

COMMISSION ON STATE MANDATES

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February 10, 2009

Mr. Allan Burdick
MAXIMUS
3130 Kilgore Road, Suite 400
Rancho Cordova, CA 95670

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis, Comment Period, and Hearing Date
Identify Theft, 03-TC-08
Penal Code Section 530.6, Subdivision (a)
Statutes 2000, Chapter 956
City of Newport Beach, Claimant

Dear Mr. Burdick:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by Tuesday, **March 3, 2009**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on **Friday, March 27, 2009**, at 9:30 a.m. in Room 447, State Capitol, Sacramento, CA. The final staff analysis will be issued on or about March 13, 2009. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Heather Halsey at (916) 323-3562 if you have questions.

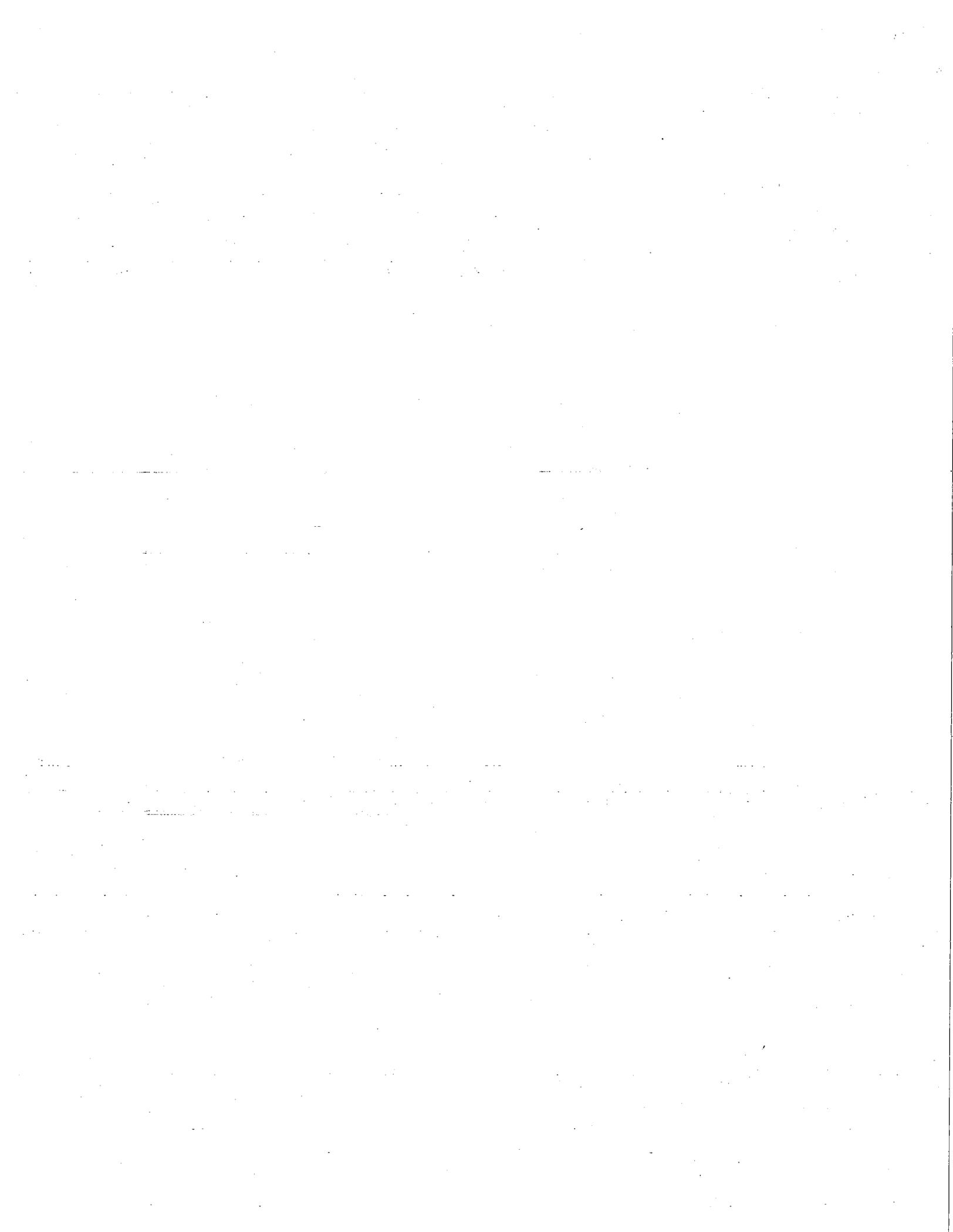
Sincerely,

A handwritten signature in cursive script that reads "Paula Higashi".

