

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Penal Code Section 14250
Statutes 2000, Chapter 822

Filed on July 5, 2001
By County of San Bernardino, Claimant
and

Penal Code Section 14250
Statutes 2001, Chapter 467

Filed on June 25, 2003
By County of Los Angeles, Claimant

No. 00-TC-27

DNA Database
and

No. 02-TC-39

Amendment to *Postmortem Examinations:
Unidentified Bodies*

STATEMENT OF DECISION PURSUANT TO
GOVERNMENT CODE SECTION 17500 ET
SEQ.; CALIFORNIA CODE OF
REGULATIONS, TITLE 2, DIVISION 2,
CHAPTER 2.5, ARTICLE 7

(Adopted on September 30, 2004)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

PAULA HIGASHI, Executive Director

Date

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STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on July 29, 2004. Bonnie Ter Keurst appeared on behalf of the County of San Bernardino. Leonard Kaye and David Campbell appeared on behalf of the County of Los Angeles. Jeannine Willie and John Tonkyn appeared on behalf of the Missing Person's DNA Program, Department of Justice (DOJ), and Dirk Anderson appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing to partially approve the test claim, with one modification to the recommendation, by a vote of 4-0, with one abstention.

BACKGROUND

Test claim statute: In 2000, the Legislature enacted the test claim statute¹ (Stats. 2000, ch. 822; Pen. Code, § 14250²) to require DOJ to create a data bank of DNA samples for two purposes: (1) to identify unidentified deceased persons or remains, and (2) to close missing persons cases. To build the data bank, DNA samples are collected by coroners from unidentified human remains,

¹ The original claim was filed on Statutes 2000, chapter 822. The County of Los Angeles' amendment (02-TC-39), which was consolidated with this test claim, added Statutes 2001, chapter 467, which amended the original test claim statute.

² Unless otherwise indicated, all statutory references are to the Penal Code.

and DNA samples are collected by local law enforcement agencies from missing persons' relatives or a missing person's personal articles.

The statute requires coroners to take DNA samples from unidentified human remains and deliver them to DOJ. Local law enforcement agencies investigating a missing person inform the missing person's parents or other relatives that they may give a DNA sample for the database. DOJ accepts DNA samples submitted by both coroners and local law enforcement agencies and administers the database and data bank.³

The test claim statute requires those collecting DNA samples to follow DOJ guidelines. The DOJ has released two Information Bulletins⁴ that contain the standards and guidelines for this program. In October 2001, the DOJ issued Information Bulletin 01-BFS-04, which are standards and guidelines that coroners follow in collecting DNA samples from unidentified bodies or remains. In July 2002, the DOJ released Information Bulletin 02-BFS-03, which are guidelines local law enforcement agencies follow in collecting DNA from family members or missing persons' articles ("living persons").

DOJ compares DNA samples taken from the remains of unidentified deceased persons with DNA samples taken from high-risk missing persons, or from their parents or appropriate relatives. According to the bill's author:

The creation of a Missing Persons DNA Data Base would allow law enforcement to take a voluntary saliva sample from the parents or relatives of a missing person. Once that person is missing for more than a month, the sample would be submitted to the Department of Justice DNA Laboratory for inclusion in the DNA Data Base. When a coroner uncovers an unidentifiable remain, a sample would be submitted to the DOJ for analysis. A positive match will bring closure to the case, and bring closure to the victim's family.⁵

According to the legislative history, coroners estimate there are approximately 2,000 unidentified remains, or samples of remains statewide, and 150-200 new cases of unidentified missing persons each year.⁶ The California State Coroner's Association, the Amber Foundation of Missing Children, and the Attorney General's Office sponsored the test claim legislation.

To fund the program, section 14251, enacted with the test claim statute, creates a Missing Persons DNA Data Base Fund,⁷ administered by DOJ, requiring a \$2 fee on death certificates

³ The statute uses both terms "database" and "data bank," although "data bank" is used only in subdivision (c)(1). Neither term is defined in the statute, but it appears that the database contains information, and the data bank contains actual DNA samples.

⁴ Exhibit B.

⁵ Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill No. 1818 (1999-2000 Reg. Sess.) as amended August 24, 2000, page 6.

⁶ *Id.* at page 5.

⁷ Penal Code section 14251 (Stats. 2000, ch. 822). Claimant did not plead this section.

issued by a local government agency⁸ or the state. The agency issuing the death certificate is authorized to retain up to five percent of the funds for administrative costs. This fee has a sunset date of January 1, 2006.

Related programs: In 1979, California became the first state to implement a statewide Dental Identification Program to process dental records submitted by law enforcement agencies and coroners in California and other states. The DOJ classifies, indexes, and compares dental records of missing and unidentified persons against each other for matches.⁹

In 1998, the Legislature enacted the DNA and Forensic Identification Data Base and Data Bank Act (Pen. Code, § 295 et seq.) to assist in prosecuting crimes and identifying missing persons. This database consists of DNA samples of those convicted of specified felonies,¹⁰ and is kept separate from the database created by the test claim statute, which is solely for identifying missing persons.¹¹

The DOJ also administers the Violent Crime Information Center to assist in identifying and apprehending persons responsible for specific violent crimes, and for the disappearance and exploitation of persons, particularly children and dependent adults.¹²

Related test claims: The Commission determined, in September 2003, that the test claim on *Postmortem Examinations: Unidentified Bodies, Human Remains*, 00-TC-18 (2003) (Stats. 2000, ch. 284) is a partially reimbursable mandate for local law enforcement investigating the death of an unidentified person to report the death to the DOJ within 10 calendar days of the date the body or human remains are discovered. There is an exception for children under 12 or found persons with evidence that they were at risk, as defined by Penal Code section 14213. The Commission also found that coroners' tasks undertaken as part of a discretionary autopsy are not reimbursable (including taking fingerprints/palm prints, a dental exam, tissue collection, photographs, and recording observations about the deceased, as specified).

