MEMORANDUM OF LAW

DATE: September 23, 1997

TO: Kent Lewis, Assistant Director, Personnel Department

FROM: City Attorney

SUBJECT: Confidentiality of Medical Records

QUESTIONS PRESENTED

You have made a number of specific inquiries regarding medical records currently used or held by the City of San Diego in its capacity as an employer. Because of the overlap in the legal issues involved in many of those inquiries you made, I have consolidated them into the following specific questions to be answered:

1. Must an employee sign a written authorization for release of medical information before being evaluated by a doctor in a fitness for duty examination?

2. What type of information, if any, may a doctor release as a result of a fitness for duty evaluation if the employee refuses to sign an authorization for release of medical information?

3. If the City discovers, through a fitness for duty examination or a workers compensation claim, that an employee was untruthful on his or her pre-employment application, may such information be used for disciplinary purposes, up to and including termination?

4. If an applicant is rejected for employment, or an employee is terminated for medical reasons and he or she appeals the adverse action to the Civil Service Commission, is the medical information which served as the basis for the adverse employment action subject to disclosure in a public hearing?

In addition to these questions, you have asked that I review for legality a number of medical information forms currently in use by the City, and you have also asked that I draft a release of medical information authorization.

SHORT ANSWERS

1. It is not necessary for an employee to sign an authorization for release of medical information in order for the City to conduct a fitness for duty examination. However, a medical release authorization would allow the examining doctor to provide the City with a more complete medical or psychological history of the employee.

2. Absent the authorization, a doctor may still conduct a fitness for duty examination, but the information available to the City would be limited to a recitation of the functional limitations of the employee as those limitations relate to the employee's job duties. Underlying medical causation may not be revealed except in those instances when knowledge of causation is essential to understanding or accommodating the limitations.

3. Since, under the City's civil service rules, employees and applicants may be terminated or denied employment for untruthfulness, medical information that reveals untruthfulness may be used for disciplinary purposes.

4. If an applicant or employee appeals an employment decision made by the City on the basis of a fitness for duty evaluation or medical information provided by the employee during the application process, the appeal must be heard in a public forum pursuant to the City's civil service rules and the Brown Act, California Government Code sections 54952 through 54962. Nothing in the Confidentiality of Medical Information Act (CMIA), California Civil Code sections 56 through 56.37, precludes the use of relevant medical information in such public hearings once the applicant or employee has put his or her medical condition at issue. Similarly, once the applicant or employee has placed his or her medical condition at issue, that information is available for other employment related uses.

BACKGROUND

Applicants for employment and employees of the City are required, in a number of different circumstances, to provide medical information. For example, applicants for employment fill out a general medical history questionnaire which provides the City with relevant information to ensure the applicant can perform the essential functions of the job being sought. Similarly, an employee may be required to provide medical information if the employee seeks an accommodation for a disability under the Americans with Disabilities Act, or if questions arise regarding an employee's fitness to continue performing the essential functions of a job. An employee may also be required to disclose certain medical information during the course of a drug screen conducted under the auspices of the Department of Transportation drug screening program, or under one of the City's random drug screening programs.

The City obtains medical information on a need to know basis. Individuals provide only information which is specifically job related. Preemployment medical information is retained by the City's industrial medical provider and requested by the Personnel or Risk Management Department when an employee puts his or her medical condition at issue. The employee's operational department is given only that information necessary to accommodate the employee's needs. Information provided to a department might include, for example, an employee's lifting

restrictions, vision problems or allergic conditions that might be exacerbated by certain workplace conditions.

Your questions regarding the City's current policies and procedures on the collection and retention of medical information stems from the recent California Appellate Court case of Pettus v. Cole, 49 Cal. App. 4th 402 (1996). The Pettus case held two doctors liable for the inappropriate release of an employee's medical history after the employee had submitted to a fitness for duty examination ordered by his employer.

