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ITEM 17

TEST CLAIM
FINAL STAFF ANALYSIS

Family Code Section 6228; Penal Code Sections 12028.5 and 13730
Statutes 1984, Chapter 901; Statutes 2001, Chapter 483;
Statutes 2002, Chapters 377, 830 and 833

Crime Victims' Domestic Violence Incident Reports II
(02-TC-18)

County of Los Angeles, Claimant

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Crime Victims' Domestic Violence Incident Reports II
(02-TC-18)

County of Los Angeles, Claimant

EXECUTIVE SUMMARY

This test claim was filed as an amendment to an earlier test claim, *Crime Victims' Domestic Violence Incident Reports,* 99-TC-08, by the County of Los Angeles in April 2003. The Commission's executive director severed it from the original test claim pursuant to authority in Government Code section 17530.

The test claim statutes (Pen. Code, § 13730 & Fam. Code, § 6228) add information regarding firearms or weapons to the domestic violence incident report form, and require giving a copy of the incident report or the face sheet to a representative of the domestic violence victim if the victim is deceased. Penal Code section 12028.5 requires officers "at the scene of a domestic violence incident involving a threat to human life or a physical assault"[1] to take temporary custody of firearms or weapons in plain sight or discovered pursuant to a consensual or other lawful search, and provides a procedure for return or disposal of the weapon.

For reasons discussed in the analysis, staff finds that effective January 1, 2002, Penal Code section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for local agencies, on all domestic violence-related calls for assistance:

- To include on the domestic violence incident report form a notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon (Pen. Code, § 13730, subd. (c)(3).

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the activities listed below are a reimbursable state-mandated program within the

[1] Penal Code section 12028.5, subdivision (b).

meaning of article XIII B, section 6 and Government Code section 17514, when firearms or other deadly weapons are discovered during any other lawful search at the scene of a domestic violence incident involving a threat to human life or a physical assault. Any other lawful search includes but is not limited to the following searches: (1) a search incident to arrest, or of people the officer has legal cause to arrest; (3) a search pursuant to a warrant; or (3) a search based on statements of persons who do not have authority to consent, but have indicated to law enforcement that a weapon is present at the scene.

- To take temporary custody of any firearm or other deadly weapon when necessary for the protection of the peace officer or other persons present. (Pen. Code, § 12028.5, subd. (b).)
- To give the owner or person in lawful possession of the firearm or other deadly weapon a receipt that describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b).)
- To make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure. Reimbursement for this activity is not required if either: (1) the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident; or (2) if the firearm or other deadly weapon is retained because it was illegally possessed, or (3) if the firearm or other deadly weapon is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[2] (Pen. Code, § 12028.5, subd. (b).)
- To sell or destroy, as provided in subdivision (c) of Section 12028,[3] any firearm or other deadly weapon taken into custody and held for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody. Reimbursement for this activity is not required for firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j) of section 12028.5. (Pen. Code, § 12028.5, subd. (e).)

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[2] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

[3] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

- If the local agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for the agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. (Pen. Code, § 12028.5, subd. (f).)

- To inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. If the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the local agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g) of section 12028.5. (Pen. Code, § 12028.5, subd. (g).)

- If the owner or person who had lawful possession of the firearm or other deadly weapon requests a hearing, to show in court by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (h).)

- If the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not respond within 30 days of the receipt of notice, to file a petition in court for an order of default. (Pen. Code, § 12028.5, subd. (i).)

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the following activities are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for local agencies, when firearms or other deadly weapons are taken into temporary custody at the scene of a domestic violence incident involving a threat to human life or a physical assault, and the firearm or other deadly weapon is discovered in plain sight or pursuant to a consensual or other lawful search.

- The one-time activity of amending the receipt for a confiscated firearm or other deadly weapon to include "the time limit for recovery as required" by section 12028.5. (Pen. Code, § 12028.5, subd. (b).)

- If the person who owns or had lawful possession of the firearm or other deadly weapon petitions the court for a second hearing within 12 months of the date of the initial hearing, showing by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other

deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (j).)

Staff also finds that Family Code section 6228 (Stats. 2002, ch. 377) and Penal Code section 12028.5 (Stats. 1984, ch. 901 & Stats. 2002, ch 830)[4] are not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 because they do not mandate a new program or higher level of service.

Recommendation

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

[4] Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last (Gov. Code, § 9605).

STAFF ANALYSIS

Claimant

County of Los Angeles

Chronology

4/02/03	Claimant files proposed amendment (02-TC-18) to test claim 99-TC-08, *Crime Victims' Domestic Violence Incident Reports*
4/11/03	Commission staff deems proposed amendment incomplete
4/18/03	Claimant refiles amendment to test claim
4/22/03	The Commission's executive director severs test claim amendment (02-TC-18) from original test claim (99-TC-08), deems test claim amendment complete, and requests comments
8/06/07	Commission staff issues draft staff analysis
8/24/07	Claimant submits comments on the draft staff analysis
8/30/07	Department of Finance submits comments on the draft staff analysis
9/13/07	Commission issues final staff analysis and proposed Statement of Decision

Background

This test claim alleges activities based on Penal Code sections 13730 (Stats. 2001, ch. 483), 12028.5 (Stats. 1984, ch. 901; Stats. 2002, chs. 830 & 833), and Family Code section 6228 (Stats. 2002, ch. 377). These statutes add weapons information to the domestic violence incident report form, require giving a copy of the form to the victim's representative, as defined, if the victim is deceased, and require law enforcement officers at the scene of a domestic violence incident "involving a threat to human life or a physical assault"[5] to take temporary custody of weapons, including a process for their return or disposal.

Test Claim Statutes

Penal Code section 13730: This section was originally added by Chapter 1609, Statutes of 1984, and requires local law enforcement agencies to develop a system for recording all domestic violence-related calls for assistance. Subdivision (c) requires law enforcement agencies to develop an incident report form for the domestic violence calls, with specified content. It was amended (Stats. 2001, ch. 483) in subdivision (c) to add the following to the form:

> (3) A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the

[5] Penal Code section 12028.5, subdivision (b).

scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5.

Family Code section 6228: This section requires giving, without charging a fee, a copy of the domestic violence incident report or the incident report face sheet, or both, to the victim. The test claim statute (Stats. 2002, ch. 377) amended this section to require giving a copy of the report to a representative of the victim, as defined, if the victim is deceased. Specifically, it was amended to add the underlined text as follows:

> (a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.[6]

Other subdivisions of section 6228 were amended similarly. Subdivision (d), which specifies that the person requesting copies of the incident report must present identification, was amended to require the representative to present a certified copy of the death certificate of the victim at the time of the request. Subdivision (g) defines the representative of the victim as any of the following:

> (1) (A) The surviving spouse.
> (B) A surviving child of the decedent who has attained 18 years of age.
> (C) A domestic partner, as defined in subdivision (a) of Section 297.
> (D) A surviving parent of the decedent.
> (E) A surviving adult relative.

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[6] Family Code section 6211 defines domestic violence as "abuse perpetrated against any of the following persons:

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

Family Code section 6203 defines abuse as any of the following:

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

(F) The public administrator if one has been appointed.

(2) A representative of the victim does not include any person who has been convicted of murder in the first degree, as defined in Section 189 of the Penal Code, of the victim, or any person identified in the incident report face sheet as a suspect. Domestic violence incident report face sheets may not be provided to a representative of the victim unless the representative presents his or her identification, such as a current, valid driver's license, a state-issued identification card, or a passport and a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time of the request.

The purpose of Family Code section 6228 is to assist domestic violence victims to obtain a temporary restraining order against the accused.[7] The amendment regarding the victim representative was in response to a case in which a domestic violence victim committed suicide, and the victim's mother had difficulty obtaining the incident report when seeking custody of her grandchildren.[8]

Penal Code section 12028.5: This section was enacted in 1984 and has been amended several times. The original 1984 statute authorized a law enforcement officer to take temporary custody of a firearm "at the scene of a domestic violence incident involving a threat to human life or a physical assault."[9] The original statute also defined domestic violence, abuse, and family household member.[10]

Statutes 1999, chapter 662, not pled by claimant, amended section 12028.5 to require law enforcement officers to take temporary custody of any firearm or other deadly weapon[11] at a domestic violence[12] scene involving a threat to human life or a physical assault. Section 12028.5 also includes definitions of domestic violence and abuse, and specifies a procedure for making the firearm or other deadly weapon available to the owner, or disposing of it.

Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last.[13] This amendment to section 12028.5 pled by claimant adds "other lawful searches" (to preexisting plain sight or consensual search) during which law enforcement officers must confiscate firearms or other deadly weapons

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[7] Assembly Committee on Judiciary, Analysis of Assem. Bill No. 403 (1999-2000 Reg. Sess.) as amended on March 18, 1999, page 2.

[8] Senate Committee on Public Safety, Analysis of Senate Bill No. 1265 (2001-2002 Reg. Sess.) as amended on April 2, 2002, page 4.

[9] Former Penal Code section 12028.5, subdivision (b) (Stats. 1984, ch. 901).

[10] The definitions were amended by Statutes 1992, chapter 1136 and Statutes 1993, chapter 1098. These amendments were not pled by claimant, so staff makes no findings on them.

[11] "Deadly weapon means any weapon, the possession or concealed carrying of which is prohibited by Section 12020." (Pen. Code, § 12028.5, subd. (a)(3)).

[12] Penal Code section 12028.5, subdivision (b).

[13] Government Code section 9605.

at the scene of a domestic violence incident. The amendment requires including on the receipt for the confiscated firearm or weapon "the time limit for recovery as required by this section."[14] It expands the maximum time the firearm or weapon can be held from 72 hours to five days (the minimum time remained 48 hours).[15] It also lengthens the time local government has to file a petition to determine whether the firearm or weapon should be returned, extending it from 30 to 60 days after the seizure, or from 60 to 90 days with extensions.[16] In addition, the amendment lowered the standard of evidence needed to keep the firearm or weapon from being returned to the owner, from clear and convincing to a preponderance of evidence "that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat."[17]

The 2002 amendment also added a provision requiring the court to order returning the firearm or weapon to the owner, and to award reasonable attorney's fees to the prevailing party if there is a petition for a second hearing, "unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat."[18]

Prior Commission Decisions

CSM 4222: In 1987, the Commission approved a test claim on Penal Code section 13730, as added by Statutes 1984, chapter 1609 (*Domestic Violence Information*). The parameters and guidelines for *Domestic Violence Information* authorize reimbursement for local law enforcement agencies for the "costs associated with the development of a Domestic Violence Incident Report form used to record and report domestic violence calls," and "for the writing of mandated reports which shall include domestic violence reports, incidents or crime reports directly related to the domestic violence incident."

Beginning in fiscal year 1992-93, the Legislature suspended Penal Code section 13730 (as added by Stats. 1984, ch. 1609) pursuant to Government Code section 17581. Suspending a statute means the Legislature assigns a zero-dollar appropriation to the program and makes it optional.

CSM 96-362-01: In February 1998, the Commission considered a test claim on the 1995 amendment to Penal Code section 13730 (*Domestic Violence Training and Incident Reporting*).

In 1995, the Legislature amended Penal Code section 13730, subdivision (c) (Stats. 1995, ch. 965) to require law enforcement agencies to include in the domestic violence incident report information relating to the use of alcohol or controlled substances by the alleged abuser, and any prior domestic violence responses to the same address.

The Commission determined that the additional information on the domestic violence incident report was not mandated by the state because the suspension of the statute under Government

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[14] Penal Code section 12028.5, subdivision (b).

[15] *Ibid.*

[16] Penal Code section 12028.5, subdivision (f).

[17] *Ibid.*

[18] Penal Code section 12028.5, subdivision (j).

Code section 17581 made the completion of the incident report optional, so the additional information under the test claim statute came into play only after a local agency elected to complete the incident report.

Based on the language of the suspension statute (Gov. Code, § 17581), the Commission determined, however, that during periods when the state operates without a budget, the original suspension of the mandate would not be in effect. Thus, for the periods when the state operates without a budget until the Budget Act is chaptered and makes the domestic violence incident reporting program optional under Government Code section 17581, the Commission determined the activities required by the 1995 amendment to Penal Code section 13730 are reimbursable.

In 1998, Government Code section 17581 was amended to close the gap and continue the suspension of programs during periods when the state operates without a budget.[19] The *Domestic Violence Information and Incident Reporting* program has been suspended in every Budget Act since 1992 except for 2003-2004.[20]

99-TC-08: The current test claim was originally submitted as an amendment to (and severed from) test claim 99-TC-08, *Crime Victims' Domestic Violence Incident Reports,* which the Commission decided on May 29, 2003 (corrected decision issued in September 2003).[21] The Commission found it had no jurisdiction over Penal Code section 13730 (Stats. 1984, ch. 1609, Stats. 1995, ch. 965) because it had already adjudicated the statute in CSM 4222, *Domestic Violence Information,* and in CSM 96-362-01, *Domestic Violence Training and Incident Reporting.* The Commission also found that the mandate had been suspended by the Legislature every year since 1992-1993, making the activities discretionary on the part of local government.

Also decided in 99-TC-08 was Family Code section 6228 (Stats. 1999, ch. 1022), which the Commission found is a reimbursable mandate for storing domestic violence incident reports and face sheets for three years (Fam. Code, § 6228, subd. (e)). The Commission also found that section 6228 does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet, and that other activities related to providing the incident reports to victims were already required under Government Code section 6254 of the California Public Records Act, and were therefore not reimbursable.

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[19] Government Code section 17581, subdivision (a), now states the following: "No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year *and the for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year . . .*" (Emphasis added.)

[20] 2006-2007 Budget Act (Stats. 2006, chs. 46 & 47) Item 8885-295-0001, Schedule (3) (aa); 2005-2006 Budget Act (Stats. 2005, chs. 38 & 39) Item 8885-295-0001, Schedule (3) (hh); 2004-2005 Budget Act (Stats. 2004, ch. 208) Item 9210-295-0001, Provision 3, Schedule (5); 2002-2003 Budget Act (Stats. 2002, ch. 379), Item 9210-295-0001, Provision 3, Schedule (8); 2001-2002 Budget Act (Stats. 2001, ch. 106), Item 210-295-0001, Provision 3, Schedule (8); 2000-2001 Budget Act (Stats. 2000, ch. 52), Item 210-295-0001, Provision 3, Schedule (8); 1999-2000 Budget Act (Stats. 1999, ch. 50), Item 210-295-0001, Provision 2, Schedule (8).

[21] To avoid confusing this test claim with the original *Crime Victims' Domestic Violence Incident Reports,* this test claim is renamed *Crime Victims' Domestic Violence Incident Reports II.*

Test claim 99-TC-08 did not include Penal Code section 12028.5, which is part of this claim.

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable state mandate under article XIII B, section 6 of the California Constitution. Claimant requests reimbursement for local law enforcement agencies to do the following based on Statutes 2001, chapter 483 that added subdivision (c)(3) to Penal Code section 13730: [22]

1. When "necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser or both, whether a firearm or other deadly weapon was present at the location."
2. To report if an inquiry was made "whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon."
3. To confiscate "[a]ny firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident ... pursuant to Section 12028.5"

Claimant requests reimbursement for local law enforcement agencies to do the following based on Penal Code section 12028.5:[23]

1. A peace officer "... shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present." (§ 12028.5 (b).)
2. "Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon. (§ 12028.5 (b).)
3. The confiscated "... firearm or other deadly weapon shall be held [not less than] 48 hours." (§ 12028.5 (b).)
4. "[T]he firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession [as specified] 48 hours after the seizure or as soon thereafter as possible, but no later than 5 business days after the seizure." (§ 12028.5 (b).)
5. A "peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located." (§ 12028.5 (c).)

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[22] Test Claim 02-TC-18, pages 2-3.

[23] Test Claim 02-TC-18, pages 7-10

6. Any "firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership." (§ 12028.5 (d).)

7. Any "firearm or other deadly weapon taken into custody and held by police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined ... for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028." (§ 12028.5 (e).)

8. "In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned." (§ 12028.5 (f).)

9. "The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at the person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements." (§ 12028.5 (g).)

10. Local law enforcement agencies and the district attorney shall participate in hearings "... if the person requests a hearing" in which case, "... the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party." (§ 12028.5 (h).)

11. Local law enforcement agencies and the district attorney shall participate in hearings "...[i]f there is a petition for a second hearing, and, "... unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat," the duty of local law enforcement agencies to "... return of the firearm or other deadly weapon" and, as specified, pay "... reasonable attorney's fees to the prevailing party." (§ 12028.5 (j).)

Claimant also requests reimbursement for local law enforcement agencies to, based on Family Code section 6228, to prepare and provide domestic violence incident reports for the "representatives" of domestic violence victims, as provided in statute.[24]

Claimant alleges that the duty to provide requested domestic violence incident reports and face sheets to victims and their representatives under Family Code section 6228 is not excused even if the general duty to prepare such reports and face sheets under Statutes 1984, chapter 1609 is made optional by the Legislature's suspension of the mandate pursuant to Government Code section 17581. Claimant submits that it has no reasonable alternative but to prepare the incident report or face sheet.

Claimant also submitted a declaration that it will incur "costs well in excess of $1,000 during the 2002-03 fiscal year to implement" the test claim statutes.[25] Another declaration includes the time required for the alleged activities: "on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform" the duties listed in nos. 1-11 above.[26]

Claimant submitted comments concurring with the draft staff analysis.

State Agency Position

The Department of Finance, in comments filed August 20, 2007, concurs in part with the draft staff analysis. Finance disagrees with the discussion of Penal Code 13730, subdivision (c)(3), and argues that the finding should conform to the Commission's decision in CSM-96-362-01. Finance also disagrees that activities in Penal Code section 12028.5, subdivisions (f) and (i), should be reimbursable because, according to Finance, they are discretionary. These comments are further detailed and addressed below.

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[24] Test Claim 02-TC-18, pages 10-12.

[25] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 1; Exhibit 9, Declaration of Wendy Watanabe, page 1.

[26] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 2; Exhibit 9, Declaration of Wendy Watanabe, page 2.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[27] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[28] "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."[29] 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.[30]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[31]

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.[32] 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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[27] Article XIII B, section 6, subdivision (a), (as amended in Nov. 2004) provides:

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

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

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

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

[31] *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*).

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

legislation.[33] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[34]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[35]

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.[36] 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."[37]

Issue 1: Does Penal Code section 13730, as amended by Statutes 2001, chapter 483, constitute a reimbursable state-mandated program?

Section 13730 requires local law enforcement agencies to develop and complete incident report forms for all domestic violence calls. As stated in subdivision (c) "In all incidents of domestic violence, *a report shall be written* and shall be identified on the face of the report as a domestic violence incident." [Emphasis added.] The report is required to include notations of officer observations regarding (in subd. (c)(1)) whether the alleged abuser was under the influence of alcohol or a controlled substance, and (in subd. (c)(2)) whether any law enforcement agency had previously responded to a domestic violence call at the same address involving the same alleged abuser or victim.

It was amended (Stats. 2001, ch. 483) in subdivision (c)(3) to add the following to the form:

> A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5.

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

[34] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[35] *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.

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

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

Read together, the plain language of subdivisions (c) and (c) (3) requires local law enforcement agencies to include this firearm information on the domestic violence incident report form. Moreover, it constitutes a program within the meaning of article XIII B, section 6 because it carries out the governmental function of providing a service to the public[38] by adding information to the domestic violence incident report form. It is also an activity that is unique to local government.

For a statute that had not been suspended by the Legislature, the above criteria would be enough to determine that the 2001 amendment is a state mandate subject to article XIII B, section 6. The 1984 version of section 13730 (Stats. 1984, ch. 1609) however, has been suspended by the Legislature. Thus, the issue is whether the 2001 requirement to include firearm and weapon information on the domestic violence incident form is a state mandate in light of the Legislature's annual budget-act suspension of Statutes 1984, chapter 1609.

The 1984 version of section 13730, subdivision (c), includes the following sentence: "In all incidents of domestic violence, a report shall be written and shall be thus identified on the face of the report as a domestic violence incident." This was determined to be a reimbursable activity in the Commission's decision CSM 4222, as discussed above.

As provided in Government Code section 17581, subdivisions (a) and (b), before suspending a statute, the following criteria must be met:

> (a) No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if all of the following apply:
>
> (1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to Section 6 of Article XIIIB of the California Constitution.
>
> (2) The statute or executive order, or portion thereof, or the commission's test claim number, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year.
>
> (b) Notwithstanding any other provision of law, if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a), the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency.

(c) suspended 1984 ch 1609

The requirement in subdivision (c) of section 13730 to prepare a written domestic violence incident report has been suspended each year,[39] except for fiscal year 2003-2004,[40] since fiscal

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

[39] 2006-2007 Budget Act (Stats. 2006, chs. 46 & 47) Item 8885-295-0001, Schedule (3) (aa); 2005-2006 Budget Act (Stats. 2005, chs. 38 & 39) Item 8885-295-0001, Schedule (3) (hh); 2004-

year 1992-1993. The Legislature specifically identified Statutes 1984, chapter 1609 in the Budget Act and assigned a zero dollar appropriation to it. By suspending Statutes 1984, chapter 1609, the Legislature made preparing the written domestic violence incident report form an optional activity for local government.

Statutes 1993, chapter 1230 added the following to subdivision (a) of section 13730: "All domestic violence related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident." This 1993 amendment has never been determined by the Legislature, the Commission, or any court to mandate a new program or higher level of service requiring local agency reimbursement, as required by Government Code section 17581. In sum, the 1993 amendment is not eligible for suspension.

This means, in essence, that the provisions of subdivision (c) in section 13730, when suspended by the Budget Act, are permissive, but the plain language of the 1993 amendment requires a written incident report for all domestic violence calls for assistance in subdivision (a). When statutory provisions conflict in this way, the Commission, like a court, relies on the following rule of statutory construction: "[W]hen two laws, upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail."[41] Accordingly, the 1993 amendment to subdivision (a) prevails over the suspension of subdivision (c).[42] Thus, preexisting law requires that every domestic violence related call for assistance be supported with a written domestic violence incident report. Consequently, staff finds that including the firearm and weapon information in the domestic violence incident report form, as required by the 2001 amendment to Penal Code section 13730, subdivision (c), is state-mandated.

Finance disagrees. In comments filed August 30, 2007, Finance argues that this conclusion is inconsistent with the Commission's February 1998 decision in the *Domestic Violence Training and Incident Reporting* test claim (CSM-96-362-01) in which the Commission found that additional information on the domestic violence incident report was not mandated because the suspension of the statute made completion of the incident report optional, so the additional information under the test claim statute came into play only after a local agency elected to complete the incident report. Finance indicates in its comments that the Commission's 1998 decision "found that the 1993 amendment to Penal Code section 13730 (a), (Stats. 1993, ch. 1230) 'merely clarifies' the reporting requirement of subdivision (c) rather than mandating a new or additional requirement."

2005 Budget Act (Stats. 2004, ch. 208) Item 9210-295-0001, Provision 3, Schedule (5); 2002-2003 Budget Act (Stats. 2002, ch. 379), Item 9210-295-0001, Provision 3, Schedule (8); 2001-2002 Budget Act (Stats. 2001, ch. 106), Item 210-295-0001, Provision 3, Schedule (8); 2000-2001 Budget Act (Stats. 2000, ch. 52), Item 210-295-0001, Provision 3, Schedule (8); 1999-2000 Budget Act (Stats. 1999, ch. 50), Item 210-295-0001, Provision 2, Schedule (8).

[40] 2003-2004 Budget Act (Stats. 2003, ch. 157) Final Change Book, p.655, Item 9210-295-0001, Provision 3.

[41] *People v. Kuhn* (1963) 216 Cal.App.2d 695, 700.

[42] This does not mean that the suspensions in the Budget Acts are idle acts of the Legislature, since there were other findings in the Commission's decision (CSM 4222) that are suspended.

Staff acknowledges that the analysis herein departs from the 1998 Commission decision. However, the plain language of the 1993 amendment to Penal Code section 13730, subdivision (a), requires a written incident report for all domestic violence calls. This amendment has never been the subject of a test claim, has never been determined by the Legislature or any court to mandate a new program or higher level of service, and is not pled here. Thus, it has not met the requirements of Government Code section 17581 to suspend a statute.

Moreover, since 1953, the California Supreme Court has held that the failure of a quasi-judicial agency to consider and apply prior decisions on the same subject is not a violation of due process and does not constitute an arbitrary action by the agency.[43] In *Weiss v. State Board of Equalization*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs' contention and found that the board did *not* act arbitrarily. The Court stated:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [44]

DOF 13730

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[45] While opinions of the Attorney General are not binding, they are entitled to great weight.[46]

Staff finds, therefore, that existing law in Penal Code section 13730, subdivision (a), requires a written incident report for each domestic violence call. Therefore, including the firearm and weapon information in the domestic violence incident report form, as required by the 2001 amendment to Penal Code section 13730, subdivision (c)(3), is state-mandated.

The next issue is whether the provision in subdivision (c)(3) is a new program or higher level of service. To determine this, the test claim statute is compared to the legal requirements in effect immediately before enacting the test claim statute.[47]

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[43] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777.

[44] *Id.* at page 776.

[45] 72 Opinions of the California Attorney General 173, 178, footnote 2 (1989).

[46] *Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 227.

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

Although preexisting law required filing an incident report for all domestic violence incident-related calls, as discussed above, preexisting law did not require the incident report to contain the following:

> A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. (Pen. Code, § 13730, subd. (c)(3).)

Therefore, staff finds that the following is a new program or higher level of service within the meaning of article XIII B, section 6: including on the domestic violence incident report form a notation of whether the officer who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

The final issue is whether the 2001 amendment to section 13730 imposes costs mandated by the state,[48] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines "cost mandated by the state" as follows:

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

In the test claim exhibits,[49] claimant declares that it will incur costs in excess of $1,000 during the 2002-2003 fiscal year to implement the claim statutes.[50] Therefore, staff finds that section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes costs mandated by the state within the meaning of Government Code section 17514, and that no exceptions to reimbursement in Government Code section 17556 apply.

All the elements having been met, staff finds that Penal Code section 13730, subdivision (c)(3), as amended (by Stats. 2001, ch. 483), is a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, for all domestic violence-related calls for assistance, to include the following on the domestic violence incident report: A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at

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

[49] Test Claim 02-TC-18, Exhibit 8, declaration of Bernice K. Abram, and Exhibit 9, declaration of Wendy Watanabe.

[50] Government Code section 17564.

the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

Issue 2: Does Family Code section 6228, as amended by Statutes 2002, chapter 377, constitute a reimbursable state-mandated program?

Family Code section 6228 requires the local law enforcement agency to provide, without charging a fee, one copy of a domestic violence incident report face sheet, or one copy of a domestic violence incident report, or both, to a victim of domestic violence. The test claim statute amended this section to also require providing a copy to the victim's representative if the victim is deceased. The victim representative is defined as any of the following:

(A) The surviving spouse.
(B) A surviving child of the decedent who has attained 18 years of age.
(C) A domestic partner, as defined in subdivision (a) of Section 297.
(D) A surviving parent of the decedent.
(E) A surviving adult relative.
(F) The public administrator if one has been appointed.

Claimant alleges that section 6228 requires law enforcement agencies to prepare the incident report or face sheet.

The plain language of Family Code section 6228, however, does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet. Rather, the express language states that local law enforcement agencies "shall *provide*, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request." [Emphasis added.]

Therefore, staff finds that Family Code section 6228 is a state mandate for a local law enforcement agency to provide upon request, without charging a fee, one copy of the domestic violence incident report face sheet, or one copy of the domestic violence incident report, or both, to the victim's representative, as defined, if the victim is deceased.

Doing so, however, is not a new program or higher level of service.

The Public Records Act, in Government Code section 6254, subdivision (f) requires giving a copy of a police report "to the victim of an incident or *an authorized representative thereof* ..." [Emphasis added.] And one California appellate court held, with respect to records of law enforcement investigations, that "While the general public is denied access to this information such is not true with respect to parties involved in the incident or others who have a proper interest in the subject matter."[51]

Moreover, subdivision (f) of Government Code section 6254 requires the following:

> [S]tate and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or

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

would endanger the successful completion of the investigation or a related investigation:

(1) The full name, current address, and occupation of every individual arrested by the agency, the individual's physical description ..., the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, ... all charges the individual is being held upon ....

(2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by an agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, ...

Because preexisting Government Code section 6254, subdivision (f), requires releasing the same information as the domestic violence incident report to persons who would be authorized representatives, staff finds that providing the report or face sheet to the authorized victim representative (as required by Fam. Code, § 6228) is not a new program or higher level of service within the meaning of article XIII B, section 6.

Family Code section 6228 differs from the Public Records Act in one major aspect. Under the Public Records Act, local governments may charge a fee to recover the costs of making the police report information available, whereas the test claim statute prohibits charging a fee for the information. Increased costs alone, however, without the test claim statute mandating a new program or higher level of service to the public does not require reimbursement under article XIII B, section 6.[52]

Accordingly, staff finds that Family Code section 6228 (Stats. 2002, ch. 377) does not constitute a new program or higher level of service for a local law enforcement agency to provide, without charging a fee, one copy of the domestic violence incident report face sheet, or one copy of the domestic violence incident report, or both, to the victim's representative, as defined, if the victim is deceased.

Therefore, staff finds that that Family Code section 6228, as amended (Stats. 2002, ch. 377) is not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

Issue 3: Does Penal Code section 12028.5 constitute a reimbursable state-mandated program?

This section describes the procedure for a law enforcement officer to confiscate a firearm or other deadly weapon at the scene of a domestic violence incident "involving a threat to human life or a physical assault"[53] and describes the procedure for the destruction or return of the

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[52] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877. *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[53] Penal Code section 12028.5, subdivision (b).

weapon. Although Section 12028.5 has been amended almost annually since 1984,[54] claimant pled only the 1984 version (Stats. 1984, ch. 901), and the 2002 amendment (Stats. 2002, chs. 830 & 833), so this analysis is limited to only those two versions of the statute.[55]

The 1999 amendment (Stats. 1999, ch. 662) to section 12028.5 stands out because it changed the "may take temporary custody" phrase in subdivision (b) to "shall take temporary custody." But because neither the 1999 amendment, nor any of the others before 2002 were pled by claimant, staff makes no findings on them.

did not plead 1999 version

A. Does Penal Code section 12028.5 (Stats. 1984, ch. 901) impose a state-mandated program?

Not mandated

As originally enacted in 1984, section 12028.5 read as follows:

> (a) As used in this section, the following words have the following meanings:[56]
>
> (1) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself, herself, or another.
>
> (2) "Domestic Violence" is abuse perpetrated against a family or household member.
>
> (3) "Family or household member" means a spouse, former spouse, parent, child, any other person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household.
>
> (b) A sheriff, undersheriff, deputy sheriff, or police officer of a city at the scene of a domestic violence incident involving a threat to human life or a physical assault *may* take temporary custody of any firearm described in Section 12001 in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm, the officer shall give the owner or person who possessed the firearm a receipt.

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[54] Statutes 1985, chapter 311, Statutes 1987, chapters 131 & 1362, Statutes 1989, chapters 850 & 1165, Statutes 1990, chapter 1695, Statutes 1991, chapter 866, Statutes 1992, chapters 163 & 1136, Statutes 1993, chapters 219 & 1098, Statutes 1994, chapters 871 & 872, Statutes 1996, chapter 305, Statutes 1998, chapter 606, Statutes 1999, chapters 659 & 662, Statutes 2000, chapter 254.

[55] Subdivision (c) of section 12028.5 (as amended by Stats. 1999, ch. 659) requires a community college or school district peace officer who takes custody of a firearm or deadly weapon pursuant to this section to deliver it within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located. Because there is no community college or school district claimant and college declaration alleging increased costs in this test claim, staff does not discuss or make any findings on this provision in subdivision (c).

[56] The definitions were amended by Statutes 1992, chapter 1136 and Statutes 1993, chapter 1098. Staff makes no findings on those amendments.

> The receipt shall describe the firearm and identification or serial number on the firearm. The receipt shall indicate where the firearm can be recovered and the date after which the owner or possessor can recover the firearm. No firearm shall be held less than 48 hours. If a firearm is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. [Emphasis added.]
>
> (c) Any firearm which has been taken into custody which has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm and proof of ownership.
>
> (d) Any firearm taken into custody and held by a police or sheriff's department for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028.

Because the plain language in subdivision (b) of the 1984 version is permissive as to taking custody of the firearm, staff finds that local agencies are not legally compelled to take custody of a firearm at the scene of a domestic violence incident involving a threat to human life or a physical assault. Staff also finds that local agencies are not practically compelled to take custody of a firearm under those circumstances. The statute on its face does not impose "certain and severe penalties such as double taxation or other draconian consequences"[57] for not confiscating the firearm. And there is no evidence in the record that local agencies are practically compelled to confiscate the firearm. Rather, under the 1984 statute, taking a firearm at the scene of a domestic violence incident was a policy decision of the local agency. Therefore, staff finds that confiscating the firearm under the circumstances described in subdivision (b) of section 12028.5 (Stats. 1984, ch. 901) is not a state mandate.

As to the remaining downstream activities in the 1984 statute, the issue is whether they are state mandated (e.g., giving a receipt, holding the weapon for 48 to 72 hours, returning it to the owner if stolen, and final disposal if unclaimed) if the triggering event is not state mandated.

In the *Kern High School Dist.* case,[58] the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the

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[57] *Kern High School Dist., supra,* 30 Cal.4th 727, 751. In another part of the opinion, the court stated an example of practical compulsion as a substantial penalty (independent of the program funds at issue) for not complying with the statute. (*Id.* at p. 731).

[58] *Id.*.

district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."[59]

Therefore, based on the plain language of the statute and the reasoning in *Kern High School Dist.*, staff finds that there is no legal compulsion in section 12028.5, as added by Statutes 1984, chapter 901, for law enforcement officer to perform the downstream activities related to confiscating a firearm at a domestic violence scene (e.g., giving a receipt, holding the weapon for 48 to 72 hours, returning it to the owner if stolen, and final disposal if unclaimed). Absent any evidence in the record, staff also finds that there is no practical compulsion to perform these activities. Therefore, staff finds that section 12028.5, as added by Statutes 1984, chapter 901, is not a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. Does Penal Code section 12028.5 (Stats. 2002, ch. 833) impose a state-mandated new program or higher level of service?

We begin by summarizing the 2002 amendments to section 12028.5 (Stats. 2002, ch. 833, § 1.5). Subdivision (b) was amended as follows:

> [Law enforcement officers] shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm and identification or serial number on the firearm. The receipt shall indicate where the firearm can be recovered, and the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision (f), if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than ~~72 hours~~ 5 business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within ~~72 hours~~ 5 business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

Subdivision (f) was amended to extend law enforcement deadlines as follows:

> In those cases ~~where~~ in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within

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[59] *Id.* at page 743. Emphasis in original.

~~30~~ 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within ~~60~~ 90 days of the date of seizure of the firearm or other deadly weapon.

Subdivision (h) was amended to lower the standard of proof required to prevent owners from recovering their firearms or weapons, as follows:

> If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by ~~clear and convincing~~ a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

Subdivision (j) authorizes the person to petition the court a second time if the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession. The 2002 amendment added the following:

> If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

As a preliminary matter, staff finds that section 12028.5 constitutes a program within the meaning of article XIII B, section 6 because firearm or weapon confiscation is a governmental service to the public, in that it is done "as necessary for the protection of the peace officer or other persons present."[60]

1. Firearms or other deadly weapons taken in plain sight or during a consensual search

Amending the receipt for confiscated weapon: Penal Code section 12028.5, subdivision (b) requires law enforcement, on taking custody of the firearm or other deadly weapon at the scene of a domestic violence incident, to give the owner or person in possession a receipt. The receipt describes the firearm or deadly weapon and lists any identification or serial number on the

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[60] Penal Code section 12028.5, subdivision (b).

firearm, and indicates where the firearm or weapon can be recovered, and the date after which the owner or possessor can recover it (Pen. Code, § 12028.5, subd. (b)). The 2002 amendment requires the receipt to include information regarding "the time limit for recovery as required by this section."

Adding "the time limit for recovery as required by this section" to the information on the receipt is a new requirement. As such, staff finds that this is a state mandate, and a new program or higher level of service for law enforcement to make a one-time amendment to the receipt to include this information for a firearm or other deadly weapon confiscated at the scene of a domestic violence incident. (Pen. Code, § 12028.5, subd. (b), Stats. 2002, ch. 833.)).

Extending the period to make the firearm or weapon available after seizure: Subdivision (b) of section 12028.5 was amended further as follows:

> Except as provided in subdivision (f),[61] if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than ~~72 hours~~ 5 business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within ~~72 hours~~ 5 business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

Preexisting law (before the 2002 amendment) required making the firearm or weapon available to the owner or person in lawful possession 48 hours after seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. Staff finds that extending the period before a firearm or other deadly weapon may be made available from 72 hours to five business days does not mandate a new program or higher level of service. Although this may result in longer storage of the firearm or weapon, the storage is at the discretion of the local agency since nothing prevents making the firearm available within the 48 hours after seizure. Therefore, staff finds that this amendment does not mandate a new activity on a local agency within the meaning of article XIII B, section 6.

Extending the time to initiate a petition in court to determine if weapon should be returned: Subdivision (f) was amended by Statutes 2002, chapter 833 to extend law enforcement deadlines as follows:

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[61] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

In those cases ~~where~~ in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within ~~30~~ 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within ~~60~~ 90 days of the date of seizure of the firearm or other deadly weapon.

Staff finds that the 2002 amendment increasing the time from 30 to 60 days to initiate a petition, and from 60 to 90 days if the court grants an extension to file the petition, does not mandate a new program or higher level of service because the amendment gives the local law enforcement agency *more* time than in preexisting law to initiate the petition, but does not require a new activity of a local agency.

Lowering the standard of evidence to deny returning the firearm or weapon: Subdivision (h) of section 12028.5 was amended by the test claim statute to lower the standard of proof required to prevent owners from recovering their firearms or weapons, as follows:

> If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by ~~clear and convincing~~ a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

Staff finds that the 2002 amendment does not mandate a new program or higher level of service. The amendment lowers the standard of proof from clear and convincing to a preponderance of the evidence that the local government is required to show in order to keep the firearm or weapon from being returned to the owner. This amendment does not, however, require a new activity of the local agency, or increase the level service for an existing activity. Therefore, staff finds that the 2002 amendment to subdivision (h) that lowers the standard of proof does not mandate a new program or higher level of service.

Petition for second hearing and attorney's fees: Subdivision (j) states (with the 2002 amendments shown) the following:

> If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or

person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

Although this provision in subdivision (j) does not expressly contain mandatory language, the local agency would have a duty to respond to the owner's petition to return the firearm or weapon if the facts present themselves. Subdivision (f) of section 12028.5 requires the local agency to file the petition to prevent the return of the firearm if "a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This statutory duty in (f) to keep the weapon from being returned to someone dangerous carries over to the petition for a second hearing in subdivision (j). This is consistent with the general duty of local law enforcement and district attorneys to protect the public.[62] Therefore, in cases where the firearm or weapon owner petitions for a second hearing within 12 months of the date of the initial hearing, staff finds that it is a state mandate for the local agency to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat.

As to attorney's fees, staff also finds that it is a mandate, since the court is required to impose them, and the local agency is required to pay them, if it does not prevail in keeping the firearm or other deadly weapon from being returned to the owner or person who was in lawful possession after the second petition. Therefore, staff finds that paying the attorney's fees in subdivision (j) to the prevailing party is a state mandate upon order of the court.

Preexisting law (before the 2002 amendment) authorizes the owner or person in possession to petition the court a second time for return of the firearm or other deadly weapon. Preexisting law also authorizes local law enforcement to dispose of the firearm or other deadly weapon if the person does not petition the court or is unsuccessful at the second hearing in gaining the return of the firearm or other deadly weapon. Preexisting law did not, however, require a local government to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, nor did it require the local agency to pay attorney's fees on order of the court. Therefore, if the facts so dictate, staff finds that these activities are a new program or higher level of service if there is a petition for a second hearing for firearms or other deadly weapons confiscated in plain sight or during a consensual search.

2. Firearms or other deadly weapons taken during "other lawful searches"

Firearm or weapon seizure: The 2002 amendment to section 12028.5 (Stats. 2002, ch. 833, § 1.5) adds the following underlined text to subdivision (b):

> [Law enforcement officers] shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present.

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[62] *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 615.

Sponsored by the City of Santa Rosa, the legislative history of this amendment indicates that its purpose was "to add any "lawful" search to the existing "plain sight or consensual" search required in domestic violence circumstances for the mandated seizure of firearms and weapons."[63] Adding "any lawful search" to the consensual or plain sight searches already in the statute means that firearm or weapon confiscation is now also required for searches incident to arrest, or of people the officer has legal cause to arrest,[64] or searches pursuant to a warrant, or searches based on statements of persons who do not have authority to consent but have indicated to law enforcement that a weapon is present at the scene.[65]

Staff finds that the plain language of this subdivision mandates a law enforcement officer at a domestic violence scene involving a threat to human life or a physical assault to take temporary custody of any firearm or other deadly weapon during an "other lawful search" as necessary for the protection of the peace officer or other persons present (Pen. Code, § 12028.5, subd. (b)).

Adding "or other lawful search" to subdivision (b) also creates a new program or higher level of service by increasing the quantity of searches during which taking temporary custody of the weapon is required. Adding "other lawful search" to the statute means that firearm or weapon confiscation is now also required for searches incident to arrest, or of people the officer has legal cause to arrest,[66] or searches pursuant to a warrant, or searches based on statements of persons who do not have authority to consent but have indicated to law enforcement that a weapon is present at the scene.[67]

Therefore, staff finds that Penal Code section 12028.5, subdivision (b), is a new program or higher level of service for law enforcement to take temporary custody of a firearm or other deadly weapon at a scene of domestic violence, as defined in section 12028.5, subdivision (a), if the firearm or weapon is confiscated during an "other lawful search."

The remainder of the analysis of section 12028.5 is limited to conditions of "other lawful searches" which, for purposes of this analysis, is defined as searches that are not plain sight or consensual.

Give receipt for confiscated weapon: The next activity in Penal Code section 12028.5, subdivision (b) is, upon taking custody of the firearm or deadly weapon at the scene of domestic violence, giving the owner or person in possession a receipt for the item. The receipt describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it (Pen. Code, § 12028.5, subd. (b)). Based on

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[63] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 2.

[64] Penal Code section 833.

[65] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 6.

[66] Penal Code section 833.

[67] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 6.

the plain language of this provision, staff finds that giving a receipt to the owner or person in lawful possession of the firearm or other deadly weapon, with contents as specified, is a state mandate.

Preexisting law requires, when a weapon or personal property is taken from an arrested person, giving a receipt to the person for the property taken.[68] And there is a similar requirement for arrested persons for property alleged to have been stolen or embezzled.[69] Although these statutes indicate that law enforcement officers have a longstanding duty to give a receipt to arrested persons for confiscated property, the receipt requirement for weapons taken at the scene of a domestic violence incident in the test claim statute is different in that more detail is required regarding the firearm or other deadly weapon seized.

other lawful search

Staff finds that the entire content of the receipt is a new program or higher level of service for other lawful searches, because no confiscation or receipt was required for those searches under preexisting law.

Therefore, staff finds that, upon taking custody of the firearm or other deadly weapon at the scene of domestic violence during any other lawful search, it is a new program or higher level of service to give the owner or person in possession a receipt for the firearm or other deadly weapon. The receipt must contain a description of the firearm or deadly weapon and list any identification or serial number on the firearm, and must indicate where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b)).

Hold and make firearm or weapon available to owner: Subdivision (b) requires local law enforcement to make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but "no later than five business days" following the seizure (Pen. Code, § 12028.5, subd. (b)). Returning the firearm or weapon is not required if it is retained for use as evidence related to criminal charges as a result of domestic violence incident, or it is retained because it was illegally possessed, or if the law enforcement agency files a petition to prevent returning the firearm or weapon because the agency has reasonable cause to believe the return would endanger the victim or person reporting the assault. Staff finds that, based on the language in subdivision (b), it is a state mandate to make the firearm or other deadly weapon available to the owner or person who was in lawful possession between 48 hours and five business days after the seizure.

Preexisting law did not require holding firearms or other deadly weapons for weapons seized under section 12028.5 during other lawful searches.

Staff finds, therefore, it is a new program or higher level of service for local law enforcement, for firearms or other deadly weapons confiscated during any other lawful search, to make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure (Pen. Code, § 12028.5, subd. (b)). This finding does not apply if the firearm or other

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[68] Penal Code section 4003.

[69] Penal Code section 1412. This apparently refers to property, alleged to have been stolen or embezzled (see Pen. Code, § 1407).

deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident, or is retained because it was illegally possessed, or is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[70]

Return stolen firearm: Subdivision (d) of section 12028.5 requires any stolen firearm or other deadly weapon to be returned to its lawful owner, as soon as its use for evidence has been served, upon proof of ownership. Staff finds that the plain language of subdivision (d) makes this provision a state mandate to return a stolen firearm.

Preexisting law, in Penal Code sections 1407 and 1408, requires stolen property in the custody of a peace officer to be returned to its owner "on the application of the owner and on satisfactory proof of his ownership of the property." More specifically, preexisting Penal Code section 12028, subdivisions (c) and (f) require returning a stolen firearm to its owner.

Because returning a stolen firearm or weapon to its owner is a preexisting duty of law enforcement, regardless of the type of search under which it is confiscated, staff finds that returning a stolen firearm or other deadly weapon to its owner is not a new program or higher level of service.

Dispose of firearm or weapon: Subdivision (e) of Penal Code section 12028.5 requires:

> Any firearm or other deadly weapon taken into custody and held by ...[law enforcement] for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028.[71] Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

Staff finds that the plain language in the first sentence of subdivision (e) makes it a state mandate to sell or destroy a firearm held for longer than 12 months as specified. The second sentence regarding firearms or weapons not recovered "due to an extended hearing process" prevent destruction of the firearm or weapon until the court issues a decision on a second petition to prevent the return of the firearm or other deadly weapon as specified in subdivision (j). Subdivision (j), as discussed below, authorizes destruction of the firearm or other deadly weapon after the petition process is complete and the court does not order the firearm or other deadly weapon returned to the owner or person in lawful possession.

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[70] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

[71] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

Preexisting law did not require firearms or other deadly weapons confiscated, at the scene of a domestic violence incident involving a threat to human life or a physical assault, during any other lawful search, and held for 12 months, to be sold or destroyed as provided in subdivision (c) of section 12028. Therefore, staff finds that this activity is a new program or higher level of service.

Advise owner and petition court: Subdivision (f) of section 12028.5 states in part:

> In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

Because of the plain language of this subdivision, staff finds that this is a state mandate to notify the owner and petition the court as specified if the agency has reasonable cause to believe that the return of the firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat.

Preexisting law did not require notice to the owner or the initiation of a court petition in cases where a firearm or other deadly weapon was taken at the scene of a domestic violence incident during any other lawful search.

Therefore, staff finds that it is a new program or higher level of service, for firearms or other deadly weapons confiscated during any other lawful search, if the law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for a local law enforcement agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

Ex parte application: Subdivision (f) of section 12028.5 also states in part:

> The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within 90 days of the date of seizure of the firearm or other deadly weapon.

The Department of Finance, in comments filed August 30, 2007, argues that the language that the local agency "may make an ex parte application stating good cause for an order extending the time to file a petition" in subdivision (f) is permissive and this is therefore not a state mandate.

