attorney
SUBJECT: Preemployment Inquiries of Handicapped Individuals

By memorandum dated October 24, 1986, you indicated a concern over the legality of the use of a preemployment inquiry into the nature of the impairment for applicants who self-identify as handicapped. You stated that the Citizen's Equal Opportunity Commission has voiced a continuing interest in the use of these inquiries but you were concerned with apparent conflicts with this procedure in certain provisions of the Rehabilitation Act of 1973 (29 USC 791 et seq.) and the regulations of the Department of Fair Employment and Housing of the State of California concerning the use of such inquires.

On June 10, 1986, we advised you by memorandum of the general rule concerning such inquiries whenever the City is required to compile statistical data regarding the number of women, minorities, handicapped individuals or persons protected by the Age Discrimination Act that have applied for employment with The City of San Diego. You stated that you believe that the above regulations prohibit the collection of such data, especially the type and nature of an applicant's self-alleged impairment. This memorandum hopefully will resolve your concerns and delineate the legal basis for the use of such preemployment forms.

The California Fair Employment and Housing Act (Cal. Gov't Code Sec. 12900 et seq.) prohibits unlawful employment discrimination by an employer in the state of California. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791 et seq.) prohibits discrimination against the handicapped by recipients of federal assistance. Generally speaking, but not without exception, section 12940(d) of the Cal. Gov't Code prohibits an employer from requiring a job applicant to disclose information concerning physical or medical condition. There is no corresponding prohibition in the Rehabilitation Act of 1973,

but the collection of such data in violation of the federal regulations enacted pursuant to this Act could be used as the basis of a charge of employment discrimination.

Limited exemptions do exist under both the state and federal law for the use of preemployment inquiries. The federal regulations adopted pursuant to 29 U.S.C. 791 are clearer and more concise than the corresponding regulations promulgated by the California Department of Fair Employment and Housing Act and,

for that reason we will address them first.

Because each of the federal departments that dispenses federal aid adopts its own regulations, there are numerous provisions concerning preemployment inquiries of handicapped individuals in the Code of Federal Regulations. For the purpose of this discussion, we will use as an example the Department of Labor Regulations because they are similar to those adopted by the other federal departments. The applicable provisions at 29 CFR 32.15 state:

> (a) Except as provided in paragraphs (b) and (c) of this subsection, a recipient may not conduct preemployment, medical examinations or make preemployment inquiry of an applicant for employment or training as to whether the applicant is a handicapped person or as to the nature of the severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job related functions.
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> (b) When a recipient is taking remedial action to correct the effects of past discrimination, when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity, or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment or training to indicate whether and to what extent they are handicapped if (emphasis added):
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> (1) The recipient states clearly on any written questionnaire used for this purpose or makes it clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts.
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> (2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant, employee or

> participant to any adverse treatment, and
> that it will be used only in accordance
> with this part.

It is therefore clear that the regulations adopted by the federal government pursuant to the Rehabilitation Act of 1973 do not prohibit recipients from making preemployment inquiries to determine if an individual has a handicap when the safeguards in the regulations are followed and the purpose of the collection of data is for one of the reasons specified in 29 CFR 32.15. One must realize, however, that these regulations are not mandatory. They are permissive only as they relate to specific programs receiving federal aid and do not preempt applicable state law.

The City of San Diego is bound by state law in this matter. Cal. Gov't Sec. 12940(d) initially appears to prohibit the collection of this data, but it does contain an important exception. That section states in part:

> It shall be an unlawful employment practice, unless based upon bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: (emphasis added)
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> ....
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> (d) for any employer or employment agency, unless specifically acting in accordance with federal equal employment opportunity guidelines and regulations approved by the Commission, (emphasis added)
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> to print or circulate or to cause to be printed or circulated any publication or make any non-job-related inquiry either verbal or through the use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status or sex, or any intent to make such a limitation specification or discrimination. ...

We must then look to the Commission's regulations themselves and to the provisions of the Federal Equal Employment Opportunity Guidelines to determine when such inquiries are permitted. Title II, California Administrative Code section 7287.3(b) which

pertains to preemployment inquiries provides in part:

> (1) Limited Permissible Inquiries. An employer or other covered entity may make any pre-employment inquiries which do not discriminate on a basis enumerated in the Act. Inquiries which directly or indirectly identify an individual on basis enumerated in the Act are unlawful unless pursuant to a permissible defense. However, an employer or other covered entity may make a pre-employment inquiry as to physical fitness, medical condition, physical condition or medical history of an applicant if, and only if, that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or is directly related to a determination of whether the applicant would endanger his or her health or safety or the health and safety of others.
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> (2) Applicant Flow and Other Statistical Recordkeeping. Notwithstanding any prohibition in these regulations on pre-employment inquiries, it is not unlawful for an employer or other covered entity to collect applicant flow and other recordkeeping data for statistical purposes as provided in section 7287.0(b) of these regulations or in other provisions of state and federal law.