PAULA HIGASHI
Executive Director

Enclosures:

Draft Staff Analysis



ITEM _____
TEST CLAIM
DRAFT STAFF ANALYSIS

Penal Code Section 530.6, subdivision (a)
Statutes 2000, Chapter 956

Identity Theft
03-TC-08

City of Newport Beach, Claimant

EXECUTIVE SUMMARY

Background

This test claim was filed on September 25, 2003 and concerns increased activities of local law enforcement required by Penal Code section 530.6, subdivision (a) as added by Statutes 2000, chapter 956, when a complainant residing in the local law enforcement agency's jurisdiction reports identity theft to local law enforcement. Identity theft is defined as willfully obtaining "personal identifying information" and using that information for an unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person.¹ The use of the identifying information for an unlawful purpose completes the crime and each separate use constitutes a new crime.² Prior to enactment of the test claim statute, local law enforcement had discretion to decide whether or not to take a police report and begin an investigation when a complainant residing within its jurisdiction reported suspected identity theft. When a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, Penal Code section 530.6, subdivision (a) requires the local law enforcement agency to:

- take a police report of the matter,
- provide the complainant with a copy of that report, and,
- begin an investigation of the facts or refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

The Test Claim Statute Imposes a Reimbursable State-Mandated Program for Cities and Counties for Some of the Required Activities within the Meaning of Article XIII B, Section 6 of the California Constitution

¹ See Penal Code section 530.5.

² *People v. Mitchell* (App. 3 Dist. 2008) 78 Cal.Rptr.3d 855, 164 Cal.App.4th 442, review denied.

For reasons discussed in the analysis below, staff finds that state law did not require all of the state-mandated activities before January 1, 2000. Specifically, the requirements to take a police report and begin an investigation of the facts mandate a new program or higher level of service and impose costs mandated by the state within the meaning of Government Code section 17514 and 17556 because these activities were discretionary prior to enactment to the test claim statute and the test claim statute makes them mandatory. However, staff finds that referral of the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts is not a mandated activity and therefore is not reimbursable. Finally, staff finds that the requirement to provide the complainant with a copy of the police report is not a new program or higher level of service because Government Code section 6254, subdivision (f), as added by Statutes 1981 chapter 684, already required local law enforcement agencies to provide complainants with a copy of the report.

CONCLUSION

Staff concludes that Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places where the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

STAFF ANALYSIS

Claimant

City of Newport Beach

Chronology

- 09/25/03 City of Newport Beach filed test claim with the Commission on State Mandates ("Commission")
- 10/07/03 Commission staff issued completeness review letter and requested comments from state agencies
- 11/05/03 DOJ requested a 60-day extension for filing comments due to schedule and workload conflicts.
- 11/10/03 DOF submitted comments on test claim
- 01/05/04 DOJ submitted comments on the test claim

Background

According to the California Office of Privacy Protection, California law provides a number of protections for identity theft victims and the key to obtaining those benefits is a police report.³ Specifically, California Penal Code section 530.8⁴ entitles victims who obtain police reports to copies of documents relating to fraudulent transactions or accounts created using their personal information.⁵ They are entitled to have information resulting from identity theft removed (blocked) from their credit reporting agency files.⁶ They receive up to 12 free credit reports, one per month, in the 12 months from the date of the police report.⁷ They can stop debt collection actions related to a debt resulting from identity theft. Before resuming collection, the collector must make a good faith determination that the evidence does not establish that the consumer is not responsible for the debt.⁸ They can bring an action or assert a defense against anyone claiming a right to money or property in connection with a transaction resulting from identity theft.⁹ If they are a victim of criminal identity theft, which occurs when an identity thief creates a false criminal record in the victim's name, they have additional rights including:

³ See *Know Your Rights: California Identity Theft Victims' Rights*, California Office of Privacy Protection.

⁴ All further code references are to the California Penal Code unless otherwise specified.

⁵ See also The Fair Credit Reporting Act (FCRA) § 609(e) [15 U.S.C. § 1681g].

⁶ California Civil Code sections 1785.16, subdivision (k), 1785.16.1, 1785.16.2, and, 1785.20.3, subdivision (b); FCRA section 605B [15 U.S.C. § 1681c-2].

⁷ California Civil Code section 1785.15.3, subdivision (b).

⁸ California Civil Code section 1788.18.

⁹ California Civil Code section 1798.93.

- The right to an expedited proceeding in Superior Court for getting a judge's order finding that they are factually innocent. If such an order is issued, the judge may also order the deletion, sealing, or labeling of records.¹⁰
- The right to be listed in the California Department of Justice's Identity Theft Victim Registry. This gives victims of criminal identity theft a mechanism for confirming their innocence.¹¹

Test Claim Statute

This test claim concerns increased activities of local law enforcement required by section 530.6, subdivision (a) as added by Statutes 2000, chapter 956, when a complainant residing in the local law enforcement agency's jurisdiction reports identity theft to local law enforcement. The test claim statute, section 530.6, subdivision (a) provides:

A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

Claimant's Position

The claimant states that generally the location where a crime is committed determines where it will be investigated and where jurisdiction and venue for the investigation and enforcement may take place.¹² The claimant asserts that the test claim statute changes this to provide for venue and jurisdiction where the complainant resides.¹³ The claimant states that Newport Beach is not the location of many thefts, though residents of Newport Beach have been victims of identity theft, and that the test claim statute requires Newport Beach to take and pursue a police report for crimes that did not occur in Newport Beach. Specifically, claimant asserts that the test claim statute requires local law enforcement to:

- take a police report;
- determine the appropriate law enforcement agency to investigate the matter further and make a referral to that agency;
- provide a copy of the report to the complainant.¹⁴

¹⁰ Section 530.6, subsection (b).

