MEMORANDUM OF LAW

DATE: June 6, 1991

TO: Jack McGrory, City Manager

FROM: City Attorney

SUBJECT: Documents Requested in the Matter of a Claim of Susan Bray and the Resignation of Planning Director Robert Spaulding

We have received numerous requests from the media to disclose various documents concerning the Bray-Spaulding case and other related matters. We have examined these requests in order to determine the City of San Diego's obligation to disclose the requested information. By memorandum dated May 15, 1991, we informed you of our preliminary determination concerning certain identifiable documents that were clearly subject to disclosure under the California Public Records Act (the Act). Government Code section 6250 et seq. We have also filed an action in Superior Court to determine the disclosure status of the settlement agreement in the Bray-Spaulding case and related documents. In addition, Copley Newspapers and other plaintiffs have filed a complaint in Superior Court requesting the court order disclosure of certain records. This memorandum will not address the specific issues which are the subject of those lawsuits but will focus on the general issues concerning the disclosure of other City documents and records, primarily material contained in personnel, medical or similar files of employees.

You have received several requests for copies of all claims filed against the City of San Diego since 1982 containing, in whole or in part, allegations of stress and/or sexual harassment by a City employee. The Act does not require the City of San Diego to do research for the public, but only requires that the City grant access to the public to identifiable public records and permit the copying of specific documents. We believe that a request for any or all documents of a certain type for a period of ten years should be denied as unreasonable on its face because it fails to identify specific identifiable documents and places an undue burden on the City of San Diego. Rosenthal v. Hansen, 34 Cal. App. 754 (1973). We are also concerned about the effect such a disclosure may have on the privacy rights of City employees. We discuss that issue in detail later in this memorandum. We, therefore, recommend that you deny broad requests of this nature.

Some of the other requests that you have received ask for identifiable records that are subject to disclosure only under certain conditions. Included in this category are peace officer personnel records and

employee medical records.

In regard to peace officer's records, California Penal Code section 832.7 specifically makes these records confidential. They are, therefore, not subject to disclosure under the Act. The term "peace officer personnel record" is defined in Penal Code section 832.8 as any record related to any of the following:

(a) Personnel data, including marital status, family members, educational and employment history, home addresses or similar information.

(b) Medical history.

(c) Election of employee benefits.

(d) Employee advancement, appraisal, or discipline.

(e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

(f) Any other information the disclosure of which constitute an unwarranted invasion of personal privacy.

Civil Code section 56.20 prohibits the unauthorized release by an employer of employee medical information. That statute reads in part:

> (c) No employer shall use, disclose or knowingly permit its employees or agents to use or disclose medical information which the employer possesses pertaining to its employees without the patient having first signed an authorization under Section 56.11 or Section 56.21 permitting such use or disclosure, except as follows . . . .
>
> (3) The information may be used only for the purpose of administering and maintaining employee benefit plans, including health care plans and plans providing short-term and long-term disability income, workers' compensation and for determining eligibility for paid and unpaid leave from work for medical reasons.

Medical information is defined in Civil Code section 56.05 as any individually identifiable information in possession of or derived from a provider of health care regarding a patient's medical history, mental or physical condition or treatment. We, therefore, recommend that you deny requests asking for peace officer personnel records as defined in Penal Code section 832.8 and employee medical information as defined in Civil Code section 56.05.

Other certain identifiable documents requested by the media are clearly subject to disclosure under the Act. Section 6254.8 of the Act makes every employment contract between a state or local agency and any public official or public employee a public record which is not subject to the provisions of sections 6254 and 6255. Those two sections

authorize the public agency under certain conditions not to disclose specific records. In other words, the employment contract of a public employee must be disclosed to the public. In Braun v. City of Taft, 154 Cal. App. 3d 332 (1984), it was determined that a public employee's salary and job classification were part of the employment contract and subject to disclosure under the Act. You may, therefore, disclose any written evidence of an employee contract of employment with the City of San Diego that has been requested.

