

ITEM 5
TEST CLAIM
FINAL STAFF ANALYSIS

Family Code Sections 6300 and 6306, Welfare and Institutions Code Section 213.5
Penal Code Section 273.75
Statutes 2001, Chapter 572; Statutes 2001, Chapter 713

Domestic Violence Background Checks
(01-TC-29)

County of Alameda, Claimant

EXECUTIVE SUMMARY

Claimant County of Alameda submitted the test claim in July 2002 alleging a reimbursable state-mandated program for courts, district attorneys and prosecuting city attorneys to perform data base searches of persons who are charged with domestic violence, or when considering domestic violence restraining orders.

For the reasons indicated in the analysis below, staff finds that Penal Code section 273.75 imposes a reimbursable state-mandated program on district attorneys or prosecuting city attorneys within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to do the following upon any charge involving acts of domestic violence (as defined in Pen. Code, § 13700 & Fam. Code, §§ 6211 & 6203):

- Perform or cause to be performed, in specified electronic data bases,¹ a thorough investigation of the defendant's history, including, but not limited to, prior convictions for domestic violence, other forms of violence or weapons offenses and any current protective or restraining order issued by any civil or criminal court (Pen. Code, § 273.75, subd. (a)).
- Present the information for consideration by the court (1) when setting bond or when releasing a defendant on his or her own recognizance at the arraignment, if the defendant is in custody, and (2) upon consideration of any plea agreement (Pen. Code, § 273.75, subd. (a)).

¹ As specified in subdivision (b) of Penal Code section 273.75, the electronic data bases to be searched, "when readily available and reasonably accessible," are:
“(1) The Violent Crime Information Network (VCIN).
(2) the Supervised Release File.
(3) State summary criminal history information maintained by the Department of Justice pursuant to Section 11105 of the Penal Code.
(4) The Federal Bureau of Investigation's nationwide data base.
(5) Locally maintained criminal history records or data bases.”

- If a protective or restraining order is issued in the current criminal proceeding, and if the investigation reveals a current civil protective or restraining order issued by another criminal court and involving the same or related parties, the district attorney or prosecuting city attorney sends relevant information regarding the contents of the order issued in the current criminal proceeding, and any other information regarding a conviction of the defendant, to the other court immediately after the order has been issued (Pen. Code, § 273.75, subd. (c)).

The reimbursement period for this claim begins January 1, 2002.²

Staff finds that all other statutes in the test claim (Fam. Code, §§ 6300 & 6306, Welf. & Inst. Code, § 213.5, and the last two sentences of Pen. Code, § 273.75, subd. (c), as added or amended by Stats. 2001, chs. 572 & 713) are not subject to article XIII B, section 6 and Government Code section 17514 because they do not mandate an activity on a local government.

Recommendation

Staff recommends that the Commission adopt this analysis to partially approve the test claim for the activities listed above.

² Government Code section 17556, subdivision (e).

STAFF ANALYSIS

Claimants

County of Alameda

Chronology

07/31/02 Test Claim filed by County of Alameda, Claimant
08/02/02 Commission staff issues completeness letter to Claimant
08/29/02 Department of Finance submits comments on the test claim
01/24/03 Claimant submits rebuttal comments to Finance's comments
04/12/07 Commission staff requests information from Judicial Council
04/27/07 Judicial Council responds to staff's request for information
05/16/07 Commission staff issues draft staff analysis
06/08/07 Department of Finance submits comments on the draft staff analysis
06/29/07 Claimant submits comments on the draft staff analysis
07/12/07 Commission staff issues final staff analysis

Background

This test claim alleges statutes that require a data base search of records for persons charged with acts involving domestic violence or when the court considers a domestic violence restraining order.

Preexisting Law

The Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.) authorizes the court to issue a protective order,³ either ex parte or after a hearing, to restrain any person to prevent a recurrence of domestic violence. The application for a protective order is usually accompanied by a declaration or affidavit stating facts on which an order may be issued. Existing law also allows the juvenile court to issue similar protective orders to protect minors. The willful and knowing violation of those orders is a misdemeanor.

Preexisting law also authorizes the California Department of Justice to create and maintain various criminal history information databases, including the Violent Crime Information Network (VCIN), the California Law Enforcement Telecommunications Network (CLETS), and a state summary criminal history database. (Pen. Code, § 14201.1, Gov. Code, § 15152, Pen. Code, § 11105.)