¹¹ Sections 530.6 and 530.7.

¹² Test Claim, page 1.

¹³ *Ibid.*

¹⁴ Test Claim, page 2.

Department of Finance's (DOF) Position

DOF concludes that the test claim statute "may have resulted in increased costs as a result of 'a higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.'"¹⁵

Department of Justice's (DOJ) Position

DOJ, on the other hand, states that section 530.6, subdivision (a) does not impose a higher level of service. DOJ maintains that venue for identity theft crimes would be proper in the jurisdiction where the victim resides even without section 530.6, subdivision (a) because identity theft is a form of fraud or trespass against the person who is in constructive possession of his or her identity.¹⁶ Thus, the crime "occurs" where the victim resides in addition to wherever the thief uses the identity of the victim for an unlawful purpose. DOJ's letter cites to an old case regarding theft and venue which is still good law,¹⁷ to support this proposition. In addition, DOJ argues that even if the identity theft was committed outside of the state, venue would be proper where the crime is consummated, that is, where the victim lives, citing to Penal Code section 778.¹⁸ Finally, DOJ points out that the test claim statute, as added by Statutes 2000, chapter 956 was sponsored by the Los Angeles County District Attorney's Office and states that if the Commission finds that section 530.6 imposes a new program or higher level of service on local agencies there should be no subvention since the legislation was requested by local government and supported by many cities.¹⁹

Discussion

The courts have found that article XIII B, section 6, of the California Constitution recognizes the state constitutional restrictions on the powers of local government to tax and spend. "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."²⁰ A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.²¹ In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.²²

¹⁵ DOF comments dated November 6, 2003, page 1.

¹⁶ DOJ comments dated January 5, 2004, page 1.

¹⁷ *People v. Robinson* (1930) 107 Cal. App. 211, 222.

¹⁸ DOJ comments dated January 5, 2004, page 1.

¹⁹ *Ibid*, page 2.

²⁰ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

²¹ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

²² *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.*); *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3rd 830, 835 (*Lucia Mar*).

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.²³ To determine if the program is new or imposes a higher level of service, the test claim statutes and/or executive orders must be compared with the legal requirements in effect immediately before the enactment.²⁴ A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."²⁵ Finally, the newly required activity or increased level of service must impose costs mandated by the state.²⁶

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.²⁷ In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."²⁸

Issue 1. Does Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 require local agencies to perform state-mandated activities?

The test claim statute, Section 530.6, subdivision (a) as added by Statutes 2000, chapter 956 states:

A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

²³ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar*, *supra*,

²⁴ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

²⁵ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

²⁶ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

²⁷ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

²⁸ *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

When a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, the plain language of section 530.6, subdivision (a) requires the local law enforcement agency to:

1. take a police report of the matter,
2. provide the complainant with a copy of that report, and,
3. begin an investigation of the facts or refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

The California Supreme Court has noted: "When interpreting a statute our primary task is to determine the Legislature's intent. [Citation.] In doing so we turn 1st to the statutory language, since the words the Legislature chose are the best indicators of its intent."²⁹ Further, our Supreme Court has noted: "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . ."³⁰ Because there has been some confusion regarding the meaning of these words, a statutory construction analysis is necessary.

The legislative history of section 530.6 indicates that the main purpose of the test claim statute is to help victims of identity theft to clear their names. Penal Code section 851.8 (A.B. 2861, Stats. 1980, chapter 1172) provides a procedure whereby a person who has been arrested or detained and is factually innocent may request a law enforcement agency or a court to seal or destroy the arrest record. However, this provision does not apply where the identity theft victim was not arrested or detained. Penal Code section 530.6 was intended to assist those victims who have not yet been arrested or detained.³¹ The California Supreme Court has stated that the literal meaning of a statute must be read in accord with its purpose.³² Thus the Legislature's intent to assist these victims will guide the following statutory construction analysis.

"Take a Police Report of the Matter"

A police report prepared in accordance with the test claim statute includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places where the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information as specified by sections 530.5 and 530.55. What it means to "take a police report of the matter" is undefined in California law. Moreover, "police report" is not defined in any of the well known dictionaries. However, "police" means: "1. [t]he governmental department charged with the preservation of public order, the promotion of public safety, and the prevention and detection of crime. 2. The officers or members of this department."³³ "Report" means: "a formal oral or written presentation

²⁹ *Freedom Newspapers, Inc v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826.

³⁰ *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.

³¹ See Sen. Com. on Public Safety, Analysis of Assem. Bill No. (AB) 1897, as Amended June 20, 2000.

³² *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659.

