Hearing Date: July 26, 2013
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ITEM 8

FINAL STAFF ANALYSIS

REQUEST FOR RECONSIDERATION

of Statement of Decision and Parameters and Guidelines
Adopted April 19, 2013

Government Code Sections 6253, 6253.1, 6253.9, 6254.3, and 6255

Statutes 1992, Chapter 463 (AB 1040); Statutes 2000, Chapter 982 (AB 2799); and Statutes 2001, Chapter 355 (AB 1014)

California Public Records Act

02-TC-10 and 02-TC-51

California Special Districts Association, Requester

EXECUTIVE SUMMARY

This is a request for reconsideration made pursuant to Government Code section 17559 and section 1188.4 of the Commission on State Mandates' (CSM) regulations. The California Special Districts Association (CSDA) requests reconsideration of the Commission's statement of decision and parameters and guidelines for the *California Public Records Act* (CPRA) program, adopted April 19, 2013. CSDA contends that the decision and parameters and guidelines contain an error of law with respect to the description of eligible claimants. The decision describes the eligible claimants as "any city, county, and city and county, or any school district as defined in Government Code section 17519," but omits special districts required to comply with the CPRA.

On May 24, 2013, the Commission granted the request for reconsideration and directed staff to schedule the matter for a hearing on the merits. Under the Commission's regulations, five affirmative votes are required to change a prior final decision to correct an error of law.[1]

On May 30, 2013, a draft staff analysis, proposed corrected decision, and proposed corrected parameters and guidelines were issued for comment with a deadline of June 20, 2013. No requests for an extension of time to file comments were submitted. The Department of Finance and State Controller's Office both filed comments on June 20, 2013, agreeing with the analysis and proposed corrections. On July 1, 2013, 10 days after the end of the comment period and after the final analysis for this item had been prepared and completed the review process; CSDA filed late comments.[2] CSDA's comments urge the Commission to approve reimbursement for all

[1] California Code of Regulations, title 2, section 1188.4(g)(2).

[2] The late filing of comments has resulted in Commission staff rewriting the final staff analysis and putting it through the Commission's review process two times, since the comments came in after the final was completed by staff. This has caused significant disruptions in the work flow of the Commission and has taken staff away from working on matters for the September hearing

special districts, including those that receive revenue solely from fees and assessments, and request that the Commission consider Proposition 218 (1996), Proposition 1A (2004), and Proposition 26 (2012), which amended article XIII of the California Constitution.

Staff Analysis

Staff finds that the statement of decision and the parameters and guidelines adopted on the *CPRA* program are incorrect as a matter of law and inconsistent with the test claim decision. Thus, staff recommends that the Commission correct these errors in the statement of decision and parameter and guidelines.

Except for certain provisions relating only to school districts, the activities mandated by the CPRA, by definition, apply equally to all levels of government.[3] The test claim statement of decision acknowledged that "local agencies" were eligible for reimbursement under the program, and "local agencies" are defined in Government Code section 17518 to include special districts.

The decision on the parameters and guidelines, however, did not address the issue of eligible claimants, but was primarily focused on the scope of reimbursable activities. Because special districts were inadvertently excluded from the decision on parameters and guidelines, that decision and the parameters and guidelines are incorrect as a matter of law and inconsistent with the test claim decision.

However, this is more than a technical oversight. There was no analysis of special districts and not all special districts are eligible to claim reimbursement under article XIII B, section 6 of the California Constitution. The courts have made clear that despite the broad statutory definitions of "local agency" in the CPRA and mandates statutes, reimbursement under article XIII B, section 6 is required only when the local agency is subject to the tax and spend limitations of the California Constitution, and only when the costs in question can be recovered solely from

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which will now be postponed to the December hearing. As a result, if those postponed items are later approved, there will not be a statewide cost estimate (SCE) prepared in time for inclusion in the 2014-2015 budget and, of course the overall time to complete the backlog will be extended. Several parties have taken to routinely filing late comments without requesting an extension of time to file comments for good cause, as is provided for under the Commission's regulations. The net result of this practice is to increase delays in the processing of matters pending before the Commission. Under the Commission's regulations, a three week comment period is provided and "all comments timely filed shall be reviewed by Commission staff and may be incorporated into the final written analysis." (2 CCR 1183.07(c).) These comments were not timely. However, written testimony received at least 15 days in advance of the hearing [i.e. late filings], shall be included in the Commission's meeting binders. (2 CCR 1187.6.) Thus, there is no requirement for staff to review late comments or include an analysis of them in the final staff analysis and proposed decision. However, because of the potential significance of the constitutional issues raised, staff did prepare an analysis of these comments for the consideration by the Commission in this instance.

[3] Government Code section 6252.

"proceeds of taxes." No duty of subvention is triggered where the local agency is not required to expend "proceeds of taxes." [4]

"Proceeds of taxes" is defined to include "all" tax revenues. Tax revenues come from property tax and special tax levies by local government, and both are restricted by constitutional requirements in articles XIII A and XIII C to be approved by a two-thirds vote of the electorate before the tax can be levied. In addition, the definition of "taxes" has expanded to include some charges formerly believed to be "fees" with the adoption of Proposition 26 in 2010. All of these "proceeds of taxes" are subject to the spending limits of article XIII B. "Proceeds of taxes," however, do not include fees or assessments – levies that are not restricted by the spending limitation in article XIII B.

CSDA nevertheless argues that local agencies funded solely from service charges, fees, or assessments should be entitled to reimbursement. However, no authorities have found that reimbursement under section 6 is required when the expenditure is made from fees or assessments that do not exceed the costs reasonably borne by the entity in providing the regulation, product, or service. The new restriction on fees established by Proposition 218 (which now requires a majority vote of the electorate to levy a fee) does not change this result. Article XIII B, section 6 is designed to protect the limited tax revenue that is restricted by the spending limit of article XIII B. There is no spending limit for fees or assessments.

Thus, article XIII B, section 6, does not require reimbursement when the costs are for expenses that are recoverable from sources other than tax revenue; i.e., service charges, fees, or assessments.[5] There are many special districts that receive their revenue solely from fees, or receive some of their funding through fees that can be applied to this program. Thus, not all special districts are eligible to claim reimbursement under article XIII B, section 6 and some eligible districts may also have fee authority that applies to this program as offsetting revenue.

Based on the analysis contained herein, staff recommends that Section II of the parameters and guidelines addressing eligible claimants be corrected as follows:

> Any city; county; ~~and~~ city and county; special district subject to the taxing restrictions of articles XIII A and XIII C, and the spending limits of article XIII B, of the California Constitution, whose costs for this program are paid from proceeds of taxes; or any "school district" as defined in Government Code section 17519 which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

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[4] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486-487; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282.

[5] *County of Fresno, supra,* 53 Cal.3d at p. 487; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282. In addition, staff finds that Proposition 1A is not relevant to the issue in this case.

Staff further recommends that Section VII of the parameters and guidelines addressing offsetting revenue be modified as follows:

> Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees or assessments; federal funds; and other state funds which fund the cost of the mandated activities, shall be identified and deducted from this claim.
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> Revenue from the fee authority authorized in Government Code sections 6253 and 6253.9(a)(2) and (b), as added by Statutes 2000, chapter 982, shall be identified and deducted from the following costs claimed:
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> 1. The direct costs of providing a copy of a disclosable electronic record in the electronic format requested; and
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> 2. If the request requires data compilation, extraction, or programming to produce the record, or if the record is one that is otherwise produced only at regularly scheduled intervals, the cost of producing the record including the cost to construct it, and the cost of programming and computer services necessary to produce the copy of the electronic record.

Conclusion and Staff Recommendation

Staff finds that the statement of decision and parameters and guidelines adopted April 19, 2013 on the *CPRA* program are incorrect as a matter of law. Staff recommends that the Commission adopt this analysis and correct the statement of decision and parameters and guidelines as follows:

- Adopt the attached proposed *corrected* statement of decision on the parameters and guidelines.
- Adopt the attached proposed *corrected* parameters and guidelines.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical changes to these documents.

STAFF ANALYSIS

Requester

California Special Districts Association

Chronology

04/19/2013 The Commission on State Mandates (Commission) adopted the statement of decision and parameters and guidelines.

05/02/2013 California Special Districts Association (CSDA) requested reconsideration of the statement of decision and parameters and guidelines pursuant to Government Code section 17559 and California Code of Regulations, title 2, section 1188.4.

05/24/2013 The Commission granted the request for reconsideration and directed staff to schedule the second hearing on the merits.

05/30/2013 Commission staff issued the draft staff analysis on reconsideration for comment.

06/20/2013 Department of Finance (DOF) filed comments agreeing with the staff analysis and proposed corrected decision and parameters and guidelines.

06/20/2013 State Controller's Office (SCO) filed comments agreeing with the staff analysis and proposed corrected decision and parameters and guidelines.

07/01/2013 CSDA filed late comments on the draft staff analysis.[6]

I. Background

This is a request for reconsideration made pursuant to Government Code section 17559 and section 1188.4 of the Commission's regulations. CSDA requests reconsideration of the statement of decision and parameters and guidelines for the *California Public Records Act* (CPRA) program, adopted April 19, 2013. CSDA contends that the decision and parameters and guidelines contain an error of law with respect to the description of eligible claimants. The decision describes the eligible claimants as "any city, county, and city and county, or any school district as defined in Government Code section 17519," but omits special districts required to comply with the CPRA.

Government Code section 17559(a) grants the Commission the authority to reconsider a prior final decision to correct an error of law as follows:

[6] Under the Commission's regulations, a three week comment period is provided and "all comments timely filed shall be reviewed by Commission staff and may be incorporated into the final written analysis." (2 CCR 1183.07(c).) However, written testimony received at least 15 days in advance of the hearing [i.e. late filings], shall be included in the Commission's meeting binders. (2 CCR 1187.6.) These comments were 10 days late and were not timely filed. Thus, there is no requirement for staff to review late comments or include an analysis of them in the final staff analysis and proposed decision. However, because of the potential significance of the constitutional issues raised, staff did prepare an analysis of these comments for the consideration by the Commission in this instance.

> The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

Section 17559 refers to the reconsideration of test claim and incorrect reduction claim decisions, and does not specifically address decisions on other matters. However, parameters and guidelines are part of the test claim process, contain findings of law, and are adopted under the Commission's article 7 quasi-judicial hearing regulations. Thus, the authority to reconsider a prior decision to correct an error of law extends to a decision on parameters and guidelines.

The process provides that any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.[7] The request has to be filed within 30 days after the decision is delivered to the claimant. Before the Commission considers a request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted.[8] Five affirmative votes are required to grant the request for reconsideration and schedule the matter for a hearing on the merits.[9]

If the Commission grants the request for reconsideration, a subsequent hearing on the merits is conducted to determine if the prior final decision is contrary to law and to correct an error of law.[10] A draft staff analysis is prepared by staff and issued before the date that the matter is set for hearing, allowing for a 3-week comment period. Five affirmative votes are required to change a prior final decision.[11]

On May 24, 2013, the Commission granted the request for reconsideration and directed staff to schedule the matter for a hearing on the merits.

II. Position of the Parties

A. CSDA

In its request, CSDA states the following:

[7] California Code of Regulations, title 2, section 1188.4(a) and (b).

[8] California Code of Regulations, title 2, section 1188.4(f).

[9] *Ibid.*

[10] California Code of Regulations, title 2, section 1188.4(g).

[11] California Code of Regulations, title 2, section 1188.4(g)(2).

> The Parameters and Guidelines for the CPRA . . . provides that "Any city, county, and city and county, or any 'school district' as defined in Government Code section 17519, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement." It appears that the term "local agencies" was replaced by "Any city, county, and city and county" for eligible claimants. This language is inconsistent with the eligible claimants identified in the following documents, in which all eligible claimants and affected entities are repeatedly identified as "local agencies":
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> - Test Claim filed by the County of Los Angeles (October 2002)
> - "Adopted Statement of Decision [on the test claim] (May 26, 2011)
> - County of Los Angeles "Proposed Parameters and Guidelines" (June 23, 2011)
> - County of Los Angeles "Revised Parameters and Guidelines" (August 30, 2011)
>
> Government Code section 17518 defines "Local agency" to mean any city, county, special district, authority, or other political subdivision of the state. Thus, special districts have been incorrectly removed as eligible claimants. Therefore, we respectfully request that the Commission reconsiders [sic] this omission as allowed under Title 2, California Code of Regulations Section 1188.4 and includes [sic] special districts as eligible claimants to ensure they may continue to seek reimbursement for their adherence to the CPRA mandates.

CSDA filed late comments on the draft analysis, expressing a "strong concern" with the "assertion that a local agency's power to levy a fee for service renders it ineligible for reimbursement of state mandated local programs." CSDA requests that the Commission consider three propositions adopted by the voters that amend the Constitution (Proposition 218 (1996), Proposition 1A (2004), and Proposition 26 (2012)), to find that special districts that have the authority to levy fees, or that are enterprise districts, be considered an eligible claimant within the meaning of article XIII B, section 6 of the California Constitution.

B. State Controller's Office

The SCO filed comments agreeing with the staff analysis and proposed corrected decision and parameters and guidelines.

C. Department of Finance

DOF filed comments agreeing with the staff analysis and proposed corrected decision and parameters and guidelines.

III. Discussion

Issue: Because They Fail To Identify Special Districts as Eligible Claimants, the Parameters And Guidelines and Statement of Decision Are Not Consistent with the Test Claim Decision and are Incorrect as a Matter of Law.

CSDA correctly asserts that the test claim filed by County of Los Angeles on the *CPRA* program was filed as a class action request for reimbursement on behalf of all "local agencies" eligible to

claim reimbursement,[12] and that the statement of decision on the test claim for *CPRA* acknowledges that "local agencies" are required to comply with mandated activities.[13] Except for certain provisions relating only to school districts, the activities mandated by the *CPRA*, by definition, apply equally to all levels of government, including special districts. Government Code section 6252, a statute within the *CPRA*, defines "local agency" to include "a county; city, whether general law or chartered; city and county; school district; municipal corporation; *district*; political subdivision; or any board, commission or agency thereof; other local public agency; or entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952." And Government Code section 17518 defines "local agency" for purposes of mandate reimbursement to mean "any city, county, *special district*, authority, or other political subdivision of the state." Thus, the Commission's decision on the test claim authorized reimbursement for special districts.

CSDA is also correct that the decision on the parameters and guidelines did not address the issue of eligible claimants, but was primarily focused on the scope of reimbursable activities. The statement of decision and parameters and guidelines identified eligible claimants as counties, cities, and school districts as defined, but did not include special districts. Thus, the statement of decision and the parameters and guidelines are incorrect as a matter of law and inconsistent with the test claim decision. Therefore, staff recommends that the Commission correct these errors in the statement of decision and parameter and guidelines.

Not all special districts, however, may be eligible to claim reimbursement under article XIII B, section 6 of the California Constitution.

A. The statement of decision and the parameters and guidelines should be corrected to provide that special districts eligible to claim reimbursement are those that are subject to the tax restrictions of articles XIII A or XIII C, and the spending limitation of article XIII B, and whose costs for the *CPRA* program were expended from "proceeds of taxes."

CSDA argues that all special districts, including those that are fully funded by fee revenue, should be eligible to claim reimbursement for complying with CPRA pursuant to article XIII B, section 6 of the California Constitution. CSDA bases its argument on Propositions adopted by the voters after the enactment of article XIII B, section 6, which expand the definition of "taxes" to include some charges that were formerly considered a fee or an assessment, and further impose new restrictions on other fees and assessments.

As described below, however, the courts have made clear that despite the broad definition of "local agency" in section 17518, reimbursement under article XIII B, section 6 is required only when the local agency is subject to the tax and spend limitations in the Constitution, and only

[12] Government Code section 17521 defines "test claim" to mean the "first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state . . ."

[13] Statement of Decision on test claim for *CPRA*, page 10.

when the costs in question can be recovered solely from "proceeds of taxes."[14] There is no support for the assertion that reimbursement is required for costs expended from sources other than "proceeds of taxes."

There are roughly between 3,294 and 4,776 special districts in California, depending upon whose definition is applied.[15] And, as shown below, some of these districts are not entitled to reimbursement because they are totally funded with fees or service charges, and not from proceeds of taxes. Although it is not possible for the Commission to determine, for each special district required to comply with the CPRA, whether the special district is also entitled to claim reimbursement under article XIII B, section 6, the Commission's decision and parameters and guidelines can provide guidance to the SCO for auditing reimbursement claims filed.

1. Article XIII B, section 6 requires reimbursement only for local governments subject to the tax and spend limitations of the Constitution.

To understand the reimbursement requirement in article XIII B, section 6, it is necessary to understand the history of the tax and spend restrictions in articles XIII A and B as originally enacted by Proposition 13, and the later initiatives that amended that article.

> The correct approach is to read [article XIII B] section 6 in light of its historical and textual context. The rules of constitutional interpretation require a strict construction of section 6, because constitutional limitations and restrictions on legislative powers are not to be extended to include matters not covered by the language used.[16]

a) Articles XIII A and XIII C impose taxing restrictions on property taxes and special taxes.

Local government does not have an inherent power to levy and collect tax revenue. Article XIII section 24 of the California Constitution provides that "the Legislature may authorize local

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[14] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486-487; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 987.

[15] The Senate Local Government Committee asserts that there are approximately 3,294 while the State Controller asserts there are 4,776. (See, www.sco.ca.gov/Files-ARD-Local/LocRep/2010-11_Special_District.pdf; Sen. Loc. Gov., *What's So Special About Special Districts?* (Fourth Edition), October 2010, p. 4 (http://www.rsrpd.org/admin/Whatsso.pdf).) However, for the Commission's purposes, we are only concerned with those, approximately 610 districts subject to the tax and spend restrictions of the California Constitution.

[16] *Redevelopment Agency of the City of San Marcos, supra,* 55 Cal.App.4th 976, 985, quoting *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817. See also, *County of Fresno, supra,* 53 Cal.3d 482, 486; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; and *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735, all of which reviewed the requirements of section 6 in light of the tax and spend restrictions of the California Constitution.

governments to impose" local taxes as the Legislature sees fit.[17] Thus, the power to tax comes from the Legislature through its enactment of general laws which enable the local governing body to collect the taxes specified in those general laws.[18] Local government, including special districts, must have statutory authority to levy a tax or have a tax levied on its behalf.

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution, to control ad valorem property taxes and the imposition of new "special taxes." With respect to property taxes, Article XIII A, section 1, drastically reduced property tax revenue previously enjoyed by local governments by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value" and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…"

Soon after the adoption of this provision in Proposition 13, the Legislature, giving effect to the constitutional command that the "One percent (1%) tax to be collected by the counties [be] *apportioned according to law*," enacted Government Code section 26912, effective June 24, 1978. Section 26912 provided, among other things, that the amount of revenue derived from real property taxes levied by a county, "shall be allocated by the county auditor ...*to each local agency*" of the county according to a designated formula. Section 26912 also provided that "For the purposes of this section, a *local agency* includes a ... special district, ... if such *local agency* levied a property tax during the 1977–78 fiscal year or if a property tax was levied for such *local agency* for such fiscal year, ..." Thus, those special districts that did not levy property taxes or have property taxes levied for them in fiscal year 1977-1978 were no longer eligible to receive property tax revenue.[19] In addition, the Legislature enacted Government Code section 16270, which stated the following:

> The Legislature finds and declares that many special districts have the ability to raise revenue through user charges and fees and that their ability to raise revenue directly from the property tax for district operations has been eliminated by Article XIII A of the California Constitution. It is the intent of the Legislature that

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[17] Article XIII, section 24 derives from former article XI, section 12 of the 1979 Constitution. (*Santa Clara Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 252.)

[18] *Santa Clara Local Transportation Authority, supra,* 11 Cal.4th 220, 247-249.

[19] See, for example, *Marin Hospital District v. Rothman* (1983) 139 Cal.App.3d 495. In that case, the hospital district was created by statute and had been authorized by law to levy a tax upon real property within its territorial limits. Relying upon other funding, the district did not levy a property tax for fiscal year 1977–1978, nor had such a property tax been levied for it. The court determined that the district could no longer receive property tax revenue following the adoption of Proposition 13. The court determined that "the Legislature concluded (we think reasonably) that special districts which were not in need of property tax revenues during the 1977-1978 fiscal year (i.e., the year preceding Proposition 13's adoption), and were therefore probably self-supporting, would be among the least affected by the necessary cut-off of such funds."

> such districts rely on user fees and charges for raising revenue due to the lack of the availability of property tax revenue after the 1978–79 fiscal year. Such districts are encouraged to begin the transition to user fees and charges during the 1978–79 fiscal year.

Article XIII A, section 4, also restricts the ability of local government to impose special taxes by first requiring the approval of the special tax by a two-thirds vote of the qualified electors in the district.[20] Section 4 provides that: "Cities, counties, and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes of real property or a transaction or sales tax on the sale of real property within such City, county, or special district." "Special taxes" are taxes "levied to fund a specific governmental project or program," even when the project is the agency's only reason for existence.[21]

The California Supreme Court, in *Los Angeles County Transportation Commission v. Richmond*, analyzed the term "special district" in article XIII A, section 4 to determine if special districts were subject to the two-thirds vote requirement for special taxes.[22] The court determined that the term "special districts" in section 4 refers to only to those entities authorized to levy a tax on real property. The court relied on the ballot materials, finding that the purpose of section 4 was to restrict the ability of local governments to impose new taxes in order to *replace* the property tax revenue losses brought by section 1. "Since only those 'special districts' which levied property taxes could 'replace' the 'loss' of such taxes, these statements imply that the 'special districts' referred to are those which are authorized to levy a property tax."[23]

In 1991, the California Supreme Court in *Rider v. County of San Diego* broadened its interpretation of the term "special district" in article XIII A, section 4, to include special districts that did not possess the express statutory authority to levy property taxes, if the district was *created after the passage of Proposition 13,* was controlled by entities subject to Proposition 13, and was created in order to raise funds to replace revenues lost by those entities because of Proposition 13.[24] A tax ordinance adopted by San Diego County Regional Justice Facility Financing Agency, an agency created by the Legislature in 1987 in express recognition of the County's need for improved courtrooms and jails, was at issue in *Rider*. Under the statutory scheme, the Agency was charged with adopting a tax ordinance imposing a supplemental sales

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[20] *Los Angeles County Transportation Commission v. Richmond* (1982) 31 Cal.3d 197, 201.