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant requests reimbursement for coroners and law enforcement for the following activities:

⁸ Agencies that issue death certificates include the State Registrar, local registrar, or county recorder (Health & Saf. Code, § 103525, subd. (a)). A local registrar is the health officer of an approved local health department (Health & Saf. Code, § 102275).

⁹ California Department of Justice, Office of the Attorney General's website <<http://www.ag.ca.gov/missing/content/dental.htm>> [as of June 17, 2004]. Former Health and Safety Code section 10254 (Stats. 1978, ch. 462) was repealed in 1995 (Stats. 1995, ch. 415).

¹⁰ Penal Code section 295 et seq. The list of felonies is in Penal Code section 296.

¹¹ Penal Code section 14250, subdivision (a)(2).

¹² Penal Code section 14200 et seq.

For coroners:

- (1) collecting samples for DNA testing from the remains of all unidentified persons, including all costs associate [sic] with the exhumation and reburial of the remains for preexisting cases;
- (2) sending those samples to DOJ for DNA testing and inclusion in the DNA data bank;
- (3) maintaining the evidence [DNA sample] returned by DOJ;
- (4) storing, retaining, and refrigerating the evidence [DNA sample];
- (5) destroying the maintained evidence [DNA sample] after a positive identification is made and a report is issued by DOJ; and
- (6) training employees on an ongoing basis to assure compliance with this section.

For local law enforcement agencies:

- (1) informing the parents or other appropriate relatives that they may give a voluntary sample for DNA testing or may collect a DNA sample from a personal article belonging to the missing person if available;
- (2) taking DNA samples in a manner prescribed by the Department of Justice;
- (3) explaining the standard release form developed by the Department of Justice to the public;
- (4) developing data bases to track the time requirements mandated under this section; and
- (5) training employees on an ongoing basis to assure compliance with this section.

Claimant's test claim submission identifies the \$2 fee on death certificates to fund the program.¹³ Claimant argues that funds collected pursuant to Penal Code section 14251 are not intended to reimburse local government entities for the mandated activities, and that the funding is inadequate to do so. Claimant states, "[h]owever, to the extent that funding is received, it will be credited against the amount claimed."

Claimant County of Los Angeles commented on the draft staff analysis that it concurs in the finding of a reimbursable state-mandated local program. However, in a declaration submitted with the comments, a representative from the claimant's coroner's office states that the test claim statute requires the coroner, as part of collecting DNA samples to exhume and rebury the remains of unidentified deceased persons for preexisting cases, and that any reimbursement for doing so, pursuant to section 14251, would offset otherwise reimbursable costs. The claimant also states that storage of the DNA samples (presumably referring to samples from deceased unidentified persons) for periods of time required by DOJ, including tissue and fluid storage according to DOJ standards and guidelines, and provision of access to the samples as necessary are all reimbursable state-mandated duties.

Claimant County of San Bernardino also commented on the draft staff analysis that it concurs in the finding of a reimbursable state-mandated local program; but disagrees with staff's proposed finding that exhumation of a deceased's remains is not a state-mandated activity.

State Agency Positions

¹³ Penal Code section 14251 (Stats. 2000, ch. 822), not pled as a test claim statute.

In its comments on the test claim, DOF agrees that the chaptered legislation results in reimbursable costs. However, DOF notes that certain claimed activities, such as maintaining local records or training employees, are not specified in the test claim legislation. DOF concludes that those activities are discretionary and not reimbursable.

DOJ (Missing Persons DNA Program) comments that the test claim statute imposes new requirements on local law enforcement “for which all Californians will receive a higher level of service.” DOJ states that section 14250 requires coroners and medical examiners to follow specific standards and guidelines for the collection, preservation and submission of samples for DNA testing. According to DOJ:

There will be additional costs for exhumation and pathology of unidentified remains that have already been buried [and] ... local law enforcement is required to inform family members of missing persons of their right to submit a sample of DNA testing within 30 days from the time a missing persons report has been made. The collection of the family member’s sample will be done by local law enforcement. Both coroners/medical examiners and law enforcement are required to follow specified procedures developed by the [DOJ], and there will be some training involved. ... The DOJ will rely on county coroners/medical examiners to possibly exhume, process and submit samples from their cases of unidentified remains.

DOJ clarified that it is the entity that destroys DNA samples taken from living persons. But regarding samples from unidentified deceased persons, DOJ states:

[R]emains that are not consumed in the testing will be returned to the County coroner/medical examiner, but as these are not from living persons, they would not be destroyed but rather returned to the family for cremation or burial.

No other state agencies commented on the test claim.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution¹⁴ recognizes the state constitutional restrictions on the powers of local government to tax and spend.¹⁵ “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

¹⁴ Article XIII B, section 6 provides:

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 such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

¹⁵ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ 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 claim legislation.²⁰ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”²¹ Finally, the newly required activity or increased level of service must impose costs mandated by the state.²²

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 6.²³ 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.”²⁴

This test claim presents the following issues:

¹⁶ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

¹⁷ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

¹⁸ *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.3d 830, 835 (*Lucia Mar*).

¹⁹ *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; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835).

²⁰ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878. *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

²¹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

²² *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; Government Code sections 17514 and 17556.

²³ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

²⁴ *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.

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a new program or higher level of service on local government within the meaning of article XIII B, section 6?
- Does the test claim legislation impose “costs mandated by the state” within the meaning of Government Code sections 17514 and 17556?