³ Family Code section 6218 defines protective order as: “an order that includes any of the following restraining orders, whether issued ex parte, after notice and hearing, or in a judgment:
(a) An order described in Section 6320 enjoining specific acts of abuse.
(b) An order described in Section 6321 excluding a person from a dwelling.
(c) An order described in Section 6322 enjoining other specified behavior.”

Test Claim Statutes

Sponsored by the California Alliance against Domestic Violence, the test claim statute (Sen. Bill No. 66, Stats. 2001, ch. 572) was patterned after a Massachusetts law that was enacted after a woman, despite a restraining order in effect, was killed by a former boyfriend. Unbeknownst to the victim and the court issuing the restraining order, the former boyfriend had a long history of criminal violent behavior. The legislation (known as "Kristin's Law") was enacted after wide publicity and lobbying by the woman's father, a journalist, who tracked down the criminal history of the boyfriend after the killing.⁴

The test claim statutes in the Family Code and Welfare and Institutions Code describe a civil proceeding between two private parties. The Penal Code test claim statute applies to a criminal proceeding involving a charge of domestic violence.⁵

⁴ Senate Committee on Judiciary, Analysis of Senate Bill No. 66 (2001-2002 Reg. Sess.) as amended March 27, 2001, page 2.

⁵ The test claim statute, in Penal Code section 273.75, cites to two definitions of domestic violence, in Penal Code section 13700 and in Family code section 6211.

As defined in Penal Code section 13700, subdivision (b), for use in title 5 [law enforcement response to domestic violence] of part 4 of the Penal Code, domestic violence is: “[A]buse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. For purposes of this subdivision, "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.”

Abuse is defined in Penal Code section 13700, subdivision (a) as “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.”

As defined in Family Code section 6211, domestic violence means: “[A]buse perpetrated against any of the following persons:

- (a) A spouse or former spouse.
- (b) A cohabitant or former cohabitant, as defined in Section 6209.
- (c) A person with whom the respondent is having or has had a dating or engagement relationship.
- (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).
- (e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.
- (f) Any other person related by consanguinity or affinity within the second degree.”

Family Code: Statutes 2001, chapter 572 added Family Code section 6306, which requires, before a hearing on whether to issue a domestic violence restraining order, a data search to determine whether the subject of the order has any prior criminal convictions, outstanding warrants, is currently on parole or probation, or has violated a prior restraining order. Section 6306 also specifies the following data bases that at a minimum must be searched:

- (1) The Violent Crime Information Network (VCIN).
- (2) the Supervised Release File.
- (3) State summary criminal history information maintained by the Department of Justice pursuant to Section 11105 of the Penal Code.
- (4) The Federal Bureau of Investigation's nationwide data base.
- (5) Locally maintained criminal history records or data bases.

The statute further details which information the court considers when deciding whether to issue a restraining order or when determining temporary custody and visitation orders. Subdivision (d) requires the information obtained as a result of the data search to be maintained in a confidential case file and not to be part of the public file in the proceeding or any other civil proceeding, but requires the information to be disclosed to a court-appointed mediator or child custody evaluator. Subdivision (e) of section 6306 requires the court to notify law enforcement if there is an outstanding warrant against the person who is the subject of the order. Similarly, subdivision (f) requires notifying probation or parole officers, if the person is on parole or probation, of the issuance and contents of any protective order the court issues (see footnote 2 above for the definition of protective order).

Statutes 2001, chapter 572 also amended Family Code section 6300 to authorize the court to include the data obtained in the section 6306 data search to support the issuance of a protective order.

With respect to Family Code sections 6300 and 6306, section 7 of Statutes 2001, chapter 572, states, "This act shall be implemented in those courts identified by the Judicial Council as having resources currently available for these purposes. This act shall be implemented in other courts to the extent that funds are appropriated for purposes of the act in the annual Budget Act."

Penal Code: Statutes 2001, chapter 572 also added Penal Code section 273.75 to require the district attorney or prosecuting city attorney to search the data bases listed above when the defendant is charged with an act involving domestic violence (as defined in Pen. Code, § 13700, and Fam. Code, §§ 6211 & 6203). Subdivision (a) of section 273.75 specifies how the information is used:

This information shall be presented for consideration by the court (1) when setting bond or when releasing a defendant on his or her own recognizance at the

Family Code section 6203 states: "For purposes of this act, "abuse" means any of the following:

- (a) Intentionally or recklessly to cause or attempt to cause bodily injury.
- (b) Sexual assault.
- (c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
- (d) To engage in any behavior that has been or could be enjoined pursuant to Section 6320."

arraignment, if the defendant is in custody, and (2) upon consideration of any plea agreement. In determining bail or release upon a plea agreement, the court shall consider the safety of the victim, the victim's children, and any other person who may be in danger if the defendant is released.