Section 7287.0(b) pertaining to recordkeeping and provides in part:

> Applicant Identification Records. Unless otherwise prohibited by law and for recordkeeping purposes only, every employer or other covered entity shall maintain data regarding the race, sex and national origin of each applicant for the job for which he or she applied. If such data is to be provided on identification form, this form shall be separate or detachable from the application form itself. Employment decisions shall not be based on whether an applicant has provided this information, nor shall the applicant identification information be used for discriminatory purposes, except pursuant to a bona fide affirmative action or

non-discrimination plan.

It should be noted that section 7287(b), which appears to impose a mandatory duty on employers to maintain records regarding race, sex and national origin, cannot be used as a basis for compiling handicapped information because that term is not found in the section. However, section 7287.3(b)(1) indicates that an agency may identify an individual on a basis enumerated in the Fair Employment and Housing Act if they're acting pursuant to a "permissible defense." Section 7293.8 includes the affirmative defenses listed in section 7286.7 within the term "permissible defense." Section 7286.7 states in part:

> (e) Non-Discrimination Plans or Affirmative Action Plans. Notwithstanding a showing of discrimination, such an employment practice is lawful which conforms to:
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> (1) a bona fide voluntary affirmative action plan as discussed below in section 7286.8 (emphasis added);
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> (2) A non-discrimination plan pursuant to Labor Code Section 1431 (Government Code Section 12990); or
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> (3) An order of a state or federal court or administrative agency of proper jurisdiction.
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> (f) Otherwise Required by Law. Notwithstanding a showing of discrimination, such an employment practice is lawful where required by state or federal law or where pursuant to an order of a state or federal of proper jurisdiction.

The City of San Diego is not currently required by state or federal law or by any order of a state or federal court or administrative agency to compile information concerning applicants who are handicapped. If The City of San Diego was so required, the collection of this data would be permissible under California law.

However, this does not resolve the issue of whether or not the City can claim that its Equal Opportunity Policy is in effect a "bona fide voluntary affirmative action plan" for the limited purposes of section 7286.7(1). That section refers to section 7286.8, which is very broad. It states:

> Voluntary action by employers and other covered entities is an effective means for eliminating employment discrimination. The Commission hereby adopts the Affirmative

Action Guidelines of the Federal Equal
Employment Opportunity Commission. (29 CFR
Section 1608 (1979).

While it is evident that The City of San Diego does not have an "affirmative action" program per se, section 1608.10 of the Federal Equal Employment Opportunity Commissions Regulations permits The City of San Diego to raise as a defense to a charge of discrimination that its Equal Opportunity policy is similar to the Equal Opportunity Commission guidelines set forth in section 1608 et seq. and that The City of San Diego has been acting in conformity and reliance upon those regulations even though it does not have a formally approved "affirmative action" plan.

If The City of San Diego desires to conduct preemployment inquiries to obtain handicap applicant information, it certainly can make a strong argument that the Civil Service Commission's Equal Opportunity Policy Statement, the provisions of Civil Service rule XVI, section 1 (Municipal Code section 23.1701) and the provisions of Municipal Code section 26.16(c)(4), which outlines the duties and functions of the Citizen's Equal Opportunity Commission, have the combined effect of meeting the standards set forth by the Federal Equal Employment Opportunity Commission. However, we must advise you that no court of competent jurisdiction has interpreted that provision of the California Fair Employment Housing Act and the regulations adopted pursuant to it concerning permissible defenses. The risk of possible litigation over the collection of this data is always a possibility. To that extent, The City of San Diego may want to seriously consider undertaking any attempt at surveying its applicant pool for handicap data, absent, of course, a valid court, agency order or an approved affirmative action plan.

In addition, we believe that under the federal regulations when an employer is conducting a valid preemployment inquiry, the employer may ask the applicants whether and to what extent they are handicapped. There are no corresponding provisions in the California Fair Employment and Housing Act or in the regulations adopted pursuant to it. We therefore believe that questions concerning the nature of an individual's handicap are inappropriate and may, in fact, conflict with the provisions of Health and Safety Code section 199.20 which protects the privacy of individuals who are the subject of blood testing for acquired immune deficiency syndrome (AIDS).

JOHN W. WITT, City Attorney
By
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