BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Government Code Sections 6252, 6253, 6253.1, 6253.5, 6253.9, 6254.3, 6255, and 6259

Statutes 1975, Chapters 678 and 1246, Statutes 1977, Chapter 556; Statutes 1980, Chapter 535; Statutes 1982, Chapter 163; Statutes 1984, Chapters 802 and 1657; Statutes 1985, Chapter 1053; Statutes 1990, Chapter 908; Statutes 1992, Chapters 463 and 970; Statutes 1993, Chapter 926; Statutes 1994, Chapter 923; Statutes 1998, Chapter 620; Statutes 1999, Chapter 83; Statutes 2000, Chapter 982; Statutes 2001, Chapter 355; and Statutes 2002, Chapters 945 and 1073

Filed on October 15, 2002 (02-TC-10), and June 26, 2003 (02-TC-51)

By County of Los Angeles and Riverside Unified School District, Claimants.

Case No.: 02-TC-10 and 02-TC-51

California Public Records Act

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

(Adopted on May 26, 2011)

STATEMENT OF DECISION

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

Dated: May 31, 2011

Drew Bohan, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Sections 6252, 6253, 6253.1, 6253.5, 6253.9, 6254.3, 6255, and 6259 Statutes 1975, Chapters 678 and 1246; Statutes 1977, Chapter 556; Statutes 1980, Chapter 535; Statutes 1982, Chapter 163; Statutes 1984, Chapters 802 and 1657; Statutes 1985, Chapter 1053; Statutes 1990, Chapter 908; Statutes 1992, Chapters 463 and 970; Statutes 1993, Chapter 926; Statutes 1994, Chapter 923; Statutes 1998, Chapter 620; Statutes 1999, Chapter 83; Statutes 2000, Chapter 982; Statutes 2001, Chapter 355; and Statutes 2002, Chapters 945 and 1073 Filed on October 15, 2002 (02-TC-10), and June 26, 2003 (02-TC-51) By County of Los Angeles and Riverside Unified School District, Claimants.	Case No.: 02-TC-10 and 02-TC-51 *California Public Records Act* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on May 26, 2011)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 26, 2011. Keith Petersen appeared on behalf of Riverside Unified School District. Leonard Kaye and Lieutenant Judy Gerhardt appeared on behalf of Los Angeles County and Los Angeles County Sheriff's Department. Donna Ferebee appeared on behalf of the Department of Finance.

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 by a vote of 6-0 to partially approve this test claim.

Summary of Findings

This consolidated test claim filed by County of Los Angeles and Riverside Unified School District addresses activities associated with the California Public Records Act (CPRA) (Gov. Code, § 6250 et seq.), which provides for the disclosure of public records kept by state, local

agencies, kindergarten through 12th grade school districts and community college districts (K-14 districts), and county offices of education. These activities include: (1) providing copies of public records with portions exempted from disclosure redacted; (2) notifying a person making a public records request whether the requested records are disclosable; (3) assisting members of the public to identify records and information that are responsive to the request or the purpose of the request; (4) making disclosable public records in electronic formats available in electronic formats; and (5) removing an employee's home address and home telephone number from any mailing list maintained by the agency when requested by the employee.

In 2004, California voters approved Proposition 59, to incorporate the right of public access to information contained in the CPRA and other open meetings and public records laws, into the California Constitution.

The Commission makes the following findings regarding the test claim statutes:

Public records open to inspection (Gov. Code, §§ 6252, 6253, and 6253.9)

Section 6253 sets forth the right of every person to inspect any public record with exceptions, and the duties of public agencies that receive a request to inspect public records. Section 6253.9 addresses the form of disclosure of public records that are in an electronic format, and sets limits on the costs charged to the requester of information in an electronic format.

Some of the activities imposed by sections 6253 and 6253.9 are not new activities. However, sections 6253 and 6253.9 do impose state-mandated new programs or higher levels of service on local agencies and K-14 districts.

Assistance to members of the public (Gov. Code, § 6253.1)

Section 6253.1 addresses the duty of a public agency to assist members of the public that request to inspect a public record. Section 6253.1 imposes a state-mandated new program or higher level of service on local agencies and K-14 districts.

Initiative, referendum, recall petitions, and petitions for reorganization of K-14 districts (Gov. Code, § 6253.5)

Section 6253.5 excludes initiatives, referenda, recall petitions, petitions for reorganization of K-14 districts, and any memoranda prepared by the county elections officials in the examination of the petitions indicating which registered voters have signed particular petitions from being deemed public records and provides that such records shall not be open to inspection. Section 6253.5 also provides exceptions to the exclusion, in which specified individuals are permitted to examine such records.

The plain language of section 6253.5 does not impose any activities on K-14 districts. In addition, K-14 districts are not required to seek permission to examine the documents addressed in section 6253.5, and as a result, section 6253.5 does not impose a state-mandated new program or higher level of service.

Disclosure of home addresses and phone numbers of school district and county office of education employees (Gov. Code, § 6254.3)

Section 6254.3 provides that the home addresses and home telephone numbers of state employees and employees of a school district or county office of education shall not be deemed to be public records and prohibits such records from being open to public inspection.

Section 6254.3 authorizes the state, school districts, and county offices of education, to make such information open to public inspection in limited circumstances.

Section 6254.3 imposes a state-mandated new program or higher level of service on K-14 districts and county offices of education to remove the home address and telephone number of an employee from any mailing lists that the K-14 district or county office of education is legally required to maintain, if requested by the employee, except for lists used exclusively by the K-14 district or county office of education to contact the employee.

Justification for withholding of records (Gov. Code, § 6255)

Section 6255 requires local agencies and K-14 districts to provide a justification for withholding records for which a public records request was made, but providing a justification for withholding records is not a new requirement.

Section 6255 imposes a state-mandated new program or higher level of service to respond in writing to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part.

Court costs and attorney fees (Gov. Code § 6259)

Section 6259 addresses the orders of the court in proceedings brought by a person seeking to enforce his or her right to inspect or to receive a copy of any public record or class of public records that a public agency has refused to disclose. Section 6259 requires the court to award court costs and attorney fees to a plaintiff that prevails in litigation alleging the improper withholding of public records by a public agency.

The payment of court costs and attorney fees is not a service to the public. Instead it is a consequence for failing to provide a service to the public when required by law, and as a result, does not constitute a program within the meaning of article XIII B, section 6 of the California Constitution.

Also, the language of section 6259 does not require local agencies or K-14 districts to engage in litigation. Even if the requirement were read into section 6259, section 6259 has not changed, as relevant to this discussion, since 1968. As a result, engaging in litigation is not a state-mandated new program or higher level of service imposed by section 6259.