Staff finds that, based on its plain language, this ex parte application provision in subdivision (f) is discretionary and not a state mandate.

Notify owner: Subdivision (g) of section 12028.5 requires the law enforcement agency to inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the

confiscated firearm or other deadly weapon. The agency is also required, if the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g). Staff finds that the plain language of subdivision (g) requires these activities, so the owner notification and effort to learn the owner's whereabouts, as specified, impose a state mandate.

Preexisting law did not require these activities. Therefore, staff finds that it is a new program or higher level of service for firearms or other deadly weapons confiscated during any other lawful search, for a law enforcement agency to inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon.

It is also a new program or higher level of service, for firearms or other deadly weapons confiscated during any other lawful search, if the owner or possessor whose firearm or other deadly weapon was seized does not reside at the last address provided to the law enforcement agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the owner or possessor and to comply with the notification requirements in subdivision (g) of section 12028.5.

Court hearing and attorney's fees: Subdivision (h) requires the court clerk, if the owner or possessor of the firearm or weapon requests a hearing, to set a hearing no later than 30 days from the receipt of the request, and requires the clerk to notify the owner or possessor, law enforcement agency, and district attorney of the date, time and place of the hearing. If the owner or possessor requests a hearing, the local agency must show by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. The court is required to award attorney's fees to the prevailing party.

Although the language in subdivision (h) for this activity is not expressly mandatory, law enforcement and district attorneys have a duty to make this showing regarding return of the firearm or weapon if the facts present themselves. Subdivision (f) of section 12028.5 requires the local agency to file the petition to prevent the return of the firearm if "a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." If the owner requests a hearing, the duty in subdivision (f) to file the petition is extended to responding to the request for a hearing in subdivision (h). Therefore, staff finds that making the showing by a preponderance of the evidence regarding the return of the weapon is a state mandate.

As to awarding attorney's fees, staff also finds that is a mandate, since the court is required to impose them, and the local agency is required to pay them, if it does not prevail in keeping the firearm or other deadly weapon from being returned to the owner or person who was in lawful possession. Therefore, staff finds that paying the attorney's fees in subdivision (h) to the prevailing party is a state mandate upon order of the court.

Because this was not previously required for firearms or weapons confiscated at a scene of domestic violence during any other lawful search, staff also finds that this provision is a new

program or higher level of service. Specifically, for firearms or other deadly weapons confiscated during any other lawful search, staff finds that it is a new program or higher level of service to show at a hearing by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. Staff also finds, since it was not previously required for any other lawful search, that it is a new program or higher level of service for the local agency to pay attorney's fees to the owner or person in lawful possession if the court orders the firearm or other deadly weapon returned to the owner or person who was in lawful possession (Pen. Code, § 12028.5, subd. (h.).

Petition for default and disposal of firearm or weapon: Subdivision (i) states that if the person does not request a hearing or does not respond within 30 days of receipt of the notice, the local law enforcement agency may file a petition for an order of default and to dispose of the firearm or other deadly weapon as provided in section 12028.

Staff finds that subdivision (i) is a state mandate to file the default petition, as an extension of the agency's duty in subdivision (f) to petition the court to not return the firearm or other deadly weapon if it "has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat."

In its August 30 comments on the draft staff analysis, Finance argues that filing a petition for an order of default is discretionary because the statute states that the local agency *may* do so, but does not require filing the petition. According to Finance, if no default petition is filed, after 12 months the weapons are disposed of pursuant to subdivision (e), which authorizes a weapon or firearm held by law enforcement for longer than 12 months and not recovered by the owner or possessor to be sold or destroyed, as specified.

Staff disagrees. Under subdivision (f), the law enforcement agency has already "initiat[ed] a petition in superior court to determine if the firearm or other deadly weapon should be returned." And the required notice must include, according to subdivision (g), that "failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon." Also, under subdivision (e), "firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision." In other words, once the petition is filed, the court must make a decision regarding the firearm or weapon and it cannot simply be disposed of after 12 months. Thus, staff finds that subdivision (i) is a state mandate to file a petition for an order of default.

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Staff also finds that since filing a default petition was not previously required, it is a new program or higher level of service for any other lawful searches. Therefore, for firearms or other deadly weapons confiscated pursuant to any other lawful search, staff finds that it is a new program or higher level of service for local agencies, if the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, to file a petition for an order of default. (Pen. Code, § 12028.5, subd. (i).)

As to disposal of the firearm or other deadly weapon, the permissive language in subdivision (i) indicates that the local agency is not required to do so. Although other statutes govern disposal of firearms or weapons (e.g., Pen. Code, §§ 12032 or 12028) staff finds that the test claim statute does not require a local agency to dispose of them.

Petition for second hearing, dispose of firearm or weapon, attorney's fees: Subdivision (j) authorizes the person (owner) to petition the court a second time if the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession. Subdivision (j) requires the court to award reasonable attorney's fees to the prevailing party.

In the analysis above of subdivision (h), staff found that this provision is a new program or higher level of service, if there is a petition for a second hearing, to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, and to pay attorney's fees to the prevailing party upon the order of the court. The same reasoning applies here.

Therefore, if there is a petition for a second hearing for firearms or other deadly weapons confiscated during any other lawful search, it is a mandated new program or higher level of service to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, and to pay attorney's fees to the prevailing party upon the order of the court.

Subdivision (j) also authorizes law enforcement to dispose of the firearm or weapon if the person does not petition the court or is unsuccessful at the second hearing in gaining the return of the firearm or other deadly weapon. Because the language regarding disposal of the firearm or weapon is permissive, staff finds that disposing of the firearm or weapon is not a state mandate.

C. Does section 12028.5 impose costs mandated by the state?

Having discussed whether all the state mandated provisions of section 12028.5 constitute a new program or higher level of service, the final issue is whether they impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

Claimant submitted a declaration that it will incur "costs well in excess of $1,000 during the 2002-03 fiscal year to implement" the test claim statutes.[72] Another declaration includes the time required for the alleged activities: "on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform the other duties in the statute.[73]

Staff finds, therefore, that section 12028.5 imposes costs mandated by the state within the meaning of Government Code section 17514. Staff also finds that no exceptions to reimbursement in Government Code section 17556 apply.

All the elements having been met, staff finds that Penal Code section 12028.5, as amended by Statutes 2002, chapter 833, is a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, for the activities listed above.

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[72] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 1; Exhibit 9, Declaration of Wendy Watanabe, page 1.

[73] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 2; Exhibit 9, Declaration of Wendy Watanabe, page 2.

Issue 4: What is the period of reimbursement for the test claim?

The period of reimbursement for an approved test claim is the fiscal year before the fiscal year in which the claim is filed.[74] As for a test claim amendment: "The claimant may thereafter amend the test claim at any time, *but before the test claim is set for a hearing*, without affecting the original filing date as long as the amendment substantially relates to the original test claim."[75]

The original test claim, 99-TC-08, was filed May 15, 2000 (reimbursement period beginning July 1, 1998), and this test claim amendment was filed in April 2003. The test claim was set for hearing when the draft staff analysis for 99-TC-08 was issued on March 6, 2003. The claimant, however, amended the test claim in April 2003, *after* the test claim was set for a hearing. Because the amendment was not filed before the test claim was set for a hearing, as required by Government Code section 17557, subdivision (e), the period of reimbursement does not go back to the original reimbursement period of 99-TC-08. Thus, staff finds that the test claim amendment is deemed filed in April 2003 and if approved, claimants are eligible for reimbursement beginning July 1, 2001 (or later, depending on the effective date of the test claim statutes).

CONCLUSION

In sum, staff finds that effective January 1, 2002, Penal Code section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for local agencies, on all domestic violence-related calls for assistance:

- To include on the domestic violence incident report form a notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon (Pen. Code, § 13730, subd. (c)(3).

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the activities listed below are a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, when firearms or other deadly weapons are discovered during any other lawful search at the scene of a domestic violence incident involving a threat to human life or a physical assault. Any other lawful search includes but is not limited to the following searches: (1) a search incident to arrest, or of people the officer has legal cause to arrest; (3) a search pursuant to a warrant; or (3) a search based on statements of persons who do not have authority to consent, but have indicated to law enforcement that a weapon is present at the scene.

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[74] Government Code section 17557, subdivision (e).

[75] *Ibid.* [Emphasis added.] At the time this amendment was filed, this same provision was in Government Code section 17557, subdivision (c).

- To take temporary custody of any firearm or other deadly weapon when necessary for the protection of the peace officer or other persons present. (Pen. Code, § 12028.5, subd. (b).)
- To give the owner or person in lawful possession of the firearm or other deadly weapon a receipt that describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b).)
- To make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure. Reimbursement for this activity is not required if either: (1) the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident; or (2) if the firearm or other deadly weapon is retained because it was illegally possessed, or (3) if the firearm or other deadly weapon is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[76] (Pen. Code, § 12028.5, subd. (b).)
- To sell or destroy, as provided in subdivision (c) of Section 12028,[77] any firearm or other deadly weapon taken into custody and held for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody. Reimbursement for this activity is not required for firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j) of section 12028.5. (Pen. Code, § 12028.5, subd. (e).)
- If the local agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for the agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. (Pen. Code, § 12028.5, subd. (f).)

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[76] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

[77] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

- To inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. If the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the local agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g) of section 12028.5. (Pen. Code, § 12028.5, subd. (g).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon requests a hearing, to show in court by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (h).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not respond within 30 days of the receipt of notice, to file a petition in court for an order of default. (Pen. Code, § 12028.5, subd. (i).)

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the following activities are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for local agencies, when firearms or other deadly weapons are taken into temporary custody at the scene of a domestic violence incident involving a threat to human life or a physical assault, and the firearm or other deadly weapon is discovered in plain sight or pursuant to a consensual or other lawful search.

- The one-time activity of amending the receipt for a confiscated firearm or other deadly weapon to include "the time limit for recovery as required" by section 12028.5. (Pen. Code, § 12028.5, subd. (b).)
- If the person who owns or had lawful possession of the firearm or other deadly weapon petitions the court for a second hearing within 12 months of the date of the initial hearing, showing by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (j).)

Staff also finds that Family Code section 6228 (Stats. 2002, ch. 377) and Penal Code section 12028.5 (Stats. 1984, ch. 901 & Stats. 2002, ch 830)[78] are not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 because they do not mandate a new program or higher level of service.

Recommendation

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

[78] Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last (Gov. Code, § 9605).

PAGES 39-100 LEFT BLANK INTENTIONALLY

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

EXHIBIT A

RECEIVED
APR 18 2003
COMMISSION ON
STATE MANDATES

April 17, 2003

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

County of Los Angeles Test Claim [CSM-99-TC-08] Amendment
Crime Victims' Domestic Violence Incident Reports

We submit and enclose herein an amendment to the subject test claim.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916)323-3562
CSM 1 (12/89)

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RECEIVED
APR 18 2003
COMMISSION ON STATE MANDATES

TEST CLAIM FORM

Claim No.

Local Agency or School District Submitting Claim

Los Angeles County

Contact Person	**Telephone No.**
Leonard Kaye	(213) 974-8564

Address
500 West Temple Street, Room 603
Los Angeles, CA 90012

Representative Organization to be Notified

California State Association of Counties

This test claim alleges the existence of " costs mandated by the state" within the meaning of section 17514 of the Government Code and section 6, article, XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

See page a

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative	**Telephone No.**
J. Tyler McCauley Auditor-Controller	(213) 974-8301
Signature of Authorized Representative	**Date**
J. Tyler McCauley	4/17/03

County of Los Angeles Test Claim Amendment [1]
Penal Code Section 13730 as Added and Amended by: Chapter 1609, Statutes of 1984, Chapter 965, Statutes of 1985, ~~Chapter 483, Statutes of 2001~~; Penal Code Section 12028.5 as Added and Amended by Chapter 901, Statutes of 1984, Chapters 830 and 833, Statutes of 2002; Family Code Section 6228 as Added And Amended by Chapter 1022, Statutes of 1999, ~~Chapter 377, Statutes of 2002~~
Crime Victims' Domestic Violence Incident Reports

---

[1] The County of Los Angeles requests that its "Crime Victims' Domestic Violence Incident Reports" test claim, filed on May 11, 2000 with the Commission on State Mandates, be amended to include related changes to Family Code Section 6228 and Penal Code Section 13730, the test claim legislation, as follows: Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code and Chapter 483, Statutes of 2001, amending Section 13730 of the Penal Code and, with respect to implementing Section 13730(c)(3) of the Penal Code, Section 12028.5 of the Penal Code as Added and Amended by Chapter 901, Statutes of 1984, Chapters 830 and 833, Statutes of 2002.

County of Los Angeles Test Claim Amendment
Penal Code Section 13730 as Added and Amended by: Chapter 1609, Statutes of 1984, Chapter 965, Statutes of 1985, Chapter 483, Statutes of 2001; Penal Code Section 12028.5 as Added and Amended by Chapter 901, Statutes of 1984, Chapters 830 and 833, Statutes of 2002; Family Code Section 6228 as Added and Amended by Chapter 1022, Statutes of 1999, Chapter 377, Statutes of 2002
Crime Victims' Domestic Violence Incident Reports

The County of Los Angeles requests that its "Crime Victims' Domestic Violence Incident Reports" test claim, filed on May 11, 2000 with the Commission on State Mandates, be amended to include related changes to Family Code Section 6228 and Penal Code Section 13730, the test claim legislation, as follows: Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code and Chapter 483, Statutes of 2001, amending Section 13730 of the Penal Code and, with respect to implementing Section 13730(c)(3) of the Penal Code, Section 12028.5 of the Penal Code as Added and Amended by Chapter 901, Statutes of 1984, Chapters 830 and 833, Statutes of 2002.

Chapter 483, Statutes of 2001 [attached as Exhibit 1], enacted on February 21, 2001, amends Section 13730 of the Penal Code [as added by Chapter 1609, Statutes of 1984 and amended by Chapter 965, Statutes of 1995 - the original test claim legislation] and imposes additional duties on local government which were not included in the original test claim legislation.

Section 12028.5 of the Penal Code details the duties referenced in implementing Section 13730(c)(3) of the Penal Code, as added by Chapter 483, Statutes of 2001, and, accordingly, is claimed herein. Section 12028.5's duties were first added to the Penal Code by Chapter 901, Statutes of 1984 [attached as Exhibit 2] on September 6, 1984. Subsequently, Section 12028.5 was amended on September 24, 2002 by both Chapter 830, Statutes of 2002 [attached as Exhibit 3] and Chapter 833, Statutes of 2002 [attached as Exhibit 4].

Chapter 377, Statutes of 2002 [attached as Exhibit 5], enacted on January 14, 2002, amends Section 6228 of the Family Code [as added by Chapter 1022, Statutes of 1999 - the original test claim legislation] and imposes additional duties on local government which were not included in the original test claim legislation.

Therefore, duties claimed herein are substantially related to the original test claim legislation. Accordingly, this amendment request should be granted.

Amendment Provision

As noted by Commission's Executive Director, "[p]ursuant to Government Code section 17557, subdivision (c), the claimant may amend the 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"[1].

New Section 13730 Duties

Chapter 483, Statutes of 2001, amends Section 13730 of the Penal Code [as added by Chapter 1609, Statutes of 1984 and amended by Chapter 965, Statutes of 1995 - the original test claim legislation] and imposes new duties on local government, not found in prior law. In particular, Chapter 483, Statutes of 2001 added Section 13730(c)(3) to mandate that:

> " ... The [domestic violence incident] report shall include at least all of the following ...
>
> (3) A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5" [Emphasis added.]

Therefore, Chapter 483, Statutes of 2001 added Section 13730(c)(3) to imposes three mandatory duties upon local law enforcement agencies:

> 1. When "... necessary, for the protection of the peace officer or other persons present, [the mandatory duty] to inquire of the victim, the

[1] From page 1 of the October 5, 2000 letter of Paula Higashi, Commission's Executive Director to Leonard Kaye, County of Los Angeles, regarding "Claimant's Amendment to Test Claim...", attached as Exhibit 6.

alleged abuser or both, whether a firearm or other deadly weapon was present at the location..."

2. The mandatory duty to report if an inquiry was made "... whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon."

3. The mandatory duty that "... [a]ny firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5"

New Section 12028.5 Duties

Section 12028.5 of the Penal Code, as added by Chapter 901, Statutes of 1984 and amended by Chapters 830 and 833, Statutes of 2002, provides that:

"(a) As used in this section, the following definitions shall apply:

(1) "Abuse" means any of the following:

(A) Intentionally or recklessly to cause or attempt to cause bodily injury.

(B) Sexual assault.

(C) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.

(D) To molest, attack, strike, stalk, destroy personal property, or violate the terms of a domestic violence protective order issued pursuant to Part 4 (commencing with Section 6300) of Division 10 of the Family Code.

(2) "Domestic violence" means abuse perpetrated against any of the following persons:

(A) A spouse or former spouse.

(B) A cohabitant or former cohabitant, as defined in Section 6209 of the Family Code.

(C) A person with whom the respondent is having or has had a dating or engagement relationship.

(D) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code).

(E) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.

(F) Any other person related by consanguinity or affinity within the second degree.

(3) "Deadly weapon" means any weapon, the possession or concealed carrying of which is prohibited by Section 12020.

(b) A sheriff, undersheriff, deputy sheriff, marshal, deputy marshal, or police officer of a city, as defined in subdivision (a) of Section 830.1, a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, a member of the University of California Police Department, as defined in subdivision (b) of Section 830.2, an officer listed in Section 830.6 while acting in the course and scope of his or her employment as a peace officer, a member of a California State University Police Department, as defined in subdivision (c) of Section 830.2, a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, a peace officer, as defined in subdivision (d) of Section 830.31, a peace officer, as defined in subdivisions (a) and (b) of Section 830.32, and a peace officer, as defined in Section 830.5, who is at the scene of a domestic violence incident involving a threat to human life or a physical assault, shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present. Upon taking

custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision (f), if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than 5 business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within 5 business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

(c) Any peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located.

(d) Any firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership.

(e) Any firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, by a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section 830.31, or by a peace officer, as defined in Section 830.5, for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a

nuisance and sold or destroyed as provided in subdivision (c) of Section 12028. Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

(f) In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within 90 days of the date of seizure of the firearm or other deadly weapon.

(g) The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements.

(h) If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the

firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

(i) If the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Section 12028.

(j) If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

(k) The law enforcement agency, or the individual law enforcement officer, shall not be liable for any act in the good faith exercise of this section." [Emphasis added.]

The mandatory duties imposed on local law enforcement agencies in implementing Section 13730(c)(3)'s provision that "... [a]ny firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5" [emphasis added], are detailed in Section 12028.5 and include:

1. The duty requiring that a peace officer "... shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present." [Section 12028.5(b)]

2. The duty requiring that "... [u]pon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed

the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon." [Section 12028.5(b)]

3. The duty requiring that the confiscated "... firearm or other deadly weapon shall be held [not less than] than 48 hours." [Section 12028.5(b)]

4. The duty requiring that "... the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession [as specified] 48 hours after the seizure or as soon thereafter as possible, but no later than 5 business days after the seizure." [Section 12028.5(b)]

5. The duty requiring that a "... peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located." [Section 12028.5(c)]

6. The duty requiring that " [a]ny firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership." [Section 12028.5(d)]

7. The duty requiring that "...[a]ny firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, by a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section 830.31, or by a peace officer, as defined in Section 830.5, for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028." [Section 12028.5(e)]

8. The duty requiring that, "... [i]n those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned." [Section 12028.5(f)]

9. The duty requiring that "... the law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements." [Section 12028.5(g)]

10. The duty requiring local law enforcement agencies and the district attorney to participate in hearings "... if the person requests a hearing", in which case, "... the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party." [Section 12028.5(h)]

11. The duty requiring local law enforcement agencies and the district attorney to participate in hearings " ... [i]f there is a petition for a second hearing, and, "...unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat," the

duty of local law enforcement agencies to "... return of the firearm or other deadly weapon" and, as specified, pay "... reasonable attorney's fees to the prevailing party." [Section 12028.5(j)]

Therefore, as amended herein, the County is now required to provide additional reimbursable Section 13730 services, not required under prior law, and substantially related to the original test claim legislation.

New Section 6228 Duties

Chapter 377, Statutes of 2002 [attached as Exhibit 5], enacted on January 14, 2002, amends Section 6228 of the Family Code [as added by Chapter 1022, Statutes of 1999 - the original test claim legislation] and imposes new duties on local government which were not included in the original test claim legislation. Specifically, Section 6228 now requires local law enforcement agencies to prepare and provide domestic violence incident reports for the "representatives" of domestic violence victims, as follows:

"(a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.

(b) A copy of a domestic violence incident report face sheet shall be made available during regular business hours to a victim of domestic violence or his or her representative no later than 48 hours after being requested by the victim or his or her representative, unless the state or local law enforcement agency informs the victim or his or her representative of the reasons why, for good cause, the domestic violence incident report face sheet is not available, in which case the domestic violence incident report face sheet shall be made available to the victim or his or her representative no later than five working days after the request is made.

(c) A copy of the domestic violence incident report shall be made available during regular business hours to a victim of domestic violence or his or her representative no later than five working days after being requested by a victim or his or her representative, unless the state or local law enforcement agency informs the victim or his or her representative of

the reasons why, for good cause, the domestic violence incident report is not available, in which case the domestic violence incident report shall be made available to the victim or his or her representative no later than 10 working days after the request is made.

(d) Any person requesting copies under this section shall present state or local law enforcement with his or her identification, such as a current, valid driver's license, a state-issued identification card, or a passport and, if the person is a representative of the victim, a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time a request is made.

(e) This section shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incidence report.

(f) This section shall be known, and may be cited, as the Access to Domestic Violence Reports Act of 1999.

(g)(1) For purposes of this section, a representative of the victim means any of the following:

(A) The surviving spouse.

(B) A surviving child of the decedent who has attained 18 years of age.

(C) A domestic partner, as defined in subdivision (a) of Section 297.

(D) A surviving parent of the decedent.

(E) A surviving adult relative.

(F) The public administrator if one has been appointed.

(2) A representative of the victim does not include any person who has been convicted of murder in the first degree, as defined in Section 189 of the Penal Code, of the victim, or any person identified in the incident report face sheet as a suspect. Domestic violence incident report face sheets may not be provided to a representative of the victim unless the representative presents his or her identification, such as a current, valid driver's license, a state- issued identification card, or a passport and a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time of the request." [Emphasis added.]

It should be noted that the Legislative Counsel, in its Digest to Chapter 377, Statutes of 2002 [attached as page 1 of Exhibit 5], amending Section 6228 of the Family Code, states that:

"This bill would also require state and local law enforcement agencies to provide those [domestic violence incident report] documents to a representative of the victim, as defined, if the victim is deceased. The bill would require any person requesting those documents to present his or her identification, as specified, and, if that person is a representative of the victim, a certified copy of the death certificate or other satisfactory evidence of the death of the victim. By imposing additional duties on local officials, the bill would create a state-mandated local program."

State Funding Disclaimers are Not Applicable

There are seven disclaimers specified in Government Code (GC) Section 17556 which could serve to bar recovery of "costs mandated by the State", as defined in GC Section 17514. These seven disclaimers do not apply to the instant test claim amendment, as shown, in seriatim, for pertinent sections of GC Section 17556.

(a) "The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the Program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency to implement a given program shall constitute a request within the meaning of this paragraph."

(a) is not applicable as the subject law was not requested by the County claimant or any local agency or school district.

(b) "The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts."

(b) is not applicable because the subject law did not affirm what had been declared existing law or regulation by action of the courts.

(c) "The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation."

(c) is not applicable as no federal law or regulation is implemented in the subject law.

(d) "The 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."

(d) is not applicable as there is no authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service. Indeed, as previously discussed in the County's May 11, 2000 Test Claim on pages 2-8, the imposition of a fee for this type of mandated program is specifically prohibited.

(e) "The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate."

(e) is not applicable as no offsetting savings are provided in the subject law.

(f) "The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election."

(f) is not applicable as the duties imposed in the subject law were not included in a ballot measure.

(g) "The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

(g) is not applicable as the subject law did not create or eliminate a crime or infraction and did not change that portion of the statute not relating directly to the penalty enforcement of the crime or infraction.

Therefore, the above seven disclaimers will not bar local governments' reimbursement of its costs mandated by the state as claimed herein for the preparation and provision of domestic violence incident reports to victims of domestic violence.

Duty to Provide Requested Reports and Face Sheets is Not Excused

The County maintains that the duty to provide requested domestic violence incident reports and face sheets to domestic violence victims and their representatives under Family Code Section 6228 is not excused --- even if the general duty to prepare such reports and face sheets under Chapter 1609, Statutes of 1984 has been made optional under Government Code Section 17581[2].

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[2] Government Code section 17581 deals with "[i]mplementation by local agencies of statutes or executive orders requiring state reimbursement" and provides that:

"(a) No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if all of the following apply:

(1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to Section 6 of Article XIII B of the California Constitution.

As previously discussed, on page 10 herein, domestic violence victims and their representatives under Family Code Section 6228 must be provided requested domestic violence incident reports and face sheets. There are no exceptions or excuses for not doing so. Such victims and representatives have an unqualified right to obtain their domestic violence incident reports and face sheets when requested.

Accordingly, requested reports and face sheets need to be prepared in order to be provided. Otherwise, requested reports and face sheets would not be provided --- a result not permitted by the Legislature.

Family Code Section 6228 plainly requires that a domestic violence report and face sheet "... shall be made available...". There are no exceptions. The County has no alternative but to prepare-in-order-to-provide domestic violence reports and face sheets.

Commission staff disagree. They state, on page 10 of their March 6, 2003 analysis, that while "... Family Code section 6288 expressly requires local law enforcement agencies to ... provide one copy of all domestic violence face sheets ... [and] ... provide one copy of all domestic violence incident reports ..." to victims upon

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(2) The statute or executive order, or portion thereof, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year. For purposes of this paragraph, a mandate shall be considered to have been specifically identified by the Legislature only if it has been included within the schedule of reimbursable mandates shown in the Budget Act and it is specifically identified in the language of a provision of the item providing the appropriation for mandate reimbursements.

(b) Notwithstanding any other provision of law, if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a), the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency.

(c) This section shall not apply to any state-mandated local program for the trial courts, as specified in Section 77203.

(d) This section shall not apply to any state-mandated local program for which the reimbursement funding counts toward the minimum General Fund requirements of Section 8 of Article XVI of the Constitution."

their request, there is no mandatory duty to prepare any domestic violence face sheets or incident reports.

The issue here is whether the County has any reasonable alternative but to prepare the domestic violence face sheets and incident reports that must, without exception, be provided victims. The issue of whether reimbursable state mandates "... also encompass situations where there is no reasonable alternative or no true choice but to participate in the state scheme" or not, is addressed in Department of Finance v. Commission on State Mandates, Kern High School District et al. [Case Number CO37645], attached as Exhibit 7.

Regarding duties like the duty to prepare-in-order-to-provide domestic violence face sheets and incident reports, pursuant to implementing Family Code section 6288, the Third Appellate District Court, in Department of Finance v. Commission on State Mandates, Kern High School District et al, on page 11 of Exhibit 7, states:

> "We construe it [state mandates] to also encompass situations where there is no reasonable alternative or true choice but to participate in the state scheme."

We agree. Here, the state scheme requires that requested domestic violence incident reports and face sheets be provided to victims or their representatives --- without exception. We have no true choice but to prepare-in-order-to-provide domestic violence face sheets and incident reports pursuant to implementing Family Code section 6288.

The Costs of Implementing New, Amended Duties are Also Reimbursable

The County has unavoidably incurred costs in performing new domestic violence incident duties, as detailed above and amended herein, which are reimbursable "costs mandated by the State" as there is no bar or disclaimer to such a finding, as previously discussed, and because such costs satisfy three requirements, found in Government Code Section 17514:

1. There are "increased costs which a local agency is required to incur after July 1, 1980"; and

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975"; and

3. The costs are the result of "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".

All three of above requirements for finding "costs mandated by the State" are met herein.

First, local government began incurring costs for the subject program as a result of Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code and Chapter 483, Statutes of 2001, amending Section 13730 of the Penal Code and, with respect to implementing Section 13730(c)(3) of the Penal Code, Section 12028.5 of the Penal Code as added and amended by Chapter 901, Statutes of 1984, Chapter 830, Statutes of 2002 and Chapter 833, Statutes of 2002 --- all statutes enacted on or after January 1, 1975.

Second, as noted in the declaration of Ms. Abram, attached hereto as Exhibit 8, and in the declaration of Ms. Watanabe, attached hereto as Exhibit 9, County costs are now being incurred during the County's 2002-03 fiscal year --- well after July 1, 1980. So the second requirement, that the increased costs claimed herein be incurred after July 1, 1980, is met. Also, the amount of such increased costs well exceeds the statutory minimum of $1,000 a year. In this regard, Ms. Watanabe states, on page 1 of her declaration, that:

> "I declare that the County of Los Angeles will incur costs well in excess of $1,000 during the 2002-03 fiscal year to implement Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code and Chapter 483, Statutes of 2001, amending Section 13730 of the Penal Code and, with respect to implementing Section 13730(c)(3) of the Penal Code, to implement Section 12028.5 of the Penal Code as added and amended by Chapter 901, Statutes of 1984, Chapter 830, Statutes of 2002 and Chapter 833, Statutes of 2002."

According to Ms. Abrams, on pages 2 through 5 of her declaration, the new duties claimed herein include:

> "... on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform the following duties:

1. The duty requiring that a peace officer "... shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present." [Section 12028.5(b)]

2. The duty requiring that "... [u]pon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon. [Section 12028.5(b)]

3. The duty requiring that the confiscated "... firearm or other deadly weapon shall be held [not less than] than 48 hours." [Section 12028.5(b)]

4. The duty requiring that "... the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession [as specified] 48 hours after the seizure or as soon thereafter as possible, but no later than 5 business days after the seizure." [Section 12028.5(b)]

5. The duty requiring that a "... peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located." [Section 12028.5(c)]

6. The duty requiring that " [a]ny firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership." [Section 12028.5(d)]

7. The duty requiring that "...[a]ny firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, by a peace officer of the Department of Parks and Recreation, as defined

in subdivision (f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section 830.31, or by a peace officer, as defined in Section 830.5, for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028." [Section 12028.5(e)]

8. The duty requiring that, "... [i]n those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned." [Section 12028.5(f)]

9. The duty requiring that "... the law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements." [Section 12028.5(g)]

10. The duty requiring local law enforcement agencies and the district attorney to participate in hearings "... if the person requests a hearing", in which case, "... the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party." [Section 12028.5(h)]

11. The duty requiring local law enforcement agencies and the district attorney to participate in hearings " ... [i]f there is a petition for a second hearing, and, "...unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat," the duty of local law enforcement agencies to "... return of the firearm or other deadly weapon" and, as specified, pay "... reasonable attorney's fees to the prevailing party." [Section 12028.5(j)] "

The third requirement, that the costs claimed herein are the result of "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", is also met. As previously discussed, in "New Section 13730 Duties" [pages 2-3], "New Section 12028.5 Duties" [pages 3-9] and "New Section 6228 Duties" [pages 10-12], such duties are not found in prior law.

Therefore, reimbursement of the County's "costs mandated by the State", as claimed herein, is required.

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

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J. TYLER McCAULEY
AUDITOR-CONTROLLER

County of Los Angeles Test Claim Amendment
Penal Code Section 13730 as Added and Amended by: Chapter 1609, Statutes of 1984, Chapter 965, Statutes of 1985, Chapter 483, Statutes of 2001; Penal Code Section 12028.5 as Added and Amended by Chapter 901, Statutes of 1984, Chapters 830 and 833, Statutes of 2002; Family Code Section 6228 as Added and Amended by Chapter 1022, Statutes of 1999, Chapter 377, Statutes of 2002
Crime Victims' Domestic Violence Incident Reports

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I, Leonard Kaye, SB90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims and amendments thereto, reviews of State agency comments, Commission staff analyses, and for proposing, or commenting on, parameters and guidelines (Ps&Gs) and amendments thereto, and for filing incorrect reduction claims, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the subject test claim amendment, attached hereto.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the attached document, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

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

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

4/17/03; Los Angeles, CA — Leonard Kaye

Date and Place — Signature

CHAPTER 483

(Assembly Bill No. 469)

An act to amend Section 13730 of the Penal Code, relating to domestic violence.

[Approved by Governor October 3, 2001. Filed with Secretary of State October 4, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

AB 469, Cohn. Domestic violence.

Existing law requires all law enforcement agencies to prepare a written incident report containing specified information about all domestic violence-related calls for assistance made to the department. Existing law also requires that the total number of domestic-violence calls received and the number of those cases involving weapons be compiled by the agency monthly and submitted to the Attorney General.

This bill would require a law enforcement officer who responds to the scene of a domestic violence-related incident to prepare a domestic violence incident report which includes a notation of whether he or she found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and whether the inquiry disclosed the presence of a firearm or other deadly weapon. This bill would also require officers to confiscate any firearm or deadly weapon discovered at the location of a domestic violence incident. Because this bill would require local law enforcement officers to perform additional duties, it would impose a state-mandated local program. The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 13730 of the Penal Code is amended to read:

§ 13730. (a) Each law enforcement agency shall develop a system, by January 1, 1986, for recording all domestic violence-related calls for assistance made to the department including whether weapons are involved. All domestic violence-related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident. Monthly, the total number of domestic violence calls received and the numbers of those cases involving weapons shall be compiled by each law enforcement agency and submitted to the Attorney General.

(b) The Attorney General shall report annually to the Governor, the Legislature, and the public the total number of domestic violence-related calls received by California law enforcement agencies, the number of cases involving weapons, and a breakdown of calls received by agency, city, and county.

(c) Each law enforcement agency shall develop an incident report form that includes a domestic violence identification code by January 1, 1986. In all incidents of domestic

Italics indicate changes or additions. * * * indicate omissions.

ence, a report shall be written and shall be identified on the face of the report as a estic violence incident. *The* report shall include at least *all* of the following:

) A notation of whether the officer or officers who responded to the domestic violence observed any signs that the alleged abuser was under the influence of alcohol or a rolled substance.

) A notation of whether the officer or officers who responded to the domestic violence determined if any law enforcement agency had previously responded to a domestic ence call at the same address involving the same alleged abuser or victim.

) A notation of whether the officer or officers who responded to the domestic nce call found it necessary, for the protection of the peace officer or other persons ent, to inquire of the victim, the alleged abuser, or both, whether a firearm or other lly weapon was present at the location, and, if there is an inquiry, whether that iry disclosed the presence of a firearm or other deadly weapon. Any firearm or other lly weapon discovered by an officer at the scene of a domestic violence incident shall ubject to confiscation pursuant to Section 12028.5.

EC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission State Mandates determines that this act contains costs mandated by the state, sement to local agencies and school districts for those costs shall be made pursuant ... 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government e. If the statewide cost of the claim for reimbursement does not exceed one million ars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Italics indicate changes or additions. * * * indicate omissions.

the public.

(c) Participation in a program under this article shall not be a defense to any disciplinary action which may be taken by the board. Further, no provision of this article shall preclude the board from commencing disciplinary action against a licensee who is terminated from a program under this article.

4435. The board shall review the activities of the employee assistance program on a quarterly basis. As part of this evaluation, the board shall review files of all participants in the impairment program. Names of those pharmacists who entered the program voluntarily without the knowledge of the board shall remain confidential from the board except when monitoring by the board reveals misdiagnosis, case mismanagement, or noncompliance by the participant.

4436. All board records and records of the employee assistance program pertaining to the treatment of a pharmacist in the program shall be kept confidential and are not subject to discovery or subpoena.

4438. No member of the board or the contracting professional association or any volunteer intervenor shall be liable for any civil damages because of acts or ommissions which may occur while acting in good faith pursuant to this article.

4439. This article shall be operative until January 1, 1988, and on that date is repealed, unless a later enacted statute deletes or extends that date. The board shall prepare a sunset review report of the program, and submit the report to the Legislature on or before March 31, 1987.

SEC. 2. The sum of twenty-five thousand dollars ($25,000) is hereby appropriated from the Pharmacy Board Contingent Fund to the California State Board of Pharmacy to carry out the purposes of this act.

LIBRARY

CHAPTER 901

An act to add Section 12028.5 to the Penal Code, relating to weapons.

[Approved by Governor September 5, 1984. Filed with Secretary of State September 6, 1984.]

The people of the State of California do enact as follows:

SECTION 1. Section 12028.5 is added to the Penal Code, to read:

12028.5. (a) As used in this section, the following words have the following meanings:

(1) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to

himself, herself, or another.

(2) "Domestic violence" is abuse perpetrated against a family or household member.

(3) "Family or household member" means a spouse, former spouse, parent, child, any other person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household.

(b) A sheriff, undersheriff, deputy sheriff, or police officer of a city at the scene of a domestic violence incident involving a threat to human life or a physical assault may take temporary custody of any firearm described in Section 12001 in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm and list any identification or serial number on the firearm. The receipt shall indicate where the firearm can be recovered and the date after which the owner or possessor can recover the firearm. No firearm shall be held less than 48 hours. If a firearm is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than 72 hours after the seizure.

(c) Any firearm which has been taken into custody which has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm and proof of ownership.

(d) Any firearm taken into custody and held by a police or sheriff's department for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028.

SEC. 2. Notwithstanding Section 6 of Article XIII B of the California Constitution and Section 2231 or 2234 of the Revenue and Taxation Code, no appropriation is made by this act for the purpose of making reimbursement pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

CHAPTER 830

(Assembly Bill No. 2695)

An act to amend Sections 166, 12021, 12028.5, and 12028.7 of the Penal Code, relating to firearms.

[Approved by Governor September 23, 2002. Filed with Secretary of State September 24, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2695, Oropeza. Firearms.

Existing law provides that any willful and knowing violation of specified court orders involving family relations and domestic violence shall constitute contempt of court punishable by imprisonment for not more than one year.

This bill would make a clarifying change to this provision.

Existing law prohibits persons convicted of certain offenses from owning, possessing or exerting custody or control over a firearm, as specified. Violation of these provisions is a crime.

This bill would require the Attorney General, subject to available funding, to work with other specified entities to develop a protocol designed to facilitate the enforcement of restrictions on firearm ownership, as specified. The protocol would be required to be completed on or before January 1, 2005.

Existing law provides that, if a firearm or other deadly weapon seized by a law enforcement officer as a result of a domestic violence incident is not retained for specified reasons, the firearm or other weapon shall be made available to the owner or lawful possessor no later than 72 hours after the seizure.

This bill would provide that, if not retained, the firearm or other weapon shall be made available to the owner or lawful possessor no later than 5 business days after the seizure.

Existing law provides that, if a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to endanger the victim or the person reporting the threat, the agency shall, within 30 days of the seizure, initiate a petition in superior court to determine if the firearm or other weapon should be returned. Existing law allows the agency to seek an extension of this period, for good cause, to no more than 60 days after the date of the seizure.

This bill would extend to 60 days the period for the law enforcement agency to initiate a petition, and would extend to 90 days the period of extension for good cause.

Existing law requires that a receipt be given to the possessor of a firearm or other deadly weapon when the firearm or other weapon is taken into custody by a law enforcement officer. Existing law specifies the information to be included in the receipt.

This bill would add to that information the time limit for the possessor to recover the firearm or other weapon.

This bill would make nonsubstantive corrections to these provisions.

This bill would incorporate changes to Section 12028.5 of the Penal Code proposed by SB 1807 that would become operative only if both bills are enacted and this bill is enacted after SB 1807.

The people of the State of California do enact as follows:

SECTION 1. Section 166 of the Penal Code is amended to read:

§ 166. (a) Except as provided in subdivisions (b), (c), and (d), every person guilty of any contempt of court, of any of the following kinds, is guilty of a misdemeanor:

(1) Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in *the* immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority.

(2) Behavior as specified in paragraph (1) committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law.

(3) Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any court.

(4) Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by any court, including orders pending trial.

(5) Resistance willfully offered by any person to the lawful order or process of any court.

(6) The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question.

(7) The publication of a false or grossly inaccurate report of the proceedings of any court.

(8) Presenting to any court having power to pass sentence upon any prisoner under conviction, or to any member of the court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon the prisoner, except as provided in this code.

(b)(1) Any person who is guilty of contempt of court under paragraph (4) of subdivision (a) by willfully contacting a victim by phone *or* mail, or directly, and who has been previously convicted of a violation of Section 646.9 shall be punished by imprisonment in a county jail for not more than one year, by a fine of five thousand dollars ($5,000), or by both that fine and imprisonment.

(2) For the purposes of sentencing under this subdivision, each contact shall constitute a separate violation of this subdivision.

(3) The present incarceration of a person who makes contact with a victim in violation of paragraph (1) is not a defense to a violation of this subdivision.

(c)(1) Notwithstanding paragraph (4) of subdivision (a), any willful and knowing violation of any protective order or stay away court order issued pursuant to Section 136.2, in a pending criminal proceeding involving domestic violence, as defined in Section 13700, or issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence, as defined in Section 13700, ***or that*** is an order described in paragraph (3), shall constitute contempt of court, a misdemeanor, punishable by imprisonment in a county jail for not more than one year, by a fine of not more than one thousand dollars ($1,000), or by both that imprisonment and fine.

(2) If a violation of paragraph (1) results in a physical injury, the person shall be imprisoned in a county jail for at least 48 hours, whether a fine or imprisonment is imposed, or the sentence is suspended.

(3) Paragraphs (1) and (2) *** apply to the following court orders:

(A) Any order issued pursuant to Section 6320 or 6389 of the Family Code.

(B) An order excluding one party from the family dwelling or from the dwelling of the other.

Italics indicate changes or additions. * * * indicate omissions.

(3) An order enjoining a party from specified behavior that the court determined was necessary to effectuate the orders described in paragraph (1).

(4) A second or subsequent conviction for a violation of any order described in paragraph (1) occurring within seven years of a prior conviction for a violation of any of those orders and involving an act of violence or "a credible threat" of violence, as provided in subdivisions (c) and (d) of Section 139, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months or two or three years.

(5) The prosecuting agency of each county shall have the primary responsibility for the enforcement of the orders described in paragraph (1).

(d)(1) *A* person who owns, possesses, purchases, or receives a firearm knowing he or she is prohibited from doing so by the provisions of a protective order as defined in Section 136.2 of this code, Section 6218 of the Family Code, or Sections 527.6 or 527.8 of the Code of Civil Procedure, shall be punished under the provisions of subdivision (g) of Section 12021.

(2) *A* person subject to a protective order described in paragraph (1) shall not be prosecuted under this section for owning, possessing, purchasing, or receiving a firearm to the extent that firearm is granted an exemption pursuant to subdivision (h) of Section 6389 of the Family Code.

(e)(1) If probation is granted upon conviction of a violation of subdivision (c), the court shall impose probation consistent with the provisions of Section 1203.097 of the Penal Code.

(2) If probation is granted upon conviction of a violation of subdivision (c), the conditions of probation may include, in lieu of a fine, one or both of the following requirements:

(A) That the defendant make payments to a battered women's shelter, up to a maximum of one thousand dollars ($1,000).

(B) That the defendant provide restitution to reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense.

(3) For any order to pay a fine, make payments to a battered women's shelter, or pay restitution as a condition of probation under this subdivision or subdivision (c), the court shall make a determination of the defendant's ability to pay. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support.

(4) *If* the injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of subdivision (c), the community property may not be used to discharge the liability of the offending spouse for restitution to the injured spouse *** required by Section 1203.04, as operative on or before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse and dependents required by this subdivision, until all separate property of the offending spouse is exhausted.

(5) Any person violating any order described in subdivision (c) *** may be punished for any substantive offenses described under Section 136.1 or 646.9. No finding of contempt shall be a bar to prosecution for a violation of Section 136.1 or 646.9. However, any person held in contempt for a violation of subdivision (c) shall be entitled to credit for any punishment imposed as a result of that violation against any sentence imposed upon conviction of an offense described in Section 136.1 or 646.9. Any conviction or acquittal for any substantive offense under Section 136.1 or 646.9 shall be a bar to a subsequent punishment for contempt arising out of the same act.

SEC. 2. Section 12021 of the Penal Code is amended to read:

12021. (a)(1) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or of

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an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, or who is addicted to the use of any narcotic drug, who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

(2) Any person who has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417 and who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

(b) Notwithstanding subdivision (a), any person who has been convicted of a felony or of an offense enumerated in Section 12001.6, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

(c)(1) Except as provided in subdivision (a) or paragraph (2) of this subdivision, any person who has been convicted of a misdemeanor violation of Section 71, 76, 136.1, 136.5, or 140, subdivision (d) of Section 148, Section 171b, 171c, 171d, 186.28, 240, 241, 242, 243, 244.5, 245, 245.5, 246, 246.3, 247, 273.5, 273.6, 417, 417.1, 417.2, 417.6, 422, 626.9, 646.9, 12023, or 12024, subdivision (b) or (d) of Section 12034, Section 12040, subdivision (b) of Section 12072, subdivision (a) of former Section 12100, Section 12220, 12320, or 12590, or Section 8100, 8101, or 8103 of the Welfare and Institutions Code, any firearm-related offense pursuant to Sections 871.5 and 1001.5 of the Welfare and Institutions Code, or of the conduct punished in paragraph (3) of subdivision (g) of Section 12072, and who, within 10 years of the conviction, owns, or has in his or her possession or under his or her custody or control, any firearm is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine. The court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this subdivision. However, the prohibition in this paragraph may be reduced, eliminated, or conditioned as provided in paragraph (2) or (3).

(2) Any person employed as a peace officer described in Section 830.1, 830.2, 830.31, 830.32, 830.33, or 830.5 whose employment or livelihood is dependent on the ability to legally possess a firearm, who is subject to the prohibition imposed by this subdivision because of a conviction under Section 273.5, 273.6, or 646.9, may petition the court only once for relief from this prohibition. The petition shall be filed with the court in which the petitioner was sentenced. If possible, the matter shall be heard before the same judge that sentenced the petitioner. Upon filing the petition, the clerk of the court shall set the hearing date and shall notify the petitioner and the prosecuting attorney of the date of the hearing. Upon making each of the following findings, the court may reduce or eliminate the prohibition, impose conditions on reduction or elimination of the prohibition, or otherwise grant relief from the prohibition as the court deems appropriate:

(A) Finds by a preponderance of the evidence that the petitioner is likely to use a firearm in a safe and lawful manner.

(B) Finds that the petitioner is not within a prohibited class as specified in subdivision (a), (b), (d), (e), or (g) or Section 12021.1, and the court is not presented with any credible evidence that the petitioner is a person described in Section 8100 or 8103 of the Welfare and Institutions Code.

(C) Finds that the petitioner does not have a previous conviction under this subdivision no matter when the prior conviction occurred.

In making its decision, the court shall consider the petitioner's continued employment, the interest of justice, any relevant evidence, and the totality of the circumstances. The court shall require, as a condition of granting relief from the prohibition under this section, that the petitioner agree to participate in counseling as deemed appropriate by the court. Relief from the prohibition shall not relieve any other person or entity from any liability

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might otherwise be imposed. It is the intent of the Legislature that courts exercise broad discretion in fashioning appropriate relief under this paragraph in cases in which relief is warranted. However, nothing in this paragraph shall be construed to require courts to grant relief to any particular petitioner. It is the intent of the Legislature to permit persons who were convicted of an offense specified in Section 273.5, 273.6, or 646.9 to seek relief from the prohibition imposed by this subdivision.