Subdivision (b) specifies the data bases to be searched, which are the same as those in Family Code section 6306, as listed above. Subdivision (c) provides:

If the investigation required by this section reveals a current civil protective or restraining order or a protective or restraining order issued by another criminal court and involving the same or related parties, and if a protective or restraining order is issued in the current criminal proceeding, the district attorney or prosecuting city attorney shall send relevant information regarding the contents of the order issued in the current criminal proceeding, and any information regarding a conviction of the defendant, to the other court immediately after the order has been issued. When requested, the information described in this subdivision may be sent to the appropriate family, juvenile, or civil court. When requested, and upon a showing of a compelling need, the information described in this section may be sent to a court in another state.

Welfare and Institutions Code: Statutes 2001, chapter 713 (which was double-joined to Stats. 2001, ch. 572) amended Welfare and Institutions Code section 213.5. The section authorizes the juvenile court, after a petition has been filed to declare a child a dependent child or ward of the juvenile court, to issue an ex parte order “enjoining any person from contacting, threatening, molesting, attacking, striking, sexually assaulting, stalking, battering, or disturbing the peace of any parent, legal guardian, or current caretaker, upon application in the manner provided by Section 527 of the Code of Civil Procedure.”

Welfare and Institutions Code section 213.5 was amended to expand the ability to issue protective orders to cover the parent, legal guardian, or caretaker of the child. It also was amended to require a data base search be “conducted as described in subdivision (a) of Section 6306 of the Family Code” before deciding to issue a protective order.

Claimant Position

Claimant County of Alameda alleges that the test claim statutes impose a reimbursable state mandate under article XIII B, section 6 of the California Constitution. Claimant requests reimbursement for the district attorney or prosecuting city attorney, on any charge involving acts of domestic violence, to do the following:

1. Perform an investigation of defendant’s history, including search of specified data bases.
2. Present this information to the court at any hearing when bond is set, or when a defendant is released on own recognizance at preliminary hearing, or on consideration of any plea agreement
3. The data bases that are required to be searched are:
 - Violent Crime Information Network (VCIN)
 - Supervised Release File
 - State summary criminal history information maintained by the Department of Justice

- Federal Bureau of Investigation’s nationwide data base
- Locally maintained criminal history or data bases

Claimant also states that for every criminal complaint now filed, or every case reviewed for the filing of a criminal complaint, the district attorney or prosecuting city attorney is now required to search all relevant data bases for a history of domestic violence, history of restraining orders, or any other protective order against defendant.

In its September 2002 response to the Department of Finance’s comment that only the Penal Code provision ‘may contain a mandate,’ the claimant states that courts do not have access to the forgoing data bases; they are only accessible to certain law enforcement agencies. “As a result, the courts have been examining how to access this information in order to comply with the new mandate. The County ... is concerned that the courts may consider utilizing a court order to require that the prosecuting attorney or DA perform these background checks for them.”

In June 2007, claimant submitted comments concurring with the draft staff analysis.

State Agency Positions

In comments submitted in August 2002 on the test claim, the Department of Finance (Finance) states that the test claim statute ‘may have resulted in a reimbursable state-mandated local program’ for the following activities when performed by the District Attorney or prosecuting city attorney:

- Performing an investigation of the history of a defendant charged with domestic violence
- Search all relevant data bases for a history of domestic violence, restraining orders, or other protective orders against the defendant
- Search the following specified data bases:
 - Violent Crime Information Network (VCIN)
 - Supervised Release File
 - State summary criminal history information maintained by the Department of Justice
 - Federal Bureau of Investigation’s nationwide data base
 - Locally maintained criminal history or data bases
- Present information obtained as a result of this investigation to the court at any hearing when bond is set, a defendant is released on his or her own recognizance at a preliminary hearing, or upon consideration of any plea agreement.

