MEMORANDUM OF LAW

DATE: December 7, 1989

TO: James Smith, Contract Compliance Officer, via
Severo Esquivel, Deputy City Manager

FROM: City Attorney

SUBJECT: Maintaining Job Application Information by
Gender and Ethnicity

BACKGROUND

In 1985 the City established a Minority Business Enterprise (MBE) and Women's Business Enterprise (WBE) program in an effort to increase the participation of minorities and women in City contracts. Participation in the program requires all employers who contract with the City to keep records of applicants and employees regarding ethnicity and gender. The records are then used by the City to monitor good faith compliance with the goals established by the MBE and WBE programs. You have asked if the City may legally require businesses to gather this information. Additionally, you have asked if private employers may legally reference race and gender on employment applications and, having once obtained such information, whether employers may legally separate job applicant information by race and gender. The questions which you ask necessarily require us to answer the fundamental question, can the City use the information to ensure compliance with its MBE/WBE program.

STATUTORY LAW

Maintenance by employers of employment information based on race and gender is mandated by both federal and state legislation. The Federal Civil Rights Act, 42 U.S.C. section 2000(e) et seq. and the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq., each of which deal with race and gender information, are remarkably similar in their goals and prohibitions.

The Federal Civil Rights Act provides:

> 2000e-2. Unlawful employment practices
>
> (a) Employer practices. It shall be an unlawful employment practice for an employer-(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color,

religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Similarly, Section 12940 of the FEHA states:

12940. Unlawful employment practices

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

Each of the acts establishes an independent commission to promulgate regulations and guidelines concerning hiring and employment practices. Additionally the commissions establish record keeping requirements for employers which enable the commissions to ensure compliance with the acts. The statistical data provided by the records allows the commissions to pursue complaints lodged against employers who are alleged to have violated any of the terms of either act. The two commissions are known respectively as California Fair Employment and Housing Commission (FEHC), established by Government Code section 12903, and the Equal Employment Opportunity Commission (EEOC), established by 42 U.S.C. section 2000e(4).

SUPPORTING REGULATIONS

The federal regulatory provisions are found in the Code of Federal Regulations section 1600 et seq. The California analogue is found in the California Code of Regulations, Title 2, section 7287.0 et seq.

Under the regulations promulgated to ensure compliance with the statutes, maintaining employment information based on ethnicity and gender is not only allowed but required by law.

The federal record keeping provision, 29 C.F.R. section 1602.7 (1988), provides as follows:

> 1602.7 Requirement for filing of report
> Every employer subject to title VII of the Civil Rights Act of 1964 which meets the 100-employee test set forth in section 701(b) thereof shall file with the Commission or its delegate executed copies of Standard Form 100, as revised (otherwise known as "Employer Information Report EEO-1") in conformity with the directions set forth in the form and accompanying instructions. Notwithstanding the provisions of Section 1602.14, every such employer shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent report filed for each such unit and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII.

Similarly, the California Code of Regulations, Title 2, section 7287.0 provides that:

> Employers and other covered entities are required to maintain certain relevant records of personnel actions. Each employer or other covered entity subject to this section shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent CEIR or appropriate substitute and applicant identification records for each such unit and shall make them available upon request to any officer, agent, or employee of the Commission or Department.

The CEIR referred to in this regulation is the California Employee Information Record. Title 2, section 7287.0(a)(1) provides that an employer may substitute the appropriate federal report, an EEOI, a copy of which is attached, in lieu of the CEIR.

Data collected pursuant to the regulations promulgated by the respective commissions consist of information regarding the number of women and minorities in the workplace. The numbers are

broken down according to race or ethnic origin and sex. Additionally, the forms delineate various job classifications to determine how, if at all, race or gender is concentrated in various job classifications. The records are used by the EEOC and the FEHC in pursuing discrimination complaints brought by employees. The records assist the commissions in determining statistically whether there has been a distinctive pattern of discrimination by an employer. Records may also be used by an employer as a statistical validation of the need for a remedial affirmative action plan to remedy past discrimination in the workplace.

Requirements for the maintenance of applicant information based on race and gender are also found in the California Code of Regulations and the Code of Federal Regulations. Employers are specifically required by the FEHA to take and keep applicant information regarding race and gender. Title 2, section 7287.0(b) reads as follows:

> 7287.0(b) Applicant Identification Records
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> Unless otherwise prohibited by law and for record keeping purposes only, every
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> employer or other covered entity shall maintain data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied. If such data is to be provided on an identification form, this form shall be separate or detachable from the application form itself.

Although no similar requirement is found in the Civil Rights Act, the keeping of such records is not expressly forbidden. 29 C.F.R. section 1602.14 requires that all personnel or employment records "including but not limited to application forms submitted by applicants" must be preserved for six months. Additionally, federal law provides that state laws are not preempted by the federal statute. Unless a distinct contradiction exists between the two sets of statutes, the state and federal systems are set up to work in conjunction with each other (emphasis added).

42 U.S.C. section 2000e-7 provides:

> 2000e-7 Effect on State laws
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> Nothing in this title 42 USCS Sections 2000e et seq. shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such

law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

It is clear from the regulations that all employers as well as state and local entities (29 C.F.R. section 1602.32), labor unions (29 C.F.R. section 1602.27), and apprenticeship programs (29 C.F.R. section 1602.15), must maintain both applicant and employee information based on race and gender. 29 C.F.R. section 1602.13 simply recommends that the information be kept separate from the employee's regular personnel file. However, Title 2, section 7287.0(b) is more specific and provides that applicant identification forms which note race and gender shall be separate and detachable from the application itself and section 7287.0(c)(3) mandates that "records as to the sex, race, or national origin of any individual accepted for employment shall be kept separately from the employee's main personnel file or other records available to those responsible for personnel decisions." Thus, because of the regulations, the City need not require that race and gender information be collected by

employers. However, the required separation of race and gender statistics from applicant and employee personnel data raises the question of whether the City may require that the information be made available for inspection prior to or after a contract has been awarded to a bidder.