[21] *Rider v. County of San Diego* (1991) 1 Cal.4th 1, 15. "Special taxes" are not fees. In response to Proposition 13, the Legislature enacted Government Code section 50076, which states:

> A special tax shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes.

[22] *Los Angeles County Transportation Commission v. Richmond, supra*, 31 Cal.3d 197.

[23] *Id.* at pages 205-206.

[24] *Rider, supra*, 1 Cal.4th 1.

tax of one-half of one percent throughout the County for the purpose of financing the construction of justice facilities. The act provided for a countywide election held for the purpose of approving the tax ordinance by a simple majority vote. The act also provided that the Agency possesses no tax power other than the foregoing sales tax. At an election held in June 1988, the County's voters approved the tax ordinance by a simple majority vote. Taxpayers then challenged the validity of the tax, asserting that it violated the supermajority vote requirements of article XIII A, section 4. The court recognized that the prior

> ….limitation of the term "special district" to those districts possessing property tax power is unworkable as applied to districts formed after the adoption of Proposition 13, because to our knowledge *no* such agencies possess that power. With limited exceptions, only *counties* are empowered to levy the 1 percent maximum property tax allowed by Proposition 13. [Citations omitted.] In other words, as a practical matter, the proposed extension of *Richmond* to all districts, whenever created, which lack property tax power would read section 4's reference to "special districts" out of existence as applied to districts formed after 1978.[25]

The court also acknowledged the increase in the number of revenue-generating governmental entities which lack the power to assess property taxes, noting there were now numerous "justice facility financing agencies" and authority given to counties to create special transportation districts, funding their programs exclusively through increased sales taxes. Since the court found that the tax was a "special tax" subject to the two-third vote requirement of article XIII A, section 4, the tax, upheld by only a majority of the electorate, was held invalid. The court directed the Agency to place the proceeds in an account to allow the voters to claim refunds.[26]

Thus, after *Rider*, only the following special districts were subject to the two-thirds vote requirement in article XIII A, section 4 when levying special taxes: (1) special districts that had the power to levy property taxes and (2) special districts that did not have the authority to levy a property tax, but were created after Proposition 13 and controlled by entities subject to Proposition 13 in order to raise funds to replace revenues lost by those entities because of Proposition 13. Tax restrictions on special taxes were not imposed on other types of special districts.

In 1996, after many local governments increasingly relied upon other revenue tools to finance local services, Proposition 218 was adopted by the voters to add articles XIII C and XIII D to the California Constitution. [27] Proposition 218 provides that all taxes imposed by any local

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[25] *Id.* at p. 11.

[26] *Ibid*., See also *Hoogasian Flowers, Inc. v. State Bd. of Equalization (1994)* 23 Cal.App.4th 1264, which applied the same rule to an agency formed by a school district as the taxing authority subject to article XIII A.

[27] See, *Apartment Association of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 839, which recognized that the ballot materials for Proposition 218 stated the following:

government shall be deemed to be either a general tax (taxes imposed for general governmental purposes) or a special tax (tax imposed for specific purposes, including those placed into a general fund). "Special purpose districts or agencies," however, "shall have no power to levy general taxes" and may only levy special taxes. Proposition 218 then required *all* special taxes imposed by a local government to be approved by a two-thirds vote of the electorate.[28] Thus, after Proposition 218, all special districts that have authority to levy a special tax are subject to the two-thirds vote requirement.

Proposition 218 also imposed strict notice and hearing procedures on local government, including special districts, before the adoption of any new or increased fee or assessment. In addition, voter approval of a *majority* of the local electorate was required before a fee or assessment could take effect.[29] By definition in Proposition 218, fees and assessments are not "taxes."[30]

Proposition 26 was then adopted in 2010. Proposition 26 expressly defines "taxes," requiring approval by a two-thirds vote, to include some fees and charges that previously could be approved with a majority vote under Proposition 218. Proposition 26 prohibits local government from enacting, increasing, or extending any levy, charge, or exaction defined to be a "tax" without approval from two-thirds of the electorate. Proposition 26 amended article XIII C, section 1, to define a tax as follows:

> As used in this article, "tax' means any levy, charge, or exaction, of any kind imposed by a local government, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the

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> There are now over 5,000 local districts which can impose fees and assessments without the consent of local voters. Special districts have increased assessments by over 2400% over 15 years."

[28] California Constitution, article XIII C, sections 1 and 2. Section 2 states that "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote."

[29] California Constitution, article XIII D.

[30] Article XIII D, section 2 defines "assessment" to mean

> … any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment," and "special assessment tax."

"Fee" or "charge" means "any levy other than an ad valorem tax, a special tax or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including user fees or charges for a property related service."

reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

There will be litigation regarding the meaning of Proposition 26, and it is likely that some fees will actually be considered "taxes" under Proposition 26. However, there are no published cases that have invalidated a fee, or determined that a "fee" imposed was actually a tax under a Proposition 26 analysis to date. [31] In the meantime, the analysis of Proposition 26 by the Legislative Analyst's Office (LAO) is helpful and can be used to determine what the voters

[31] To date, there are two published cases interpreting Proposition 26, both finding that the levy imposed was a fee and not a tax. *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982 dealt with regulatory fees associated with a city ordinance requiring annual inspections of residential rental property. The court held the regulatory fees were not an unconstitutional special tax enacted without voter consent. The fees were imposed to cover the cost of performing inspections, the fees did not exceed the approximate cost of the activity, and the fee schedule itself showed the basis for the apportionment and established that the fees were reasonably related to the payors' burden upon the inspection program.

Schmeer v. County of Los Angeles (2013) 213 Cal.App.4th 1310 addressed a county ordinance requiring retail establishments to charge customers for each carryout paper bag provided. The court held that the ordinance was not a "tax within the meaning of Proposition 26. The charge was not remitted to the county, but was payable to and retained by the store providing the bag, and the store was required to use the funds for specified purposes.

intended.[32] In its summary of Proposition 26, LAO explained the state of the law before Proposition 26 and described the differences between taxes, and fees and charges as follows:

> State and local governments impose a variety of taxes, fees, and charges on individuals and businesses. Taxes—such as income, sales, and property taxes—are typically used to pay for general public services such as education, prisons, health, and social services. Fees and charges, by comparison, typically pay for a particular service or program benefitting individuals or businesses. There are three broad categories of fees and charges:
>
> - User fees—such as state park entrance fees and garbage fees, where the user pays for the cost of a specific service or program.
> - Regulatory fees—such as fees on restaurants to pay for health inspections and fees on the purchase of beverage containers to support recycling programs. Regulatory fees pay for programs that place requirements on the activities of businesses or people to achieve particular public goals or help offset the public or environmental impact of certain activities.
> - Property charges—such as charges imposed on property developers to improve roads leading to new subdivisions and assessments that pay for improvements and services that benefit the property owner.
>
> State law has different approval requirements regarding taxes, fees, and property charges. As Figure 1 shows, state or local governments usually can create or increase a fee or charge with a majority vote of the governing body (the Legislature, city council, county board of supervisors, etcetera). In contrast, increasing tax revenues usually requires approval by two-thirds of each house of the state Legislature (for state proposals) or a vote of the people (for local proposals). [33]

Over the years, however, there was disagreement about the difference of regulatory fees and taxes, particularly when the money is raised to pay for a program of broad public benefit.[34]

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[32] Ballot summaries and the "Analysis by the Legislative Analyst" in the "Voter Information Guide" are recognized sources for determining the voters' intent." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 116.)

[33] Legislative Analyst's Office, Summary of Proposition 26, July 15, 2010.

[34] For example, in *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, the California Supreme Court determined that a regulatory fee on businesses that made products containing lead was a fee, and not a tax, even though fee revenue was used to screen children at risk for lead poisoning, follow up on their treatment, and identify sources of lead contamination responsible for the poisoning. The court's ruling in *Sinclair Paint* lead to Proposition 26.

Thus, under Proposition 26, LAO states that "taxes" now generally include those fees and charges that government imposes to address health, environmental, or other societal or economic concerns – charges that benefit the public broadly, as follows:

> ***Expands Definition.*** This measure broadens the definition of a state or local tax to include many payments currently considered to be fees or charges. As a result, the measure would have the effect of increasing the number of revenue proposals subject to the higher approval requirements summarized in Figure 1. Generally, the types of fees and charges that would become taxes under the measure are ones that government imposes to address health, environmental, or other societal or economic concerns. Figure 3 provides examples of some regulatory fees that could be considered taxes, in part or in whole, under the measure. This is because these fees pay for many services that benefit the public broadly, rather than providing services directly to the fee payer. The state currently uses these types of regulatory fees to pay for most of its environmental programs. [35]

However, LAO determined that the change in the definition of "taxes" does not affect most user fees, property development charges, and property assessments that affect individuals or businesses. In addition, most other fees or charges in existence at the time of the November 2, 2010 election would not be affected by Proposition 26 unless that fee is later increased or extended, or the fee is increased by state law between January 1, 2010 and November 2, 2010, and conflicts with Proposition 26.[36]

b) *Article XIII B imposes spending limitations on "proceeds of taxes."*

Article XIII B was adopted by the voters less than 18 months after the addition of article XIII A, and was billed as "the next logical step to Proposition 13." While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[37]

The appropriations limit in article XIII B is accomplished by limiting the "total annual appropriations subject to limitation" so that "a government entity may not spend more in one year on a program funded with the proceeds of taxes than it did in the prior year."[38] No "appropriations subject to limitation" may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.[39]

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[35] Legislative Analyst's Office, Summary of Proposition 26, July 15, 2010.

[36] *Ibid*.

[37] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[38] *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 107.

[39] Article XIII B, section 2.

The spending limit applies only to appropriations made from "proceeds of taxes." "Proceeds of taxes" for local governments are defined in article XIII B, section 8(c) to include *all tax revenues*; revenues from user charges and fees *to the extent that those proceeds exceed* the costs reasonably borne by that entity in providing the regulation, product, or service; proceeds from the investment of tax revenues; and subventions from the state, other than pursuant to article XIII B, section 6. "All tax revenues" would include the revenues generated from the additional taxes identified in Proposition 26. However, the appropriations limit does not apply to an appropriation totally funded by "other than the proceeds of taxes."[40]

Thus, article XIII B does not place spending limits on the expenditure of revenue from fees or assessments.[41] "Proceeds of taxes" do not include "the proceeds from the sale of bonds, notes, warrants or other obligations required for the purpose of financing or refinancing the acquisition, construction, or completion of public improvements or projects or any rents, charges, assessments, or levies, other than tax levies, made pursuant to law, the proceeds of which are required for the payment of principal and interest, or to otherwise secure such obligations, and to pay the costs and expenses associated therewith."[42]

c) The reimbursement requirement of article XIII B, section 6, is triggered only when the costs in question are "proceeds of taxes" subject to the appropriations limit of article XIII B.

Section 6 was included in article XIII B in recognition that articles XIII A and XIII B of the Constitution severely restricted the taxing and spending powers of local governments.[43] Article XIII B, section 6 provides in relevant part "[w]henever the Legislature … mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service…."[44] The Supreme Court recognized the purpose of article XIII B, section 6 was to

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[40] California Constitution, article XIII B, section 9(c), which states: "'Appropriations subject to limitation' for each entity of government do not include: (c) Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 ½ cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."

[41] *Placer v. Corin, supra,* 113 Cal.App.3d 443, 450.

[42] *Id*. at p. 453, fn. 8, quoting Government Code section 53715, which implemented article XIII B; see also, *County of Fresno, supra,* 53 Cal.3d 482, 487.

[43] *County of Fresno, supra,* 53 Cal.3d at p. 487; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[44] In November 2004, the voters approved Proposition 1A, which amended article XIII B, section 6 by requiring the state to suspend state mandates in any year the Legislature does not fully fund the mandate; expands the definition of state mandate to include the transfer of responsibility of a program for which the state previously had full or partial

protect the *tax revenues* of local governments from state mandates that would require the expenditure of tax revenues.

> Specifically, [article XIII B, section 6] was designed to protect the tax revenues of local governments from state mandates that would require the expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse …local government for the costs of a state-mandated new program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention *only when the costs in question can be recovered solely from tax revenues*.[45]

Thus, article XIII B, section 6 does not require reimbursement for expenses that are recoverable from sources other than tax revenue. As stated earlier, these other sources of revenue include revenue received from service charges, fees, or assessments. Thus, if a local agency is funded solely from service charges, fees, or assessments – revenues which are excluded from the spending limit – they are not entitled to reimbursement under article XIII B, section 6 and are thus, not eligible claimants for mandates purposes. A local agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[46]

CSDA nevertheless argues that local agencies funded solely from service charges, fees, or assessments should be entitled to reimbursement in cases where the state-mandated program itself is not self-financing with fee authority. In this respect, CSDA attempts to distinguish this case from the facts presented in *County of Fresno v. State of California*, the case which first held that article XIII B, section 6 requires subvention only when the costs in question can be recovered solely from tax revenues. *County of Fresno* addressed a hazardous material abatement program for local agencies and the statutory scheme of the program provided fee authority to the local agencies to recover their costs.[47]

The courts, however, have rejected CSDA's argument. In *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates*, the court addressed a statute requiring

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responsibility; and requires the repayment of the amounts owed to local governments for state mandated costs incurred before fiscal year 2004-2005. Proposition 1A also protected local revenue (local property tax, sales tax, and VLF revenues) by prohibiting the Legislature from taking any action to reduce or decrease those revenues, or from shifting property taxes to schools except under limited circumstances. Proposition 1A, however, does not affect whether a special district is eligible to claim reimbursement for a state-mandated program.

[45] *County of Fresno, supra,* 53 Cal.3d at p. 487; See also, *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 280, and Government Code section 17556(d).

[46] *Placer v. Corin, supra,* 113 Cal.App.3d at p. 453; *City of El Monte, supra,* 83 Cal.App.4th 266, 281-282.

[47] *County of Fresno, supra,* 53 Cal.3d at p. 485.

redevelopment agencies to deposit 20 percent of its tax increment financing generated from project areas into a fund to improve the supply of affordable housing. The program at issue was not self-financing. The Commission and the trial court denied the claim, finding that the funds used by the agency were not "proceeds of taxes," were exempt from the spending limit in article XIII B and, thus, exempt from the reimbursement requirement of section 6. Like CSDA, the agency on appeal argued that the *County of Fresno* case should be read narrowly to cover only self-financing programs, and that the broad statements by the Supreme Court in *County of Fresno* defining "costs" was mere dicta. The agency also argued that the plain language of article XIII B, section 6 does not expressly discuss the source of funds used by the agency to pay the costs of a program. Thus, the agency urged the court to approve the reimbursement requirement. The court disagreed with both arguments, and held as follows:

> The correct approach is to read section 6 in light of its historical and textual context. The rules of constitutional interpretation require a strict construction of section 6, because constitutional limitations and restrictions on legislative powers are not to be extended to include matters not covered by the language used. [Citation omitted.]
>
> The goals of articles XIII A and XIII B are to protect California residents from excessive taxation and government spending. [Citation omitted.] A central purpose of section 6 is to prevent the state's transfer of the cost of government from itself to the local level. [Citation omitted.] The related goals of these enactments require us to read the term "costs" in section 6 in light of the enactment as a whole.[48]

Using this approach, the court determined that reimbursement is required only when the costs in question can be recovered solely from tax revenues. No duty of subvention is triggered where the local agency is not required to expend "proceeds of taxes":

> For all these reasons, we conclude the same policies which support exempting tax increment revenues [received by redevelopment agencies] from article XIII B appropriations limits also support denying reimbursement under section 6. … Section 6 "requires subvention only when the costs in question can be recovered solely from tax revenues." [Citation omitted.] No duty of subvention is triggered where the local agency is not required to expend proceeds of taxes. … Therefore, in light of the above authorities, this use of tax increment financing is not a reimbursable "cost" under section 6. [49]

These cases remain good law, and no authorities have found that reimbursement under section 6 is required when the expenditure is made from fees or assessments. The new restrictions on fees established by Proposition 218 (which now require a majority vote of the electorate) do not change this result. Article XIII B, section 6 is designed to protect the limited tax revenue that is

[48] *Redevelopment Agency of the City of San Marcos, supra,* 55 Cal.App.4th 976, 985.

[49] *Id.* at p. 987.

restricted by the spending limit of article XIII B. There is no spending limit for fees or assessments.

Accordingly, only those local agencies that are subject to the tax and spend limitations of the California Constitution and use their proceeds of taxes to pay the costs incurred to implement a state-mandated program are eligible to claim reimbursement under article XIII B, section 6.

2. Some special districts are subject to the tax and spend limitations of the Constitution and, thus, are generally eligible to claim reimbursement under article XIII B, section 6.

Special districts come in many forms, but their authority is derived by statute; either under a principal act or a special act. A principal act is a generic statute which applies to all special districts of that type. For example, the Community Services District Law governs all 325 community services districts. There are about 50 principal act statutes which local voters can use to create and govern special districts.[50] On the other hand, districts which are regional in nature, have unusual governing board requirements, provide unique services, or need special financing, result in special act districts. Examples of districts formed under special acts include the Embarcadero Municipal Improvement District (Santa Barbara County), the Humboldt Bay Harbor, Recreation, and Conservation District, and the Shasta-Tehama County Watermaster District. There are about 125 special act districts.[51] All principal acts are codified state laws, whereas most special acts are not codified. For a list of special acts, see Appendix A in the State Controller's Special Districts Annual Report.[52]

Just over a quarter of the special districts are enterprise districts. Enterprise districts deliver services that are run like business enterprises and have the statutory authority to charge their customers fees for services. For example, a hospital district generally charges room fees paid by patients, not the district's other residents. Generally, enterprise districts are not subject to the tax and spend restrictions of article XIII of the California Constitution and so are not eligible to receive mandate reimbursement. Nearly all of the water, wastewater, and hospital districts are enterprise districts that charge rates or fees for their services and do not have the statutory authority to receive any "proceeds of taxes."[53] Since enterprise districts are usually not funded by proceeds of taxes, they are generally exempt from article XIII B's spending limit and, thus, are not entitled to reimbursement under section 6. However, some enterprise districts operate with a mix of tax and fee revenues; Alpaugh Irrigation District, Canebrake County Water District, Irvine Ranch Water District, and San Bernardino Valley Municipal Water District, for

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[50] Senate Local Government Committee, *What's So Special About Special Districts?* (Fourth Edition), October 2010, p. 5. (http://www.rsrpd.org/admin/Whatsso.pdf)

[51] *Ibid.*

[52] State Controller, *Special Districts Annual Report*, December 13, 2011, Appendix A. (www.sco.ca.gov/Files-ARD-Local/LocRep/2010-11_Special_District.pdf)

[53] See Senate Local Government, *What's So Special About Special Districts?* (Fourth Edition), October 2010, p. 6. (http://www.rsrpd.org/admin/Whatsso.pdf)

example.[54] These districts are subject to the tax and spend limitations of articles XIII A and XIII B, and are thus generally eligible claimants for mandates purposes. However, as explained in section B of this analysis, if the expenses for the mandated program are funded totally from fee revenue, then the fee authority provides a complete offset and no reimbursement is required, even for these otherwise eligible special districts.

Conversely, non-enterprise districts provide services which have been deemed by some to not easily lend themselves to fees.[55] It has been argued, for example, that fire protection services and mosquito abatement programs benefit the entire community, not just individual residents.[56] Non-enterprise districts have the statutory authority to levy taxes, and rely overwhelmingly on property tax revenues and parcel taxes to pay their operational expenses. Non-enterprise districts are subject to the tax and spend limitations of the California Constitution and are generally eligible claimants for reimbursement of state-mandated programs. Services commonly provided by non-enterprise districts include cemetery, fire protection, library, and police services.

In addition to the statutes that provide authority to each special district, the SCO issues an annual report on special districts that identifies those special districts that collect tax revenue and are subject to the spending limitations of article XIII B. On December 13, 2011, SCO issued its most recent *Special Districts Annual Report* for fiscal year 2009-2010. The report shows that approximately 610, or roughly 17 percent of all special districts, are subject to the appropriations limit of article XIII B, thus making them eligible claimants for mandates purposes. Special districts have a statutory duty to submit annual reports to the SCO pursuant to Government Code section 12463.[57] The report is required to contain, among other things:

> (a) The aggregate amount of taxes levied and assessed against the taxable property in the local agency, which became due and payable during the next preceding fiscal year.
>
> (b) The aggregate amount of taxes levied and assessed against this property collected by or for the local agency during the fiscal year. …
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> (e) The assessed valuation of all of the taxable property in the local agency as set forth on the assessment roll of the local agency equalized for the fiscal year, or, if the officers of the county in which the city or district is situated have collected for

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[54] State Controller, *Special Districts Annual Report*, December 13, 2011. (www.sco.ca.gov/Files-ARD-Local/LocRep/2010-11_Special_District.pdf); Little Hoover Commission, *Special Districts: Relics of the Past or Resources for the Future*," p. 70. (http://www.lhc.ca.gov/studies/155/report155.pdf)

[55] See Senate Local Government, *What's So Special About Special Districts?* (Fourth Edition), October 2010, p. 6. (http://www.rsrpd.org/admin/Whatsso.pdf)

[56] *Ibid.*

[57] Government Code section 12463.

the city or district the general taxes levied by the city or district for the fiscal year, the assessed valuation of all taxable property.[58]

If an officer of the district willfully and knowingly rendered a false report to the Controller, that officer would be guilty of a misdemeanor.[59] The report submitted by the special districts contains the data upon which the SCO bases its *Special Districts Annual Report*.

The SCO can use its report to determine if a special district is eligible to claim reimbursement. It is noteworthy though, that Government Code section 12463 has not been updated to include information on other local taxes that may be imposed, which are also subject to the spending limitations of article XIII B. Therefore, even if the *Special Districts Annual Report* does not identify a particular special district as subject to the spending limitation, the SCO can look to other sources. If the Legislature has authorized the special district to levy a tax, or a court determines that a fee levied by the district was actually a "tax" and the district is not required to return that tax to the taxpayers, but instead uses it for district purposes, then the district is eligible to claim reimbursement.

Accordingly, staff recommends that the Commission correct Section II of the parameters and guidelines, addressing the eligible claimants for this program, to clarify the following:

> Any city; county; ~~and~~ city and county; special district subject to the taxing restrictions of articles XIII A and XIII C, and the spending limits of article XIII B, of the California Constitution, whose costs for this program are paid from proceeds of taxes; or any "school district" as defined in Government Code section 17519 which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

3. Some special districts have potential offsetting revenues that pay for the program.

In 1978, after article XIII A was adopted by the voters through Proposition 13, the Legislature enacted Government Code section 16270 to state its intent that special districts with authority to charge fees should rely on the fees and charges for raising revenue due to the lack of availability of property tax revenue after the 1978-79 fiscal year.