Pettus was a long term employee who requested a medical leave based on stress he was experiencing as a result of alleged racial harassment in the workplace. While verifying the disability for leave purposes, Pettus underwent two psychiatric evaluations ordered by his employer. Pettus signed no medical release authorization form. Nevertheless, the doctors sent full reports, including Pettus' entire psychiatric history to the company managers, and in one case, sent the full report to Pettus' on-line supervisor. Pettus sued, claiming the release of his medical history was prohibited under the CMIA, and was an invasion of his constitutional right of privacy. The court of appeal agreed with Pettus and found the disclosures violated both the CMIA and Pettus' right to privacy. The court did, however, remand the case to the lower court for further hearing on whether Pettus had waived his right to privacy by voluntarily disclosing some of the information to his supervisors prior to its release by the doctors.

ANALYSIS

Confidentiality of medical records in the workplace is a sensitive issue. There is a delicate balance between an employer's legitimate need to know certain information and the employee's privacy rights. The CMIA and the California Constitution protect an individual's privacy only under certain conditions.

The Pettus case makes clear the City has no general authority to receive or review detailed doctor's reports developed during employment related medical examinations of employees. California Civil Code section 56.10(c)(8)(B) limits disclosure to a description of any "functional limitations" that may have entitled the employee to medical leave or which limit the employee's fitness to perform his or her present job. This section also explicitly prohibits disclosure of any underlying "medical causes." While neither the CMIA nor the Pettus case precisely define "functional limitations," a conservative interpretation would allow employers only as much information as is needed to accomplish its legitimate objectives. However, what information is necessary, and therefore accessible, is still being debated.

The recent Supreme Court case of Loder v. City of Glendale, 14 Cal. 4th 846 (1997), articulates the balancing process that must be used if a governmental entity seeks to intrude upon its employees' constitutionally guaranteed right to privacy. The Loder case examined the City of Glendale's pre-employment and promotional drug screening policy.

The Supreme Court upheld Glendale's pre-employment drug and alcohol testing for all applicants but found the City had a diminished need for drug testing promotional candidates. The Court held that testing of candidates must be limited to those individuals seeking promotions

to jobs with articulable needs for drug testing, such as safety sensitive positions. In reaching its decision, the Court said "the reasonableness of such testing turns upon the nature and duties of the position in question." 14 Cal. 4th at 880.

The Court explained that in order for an individual to prove a violation of the California Constitutional right to privacy, the individual must establish: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." Id. at 890-91. Allegations of invasion of privacy may be countered by proving "that the invasion of privacy is justified because it substantially furthers one or more countervailing interests." Id. at 891. In Loder, the Court explained that an applicant's expectation of privacy is greatly diminished because medical examinations and drug testing at the pre-employment stage are, "simply too familiar a feature of the job market on all levels to permit anyone to claim an objectively based expectation of privacy in what such analysis might disclose." Id. at 886.

The Pettus case does not discuss the balancing test articulated by the Loder court, but indicates there was a violation of Pettus' right to privacy because of the complete psychological data that was reported to Pettus' employer. However, the Loder analysis is an important element in determining what medical information the City may lawfully receive from doctors concerning employees. Your questions are, therefore, answered by subjecting each situation to the balancing test articulated in the Loder case.

I. Are Written Authorizations Necessary?

An authorization for release of medical information is not necessary for a "fitness for duty" evaluation. "[W]hen health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability." Yin v. State of California, 95 F.3d 864, 868 (9th Cir. 1996). By going to a doctor for a fitness for duty evaluation, the employee impliedly consents to a limited disclosure of medical information to his or her employer. However, the scope of this implied consent is exceeded when the doctor discloses detailed medical information about the employee, absent a specific authorization by the employee. Pettus, 49 Cal. App. 4th at 442. "The legislature restricted the information that may be disclosed without authorization to only that which is necessary to achieve the legitimate purpose." Id. at 432.

II. What is Scope of Permissible Disclosure?

In the context of a medical examination to verify a disability or determine fitness for duty, disclosure should be limited to a brief description of the functional limitations of the employee. Any statements concerning "medical causes" of the disability may not be disclosed without first obtaining a written authorization from the employee. There is nothing in either the CMIA or the

Pettus decision that explicitly prohibits the City's Personnel Department from obtaining the details of the type and scope of the examination itself. However, access to this information would seem to be limited as well, except to the extent necessary to ensure the testing was adequate. Since the CMIA limits disclosure to a description of any "functional limitations" and explicitly prohibits disclosure of underlying medical causes, disclosure of the details of the scope and types of examinations could very well provide impermissible insights into the underlying medical causes. For example, the type of follow up tests given after an initial screening could reveal information beyond that which is subject to disclosure.