(3) Any person who is subject to the prohibition imposed by this subdivision because of a conviction of an offense prior to that offense being added to paragraph (1) may petition the court only once for relief from this prohibition. The petition shall be filed with the court in which the petitioner was sentenced. If possible, the matter shall be heard before the same judge that sentenced the petitioner. Upon filing the petition, the clerk of the court shall set the hearing date and notify the petitioner and the prosecuting attorney of the date of the hearing. Upon making each of the following findings, the court may reduce or eliminate the prohibition, impose conditions on reduction or elimination of the prohibition, or otherwise grant relief from the prohibition as the court deems appropriate:

(A) Finds by a preponderance of the evidence that the petitioner is likely to use a firearm in a safe and lawful manner.

(B) Finds that the petitioner is not within a prohibited class as specified in subdivision (a), (b), (d), (e), or (g) or Section 12021.1, and the court is not presented with any credible evidence that the petitioner is a person described in Section 8100 or 8103 of the Welfare and Institutions Code.

(C) Finds that the petitioner does not have a previous conviction under this subdivision, no matter when the prior conviction occurred.

In making its decision, the court may consider the interest of justice, any relevant evidence, and the totality of the circumstances. It is the intent of the Legislature that courts exercise broad discretion in fashioning appropriate relief under this paragraph in cases in which relief is warranted. However, nothing in this paragraph shall be construed to require courts to grant relief to any particular petitioner.

(4) Law enforcement officials who enforce the prohibition specified in this subdivision against a person who has been granted relief pursuant to paragraph (2) or (3) shall be immune from any liability for false arrest arising from the enforcement of this subdivision unless the person has in his or her possession a certified copy of the court order that granted the person relief from the prohibition. This immunity from liability shall not relieve any person or entity from any other liability that might otherwise be imposed.

(d)(1) Any person who, as an express condition of probation, is prohibited or restricted from owning, possessing, controlling, receiving, or purchasing a firearm and who owns, or has in his or her possession or under his or her custody or control, any firearm but who is not subject to subdivision (a) or (c) is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine. The court, on forms provided by the Department of Justice, shall notify the department of persons subject to this subdivision. The notice shall include a copy of the order of probation and a copy of any minute order or abstract reflecting the order and conditions of probation.

(2) For any person who is subject to subdivision (a), (b), or (c), the court shall, at the time judgment is imposed, provide on a form supplied by the Department of Justice, a notice to the defendant prohibited by this section from owning, possessing or having under his or her custody or control, any firearm. The notice shall inform the defendant of the prohibition regarding firearms and include a form to facilitate the transfer of firearms. Failure to provide the notice shall not be a defense to a violation of this section.

(e) Any person who (1) is alleged to have committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, an offense described in subdivision

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(b) of Section 1203.073, or any offense enumerated in paragraph (1) of subdivision (b) and (2) is subsequently adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, an offense described in subdivision (b) of Section 1203.073, or any offense enumerated in paragraph (1) of subdivision (c) shall not own, or have in his or her possession or under his or her custody or control, any firearm until the age of 30 years. A violation of this subdivision shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine. The juvenile court, on forms prescribed by the Department of Justice, shall notify the department of persons subject to this subdivision. Notwithstanding any other law, the forms required to be submitted to the department pursuant to this subdivision may be used to determine eligibility to acquire a firearm.

(f) Subdivision (a) shall not apply to a person who has been convicted of a felony under the laws of the United States unless either of the following criteria is satisfied:

(1) Conviction of a like offense under California law can only result in imposition of felony punishment.

(2) The defendant was sentenced to a federal correctional facility for more than 30 days, or received a fine of more than one thousand dollars ($1,000), or received both punishments.

(g)(1) Every person who purchases or receives, or attempts to purchase or receive, a firearm knowing that he or she is subject to a protective order as defined in Section 6218 of the Family Code, Section 136.2, or a temporary restraining order or injunction issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine. This subdivision does not apply unless the copy of the restraining order personally served on the person against whom the restraining order is issued contains a notice in bold print stating (1) that the person is prohibited from purchasing or receiving or attempting to purchase or receive a firearm and (2) specifying the penalties for violating this subdivision, or a court has provided actual verbal notice of the firearm prohibition and penalty as provided in Section 6304 of the Family Code.

(2) Every person who owns or possesses a firearm knowing that he or she is prohibited from owning or possessing a firearm by the provisions of a protective order as defined in Section 6218 of the Family Code, Section 136.2 of the Penal Code, or a temporary restraining order or injunction issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine. This subdivision does not apply unless a copy of the restraining order personally served on the person against whom the restraining order is issued contains a notice in bold print stating (1) that the person is prohibited from owning or possessing or attempting to own or possess a firearm and (2) specifying the penalties for violating this subdivision, or a court has provided actual verbal notice of the firearm prohibition and penalty as provided in Section 6304 of the Family Code.

(3) Judicial Council shall provide notice on all protective orders that the respondent is prohibited from owning, possessing, purchasing, or receiving a firearm while the protective order is in effect and that the firearm shall be relinquished to the local law enforcement agency for that jurisdiction or sold to a licensed gun dealer, and that proof of surrender or sale shall be filed within a specified time of receipt of the order. The order shall also state on its face the expiration date for relinquishment.

(4) If probation is granted upon conviction of a violation of this subdivision, the court shall impose probation consistent with the provisions of Section 1203.097.

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(1) A violation of subdivision (a), (b), (c), (d), or (e) is justifiable where all of the following conditions are met:

(A) The person found the firearm or took the firearm from a person who was committing a crime against him or her.

(B) The person possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency's disposition according to law.

(C) If the firearm was transported to a law enforcement agency, it was transported in accordance with paragraph (18) of subdivision (a) of Section 12026.2.

(D) If the firearm is being transported to a law enforcement agency, the person transporting the firearm has given prior notice to the law enforcement agency that he or she is transporting the firearm to the law enforcement agency for disposition according to law.

(2) Upon the trial for violating subdivision (a), (b), (c), (d), or (e), the trier of fact shall determine whether the defendant was acting within the provisions of the exemption created by this subdivision.

(3) The defendant has the burden of proving by a preponderance of the evidence that he or she comes within the provisions of the exemption created by this subdivision.

(i) Subject to available funding, the Attorney General, working with the State Judicial Council, the California Alliance Against Domestic Violence, prosecutors, and law enforcement, probation, and parole officers, shall develop a protocol for the implementation of the provisions of this section. The protocol shall be designed to facilitate the enforcement of restrictions on firearm ownership, including provisions for giving notice to defendants who are restricted, provisions for informing those defendants of the procedures by which defendants shall dispose of firearms when required to do so, provisions explaining how defendants shall provide proof of the lawful disposition of firearms, and provisions explaining how defendants may obtain possession of seized firearms when legally permitted to do so pursuant to this section or any other provision of law. The protocol shall be completed on or before January 1, 2005.

SEC. 3. Section 12028.5 of the Penal Code is amended to read:

§ 12028.5. (a) As used in this section, the following definitions shall apply:

(1) "Abuse" means any of the following:

(A) Intentionally or recklessly to cause or attempt to cause bodily injury.

(B) Sexual assault.

(C) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.

(D) To molest, attack, strike, stalk, destroy personal property, or violate the terms of a domestic violence protective order issued pursuant to Part 4 (commencing with Section 6300) of Division 10 of the Family Code.

(2) "Domestic violence" means abuse perpetrated against any of the following persons:

(A) A spouse or former spouse.

(B) A cohabitant or former cohabitant, as defined in Section 6209 of the Family Code.

(C) A person with whom the respondent is having or has had a dating or engagement relationship.

(D) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code).

(E) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.

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(F) Any other person related by consanguinity or affinity within the second degree.

(3) "Deadly weapon" means any weapon, the possession or concealed carrying of which is prohibited by Section 12020.

(b) A sheriff, undersheriff, deputy sheriff, marshal, deputy marshal, or police officer of a city, as defined in subdivision (a) of Section 830.1, a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, a member of the University of California Police Department, as defined in subdivision (b) of Section 830.2, an officer listed in Section 830.6 while acting in the course and scope of his or her employment as a peace officer, a member of a California State University Police Department, as defined in subdivision (c) of Section 830.2, a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, a peace officer, as defined in subdivision (d) of Section 830.31, a peace officer, as defined in subdivisions (a) and (b) of Section 830.32, and a peace officer, as defined in Section 830.5, who is at the scene of a domestic violence incident involving a threat to human life or a physical assault, shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, ***the time limit for recovery as required by this section,*** and the date after which the owner or possessor can recover the firearm or other deadly weapon. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision ***(f)***, if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than ***five business days*** after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within ***five business days*** following the initial seizure, except as provided in subdivision ***(d)***, the court shall allow reasonable attorney's fees to the prevailing party.

(c) Any peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located.

(d) Any firearm or other deadly weapon which has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership.

(e) Any firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, by a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section 830.31, or by a peace officer, as defined in Section 830.5, for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028. Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

(f) In those cases where a law enforcement agency has reasonable cause to believe that

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return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within *60* days of the *date of* seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within *90* days of the date of seizure of the firearm *or other deadly weapon*.

(g) The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements.

(h) If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and may award reasonable attorney's fees to the prevailing party.

(i) If the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Section 12028.

(j) If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

(k) The law enforcement agency, or the individual law enforcement officer, shall not be liable for any act in the good faith exercise of this section.

SEC. 3.5. Section 12028.5 of the Penal Code is amended to read:

§ 12028.5. (a) As used in this section, the following definitions shall apply:

(1) "Abuse" means any of the following:

(A) Intentionally or recklessly to cause or attempt to cause bodily injury.

(B) Sexual assault.

(C) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.

(D) To molest, attack, strike, stalk, destroy personal property, or violate the terms of a domestic violence protective order issued pursuant to Part 4 (commencing with Section 6300) of Division 10 of the Family Code.

(2) "Domestic violence" means abuse perpetrated against any of the following persons:

(A) A spouse or former spouse.

(B) A cohabitant or former cohabitant, as defined in Section 6209 of the Family Code.

(C) A person with whom the respondent is having or has had a dating or engagement relationship.

(D) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code).

(E) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.

(F) Any other person related by consanguinity or affinity within the second degree.

(3) "Deadly weapon" means any weapon, the possession or concealed carrying of which is prohibited by Section 12020.

(b) A sheriff, undersheriff, deputy sheriff, marshal, deputy marshal, or police officer of a city, as defined in subdivision (a) of Section 830.1, a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, a member of the University of California Police Department, as defined in subdivision (b) of Section 830.2, an officer listed in Section 830.6 while acting in the course and scope of his or her employment as a peace officer, a member of a California State University Police Department, as defined in subdivision (c) of Section 830.2, a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, a peace officer, as defined in subdivision (d) of Section 830.31, a peace officer, as defined in subdivisions (a) and (b) of Section 830.32, and a peace officer, as defined in Section 830.5, who is at the scene of a domestic violence incident involving a threat to human life or a physical assault, shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision (f), if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than five business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within five business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

(c) Any peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located.

(d) Any firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership.

(e) Any firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, by a peace officer of the

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tment of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, by a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section 830.31, or by a peace officer, as defined in Section 830.5, for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028. Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

(f) In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within 90 days of the date of seizure of the firearm or other deadly weapon.

(g) The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements.

(h) If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

(i) If the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Section 12028.

(j) If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

Italics indicate changes or additions. * * * indicate omissions.

(k) The law enforcement agency, or the individual law enforcement officer, shall not be liable for any act in the good faith exercise of this section.

SEC. 4. Section 12028.7 of the Penal Code is amended to read:

§ 12028.7. (a) Except where a procedure is already provided by existing law, or other provisions of law apply, when a firearm is taken into custody by a law enforcement officer, the officer shall issue the person who possessed the firearm a receipt describing the firearm, and listing any serial number or other identification on the firearm.

(b) The receipt shall indicate where the firearm may be recovered, ***any applicable time limit for recovery,*** and the date after which the owner or possessor may recover the firearm, provided however, that no firearm shall be held less than 48 hours, and no more than ***5 business days***. In any civil action or proceeding for the return of a firearm seized and not returned within ***5 business days***, pursuant to this section, the court shall award reasonable attorney's fees to the prevailing party.

(c) Nothing in this section is intended to displace any existing law regarding the seizure or return of firearms.

SEC. 5. Section 3.5 of this bill incorporates amendments to Section 12028.5 of the Penal Code proposed by both this bill and SB 1807. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2003, (2) each bill amends Section 12028.5 of the Penal Code, and (3) this bill is enacted after SB 1807, in which case Section 3 of this bill shall not become operative.

Italics indicate changes or additions. * * * indicate omissions.

CHAPTER 833

(Senate Bill No. 1807)

An act to amend Section 12028.5 of the Penal Code, relating to firearms.

[Approved by Governor September 23, 2002. Filed with Secretary of State September 24, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1807, Chesbro. Firearms.

Existing law requires specified law enforcement officers who are at the scene of a domestic violence incident involving a threat to human life or physical assault to take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual search, as necessary for the protection of the peace officer or other persons present. Existing law details a procedure for return or disposal of these weapons, depending on specified circumstances.

This bill would also require a peace officer to take custody of a firearm or other deadly weapon in these circumstances if it were discovered pursuant to any other lawful search, and would subject a weapon so taken to this same procedure. By imposing new duties on peace officers, the bill would impose a state-mandated local program.

Existing law provides for the return of the weapon within a specified period. However, a law enforcement agency with reasonable cause to believe that the return of a firearm or other deadly weapon taken pursuant to these provisions would be likely to result in endangering the victim or the person reporting the assault or threat, may initiate a petition in superior court to determine if a firearm or other deadly weapon should be returned. Existing law provides that a court shall order the return of the firearm or other weapon unless shown by clear and convincing evidence that the return would result in endangering the victim or the person reporting the assault.

This bill would require an order returning the firearm or other weapon unless shown by a preponderance of the evidence that the return would result in endangering the victim or the person reporting the assault.

Under existing law, if, at this hearing, the court does not order the return of the weapon, the owner or person who had lawful possession of it may petition for a 2nd hearing within 12 months.

This bill would specify that, at the 2nd hearing, unless it is shown by clear and convincing evidence that the return of the weapon would endanger the victim or the person reporting the assault or threat, the court shall order the return of the weapon and award reasonable attorney's fees to the prevailing party.

Under existing law, weapons taken pursuant to these procedures must be returned, auctioned off or destroyed, and are subject to certain storage requirements.

By expanding the number of weapons to which these requirements apply, this bill would impose a state-mandated local program.

This bill would also make technical changes.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

Italics indicate changes or additions. * * * indicate omissions.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

This bill would incorporate changes to Section 12028.5 of the Penal Code proposed by AB 2695 that would become operative if both bills become effective on or before January 1, 2003, and this bill is enacted after AB 2695.

The people of the State of California do enact as follows:

SECTION 1. Section 12028.5 of the Penal Code is amended to read:

§ 12028.5. (a) As used in this section, the following definitions shall apply:

(1) "Abuse" means any of the following:

(A) Intentionally or recklessly to cause or attempt to cause bodily injury.

(B) Sexual assault.

(C) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.

(D) To molest, attack, strike, stalk, destroy personal property, or violate the terms of a domestic violence protective order issued pursuant to Part 4 (commencing with Section 6300) of Division 10 of the Family Code.

(2) "Domestic violence" means abuse perpetrated against any of the following persons:

(A) A spouse or former spouse.

(B) A cohabitant or former cohabitant, as defined in Section 6209 of the Family Code.

(C) A person with whom the respondent is having or has had a dating or engagement relationship.

(D) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code).

(E) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.

(F) Any other person related by consanguinity or affinity within the second degree.

(3) "Deadly weapon" means any weapon, the possession or concealed carrying of which is prohibited by Section 12020.

(b) A sheriff, undersheriff, deputy sheriff, marshal, deputy marshal, or police officer of a city, as defined in subdivision (a) of Section 830.1, a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, a member of the University of California Police Department, as defined in subdivision (b) of Section 830.2, an officer listed in Section 830.6 while acting in the course and scope of his or her employment as a peace officer, a member of a California State University Police Department, as defined in subdivision (c) of Section 830.2, a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, a peace officer, as defined in subdivision (d) of Section 830.31, a peace officer, as defined in subdivisions (a) and (b) of Section 830.32, and a peace officer, as defined in Section 830.5, who is at the scene of a domestic violence incident involving a threat to human life or a physical assault, shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the

Italics indicate changes or additions. * * * indicate omissions.

ire[illegible]r other deadly weapon can be recovered and the date after which the owner or o[illegible]r can recover the firearm or other deadly weapon. No firearm or other deadly veapon shall be held less than 48 hours. Except as provided in subdivision (f), if a firearm r other deadly weapon is not retained for use as evidence related to criminal charges rought as a result of the domestic violence incident or is not retained because it was legally possessed, the firearm or other deadly weapon shall be made available to the wner or person who was in lawful possession 48 hours after the seizure or as soon ıereafter as possible, but no later than 72 hours after the seizure. In any civil action or roceeding for the return of firearms or ammunition or other deadly weapon seized by any tate or local law enforcement agency and not returned within 72 hours following the ıitial seizure, except as provided in subdivision (d), the court shall allow reasonable ttorney's fees to the prevailing party.

(c) Any peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who ıkes custody of a firearm or deadly weapon pursuant to this section shall deliver the rearm within 24 hours to the city police department or county sheriff's office in the ırisdiction where the college or school is located.

(d) Any firearm or other deadly weapon that has been taken into custody that has been [illegible] shall be restored to the lawful owner, as soon as its use for evidence has been [illegible] upon his or her identification of the firearm or other deadly weapon and proof of wnership.

(e) Any firearm or other deadly weapon taken into custody and held by a police, niversity police, or sheriff's department or by a marshal's office, by a peace officer of the epartment of the California Highway Patrol, as defined in subdivision (a) of Section 30.2, by a peace officer of the Department of Parks and Recreation, as defined in ıbdivision (f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section 30 [illegible]r by a peace officer, as defined in Section 830.5, for longer than 12 months and ot [illegible]vered by the owner or person who has lawful possession at the time it was taken ıto custody, shall be considered a nuisance and sold or destroyed as provided in ıbdivision (c) of Section 12028. Firearms or other deadly weapons not recovered within 2 months due to an extended hearing process as provided in subdivision (j), are not ıbject to destruction until the court issues a decision, and then only if the court does not rder the return of the firearm or other deadly weapon to the owner.

(f) In those cases in which a law enforcement agency has reasonable cause to believe ıat the return of a firearm or other deadly weapon would be likely to result in endangering ıe [illegible]im or the person reporting the assault or threat, the agency shall advise the owner f the firearm or other deadly weapon, and within 30 days of the seizure, initiate a petition ı superior court to determine if the firearm or other deadly weapon should be returned. he law enforcement agency may make an ex parte application stating good cause for an rder extending the time to file a petition. Including any extension of time granted in esponse to an ex parte request, a petition must be filed within 60 days of the date of eizure of the firearm.

(g) The law enforcement agency shall inform the owner or person who had lawful ossession of the firearm or other deadly weapon, at that person's last known address by egistered mail, return receipt requested, that he or she has 30 days from the date of receipt f the notice to respond to the court clerk to confirm his or her desire for a hearing, and ıat the failure to respond shall result in a default order forfeiting the confiscated firearm r other deadly weapon. For the purposes of this subdivision, the person's last known ddress shall be presumed to be the address provided to the law enforcement officer by ıat person at the time of the family violence incident. In the event the person whose rearm or other deadly weapon was seized does not reside at the last address provided to ıe [illegible]cy, the agency shall make a diligent, good faith effort to learn the whereabouts of ıe [illegible]on and to comply with these notification requirements.

(h) If the person requests a hearing, the court clerk shall set a hearing no later than 30

Italics indicate changes or additions. * * * indicate omissions.

Exhibit 4
Page 4 of 6

days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

(i) If the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Section 12028.

(j) If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

(k) The law enforcement agency, or the individual law enforcement officer, shall not be liable for any act in the good faith exercise of this section.

SEC. 1.5. Section 12028.5 of the Penal Code is amended to read:

§ 12028.5. (a) As used in this section, the following definitions shall apply:

(1) "Abuse" means any of the following:

(A) Intentionally or recklessly to cause or attempt to cause bodily injury.

(B) Sexual assault.

(C) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.

(D) To molest, attack, strike, stalk, destroy personal property, or violate the terms of a domestic violence protective order issued pursuant to Part 4 (commencing with Section 6300) of Division 10 of the Family Code.

(2) "Domestic violence" means abuse perpetrated against any of the following persons:

(A) A spouse or former spouse.

(B) A cohabitant or former cohabitant, as defined in Section 6209 of the Family Code.

(C) A person with whom the respondent is having or has had a dating or engagement relationship.

(D) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code).

(E) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.

(F) Any other person related by consanguinity or affinity within the second degree.

(3) "Deadly weapon" means any weapon, the possession or concealed carrying of which is prohibited by Section 12020.

(b) A sheriff, undersheriff, deputy sheriff, marshal, deputy marshal, or police officer of a city, as defined in subdivision (a) of Section 830.1, a peace officer of the Department of

California Highway Patrol, as defined in subdivision (a) of Section 830.2, a member of the University of California Police Department, as defined in subdivision (b) of Section 830.2, an officer listed in Section 830.6 while acting in the course and scope of his or her employment as a peace officer, a member of a California State University Police Department, as defined in subdivision (c) of Section 830.2, a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, a peace officer, as defined in subdivision (d) of Section 830.31, a peace officer, as defined in subdivisions (a) and (b) of Section 830.32, and a peace officer, as defined in Section 830.5, who is at the scene of a domestic violence incident involving a threat to human life or a physical assault, shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual ***or other lawful search as necessary for the protection of the peace officer or other persons present. Upon taking*** custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, ***the time limit for recovery as required by this section,*** and the date after which the owner or possessor can recover the firearm or other deadly weapon. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision ***(f)***, if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than *5* ***business days*** after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within *5* ***business days*** following the initial seizure, except as provided in subdivision ***(d)***, the court shall allow reasonable attorney's fees to the prevailing party.

(c) Any peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located.

(d) Any firearm or other deadly weapon ***that*** has been taken into custody that has been seized shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership.

(e) Any firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, by a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section 830.31, or by a peace officer, as defined in Section 830.5, for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028. Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

(f) In those cases ***in which*** a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within ***60*** days of the ***date of*** seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be

returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension granted in response to an ex parte request, a petition must be filed within ***90*** days of the date of seizure of the firearm ***or other deadly weapon***.

(g) The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements.

(h) If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by ***a preponderance of the*** evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

(i) If the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Section 12028.

(j) If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. ***If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.*** If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

(k) The law enforcement agency, or the individual law enforcement officer, shall not be liable for any act in the good faith exercise of this section.

SEC. 2. Section 1.5 of this bill incorporates amendments to Section 12028.5 of the Penal Code proposed by both this bill and AB 2695. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2003, (2) each bill amends Section 12028.5 of the Penal Code, and (3) this bill is enacted after AB 2695, in which case Section 1 of this bill shall not become operative.

SEC. 3. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Italics indicate changes or additions. * * * indicate omissions.

CHAPTER 377

(Senate Bill No. 1265)

An act to amend Section 6228 of the Family Code, relating to domesti c violence.

[Approved by Governor September 4, 2002. Filed with Secretary of State September 5, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1265, Alpert. Domestic violence incident report.

Existing law requires state and local law enforcement agencies to provide one copy of all domestic violence incident reports, one copy of all domestic violence incident report face sheets, or both, to a victim of domestic violence, upon request. Existing law requires persons requesting these copies to present state or local law enforcement with identification at the time a request is made.

This bill would also require state and local law enforcement agencie s to provide those documents to a representative of the victim, as defined, if the victim is deceased. The bill would require any person requesting those documents to present his or her identification, as specified, and, if that person is a representative of the victim, a certified copy of the death certificate or other satisfactory evidence of the death of the victim. By imposing additional duties on local officials, the bill would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 6228 of the Family Code is amended to read:

§ 6228. (a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, ***or to his or her representative if the victim is deceased, as defined in subdivision (g),*** upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.

(b) A copy of a domestic violence incident report face sheet shall be made available during regular business hours to a victim of domestic violence ***or his or her representative*** no later than 48 hours after being requested by the victim ***or his or her representative***, unless the state or local law enforcement agency informs the victim ***or his or her representative*** of the reasons why, for good cause, the domestic violence incident report face sheet is not available, in which case the domestic violence incident report face sheet shall be made available to the victim ***or his or her representative*** no later than five working days after the request is made.

(c) A copy of the domestic violence incident report shall be made available during regular business hours to a victim of domestic violence ***or his or her representative*** no

Italics indicate changes or additions. * * * indicate omissions.

later than five working days after being requested by a victim *or his or her representative*, unless the state or local law enforcement agency informs the victim *or his or her representative* of the reasons why, for good cause, the domestic violence incident report is not available, in which case the domestic violence incident report shall be made available to the victim *or his or her representative* no later than 10 working days after the request is made.

(d) *Any person* requesting copies under this section shall present state or local law enforcement with *his or her identification, such as a current, valid driver's license, a state-issued* identification *card, or a passport and, if the person is a representative of the victim, a certified copy of the death certificate or other satisfactory evidence of the death of the victim* at the time a request is made.

(e) This section shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incidence report.

(f) This section shall be known, and may be cited, as the Access to Domestic Violence Reports Act of 1999.

(g)(1) For purposes of this section, a representative of the victim means any of the following:

(A) The surviving spouse.

(B) A surviving child of the decedent who has attained 18 years of age.

(C) A domestic partner, as defined in subdivision (a) of Section 297.

(D) A surviving parent of the decedent.

(E) A surviving adult relative.

(F) The public administrator if one has been appointed.

(2) A representative of the victim does not include any person who has been convicted of murder in the first degree, as defined in Section 189 of the Penal Code, of the victim, or any person identified in the incident report face sheet as a suspect. Domestic violence incident report face sheets may not be provided to a representative of the victim unless the representative presents his or her identification, such as a current, valid driver's license, a state-issued identification card, or a passport and a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time of the request.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

E OF CALIFORNIA
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MMISSION ON STATE MANDATES
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October 5, 2000

Mr. Leonard Kaye
County of Los Angeles
Auditor-Controller's Office
500 West Temple Street, Room 603
Los Angeles, CA 90012

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

RE: Claimant's Amendment to Test Claim/Draft Staff Analysis
Mentally Disordered Offenders' Extended Commitment Proceedings
CSM 98-TC-09
Penal Code Sections 2970, 2972, and 2972.1
Added and Amended by Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858; Statutes of 1988, Chapters 657 and 658; Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435; and Statutes of 2000, Chapter 324
County of Los Angeles, Claimant

Test Claim Amendment

On September 19, 2000 the claimant filed an amendment to this test claim with the Commission. The amendment added Penal Code sections 2972 and 2972.1 (as added or amended by Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; Statutes of 1989, Chapter 228; and Statutes of 2000, Chapter 324) to the test claim. These code sections establish the procedures for the court hearing on the petition to extend the commitment of mentally disordered offenders beyond their parole termination date, and establish the rights of the offender, including the right to a trial by jury and the appointment of a public defender for indigent offenders.

Pursuant to Government Code section 17557, subdivision (c), the claimant may amend the 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.

Staff finds that the amendment, which adds Penal Code sections 2972 and 2972.1, substantially relates to the original test claim filing. Accordingly, staff has analyzed these code sections in the draft staff analysis, a copy of which is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the test claim amendment and the draft staff analysis by **November 6, 2000**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties (on the mailing list), and to be accompanied by a proof of service on those parties.

If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c), of the Commission's regulations.

Hearing

This test claim is set for hearing on **November 30, 2000** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will also appear. If you would like to request postponement of the hearing, please refer to section 1183.01 (c) of the Commission's regulations.

Please contact Camille Shelton, Staff Counsel, with questions regarding the above.

Sincerely,

Paula Higashi
Executive Director

c. Test Claim Amendment, and Draft Staff Analysis and Supporting Documents

Court of Appeal, Third District, California.

DEPARTMENT OF FINANCE, Plaintiff and Appellant,

v.

COMMISSION ON STATE MANDATES,

Defendant and Respondent.

Kern High School District et al., Real Parties in Interest and Respondents.

No. C037645.

July 17, 2002.

122 Cal.Rptr.2d 447
167 Ed. Law Rep. 283, 2 Cal. Daily Op. Serv. 6362, 2002 Daily Journal D.A.R. 7992
Review Granted
Previously published at: 100 Cal.App.4th 243
(Cal.Const. art. 6, s 12; Cal. Rules of Court, Rules 28, 976, 977, 979)
(Cite as: 122 Cal.Rptr.2d 447)

Court of Appeal, Third District, California.

DEPARTMENT OF FINANCE, Plaintiff and Appellant,
v.
COMMISSION ON STATE MANDATES,
Defendant and Respondent.
Kern High School District et al., Real Parties in Interest and Respondents.

No. C037645.

July 17, 2002.

Two school districts and one county filed a test claim with the **Commission on State Mandates** for a determination of whether two state statutes constituted reimbursable state mandates. The Commission determined they were. State, through its Department of Finance, brought an administrative mandate proceeding to review the Commission's decision. The Superior Court, Sacramento County, No. 00CS00866, Ronald B. Robie, J., denied petition. State appealed. The Court of Appeal, Davis, Acting P.J., held that: (1) the statutes concerned "programs" within meaning of state mandate laws; (2) statutes specified a "higher level of service for an existing program," within meaning of state mandate laws; but (3) to determine whether statutes created a "mandate," Commission was required to consider whether test claimants had a reasonable alternative or a true choice not to participate in the educational programs at issue, not whether they were legally compelled to do so; abrogating *County of Contra Costa v. State of California*, 177 Cal.App.3d 62, 222 Cal.Rptr. 750.

Reversed and remanded.

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Camille Shelton, Sacramento, for Defendant and Respondent.

Jo Anne Sawyerknoll, Sacramento, and Jose A. Gonzales, San Diego, for Real Party in Interest and Respondent San Diego Unified School District.

No appearance by Real Parties in Interest and Respondents Kern High School District and County of Santa Clara.

DAVIS, Acting P.J.

The question in this appeal is whether two state statutes--requiring local school site councils and advisory committees for certain educational programs to prepare and post an agenda for their meetings and to provide for public comment on agenda items--constitute a reimbursable state mandate under article XIII B, section 6 of California's Constitution. We agree with the trial court that these statutes specify a "higher level of service" under state mandate principles. [FN1] We also agree with the trial court that a state mandate is not limited to situations of *legal* compulsion. We construe state mandate as also extending to situations where the local governmental entity has no reasonable alternative to the state scheme, or has no true choice but to participate in it. The **Commission on State Mandates** (the Commission) did not consider these issues. We will therefore remand this matter to the Commission for it to determine whether the test claimants have a reasonable alternative or a true choice not to participate in the educational programs at issue, and thus a reasonable alternative to paying the higher costs associated with the higher level of service specified in the two challenged statutes. In light of this remand, we will reverse the trial court's judgment that upheld the Commission's decision finding a state mandate.

FN1. California Constitution, article XIII B, section 6; Government Code section 17514.

BACKGROUND

[1] In 1978, California voters adopted Proposition 13, which added article XIII A (Article XIII A) to the state Constitution. This measure limits the power of state and local governments to tax. [FN2] In 1979, the state voters added article XIII B to the

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Constitution (Article XIII B). This measure limits the power of state and local governments to spend.. [FN3] These two constitutional measures work in tandem; their goal is to protect California residents from excessive government taxation and spending.. [FN4]

FN2. California Constitution, article XIII A; see *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 80, 61 Cal.Rptr.2d 134, 931 P.2d 312 (*County of San Diego*).

FN3. See *County of San Diego, supra*, 15 Cal.4th at page 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.

FN4. *County of San Diego, supra*, 15 Cal.4th at page 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.

[2] Article XIII B includes section 6 (section 6 or Article XIII B, section 6), which sets forth the concept of reimbursable state mandates. With certain exceptions not relevant here, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government ["local government" includes school districts], the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service...." [FN5] "Section 6 recognizes that articles XIII A and XIII B severely restrict the taxing and spending *450 powers of local governments. [Citation.] 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" in light of Articles XIII A and XIII B. [FN6]

FN5. Article XIII B, section 6; see also Article XIII B, section 8, subdivision (d).

FN6. *County of San Diego, supra*, 15 Cal.4th at page 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.

[3] A reimbursable state mandate does not equate to any "additional cost" that a state law may require a local government to bear. [FN7] The reimbursable mandate arises only when the state imposes on a local government a new program of governmental services or an increased level of service under an existing program. [FN8]

FN7. *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 55-57, 233 Cal.Rptr. 38, 729 P.2d 202 (*County of Los Angeles*); *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 277, 99 Cal.Rptr.2d 333 (*City of El Monte*).

FN8. *City of El Monte, supra*, 83 Cal.App.4th at page 277, 99 Cal.Rptr.2d 333; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835, 244 Cal.Rptr. 677, 750 P.2d 318 (*Lucia Mar*); see also *County of Los Angeles, supra*, 43 Cal.3d at page 56, 233 Cal.Rptr. 38, 729 P.2d 202.

In the Government Code, the Legislature has set forth the procedure for determining whether a state law imposes state-mandated costs on a school district or other local agency under Article XIII B, section 6. [FN9] Pursuant to that procedure, two school districts (San Diego Unified and Kern High) and one county (Santa Clara) filed a "test claim" with the Commission. [FN10] Kern High and Santa Clara did not appear in the trial court proceedings, and we will refer to the test claimants as such or simply as San Diego Unified.

FN9. Government Code section 17500 et seq.; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-333, 285 Cal.Rptr. 66, 814 P.2d 1308 (*Kinlaw*).

FN10. Government Code sections 17521, 17551, subdivision (a).

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The test claim concerned two statutes: Government Code section 54952, as amended by Statutes 1993, chapter 1138 (this measure operated from April 1, 1994 to July 21, 1994, for the school site councils and advisory committees at issue here); and Education Code section 35147, as added by Statutes 1994, chapter 239, as an urgency measure (effective from July 21, 1994, onward, for those councils and committees). These two statutes will be referred to as the Test Claim statutes or the two Test Claim statutes.

The 1993 amendment to Government Code section 54952 redefined the "legislative body" that must comply with the open meeting requirements of the Ralph M. Brown Act (the Brown Act), [FN11] including the requirement imposed by Government Code section 54954.2 to prepare and post an agenda. As amended by the 1993 legislation, section 54952 provides in relevant part:

FN11. See Government Code section 54950.5.

"As used in this chapter, 'legislative body' means:

"(a) The governing body of a local agency or any other local body created by state or federal statute.

"(b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body...."

Education Code section 35147 requires nine designated school site councils and advisory committees to comply with certain notice, agenda, and public comment requirements, but otherwise exempts them *451 from the Brown Act and other open meeting acts. Section 35147 specifies in relevant part:

"(a) Except as specified in this section, any meeting of the councils or committees specified in subdivision (b) is exempt from the provisions of this article, the Bagley-Keene Open Meeting Act ..., and the Ralph M. Brown Act....

"(b) The councils and schoolsite advisory committees established pursuant to [Education Code] Sections 52012, 52065, 52176, and 52852, subdivision (b) of Section 54425, Sections 54444.2, 54724, and 62002.5, and committees formed pursuant to Section 11503 or [former] Section 2604 of Title 25 of the United States Code, are subject to this section.

"(c) Any meeting held by a council or committee specified in subdivision (b) shall be open to the public and any member of the public shall be able to address the council or committee during the meeting on any item within the subject matter jurisdiction of the council or committee. Notice of the meeting shall be posted at the schoolsite, or other appropriate place accessible to the public, at least 72 hours before the time set for the meeting. The notice shall specify the date, time, and location of the meeting and contain an agenda describing each item of business to be discussed or acted upon. The council or committee may not take any action on any item of business unless that item appeared on the posted agenda or unless the council or committee members present, by unanimous vote, find that there is a need to take immediate action and that the need for action came to the attention of the council or committee subsequent to the posting of the agenda. Questions or brief statements made at a meeting by members of the council, committee, or public that do not have a significant effect on pupils or employees in the school or school district or that can be resolved solely by the provision of information need not be described on an agenda as items of business. If a council or committee violates the procedural meeting requirements of this section and upon demand of any person, the council or committee shall reconsider the item at its next meeting, after allowing for public input on the item.

"(d) Any materials provided to a schoolsite council shall be made available to any member of the public who requests the materials pursuant to the California Public Records Act...."

The nine school site councils and advisory committees specified in Education Code section 35147, subdivision (b), were, save for one, established by statutes enacted in the 1970's and 1980's as part of the following programs: the School Improvement Plan (a general program that disburses money across all aspects of school operation and

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performance; Educ.Code, § § 52012, 52015); the Native American Indian Education Program (Educ.Code, § 52065); the Chacon-Moscone Bilingual-Bicultural Education Act of 1976 (Educ.Code, § § 52160, 52176); the School-Based Program Coordination Act (to coordinate various categorical aid programs; Educ.Code, § § 52850, 52852); the McAteer Act (compensatory education program--for programs beyond regular education program; Educ.Code, § § 54403, 54425, subd. (b)); the migrant education program (Educ.Code, § 54444.2); the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act (to address truancy and dropout issues; Educ.Code, § § 54720, 54724); the Program[ ] to Encourage Parental Involvement (Educ.Code, § 11503, enacted 1990); and the federal Indian Education Program (see former 25 U.S.C. § 2604; now see 20 U.S.C. § 7801 et seq.).

*452 In the test claim, San Diego Unified alleged that the Test Claim statutes imposed certain open meeting requirements on these school site councils and advisory committees, constituting reimbursable state mandates. The Commission agreed. It found the statutes constituted reimbursable state mandates for the costs of preparing specified meeting agendas, posting those agendas, and providing the opportunity for the public to address agenda items.

Pursuant to Government Code section 17559, the state Department of Finance (the State) brought an administrative mandate proceeding to review the Commission's decision. [FN12] The trial court agreed with the Commission, stating: "Two primary issues are raised in this matter. The first issue is whether the 1993 amendments to the Brown Act [i.e., to Government Code section 54952] and the 1994 enactment of ... section 35147 mandate a new program or higher level of service. The Court concludes that they do. The second issue is whether a reimbursable state mandate is created only when an advisory council or committee which is subject to the Brown Act is required by state law. The Court concludes that it is not. [¶] The petition for writ of mandate is DENIED."

FN12. Government Code section 17559, subdivision (b).

These are the two issues before us as well. Government Code section 17559 requires that the trial court review the Commission's decision under the substantial evidence standard; where the trial court applies this standard, we are generally confined to inquiring whether substantial evidence supports that court's decision. [FN13] However, we independently review the trial court's "legal conclusions about the meaning and effect of constitutional and statutory provisions." [FN14]

FN13. *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810, 53 Cal.Rptr.2d 521 (*City of San Jose*).

FN14. *City of San Jose, supra,* 45 Cal.App.4th at page 1810, 53 Cal.Rptr.2d 521.

DISCUSSION

1. New Program or Higher Level of Service for an Existing Program

[4][5] A reimbursable state mandate is created only when the state "mandates" a "new program" or a "higher level of service" for an existing program on any local government, including a school district. [FN15] "Program" has its commonly understood meaning: a program carries out "the governmental function of providing services to the public"; or it is a law "which, to implement a state policy, impose[s] unique requirements on local governments and do[es] not apply generally to all residents and entities in the state." [FN16]

FN15. Article XIII B, sections 6, 8, subdivision (d); Government Code section 17514; *Lucia Mar, supra,* 44 Cal.3d at page 835, 244 Cal.Rptr. 677, 750 P.2d 318; *City of El Monte, supra,* 83 Cal.App.4th at page 277, 99 Cal.Rptr.2d 333.

FN16. *County of Los Angeles, supra,* 43 Cal.3d at page 56, 233 Cal.Rptr. 38, 729 P.2d 202.

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In this part of the opinion, we address the issue of whether the two Test Claim statutes reflect a "new program" or a "higher level of service" for an existing program. In the next part, we confront the issue of whether the two statutes "mandate" the program services.

The parties spend considerable time on whether the school site councils and advisory bodies were "legislative bodies" subject to the Brown Act before the Test Claim statutes, and thus whether the Test Claim statutes involve a "new program." *453 We need not resolve this matter. Even assuming the school site councils and advisory committees were subject to the Brown Act before the advent of the two Test Claim statutes, these two statutes reflect a "higher level of service" for existing programs. [FN17]

FN17. Article XIII B, section 6; Government Code section 17514; see *City of El Monte, supra,* 83 Cal.App.4th at page 277, 99 Cal.Rptr.2d 333.

[6] As a preliminary matter, we note that we are dealing with "programs" within the meaning of the state mandate laws. The provision of educational services--as carried out by the school site councils and advisory committees at issue--is certainly a governmental program, as that term is commonly understood. The two Test Claim statutes, as well, set forth unique requirements on local government (school districts) to further the state policy of open public meetings; these requirements do not apply generally to residents and entities in the state.

On the issue of "higher level of service," the 1993 legislative package that redefined "legislative body" for Brown Act purposes in section 54952 also repealed a Brown Act statute that applied to advisory bodies of local agencies, including advisory bodies of school districts. [FN18] The repealed Brown Act statute was Government Code section 54952.3; as enacted, it provided in relevant part:

FN18. Statutes 1993, chapter 1138, sections 3, 5, pages 6387-6388; see Government Code section 54951.

"As used in this chapter 'legislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a governing body of a local agency.

"Meetings of such advisory commissions, committees or bodies ... shall be open and public, and *notice thereof must be delivered personally or by mail at least 24 hours before the time of such meeting to each person who has requested, in writing, notice of such meeting.*

"If the advisory commission, committee or body elects to provide for the holding of regular meetings, *it shall provide by bylaws, or by whatever other rule is utilized by that advisory body for the conduct of its business, for the time and place for holding such regular meetings. No other notice of regular meetings is required....* " [FN19]

FN19. Former Government Code section 54952.3 (added by Stats.1968, ch. 1297, § 1, p. 2444 [note: amended nonsubstantively by Stats.1975, ch. 959, § 7, p. 2241, and by Stats.1981, ch. 968, § 26, p. 3694]), italics added.

The State concedes that all of the school site councils and advisory committees at issue here are advisory bodies. This is borne out by their similar treatment as advisory entities within Education Code section 35147.

The two Test Claim statutes reflect a higher level of service for the existing programs served by these councils and committees than what former Government Code section 54952.3 specified. The Test Claim statutes require that meeting agendas be prepared and posted at least 72 hours before the meeting, and that the public be allowed to address agenda items. [FN20] These requirements are above *454 those specified in the italicized portions of former Government Code section 54952.3, set forth *ante.* No party has disputed that the increased amount of costs involving this higher level of service is significant and surpasses the statutory minimum cost mandate set forth in Government Code section

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17564.

FN20. See Government Code section 54954.2, imposing such Brown Act requirements on the advisory bodies at issue here from April 1, 1994 to July 21, 1994; see also Education Code section 35147, imposing such requirements on these advisory bodies from July 21, 1994, onward.

We conclude that the Test Claim statutes specify a "higher level of service" for existing programs. We now turn to the thornier issue: whether these two statutes "mandate" a higher level of service.

2. "Mandate" a Higher Level of Service

[7] For there to be a reimbursable state mandate here, the Constitution and Government Code require that the Test Claim statutes "mandate" a higher level of service. [FN21]

FN21. Article XIII B, section 6; Government Code section 17514.

The State argues that the school site councils and advisory committees referred to in the Test Claim statutes serve categorical aid programs that school districts participate in either voluntarily or as a condition to receive state or federal funds. From this, the State concludes that, *as a matter of law,* where a school district participates in a state statutory program voluntarily or conditionally, the State may impose reasonable requirements on the district without providing a reimbursable state mandate, because the State has not *legally mandated* such program participation. While the State's position looks strong on the surface, there are cracks in its foundation.

The State's position finds support in a 1984 appellate court decision, *City of Merced v. State of California.* [FN22] The question there was whether a new state statute that required compensation for business goodwill in local eminent domain proceedings constituted a reimbursable state mandate under statutory law. The court said no, reasoning "that whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain.... Thus, payment for loss of goodwill is not a state-mandated cost." [FN23]

FN22. *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 200 Cal.Rptr. 642 (*City of Merced*).

FN23. *City of Merced, supra,* 153 Cal.App.3d at page 783, 200 Cal.Rptr. 642.

Two months after *City of Merced,* this court, in *City of Sacramento v. State of California* (*Sacramento I*), [FN24] employed similar reasoning. The question in *Sacramento I* was whether a state law requiring local public employees to be covered by the state unemployment insurance law constituted a state mandate under Article XIII B, section 6, and statutory law. [FN25] The State asserted that it was only complying with a federal requirement rather than imposing a state mandate. [FN26] The federal component of the unemployment insurance system induced states to cover local public employees, by making the states incur substantial political and economic *455 detriment for not doing so. [FN27] We looked at the definition of a federal mandate in Article XIII B, section 9, subdivision (b), which directs compliance "without discretion" or "which unavoidably make[s] the provision of existing services more costly" (costs of federal mandates are not within Article XIII B's spending limits for state and local governments). A federal mandate, we reasoned, is one in which the mandated governmental entity "has *no discretion* to refuse." [FN28] We concluded that while it was economically and politically detrimental for the State not to comply with the federal law, the State still had the *legal* discretion not to do so; however, the local government had no discretion whether to comply with the state statute. [FN29] Thus, the state statute constituted a reimbursable state mandate.

FN24. *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 203 Cal.Rptr. 258 (*Sacramento I*); see also *County of Contra Costa v. State of*

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California (1986) 177 Cal.App.3d 62, 79-80, footnote 10, 222 Cal.Rptr. 750 (*County of Contra Costa*).

FN25. *Sacramento I, supra,* 156 Cal.App.3d at page 186, 203 Cal.Rptr. 258.

FN26. *Sacramento I, supra,* 156 Cal.App.3d at page 186, 203 Cal.Rptr. 258.

FN27. *Sacramento I, supra,* 156 Cal.App.3d at page 187, 203 Cal.Rptr. 258.

FN28. *Sacramento I, supra,* 156 Cal.App.3d at page 197, 203 Cal.Rptr. 258.

FN29. *Sacramento I, supra,* 156 Cal.App.3d at pages 196-197, 203 Cal.Rptr. 258.

In 1986, in *County of Contra Costa,* this court agreed with *City of Merced* that the state statute requiring the payment of business goodwill in eminent domain proceedings did not constitute a state-mandated cost. [FN30] We noted that "we employed analogous reasoning in [*Sacramento I*]." [FN31] We characterized *Sacramento I* as follows: "There the city contended that a state law requiring public employees to be covered by the state unemployment insurance law constituted a state mandate. The state countered that it was only complying with a federal requirement.... We noted that federal law provided financial incentives and that it would have been politically unpalatable for the state to refuse to extend coverage to public employees, but nonetheless the decision was optional with the state.... The same reasoning applies here: the decision to proceed in eminent domain is optional with the local government. Since the state does not mandate that the local agency incur the costs it claims, the agency is not entitled to reimbursement from the state." [FN32]

FN30. *County of Contra Costa, supra,* 177 Cal.App.3d at pages 79-80 & footnote 10, 222 Cal.Rptr. 750.

FN31. *County of Contra Costa, supra,* 177 Cal.App.3d at page 79, footnote 10, 222 Cal.Rptr. 750.

