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State of California

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OPINION	:	No. 83-1104
	:	
of	:	<u>JANUARY 10, 1984</u>
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THE HONORABLE ED DAVIS, MEMBER OF THE CALIFORNIA
STATE SENATE, has requested an opinion on the following
question:

Is the Los Angeles Olympic Organizing Committee precluded by Labor
Code section 1051 from providing to a law enforcement agency photographs and
fingerprints for purposes of screening, pursuant to Labor Code section 432.7, subdivision
(k), applicants for employment and for positions requiring Olympic accreditation,
including concessionaires and contractors?

CONCLUSION

The Los Angeles Olympic Organizing Committee is precluded by Labor
Code section 1051 from providing to a law enforcement agency photographs and
fingerprints for purposes of screening, pursuant to Labor Code section 432.7, subdivision

(k), applicants for employment and for positions requiring Olympic accreditation, including concessionaires and contractors.

ANALYSIS

The Los Angeles Olympic Organizing Committee is presently engaged in the hiring of employees and accreditation of agents and employees of concessionaires, contractors and subcontractors. To assist in such screening and accreditation, state and local law enforcement agencies which are members of the Olympic Games Law Enforcement Coordinating Council are authorized to furnish to the Council summary criminal history information. (Lab. Code, § 432.7, subs. (j) & (k); Pen. Code, § 11105, subd. (c)(11), & 13300, subd. (c)(10).)¹ Law enforcement agencies which are members of the Council are authorized to inform the Committee of their recommendation as to whether an individual should be granted accreditation. (Lab. Code, § 432.7, subd. (k)(2).) Any information obtained from state or local summary criminal history is confidential and the recipient shall not disclose its contents other than for the purpose for which it was acquired. (Pen. Code, § 11105, subd. (c)(11), & 13300, subd. (c)(10).) Further, any such information shall be destroyed at the end of the limitation period for the filing of a civil action arising out of the screening or accreditation of persons as current or prospective employees, concessionaires and contractors and their subcontractors, agents and employees for Olympic Games purposes. (Pen. Code, § 11105.05 & 13300.1.) Finally, no employer other than the Committee may utilize a recommendation or denial of accreditation² as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, for work conducted by the employer that is not conducted as an Olympic Games concessionaire, contractor, or subcontractor. (Lab. Code, § 432.7, subd. (k)(1).)³

¹ Statutes of 1983, chapter 1297, sections 2, 3, and 4.

² Any person denied accreditation by reason of a recommendation is entitled to notice and an opportunity to appeal such recommendation and its basis to the Council. (Lab. Code, § 432.7, subd. (k)(3).)

³ Labor Code section 432.7 provides in pertinent part as follows:

"(a) No employer whether a public agency or private individual or corporation shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention which did not result in conviction, or information concerning a referral to and participation in any pretrial or post trial diversion program, nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention which did not result in conviction, or any record regarding a referral to and participation in any pretrial or posttrial diversion program. As used in this section,

a conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court. Nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial.

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"(j) The provisions of subdivision (a) shall not apply to the Los Angeles Olympic Organizing Committee, and the Olympic Games Law Enforcement Coordinating Council and its designated representatives employed by member agencies in screening, pursuant to subdivision (k), current and prospective Los Angeles Olympic Organizing Committee employees, Olympic Games concessionaires and contractors and their subcontractors, agents, and employees, and any other individuals who require Olympic accreditation. However, individuals shall not be asked to disclose arrests except for which the individual is out on bail or on his or her own recognizance pending trial.

"(k) (1) Nothing in subdivision (a) shall prohibit the Olympic Games Law Enforcement Coordinating Council from denying Olympic Games accreditation to individuals on the basis of a recommendation pursuant to paragraph (2). No employer other than the Los Angeles Olympics Organizing Committee shall utilize such a recommendation or denial of accreditation as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, for work conducted by the employer that is not conducted as an Olympic Games concessionaire, contractor, or subcontractor.

"(2) State and local law enforcement agencies who are members of the Olympic Games Law Enforcement Coordinating Council may inform the Los Angeles Olympics Organizing Committee of their recommendation as to whether or not an individual should be granted Olympic Games accreditation based upon (i) conviction for a felony or misdemeanor involving moral turpitude or (ii) a currently pending criminal charge. In making its recommendation, the agency shall consider the nature of the crime for which the applicant was convicted or the currently pending criminal charge in relationship to the specific assignment for which the applicant is being considered and any evidence of rehabilitation and the period of time that has elapsed since the conviction.