³³ Black's Law Dictionary, 7th Edition, page 1178.

of facts.”³⁴ The language of a related statute provides a victim of identity theft who provides a consumer credit reporting agency with a copy of a “police report prepared pursuant to Section 530.6. . .regarding the public offenses described in section 530.5” with up to twelve copies of his or her file (no more than one per month), following the date of the police report.³⁵ This language, when considered in conjunction with the Legislature’s intent in passing the test claim statute to assist identity theft victim’s in clearing their names supports the proposition that a police report prepared pursuant to section 530.6 must include information that establishes the elements of section 530.5.

The elements of the crime of identity theft are: 1) willfully obtaining personal identifying information, and 2) use of that information for any unlawful purpose.³⁶ Section 530.5 provides that a person that “willfully obtains personal identifying information as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person” is guilty of identity theft. The use of the identifying information for an unlawful purpose completes the crime and each separate use constitutes a new crime.³⁷ “Personal identifying information” is defined as the name, address, mother’s maiden name, place of employment, date of birth, unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation, unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, the following identifying numbers: telephone, health insurance, credit card, taxpayer identification, school identification, state or federal driver’s license, state or federal identification number, social security, employee identification number, professional or occupational, demand deposit account, savings account, checking account, PIN or password, alien registration, government passport, or any form of identification that is equivalent to those listed above.³⁸ Thus a “police report” under the test claim statute must include information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual, including, if available, information surrounding the suspected identity theft, places where the crimes occurred, and how and where the suspect obtained and used the personal identifying information in accordance with sections 530.5 and 530.55.

In addition to the protections afforded by California law, according to the Federal Trade Commission (FTC), in order for a police report to be considered an Identity Theft Report, and therefore entitle an identity theft victim to a number of federal law protections, the police report must contain details about the accounts and inaccurate information that resulted from the identity

³⁴ *Ibid*, page 1303.

³⁵ California Civil Code section 1785.15.3 (Stats. 2002, c. 860), emphasis added.

³⁶ Section 530.5.

³⁷ *People v. Mitchell* (App. 3 Dist. 2008) 78 Cal.Rptr.3d 855, 164 Cal.App.4th 442, review denied.

³⁸ Penal Code section 530.55.

theft.³⁹ A person who suspects he or she is the victim of identity theft can file an Identity Theft Complaint on line with the FTC at <https://www.ftccomplaintassistant.gov>. The FTC advises victims to bring a printed copy of the ID Theft Complaint with them to the police station in order to better assist the police in creating a detailed police report so that victims can access the important federal protections available to them if they have an Identity Theft Report. The FTC has also prepared a Letter to Law Enforcement Officers encouraging local law enforcement to attach or incorporate the ID Theft Complaint into the police report, sign the “Law Enforcement Report Information” section of the FTC’s ID Theft Complaint, and provide the identity theft complainant with a copy of the Identity Theft Report (the police report with the victim’s ID Theft Complaint attached or incorporated) to permit the victim to dispute the fraudulent accounts and debts created by the identity thief.⁴⁰ Though the FTC suggestions are not binding upon local law enforcement agencies, the requirements for an Identity Theft Report are consistent with the required contents of a police report and the legislative intent “to help victims of identity theft to clear their names.”

“Provide the Complainant with a Copy of That Report”

“Provide the complainant with a copy of that report” means that local law enforcement must make readily available to the complainant an actual copy of the police report taken. The word “provide” is not defined in California law or in Black’s Law Dictionary. However, one definition of “provide” is “[t]o make (something) readily available.”⁴¹ According to Black’s Law Dictionary a “copy” means: “an imitation or reproduction of an original.”⁴² “That report,” clearly refers to the “police report” immediately preceding “provide the complainant with a copy of that report” in the same sentence.

“Begin an Investigation of the Facts or Refer the Matter to the Law Enforcement Agency Where the Suspected Crime was Committed for Further Investigation of the Facts.”

When a local law enforcement agency has taken a police report on the matter, the plain language of the test claim statute also requires it to “begin an investigation of the facts.” The word “begin” means: “to originate; to come into existence; to start; to institute, to initiate; to commence.”⁴³ While the word “investigation” means: “the process of inquiring into or tracking down through inquiry.”⁴⁴ The word “investigate” means: “[t]o follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry.”⁴⁵ Therefore, in the context of section 530.6, to “begin an investigation” means to commence an inquiry into suspected identity theft. However, “begin” certainly does not require a “complete” investigation such as would be required to criminally prosecute a suspect.

³⁹ FTC Letter to Law Enforcement Officers, page 1

⁴⁰ *Ibid.*

⁴¹ Roget’s II, The New Thesaurus, Expanded Edition, page 778.

⁴² Black’s Law Dictionary, Seventh Edition, page 337.

⁴³ Black’s Law Dictionary, Sixth Edition, page 155.

⁴⁴ Black’s Law Dictionary, *supra*, page 825.

