MEMORANDUM OF LAW

DATE: May 19, 1992

TO: Kent Lewis, Assistant Personnel Director

FROM: City Attorney

SUBJECT: Privacy of Employees Ethnic Identification

You have asked whether the ethnic and statistical information which the City is required to gather for state and federal purposes should continue to be kept separately from records available to those making selection decisions.

You have also asked whether outside groups may challenge the ethnic identification volunteered by City employees. The question apparently stems from concerns that some individuals may be identifying themselves with an inaccurate ethnic identification and are thereby being treated differently in the hiring and promotion process.

The short answer to your inquiry is that ethnic identification information is subject to strict confidentiality provisions. Ethnic identification information should be kept separately from records available to those making promotion and selection decisions. Moreover, because of the limited use made of the data, a procedure to challenge the data would not be appropriate. An in depth analysis follows.

STATUTORY LAW

Maintenance by employers of employment information concerning 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 FEHA and the Federal Civil Rights Act establish independent commissions 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).

It is clear from the statutes that the legislative intent is to disallow the use of ethnic identification information in the hiring, promotion or transfer of any individual. Since the City is prohibited by law from using ethnic identification for any reason other than statistical purposes, such information should be of no interest to any person or group except the Personnel Department which does the statistical analysis.

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 for limited statistical purposes 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 in lieu of the CEIR.

Data collected pursuant to the regulations promulgated by the respective commissions consists 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. Note, however, that the legitimate uses of the information is limited to effecting remedies for past inequities.

Requirements for the maintenance of applicant information based on race and gender are 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
>
> Unless otherwise prohibited by law and for record keeping purposes only, every 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. (Emphasis added.)

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.

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

> 2000e-7 Effect on State laws
>
> 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. It is equally clear that the purpose behind the retention of such information is to ensure that the statistical data necessary for enactment of a remedial program is available if pattern of discrimination is discovered. 29 C.F.R. section 1602.13 recommends the information be kept separate from the employee's regular personnel file. Additionally, Title 2, section 7287.0(b) specifically 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." (Emphasis added.) It is difficult to imagine how the language could more clearly state the Legislative intent to disallow the use of ethnic identification information in personnel decisions.

VALID USES OF THE INFORMATION

As can be seen by the regulations, race, ethnic and gender information is maintained for the very limited purpose of providing statistical information to the state and federal government. 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 use this information for promotional purposes.

Mr. Nieto, from the County of San Diego, has provided a number of case citations, ostensibly to show that the City may use ethnic identification information for promotional purposes. The legal summary provided by Mr. Nieto is not on point. In order for the City to avail itself of the affirmative action plans approved by the Courts in the cited cases, the City must first show that any adopted plan is designed to "eliminate a manifest racial imbalance." Steelworkers v. Weber, 443 U.S., 61 L. Ed. 2d 480 (1979), and narrowly tailored to accomplish a remedial purpose. The Courts have indicated that ethnic identification and gender information may be considered in personnel decisions only when they are part of this type of legal affirmative action plan. No such plan has been instituted in the City of San Diego.

An example of such a remedial program was promulgated as a result of litigation between the City and County of San Francisco and its local firefighters union. The City of San Francisco is under the strictures of a valid court ordered consent decree designed to remedy the manifest racial imbalance cited in Steelworkers and found to similarly exist in the City of San Francisco. Pursuant to that consent decree, San Francisco may look to ethnicity or gender in personnel decisions with the Fire Department if all other factors between applicants are equal. San Diego is under no such court ordered consent decree. Accordingly, there is no need to challenge the ethnic identification of employees.

CONCLUSION

Ethnic and gender information collected by the City should be released only to the state or federal government for the limited statistical purposes previously noted. Ethnic and gender information collected by the City should be kept separately from information available to those making selection and promotion decisions. Challenges to the ethnic identification volunteered by employees are not appropriate.

If I can be of further assistance or if you have additional statutory or case law you would like me to review, please feel free to contact me.

JOHN W. WITT,
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