> The Legislature finds and declares that many special districts have the ability to raise revenue through use charges and fees and that the ability to raise revenue directly from the property tax for district operations has been eliminated by Article XIIIA of the California Constitution. It is the intent of the Legislature that such districts rely on user fees and charges for raising revenue due to the lack of the availability of property tax revenues after the 1978-79 fiscal year. Such districts are encouraged to begin the transition to user fees and charges during the 1978-79 fiscal year.

[58] Government Code section 53892.

[59] Government Code section 53894.

Government Code section 17556(d) provides that there are no costs mandated by the state, and reimbursement is not required, when a local agency has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

The parameters and guidelines recognize this limitation and provide that "reimbursement for this mandate from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim." Special districts, generally eligible to claim reimbursement because they are subject to the tax and spend limitations of the Constitution, may still have the authority to charge fees and assessments that pay for the mandated program and not be entitled to mandate reimbursement. If fee revenue is used by the district to pay for general administration costs of the district, including the expenses to comply with the *CPRA* program, then reimbursement is not required in that case.

An example is highlighted in a report issued in May 2000 by the Little Hoover Commission entitled "Special Districts: Relics of the Past or Resources for the Future."[60] The report, beginning on page 67, discusses enterprise special districts that have the authority to charge fees and assessments for their services, but also collect property tax revenue. The report indicates that in fiscal year 1996-1997, enterprise districts received $421 million in property tax revenue, and a sizable portion of that revenue (more than $100 million) went to 15 enterprise districts. Page 70 of the report highlights three special districts that used all of their property tax revenue in fiscal year 1996-1997 to pay for debt service and capital projects. Under these circumstances, then, the remaining expenses of the district, including the cost of compliance with the *CPRA*, would be paid through revenue collected from fees and reimbursement would not be required.

Thus, staff recommends that Section VII of the parameters and guidelines addressing offsetting revenue be modified as follows:

> Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees or assessments; federal funds~~,~~; and other state funds; any of which fund the cost of the mandated activities, shall be identified and deducted from this claim.
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> Revenue from the fee authority authorized in Government Code sections 6253 and 6253.9(a)(2) and (b), as added by Statutes 2000, chapter 982, shall be identified and deducted from the following costs claimed:
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> 1. The direct costs of providing a copy of a disclosable electronic record in the electronic format requested; and
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> 2. If the request requires data compilation, extraction, or programming to produce the record, or if the record is one that is otherwise produced only at regularly scheduled intervals, the cost of producing the record including the cost to

[60] Little Hoover Commission, *Special Districts: Relics of the Past or Resources for the Future*," (http://www.lhc.ca.gov/studies/155/report155.pdf)

construct it, and the cost of programming and computer services necessary to produce the copy of the electronic record.

IV. Conclusion and Staff Recommendation

Staff finds that the statement of decision on the parameters and guidelines, and the parameters and guidelines adopted April 19, 2013 on the *CPRA* program are incorrect as a matter of law. Staff recommends that the Commission adopt this analysis and correct the statement of decision and parameters and guidelines as follows:

- Adopt the attached proposed *corrected* statement of decision on the parameters and guidelines.
- Adopt the attached proposed *corrected* parameters and guidelines, which amends Sections II and VII of the parameters and guidelines consistent with this analysis.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical changes to these documents.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES: Government Code Sections 6253, 6253.1, 6253.9, 6254.3, and 6255 Statutes 1992, Chapters 463 (AB 1040); Statutes 2000, Chapter 982 (AB 2799); and Statutes 2001, Chapter 355 (AB 1014) Period of reimbursement begins on July 1, 2001, or later for specified activities added by subsequent statutes.	Case No.: 02-TC-10 and 02-TC-51 *California Public Records Act* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Adopted April 19, 2013*) (*Served April 25, 2013*) *(Corrected July 26, 2013)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) adopted this statement of decision and parameters and guidelines on consent during a regularly scheduled hearing on April 19, 2013. On May 24, 2013, the Commission granted a request filed by the California Special Districts Association (CSDA) for reconsideration of this decision and the parameters and guidelines pursuant to Government Code section 17559 and California Code of Regulations, title 2, section 1188.4 to correctly identify special districts as eligible claimants.

On July 26, 2013, the Commission reconsidered the decision and corrected the decision to clarify that some special districts are eligible to claim reimbursement for this program. [Witness list and vote count will be included in the final corrected statement of decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

I. SUMMARY OF THE MANDATE

These proposed parameters and guidelines pertain to the consolidated *California Public Records Act* test claim (02-TC-10 and 02-TC-51), adopted May 26, 2011. Based on the filing date of the test claim, the period of reimbursement begins on July 1, 2001, or later for specified activities added by subsequent statutes.

The California Public Records Act (CPRA) provides for the disclosure of public records kept by the state, local agencies, school districts and community college districts, and county offices of education. The required activities include:

- Providing copies of public records with portions exempted from disclosure redacted;
- Notifying a person making a public records request whether the requested records are disclosable;
- Assisting members of the public to identify records and information that are responsive to the request or the purpose of the request;
- Making disclosable public records in electronic formats available in electronic formats; and
- Removing an employee's home address and home telephone number from any mailing list maintained by the agency when requested by the employee.

The CPRA was originally adopted in 1968 "to more clearly define what constitutes a "public record" open to inspection and what information can be or is required to be withheld from disclosure."[1] Prior to the adoption of the CPRA in 1968, the law governing disclosure of public records consisted of a "hodgepodge of statutes and court decisions."[2] These parameters and guidelines address the statutory amendments to the CPRA made after 1975.

The Commission found in the test claim statement of decision that the requirement for local agencies and school districts to make public records available for inspection during office hours, "except for public records exempted from disclosure or prohibited from disclosure" was required prior to 1975 and thus was not new.[3] The Commission also found that "the Legislature intended public records to include every conceivable kind of record that is involved in the governmental process," and that the purpose and intent of the CPRA is "to make disclosable *information* open to the public, not simply the documents prepared, owned, used, or retained by a public agency."[4] In addition, the Commission found that a 1981 amendment to CPRA codified the courts' interpretation, that "CPRA requires segregation of exempt materials from nonexempt materials contained in a single document and to make the nonexempt materials open for inspection and copying."[5] Finally, the Commission found that pursuant to Government Code sections 6256 and 6257, public agencies (both state and local government) have been required to provide "copies or

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[1] Exhibit A, Test Claim Statement of Decision, at p. 5.

[2] Exhibit A, Test Claim Statement of Decision, at p. 5 [citing *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 765].

[3] *Id*, at p. 12.

[4] *Id*, at p. 13.

[5] *Ibid*.

exact copies of public records upon a request that reasonably describes an identifiable record" since the 1968 enactment of CPRA.[6] These activities, required by the CPRA under prior law, are not eligible for reimbursement.

However, the Commission found that Government Code sections 6253, 6253.1, 6253.9, 6254.3, and 6255, as amended by Statutes 1992, Chapters 463 (AB 1040), Statutes 2000, Chapter 982 (AB 2799), and Statutes 2001, Chapter 355 (AB 1014), impose reimbursable state-mandated programs on local agencies and K-14 school districts, within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, as follows:

1. If requested by a person making a public records request for a public record kept in an electronic format, provide a copy of a disclosable electronic record in the electronic format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. (Gov. Code, § 6253.9(a)(2) (Stats. 2000, ch. 982).)
2. Within 10 days from receipt of a request for a copy of records determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the local agency or K-14 district and notify the person making the request of the determination and the reasons for the determination. (Gov. Code, § 6253(c) (Stats. 2001, ch. 982).)
3. If the 10-day time limit of Government Code section 6253 is extended by a local agency or K-14 district due to "unusual circumstances" as defined by Government Code section 6253(c)(1)-(4) (Stats. 2001, ch. 982), the agency head, or his or her designee, shall provide written notice to the person making the request, setting forth the reasons of the extension and the date on which a determination is expected to be dispatched. (Gov. Code, § 6253(c) (Stats. 2001, ch. 982).)
4. When a member of the public requests to inspect a public record or obtain a copy of a public record:
   a. assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated;
   b. describe the information technology and physical location in which the records exist; and
   c. provide suggestions for overcoming any practical basis for denying access to the records or information sought.

   These activities are not reimbursable when: (1) the public records requested are made available to the member of the public through the procedures set

[6] *Id*, at p. 14.

forth in Government Code section 6253; (2) the public agency determines that the request should be denied and bases that determination solely on an exemption listed in Government Code section 6254; or (3) the public agency makes available an index of its records. (Gov. Code, § 6253.1(a) and (d) (Stats. 2001, ch. 355).)

5. For K-12 school districts and county offices of education only, the following activities are eligible for reimbursement:

   a. Redact or withhold the home address and telephone number of employees of K-12 school districts and county offices of education from records that contain disclosable information.

      This activity is not reimbursable when the information is requested by: (1) an agent, or a family member of the individual to whom the information pertains; (2) an officer or employee of another school district, or county office of education when necessary for the performance of its official duties; (3) an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed (and thus must always be redacted or withheld); (4) an agent or employee of a health benefit plan providing health services or administering claims for health services to K-12 school district and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents. (Gov. Code, § 6254.3(a) (Stats. 1992, ch. 463).)

   b. Remove the home address and telephone number of an employee from any mailing lists that the K-12 school district or county office of education is legally required to maintain, if requested by the employee, except for lists used exclusively by the K-12 school district or county office of education to contact the employee. (Gov. Code, § 6254.3(b) (Stats. 1992, ch. 463).)

6. If a request is denied, in whole or in part, respond in writing to a written request for inspection or copies of public records that includes a determination that the request is denied. (Gov. Code, § 6255(b) (Stats. 2000, ch. 982).)

In addition, the Commission concluded that the fee authority set forth in Government Code section 6253.9(a)(2) and (b), as added by Statutes 2000, chapter 982, is offsetting revenue and shall be deducted from the costs of providing a copy of a disclosable electronic record in the electronic format requested.[7]

[7] Exhibit A, Corrected Statement of Decision, at pp. 4-5.

II. PROCEDURAL HISTORY

The first test claim was filed by the County of Los Angeles (LA County) on October 15, 2002. A second test claim on the same statutes was filed by Riverside Unified School District (Riverside Unified) on June 26, 2003. Due to an ongoing dispute over the constitutionality of Government Code section 17556(f), and a ballot measure that would have triggered an analysis of the disputed issue, the two CPRA test claims were removed from the Commission's hearing calendar until the constitutionality of section 17556 was resolved in March of 2009.[8] On November 2, 2010, the two claims were consolidated by the executive director. The consolidated test claim was heard, and the statement of decision adopted, on May 26, 2011. A corrected statement of decision was issued on December 17, 2012, to correct a clerical error approving reimbursement for K-14 school districts, rather than K-12 school districts, for activities mandated by Government Code section 6254.3. That code section imposes requirements only on K-12 school districts.

On June 15, 2011, Riverside Unified submitted proposed parameters and guidelines. On June 23, 2011, LA County submitted proposed parameters and guidelines. On July 22, 2011, the State Controller's Office (SCO) submitted comments on the claimants' proposed parameters and guidelines. On July 25, 2011, the Department of Finance (DOF) submitted comments on the claimants' proposed parameters and guidelines. On August 30, 2011, LA County submitted rebuttal comments.

On February 13, 2013, Commission staff issued the draft proposed statement of decision and parameters and guidelines setting this matter for hearing on April 19, 2013. On February 21, 2013, Cost Recovery Systems, Inc. submitted written comments on the draft. On March 5, 2013, claimant LA County submitted written comments on the draft. On March 6, 2013, SCO and DOF each submitted written comments on the draft.

On March 15, 2013, the California State Association of Counties (CSAC), which is not a party to this matter and had not submitted any comments on this matter until this time, requested "an extension of the April 19, 2013 hearing date to file an amended set of parameters and guidelines…to include an RRM [reasonable reimbursement methodology]." The letter stated that "the local associations are committed to doing everything possible to reach an agreement with DOF."[9] The tentative timeline set out by CSAC would have postponed this item until the December 2013 hearing. The executive director denied the request for extension, stating "there is no authority for interested parties (such as CSAC) to request a postponement of a hearing."[10] None of the state or local agency parties to this matter requested an extension of time or postponement of the hearing on these parameters and guidelines.

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[8] Exhibit A, Corrected Statement of Decision, at p. 6.

[9] Exhibit K, CSAC, Hearing Postponement Request.

[10] Exhibit K, Commission, Denial of Postponement Request.

On April 19, 2013, the Commission adopted the statement of decision and parameters and guidelines for the CPRA program.

On May 2, 2013, CSDA filed a request for reconsideration pursuant to Government Code section 17559 and section 1188.4 of the Commission's regulations of the Commission's statement of decision and parameters and guidelines for the CPRA program, adopted April 19, 2013. CSDA contends that the decision and parameters and guidelines contain an error of law with respect to the description of eligible claimants. The decision describes the eligible claimants as "any city, county, and city and county, or any school district as defined in Government Code section 17519," but omits special districts required to comply with the CPRA.

On May 24, 2013, the Commission granted the request for reconsideration and directed staff to schedule the matter for a hearing on the merits. On July 26, 2013, the Commission determined that the statement of decision and parameters and guidelines adopted April 19, 2013, contained an error of law by not including some special districts as eligible claimants for this program. The Commission amended this decision and parameters and guidelines by including additional analysis and findings regarding Sections II and VII of the parameters and guidelines, addressing eligible claimants and offsetting revenues.

III. POSITION OF THE PARTIES

A. Claimant, Riverside Unified's, Position and Proposed Parameters and Guidelines

Riverside Unified submitted proposed parameters and guidelines in which the claimant proposes reimbursement for exactly the activities approved in the test claim statement of decision, except that the claimant reorganizes the activities and re-numbers them.[11] Riverside Unified did not submit comments on the draft analysis.

B. Claimant, LA County's, Position and Proposed Parameters and Guidelines

LA County submitted proposed parameters and guidelines in which the claimant proposes reimbursement for the activities approved in the test claim statement of decision, but also proposes reimbursement for a number of proposed reasonably necessary activities. These proposed reasonably necessary activities will be described in the analysis below.[12] LA County submitted comments on the draft analysis, reiterating the need for certain reasonably necessary activities proposed, and generally disagreeing with staff's analysis of the scope of the mandate.[13]

[11] Exhibit B, Riverside Unified's Proposed Parameters and Guidelines.

[12] Exhibit C, LA County's Proposed Parameters and Guidelines.

[13] Exhibit H, LA County's Comments on Draft Staff Analysis.

C. California Special Districts Association Position

CSDA states the following:

> The Parameters and Guidelines for the CPRA . . . provides that "Any city, county, and city and county, or any 'school district' as defined in Government Code section 17519, which incurs increased costs as a result of this mandate, is eligible to claim reimbursement." It appears that the term "local agencies" was replaced by "Any city, county, and city and county" for eligible claimants. This language is inconsistent with the eligible claimants identified in the following documents, in which all eligible claimants and affected entities are repeatedly identified as "local agencies":
>
> - Test Claim filed by the County of Los Angeles (October 2002)
> - "Adopted Statement of Decision [on the test claim] (May 26, 2011)
> - County of Los Angeles "Proposed Parameters and Guidelines" (June 23, 2011)
> - County of Los Angeles "Revised Parameters and Guidelines" (August 30, 2011)
>
> Government Code section 17518 defines "Local agency" to mean any city, county, special district, authority, or other political subdivision of the state. Thus, special districts have been incorrectly removed as eligible claimants. Therefore, we respectfully request that the Commission reconsiders [sic] this omission as allowed under Title 2, California Code of Regulations Section 1188.4 and includes [sic] special districts as eligible claimants to ensure they may continue to seek reimbursement for their adherence to the CPRA mandates.

CSDA also expresses a "strong concern" with the "assertion [in the staff analysis] that a local agency's power to levy a fee for service renders it ineligible for reimbursement of state mandated local programs." CSDA requests that the Commission consider three propositions adopted by the voters that amend the Constitution (Proposition 218 (1996), Proposition 1A (2004), and Proposition 26 (2012)), to find that special districts that have the authority to levy fees, or that are enterprise districts, be considered an eligible claimant within the meaning of article XIII B, section 6 of the California Constitution.

D. State Controller's Office Position

SCO submitted comments on the claimants' proposed parameters and guidelines, in which SCO stated that "the reimbursable activities listed under the "Scope of Reimbursable Activities" were numbered incorrectly, included several duplications, and were incomplete." SCO continued, "[f]urthermore, the reimbursable activities listed were confusing, not specific, and needed clarification." SCO also suggested that activities should be designated "one-time" or "ongoing."[14] SCO's comments on the draft analysis recommended no changes.[15]

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[14] Exhibit D, SCO Comments on Proposed Parameters and Guidelines.

E. Department of Finance Position

DOF submitted comments on the claimants' proposed parameters and guidelines, in which DOF raises the following arguments:

- Claimants "appear to add to the activities found reimbursable by the Commission;"
- Many of the activities "appear to be outside the scope of the SOD as these were likely already required and utilized before this mandate and for purposes other than complying with this mandate;"
- Many activities are "duplicative and repetitious or are too vague and general and therefore lack sufficient specificity;"
- A number of activities "do not appear to be reasonably necessary to comply with the mandate, are inconsistent with the SOD, and additive in nature;" and
- Several of the activities "could be performed by lower-level staff than what is referenced in the [parameters and guidelines]."

The DOF recommends "that Commission staff apply the *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794 case and offset any and all applicable costs for specified activities…to the extent of the fee authority provided by law."[16]

DOF's comments on the draft analysis focus on the offsetting revenue provisions of the parameters and guidelines, and are discussed below, as applicable.[17]

IV. COMMISSION FINDINGS

A. Eligible Claimants (Section II. of the Proposed Parameters and Guidelines)

Except for certain provisions relating only to school districts, the activities mandated by the *CPRA*, by definition, apply equally to all levels of government, including special districts. Government Code section 6252, a statute within the *CPRA*, defines "local agency" to include "a county; city, whether general law or chartered; city and county; school district; municipal corporation; *district*; political subdivision; or any board, commission or agency thereof; other local public agency; or entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952." And Government Code section 17518 defines "local agency" for purposes of mandate reimbursement to mean "any city, county, *special district*, authority, or other political subdivision of the state."

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[15] Exhibit J, SCO Comments on Draft Analysis.

[16] Exhibit E, DOF Comments on Proposed Parameters and Guidelines.

[17] Exhibit I, DOF Comments on Draft Staff Analysis.

While it is clear that the mandate applies to cities, counties, any county and city, and school districts, not all special districts are eligible to claim reimbursement under article XIII B, section 6 of the California Constitution. As described below, the courts have made clear that despite the broad definition of "local agency" in section 17518, reimbursement under article XIII B, section 6 is required only when the local agency is subject to the tax and spend limitations of the California Constitution, and only when the costs in question can be recovered solely from "proceeds of taxes."[18]

1. Article XIII B, section 6 requires reimbursement only for local governments subject to the tax and spend limitations of the Constitution.

To understand the reimbursement requirement in article XIII B, section 6, it is necessary to understand the history of the tax and spend restrictions in articles XIII A and B as originally enacted by Proposition 13, and the later initiatives that amended that article.

> The correct approach is to read [article XIII B] section 6 in light of its historical and textual context. The rules of constitutional interpretation require a strict construction of section 6, because constitutional limitations and restrictions on legislative powers are not to be extended to include matters not covered by the language used.[19]

a) Articles XIII A and XIII C impose taxing restrictions on property taxes and special taxes.

Local government does not have an inherent power to levy and collect tax revenue. Article XIII section 24 of the California Constitution provides that "the Legislature may authorize local governments to impose" local taxes as the Legislature sees fit.[20] Thus, the power to tax comes from the Legislature through its enactment of general laws which enable the local governing body to collect the taxes specified in those general laws.[21] Local government, including special districts, must have statutory authority to levy a tax or have a tax levied on its behalf.

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[18] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486-487; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 987.

[19] *Redevelopment Agency of the City of San Marcos*, *supra*, 55 Cal.App.4th 976, 985, quoting *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817. See also, *County of Fresno, supra*, 53 Cal.3d 482, 486; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; and *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735, all of which reviewed the requirements of section 6 in light of the tax and spend restrictions of the California Constitution.

[20] Article XIII, section 24 derives from former article XI, section 12 of the 1979 Constitution. (*Santa Clara Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 252.)

[21] *Santa Clara Local Transportation Authority*, *supra*, 11 Cal.4th 220, 247-249.

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution, to control ad valorem property taxes and the imposition of new "special taxes." With respect to property taxes, Article XIII A, section 1, drastically reduced property tax revenue previously enjoyed by local governments by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value" and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…" Soon after the adoption of this provision in Proposition 13, the Legislature, giving effect to the constitutional command that the "One percent (1%) tax to be collected by the counties [be] *apportioned according to law*," enacted Government Code section 26912, effective June 24, 1978. Section 26912 provided, among other things, that the amount of revenue derived from real property taxes levied by a county, "shall be allocated by the county auditor ...*to each local agency*" of the county according to a designated formula. Section 26912 also provided that "For the purposes of this section, a *local agency* includes a ... special district, ... if such *local agency* levied a property tax during the 1977–78 fiscal year or if a property tax was levied for such *local agency* for such fiscal year, ..." Thus, those special districts that did not levy property taxes or have property taxes levied for them in fiscal year 1977-1978 were no longer eligible to receive property tax revenue.[22] In addition, the Legislature enacted Government Code section 16270, which stated the following:

> The Legislature finds and declares that many special districts have the ability to raise revenue through user charges and fees and that their ability to raise revenue directly from the property tax for district operations has been eliminated by Article XIII A of the California Constitution. It is the intent of the Legislature that such districts rely on user fees and charges for raising revenue due to the lack of the availability of property tax revenue after the 1978–79 fiscal year. Such districts are encouraged to begin the transition to user fees and charges during the 1978–79 fiscal year.