⁴⁵ *Ibid.*

The test claim statute continues in pertinent part: "...or, if the suspected crime was committed in a different jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts." This language is confusing because it could be read as requiring local law enforcement to either begin an investigation or refer the matter except that the sentence ends with "for *further investigation* of the facts" (emphasis added). The adverb "further" means "1. Going beyond what currently exists: without further ado. 2. Being an addition."⁴⁶ Thus, "further investigation" necessarily requires the law enforcement agency that takes the police report to first begin an investigation before referring it out to another agency so that that the other agency may go beyond or add to the investigation that was begun by the referring agency. Still, some local agencies found this language confusing saying that it was unclear whether it permitted a local law enforcement agency to simply refer a matter to a jurisdiction where the suspected crime occurred without investigation.⁴⁷ Three years after enactment of the test claim statute, section 530.6 was amended by Statutes of 2003, chapter 533 which is not pled in this test claim, for the purpose of clarifying that the local law enforcement agency with jurisdiction over the victim's residence or place of business must take the police report and begin an investigation⁴⁸ to say:

A person who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, as described in subdivision (a) of Section 530.5, may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence or place of business, which shall take a police report of the matter, provide the complainant with a copy of that report, and begin an investigation of the facts. ~~or, if~~ If the suspected crime was committed in a different jurisdiction, the local law enforcement agency may refer the matter to the law enforcement agency where the suspected crime was committed for further investigation of the facts.

(Underlining and strikethrough of amendments and deletions added.)

The California Supreme Court stated:

"Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose" (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337 [283 Cal.Rptr. 893, 813 P.2d 240].) That purpose is not necessarily to change the law. "While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute." (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71].)⁴⁹

⁴⁶ Roget's II, The New Thesaurus, Expanded Edition, page 435.

⁴⁷ Assembly Committee on Judiciary analysis of Sen. Bill (SB) 602, as amended June 26, 2003, page 7.

⁴⁸ *Ibid.*

⁴⁹ *Williams v. Garcetti* (1993) 5 Cal.4th 561.

In this instance, there is a statement of legislative intent to clarify the test claim statute.⁵⁰

Thus, referral of the matter to another jurisdiction for further investigation of the facts is only permitted after the investigation has begun and at that point would be at the discretion of the referring law enforcement agency.⁵¹ The clarifying language did not change the original requirement for the law enforcement agency where the alleged victim resides to begin an investigation of the matter because, as discussed above, the language “further investigation of the facts” necessarily implies that a preliminary investigation of the facts was conducted by the law enforcement agency that took the police report. Because this permissive authority to refer the matter to another jurisdiction does not require any action on behalf of local law enforcement, it does not impose a new state-mandated activity.

Thus, based on the foregoing analysis, staff finds that when a victim of identity theft initiates a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her actual residence, section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 requires local law enforcement agencies to undertake the following state-mandated activities:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places where the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information;
- provide the complainant with an actual copy of that report; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Issue 2. Do the state-mandated activities impose a new program or higher level of service on local agencies?

For section 530.6, subdivision (a) to be subject to article XIII B, section 6 of the California Constitution, the statute must constitute a new “program” or “higher level of service.” The California Supreme Court, in the case of *County of Los Angeles v. State of California*,⁵² defined the word “program” within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.⁵³ To determine if a required activity is new or imposes

⁵⁰ Assembly Committee on Judiciary analysis of SB 602, *supra*, page 7.

⁵¹ *Ibid.*

⁵² *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

⁵³ *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

a higher level of service, a comparison must be undertaken between the test claim statute and the legal requirements in effect immediately prior to the enactment of the test claim statute.

For the reasons stated below, staff finds that state law did not require all of the state-mandated activities before January 1, 2000. The requirements to take a police report and begin an investigation of the facts represent a new program or higher level of service within the meaning of Government Code section 17514 and 17556. However, staff finds that the requirement to provide the complainant with a copy of the police report is not a new program or higher level of service because Government Code section 6254, subdivision (f), as added by Statutes 1981 chapter 684, requires local law enforcement agencies to provide complainants with a copy of the report.

Duty of Local Law Enforcement to Take a Police Report and Begin an Investigation

DOJ argues that section 530.6, subdivision (a) does not impose a new program or higher level of service.⁵⁴ DOJ maintains that venue for identity theft crimes would be proper in the jurisdiction where the victim resides even without section 530.6, subdivision (a) because identity theft is a form of fraud or trespass against the person who is in constructive possession of his or her identity. Based on DOJ's reasoning, the crime "occurs" where the victim resides in addition to wherever the thief uses the identity of the victim for an unlawful purpose.

Prior to the enactment of the test claim statute, local law enforcement agencies in the jurisdiction where the complainant resided could take police reports from residents regarding alleged crimes of identity theft, even if the suspect resided in another jurisdiction and committed each offense of using the personal identifying information for unlawful purposes in a jurisdiction other than that in which the complainant resided. The following provisions of the Penal Code support this conclusion.

Section 830.1 provides that the authority peace officers "extends to any place in the state, as follows:

- (1) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs the peace officer or in which the peace officer serves. . . ."

A "public offense" is not specifically defined in California law but according to Black's Law Dictionary, a "public offense" is "an act or omission forbidden by law."⁵⁵ Thus, it would include all of the theft crimes, including identity theft.