"(3) Any person denied accreditation by reason of a recommendation made pursuant to paragraph (2) shall be informed in writing of the reason for denial and shall have the opportunity to correct any inaccuracy or incompleteness in the state or local summary criminal history information pursuant to Section 11126 or Section 13324 of the Penal Code. The person shall also be entitled to an appeal of such recommendation, which appeal must be filed within five days of notice of such recommendation, with the Olympic Games Law Enforcement Coordinating

In order to facilitate the screening process for employment or accreditation, the Committee proposes to take a photograph and fingerprints of each applicant for submission to a law enforcement agency. The inquiry presented is whether such procedure is prohibited by Labor Code section 1051, which provides as follows:

"Any person or agent or officer thereof, who requires, as a condition precedent to securing or retaining employment, that an employee or applicant for employment be photographed or fingerprinted by any person who desires his photograph or fingerprints for the purpose of furnishing the same or information concerning the same or concerning the employee or applicant for employment to any other employer or third person, and such photographs and fingerprints could be used to the detriment of such employee or applicant for employment is guilty of a misdemeanor."

This section forms a part of what is commonly referred to as the Anti-Blacklisting Law originally enacted by the Statutes of 1913, chapter 350, as section 653e of the Penal Code. (10 Ops.Cal.Atty.Gen. 19, 20 (1947).) That portion which now appears as section 1051 of the Labor Code was added by chapter 586 of the Statutes of 1929. Does this provision prohibit an employer from taking a photograph and fingerprints, and delivering them to a law enforcement agency *solely* for the purpose of *receiving* criminal history information for the *employer's own use*?

Literally construed, Labor Code section 1051 would appear to prohibit "any person," including the employer, from taking a photograph and fingerprints "for the purpose of furnishing the same . . . to any . . . third person," including a law enforcement agency, where such photograph and fingerprints could be used to the detriment of the subject employee or applicant for employment. Such a detriment would consist of a denial, based on summary criminal history information acquired as a result of such photograph and fingerprints, of employment by the Committee, or of accreditation for employment related to the Olympic Games by a concessionaire or contractor. In 10 Ops.Cal.Atty.Gen., *supra*, we concluded that while "the statute makes no prohibition against the employer obtaining information about his employee for his own use," fingerprints taken by an employer may not be delivered to or retained by a local police department or any other governmental law enforcement agency for any purpose, including receipt by the employer of summary criminal history information, since such a government agency would constitute a "third person" within the meaning of the statute. It must be presumed that this interpretation has come to the attention of the Legislature, and if it were contrary to the

Council. The decision on such appeal shall be rendered within five days after the appeal is made.

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legislative intent that some corrective measure would have been adopted over the course of the intervening three and one-half decades. (*California Correctional Officers Assn. v. Board of Administration* (1978) 76 Cal.App.3d 786, 794.)

Labor Code section 432.7 is not inherently inconsistent with section 1051 of said code in that it neither expressly nor by necessary implication requires the taking and delivery of photographs or fingerprints. Other descriptors, including name, address, birthdate and place, social security number, et cetera, may be used to provide access to criminal history information.⁴ No reason appears, therefore, why the two statutes should not be harmonized so as to give effect to both. (Cf. *Gillet-Harris-Duranceau & Associates, Inc. v. Kemple* (1978) 83 Cal.App.3d 214, 220; 65 Ops.Cal.Atty.Gen. 11, 14 (1982).)

It may be further noted that where the Legislature has intended to authorize the delivery of fingerprints of an applicant for employment to a law enforcement agency for the purpose of obtaining information, it has made such authorization expressly, specifically excepting the provisions of Labor Code section 1051. For example, Financial Code section 777, subdivision (a) (Stats. 1982, ch. 595, § 1, amended, Stats. 1982, ch. 1203, § 4), provides that "[n]otwithstanding the provisions of Sections 1051, 1052, and 1054 of the Labor Code . . . a commercial bank . . . may deliver fingerprints taken of an applicant for employment to local, state, or federal law enforcement agencies for the purpose of obtaining [criminal history] information" (See also Fin. Code, §§ 5612.5(a), 11110(a), & 14409.2(a).) In view of the general and unequivocal prohibition contained in Labor Code section 1051, the legislative articulation of specific statutory exceptions in other related contexts indicates the absence of any such exception in the present context. (Cf. *Safer v. Superior Court* (1975) 15 Cal.3d 230, 237-238.)

It is concluded that the taking of a photograph and fingerprints by the Committee of each applicant for submission to a law enforcement agency is precluded by Labor Code section 1051.

⁴ The release of such information by a law enforcement agency is not mandatory, but permissive. (Pen. Code, §§ 11105, subd. (c) & 13300, subd. (c).)