Costs mandated by the state

Government Code section 17556, subdivision (f), prohibits the Commission from finding costs mandated by the state for duties that are necessary to implement or expressly included in a ballot measure approved by the voters in a state-wide or local election. In addition, Government Code section 17556, subdivision (d), prohibits the Commission from finding costs mandated by the state where a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

Neither subdivision (f) or (d), preclude the Commission from finding costs mandated by the state because there is no evidence in the law or in the record that the state-mandated activities are necessary to implement Proposition 59, and there is insufficient fee authority to cover the costs of all state-mandated activities. The fee authority applies only to the direct costs of providing an electronic copy to a person pursuant to Government Code section 6254.3, or the direct cost plus the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record if: (1) the public agency would be required to produce a copy of an

electronic record and the record is one that is produced only at otherwise regularly scheduled intervals; or (2) the request would require data compilation, extraction, or programming to produce the record. Under article XIII B, section 6, all costs mandated by the state, including direct and indirect costs, are reimbursable. However, the fee authority provided by the CPRA constitutes offsetting revenue that will be identified in the parameters and guidelines.

For the reasons discussed above, the Commission finds that Government Code sections 6253, 6253.1, 6253.9, 6254.3, and 6255 impose reimbursable state-mandated programs on local agencies and K-14 districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following specific new activities:

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

    These activities are not reimbursable when: (1) the public records requested are made available to the member of the public through the procedures set forth in Government Code section 6253; (2) the public agency determines that the request should be denied and bases that determination solely on an exemption listed in Government Code section 6254; or (3) the public agency makes available an index of its records. (Gov. Code, § 6253.1, subds. (a) and (d) (Stats. 2001, ch. 355).)
5. For K-14 districts and county offices of education only, redact or withhold the home address and telephone number of employees of K-14 districts and county offices of education from records that contain disclosable information.

This activity is not reimbursable when the information is requested by: (1) an agent, or a family member of the individual to whom the information pertains; (2) an officer or employee of another school district, or county office of education when necessary for the performance of its official duties; (3) an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed (and thus must always be redacted or withheld); (4) an agent or employee of a health benefit plan providing health services or administering claims for health services to K-14 district and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents. (Gov. Code, § 6254.3, subd. (a) (Stats. 1992, ch. 463).)

6. For K-14 districts and county offices of education only, remove the home address and telephone number of an employee from any mailing lists that the K-14 district or county office of education is legally required to maintain, if requested by the employee, except for lists used exclusively by the K-14 district or county office of education to contact the employee. (Gov. Code, § 6254.3, subd. (b) (Stats. 1992, ch. 463).)

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

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

Finally, the Commission finds that any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.

BACKGROUND

This test claim addresses activities associated with the California Public Records Act (CPRA) (Gov. Code, § 6250 et seq.), which provides individuals in California access to information concerning the conduct of the people's business. Prior to the adoption of the CPRA in 1968, the law governing disclosure of public records consisted of a "hodgepodge of statutes and court decisions."[1] The CPRA was adopted in order to more clearly define what constitutes a "public record" open to inspection and what information can be or is required to be withheld from disclosure. Since the 1968 adoption of the CPRA there have been numerous amendments to the CPRA; some of these amendments are the subject of this test claim.

On October 15, 2002 the County of Los Angeles filed the *California Public Records Act: Disclosure Procedures* (02-TC-10) test claim seeking reimbursement for costs associated with the procedures used by counties for responding to public records requests. The County of Los Angeles alleges reimbursable costs for activities such as: (1) assisting members of the public to identify records and information that are responsive to the request or the purpose of the

[1] *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 765.

request; (2) estimate a date and time when the disclosable records will be made available; (3) respond in writing to a written request for inspection or copies of public records when the request is denied in whole or in part; (3) make information that constitutes an identifiable public record kept in electronic format available in the electronic format which it is held; and (4) include as a writing that can constitute a "public record" any photocopy, transmission by electronic mail or facsimile, and any record thereby created, regardless of the manner in which the record has been stored.[2]

On June 26, 2003, Riverside Unified School District filed the *California Public Records Act* (02-TC-51) test claim, which similarly seeks reimbursement for costs associated with complying with the CPRA. Riverside Unified School District alleges reimbursable state-mandated costs for K-14 districts and county offices of education to engage in activities including: (1) providing redacted copies of requested documents deleting portions exempted by law; (2) providing copies of public records to the public, including the determination and collection of the fee; (3) promptly notifying a person making a request for a copy of records, within 10 days from receipt of the request, of the determination of whether the requested records are disclosable records; and (4) removing an employee's home address and home telephone number from any mailing list maintained by the agency when requested by that employee.[3]

In 2004, California voters approved Proposition 59, which amended article I, section 3 of the California Constitution to include the right of public access to writings of government officials. In light of Proposition 59, it was determined that the *California Public Records Act: Disclosure Procedures* (02-TC-10) test claim and the *California Public Records Act (K-14)* (02-TC-51) test claim would require consideration of Government Code section 17556, subdivision (f), which provided that the Commission shall not find costs mandated by the state if the Commission finds:

> The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in, a ballot measure approved by voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.[4]

However, on March 13, 2007, Government Code section 17556, subdivision (f), was found unconstitutional by the superior court in *California School Boards Association (CSBA), et al. v. Commission on State Mandates, et al.* [No. 06CS01335*]*. The court's judgment enjoined the Commission from taking any action to implement Government Code section 17556, subdivision (f). This decision was appealed, and as a result, on August 2, 2007 the test claims were removed from the Commission's hearing calendar until a final court decision in *California School Boards Association, et al. v. Commission on State Mandates, et al*.

On March 9, 2009, the Court of Appeal found Government Code section 17556, subdivision (f), constitutional except for the language "reasonably within the scope of." As a result of the court's decision, Government Code section 17556, subdivision (f) provides that the Commission shall not find costs mandated by the state if the Commission finds:

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[2] 02-TC-10 test claim, *supra*, pgs. 1-9.

[3] 02-TC-51 test claim, *supra*, pgs. 26-28.

[4] Government Code section 17556, subdivision (f), as amended by Statutes 2006, chapter 538.

> The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.[5]

On November 2, 2010 the Commission consolidated the *California Public Records Act: Disclosure Procedures* (02-TC-10) and *California Public Records Act (K-14)* (02-TC-51) test claims to form the consolidated *California Public Records Act* (02-TC-10 and 02-TC-51) test claim.

A. Claimants' Position

The claimants allege that the test claim statutes impose reimbursable state-mandated activities. Activities which are alleged to have resulted in reimbursable costs include: assisting members of the public in making an effective public records request, disclosing records in an electronic format, redacting information exempt from disclosure, limiting disclosure of K-14 district employees' home address and telephone numbers, removing a K-14 district employee's home address and telephone numbers when requested by the employee, and paying attorney fees to a prevailing plaintiff that brought suit against a K-14 district for improperly withholding public records.[6]

On March 25, 2004, the California Community Colleges Chancellor's Office (Chancellor's Office) indicated that it would defer to the analysis of the Department of Finance (Finance) regarding the test claim, because the CPRA applies equally to all government entities, and as a result, there is nothing unique to the college districts that requires a response from the Chancellor's Office. Interpreting this as a comment that districts are not entitled to reimbursement, the school district claimant, Riverside Unified School District, argues that the Chancellor's Office comments must be disregarded. The claimant states:

> The comment that the statute in question applies equally to all government entities is not one of the valid exceptions to mandate reimbursement set forth in Government Code section 17556. Therefore, it must be disregarded.
>
> If, by chance, CCC intended to object to the test claim on the grounds that the statute in question is a law of general application, that too must fail. [¶] . . . . [A] law of general application must make local agencies indistinguishable from private employers. The test claim statutes apply only to school districts, county offices of education and community college districts and not to private employers.[7]

On January 18, 2011 the County of Los Angeles submitted comments in response to the Commission's request for comments regarding the effect of Proposition 59 on the consolidated *California Public Records Act* (02-TC-10 and 02-TC-25) test claim. The County of Los Angeles argues:

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[5] Government Code section 17556, subdivision (f), as amended by Statutes 2010, chapter 719.