Finance also states in its August 2002 comments:

[A]lthough the test claim identifies Family Code Sections 6300 and 6306, Penal Code Section 273.75, and Welfare and Institutions Code Section 213.5, as the sections that contain the mandate, the activities claimed are only referenced in Penal Code Section 273.5. Therefore, this test claim should only apply to the relevant section. The other sections of law referenced impose requirements on the courts, which are already fully funded by the State and therefore would not be eligible to receive State reimbursements. In addition, the claimant has not

identified any court activities as new activities or higher levels of service imposed on local government.⁶

In June 2007, Finance submitted comments agreeing with the draft staff analysis.

The Judicial Council submitted a letter in April 2007 stating that no courts were identified, for purposes of section 7 of the test claim statute,⁷ as having resources available to implement the test claim statute, although some courts are complying with it of their own accord. Also, the Judicial Council states that no funds have been appropriated in the Budget Act, and no grants have been issued by the Judicial Council. Regarding section 7 of the act, the Judicial Council stated:

The courts were given the duty to conduct the criminal history check in cases filed under the Domestic Violence Prevention Act because those cases involve two private parties and the district attorneys are not involved in those cases. The district attorneys were given the duty to conduct the criminal history check in cases filed under the Penal Code because they are responsible for prosecuting the criminal cases. To the extent SB 66 imposes requirements on the district attorneys, those requirements are not subject to the [section 7] implementation language, and would therefore appear to be effective regardless of whether the Judicial Council has identified any courts as being able to implement SB 66 in full.⁸

No other state agencies submitted comments on the claim.

⁶ Department of Finance, Program Budget Manager S. Calvin Smith, letter to Paula Higashi, August 29, 2002.

⁷ Section 7 of Statutes 2001, chapter 572 states, “This act shall be implemented in those courts identified by the Judicial Council as having resources currently available for these purposes. This act shall be implemented in other courts to the extent that funds are appropriated for purposes of the act in the annual Budget Act.”

⁸ Judicial Council of California, Director Diane Nunn, letter to Paula Higashi, April 26, 2007.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution⁹ recognizes the state constitutional restrictions on the powers of local government to tax and spend.¹⁰ “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.”¹¹ 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.¹²

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.¹³

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.¹⁴ To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test

⁹ Article XIII B, section 6, subdivision (a), (as amended in November 2004) provides:

(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

¹⁰ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

¹¹ *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

¹² *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

¹³ *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 District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

¹⁴ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.)

claim legislation.¹⁵ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”¹⁶

Finally, the newly required activity or increased level of service must impose costs mandated by the state.¹⁷ -

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 6.¹⁸ 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.”¹⁹

Issue 1: Are the test claim statutes subject to article XIII B, section 6 of the California Constitution?

A. Do the test claim statutes mandate an activity on a local government?

Family Code section 6306 and Welfare and Institutions Code section 213.5: These provisions were both added by Statutes 2001, chapter 572. The Family Code section requires the court, before a hearing on issuing or denying a domestic violence protective order, to do the following.

(a) [T]he court shall ensure that a search is or has been conducted to determine if the subject of the proposed order has any prior criminal conviction for a violent felony specified in Section 667.5 of the Penal Code or a serious felony specified in Section 1192.7 of the Penal Code; has any misdemeanor conviction involving domestic violence, weapons, or other violence; has any outstanding warrant; is currently on parole or probation; or has any prior restraining order or any violation of a prior restraining order. The search shall be conducted of all records and data bases readily available and reasonably accessible to the court, including, but not limited to, the following:

- (1) The Violent Crime Information Network (VCIN).
- (2) the Supervised Release File.
- (3) State summary criminal history information maintained by the Department of Justice pursuant to Section 11105 of the Penal Code.
- (4) The Federal Bureau of Investigation’s nationwide data base.

¹⁵ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

¹⁶ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

¹⁷ *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.

¹⁸ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

¹⁹ *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.

(5) Locally maintained criminal history records or data bases.

The remainder of section 6306, in subdivisions (b) through (g), govern how the information obtained in the data base searches is to be used and to whom and under what circumstances it is disseminated.

Similarly, Welfare and Institutions Code section 213.5 governs juvenile court issuance of similar protective orders to protect minors, the willful and knowing violation of which is a misdemeanor. This section was amended to expand the ability to issue protective orders to cover the parent, legal guardian, or caretaker of the child. It also was amended to require a data base search to be “conducted as described in subdivision (a) of Section 6306 of the Family Code” before deciding to issue or deny a protective order. Because this provision incorporates the data search in Family Code section 6306, it is discussed together with section 6306.