Article XIII A, section 4, also restricts the ability of local government to impose special taxes by first requiring the approval of the special tax by a two-thirds vote of the qualified electors in the

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[22] See, for example, *Marin Hospital District v. Rothman* (1983) 139 Cal.App.3d 495. In that case, the hospital district was created by statute and had been authorized by law to levy a tax upon real property within its territorial limits. Relying upon other funding, the district did not levy a property tax for fiscal year 1977–1978, nor had such a property tax been levied for it. The court determined that the district could no longer receive property tax revenue following the adoption of Proposition 13. The court determined that "the Legislature concluded (we think reasonably) that special districts which were not in need of property tax revenues during the 1977-1978 fiscal year (i.e., the year preceding Proposition 13's adoption), and were therefore probably self-supporting, would be among the least affected by the necessary cut-off of such funds."

district.[23] Section 4 provides that: "Cities, counties, and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes of real property or a transaction or sales tax on the sale of real property within such City, county, or special district." "Special taxes" are taxes "levied to fund a specific governmental project or program," even when the project is the agency's only reason for existence.[24]

The California Supreme Court, in *Los Angeles County Transportation Commission v. Richmond*, analyzed the term "special district" in article XIII A, section 4 to determine if special districts were subject to the two-thirds vote requirement for special taxes.[25] The court determined that the term "special districts" in section 4 refers to only to those entities authorized to levy a tax on real property. The court relied on the ballot materials, finding that the purpose of section 4 was to restrict the ability of local governments to impose new taxes in order to *replace* the property tax revenue losses brought by section 1. "Since only those 'special districts' which levied property taxes could 'replace' the 'loss' of such taxes, these statements imply that the 'special districts' referred to are those which are authorized to levy a property tax."[26]

In 1991, the California Supreme Court in *Rider v. County of San Diego* broadened its interpretation of the term "special district" in article XIII A, section 4, to include special districts that did not possess the express statutory authority to levy property taxes, if the district was *created after the passage of Proposition 13,* was controlled by entities subject to Proposition 13, and was created in order to raise funds to replace revenues lost by those entities because of Proposition 13.[27] A tax ordinance adopted by San Diego County Regional Justice Facility Financing Agency, an agency created by the Legislature in 1987 in express recognition of the County's need for improved courtrooms and jails, was at issue in *Rider*. Under the statutory scheme, the Agency was charged with adopting a tax ordinance imposing a supplemental sales tax of one-half of 1 percent throughout the County for the purpose of financing the construction of justice facilities. The act provided for a countywide election held for the purpose of approving the tax ordinance by a simple majority vote. The act also provided that the Agency possesses no tax power other than the foregoing sales tax. At an election held in June 1988, the County's

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[23] *Los Angeles County Transportation Commission v. Richmond* (1982) 31 Cal.3d 197, 201.

[24] *Rider v. County of San Diego* (1991) 1 Cal.4th 1, 15. "Special taxes" are not fees. In response to Proposition 13, the Legislature enacted Government Code section 50076, which states:

> A special tax shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes.

[25] *Los Angeles County Transportation Commission v. Richmond*, *supra*, 31 Cal.3d 197.

[26] *Id.* at pages 205-206.

[27] *Rider*, *supra*, 1 Cal.4th 1.

voters approved the tax ordinance by a simple majority vote. Taxpayers then challenged the validity of the tax, asserting that it violated the supermajority vote requirements of article XIII A, section 4. The court recognized that the prior

> ….limitation of the term "special district" to those districts possessing property tax power is unworkable as applied to districts formed after the adoption of Proposition 13, because to our knowledge *no* such agencies possess that power. With limited exceptions, only *counties* are empowered to levy the 1 percent maximum property tax allowed by Proposition 13. [Citations omitted.] In other words, as a practical matter, the proposed extension of *Richmond* to all districts, whenever created, which lack property tax power would read section 4's reference to "special districts" out of existence as applied to districts formed after 1978.[28]

The court also acknowledged the increase in the number of revenue-generating governmental entities which lack the power to assess property taxes, noting there were now numerous "justice facility financing agencies" and authority given to counties to create special transportation districts, funding their programs exclusively through increased sales taxes. Since the court found that the tax was a "special tax" subject to the two-third vote requirement of article XIII A, section 4, the tax, upheld by only a majority of the electorate, was held invalid. The court directed the Agency to place the proceeds in an account to allow the voters to claim refunds.[29]

Thus, after *Rider,* only the following special districts were subject to the two-thirds vote requirement in article XIII A, section 4 when levying special taxes: (1) special districts that had the power to levy property taxes and (2) special districts that did not have the authority to levy a property tax, but were created after Proposition 13 and controlled by entities subject to Proposition 13 in order to raise funds to replace revenues lost by those entities because of Proposition 13. Tax restrictions on special taxes were not imposed on other types of special districts.

In 1996, after many local governments increasingly relied upon other revenue tools to finance local services, Proposition 218 was adopted by the voters to add articles XIII C and XIII D to the California Constitution.[30] Proposition 218 provides that all taxes imposed by any local

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[28] *Id.* at p. 11.

[29] *Ibid*., See also *Hoogasian Flowers, Inc. v. State Bd. of Equalization (1994)* 23 Cal.App.4th 1264, which applied the same rule to an agency formed by a school district as the taxing authority subject to article XIII A.

[30] See, *Apartment Association of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 839, which recognized that the ballot materials for Proposition 218 stated the following:

> There are now over 5,000 local districts which can impose fees and assessments without the consent of local voters. Special districts have increased assessments by over 2400% over 15 years."

government shall be deemed to be either a general tax (taxes imposed for general governmental purposes) or a special tax (tax imposed for specific purposes, including those placed into a general fund). "Special purpose districts or agencies," however, "shall have no power to levy general taxes" and may only levy special taxes. Proposition 218 then required *all* special taxes imposed by a local government to be approved by a two-thirds vote of the electorate.[31] Thus, after Proposition 218, all special districts that have authority to levy a special tax are subject to the two-thirds vote requirement.

Proposition 218 also imposed strict notice and hearing procedures on local government, including special districts, before the adoption of any new or increased fee or assessment. In addition, voter approval of a *majority* of the local electorate was required before a fee or assessment could take effect.[32] By definition in Proposition 218, fees and assessments are not "taxes."[33]

Proposition 26 was then adopted in 2010. Proposition 26 expressly defines "taxes," requiring approval by a two-thirds vote, to include some fees and charges that previously could be approved with a majority vote under Proposition 218. Proposition 26 prohibits local government from enacting, increasing, or extending any levy, charge, or exaction defined to be a "tax" without approval from two-thirds of the electorate. Proposition 26 amended article XIII C, section 1, to define a tax as follows:

> As used in this article, "tax' means any levy, charge, or exaction, of any kind imposed by a local government, except the following:
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

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[31] California Constitution, article XIII C, sections 1 and 2. Section 2 states that "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote."

[32] California Constitution, article XIII D.

[33] Article XIII D, section 2 defines "assessment" to mean

> … any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment," and "special assessment tax."

"Fee" or "charge" means "any levy other than an ad valorem tax, a special tax or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including user fees or charges for a property related service."

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

There will be litigation regarding the meaning of Proposition 26, and it is likely that some fees will actually be considered "taxes" under Proposition 26. However, to date, there are no published cases that have invalidated a fee, or determined that a "fee" imposed was actually a tax under a Proposition 26 analysis.[34] In the meantime, the analysis of Proposition 26 by the Legislative Analyst's Office (LAO) is helpful and can be used to determine what the voters

[34] To date, there are two published cases interpreting Proposition 26, both finding that the levy imposed was a fee and not a tax. *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982 dealt with regulatory fees associated with a city ordinance requiring annual inspections of residential rental property. The court held the regulatory fees were not an unconstitutional special tax enacted without voter consent. The fees were imposed to cover the cost of performing inspections, the fees did not exceed the approximate cost of the activity, and the fee schedule itself showed the basis for the apportionment and established that the fees were reasonably related to the payors' burden upon the inspection program.

Schmeer v. County of Los Angeles (2013) 213 Cal.App.4th 1310 addressed a county ordinance requiring retail establishments to charge customers for each carryout paper bag provided. The court held that the ordinance was not a "tax within the meaning of Proposition 26. The charge was not remitted to the county, but was payable to and retained by the store providing the bag, and the store was required to use the funds for specified purposes.

intended.[35] In its summary of Proposition 26, LAO explained the state of the law before Proposition 26 and described the differences between taxes, and fees and charges as follows:

> State and local governments impose a variety of taxes, fees, and charges on individuals and businesses. Taxes—such as income, sales, and property taxes—are typically used to pay for general public services such as education, prisons, health, and social services. Fees and charges, by comparison, typically pay for a particular service or program benefitting individuals or businesses. There are three broad categories of fees and charges:
>
> - User fees—such as state park entrance fees and garbage fees, where the user pays for the cost of a specific service or program.
> - Regulatory fees—such as fees on restaurants to pay for health inspections and fees on the purchase of beverage containers to support recycling programs. Regulatory fees pay for programs that place requirements on the activities of businesses or people to achieve particular public goals or help offset the public or environmental impact of certain activities.
> - Property charges—such as charges imposed on property developers to improve roads leading to new subdivisions and assessments that pay for improvements and services that benefit the property owner.
>
> State law has different approval requirements regarding taxes, fees, and property charges. As Figure 1 shows, state or local governments usually can create or increase a fee or charge with a majority vote of the governing body (the Legislature, city council, county board of supervisors, etcetera). In contrast, increasing tax revenues usually requires approval by two-thirds of each house of the state Legislature (for state proposals) or a vote of the people (for local proposals). [36]

Over the years, however, there was disagreement about the difference of regulatory fees and taxes, particularly when the money is raised to pay for a program of broad public benefit.[37]

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[35] Ballot summaries and the "Analysis by the Legislative Analyst" in the "Voter Information Guide" are recognized sources for determining the voters' intent." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 116.)

[36] Legislative Analyst's Office, Summary of Proposition 26, July 15, 2010.

[37] For example, in *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, the California Supreme Court determined that a regulatory fee on businesses that made products containing lead was a fee, and not a tax, even though fee revenue was used to screen children at risk for lead poisoning, follow up on their treatment, and identify sources of lead contamination responsible for the poisoning. The court's ruling in *Sinclair Paint* lead to Proposition 26.

Thus, under Proposition 26, LAO states that "taxes" now generally include those fees and charges that government imposes to address health, environmental, or other societal or economic concerns – charges that benefit the public broadly, as follows:

> ***Expands Definition.*** This measure broadens the definition of a state or local tax to include many payments currently considered to be fees or charges. As a result, the measure would have the effect of increasing the number of revenue proposals subject to the higher approval requirements summarized in Figure 1. Generally, the types of fees and charges that would become taxes under the measure are ones that government imposes to address health, environmental, or other societal or economic concerns. Figure 3 provides examples of some regulatory fees that could be considered taxes, in part or in whole, under the measure. This is because these fees pay for many services that benefit the public broadly, rather than providing services directly to the fee payer. The state currently uses these types of regulatory fees to pay for most of its environmental programs. [38]

However, LAO determined that the change in the definition of "taxes" does not affect most user fees, property development charges, and property assessments that affect individuals or businesses. In addition, most other fees or charges in existence at the time of the November 2, 2010 election would not be affected by Proposition 26 unless that fee is later increased or extended, or the fee is increased by state law between January 1, 2010 and November 2, 2010, and conflicts with Proposition 26.[39]

b) *Article XIII B imposes spending limitations on "proceeds of taxes."*

Article XIII B was adopted by the voters less than 18 months after the addition of article XIII A, and was billed as "the next logical step to Proposition 13." While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[40] The appropriations limit in article XIII B is accomplished by limiting the "total annual appropriations subject to limitation" so that "a government entity may not spend more in one year on a program funded with the proceeds of taxes than it did in the prior year."[41] No "appropriations subject to limitation" may be made in excess of the

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[38] Legislative Analyst's Office, Summary of Proposition 26, July 15, 2010.

[39] *Ibid.*

[40] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[41] *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 107.

appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.[42]

The spending limit applies only to appropriations made from "proceeds of taxes." "Proceeds of taxes" for local governments are defined in article XIII B, section 8(c) to include *all tax revenues*; revenues from user charges and fees *to the extent that those proceeds exceed* the costs reasonably borne by that entity in providing the regulation, product, or service; proceeds from the investment of tax revenues; and subventions from the state, other than pursuant to article XIII B, section 6. "All tax revenues" would include the revenues generated from the additional taxes identified in Proposition 26. However, the appropriations limit does not apply to an appropriation totally funded by "other than the proceeds of taxes."[43]

Thus, article XIII B does not place spending limits on the expenditure of revenue from fees or assessments.[44] "Proceeds of taxes" do not include "the proceeds from the sale of bonds, notes, warrants or other obligations required for the purpose of financing or refinancing the acquisition, construction, or completion of public improvements or projects or any rents, charges, assessments, or levies, other than tax levies, made pursuant to law, the proceeds of which are required for the payment of principal and interest, or to otherwise secure such obligations, and to pay the costs and expenses associated therewith."[45]

c) The reimbursement requirement of article XIII B, section 6, is triggered only when the costs in question are "proceeds of taxes" subject to the appropriations limit of article XIII B.

Section 6 was included in article XIII B in recognition that articles XIII A and XIII B of the Constitution severely restricted the taxing and spending powers of local governments.[46] Article XIII B, section 6 provides in relevant part "[w]henever the Legislature … mandates a new

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[42] Article XIII B, section 2.

[43] California Constitution, article XIII B, section 9(c), which states: "'Appropriations subject to limitation' for each entity of government do not include: (c) Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 ½ cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."

[44] *Placer v. Corin*, *supra*, 113 Cal.App.3d 443, 450.

[45] *Id*. at p. 453, fn. 8, quoting Government Code section 53715, which implemented article XIII B; see also, *County of Fresno*, *supra*, 53 Cal.3d 482, 487.

[46] *County of Fresno*, *supra*, 53 Cal.3d at p. 487; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service…."[47] The Supreme Court recognized the purpose of article XIII B, section 6 was to protect the *tax revenues* of local governments from state mandates that would require the expenditure of tax revenues.

> Specifically, [article XIII B, section 6] was designed to protect the tax revenues of local governments from state mandates that would require the expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse …local government for the costs of a state-mandated new program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention *only when the costs in question can be recovered solely from tax revenues*.[48]

Thus, article XIII B, section 6 does not require reimbursement for expenses that are recoverable from sources other than tax revenue. As stated earlier, these other sources of revenue include revenue received from service charges, fees, or assessments. Thus, if a local agency is funded solely from service charges, fees, or assessments – revenues which are excluded from the spending limit – they are not entitled to reimbursement under article XIII B, section 6 and are thus, not eligible claimants for mandates purposes. A local agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[49]

CSDA nevertheless argues that local agencies funded solely from service charges, fees, or assessments should be entitled to reimbursement in cases where the state-mandated program

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[47] In November 2004, the voters approved Proposition 1A, which amended article XIII B, section 6 by requiring the state to suspend state mandates in any year the Legislature does not fully fund the mandate; expands the definition of state mandate to include the transfer of responsibility of a program for which the state previously had full or partial responsibility; and requires the repayment of the amounts owed to local governments for state mandated costs incurred before fiscal year 2004-2005. Proposition 1A also protected local revenue (local property tax, sales tax, and VLF revenues) by prohibiting the Legislature from taking any action to reduce or decrease those revenues, or from shifting property taxes to schools except under limited circumstances. Proposition 1A, however, does not affect whether a special district is eligible to claim reimbursement for a state-mandated program.

[48] *County of Fresno*, *supra*, 53 Cal.3d at p. 487; See also, *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 280, and Government Code section 17556(d).

[49] *Placer v. Corin, supra,* 113 Cal.App.3d at p. 453; *City of El Monte, supra,* 83 Cal.App.4th 266, 281-282.

itself is not self-financing with fee authority. In this respect, CSDA attempts to distinguish this case from the facts presented in *County of Fresno v. State of California*, the case which first held that article XIII B, section 6 requires subvention only when the costs in question can be recovered solely from tax revenues. *County of Fresno* addressed a hazardous material abatement program for local agencies and the statutory scheme of the program provided fee authority to the local agencies to recover their costs.[50]

The courts, however, have rejected CSDA's argument. In *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates,* the court addressed a statute requiring redevelopment agencies to deposit 20 percent of its tax increment financing generated from project areas into a fund to improve the supply of affordable housing. The program at issue was not self-financing. The Commission and the trial court denied the claim, finding that the funds used by the agency were not "proceeds of taxes," were exempt from the spending limit in article XIII B and, thus, exempt from the reimbursement requirement of section 6. Like CSDA, the agency on appeal argued that the *County of Fresno* case should be read narrowly to cover only self-financing programs, and that the broad statements by the Supreme Court in *County of Fresno* defining "costs" was mere dicta. The agency also argued that the plain language of article XIII B, section 6 does not expressly discuss the source of funds used by the agency to pay the costs of a program. Thus, the agency urged the court to approve the reimbursement requirement. The court disagreed with both arguments, and held as follows:

> The correct approach is to read section 6 in light of its historical and textual context. The rules of constitutional interpretation require a strict construction of section 6, because constitutional limitations and restrictions on legislative powers are not to be extended to include matters not covered by the language used. [Citation omitted.]
>
> The goals of articles XIII A and XIII B are to protect California residents from excessive taxation and government spending. [Citation omitted.] A central purpose of section 6 is to prevent the state's transfer of the cost of government from itself to the local level. [Citation omitted.] The related goals of these enactments require us to read the term "costs" in section 6 in light of the enactment as a whole.[51]

Using this approach, the court determined that reimbursement is required only when the costs in question can be recovered solely from tax revenues. No duty of subvention is triggered where the local agency is not required to expend "proceeds of taxes":

> For all these reasons, we conclude the same policies which support exempting tax increment revenues [received by redevelopment agencies] from article XIII B

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[50] *County of Fresno, supra*, 53 Cal.3d at p. 485.

[51] *Redevelopment Agency of the City of San Marcos, supra*, 55 Cal.App.4th 976, 985.

> appropriations limits also support denying reimbursement under section 6. … Section 6 "requires subvention only when the costs in question can be recovered solely from tax revenues." [Citation omitted.] No duty of subvention is triggered where the local agency is not required to expend proceeds of taxes. … Therefore, in light of the above authorities, this use of tax increment financing is not a reimbursable "cost" under section 6. [52]

These cases remain good law, and no authorities have found that reimbursement under section 6 is required when the expenditure is made from fees or assessments. The new restrictions on fees established by Proposition 218 (which now require a majority vote of the electorate) do not change this result. Article XIII B, section 6 is designed to protect the limited tax revenue that is restricted by the spending limit of article XIII B. There is no spending limit for fees or assessments.

Accordingly, only those local agencies that are subject to the tax and spend limitations of the California Constitution and use their proceeds of taxes to pay the costs incurred to implement a state-mandated program are eligible to claim reimbursement under article XIII B, section 6.

2. Some special districts are subject to the tax and spend limitations of the Constitution and, thus, are generally eligible to claim reimbursement under article XIII B, section 6.

Special districts come in many forms, but their authority is derived by statute; either under a principal act or a special act. A principal act is a generic statute which applies to all special districts of that type. For example, the Community Services District Law governs all 325 community services districts. There are about 50 principal act statutes which local voters can use to create and govern special districts.[53] On the other hand, districts which are regional in nature, have unusual governing board requirements, provide unique services, or need special financing, result in special act districts. Examples of districts formed under special acts include the Embarcadero Municipal Improvement District (Santa Barbara County), the Humboldt Bay Harbor, Recreation, and Conservation District, and the Shasta-Tehama County Watermaster District. There are about 125 special act districts.[54] All principal acts are codified state laws, whereas most special acts are not codified. For a list of special acts, see Appendix A in the State Controller's Special Districts Annual Report.[55]

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[52] *Id.* at p. 987.

[53] Senate Local Government Committee, *What's So Special About Special Districts?* (Fourth Edition), October 2010, p. 5. (http://www.rsrpd.org/admin/Whatsso.pdf)

[54] *Ibid.*

[55] State Controller, *Special Districts Annual Report*, December 13, 2011, Appendix A. (www.sco.ca.gov/Files-ARD-Local/LocRep/2010-11_Special_District.pdf)

Just over a quarter of the special districts are enterprise districts. Enterprise districts deliver services that are run like business enterprises and have the statutory authority to charge their customers fees for services. For example, a hospital district generally charges room fees paid by patients, not the district's other residents. Generally, enterprise districts are not subject to the tax and spend restrictions of article XIII of the California Constitution and so are not eligible to receive mandate reimbursement. Nearly all of the water, wastewater, and hospital districts are enterprise districts that charge rates or fees for their services and do not have the statutory authority to receive any "proceeds of taxes."[56] Since enterprise districts are usually not funded by proceeds of taxes, they are generally exempt from article XIII B's spending limit and, thus, are not entitled to reimbursement under section 6. However, some enterprise districts operate with a mix of tax and fee revenues; Alpaugh Irrigation District, Canebrake County Water District, Irvine Ranch Water District, and San Bernardino Valley Municipal Water District, for example.[57] These districts are subject to the tax and spend limitations of articles XIII A and XIII B, and are thus generally eligible claimants for mandates purposes. However, as explained in section B of this analysis, if the expenses for the mandated program are funded totally from fee revenue, then the fee authority provides a complete offset and no reimbursement is required, even for these otherwise eligible special districts.

Conversely, non-enterprise districts provide services which have been deemed by some to not easily lend themselves to fees.[58] It has been argued, for example, that fire protection services and mosquito abatement programs benefit the entire community, not just individual residents.[59] Non-enterprise districts have the statutory authority to levy taxes, and rely overwhelmingly on property tax revenues and parcel taxes to pay their operational expenses. Non-enterprise districts are subject to the tax and spend limitations of the California Constitution and are generally eligible claimants for reimbursement of state-mandated programs. Services commonly provided by non-enterprise districts include cemetery, fire protection, library, and police services.

