

MEMORANDUM OF LAW

DATE: December 20, 1993

TO: Joe Wong, Safety Officer, Risk Management
Department

FROM: City Attorney

SUBJECT: HIV Consent Forms

BACKGROUND

After a recent Hepatitis-B training class, Firefighters indicated an interest in gaining access to the Human Immunodeficiency Virus ("HIV") status of individuals they treat in an emergency situation prior to taking the individual to a hospital. You indicate that Firefighters are experiencing a high level of frustration for not being given access to an individual's HIV status after an exposure incident. As a result, Firefighters have requested that a consent form, allowing for HIV testing, be provided by the City of San Diego in all hospitals in San Diego County. You have asked if it is legally permissible for the City to distribute such forms and request that individuals treated by Firefighters sign the forms and consent to HIV testing.

ANALYSIS

Recognizing that there are conflicting tensions between an individual's privacy interest in his or her medical records, and the critical need of Public Safety Officers, Firefighters and Emergency Medical Technicians ("EMTs") to know certain individuals medical status in some instances, the California Legislature has proactively initiated legislation that specifically addresses the many concerns dealing with AIDS issues. (For purposes of this memorandum, Firefighters, Public Safety Officers and Emergency Medical Providers will be grouped as EMTs.) Initially, the Legislature has recognized the need for maintaining the confidentiality of an individual's HIV status. See Health and Safety Code section 199.20. The legislation provides civil and criminal liability for wrongful disclosure of AIDS test results. Health and Safety Code section 199.21. Despite the need to maintain the confidentiality of an individual's medical history, the Legislature has also recognized a legitimate need for EMTs to have access to otherwise

confidential information when potential exposure to HIV has occurred in the course of one's scope of work and have consequently adopted legislation that provides such access when necessary.

A threshold issue in determining when confidential information should be released to an EMT is the question of when potential exposure to the EMT has actually occurred. Your memorandum does not indicate how Firefighters define "exposure." However, researchers have indicated, and the courts have acknowledged that:

HIV is "transmitted only through the exchange of semen or cervical or vaginal secretions during sexual contact, from transfusions of blood products that have been contaminated with the virus, by the shared use of hypodermic needles that have been contaminated, and between an infected pregnant woman and her fetus." Of 85,000 AIDS cases documented, none have resulted from a bite by an infected person. See *Johnetta J. v. Municipal Court*, 218 Cal.App.3d 1255, 1269, 267 Cal.Rptr. 666 (1990). According to the Center for Disease Control, the potential for transmitting the virus by saliva is "remote." United States Department of Human and Health Services, Center for Disease Control, "Guidelines for Prevention of Transmission of Human Immunodeficiency Virus and

Hepatitis-B Virus to Health-Care and Public-Safety Workers," 10 (Feb. 1989).

Barlow v. Ground, 943 F.2d 1132, 1138 (1991).

Since the danger of transmission of HIV is limited to relatively few circumstances, the determination of whether such exposure has occurred can only be made by a qualified medical doctor.

Once this threshold determination has been made, California law allows release of the confidential information to the affected EMT. Health and Safety Code section 1797.88 provides:

- (a) (1) "Prehospital emergency medical care person or personnel" means any of the following: an

authorized registered nurse or mobile intensive care nurse, emergency medical technician-I, emergency medical technician-II, emergency medical technician-paramedic, lifeguard, firefighter, or peace officer, as defined or described by Sections 1797.56, 1797.80, 1797.82, 1797.84, 1797.182, and 1797.183, respectively, or a physician and surgeon who provides prehospital emergency medical care or rescue services.

It further provides at subsection (b):

- (b) All prehospital emergency medical care personnel, whether volunteers, partly paid, or fully paid who have provided emergency medical or rescue services and have been exposed to a person afflicted with a disease or condition listed as reportable, which can, as determined by the county health officer, be transmitted through oral contact or secretions of the body, including blood, shall be notified that they have been exposed to the disease and should contact the county health officer if all the following are satisfied.