Section 789, establishes the jurisdiction of a criminal action for "stealing or embezzling ... in any competent court into or through the jurisdictional territory of which such stolen or embezzled property has been brought." Penal Code section 789 was originally enacted in 1872 and has had three amendments that are of little significance to this test claim.⁵⁶

⁵⁴ Assembly Committee on Judiciary analysis of SB 602, *supra*, page 7.

⁵⁵ Blacks Law Dictionary, Seventh Edition, page 1110.

⁵⁶ The essence of this provision has remained unchanged since 1872: the crime of "stealing" which is synonym for "theft" or "larceny" could be prosecuted where the property was originally taken or anywhere it was transported to or through. Moreover, Penal Code section 789, as

Theft in its various forms (burglary, carjacking, robbery, theft, or embezzlement), receipt or concealment, sale, withholding, or aiding in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained of stolen property are all crimes.⁵⁷ From 1993 to the present, section 786, subdivision (a) has provided that when a person takes property in one jurisdiction by burglary, carjacking, robbery, theft, or embezzlement and brings the property into another jurisdiction, or a person receives the property in another jurisdiction, the district attorney can prosecute in any of the jurisdictions. This makes sense because crimes were committed in all of the jurisdictions specified in section 786, subdivision (a). Similarly, a peace officer's authority extends to any public offense for which there is probable cause to believe has been committed within the political subdivision that employs the police officer. Therefore, local law enforcement in the City of Newport Beach had authority to take a police report from a resident of its jurisdiction in a case of suspected identity theft under one or more of the theft related Penal Code provisions discussed above prior to the test claim statute.

Prior to the enactment of the test claim statute, sections 830.1 and 789 authorized the peace officers who had jurisdiction over the victim's residence to exercise jurisdiction in identity theft cases. Therefore, the test claim statute simply clarifies and restates what was existing law with regard to the *discretion* of the law enforcement agency with jurisdiction over the victim's residence to exercise jurisdiction in the case of suspected identity theft. Thus, Newport Beach's ability to take police reports of identity theft claims brought by residents of its jurisdiction is not new. However, there was no specific state mandate to take a police report or begin an investigation of the facts in the case of suspected identity theft prior to the test claim statute, as added by Statutes 2000, chapter 956.⁵⁸ Because the test claim statute specifically mandates the taking of a police report and beginning of an investigation, DOJ's conclusion that it does not impose a new program or higher level of service is incorrect.

Moreover, Government Code section 17565 provides that "[i]f a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate." Thus, though the Appropriations Committee analysis notes that many jurisdictions did prepare police reports and conduct investigations regarding reports of identity theft from residents within their jurisdictions prior to the test claim statute, as added by Statutes 2000, chapter 956,⁵⁹ this point is irrelevant to the issue of whether the test claim imposes a reimbursable state-mandated program or higher level of service. There was no California or federal law specifically requiring police to take a report or begin an investigation in the case of suspected identity theft prior to the enactment of the test claim statute. This means that prior to

enacted in 1872 simply enacted what was already well established common law. (See *People v. Staples* (1891) 91 Cal. 23 at 27.)

⁵⁷ See generally Penal Code sections 211, 215, 484, 487, 488, 496, 503-515.

⁵⁸ Note that there are specific provisions in state law mandating police reports for domestic violence and child abuse incidents (See e.g. Pen. Code, §§ 13730, 11164, 11165.9, and 11165.14.)

⁵⁹ Assembly Committee on Appropriations Analysis of AB 1897 (Davis) as amended: May 16, 2000.

the test claim statute, local agencies were free to decline to take a police report or to decline to begin an investigation in a case of suspected identity theft. The test claim statute removed that discretion.

The taking of a police report on an allegation of identity theft and beginning an investigation carry out the governmental function of providing service to the public and the mandatory activities imposed by section 530.6 impose unique requirements on local governments that do not apply generally to all residents and entities of the state. To the extent local agencies provide police protection; they are serving a peculiarly governmental function.⁶⁰ The purpose of the test claim statute is "to provide expedited remedies for a victim of identity theft to clear his or her name."⁶¹ A police report provides important factual information which guides the court's decision on whether to declare the alleged victim factually innocent and therefore entitled to California's identity theft protections. The taking of the report and beginning of an investigation supports effective police protection in the area of identity theft.

Duty to Provide a Copy of the Police Report to the Complainant

Providing complainants with a copy of the police report and other activities related to providing police reports to complainants were already required under the California Public Records Act, and therefore do not constitute a new program or higher level of service. Since 1981, Government Code section 6254, subdivision (f), of the California Public Records Act has required local law enforcement agencies to disclose and provide records of incidents reported to and responded by law enforcement agencies to the victims of an incident.⁶² Government Code section 6254, subdivision (f), states in relevant part the following:

[S]tate and local law enforcement agencies shall disclose the names and addresses of the persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident

Except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation, law enforcement agencies are required to disclose and provide to the victim the following information:

The time, substance, and location of all complaints or requests for assistance received by the agency; the time and nature of the response; the time, date, and location of the occurrence; the time and date of the report; the name and age of

⁶⁰ See *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

⁶¹ Assembly Committee on Appropriations Analysis of AB 1897, *supra*.