In addition to the statutes that provide authority to each special district, the SCO issues an annual report on special districts that identifies those special districts that collect tax revenue and are subject to the spending limitations of article XIII B. On December 13, 2011, SCO issued its

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[56] See Senate Local Government, *What's So Special About Special Districts?* (Fourth Edition), October 2010, p. 6. (http://www.rsrpd.org/admin/Whatsso.pdf)

[57] State Controller, *Special Districts Annual Report*, December 13, 2011. (www.sco.ca.gov/Files-ARD-Local/LocRep/2010-11_Special_District.pdf); Little Hoover Commission, *Special Districts: Relics of the Past or Resources for the Future*," p. 70. (http://www.lhc.ca.gov/studies/155/report155.pdf)

[58] See Senate Local Government, *What's So Special About Special Districts?* (Fourth Edition), October 2010, p. 6. (http://www.rsrpd.org/admin/Whatsso.pdf)

[59] *Ibid.*

most recent *Special Districts Annual Report* for fiscal year 2009-2010. The report shows that approximately 610, or roughly 17 percent of all special districts, are subject to the appropriations limit of article XIII B, thus making them eligible claimants for mandates purposes. Special districts have a statutory duty to submit annual reports to the SCO pursuant to Government Code section 12463.[60] The report is required to contain, among other things:

> (a) The aggregate amount of taxes levied and assessed against the taxable property in the local agency, which became due and payable during the next preceding fiscal year.
>
> (b) The aggregate amount of taxes levied and assessed against this property collected by or for the local agency during the fiscal year. …
>
> (e) The assessed valuation of all of the taxable property in the local agency as set forth on the assessment roll of the local agency equalized for the fiscal year, or, if the officers of the county in which the city or district is situated have collected for the city or district the general taxes levied by the city or district for the fiscal year, the assessed valuation of all taxable property.[61]

If an officer of the district willfully and knowingly rendered a false report to the Controller, that officer would be guilty of a misdemeanor.[62] The report submitted by the special districts contains the data upon which the SCO bases its *Special Districts Annual Report*.

The SCO can use its report to determine if a special district is eligible to claim reimbursement. It is noteworthy though, that Government Code section 12463 has not been updated to include information on other local taxes that may be imposed, which are also subject to the spending limitations of article XIII B. Therefore, even if the *Special Districts Annual Report* does not identify a particular special district as subject to the spending limitation, the SCO can look to other sources. If the Legislature has authorized the special district to levy a tax, or a court determines that a fee levied by the district was actually a "tax" and the district is not required to return that tax to the taxpayers, but instead uses it for district purposes, then the district is eligible to claim reimbursement.

Accordingly, Section II of the parameters and guidelines, addressing the eligible claimants for this program, provides as follows:

> Any city; county; city and county; special district subject to the taxing restrictions of articles XIII A and XIII C, and the spending limits of article XIII B, of the California Constitution, whose costs for this program are paid from proceeds of taxes; or any "school district" as defined in Government Code section 17519

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[60] Government Code section 12463.

[61] Government Code section 53892.

[62] Government Code section 53894.

which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

B. Period of Reimbursement (Section III. of Proposed Parameters and Guidelines)

Government Code section 17557(e) states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. LA County filed the first test claim on October 15, 2002, establishing eligibility for reimbursement for the 2001-2002 fiscal year. Therefore, costs incurred on or after July 1, 2001 are reimbursable under this consolidated test claim, for statutes in effect before July 1, 2001, or later, as specified, for statutes effective after July 1, 2001. The language of Section III. Period of Reimbursement, therefore reflects a reimbursement period beginning July 1, 2001, or later for specified activities added by subsequent statutes.

C. Reimbursable Activities (Section IV. of Proposed Parameters and Guidelines)

Government Code section 17557 provides that "[t]he proposed parameters and guidelines may include proposed reimbursable activities that are reasonably necessary for the performance of the state-mandated program."[63] The Commission's regulations provide that parameters and guidelines shall include "a description of the most reasonable methods of complying with the mandate." "'The most reasonable methods of complying with the mandate' are those methods not specified in statute or executive order that are necessary to carry out the mandated program."[64]

Government Code section 17559 provides that a claimant or the state may petition to set aside a Commission decision not supported by substantial evidence.[65] Substantial evidence has been defined in two ways: first, as evidence of ponderable legal significance...reasonable in nature, credible, and of solid value;[66] and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[67] The California Supreme Court has stated that "[o]bviously the word [substantial] cannot be deemed synonymous with 'any' evidence."[68] Moreover, substantial evidence is not submitted by a party; it is a standard of review, which

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[63] Government Code section 17557 (as amended by Stats. 2010, ch. 719 § 32 (SB 856) effective October 19, 2010; Stats. 2011, ch. 144 (SB 112)).

[64] Code of Regulations, Title 2, section 1183.1(a)(4) (Register 96, No. 30; Register 2005, No. 36).

[65] Government Code section 17559(b) (Stats. 1984, ch. 1469, § 1; Stats. 1999, ch. 643 (AB 1679)).

[66] *County of Mariposa v. Yosemite West Associates* (Cal. Ct. App. 5th Dist. 1998) 202 Cal.App.3d 791, at p. 805.

[67] *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.

[68] *People v. Bassett* (1968) 69 Cal.2d 122, at p. 139.

requires a reviewing court to uphold the determinations of a lower court, or in this context, the Commission, if they are supported by substantial evidence. A court will not reweigh the evidence of a lower court, or of an agency exercising its adjudicative functions; rather a court is "obliged to consider the evidence in the light most favorable to the [agency], giving to it the benefit of every reasonable inference and resolving all conflicts in its favor."[69]

The Commission's regulations provide that hearings need not be conducted according to strict and technical rules of evidence, but that evidence must be "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs," and that hearsay evidence will usually not be sufficient to support a finding unless admissible over objection in a civil action. The regulations also provide for admission of oral or written testimony, the introduction of exhibits, and taking official notice "in the manner and of such information as is described in Government Code section 11515."[70] Therefore, reasonably necessary activities, in order to be adopted by the Commission, must be supported by substantial evidence, and that evidence must include something other than hearsay evidence.

LA County has proposed reimbursement for a number of alleged reasonably necessary activities, in its Revised Proposed Parameters and Guidelines, attached as Exhibit C. These are analyzed below, incorporating SCO and DOF comments where appropriate. The claimant has ordered and categorized the proposed reasonably necessary activities under headings that approximate, but overstate, the language of the reimbursable activities expressly approved in the test claim statement of decision. The following analysis will determine that some of the activities that LA County proposes are reasonably necessary to implement the mandated activities approved in the test claim statement of decision, and others are beyond the scope of what was approved in the test claim statement of decision, or are not new.

1. Evidence Filed by LA County in Support of its Request

The draft staff analysis pointed out that the claimants had submitted scant evidence that the proposed activities are necessary to implement the mandate: four declarations were submitted, each of which referred to an "Attachment A," prepared by LA County's representative on the test claim; but none of those four declarations directly endorsed the contents of "Attachment A," or stated directly why or how the activities referenced therein are necessary to comply with the mandate. Instead, the declarants stated that they had *reviewed* the attachment, and that the attachment "includes and summarizes" the department's statutory and reasonably necessary activities for the parameters and guidelines.[71]

LA County responded to the draft analysis by submitting new declarations, and a new Attachment A. LA County asserted that each of the new declarations "adds substantial evidence

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[69] *Martin v. State Personnel Board* (Cal. Ct. App. 3d Dist. 1972) 26 Cal.App.3d 573, at p. 577.

[70] Code of Regulations, title 2, section 1187.5.

[71] Exhibit C, LA County's Proposed Parameters and Guidelines, Exhibits 1-4.

to the record supporting a Commission decision to adopt CPRA Ps&Gs which include the County's revisions."[72] As discussed above, "substantial evidence" is not a factor or element submitted by a party; it is the standard of review that either supports or fails to support the Commission's decision. And in no event is "substantial evidence" that which compels a particular result, as LA County's assertion suggests: the presence or absence of substantial evidence is considered in the light most favorable to the decision made; in this context, the decision whether to accept LA County's proposed revisions to the parameters and guidelines.

The prior declaration of Diane Reagan stated that "I have reviewed Attachment A which *includes and summarizes* County Counsel's statutory and reasonably necessary activities for inclusion in Los Angeles County's proposed parameters and guidelines as reimbursable service components." Ms. Reagan did not state on her own information and belief that the activities in Attachment A are necessary to implement the mandate, nor indicate any cognizance of what was mandated under prior law.[73] The new declaration submitted by the claimant states that Ms. Reagan has reviewed the draft staff analysis, and includes new Attachment A, proposing changes, including re-inserting one-time training of employees charged with implementing the CPRA activities. Reimbursement for annual training was previously requested, and staff recommended denial. Ms. Reagan's declaration states as follows:

> I declare on information and belief that the changes recommended to Commission staff's "reimbursable activities" are required because the provision of new CPRA services, including those to assist CPRA requestors in making a focused and effective search, must be tracked, processed, and provided to the requestor in a timely and cost-efficient manner.[74]

The same result obtains in the declarations of Rick Brouwer and Shaun Mathers, both of whom previously acknowledged having read Attachment A, but neither of whom expressly endorsed its content.[75] New declarations submitted by Mr. Brouwer and Mr. Mathers suggest a greater degree of personal knowledge than was asserted before, and assert more emphatically an understanding of what activities are necessary to comply with the mandate.

However, none of the three new declarations provides any analysis or reasoning to explain why training is necessary to implement the higher level of service approved in the test claim statement of decision, nor why the requirement to assist requestors in making an effective public records request necessarily implies that such requests and searches must be tracked, processed, and provided to the requestor in a timely and efficient manner. As discussed at length below, the amendments to CPRA enacted by the test claim statutes were intended to remedy inadequacies in

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[72] Exhibit H, LA County's Comments on Draft Staff Analysis, Exhibit 1, at pp. 2-4.

[73] Exhibit C, LA County's Proposed Parameters and Guidelines, Exhibit 1.

[74] Exhibit H, LA County's Comments on Draft Staff Analysis, Exhibit 1, at p. 2.

[75] Exhibit C, LA County's Proposed Parameters and Guidelines, Exhibits 3-4.

the provision of public records act services originally enacted in 1968. Even if tracking and processing of requests is necessary, there is no explanation why tracking and processing would not have been necessary under prior law. One-time training to implement the incremental changes is discussed below, but such training must be strictly limited to the increased level of service.

Finally, whatever the change in form and emphasis attempted by the amended declarations, the finding of reasonably necessary activities is still a finding of law, and declarations from claimants may inform that decision, but are not controlling, even in the absence of competing submissions. The self-serving statement that "substantial evidence has been provided by three County declarants supporting a Commission decision to adopt the [parameters and guidelines] as revised by the County" is not persuasive.[76] If it cannot be said as a matter of law that an activity is either reasonably necessary to implement the mandate, or within the scope of the mandate, that activity cannot be approved. More importantly, "substantial evidence" is a legal standard, which is defined by the contours of a court's review of the Commission's decision; substantial evidence is that which supports a legal finding, not a particular fact or item of evidence proferred by a party, or a quantum of evidence that necessitates or compels a particular result. Thus, "substantial evidence" is developed on the basis of the whole record.

The Commission finds that former Attachment A does not provide sufficient evidence of reasonably necessary activities because it lacks clear explanation why the proposed activities are *necessary* to implement the mandated increased levels of service. Rather, these declarations support the assertion that these are the practices of the respective agencies, which is not directly relevant to whether claimants have a legal duty to perform these activities, or whether they are reasonably necessary to implement the mandate.

The Commission finds also that the three additional declarations submitted do little to establish, as a matter of law, that the asserted activities are reasonably necessary to carry out the mandate. None of the three declarations illustrate how the practices of the county and its component agencies are reasonably necessary to implement the reimbursable activities approved by the Commission.

Additionally, the claimant cites to the declaration of Commander Castro, submitted in the County's 2002 test claim filing, in which the declarant states that it is his information and belief that "the new public record duties imposed on the County, *as detailed on the attached list*, are reasonably necessary in complying with the test claim legislation."[77] The attached list to which Commander Castro's declaration refers, without explanation or context, states that claimants should be reimbursed for:

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[76] Exhibit H, LA County's Comments on Draft Staff Analysis, at p. 4.

[77] Exhibit H, LA County's Comments on Draft Staff Analysis, at p. 4 [emphasis added].

One-time Activities

1. Develop policies, protocols.
2. Conduct training on implementing test claim legislation.
3. Purchase computers to monitor and document public record service actions.
4. Purchase or develop data base software for tracking and processing Public Record Act requests.
5. Develop a Web Site for public record disclosure requests.

Continuing Activities

I. Staff time for:
   A. Station or branch personnel.
      1. Assistance in defining telephone, walk-in or written requests.
      2. Writing and logging request.
      3. Station-level research.
      4. If availability known, notify requestor.
      5. Indicate date/time available.
      6. If availability not known, forward request to central unit.
   B. Central Unit Personnel
      1. Assistance in defining telephone, walk-in or written requests.
      2. Writing and logging request.
      3. Central Unit research.
      4. If availability known, notify requestor.
      5. Indicate date/time available.
      6. If availability not known:
         a. consult with specialized personnel.
         b. document findings.
         c. notify requestor of results.
   C. County Counsel-legal services to implement and comply with the test claim legislation, including Govt Code 6253.1.[78]

LA County implies that this list should simply be accepted and approved by the Commission, but the submission is insufficiently detailed, and does not demonstrate any consideration of prior law requirements or specifically link the proposed activities to any requirement in law. Research, in particular, whether taking place at the "station-level" or the "Central Unit," is not meaningfully distinguished from the requirements to make a determination whether records requested are exempt from disclosure, as was required under prior law. More importantly, Commander Castro's declaration states only an opinion regarding the means by which his department implements CPRA, and that "the County's new State mandated duties and resulting costs in

[78] Exhibit H, LA County's Comments on Draft Staff Analysis, at pp. 4-5; Claimant's Exhibit 5.

implementing the test claim legislation are, in my opinion, reimbursable 'costs mandated by the State,' as defined in Government Code section 17514."[79]

The Commission finds that LA County's submissions are not sufficient to support a finding by the Commission that the county's proposed reasonably necessary activities are reasonably necessary as a matter of law. However, to the extent that the activities described in Attachment A, and in LA County's proposed parameters and guidelines, and the newly-submitted exhibits here, are clarifying of the mandated activities approved in the test claim statement of decision, or reasonably define the scope of the approved activities, the suggested activities will be included in the proposed parameters and guidelines. The following analysis will address each proposed activity in turn, maintaining consistency with the test claim statement of decision and distinguishing activities which were required under prior law and are therefore not reimbursable.

2. <u>One-time Activities</u>

a. <u>Developing Policies and Procedures to Implement the Mandate</u>

LA County has proposed reimbursement for the following:

> To develop policies, protocols, manuals and procedures for implementing the following reimbursable California Public Record Act (CPRA) provisions:
>
> a. Determining whether electronic records or parts thereof are not subject to statutory and case law exemptions in order to determine if such records are disclosable. (Gov. Code,§ 6253.9, subd. (a)(2) (Stats. 2000, ch. 982)).
>
> b. Within 10 days, determining whether records or parts thereof are not subject to statutory and case law exemptions in order to determine if such records are disclosable; and, developing or reviewing language to notify the person making the request of the determination and the reasons for the determination. ((Gov. Code, § 6253, subd. (c) (Stats. 2001, ch. 982)).
>
> c. When an extension of time is required in complying with the 10 day requirement, developing or reviewing language providing a legal basis for the extension. (Gov. Code,§ 6253, subd. (c) (Stats. 2001, ch. 982)).
>
> d. Identifying litigation, claims, and related records which may be disclosable and may be responsive to the request or to the purpose of the request, if stated; and provide suggestions for overcoming any practical basis for denying access to the records or information sought. (Gov. Code,§ 6253.1, subds. (a) and (d) (Stats. 2001, ch. 355)).
>
> e. If a request is denied, in whole or in part, preparing or reviewing a written response to a written request for inspection or copies of public records that

[79] Exhibit H, LA County's Exhibit 5

includes a determination that the request is denied. (Gov. Code,§ 6255, subd. (b) (Stats. 2000, ch. 982).[80]

The Commission has routinely approved reimbursement for the development of policies and procedures to address the implementation of mandated new programs or increased levels of service determined to be reimbursable. And it is easily imagined that changes to CPRA would necessitate an update of policies and procedures to implement the mandate. However, as will appear below to be a consistently recurring theme, what was approved in the test claim statement of decision was only an *incremental* increase in service: to provide records in *electronic form*; to provide a time frame for response, and to ensure that the response, when denying the request, is in writing; and to place the burden on agencies to assist the public in making effective public records requests.[81] As discussed in the test claim statement of decision, the duty of government agencies (both state and local) to make records available for inspection reaches back to the 1968 statute, and is therefore not new.[82] The test claim statement of decision also notes that public records, per the interpretation of the courts, included "every conceivable kind of record that is involved in the governmental process," and the spirit of the CPRA was "to make disclosable *information* open to the public, not simply the documents prepared, owned, used, or retained by a public agency."[83] Moreover, the Commission found that, "since 1968 public agencies were required to provide copies or exact copies of public records upon a request of identifiable public records."[84] The test claim statement of decision also found that the determination whether and to what extent a record is disclosable was not a new activity subject to reimbursement.

The Commission concluded in the test claim statement of decision that the purpose of amending the CPRA to provide for copies of electronic records was to "substantially increase the availability of public records to the public and to reduce the cost and inconvenience to the public associated with large volumes of paper records," and that therefore "the requirement to provide an electronic copy of a public record kept in an electronic format constitutes a new program or higher level of service subject to article XIII B, section 6 of the California Constitution."[85]

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[80] Exhibit C, LA County's Proposed Parameters and Guidelines, at p. 15.

[81] See Exhibit A, Test Claim Statement of Decision, at pp. 14-16.

[82] *Id*, at p. 12.

[83] *Id*, at p. 13 [citing *Nor. Cal. Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, p. 123-124].

[84] Id. at p.14. citing former Government Code sections 6256 and 6257as adopted by Statutes 1968, chapter 1473.

[85] Exhibit A, Test Claim Statement of Decision, at pp. 14-15.

However, because the requirement to provide copies of disclosable public records upon request was an element of prior law,[86] the claimants cannot receive reimbursement for *making a determination whether a record is disclosable*, or for *providing records* upon request; those activities are not new and were required under prior law. Only the incremental increase in service of providing copies of records *in an electronic format*, and of providing written notice of the determination *within 10 days* whether a record is disclosable, can be reimbursed. And in this context, only the development or updating of policies and procedures to perform these incrementally increased levels of service are reimbursable.

Therefore item a., above, developing a policy or procedure for "Determining whether electronic records or parts thereof are not subject to statutory and case law exemptions in order to determine if such records are disclosable" is denied. The underlying requirement to determine whether records or parts thereof are disclosable is not new, and there is no meaningful difference between making that determination for physical records and making that determination for electronic records. Similarly, item b., above, developing policies or procedures for "Within 10 days, determining whether records or parts thereof are not subject to statutory and case law exemptions in order to determine if such records are disclosable; and, developing or reviewing language to notify the person making the request of the determination and the reasons for the determination," is only reimbursable for updating the existing policy or procedure to provide for the new deadline to provide notice of the determination within 10 days, and to provide for a written notice of the disclosure determination, as these activities are new.

LA County's proposed parameters and guidelines do not include any information about the activity of developing policies and procedures for implementing the activities that were approved only for schools and school districts. If policies and procedures are to be reimbursed as a one-time activity for counties, school districts should receive the same treatment since the mandate in this regard is the same for counties and school districts, and therefore receive reimbursement for developing policies and procedures to implement those new mandated activities also.

The Commission finds that the development of policies, protocols, manuals and procedures *to implement the newly mandated activities* identified in Section IV. B. is approved for all claimants, for *one-time reimbursement*, but not for policies and procedures for "[d]etermining whether electronic records or parts thereof are not subject to statutory and case law exemptions in order to determine if such records are disclosable," and not for policies and procedures for determining whether a record is disclosable, but only for the higher level of service of providing notice of the determination within 10 days. Section IV.A. of the parameters and guidelines authorizes reimbursement for this one-time activity as follows:

> *Developing policies, protocols, manuals, and procedures, to implement only the activities identified in section IV.B. of these parameters and guidelines. The*

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[86] Former Government Code sections 6256 and 6257 (Stats. 1968, ch. 1473).

activities in section IV.B. represent the incremental higher level of service approved by the Commission.

This activity does not include, and reimbursement is not required for, developing policies and procedures to implement California Public Records Act requirements not specifically included in these parameters and guidelines. This activity specifically does not include making a determination whether a record is disclosable, or providing copies of disclosable records.

b. One-Time Training

In the draft analysis, reimbursement for Annual Training was recommended for denial. In comments on the draft staff analysis, LA County answered with a request for reimbursement of one-time training, excluding training on existing requirements of CPRA and provided an explanation of why this was reasonably necessary to implement the mandated activities. The one-time activity proposed for reimbursement by the claimant is as follows:

One-time training of each employee assigned the duties of implementing the reimbursable activities identified in section "IV. REIMBURSABLE ACTIVITIES" of these parameters and guidelines. This training activity does not include and reimbursement is not required for implementing all of the California Public Records Act or instruction regarding making a determination whether a record is disclosable.[87]

As discussed above, the test claim statutes impose only an incremental higher level of service, but that incremental increase includes providing copies of public records in an electronic format, as specified; providing a disclosure determination within 10 days, or explaining why a disclosure determination cannot be provided within that time; providing assistance to the public in making effective public records requests; and providing a written response when a record is determined not to be disclosable. To the extent that these incremental increases in service may require training, one-time training may be approved for each employee whose duties include responding to CPRA requests consistently with the test claim statute.

The Commission finds that one-time training of employees is reasonably necessary to comply with the mandated activities. The parameters and guidelines include the one-time activity of training employees, as follows:

One-time training of each employee assigned the duties of implementing the reimbursable activities identified in section IV.B. of these parameters and guidelines.

This activity does not include, and reimbursement is not required for, instruction on California Public Records Act requirements not specifically included in these

[87] Exhibit H, LA County's Comments on Draft Staff Analysis, at p. 7.

parameters and guidelines. This activity specifically does not include instruction on making a determination whether a record is disclosable, or providing copies of disclosable records.

3. On-Going Activity: Acquiring or Developing Technology and Equipment to Track and Process Public Records Requests

LA County has proposed reimbursement for the following activities relating to acquiring or developing technology and equipment:

> *To develop data base software or manual system(s) for tracking and processing public records request actions to implement reimbursable test claim provisions (as stated above).*
>
> *To purchase or lease computers to monitor and document public records request actions to implement reimbursable test claim provisions (as stated above). (Use for other purposes is not reimbursable).*
>
> *To develop or update web site(s) for public record act requests to implement reimbursable test claim provisions (as stated above).*[88]

These activities are not established as being reasonably necessary on the basis of the record. As discussed above, none of the four declarations submitted directly supports a finding that the activities proposed are reasonably necessary to comply with the mandated activities. Moreover, none of the four declarations refers to any technological difficulties that could be ameliorated by tracking software or documentation. Neither do any of the four declarants specifically cite the tracking of requests as a necessary activity. Finally, none of the other exhibits that LA County has submitted speaks to the necessity of technological methods to "track and process" or "monitor and document" public records requests. The need to "track and process" public record requests is not new, in any event, since the CPRA has been law since 1968 and public record requests have required processing for nearly 35 years.