The issue is whether these statutes mandate an activity on local government. Staff finds that they do not.

The requirement for the data search is on the court. As the plain language of Family Code section 6306, subdivision (a) states: “the court shall ensure that a search is or has been conducted ...” There is no requirement in section 6306 for any other entity to perform the data search.

Section 8 (d) of article XIII B of the California Constitution defines “local government” as “any city, county, city and county, school district, special district, authority, or other political subdivision of the state.” Accordingly, Government Code sections 17514, 17518 and 17519 define eligible claimants to be cities, counties, special districts, and school districts. Courts are not included in these definitions as eligible claimants. Nor are courts part of county government any longer. The state has assumed primary responsibility for funding trial courts since the Lockyer-Isenberg Trial Court Funding Act of 1997 (Stats. 1997, ch. 850).

Moreover, with respect to Family Code Sections 6300 and 6306, section 7 of Statutes 2001, chapter 572 states: “This act shall be implemented in those courts identified by the Judicial Council as having resources currently available for these purposes. This act shall be implemented in other courts to the extent that funds are appropriated for purposes of the act in the annual Budget Act.” As stated above, the Judicial Council’s April 2007 letter indicated that no courts were identified and no funds have been appropriated.

Thus, although the statutes may impose requirements on the court to perform a data search, staff finds that Family Code section 6306 and Welfare and Institutions Code section 213.5, as added by Statutes 2001, chapter 572, are not a mandate on a local government within the meaning of article XIII B, section 6 because (1) they do not impose an activity on a local government, and (2) implementation is subject to funding that has not been appropriated.

Claimant states that courts do not have access to the forgoing data bases, they are only accessible to certain law enforcement agencies. “As a result, the courts have been examining how to access this information in order to comply with the new mandate. The County ... is concerned that the courts may consider utilizing a court order to require that the prosecuting attorney or DA perform these background checks for them.”²⁰

²⁰ Claimant’s comments on 01-TC-29, submitted January 24, 2003, page 1.

The existence of a state mandate is a question of law based on the language of the statute.²¹ It does not, as claimant contends, depend on whether a court has the ability to perform, or may in the future issue an order for, a data search. Therefore, staff finds that Family Code section 6306 and Welfare and Institutions Code section 213.5 do not impose a mandate on local government within the meaning of article XIII B, section 6 and are not subject to article XIII B, section 6.

Family Code section 6300: Statutes 2001, chapter 572 amended Family Code section 6300 to include the data obtained in the section 6306 data search to support the issuance of a protective order.

This provision authorizes the court, if necessary, to use data obtained during an investigation under Family Code section 6306 when deciding to issue a protective (restraining) order. It does not, however, mandate an activity on a local government. And as with Family Code section 6306 discussed above, funding was not appropriated for this activity. Therefore, staff finds that Family Code section 6300, as amended by Statutes 2001, chapter 572, does not impose a mandate on local government and is not subject to article XIII B, section 6 of the California Constitution.

Penal Code section 273.75: Statutes 2001, chapter 572 added the following provision to the Penal Code:

(a) On any charges involving acts of domestic violence as defined in subdivisions (a) and (b) of Section 13700 of the Penal Code or Sections 6203 and 6211 of the Family Code, [see fn. 4 on p. 4 above] the district attorney or prosecuting city attorney shall perform or cause to be performed, by accessing the electronic data bases enumerated in subdivision (b), a thorough investigation of the defendant's history, including, but not limited to, prior convictions for domestic violence, other forms of violence or weapons offenses and any current protective or restraining order issued by any civil or criminal court. This information shall be presented for consideration by the court (1) when setting bond or when releasing a defendant on his or her own recognizance at the arraignment, if the defendant is in custody, and (2) upon consideration of any plea agreement. In determining bail or release upon a plea agreement, the court shall consider the safety of the victim, the victim's children, and any other person who may be in danger if the defendant is released.