[6] 02-TC-10 Test Claim, *supra*, 02-TC-51 Test Claim Filing, *supra*.

[7] Claimant response to the Chancellor's Office Comments, dated April 30, 2004.

> [T]he public records act requirements included in the test claim legislation were in addition to those found in prior law and were not available or necessary in implementing the . . . declaration of fundamental rights in the California Public Records Act of 1968 and Proposition 59. In addition, the test claim legislation was not expressly included in Proposition 59.
>
> Accordingly, the County finds that the test claim legislation did not impose duties that are necessary to implement, or are expressly included in, the Proposition 59 ballot measure approved by the voters. Consequently, the ballot initiative funding disclaimer cannot be applied to disqualify reimbursement of the County's costs . . . .[8] (Original underline.)

On April 18, 2011 both claimants submitted comments in response to the draft staff analysis, which will be addressed in the discussion below.[9]

B. Department of Finance's Position (Finance)

On November 20, 2002, Finance submitted comments in response to the unconsolidated *California Public Records Act: Disclosure Procedures* (02-TC-10) test claim. Finance found that a portion of the test claim may be a state mandate. Finance states:

> The test claim legislation specifies the type of response that the claimant must give to the requestor and the timelines that must be met which could potentially result in a greater number of staff hours spent researching and helping requestors. Anything above and beyond staff time dedicated to expediting and or [*sic*] researching requests would not be considered state-mandated activities, and additional activities and equipment noted by the claimant are considered discretionary and therefore not reimbursable.[10]

On January 14, 2011, Finance submitted comments in response to the Commission's request for comments regarding the effect of Proposition 59 on the consolidated *California Public Records Act* (02-TC-10 and 02-TC-51) test claim. Finance argues that the Commission should find that there are no costs mandated by the state because the test claim statutes are necessary to implement Proposition 59.

On April 19, 2011, Finance submitted comments in response to the draft staff analysis, which echo the arguments made in Finance's January 14, 2011 comments.[11]

C. Chancellor's Office Position

On March 25, 2010, the Chancellor's Office submitted comments in response to the unconsolidated *California Public Records Act (K-14)* (02-TC-51) test claim. The Chancellor's Office states in relevant part:

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[8] Claimant comments in response to request for comments, dated January 18, 2011.

[9] Claimants' responses to draft staff analysis, *supra*.

[10] Finance comments on 02-TC-10, *supra*.

[11] Finance comments on draft staff analysis, *supra*.

The Chancellor's Office chooses not to respond to this test claim. We don't have anything to add to this issue, because the statute in question applies equally to all government entities and there's nothing unique to college districts that requires a response. Therefore, we defer to whatever analysis is provided to you by the Department of Finance.[12]

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[13] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[14] "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."[15] 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.[16] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[17]

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.[18] 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

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[12] Chancellor's Office comments on 02-TC-51 test claim, dated March 25, 2004.

[13] California Constitution, article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) 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 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."

[14] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th727, 735 (*Kern High School Dist*.).

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

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

[17] *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*).

[18] *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 (*Los Angeles I*); *Lucia Mar, supra*, 44 Cal.3d 830, 835).

legislation.[19] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[20] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[21]

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.[22] 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."[23]

A. Some of the test claim statutes impose state-mandated new programs or higher levels of service subject to article XIII B, section 6 of the California Constitution

The following discussion will introduce each test claim statute or groups of test claim statutes with a header that describes the content of the statutes. The discussion will then analyze whether each statute or groups of statutes under the header impose state-mandated new programs or higher levels of service.

Public records open to inspection (Gov. Code, §§ 6252, 6253, and 6253.9)

Section 6252 sets forth the definitions of terms used in the CPRA. Section 6253 sets forth the right of every person to inspect any public record, with exceptions, and the duties of public agencies, state and local, and K-14 districts that receive a request to inspect public records. Section 6253.9 addresses the form of disclosure of public records that are in an electronic format, and sets limits on the costs charged to the requester of information in an electronic format.

Interpreting statutes begins with examining the statutory language, giving the words their ordinary meaning, and if the words are unambiguous the plain meaning of the language governs.[24] The plain language of Government Code sections 6253 and 6253.9 require local agencies and K-14 districts to engage in the following activities:

1. Make public records open to inspection at all times during the office hours of the local agency or K-14 district, by every person, except for public records exempted from disclosure or prohibited from disclosure. (Gov. Code, § 6253, subd. (a) (Stats. 2001, ch. 982); and Gov. Code, § 6253.9, subd. (a)(1) (Stats. 2000, ch. 982).)

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

[20] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

[21] *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.

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

[23] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[24] *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.

2. Make any reasonably segregable portion of a record available for inspection after the deletion of the portions that are exempted by law. (Gov. Code, § 6253, subd. (a) (Stats. 2001, ch. 982).)
3. Provide a copy, or exact copy unless impractical, of disclosable records, upon request for a copy or exact copy of records that reasonably describes an identifiable record or records. (Gov. Code, § 6253, subd. (b) (Stats. 2001, ch. 982).)
4. If requested by a person making a public records request for a public record kept in an electronic format, provide a copy of a disclosable electronic record in the electronic format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. (Gov. Code, § 6253.9, subd. (a)(2) (Stats. 2000, ch. 982).)
5. Within 10 days from receipt of a request for a copy of records determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the local agency or K-14 district and notify the person making the request of the determination and the reasons for the determination. (Gov. Code, § 6253, subd. (c) (Stats. 2001, ch. 982).)
6. If the 10-day time limit of Government Code section 6253 is extended by a local agency or K-14 district, due to "unusual circumstances" as defined by Government Code section 6253, subdivision (c)(1)-(4) (Stats. 2001, ch. 982), the agency head, or his or her designee, shall provide written notice to the person making the request, setting forth the reasons the extension and the date on which a determination is expected to be dispatched. (Gov. Code, § 6253, subd. (c) (Stats. 2001, ch. 982).)

The Commission finds that the above activities are mandated by the state.

In addition, the claimants argue that the provision of a copy of disclosable records pursuant to Government Code section 6253, subdivision (b), includes "the determination and collection of the fee" that local agencies and K-14 districts are authorized to charge for duplication of public records.[25] Subdivision (b) provides in relevant part:

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

The claimants argue, "The unambiguous plain meaning of this Section is that collection of the fee is a condition precedent to providing the records, so it is a necessary activity to comply with the mandate to provide the records. Furthermore, to collect the fee, the amount must be determined." However, the plain language of subdivision (b) does not require public agencies to determine or collect a fee. Instead, it speaks to the timing of the mandated activity of providing a copy of a public record. In addition, under Government Code section 6253, subdivision (e), which allows local agencies and K-14 districts to adopt requirements that provide greater access to records, local agencies and K-14 districts can waive fees, and thus, the collection and determination of a fee is not a necessary activity to comply with the mandate to provide public

[25] 02-TC-51 test claim, *supra*, p. 26.

records.[26] As a result, the Commission finds that local agencies and K-14 districts are not mandated to determine or collect fees for the duplication of public records.