DOF argues, in its comments on the claimants' proposed parameters and guidelines, that many of the activities, "including, but not limited to, developing data base software for tracking and processing public records requests appear to be outside the scope of the [statement of decision] as these were likely already required and utilized before this mandate and for purposes other than complying with this mandate."[89] LA County does not directly answer that argument in its rebuttal comments, instead arguing that the CPRA amendments giving rise to the test claim were intended to prevent public agencies from ignoring public records requests. LA County argues that "tracking and processing public records act requests to ensure timely compliance of CPRA

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[88] Exhibit C, LA County's Proposed Parameters and Guidelines, at p. 6.

[89] Exhibit E, DOF Comments on Proposed Parameters and Guidelines

provisions" is necessary, and should be reimbursable, because without "such systems, the status of requests would be left to memory – easily ignored as in the past."[90]

Even accepting LA County's argument that a "system" for tracking and processing of records is essential to comply with the mandate, nothing submitted in the record amounts to substantial evidence that acquiring or developing a data base or purchasing or leasing computers is necessary to comply with the mandated activities approved by the Commission in the test claim statement of decision. Nor does LA County answer DOF's charge that such methods "were likely already required and utilized before this mandate and for purposes other than complying with this mandate." Furthermore, the claimants ignore the fact that whatever difficulties in tracking and responding to public records requests might have obtained prior to the enactment of the test claim statutes, the fundamental and existing requirement to make records available and provide copies upon request has not changed; a lost or ignored records request was no more permitted under prior law than it can be permitted now.[91] The state is not required to provide reimbursement to local government for increased costs of complying with an existing requirement merely because local government did not comply prior law. Compliance with existing law is presumed.

As discussed above, the changes implicated here are incremental. The requirement to respond to a public records request is not new. The bill analysis attached to LA County's rebuttal comments describes an audit in which it was found that local agencies rejected or ignored public records requests 77% of the time.[92] LA County cites this as evidence of the need for tracking software and other technology, but it is also evidence that the test claim statute was meant to remedy an inadequacy; that the Legislature was not satisfied that local governments were fully and properly implementing the CPRA, and the Legislature chose to make the requirements more stringent in order to encourage more consistent compliance. To the extent that local governments must implement processes to track records requests to avoid losing them or ignoring them, those requirements are not new; the prior law was not being implemented properly and completely. Moreover, to the extent that existing equipment is inadequate to implement the mandate, replacing such outmoded equipment is not reimbursable because the underlying mandate to receive and respond to public records requests is not new.

LA County's comments on the draft staff analysis continue to assert the need for computers and other technology to implement the mandate. The county requests reimbursement for "the pro rata costs of purchasing and installing software systems permitting key word searches for those

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[90] Exhibit F, LA County's Rebuttal Comments, at p. 4.

[91] See Government Code sections 6256 and 6257 [public agencies (both state and local government) have been required to provide "copies or exact copies of public records upon a request that reasonably describes an identifiable record" since the 1968 enactment of CPRA].

[92] Exhibit F, LA County's Rebuttal Comments, at p. 4.

requests requiring assistance to the requestor in making a focused and effective search." But LA County still fails to provide any explanation why new technology or equipment is needed, or why new technology or equipment should be reimbursable under this mandate, where, as discussed above, this mandate was meant, at least in part, to be remedial; to correct the failings of local government under prior law to properly receive and respond to public records act requests in a timely manner.

Therefore, the Commission finds that the request for reimbursement for acquiring or developing new technology and equipment is denied, because there is no evidence that these activities are reasonably necessary to implement the limited approved activities in this claim.

4. <u>On-Going Activity: Providing a Copy of a Disclosable Electronic Record</u>

The test claim statement of decision approved reimbursement for *providing a copy of an electronic record* as follows:

> *If requested by a person making a public records request for a public record kept in an electronic format, provide a copy of a disclosable electronic record in the electronic format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies.*[93]

LA County has proposed reimbursement for the following, citing the same code section as authority, as was relied upon in the test claim statement of decision:

> *Determining whether electronic records or parts thereof are not subject to statutory and case law exemptions in order to determine if such records are disclosable. (Gov. Code, § 6253.9, subd. (a)(2) (Stats. 2000, ch. 982)).*
>
> a. *Receiving, logging and tracking oral (in-person or telephone), written, e-mail and fax requests for electronic public records.*
>
> b. *Determining whether the electronic public records request falls within the agency's jurisdiction.*
>
> c. *Determining whether the request reasonably describes any identifiable electronic records(s) and conferring with the requestor if clarification is needed.*
>
> d. *Meeting and/or conferring with specialized systems and/or other local agency staff to identify access to pertinent electronic records. If external public entities have oversight and/or ownership of the requested electronic data or information, meeting and/or conferring with those entities to provide the requested electronic data or information.*

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[93] Exhibit A, Test Claim Statement of Decision, at p. 27 [citing Government Code section 6253.9, as amended by Statutes 2000, chapter 982].

e. *Conducting legal reviews, research and analysis of the requested electronic record(s) to determine if the requested electronic record(s) or parts thereof are subject to statutory and case law disclaimers, i.e. are disclosable. Reimbursement includes, but is not limited to, legal staff and/or legal contract services costs and the associated costs of legal data base services.*

f. *Processing the requested electronic record(s) or parts thereof that are disclosable.*

g. *Reviewing the electronic record(s) to be sent to the requestor to ensure compliance with statutory and case law exemptions.*

h. *Preparing, and obtaining supervisory approval and signature of, correspondence accompanying the requested electronic record(s).*

i. *Copying or saving electronic record(s) and accompanying correspondence.*

j. *Sending or transmitting the electronic records to the requestor.*

k. *Tracking the shipment of requested CPRA electronic records.*[94]

LA County's proposed reimbursable activities under this heading suggest that "provid[ing] a copy of a disclosable electronic record," as was approved in the test claim statement of decision, necessarily implies making a determination as to whether the record is disclosable. As the test claim statement of decision explored at length, the making of a determination whether a record or part thereof is disclosable is not new. The test claim statement of decision makes clear that local government claimants would have been required under prior law to determine whether a record is disclosable under statutory and case law exemptions, in order to make a record "open to inspection by every person at all times during the office hours of the local agency and [school district]."[95] The activity of making that determination is no different whether the determination applies to electronic records or physical records. Therefore the activities proposed above are not new. Furthermore, the Commission found in the test claim statement of decision that the process of determining that a portion of a record is exempt from disclosure and redacting the document was not new. The Commission found that "[p]rior to the 1981 amendment courts already held that the CPRA requires segregation of exempt materials from nonexempt materials contained in a single document and to make the nonexempt materials open for inspection and copying."[96]

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[94] Exhibit C, LA County's Proposed Parameters and Guidelines, at pp. 6-7.

[95] Exhibit A, Test Claim Statement of Decision, at p. 12, [citing former Government Code section 6253 (Stats. 1968, ch. 1473)].

[96] Exhibit A, Test Claim Statement of Decision, at p. 13[citing former Government Code section 6257 and *Nor Cal. Police Practices* (1979) 90 Cal.App.3d 116, p. 123-124].

The activity that was approved, read in context of the test claim analysis, includes only the marginal increase in service to *provide a copy* of a disclosable *electronic record*, *in an electronic format requested*, as specified; the activity does not include the determination of whether a record is disclosable, and does not include the provision of a copy of a public record. Any of the activities described above that relate to the making of a determination *whether a record is disclosable* are denied, because that determination was required under prior law, in order to make records available for inspection and to provide copies upon request. In fact, even the 1968 statute required disclosure of electronic data: "[c]omputer data shall be provided in a form determined by the agency."[97] The inclusion of "computer data," though vague, expresses the Legislature's intent that electronic records should receive differential treatment only insofar as the form in which they would be provided, and further reinforces the view, as found in the test claim statement of decision, that determining whether records are disclosable is not new, and therefore not reimbursable, even where the records are in electronic form. Additionally, any of the above activities related to receiving, logging, tracking of requests, or copying, saving, sending, or transmitting the records requested are not new. These activities are either within the scope of providing access to and copies of physical records under the 1968 statute, or they are not within the scope of the amended statute.

In comments submitted in response to the draft staff analysis, Cost Recovery Systems, Inc. (CRS) objects to this view, and argues that the approved activity in the test claim statement of decision includes sending the records, as part of the new program or higher level of service approved. CRS claims that the above analysis contradicts the test claim statement of decision. But CRS' view can only be supported if the phrase "provide a copy of a disclosable electronic record" is read in isolation, and the remainder of the same sentence, "*in the electronic format requested* if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies," is ignored, and the analysis of prior law in the test claim statement of decision is forgotten. The finding made in the test claim statement of decision was that providing a copy of a disclosable electronic record in the format requested, as specified, was a new activity. The higher level of service is imposed by expressly requiring disclosure of public records in electronic format, in addition to the physical format, which was required under prior law and so is not reimbursable. The test claim statement of decision analyzed at length what was required under prior law, and in fact makes very plain that the provision of copies or exact copies of identifiable disclosable public records has been required since 1968:

> Former Government Code sections 6256 and 6257 provided:
>
> 6256. Any person may receive a copy of any identifiable public record or shall be provided with a copy of all information contained therein. Computer data shall be provided in a form determined by the agency.

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[97] Former Government Code section 6256 (Stats. 1968, ch. 1473).

> 6257. A request for a copy of an identifiable public record or information produced therefrom, or certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, or the prescribed statutory fee, where applicable.[98]

As articulated throughout this analysis, the test claim statement of decision approved only an incremental increase in service: where an electronic format requested is one that the agency has used, the agency must provide the requested records in that format. Provision of the records is not a new activity. Accordingly, "sending" the records, in the electronic format, is not a higher level of service, because physical records too would have to be sent.

The activities requested for reimbursement above, under this heading, are therefore denied. The activity of providing a copy of a disclosable electronic record, in an electronic format requested, exactly as approved in the test claim statement of decision, is included in the parameters and guidelines.

However, the test claim statutes, as interpreted by the courts, imply that the activity of "providing a copy of a disclosable electronic record" may at times be more involved than simply copying, redacting, and emailing a document. Section 6253.9(b) provides, in pertinent part:

> [T]he requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:
>
> (1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.
>
> (2) The request would require data compilation, extraction, or programming to produce the record.

This section does not impose an explicit mandate to conduct activities related to data compilation, extraction, or programming, or a mandate to provide a copy of a record that is produced only at otherwise regularly scheduled intervals. But the section implies that such activities might from time to time be required. However, the section also provides new fee authority to cover those activities. Furthermore, the Attorney General of California assumes, in a published opinion analyzing section 6253.9, that a request for electronic records might "require data compilation, extraction, or programming to produce the record;" and that in that event the fee authorized under section 6253.9 "may additionally include 'the cost to construct [the] record, and the cost of programming and computer services necessary to produce a copy of the

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[98] Exhibit A, Test Claim Statement of Decision, at p. 14 [citing Former Government Code sections 6256 and 6257 (Stats. 1968, ch. 1473)].

record.'"[99] This comports with the broad definition of "public records," and the emphasis on the disclosure of "information," rather than individual documents.[100]

The same interpretation is accorded in *County of Santa Clara v. Superior Court* (Cal. Ct. App. 6th Dist. 2009) 170 Cal.App.4th 1301. In that case the court found that section 6253.9 permitted the county to charge the requestor fees in excess of the direct cost of duplicating the records, where the county was being asked to produce electronic records "at an unscheduled interval." The court remanded the case to resolve a factual dispute but first recognized that, if excess costs were shown, the agency may charge "the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record..." pursuant to section 6253.9(b).[101]

The Commission therefore finds that providing a copy of an electronic record may include compiling information from disparate sources, extracting information from larger data sets, or writing computer programs or code to cull information, in order to generate an electronic record. However, the Commission also finds that the test claim statutes provide fee authority to offset the requirement to "provide a copy of a disclosable electronic record in the electronic format requested," as discussed below, including fee authority to offset the costs of compiling, extracting, or otherwise generating an electronic record. The SCO is authorized to reduce reimbursement for these activities accordingly, as discussed below. The parameters and guidelines contain the following approved activity:

> *Provide a copy of a disclosable electronic record in the electronic format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. (Gov. Code, § 6253.9(a)(2), Stats. 2000, ch. 982).*
>
> *This activity includes:*
>
> *a. Computer programming, extraction, or compiling necessary to produce disclosable records.*
>
> *b. Producing a copy of an electronic record that is otherwise produced only at regularly scheduled intervals.*
>
> *Reimbursement is not required for the activities of making the determination whether a record is disclosable, receiving the request for records, determining*

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[99] Exhibit X, 88 Ops. Cal. Atty. Gen. 153 (2005).

[100] Exhibit A, Test Claim Statement of Decision, at p. 5; Government Code section 6250 (Stats. 1968, ch. 1473) ["access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state"].

[101] *County of Santa Clara v. Superior Court* (Cal. Ct. App. 6th Dist. 2009) 170 Cal.App.4th 1301, at p. 1337.

whether the request falls within the agency's jurisdiction, determining whether the request describes reasonably identifiable records, identifying access to records, conducting legal review to determine whether the records are disclosable, processing the records, sending the records, or tracking the records.

Fee authority discussed in section VII. of these parameters and guidelines is available to be applied to the costs of this activity. The Controller is authorized to reduce reimbursement for this activity to the extent of fee authority, as described in section VII.

LA County has proposed a number of changes to the above activity, including re-inserting language providing for reimbursement of technology and equipment costs, and eliminating the above limitation that reimbursement is not required for the costs of determining whether a request describes reasonably identifiable records and identifying access to those records. The "pro rata costs of purchasing and installing software systems permitting keyword searches" is not supported on the record here; the requirement to provide electronic records in a format requested only applies if the format is one that has been used by the agency to create copies for its own use. There is no requirement that all records be made available electronically. The test claim statute does now require an agency to assist a member of the public in making an effective request, but that still fails to justify a complete overhaul of local government's recordkeeping, as implied by LA County's request. The pro rata costs of software systems requested are denied. Each of the remaining changes proposed is discussed in other sections of this analysis, and needs no further explanation here. The proposed changes are not incorporated in the parameters and guidelines.

5. <u>On-Going Activities: Responding to a Public Records Act Request Within 10 Days With Either a Notice of Disclosure Determination or Notice of Extension; and, Where a Request is Denied, Responding to the Requestor in Writing.</u>

In the test claim statement of decision the Commission approved reimbursement for three separate activities conducted in response to a public records request, as follows:

Within 10 days from receipt of a request for a copy of records determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the local agency or K-14 district and notify the person making the request of the determination and the reasons for the determination. (Gov. Code, § 6253, subd. (c) (Stats. 2001, ch. 982).)

If the 10-day time limit of Government Code section 6253 is extended by a local agency or K-14 district due to "unusual circumstances" as defined by Government Code section 6253, subdivision (c)(1)-(4) (Stats. 2001, ch. 982), the agency head, or his or her designee, shall provide written notice to the person making the request, setting forth the reasons of the extension and the date on which a determination is expected to be dispatched. (Gov. Code, § 6253, subd. (c) (Stats. 2001, ch. 982).)

¶…¶

If a request is denied, in whole or in part, respond in writing to a written request for inspection or copies of public records that includes a determination that the request is denied. (Gov. Code, § 6255, subd. (b) (Stats. 2000, ch. 982).)

These three activities are analyzed together for purposes of these parameters and guidelines, and listed together in section IV.B., because, in practice, they impact one another. Note also that the response made within 10 days need not be in writing. Only a notice of extension of the 10 day time limit, or a determination that the records are exempt from disclosure must be made in writing. Therefore oral or telephone notice must be included as a reimbursable means of compliance for the initial notice of the disclosure determination.

a. Within 10 days, provide notice of the disclosure determination.

With respect to the first activity approved under section 6253, LA County has proposed reimbursement for the following:

Within 10 days, determining whether records or parts thereof are not subject to statutory and case law exemptions in order to determine if such records are disclosable; and, developing or reviewing language to notify the person making the request of the determination and the reasons for the determination. ((Gov. Code, § 6253, subd. (c) (Stats. 2001, ch. 982)).

a. Receiving, logging and tracking oral (in-person or telephone), written, e-mail and fax requests to comply with the 10 day time limit to notify the requestor if the requested record(s) or parts thereof are disclosable and the reason for the determination.

b. Determining whether the public record(s) request falls within the agency's jurisdiction.

c. Determining whether the request reasonably describes any identifiable records(s) and conferring with the requestor if clarification is needed.

d. Meeting and/or conferring with local agency staff to identify access to pertinent records. If external public entities have oversight and/or ownership of the requested data or information, meeting and/or conferring with those entities to provide the requested data or information.

e. Conducting legal reviews, research and analysis of the requested records to determine if the requested electronic record(s) or parts thereof are subject to statutory and case law disclaimers, i.e. are disclosable. Reimbursement includes, but is not limited to, legal staff and/or legal contract services costs and the costs of legal data base services.

f. Within 10 days of receipt of the public record(s) request, developing and reviewing language to notify the requestor of the disclosure determination and the reasons for the determination.

g. Processing and reviewing the record(s) to be sent to the requestor to ensure compliance with statutory and case law exemptions.

h. Preparing, and obtaining supervisory approval and signature of, correspondence accompanying the requested record(s).

i. Copying or saving record(s) and accompanying correspondence.

j. Sending or transmitting the records to the requestor.

k. Tracking the shipment of requested CPRA records.[102]

As discussed above, the determination whether a record is disclosable and the provision of copies upon request, are not new activities and so are not reimbursable. The approved newly-mandated activity is to provide notice to the requestor of the determination within 10 days. This is an *incremental* increase in service, and the focus is not *whether the records are disclosable*, as implied by the claimant's proposed activities, but providing notice to the requestor within 10 days. The plain language of the statute does not impose a requirement to provide the records within 10 days, only to *provide notice* (verbal or written) to the requestor of the determination on the request.

As discussed throughout this analysis, and in the test claim statement of decision, prior law provided for "the right of every person to inspect any public record, with exceptions."[103] The Commission found, in the test claim statement of decision, that "[s]ince 1968, local agencies and K-14 districts were required to make public records open to inspection at all times during the office hours of the local agencies and K-14 districts, by every person, except for public records exempted from disclosure or prohibited from disclosure."[104] The Commission also found that "the general duty to make any reasonably segregable portion of a record available for inspection" was not a new program or higher level of service as compared with prior law.[105] Moreover, the Commission found that, "since 1968 public agencies were required to provide copies or exact copies of public records upon a request of identifiable public records."[106] The test claim statement of decision also found that the determination whether and to what extent a record is disclosable was not a new activity subject to reimbursement. Therefore, the duty to make a determination as to what records or parts of records were exempt from disclosure or prohibited

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[102] Exhibit C, LA County's Proposed Parameters and Guidelines, at pp. 8-9.

[103] Exhibit A, Test Claim Statement of Decision, at p. 10

[104] Exhibit A, Test Claim Statement of Decision, at p. 12.

[105] Exhibit A, Test Claim Statement of Decision, at pp. 13-14.

[106] Id. at p.14. citing former Government Code sections 6256 and 6257as adopted by Statutes 1968, chapter 1473.

from disclosure is not a new program or higher level of service. Only the requirement to notify the requestor *within 10 days* is new.

Receiving, logging, and tracking public records requests, as well as determining whether the agency has jurisdiction over the request, and whether the request describes reasonably identifiable records, are all requirements of the public records act under prior law. Similarly, identifying access to pertinent records and conducting legal review would have been required under prior law. Processing and reviewing the records for compliance, as well as preparing supervisory approval and signature of correspondence, copying or saving records and correspondence, sending the records, and tracking shipment are all activities that were required, at least in analog, with respect to physical records subject to disclosure under prior law. Therefore, items (a.) through (e.), and (g.) through (k.), above, are either duplicative or not *new* mandated activities, and must be denied.

The Commission finds that item (f.) - Within 10 days of receipt of the public record(s) request, *developing and reviewing language to notify the requestor of the disclosure determination and the reasons for the determination* - reasonably defines the mandate to provide notice to the requestor within 10 days, and this activity is therefore approved.

In its comments submitted in response to the draft staff analysis, CRS proposed altering the approved activity, on the ground that "developing and reviewing language to notify" was ambiguous. CRS suggested applying the same phrasing as the activity of *notifying a requestor when a determination cannot be made within 10 days*, as discussed below.[107] The Commission agrees that the phrase "drafting, editing, and reviewing a written notice," as applied in that context, is more specific and clear, and the parameters and guidelines will therefore adjust the phrasing suggested by LA County. CRS also proposed allowing for an oral notification, and reimbursing staff time to make that notification. The Commission finds that orally notifying the requestor is within the scope of the approved activity. Finally, CRS proposed reimbursement for obtaining supervisory review and sending the notice to the requestor, as those activities are approved in a similar context below, where the determination cannot be made within 10 days. The Commission finds that obtaining supervisory review and sending the required notice to the requestor are reasonably within the scope of the approved activity, and are not requirements of prior law. The parameters and guidelines reflect this analysis.

Finally, the activity approved for reimbursement in the conclusion of the test claim statement of decision is written vaguely enough to be interpreted as encompassing activities beyond those approved in the body of the analysis, if not read in the context of the analysis, which are beyond the higher level of service imposed by the test claim statute. For this reason, the Commission defines the scope of the approved activity in the parameters and guidelines to appropriately limit reimbursement to the scope of the test claim statement of decision and the higher level of service imposed by the test claim statutes and to exclude reimbursement for requirements of prior law.

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[107] Exhibit G, CRS Comments on Draft Staff Analysis, at p. 2.