The stated purpose of the CMIA is "to provide for the confidentiality of individually identifiable medical information, while permitting certain reasonable and limited uses of that information." Cal. Civ. Code 56 (citing Stats. 1981, ch. 782, 1, p. 3040). "[T]he Legislature has determined that the unauthorized disclosure to employers of further detailed medical information about employees is not a reasonable use of that information." Pettus, 49 Cal. App. 4th at 433. The reasonable expectation of privacy which the Loder court discussed will help determine the extent of the information the City should receive from examining doctors in each situation. The employee's privacy must be balanced against the importance of the interest the City is protecting. Thus, for example, more information may be available to the City after a psychiatric fitness for duty examination of a police officer than may be available after a similar evaluation for a utility worker. See Thompson v. City of Arlington, Tex., 838 F. Supp. 1137 (N.D. Tex. 1993). A police officer's expectation of privacy is reduced in light of the sensitive nature of a police officer's duties.

Even though there are numerous exceptions permitted by the CMIA which allow the release of medical information without an authorization, one should be obtained whenever possible as a precautionary measure. An authorization should be routinely signed by any employee sent for a "fitness for duty" evaluation or any other medically related examination. If an authorization is obtained, the type of problems that arose in Pettus never surface since that case dealt with the release of detailed medical information without any authorization. It is wise to have an authorization on file in the event a doctor issues a report that provides more information than simply a recitation of the functional limitations of the employee. A carefully drafted authorization signed by the employee permits the City access to the full details of the medical examination otherwise prohibited by Pettus. An authorization will not, however, allow unlimited use or dissemination of medical information. Medical information may still be used only for specific identifiable purposes by individuals with a need to know.

Employees cannot be discriminated against in terms or conditions of employment because of a refusal to sign an authorization. However, when an employee refuses to sign an authorization, an employer can take whatever action is necessitated by the absence of medical information. Cal. Civ. Code 56.20(b). Employers may draw adverse inferences from the lack of pertinent medical information. Therefore, if an employee who is scheduled for a fitness for duty evaluation refuses to report for the examination, the City could infer from the refusal that the employee is unfit for duty and take appropriate action based on the inference. Similarly, if an applicant refuses to provide requested medical information, the City may decline to offer a job because of the lack of necessary information. Should the employee report for the examination but refuse to sign an authorization, the examination may proceed as scheduled; however, the City

would only receive information about the functional limitations of the employee.

There are also instances in which an employee may waive his or her privacy interest in his or her medical records. For example, an employee may waive the confidentiality of his or her medical records by voluntarily disclosing otherwise private information to his or her supervisors. In Pettus, the Court returned the case to the trial court for a determination of whether Pettus had waived his privacy rights. The Court pointed out that an employee's claim that his informational privacy rights were violated "will be greatly undermined if his supervisors already knew the essential facts about those matters." Pettus, 49 Cal. App. 4th at 449. Also, disclosure is mandatory when compelled by court order, subpoena, search warrant, or is "otherwise specifically required by law." Cal. Civ. Code 56.10(b)(1)-(7).

III. May Medical Information be used for Disciplinary Purposes?

False statements made on an employment application have long been recognized by the courts as a legitimate business reason for disciplinary action up to and including termination. The court in Roundtree v Board of Review, 281 N.E. 2d 360, 362 (1972), stated the rule succinctly when it said "[T]here can be no doubt that the falsification of an employment application is a proper ground for dismissal." Similarly, the court in N.L.R.B. v. Florida Steel Corp., 586 F.2d 436, 443 (5th Cir. 1978), said "any employer has the right to demand that its employees be honest and truthful in every facet of their employment" and that "any employer has the right to discipline an employee for his dishonesty or untruthfulness." The City has codified this employer right in Civil Service Rule II, San Diego Municipal Code section 23.0306, which provides that an applicant or employee may be rejected or terminated if he or she "has knowingly made a false statement of any material fact, or has practiced or attempted to practice any deception or fraud in an application or examination." Given the clear dictate of the Municipal Code and staunch support by the courts, it is clear the City may discipline an employee for misstatements of medical information, or any other material fact, on an employment application. The question that remains is whether the Personnel Department may have access to, and use, that information if the falsity is not discovered until some time after the applicant has been hired.