⁶² Government Code section 6254 was added by Statutes 1981, chapter 684. Section 6254 was derived from former section 6254, which was originally added in 1968 (Stats. 1968, ch. 1473).

the victim; the factual circumstances surrounding the crime or incident; and a general description of any injuries, property, or weapons involved.⁶³

Although the general public is denied access to the information listed above, the victim of identity theft is entitled to the information described above.⁶⁴ Furthermore, the information required to be disclosed to victims under Government Code section 6254, subdivision (f), satisfies the purpose of the test claim statute. As indicated in the legislative history, the purpose of the test claim statute is to assist victims of identity theft in clearing their names. As discussed above, a police report is required to qualify the victim for numerous protections under California and federal law. Also credit card companies and financial institutions may ask victims to show a copy of a police report to verify the crime.⁶⁵ Staff finds that the disclosure of information describing the factual circumstances surrounding the incident pursuant to Government Code section 6254, subdivision (f), is evidence that can support a victim's request for a judicial determination of factual innocence pursuant to section 530.6, subdivision (b) where the identity thief has committed crimes with which the identity theft victim has been charged.

Finally, staff acknowledges that the requirements under the test claim statute and the requirements under the Public Records Act are different in two respects. First, unlike the Public Records Act, the test claim statute requires local law enforcement to "provide the complainant with a copy" of the police report, but does not require the complainant to request the copy. However, Government Code section 6253, subdivision (b), requires the local agency to "upon request" make the records "promptly available." As discussed above, one meaning of "provide" in common usage is "[t]o make (something) readily available."⁶⁶ Thus, the requirement of the test claim to "provide a copy of that report" to the victim is essentially the same activity as required by the Public Records Act of making the copy "promptly available". Second, the test claim statute does not specifically mandate when law enforcement agencies are required to provide the complainant with a copy of the police report while Government Code section 6253, subdivision (b), requires the records to be made "promptly available" and generally defines "promptly available" as within no more than 10 days. However, these differences are minor and the activities of providing, retrieving, and copying information related to a case of suspected identity theft are not new. Thus, the activity "provide complainant with a copy of that report" does not constitute a new program or higher level of service.

Additionally, while the test claim statute is silent on fee authority for providing a copy of the report, Government Code Section 6253, subdivision (b) authorizes local agencies to impose a fee to cover the direct costs of duplication or a statutory fee if available. Most jurisdictions, including Newport Beach, currently charge a fee for the direct costs of providing a copy of a police report. The Los Angeles Police Department currently charges \$23 per report while Newport Beach Police Department charges only \$4. There are some cities that choose not to

⁶³ Government Code section 6254, subdivision (f)(2).

⁶⁴ *Vallejos v. California Highway Patrol* (1979) 89 Cal.App.3d 781, 786.

⁶⁵ California Attorney General, Identity Theft: Tips for Victims, <http://caag.state.ca.us/idtheft/tips.htm> (accessed 1/29/09).

⁶⁶ Roget's II, The New Thesaurus, Expanded Edition, page 778.

charge crime victims for copies of police reports, but providing free copies to victims is a policy decision which is at the discretion of the local agency and not mandated by the state.

Therefore, based on the above discussion staff finds that only the following activities mandated by section 530.6, subdivision (a), as added by Statutes 2000, chapter 956 constitute a new program or higher level of service:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places where the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information, and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Issue 3: Are there costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

Government Code section 17514 defines “costs mandated by the state” as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant estimates that for the tasks of taking a police report, providing a copy of the police report to the victim, ascertaining the appropriate jurisdiction and referring the matter for further investigation is in excess of \$15,000 per year.⁶⁷ Claimant also asserts that none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply here. (Test Claim, page 4.)

DOJ argued that even in the event that the Commission finds that there is a state-mandated program or higher level of service that it should deny the claim because the exception under Government Code section 17556, subdivision (a) should apply in this case.⁶⁸ Government Code section 17556 subdivision (a) prohibits the Commission from finding costs mandated by the state if the test claim is submitted by a local entity that requested the test claim legislation.

Government Code section 17556 subdivision (a) requires a specific request for the test claim legislation in the form of a resolution of the governing body of the city, county or school district claimant or a letter from the delegated representative of the governing body. However, Government Code section 17556 subdivision (a) does not apply in this case because there is no evidence of a specific request for this legislation by the claimant. Staff pulled the author’s bill file and found no evidence of anything from Newport Beach’s governing body requesting the legislation. Moreover, a search of the City of Newport Beach’s Resolutions for the years 1999 and 2000 shows no evidence of a specific request for this legislation. Though many local governments supported Assembly Bill 1897, support of a bill does not constitute a request for legislation under Government Code section 17556, subdivision (a).

Government Code section 17556 subdivision (g) provides an exemption from finding costs mandated by the state for statutes that create a new crime or infraction, eliminate a crime or

⁶⁷ Test Claim Page 3.