The Commission further finds that the above state-mandated activities carry out the governmental function of providing a service to the public by providing access to information regarding the business of the public, and as a result, constitute a program within the meaning of article XIII B, section 6 of the California Constitution. Although the above activities constitute "programs" it is necessary to determine whether they are new in comparison with the legal requirements in effect immediately before the enactment of the test claim legislation. The following discussion will address each activity in the order listed above.

Since 1968, local agencies and K-14 districts were required to make public records open to inspection at all times during the office hours of the local agencies and K-14 districts, by every person, except for public records exempted from disclosure or prohibited from disclosure.[27] However, the claimants argue that "public records" that are required to be open for inspection did not include records made by "photocopying, transmitting by electronic mail or facsimile [or]. . . . any record thereby created, regardless of the manner in which the record has been stored," until the definition of "writing" as used in the CPRA was amended in 2002 to specifically include these methods of keeping information.[28] Thus, the claimants assert that publicly disclosing information kept in these formats is a new activity.

However, in 1970 the Legislature defined "public records" to include:

> [A]ny writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency *regardless of physical form or characteristics*.[29] (Italics added.)

"Writing" as used in the CPRA was defined to include:

> [H]andwriting, typewriting, printing, photostating, photographing, and *every other means of recording* upon *any form of communication or representation*, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and *other documents*.[30] (Italics added.)

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[26] *North County Parents Organization v. Dept. of Education* (4th. Dist. 1994) 23 Cal.App.4th 144, 148. The court, in discussing former Government Code section 6253.1 (currently Government Code section 6253, subdivision (e)) found that, "This section gives an agency power to 'adopt requirements for itself which allow greater access to records than prescribed by the minimum standards set forth in this chapter.' The trial court apparently concluded that this provision permits an agency to waive or reduce its fees. We agree. A reduction in copy fee permits 'greater access' to records."

[27] Former Government Code section 6253 (Stats. 1968, ch.1473).

[28] 02-TC-10 test claim, *supra*, p. 8, citing to Statutes, 2002, chapter 945.

[29] Former Government Code section 6252, subdivision (d).

[30] Former Government Code section 6252, subdivision (e).

The above language indicates that the Legislature intended public records to include every conceivable kind of record that is involved in the governmental process. To find otherwise would conflict with the purpose and focus of the CPRA, which is to make disclosable *information* open to the public, not simply the documents prepared, owned, used, or retained by a public agency.[31] This interpretation is consistent with the court's discussion of what constitutes a public record in *San Gabriel Tribune v. Superior Court*, which included in its discussion the following description by the Assembly Committee on Statewide Information Policy:

> This definition [of what constitutes a public record] is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed.[32]

As a result, the Commission finds that making public records open to inspection by every person at all times during the office hours of the local agency and K-14 district does not constitute a new program or higher level of service regardless of the form which the public records are kept.

The claimants also argue that prior to 1981 state and local agencies and K-14 districts were not required to provide redacted copies of requested documents.[33] In 1981, the CPRA was specifically amended to provide, "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law."[34] However, this amendment only codified the interpretation of the CPRA accorded to it by case law. Prior to the 1981 amendment courts already held that the CPRA requires segregation of exempt materials from nonexempt materials contained in a single document and to make the nonexempt materials open for inspection and copying.[35] In 1979, after noting that the focus of the CPRA is information and not documents the court in *Nor. Cal. Police Practices Project v. Craig* concluded:

> [W]here nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required to serve the objective of the [CPRA] to make public records available for public inspection and copying unless a particular statute makes them exempt.[36]

As a result, the Commission finds that the general duty to make any reasonably segregable portion of a record available for inspection after the deletion of the portions that are exempted by

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[31] *Nor Cal. Police Practices* (1979) 90 Cal.App.3d 116, p. 123-124.

[32] *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774, citing to Volume 58 Opinions of the Attorney General 629, 633-634 (1975), which cites to Assembly Committee on Statewide Information Policy California Public Records Act of 1968 (1 Appendix to Journal of Assembly 7, Reg. Sess. (1970), See also AG opinion 53 Ops.Cal.Atty.Gen. 136, 140-143).

[33] 02-TC-51, *supra*, pgs. 11 and 26, citing to Statutes 1981, chapter 968.

[34] Former Government Code section 6257 (Stats. 1981, ch. 968).

[35] *Nor Cal. Police Practices* (1979) 90 Cal.App.3d 116, p. 123-124.

[36] *Ibid.* This interpretation of the CPRA is retroactive to the initial enactment of the CPRA in 1968 as it involves no novel or unforeseeable judicial expansion of the statutory language in question. For retroactivity of judicial statutory interpretation see *County of San Diego v. State Bd. of Control* (1984) 161 Cal.App.3d 868, 870.

law does not constitute a new program or higher level of service subject to articles XIII B, section 6 of the California Constitution.

In regard to providing copies or exact copies of public records upon a request that reasonably describes an identifiable record, public agencies have been required to engage in this activity since the 1968 enactment of the CPRA. Former Government Code sections 6256 and 6257 provided:

> 6256. Any person may receive a copy of any identifiable public record or shall be provided with a copy of all information contained therein. Computer data shall be provided in a form determined by the agency.
>
> 6257. A request for a copy of an identifiable public record or information produced therefrom, or certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, or the prescribed statutory fee, where applicable.[37]

A "certified copy" is a duplicate of an original document, certified as an exact reproduction of the original.[38] Thus, since 1968 public agencies were required to provide copies or exact copies of public records upon a request of identifiable public records. As a result, the Commission finds that providing a copy, or exact copy unless impractical, of disclosable records, upon request for a copy or exact copy of records that reasonably describes an identifiable record, does not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Although the Commission has found that making public records, including records in an electronic format, *open to inspection* at all times does not constitute a new program or higher level of service, *providing an electronic copy* of a public record kept in an electronic format does constitute a new program or higher level of service. Prior to 2000, public agencies were not required to provide the public with an *electronic* copy of a public record kept in an electronic format. Instead, public agencies were given discretion to provide "[c]omputer data . . . in a form determined by the agency."[39] One of the purposes for enacting section 6253.9, and requiring public agencies to provide an electronic copy, was to substantially increase the availability of public records to the public and to reduce the cost and inconvenience to the public associated with large volumes of paper records.[40] In essence, the intent was to provide a higher level of the service of providing public records to the public. As a result, the Commission finds that the requirement to provide an electronic copy of a public record kept in an electronic format constitutes a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

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

[38] Black's Law Dictionary (Seventh Ed. 1999) p. 337.

[39] Former Government Code section 6253, subdivision (b) (Stats. 1998, ch. 620).