Subdivision (b) specifies the data bases to be searched, which are the same as those listed above in Family Code section 6306. Subdivision (c) requires the information in the investigation be shared as follows:

If the investigation required by this section reveals a current civil protective or restraining order issued by another criminal court and involving the same or related parties, and if a protective or restraining order is issued in the current criminal proceeding, the district attorney or prosecuting city attorney shall send relevant information regarding the contents of the order issued in the current criminal proceeding, and any other information regarding a conviction of the

²¹ *County of San Diego, supra*, 15 Cal.4th 68, 89.

defendant, to the other court immediately after the order has been issued. When requested, the information described in this subdivision may be sent to the appropriate family, juvenile, or civil court. When requested, and upon a showing of a compelling need, the information described in this section may be sent to a court in another state.

Based on the mandatory language of Penal Code section 273.75, staff finds that it is a mandate on the district attorney or prosecuting city attorney, on any charges involving acts of domestic violence (as defined in Pen. Code, § 13700 & Fam. Code, §§ 6211 & 6203) to do the following:

- Perform or cause to be performed, in electronic data bases specified in subdivision (b) of Penal Code section 273.75, a thorough investigation of the defendant's history, including, but not limited to, prior convictions for domestic violence, other forms of violence or weapons offenses and any current protective or restraining order issued by any civil or criminal court (Pen. Code, § 273.75, subd. (a)).
- Present the information for consideration by the court (1) when setting bond or when releasing a defendant on his or her own recognizance at the arraignment, if the defendant is in custody, and (2) upon consideration of any plea agreement (Pen. Code, § 273.75, subd. (a)).
- If a protective or restraining order is issued in the current criminal proceeding, and if the investigation reveals a current civil protective or restraining order issued by another criminal court and involving the same or related parties, the district attorney or prosecuting city attorney shall send relevant information regarding the contents of the order issued in the current criminal proceeding, and any other information regarding a conviction of the defendant, to the other court immediately after the order has been issued (Pen. Code, § 273.75, subd. (c)).

The last two sentences of subdivision (c) list activities that the district attorney or prosecuting city attorney may do when requested: (1) send the information to the appropriate family, juvenile, or civil court, and (2) on a showing of compelling need, send the information to a court in another state. These last two sentences contain activities that are not required, but remain at the discretion of the district attorney or prosecuting city attorney, as the language indicates that the information "may be sent." The issue is whether the activities in these two sentences in subdivision (c) are state mandates.

In the *Kern High School Dist.* case,²² the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the

²² *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."²³

Here, as in *Kern*, the decision to send the information is voluntary or discretionary, as indicated by the statute's use of the word "may." Thus, because the last two sentences of subdivision (c) authorize but do not require sending the information to another court or an out-of-state court, staff finds that the last two sentences of Penal Code section 273.75, subdivision (c) (Stats. 2001, ch. 572) are not state mandated within the meaning of article XIII B, section 6.

Additionally, the legislative history of section 273.75 indicates that sending the information to another court is discretionary. The original version of Senate Bill No. 66, as introduced January 8, 2001, made sending the information mandatory by stating: "Upon receipt of information from the data base search ... the prosecuting attorney *shall* notify any other court that has issued a current protective or restraining order against the defendant regarding the current prosecution of the defendant under Section 273a, 273d, 273.5, 273.6, or 273.65."²⁴ [Emphasis added.] The provision was amended September 5, 2001, to the current permissive language, indicating legislative intent that sending the information is not required. As one court stated the rule: "The rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out."²⁵ Since the mandatory language was amended out of that portion of the bill, it should not be interpreted as a mandatory provision.

Further discussion in this test claim is limited to Penal Code section 273.75.

B. Does Penal Code section 273.75 constitute a program?

In order for Penal Code section 273.75 to be subject to article XIII B, section 6 of the California Constitution, the test claim statute must constitute a "program," defined 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.²⁶ Only one of these findings is necessary to trigger article XIII B, section 6.²⁷

Staff finds that Penal Code section 273.75 constitutes a program within the meaning of article XIII B, section 6. Performing background checks on individuals charged with domestic violence carries out a governmental function of providing a service to the public by allowing courts to make informed decisions regarding setting bond, releasing defendants, or plea agreements. It also promotes public safety by protecting potential victims of domestic violence,

²³ *Id.* at page 743. Emphasis in original.

²⁴ Just before the September 5, 2001 amendment, this read: "The information described in this subdivision *shall be sent* to the appropriate family, juvenile, or civil court, including a court in another state, so that it may be considered in future civil court actions." [Emphasis added.]

²⁵ *Bollinger v. San Diego Civil Service Commission* (1999) 71 Cal.App.4th 568, 575.