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

A. Does the test claim legislation mandate a local government activity?

In order to be subject to article XIII B, section 6 of the California Constitution, the test claim legislation must require local government to perform an activity.²⁵ The Commission finds that many of the activities specified in section 14250 are not subject to article XIII B, section 6 for reasons indicated below.

- Subdivision (a) requires developing the database, and specifies its contents. This section applies to DOJ, but does not require a local activity.
- Subdivision (b) requires DOJ to develop standards and guidelines for preserving and storing DNA samples. Although local agencies may be required to follow the standards and guidelines,²⁶ as analyzed below, developing them is a DOJ activity and not a local one.
- Subdivision (c)(3) requires DOJ to develop a standard release form that authorizes parents or relatives to voluntarily provide a DNA sample, with specified contents. Subdivision (c)(4) requires DOJ to develop a model kit to use when taking samples from parents and relatives. These subdivisions require DOJ to develop materials for local use (whether local use of these materials is a mandate is discussed below) but do not require a local activity.
- Subdivision (c)(6) originally required that DNA and samples taken from a living person be destroyed after a positive identification is made and a report is issued. Statutes 2001, chapter 467 added clarifying amendments, and exceptions to destruction if the DNA is needed for a criminal investigation or prosecution. This subdivision does not require the local agency to destroy the DNA, because it is not required to keep the DNA. DNA samples from a “living person” are sent to DOJ. (§ 14250, subs. (c)(5) & (c)(6).) Only DNA from unidentified remains is to be returned to the coroner, according to subdivision (c)(1). Since the destruction of living persons’ DNA is only required of DOJ, subdivision (c)(6) does not require a local activity.

²⁵*Kern High School Dist., supra*, 30 Cal.4th, 727, 741.

²⁶ Subdivision (b) states: “Any agency that is required to collect samples from unidentified remains for DNA testing shall follow these standards and guidelines.” Regarding DNA samples from living persons, subdivision (c)(2) states: “The samples shall be taken by the appropriate law enforcement agency in a manner prescribed by the Department of Justice.”

- Subdivision (c)(7), added by Statutes 2001, chapter 467, requires a DNA sample to be removed from the DNA database on request of any living person who submits his or her DNA sample and profile, “including the parent or guardian of a child who submits a DNA sample of the child.” This requirement is outside the purview of a local law enforcement agency, which does not have access to or control over the DNA database. Therefore, as a requirement imposed on DOJ, subdivision (c)(7) does not require a local activity.
- Subdivision (d) originally required that DNA samples be confidential and only disclosed to DOJ personnel, law enforcement officers, coroners, medical examiners, and district attorneys, “except that a law enforcement officer may notify a victim’s family to disclose whether or not a match has occurred.” As originally drafted, this section merely prohibits releasing information rather than mandating an activity, and authorizes but does not require the law enforcement officer to release information. Statutes 2001, chapter 467 amended this section to require confidentiality for profiles developed from DNA samples, in addition to the samples themselves, and broadened information access to “persons who need access to a DNA sample for purposes of the prosecution or defense of a criminal case.” This subdivision now authorizes public disclosure of a DNA profile match after taking reasonable measures to first notify the family of the unidentified deceased person or high-risk missing person. As amended, this section again merely prohibits releasing information rather than mandating an activity, and authorizes but does not require the law enforcement officer to release information. Thus, no local activity is required.
- Subdivision (e), added by Statutes 2001, chapter 467, exempts the DNA identification information retained by DOJ from public disclosure laws, and does not require a local activity.
- Subdivision (f) (originally subd. (e) but amended and moved to subdivision (f) by Stats. 2001, ch. 467) states that those who disclose the information to unauthorized individuals are guilty of a misdemeanor, and provides the penalties for violating the section. This subdivision creates a new crime or infraction. Article XIII B, section 6 states that “the Legislature may, but need not, provide ... subvention of funds for ...[¶]...[¶] (b) Legislation defining a new crime or changing an existing definition of a crime.” Therefore, subdivision (f) is not subject to article XIII B, section 6.
- Subdivision (g) states that DOJ is liable for disclosure or failure to destroy samples by its employees, and limits the remedy to the penalties in section 14250. Subdivision (g) also does not require a local activity.
- Subdivision (h), added by Statutes 2001, chapter 467, authorizes disclosure of DNA information to a jury or grand jury, as part of a judicial or administrative proceeding, in filings with a court or administrative agency, or when the information becomes part of a court transcript or record of proceeding. Subdivision (i) states that the program’s software and database is confidential. Again, these subdivisions do not mandate a local activity.

Exhumation: Subdivision (c)(1) of the test claim statute requires coroners to collect DNA samples from “the remains of all unidentified persons.” In the test claim, claimant requests

reimbursement for the coroner, in order to collect DNA samples, to exhume and rebury the remains of unidentified deceased persons “for preexisting cases.”

In its comments on the claim, DOJ states, “[t]here will be additional costs for exhumation and pathology of unidentified remains that have already been buried. ... The DOJ will rely on county coroners ... to possibly exhume, process and submit samples from their cases of unidentified persons.”