[40] Assembly Committee on Governmental Organization, third reading analysis of AB 2799 (1999-2000 Regular Session) as amended July 6, 2000. See also, Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of AB 2799 (1999-2000 Regular Session) as amended July 6, 2000.

The claimants have pled the activities mandated by Government Code section 6253, subdivision (c), relating to providing a person making a public records request notice of the determination of whether records are disclosable and whether an extension is needed by the public agency to make a determination, as added in 1981.[41] Immediately prior to 1981, public agencies were not required to engage in these activities. As a result, the Commission finds that the activities mandated by Government Code section 6253 constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

In summary, the Commission finds the following activities constitute state-mandated new programs or higher levels of service subject to article XIII B, section 6 of the California Constitution.

1. If requested by a person making a public records request for a public record kept in an electronic format, provide a copy of a disclosable electronic record in the electronic format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. (Gov. Code, § 6253.9, subd. (a)(2) (Stats. 2000, ch. 982).)
2. Within 10 days from receipt of a request for a copy of records determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the local agency or K-14 district, and notify the person making the request of the determination and the reasons for the determination. (Gov. Code, § 6253, subd. (c) (Stats. 2001, ch. 982).)
3. If the 10-day time limit of Government Code section 6253 is extended by a local agency or K-14 district due to "unusual circumstances" as defined by Government Code section 6253, subdivision (c)(1)-(4) (Stats. 2001, ch. 982), the agency head, or his or her designee, shall provide written notice to the person making the request, setting forth the reasons the extension and the date on which a determination is expected to be dispatched. (Gov. Code, § 6253, subd. (c) (Stats. 2001, ch. 982).)

Assistance to members of the public (Gov. Code, § 6253.1)

Section 6253.1 addresses the duty of a public agency to assist members of the public that request to inspect a public record. The Commission finds that section 6253.1 mandates local agencies and K-14 districts to engage in the following activities:

> When a member of the public requests to inspect a public record or obtain a copy of a public record:
>
> a. assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated;
>
> b. describe the information technology and physical location in which the records exist; and
>
> c. provide suggestions for overcoming any practical basis for denying access to the records or information sought.

[41] 02-TC-51 test claim, *supra*, pgs. 11 and 26-27. Statutes 1981, chapter 968.

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

The claimants pled Government Code section 6253.1 as added in 2001.[42] Immediately before 2001, local agencies and K-14 districts were not required to engage in the activities mandated by section 6253.1. In addition, the above activities are unique to public agencies and implement the state policy of increasing access to information regarding the people's business.[43] As a result, the Commission finds that the activities mandated by Government Code 6253.1 constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Initiative, referenda, recall petitions, and petitions for reorganization of K-14 districts (Gov. Code, § 6253.5)

Section 6253.5 excludes initiatives, referenda, recall petitions, petitions for reorganization of K-14 districts, and any memoranda prepared by the county elections officials in the examination of the petitions indicating which registered voters have signed particular petitions from being deemed public records and provides that such records shall not be open to inspection. Section 6253.5 also provides exceptions to the exclusion, in which specified individuals are permitted to examine such records.

The claimants assert that section 6253.5 requires K-14 districts to engage in the following activity:

> [W]hen necessary, [examine] petitions for the district when petitions are filed to fill vacancies on the governing board and petitions for recall, after obtaining approval of the appropriate superior court.[44]

However, section 6253.5 does not impose any requirements on K-14 districts. As described above, section 6253.5 prohibits disclosure of petitions, and provides exceptions to this prohibition. One of the exceptions allows a K-14 district attorney to review a petition upon the approval of the appropriate superior court. This exception does not require K-14 districts to seek this approval. As a result, the Commission finds that Government Code section 6253.5 does not impose any state-mandated new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Disclosure of home addresses and phone numbers of school district and county office of education employees (Gov. Code, § 6254.3)

Section 6254.3 only applies to state employees, school districts, and county offices of education. Section 6254.3 provides that the home addresses and home telephone numbers of state

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[42] Statutes 2001, chapter 355.

[43] Government Code section 6250, which states that access to information concerning the people's business is a fundamental and necessary right of every person in this state.

[44] 02-TC-51 test claim, *supra*, p. 28.

employees and employees of a school district or county office of education shall not be deemed to be public records and prohibits such records from being open to public inspection. Section 6254.3 authorizes the state, school districts, and county offices of education, to make such information open to public inspection in limited circumstances.

Specifically, section 6254.3 provides:

> (a) The home addresses and home telephone numbers of state employees and employees of a school district or county office of education shall not be deemed to be public records and shall not be open to public inspection, except that disclosure of that information may be made as follows:
>
> (1) To an agent, or a family member of the individual to whom the information pertains.
>
> (2) To an officer or employee of another state agency, school district, or county office of education when necessary for the performance of its official duties.
>
> (3) To an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed.
>
> (4) To an agent or employee of a health benefit plan providing health services or administering claims for health services to state, school districts, and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents.
>
> (b) Upon written request of any employee, a state agency, school district, or county office of education shall not disclose the employee's home address or home telephone number pursuant to paragraph (3) of subdivision (a) and an agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee.

Although, the language of subdivision (a) is prohibitory in nature, section 6254.3 must be read in the context of the whole statutory scheme and not as individual parts or words standing alone.[45] As discussed above, section 6253 of the CPRA requires the redaction of information that is exempted or prohibited from disclosure from records that contain disclosable information. Section 6254.3 prohibits the disclosure of the home address and telephone number of employees of K-14 districts and county offices of education. Thus, if a record that contains disclosable information also contains the addresses and telephone numbers of employees of K-14 districts and county offices of education, the addresses and telephone numbers must be redacted from the record, except in the limited circumstances listed in section 6254.3, subdivisions (a)(1)-(4), in which K-14 districts and county offices of education have the discretion to release this information.

[45] *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 218.

Pursuant to the plain language of the statute read in light of the whole CPRA, the Commission finds that section 6254.3 requires K-14 districts and county offices of education to engage in the following activities:

1. Redact or withhold the home address and telephone number of employees of K-14 districts and county offices of education from records that contain disclosable information.

   This activity is not reimbursable when the information is requested by: (1) an agent, or a family member of the individual to whom the information pertains; (2) an officer or employee of another school district, or county office of education when necessary for the performance of its official duties; (3) an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed (and thus must always be redacted or withheld); (4) an agent or employee of a health benefit plan providing health services or administering claims for health services to K-14 district and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents.

2. Remove the home address and telephone number of an employee from any mailing list maintained by the K-14 district or county office of education if requested by the employee, except for lists used exclusively by the K-14 district or county office of education to contact the employee. (Gov. Code, § 6254.3, subd. (b) (Stats. 1992, ch. 463).)