²⁶ *County of Los Angeles, supra*, 43 Cal.3d 46, 56.

²⁷ *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

as stated in subdivision (a): “In determining bail or release upon a plea agreement, the court shall consider the safety of the victim, the victim’s children, and any other person who may be in danger if the defendant is released.” Moreover, the statute imposes unique requirements on a local government district attorney or prosecuting city attorney that do not apply generally to all residents and entities in the state. Therefore, staff finds that Penal Code section 273.75 constitutes a program within the meaning of article XIII B, section 6.

Issue 2: Does Penal Code section 273.75 impose a new program or higher level of service on local agencies within the meaning of article XIII B, section 6?

To determine whether the “program” is new or imposes a higher level of service, the test claim statute is compared to the legal requirements in effect immediately before enacting the test claim statute.²⁸ And the test claim statute must increase the level of governmental service provided to the public.²⁹ At issue are the following activities in Penal Code section 273.75 imposed on district attorneys or prosecuting city attorneys when a person is charged with acts involving domestic violence (as defined in Pen. Code, § 13700 & Fam. Code, §§ 6211 & 6203):

- Perform or cause to be performed, in electronic data bases specified in subdivision (b) of Penal Code section 273.75, a thorough investigation of the defendant’s history, including, but not limited to, prior convictions for domestic violence, other forms of violence or weapons offenses and any current protective or restraining order issued by any civil or criminal court. (Pen. Code, § 273.75, subd. (a).)
- Present the information for consideration by the court (1) when setting bond or when releasing a defendant on his or her own recognizance at the arraignment, if the defendant is in custody, and (2) upon consideration of any plea agreement. (Pen. Code, § 273.75, subd. (a).)
- If a protective or restraining order is issued in the current criminal proceeding, and if the investigation reveals a current civil protective or restraining order issued by another criminal court and involving the same or related parties, the district attorney or prosecuting city attorney shall send relevant information regarding the contents of the order issued in the current criminal proceeding, and any other information regarding a conviction of the defendant, to the other court immediately after the order has been issued. (Pen. Code, § 273.75, subd. (c).)

Prior to the test claim statute, district attorneys or prosecuting city attorneys were not required to perform these activities. Therefore, staff finds that Penal Code section 273.75 is a new program or higher level of service.

²⁸ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

²⁹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

Issue 3: Does Penal Code section 273.75 impose “costs mandated by the state” within the meaning of Government Code sections 17514 and 17556?

In order for Penal Code section 273.75 to impose a reimbursable state-mandated program under the California Constitution, the statute must impose costs mandated by the state.³⁰ In addition, no statutory exceptions listed in Government Code section 17556 can apply. Government Code section 17514 defines “cost mandated by the state” as follows:

[A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

In the test claim, claimant states that the “activities necessary to comply with the mandated activities cost in excess of \$200.00 per year.”³¹ Claimant states that it takes approximately 15-20 minutes for a search for each misdemeanor defendant, and approximately 15-30 minutes for each felony defendant. Claimant also states: “We believe that there are presently approximately 558 misdemeanor and 112 felony domestic violence cases per year.”³²

Criminal penalty: Government Code section 17556, subdivision (g), precludes reimbursement for a local agency if:

[t]he statute created a new crime or infraction, eliminated a crime or infraction, or changed 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.

The issue, therefore, is whether Penal Code section 273.75 creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction. Staff finds that it does not.

The section specifies a procedure when a defendant is charged with an act involving domestic violence, as defined, but nothing on the statute’s face creates or eliminates a new crime or infraction. As to whether or not section 273.75 changes a penalty for a crime or infraction, subdivision (a) details how the information obtained about the defendant is used:

This information shall be presented for consideration by the court (1) when setting bond or when releasing a defendant on his or her own recognizance at the arraignment, if the defendant is in custody, and (2) upon consideration of any plea agreement. In determining bail or release upon a plea agreement, the court shall consider the safety of the victim, the victim’s children, and any other person who may be in danger if the defendant is released.

Although the court may use the information the district attorney or prosecuting city attorney obtains “in consideration of any plea agreement” that may have the potential to change a penalty,

³⁰ *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

³¹ The current requirement is \$1000 in costs (Gov. Code, § 17564, Stats. 2004, ch. 890).