In comments on the draft staff analysis, claimant Los Angeles County argues that the test claim statute requires the coroner, as part of collecting DNA samples, to exhume and rebury the remains of unidentified deceased persons for preexisting cases, and that any reimbursement for doing so, pursuant to section 14251, would offset otherwise reimbursable costs. Claimant County of San Bernardino also argues, in comments on the draft staff analysis, that exhumation of a deceased’s remains is a state-mandated activity. San Bernardino argues that nothing in the test claim statute limits the identification activities to cases that occur subsequent to enacting the test claim statute. San Bernardino also cites the letter from DOJ that states, “[t]here will be additional costs for exhumation and pathology of unidentified remains that have already been buried.” San Bernardino further quotes DOJ, which pointed out records of approximately 2,100 unidentified remains in California dating back to 1959, and 3,100 long term missing persons dating back to 1972. According to DOJ, DNA testing is the last means of identification for these cases. Finally, San Bernardino cites section 14250, subdivision (c)(1) and section 14251, subdivision (b), and states:

Just as Staff identified (in Draft Staff Analysis, Issue 1, Section A) the various components in Penal Code Section 14250 that applied only to the Department of Justice, segregating them from the local activity; so too, the DOJ’s discretionary use of their funds as stated in Penal Code Section 14251 must be segregated from the coroner’s mandate to collect samples from the remains of all unidentified persons.

The Commission agrees that exhumation is required in circumstances where it is the only alternative available to meet the reporting requirements under the test claim statute. When an agency administers a statutory program, that agency’s position is entitled to some consideration in interpreting the program’s statutory scheme.²⁷ As demonstrated by the hearing testimony of July 29, 2004, DOJ believes that exhumation is required. Because DOJ administers the test claim statute, its interpretation is entitled to consideration.

At the hearing, Mr. John Tonkyn of DOJ testified of the necessity of exhumation to resolve cases of those who died before the test claim statute was enacted.²⁸ He stated there is no distinction in the law between buried remains and remains in the coroner’s possession.²⁹ Mr. Tonkyn also said that although DOJ does not require retaining remains, it is a practice to do so for possible future reference or future technology.³⁰ He further stated that the intent behind the funding provision of

²⁷ *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 15.

²⁸ Commission on State Mandates, hearing transcript of July 29, 2004 meeting, page 62, lines 2-6.

²⁹ *Id.* at page 62, lines 11-16.

³⁰ *Id.* at pages 65-66, lines 25, 1-4.

section 14251, subdivision (b), was funding the laboratory functions first, with discretionary funds used for exhumation. However, due to the high cost of DNA testing, exhumation funding has not been available.³¹ Mr. Tonkyn testified that DOJ did not feel the need, in information bulletins, to distinguish between buried DNA samples that need exhuming and other samples because exhumation is not related to the quality of the DNA sample obtained from the grave. Rather, it is more important to DOJ how the samples are prepared, stored and shipped.³² And although counties have not exhumed very many bodies (only one that Mr. Tonkyn knows of) the counties think it is a requirement, although there is the question of who pays for it.³³

Ms. Jeannine Willie of DOJ testified that the legislative history of the test claim statute, Senate Bill No. 1818, was to identify victims and open homicide investigations in the hopes of solving homicides. She testified that although counties understand the test claim statute, they do not have the funds to exhume the bodies and so are awaiting the Commission's decision.³⁴

Therefore, as the legislative intent was to obtain a DNA sample from all unidentified remains, the Commission finds that exhuming the deceased's remains is a state-mandated activity in circumstances where it is the only alternative available to meet the reporting requirements under the test claim statute.

Storage & retention of DNA samples from unidentified remains: Claimant also claimed reimbursement for "maintaining the evidence returned by DOJ; [and] Storing, retaining, and refrigerating the evidence." It is assumed that "the evidence" refers to DNA samples. Claimant County of Los Angeles reiterated this alleged requirement in comments on the draft staff analysis.

DOJ commented that samples from unidentified remains not consumed in the testing are returned to the coroner for cremation or reburial.³⁵ DOJ Information Bulletin 01-BFS-04, under "storage," requires refrigeration of non-desiccated remains, but did not otherwise address storage.

At the hearing on July 29, 2004, Ms. Bonnie Ter Keurst testified that the county views this activity as reasonably necessary to carry out the directives of the test claim statute in providing good samples to DOJ. Ms. Ter Keurst referred to parts of DOJ Information Bulletin 01-BFS-04 to argue that storage of unidentified remains is necessary.³⁶

³¹ *Id.* at page 66, lines 5-24.

³² *Id.* at pages 68-69, lines 2-25, 1-2.

³³ *Id.* at pages 75-76, lines 17-21, 1-3.

³⁴ *Id.* at page 82, lines 3-20.

³⁵ Letter from DOJ Missing Persons DNA Program, August 13, 2001. The letter states that "[h]uman remains that are not consumed in the testing will be returned to the County coroner/medical examiner, but as these are not from living persons, they would not be destroyed but rather returned to the family for cremation or burial." The feasibility of returning samples to the family, however, is doubtful unless identification were to be successful.

³⁶ Commission on State Mandates, hearing transcript of July 29, 2004 meeting, pages 56-57, lines 15-25, 1-13.

The Commission finds that storing DNA samples from unidentified human remains is not mandated by the test claim statute. Coroners collect and send the DNA samples to DOJ, and DOJ returns the samples to the coroner (§ 14250, subd. (c)(1)). Neither the statute nor the DOJ guidelines require the sample to be stored, either before sending to DOJ or upon return. After the sample is returned, the coroner may dispose of it, but is not required to retain or store it.³⁷

B. Is the test claim legislation a program under article XIII B, section 6?

The remainder of the test claim statute is contained in Penal Code, section 14250, subdivisions (b),(c)(1), (c)(2), (c)(4) and (c)(5), which mandates coroners and local law enforcement to collect DNA samples and send them to DOJ in accordance with DOJ guidelines. It also mandates local law enforcement to (1) inform family members of their right to provide DNA samples, and (2) reverify the status of a missing person before submitting a DNA sample to DOJ.