In order to determine whether the activity required by section 6254.3 constitutes a state-mandated activity it is necessary to look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[46] Here, K-14 districts and county offices of education are required to remove the home address and telephone number of an employee from *any* mailing list maintained by the K-14 districts or county offices of education if requested by the employee. "Any mailing list" includes mailing lists that K-14 districts and county offices of education are legally required to maintain and those voluntarily maintained by the K-14 districts or county offices of education. In regard to mailing lists that K-14 districts and county offices of education voluntarily maintain, the requirement to remove from the mailing list the home address and telephone number of an employee that requests the removal is triggered by the decision by K-14 districts and county offices of education to voluntarily maintain a mailing list. As a result, the Commission finds in regard to voluntarily maintained mailing lists, the activity required by section 6254.3 is not a state-mandated activity. However, the Commission finds that the following requirements do constitute state-mandated activities:

1. For K-14 districts and county offices of education only, redact or withhold the home address and telephone number of employees of K-14 districts and county offices of education from records that contain disclosable information.

[46] *Kern High School Dist., supra,* 30 Cal.4th 727, 743.

This activity is not reimbursable when the information is requested by: (1) an agent, or a family member of the individual to whom the information pertains; (2) an officer or employee of another school district, or county office of education when necessary for the performance of its official duties; (3) an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed (and thus must always be redacted or withheld); (4) an agent or employee of a health benefit plan providing health services or administering claims for health services to K-14 district and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents. (Gov. Code, § 6254.3, subd. (a) (Stats. 1992, ch. 463).)

2. For K-14 districts and county offices of education only, remove the home address and telephone number of an employee from any mailing lists that the K-14 district or county office of education is legally required to maintain, if requested by the employee, except for lists used exclusively by the K-14 district or county office of education to contact the employee. (Gov. Code, § 6254.3, subd. (b) (Stats. 1992, ch. 463).)

The claimants have pled section 6254.3 as last amended in 1992.[47] Immediately prior to the 1992 amendment, section 6254.3 only applied to state employers and state employees.[48] In addition, although the general duty to redact information that is exempt or prohibited from disclosure existed prior to the adoption of section 6254.3, the specific duty to redact the home address and telephone number of an employee of a K-14 district or county office of education did not exist. Thus, the scope of what must be withheld from disclosure, and as a result, redacted from records containing disclosable information increased. As a result, the state-mandated activities imposed by section 6254.3 are new.

In addition, these mandates impose requirements that are unique to public agencies and implement the state policy of increasing access to information regarding the people's business while being mindful of the right of individuals to privacy.[49] As a result, the Commission finds that Government Code section 6254.3 imposes state-mandated new programs or higher levels of service subject to article XIII B, section 6 of the California Constitution:

Justification for withholding of records (Gov. Code, § 6255)

Section 6255 addresses the provision of a justification for withholding records for which a public records request was made. The Commission finds that section 6255 mandates local agencies and K-14 districts to engage in the following activities:

1. Justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the

[47] Statutes 1992, chapter 463.

[48] Government Code section 6254.3 as added by Statutes 1984, chapter 1657.

[49] Government Code section 6250, which states, "In enacting [the CPRA], the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Gov. Code, § 6255, subd. (a).)

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

The claimants pled section 6255 as last amended in 2000.[50] Since 1968, section 6255 required the justification of withholding records by demonstrating that the record in question is exempt or that the public interest served by not disclosing the record outweighs the public interest served by disclosing the record. As a result, that state-mandated activity does not constitute a new program or higher level of service.

However, immediately prior to the amendment of section 6255 in 2000, districts were not required to respond to written requests *in writing* that includes a determination that the request is denied. In addition, this mandate imposes requirements that are unique to public agencies and implement the state policy of increasing access to information regarding the people's business.[51] As a result, the Commission finds that Government Code section 6255, subdivision (b), imposes the following state-mandated new program or higher level of service subject to article XIII B, section 6 of the California Constitution:

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

Court costs and attorney fees (Gov. Code § 6259)

In 1968 Government Code section 6259 was enacted as part of the CPRA.[52] Since its original enactment in 1968, section 6259 has addressed the orders of the court in proceedings brought by a person seeking to enforce his or her right to inspect or to receive a copy of any public record or class of public records that a public agency has refused to disclose. Specifically, since 1968 the court has been required to order the officer or person charged with withholding the requested records to disclose the public record or show cause why he or she should not disclose the record.[53] If the court determines that the public official was not justified in refusing to disclose the record, the court is required to order the public official to make the record public.[54]

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[50] Statutes 2000, chapter 982.

[51] Government Code section 6250, which states that access to information concerning the people's business is a fundamental and necessary right of every person in this state.

[52] Statutes 1968, chapter 1473.

[53] Former Government Code section 6259, as amended by Statutes 1968, chapter 1473. Currently Government Code section 6259, subdivision (a), as amended by Statutes 1993, chapter 926.

[54] Former Government Code section 6259, as amended by Statutes 1968, chapter 1473. Currently Government Code section 6259, subdivision (b), as amended by Statutes 1993, chapter 926.

In 1975, section 6259 was amended to add the provisions that a court is required to award court costs and reasonable attorney fees to the plaintiff if public records are disclosed as a result of the plaintiff filing suit.[55] In addition, if the court finds that the plaintiff's case is clearly frivolous, the court is required to award court costs and reasonable attorney fees to the public agency.[56] In 1984 section 6259 was amended to add the procedure for appealing a decision by a court.[57]

The K-14 district claimant argues that section 6259 imposes the following reimbursable state-mandated new program or higher level of service:

> [W]hen ordered by a court, [pay] to a prevailing plaintiff his or her court costs and reasonable attorney fees.[58]

Thus, the K-14 district claimant alleges that payment of court costs and reasonable attorney fees is a reimbursable state-mandated new program or higher level of service. However, the payment of court costs and reasonable attorney fees is not a program or service provided to the public. Instead, it is a consequence of failing to provide a legally required program or service, specifically the service of making disclosable public records open for inspection by the public or providing copies of the disclosable public records to the public.

The K-14 district claimant disagrees with this characterization and argue that the "court's determination is not a finding of a failure to implement the mandate to disclose or not to disclose the records, but instead, it is a conclusion as to whether the justification for the action was reasonable."[59] However, if a court finds that a local agency or K-14 district was unjustified in its decision not to disclose a public record, and thus failed to disclose public records as mandated by the CPRA, the consequence is the payment of court costs and attorney fees. Thus, the Commission finds that payment of court costs and attorney fees pursuant to Government Code section 6259 is not a state-mandated new program or higher level of service subject to article XIII B, section 6 of the California Constitution.[60]

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[55] Former Government Code section 6259, as amended by Statutes 1975, chapter 1246. Currently, Government Code section 6259, subdivision (d), as amended by Statutes 1993, chapter 926. See also, *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1390-1391, in which the court defines "prevail," as used in Government Code section 6259, as a situation when the plaintiff files an action which results in the defendant releasing a copy of a previously withheld document. The court further finds that an action results in the release of previously withheld document if the lawsuit motivated the defendants to produce the documents.

[56] *Ibid*.

[57] Government Code section 6259, subdivision (c).

[58] 02-TC-51 test claim, *supra*, p. 28.

[59] Claimant (Riverside Unified School District) response to draft staff analysis, dated April 18, 2011, p. 4-5.