³² County of Alameda, Test Claim 01-TC-29, page 3.

nothing in the plain language of Penal Code section 273.75 changes the penalty for the crime of domestic violence.³³ Because the test claim statute did not amend any statute that specifies the penalties for an act involving domestic violence, Government Code section 17556, subdivision (g) does not apply.

Moreover, the original version of Senate Bill No. 66 (as introduced Jan. 8, 2001), which added Penal Code section 273.75, included the following provision: “The court shall consider that [background] information when deciding whether to grant probation and *when deciding what punishment shall be imposed.*” [Emphasis added.] The next version (Mar. 12, 2001) amended the sentence to read: “This information shall be presented for consideration by the court at first appearance, when setting bond, upon consideration of any plea agreement, *and when passing sentence.*” [Emphasis added.] The phrase “when passing sentence” was in the bill until the July 18, 2001 amendment, when it was deleted.

As one court stated: “The rejection of a specific provision contained in an act as originally introduced is ‘most persuasive’ that the act should not be interpreted to include what was left out.”³⁴ Thus, the fact that the original bill required the court to consider the information obtained in deciding punishment (or as later stated, ‘when passing sentence’), which language was later removed, shows legislative intent that the information obtained by the district attorney or prosecuting city attorney is not to be used in the trial or penalty phase of a domestic violence conviction. Given this legislative history, and that the test claim statute did not amend a domestic violence penalty statute, staff finds that Penal Code section 273.75 does not change the penalty of a crime or infraction, nor does it create or eliminate one within the meaning of Government Code section 17556, subdivision (g).

Accordingly, staff finds that Penal Code section 273.75 imposes costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

Staff finds that Penal Code section 273.75 imposes a reimbursable state-mandated program on district attorneys or prosecuting city attorneys within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to do the following upon any charge involving acts of domestic violence (as defined in Pen. Code, § 13700 & Fam. Code, §§ 6211 & 6203):

³³ The penalties for domestic violence are scattered through various statutes, including: (1) Penal Code section 243, subdivision (e), punishment for battery committed against spouse, cohabitant, parent of defendant's child, noncohabiting former spouse, or person whom or to whom defendant has been or is dating or engaged; and (2) Penal Code section 273.5, violence to spouse, cohabitant, or parent of defendant's child resulting in traumatic condition. None of these penalty statutes were test-claim statutes in this claim.

³⁴ *Bollinger v. San Diego Civil Service Commission*, *supra*, 71 Cal.App.4th 568, 575.

- Perform or cause to be performed, in specified electronic data bases,³⁵ a thorough investigation of the defendant’s history, including, but not limited to, prior convictions for domestic violence, other forms of violence or weapons offenses and any current protective or restraining order issued by any civil or criminal court (Pen. Code, § 273.75, subd. (a)).
- Present the information for consideration by the court (1) when setting bond or when releasing a defendant on his or her own recognizance at the arraignment, if the defendant is in custody, and (2) upon consideration of any plea agreement (Pen. Code, § 273.75, subd. (a)).
- If a protective or restraining order is issued in the current criminal proceeding, and if the investigation reveals a current civil protective or restraining order issued by another criminal court and involving the same or related parties, the district attorney or prosecuting city attorney sends relevant information regarding the contents of the order issued in the current criminal proceeding, and any other information regarding a conviction of the defendant, to the other court immediately after the order has been issued (Pen. Code, § 273.75, subd. (c)).

The reimbursement period for this claim begins January 1, 2002.³⁶

Staff finds that all other statutes in the test claim (Fam. Code, §§ 6300 & 6306, Welf. & Inst. Code, § 213.5, and the last two sentences of Pen. Code, § 273.75, subd. (c), as added or amended by Stats. 2001, chs. 572 & 713) are not subject to article XIII B, section 6 and Government Code section 17514 because they do not mandate an activity on a local government.

Recommendation

Staff recommends that the Commission adopt this analysis to partially approve the test claim for the activities listed above.

³⁵ As specified in subdivision (b) of Penal Code section 273.75, the electronic data bases to be searched, “when readily available and reasonably accessible,” are: “(1) The Violent Crime Information Network (VCIN).
 (2) the Supervised Release File.
 (3) State summary criminal history information maintained by the Department of Justice pursuant to Section 11105 of the Penal Code.
 (4) The Federal Bureau of Investigation’s nationwide data base.
 (5) Locally maintained criminal history records or data bases.”

³⁶ Government Code section 17556, subdivision (e).