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation 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.³⁸ Only one of these findings is necessary to trigger article XIII B, section 6.³⁹

The test claim legislation mandates DNA collection by local agencies to help locate missing persons or identify their remains, activities that concern law enforcement⁴⁰ and public safety.⁴¹ Moreover, the test claim legislation imposes unique requirements on coroners and local law enforcement agencies that do not apply generally to all residents and entities of the state.

³⁷ This analysis does not apply to storing DNA samples taken from living persons, which may be reasonable under the parameters and guidelines. The DOJ guidelines require the samples from living persons to be mailed to DOJ within 72 hours of collection (Department of Justice Information Bulletin, 02-BFS-03, July 19, 2002, page 4). The test claim statute requires DOJ to keep the samples until a positive identification is made, then that they be destroyed unless certain criteria are met (§ 14250, subd. (c)(6)). According to its comments, DOJ would destroy the samples.

³⁸ *County of Los Angeles, supra*, 43 Cal.3d 46, 56.

³⁹ *Carmel Valley Fire Protection District v. State of California, et al.* (1987) 190 Cal.App.3d 521, 537.

⁴⁰ Penal Code section 14210, subdivision (a) states: “it is the duty of all law enforcement agencies to immediately assist any person who is attempting to make a report of a missing person or runaway.” Penal Code section 14205 requires police and sheriff’s departments to “accept any report, including any telephonic report, of a missing person, including runaways, without delay and ... [to] give priority to the handling of these reports over the handling of reports related to crimes involving property.”

⁴¹ “Police and fire protection are two of the most essential and basic functions of local government.” *Carmel Valley Fire Protection District v. State of California, et al., supra*, 190 Cal. App. 3d 521, 537.

Therefore, the Commission finds the test claim statute constitutes a “program” within the meaning of article XIII B, section 6.

Issue 2: Does the test claim statute impose a new program or higher level of service on local government within the meaning of article XIII B, section 6 of the California Constitution?

To determine if the “program” is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before enacting the test claim legislation.⁴²

Collect DNA samples (Pen. Code, § 14250, subs. (b)&(c)(1)): This section states that “[a] coroner shall collect samples for DNA testing from the remains of all unidentified persons and ... send those samples to the ... [DOJ] for DNA testing and inclusion in the DNA data bank.” After DOJ analyzes the sample, the remaining evidence is to be returned to the local coroner.

Subdivision (b) requires DOJ to develop guidelines for preservation and storage of DNA samples, and states “[a]ny agency that is required to collect samples from unidentified remains for DNA testing shall follow these standards and guidelines.”

Prior law did not require coroners to collect and submit to DOJ DNA samples of the remains of all unidentified persons, nor required following DOJ standards and guidelines for doing so.

The DOJ standards and guidelines that coroners are required to follow were promulgated in an October 2001 DOJ Information Bulletin (01-BFS-04), as follows.

To prevent contamination: (1) always wear gloves for personal protection as well as to prevent contamination of remains with the examiner’s DNA; (2) Surgical blades should be new or thoroughly cleaned and sterilized between examinations. Carryover of DNA between sets of remains should be avoided. Sterilization can be accomplished by cleaning and autoclaving, or soaking implements in 10% bleach for 15 minutes, followed by rinsing with water. (3) Surfaces such as exam tables should be wiped down with 10% bleach between examinations, even if disposable sheets are used between the remains and the table.

Documentation: The Sample Request Form enclosed in the shipping container should be completely filled out.⁴³

⁴² *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878. *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

⁴³ The DOJ bulletin states that “[a]dditional requirements (as outlined in S.B. 1736) include dental x-rays and charts as well as photographs. Indicate on the sample request form whether these have been submitted to the Missing and Unidentified Persons Section of the DOJ. Identification by other means will be attempted before DNA analysis begins.” However, coroner

Storage: If the remains are desiccated (mummified or skeletal), room temperature storage is acceptable. However, in order to minimize further degradation, all other remains and samples should be stored refrigerated.

Shipping: Desiccated remains can be shipped at room temperature. All other remains, blood, and tissue samples should be shipped on ice, scheduled for next day delivery.

Sample Submission Prioritization: Since the condition and completeness of the remains can vary greatly depending on environmental conditions and human or animal activity, specified factors should be carefully evaluated. The state of decay of a human body can be generally categorized as one of the following: (1) Fresh (limited flesh decomposition, limited blistering/bloating, typically deceased from days to weeks); (2) Decomposed (significant amount of flesh decay, typically deceased from weeks to months); (3) Skeletal (mummified or no flesh remaining, typically deceased from months to years). Samples exhibiting all of these states of decay can be analyzed by DNA testing, with the chance of success generally decreasing with age and increasing with the amount of sample tested. The following guidelines should be used to determine how much and what samples should be submitted.

Fresh: (1) Ten milliliters of blood, stored in a purple-cap (EDTA) tube. This tube should be kept refrigerated until submission. Blood should be shipped on ice for next day delivery to minimize degradation. (2) Approximately ten grams of deep muscle tissue in a 50 milliliter conical tube or similar storage device. The storage and shipping recommendations are the same as above.

Decomposed: “Decomposed” can cover a wide range of states of decomposition. Depending on where the remains were found (in water, buried, or on the surface) and the environment to which the remains had been exposed (e.g., desert or snow), the rate of decomposition can vary. In these situations, blood, if present, will tend to be putrefied and not useful for DNA typing. Depending on the state of decomposition of the flesh, it may or not be useful for DNA testing. Dry or cold environments tend to preserve tissue better than warm or wet environments. Depending on the state of composition, the following should be submitted: (1) Approximately ten grams of deep muscle tissue in a 50 milliliter conical tube or similar storage device. The storage and shipping conditions are the same as above. (2) If mummified tissue is present, 1-10 grams should be collected, stored and submitted as above. (3) Bone (as prioritized below). Badly decomposed tissue should be removed from the bone before submission.