[60] The County of Los Angeles argues in its response to the draft staff analysis that attorney costs associated with any legal analyses needed to determine whether to release a public record is a reimbursable state-mandated cost (See Claimant (County of Los Angeles) response to draft staff analysis, dated April 18, 2011, pgs. 4-6). However, the findings made in this section of the

In response to the draft staff analysis, the K-14 district claimant expands its allegation to provide that the various duties resulting from the CPRA (including those stemming from a statute that was not pled in this test claim), in conjunction with section 6259, mandate *litigation as a whole*, as opposed to only paying court costs and reasonable attorney fees pursuant to section 6259 as pled in the test claim.[61] Similarly, the county claimant expands its allegations to provide that litigation costs, including possible court costs and attorney fees, are reimbursable state-mandated costs.[62]

The claimants' responses to the draft staff analysis do not allege that Government Code section 6259 specifically requires local agencies or K-14 districts to engage in litigation. Rather, the claimants' responses provide that local agencies and K-14 districts are generally required to disclose public records by section 6253, local agencies and K-14 districts have an affirmative duty not to disclose information described in section 6254 (which was not pled), local agencies and K-14 districts are required to provide a written justification of why a public record is withheld pursuant to section 6255, that nondisclosure of a public record and justifications provided pursuant to sections 6254 and 6255 are heavily litigated, and section 6259 requires a court to award court costs and attorney fees to a plaintiff if a local agency or K-14 district unjustifiably refused to disclose a public record.[63] From this the claimants argue:

> The litigation costs incurred by the public agency are a necessary and reasonable consequence of its statutory duty to comply with Sections 62253 [*sic*], 6254, and 6255. Therefore, to the extent that the subject matter of the litigation pertains to information not to be disclosed pursuant to legislation enacted after December 31, 1974, the cost and fees incurred by the public agency to respond to the writ and the court are reimbursable, as well as any award assessed against the public agency.[64]

Pursuant to the claimants' argument Government Code section 6254 is part of the basis upon which the activity of engaging in litigation arises from. As a result, the Commission would be required to make specific findings on section 6254. However, the claimants have not pled

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analysis *only* address court costs and attorney fees as awarded by a court pursuant to Government Code section 6259. They do not address attorney costs associated with any state-mandated new program or higher level of service found to be imposed by the CPRA in this test claim.

[61] Claimant (Riverside Unified School District) response to draft staff analysis, dated April 18, 2011, pgs. 4-5. In the claimant's response, the claimant cites to Government Code section 6254, which was not pled in this test claim, as being a source of the requirement to engage in litigation.

[62] Claimant (County of Los Angeles) response to draft staff analysis, *supra*, pgs. 4-6.

[63] Claimant (Riverside Unified School District) response to draft staff analysis, *supra*, pgs. 4-5. Claimant (County of Los Angeles) response to draft staff analysis, *supra*, pgs. 4-6.

[64] Claimant (Riverside Unified School District) response to draft staff analysis, dated April 18, 2011, pgs. 4-5.

section 6254, and thus, the Commission does not have jurisdiction to make any findings on section 6254.[65]

In regard to Government Code sections 6255 and 6259, these sections, read together or separately, do not require local agencies and K-14 districts to engage in litigation. Instead, as described above, section 6255 requires local agencies and K-14 districts to provide a justification of why a public record is being withheld, and section 6259 sets forth the duties of a court when a lawsuit is brought under the CPRA. In addition, even if litigation were implied from the duties imposed on local agencies and K-14 districts to provide a justification for withholding a public record and a court's duties when litigation is initiated, these duties have been present since the original enactment of the CPRA in 1968, and as a result, the implied duty to engage in litigation would have been present since 1968.

Since 1968, section 6255 has required local agencies and K-14 districts to justify withholding any record.[66] The only substantive change that has occurred since 1968 was the addition of the requirement to provide the justification in writing when the public records request was made in writing. This additional requirement does not create a new duty to engage in litigation. Similarly, since 1968, section 6259 sets forth the duties of the court when litigation is initiated.[67] The only substantive changes to section 6259 are the addition of the requirement on the court to award court costs and attorney fees to a prevailing plaintiff, and the procedures to appeal a court's decision. Neither of these additions creates a new duty to engage in litigation. As a result, the Commission finds that Government Code sections 6255 and 6259 do not impose a state-mandated new program or higher level of service to engage in litigation.

B. The state-mandated new programs or higher levels of service impose costs mandated by the state on counties, K-14 districts, county offices of education within the meaning of article XIII B, section 6, and Government Code sections 17514 and 17556

In order for the test claim statutes to impose a reimbursable state-mandated program under the California Constitution, the test claim statutes must impose costs mandated by the state.[68] 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.

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[65] Pursuant to former Government Code section 17557, subdivision (c), as amended by Statutes 1998, chapter 681, which was in effect at the time of the filing of this test claim, a claimant may amend a test claim at "any time prior to a commission hearing on the claim without affecting the original filing date as long as the amendment substantially relates to the original test claim."

[66] Former Government Code section 6255, as added by Statutes 1968, chapter 1473.

[67] Former Government Code section 6259, as added by Statutes 1968, chapter 1473.

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

"Any increased costs" for which claimants may seek reimbursement include both direct and indirect costs.[69]

The claimants estimated that they "incurred more than $1,000 in staffing and other costs, annually, in excess of any fees collected pursuant to Government Code Section 6253, subdivision (b) and funding provided to school districts and the state for the period from July 1, 2001 through June 30, 2002"[70] to implement all duties alleged by the claimants to be mandated by the state. Thus, the claimants have met the minimum burden of showing costs necessary to file a test claim pursuant to Government Code section 17564.

However, pursuant to Government Code section 17556, subdivision (f), Finance argues that the claimants are not entitled to reimbursement for the state-mandated new program or higher levels of service imposed by Government Code sections 6253, 6253.9, 6253.1, 6254.3, and 6255, because the activities mandated by the code sections are necessary to implement a ballot measure approved by voters.[71] In addition, under Government Code section 6253.9, the claimants have fee authority for the costs of producing electronic copies of public records kept in an electronic format. Thus, it is also necessary to determine whether the claimants are precluded from reimbursement pursuant to the "ballot measure" and "fee authority" exceptions to reimbursement found in Government Code section 17556, subdivisions (f) and (d).

Ballot measure exception

Government Code section 17556, subdivision (f), prohibits a finding of costs mandated by the state for duties that are necessary to implement or expressly included in a ballot measure approved by the voters in a state-wide or local election.[72] The prohibition applies regardless of whether the statute was enacted before or after the date on which the ballot measure was approved by voters.

The claimants argue that the ballot measure exception to reimbursement in Government Code section 17556, subdivision (f), does not apply here because the test claim statutes were "enacted long after the advent of the declaration of rights in the 1968 California Public Records Act and [were] not available, let alone necessary, for the implementation of those rights, subsequently incorporated in Proposition 59."[73] In addition, the claimants note that Proposition 59 does not expressly include the activities mandated by the test claim statutes.

In 2004, California voters approved Proposition 59 to incorporate the right of access to information concerning the people's business that was already provided by various state laws,

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[69] Government Code section 17564.

[70] 02-TC-51 test claim, Exhibit 1 Declarations of Michael H. Fine, of Riverside Unified School District, and Cheryl Miller of Santa Monica Community College District.