However, when disclosing a public employee's salary, you should take care not to disclose any personal deductions or allotments. Those amounts are not normally subject to disclosure unless there is some dominating public interest which favors disclosure. 64 Op. Atty Gen. 575 (1981). We, therefore, recommend that you do not disclose personal deductions or allotments but that you disclose other nonpersonal information concerning the employment contract of an identified employee upon a proper request.

Government Code section 6254(c) provides that documents contained in personnel, medical, or similar files are not subject to disclosure when such disclosure causes an unwarranted invasion of personal privacy. It is, therefore, necessary to review each request and the circumstances surrounding the request to determine whether or not disclosure of a particular document, under the present circumstances, would constitute an unwarranted invasion of personal privacy. The California courts have consistently held that matters concerning an individual's medical and sexual history are protected under both the California Constitution, article I, section 1, and under the Federal Constitution. Vincent v. Superior Court, 43 Cal. 3d 833 (1987). Diaz v. Oakland Tribune Inc., 139 Cal. App. 3d 118 (1983). You should also be aware that the Information Practices Act of 1977, Civil Code section 1798 et seq., requires a public agency not to disclose personal or confidential information of employees unless required to do so by the Act. In determining what constitutes an unwarranted invasion of personal privacy, a close examination of each record is required in order to determine if the intrusion into an employee's ostensibly private affairs is warranted by the social value of the facts to be disclosed. Briscoe v. Readers Digest Association, Inc., 4 Cal. 3d 529 (1971). In some cases a document may be subject to disclosure for one reason but certain personal or confidential information may be needed to be deleted from the document prior to disclosure. We, therefore, recommend that you work closely with the Personnel Director to ensure that no information is disclosed that causes a City employee to be the victim of an unwarranted invasion of personal privacy.

It has been argued that disclosure of the fact that an employee has filed an action against his or her employer in court or with an administrative body is not an unwarranted invasion of personal privacy because the employee has voluntarily come forward into the public arena. While this may be true, there is equal weight to the argument that when

an employee voluntarily applies for a benefit from his or her employer for workers compensation or long term disability benefits, the employee has not yet stepped out into the public light. It is only when such application for benefits is denied and the employee decides to litigate such a claim in court or in a public forum of any sort that the matter clearly become public. The same analysis applies to an internal complaint of sexual harassment. The employee's concerns may be resolved without filing with an outside agency such as Department of Employment and Fair Housing. An additional factor to be considered in disclosing personal information concerning City of San Diego employees is the employee's right to be left alone and not to be subject to scrutiny years after a claim or application for benefits is resolved. As the California Supreme Court indicated in CBS Inc. v. Block, 42 Cal. 3d 646 (1986):

> Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process. However, a narrower but no less important interest is the privacy of individuals whose personal affairs are recorded in government files.

A court will most likely rule that, in most circumstances, the release of documents pertaining to an employee's past medical or sexual history is an unwarranted invasion of personal privacy unless there is a strong public purpose for such disclosure. It is difficult to argue that, absent extraordinary circumstances, there is any public purpose served in disclosing a public employee's ten (10) year old application for workers compensation benefits or complaint of sexual harassment.

It is appropriate at this point to distinguish the case of Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893 (1984). It is often cited as authority for the proposition that all settlement claims and all medical records associated with such claims are subject to disclosure under the Act. However, the plaintiff in that case was a jail inmate who filed a claim against the County of Orange in accordance with the claims provisions of the California Government Code. That plaintiff voluntarily disclosed his medical records when he attached them to the claim. As one can easily see, many of the current requests from the media go far beyond requesting the disclosure of a tort claim filed under the Government Code or information voluntarily made public by a plaintiff in a civil action or administrative proceeding.

We, therefore, recommend that you do not disclose personal or confidential information contained in employees' personnel, medical or similar files that has not previously been disclosed except, in those rare cases, where it is abundantly clear that no unwarranted invasion of personal privacy will result.

JOHN W. WITT, City Attorney
By
John M. Kaheny
Chief Deputy City Attorney

JMK:mrh:mb:300(x043.2)
cc Rich Snapper
D. Cruz Gonzalez
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