The parameters and guidelines authorize reimbursement for the following activity:

> *Beginning January 1, 2002, within 10 days from receipt of a request for a copy of records, provide verbal or written notice to the person making the request of the disclosure determination and the reasons for the determination. (Gov. Code, § 6253(c), Stats. 2001, ch. 982).*
>
> *This activity includes, where applicable:*
>
> 1) *Drafting, editing and reviewing a written notice to the person making the request, setting forth the reasons for the determination.*
> 2) *Obtaining agency head, or his or her designee, approval and signature of a written notice of determination.*
> 3) *Sending or transmitting the notice to the requestor*.
>
> b. <u>When the 10 day time limit cannot be met due to unusual circumstances, providing notice to the requestor setting forth the reasons for the extension</u>

With respect to the second activity approved under section 6253, providing a reason for an extension of time, LA County has proposed reimbursement for the following:

> *If the 10-day time limit of Government Code section 6253 is extended by a local agency or K-14 district due to "unusual circumstances" as defined by Government Code section 6253, subdivision (c)(1)-(4) (Stats. 2001, ch. 982), the agency head, or his or her designee, shall provide written notice to the person making the request, setting forth the reasons of the extension and the date on which a determination is expected to be dispatched. (Gov. Code, § 6253, subd. (c) (Stats. 2001, ch. 982)).*
>
> a. *Reviewing the following "unusual circumstances" (in Government Code section 6253, subdivision (c)(l)-(4)) to determine which are relevant in justifying an extension of the 10 day time limit in providing the requested document(s).*
>
> i. *The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.*
>
> ii. *The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.*
>
> iii. *The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.*

iv. *The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.*

b. *Meeting and/or conferring with local agency staff, including legal staff, to determine the date on which a determination is expected to be dispatched to the person making the request. If other establishments have oversight and/or ownership of the requested data or information, meeting and/or conferring with those staff to ascertain an expected determination date.*

c. *Drafting, editing and reviewing a written notice to the person making the request, setting forth the reasons of the extension and the date on which a determination is expected to be dispatched.*

d. *Preparing, and obtaining agency head, or his or her designee, approval and signature of, the extension notice and accompanying correspondence.*

e. *Copying or saving the extension notice and accompanying correspondence.*

f. *Sending or transmitting the notice and accompanying correspondence to the requestor.*

g. *Tracking delivery of the notice and accompanying correspondence to the requestor.*[108]

The Commission approved, in the test claim statement of decision, reimbursement for "providing written notice" to a requestor when the 10-day time limit must be extended due to unusual circumstances. Based on the intent of the amendments made to CPRA that are the subject of this test claim, this activity should be read as narrowly as possible. The intent and purpose of the amendments to CPRA was to promote access to public records and accountability to the public, and to remedy existing failures in the administration of the CPRA, by providing more specific guidelines for agencies and school districts to respond promptly to public records requests.

Item a. above, restates the "unusual circumstances" that are provided in the test claim statute to justify an extension of time beyond the 10-day time limit, and provides reimbursement for the decisionmaking process of selecting an appropriate justification. The activity approved in the statement of decision is to prepare and send written notice to the requestor when the 10-day time limit cannot be met due to unusual circumstances. The circumstances are enumerated in the code and need not be repeated. Item a. and its sub-parts are therefore denied.

Item b. above is not sufficiently specific. As discussed above, the claimants have not submitted substantial evidence to defend the reasonably necessary activities proposed, and the activity of meeting or conferring with other staff to determine the date on which the determination can be

[108] Exhibit C, LA County's Proposed Parameters and Guidelines, at pp. 9-10.

expected is not sufficiently distinguished from item c., "drafting, editing, and reviewing..." Item b. is therefore denied.

Items c. and d. are reasonably within the scope of the mandate. As discussed above, the 10-day time limit is new, and was approved, as was the requirement to inform a requestor when the 10-day time limit must be extended. In the case an extension is necessary, a written notice is due the requestor, identifying the reasons for the extension and the date on which a determination is expected. Items c. and d. include drafting and reviewing that notice, and obtaining the signature of the agency head or his or her designee. These activities are consistent with the mandated activity, are reasonably necessary to comply with the mandated activity, and are therefore approved.

Item e. is denied: there is no requirement to copy or save the notice prepared for the requestor, only to "provide written notice to the person." It may be a policy of the agencies to save the notice prepared for the requestor, but that activity is not necessary to perform the mandated activity of "providing" written notice.

Item f., to send or transmit the notice, is approved. As discussed above, the requirement to inform the requestor if the 10-day time limit cannot be met is new, and in order to inform the requestor, a written notice must be sent or transmitted. This activity is reasonably within the scope of the approved activity.

Item g. is denied: there is no requirement to track delivery of the written notice or accompanying correspondence.

Items c., d., and f. reasonably describe and explain the process of providing notice to a requestor that the 10-day time limit must be extended, consistently with the activities approved in the test claim statement of decision. These activities are reasonably within the scope of the mandate and are therefore approved.

Thus, the parameters and guidelines authorize reimbursement for the following activity:

> *Beginning January 1, 2002, if the 10-day time limit to notify the person making the records request of the disclosure determination is extended due to "unusual circumstances" as defined by Government Code section 6253(c)(1)-(4) (Stats. 2001, ch. 982), the agency head, or his or her designee, shall provide written notice to the person making the request, setting forth the reasons of the extension and the date on which a determination is expected to be dispatched. (Gov. Code, § 6253(c), Stats. 2001, ch. 982).*
>
> *This activity includes, where applicable:*
>
> 1) *Drafting, editing and reviewing a written notice to the person making the request, setting forth the reasons for the extension of time.*
> 2) *Obtaining agency head, or his or her designee, approval and signature of, the notice of determination or notice of extension.*
> 3) *Sending or transmitting the notice to the requestor.*

c. When a written request is denied, respond in writing.

With respect to the activity approved under section 6255, providing a written response to a written request for inspection or copies of records when the request is denied, LA County has proposed reimbursement for the following:

> *If a request is denied, in whole or in part, preparing or reviewing a written response to a written request for inspection or copies of public records that includes a determination that the request is denied. (Gov. Code § 6255, subd. (b) (Stats. 2000, ch. 982)).*
>
> *a. Meeting and/or conferring with staff, including but not limited to legal staff, to review and finalize the analysis, findings and conclusions providing the basis for the denial determination.*
>
> *b. Drafting and editing a written response that includes a determination that the request is denied.*
>
> *c. Preparing, and obtaining agency head, or his or her designee, approval and signature of, the denial response and accompanying correspondence.*
>
> *d. Copying or saving the written denial response and accompanying correspondence.*
>
> *e. Copying or saving the denial response and accompanying correspondence.*
>
> *f. Sending the denial response and accompanying correspondence to the requestor.*
>
> g. *Tracking delivery of the denial response and accompanying correspondence to the requestor.*[109]

The requirement to provide a written response is new, and was expressly approved in the test claim statement of decision, as provided above. The incremental increase in service here is to *provide the determination in writing*, and not to make the determination, as repeated throughout this analysis. LA County, in its comments filed in response to the draft staff analysis, argues that staff inappropriately denied reimbursement for "all legal services," and that "the Commission's [test claim statement of] decision does not deny reimbursement for all legal services." LA County argues that the test claim statement of decision "only denies reimbursement for legal service when performed to determine whether the requested records are disclosable."[110] The Commission agrees that the test claim statement of decision denied legal research and review to determine whether a record is disclosable, and throughout this analysis the same approach is

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[109] Exhibit C, LA County's Proposed Parameters and Guidelines, at p. 12.

[110] Exhibit H, LA County Comments on Draft Staff Analysis.

adopted. LA County cites to the Commission's hearing on the test claim, in which Commissioner Alex stated, "…the idea that you need some legal advice on how to proceed initially is pretty clear."[111] It is not clear, from the county's reliance on this off-hand remark, or from the comments on the draft staff analysis, exactly what sort of legal services the county proposes for reimbursement. If the "legal advice on how to proceed initially" is encompassed in the training of existing employees and the development of policies and procedures with respect to the activities approved by the Commission, those activities are approved above. If the county proposes any other legal services or advice for reimbursement, those activities must be distinguished from legal review regarding disclosure. It is not the Commission's purview to assume or otherwise guess the activities for which claimants might wish to claim reimbursement; a successful claimant must describe the activities for which reimbursement is sought with some particularity. The Commission holds to the test claim analysis, finding that legal review for purposes of determining whether requested records are disclosable is not reimbursable. However, the Commission does recognize that a denial of a request under CPRA may lead to litigation. Therefore review of the language in the written notice by an agency's legal staff may be necessary, and is reasonably within the scope of providing a written notice when a request is denied.

Additionally, as discussed above in similar context, drafting and editing a response, obtaining approval and signature of the denial response, and sending the response are also within the scope of the approved activity.

Item d. is not required: there is no requirement to copy or save the denial response, and no consequence for failure to do so; it may be a policy of the agencies to save denial responses, but it is not required by the statute. Item e. is duplicative, and is not required, and is therefore denied. Item g. is not established as necessary; there would seem to be no consequence in the test claim statute for failing to track delivery of a denial response.

The parameters and guidelines identify the following activities for reimbursement:

> *Beginning July 1, 2001, if a request is denied, in whole or in part, respond in writing to a written request for inspection or copies of public records that includes a determination that the request is denied. (Gov. Code, § 6255(b) (Stats. 2000, ch. 982)).*
>
> *This activity includes, where applicable:*
>
> 1) *Drafting, editing and reviewing a written notice to the person making the request, setting forth the reasons for the determination. This may include legal review of the written language in the notice. However, legal research and review of the law and facts that form the basis of the denial are not reimbursable.*

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[111] Exhibit H, LA County's Comments on Draft Staff Analysis, at p. 1.

2) *Obtaining agency head, or his or her designee, approval and signature of, the notice of determination.*

3) *Sending or transmitting the notice to the requestor*.

d. Limiting language applicable to these three activities.

The three activities described under section 4., above, providing notice of the disclosure determination in response to a public records act request within 10 days; providing notice of an extension when the 10-day time limit cannot be met; and, where a request is denied, responding to the requestor in writing; are all limited by the same prior law requirements. Prior law required a determination regarding whether records were disclosable; prior law required receiving and processing public records requests; prior law required determining whether records were within the jurisdiction and possession of the agency; and prior law required sending or transmitting the records, if the request was granted. Therefore, the following limits on reimbursement are included in the parameters and guidelines after activity c.:

> *Reimbursement* for activities 2a., 2b., and 2c.*is not required for making the determination whether a record is disclosable, receiving the request for records, determining whether the request falls within the agency's jurisdiction, determining whether the request describes reasonably identifiable records, identifying access to records, conducting legal review to determine whether the records are disclosable, processing the records, sending the records, or tracking the records.*

6. On-Going Activity: Assisting the Public in Making Effective Records Requests

The test claim statement of decision approved reimbursement for the following:

> *When a member of the public requests to inspect a public record or obtain a copy of a public record:*
>
> *a. Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated;*
>
> *b. Describe the information technology and physical location in which the records exist; and*
>
> *c. Provide suggestions for overcoming any practical basis for denying access to the records or information sought.*
>
> *These activities are not reimbursable when:*
>
> - *The public records requested are made available to the member of the public through the procedures set forth in Government Code section 6253;*

- *The public agency determines that the request should be denied and bases that determination solely on an exemption listed in Government Code section 6254; or*
- *The public agency makes available an index of its records. (Gov. Code, § 6253.1(a) and (d) (Stats. 2001, ch. 355)).*[112]

LA County has proposed reimbursement for the following:

> *When a member of the public requests to inspect a public record or obtain a copy of a public record:*
>
> *a. assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated;*
>
> *b. describe the information technology and physical location in which the records exist; and*
>
> *c. provide suggestions for overcoming any practical basis for denying access to the records or information sought.*
>
> *To implement Sections (9) a., b., c. (above):*
>
> *(i) Receiving, logging and tracking oral (in-person or telephone), written, e-mail and fax requests to comply with public requests to inspect a public record or obtain a copy of a public record.*
>
> *(ii) Determining whether the public record(s) request falls within the agency's jurisdiction.*
>
> *(iii) Determining whether the request reasonably describes any identifiable records(s) and conferring with the requestor if clarification is needed.*
>
> *(iv) Meeting and/or conferring with local agency staff to identify access to pertinent records. If external public entities have oversight and/or ownership of the requested data or information, meeting and/or conferring with those entities to provide the requested data or information.*
>
> *(v) Conducting legal reviews, research and analysis of the requested records to determine if the requested record(s) or parts thereof are subject to statutory and case law disclaimers, i.e. are disclosable. Reimbursement includes, but is not limited to, legal staff and/or*

[112] Exhibit A, Test Claim Statement of Decision, at p. 28.

legal contract services costs and the costs of legal data base services.

(vi) Identifying litigation, claims, and related record(s) which may be disclosable and may be responsive to the request or to the purpose of the request, if stated; and provide suggestions for overcoming any practical basis for denying access to the records or information sought.

(vii) Developing and reviewing language to notify the requestor of the disclosure determination and the reasons for the determination.

(viii) Processing and reviewing the record(s) to be sent to the requestor to ensure compliance with statutory and case law exemptions.

(ix) Preparing, and obtaining supervisory approval and signature of, correspondence accompanying the requested record(s).

(x) Copying or saving record(s) and accompanying correspondence.

(xi) Sending or transmitting the records to the requestor.

These activities are not reimbursable when:

1) the public records requested are made available to the member of the public through the procedures set forth in Government Code section 6253;

2) the public agency determines that the request should be denied and bases that determination solely on an exemption listed in Government Code section 6254; or

3) *the public agency makes available an index of its records. (Gov. Code,§ 6253.1, subds. (a) and (d) (Stats. 2001, ch. 355)).*[113]

In its comments on the draft staff analysis, LA County proposed isolating public records requests that require assistance to the requestor, and treating them differently from all other requests, ensuring that such requests are fully reimbursable, including activities specifically denied in the test claim decision if assistance to the requestor is involved. For example, where staff recommended approving reimbursement for *providing a copy of a disclosable electronic record in an electronic format*, as discussed above, staff also recommended the following limitation:

This activity does not include, and reimbursement is not required for the costs of determining whether the record is disclosable; receiving public records act requests; tracking requests; processing requests; determining whether a request

[113] Exhibit C, LA County's Proposed Parameters and Guidelines, at pp. 10-12.

describes reasonably identifiable records and identifying access to those records; retrieving records, or sending the records to the requestor.

LA County proposed to add, and to strike, the following language:

> This activity does not include, and reimbursement is not required for the costs of determining whether the record is disclosable; receiving public records act requests *not requiring assistance to the requestor in making a focused and effective search*; tracking requests *not requiring assistance to the requestor in making a focused and effective search*; processing requests *not requiring assistance to the requestor in making a focused and effective search*; ~~determining whether a request describes reasonably identifiable records and identifying access to those records; retrieving records, or sending the records to the requestor~~.

Similar language, if not identical, is proposed for a number of other activities in the proposed parameters and guidelines, including the activity of providing assistance to the public in making effective public records act requests, as discussed in this section.[114] Other than the three declarations discussed above, which contain nothing more than bare assertion, LA County has submitted no evidence or explanation that would justify reimbursement for receipt of a records request that requires assistance to the requestor; or for tracking and processing such a request. The higher level of service approved is *to provide assistance to the public in making an effective records request*; there is no implication that handling the records request, once made, is a new program or higher level of service. The underlying prior law requirements to provide access to disclosable records, and to provide copies or exact copies, as discussed above, apply with equal force to public records act requests that require assistance to the requestor.[115] There is no evidence that tracking or processing a request is necessary, or if necessary, that tracking and processing are not requirements of prior law; and, receipt of records requests is clearly not new, as discussed throughout this analysis. The declarations submitted state that these activities are necessary to provide the records in a timely and cost-efficient manner, but there is nothing in the language of the statute, or implied by the test claim statute or any of the test claim findings that would justify reimbursement for activities that are either not new, or not required. Providing the records in a timely manner was always a requirement;[116] it was simply not adequately implemented. Moreover, cost-efficiency is not a requirement of CPRA; there is no suggestion that cost should be a factor in refusing disclosure, or that the state has any interest in making the CPRA requirements inexpensive for local government; the focus has always been on the public's

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[114] See e.g., Exhibit H, LA County's Comments on Draft Staff Analysis, at pp. 8; 9; 11.

[115] Former Government Code sections 6253; 6256; 6257 (Stats. 1968, ch. 1473).

[116] Former Government Code section 6253 required records to be open to inspection during regular business hours; this implies that records should be made available on demand.

right to access information.[117] The language that LA County proposes to add must be denied. The language that LA County proposes to strike is addressed below.

Proposed reimbursable activities (i) and (ii) above – receiving public records requests and determining whether the request is within the agency's jurisdiction – are not new. As discussed throughout this analysis, agencies had a duty under prior law to receive public records requests; and the duty to determine whether the request is within the agency's jurisdiction is implied from the duty to determine whether a record is disclosable.[118] Similarly, activities (iv), (v), (vii), and (viii), above, restate the legal review that would be required under prior law pursuant to the requirement to make all public records available, subject to exemptions. Items (iv) and (v) describe the process of identifying access to requested records and reviewing for disclosable material (i.e., reviewing for exemptions from disclosure), and items (vii) and (viii) describe the making of the disclosure determination and the review of that determination. All four of these activities were required under prior law, and none relate to or explain the activity of assisting the public with an effective records request. Item (ix) is duplicative, and does not relate to or explain the activity of assisting the public in making an effective request. Items (ix) and (x) are not required activities, where public records are to be disclosed: an agency head is only required to sign a determination that records will not be disclosed, or a notice of extension of the time limit. And there is no requirement to copy or save records and accompanying correspondence; the requirement is merely to send the records. Thus, the activity to copy or save records is not reasonably necessary to implement the mandate to "send" the records. Item (xi) is required, but is not new: disclosable records would have to be sent or transmitted under prior law as well.

The requirement that local agencies and school districts must assist members of the public in making an effective public records act request is new, as approved in the test claim statement of decision, but is only an incremental increase in service, as discussed in similar context above. Therefore, items (i), (ii), (iv), (v), (vii), (viii), (ix), (x), and (xi) are not reasonably necessary to comply with the incremental increase in service.

Activity (vi) "Identifying litigation, claims, and related record(s)" is narrower than the requirement the test claim statute (which requires "identifying records and information which may be disclosable and may be responsive…")[119] and is redundant. Therefore, it is denied as written. The intent of placing the burden on the agency to assist the public in making an effective records request necessarily includes identifying records and information which "may be

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[117] See Former Government Code section 6250 (Stats. 1968, ch. 1473) ["In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every citizen of this state."].

[118] See Exhibit X, Government Code 6253 (Stats. 1968, ch. 1473).

[119] Government Code section 6253.1 (Stats. 2001, ch. 355 (AB 1014)).

disclosable and may be responsive to the request or to the purpose of the request." The intent of the statutory change, and the activity approved in the test claim statement of decision, is to require an agency to interpret a request generously, with a bias toward identifying all relevant information. However, this activity not does not include determining whether such relevant information is disclosable, since that activity is not new and was specifically denied in the test claim statement of decision,

Thus, of the above activities, only a portion of activity (iii), "[d]etermining whether the request reasonably describes any identifiable records(s) and conferring with the requestor if clarification is needed," is reasonably within the scope of the approved activity of assisting the public. Activity (iii), is therefore partially approved: "conferring with the requestor" for clarification is implied by the statutory change and the activity as approved in the test claim statement of decision. But "[d]etermining whether the request reasonably describes any identifiable records(s)" is not new; this is an essential part of providing access to or copies of disclosable public records, as required under provisions of CPRA dating back to 1968.[120] In light of this long-standing requirement of prior law, in many of the approved activities in the draft proposed parameters and guidelines, staff recommended including the following limiting language:

> *Reimbursement is not required for the activities of making the determination whether a record is disclosable, receiving the request for records, determining whether the request falls within the agency's jurisdiction, determining whether the request describes reasonably identifiable records, identifying access to records…*

In each activity to which this limiting language was applied, LA County proposed striking the phrase "determining whether the request describes reasonably identifiable records, [and] identifying access to records…" LA County did not explain this proposed change, other than to reiterate, in each of the three *new declarations*, that "I declare on information and belief that the Commission staff fairly state the activities reasonably necessary in implementing new CPRA services *except for the changes I recommend which are found (highlighted) in Attachment A.*"[121] As discussed in this section, determining whether a request describes reasonably identifiable records is not new. And, as discussed above, the declarations indicate no consideration of prior law, and therefore cannot be relied upon in conducting a mandates analysis. The limitation on reimbursement is left intact in the proposed parameters and guidelines, including the approved activity of assisting the public; LA County's proposed changes are denied.

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[120] Former Government Code section 6256 (Stats. 1968, ch. 1473) ["Any person may receive a copy of any identifiable public record or shall be provided with a copy of all information contained therein."].

[121] Exhibit H, LA County's Comments on Draft Staff Analysis, at pp. 2-4.

The Commission finds that activity (iii), above, is partially approved. The parameters and guidelines authorize reimbursement for the following activities:

> *When a member of the public requests to inspect a public record or obtain a copy of a public record, the local agency or K-14 school district shall (1) assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated; (2) describe the information technology and physical location in which the records exist; and (3) provide suggestions for overcoming any practical basis for denying access to the records or information sought.*
>
> *This activity includes:*
>
> *i. Conferring with the requestor if clarification is needed to identify records requested.*
>
> *ii. Identifying record(s)and information which may be disclosable and may be responsive to the request or to the purpose of the request, if stated.*
>
> *iii. Providing suggestions for overcoming any practical basis for denying access to the records or information sought.*
>
> *These activities are not reimbursable when: (1) the public records requested are made available to the member of the public through the procedures set forth in Government Code section 6253; (2) the public agency determines that the request should be denied and bases that determination solely on an exemption listed in Government Code section 6254; or (3) the public agency makes available an index of its records. (Gov. Code, § 6253.1(a) and (d) (Stats. 2001, ch. 355)).*
>
> *In addition, reimbursement is not required for the activities of making the determination whether a record is disclosable, receiving the request for records, determining whether the request falls within the agency's jurisdiction, conducting legal review, processing the records, obtaining supervisory review, sending the records, or tracking the records.*

7. <u>On-Going Activity: Redaction and Removal of Home Addresses and Telephone Numbers Upon Request, for K-12 School Districts Only.</u>

The remaining activities approved in the parameters and guidelines for Government Code section 6254.3 are those affecting only school districts, and are approved as written in the test claim statement of decision, with only slight reorganization. Those activities are, in summary, to "redact or withhold the home address and telephone number of employees of K-12 school districts and county offices of education from records that contain disclosable information," and to "remove the home address and telephone number of an employee from any mailing lists that the K-12 school district or county office of education is legally required to maintain, if requested by the employee, except for lists used exclusively by the K-12 school district or county office of

education to contact the employee."[122] The Commission approves these activities, as stated in the test claim statement of decision, without substantial analysis.