FN32. *County of Contra Costa, supra,* 177 Cal.App.3d at pages 79-80, footnote 10, 222 Cal.Rptr. 750.

In 1990, the state Supreme Court, in *City of Sacramento v. State of California* (*Sacramento II*), [FN33] rejected our reasoning in *Sacramento I.* The issue of state mandate in *Sacramento II* was the same as in *Sacramento I,* and again implicated the question of federal mandate. [FN34] *Sacramento II* did not directly review *Sacramento I,* but involved litigation arising from a *Sacramento I* remand. [FN35]

FN33. *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522 (*Sacramento II*).

FN34. *Sacramento II, supra,* 50 Cal.3d at pages 57, 70, 266 Cal.Rptr. 139, 785 P.2d 522.

FN35. *Sacramento II, supra,* 50 Cal.3d at pages 59-60, 266 Cal.Rptr. 139, 785 P.2d 522; see *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1581, footnote 8, 15 Cal.Rptr.2d 547 (*Hayes*).

As in *Sacramento I,* the argument in *Sacramento II* supporting a narrower view of mandate was that the words "without discretion" and "unavoidably" in the Article XIII B, section 9, subdivision (b) definition of federal mandate require that there be clear *legal* compulsion for there to be a *456 federal mandate. [FN36] The argument supporting a broader view of mandate countered that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse, and thus there

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was a federal mandate because of *practical* compulsion. [FN37]

FN36. *Sacramento II, supra,* 50 Cal.3d at page 71, 266 Cal.Rptr. 139, 785 P.2d 522.

FN37. *Sacramento II, supra,* 50 Cal.3d at page 71, 266 Cal.Rptr. 139, 785 P.2d 522.

The *Sacramento II* court adopted the broader view of mandate, disagreeing with our adoption of the narrower view in *Sacramento I.* In doing so, the high court noted that the vast bulk of cost-producing federal influence on state and local government is by inducement or incentive rather than by direct legal compulsion. [FN38] The court noted that "certain regulatory standards imposed by the federal government under 'cooperative federalism' [i.e., federal-state carrot and stick] schemes are coercive on the states and localities in every practical sense." [FN39] The test for determining whether there is a federal mandate, *Sacramento II* concluded, is whether compliance with federal standards "is a matter of true choice," that is, whether participation in the federal program "is truly voluntary." [FN40] *Sacramento II* went on to say: "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." [FN41]

FN38. *Sacramento II, supra,* 50 Cal.3d at page 73, 266 Cal.Rptr. 139, 785 P.2d 522.

FN39. *Sacramento II, supra,* 50 Cal.3d at pages 73-74, 266 Cal.Rptr. 139, 785 P.2d 522.

FN40. *Sacramento II, supra,* 50 Cal.3d at page 76, 266 Cal.Rptr. 139, 785 P.2d 522; see also *Hayes, supra,* 11 Cal.App.4th at pages 1581-1582, 15 Cal.Rptr.2d 547.

FN41. *Sacramento II, supra,* 50 Cal.3d at page 76, 266 Cal.Rptr. 139, 785 P.2d 522.

Another state Supreme Court decision that has some bearing on the question of state mandate in terms of legal versus practical compulsion is *Lucia Mar.* [FN42] The issues there were whether a state statute that required school districts to contribute part of the cost of educating disabled pupils at state schools constituted a "new program" for the districts, and whether the districts were "mandated" by the state to make these contributions. [FN43] The argument in *Lucia Mar* that there was no state mandate was that the school districts had the option, under another state statute, to provide a local program for disabled children, to send them to private schools, or to refer them to the state schools. [FN44] The argument in favor of a state mandate was that the districts " 'had no other reasonable alternative than to utilize the services of the state[ ] schools, as they [were] the least expensive alternative in educating [disabled] children.' " [FN45] Since the Commission in *Lucia Mar* had concluded that *457 the state statute at issue did not specify a "new program" or "higher level of service," it never reached the issue of state "mandate." The *Lucia Mar* court concluded there was a "new program," and remanded the mandate issue to the Commission without explicitly resolving whether the concept of state mandate is confined to legal compulsion or whether it extends to practical compulsion as well. [FN46]

FN42. *Lucia Mar, supra,* 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318.

FN43. *Lucia Mar, supra,* 44 Cal.3d at pages 832, 836, 244 Cal.Rptr. 677, 750 P.2d 318.

FN44. *Lucia Mar, supra,* 44 Cal.3d at page 837, 244 Cal.Rptr. 677, 750 P.2d 318.

FN45. *Lucia Mar, supra,* 44 Cal.3d at page

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837, 244 Cal.Rptr. 677, 750 P.2d 318.

FN46. *Lucia Mar, supra,* 44 Cal.3d at pages 836-837, 838, 244 Cal.Rptr. 677, 750 P.2d 318.

Citing *Lucia Mar's* mandate discussion, two appellate court decisions have characterized the concept of state mandate in terms of whether the local governmental entity has an alternative to the state scheme. The first decision, *County of Los Angeles v. Commission on State Mandates,* noted that if "a local entity or school district has alternatives under the statute other than the mandated [cost], it does not constitute a state mandate." [FN47] Like *Lucia Mar,* though, *County of Los Angeles v. Commission on State Mandates* does not say whether these "alternatives," for state mandate purposes, are just legal alternatives or whether they encompass practical alternatives as well. The second decision is a recent decision from this court, *City of El Monte.* [FN48] We observed there that "[t]he possible existence of *reasonable* alternatives ... [leaves] open the question whether the [state-directed cost] [was] mandated...." [FN49]

FN47. *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818, 38 Cal.Rptr.2d 304, citing *Lucia Mar, supra,* 44 Cal.3d at pages 836-837, 244 Cal.Rptr. 677, 750 P.2d 318.

FN48. *City of El Monte, supra,* 83 Cal.App.4th 266, 99 Cal.Rptr.2d 333.

FN49. *City of El Monte, supra,* 83 Cal.App.4th at page 278, footnote 6, 99 Cal.Rptr.2d 333, italics added, citing *Lucia Mar, supra,* 44 Cal.3d at pages 836-837, 244 Cal.Rptr. 677, 750 P.2d 318.

[8] In line with *Sacramento II's* approach to mandate and with this court's characterization of *Lucia Mar* in *City of El Monte,* we define the concept of state mandate to include situations where the local governmental entity has no reasonable alternative to the state scheme or no true choice but to participate in it, rather than confine the concept to direct *legal* compulsion as argued by the State. Our definition aligns with the constitutional and statutory language relating to state mandate when viewed against the backdrop of how the concept of federal mandate in Article XIII B has been interpreted by our Supreme Court. Article XIII B, section 6, as pertinent, states simply that "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government," the State shall pay for that mandate. Government Code section 17514, part of the statutory scheme that implements Article XIII B, section 6, defines " '[c]osts mandated by the state' " to mean, as relevant here, "any increased costs which a local agency or school district is required to incur ... as a result of any statute ... which mandates a new program or higher level of service of an existing program." [FN50] Although Article XIII B defines a federal mandate as one being "without discretion" or involving "unavoidabl [e]" costs, [FN51] our Supreme Court has interpreted that mandate along the lines of whether reasonable, practical alternatives exist to the federal directive. [FN52] Given the less mandatory language surrounding the definition of state mandate, *458 we construe the Article XIII B concept of state mandate along these same lines. Like the pervasive "carrot and stick" approach to federal-state relations that prompted the federal mandate interpretation, a similar approach pervades state-local relations, as the educational programs referenced in the test claim statute of Education Code section 35147 aptly illustrate.

FN50. See Government Code section 17500.

FN51. Article XIII B, section 9, subdivision (b).

FN52. *Sacramento II, supra,* 50 Cal.3d at pages 70-76, 266 Cal.Rptr. 139, 785 P.2d 522.

[9] At oral argument, the State emphasized the statutory language of Government Code section 17513 defining " '[c]osts mandated by the federal government' " as including "costs resulting from enactment of a state law or regulation where failure

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(Cite as: 122 Cal.Rptr.2d 447)

to enact that law or regulation to meet specific federal program or service requirements *would result in substantial monetary penalties or loss of funds to public or private persons in the state.*" (Italics added.) The State noted that similar language does not appear in the statutory definition of " '[c]osts mandated by the state' " set forth in Government Code section 17514. Nevertheless, as the *Sacramento II* court observed, Government Code sections 17513 and 17514 merely implement the constitutional language of Article XIII B; the focus of the *Sacramento II's* "mandate" analysis remained on Article XIII B, section 9's language of "without discretion" and "unavoidabl[e]." [FN53] In any event, statutory language cannot trump constitutional language nor our high court's interpretation of that constitutional language.

FN53. *Sacramento II, supra,* 50 Cal.3d at pages 70-76, 266 Cal.Rptr. 139, 785 P.2d 522; see Government Code section 17500.

That brings us full circle to the State's argument here. The State argues that, *as a matter of law,* where a local governmental entity participates in a state statutory program either voluntarily or as a condition of receiving funds, the State may impose reasonable requirements on the entity without having to pay a reimbursable state mandate. The key to this argument is that the concept of voluntary or conditional participation encompasses *all* participation except that which is *legally* compelled. Applying this argument, then, the State notes that since San Diego Unified is not *legally* compelled to offer the programs for which the Test Claim statutes increase the agenda and public comment costs, that is the end of the analysis--there can be no state mandate as a matter of law. San Diego Unified may simply discontinue these "discretionary," "voluntary," "optional" programs (i.e., not *legally* compelled programs) and not incur the additional costs of posting and preparing meeting agendas, and providing for public comment on agenda items, pursuant to the Test Claim statutes.

However, for the reasons set forth above, we do not construe state mandate as limited to situations of *legal* compulsion. We construe it to also encompass situations where there is no reasonable alternative or no true choice but to participate in the state scheme. The State's narrow view of state mandate ignores the realities of how contemporary multilevel governments carry out much of their business.

The Commission never considered the issues whether the test claimants have a reasonable alternative or a true choice not to participate in the educational programs at issue, and thus a reasonable alternative to paying the higher costs associated with the "higher level of service" specified in Education Code section 35147 and Government Code section 54952. We will remand this matter to the Commission for it to resolve these issues, because the ***459** Commission is charged with initially deciding whether a local agency is entitled to reimbursement under Article XIII B, section 6. [FN54] Furthermore, the statutory procedure to implEMENT ARTICLE XIII B, section 6, "establishes procedures ... for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created." [FN55]

FN54. See *Lucia Mar, supra,* 44 Cal.3d at page 837, 244 Cal.Rptr. 677, 750 P.2d 318; Government Code section 17551; see also Government Code section 17500.

FN55. *Kinlaw, supra,* 54 Cal.3d at page 333, 285 Cal.Rptr. 66, 814 P.2d 1308; see also Government Code section 17500 et seq.

DISPOSITION

The judgment is reversed, and this matter is remanded to the Commission for further proceedings consistent with this opinion. Each party will pay its own appellate costs.

We concur: NICHOLSON and HULL, JJ.

122 Cal.Rptr.2d 447, 167 Ed. Law Rep. 283, 2 Cal. Daily Op. Serv. 6362, 2002 Daily Journal D.A.R. 7992 Review Granted, Previously published at: 100 Cal.App.4th 243, (Cal.Const. art. 6, s 12; Cal. Rules of Court, Rules 28, 976, 977, 979)

END OF DOCUMENT

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County of Los Angeles Test Claim Amendment
Penal Code Section 13730 as Added and Amended by: Chapter 1609, Statutes of 1984, Chapter 965, Statutes of 1985; Chapter 483, Statutes of 2001; Penal Code Section 12028.5 as Added and Amended by Chapter 901, Statutes of 1984, Chapters 830 and 833, Statutes of 2002; Family Code Section 6228 as Added and Amended by Chapter 1022, Statutes of 1999, Chapter 377, Statutes of 2002
Crime Victims' Domestic Violence Incident Reports

Declaration of Bernice K. Abram

Bernice K. Abram makes the following declaration and statement under oath:

I, Bernice K. Abram, Sergeant, Sheriff's Department, County of Los Angeles, executed a declaration on April 26, 2000, supporting reimbursement for developing and implementing methods and procedures to comply with new State-mandated requirements in responding to and reporting domestic violence incidents.

I declare that it is my information or belief that the County of Los Angeles "Crime Victims' Domestic Violence Incident Reports" test claim, filed on May 11, 2000 with the Commission on State Mandates, is substantially related to this test claim amendment incorporating subsequent changes to Family Code Section 6228 and Penal Code Section 13730 [the test claim legislation] as follows: Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code and Chapter 483, Statutes of 2001, amending Section 13730 of the Penal Code and, with respect to implementing Section 13730(c)(3) of the Penal Code, Section 12028.5 of the Penal Code as added and amended by Chapter 901, Statutes of 1984, Chapter 830, Statutes of 2002 and Chapter 833, Statutes of 2002

I declare that the County of Los Angeles will incur costs well in excess of $1,000 during the 2002-03 fiscal year to implement Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code and Chapter 483, Statutes of 2001, amending Section 13730 of the Penal Code and, with respect to implementing Section 13730(c)(3) of the Penal Code, to implement Section 12028.5 of the Penal Code as added and amended by Chapter 901, Statutes of 1984, Chapter 830, Statutes of 2002 and Chapter 833, Statutes of 2002.

I declare that Chapter 483, Statutes of 2001, in adding Section 13730(c)(3), mandates that:

" ... The [domestic violence incident] report shall include at least all of the following ...

(3) A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5" [Emphasis added.]

I declare that Chapter 483, Statutes of 2001, in adding Section 13730(c)(3), imposes three mandatory duties upon local law enforcement agencies:

1. When "... necessary, for the protection of the peace officer or other persons present, [the mandatory duty] to inquire of the victim, the alleged abuser or both, whether a firearm or o Section 12028.5"
her deadly weapon was present at the location..."

2. The mandatory duty to report if an inquiry was made "... whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon."

3. The mandatory duty that "... [a]ny firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5"

It is my information or belief that, in order to comply with the [above] duties, each, of over 10,000 domestic violence incidents, in Los Angeles County during 2002-03, now requires, on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform the following duties:

1. The duty requiring that a peace officer "... shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present." [Section 12028.5(b)]

2. The duty requiring that "... [u]pon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon. [Section 12028.5(b)]

3. The duty requiring that the confiscated "... firearm or other deadly weapon shall be held [not less than] than 48 hours." [Section 12028.5(b)]

4. The duty requiring that "... the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession [as specified] 48 hours after the seizure or as soon thereafter as possible, but no later than 5 business days after the seizure." [Section 12028.5(b)]

5. The duty requiring that a "... peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located." [Section 12028.5(c)]

6. The duty requiring that " [a]ny firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership." [Section 12028.5(d)]

7. The duty requiring that "...[a]ny firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, by a peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section

830.31, or by a peace officer, as defined in Section 830.5, for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028." [Section 12028.5(e)]

8. The duty requiring that, "... [i]n those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned." [Section 12028.5(f)]

9. The duty requiring that "... the law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements." [Section 12028.5(g)]

10. The duty requiring local law enforcement agencies and the district attorney to participate in hearings "... if the person requests a hearing", in which case, "... the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party."
[Section 12028.5(h)]

11. The duty requiring local law enforcement agencies and the district attorney to participate in hearings " ... [i]f there is a petition for a second hearing, and, "...unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat," the duty of local law enforcement agencies to "... return of the firearm or other deadly weapon" and, as specified, pay "... reasonable attorney's fees to the prevailing party." [Section 12028.5(j)]

I declare that the County of Los Angeles will incur costs well in excess of $1,000 during the 2002-03 fiscal year to implement Penal Code Section 13730(c)(3) as added by Chapter 483, Statutes of 2001 and, when required under Section 13730(c)(3), Penal Code Section 12028.5 as added and amended by Chapter 901, Statutes of 1984, Chapter 830, Statutes of 2002 and Chapter 833, Statutes of 2002.

I declare that Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code [as added by Chapter 1022, Statutes of 1999 - the original test claim legislation], imposes additional duties on local government as underlined below:

"(a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.

(b) A copy of a domestic violence incident report face sheet shall be made available during regular business hours to a victim of domestic violence or his or her representative no later than 48 hours after being requested by the victim or his or her representative, unless the state or local law enforcement agency informs the victim or his or her representative of the reasons why, for good cause, the domestic violence incident report face sheet is not available, in which case the domestic violence incident report face sheet shall be made available to the victim or his or her representative no later than five working days after the request is made.

(c) A copy of the domestic violence incident report shall be made available during regular business hours to a victim of domestic violence or his or her representative no later than five working days after being requested by a victim or his or her representative, unless the state or local law enforcement

agency informs the victim or his or her representative of the reasons why, for good cause, the domestic violence incident report is not available, in which case the domestic violence incident report shall be made available to the victim or his or her representative no later than 10 working days after the request is made.

(d) Any person requesting copies under this section shall present state or local law enforcement with his or her identification, such as a current, valid driver's license, a state-issued identification card, or a passport and, if the person is a representative of the victim, a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time a request is made.

(e) This section shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incidence report.

(f) This section shall be known, and may be cited, as the Access to Domestic Violence Reports Act of 1999.

(g)(1) For purposes of this section, a representative of the victim means any of the following:

(A) The surviving spouse.

(B) A surviving child of the decedent who has attained 18 years of age.

(C) A domestic partner, as defined in subdivision (a) of Section 297.

(D) A surviving parent of the decedent.

(E) A surviving adult relative.

(F) The public administrator if one has been appointed." [Emphasis added.]

I declare that the County of Los Angeles will incur costs well in excess of $1,000 during the 2002-03 fiscal year to implement Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code, mandating that additional services be provided to 'representatives' of domestic violence victims.

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and to those matters, I believe them to be true.

04-16-03 COUNTY OF L.A.
Date and Place

Sgt. Bruce Allen
Signature

County of Los Angeles Test Claim Amendment

Penal Code Section 13730 as Added and Amended by: Chapter 1609, Statutes of 1984, Chapter 965, Statutes of 1985, Chapter 483, Statutes of 2001; Penal Code Section 12028.5 as Added and Amended by Chapter 901, Statutes of 1984, Chapters 830 and 833, Statutes of 2002; Family Code Section 6228 as Added and Amended by Chapter 1022, Statutes of 1999, Chapter 377, Statutes of 2002

Crime Victims' Domestic Violence Incident Reports

Declaration of Wendy Watanabe

Wendy Watanabe makes the following declaration and statement under oath:

I, Wendy Watanabe, Director of Financial Programs, Administrative Services Division, Sheriff's Department, County of Los Angeles, am responsible for claiming reimbursement for developing and implementing methods and procedures to comply with new State-mandated requirements in responding to and reporting domestic violence incidents.

I declare that it is my information or belief that the County of Los Angeles "Crime Victims' Domestic Violence Incident Reports" test claim, filed on May 11, 2000 with the Commission on State Mandates, is substantially related to this test claim amendment incorporating subsequent changes to Family Code Section 6228 and Penal Code Section 13730 [the test claim legislation] as follows: Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code and Chapter 483, Statutes of 2001, amending Section 13730 of the Penal Code and, with respect to implementing Section 13730(c)(3) of the Penal Code, Section 12028.5 of the Penal Code as added and amended by Chapter 901, Statutes of 1984, Chapter 830, Statutes of 2002 and Chapter 833, Statutes of 2002

I declare that the County of Los Angeles will incur costs well in excess of $1,000 during the 2002-03 fiscal year to implement Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code and Chapter 483, Statutes of 2001, amending Section 13730 of the Penal Code and, with respect to implementing Section 13730(c)(3) of the Penal Code, to implement Section 12028.5 of the Penal Code as added and amended by Chapter 901, Statutes of 1984, Chapter 830, Statutes of 2002 and Chapter 833, Statutes of 2002.

I declare that Chapter 483, Statutes of 2001, in adding Section 13730(c)(3), mandates that:

> " ... The [domestic violence incident] report shall include at least all of the following ...
>
> (3) A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5" [Emphasis added.]

I declare that Chapter 483, Statutes of 2001, in adding Section 13730(c)(3), imposes three mandatory duties upon local law enforcement agencies:

> 1. When "... necessary, for the protection of the peace officer or other persons present, [the mandatory duty] to inquire of the victim, the alleged abuser or both, whether a firearm or o Section 12028.5"
> her deadly weapon was present at the location..."
>
> 2. The mandatory duty to report if an inquiry was made "... whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon."
>
> 3. The mandatory duty that "... [a]ny firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5"

It is my information or belief that, in order to comply with the [above] duties, each, of over 10,000 domestic violence incidents, in Los Angeles County during 2002-03, now requires, on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform the following duties:

1. The duty requiring that a peace officer "... shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present." [Section 12028.5(b)]

2. The duty requiring that "... [u]pon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon. [Section 12028.5(b)]

3. The duty requiring that the confiscated "... firearm or other deadly weapon shall be held [not less than] than 48 hours." [Section 12028.5(b)]

4. The duty requiring that "... the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession [as specified] 48 hours after the seizure or as soon thereafter as possible, but no later than 5 business days after the seizure." [Section 12028.5(b)]

5. The duty requiring that a "... peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located." [Section 12028.5(c)]

6. The duty requiring that " [a]ny firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm or other deadly weapon and proof of ownership." [Section 12028.5(d)]

7. The duty requiring that "...[a]ny firearm or other deadly weapon taken into custody and held by a police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2, by a peace officer of the Department of Parks and Recreation, as defined in subdivision

(f) of Section 830.2, by a peace officer, as defined in subdivision (d) of Section 830.31, or by a peace officer, as defined in Section 830.5, for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028." [Section 12028.5(e)]

8. The duty requiring that, "... [i]n those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned." [Section 12028.5(f)]

9. The duty requiring that "... the law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements." [Section 12028.5(g)]

10. The duty requiring local law enforcement agencies and the district attorney to participate in hearings "... if the person requests a hearing", in which case, "... the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party."
[Section 12028.5(h)]

11. The duty requiring local law enforcement agencies and the district attorney to participate in hearings "... [i]f there is a petition for a second hearing, and, "...unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat," the duty of local law enforcement agencies to "... return of the firearm or other deadly weapon" and, as specified, pay "... reasonable attorney's fees to the prevailing party." [Section 12028.5(j)]

I declare that the County of Los Angeles will incur costs well in excess of $1,000 during the 2002-03 fiscal year to implement Penal Code Section 13730(c)(3) as added by Chapter 483, Statutes of 2001 and, when required under Section 13730(c)(3); Penal Code Section 12028.5 as added and amended by Chapter 901, Statutes of 1984, Chapter 830, Statutes of 2002 and Chapter 833, Statutes of 2002.

I declare that Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code [as added by Chapter 1022, Statutes of 1999 - the original test claim legislation], imposes additional duties on local government as underlined below:

"(a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.

(b) A copy of a domestic violence incident report face sheet shall be made available during regular business hours to a victim of domestic violence or his or her representative no later than 48 hours after being requested by the victim or his or her representative, unless the state or local law enforcement agency informs the victim or his or her representative of the reasons why, for good cause, the domestic violence incident report face sheet is not available, in which case the domestic violence incident report face sheet shall be made available to the victim or his or her representative no later than five working days after the request is made.

(c) A copy of the domestic violence incident report shall be made available during regular business hours to a victim of domestic violence or his or her representative no later than five working days after being requested by a

victim or his or her representative, unless the state or local law enforcement agency informs the victim or his or her representative of the reasons why, for good cause, the domestic violence incident report is not available, in which case the domestic violence incident report shall be made available to the victim or his or her representative no later than 10 working days after the request is made.

(d) Any person requesting copies under this section shall present state or local law enforcement with his or her identification, such as a current, valid driver's license, a state-issued identification card, or a passport and, if the person is a representative of the victim, a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time a request is made.

(e) This section shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incidence report.

(f) This section shall be known, and may be cited, as the Access to Domestic Violence Reports Act of 1999.

(g)(1) For purposes of this section, a representative of the victim means any of the following:

(A) The surviving spouse.

(B) A surviving child of the decedent who has attained 18 years of age.

(C) A domestic partner, as defined in subdivision (a) of Section 297.

(D) A surviving parent of the decedent.

(E) A surviving adult relative.

(F) The public administrator if one has been appointed." [Emphasis added.]

I declare that the County of Los Angeles will incur costs well in excess of $1,000 during the 2002-03 fiscal year to implement Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code, mandating that additional services be provided to 'representatives' of domestic violence victims.

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and to those matters, I believe them to be true.

4/16/03, County of Los Angeles — Wendy WoSambe

Date and Place — Signature

TOTAL P.08

Mailing List

.ber: 99-TC-08
Crime Victim's Domestic Violence Incident Reports

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Claim Number: 99-TC-08
Title: Crime Victim's Domestic Violence Incident Reports

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COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

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TYLER McCAULEY
/DITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 17th day of April 2003, I served the attached:

Documents: County of Los Angeles Test Claim Amendment, Penal Code Section 13730 as Added and Amended by: Chapter 1609, Statutes of 1984, Chapter 965, Statutes of 1985, Chapter 483, Statutes of 2001: Penal Code Section 12028.5 as Added and Amended by Chapter 901, Statutes of 1984, Chapters 830 and 833, Statutes of 2002; Family Code Section 6228 as Added and Amended by chapter 1022, Statutes of 1999, Chapter 377, Statues of 2002, Crime Victim's Domestic Violence Incident Reports, *including a 1 page letter of J. Tyler McCauley dated April 17, 2003, a Test Claim Form, a title page "a", 20 page narrative, a 1 page declaration of Leonard Kaye, a Exhibits 1-9 (51 pages), all pursuant to CSM-99-TC-08, now* pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates – FAX (narrative only) and mailed the original set.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of April 2003, at Los Angeles, California.

EXHIBIT B

BEFORE THE COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of:

Madera Police Department
Claimant

No. CSM-4222

DECISION

The attached Proposed Statement of Decision of the Commission on State Mandates is hereby adopted by the Commission on State Mandates as its decision in the above-entitled matter.

This Decision shall become effective on January 22, 1987.

IT IS SO ORDERED January 22, 1987.

Peter Pelkofer

Peter Pelkofer Vice Chairman
Commission on State Mandates

WP 1551A

BEFORE THE COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of:	
Madera Police Department Claimant	CSM-4222

PROPOSED DECISION

This claim was heard by the Commission on State Mandates (commission) on November 20, 1986, in Sacramento, California, during a regulary scheduled meeting of the commission. Chief Gordon Skeels appeared on behalf of the Madera Police Department. Sterling O'Ran of the Office of Criminal Justice Planning also appeared.

Evidence both oral and documentary having been introduced, the matter submitted, and a vote taken the commission finds:

I.
NOTE

1. The finding of a reimbursable state mandate does not mean that all increased costs claimed will be reimbursed. Reimbursement, if any, is subject to commission approval of parameters and guidelines for reimbursement of the claim, and a statewide cost estimate; legislative appropriation; a timely filed claim for reimbursement; and subsequent review of the claim by the State Controller.

II.
FINDINGS OF FACT

1. The test claim was filed with the Commission on State Mandates on June 23, 1986, by the Madera Police Department.

2. The subject of the claim is Chapter 1609, Statutes of 1984 and Chapter 668, Statutes of 1985.

3. Chapter 1609, Statutes of 1984 and Chapter 668, Statutes of 1985 require that California law enforcement agencies develop, adopt and implement written policies and standards for officers' response to domestic violence calls. It also requires law enforcement agencies to maintain records and recording systems specific to domestic violence activities and to provide specific written information to apparent victims of domestic violence.

4. The Madera Police Department has incurred increased costs as a result of having to: develop, adopt and implement standards for police officers' responses to domestic violence calls; maintain records and recording systems; provide written information to victims of domestic violence; compile and submit monthly summary reports to the State Attorney General; develop of a Domestic Violence Incident Report form.

5. The Madera Police Department's resulting increased costs are costs mandated by the State.

III.
DETERMINATION OF ISSUES

1. The Commission has the authority to decide this claim under the provisions of Government Code Section 17551.

2. Chapter 1609, Statutes of 1984 and Chapter 668, Statutes of 1985 impose a reimbursable state mandate upon California law enforcement agencies. The Madera Police Department has established that these statutes impose a higher level of service by requiring law enforcement agencies to develop, adopt and implement policies and standards for officer's responses to domestic violence calls; by requiring the maintenance of records and recording systems, and by requiring that specific written information be provided to victims of domestic violence.

WP: 1462A

WP 1575A
Adopted: 2/26/87

PARAMETERS AND GUIDELINES
Chapter 1609, Statutes of 1984 and
Chapter 668, Statutes of 1985
DOMESTIC VIOLENCE

I. SUMMARY OF MANDATE

Chapter 1609, Statutes of 1984 added Chapters 1 through 5, and non-consecutive Sections 13700 through 13731 to the California Penal Code. These sections require all law enforcement agencies in the state to develop, adopt and implement written policies and standards for officers' response to domestic violence calls by January 1, 1986. Existing local policies and those developed must be in writing and available to the public upon request and must include specific standards for a range of related activities.

Chapter 1609, Statutes of 1984 also requires law enforcement agencies to develop an incident report form and maintain records of all protection orders with respect to domestic violence incidents. This is required to be available for the information of and use by law enforcement officers responding to domestic violence related calls for assistance and to provide information about such calls to the Attorney General on a monthly basis.

II. COMMISSION ON STATE MANDATES DECISION

On November 20, 1986, the Commission on State Mandates found that Chapter 1609, Statutes of 1984 and Chapter 668, Statutes of 1984 imposed an increased level of service upon local law enforcement agencies thereby mandating that these agencies provide the services as described above. The commission's finding was in response to a test claim, originally filed, by the City of Madera Police Department on June 23, 1986.

III. ELIGIBLE CLAIMANTS

Law enforcement agencies are eligible to file for reimbursement of costs incurred as a result of the state legislated domestic violence programs.

IV. PERIOD OF REIMBURSEMENT

Chapter 1609, Statutes of 1984 became effective on January 1, 1985, and Chapter 668, Statutes of 1985 became effective January 1, 1986. Section 17557 of the Government Code states that a test claim must be submitted on or before November 30 following a given fiscla year to establish eligibility for that fiscal year. The test claim for this mandate was filed on June 23, 1986, therefore, costs incurred on or after July 1, 1985, are reimbursable. Costs incurred as a result of Chapter 668, Statutes of 1985 are reimbursable after its effective date of January 1, 1986.

V. REIMBURSABLE COSTS

A. The following costs associated with the development of a Domestic Violence Policy are reimbursable.

(1) For the costs associated with the development, adoption and implementation of policies and standards, termed a Domestic Violence Policy, pursuant to California Penal Code Section 13701, involving domestice violence implemented by January 1, 1986.

(2) For the costs associated with the development of a system for recording all domestic violence-related calls for assistance to include whether weapons are involved.

(3) For the costs incurred after January 1, 1986, for preparation of a statement of information for victims of incidents of domestic violence.

(4) For monthly summary reports compiled by the local agency and submitted to the Attorney General, State of California.'

(5) For the costs associated with the development of a Domestic Violence Incident Report form used to record and report domestic violence calls.

B. The following costs are now reauired when responding to incidents involving domestic violence, as a result of Chapter 668, and did not exist prior to January 1, 1986. These costs are reimbursable.

(1) For furnishing the victim at the scene of a domestic violence incident with written information regarding legal options and available assistance and any necessary explanation of that information, or for providing orally communicated information regarding legal options and available assistance to victims via telephone when law enforcement response is not reauired.

(2) For the writing of mandated reports which shall include domestic violence reports, incidents or crime reports directly related to the domestic violence incident.

(3) For the establishment and utilization of a system to verify temporary restraining orders, stay away orders, and proofs of service at the scene of any incidents of domestic violence.

C. The costs for the maintenance of all protection order records which restrain an individual from the home or other court defined areas who has been accused of an illegal behavior and has applied to the court and been granted such an order.

If total costs for a given fiscal year do not exceed $200, no reimbursement shall be allowed, except as otherwise provided in Section 17564 of the Government Code.

VI. CLAIM PREPARATION

Attach a statement showing the actual increased costs incurred to comply with the mandate.

A. Employee Salaries and Benefits

Show the classification of the employees involved, mandated functions performed, number of hours devoted to the function, and productive hourly rates and benefits.

B. Services and Supplies

Only expenditures which can be identified as a direct cost as a result of the mandate can be claimed. List cost of materials aquired which have been consumed or expended specifically for the purposes of this mandate.

C. Allowable Overhead Costs

Indirect costs may be claimed in the manner prescribed by the State Controller in his claiming instructions.

D. Supporting Data

For auditing purposes, all costs claimed must be traceable to source documents or worksheets that show evidence of and the validity of the costs. These documents must be kept on file and made available at the reauest of the State Controller.

VII. OFFSETTING SAVINGS AND OTHER REIMBURSEMENT

Any offsetting savings the claimants experience as a direct result of this statute must be deducted from the costs claimed. In addition, this reimbursement for this mandate received from any source, e.g., federal, state, block grants, etc., shall be identified and deducted from this claim.

VIII. REQUIRED CERTIFICATION

The following certification must accompany the claim:

I DO HEREBY CERTIFY:

THAT sections 1090 to 1096, inclusive, of the Government Code and other applicable provisions of the law have been complied with; and

THAT I am the person authorized by the local agency to file claims for funds with the State of California.

Signature of Authorized Representative	Date
Title	Telephone Number

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 13519 and 13730, as amended by Chapter 965, Statutes of 1995 And filed on December 27, 1996; By the County of Los Angeles, Claimant.	CSM-96-362-01 *Domestic Violence Training and Incident Reporting* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7

STATEMENT OF DECISION

The attached Statement of Decision is hereby adopted by the Commission on State Mandates on February 26, 1998

Date: March 3, 1998

Paula Higashi, Executive Director

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However, the Commission found that while this additional information must be included on the domestic violence incident report, the performance of this incident reporting activity is presently not state mandated because:

- Presently, the State Budget Act of 1997/98 makes the completion of the incident report itself *optional* and
- The new additional information under the test claim statute comes into play only after a local agency opts or elects to complete the incident report.

The Commission recognized that during the period from July 1, 1997 through August 17, 1997, and during subsequent "window periods" when the state operates without a budget, the original suspension of the mandate would not be in effect.

Accordingly, the Commission determined that for the *limited* window period from July 1, 1997 through August 17, 1997, the domestic violence incident reporting, including the inclusion and completion of the new additional information to the form, is a reimbursable state mandated activity because the 1997/98 Budget Act was not chaptered until August 18, 1997. (Chapter 282, Statutes of 1997.)

The Commission further determined that in all subsequent "window periods" when the state operates without a budget, the domestic violence incident reporting program, including the inclusion and completion of the new additional information to the form, is a reimbursable state mandated activity until the Budget Act is chaptered and makes the incident reporting program optional under Government Code section 17581.

Therefore, the Commission concluded the following:

- Penal Code section 13730, subdivision (c), as amended by Chapter 965, Statutes of 1995, does *not* impose a reimbursable state mandated program for the period in which the underlying incident reporting program is made optional under Government Code section 17581.
- Penal Code section 13730, subdivision (c), as amended by Chapter 965, Statutes of 1995, does impose a reimbursable state mandated program for the *limited* window period from July 1, 1997 (the start of the new fiscal year) through August 17, 1997, when the State Budget Act made the incident reporting program optional under Government Code section 17581.
- Penal Code section 13730, subdivision (c), as amended by Chapter 965, Statutes of 1995, does impose a reimbursable state mandated program for all *subsequent* window periods from July 1 (the start of the new fiscal year) until the Budget Act is chaptered and makes the incident reporting program optional under Government Code section 17581.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 13519 and 13730, as amended by Chapter 965, Statutes of 1995 And filed on December 27, 1996; By the County of Los Angeles, Claimant.	NO. CSM - 96-362-01 DOMESTIC VIOLENCE TRAINING AND INCIDENT REPORTING PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Presented for adoption on January 29, 1998)

PROPOSED STATEMENT OF DECISION

This test claim was heard by the Commission on State Mandates (Commission) on December 18, 1997, during a regularly scheduled hearing. Mr. Leonard Kaye appeared for the County of Los Angeles; Mr. Glen Fine, appeared for the Commission on Peace Officer Standards and Training; and Mr. James Apps and Mr. James Foreman appeared for the Department of Finance. The following persons were witnesses for the County of Los Angeles: Captain Dennis D. Wilson, Deputy Bernice K. Abram, and Ms. Martha Zavala.

At the hearing, evidence both oral and documentary was introduced, the test claim was submitted, and the vote was taken.

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

PART I. DOMESTIC VIOLENCE TRAINING

Issue 1: Does the domestic violence continuing education requirement upon law enforcement officers under Penal Code section 13519, subdivision (e), impose a new program or higher level of service

governments (i.e., "[i]t is the intent of the Legislature not to increase the annual training costs of local government.")

Thus, the Commission found this continuing education activity is imposed upon local agencies whose local law enforcement officers carry out a basic governmental function by providing services to the public. Such activity is not imposed on state residents generally.[2] In sum, the Commission found that the first requirement to determine whether the test claim legislation imposes state-mandated program is satisfied.

Second, subdivision (e) of section 13519 imposes a new requirement on certain law enforcement officers below the rank of supervisor to complete an updated course of instruction on domestic violence every two years. This training obligation was not required immediately prior to the enactment of subdivision (e). Instead, local law enforcement agencies were *encouraged*, but not required, to include periodic updates and training on domestic violence *as part of their advance officer training program only*. (Former Pen. Code § 13519, subd. (c).) Accordingly, the Commission found that the second requirement to determine whether the test claim legislation imposes a state mandated program is satisfied.

Third, the Commission found that subdivision (e) is state mandated because local agencies have no options or alternatives available to them and, therefore, the officers described in subdivision (e) must attend and complete the updated domestic violence training course from a POST-certified class.[3]

Based on the foregoing, the Commission found that section 13519, subdivision (e), imposes a new program upon local agencies.

Issue 2: Does section 13519, subdivision (e), impose costs mandated by the state upon local agencies which are reimbursable from the State Treasury?

The latter portion of Penal Code section 13519, subdivision (e), provides in pertinent part:

> ". . . . The instruction required pursuant to this subdivision *shall be funded from existing resources* available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local governmental entities."
> (Emphasis added.)

Given the above statutory language, the Commission continued its inquiry to determine whether local law enforcement agencies incur any increased costs as a result of the test claim statute.

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[2] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

[3] *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 832 and 836.

The evidence submitted by the parties reveals that the updated training is accommodated or absorbed within the 24-hour continuing education requirement provided in the above regulation.

POST Bulletin 96-2 was forwarded to local law enforcement agencies shortly after the test claim statute was enacted. The Bulletin specifically recommends that local agencies make the required updated domestic violence training part of the officer's continuing professional training. It does not mandate creation and maintenance of a separate schedule and tracking system for the required domestic violence training. To satisfy the training in question, POST prepared and provided local agencies with course materials and a two-hour videotape.

Additionally, the letter dated July 11, 1997, from Glen Fine of POST indicates POST's interpretation of the test claim statute that the domestic violence update training be included *within* the 24 hour continuing education requirement set forth above. Accordingly, the two-hour course may be credited toward satisfying the officer's 24-hour continuing education requirement.

The Commission disagreed with the claimant's contention that it is entitled to reimbursement as a result of the test claim statute since it cannot redirect funds for salary reimbursement from other non-funded POST training modules. The POST memorandum submitted by the claimant, dated July 6, 1993, reveals that the claimant has not received salary reimbursement for officer training since 1993, before the enactment of the test claim statute.

Accordingly, the Commission found that local agencies incur no increased costs mandated by the state in carrying out this two hour course because:

- *immediately before and after* the effective date of the test claim legislation, POST's minimum required number of continuing education hours for the law enforcement officers in question *remained the same at 24 hours*. After the operative date of the test claim statute these officers must still complete at least 24 hours of professional training every two years,
- the two hour domestic violence training update may be credited toward satisfying the officer's 24 hour minimum,
- the two hour training is *not* separate and apart nor "on top of" the 24 hour minimum,
- POST does not mandate creation and maintenance of a separate schedule and tracking system for this two hour course,
- POST prepared and provides local agencies with the course materials and video tape to satisfy the training in question, and
- of the 24 hour minimum, the two hour domestic violence training update is the only course that is legislatively mandated to be continuously completed every two years by the officers in question. The officers may satisfy their remaining 22 hour requirement by choosing from *the many elective courses* certified by POST.

Chapter 1609, Statutes of 1984, was the subject of a previous test claim (CSM-4222) approved by the Commission on January 22, 1987. The Parameters and Guidelines for Chapter 1609, Statutes of 1984, provided that the following costs were reimbursable:

(1) the "costs associated with the *development of a Domestic Violence Incident Report form* used to record and report domestic violence calls"; and

(2) costs incurred "for the *writing of mandated reports which shall include domestic violence reports, incidents or crime reports directly related to the domestic violence incident.*"

In 1993, the Legislature made minor nonsubstantive changes to section 13730 and amended subdivision (a) to include the second underlined sentence relating to the written incident report required under subdivision (c):

> "(a) Each law enforcement agency shall develop a system, by January 1, 1986 for recording all domestic violence-related calls for assistance made to the department including whether weapons are involved. <u>All domestic violence-related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident.</u> Monthly, the total number of domestic violence calls received and the numbers of such cases involving weapons shall be compiled by each law enforcement agency and submitted to the Attorney General." (Chapter 1230, Statutes of 1993.)

Since the Legislature required local law enforcement agencies to develop and complete the domestic violence incident report form in subdivision (c) under the 1984 legislation, the 1993 amendment to subdivision (a) merely *clarified* this reporting requirement, rather than mandating a new or additional requirement. The Commission further noted that a test claim has never been filed on Chapter 1230, Statutes of 1993, requesting that the amendment constitute a new program or higher level of service.

During fiscal years 1992/93 through 1996/97, the Legislature no longer mandated the incident reporting requirements set forth in Penal Code section 13730 pursuant to Government Code section 17581. Accordingly, it was optional for local law enforcement agencies to implement the domestic violence incident reporting activity during these fiscal years. The fiscal year 1997/98 budget continues the suspension, effective August 18, 1997. (Chapter 282, Statutes of 1997, Item 9210-295-0001, par. 2, pp. 587-588.)

In 1995, the Legislature amended Penal Code section 13730, subdivision (c), in Chapter 965, Statutes of 1995. Subdivision (c), as amended by Chapter 965, Statutes of 1995, provides the following:

> "Each law enforcement agency shall develop an incident report form that includes a domestic violence identification code by January 1, 1986. In all incidents of domestic violence, a report shall be written and shall be

domestic violence incident report was determined by the Commission to be a reimbursable state mandated program. However, this program was made optional by the Legislature under Government Code section 17581.

Issue 2: If Penal Code section 13730, as originally added by Chapter 1609, Statutes of 1984, is made optional by the Legislature pursuant to Government Code section 17581, are subsequent legislative amendments to section 13730 also made optional?

The County of Los Angeles contended that Chapter 965, Statutes of 1995, is not included in the Legislature's suspension of the original statute. The County contended that the chapters need to be addressed separately. The County further contended that Chapter 965, Statutes of 1995, is not automatically made optional by association with the original statute. Rather the determination of whether a statute is suspended is up to Legislature.

COMMISSION FINDINGS:

Government Code section 17581 provides, in pertinent part, the following:

> "(a) No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year if all of the following apply:
>
> "(1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to section 6 of article XIIIB of the California Constitution.
>
> "(2) The statute or executive order, or portion thereof, has been specifically identified by the Legislature in the Budget Act for that fiscal year as being one for which reimbursement is not provided for that fiscal year. For purposes of this paragraph, a mandate shall be considered to have been specifically identified by the Legislature only if it has been included within the schedule of reimbursable mandates shown in the Budget Act and it is specifically identified in the language of a provision of the item providing the appropriation for mandate reimbursements.
>
> "(b) Notwithstanding any other provision of law, if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a), the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency.
>
> "....."

claim statute does not require a new or different report. It simply specifies the minimum content of the underlying report.

Therefore, the Commission found that the new requirements imposed by Chapter 965, Statutes of 1995, are *not* independent of the incident report as suggested by the claimant; rather, they are encompassed and directly connected to the underlying incident reporting program established by the Legislature in Chapter 1609, Statutes of 1984. [6]

The Commission further found that section 13730, subdivision (c), requires additional information to be included on the domestic violence incident report, the performance of domestic violence incident reporting is *not* state mandated because the development and completion of the report itself was made optional by the Legislature. In other words, since the development and completion of the incident report are not state mandated, then the new information to be included on the incident report is likewise not state mandated.

On the other hand, *if* a local agency voluntarily opts or elects to complete the incident report, then the additional information must be included on the report pursuant to the provisions of the test claim statute. In this respect, Chapter 965, Statutes of 1995, is not a meaningless and unnecessary law as suggested by the claimant.

Therefore, the Commission determined that the new additional information to the domestic violence incident report is not a reimbursable state-mandated program because:

- Presently, the State Budget Act of 1997/98 makes the completion of the incident report *optional* and
- The new additional information under the test claim statute comes into play only after a local agency opts or elects to complete the incident report.

Notwithstanding the foregoing, the Commission determined that for the *limited* window period from July 1, 1997 through August 17, 1997, the domestic violence incident reporting, including the inclusion and completion of the new additional information to the form, is a reimbursable state mandated activity because the 1997/98 Budget Act was not chaptered until August 18, 1997. (Chapter 282, Statutes of 1997.)

The Commission further determined that in all subsequent "window periods" when the state operates without a budget, the domestic violence incident reporting program,

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[6] This test claim is to be distinguished from the previously decided test claim (September 25, 1997), entitled *Domestic Violence Arrest Policies and Standards*, where the Commission determined that the legislation in question imposed new and distinct activities and, therefore, was not affected by Government Code section 17581. In the *Domestic Violence Arrest Policies and Standards* test claim, the Legislature made optional the original requirement to develop, adopt and implement written policies for *response* to domestic violence calls pursuant to Government Code section 17581. The test claim legislation amended the statute adding the requirement to develop and implement *arrest* policies for domestic violence offenders, a new and distinct requirement not encompassed by the previously suspended requirement to develop response policies.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Section 13730, As Added and Amended by Statutes 1984, Chapter 1609, and Statutes 1995, Chapter 965; and Family Code Section 6228, As Added by Statutes 1999, Chapter 1022, Filed on May 15, 2000, by County of Los Angeles, Claimant.	No. 99-TC-08 *Crime Victims' Domestic Violence Incident Reports* CORRECTED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Corrected Decision Adopted on September 25, 2003)*

STATEMENT OF DECISION

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

_____ _____

PAULA HIGASHI, Executive Director Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Section 13730, As Added and Amended by Statutes 1984, Chapter 1609, and Statutes 1995, Chapter 965; and Family Code Section 6228, As Added by Statutes 1999, Chapter 1022, Filed on May 15, 2000, by County of Los Angeles, Claimant.	No. 99-TC-08 *Crime Victims' Domestic Violence Incident Reports* CORRECTED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Corrected Decision Adopted on September 25, 2003)*

STATEMENT OF DECISION

On April 24, 2003, the Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing. Mr. Leonard Kaye and Sergeant Wayne Bilowit appeared for claimant, County of Los Angeles. Mr. Dirk L. Anderson and Ms. Susan Geanacou appeared on behalf of the Department of Finance. At the hearing, testimony was given, the test claim was submitted, and the vote was taken.

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, which partially approves this test claim, by a 5-0 vote. The Statement of Decision was adopted on May 29, 2003.