Knowledge of a false statement of an applicant's medical condition usually arises in the context of a worker's compensation claim. When a workers' compensation claim is filed, Risk Management requests copies of the relevant employee medical records to determine if the injury is work related. If the records reveal a pre-existing injury may have contributed to the current injury and was not included in the pre-employment questionnaire, Risk Management apprises Personnel of the failure to report the pre-existing injury and Personnel then takes disciplinary action pursuant to Civil Service Rule XI.

Risk Management is expressly authorized by the CMIA to receive the medical information in the context of a workers' compensation claim, even absent an employee authorization. Cal. Civ. Code 56.20(b)(3). The CMIA also provides an employer may use "[t]hat part of the information which is relevant in a lawsuit, arbitration, grievance or other claim or challenge to which the employer and employee are parties." Cal. Civ. Code 56.20(c)(2). No definition of claim or challenge is provided by the statute. Arguably, once an employee has put his or her

medical status at issue by filing a claim for workers' compensation, any false statements discovered in the course of investigating the claim are subject to disclosure. This reasoning follows the thinking of the court in Roccaforte v. City of San Diego, 89 Cal. App. 3d 877, 888 (1979), in which the court said "while the City has many departments and subdepartments, yet it is a single entity in its contractual obligation." In this case, although Risk Management and Personnel are separate departments, the City is the employer. Thus, disclosure by Risk Management to Personnel would not violate either the CMIA or the right of privacy.

The Loder court's discussion is also instructive on this point. A key element in the right to privacy analysis is whether the individual's expectation of privacy is reasonable. Applications for City employment explain in unambiguous terms that any falsification in the application may be grounds for rejection or dismissal. Applicants are then selected or rejected based in part on the medical information provided. The clear implication is that the medical information will be subject to scrutiny for truthfulness. The responses in the application put the employee's medical condition at issue and subject to challenge. An expectation of privacy would not likely be considered reasonable by the courts under these circumstances. If other restrictions of the CMIA have been adhered to, medical information properly obtained by Risk Management may legitimately be used by Personnel for disciplinary purposes.

IV. Can an employee be compelled to waive his or her right to privacy if he or she wishes to appeal an adverse employment decision that is predicated on medical information?

Medical records are subject to disclosure in the context of a lawsuit or administrative action in which the employee's medical condition is at issue. "Administrative action" has been broadly interpreted to include "quasi-judicial" proceedings. Pettus, 49 Cal. App. 4th at 437. The Pettus court held that du Pont's disability evaluations did not qualify as "quasi-judicial" proceedings because no administrative body evaluated the information and made findings. The examining doctor was the sole arbiter of the employee's disability. The court pointed out that "one of the primary factors which determines if a proceeding is 'quasi-judicial' is whether the administrative body involved is entitled to hold hearings and decide issues by application of rules of law to ascertain facts." Id., citing Ascherman v. Natanson, 23 Cal. App. 3d 861 (1972). The City's Civil Service Commission is an administrative body empowered to hold hearings and decide issues by applying rules of law to the given facts. Hearings before it are thus "quasi- judicial" proceedings and disclosure of relevant medical records without written authorization is permitted if an employee puts his or her medical condition at issue. The Commission is empowered to hold closed sessions only for matters dealing with pending litigation or meet and confer issues. No exceptions are permitted under the Brown Act for appeals of medical disqualifications and the CMIA does not compel such an exception.

CONCLUSION

All medical information forms currently in use by the City are relatively unaffected by the Pettus case. The forms have been developed for specific purposes and do not seek disclosure of medical facts unrelated to the job the applicant or employee held or sought. However, Pettus

does affect the amount of medical information that can be disclosed by doctors. Pettus limits the information disclosed to information which describes the functional limitations of the employee to perform his or her job. The City may avoid the strict guidelines of the Pettus case by obtaining authorizations for release of medical information from employees. The Pettus case does not restrict the City's ability to discipline employees for providing false medical information. Nor does it compel closed session appeals of medically related employment decisions. Finally, the City is not restricted in its ability to require medical information from applicants and employees. Such information is essential to the City's ability to retain a qualified labor force and is not limited by the Pettus case.

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