

MEMORANDUM OF LAW

DATE: August 22, 1988

TO: Rich Snapper, Personnel Director

FROM: City Attorney

SUBJECT: Disability Survey

In a memorandum dated August 3, 1988, you indicated that the Civil Service Commission agreed to the development and use of an employee survey to determine the number of disabled employees currently serving in The City of San Diego. Attached to the memorandum was a survey form developed by the Citizens Equal Opportunity Commission and your office. You indicated your continuing reservations about conducting such a survey and asked for advice on how you might limit potential problems arising from the collection of this data.

The material accompanying your memorandum indicates that the information gathered by your survey will be held strictly confidential by the Personnel Department and will be used for statistical purposes only. The questionnaire asks for the name, classification, department/division of the employee and provides for the employee's signature. The form also contains a checkoff list of twenty-three specific types of disability with an additional block available for an employee to describe any other specific medical condition, disability or handicap not shown on the questionnaire.

As we indicated to you in the attached Memorandum of Law, dated December 22, 1986, entitled "Preemployment Inquiries of Handicapped Individuals" there is always a risk of possible litigation associated with the collection and retention of this type of data. This is true whether or not the requested information pertains to applicants or current employees.

We believe that if the Civil Service Commission desires to collect this type of information on current employees, the Personnel Department should follow very closely the provisions of the Confidentiality of Medical Information Act, California Civil Code sec. 56 et seq., which mandates an employer's duty to ensure

the confidentiality of medical information obtained from employees. While it may be argued that, strictly speaking, the Act's provisions do not apply to The City of San Diego under these limited circumstances, we believe it prudent for The City of San Diego to follow its provisions in order to fully protect the privacy of City employees. Section 56.20(c) of the Act requires that an employer may not use or disclose medical

information which the employer possesses pertaining to its employees without the employee first signing an authorization form meeting the requirements of section 56.21 except under certain limited conditions. A survey undertaken solely for the purposes of determining the number of disabled persons in the work place is not an exception to this rule. Therefore, we advise you that an authorization statement, meeting the following requirements of section 56.21, accompany the survey form.

Section 56.21 states as follows:

56.21. Requirements for Authorized Release of Medical Information.

An authorization for an employer to disclose medical information shall be valid if it:

(a) Is handwritten by the person who signs it or is in typeface no smaller than 8-point type.

(b) Is clearly separate from any other language present on the same page and is executed by a signature which serves no purpose other than to execute the authorization.

(c) Is signed and dated by one of the following:

(1) The patient, except that a patient who is a minor may only sign an authorization for the disclosure of medical information obtained by a provider of health care in the course of furnishing services to which the minor could lawfully have consented under Part 1 (commencing with Section 25) or Part 2.7 (commencing with Section 60) of Division 1.

(2) The legal representative of the patient, if the patient is a minor or

incompetent. However, authorization may not be given under this subdivision for the disclosure of medical information which pertains to a competent minor and which was created by a provider of health care in the course of furnishing services to which a minor patient could lawfully have consented under Part 1 (commencing with Section 25) or Part 2.7 (commencing with Section 60) of Division 1.

(3) The beneficiary or personal

representative of a deceased patient.

(d) States the limitations, if any, on the types of medical information to be disclosed.

(e) States the name or functions of the employer or persons authorized to disclose the medical information.

(f) States the names or functions of the persons or entities authorized to receive the medical information.

(g) States the limitations, if any, on the use of the medical information by the persons or entities authorized to receive the medical information.

(h) States a specific date after which the employer is no longer authorized to disclose the medical information.

(i) Advises the person who signed the authorization of the right to receive a copy of the authorization.

We also remind you of the provisions of section 56.20(b) of the Act which state that:

No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization under this part. However, nothing in this section shall prohibit an employer from taking such action as is necessary in the absence of

medical information due to an employee's refusal to sign an authorization under this part.

We believe that if employees voluntarily submit the requested information to the Personnel Department with signed authorization forms meeting the requirements of section 56.21 of the California Civil Code and if such information is kept confidential and used only for statistical purposes, your exposure to any possible future litigation will be minimized. However, our reservations expressed in the attached December 22, 1986 Memorandum of Law remain.

JOHN W. WITT, City Attorney

By

John M. Kaheny

Deputy City Attorney

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Attachment

ML-88-80