On June 5, 2003, a request for reconsideration was filed, alleging the following error of law in the May 29, 2003 decision:

> The Commission finding that "the state has not previously mandated any record retention requirements on local agencies for information to victims of domestic violence" does not take into consideration prior law, codified in Government Code sections 26202 and 34090, that requires counties and cities to maintain records for two years. Thus, the conclusion, that storage of the domestic violence incident report for five years constitutes a new program or higher level of service, is an error of law.
>
> The statement of decision should be corrected to reflect that local agencies are now required to perform a higher level of service by storing these documents for three additional years only.

On June 20, 2003, the Commission, by a supermajority of five affirmative votes, granted the request for reconsideration and agreed to conduct a subsequent hearing on the merits

of the request to determine if the prior final decision is contrary to law and to correct any errors of law.

On September 25, 2003, the Commission reconsidered this test claim during a regularly scheduled hearing. Mr. Leonard Kaye appeared for claimant, County of Los Angeles. Ms. Susan Geanacou and Ms. Sarah Mangum appeared on behalf of the Department of Finance. At the hearing, testimony was given, the issue on reconsideration was submitted, and the vote was taken.

The Commission, by a 6-0 vote, adopted the staff analysis finding an error of law. On a separate motion, the Commission moved the staff recommendation, adopting the corrected decision, by a 6-0 vote.

BACKGROUND

This test claim is filed on two statutes: Penal Code section 13730, as added in 1984 (Stats. 1984, ch. 1609) and amended in 1995 (Stats. 1995, ch. 965), and Family Code section 6228, as added in 1999 (Stats. 1999, ch. 1022).

In 1987, the Commission approved a test claim filed by the City of Madera on Penal Code section 13730, as added by Statutes 1984, chapter 1609, as a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution (*Domestic Violence Information*, CSM 4222). The parameters and guidelines for *Domestic Violence Information* authorized reimbursement for local law enforcement agencies for the "costs associated with the development of a Domestic Violence Incident Report form used to record and report domestic violence calls," and "for the writing of mandated reports which shall include domestic violence reports, incidents or crime reports directly related to the domestic violence incident."

Beginning in fiscal year 1992-93, the Legislature, pursuant to Government Code section 17581, suspended Penal Code section 13730, as added by Statutes 1984, chapter 1609. With the suspension, the Legislature assigned a zero-dollar appropriation to the mandate and made the program optional.

In 1995, the Legislature amended Penal Code section 13730, subdivision (c). (Stats. 1995, ch. 965.) As amended, Penal Code section 13730, subdivision (c)(1)(2), required law enforcement agencies to include in the domestic violence incident report additional information relating to the use of alcohol or controlled substances by the alleged abuser, and any prior domestic violence responses to the same address.

In February 1998, the Commission considered a test claim filed by the County of Los Angeles on the 1995 amendment to Penal Code section 13730 (*Domestic Violence Training and Incident Reporting*, CSM 96-362-01). The Commission concluded that the additional information on the domestic violence incident report was not mandated by the state because the suspension of the statute under Government Code section 17581 made the completion of the incident report itself optional, and the additional information under the test claim statute came into play only after a local agency elected to complete the incident report.

Based on the plain language of the suspension statute (Gov. Code, § 17581), the Commission determined, however, that during window periods when the state operates

without a budget, the original suspension of the mandate would not be in effect. Thus, the Commission concluded that for the limited window periods when the state operates without a budget until the Budget Act is chaptered and makes the domestic violence incident reporting program optional under Government Code section 17581, the activities required by the 1995 amendment to Penal Code section 13730 were reimbursable under article XIII B, section 6.

In 1998, Government Code section 17581 was amended to close the gap and continue the suspension of programs during window periods when the state operates without a budget.[1] In 2001, the California Supreme Court upheld Government Code section 17581 as constitutionally valid.[2] The Domestic Violence Information and Incident Reporting programs remained suspended in the 2002 Budget Act.[3]

Test Claim Statutes

Penal Code section 13730, as added in 1984 and amended in 1995, requires local law enforcement agencies to develop and prepare domestic violence incident reports as specified by statute. Penal Code section 13730 states the following:

> (a) Each law enforcement agency shall develop a system, by January 1, 1986, for recording all domestic violence-related calls for assistance made to the department including whether weapons were involved. All domestic violence-related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident. Monthly, the total number of domestic violence calls received and the numbers of those cases involving weapons shall be compiled by each law enforcement agency and submitted to the Attorney General.

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[1] Government Code section 17581, subdivision (a), now states the following: "No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year *and the for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year* . . ." (Emphasis added.)

[2] *Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal.4th 287, 297.

[3] Since the operative date of Family Code section 6228 (January 1, 2000), Penal Code section 13730, as originally added by Statutes 1984, chapter 1609, has been suspended by the Legislature pursuant to Government Code section 17581. The Budget Bills suspending Statutes 1984, chapter 1609, are as follows: Statutes 1999, chapter 50, Item 9210-295-0001, Schedule (8), Provision 2; Statutes 2000, chapter 52, Item 9210-295-0001, Schedule (8), Provision 3; Statutes 2001, chapter 106, Item 9210-295-0001, Schedule (8), Provision 3; and Statutes 2002, chapter 379, Item 9210-295,0001, Schedule (8), Provision 3.

The Governor's Proposed Budget for fiscal year 2003-04 proposes to continue the suspension of the domestic violence incident report.

(b) The Attorney General shall report annually to the Governor, the Legislature, and the public the total number of domestic violence-related calls received by California law enforcement agencies, the number of cases involving weapons, and a breakdown of calls received by agency, city, and county.

(c) Each law enforcement agency shall develop an incident report that includes a domestic violence identification code by January 1, 1986. In all incidents of domestic violence, a report shall be written and shall be identified on the face of the report as a domestic violence incident. A report shall include at least both of the following:

(1) A notation of whether the officer or officers who responded to the domestic violence call observed any signs that the alleged abuser was under the influence of alcohol or a controlled substance.

(2) A notation of whether the officer or officers who responded to the domestic violence call determined if any law enforcement agency has previously responded to a domestic violence call at the same address involving the same alleged abuser or victim.

Family Code section 6228 requires state and local law enforcement agencies to provide, without charge, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence upon request within a specified period of time. Family Code section 6228, as added in 1999, states the following:

(a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.

(b) A copy of a domestic violence incident report face sheet shall be made available during regular business hours to a victim of domestic violence no later than 48 hours after being requested by the victim, unless the state or local law enforcement agency informs the victim of the reasons why, for good cause, the domestic violence incident report face sheet is not available, in which case the domestic violence incident report face sheet shall be made available to the victim no later than five working days after the request is made.

(c) A copy of the domestic violence incident report shall be made available during regular business hours to a victim of domestic violence no later than five working days after being requested by a victim, unless the state or local law enforcement agency informs the victim of the reasons why, for good cause, the domestic violence incident report is not available, in which case the domestic violence incident report shall be made available to the victim no later than 10 working days after the request is made.

(d) Persons requesting copies under this section shall present state or local law enforcement with identification at the time a request is made.

(e) This section shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incidence report.

(f) This section shall be known, and may be cited, as the Access to Domestic Violence Reports Act of 1999.

According to the bill analysis prepared by the Assembly Judiciary Committee, section 6228 was added to the Family Code for the following reasons:

> The author notes that victims of domestic violence do not have an expedited method of obtaining police reports under existing law. Currently, victims of domestic violence must write and request that copies of the reports be provided by mail. It often takes between two and three weeks to receive the reports. Such a delay can prejudice victims in their ability to present a case for a temporary restraining order under the Domestic Violence Prevention Act. This bill remedies that problem by requiring law enforcement agencies to provide a copy of the police report to the victim at the time the request is made if the victim personally appears.
>
> The purpose of restraining and protective orders issued under the DVPA [Domestic Violence Prevention Act] is to prevent a recurrence of domestic violence and to ensure a period of separation of the persons involved in the violent situation. According to the author, in the absence of police reports, victims may have difficulty presenting the court with proof of a past act or acts of abuse and as a result may be denied a necessary restraining order which could serve to save a victim's life or prevent further abuse. By increasing the availability of police reports to victims, this bill improves the likelihood that victims of domestic violence will have the required evidence to secure a needed protective order against an abuser.
>
> In addition to the lack of immediate access to copies of police reports, the author points to the cost of obtaining such copies. For example, in Los Angeles County the fee is $13 per report. These fees become burdensome for victims who need to chronicle several incidents of domestic violence. For some the expense may prove prohibitive.

Claimant's Position

The claimant contends that the test claim legislation imposes a reimbursable state-mandated program upon local law enforcement agencies to prepare domestic violence incident reports, store the reports for five years, and retrieve and copy the reports upon request of the domestic violence victim. The claimant contends that it takes 30 minutes to prepare each report, 10 minutes to store each report, and 15 minutes to retrieve and copy each report upon request by the victim. The claimant states that from January 1, 2000, until June 30, 2000, the County prepared and stored 4,740 reports and retrieved 948 reports for victims of domestic violence. The claimant estimates costs during this six-month time period in the amount of $181,228.

Position of the Department of Finance

The Department of Finance filed comments on June 16, 2000, concluding that Family Code section 6228 results in costs mandated by the state. The Department further states that the nature and extent of the specific required activities can be addressed in the parameters and guidelines developed for the program.

COMMISSION FINDINGS

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.[4] In addition, the required activity or task must constitute a "new program" or create a "higher level of service" over the previously required level of service.[5] 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.[6] To determine if the program is new or imposes a higher level of service, the analysis must compare the test claim legislation with the legal requirements in effect immediately before the enactment of the test claim legislation.[7] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[8]

This test claim presents the following issues:

- Does the Commission have jurisdiction to retry the issue whether Penal Code section 13730 constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports?
- Is Family Code section 6228 subject to article XIII B, section 6 of the California Constitution?
- Does Family Code section 6228 mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Does Family Code section 6228 impose "costs mandated by the state" within the meaning of Government Code sections 17514?

These issues are addressed below.

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

[5] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[6] *Id.*

[7] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835.

[8] Government Code section 17514; *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 1264, 1284.

I. Does the Commission have jurisdiction to retry the issue whether Penal Code section 13730 constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports?

The test claim filed by the claimant includes Penal Code section 13730, as added in 1984 and amended in 1995. The claimant acknowledges the Commission's prior final decisions on Penal Code section 13730, and acknowledges the Legislature's suspension of the program. Nevertheless, the claimant argues that Penal Code section 13730, as well as Family Code section 6228, constitute a reimbursable state-mandated program for the activity of preparing domestic violence incident reports. In comments to the draft staff analysis, the claimant argues as follows:

> Penal Code section 13730 mandates that "domestic violence incident reports" be prepared. This mandate was found to be reimbursable by the Commission. [Footnote omitted.] Therefore, this reporting duty was new, not required under prior incident reporting law.
>
> Now, "domestic violence incident reports" must be prepared–and-provided to domestic violence victims upon their request, without exception, in accordance with Family Code section 6228, and in accordance with Penal Code section 13730, as added by Chapter 1609, Statutes of 1984 and amended by Chapter 965, Statutes of 1995 . . .[9]

The claimant further contends that "the duty to prepare and provide domestic violence incident reports to domestic violence victims was not made 'optional' under Government Code section 17581." (Emphasis in original)[10]

For the reasons provided below, the Commission finds that it does not have jurisdiction to retry the issue whether Penal Code section 13730, as added in 1984 and amended in 1995, constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports.

It is a well-settled principle of law that an administrative agency does not have jurisdiction to retry a question that has become final. If a prior decision is retried by the agency, that decision is void. In *City and County of San Francisco v. Ang*, the court held that whenever a quasi-judicial agency is vested with the authority to decide a question, such decision, when made, is conclusive of the issues involved in the decision.[11]

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[9] Claimant's comments to draft staff analysis, pages 2-3.

[10] *Id.* at pages 4-6.

[11] *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 697; See also, *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407, where the court held that the civil service commission had no jurisdiction to retry a question and make a different finding at a later time; and *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143, where the court held that in the absence of express statutory authority, an administrative agency may not change a determination made on the facts presented at a full hearing once the decision becomes final.

These principles are consistent with the purpose behind the statutory scheme and procedures established by the Legislature in Government Code section 17500 and following, which implement article XIII B, section 6 of the California Constitution. As recognized by the California Supreme Court, Government Code section 17500 and following were established for the "express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created."[12]

Government Code section 17521 defines a test claim as follows: " 'Test claim' means the first claim, including claims joined or consolidated with the first claim, filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state." Government Code section 17553, subdivision (b), requires the Commission to adopt procedures for accepting more than one claim on the same statute or executive order if the subsequent test claim is filed within 90 days of the first claim and consolidated with the first claim. Section 1183, subdivision (c), of the Commission's regulations allow the Commission to consider multiple test claims on the same statute or executive order only if the issues presented are different or the subsequent test claim is filed by a different type of local governmental entity.

Here, the issue presented in this test claim is the same as the issue presented in the prior test claim; i.e., whether preparing a domestic violence incident report is a reimbursable state-mandated activity under article XIII B, section 6 of the California Constitution. The Commission approved CSM 4222, *Domestic Violence Information*, and has authorized reimbursement in the parameters and guidelines for "writing" the domestic violence incident reports as an activity reasonably necessary to comply with the mandated program.[13] Moreover, this test claim was filed more than 90 days after the original test claims on Penal Code section 13730.

Accordingly, the Commission finds that it does not have jurisdiction to retry the issue whether Penal Code section 13730, as added in 1984 and amended in 1995, constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports.

The remaining analysis addresses the claimant's request for reimbursement for compliance with Family Code section 6228.

II. Is Family Code Section 6228 Subject to Article XIII B, Section 6 of the California Constitution?

In order for Family Code section 6228 to be subject to article XIII B, section 6 of the California Constitution, the statute must constitute a "program." The California Supreme Court, in the case of *County of Los Angeles* v. *State of California*[14], defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not

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[12] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333.

[13] California Code of Regulations, title 2, section 1183.1, subdivision (a)(1)(4).

[14] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[15]

The plain language of Family Code section 6228 requires local law enforcement agencies to provide, without charging a fee, one copy of the domestic violence incident report and/or face sheet to victims of domestic violence within a specified time period. As indicated above, the purpose of the legislation is to assist victims in supporting a case for a temporary restraining order against the accused.

The Commission finds that Family Code section 6228 qualifies as a program under article XIII B, section 6. As determined by the Second District Court of Appeal, police protection is a peculiarly governmental function.[16] The requirement to provide a copy of the incident report to the victim supports effective police protection in the area of domestic violence.[17] Moreover, the test claim statute imposes unique requirements on local law enforcement agencies that do not apply generally to all residents and entities in the state.

Accordingly, the Commission finds that Family Code section 6228 is subject to article XIII B, section 6 of the California Constitution.

III. Does Family Code Section 6228 Mandate a New Program or Higher Level of Service on Local Law Enforcement Agencies?

The claimant alleges that Family Code section 6228 mandates a new program or higher level of service within the meaning of article XIII B, section 6, for the activities of preparing, storing, retrieving, and copying domestic violence incident reports upon request of the victim.

Family Code Section 6228 Does Not Mandate a New Program or Higher Level of Service on Local Law Enforcement Agencies to Prepare a Report or a Face Sheet

First, the plain language of Family Code section 6228 does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet. Rather, the express language of the statute states that local law enforcement agencies "shall *provide*, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, upon request." (Emphasis added.)

The claimant acknowledges that Family Code section 6228 does not expressly require the local agency to prepare a report. The claimant argues, however, that preparation of a

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

[16] *Id.*

[17] *Ante*, pp. 6-7 (bill analysis of Assembly Judiciary Committee, dated September 10, 1999).

report under Family Code section 6228 is an "implied mandate" because, otherwise, victims would be requesting non-existent reports.[18] The Commission disagrees.

Pursuant to the rules of statutory construction, courts and administrative agencies are required, when the statutory language is plain, to enforce the statute according to its terms. The California Supreme Court explained that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted][19]

In this regard, courts and administrative agencies may not disregard or enlarge the plain provisions of a statute, nor may they go beyond the meaning of the words used when the words are clear and unambiguous. Thus, courts and administrative agencies are prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[20] This prohibition is based on the fact that the California Constitution vests the Legislature, and not the Commission, with policymaking authority. As a result, the Commission has been instructed by the courts to construe the meaning and effect of statutes analyzed under article XIII B, section 6 strictly:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." ... "Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation." [Citations omitted.] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies."[21]

Legislative history of Family Code section 6228 further supports the conclusion that the Legislature, through the test claim statute, did not require local agencies to prepare an incident report. Rather, legislative history indicates that local agencies were required under prior law to prepare an incident report. The analyses of the bill that enacted Family Code section 6228 all state that under prior law, a victim of domestic violence could

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[18] Claimant's test claim filing, page 10; Claimant's comments on draft staff analysis, pages 1, 7-10.

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

[20] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757; In re *Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.

[21] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

request in writing that a copy of the report be provided by mail.[22] The analysis prepared by the Assembly Appropriations Committee dated September 1, 1999, further states that "[a]ccording to the California State Sheriff's Association, reports are currently available for distribution within 3-12 working days," and that "agencies currently charge a fee of $5-$15 per report."

Moreover, preparing a domestic violence incident report does not constitute a new program or higher level of service because preparation of the report is required under prior law. Penal Code section 13730, *as amended in 1993* (Stats. 1993, ch. 1230), added the requirement that "[a]ll domestic violence-related calls for assistance *shall be supported with a written incident report*, as described in subdivision (c), identifying the domestic violence incident." (Emphasis added.) The claimant did not include the 1993 amendment to Penal Code section 13730 in this test claim. In addition, the 1993 amendment to Penal Code section 13730 has not been included in the Legislature's suspension of Penal Code section 13730, as originally added in 1984, since neither the Legislature, the Commission, nor the courts, have made the determination that the 1993 statute constitutes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution.[23] Thus, the activity of preparing the domestic violence incident report is an activity currently required by prior law through the 1993 amendment to Penal Code section 13730.

Accordingly, the Commission finds that Family Code section 6228 does not mandate a new program or higher level of service on local agencies to prepare a domestic violence incident report or a face sheet and, thus, reimbursement is not required for this activity under article XIII B, section 6 of the California Constitution.

Family Code Section 6228 Does Not Impose a New Program or Higher Level of Service for the Activities of Providing, Retrieving, and Copying Information Related to a Domestic Violence Incident.

Family Code section 6228 expressly requires local law enforcement agencies to perform the following activities:

- Provide one copy of all domestic violence incident report face sheets to the victim, free of charge, within 48 hours after the request is made. If, however, the law enforcement agency informs the victim of the reasons why, for good cause, the face sheet is not available within that time frame, the law enforcement agency shall make the face sheet available to the victim no later than five working days after the request is made.

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[22] Bill Analysis of Assembly Judiciary Committee, dated September 10, 1999; Senate Floor Analysis dated September 8, 1999; Bill Analysis by the Assembly Appropriations Committee, dated September 1, 1999.

[23] Government Code section 17581, subdivision (a)(1), requires that the statute or executive order proposed for suspension must first be "determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to Section 6 of Article XIII B of the California Constitution."

- Provide one copy of all domestic violence incident reports to the victim, free of charge, within five working days after the request is made. If, however, the law enforcement agency informs the victim of the reasons why, for good cause, the incident report is not available within that time frame, the law enforcement agency shall make the incident report available to the victim no later than ten working days after the request is made.
- The requirements in section 6228 shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incident report.

The Commission finds that the claimed activities of "retrieving" and "copying" information related to a domestic violence incident do not constitute a new program or higher level of service. Since 1981, Government Code section 6254, subdivision (f), of the California Public Records Act has required local law enforcement agencies to disclose and provide records of incidents reported to and responded by law enforcement agencies to the victims of an incident.[24] Government Code section 6254, subdivision (f), states in relevant part the following:

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

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

- The full name and occupation of every individual arrested by the agency; the individual's physical description; the time and date of arrest; the factual circumstances surrounding the arrest; the time and manner of release or the location where the individual is currently being held; and all charges the individual is being held upon;[25] and
- The time, substance, and location of all complaints or requests for assistance received by the agency; the time and nature of the response; the time, date, and location of the occurrence; the time and date of the report; the name and age of the victim; the factual circumstances surrounding the crime or incident; and a general description of any injuries, property, or weapons involved.[26]

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

[25] Government Code section 6254, subdivision (f)(1).

[26] Government Code section 6254, subdivision (f)(2).

Although the general public is denied access to the information listed above, parties involved in an incident who have a proper interest in the subject matter are entitled to such records.[27] The disclosure of a domestic violence incident report under Government Code section 6254, subdivision (f), of the Public Records Act is proper.[28]

Furthermore, the information required to be disclosed to victims under Government Code section 6254, subdivision (f), satisfies the purpose of the test claim statute. As indicated in the legislative history, the purpose of the test claim statute is to assist victims of domestic violence in obtaining restraining and protective orders under the Domestic Violence Prevention Act. Pursuant to Family Code section 6300 of the Domestic Violence Prevention Act, a protective order may be issued to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved, if an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse. The Commission finds that the disclosure of information describing the factual circumstances surrounding the incident pursuant to Government Code section 6254, subdivision (f), is evidence that can support a victim's request for a protective order under Family Code section 6300.

Finally, the Commission acknowledges that the requirements under the test claim statute and the requirements under the Public Records Act are different in two respects. First, unlike the test claim statute, the Public Records Act does not specifically mandate when law enforcement agencies are required to disclose the information to victims. Rather, Government Code section 6253, subdivision (b), requires the local agency to make the records "promptly available." Under the test claim statute, law enforcement agencies are required to provide the domestic violence incident report face sheets within 48 hours or, for good cause, no later than five working days from the date the request was made. The test claim statute further requires law enforcement agencies to provide the domestic violence incident report within five working days or, for good cause, no later than ten working days from the date the request was made. While the time requirement imposed by Family Code section 6228 is specific, the activities of providing, retrieving, and copying information related to a domestic violence incident are not new and, thus, do not constitute a new program or higher level of service.

Second, unlike the test claim statute, the Public Records Act authorizes local agencies to charge a fee "covering the direct costs of duplication of the documentation, or a statutory fee, if applicable."[29] The test claim statute, on the other hand, requires local law enforcement agencies to provide the information to victims free of charge.

Although the test claim statute may result in additional costs to local agencies because of the exclusion of the fee authority, those costs are not reimbursable under article XIII B, section 6. The California Supreme Court has ruled that evidence of additional costs alone does not automatically equate to a reimbursable state-mandated program under section 6.

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

[28] *Baugh v. CBS, Inc.* (1993) 828 F.Supp. 745, 755.

[29] Government Code section 6253, subdivision (b).

Rather, the additional costs must result from a new program or higher level of service. In *County of Los Angeles v. State of California*, the Supreme Court stated:

> If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme [after article XIII B, section 6 was adopted].[30]

The Supreme Court affirmed this principle in *Lucia Mar Unified School District v. Honig*:

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[31]

As indicated above, the state has not mandated a new program or higher level of service to provide, retrieve, and copy information relating to a domestic violence incident to the victim. Moreover, the First District Court of Appeal, in the *County of Sonoma* case, concluded that article XIII B, section 6 does not extend "to include concepts such as lost revenue."[32, 33]

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[30] *County of Los Angeles, supra,* 43 Cal.3d at pages 55-56.

[31] *Lucia Mar Unified School District v. Honig, supra,* 44 Cal.3d at page 835; see also, *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[32] *County of Sonoma, supra,* 84 Cal.App.4th at page 1285.

[33] In comments to the draft staff analysis, the claimant cites analyses prepared by the Department of Finance, Legislative Counsel, and the Assembly Appropriations Committee on the test claim statute that indicate the lost revenues may be reimbursable to support its contention that Family Code section 6228 imposes a reimbursable state-mandated program (pp. 11-14).

But, these analyses are not determinative of the mandate issue. The statutory scheme in Government Code section 17500 et seq. contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. (*City of San Jose, supra,* 45 Cal.App.4th 1802, 1817-1818, quoting *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, and *Kinlaw v. State of California, supra,* 54 Cal.3d at p. 333.) Moreover, as indicated in the analysis, the conclusion that the activities of providing, retrieving, and copying do not constitute a new program or higher level of service is supported by case law.

Accordingly, the Commission finds that the activities of providing, retrieving, and copying information related to a domestic violence incident do not constitute a new program or higher level of service.

Family Code Section 6228 Does Not Impose a New Program or Higher Level of Service for the Activity of Informing the Victim of the Reasons Why, For Good Cause, the Incident Report and Face Sheet are not Available within the Statutory Time Limits.

Family Code section 6228, subdivision (b), states that the domestic violence incident report face sheet shall be made available to a victim no later than 48 hours after the request, unless the law enforcement agency informs the victim of the reasons why, for good cause, the face sheet is not available within 48 hours. Under these circumstances, the law enforcement agency is required to provide the face sheet to the victim within five working days after the request is made.

Family Code section 6228, subdivision (c), contains a similar provision. Subdivision (c) states that the domestic violence incident report shall be made available to a victim no later than five working days after the request, unless the law enforcement agency informs the victim of the reasons why, for good cause, the incident report is not available within five working days. Under these circumstances, the law enforcement agency is required to provide the incident report to the victim within ten working days after the request is made.

The Commission finds that the activity of informing the victim of the reasons why, for good cause, the incident report and the face sheet are not available within the statutory time limits does not constitute a new program or higher level of service.

Since 1981, Government Code section 6253 of the Public Records Act has required law enforcement agencies to perform the same activity. Subdivision (c) of Government Code section 6253 states that each agency is required to determine whether a request for public records seeks copies of disclosable public records in the possession of the agency and notify the person making the request of the determination and the reasons of the determination within ten days of the request. Government Code section 6253, subdivision (c), further provides that the time limit may be extended if the agency notifies the person making the request, by written notice, of the reasons for the extension.[34]

Although the time limits defined in Government Code section 6253 and Family Code section 6228 are different, the activity of informing the victim of the reasons why, for good cause, the incident report and face sheet are not available within the statutory time limits is not new and, thus, does not constitute a new program or higher level of service.

Storing the Domestic Violence Incident Report and Face Sheet for Five Years Constitutes a New Program or Higher Level of Service.

Family Code section 6228, subdivision (e), states that the requirements in section 6228 shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incident report. The claimant contends that

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[34] This activity derives from Government Code section 6256.1, which was added by Statutes 1981, chapter 968. In 1998, section 6256.1 was repealed and renumbered section 6253.

subdivision (e) imposes a new program or higher level of service on local law enforcement agencies to store the domestic violence incident report for five years. The County also argues that there is no law prior to the enactment of Family Code section 6228 that required local agencies to store domestic violence incident reports and face sheets in a readily accessible format.

For the reasons provided below, the Commission finds that Family Code section 6228, subdivision (e), imposes a new program or higher level of service on local law enforcement agencies to store the domestic violence incident report for three years only.

Before the enactment of the test claim statute, the Government Code imposed a two-year record retention requirement on local agencies. Government Code section 26202, which applies to counties, states in relevant part the following:

> [T]he board may authorize the destruction or disposition of *any record, paper, or document which is more than two years old*, which was prepared or received pursuant to state statute or county charter, and which is not expressly required by law to be filed and preserved if the board determines by four-fifths (4/5) vote that the retention of any such record, paper, or document is no longer necessary or required for county purposes. Such records, papers or documents need not be photographed, reproduced or microfilmed prior to destruction and no copy thereof need be retained. (Emphasis added.)[35]

Government Code section 34090, which applies to cities, similarly states in relevant part the following:

> Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney the head of a city department may *destroy any city record, document, instrument, book or paper*, under his charge, without making a copy thereof, after the same is no longer required.
>
> *This section does not authorize destruction of*:
>
> [¶] . . .[¶]
>
> (d) *Records less than two years old*. . . .(Emphasis added.)[36]

Criminal sanctions are imposed on the custodian of records pursuant to Government Code section 6200 if the records are destroyed. That section states the following:

> Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment in the state prison for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to day any of the following:

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[35] Government Code section 26202 was last amended by Statutes 1963, chapter 1123.

[36] Government Code section 34090 was last amended by Statutes 1975, chapter 356.

(a) Steal, remove, or secrete.

(b) Destroy, mutilate, or deface.

(c) Alter or falsify.

In 1981, the Attorney General's Office issued two opinions that defined the records required to be retained by cities pursuant to Government Code section 34090 and Government Code section 6200.[37] Government Code section 6200, which was originally enacted in 1943, imposes criminal sanctions on an official custodian of "any" public record who steals, destroys, or alters public documents. Section 6200 states the following:

> Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment in the state prison for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to do any of the following:
>
> (d) Steal, remove, or secrete.
>
> (e) Destroy, mutilate, or deface.
>
> (f) Alter or falsify.

Relying on case law authority, the Attorney General's Office determined that "records" within the meaning of Government Code sections 6200 and 34090 include *all* records that are required to be kept or were made or retained for the purpose of preserving its content for future use.

> . . . a thing which constitutes an objective lasting indication of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference.[38]

Thus, if a document constitutes a record within this definition, it may not be destroyed except in accordance with the requirements of Government Code section 34090.[39]

Furthermore, the Commission disagrees with the County's assertion that Government Code section 34090 refers only to the destruction of records and does not impose a duty on agencies to maintain the records. The California Supreme Court in *People v. Memro,* a case addressing the discovery of personnel records of peace officers, found that Government Code section 34090 requires local agencies to *keep* public records for two years:

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[37] 64 Ops. Cal. Atty. Gen. 317 (1981); 64 Ops. Cal. Atty. Gen. 435 (1981).

[38] 64 Ops. Atty. Gen. 435, 437 (1981).

[39] *Ibid.*

> Although the defendant calls the circumstances surrounding the records' destruction suspicious because the court's denial of the motion to discover them was a major focus of his appeal from the original judgment and the records were destroyed two months after oral argument in that appeal, the court could reasonably conclude that (1) the evidence showed the records were destroyed according to the provisions of the Government Code – indeed, they were ***kept*** for three years beyond the two-year period after which Government Code section 34090, subdivision (d), permitted their destruction . . . (Emphasis added.)[40]

Based on these authorities, the Commission finds that before the enactment of the test claim statute, cities were required by Government Code section 34090 to keep domestic violence incident reports for two years. Penal Code section 13730 (as amended by Stats. 1993, ch. 1230) required all law enforcement agencies to prepare the domestic violence incident report before the enactment of the test claim statute.[41] The domestic violence incident report qualifies as a "record" within the meaning of Government Code sections 6200 and 34090 since it is a document required to be to be kept by law enforcement agencies and was made or retained for the purpose of preserving its content for future use; i.e., possible future criminal investigation and prosecution.

The Commission further finds that counties were required by Government Code section 26202 to keep domestic violence incident reports for two years before the enactment of the test claim statute. The plain language of Government Code section 26202 prohibits counties from destroying records, required by state statute to be prepared, if they are less than two years old. As indicated above, Penal Code section 13730, as amended in 1993, required county law enforcement agencies to prepare the domestic violence incident report. Thus, when the test claim statute was enacted in 1999, counties could not destroy domestic violence incident reports that were less than two years old.

Moreover, the Commission finds that the interpretation by the court of the requirement to keep records pursuant Government Code section 34090 applies equally to Government Code section 26202. Under the rules of statutory construction, when similar words or phrases are used in two statutes they will be construed to have the same meaning.[42] Both Government Code section 26202 and section 34090 refer to "any record, paper, or document" and both prohibit the destruction of records, which are required to be kept by state statute, if they are less than two years old.

Finally, in 1976, the California Supreme Court held that an arrest record is a public record within the scope of Government Code section 6200.[43] Thus, unless otherwise provided by statute, arrest records are required to be kept and can only be destroyed in accordance with Government Code sections 26202 and 34090. The Commission finds that the same reasoning applies to domestic violence incident reports. Arrest records are

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[40] *People v. Memro* (1996) 11 Cal.4th 786, 831.

[41] See, pages 10-11, *ante*.

[42] *Hunstock v. Estate Development Corp.* (1943) 22 Cal.2d 205.

[43] *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 863.

similar to incident reports because both documents are prepared by law enforcement agencies and are retained for the purpose of preserving evidence.

Accordingly, the Commission finds that storing the domestic violence incident report and face sheet for three years constitutes a new program or higher level of service.

Thus, the Commission must continue its inquiry to determine if storing the domestic violence incident report results in increased costs mandated by the state.

IV. Does Family Code Section 6228 Impose Costs Mandated by the State Within the Meaning of Government Code Section 17514?

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant states that it incurred $24,856 to store domestic violence incident reports from January 1, 2000, to June 30, 2000[44] and that none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply here.

The Commission finds that the requirement to store domestic violence incident reports pursuant to Family Code section 6228, subdivision (e), results in costs mandated by the state under Government Code section 17514, and that none of the exceptions under Government Code section 17556 apply to this activity.

CONCLUSION

The Commission concludes that Family Code section 6228, as added by Statutes 1999, chapter 1022, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activity only:

- Storing domestic violence incident reports and face sheets for three years. (Fam. Code, § 6228, subd. (e).)

The Commission further concludes that it does not have jurisdiction to retry the issue whether Penal Code section 13730, as added in 1984 and amended in 1995, constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports.

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[44] Schedule 1 attached to Test Claim Filing.

COMMISSION ON STATE MANDATES
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August 6, 2007

Mr. Leonard Kaye
County of Los Angeles
Auditor, Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

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

RE: Draft Staff Analysis and Hearing Date
Crime Victims' Domestic Violence Incident Reports II, 02-TC-18
Family Code Section 6228;
Penal Code Sections 12028.5 and 13730;
Statutes 1984, Chapter 901; Statutes 2001, Chapter 483; Statutes 2002, Chapters 377, 230, and 833;
County of Los Angeles, Claimant

Dear Mr. Kaye:

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

Written Comments
Any party or interested person may file written comments on the draft staff analysis by Monday, **August 27, 2007**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing
This test claim is set for hearing on **Thursday, September 27, 2007**, at 9:30 a.m. in Room 126, State Capitol, Sacramento, CA. The final staff analysis will be issued on or about September 13, 2007. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Eric Feller at (916) 323-8221 with any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosures

ITEM ___

TEST CLAIM
DRAFT STAFF ANALYSIS

Family Code Section 6228; Penal Code Sections 12028.5 and 13730
Statutes 1984, Chapter 901; Statutes 2001, Chapter 483;
Statutes 2002, Chapters 377, 830 and 833

Crime Victims' Domestic Violence Incident Reports II
(02-TC-18)

County of Los Angeles, Claimant

EXECUTIVE SUMMARY

This test claim was filed as an amendment to an earlier test claim, *Crime Victims' Domestic Violence Incident Reports*, 99-TC-08, by the County of Los Angeles in April 2003. The Commission's executive director severed it from the original test claim pursuant to authority in Government Code section 17530.

The test claim statutes (Pen. Code, § 13730 & Fam. Code, § 6228) add information regarding firearms or weapons to the domestic violence incident report form, and require giving a copy of the incident report or the face sheet to a representative of the domestic violence victim if the victim is deceased. Penal Code section 12028.5 requires officers "at the scene of a domestic violence incident involving a threat to human life or a physical assault"[1] to take temporary custody of firearms or weapons in plain sight or discovered pursuant to a consensual or other lawful search, and provides a procedure for return or disposal of the weapon.

For reasons discussed in the analysis, staff finds that effective January 1, 2002, Penal Code section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for local agencies, on all domestic violence-related calls for assistance:

- To include on the domestic violence incident report form a notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon (Pen. Code, § 13730, subd. (c)(3); Stats. 2001, ch. 483).

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the following activities are a reimbursable state-mandated program within the

[1] Penal Code section 12028.5, subdivision (b).

meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for local agencies, when firearms or other deadly weapons are taken into temporary custody at the scene of a domestic violence incident involving a threat to human life or a physical assault, and the firearm or other deadly weapon is discovered in plain sight or pursuant to a consensual or other lawful search.

- The one-time activity of amending the receipt for a confiscated firearm or other deadly weapon to include "the time limit for recovery as required" by section 12028.5. (Pen. Code, § 12028.5, subd. (b).)
- If the person who owns or had lawful possession of the firearm or other deadly weapon petitions the court for a second hearing within 12 months of the date of the initial hearing, showing by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (j).)

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the activities listed below are a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, when firearms or other deadly weapons are discovered during an other lawful search at the scene of a domestic violence incident involving a threat to human life or a physical assault. Another lawful search includes but is not limited to the following searches: (1) a search incident to arrest, or of people the officer has legal cause to arrest; (3) a search pursuant to a warrant; or (3) a search based on statements of persons who do not have authority to consent, but have indicated to law enforcement that a weapon is present at the scene.

- To take temporary custody of any firearm or other deadly weapon when necessary for the protection of the peace officer or other persons present. (Pen. Code, § 12028.5, subd. (b).)
- To give the owner or person in lawful possession of the firearm or other deadly weapon a receipt that describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b).)
- To make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure. Reimbursement for this activity is not required if either: (1) the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident; or (2) if the firearm or other deadly weapon is retained because it was illegally possessed, or (3) if the firearm or other deadly weapon is retained

because of a court petition filed pursuant to subdivision (f) of section 12028.5.[2] (Pen. Code, § 12028.5, subd. (b).)

- To sell or destroy, as provided in subdivision (c) of Section 12028,[3] any firearm or other deadly weapon taken into custody and held for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody. Reimbursement for this activity is not required for firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j) of section 12028.5. (Pen. Code, § 12028.5, subd. (e).)
- If the local agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for the agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. (Pen. Code, § 12028.5, subd. (f).)
- To inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. If the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the local agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g) of section 12028.5. (Pen. Code, § 12028.5, subd. (g).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon requests a hearing, to show in court by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful

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[2] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

[3] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (h).)

- If the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not respond within 30 days of the receipt of notice, to file a petition in court for an order of default. (Pen. Code, § 12028.5, subd. (i).)

Staff also finds that Family Code section 6228 (Stats. 2002, ch. 377) and Penal Code section 12028.5 (Stats. 1984, ch. 901 & Stats. 2002, ch 830)[4] are not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 because they do not mandate a new program or higher level of service.

Recommendation

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

[4] Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last (Gov. Code, § 9605).

STAFF ANALYSIS

Claimant

County of Los Angeles

Chronology

4/02/03	Claimant files proposed amendment (02-TC-18) to test claim 99-TC-08, *Crime Victims' Domestic Violence Incident Reports*
4/11/03	Commission staff deems proposed amendment incomplete
4/18/03	Claimant refiles amendment to test claim
4/22/03	The Commission's executive director severs test claim amendment (02-TC-18) from original test claim (99-TC-08), deems test claim amendment complete, and requests comments
08/06/07	Commission staff issues draft staff analysis

Background

This test claim alleges activities based on Penal Code sections 13730 (Stats. 2001, ch. 483), 12028.5 (Stats. 1984, ch. 901; Stats. 2002, chs. 830 & 833), and Family Code section 6228 (Stats. 2002, ch. 377). These statutes add weapons information to the domestic violence incident report form, require giving a copy of the form to the victim's representative, as defined, if the victim is deceased, and require law enforcement officers at the scene of a domestic violence incident "involving a threat to human life or a physical assault"[5] to take temporary custody of weapons, including a process for their return or disposal.

Test Claim Statutes

Penal Code section 13730: This section was originally added by Chapter 1609, Statutes of 1984, and requires local law enforcement agencies to develop a system for recording all domestic violence-related calls for assistance. Subdivision (c) requires law enforcement agencies to develop an incident report form for the domestic violence calls, with specified content. It was amended (Stats. 2001, ch. 483) in subdivision (c) to add the following to the form:

> (3) A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5.

Family Code section 6228: This section requires giving, without charging a fee, a copy of the domestic violence incident report or the incident report face sheet, or both, to the victim. The

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[5] Penal Code section 12028.5, subdivision (b).

test claim statute (Stats. 2002, ch. 377) amended this section to require giving a copy of the report to a representative of the victim, as defined, if the victim is deceased. Specifically, it was amended to add the underlined text as follows:

> (a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.[6]

Other subdivisions of section 6228 were amended similarly. Subdivision (d), which specifies that the person requesting copies of the incident report must present identification, was amended to require the representative to present a certified copy of the death certificate of the victim at the time of the request. Subdivision (g) defines the representative of the victim as any of the following:

> (1) (A) The surviving spouse.
> (B) A surviving child of the decedent who has attained 18 years of age.
> (C) A domestic partner, as defined in subdivision (a) of Section 297.
> (D) A surviving parent of the decedent.
> (E) A surviving adult relative.
> (F) The public administrator if one has been appointed.
>
> (2) A representative of the victim does not include any person who has been convicted of murder in the first degree, as defined in Section 189 of the Penal Code, of the victim, or any person identified in the incident report face sheet as a

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[6] Family Code section 6211 defines domestic violence as "abuse perpetrated against any of the following persons:

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

Family Code section 6203 defines abuse as any of the following:

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

suspect. Domestic violence incident report face sheets may not be provided to a representative of the victim unless the representative presents his or her identification, such as a current, valid driver's license, a state-issued identification card, or a passport and a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time of the request.

The purpose of Family Code section 6228 is to assist domestic violence victims to obtain a temporary restraining order against the accused.[7] The amendment regarding the victim representative was in response to a case in which a domestic violence victim committed suicide, and the victim's mother had difficulty obtaining the incident report when seeking custody of her grandchildren.[8]

Penal Code section 12028.5: This section was enacted in 1984 and has been amended several times. The original 1984 statute authorized a law enforcement officer to take temporary custody of a firearm "at the scene of a domestic violence incident involving a threat to human life or a physical assault."[9] The original statute also defined domestic violence, abuse, and family household member.[10]

Statutes 1999, chapter 662, not pled by claimant, amended section 12028.5 to require law enforcement officers to take temporary custody of any firearm or other deadly weapon[11] at a domestic violence[12] scene involving a threat to human life or a physical assault. Section 12028.5 also includes definitions of domestic violence and abuse, and specifies a procedure for making the firearm or other deadly weapon available to the owner, or disposing of it.

Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last.[13] This amendment to section 12028.5 pled by claimant adds "other lawful searches" (to preexisting plain sight or consensual search) during which law enforcement officers must confiscate firearms or other deadly weapons at the scene of a domestic violence incident. The amendment requires including on the receipt for the confiscated firearm or weapon "the time limit for recovery as required by this section."[14] It expands the maximum time the firearm or weapon can be held from 72 hours to five days (the

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[7] Assembly Committee on Judiciary, Analysis of Assem. Bill No. 403 (1999-2000 Reg. Sess.) as amended on March 18, 1999, page 2.

[8] Senate Committee on Public Safety, Analysis of Senate Bill No. 1265 (2001-2002 Reg. Sess.) as amended on April 2, 2002, page 4.

[9] Former Penal Code section 12028.5, subdivision (b) (Stats. 1984, ch. 901).

[10] The definitions were amended by Statutes 1992, chapter 1136 and Statutes 1993, chapter 1098. These amendments were not pled by claimant, so staff makes no findings on them.

[11] "Deadly weapon means any weapon, the possession or concealed carrying of which is prohibited by Section 12020." (Pen. Code, § 12028.5, subd. (a)(3)).

[12] Penal Code section 12028.5, subdivision (b).

[13] Government Code section 9605.

[14] Penal Code section 12028.5, subdivision (b).

minimum time remained 48 hours).[15] It also lengthens the time local government has to file a petition to determine whether the firearm or weapon should be returned, extending it from 30 to 60 days after the seizure, or from 60 to 90 days with extensions.[16] In addition, the amendment lowered the standard of evidence needed to keep the firearm or weapon from being returned to the owner, from clear and convincing to a preponderance of evidence "that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat."[17]

The 2002 amendment also added a provision requiring the court to order returning the firearm or weapon to the owner, and to award reasonable attorney's fees to the prevailing party if there is a petition for a second hearing, "unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat."[18]

Prior Commission Decisions

CSM 4222: In 1987, the Commission approved a test claim on Penal Code section 13730, as added by Statutes 1984, chapter 1609 (*Domestic Violence Information*). The parameters and guidelines for *Domestic Violence Information* authorize reimbursement for local law enforcement agencies for the "costs associated with the development of a Domestic Violence Incident Report form used to record and report domestic violence calls," and "for the writing of mandated reports which shall include domestic violence reports, incidents or crime reports directly related to the domestic violence incident."

Beginning in fiscal year 1992-93, the Legislature suspended Penal Code section 13730 (as added by Stats. 1984, ch. 1609) pursuant to Government Code section 17581. Suspending a statute means the Legislature assigns a zero-dollar appropriation to the program and makes it optional.

CSM 96-362-01: In February 1998, the Commission considered a test claim on the 1995 amendment to Penal Code section 13730 (*Domestic Violence Training and Incident Reporting*).

In 1995, the Legislature amended Penal Code section 13730, subdivision (c) (Stats. 1995, ch. 965) to require law enforcement agencies to include in the domestic violence incident report information relating to the use of alcohol or controlled substances by the alleged abuser, and any prior domestic violence responses to the same address.

The Commission determined that the additional information on the domestic violence incident report was not mandated by the state because the suspension of the statute under Government Code section 17581 made the completion of the incident report optional, so the additional information under the test claim statute came into play only after a local agency elected to complete the incident report.

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[15] *Ibid.*

[16] Penal Code section 12028.5, subdivision (f).

[17] *Ibid.*

[18] Penal Code section 12028.5, subdivision (j).

Based on the language of the suspension statute (Gov. Code, § 17581), the Commission determined, however, that during periods when the state operates without a budget, the original suspension of the mandate would not be in effect. Thus, for the periods when the state operates without a budget until the Budget Act is chaptered and makes the domestic violence incident reporting program optional under Government Code section 17581, the Commission determined the activities required by the 1995 amendment to Penal Code section 13730 are reimbursable.

In 1998, Government Code section 17581 was amended to close the gap and continue the suspension of programs during periods when the state operates without a budget.[19] The *Domestic Violence Information and Incident Reporting* program has been suspended in every Budget Act since 1992 except for 2003-2004.[20]

99-TC-08: The current test claim was originally submitted as an amendment to (and severed from) test claim 99-TC-08, *Crime Victims' Domestic Violence Incident Reports,* which the Commission decided May 29, 2003 (corrected decision issued September 2003).[21] The Commission found it had no jurisdiction over Penal Code section 13730 (Stats. 1984, ch. 1609, Stats. 1995, ch. 965) because it had already adjudicated the statute in CSM 4222, *Domestic Violence Information,* and in CSM 96-362-01, *Domestic Violence Training and Incident Reporting.* The Commission also found that the mandate had been suspended by the Legislature every year since 1992-1993, making the activities discretionary on the part of local government.

Also decided in 99-TC-08 was Family Code section 6228 (Stats. 1999, ch. 1022), which the Commission found is a reimbursable mandate for storing domestic violence incident reports and face sheets for three years (Fam. Code, § 6228, subd. (e)). The Commission also found that section 6228 does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet, and that other activities related to providing the incident reports to victims were already required under Government Code section 6254 of the California Public Records Act, and were therefore not reimbursable.

Test claim 99-TC-08 did not include Penal Code section 12028.5, which is part of this claim.

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[19] Government Code section 17581, subdivision (a), now states the following: "No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year *and the for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year* . . ." (Emphasis added.)