8. Time Studies

In the revised proposed parameters and guidelines LA County proposed allowing actual cost claiming by way of time studies. Staff did not include this language in the draft parameters and guidelines because it was not addressed in the claimant's narrative, and the Commission's boilerplate language does not normally include provision for time studies.

In its comments on the draft staff analysis, LA County has requested inclusion of language in the parameters and guidelines authorizing claiming through time studies.[123] The language requested by LA County is not justified on the record, but the following is inserted in the parameters and guidelines, recognizing that time studies are a claiming tool that has been approved in prior test claims:

> *Claimants may use time studies to support salary, benefit, and associated indirect costs when an activity is task-repetitive. Activities that require varying levels of effort are not appropriate for time studies. Time study usage is subject to the review and audit conducted by the State Controller's Office.*

D. Offsetting Revenues (Section VII. of Parameters and Guidelines)

In adopting parameters and guidelines, the Commission is required by Government Code section 17557 to determine the "amount to be subvened" under the Constitution. Specifically, the Commission's regulations require parameters and guidelines to identify offsetting revenues that may apply to the program as follows:

i. Dedicated state and federal funds appropriated for this program

ii. Non-local agency funds dedicated for this program.

iii. Local agency's general purpose funds for this program.

iv. Fee authority to offset partial costs of this program.[124]

The SCO has the authority to reduce reimbursement to an eligible claimant, to the extent of fee authority created by the test claim statute (or another provision), which must in turn be identified in the parameters and guidelines. A reduction in this manner is consistent with Article XIII B, section 6, which requires subvention only when the costs in question can be recovered solely from tax revenues.[125]

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[122] Exhibit A, Test Claim Statement of Decision, at p. 27.

[123] Exhibit H, LA County's Comments on Draft Staff Analysis, at pp. 12-13.

[124] Code of Regulations, Title 2, section 1183.1 (Register 2005, No. 36).

[125] *County of Fresno, supra,* 53 Cal.3d at p. 487.

Thus, fee authority given to local government agencies and school districts that *can* be used for costs of a mandated program is required to be identified as a source of offsetting revenues in the parameters and guidelines, and required to be offset against costs claimed, to the extent of the authority. Fee authority granted by the Legislature provides a mechanism by which funds other than local tax revenues can be used for costs of the program. A claimant is not in need of the protection offered by article XIII B, section 6, to the extent of the revenues that can be raised by authorized fees, and cannot show increased costs mandated by the state, consistently with sections 17556(d) and 17514, to the extent of the fee authority granted.

1. Some special districts have potential offsetting revenues that pay for the program.

In 1978, after article XIII A was adopted by the voters through Proposition 13, the Legislature enacted Government Code section 16270 to state its intent that special districts with authority to charge fees should rely on the fees and charges for raising revenue due to the lack of availability of property tax revenue after the 1978-79 fiscal year.

> The Legislature finds and declares that many special districts have the ability to raise revenue through use charges and fees and that the ability to raise revenue directly from the property tax for district operations has been eliminated by Article XIIIA of the California Constitution. It is the intent of the Legislature that such districts rely on user fees and charges for raising revenue due to the lack of the availability of property tax revenues after the 1978-79 fiscal year. Such districts are encouraged to begin the transition to user fees and charges during the 1978-79 fiscal year.

Thus, special districts, generally eligible to claim reimbursement because they are subject to the tax and spend limitations of the Constitution, may still have the authority to charge fees and assessments that pay for the mandated program and not be entitled to mandate reimbursement. If fee revenue is used by the district to pay for general administration costs of the district, including the expenses to comply with the *CPRA* program, then reimbursement is not required in that case.

An example is highlighted in a report issued in May 2000 by the Little Hoover Commission entitled "Special Districts: Relics of the Past or Resources for the Future."[126] The report, beginning on page 67, discusses enterprise special districts that have the authority to charge fees and assessments for their services, but also collect property tax revenue. The report indicates that in fiscal year 1996-1997, enterprise districts received $421 million in property tax revenue, and a sizable portion of that revenue (more than $100 million) went to 15 enterprise districts. Page 70 of the report highlights three special districts that used all of their property tax revenue in fiscal year 1996-1997 to pay for debt service and capital projects. Under these circumstances,

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[126] Little Hoover Commission, *Special Districts: Relics of the Past or Resources for the Future,*" (http://www.lhc.ca.gov/studies/155/report155.pdf)

then, the remaining expenses of the district, including the cost of compliance with the *CPRA*, would be paid through revenue collected from fees and reimbursement would not be required.

Thus, the boilerplate language in Section VII of the parameters and guidelines addressing offsetting revenue states the following:

> Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees or assessments; federal funds~~,~~; and other state funds; any of which fund the cost of the mandated activities, shall be identified and deducted from this claim.

2. Fee authority in Government Code sections 6253 and 6253.9.

~~Here~~ In addition, the fee authority found in Government Code sections 6253 and 6253.9 must be identified in the parameters and guidelines, and the SCO may reduce reimbursement to the extent of direct costs that are permissible subjects of the fees.

Government Code section 6253 provides, in pertinent part:

> Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person *upon payment of fees covering direct costs of duplication*, or a statutory fee if applicable.[127]

Section 6253.9 provides, in pertinent part:

> (a) Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
>
> (1) The agency shall make the information available in any electronic format in which it holds the information.
>
> (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. *The cost of duplication*

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[127] Government Code section 6253 (Stats. 1998, ch. 620 (SB 143); Stats. 1999, ch. 83 (SB 966); Stats. 2000, ch. 982 (AB 2799); Stats. 2001, ch. 355 (AB 1014)) [derived from former Government Code section 6257 (Stats. 1981, ch. 968)].

shall be limited to the direct cost of producing a copy of a record in an electronic format.

(b) Notwithstanding paragraph (2) of subdivision (a), *the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy* of the record when either of the following applies:

(1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.

(2) The request would require data compilation, extraction, or programming to produce the record.[128]

Section 6253, above, provides that agencies shall make disclosable records "promptly available to any person upon payment of fees covering *direct costs of duplication,"* or statutorily defined fees, where applicable. Section 6253.9(a)(2), above states that the costs of duplication generally must be limited to direct costs of producing copies. This would include, for example, the cost of a flash drive. Subdivision (b) provides that "the requester shall bear the cost of producing a copy of the record," if the agency is compelled to produce the record other than at the regularly scheduled time, or if the request requires data compilation, extraction, or programming.

In the context of paper records, the courts have held that "[t]he direct cost of duplication is the cost of running the copy machine, and conceivably also the expense of the person operating it." The courts contend that direct cost "does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted."[129] In the context of electronic records, "the statute allows an agency to recover specified ancillary costs in either of two cases: (1) when it must 'produce a copy of an electronic record' between 'regularly scheduled intervals' of production, or (2) when compliance with the request for an electronic record 'would require data compilation, extraction, or programming to produce the record.'" The court in *County of Santa Clara* held that pursuant to section 6253.9, "[u]nder those circumstances, the agency may charge 'the cost [of staff] to construct a record, and the cost of programming and computer services necessary to produce a copy of the record ....'"[130]

In this test claim, reimbursement is required for the increased level of service mandated by providing a copy of an electronic record, which the court in *Santa Clara* recognizes may at times

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[128] Government Code section 6253.9 (added by Stats. 2000, ch. 982 (AB 2799)).

[129] Exhibit X, *North County Parents Organization v. Department of Education* (*North County*) (Cal. Ct. App. 4th Dist. 1994) 23 Cal.App.4th 144, at p. 148.

[130] Exhibit X, *County of Santa Clara v. Superior Court* (Cal. Ct. App. 6th Dist. 2009) 170 Cal.App.4th 1301, at p. 1336.

require "data compilation, extraction, or programming." The fee authority under sections 6253 and 6253.9(a), as discussed, extends to the *direct costs* of providing copies of disclosable public records, and may not be applied to cover the costs of retrieving records to comply with a request,. And the fee authority found in section 6253.9(b) also extends to the costs of programming, extraction, and compiling required to construct a record.

Based on the courts' interpretation of sections 6253 and 6253.9, the Commission finds that the test claim statutes provide fee authority to offset the direct costs of "provid[ing] a copy of a disclosable electronic record in the electronic format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies."[131] The Commission also finds fee authority for the costs of staff "construct[ing] a record, and the cost of programming and computer services necessary to produce a copy of the record," when "the record is one that is produced only at otherwise regularly scheduled intervals…[or]… would require data compilation, extraction, or programming to produce the record."[132]

The remaining activities required under the test claim statutes, including responding in writing to public records requests within 10 days, assisting the public in making effective public records requests, and redacting employees' home addresses and phone numbers, are not permissible subjects of the identified fee authority. The parameters and guidelines reflect this analysis.

In comments on the draft staff analysis, DOF suggested a small, non-substantive change to the language recommended by staff regarding fee authority. Rather than focusing on the records requested, as was the case in the test claim statement of decision and the case law on point, DOF's version focuses on the request, and what is required to satisfy the request. The Commission finds that DOF's proposed language has the same substantive effect as the language recommended in the draft proposed parameters and guidelines, and focuses more clearly on the request, rather than the records requested.[133] DOF's proposed language is therefore incorporated in the parameters and guidelines, as follows:

> *Revenue from the fee authority authorized in Government Code sections 6253 and 6253.9(a)(2) and (b), as added by Statutes 2000, chapter 982, shall be identified and deducted from the following costs claimed:*
>
> *1. The direct costs of providing a copy of a disclosable electronic record in the electronic format requested; and*
>
> *2. If the request requires data compilation, extraction, or programming to produce the record, or if the record is one that is otherwise produced only at*

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[131] Exhibit A, Test Claim Statement of Decision, at p. 27.

[132] Government Code section 6253.9 (Stats. 2000, ch. 982 (AB 2799)).

[133] Exhibit I, DOF Comments on Draft Staff Analysis.

regularly scheduled intervals, the cost of producing the record including the cost to construct it, and the cost of programming and computer services necessary to produce the copy of the electronic record.

V. CONCLUSION

For the foregoing reasons the Commission hereby adopts the attached proposed parameters and guidelines, providing for actual cost reimbursement of the activities approved in the test claim statement of decision and the reasonably necessary activities approved, as analyzed above.

Adopted: April 19, 2013
Proposed for Correction: July 26, 2013

PROPOSED CORRECTED PARAMETERS AND GUIDELINES

Government Code Sections 6253, 6253.1, 6253.9, 6254.3, and 6255

Statutes 1992, Chapters 463 (AB 1040); Statutes 2000, Chapter 982 (AB 2799); and Statutes 2001, Chapter 355 (AB 1014)

California Public Records Act

02-TC-10 and 02-TC-51

Period of reimbursement begins on July 1, 2001, or later for specified activities added by subsequent statutes

I. SUMMARY OF THE MANDATE

The California Public Records Act (CPRA) provides for the disclosure of public records kept by the state, local agencies, school districts and community college districts, and county offices of education. On May 26, 2011, the Commission on State Mandates (Commission) adopted a statement of decision finding that the test claim statutes impose a partially reimbursable state-mandated program upon local agencies and K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission approved this test claim for the following reimbursable activities which impose an incremental increase in the level of service required under prior law:

1. If requested by a person making a public records request for a public record kept in an electronic format, provide a copy of a disclosable electronic record in the electronic format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. (Gov. Code, § 6253.9(a)(2) (Stats. 2000, ch. 982)).
2. Within 10 days from receipt of a request for a copy of records, notify the person making the request of the determination regarding whether the records are disclosable and the reasons for the determination. (Gov. Code, § 6253(c) (Stats. 2001, ch. 982)).
3. If the 10-day time limit of Government Code section 6253 is extended by a local agency or K-14 district due to "unusual circumstances" as defined by Government Code section 6253(c)(1)-(4) (Stats. 2001, ch. 982), provide written notice to the person making the request, setting forth the reasons of the extension and the date on which a determination is expected to be dispatched. (Gov. Code, § 6253(c) (Stats. 2001, ch. 982)).
4. If a request is denied, in whole or in part, respond in writing to a written request for inspection or copies of public records that includes a determination that the request is denied. (Gov. Code, § 6255(b) (Stats. 2000, ch. 982).)
5. When a member of the public requests to inspect a public record or obtain a copy of a public record:
    a. Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated;

b. Describe the information technology and physical location in which the records exist; and

c. Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

These activities are not reimbursable when:

- The public records requested are made available to the member of the public through the procedures set forth in Government Code section 6253;
- The public agency determines that the request should be denied and bases that determination solely on an exemption listed in Government Code section 6254; or
- The public agency makes available an index of its records. (Gov. Code, § 6253.1(a) and (d) (Stats. 2001, ch. 355)).

6. For K-12 school districts and county offices of education only, the following activities are eligible for reimbursement:

   a. Redact or withhold the home address and telephone number of employees of K-12 school districts and county offices of education from records that contain disclosable information.

      This activity is not reimbursable when the information is requested by: (1) an agent, or a family member of the individual to whom the information pertains; (2) an officer or employee of another school district, or county office of education when necessary for the performance of its official duties; (3) an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed (and thus must always be redacted or withheld); (4) an agent or employee of a health benefit plan providing health services or administering claims for health services to K-12 school district and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents. (Gov. Code, § 6254.3(a) (Stats. 1992, ch. 463).)

   b. Remove the home address and telephone number of an employee from any mailing lists that the K-12 school district or county office of education is legally required to maintain, if requested by the employee, except for lists used exclusively by the K-12 school district or county office of education to contact the employee. (Gov. Code, § 6254.3(b) (Stats. 1992, ch. 463).)

II. ELIGIBLE CLAIMANTS

Any city; county; ~~and~~ city and county; special district subject to the taxing restrictions of articles XIII A and XIII C, and the spending limits of article XIII B, of the California Constitution, whose costs for this program are paid from proceeds of taxes; or any "school district" as defined in Government Code

section 17519 which incurs increased costs as a result of this mandate, is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of Los Angeles filed the first test claim on October 15, 2002, establishing eligibility for reimbursement for the 2001-2002 fiscal year. Therefore, costs incurred pursuant to the test claim statutes are reimbursable on or after July 1, 2001.

Reimbursement for state-mandated costs may be claimed as follows:

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a local agency or school district may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a local agency or school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Gov. Code § 17560(b)).
5. If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564(a).
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable to and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

Claimants may use time studies to support salary, benefit, and associated indirect costs when an activity is task-repetitive. Activities that require varying levels of effort are not appropriate for time studies. Time study usage is subject to the review and audit conducted by the State Controller's Office.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant that incurs increased costs, the following activities are reimbursable:

A. <u>One Time Activities: Development of Policies and Procedures, and Training Employees to Implement the Mandate</u>

1. Developing policies, protocols, manuals, and procedures, to implement only the activities identified in section IV.B. of these parameters and guidelines. The activities in section IV.B. represent the incremental higher level of service approved by the Commission.

   This activity does not include, and reimbursement is not required for, developing policies and procedures to implement California Public Records Act requirements not specifically included in these parameters and guidelines. This activity specifically does not include making a determination whether a record is disclosable, or providing copies of disclosable records.

2. One-time training of each employee assigned the duties of implementing the reimbursable activities identified in section IV.B. of these parameters and guidelines.

   This activity does not include, and reimbursement is not required for, instruction on California Public Records Act requirements not specifically included in these parameters and guidelines. This activity specifically does not include instruction on making a determination whether a record is disclosable, or providing copies of disclosable records.

B. <u>Ongoing Activities</u>

1. Provide a copy of a disclosable electronic record in the electronic format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. (Gov. Code, § 6253.9(a)(2) (Stats. 2000, ch. 982)).

   This activity includes:

   a. Computer programming, extraction, or compiling necessary to produce disclosable records.

   b. Producing a copy of an electronic record that is otherwise produced only at regularly scheduled intervals.

   Reimbursement is not required for the activities of making the determination whether a record is disclosable, receiving the request for records, determining whether the request falls within the agency's jurisdiction, determining whether the request describes reasonably identifiable records, identifying access to records, conducting legal review to determine whether the records are disclosable, processing the records, sending the records, or tracking the records.

Fee authority discussed in section VII. of these parameters and guidelines is available to be applied to the costs of this activity. The Controller is authorized to reduce reimbursement for this activity to the extent of fee authority, as described in section VII.

2. Upon receipt of a request for a copy of records, a local agency or K-14 school district must perform the activities in a., b., or c. as follows:

    a. Beginning January 1, 2002, within 10 days from receipt of a request for a copy of records, provide verbal or written notice to the person making the request of the disclosure determination and the reasons for the determination. (Gov. Code, § 6253(c), Stats. 2001, ch. 982);

        This activity includes, where applicable:

        1) Drafting, editing and reviewing a written notice to the person making the request, setting forth the reasons for the determination.

        2) Obtaining agency head, or his or her designee, approval and signature of a written notice of determination.

        3) Sending or transmitting the notice to the requestor.

    b. Beginning January 1, 2002, if the 10-day time limit to notify the person making the records request of the disclosure determination is extended due to "unusual circumstances" as defined by Government Code section 6253(c)(1)-(4) (Stats. 2001, ch. 982), the agency head, or his or her designee, shall provide written notice to the person making the request, setting forth the reasons of the extension and the date on which a determination is expected to be dispatched. (Gov. Code, § 6253(c), Stats. 2001, ch. 982).

        This activity includes, where applicable:

        1) Drafting, editing and reviewing a written notice to the person making the request, setting forth the reasons for the extension of time.

        2) Obtaining agency head, or his or her designee, approval and signature of, the notice of determination or notice of extension.

        3) Sending or transmitting the notice to the requestor.

    c. Beginning July 1, 2001, if a request is denied, in whole or in part, respond in writing to a written request for inspection or copies of public records that includes a determination that the request is denied. (Gov. Code, § 6255(b), Stats. 2000, ch. 982).

        This activity includes, where applicable:

        1) Drafting, editing and reviewing a written notice to the person making the request, setting forth the reasons for the determination. This may include legal review of the written language in the notice. However, legal research and review of the law and facts that form the basis of the determination to deny the request are not reimbursable.

        2) Obtaining agency head, or his or her designee, approval and signature of, the notice of determination.

3) Sending or transmitting the notice to the requestor.

Reimbursement for activities 2a., 2b., and 2c. is not required for making the determination whether a record is disclosable, receiving the request for records, determining whether the request falls within the agency's jurisdiction, determining whether the request describes reasonably identifiable records, identifying access to records, conducting legal review to determine whether the records are disclosable, processing the records, sending the records, or tracking the records.

3. When a member of the public requests to inspect a public record or obtain a copy of a public record, the local agency or K-14 school district shall (1) assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated; (2) describe the information technology and physical location in which the records exist; and (3) provide suggestions for overcoming any practical basis for denying access to the records or information sought.

   This activity includes:

   a. Conferring with the requestor if clarification is needed to identify records requested.

   b. Identifying record(s) and information which may be disclosable and may be responsive to the request or to the purpose of the request, if stated.

   c. Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

   These activities are not reimbursable when: (1) the public records requested are made available to the member of the public through the procedures set forth in Government Code section 6253; (2) the public agency determines that the request should be denied and bases that determination solely on an exemption listed in Government Code section 6254; or (3) the public agency makes available an index of its records. (Gov. Code, § 6253.1(a) and (d), Stats. 2001, ch. 355).

   In addition, reimbursement is not required for the activities of making the determination whether a record is disclosable, receiving the request for records, determining whether the request falls within the agency's jurisdiction, conducting legal review to determine whether the requested records are disclosable, processing the records, sending the records, or tracking the records.

4. For K-12 school districts and county offices of education only, the following activities are eligible for reimbursement:

   a. Redact or withhold the home address and telephone number of employees of K-12 school districts and county offices of education from records that contain disclosable information.

      This activity is <u>not</u> reimbursable when the information is requested by: (1) an agent, or a family member of the individual to whom the information pertains; (2) an officer or employee of another school district, or county office of education when necessary for the performance of its official duties; (3) an employee

organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed (and thus must always be redacted or withheld); (4) an agent or employee of a health benefit plan providing health services or administering claims for health services to K-12 school district and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents. (Gov. Code, § 6254.3(a), Stats. 1992, ch. 463.)

b. Remove the home address and telephone number of an employee from any mailing lists that the K-12 school district or county office of education is legally required to maintain, if requested by the employee, except for lists used exclusively by the K-12 school district or county office of education to contact the employee. (Gov. Code, § 6254.3(b), Stats. 1992, ch. 463.)

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim and itemize all costs for those services. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be

claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets

Report the purchase price paid for fixed assets (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

6. Training

The cost of training each employee to perform the mandated activities is eligible for reimbursement as a one time cost. Identify the employee(s) by name and job classification. Provide the title and subject of the training session, the date(s) attended, and the location. Reimbursable costs may include salaries and benefits, registration fees, transportation, and per diem.

B. Indirect Cost Rates

Indirect costs are costs that have been incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs may include both: (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

For local agency claimants:

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in 2 CFR Part 225 (Office of Management and Budget (OMB) Circular A-87). Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B).

The distribution base may be: (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc).; (2) direct salaries and wages; or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by: (1) classifying a department's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by: (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect; and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected.

For school district claimants:

School districts must use the California Department of Education approved indirect cost rate for the year that funds are expended.

Community colleges have the option of using: (1) a federally approved rate, utilizing the cost accounting principles from the Office of Management and Budget Circular A-21, "Cost Principles of Educational Institutions"; (2) the rate calculated on State Controller's Form FAM-29C; or (3) a 7% indirect cost rate.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5 (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

Any offsetting revenue the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, service fees or assessments,; federal funds~~,~~; and other state funds; any of which fund the cost of the mandated activities, shall be identified and deducted from this claim.

Revenue from the fee authority authorized in Government Code sections 6253 and 6253.9(a)(2) and (b), as added by Statutes 2000, chapter 982, shall be identified and deducted from the following costs claimed:

1. The direct costs of providing a copy of a disclosable electronic record in the electronic format requested; and

2. If the request requires data compilation, extraction, or programming to produce the record, or if the record is one that is otherwise produced only at regularly scheduled intervals, the cost of producing the record including the cost to construct it, and the cost of programming and computer services necessary to produce the copy of the electronic record.

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558(b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 90 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561(d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The statements of decision adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record. The administrative record is on file with the Commission.