⁶⁸ DOJ Comment Letter, page 2.

infraction, or change the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction. Thus, though the test claim statute relates to investigations of suspected crimes, Government Code section 17556 subdivision (g) does not apply because the test claim statute, as added by Statutes 2000, chapter 956 does not create or eliminate a crime or infraction or change the penalty for a crime or infraction.

Therefore, staff finds costs mandated by the state as defined by Government Code section 17514, and that no exceptions to reimbursement in Government Code section 17556 apply for local law enforcement agencies to:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places where the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information, and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

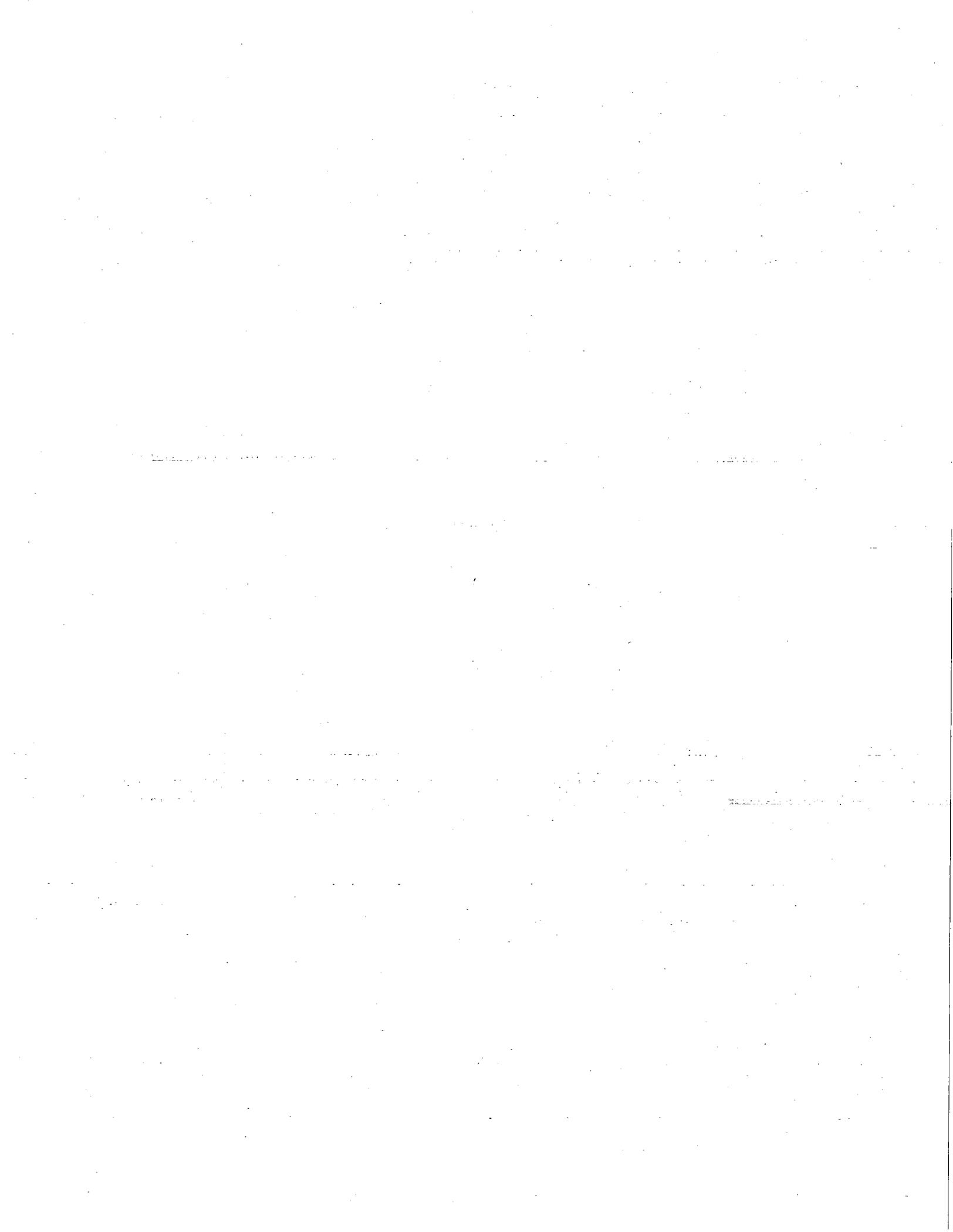
CONCLUSION

Staff concludes that Penal Code section 530.6, subdivision (a), as added by Statutes 2000, chapter 956, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- take a police report supporting a violation of Penal Code section 530.5 which includes information regarding the personal identifying information involved and any uses of that personal identifying information that were non-consensual and for an unlawful purpose, including, if available, information surrounding the suspected identity theft, places where the crime(s) occurred, and how and where the suspect obtained and used the personal identifying information; and,
- begin an investigation of the facts, including the gathering of facts sufficient to determine where the crime(s) occurred and what pieces of personal identifying information were used for an unlawful purpose.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.



Commission on State Mandates

Original List Date: 9/30/2003
Last Updated: 7/19/2006
List Print Date: 01/08/2009
Claim Number: 03-TC-08
Issue: Identity Theft

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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