Skeletal or Mummified: If the body is mummified, do not remove the dried flesh. (1) femur (intact). Dried skeletal remains can be stored and shipped at room temperature. (2) An unrestored (virgin) upper molar should also be submitted. If

identification activities associated with a discretionary autopsy are not reimbursable due to the Commission’s decision in *Postmortem Examinations: Unidentified Bodies, Human Remains*, 00-TC-18 (2003) (Stats. 2000, ch. 284).

an unrestored upper molar is not available, then any other unrestored tooth should be submitted. (3) If a femur is not available, then a long bone (e.g. tibia, humerus or rib) should be submitted. (4) If none of the above are available, then the longest and most compact bone or bone fragment should be submitted.

Therefore, the Commission finds that it is a new program or higher level of service for coroners to collect samples for DNA testing from the remains of unidentified persons and send those samples to the DOJ in accordance with the DOJ-developed standards and guidelines listed above.

Inform family and take DNA sample (Pen. Code, § 14250, subd. (c)(2)&(c)(4)): Subdivision (c)(2) states that the responsible investigating law enforcement agency “shall” do the following: (1) inform the missing person’s family, within 30 days of the missing person’s report, that the family may provide DNA samples; (2) collect a DNA sample from a personal article of the missing person if available, and (3) take the DNA sample “in a manner prescribed by the Department of Justice.” Subdivision (c)(2) states:

After a report has been made of a person missing under high-risk circumstances, the responsible investigating law enforcement agency shall inform the parents or other appropriate relatives that they may give a voluntary sample for DNA testing or may collect a DNA sample from a personal article belonging to the missing person if available. The sample shall be taken by the appropriate law enforcement agency in a manner prescribed by the [DOJ]. The responsible investigating law enforcement agency shall wait no longer than 30 days after a report has been made to inform the parents or other relatives of their right to give a sample.⁴⁴

Subdivision (c)(4) states that the law enforcement agency shall use DOJ’s model kit when collecting DNA samples.

The application of the statute is limited to a person missing under high risk circumstances, which is defined in the test claim statute as a:

person missing as a result of a stranger abduction, [or] ... missing under suspicious circumstances, [or] ... missing under unknown circumstances, or where there is reason to assume that the person is in danger, or deceased, and that person has been missing more than 30 days, or less than 30 days in the discretion of the investigating agency.⁴⁵

Prior law did not require a local law enforcement agency to inform family of those missing under high-risk circumstances of the family’s right to provide DNA samples within 30 days after making a missing person report, or require collection of DNA samples from family members using DOJ procedures.

The DOJ standards and guidelines for collecting DNA from family members or a missing person’s personal articles were promulgated in a July 2002 DOJ Information Bulletin (02-BFS-03), as follows.

⁴⁴ Penal Code section 14250, subdivision (c)(2).

⁴⁵ Penal Code section 14250, subdivision (a)(4).

For the missing person file, oral swabs will provide sufficient DNA to conduct comparison and analysis. For samples from the missing person, baby teeth, hairs, a toothbrush or other personal article may be appropriate for DNA profiling. DNA testing is very sensitive. Therefore, it is imperative that steps be taken to prevent contamination. Contamination could come from the person handling the sample, the environment, or the tools used during the collection or examination. The Commission on Peace Officer Standards and Training (POST) and the Office of the Attorney General have developed a Missing Persons DNA training video that explains the DNA collection process. The video, along with the steps outlined on the Missing Persons DNA Submission, will provide the necessary information for proper collection of samples and contamination prevention. ... To view the satellite training video, contact your agency's training officer. It is recommended that all law enforcement personnel collecting DNA samples view the training video before collecting DNA samples.⁴⁶

The following guidelines should be followed when using the DOJ Missing Persons DNA Specimen Collection Kit to collect DNA samples from family members of missing persons or personal article(s) belonging to the missing person.

- (1) Read the entire Missing persons DNA Donor Submission Form Instruction Sheet ... prior to sample collection. Use the Instruction Sheet as your guide when collecting the samples.
- (2) Verify that the kit contains all items listed on the *Kit Content List*. If items are missing or the kit box security seal is broken, **DO NOT** use the kit. Contact the [DOJ] ... for a replacement kit.
- (3) The law enforcement representative must completely fill out the Missing Persons DNA Donor Submission Form enclosed in the kit.
- (4) Inform the family member that they may give a voluntary sample for DNA testing, or that they may submit a DNA sample from a personal article(s) belonging to the missing person. Submitting samples for DNA analysis is voluntary. No incentive or coercion shall be used to compel a parent or relative to provide a sample.
- (5) If the family member agrees to voluntarily submit a sample for DNA analysis, instruct the family member to sign and date the form indicating that he/she understands the DNA sample is to be used only for the purpose of identifying the missing person and no incentive or coercion has been used to compel the donor to provide a DNA sample.

⁴⁶ This language is permissive so viewing the training video is not mandated by the DOJ guidelines. DOJ's comments state that, "training will be necessary." However, because this activity is not required by the test claim statute or the DOJ guidelines, the activity of viewing the training video may be considered during the parameters and guidelines phase.

(6) Advise the family member that it is possible personal articles belonging to the missing person submitted for DNA analysis may not be returned. In many cases, all evidence provided will be used for DNA analysis.