[20] 2006-2007 Budget Act (Stats. 2006, chs. 46 & 47) Item 8885-295-0001, Schedule (3) (aa); 2005-2006 Budget Act (Stats. 2005, chs. 38 & 39) Item 8885-295-0001, Schedule (3) (hh); 2004-2005 Budget Act (Stats. 2004, ch. 208) Item 9210-295-0001, Provision 3, Schedule (5); 2002-2003 Budget Act (Stats. 2002, ch. 379), Item 9210-295-0001, Provision 3, Schedule (8); 2001-2002 Budget Act (Stats. 2001, ch. 106), Item 210-295-0001, Provision 3, Schedule (8); 2000-2001 Budget Act (Stats. 2000, ch. 52), Item 210-295-0001, Provision 3, Schedule (8); 1999-2000 Budget Act (Stats. 1999, ch. 50), Item 210-295-0001, Provision 2, Schedule (8).

[21] To avoid confusing this test claim with the original *Crime Victims' Domestic Violence Incident Reports,* this test claim is renamed *Crime Victims' Domestic Violence Incident Reports II.*

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable state mandate under article XIII B, section 6 of the California Constitution. Claimant requests reimbursement for local law enforcement agencies to do the following based on Statutes 2001, chapter 483 that added subdivision (c)(3) to Penal Code section 13730:[22]

1. When "necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser or both, whether a firearm or other deadly weapon was present at the location."
2. To report if an inquiry was made "whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether the inquiry disclosed the presence of a firearm or other deadly weapon."
3. To confiscate "[a]ny firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident ... pursuant to Section 12028.5"

Claimant requests reimbursement for local law enforcement agencies to do the following based on Penal Code section 12028.5:[23]

1. A peace officer "... shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present." (§ 12028.5 (b).)
2. "Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm. The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm or other deadly weapon. (§ 12028.5 (b).)
3. The confiscated "... firearm or other deadly weapon shall be held [not less than] 48 hours." (§ 12028.5 (b).)
4. "[T]he firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession [as specified] 48 hours after the seizure or as soon thereafter as possible, but no later than 5 business days after the seizure." (§ 12028.5 (b).)
5. A "peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this section shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located." (§ 12028.5 (c).)
6. Any "firearm or other deadly weapon that has been taken into custody that has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been

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[22] Test Claim 02-TC-18, pages 2-3.

[23] Test Claim 02-TC-18, pages 7-10

served, upon his or her identification of the firearm or other deadly weapon and proof of ownership." (§ 12028.5 (d).)

7. Any "firearm or other deadly weapon taken into custody and held by police, university police, or sheriff's department or by a marshal's office, by a peace officer of the Department of the California Highway Patrol, as defined ... for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028." (§ 12028.5 (e).)
8. "In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned." (§ 12028.5 (f).)
9. "The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at the person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements." (§ 12028.5 (g).)
10. Local law enforcement agencies and the district attorney shall participate in hearings "... if the person requests a hearing" in which case, "... the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party." (§ 12028.5 (h).)
11. Local law enforcement agencies and the district attorney shall participate in hearings "...[i]f there is a petition for a second hearing, and, "... unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat," the duty of local law enforcement agencies to "... return of the firearm or other deadly weapon" and, as specified, pay "... reasonable attorney's fees to the prevailing party." (§ 12028.5 (j).)

Claimant also requests reimbursement for local law enforcement agencies to, based on Family Code section 6228, to prepare and provide domestic violence incident reports for the "representatives" of domestic violence victims, as provided in statute.[24]

Claimant alleges that the duty to provide requested domestic violence incident reports and face sheets to victims and their representatives under Family Code section 6228 is not excused even if the general duty to prepare such reports and face sheets under Statutes 1984, chapter 1609 is made optional by the Legislature's suspension of the mandate pursuant to Government Code section 17581. Claimant submits that it has no reasonable alternative but to prepare the incident report or face sheet.

Claimant also submitted a declaration that it will incur "costs well in excess of $1,000 during the 2002-03 fiscal year to implement" the test claim statutes.[25] Another declaration includes the time required for the alleged activities: "on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform" the duties listed in nos. 1-11 above.[26]

State Agency Positions

No state agencies submitted comments on this test claim.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[27] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[28] "Its purpose is to preclude the state from shifting financial responsibility for carrying out

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[24] Test Claim 02-TC-18, pages 10-12.

[25] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 1; Exhibit 9, Declaration of Wendy Watanabe, page 1.

[26] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 2; Exhibit 9, Declaration of Wendy Watanabe, page 2.

[27] Article XIII B, section 6, subdivision (a), (as amended in Nov. 2004) provides:

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

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

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."[29] 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.[30]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[31]

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.[32] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[33] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[34]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[35]

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.[36] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an

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

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

[31] *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*).

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

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

[34] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[35] *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.

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

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[37]

Issue 1: Does Penal Code section 13730, as amended by Statutes 2001, chapter 483, constitute a reimbursable state-mandated program?

Section 13730 requires local law enforcement agencies to develop and complete incident report forms for all domestic violence calls. As stated in subdivision (c) "In all incidents of domestic violence, *a report shall be written* and shall be identified on the face of the report as a domestic violence incident." [Emphasis added.] The report is required to include notations of officer observations regarding (in subd. (c)(1)) whether the alleged abuser was under the influence of alcohol or a controlled substance, and (in subd. (c)(2)) whether any law enforcement agency had previously responded to a domestic violence call at the same address involving the same alleged abuser or victim.

It was amended (Stats. 2001, ch. 483) in subdivision (c)(3) to add the following to the form:

> A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident shall be subject to confiscation pursuant to Section 12028.5.

Read together, the plain language of subdivisions (c) and (c) (3) requires local law enforcement agencies to include this firearm information on the domestic violence incident report form. Moreover, it constitutes a program within the meaning of article XIII B, section 6 because it carries out the governmental function of providing a service to the public[38] by adding information to the domestic violence incident report form. It is also an activity that is unique to local government.

For a statute that had not been suspended by the Legislature, the above criteria would be enough to determine that the 2001 amendment is a state mandate subject to article XIII B, section 6. The 1984 version of section 13730 (Stats. 1984, ch. 1609) however, has been suspended by the Legislature. Thus, the issue is whether the 2001 requirement to include firearm and weapon information on the domestic violence incident form is a state mandate in light of the Legislature's annual budget-act suspension of Statutes 1984, chapter 1609.

The 1984 version of section 13730, subdivision (c), includes the following sentence: "In all incidents of domestic violence, a report shall be written and shall be thus identified on the face of the report as a domestic violence incident." This was determined to be a reimbursable activity in the Commission's decision CSM 4222, as discussed above.

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

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

As provided in Government Code section 17581, subdivisions (a) and (b), before suspending a statute, the following criteria must be met:

> (a) No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if all of the following apply:
>
> (1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to Section 6 of Article XIIIB of the California Constitution.
>
> (2) The statute or executive order, or portion thereof, or the commission's test claim number, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year.
>
> (b) Notwithstanding any other provision of law, if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a), the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency.

The requirement in subdivision (c) of section 13730 has been suspended each year,[39] except for fiscal year 2003-2004,[40] since fiscal year 1992-1993. The Legislature specifically identified Statutes 1984, chapter 1609 in the Budget Act and assigned a zero dollar appropriation to it. By suspending Statutes 1984, chapter 1609, the Legislature made preparing the written domestic violence incident report form an optional activity for local government.

Statutes 1993, chapter 1230 added the following to subdivision (a) of section 13730: "All domestic violence related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident." This 1993 amendment has never been determined by the Legislature, the Commission, or any court to mandate a new program or higher level of service requiring local agency reimbursement, as required by Government Code section 17581. In sum, the 1993 amendment is not eligible for suspension.

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[39] 2006-2007 Budget Act (Stats. 2006, chs. 46 & 47) Item 8885-295-0001, Schedule (3) (aa); 2005-2006 Budget Act (Stats. 2005, chs. 38 & 39) Item 8885-295-0001, Schedule (3) (hh); 2004-2005 Budget Act (Stats. 2004, ch. 208) Item 9210-295-0001, Provision 3, Schedule (5); 2002-2003 Budget Act (Stats. 2002, ch. 379), Item 9210-295-0001, Provision 3, Schedule (8); 2001-2002 Budget Act (Stats. 2001, ch. 106), Item 210-295-0001, Provision 3, Schedule (8); 2000-2001 Budget Act (Stats. 2000, ch. 52), Item 210-295-0001, Provision 3, Schedule (8); 1999-2000 Budget Act (Stats. 1999, ch. 50), Item 210-295-0001, Provision 2, Schedule (8).

[40] 2003-2004 Budget Act (Stats. 2003, ch. 157) Final Change Book, p.655, Item 9210-295-0001, Provision 3.

This means, in essence, that the provisions of subdivision (c) in section 13730, when suspended by the Budget Act, are permissive, but the plain language of the 1993 amendment requires a written incident report for all domestic violence calls for assistance in subdivision (a). When statutory provisions conflict in this way, the Commission, like a court, relies on the following rule of statutory construction: "[W]hen two laws, upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail."[41] Accordingly, the 1993 amendment to subdivision (a) prevails over the suspension of subdivision (c).[42] Thus, preexisting law requires that every domestic violence related call for assistance be supported with a written domestic violence incident report. Consequently, staff finds that including the firearm and weapon information in the domestic violence incident report form, as required by the 2001 amendment to Penal Code section 13730, subdivision (c), is state-mandated.

The next issue is whether the provision in subdivision (c)(3) is a new program or higher level of service. To determine this, the test claim statute is compared to the legal requirements in effect immediately before enacting the test claim statute.[43]

Although preexisting law required filing an incident report for all domestic violence incident-related calls, as discussed above, preexisting law did not require the incident report to contain the following:

> A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon. (Pen. Code, § 13730, subd. (c)(3).)

Therefore, staff finds that the following is a new program or higher level of service within the meaning of article XIII B, section 6: including on the domestic violence incident report form a notation of whether the officer who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

The final issue is whether the 2001 amendment to section 13730 imposes costs mandated by the state,[44] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines "cost mandated by the state" as follows:

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[41] *People v. Kuhn* (1963) 216 Cal.App.2d 695, 700.

[42] This does not mean that the suspensions in the Budget Acts are idle acts of the Legislature, since there were other findings in the Commission's decision (CSM 4222) that are suspended.

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

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

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

In the test claim exhibits,[45] claimant declares that it will incur costs in excess of $1,000 during the 2002-2003 fiscal year to implement the claim statutes.[46] Therefore, staff finds that section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes costs mandated by the state within the meaning of Government Code section 17514, and that no exceptions to reimbursement in Government Code section 17556 apply.

All the elements having been met, staff finds that Penal Code section 13730, as amended (by Stats. 2001, ch. 483), is a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, for all domestic violence-related calls for assistance, to include the following on the domestic violence incident report: A notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon.

Issue 2: Does Family Code section 6228, as amended by Statutes 2002, chapter 377, constitute a reimbursable state-mandated program?

Family Code section 6228 requires the local law enforcement agency to provide, without charging a fee, one copy of a domestic violence incident report face sheet, or one copy of a domestic violence incident report, or both, to a victim of domestic violence. The test claim statute amended this section to also require providing a copy to the victim's representative if the victim is deceased. The victim representative is defined as any of the following:

(A) The surviving spouse.
(B) A surviving child of the decedent who has attained 18 years of age.
(C) A domestic partner, as defined in subdivision (a) of Section 297.
(D) A surviving parent of the decedent.
(E) A surviving adult relative.
(F) The public administrator if one has been appointed.

Claimant alleges that section 6228 requires law enforcement agencies to prepare the incident report or face sheet.

The plain language of Family Code section 6228, however, does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet. Rather, the express language states that local law enforcement agencies "shall *provide*, without charging

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[45] Test Claim 02-TC-18, Exhibit 8, declaration of Bernice K. Abram, and Exhibit 9, declaration of Wendy Watanabe.

[46] Government Code section 17564.

a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, or to his or her representative if the victim is deceased, as defined in subdivision (g), upon request." (Emphasis added.)

Therefore, staff finds that Family Code section 6228 is a state mandate for a local law enforcement agency to provide upon request, without charging a fee, one copy of the domestic violence incident report face sheet, or one copy of the domestic violence incident report, or both, to the victim's representative, as defined, if the victim is deceased.

Doing so, however, is not a new program or higher level of service.

The Public Records Act, in Government Code section 6254, subdivision (f) requires giving a copy of a police report "to the victim of an incident or *an authorized representative thereof* ..." [Emphasis added.] And one California appellate court held, with respect to records of law enforcement investigations, that "While the general public is denied access to this information such is not true with respect to parties involved in the incident or others who have a proper interest in the subject matter."[47]

Moreover, subdivision (f) of Government Code section 6254 requires the following:

> [S]tate and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:
>
> (1) The full name, current address, and occupation of every individual arrested by the agency, the individual's physical description ..., the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, ... all charges the individual is being held upon ....
>
> (2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by an agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, ...

Because preexisting Government Code section 6254, subdivision (f), requires releasing the same information as the domestic violence incident report to persons who would be authorized representatives, staff finds that providing the report or face sheet to the authorized victim representative (as required by Fam. Code, § 6228) is not a new program or higher level of service within the meaning of article XIII B, section 6.

Family Code section 6228 differs from the Public Records Act in one major aspect. Under the Public Records Act, local governments may charge a fee to recover the costs of making the police report information available, whereas the test claim statute prohibits charging a fee for the information. Increased costs alone, however, without the test claim statute mandating a new

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

program or higher level of service to the public does not require reimbursement under article XIII B, section 6.[48]

Accordingly, staff finds that Family Code section 6228 (Stats. 2002, ch. 377) does not constitute a new program or higher level of service for a local law enforcement agency to provide, without charging a fee, one copy of the domestic violence incident report face sheet, or one copy of the domestic violence incident report, or both, to the victim's representative, as defined, if the victim is deceased.

Therefore, staff finds that that Family Code section 6228, as amended (Stats. 2002, ch. 377) is not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

Issue 3: Does Penal Code section 12028.5 constitute a reimbursable state-mandated program?

This section describes the procedure for a law enforcement officer to confiscate a firearm or other deadly weapon at the scene of a domestic violence incident "involving a threat to human life or a physical assault"[49] and describes the procedure for the destruction or return of the weapon. Although Section 12028.5 has been amended almost annually since 1984,[50] claimant pled only the 1984 version (Stats. 1984, ch. 901), and the 2002 amendment (Stats. 2002, chs. 830 & 833), so this analysis is limited to only those two versions of the statute.[51]

The 1999 amendment (Stats. 1999, ch. 662) to section 12028.5 stands out because it changed the "may take temporary custody" phrase in subdivision (b) to "shall take temporary custody." But because neither the 1999 amendment, nor any of the others before 2002 were pled by claimant, staff makes no findings on them.

A. Does Penal Code section 12028.5 (Stats. 1984, ch. 901) impose a state-mandated program?

As originally enacted in 1984, section 12028.5 read as follows:

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[48] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877. *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[49] Penal Code section 12028.5, subdivision (b).

[50] Statutes 1985, chapter 311, Statutes 1987, chapters 131 & 1362, Statutes 1989, chapters 850 & 1165, Statutes 1990, chapter 1695, Statutes 1991, chapter 866, Statutes 1992, chapters 163 & 1136, Statutes 1993, chapters 219 & 1098, Statutes 1994, chapters 871 & 872, Statutes 1996, chapter 305, Statutes 1998, chapter 606, Statutes 1999, chapters 659 & 662, Statutes 2000, chapter 254.

[51] Subdivision (c) of section 12028.5 (as amended by Stats. 1999, ch. 659) requires a community college or school district peace officer who takes custody of a firearm or deadly weapon pursuant to this section to deliver it within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located. Because there is no community college or school district claimant in this test claim, staff does not discuss and makes no finding on this provision in subdivision (c).

(a) As used in this section, the following words have the following meanings:[52]

(1) "Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself, herself, or another.

(2) "Domestic Violence" is abuse perpetrated against a family or household member.

(3) "Family or household member" means a spouse, former spouse, parent, child, any other person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the last six months, regularly resided in the household.

(b) A sheriff, undersheriff, deputy sheriff, or police officer of a city at the scene of a domestic violence incident involving a threat to human life or a physical assault *may* take temporary custody of any firearm described in Section 12001 in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm, the officer shall give the owner or person who possessed the firearm a receipt. The receipt shall describe the firearm and identification or serial number on the firearm. The receipt shall indicate where the firearm can be recovered and the date after which the owner or possessor can recover the firearm. No firearm shall be held less than 48 hours. If a firearm is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. [Emphasis added.]

(c) Any firearm which has been taken into custody which has been stolen shall be restored to the lawful owner, as soon as its use for evidence has been served, upon his or her identification of the firearm and proof of ownership.

(d) Any firearm taken into custody and held by a police or sheriff's department for longer than 12 months and not recovered by the owner or person who has lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028.

Because the plain language in subdivision (b) of the 1984 version is permissive as to taking custody of the firearm, staff finds that local agencies are not legally compelled to take custody of a firearm at the scene of a domestic violence incident involving a threat to human life or a physical assault. Staff also finds that that local agencies are not practically compelled to take custody of a firearm under those circumstances. The statute on its face does not impose "certain

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[52] The definitions were amended by Statutes 1992, chapter 1136 and Statutes 1993, chapter 1098. Staff makes no findings on those amendments.

and severe penalties such as double taxation or other draconian consequences"[53] for not confiscating the firearm. And there is no evidence in the record that local agencies are practically compelled to confiscate the firearm. Rather, under the 1984 statute, taking a firearm at the scene of a domestic violence incident was a policy decision of the local agency. Therefore, staff finds that confiscating the firearm under the circumstances described in subdivision (b) of section 12028.5 (Stats. 1984, ch. 901) is not a state mandate.

As to the remaining downstream activities in the 1984 statute, the issue is whether they are state mandated (e.g., giving a receipt, holding the weapon for 48 to 72 hours, returning it to the owner if stolen, and final disposal if unclaimed) if the triggering event is not state mandated.

In the *Kern High School Dist.* case,[54] the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."[55]

Therefore, based on the plain language of the statute and the reasoning in *Kern High School Dist.*, staff finds that there is no legal compulsion in section 12028.5, as added by Statutes 1984, chapter 901, for law enforcement officer to perform the downstream activities related to confiscating a firearm at a domestic violence scene (e.g., giving a receipt, holding the weapon for 48 to 72 hours, returning it to the owner if stolen, and final disposal if unclaimed). Absent any evidence in the record, staff also finds that there is no practical compulsion to perform these activities. Therefore, staff finds that section 12028.5, as added by Statutes 1984, chapter 901, is not a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. Does Penal Code section 12028.5 (Stats. 2002, ch. 833) impose a state-mandated new program or higher level of service?

We begin by summarizing the 2002 amendments to section 12028.5 (Stats. 2002, ch. 833, § 1.5). Subdivision (b) was amended as follows:

> [Law enforcement officers] shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm, the officer shall give the owner or

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[53] *Kern High School Dist., supra,* 30 Cal.4th 727, 751. In another part of the opinion, the court stated an example of practical compulsion as a substantial penalty (independent of the program funds at issue) for not complying with the statute. (*Id.* at p. 731).

[54] *Id.*.

[55] *Id.* at page 743. Emphasis in original.

person who possessed the firearm a receipt. The receipt shall describe the firearm and identification or serial number on the firearm. The receipt shall indicate where the firearm can be recovered, and the time limit for recovery as required by this section, and the date after which the owner or possessor can recover the firearm. No firearm or other deadly weapon shall be held less than 48 hours. Except as provided in subdivision (f), if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than ~~72 hours~~ 5 business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within ~~72 hours~~ 5 business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

Subdivision (f) was amended to extend law enforcement deadlines as follows:

> In those cases ~~where~~ in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within ~~30~~ 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within ~~60~~ 90 days of the date of seizure of the firearm or other deadly weapon.

Subdivision (h) was amended to lower the standard of proof required to prevent owners from recovering their firearms or weapons, as follows:

> If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by ~~clear and convincing~~ a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

Subdivision (j) authorizes the person to petition the court a second time if the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession. The 2002 amendment added the following:

> If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the

initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

As a preliminary matter, staff finds that section 12028.5 constitutes a program within the meaning of article XIII B, section 6 because the firearm or weapon confiscation is a governmental service to the public, in that it is done "as necessary for the protection of the peace officer or other persons present."[56]

1. Firearms or other deadly weapons taken in plain sight or during a consensual search

Amending the receipt for confiscated weapon: Penal Code section 12028.5, subdivision (b) requires law enforcement, on taking custody of the firearm or other deadly weapon at the scene of a domestic violence incident, to give the owner or person in possession a receipt. The receipt describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, and the date after which the owner or possessor can recover it (Pen. Code, § 12028.5, subd. (b)). The 2002 amendment requires the receipt to include information regarding "the time limit for recovery as required by this section."

Adding "the time limit for recovery as required by this section" to the information on the receipt is a new requirement. As such, staff finds that this is a state mandate, and a new program or higher level of service for law enforcement to make a one-time amendment to the receipt to include this information for a firearm or other deadly weapon confiscated at the scene of a domestic violence incident. (Pen. Code, § 12028.5, subd. (b), Stats. 2002, ch. 833.)).

Extending the period to make the firearm or weapon available after seizure: Subdivision (b) of section 12028.5 was amended further as follows:

> Except as provided in subdivision (f), [57] if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed, the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as

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[56] Penal Code section 12028.5, subdivision (b).

[57] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

soon thereafter as possible, but no later than ~~72 hours~~ 5 business days after the seizure. In any civil action or proceeding for the return of firearms or ammunition or other deadly weapon seized by any state or local law enforcement agency and not returned within ~~72 hours~~ 5 business days following the initial seizure, except as provided in subdivision (d), the court shall allow reasonable attorney's fees to the prevailing party.

Preexisting law (before the 2002 amendment) required making the firearm or weapon available to the owner or person in lawful possession 48 hours after seizure or as soon thereafter as possible, but no later than 72 hours after the seizure. Staff finds that extending the period before a firearm or other deadly weapon may be made available from 72 hours to five business days does not mandate a new program or higher level of service. Although this may result in longer storage of the firearm or weapon, the storage is at the discretion of the local agency since nothing prevents making the firearm available within the 48 hours after seizure. Therefore, staff finds that this amendment does not mandate a new activity on a local agency within the meaning of article XIII B, section 6.

Extending the time to initiate a petition in court to determine if weapon should be returned: Subdivision (f) was amended by Statutes 2002, chapter 833 to extend law enforcement deadlines as follows:

> In those cases ~~where~~ in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within ~~30~~ 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within ~~60~~ 90 days of the date of seizure of the firearm or other deadly weapon.

Staff finds that the 2002 amendment increasing the time from 30 to 60 days to initiate a petition, and from 60 to 90 days if the court grants an extension to file the petition, does not mandate a new program or higher level of service because the amendment gives the local law enforcement agency *more* time than in preexisting law to initiate the petition, but does not require a new activity of a local agency.

Lowering the standard of evidence to deny returning the firearm or weapon: Subdivision (h) of section 12028.5 was amended by the test claim statute to lower the standard of proof required to prevent owners from recovering their firearms or weapons, as follows:

> If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by ~~clear and convincing~~ a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall

order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

Staff finds that the 2002 amendment does not mandate a new program or higher level of service. The amendment lowers the standard of proof from clear and convincing to a preponderance of the evidence that the local government is required to show in order to keep the firearm or weapon from being returned to the owner. This amendment does not, however, require a new activity of the local agency, or increase the level service for an existing activity. Therefore, staff finds that the 2002 amendment to subdivision (h) that lowers the standard of proof does not mandate a new program or higher level of service.

Petition for second hearing and attorney's fees: Subdivision (j) states (with the 2002 amendments shown) the following:

> If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as provided in Section 12028.

Although this provision in subdivision (j) does not expressly contain mandatory language, the local agency would have a duty to respond to the owner's petition to return the firearm or weapon if the facts present themselves. Subdivision (f) of section 12028.5 requires the local agency to file the petition to prevent the return of the firearm if "a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This statutory duty in (f) to keep the weapon from being returned to someone dangerous carries over to the petition for a second hearing in subdivision (j). This is consistent with the general duty of local law enforcement and district attorneys to protect the public.[58] Therefore, in cases where the firearm or weapon owner petitions for a second hearing within 12 months of the date of the initial hearing, staff finds that it is a state mandate for the local agency to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat.

As to attorney's fees, staff also finds that it is a mandate, since the court is required to impose them, and the local agency is required to pay them, if it does not prevail in keeping the firearm or other deadly weapon from being returned to the owner or person who was in lawful possession

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[58] *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 615.

after the second petition. Therefore, staff finds that paying the attorney's fees in subdivision (j) to the prevailing party is a state mandate upon order of the court.

Preexisting law (before the 2002 amendment) authorizes the owner or person in possession to petition the court a second time for return of the firearm or other deadly weapon. Preexisting law also authorizes local law enforcement to dispose of the firearm or other deadly weapon if the person does not petition the court or is unsuccessful at the second hearing in gaining the return of the firearm or other deadly weapon. Preexisting law did not, however, require a local government to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, nor did it require the local agency to pay attorney's fees on order of the court. Therefore, if the facts so dictate, staff finds that these activities are a new program or higher level of service if there is a petition for a second hearing for firearms or other deadly weapons confiscated in plain sight or during a consensual search.

2. Firearms or other deadly weapons taken during "other lawful searches"

Firearm or weapon seizure: The 2002 amendment to section 12028.5 (Stats. 2002, ch. 833, § 1.5) adds the following underlined text to subdivision (b):

> [Law enforcement officers] shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present.

Sponsored by the City of Santa Rosa, the legislative history of this amendment indicates that its purpose was "to add any "lawful" search to the existing "plain sight or consensual" search required in domestic violence circumstances for the mandated seizure of firearms and weapons."[59] Adding "any lawful search" to the consensual or plain sight searches already in the statute means that firearm or weapon confiscation is now also required for searches incident to arrest, or of people the officer has legal cause to arrest,[60] or searches pursuant to a warrant, or searches based on statements of persons who do not have authority to consent but have indicated to law enforcement that a weapon is present at the scene.[61]

Staff finds that the plain language of this subdivision mandates a law enforcement officer at a domestic violence scene involving a threat to human life or a physical assault to take temporary custody of any firearm or other deadly weapon during an "other lawful search" as necessary for the protection of the peace officer or other persons present (Pen. Code, § 12028.5, subd. (b)).

Adding "or other lawful search" to subdivision (b) also creates a new program or higher level of service by increasing the quantity of searches during which taking temporary custody of the weapon is required. Adding "other lawful search" to the statute means that firearm or weapon

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[59] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 2.

[60] Penal Code section 833.

[61] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 6.

confiscation is now also required for searches incident to arrest, or of people the officer has legal cause to arrest,[62] or searches pursuant to a warrant, or searches based on statements of persons who do not have authority to consent but have indicated to law enforcement that a weapon is present at the scene.[63]

Therefore, staff finds that Penal Code section 12028.5, subdivision (b), is a new program or higher level of service for law enforcement to take temporary custody of a firearm or other deadly weapon at a scene of domestic violence, as defined in section 12028.5, subdivision (a), if the firearm or weapon is confiscated during an "other lawful search."

The remainder of the analysis of section 12028.5 is limited to conditions of "other lawful searches" which, for purposes of this analysis, is defined as searches that are not plain sight or consensual.

Give receipt for confiscated weapon: The next activity in Penal Code section 12028.5, subdivision (b) is, upon taking custody of the firearm or deadly weapon at the scene of domestic violence, giving the owner or person in possession a receipt for the item. The receipt describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it (Pen. Code, § 12028.5, subd. (b)). Based on the plain language of this provision, staff finds that giving a receipt to the owner or person in lawful possession of the firearm or other deadly weapon, with contents as specified, is a state mandate.

Preexisting law requires, when a weapon or personal property is taken from an arrested person, giving a receipt to the person for the property taken.[64] And there is a similar requirement for arrested persons for property alleged to have been stolen or embezzled.[65] Although these statutes indicate that law enforcement officers have a longstanding duty to give a receipt to arrested persons for confiscated property, the receipt requirement for weapons taken at the scene of a domestic violence incident in the test claim statute is different in that more detail is required regarding the firearm or other deadly weapon seized.

Staff finds that the entire content of the receipt is a new program or higher level of service for other lawful searches, because no confiscation or receipt was required for those searches under preexisting law.

Therefore, staff finds that, upon taking custody of the firearm or other deadly weapon at the scene of domestic violence during any other lawful search, it is a new program or higher level of service to give the owner or person in possession a receipt for the firearm or other deadly weapon. The receipt must contain a description of the firearm or deadly weapon and list any

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[62] Penal Code section 833.

[63] Senate Committee on Public Safety, Analysis of Sen. Bill No. 1807 (2001-2002 Reg. Sess.) as introduced, page 6.

[64] Penal Code section 4003.

[65] Penal Code section 1412. This apparently refers to property, alleged to have been stolen or embezzled (see Pen. Code, § 1407).

identification or serial number on the firearm, and must indicate where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b)).

Hold and make firearm or weapon available to owner: Subdivision (b) requires local law enforcement to make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but "no later than five business days" following the seizure (Pen. Code, § 12028.5, subd. (b)). Returning the firearm or weapon is not required if it is retained for use as evidence related to criminal charges as a result of domestic violence incident, or it is retained because it was illegally possessed, or if the law enforcement agency files a petition to prevent returning the firearm or weapon because the agency has reasonable cause to believe the return would endanger the victim or person reporting the assault. Staff finds that, based on the language in subdivision (b), it is a state mandate to make the firearm or other deadly weapon available to the owner or person who was in lawful possession between 48 hours and five business days after the seizure.

Preexisting law did not require holding firearms or other deadly weapons for weapons seized under section 12028.5 during other lawful searches.

Staff finds, therefore, it is a new program or higher level of service for local law enforcement, for firearms or other deadly weapons confiscated during any other lawful search, to make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure (Pen. Code, § 12028.5, subd. (b)). This finding does not apply if the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident, or is retained because it was illegally possessed, or is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[66]

Return stolen firearm: Subdivision (d) of section 12028.5 requires any stolen firearm or other deadly weapon to be returned to its lawful owner, as soon as its use for evidence has been served, upon proof of ownership. Staff finds that the plain language of subdivision (d) makes this provision a state mandate to return a stolen firearm.

Preexisting law, in Penal Code sections 1407 and 1408, requires stolen property in the custody of a peace officer to be returned to its owner "on the application of the owner and on satisfactory proof of his ownership of the property." More specifically, preexisting Penal Code section 12028, subdivisions (c) and (f) require returning a stolen firearm to its owner.

Because returning a stolen firearm or weapon to its owner is a preexisting duty of law enforcement, regardless of the type of search under which it is confiscated, staff finds that

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[66] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

returning a stolen firearm or other deadly weapon to its owner is not a new program or higher level of service.

Dispose of firearm or weapon: Subdivision (e) of Penal Code section 12028.5 requires:

> Any firearm or other deadly weapon taken into custody and held by ...[law enforcement] for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivision (c) of Section 12028.[67] Firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j), are not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

Staff finds that the plain language in the first sentence of subdivision (e) makes it a state mandate to sell or destroy a firearm held for longer than 12 months as specified. The second sentence regarding firearms or weapons not recovered "due to an extended hearing process" prevent destruction of the firearm or weapon until the court issues a decision on a second petition to prevent the return of the firearm or other deadly weapon as specified in subdivision (j). Subdivision (j), as discussed below, authorizes destruction of the firearm or other deadly weapon after the petition process is complete and the court does not order the firearm or other deadly weapon returned to the owner or person in lawful possession.

Preexisting law did not require firearms or other deadly weapons confiscated, at the scene of a domestic violence incident involving a threat to human life or a physical assault, during any other lawful search, and held for 12 months, to be sold or destroyed as provided in subdivision (c) of section 12028. Therefore, staff finds that this activity is a new program or higher level of service.

Advise owner and petition court: Subdivision (f) of section 12028.5 states,

> In those cases in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

Because of the plain language of this subdivision, staff finds that this is a state mandate to notify the owner and petition the court as specified if the agency has reasonable cause to believe that the return of the firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat.

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[67] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

Preexisting law did not require this notice or court petition in cases where a firearm or other deadly weapon was taken at the scene of a domestic violence incident during an other lawful search.

Therefore, staff finds that it is a new program or higher level of service, for firearms or other deadly weapons confiscated during any other lawful search, if the law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for a local law enforcement agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned.

Notify owner: Subdivision (g) of section 12028.5 requires the law enforcement agency to inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. The agency is also required, if the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g). Staff finds that the plain language of subdivision (g) requires these activities, so the owner notification and effort to learn the owner's whereabouts, as specified, impose a state mandate.

Preexisting law did not require this activity. Therefore, staff finds that it is a new program or higher level of service for firearms or other deadly weapons confiscated during any other lawful search, for a local law enforcement agency to inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon.

It is also a new program or higher level of service, for firearms or other deadly weapons confiscated during any other lawful search, if the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the law enforcement agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g) of section 12028.5.

Court hearing and attorney's fees: Subdivision (h) requires the court clerk, if the person requests a hearing, to set a hearing no later than 30 days from the receipt of the request, and requires the clerk to notify the person, law enforcement agency, and district attorney of the date, time and place of the hearing. If the person requests a hearing, the local agency must show by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. The court is required to award attorney's fees to the prevailing party.

Although the language in subdivision (h) for this activity is not expressly mandatory, local law enforcement and district attorneys have a duty to make this showing if the facts present

themselves. Subdivision (f) of section 12028.5 requires the local agency to file the petition to prevent the return of the firearm if "a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." If the owner requests a hearing, the duty in subdivision (f) to file the petition is extended to responding to the request for a hearing in subdivision (h). Therefore, staff finds that making the showing by a preponderance of the evidence regarding the return of the weapon is a state mandate.

As to awarding attorney's fees, staff also finds that is a mandate, since the court is required to impose them, and the local agency is required to pay them, if it does not prevail in keeping the firearm or other deadly weapon from being returned to the owner or person who was in lawful possession. Therefore, staff finds that paying the attorney's fees in subdivision (h) to the prevailing party is a state mandate upon order of the court.

Because this was not previously required for firearms or weapons confiscated at a scene of domestic violence during any other lawful search, staff also finds that this provision is a new program or higher level of service. Specifically, for firearms or other deadly weapons confiscated during any other lawful search, staff finds that it is a new program or higher level of service to show at a hearing by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. Staff also finds, since it was not previously required for any other lawful search, that it is a new program or higher level of service for the local agency to pay attorney's fees to the owner or person in lawful possession if the court orders the firearm or other deadly weapon returned to the owner or person who was in lawful possession (Pen. Code, § 12028.5, subd. (h.).

Petition for default and disposal of firearm or weapon: Subdivision (i) states that if the person does not request a hearing or does not respond within 30 days of receipt of the notice, the local law enforcement agency may file a petition for an order of default and to dispose of the firearm or other deadly weapon as provided in section 12028. As with the similar provision above, staff finds that subdivision (i) is a state mandate to file the default petition, as an extension of the agency's duty is subdivision (f) to petition the court to not return the firearm or other deadly weapon if it "has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat."

Staff also finds that since filing a default petition was not previously required, it is a new program or higher level of service for any other lawful searches. Therefore, for firearms or other deadly weapons confiscated pursuant to any other lawful search, staff finds that it is a new program or higher level of service for local law enforcement, if the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, to file a petition for an order of default. (Pen. Code, § 12028.5, subd. (i).)

As to disposal of the firearm or other deadly weapon, the permissive language in subdivision (i) indicates that the agency is not required to do so. Although other statutes govern disposal of firearms or weapons (e.g., Pen. Code, §§ 12032 or 12028) staff finds that the test claim statute does not require the local agency to dispose of them.

Petition for second hearing, dispose of firearm or weapon, attorney's fees: Subdivision (j) authorizes the person (owner) to petition the court a second time if the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession.

Subdivision (j) requires, similar to subdivision (h) above, the court to award reasonable attorney's fees to the prevailing party.

In the analysis above, staff found that this provision is a new program or higher level of service, if there is a petition for a second hearing, to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, and to pay attorney's fees to the prevailing party upon the order of the court. Therefore, if there is a petition for a second hearing for firearms or other deadly weapons confiscated during any other lawful search, it is a mandated new program or higher level of service to show by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, and to pay attorney's fees to the prevailing party upon the order of the court.

Subdivision (j) also authorizes law enforcement to dispose of the firearm or weapon if the person does not petition the court or is unsuccessful at the second hearing in gaining the return of the firearm or other deadly weapon. Because the language regarding disposal of the firearm or weapon is permissive, staff finds that disposing of the firearm or weapon is not a state mandate.

C. Does section 12028.5 impose costs mandated by the state?

Having discussed whether all the state mandated provisions of section 12028.5 constitute a new program or higher level of service, the final issue is whether they impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

Claimant submitted a declaration that it will incur "costs well in excess of $1,000 during the 2002-03 fiscal year to implement" the test claim statutes.[68] Another declaration includes the time required for the alleged activities: "on average, an additional 5 minutes to inquire of the victim whether a firearm or other deadly weapon is present, an additional 30 minutes to search for and obtain the weapon; an additional 5 minutes to report the results, and, where the weapon is confiscated pursuant to Penal Code Section 12028.5, an additional 90 minutes to perform the other duties in the statute.[69]

Staff finds, therefore, that section 12028.5 imposes costs mandated by the state within the meaning of Government Code section 17514. Staff also finds that no exceptions to reimbursement in Government Code section 17556 apply.

All the elements having been met, staff finds that Penal Code section 12028.5, as amended by Statutes 2002, chapter 833, is a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, for the activities listed above.

Issue 4: What is the period of reimbursement for the test claim?

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[68] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 1; Exhibit 9, Declaration of Wendy Watanabe, page 1.

[69] Test Claim 02-TC-18, Exhibit 8, Declaration of Bernice Abram, page 2; Exhibit 9, Declaration of Wendy Watanabe, page 2.

The period of reimbursement for an approved test claim is the fiscal year before the fiscal year in which the claim is filed.[70] As for a test claim amendment: "The claimant may thereafter amend the test claim at any time, *but before the test claim is set for a hearing*, without affecting the original filing date as long as the amendment substantially relates to the original test claim."[71]

The original test claim, 99-TC-08, was filed May 15, 2000, and this test claim amendment was filed in April 2003. The test claim was set for a hearing when the draft staff analysis for 99-TC-08 was issued on March 6, 2003. The claimant, however, amended the test claim in April 2003, *after* the test claim was set for a hearing. Because the amendment was not filed before the test claim was set for a hearing, as required by Government Code section 17557, subdivision (e), the period of reimbursement does not go back to the original reimbursement period of 99-TC-08. Thus, staff finds that the test claim amendment is deemed filed in April 2003 and if approved, claimants are eligible for reimbursement beginning July 1, 2001.

CONCLUSION

In sum, staff finds that effective January 1, 2002, Penal Code section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for local agencies, on all domestic violence-related calls for assistance:

- To include on the domestic violence incident report form a notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon (Pen. Code, § 13730, subd. (c)(3); Stats. 2001, ch. 483).

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the following activities are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for local agencies, when firearms or other deadly weapons are taken into temporary custody at the scene of a domestic violence incident involving a threat to human life or a physical assault, and the firearm or other deadly weapon is discovered in plain sight or pursuant to a consensual or other lawful search.

- The one-time activity of amending the receipt for a confiscated firearm or other deadly weapon to include "the time limit for recovery as required" by section 12028.5. (Pen. Code, § 12028.5, subd. (b).)
- If the person who owns or had lawful possession of the firearm or other deadly weapon petitions the court for a second hearing within 12 months of the date of the initial hearing, showing by clear and convincing evidence that the return of the

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[70] Government Code section 17557, subdivision (e).

[71] *Ibid.* [Emphasis added.] At the time this amendment was filed, this same provision was in Government Code section 17557, subdivision (c).

firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (j).)

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the activities listed below are a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, when firearms or other deadly weapons are discovered during an other lawful search at the scene of a domestic violence incident involving a threat to human life or a physical assault. Another lawful search includes but is not limited to the following searches: (1) a search incident to arrest, or of people the officer has legal cause to arrest; (3) a search pursuant to a warrant; or (3) a search based on statements of persons who do not have authority to consent, but have indicated to law enforcement that a weapon is present at the scene.

- To take temporary custody of any firearm or other deadly weapon when necessary for the protection of the peace officer or other persons present. (Pen. Code, § 12028.5, subd. (b).)
- To give the owner or person in lawful possession of the firearm or other deadly weapon a receipt that describes the firearm or deadly weapon and lists any identification or serial number on the firearm, and indicates where the firearm or weapon can be recovered, the time limit for recovery, and the date after which the owner or possessor can recover it. (Pen. Code, § 12028.5, subd. (b).)
- To make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure. Reimbursement for this activity is not required if either: (1) the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident; or (2) if the firearm or other deadly weapon is retained because it was illegally possessed, or (3) if the firearm or other deadly weapon is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[72] (Pen. Code, § 12028.5, subd. (b).)

---

[72] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

- To sell or destroy, as provided in subdivision (c) of Section 12028,[73] any firearm or other deadly weapon taken into custody and held for longer than 12 months and not recovered by the owner or person in lawful possession at the time it was taken into custody. Reimbursement for this activity is not required for firearms or other deadly weapons not recovered within 12 months due to an extended hearing process as provided in subdivision (j) of section 12028.5. (Pen. Code, § 12028.5, subd. (e).)
- If the local agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, for the agency to advise the owner of the firearm or other deadly weapon, and within 60 days of the date of seizure (or 90 days if an extension is granted) initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. (Pen. Code, § 12028.5, subd. (f).)
- To inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. If the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the local agency, for the agency to make a diligent, good faith effort to learn the whereabouts of the person and to comply with the notification requirements in subdivision (g) of section 12028.5. (Pen. Code, § 12028.5, subd. (g).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon requests a hearing, to show in court by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (h).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not respond within 30 days of the receipt of notice, to file a petition in court for an order of default. (Pen. Code, § 12028.5, subd. (i).)

---

[73] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

Staff also finds that Family Code section 6228 (Stats. 2002, ch. 377) and Penal Code section 12028.5 (Stats. 1984, ch. 901 & Stats. 2002, ch 830)[74] are not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 because they do not mandate a new program or higher level of service.

Recommendation

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

[74] Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last (Gov. Code, § 9605).

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

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Exhibit D

J. TYLER McCAULEY
AUDITOR-CONTROLLER

WENDY L. WATANABE
CHIEF DEPUTY

August 22, 2007

RECEIVED
AUG 24 2007
COMMISSION ON
STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Los Angeles County's Review of Commission's Staff Analysis
Crime Victims' Domestic Violence Incident Reports II [02-TC-18]

We submit our review of the subject Commission analysis, finding that a reimbursable State mandated program was imposed upon counties under the test claim legislation.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:CY:LK
Enclosures

Los Angeles County's Review of Commission's Staff Analysis
Crime Victims' Domestic Violence Incident Reports II [02-TC-18]

We have reviewed the draft staff analysis issued by the Commission on State Mandates [Commission] on August 6, 2007 and concur that the test claim legislation imposes a reimbursable state-mandated program upon local government.

This test claim was part of the County of Los Angeles [County] test claim on "Crime Victims' Domestic Violence Incident Reports", filed on May 11, 2000. On April 18, 2003, under guidance from the Commission, the County amended its original test claim. On April 22, 2003, the Commission's executive director severed the test claim amendment [02-TC-18] from the original test claim [99-TC-08] and deemed the test claim amendment complete.

On April 23, 2003, the amended test claim was circulated to state agencies for their comments. To date, none have been received.

The amended test claim was filed in order to incorporate important provisions of related legislation. Specifically, provisions of Family Code Section 6228 and Penal Code Section 13730 were added to the test claim legislation, as follows: Chapter 377, Statutes of 2002, amending Section 6228 of the Family Code and Chapter 483, Statutes of 2001, amending Section 13730 of the Penal Code and, with respect to implementing Section 13730(c)(3) of the Penal Code, Section 12028.5 of the Penal Code as Added and Amended by Chapter 901, Statutes of 1984, Chapters 830 and 833, Statutes of 2002.

Chapter 483, Statutes of 2001, enacted on February 21, 2001, amends Section 13730 of the Penal Code [as added by Chapter 1609, Statutes of 1984 and amended by Chapter 965, Statutes of 1995 - the original test claim legislation] and imposes additional duties on local government which were not included in the original test claim legislation.

Section 12028.5 of the Penal Code details the duties referenced in implementing Section 13730(c)(3) of the Penal Code, as added by Chapter 483, Statutes of 2001, and, accordingly, is claimed herein. Section 12028.5's duties were first added to the Penal Code by Chapter 901, Statutes of 1984 on September 6, 1984. Subsequently, Section 12028.5 was amended on September 24, 2002 by both Chapter 830, Statutes of 2002 and Chapter 833, Statutes of 2002.

Chapter 377, Statutes of 2002, enacted on January 14, 2002, amends Section 6228 of the Family Code [as added by Chapter 1022, Statutes of 1999 - the original test claim legislation] and imposes additional duties on local government which were not included in the original test claim legislation.

The County's review of Commission staff's comprehensive analysis, issued on August 6, 2007, finds that many of the provisions included in the [above] amended test claim legislation were found to impose reimbursable duties.

The County concurs with Commission staff's analysis and detailed conclusions. On the pages that follow, Commission's conclusions, on pages 33 through 36 of their analysis, are incorporated herein as Exhibit A.

Finally, it should be noted that we look forward to working with state and local agencies in developing parameters and guidelines for this program which allow a simplified and cost-efficient claiming process.

Exhibit A

CONCLUSION

In sum, staff finds that effective January 1, 2002, Penal Code section 13730, subdivision (c)(3) (Stats. 2001, ch. 483) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for local agencies, on all domestic violence-related calls for assistance:

- To include on the domestic violence incident report form a notation of whether the officer or officers who responded to the domestic violence call found it necessary, for the protection of the peace officer or other persons present, to inquire of the victim, the alleged abuser, or both, whether a firearm or other deadly weapon was present at the location, and, if there is an inquiry, whether that inquiry disclosed the presence of a firearm or other deadly weapon (Pen. Code, § 13730, subd. (c)(3); Stats. 2001, ch. 483).

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the following activities are a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for local agencies, when firearms or other deadly weapons are taken into temporary custody at the scene of a domestic violence incident involving a threat to human life or a physical assault, and the firearm or other deadly weapon is discovered in plain sight or pursuant to a consensual or other lawful search.

- The one-time activity of amending the receipt for a confiscated firearm or other deadly weapon to include "the time limit for recovery as required" by section 12028.5. (Pen. Code, § 12028.5, subd. (b).)
- If the person who owns or had lawful possession of the firearm or other deadly weapon petitions the court for a second hearing within 12 months of the date of the initial hearing, showing by clear and convincing evidence that the return of the

firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (j).)

Effective January 1, 2003, in accordance with Penal Code section 12028.5 (Stats. 2002, ch. 833) staff finds that the activities listed below are a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514, when firearms or other deadly weapons are discovered during an other lawful search at the scene of a domestic violence incident involving a threat to human life or a physical assault. Another lawful search includes but is not limited to the following searches: (1) a search incident to arrest, or of people the officer has legal cause to arrest; (3) a search pursuant to a warrant; or (3) a search based on statements of persons who do not have authority to consent, but have indicated to law enforcement that a weapon is present at the scene.