The courts have recognized that: "While not dispositive, the information is nonetheless useful in helping the physician and patient here the EMT assess the risk of infection. A negative test, even though not dispositive, can nonetheless be of great assistance in allaying the patient's fears." *Johnetta J. v. Municipal Court*, 218 Cal. App. 3d 1255, 1266 (1990).

Thus, pursuant to this statute, local hospitals have established procedures which allow the hospitals to obtain blood samples for testing and to provide the results of those tests, when warranted, to an EMT when an incident of exposure has potentially subjected the EMT to contagion. These procedures render the need for additional consent forms provided by Firefighters unnecessary.

The Legislature has also provided that blood samples may be taken without consent in circumstances involving EMTs when the individual transported is uncooperative. Health and Safety Code

section 199.97, which was adopted by a vote of the people in 1988 through Proposition 96 provides:

Any person charged in any criminal complaint filed with a magistrate or court and any minor with respect to whom a petition has been filed in juvenile court, in which it is alleged in whole or in part that the defendant or minor interfered with the official duties of a peace officer, firefighter, or emergency medical personnel by biting, scratching, spitting, or transferring blood or other bodily fluids on, upon, or through the skin or membranes of a peace officer, firefighter, or emergency medical personnel shall in addition to any penalties provided by law be subject to an order of a court having jurisdiction of the complaint or petition requiring testing as provided in this chapter. The peace officer, firefighter, emergency medical personnel or the employing agency, officer, or entity may petition the court for an order authorized under this section.

The court shall promptly conduct a hearing upon any such petition. If the court finds that probable cause exists to believe that a possible transfer of blood, saliva, semen, or other bodily fluid took place between the defendant or minor and the peace officer, firefighter, or emergency medical personnel, as specified in this section, the court shall order that the defendant or minor provide two specimens of blood for testing as provided in this chapter.

Copies of the test results shall be sent to the defendant or minor, each peace officer, firefighter, and emergency medical

personnel named in the petition and his or her employing agency, officer, or entity, and if the defendant or minor is incarcerated or detained, to the officer in charge and the chief medical officer of the facility in which such person is incarcerated or detained.

From the legislation it is clear that the health issues of EMTs were of great concern to the people of the state and the Legislature at the time the legislation was proposed and adopted. As the court noted in the case of *Johnetta J. v. Municipal Court*, 218 Cal. App. 3d 1255 (1990):

The initiative measure Proposition 96 begins with a purpose clause: "The people of the State of California find and declare that AIDS, AIDS-related conditions, and other communicable diseases pose a major threat to the public health and safety. The health and safety of the public, victims of sexual crimes, and peace officers, firefighters and custodial personnel who may come into contact with infected persons, have not been adequately protected by law. The purpose of this chapter is to require that information that may be vital to the health and safety of the public, victims of certain crimes, certain defendants and minors, and custodial personnel, custodial medical personnel, peace officers, firefighters and emergency medical personnel put at risk in the course of their official duties, be obtained and disclosed in an appropriate manner in order that precautions can be taken to preserve their health and health of others or that such persons can be relieved from groundless fear of infection.

Johnetta J. v. Municipal Court, 218 Cal. App. 3d 1261, 1262 (1990) (emphasis in original).

The court's finding that the warrantless search in the *Johnetta* case, was neither unconstitutional nor violative of an

individual's right to privacy is a clear indication the state has recognized the potential health danger to EMTs, and have taken steps to protect those EMTs to the fullest extent possible.

CONCLUSION

Adequate safeguards have been established by the Legislature to protect the rights and needs of EMTs. The San Diego Fire Department has no independent legal authority for requiring individuals treated by its members to sign a separate consent forms. Additionally, only when a designated health care provider determines that an EMT has been exposed to HIV is the EMT entitled to know an individual's HIV status.

If you have additional questions, please call me.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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