(7) Indicate on the form whether dental/body X-rays and/or photographs have been submitted to the DOJ's Missing and Unidentified Persons Section. Identification by other means ... will be attempted before DNA analysis begins. If X-rays/photographs have not been submitted, request these items from the family member and forward those items to the [DOJ]... **DO NOT** return X-rays/photographs in the collection kit box.

(8) Always use a new kit and a new pair of gloves for each donor and a new kit and a new pair of gloves for articles from the missing person. The law enforcement representative collecting the sample should always wear gloves to avoid contaminating the family member's DNA. ... **DO NOT** place used gloves in the kit.

(9) Samples should be collected from both biological parents of the missing person(s). If both parents are not available, use the chart below to determine the order for collecting samples from other biological family members ... [see bulletin for chart]. [¶]...[¶].

(10) Retain the yellow copy of the form and the Instruction Sheet for your agency's records.

(11) Include the missing person's crime report, any supplemental information and the white copy of the Missing Persons DNA Donor Submission Form in the kit box. Seal the kit as instructed on the Instruction Sheet.

(12) Mail the kit to the DOJ Missing Persons DNA Program within 72 hours after collection. If you are unable to send the kit immediately after collection, it is recommended that you enter the kit into your agency's evidence locker. It is the responsibility of the collecting agency to forward the kit to the DOJ Missing Persons DNA Program within 72 hours after collection.

Therefore, because these are new activities, the Commission finds that it is a new program or higher level of service for local law enforcement to (1) inform parents or other appropriate relatives of those missing under high-risk circumstances that the family may give a voluntary sample of DNA within 30 days after making a missing person's report, and (2) take a DNA sample in accordance with the DOJ procedures listed above (except for viewing the training video as noted), and (3) use the model kit when taking DNA samples from parents or relatives of a person missing under high-risk circumstances, as defined.

Reverify status of missing person and submit information to DOJ (Pen. Code, § 14250, subd. (c)(5)): This subdivision states that, before submitting DNA samples to DOJ, "law enforcement shall reverify⁴⁷ the status of the missing person." Subdivision (c)(5) also provides:

After 30 days has elapsed from the date the report was filed, law enforcement shall send the sample to the ... [DOJ] for DNA testing and inclusion in the

⁴⁷ Reverification is not defined in the statute or the legislative history.

DNA data base, with a copy of the crime report, and any supplemental information.

Prior law did not require reverifying the status of a missing person before submitting DNA samples to DOJ, nor did it require sending DNA samples or supplemental information to DOJ, with a copy of the crime report.

Therefore, the Commission finds that it is a new program or higher level of service for local law enforcement to (1) reverify the status of a missing person before submitting a DNA sample to DOJ, and (2) send the DNA sample and any supplemental information to DOJ 30 days after the filing of a report with a copy of the crime report.

In summary, the Commission finds that the following activities are new programs or higher levels of service within the meaning of article XIII B, section 6:

- For coroners to collect samples for DNA testing from the remains of unidentified persons and send those samples to the DOJ in accordance with DOJ-developed standards and guidelines (as cited above) for preservation and storage of DNA samples (Pen. Code, § 14250, subds. (b) & (c)(1)). This does not include storing DNA samples of the remains of unidentified deceased persons either before sending to DOJ or upon return. It does include exhumation in circumstances where it is the only alternative available to meet the reporting needs under the test claim statute.
- For local law enforcement to: (1) inform parents or other appropriate relatives of those missing under high-risk circumstances (as defined) that they may give a voluntary sample of DNA within 30 days after making a report, and (2) take a DNA sample in a manner prescribed by DOJ, including using a model kit (Pen. Code, § 14250, subds. (c)(2) & (c)(4)).
- For local law enforcement to: (1) reverify the status of a missing person before submitting a DNA sample to DOJ, and (2) send the DNA sample and any supplemental information to DOJ with a copy of the crime report 30 days after the filing of a report (Pen. Code, § 14250, subd. (c)(5)).

Issue 3: Does the test claim statute impose “costs mandated by the state” within the meaning of Government Code sections 17514 and 17556?

In order for the activities listed above to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose costs mandated by the state.⁴⁸ Second, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 17514 defines “costs mandated by the state” as follows:

...any 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.

⁴⁸ *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

In its test claim, the claimant stated it would incur costs of over \$200 per year, which was the standard under Government Code section 17564, subdivision (a) when the claim was filed.⁴⁹

State funding: Government Code section 17556, subdivision (e), precludes reimbursement for a local agency if:

[t]he statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or **includes additional revenue** that was specifically intended to fund the costs of the state mandate **in an amount sufficient** to fund the cost of the state mandate. [Emphasis added.]

Statutes 2000, chapter 822 also enacted Penal Code section 14251, which states in pertinent part:

(a) The "Missing Persons DNA Data Base" shall be funded by a two dollar (\$2) fee increase on death certificates issued by a local government agency or by the State of California. The issuing agencies may retain up to 5 percent of the funds from the fee increase for administrative costs. This fee increase shall remain in effect only until January 1, 2006, or when federal funding for operation of the data base becomes available if it becomes available before that date.

(b) Funds shall be directed on a quarterly basis to the "Missing Persons DNA Data Base Fund," hereby established, to be administered by the department for establishing and maintaining laboratory infrastructure, DNA sample storage, DNA analysis, and labor costs for cases of missing persons and unidentified remains. Funds may also be distributed by the department to various counties for the purposes of pathology and exhumation as the department deems necessary. The department may also use those funds to publicize the data base for the purpose of contacting parents and relatives so that they may provide a DNA sample for training law enforcement officials about the data base and DNA sampling and for outreach. [¶]...[¶]

(d) (1) The death certificate fee increase shall begin and funds shall be directed to the Missing Persons DNA Data Base Fund beginning January 1, 2001. Funding for year one shall be used to develop the data base and laboratory infrastructure, and to establish Department of Justice protocols and personnel.