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- To make the firearm or other deadly weapon available to the owner or person who was in lawful possession 48 hours after seizure or as soon as possible, but no later than five business days following the seizure. Reimbursement for this activity is not required if either: (1) the firearm or other deadly weapon confiscated is retained for use as evidence related to criminal charges as a result of domestic violence incident; or (2) if the firearm or other deadly weapon is retained because it was illegally possessed, or (3) if the firearm or other deadly weapon is retained because of a court petition filed pursuant to subdivision (f) of section 12028.5.[72] (Pen. Code, § 12028.5, subd. (b).)

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[72] Subdivision (f) of section 12028.5 authorizes, within 60 days of seizure, the law enforcement agency to initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned in cases "in which a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat." This provision also requires notifying the owner.

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- If the owner or person who had lawful possession of the firearm or other deadly weapon requests a hearing, to show in court by a preponderance of evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat. If the court orders the firearm or other deadly weapon returned to the owner or person who had lawful possession, the local agency upon order of the court shall pay reasonable attorney's fees to the prevailing party. (Pen. Code, § 12028.5, subd. (h).)
- If the owner or person who had lawful possession of the firearm or other deadly weapon does not request a hearing or does not respond within 30 days of the receipt of notice, to file a petition in court for an order of default. (Pen. Code, § 12028.5, subd. (i).)

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[73] Section 12028, subdivision (c) requires specified weapons to be surrendered to law enforcement and authorizes disposal of them by sale at public auction or (in subd. (d)) by destruction.

Staff also finds that Family Code section 6228 (Stats. 2002, ch. 377) and Penal Code section 12028.5 (Stats. 1984, ch. 901 & Stats. 2002, ch 830)[74] are not a reimbursable state mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 because they do not mandate a new program or higher level of service.

Recommendation

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

[74] Statutes 2002, chapter 833 was double joined to Statutes. 2002, chapter 830, but only chapter 833 amended section 12028.5 because it was chaptered last (Gov. Code, § 9605).

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J. TYLER McCAULEY
AUDITOR-CONTROLLER

WENDY L. WATANABE
CHIEF DEPUTY

Los Angeles County's Review of Commission's Staff Analysis
Crime Victims' Domestic Violence Incident Reports II [02-TC-18]

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I Leonard Kaye, SB 90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims, reviews of State agency comments, Commission staff analysis, and for proposing parameters and guidelines (P's& G's) and amendments thereto, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the subject review of Commission staff's analysis.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the subject test claim, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

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

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

8/21/07; Los Angeles, CA
Date and Place

Signature

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WENDY L. WATANABE
CHIEF DEPUTY

ADDRESS ALL CORRESPONDENCE TO:
ACCOUNTING DIVISION
500 W. TEMPLE ST., ROOM 603
LOS ANGELES, CA 90012-2706

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Oscar F. Alvarez states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 22nd day of August, 2007, I served the attached:

Documents: Los Angeles County's Review of Commission's Staff Analysis Crime Victims' Domestic Violence Incident Reports II [02-TC-18] including *a 1 page letter of J. Tyler McCauley dated 8/22/07, a 2 page narrative, Exhibit A, and a 1 page declaration of Leonard Kaye dated 8/21/07, now* pending before the Commission on State Mandates.

[X] By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates FAX as well as mail of originals.

[X] By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed to the attached mailing list.

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of August, 2007 at Los Angeles, California.

Oscar F. Alvarez

EXHIBIT E

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR

ARNOLD SCHWARZENEGGER, GOVERNOR
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

RECEIVED
AUG 30 2007
COMMISSION ON
STATE MANDATES

August 28, 2007

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of August 6, 2007, the Department of Finance (Finance) has reviewed the draft staff analysis of Claim No. 02-TC-18, "Crime Victims, Domestic Violence Incident Reports II."

Finance concurs in part with the draft staff analysis to partially approve the test claim. Finance asserts the following objections:

Penal Code section 13730

The draft staff analysis relating to the amendment to Penal Code section 13730(c)(3), (Stats. 2001, ch. 483) is inconsistent with the Commission's February 26, 1998, decision in CSM-96-362-01. In that decision, the Commission found that the 1993 amendment to Penal Code section 13730(a), (Stats. 1993, ch. 1230) "merely clarifies" the reporting requirement of subdivision (c) rather than mandating a new or additional requirement. The Commission declined to find that the domestic violence incident report form was required because subdivision (c) is suspended and subdivision (a) does nothing except clarify subdivision (c). The same is true here. The draft staff analysis improperly relies on the existence of subdivision (a) to find the domestic violence incident report form is a requirement.

It is undisputed that subdivision (c) of section 13730 is optional because of its suspension by the Legislature. Like the 1995 amendment to subdivision (c), which the Commission found optional in CSM-96-362-01, the 2001 amendment to subdivision (c) at issue here is also optional. Both amendments were aimed at specifying the minimum content of the report with additional "notations"—a fact the Commission found compelling in CSM-96-362-01. The Commission also found compelling the fact that the requirements imposed by the 1995 amendment to subdivision (c) were not independent of the incident report, but rather were "encompassed and directly connected to the underlying incident reporting program" which was optional due to suspension. The same is true for the 2001 amendment at issue here.

In sum, the Commission should conclude in this claim as it did in CSM-96-362-01, that "since the development and completion of the incident report are not state mandated, then the new information to be included on the incident report is likewise not state mandated."

Penal Code section 12028.5

Subdivision (j). Subdivision (l), by its express language, confers discretion on the law enforcement agency. There is no requirement that the law enforcement agency file a petition for an order of default. The language of the section states in part, "...if the person does not request a hearing or does not respond within 30 days of receipt of the notice, the local law enforcement agency may file a petition for an order of default..." (Emphasis added). If no default petition is filed, after 12 months the weapons are disposed pursuant to subdivision (e).

Subdivision (f). As noted in the draft staff analysis, subdivision (f) does not require a new activity of a law enforcement agency, and in fact allows the law enforcement agency *more* time than did preexisting law to initiate a petition in court to determine if a weapon should be returned. Additionally, the language is permissive. The section states in part, "[t]he law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition." (Emphasis added).

Accordingly, no reimbursable state mandate exists for the activities described above.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your August 6, 2007 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Carla Castañeda, Principal Program Budget Analyst at (916) 445-3274.

Sincerely,

Thomas E. Dithridge
Program Budget Manager

Attachments

Attachment A

DECLARATION OF PATRICK MCGINN
DEPARTMENT OF FINANCE
CLAIM NO. 02-TC-18

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

August 28, 2007
at Sacramento, CA

Patrick Mcginn

PROOF OF SERVICE

Test Claim Name: Crime Victims, Domestic Violence Incident Reports II
Test Claim Number: 02-TC-18

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 12 Floor, Sacramento, CA 95814.

On August 28, 2007, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 12 Floor, for Interagency Mail Service, addressed as follows:

B-08
Ginny Brummels
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Allan Burdick
MAXIMUS
4320 Auburn Blvd, Suite 2000
Sacramento, CA 95841

J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661

A-15
Carla Castañeda
Department of Finance
915 L Street, Suite 12th Floor
Sacramento, CA 95814

Glen Everroad
City of Newport Beach
3300 Newport Blvd.
P.O. Box 1768
Newport Beach, CA 92659

A-15
Susan Geanacou
Department of Finance
915 L Street, Suite 1190
Sacramento, CA 95814

Juliana Gmur
MAXIMUS
2380 Houston Avenue
Clovis, CA 93611

A-16
Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Beth Hunter
Centration, Inc.
8570 Utica Ave. Suite 100
Rancho Cucamonga, CA 91730

Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Mark Sigman
Riverside County Sheriff's Office
4095 Lemon Street
P.O. Box 512
Riverside, CA 92502

B-08
Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415

David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

On I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 28, 2007 at Sacramento, California.

Ann Slaughter

EXHIBIT F

BILL ANALYSIS

Date of Hearing: April 6, 1999

ASSEMBLY COMMITTEE ON JUDICIARY
Sheila James Kuehl, Chair
AB 403 (Romero) - As Amended: March 18, 1999

SUBJECT : ACCESS TO DOMESTIC VIOLENCE REPORTS

KEY ISSUE : SHOULD THE PROVISION OF POLICE REPORTS ABOUT DOMESTIC VIOLENCE INCIDENTS BE EXPEDITED FOR VICTIMS WHO NEED SUCH REPORTS TO ASSIST THEM IN SECURING A PROTECTIVE OR RESTRAINING ORDER AGAINST THE PERPETRATOR?

SUMMARY : Creates the Access to Domestic Violence Reports Act of 1999. Specifically, this bill :

1) Requires each state and local law enforcement agency to provide to the victim, upon request, a copy of the police report relating to an incident of domestic violence.

2) Provides that a victim shall be entitled to one copy of the report provided free of charge.

3) Requires the address and telephone number of the victim, and the names, addresses, and telephone number of any witnesses to be redacted from any report provided to the victim pursuant to this section.

4) Provides that any request made in person by the victim for a copy of a police report shall be granted at the time the request is made.

EXISTING LAW :

1) Authorizes a court to issue a protective or restraining order for the purpose of preventing a recurrence of domestic violence if an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse. (Family Code section 6300. All further references are to this code unless otherwise noted.)

2) Specifies that there shall be no filing fee assessed for a petition, response, or request for modification or enforcement of a protective order filed in a proceeding under the Domestic Violence Prevention Act (DVPA). Similarly, a petitioner

seeking a nondisclosure order to keep address information confidential due to a history of domestic violence in a proceeding under the Uniform Interstate Family Support Act, may not be required to pay a filing fee. (Sections 4927 and 6222.)

3) Provides that fees payable by a petitioner to a law enforcement officer of service of an order may be waived based on a showing of financial hardship. (Section 6222.)

FISCAL EFFECT : Unknown

COMMENTS : The author notes that "victims of domestic violence do not have an expedited method of obtaining police reports under existing law. Currently, victims of domestic violence must write and request that copies of the reports be provided by mail. It often takes between two and three weeks to receive the reports. Such a delay can prejudice victims in their ability to present a case for a temporary restraining order under" the DVPA. This bill remedies that problem by requiring law enforcement agencies to provide a copy of the police report to the victim at the time the request is made if the victim personally appears.

The purpose of restraining and protective orders issued under the DVPA is to prevent a recurrence of domestic violence and to ensure a period of separation of the persons involved in the violent situation. According to the author, in the absence of police reports, victims may have difficulty presenting the court with proof of a past act or acts of abuse and as a result may be denied a necessary restraining order which could serve to save a victim's life or prevent further abuse. By increasing the availability of police reports to victims, this bill improves the likelihood that victims of domestic violence will have the required evidence to secure a needed protective order against an abuser.

In addition to the lack of immediate access to copies of police reports, the author points to the cost of obtaining such copies as an additional obstacle to victims of domestic violence. "Victims often have to pay a fee for each report they request. For example, in Los Angeles County the fee is $13 per report. These fees become burdensome for victims who need to chronicle several incidents of domestic violence. For some the expense may prove prohibitive." As noted above, the Legislature has

recognized that the importance of providing access to domestic violence courts and appropriate orders outweighs minor public fiscal considerations in certain instances. For example, the Legislature has waived all filing fees for a petition, response, or request for modification or enforcement of a protective order filed in a proceeding under the DVPA. Immediate access to the court and restraining orders can sometimes be the difference between life and death. California has recognized that such access should not be hindered by the lack of money to get into court or serve orders on the perpetrator. This bill follows that same path, waiving the cost to the victim of obtaining a single copy of a police report pertaining to an incident of domestic violence.

ARGUMENTS IN SUPPORT : The Legal Aid Foundation of Los Angeles (LAFLA) notes the wide ranging positive effects of this legislation, and the wide ranging negative consequences of not having access to police reports documenting victims' accounts of domestic violence. In particular, LAFLA notes that provisions of the federal Violence Against Women Act (VAWA) "allow immigrant spouses and children of U.S. citizens and lawful permanent residents self-petition for their permanent resident status if they are the victims of domestic violence. The VAWA regulations require that an applicant submit police reports or other evidence documenting the abuse. Unfortunately, a significant number of our VAWA clients are unable to access police reports from the local police departments in Los Angeles because they cannot afford the fee for the reports. . . .AB 403's provision making police reports available to domestic violence victims free of charge will greatly assist those women who are seeking to fulfill the documentation requirements under VAWA. . . .For some of our clients seeking VAWA relief, time is of the essence and it is imperative that they be able to obtain police reports as soon as possible." AB 403 creates an expedited process for gaining access to such reports.

REGISTERED SUPPORT / OPPOSITION :

Support

Association for Los Angeles Deputy Sheriffs
California Organization of Police and Sheriffs
California Peace Officers' Association
California Police Chiefs' Association
Doris Tate Crime Victims Bureau

Legal Aid Foundation of Los Angeles
Los Angeles County Sheriff's Department
San Bernardino County Sheriff's Office

Opposition

None on file.

Analysis Prepared by : Donna S. Hershkowitz / JUD. / (916) 319-2334

BILL ANALYSIS

SENATE COMMITTEE ON Public Safety
Senator Bruce McPherson, Chair
2001-2002 Regular Session

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B

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SB 1265 (Alpert)
As Amended March 21, 2002
Hearing date: April 2, 2002
Family Code
AA:mc

DOMESTIC VIOLENCE :

VICTIM ACCESS TO LAW ENFORCEMENT REPORTS

HISTORY

Source: San Diego City Attorney

Prior Legislation: AB 403 (Romero) - Ch. 1022, Stats. 1999

Support: Graduate Student Social Action Committee of the School of Social Work at San Diego State University; San Diego County Domestic Violence Council; Attorney General's Office; one individual

Opposition: None known

KEY ISSUE

SHOULD CURRENT LAW AUTHORIZING VICTIMS OF DOMESTIC VIOLENCE TO ACCESS INCIDENT REPORTS FROM LAW ENFORCEMENT BE EXPANDED TO INCLUDE VICTIM REPRESENTATIVES WHERE A VICTIM IS DECEASED, AS SPECIFIED?

(More)

PURPOSE

The purpose of this bill is to expand the current law authorizing victim access to domestic violence law enforcement incident reports to include victim representatives where the victim is deceased, as specified.

Current law requires law enforcement agencies to "provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, upon request," as specified.

(More)

This bill would expand this provision to include representatives of victims where a victim is deceased. "Representative" would be defined to mean any of the following:

the surviving spouse;
a surviving child of the decedent who has attained 18 years of age;
a surviving parent of the decedent;
a surviving adult relative; and
the public administrator if one has been appointed.

This bill would expressly exclude the following persons as a "representative of the victim" under this section:

any person who has been convicted of the murder in the first degree, as defined in Section 189 of the Penal Code, of the victim; and
any person identified in the incident report face sheet as a suspect.

This bill would require a victim representative to present his or her current valid driver's license or identification card issued by the Department of Motor Vehicles and a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time of the request.

This bill additionally would clarify that the "identification" required of requesting victims under current law be clarified to specify his or her current valid driver's license or identification card issued by the Department of Motor Vehicles.

COMMENTS

1. Stated Need for This Bill

According to information submitted by the author's office, this

(More)

bill has been introduced in response to a domestic violence case where the victim committed suicide. The victim's mother, who was seeking custody of her grandchildren, had difficulty in obtaining copies of the police reports concerning the domestic violence.

2. What This Bill Would Do

As explained above, since January of 2000 victims of domestic violence in California have been authorized to obtain copies of law enforcement domestic violence incident reports. This bill would expand this provision to include a representative of a victim where a victim is deceased. The bill would require that representatives present identification, as specified, and a certified death certificate of the victim at the time of the request. The bill also would clarify that requesting victims must present a valid California driver's license or identification card. "Representatives" are specifically described in the bill (see above).

3. Background: Basis for The Law and The Bill

The section of law this bill amends was intended originally to give victims of domestic violence quick and affordable access to law enforcement incident reports. Proponents of the original bill (noted above) submitted that victims of domestic violence were being required to write and request that copies of the reports be provided by mail, that they often had to pay a fee for even one report, and that it often took between two and three weeks to receive the reports. Proponents argued that such delays could prejudice victims, including their ability to present a case for a temporary restraining order.

As explained above by the author, this bill similarly seeks to provide a representative of a deceased victim with relatively quick and uncomplicated access to these reports.

****

2006-07

Item		Amount
	(ii) False Reports of Police Misconduct (Ch. 590, Stats. 1995) (00-TC-26)	
(2)	For payment of the mandate claims for the 2006–07 fiscal year for the Peace Officers' Procedural Bill of Rights (Ch. 675, Stats. 1990) (CSM-4499).....	16,600,000
(3)	Pursuant to the provisions of Section 17581 of the Government Code, the mandates identified in the following schedule are specifically identified by the Legislature for suspension during the 2006–07 fiscal year.....	0
	(a) Grand Jury Proceedings (Ch. 1170, Stats. 1996) (98-TC-27)	
	(b) Sex Crime Confidentiality (Ch. 502, Stats. 1992, Ch. 36, Stats. 1994, 1st Ex. Sess.) (98-TC-21)	
	(c) Deaf Teletype Equipment (Ch. 1032, Stats. 1980) (04-LM-11)	
	(d) Sex Offenders: Disclosure by Law Enforcement Officers (Chs. 908 and 909, Stats. 1996) (97-TC-15)	
	(e) Missing Persons Report (Ch. 1456, Stats. 1988, and Ch. 59, Stats. 1993) (CSM-4255, CSM-4484, and CSM-4368)	
	(f) Handicapped Voter Access Information (Ch. 494, Stats. 1979) (CSM-4363)	
	(g) Substandard Housing (Ch. 238, Stats. 1974) (CSM-4303)	
	(h) Adult Felony Restitution (Ch. 1123, Stats. 1977) (04-LM-08)	
	(i) Very High Fire Hazard Severity Zones (Ch. 1188, Stats. 1992) (97-TC-13)	
	(j) Local Coastal Plans (Ch. 1330, Stats. 1976) (CSM-4431)	
	(k) SIDS Training for Firefighters (Ch. 1111, Stats. 1989) (CSM-4412)	
	(*l*) SIDS Contacts by Local Health Officers (Ch. 268, Stats. 1991) (CSM-4424)	
	(m) SIDS Autopsies (Ch. 955, Stats. 1989) (CSM-4393)	
	(n) Inmate AIDS Testing (Ch. 1597, Stats. 1988) (CSM-4369)	

Item Amount

(o) SIDS Notices (Ch. 453, Stats. 1974) (04-LM-01)
(p) Guardianship/Conservatorship Filings (Ch. 1357, Stats. 1976) (04-LM-15)
(q) Victims' Statements-Minors (Ch. 332, Stats. 1981) (04-LM-14)
(r) Extended Commitment, Youth Authority (Ch. 267, Stats. 1998) (98-TC-13)
(s) Prisoner Parental Rights (Ch. 820, Stats. 1991) (CSM-4427)
(t) Structural and wildland firefighter safety clothing and equipment (8 Cal. Code Regs. 3401 to 3410, incl.) (CSM-4261-4281)
(u) Personal Alarm Devices (8 Cal. Code Regs. 3401(c)) (CSM-4087)
(v) Law Enforcement Sexual Harassment Training (Ch. 126, Stats. 1993) (97-TC-07)
(w) Elder Abuse, Law Enforcement Training (Ch. 444, Stats. 1997) (98-TC-12)
(x) Redevelopment Agencies Tax Disbursement Reporting (Ch. 39, Stats. 1998) (99-TC-06)
(y) Mandate Reimbursement Process (Ch. 486, Stats. 1975) (CSM-4204, CSM-4485)
(z) Filipino Employee Surveys (Ch. 845, Stats. 1978) (CSM-2142)
(aa) Domestic Violence Information (Ch. 1609, Stats. 1984) (CSM-4222)
(bb) Pocket Masks (Ch. 1334, Stats. 1987) (CSM-4291)

Provisions:

1. If the amount in Schedule (0.5) is insufficient to pay claims for costs incurred to carry out the cited state mandates in the 2005–06 fiscal year, the Controller shall notify the Director of Finance of the amount of the deficiency and, with the approval of the director, shall augment the amount in Schedule (0.5) from the unencumbered balance of Schedule (1) to pay those claims. If the Controller determines that excess funds will remain available from Schedule (0.5) after all claims for the 2005–06 fiscal year are paid, then the Controller, with the approval of the director, may augment the amount in Schedule (1) from the unencumbered balance of the amount provided in

Item		Amount
	(x) Police Officer's Cancer Presumption (Ch. 1171, Stats. 1989) (CSM-4416)	
	(y) Firefighter's Cancer Presumption (Ch. 1568, Stats. 1982) (CSM-4081)	
	(z) Domestic Violence Arrest Policies (Ch. 246, Stats. 1995) (CSM-96-362-02)	
	(aa) Animal Adoption (Ch. 752, Stats. 1998) (98-TC-11)	
	(bb) Unitary Countywide Tax Rates (Ch. 921, Stats. 1987) (CSM-4355 and CSM-4317)	
	(cc) Senior Citizens Property Tax Deferral (Ch. 1242, Stats. 1977) (CSM-4359)	
	(dd) Allocation of Property Tax Revenues (Ch. 697, Stats. 1992) (CSM-4448)	
	(ee) Photographic Record of Evidence (Ch. 875, Stats. 1985) (98-TC-07)	
	(ff) Rape Victim Counseling (Ch. 999, Stats. 1991) (CSM-4426)	
	(gg) Health Benefits for Survivors- of Peace Officers and Firefighters (Ch. 1120, Stats. 1996) (97-TC-25)	
(3)	Pursuant to the provisions of Section 17581 of the Government Code, the mandates identified in the following schedule are specifically identified by the Legislature for suspension during the 2005–06 fiscal year.....	0
	(a) Grand Jury Proceedings (Ch. 1170, Stats. 1996) (98-TC-27)	
	(b) Sex Crime Confidentiality (Ch. 502, Stats. 1992, Ch. 36, Stats. 1994, 1st Ex. Sess.) (98-TC-21)	
	(c) Deaf Teletype Equipment (Ch. 1032, Stats. 1980) (04-LM-11)	
	(d) Sex Offenders: Disclosure by Law Enforcement Officers (Ch. 908 and 909, Stats. 1996) (97-TC-15)	
	(e) Missing Persons Report (Ch. 1456, Stats. 1988, and Ch. 59, Stats. 1993) (CSM-4255, CSM-4484, and CSM-4368)	
	(g) Presidential Primaries 2000 (Ch. 18, Stats. 1999) (99-TC-04)	
	(h) Handicapped Voter Access Information (Ch. 494, Stats. 1979) (CSM-4363)	
	(i) Substandard Housing (Ch. 238, Stats. 1974) (CSM-4303)	

Item		Amount
	(j) Adult Felony Restitution (Ch. 1123, Stats. 1977) (04-LM-08)	
	~~(k) Airport Land Use Commissions/Plans (Ch. 644, Stats. 1994) (CSM-4507)~~	
	(m) Very High Fire Hazard Severity Zones (Ch. 1188, Stats. 1992) (97-TC-13)	
	(n) Local Coastal Plans (Ch. 1330, Stats. 1976) (CSM-4431)	
	(o) SIDS Training for ~~Peace Officers~~ Firefighters (Ch. 1111, Stats. 1989) (CSM-4412)	
	(p) SIDS: Contacts by Local Health Officers (Ch. 268, Stats. 1991) (CSM-4424)	
	(q) SIDS Autopsies (Ch. 955, Stats. 1989) (CSM-4393)	
	(r) Inmate AIDS Testing (Ch. 1597, Stats. 1988) (CSM-4369)	
	(s) SIDS Notices (Ch. 453, Stats. 1974) (04-LM-01)	
	(t) Guardianship/Conservatorship Filings (Ch. 1357, Stats. 1976) (04-LM-15)	
	(x) Victims' Statements-Minors (Ch. 332, Stats. 1981) (04-LM-14)	
	(y) Extended Commitment, Youth Authority (Ch. 267, Stats. 1998) (98-TC-13)	
	(z) Prisoner Parental Rights (Ch. 820, Stats. 1991) (CSM-4427)	
	(aa) Structural and wildland firefighter safety clothing and equipment (8 Cal. Code Regs. 3401 to 3410, incl.) (CSM-4261-4281)	
	(bb) Personal Alarm Devices (8 Cal. Code Regs. 3401(c)) (CSM-4087)	
	(cc) Law Enforcement Sexual Harassment Training (Ch. 126, Stats. 1993) (97-TC-07)	
	(dd) Elder Abuse, Law Enforcement Training (Ch. 444, Stats. 1997) (98-TC-12)	
	(ee) Redevelopment Agencies Tax Disbursement Reporting (Ch. 39, Stats. 1998) (~~88-TC-06~~ 99-TC-06)	
	(ff) Mandate Reimbursement Process (Ch. 486, Stats. 1975) (CSM 4204, CSM-4485)	
	(gg) Filipino Employee Surveys (Ch. 845, Stats. 1978) (CSM-2142)	
	(hh) Domestic Violence Information (Ch. 1609, Stats. 1984) (CSM-4222)	
	(ii) Pocket Masks (Ch. 1334, Stats. 1987) (CSM-4291)	

Item Amount

(commencing with Section 17615) of Chapter 4 of Part 7 of Division 4 of Title 2 of the Government Code.

2. If any of the scheduled amounts are insufficient to provide full reimbursement of costs, the State Controller may, upon notifying the Director of Finance in writing, augment those deficient amounts from the unencumbered balance of any other scheduled amounts therein. No order may be issued pursuant to this provision unless written notification of the necessity therefor is provided to the chairperson of the committee in each house which considers appropriations and the Chairperson of the Joint Legislative Budget Committee or his or her designee.

3. Pursuant to Section 17581 of the Government Code, mandates identified in the appropriation schedule of this item with an appropriation of $0 and included in the language of this provision are specifically identified by the Legislature for suspension during the 2004–05 fiscal year:

(1) Filipino Employee Surveys (Ch. 845, Stats. 1978)

(2) Lis Pendens (Ch. 889, Stats. 1981)

(4) Involuntary Lien Notices (Ch. 1281, Stats. 1980)

(5) Domestic Violence Information (Ch. 1609, Stats. 1984)

(6) CPR Pocket Masks (Ch. 1334, Stats. 1987)

9612-001-0001—For allocation by the Department of Finance to the trustee of the Golden State Tobacco Securitization Corporation, for payment of debt service on the Enhanced Tobacco Settlement Asset-Backed Bonds and operating expenses of the Golden State Tobacco Securitization Corporation in accordance with Section 63049.1 of the Government Code..... 1,000

Provisions:

1. Notwithstanding any other provision of law, upon certification by the Golden State Tobacco Corporation, the Department of Finance may authorize expenditures of up to $200,000,000 in excess of the amount appropriated in this item for the payment of debt service on the Enhanced Tobacco Settlement Asset-Backed Bonds and the payment of operating expenses of the Golden State Tobacco Securitization Corporation in the event tobacco settlement revenues and certain other avail-

Item | Amount

to provide reimbursement pursuant to Article 5 (commencing with Section 17615) of Chapter 4 of Part 7 of Division 4 of Title 2 of the Government Code.

2. If any of the scheduled amounts are insufficient to provide full reimbursement of costs, the State Controller may, upon notifying the Director of Finance in writing, augment those deficient amounts from the unencumbered balance of any other scheduled amounts therein. No order may be issued pursuant to this provision unless written notification of the necessity therefor is provided to the chairperson of the committee in each house which considers appropriations and the Chairperson of the Joint Legislative Budget Committee or his or her designee.
3. Pursuant to Section 17581 of the Government Code, mandates identified in the appropriation schedule of this item with an appropriation of $0 and included in the language of this provision are specifically identified by the Legislature for suspension during the 2002–03 fiscal year:
   (3) Filipino Employee Surveys (Ch. 845, Stats. 1978)
   (4) Lis Pendens (Ch. 889, Stats. 1981)
   (5) Proration of Fines and Court Audits (Ch. 980, Stats. 1984)
   (7) Involuntary Lien Notices (Ch. 1281, Stats. 1980)
   (8) Domestic Violence Information (Ch. 1609, Stats. 1984)
   (9) CPR Pocket Masks (Chapter 1334, Stats. 1987)

9620-001-0001—For Payment of Interest on General Fund loans, upon order of the Director of Finance, for any General Fund loan 50,000,000

Provisions:

1. The Director of Finance, the Controller, and the State Treasurer shall satisfy any need of the General Fund for borrowed funds in a manner consistent with the Legislature's objective of conducting General Fund borrowing in a manner that best meets the state's interest. The state fiscal officers may, among other factors, take into consideration the costs of external versus internal borrowings and potential impact on other borrowings of the state.

2001-02

Item		Amount
(3) 98.01.084.578-Filipino Employee Surveys (Ch. 845, Stats. 1978).....		0
(4) 98.01.088.981-Lis Pendens (Ch. 889, Stats. 1981).....		0
(5) 98.01.098.084-Proration of Fines and Court Audits (Ch. 980, Stats. 1984).....		0
(6) 98.01.099.991-Rape Victim Counseling Ctr. Notices (Ch. 999, Stats. 1991).....		157,896
(7) 98.01.128.180-Involuntary Lien Notices (Ch. 1281, Stats. 1980)....		0
(8) 98.01.160.984-Domestic Violence Information (Ch. 1609, Stats. 1984).....		0
(9) 98.01.133.487-CPR Pocket Masks (Ch. 1334, Stats. 1987)		0

Provisions:

1. Except as provided in Provision 2 of this item, allocations of funds provided in this item to the appropriate local entities shall be made by the State Controller in accordance with the provisions of each statute or executive order that mandates the reimbursement of the costs, and shall be audited to verify the actual amount of the mandated costs in accordance with subdivision (d) of Section 17561 of the Government Code. Audit adjustments to prior year claims may be paid from this item. Funds appropriated in this item may be used to provide reimbursement pursuant to Article 5 (commencing with Section 17615) of Chapter 4 of Part 7 of Division 4 of Title 2 of the Government Code.
2. If any of the scheduled amounts are insufficient to provide full reimbursement of costs, the State Controller may, upon notifying the Director of Finance in writing, augment those deficient amounts from the unencumbered balance of any other scheduled amounts therein. No order may be issued pursuant to this provision unless written notification of the necessity therefor is provided to the chairperson of the committee in each house which considers appropriations and the Chairperson of the Joint Legislative Budget Committee or his or her designee.
3. Pursuant to Section 17581 of the Government Code, mandates identified in the appropriation

Item	Amount
schedule of this item with an appropriation of $0 and included in the language of this provision are specifically identified by the Legislature for suspension during the 2001–02 fiscal year:	
(3) Filipino Employee Surveys (Ch. 845, Stats. 1978)	
(4) Lis Pendens (Ch. 889, Stats. 1981)	
(5) Proration of Fines and Court Audits (Ch. 980, Stats. 1984)	
(7) Involuntary Lien Notices (Ch. 1281, Stats. 1980)	
(8) Domestic Violence Information (Ch. 1609, Stats. 1984)	
(9) CPR Pocket Masks (Chapter 1334, Stats. 1987)	
9620-001-0001—For Payment of Interest on General Fund loans, upon order of the Director of Finance, for any General Fund loan	60,000,000
Provisions:	
1. The Director of Finance, the Controller, and the State Treasurer shall satisfy any need of the General Fund for borrowed funds in a manner consistent with the Legislature's objective of conducting General Fund borrowing in a manner that best meets the state's interest. The state fiscal officers may, among other factors, take into consideration the costs of external versus internal borrowings and potential impact on other borrowings of the state.	
2. In the event that interest expenses related to internal borrowing exceed the amount appropriated by this item, there is hereby appropriated any amount necessary to pay the interest. Funds appropriated by this item shall not be expended prior to 30 days after the Department of Finance notifies the Joint Legislative Budget Committee of the amount(s) necessary or not sooner than such lesser time as the Chairperson of the Joint Legislative Budget Committee may determine.	
9625-001-0001—For Interest Payments to the Federal Government arising from the federal Cash Management Improvement Act of 1990	15,200,000
Provisions:	
1. Expenditures from the funds appropriated by this item shall be made by the Controller, subject to the approval of the Department of Finance, and	

Item Amount

Part 7 of Division 4 of Title 2 of the Government Code.

2. If any of the scheduled amounts are insufficient to provide full reimbursement of costs, the State Controller may, upon notifying the Director of Finance in writing, augment those deficient amounts from the unencumbered balance of any other scheduled amounts therein. No order may be issued pursuant to this provision unless written notification of the necessity therefor is provided to the chairperson of the committee in each house which considers appropriations and the Chairperson of the Joint Legislative Budget Committee or his or her designee.
3. Pursuant to Section 17581 of the Government Code, mandates identified in the appropriation schedule of this item with an appropriation of $0 and included in the language of this provision are specifically identified by the Legislature for suspension during the 2000–01 fiscal year:
   (a) Filipino Employee Surveys (Ch. 845, Stats. 1978)
   (b) Lis Pendens (Ch. 889, Stats. 1981)
   (c) Proration of Fines and Court Audits (Ch. 980, Stats. 1984)
   (d) Involuntary Lien Notices (Ch. 1281, Stats. 1980)
   (e) Domestic Violence Information (Ch. 1609, Stats. 1984)
   (f) CPR Pocket Masks (Chapter 1334, Stats. 1987)

9620-001-0001—For Payment of Interest on General Fund loans, upon order of the Director of Finance, for any General Fund loan 14,100,000

Provisions:

1. The Director of Finance, the Controller, and the State Treasurer shall satisfy any need of the General Fund for borrowed funds in a manner consistent with the Legislature's objective of conducting General Fund borrowing in a manner that best meets the state's interest. The state fiscal officers may, among other factors, take into consideration the costs of external versus internal borrowings and potential impact on other borrowings of the state.
2. In the event that interest expenses related to internal borrowing exceed the amount appropriated by

ITEM NO.	AGENCY AND PURPOSE	DOLLAR CHANGE IN APPROPRIATION
**********		
9210-295-0001 03 03 G		
**********		
ISSUE 002:		
Repeal of suspended mandates		0
Committee repealed six suspended mandates:		
Filipino Employee Surveys (Ch.486/78)		
Lis Pendens (Ch.889/81)		
Proration of Fines & Court Audits (Ch.980/84)		
Involuntary Lien Notices (Ch.1281/80)		
Domestic Violence Info (Ch.1609/80)		
CPR Pocket Masks (Ch.1334/87)		
NON-BUDGET ACT*		
9210-601-0001 99 03 G Local Government Financing		
********** Local Assistance		38,219,841
ISSUE 001:		
Booking Fee Subvention restored		38,219,841
Item 9210-601-0001 restoration of Booking Fee Subvention	38,219,841	
NON-BUDGET ACT*		
9210-607-0001 01 03 G Local Government Financing		
********** Local Assistance		-18,500,000
ISSUE 001:		
Elimination of Small/Rural County Sheriff Grants.		-18,500,000
Elimination of Small/Rural County Sheriff grants.	-18,500,000	
NON-BUDGET ACT*		
9430-604-0064 98 03 S Shared Rev/Apprt-MV License Fees		
********** Local Assistance		34,147,000
ISSUE 002:		
Vehicle License Fee (VLF) Offset Suspension - MVLF		34,147,000
FINANCE LETTER ACCEPTED Suspend VLF offset beginning July 1, 2003.	34,147,000	* * *

C
People v. Kuhn
Cal.App.4.Dist.
THE PEOPLE, Plaintiff and Respondent,
v.
GILBERT J. KUHN, Defendant and Appellant.
Crim. No. 1869.

District Court of Appeal, Fourth District, California.
May 28, 1963.

HEADNOTES

(1a, 1b, 1c, 1d, 1e, 1f, 1g, 1h) Taxation § 458.5--Income Taxes--Offenses.
Rev. & Tax. Code, § 19406, the violation of which is a felony, and Rev. & Tax. Code, § 19401, the violation of which is a misdemeanor, do not define the same offense, though both sections punish failure to file a tax return, since intent to evade taxes is an element of § 19406 only; the two sections therefore do not unconstitutionally confer on prosecuting officials the right to choose whether an accused will be charged with a felony or misdemeanor for the same offense.
See **Cal.Jur.2d,** Income Taxes, § 66.
(2) Statutes § 167--Construction--Absurdity.
A statutory interpretation that leads to an absurdity should be rejected.

(3) Statutes § 164(1)--Construction--Harmonizing Parts.
If the provisions of a statute are subject to two or more reasonable interpretations, the interpretation that will harmonize rather than conflict with other provisions of the statute should be adopted.

(4) Statutes § 187--Construction--With Reference to Other Laws.
In determining legislative intent in connection with a phrase of a statute, the phrase should be considered as a whole, as an integral part of the whole code section, and in relation to other statutes on the same subject, so as to harmonize the whole law.

(5) Criminal Law § 14--Intent.
If qualifying words such as "knowingly," "intentionally," or "fraudulently" are omitted from a statute creating an offense, guilty knowledge and intent are not elements of that offense. By analogy the same conclusion follows from omission of the qualifying word "wilfully."
See **Cal.Jur.2d,** Criminal Law, § 85 et seq.; **Am.Jur.,** Criminal Law (1st ed § 23 et seq).
(6) Criminal Law § 14--Intent.
As used in a criminal statute, the word "wilfully" implies a purpose or willingness to do the act and also implies that the person involved knows what he is doing, intends to do what he is doing, and is a free agent.

(7) Statutes § 181--Construction--Change of Language.
Where a statute concerning one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.

(8) Statutes § 129--Construction--Departure From Literal Meaning.
A statute's purpose will not be sacrificed to a literal construction of its language.

(9) Criminal Law § 139--Identity of Offenses--Test for Determining Identity.
Though particular conduct may constitute an offense against two statutes, these statutes do not define identical offenses if one offense requires proof of an element not involved in the other.

(10) Criminal Law § 140--What Constitutes Identity of Offenses.
Substantially similar criminal acts may be distinguished by the intent which prompts them.

(11) Statutes § 90--Repeal by Implication--Latest Legislative Expression as Controlling.
If two statutes concerning the same subject, passed at different times, are inconsistent with each other, the later statute, by implication, repeals conflicting provisions contained in the earlier.
See **Cal.Jur.2d,** Statutes, § 77; **Am.Jur.,** Statutes (1st ed § § 543, 548).
(12) Statutes § 91--Repeal by Implication--Conflicting Provisions of Same Statute.
Among inconsistent provisions found in the same act, the provision that is latest in position in the act prevails.

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SUMMARY

APPEAL from a judgment of the Superior Court of San Diego County. Byron F. Lindsley, Judge. Affirmed.

Prosecution for wilful failure to file a state income tax return with intent to evade the tax imposed. Judgment of conviction affirmed.

COUNSEL

Thomas Whelan and Monroe W. Kirkman for Defendant and Appellant.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, James Don Keller, District Attorney, and Norbert Ehrenfreund, Deputy District Attorney, for Plaintiff and Respondent.

COUGHLIN, J.

The defendant, appellant herein, by an indictment in three counts, respectively, was charged with a wilful failure to file a state income tax return for each of the years 1960, 1959, and 1958, with intent to evade the tax imposed, i.e., violations of section 19406 of the Revenue and Taxation Code; was found guilty on Count 1 as charged, and of a lesser included offense on Counts 2 and 3, i.e., a violation of section 19401 of the Revenue and Taxation Code; moved ***697** for a new trial, which was denied; was sentenced to pay a fine of $5,000 on Count 1; was granted probation as to Counts 2 and 3, the imposition of sentence being suspended; and appeals from the judgment.

(1a) The defendant contends that section 19406 of the Revenue and Taxation Code, the violation of which is a felony, and section 19401 of that code, the violation of which is a misdemeanor, define the same offense; thus confer on prosecuting officials the right to choose whether an accused will be charged with a felony or a misdemeanor for the same offense; for this reason constitute an infringement of the constitutional guarantee of equal protection of the law, an unconstitutional delegation of legislative authority, and a denial of due process of law; and, therefore, are void. This contention presents the sole issue on appeal. Basic thereto is the claim that the subject sections define the same offense.

Section 19406 provides that: "Any person who ... wilfully fails to file any return ... with intent to evade any tax imposed ... is punishable by imprisonment in the county jail not to exceed one year, or in the state prison not to exceed five years, or by fine of not more than five thousand dollars ($5000), or by both such fine and imprisonment, at the discretion of the court."

Section 19401 provides that: "Any person who, with or without intent to evade any requirement of this part [*viz.* the personal income tax law] ... fails to file any return ... required ... is liable to a penalty ... [and] ... is also guilty of a misdemeanor and shall upon conviction be fined not to exceed one thousand dollars ($1000) or be imprisoned not to exceed one year, or both, at the discretion of the court."

In support of his premise that the subject code sections define identical offenses, the defendant argues that the statutorily prescribed elements for each thereof are identical, i.e., (1) the failure to file a return, and (2) an intent to evade the payment of taxes. The prosecution contends that the intent to evade the payment of taxes is an element of the felony offense but not of the misdemeanor. The intent factor clearly is included in the felony statute, i.e., section 19406, by the language therein which refers to a person who "wilfully fails to file" a return "with intent to evade any tax imposed." The defendant claims that this factor also is included in the misdemeanor statute, i.e., section 19401, by the language therein which refers to a person who fails to file a return "with or without any intent to evade any requirement" of ***698** the law; stresses that part thereof which, out of context, refers to a person who fails to file a return "with ... intent to evade"; and concludes that the language thus used demonstrates the inclusion of the intent factor in both code sections.

If the intent factor is an element of the offense described by section 19401, proof thereof would be essential to a conviction. However, applying the interpretive process indulged in by the defendant, which disregards a part of the language used, it appears that the section in question refers to a person who fails to file a return "... without any intent to evade." This interpretation renders unnecessary any proof of intent as a prerequisite to conviction. (2) The use of such an interpretive process develops a conflict within the statute; confuses rather than clarifies; and must be rejected under the fundamental rule that an interpretation which leads to an absurdity should be rejected. (*Stockton School Dist. v. Wright,* 134 Cal. 64, 68 [66 P. 34]; *Meyer v. Board of Trustees,* 195 Cal.App.2d 420, 430 [15 Cal.Rptr. 717].) (3) Where the provisions of a statute are subject to two or more reasonable interpretations, that which will harmonize rather than conflict with other provisions thereof should be adopted. (*Spreckels v. Graham,* 194 Cal. 516, 527 [228 P. 1040].) (4)

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Obviously, in determining the intention of the Legislature in the premises, the phrase "with or without intent to evade" should be considered as a whole; as an integral part of the whole code section (*In re Marquez,* 3 Cal.2d 625, 628 [45 P.2d 342]); and in relation to other statutes on the same subject, so as to harmonize the whole law. (*Stafford v. Los Angeles etc. Retirement Board,* 42 Cal.2d 795, 799 [270 P.2d 12]; *Stafford v. Realty Bond Service Corp.,* 39 Cal.2d 797, 805 [249 P.2d 241].) (1b) When so considered, the subject phrase means "regardless of intent to evade"; indicates that intent is an immaterial factor in the offense described (*Turner v. State,* 157 Tex. Crim. Rep. 77 [246 S.W.2d 642, 643]; *Maynard v. State,* 154 Tex. Crim Rep. 594 [228 S.W.2d 185, 187]; cf. *People* ex rel. *Lichtenstein v. Langan,* 196 N.Y. 260 [89 N.E. 921-922, 17 Ann.Cas. 1081, 25 L.R.A. N.S. 479] and *People v. Gittens,* 78 Misc. 7 [137 N.Y.S. 670, 672, 674]); and classifies the statute in question as one criminally enforcing an obligation imposed by law without regard to criminal knowledge or intent. (Generally see *In re Marley,* 29 Cal.2d 525, 528-529 [175 P.2d 832]; *People v. Gory,* 28 Cal.2d 450, 453 [170 P.2d 433]; *People v. McClennegen,* 195 Cal. 445, 468-470 [234 P. 91].) ***699**

It is significant that the offense defined by section 19406, i.e., the felony statute, concerns a person who "wilfully fails" to file a return, while that defined by section 19401, i.e., the misdemeanor statute, omits the term "wilfully" and applies to a person who merely "fails" to file a return. (5, 6) It has been held that where a statute which declares the commission or omission of an act to be an offense omits "qualifying words such as knowingly, intentionally, or fraudulently," guilty knowledge and intent are not elements of the offense so defined. (*In re Marley, supra,* 29 Cal.2d 525, 529; *Brodsky v. California State Board of Pharmacy,* 173 Cal.App.2d 680, 688 [344 P.2d 68].) By analogy the same conclusion follows from omission of the qualifying word "wilfully" which, as used in a criminal statute, "implies a purpose or willingness to do the act" and also implies that the person involved "knows what he is doing intends to do what he is doing and is a free agent." (*In re Trombley,* 31 Cal.2d 801, 807 [193 P.2d 734].)

(7) " 'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.' " (*People v. Town of Corte Madera,* 97 Cal.App.2d 726, 729 [218 P.2d 810]; *City of Port Hueneme v. City of Oxnard,* 52 Cal.2d 385, 395 [341 P.2d 318]; *People v. Valentine,* 28 Cal.2d 121, 142 [169 P.2d 1].)

(1c) When the Legislature included the qualifying word "wilfully" in the felony statute, which clearly applies only to a person who intended to evade payment of the tax imposed, but omitted this qualifying word from the misdemeanor statute, it thereby indicated that the latter statute should apply to a person who fails to file an income tax return regardless of his intention in the premises. This circumstance justifies our conclusion that the phrase "with or without intent to evade" as used in section 19401, is a positive declaration that an intent to evade is not an element of the offense therein defined. (8) Although the defendant's position finds support in a literal application of the aforesaid phrase, the purpose of the statute will not be sacrificed to a "literal construction" of the language used therein. (*Select Base Materials v. Board of Equalization, Inc.,* 51 Cal.2d 640, 645 [335 P.2d 672].)

(1d) As a consequence, the contention that the subject statutes ***700** define the same offense must be rejected. (9) The fact that particular conduct may constitute an offense against two statutes does not dictate the conclusion that these statutes define identical offenses. (*Blockburger v. United States,* 284 U.S. 299, 304 [52 S.Ct. 180, 182, 76 L.Ed. 306]; *United States v. Noveck,* 273 U.S. 202 [47 S.Ct. 341, 71 L.Ed. 610]; *Gavieres v. United States,* 220 U.S. 338 [31 S.Ct. 421, 422, 55 L.Ed. 489]; *Levin v. United States,* 5 F.2d 598, 599.)

"If one offense requires proof of an element different from the other, they may not be deemed to constitute the same offense. ..." (*People v. Benenato,* 77 Cal.App.2d 350, 367 [175 P.2d 296].)

Stated otherwise, it is the "presence of a fact necessary to one offense and absent in another that determines whether offenses are separate." (*People v. Day,* 199 Cal. 78, 83 [248 P. 250].) (1e) The decision in *United States v. Beacon Brass Co.,* 344 U.S. 43, 45 [73 S.Ct. 77, 78, 97 L.Ed. 61], is particularly pertinent because the court there considered the similarity between the offense of attempting to evade taxes by filing a false statement with the Treasury Department and that of merely filing such a statement, and held that the two offenses were not identical as the intent to evade taxes was an element of the one and not of the other.

(10) Substantially similar criminal acts may be

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distinguished by the intent which prompts them. (*People v. Thomas,* 58 Cal.2d 121, 125 [23 Cal.Rptr. 161, 373 P.2d 97].) (1f) In the instant case, the element of intent is a prerequisite to conviction of the offense defined by section 19406, but not to that described by section 19401. Thus, under the tests aforesaid, the subject statutes define two different offenses.

(11) Moreover, as section 19401 was enacted in 1943, while section 19406 was added in 1953, even though it be assumed that the offense described in the latter is included in that described in the former, the conflict created by their penalty provisions is academic because the later statute repealed by implication any conflicting provisions of the earlier statute.

