



March 11, 2010

Via Electronic and U.S. Mail

John C. Duncan, Director
California Department of Industrial Relations
455 Golden Gate Avenue
San Francisco, California 94102

Re: Overbroad Survey of Employees' Speech Activities

Dear Mr. Duncan:

The ACLU of Northern California has been contacted by employees of California's Department of Industrial Relations, Division of Occupational Safety and Health ("DOSH") regarding a mandatory questionnaire seeking details regarding any and all "teaching, presentations and training" they have conducted during their tenure with DOSH. Because the survey seeks information about private and protected off-duty speech without a sufficient nexus to the state's concerns about possible misconduct, we believe it violates employee privacy guaranteed by the California Constitution and infringes on employees' rights to freedom of expression and association under the First Amendment to the United States Constitution and Article I, section 2 of the California Constitution.

Our understanding is that DOSH has begun an investigation of employees' speech activities based on one former employee's improper acceptance of compensation for trainings regarding occupational safety and health while employed at DOSH. While discovery of that conduct may warrant inquiry into employees' receipt of compensation for trainings or presentations that relate to the work of the DOSH, it does not justify requiring every employee to provide details of every presentation they have given during the course of their employment, without regard to the subject matter of the training or whether the employee was compensated for his or her participation. The survey as written requires disclosure of presentations or trainings that have nothing to do with the work of DOSH and could include a range of private and/or political speech that public employees have a right to engage in without scrutiny by their employer or the government. Some examples could include leading bible study or other religious practices, training political protestors in civil disobedience, a union activist's presentation to co-workers on the status of collective bargaining negotiations, or volunteering to provide safe sex trainings at college or university residence halls. Thus, teaching, training and presentations included in the survey may involve content or indicate personal beliefs that DOSH employees do not wish to share with their employer or the government. Given this state's strong commitment to protecting the privacy of its residents, DOSH's inquiry into such wide-ranging teaching activities is improper.

NANCY PEMBERTON, CHAIRPERSON | M. QUINN DELANEY, LINDA LYE, PHILIP MONRAD, VICE CHAIRPERSONS | DICK GROSBOLL, SECRETARY/TREASURER
ABDI SOLTANI, EXECUTIVE DIRECTOR | CHERI BRYANT, DEVELOPMENT DIRECTOR | LAURA SAPONARA, COMMUNICATIONS DIRECTOR | ALAN SCHLOSSER, LEGAL DIRECTOR
MARGARET C. CROSBY, ELIZABETH GILL, JULIA HARUMI MASS, MICHAEL RISHER, JORY STEELE, STAFF ATTORNEYS | NATASHA MINSKER, NICOLE A. OZER, DIANA TATE VERMEIRE, POLICY DIRECTORS
STEPHEN V. BOMSE, GENERAL COUNSEL

In 1972, California's voters passed the Privacy Initiative, which added privacy to the rights carefully guarded by Article I, section 1 of the California Constitution. The particular "mischiefs" at which the Privacy Initiative was aimed included "'government snooping' and the secret gathering of personal information," and "overbroad collection and retention of unnecessary personal information by government and business interests." *White v. Davis*, 13 Cal.3d 757, 775 (1975). In *White*, the California Supreme Court held that allegations of police officers' covert enrollment in university classes for the purpose of recording and retaining records of class discussions raised claims under California's right to privacy as well as federal and state guarantees to freedom of expression and association. With respect to the privacy right, the Court explained that the government's "collection and retention of data relating to all facets of an individual's life," can only go forward if the government establishes a "compelling justification." *White v. Davis, supra*, 13 Cal.3d at 761; *see also Loder v. City of Glendale*, 14 Cal.4th 846, 896 (1997) (government interest must be "compelling" if it infringes on fundamentally private matters, and in any case, can only prevail if it outweighs affected privacy interests). As explained above, the state's interest in identifying and stopping DOSH employees from receiving unreported compensation for trainings and presentations related to workplace safety does not warrant broad inquiry into unrelated and uncompensated, protected and private speech or the associations that provide the context for such speech. Employees' privacy interests outweigh DOSH's interest in non-DOSH-related speech, and the survey seriously infringes on DOSH employees' privacy rights and their related rights to freedom of expression and association. *See White v. Davis*, 13 Cal.3d at 768 (police surveillance of university classroom "must inevitably inhibit the exercise of free speech"); *and Britt v. Superior Court*, 20 Cal.3d 844 (1978) (discovery of political affiliations for purpose of litigation must be justified by compelling reason and "must be drawn with narrow specificity" to minimize infringement of constitutional rights to speech and association).

We urge you immediately to notify DOSH professional employees that they need not comply with the questionnaire distributed March 1, 2010 while your office reviews its propriety under the United States and California Constitutions and other applicable federal and state law.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions.

Sincerely,



Julia Harumi Mass
Staff Attorney

cc: Len Welsh, DOSH Chief, lwelsh@dir.ca.gov, via e-mail