The issue is whether the \$2 death certificate fee is additional revenue sufficient to fund the mandate within the meaning of Government Code section 17556, subdivision (e).

Claimant asserts that the funds collected pursuant to section 14251 are not intended to reimburse local government entities for the mandated activities under section 14250, and that the funding is inadequate to reimburse local government entities for the mandated activities.

DOF's August 2001 comments did not address the adequacy of the funding except that DOF agrees that the test claim legislation results in reimbursable costs. DOF also submitted a bill analysis on Senate Bill No. 1818 (the test claim statute) that stated, "[i]t does not appear likely that the proposed revenue source would be sufficient to operate the program. As such, this bill would likely create pressure on the General Fund to provide funding for this program."

⁴⁹ Currently the claim must exceed \$1,000 in costs. (Gov. Code, § 17564, subd. (a).)

DOF submitted the following Missing Persons DNA Database Fund information (in thousands):

Fiscal Year	2000-2001	2001-2002	2002-2003	2003-2004 (projected)
Revenues	\$887	\$2,343	\$2,982	\$2,887
Expenditures	\$0	\$2,116	\$2,831	\$3,037

The Commission finds that the funding pursuant to section 14251 does not preclude reimbursement for this test claim.

No revenue for local agencies accrued in the first year because, pursuant to subdivision (d) (1) of section 14251, the first year’s revenue must “be used to develop the data base and laboratory infrastructure, and to establish ... [DOJ] protocols and personnel.” As to subsequent years, 95 percent of the \$2 fee goes to DOJ (all except the 5% administrative fee retained by local agencies that issue death certificates). Section 14251 subdivision (b), states: “[f]unds may also be distributed by the department to various counties for the purposes of pathology and exhumation as the department deems necessary.” There is no evidence in the record that funds were allocated to counties,⁵⁰ nor does the statute require allocation.

Section 14251, subdivision (a) states that agencies issuing death certificates are allowed to retain up to five percent of the funds from the fee increase for administrative costs. Agencies that issue death certificates include the State Registrar, local registrar, or county recorder.⁵¹ Since these agencies that would retain the five percent administrative fee are different from the agencies that carry out the mandated functions (coroners and local law enforcement), the five percent portion of the administrative fee kept by the agency issuing the death certificate is not considered an offset, and does not preclude reimbursement.

Therefore, the Commission finds that the five percent for administrative costs does not constitute “offsetting savings or additional revenue” within the meaning of Government Code section 17556, subdivision (e).

Federal Funds: Section 14251, subdivision (a) provides: “This fee increase shall remain in effect only until January 1, 2006, or when federal funding for operation of the data base becomes available if it becomes available before that date.” Thus, the issue is whether federal funds are available for this program to preclude “increased costs” within the meaning of Government Code section 17514.

The Commission finds there are no federal funds for this program. In commenting on the test claim, DOF stated “it does not appear that any federal funding has become available for this

⁵⁰ In October 2003, Commission staff requested information from DOJ on whether any local assistance or grants were allocated under the DNA Database program for FY 2000-2001 though FY 2003-2004, but received no response.

⁵¹ Health and Safety Code section 103525, subdivision (a). A local registrar is the health officer of an approved local health department (Health & Saf. Code, § 102275).

purpose.” A search of federal legislation shows only proposed bills to provide funding for the program.⁵²

Thus, absent any information in the record, the Commission finds that there is no federal funding available for this program so that there are “increased costs” within the meaning of Government Code section 17514. Federal funds that become available to local agencies for this program in the future would be identified as offsets, or potential offsets, in the parameters and guidelines should the Commission adopt this analysis.

In sum, the Commission finds that Penal Code section 14250, subdivisions (b),(c)(1), (c)(2), (c)(4) and (c)(5) imposes “costs mandated by the state” within the meaning of Government Code sections 17514 and 17556, and that none of the section 17556 exceptions apply.

CONCLUSION

The Commission finds that the test claim legislation imposes a reimbursable state-mandated program on local governments within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

- For coroners to collect samples for DNA testing from the remains of unidentified persons and send the samples to the DOJ in accordance with DOJ-developed standards and guidelines (as cited above) for preservation and storage of DNA samples (Pen. Code, § 14250, subds. (b) & (c)(1)). This does not include storing DNA samples from remains of unidentified deceased persons either before sending to DOJ or upon return. It does include exhumation in circumstances where it is the only alternative available to meet the reporting needs under the test claim statute.
- For local law enforcement to: (1) inform parents or other appropriate relatives of those missing under high-risk circumstances (as defined) that they may give a voluntary sample of DNA within 30 days after making a report, and (2) take a DNA sample in a manner prescribed by DOJ, including using a model kit (Pen. Code, § 14250, subds. (c)(2) & (c)(4)).
- For local law enforcement to: (1) reverify the status of a missing person before submitting a DNA sample to DOJ, and (2) send the DNA sample and any supplemental information to DOJ with a copy of the crime report 30 days after the filing of a report (Pen. Code, § 14250, subd. (c)(5)).

⁵² S. 1828, “Advancing Justice through DNA Technology Act of 2003” would provide grants “to promote the use of forensic DNA technology to identify missing persons and unidentified human remains.” S. 1700 and H.R. 3214, bills by the same name as S. 1828, would provide grants to “States and units of local government to promote the use of forensic DNA technology to identify missing persons and unidentified human remains” (§ 207).