VALID USES OF THE INFORMATION

Each of the acts expressly forbids the use of ethnic or gender information as a determinative factor in any aspect of the employment process. Similar language is found in both 42 U.S.C. section 2000e-2(a)(2) and the California Fair Employment and Housing Commission Regulation, Title 2, section 7287.0(b). 42 U.S.C. section 2000e-2(a)(2) is quoted in full on page 2 above. Section 7287.0(b) specifically states: "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." Pursuant to these statutes, it is clear that the City can not require employers to provide race and gender information as a prerequisite to being awarded a City contract. Compliance with the City's MBE/WBE program must be voluntary. Recent court decisions make clear that the courts have determined that discrimination may not be used either to increase or decrease minority or women representation in the workplace absent a lawful affirmative action plan which requires statistical data demonstrating previous discrimination by the employer enforcing

the plan.

IMPACT OF RICHMOND V. CROSON CO.

The recent Supreme Court case of Richmond v. Croson Co., 102 L. Ed. 2d 864 (1989) illustrates the Court's rejection of what is commonly known as reverse discrimination. In Richmond, the city required prime contractors to meet a mandatory thirty percent (30%) minority quota for all their subcontractors if they wished to bid on city projects. Croson challenged the legality of the plan after being denied a contract for failure to meet the thirty percent (30%) quota. The Court indicated that the mandatory quota made the plan race-conscious and therefore subject to the test of judicial strict scrutiny.

In rejecting the Richmond plan as discriminatory, the Court said for a minority set aside program to be non-violative of the fourteenth amendment's equal protection clause the city must first demonstrate a compelling state interest in the necessity for remedial action and the plan must then be narrowly tailored

to remedy the defined past discrimination. Remedial action is only acceptable when there is proof of the existence of past discrimination on the part of the entity, in this case the city, imposing the remedial plan.

The Court explained that "findings of societal discrimination will not suffice; the findings must concern 'prior discrimination' by the government unit involved." Id. at 876. The Court went on to say that the remedy must be narrowly tailored to accomplish the remedial purpose. Whether a program is specifically tailored to be remedial can only be shown by a detailed statistical analysis which shows not only the number of minorities or women in the community, but the number of minorities or women actually skilled and available to perform a particular job. In Richmond the Court found that the thirty percent (30%) figure had been chosen arbitrarily. No statistical information linked the mandatory quota to the number of minority subcontractors available in Richmond or anywhere else in the country. The Court also found there had been no pattern of discrimination in the awarding of contracts by the City of Richmond in the past.

Pursuant to Richmond v. Croson Co., MBE/WBE programs which are not race and gender neutral are suspect and therefore subject to judicial strict scrutiny if challenged. The fact that such plans may seek to achieve a positive good is irrelevant. The City's current MBE/WBE program is obviously race and gender conscious in that the goals are specifically aimed at increasing the number of women and minority businesses which participate in City contracts. A judicial challenge to the plan would reveal

that there have been no findings of any past discrimination by the City in its contracts with private businesses and therefore no need for remedial action. However, the City's plan does differ from the Richmond plan in two important respects. First, the City's plan does not mandate absolute quotas. The goals set by the Council are expressed as ideals, not as mandatory figures. Second, the City will award contracts to firms which are unable to meet the desired goals if the firm can demonstrate it has made a good faith effort to achieve the goals. No firm is automatically excluded from the bidding process on the basis of numbers alone.

Additionally, Charter section 94 requires the City to award contracts to the "lowest responsible and reliable bidder." This is clearly a race and gender neutral criteria. The issue of whether the Charter section could be amended or interpreted in such a manner as to allow for consideration of MBE's or WBE's was addressed in an opinion dated April 17, 1984, by Chief Deputy

City Attorney John M. Kaheny. In that opinion, Mr. Kaheny indicated that the City may not give preferential treatment to MBE's and WBE's absent a finding of past discrimination by the City coupled with a voter approved amendment to the City Charter allowing consideration of MBE and WBE status in addition to the lowest responsible bidder criteria. No amendment to the Charter was passed, thus the lowest, responsible reliable bidder is the only legally enforceable criteria the City may use in determining to whom a contract will be awarded. The Court's decision in Richmond v. Croson Co., reaffirms the validity of Mr. Kaheny's opinion. If the low bidder has not met the goals, nor made a good faith effort to meet the goals, all bids may be rejected and the entire bid procedure will begin again. This process allows bidders to make a second effort to meet the goals while allowing the City to comply with the mandate of Charter section 94. Given the flexibility of the City's MBE/WBE program, a court might hold that San Diego's MBE/WBE program does not violate the equal protection clause. However, passing the judicial strict scrutiny test is in no way a certainty.

CONCLUSION

It is clear from the statutory and regulatory law that employers must maintain employment records that indicate the ethnic and gender makeup of the workplace. Thus, there is no legal bar to the City requiring the records be kept. However, in light of the Richmond decision, it is equally clear that mandatory quotas of ethnic and gender makeup may not be utilized by employers for purposes of altering artificially the racial or gender composition of its work force. The City would best be

served by reevaluating its MBE/WBE program with an eye to eliminating race and gender conscious goals and instead substituting criteria that are race and gender neutral. The court in Richmond indicated that racially neutral economic criteria would have the advantage of being beneficial to all disadvantaged businesses and incidentally have the effect of increasing women and minority participation. The inclusion of neutral criteria, and exclusion of purely race-conscious criteria, would eliminate the potential of a program being struck down by a court.

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Attachments
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