[71] Finance Comments in Response to Request for Comments, dated January 14, 2011. Finance Response to Draft Staff Analysis, dated April 20, 2011.

[72] Government Code section 17556, subdivision (f). See *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, finding that the language, "reasonably within the scope of," to be violative of the California Constitution.

[73] Claimant Comments in Response to Request for Comments, dated January 18, 2011.

including the CPRA, into article I, section 3 of the California Constitution. The amendment to the Constitution provides in relevant part:

> The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

The purpose of Proposition 59 was to "create a constitutional right for the public to access government information. As a result, a government entity would have to demonstrate to a somewhat greater extent than under current law why information requested by the public should be kept private."[74]

None of the state-mandated new programs or higher levels of service imposed by the test claim statutes are expressly included in the Proposition 59. As a result, it is necessary to determine whether the state-mandated activities are "necessary to implement" Proposition 59.

The court in *California School Boards Association v. State of California*, found that duties imposed by a test claim statute or executive order that are not expressly included in a ballot measure approved by the voters in a statewide or local election are "necessary to implement" the ballot measure pursuant to Government Code section 17556, subdivision (f), when the additional requirements imposed by the state are intended to implement the ballot measure mandate, and the costs are, in context, de minimis such that the requirements are considered part and parcel of the underlying ballot measure mandate.[75] The court also makes a distinction between activities that are "necessary to implement" a ballot measure, and those that are "reasonably within the scope of" a ballot measure. In essence, for an activity to be necessary to implement a ballot measure, it must be more narrowly related to the ballot measure than an activity that simply has anything to do with the subject matter of the ballot measure.[76]

The court borrowed this analysis from the California Supreme Court's decision in *San Diego Unified School Dist.* which addressed whether state imposed procedural requirements that exceeded federal due process requirements constituted a federal mandate. The court found that the state requirements were designed to make the underlying federal due process right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective due process rights. Thus, the state requirements were merely incidental to fundamental federal due process requirements and viewed singly or cumulatively they did not significantly increase the costs of compliance with the federal mandate.[77]

Here, because Proposition 59 incorporated the fundamental right of access to information present in the CPRA into the constitution, and the provisions of the CPRA are intended to implement the right of access to public information set forth in the CPRA, it could be argued that the provisions of the CPRA also are intended to implement the ballot measure mandate (i.e. providing open

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[74] Ballot Pamphlet, General Election (November 2, 2004) Proposition 59 at <http://library.uchastings.edu/cgi-bin/starfinder/26556/calprop.txt> [as of March 21, 2011].

[75] *California School Boards Association v. State of California, supra*, 171 Cal.App.4th at p. 1217.

[76] *Id*. at pgs. 1213-1216.

[77] *San Diego School Dist., supra*, 33 Cal.4th at p. 889.

access to information concerning the conduct of the people's business). However, unlike in *San Diego Unified School Dist*., the state-mandated activities imposed by the test claim statutes, such as providing electronic copies to the public, assisting members of the public to make a request, and providing a written denial to a written request for public records, are not merely incidental to the right of access to information concerning the conduct of the people's business. Instead they impose additional requirements unnecessary to enforce the general right to access information regarding the people's business, and are not narrowly tailored to fit the definition of "necessary to implement."

Finding that the state-mandated activities are necessary to implement Proposition 59 would suggest that any activity that has anything to do with open government would be necessary to implement Proposition 59. In addition, there is no concrete evidence in the law or in record that the costs of the state-mandated activities, singly or cumulatively, do not significantly increase the cost of complying with the ballot measure mandate.[78] [79] As a result, the Commission finds that the record supports the finding of costs mandated by the state and that the Government Code section 17556, subdivision (f), exception does not apply to deny these activities.

Fee authority exception

Government Code section 17556, subdivision (d), prohibits a finding of costs mandated by the state where a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. In addition, the court in *Clovis Unified School Dist. v. Chiang* notes that to the extent that a local agency or school district has the authority to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.[80]

In regard to providing electronic copies of disclosable public records kept in an electronic format, Government Code section 6253.9, subdivision (a)(2), gives fee authority to local agencies and K-14 districts for the "direct costs" of producing a record in an electronic format. The fee authority that public agencies have under subdivision (a)(2) is limited to the direct cost of producing an electronic copy. The fee authority does not attach to the indirect costs such as the inspection of and handling of the file. Under article XIII B, section 6, all costs mandated by the state, including direct and indirect costs, are reimbursable.[81] As a result this fee authority is insufficient to preclude a finding of costs mandated by the state pursuant to Government Code section 17556, subdivision (d).

Government Code section 6253.9, subdivision (b), expands a public agency's fee authority to include the cost to construct a record, and the cost of programming and computer services

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[78] *California School Boards Association v. State of California, supra*, 171 Cal.App.4th at p. 1217. See also, *Dept. of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, regarding a concrete showing of evidence.

[79] Pursuant to Government Code section 17564, the claimants estimated under the penalty of perjury that they "incurred more than $1,000 in staffing and other costs, annually," in order to meet the burden of showing costs necessary to file a test claim.

[80] *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[81] Government Code section 17564.

necessary to produce a copy of the record if: (1) the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals; or (2) the request would require data compilation, extraction, or programming to produce the record. This increased fee authority, however, is not expanded to *all costs*, both direct *and indirect*. As a result, the Commission finds that the fee authority under Government Code section 6253.9, subdivision (b), is insufficient to preclude a finding of costs mandated by the state pursuant to Government Code section 17556, subdivision (d).

Government Code section 6253.9, subdivisions (a)(2) and (b), however, provides offsetting revenue for the mandated activity of providing an electronic copy of disclosable public records kept in an electronic format and will be identified in the parameters and guidelines.

Pursuant to the above discussion, the Commission finds that the state-mandated new programs or higher levels of service impose costs mandated by the state on local agencies and K-14 districts within the meaning of article XIII B, section 6, and Government Code sections 17514 and 17556.

CONCLUSION

The Commission concludes that Government Code sections 6253, 6253.1, 6253.9, 6254.3, and 6255 impose reimbursable state-mandated programs on local agencies and K-14 districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following specific new activities:

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

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

5. For K-14 districts and county offices of education only, redact or withhold the home address and telephone number of employees of K-14 districts and county offices of education from records that contain disclosable information.

   This activity is not reimbursable when the information is requested by: (1) an agent, or a family member of the individual to whom the information pertains; (2) an officer or employee of another school district, or county office of education when necessary for the performance of its official duties; (3) an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of employees performing law enforcement-related functions shall not be disclosed (and thus must always be redacted or withheld); (4) an agent or employee of a health benefit plan providing health services or administering claims for health services to K-14 district and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents. (Gov. Code, § 6254.3, subd. (a) (Stats. 1992, ch. 463).)

6. For K-14 districts and county offices of education only, remove the home address and telephone number of an employee from any mailing lists that the K-14 district or county office of education is legally required to maintain, if requested by the employee, except for lists used exclusively by the K-14 district or county office of education to contact the employee. (Gov. Code, § 6254.3, subd. (b) (Stats. 1992, ch. 463).)

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

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

Finally, the Commission finds that any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.