"It is an old and well-settled rule that when two laws upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail." (*People v. Dobbins,* 73 Cal. 257, 259 [14 P. 860]; accord: *People v. Thomas, supra,* 58 Cal.2d 122, 127; *County of Ventura v. *701 Barry,* 202 Cal. 550, 556 [262 P. 1081]; *People v. Orona,* 72 Cal.App.2d 478, 484 [164 P.2d 769].)

Where the provisions of one statute irreconcilably conflict with those of another, the later enactment, by implication, repeals any conflicting provisions contained in the earlier. (*Bank of British N. A. v. Cahn,* 79 Cal. 463, 465 [21 P. 863]; *People v. Haydon,* 106 Cal.App.2d 105, 107 [234 P.2d 720]; *United Milk Producers v. Cecil,* 47 Cal.App.2d 758, 766 [118 P.2d 830].) (1g) In *Achilli v. United States,* 353 U.S. 373 [77 S.Ct. 995, 998, 1 L.Ed.2d 918], the court held, in substance, that a statute making it a misdemeanor to file a false income tax return with intent "to evade the valuation, enumeration, or assessment intended to be made ..." had been repealed *pro tanto* by later statutes, the last of which made it a felony to file a false return with intent to evade the income tax; expressed its opinion that the scope of the misdemeanor statute "had been shrunk by a series of specific enactments that had the potency of implied repeals"; and affirmed a conviction under the felony statute.

The defendant contends that the rule of implied revocation does not apply to the instant situation because both sections 19401 and 19406 were included within chapter 16, part 10, division 2, of the Revenue and Taxation Code when that chapter was renumbered as chapter 23 in 1955 (Stats. 1955, ch. 939, p. 1819), which constituted a reenactment of both sections at the same time, i.e., in 1955. It would seem to be obvious that no presumed intent to reinstate those portions of section 19401 previously repealed impliedly by the enactment of section 19406 may be ascribed to the Legislature through its action in merely renumbering a chapter of the code of which both sections were a part. (12) However, no decision need be made with respect to this contention because section 19406 would control over those parts of section 19401 in conflict therewith under the general rule that "where inconsistent provisions are found in an act that provision which is latest in position in the act is deemed to express the last, final legislative intent, and prevails over prior repugnant provisions, though all are found in the same act and are intended to take effect at the same time." (*Alameda County v. Dalton,* 148 Cal. 246, 251 [82 P. 1050]; in accord: *Spreckels v. Graham,* 194 Cal. 516, 526 [228 P. 1040]; *Matter of Roberts,* 157 Cal. 472, 477 [108 P. 315].)

(1h) The defendant also contends that if the doctrine of ***702** implied revocation applies to the case at bar, his conviction of a violation of section 19401 under Counts 2 and 3 of the indictment is without support in the law because that section had been repealed by section 19406. This contention is based on the assumption that the latter section impliedly repealed the former section *in toto*; disregards the fact that the two sections are irreconcilably conflicting, under the defendant's interpretation of section 19401, only to the extent that this section declares a failure to file a return with intent to evade the tax imposed is a misdemeanor; and neglects to consider the rule that a later statute impliedly repeals an earlier statute only to the extent that their provisions are in irreconcilable conflict. (*People v. Fitzgerald,* 14 Cal.App.2d 180, 197 [58 P.2d 718].) That part of section 19401 declaring a failure to file a return without intent to evade the tax imposed is not in conflict with section 19406; was not repealed by implication; and is the offense of which the defendant was convicted under Counts 2 and 3.

As sections 19401 and 19406 define separate offenses, the essential premise upon which the defendant bases his claim of unconstitutionality is unsound and renders any further consideration of that claim unnecessary.

The judgment is affirmed.

Griffin, P. J., and Brown (G.), J., concurred.
Cal.App.4.Dist.
People v. Kuhn

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216 Cal.App.2d 695, 31 Cal.Rptr. 253

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Weiss v. State Bd. of Equalization
Cal.

ALFRED K. WEISS et al., Appellants,
v.
STATE BOARD OF EQUALIZATION et al., Respondents.
L. A. No. 22697.

Supreme Court of California
Apr. 28, 1953.

HEADNOTES

(1) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
In exercising power which State Board of Equalization has under Const., art. XX, § 22, to deny, in its discretion, ". any specific liquor license if it shall determine for good cause that the granting ... of such license would be contrary to public welfare or morals," the board performs a quasi judicial function similar to local administrative agencies.
See **Cal.Jur.2d**, Alcoholic Beverages, § 25 et seq.; **Am.Jur.**, Intoxicating Liquors, § 121.
(2) Licenses § 32--Application.
Under appropriate circumstances, the same rules apply to determination of an application for a license as those for its revocation.

(3) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
The discretion of the State Board of Equalization to deny or revoke a liquor license is not absolute but must be exercised in accordance with the law, and the provision that it may revoke or deny a license " for good cause" necessarily implies that its decision should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals.

(4) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
3While the State Board of Equalization may refuse an on-sale liquor license if the premises are in the immediate vicinity of a school (Alcoholic Beverage Control Act, § 13), the absence of such a provision or regulation by the board as to off-sale licenses does not preclude it from making proximity of the premises to a school an adequate basis for denying an off-sale license as being inimical to public morals and welfare.

(5) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
It is not unreasonable for the State Board of Equalization to decide that public welfare and morals would be jeopardized by the granting of an off-sale liquor license within 80 feet of some of the buildings on a school ground.

(6) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
Denial of an application for an off-sale license to sell beer and wine at a store conducting a grocery and delicatessen business across the street from high school grounds is not arbitrary because there are other liquor licenses operating in the vicinity of the school, where all of them, except a drugstore, are at such a distance from the school that it cannot be said the board acted arbitrarily, and where, in any event, the mere fact that the board may have erroneously granted licenses to be used near the school in the past does not make it mandatory for the board to continue its error and grant any subsequent application.

(7) Intoxicating Liquors § 9.4--Licenses--Discretion of Board.
Denial of an application for an off-sale license to sell beer and wine at a store across the street from high school grounds is not arbitrary because the neighborhood is predominantly Jewish and applicants intend to sell wine to customers of the Jewish faith for sacramental purposes, especially where there is no showing that wine for this purpose could not be conveniently obtained elsewhere.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Swain, Judge. Affirmed.

Proceeding in mandamus to compel State Board of Equalization to issue an off-sale liquor license. Judgment denying writ affirmed.

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COUNSEL
Riedman & Silverberg and Milton H. Silverberg for Appellants.
Edmund G. Brown, Attorney General, and Howard S. Goldin, Deputy Attorney General, for Respondents.
CARTER, J.
Plaintiffs brought mandamus proceedings in the superior court to review the refusal of defendant, State Board of Equalization, to issue them an off-sale beer and wine license at their premises and to compel the issuance of such a license. The court gave judgment for the board and plaintiffs appeal. *774

Plaintiffs filed their application with the board for an off-sale beer and wine license (a license to sell those beverages to be consumed elsewhere than on the premises) at their premises where they conducted a grocery and delicatessen business. After a hearing the board denied the application on the grounds that the issuance of the license would be contrary to the " public welfare and morals" because of the proximity of the premises to a school.

According to the evidence before the board, the area concerned is in Los Angeles. The school is located in the block bordered on the south by Rosewood Avenue, on the west by Fairfax Avenue, and on the north by Melrose Avenue-an 80-foot street running east and west parallel to Rosewood and a block north therefrom. The school grounds are enclosed by a fence, the gates of which are kept locked most of the time. Plaintiffs' premises for which the license is sought are west across Fairfax, an 80-foot street, and on the corner of Fairfax and Rosewood. The area on the west side of Fairfax, both north and south from Rosewood, and on the east side of Fairfax south from Rosewood, is a business district. The balance of the area in the vicinity is residential. The school is a high school. The portion along Rosewood is an athletic field with the exception of buildings on the corner of Fairfax and Rosewood across Fairfax from plaintiffs' premises. Those buildings are used for R.O.T.C. The main buildings of the school are on Fairfax south of Melrose. There are gates along the Fairfax and Rosewood sides of the school but they are kept locked most of the time. There are other premises in the vicinity having liquor licenses. There are five on the west side of Fairfax in the block south of Rosewood and one on the east side of Fairfax about three-fourths of a block south of Rosewood. North across Melrose and at the corner of Melrose and Fairfax is a drugstore which has an off-sale license. That place is 80 feet from the northwest corner of the school property as Melrose is 80 feet wide and plaintiffs' premises are 80 feet from the southwest corner of the school property. It does not appear when any of the licenses were issued, with reference to the existence of the school or otherwise. Nor does it appear what the distance is between the licensed drugstore and any school buildings as distinguished from school grounds. The licenses on Fairfax Avenue are all farther away from the school than plaintiffs' premises.

Plaintiffs contend that the action of the board in denying them a license is arbitrary and unreasonable and they particularly *775 point to the other licenses now outstanding on premises as near as or not much farther from the school.

The board has the power " in its discretion, to deny ... any specific liquor license if it shall determine for good cause that the granting ... of such license would be contrary to public welfare or morals." (Cal. Const., art. XX, § 22.) (1) In exercising that power it performs a quasi judicial function similar to local administrative agencies. (*Covert v. State Board of Equalization*, 29 Cal.2d 125 [173 P.2d 545]; *Reynolds v. State Board of Equalization*, 29 Cal.2d 137 [173 P.2d 551, 174 P.2d 4]; *Stoumen v. Reilly*, 37 Cal.2d 713 [234 P.2d 969].) (2) Under appropriate circumstances, such as we have here, the same rules apply to the determination of an application for a license as those for the revocation of a license. (*Fascination, Inc. v. Hoover*, 39 Cal.2d 260 [246 P.2d 656]; Alcoholic Beverage Control Act, § 39; Stats. 1935, p. 1123, as amended.) (3) In making its decision " The board's discretion ... however, is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." (*Stoumen v. Reilly, supra*, 37 Cal.2d 713, 717.)

(4) Applying those rules to this case, it is pertinent to observe that while the board may refuse an on-sale license if the premises are in the immediate vicinity of a school (Alcoholic Beverage Control Act, *supra*, § 13) there is no such provision or regulation by the board as to off-sale licenses. Nevertheless, proximity of the licensed premises to a school may supply an adequate basis for denial of a license as being inimical to public morals and welfare. (See *Altadena Community Church v. State Board of Equalization*,

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109 Cal.App.2d 99 [240 P.2d 322]; *State v. City of Racine,* 220 Wis. 490 [264 N.W. 490]; *Ex parte Velasco,* (Tex.Civ.App.) 225 S.W. 2d 921; *Harrison v. People,* 222 Ill. 150 [78 N.E. 52].)

The question is, therefore, whether the board acted arbitrarily in denying the application for the license on the ground of the proximity of the premises to the school. No question is raised as to the personal qualifications of the applicants. (5) We cannot say, however, that it was unreasonable for the board to decide that public welfare and morals would be jeopardized by the granting of an off-sale license at premises *776 within 80 feet of some of the buildings on a school ground. As has been seen, a liquor license may be refused when the premises, where it is to be used, are in the vicinity of a school. While there may not be as much probability that an off-sale license in such a place would be as detrimental as an on-sale license, yet we believe a reasonable person could conclude that the sale of any liquor on such premises would adversely affect the public welfare and morals.

(6) Plaintiffs argue, however, that assuming the foregoing is true, the action of the board was arbitrary because there are other liquor licensees operating in the vicinity of the school. All of them, except the drugstore at the northeast corner of Fairfax and Melrose, are at such a distance from the school that we cannot say the board acted arbitrarily. It should be noted also that as to the drugstore, while it is within 80 feet of a corner of the school grounds, it does not appear whether there were any buildings near that corner, and as to all of the licensees, it does not appear when those licenses were granted with reference to the establishment of the school.

Aside from these factors, plaintiffs' argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: " Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. Perhaps the best authority for this observation is *FCC v. WOKO* [329 U.S. 223 (67 S.Ct. 213, 91 L.Ed. 204).] The Commission denied renewal of a broadcasting license because of misrepresentations made by the licensee concerning ownership of its capital stock. Before the reviewing courts one of the principal arguments was that comparable deceptions by other licensees had not been dealt with so severely. A unanimous Supreme Court easily rejected this argument: 'The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.' *777 In rejecting a similar argument that the SEC without warning had changed its policy so as to treat the complainant differently from others in similar circumstances, Judge Wyzanski said: 'Flexibility was not the least of the objectives sought by Congress in selecting administrative rather than judicial determination of the problems of security regulation. ... The administrator is expected to treat experience not as a jailer but as a teacher.' Chief Justice Vinson, speaking for a Court of Appeals, once declared: 'In the instant case, it seems to us there has been a departure from the policy of the Commission expressed in the decided cases, but this is not a controlling factor upon the Commission.' Other similar authority is rather abundant. Possibly the outstanding decision the other way, unless the dissenting opinion in the second Chenery case is regarded as authority, is *NLRB v. Mall Tool Co.* [119 F.2d 700.] The Board in ordering back pay for employees wrongfully discharged had in the court's opinion departed from its usual rule of ordering back pay only from time of filing charges, when filing of charges is unreasonably delayed and no mitigating circumstances are shown. The Court, assuming unto itself the Board's power to find facts, said: 'We find in the record no mitigating circumstances justifying the delay.' Then it modified the order on the ground that 'Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily.' From the standpoint of an ideal system, one can hardly disagree with the court's remark. But from the standpoint of a workable system, perhaps the courts should not impose upon the agencies standards of consistency of action which the courts themselves customarily violate. Probably deliberate change in or deviation from established administrative policy should be permitted so long as the action is not arbitrary or unreasonable. This is the view of most courts." (Davis, Administrative Law, § 168; see also Parker, Administrative Law, pp. 250-253; 73 C.J.S., Public Administrative Bodies and

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Procedure, § 148; *California Emp. Com. v. Black-Foxe M. Inst.*, 43 Cal.App.2d Supp. 868 [110 P.2d 729].) Here the board was not acting arbitrarily if it did change its position because it may have concluded that another license would be too many in the vicinity of the school.

(7) The contention is also advanced that the neighborhood is predominantly Jewish and plaintiffs intend to sell wine to customers of the Jewish faith for sacramental purposes. We fail to see how that has any bearing on the issue. The wine *778 to be sold is an intoxicating beverage, the sale of which requires a license under the law. Furthermore, it cannot be said that wine for this purpose could not be conveniently obtained elsewhere.

The judgment is affirmed.

Gibson, C. J., Shenk, J., Edmonds, J., Traynor, J., Schauer, J., and Spence, J., concurred.
Appellants' petition for a rehearing was denied May 21, 1953.

Cal.
Weiss v. State Bd. of Equalization
40 Cal.2d 772, 256 P.2d 1

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C
72 Ops. Cal. Atty. Gen. 173, 1989 WL 408272 (Cal.A.G.)

Office of the Attorney General
State of California
*1 Opinion No. 88-702

September 13, 1989

THE COMMISSION ON STATE MANDATES

THE COMMISSION ON STATE MANDATES has requested an opinion on the following question:

Does the Commission on State Mandates have the authority to reconsider a prior final decision relating to the existence or nonexistence of state mandated costs?

CONCLUSION

The Commission on State Mandates does have the authority to reconsider a prior final decision relating to the existence or nonexistence of state mandated costs, where the prior decision was contrary to law.

ANALYSIS

Section 6 of article XIII B of the California Constitution, an initiative constitutional amendment which became effective on July 1, 1980, provides:

" Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

" (a) Legislative mandates requested by the local agency affected;

" (b) Legislation defining a new crime or changing an existing definition of a crime; or

" (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

In order to implement the provisions of section 6, supra, the Commission on State Mandates (" commission," post) was established on January 1, 1985. (Gov.Code, 17525.) [FN1] Its basic purpose is to adjudicate claims filed by local agencies for costs incurred as a result of certain state mandated programs. (See 68 Ops.Cal.Atty.Gen. 245 (1985).) Specifically, section 17551, subdivision (a), provides:

" The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."

The present inquiry is whether the commission is authorized to reconsider, pursuant

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to its own motion, its determination in a prior case respecting the entitlement of a claimant (local agency or school district) to reimbursement for state mandated costs. It is understood for purposes of this discussion that the prior decision was duly rendered and has become final. Our attention has been directed, for illustrative purposes, upon the interpretive clarification by the California Supreme Court in County of Los Angeles v. State of California (1987) 43 Cal.3d 46, 56-57, providing a limited definition of the phrase " new program or higher level of service" within the context of section 6 of article XIII B of the California Constitution, supra. Specifically, it was decided that that phrase does not include any incidental increase in local costs arising upon the enactment of a law of general application. Consequently, there was no mandatory subvention for increased costs to local agencies resulting from the legislative authorization for higher workers' compensation benefits. As a result of this clarification, the commission may have reached different determinations with respect to certain prior claims which it now wishes to reopen for consideration.

*2 In the absence of any specific statutory authority, an administrative agency has, as a general rule, no power to grant a rehearing or otherwise to reconsider a previous final decision. In 37 Ops.Cal.Atty.Gen. 133 (1961), we considered whether the California Unemployment Insurance Appeals Board was authorized to set aside its decision and reopen a matter for the purpose of receiving written argument or reevaluating the evidence and issuing a different decision. We explained in part (id., at 134-135):

" In 2 Ops.Cal.Atty.Gen. 442, 443, the specific question of the board's jurisdiction to review, rehear or reconsider formal decisions was discussed as follows:

" ±In cases such as this one, the jurisdiction of boards and agencies such as the California Employment Commission and its successor the California Unemployment Insurance Appeals Board, is special and limited. (Heap v. City of Los Angeles, 6 Cal. (2d) 405; Peterson v. Civil Service Board, 67 Cal.App. 70; Krohn v. Board of Water and Power Com., 95 Cal.App. 289.) It would seem that if such an agency did not have the express power to grant a rehearing, it could not grant such a rehearing.

" ±The reason for this rule of law is well expressed in the case of Heap v. City of Los Angeles, supra, where the Court said:

" " ' ... But the rule stated above, that a civil service commission has no such power in the absence of express authorization, is sound and practical. If the power were admitted, what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? And if the commission could reconsider an order sustaining a discharge, could it reconsider an order having the opposite effect, thus retroactively holding a person unfit for his position? These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure...." '

" ' The rule and reason therefor is well supported by California authority. (Pacheco v. Clark, 44 Cal.App. (2d) 147; Olive Proration etc. Com. v. Agricultural etc. Com., 17 Cal. (2d) 204; Proud v. McGregor, 9 Cal. (2d) 178.) This office has adhered to the rule just set out in Opinions (NS 2192, NS 2192a and NS 2192b) addressed to the State Board of Equalization.'

" It was concluded therein that the Unemployment Insurance Appeals Board has no jurisdiction to review, rehear or reconsider its formal decisions for the reasons stated above.

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" Again in 16 Ops.Cal.Atty.Gen. 214 at 215, this office stated:
" ' It appears to be the general rule that if the jurisdiction of an administrative board is purely statutory, it must look to its statute to ascertain whether its determinations may be reopened. (People v. Wemple (1895) 144 N.Y. 478, 39 N.E. 397; State v. Brown (1923) 126 Wash. 175, 218 P. 9; Note (1941) 29 Geo. L. J. 878; Comment (1941) 29 Cal. L. Rev. 741). That this is the California rule is illustrated by the decision in Olive Proration Committee v. Agricultural Prorate Commission, (1941) 17 Cal.2d 204, 109 P.2d 918, wherein the court said, at page 209:
*3 " ' " ... since all administrative actions must be grounded in statutory authority, in the absence of a provision allowing a commission to change its determination, courts have usually denied the right so to do." ' (See also Cook v.Civil Service Commission (1911) 160 Cal. 589, 117 P. 662; Heap v. Los Angeles (1936) 6 Cal.2d 405, 57 P.2d 1323; 1 Ops.Cal.Atty.Gen. 412, 417; 2 Ops.Cal.Atty.Gen. 442; 3 Ops.Cal.Atty.Gen. 143, 144; 4 Ops.Cal.Atty.Gen. 34, 36; 9 Ops.Cal.Atty.Gen. 294, 295.)" ' "

In 59 Ops.Cal.Atty.Gen. 123 (1976) we pointed to certain " narrow exceptions" to the general rule. (Id. at 126-127.) For example, the rule would not apply where the Legislature intended that the agency should exercise a continuing jurisdiction with power to reconsider its orders. As stated by the court in Olive Proration etc. Com. v. Agric. etc. Com. (1941) 17 Cal.2d 204, 209:
" Where orders which relate to what may be rather broadly defined as individual rights are concerned, the question whether the administrative agency may reverse a particular determination depends upon the kind of power exercised in making the order and the terms of the statute under which the power was exercised. As to the first factor, almost without exception, courts have held that the determination of an administrative agency as to the existence of a fact or status which is based upon a present or past group of facts, may not thereafter be altered or modified. (Muncy v. Hughes, 265 Ky. 588 [97 S. W. (2d) 546]; Little v. Board of Adjustment, 195 N. C. 793 [143 S. E. 827]; Lilienthal v. Wyandotte, 286 Mich. 604 [282 N.W. 837].) As concisely stated by the New York Court of Appeals, 'officers of special and limited jurisdiction cannot sit in review of their own orders or vacate or annul them'. (People ex rel. Chase v. Wemple, 144 N. Y. 478 [39 N. E. 397].) But if it is clear that the legislature intended that the agency should exercise a continuing jurisdiction with power to modify or alter its orders to conform to changing conditions, the doctrine of res judicata is not applicable. The determination depends upon the provisions of the particular statute.
" ... And since all administrative action must be grounded in statutory authority, in the absence of a provision allowing a commission to change its determination, courts have usually denied the right so to do." (Emphasis added.)
(Accord, Hollywood Circle, Inc. v. Dept. of Alc. Bev. Cont. (1961) 55 Cal.2d 728, 732.) We find no such provision in the statute in question. (See 17551 (a) supra.)

Further, the rule would not apply where the agency's decision exceeded its authority or was made without sufficient evidence. In Aylward v. State Bd. etc. Examiners (1948) 31 Cal.2d 833, the Board of Chiropractic Examiners adopted, without notice, and based upon the board's own records, a resolution canceling forty licenses, previously issued by the board, to practice chiropractic on the ground that such licenses had been issued contrary to numerous prerequisites of the Chiropractic Act. This action purported to reverse the action of the board during

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the previous year, in which it was concluded, upon a noticed and contested hearing, that " none of the matters presented were grounds under the Chiropractic Act for revocation of any licenses." The Supreme Court held that the board improperly canceled the licenses in the absence of a statutorily required noticed hearing (id. at 838), but that the board should not be precluded from taking adverse action based on any proper legal ground (id. at 842). The court explained as follows (id. at 839):

> *4 " The agency however, may be bound by its prior action where it has made a determination of a question of fact within its powers, and it lacks authority to rehear or reopen the question. (Olive Proration etc. Com. v. Agricultural etc. Com., 17 Cal.2d 204, 209; Heap v. City of Los Angeles, 6 Cal.2d 405; Proud v. McGregor, 9 Cal.2d 178, 179; Pacheco v. Clark, 44 Cal.App.2d 147, 153; Hoertkorn v. Sullivan, 67 Cal.App.2d 151, 154; Matson Terminals, Inc. v. California Emp. Com., 24 Cal.2d 695, 702.)
>
> " Implicit in the cases denying a board's power to review or reexamine a question, however, is the qualification that the board must have acted within its jurisdiction and within the powers conferred on it. Where a board's order is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the board's authority, the order is clearly void and hence subject to collateral attack, and there is no good reason for holding the order binding on the board. Not only will a court refuse to grant mandate to enforce a void order of such a board (Proud v. McGregor, 9 Cal.2d 178; Pacheco v. Clark, 44 Cal.App.2d 147), but mandate will lie to compel the board to nullify or rescind its void acts. (Board of Trustees v. State Bd. of Equalization, 1 Cal.2d 784. While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do or by making a determination without sufficient evidence. In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction." (Emphasis added.)

In Ferdig v. State Personnel Board (1969) 71 Cal.2d 96, the board had approved the appointment of an applicant to a state civil service position. More than seven months later, the board, after a hearing, adopted its order revoking the appointment due to the erroneous grant of veterans' preference points. (Id. at 100.) Responding to the contention that the initial order approving the appointment having become final, the board was, in the absence of statutory authority, without jurisdiction to reconsider it, the court observed (id. at 105-106):

> " What we examine here is the jurisdiction of the Board to take corrective action with respect to an appointment which it lacked authority to make. It defies logic to say that the mere enumeration in the Act of the methods of separating an employee from state civil service in a situation where an appointment has been validly made, compels the conclusion that no jurisdiction exists to rectify the action of the Board in a situation where an appointment has been made without authority.
>
> " We conclude, therefore, that when the matter was brought to its attention, the Board had jurisdiction to inquire into and review the certification as to veterans' preference credits made by the Department of Veterans Affairs and having determined that appellant was not entitled to such credits, to take the corrective action which it did by revoking appellant's appointment. While this jurisdiction does not appear to have been conferred upon the Board in so many

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words by the express or precise language of constitutional or statutory provision, there can be no question in that it is implicit in the constitutional and statutory scheme which empowers the Board to administer and enforce the civil service laws."

*5 Determinations by the commission as to entitlement of local agencies to reimbursement for state mandated costs are questions of law. (Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at 536.) An administrative agency is not authorized to act contrary to law. (Ferdig v. State Personnel Board, supra, 71 Cal.2d at 103-104.) Consequently, where the decision in a prior case was based upon an erroneous legal premise, and is contrary to law (e.g., licenses issued or veterans preference points granted contrary to law), the administrative agency, having exceeded its authority, may reconsider its decision notwithstanding the absence of express statutory sanction. In the case presented for illustrative purposes, the commission's prior determination, based upon an erroneous interpretation of law, to provide a subvention for an incidental increase in local costs arising upon an increase in workers' compensation benefits, was contrary to law. Under the principles set forth above, the commission would be authorized to reconsider its prior decision.

The question remains, however, whether the Legislature in this instance has authorized a different result, precluding the commission from reconsidering a prior final decision. [FN2] The commission is authorized to adopt procedures for hearing claims and for the taking of evidence. (17553.) [FN3] Pursuant to its authority to adopt and amend rules and regulations (17527, subd. (g)), the commission has promulgated rules for the conduct of hearings. (Tit. 2, C.C.R., 1187-1188.3, hereafter referred to as " rules.") Upon receipt of a claim, the commission is required to conduct a hearing within a reasonable time. (17555; rule 1187.1, subd. (a).) The hearing shall be conducted in accordance with specified rules of evidence and procedure. (Rules 1187.5, 1187.6.) Prior to the adoption of its written decision the commission may, on its own motion or upon a showing of good cause, order a further hearing. (Rule 1187.9, subd. (a).) Within a reasonable time following the hearing, a proposed decision of the commission panel, commission staff, or hearing officer, as the case may be, shall be prepared and served upon the parties. (Rule 1188.1.) The decision of the commission itself must be written, based on the record, and contain a statement of reasons for the decisions, findings and conclusion. (Rule 1188.2, subd. (a).) After the decision has been served, it shall not be changed except to correct clerical errors. (Rule 1188.2, subd. (b).) Either party may commence a proceeding for judicial review of a decision of the commission. (17559.) The period of limitations applicable to such review is three years. (Carmel Valley Fire Protection Dist. v. State of California, supra, 190 Cal.App.3d at 534.)

If the commission determines that costs are mandated by the state, it must determine the amount to be subvened to local agencies and adopt " parameters and guidelines" for reimbursement of claims. (17557; rule 1183.1.) Thereafter, the commission shall adopt an estimate of statewide costs resulting from the mandate. (Rule 1183.3, subd. (a).) At least twice each calendar year, the commission is required to identify and report to the Legislature the statewide costs estimated for each mandate and the reasons for recommending reimbursement. (17600; rule 1183.3, subd. (b).) The amounts awarded are included in the local government claims bill and thereafter, in the case of continuing costs, in the budget bill for subsequent fiscal years. (17561, subd. (b)(2).)

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*6 The Supreme Court has applied a uniform set of rules when reviewing the validity of administrative regulations. " Where a statute empowers an administrative agency to adopt regulations, such regulations 'must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.' " (Ontario Community Foundation, Inc. v. State Bd. of Equalization (1984) 35 Cal.3d 811, 816.) " [T]here is no agency discretion to promulgate a regulation which is inconsistent with the governing statute." (Woods v. Superior Court (1981) 28 Cal.3d 668, 679.) " Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (Morris v. Wil liams (1967) 67 Cal.2d 733, 737.) " Administrative regulations that alter or amend that statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (Ontario Community Foundation, Inc. v. State Bd. of Equalization, supra, 35 Cal.3d 811,816-817; emphasis added.) " It is fundamental that an administrative agency may not usurp the legislative function, no matter now altruistic its motives are." (Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal.3d 392, 419.)

There is no indication in the statutory scheme that the jurisdiction of the commission is limited to rectify its action where a determination of entitlement had been adopted without authority. As observed in Ferdig v. State Personnel Board, supra, 106, " [w]hile this jurisdiction does not appear to have been conferred upon the [commission] in so many words by the express or precise language of constitutional or statutory provision, there can be no question that it is implicit in the constitutional and statutory scheme which empowers that [commission to provide 'an effective means of resolving disputes over the existence of state-mandated local programs' (sec. 17500).]"

To the extent that rule 1188.2, subdivision (b), may be interpreted to foreclose the commission from rectifying a decision made or action taken contrary to law, it impairs the scope of the statute, and to that extent is void. (Cf. Ontario Community Foundation, Inc. v. State Bd. of Equal., supra, 35 Cal.3d at 816-817; 64 Ops.Cal.Atty.Gen. 425, 430 (1981).) In our view, an administrative agency has no more power to promulgate a rule preserving or perpetuating its decisions made or actions taken without authority, than it has to undertake such decisions or actions in the first instance.

It is concluded that the commission is authorized to reconsider a prior final decision relating to entitlement for reimbursement for state mandated costs, where the prior decision was contrary to law.

JOHN K. VAN DE KAMP
Attorney General

Anthony S. DaVigo
Deputy

[FN1]. Hereinafter, all unidentified section references are to the Government Code.

[FN2]. To be clear, this opinion concerns the reconsideration of a prior decision, i.e., which has become final, for the purpose of determining whether the decision in that case should be modified or reversed. We do not question the power of an administrative agency to reconsider a prior decision for the purpose of determining

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whether that decision should be overruled in a subsequent case. It is long settled that due process permits substantial deviation by administrative agencies from the principle of stare decisis. (*Weiss v. State Bd. of Equal.* (1953) 40 Cal.2d 772, 776.) An agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable (*Id.*, at 777.)

[FN3]. The commission is not subject to the provisions of the California Administrative Procedure Act pertaining to administrative adjudication. (§§ 11500, 11501.)

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Rideout Hosp. Foundation, Inc. v. County of Yuba
Cal.App.3.Dist.

RIDEOUT HOSPITAL FOUNDATION, INC., Plaintiff and Respondent,
v.
COUNTY OF YUBA et al., Defendants and Appellants.
No. C011614.

Court of Appeal, Third District, California.
Jul 20, 1992.

SUMMARY

A nonprofit hospital brought an action against a county to recover property taxes it had paid under protest after the county denied the hospital's application for the welfare exemption (Rev. & Tax. Code, § 214) on the ground that the hospital had net operating revenues in excess of 10 percent for the two tax years in question. The trial court granted summary judgment in favor of the hospital, finding that a nonprofit hospital that earns surplus revenues in excess of 10 percent for a given tax year can still qualify for the welfare exemption. (Superior Court of Yuba County, No. 45090, Robert C. Lenhard, Judge.)

The Court of Appeal affirmed. The court held that Rev. & Tax. Code, § 214, subd. (a)(1), which provides that a hospital will not be deemed to be operated for profit if its operating revenue does not exceed 10 percent, does not automatically preclude a hospital that does have revenue in excess of 10 percent from invoking the welfare exemption. The legislative history of the provision, the court held, indicates that it was not intended to deny exemption to a nonprofit organization earning excess revenues for debt retirement, facility expansion, or operating cost contingencies, but merely to require a hospital earning such excess revenue to affirmatively show that, in fact, it is not operated for profit and that it meets the other statutory conditions for invoking the exemption. (Opinion by Davis, J., with Sparks, Acting P. J., and Nicholson, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Property Taxes § 24--Exemptions--Property Used for Religious, Hospital, or Charitable Purposes--Hospital Earning in Excess of 10 Percent Revenue.

In a nonprofit hospital's action against a county to recover property taxes paid under protest, the trial court properly found that the hospital, which had net operating revenues in excess of 10 percent for the tax years in question, was not automatically ineligible for the " welfare exemption" of Rev. & Tax. Code, § 214. Rev. & Tax. Code, § 214, subd. (a)(1), provides that a hospital will not be deemed to be operated for profit if its operating revenue does not exceed 10 percent, but does not state the effect of earnings in excess of that amount. The legislative history of the provision indicates that it was not intended to deny exemption to a nonprofit organization earning excess revenues if those revenues were to be used for debt retirement, facility expansion, or operating cost contingencies. Thus, while a hospital earning such excess revenue does not receive the benefit of being deemed nonprofit, it can still invoke the exemption if it can show that, in fact, it is not operated for profit and meets the other statutory conditions for invoking the exemption.

[See **Cal.Jur.3d,** Property Taxes, §§ 18, 20; 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Taxation, §§ 153, 155.]

(2) Taxpayers' Remedies § 14--Proceedings and Actions to Recover Taxes Paid--Review--Questions of Law--Interpretation of Welfare Exemption Statute.

In a nonprofit hospital's action against a county to recover taxes paid under protest, the question of whether the hospital qualified for the " welfare exemption" of Rev. & Tax. Code, § 214, even though it had earned surplus revenue in excess of 10 percent for the tax years in question, was a question of law for the Court of Appeal's independent consideration on review.

(3) Statutes § 29--Construction--Language--Legislative Intent.

In interpreting a statute, the court's function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. To ascertain such intent, courts turn first to the words of the statute itself, and seek to give those words their usual and ordinary meaning. When a court interprets statutory

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language, it may neither insert language that has been omitted nor ignore language that has been inserted. The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute. If possible, the language should be read so as to conform to the spirit of the enactment. If the statute is ambiguous or uncertain, a court employs various rules of construction to assist in its interpretation.

(4) Property Taxes § 24--Exemptions--Property Used for Religious, Hospital, or Charitable Purposes--Strict Construction of Welfare Exemption Statute.
The " welfare exemption" of Rev. & Tax. Code, § 214, like all tax exemption statutes, is to be strictly construed to the end that the exemption allowed is not extended beyond the plain meaning of the language employed. The rule of strict construction, however, does not mean that the narrowest possible interpretation must be given to the statute, since strict construction must still be reasonable.

(5) Statutes § 46--Construction--Presumptions--Legislative Intent.
A fundamental rule of statutory construction is that the court must assume that the Legislature knew what it was saying and meant what it said. A related principle is that a court will not presume an intent to legislate by implication. Moreover, when the Legislature has expressly declared its intent, the courts must accept that declaration.

(6) Statutes § 42--Construction--Aids--Opinions of Attorney General.
Opinions of the Attorney General, while not binding, are entitled to great weight, and the Legislature is presumed to know of the Attorney General's formal interpretation of a statute.

COUNSEL
Daniel G. Montgomery, County Counsel, and James W. Calkins, Chief Deputy County Counsel, for Defendants and Appellants.
McCutchen, Doyle, Brown & Enersen, John R. Reese and Gerald R. Peters for Plaintiff and Respondent.
DAVIS, J.
In this action to recover property taxes paid under protest, County of Yuba (County) appeals from a decision in favor of the taxpayer, Rideout Memorial Hospital (Rideout). There is but one issue on appeal: can a nonprofit hospital that earned surplus revenue in excess of 10 percent (for a given year) still qualify for the " welfare exemption" from property taxation in light of Revenue and Taxation Code section 214, subdivision (a)(1)? We hold that it can.

Background

Revenue and Taxation Code section 214 (section 214) sets forth the " welfare exemption" from property taxation. For the tax years in question *217 here, the section provided in pertinent part: " (a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

" (1) The owner is not organized or operated for profit; provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in- aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness.

" (2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual.

" (3) The property is used for the actual operation of the exempt activity, and does not exceed an amount of property reasonably necessary to the accomplishment of the exempt purpose.

" (4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession.

" (5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose.

" (6) The property is irrevocably dedicated to

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religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes. ...

" The exemption provided for herein shall be known as the 'welfare exemption.' " *218

Our concern centers on section 214, subdivision (a)(1) (hereafter, section 214(a)(1)). [FN1]

FN1 Section 214(a)(1) was amended nonsubstantively in 1989 and now provides: " (a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if: [¶] (1) The owner is not organized or operated for profit. However, in the case of hospitals, the organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in-aid, over operating expenses has not exceeded a sum equivalent to 10 percent of those operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness." (Stats. 1989, ch. 1292, § 1.)

In 1985, the previously undesignated introductory paragraph of section 214 was lettered " (a)." (Stats. 1985, ch. 542, § 2, p. 2026.) This change redesignated section 214(1) as 214(a)(1), section 214(2) as 214(a)(2), and so on. For the sake of simplicity we will use the terms " section 214(a)(1)" " section 214(a)(2)" and the like when referring to the pre- or the post-1985 section 214.

County denied Rideout's applications for the welfare exemption for the tax years 1986-1987 and 1987-1988. Rideout paid the taxes under protest and applied for a refund. After County denied the refund, Rideout sued County.

County contends that Rideout had excess revenues, under section 214, of 24 and 21 percent for the two years in question. Rideout concedes that its net operating revenues under section 214 exceeded 10 percent in each of those two years.

In summary judgment proceedings, the parties narrowed the issues to the single issue stated above and the trial court ruled in favor of Rideout. (1a) County argues that Rideout is *automatically* ineligible for the welfare exemption for the years in question because its net revenues exceeded the 10 percent limitation of section 214(a)(1). Rideout counters that the 10 percent provision constitutes a " safe harbor" for nonprofit hospitals by which the hospital can be deemed to satisfy section 214(a)(1), but that a nonprofit hospital with revenues over 10 percent can still meet the condition of section 214(a)(1) by showing, pursuant to the general rule, that it is not organized or operated for profit. We conclude that Rideout's position is essentially correct.

Discussion

(2) The issue in this case presents a question of law that we consider independently. (See *Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 *219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624]; *Burke Concrete Accessories, Inc. v. Superior Court* (1970) 8 Cal.App.3d 773, 774-775 [87 Cal.Rptr. 619].)

All property in California is subject to taxation unless exempted under federal or California law. (Cal. Const., art. XIII, § 1; Rev. & Tax. Code, § 201; all further references to undesignated sections are to the Revenue and Taxation Code unless otherwise specified.) The constitutional basis for the " welfare exemption" was added to the California Constitution in 1944; as revised nonsubstantively in 1974, it now provides: " The Legislature may exempt from property taxation in whole or in part: [¶] ... Property used exclusively for religious, hospital, or charitable purposes and owned or held in trust by corporations or other entities (1) that are organized and operating for those purposes, (2) that are nonprofit, and (3) no part of whose net earnings inures to the benefit of any private shareholder or individual." (Cal. Const., art. XIII, § 4, subd. (b); formerly art. XIII, § 1c.) The rationale for the welfare exemption is that the exempt property is being used either to provide a government-like service or to accomplish some desired social objective. (Ehrman & Flavin, Taxing Cal. Property (3d ed. 1989) Exempt Property, § 6.05, p. 9.)

Pursuant to this constitutional authorization, the

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Legislature in 1945 enacted section 214 and labeled that exemption the " welfare exemption." In this appeal, we are asked to interpret subdivision (a)(1) of section 214.

Certain general principles guide our interpretation. (3) " Our function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 [170 Cal.Rptr. 817, 621 P.2d 856].) To ascertain such intent, courts turn first to the words of the statute itself (*ibid.*), and seek to give the words employed by the Legislature their usual and ordinary meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted. (Code Civ. Proc., § 1858.) The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 608 [86 Cal.Rptr. 793, 469 P.2d 665]), and where possible the language should be read so as to conform to the spirit of the enactment. (*Lungren v. Deukmejian, supra,* 45 Cal.3d at p. 735.)" (*Rudd v. California Casualty Gen. Ins. Co., supra,* 219 Cal.App.3d at p. 952.) If the statute is ambiguous or uncertain, courts employ various rules of construction to assist in the interpretation. (See 58 Cal.Jur.3d, Statutes, §§ 82-118, ***220** pp. 430-508.) (4) Finally, " [t]he welfare exemption, like all tax exemption statutes, is to be strictly construed to the end that the exemption allowed is not extended beyond the plain meaning of the language employed. However, the rule of strict construction does not mean that the narrowest possible interpretation be given; ' " strict construction must still be a reasonable construction." ' (*Cedars of Lebanon Hosp. v. County of L.A.* (1950) 35 Cal.2d 729, 734- 735 [221 P.2d 31, 15 A.L.R.2d 1045]; *English v. County of Alameda* (1977) 70 Cal.App.3d 226, 234 [138 Cal.Rptr. 634].)" (*Peninsula Covenant Church v. County of San Mateo* (1979) 94 Cal.App.3d 382, 392 [156 Cal.Rptr. 431].)

(1b) We therefore first consider the language of section 214(a)(1), which stated at the relevant times herein: " (a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if: [¶] (1) The owner is not organized or operated for profit; provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in-aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness." (See fn. 1, *ante.*)

As we immediately see, the proviso presents somewhat of a " knotty" problem, being cast as a double negative-if revenues did *not* exceed 10 percent, the hospital shall *not* be deemed to be organized or operated for profit. [FN2] Under the language of section 214(a)(1), the Legislature did not *automatically* exclude nonprofit hospitals earning *more* than 10 percent surplus revenues from the welfare exemption. The proviso does not address this situation on its face; it concerns only the hospital earning 10 percent or *under.* In fact, the automatic exclusion would have been a simple matter to accomplish-a mere untying of the two " knots" from the proviso would have done it. We note that in other sections of the Revenue and Taxation Code, when the Legislature wishes to exclude certain entities from a taxation exemption it can do so in clear terms. (See, e.g., § 201.2, subd. (c): " (c) This section shall not be construed to exempt any profit- making organization or concessionaire from any property tax, ...") ***221**

> FN2 Of course, if a hospital satisfies this proviso it must still actually be nonprofit because the welfare exemption does not apply to profitmaking hospitals regardless of their earnings (Cal. Const., art. XIII, § 4, subd. (b)); moreover, to claim the exemption, the nonprofit hospital must satisfy all of the other conditions set forth in section 214(a) (i.e., subds. (2) through (6)).

Nevertheless, there is that double negative. Does that double negative make a positive? In other words, is the converse of the proviso to be implied-as County argues-so that a hospital which exceeded the 10 percent figure is deemed unable to satisfy section 214(a)(1)? These questions raise ambiguities that call for the employment of certain rules of construction.

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(5) A fundamental rule of construction is that we must assume the Legislature knew what it was saying and meant what it said. (*Blew v. Horner* (1986) 187 Cal.App.3d 1380, 1388 [232 Cal.Rptr. 660]; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 764 [150 Cal.Rptr. 785, 587 P.2d 227]; *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 604 [45 Cal.Rptr. 512].) In related fashion, courts will not presume an intent to legislate by implication. (*People v. Welch* (1971) 20 Cal.App.3d 997, 1002 [98 Cal.Rptr. 113]; *First M. E. Church v. Los Angeles Co.* (1928) 204 Cal. 201, 204 [267 P. 703].) County has constructed section 214 on a foundation of implication which does not fare well under the weight of these rules.

Another important rule is that when the Legislature has expressly declared its intent, the courts must accept that declaration. (*Tyrone v. Kelley* (1973) 9 Cal.3d 1, 11 [106 Cal.Rptr. 761, 507 P.2d 65]; see *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 15 [270 Cal.Rptr. 796, 793 P.2d 2].) (1c) Here, the application of this rule requires us to consider section 214's legislative history. (See 51 Cal.3d at pp. 14- 16.)

As originally enacted in 1945, section 214 did not contain the proviso found in subdivision (a)(1), and the condition stated by subdivision (a)(3) was different. The section originally read in pertinent part as follows: " [a] Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

" (1) The owner is not organized or operated for profit;

" (2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

" (3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted; ..." (Stats. 1945, ch. 241, § 1, p. 706.)

In *Sutter Hospital v. City of Sacramento* (1952) 39 Cal.2d 33 [244 P.2d 390], the California Supreme Court was asked whether a nonprofit hospital *222 which had deliberately earned an 8 percent surplus of income over expenses to be used for debt retirement and facility expansion could qualify for the welfare exemption of section 214. Relying on subdivision (a)(3) as stated above, the court said no. (39 Cal.2d at pp. 39-41.) The court acknowledged that its holding made it difficult for modern hospitals to operate in a financially sound manner to reduce indebtedness and expand their facilities, but said that matter should be addressed to the Legislature rather than the courts because subdivision (a)(3) compelled the court's holding. (39 Cal.2d at pp. 40-41.)

Responding to the challenge raised by the *Sutter* decision, the Legislature in 1953 amended section 214. (Stats. 1953, ch. 730, § 1-4, pp. 1994-1996; *Christ The Good Shepherd Lutheran Church v. Mathiesen* (1978) 81 Cal.App.3d 355, 365 [146 Cal.Rptr. 321].) This amendment was proposed in Assembly Bill No. 1023 (A.B. 1023). As originally introduced, A.B. 1023 rewrote subdivision (a)(3) to require simply that the property be " used for the actual operation of the exempt activity," and contained an urgency clause setting forth the Legislature's intent as follows: " This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution, and shall go into immediate effect. The facts constituting such necessity are: Continuously since the adoption of the 'welfare exemption' it has been understood by the administrators of the law, as well as by the public generally, that it was the purpose and the intent of Legislature in the adoption of subdivision [a](3) of Section 214 of the Revenue and Taxation Code to disqualify for tax exemption any property of a tax exempt organization which was not used for the actual operation of the exempt activity, but that such organization could rightfully use the income from the property devoted to the exempt activity for the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies without losing the tax exempt status of its property.

" Recently, doubt has been cast upon the foregoing interpretation by a decision of the State Supreme Court involving the tax exemption of a hospital. This decision was broad in its application and has caused the postponement or actual abandonment of plans for urgently needed hospital construction and expansion at a time when there are insufficient hospital facilities in this State to properly care for the health needs of its citizens, and virtually no surplus facilities for use

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in case of serious epidemic or disaster. This Legislature has recognized that in addition to gifts and bequests the traditional method for the financing of the expansion and construction of voluntary religious and community nonprofit hospital facilities is through the use of receipts from the actual operating facilities. In its decision the Supreme Court indicated that this was a matter for legislative clarification. ***223**

" It has never been the intention of the Legislature that the property of nonprofit religious, hospital or charitable organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies, it having been the intent of the Legislature in adopting subsection [a](3) of Section 214 to deny exemption to property not used for exempt purposes even though the income from the property was used to support an exempt activity.

" Therefore, in order to clarify the legislative intent and to remove any doubt with respect to the status of property actually used for exempt purposes, it is necessary to amend subdivision [a](3) of Section 214 of the Revenue and Taxation Code. It is essential that this be done at the earliest possible moment to avoid further delays in the construction and expansion of needed hospital facilities." (Stats. 1953, ch. 730, § 4, pp. 1995-1996.)

About three months after this urgency clause and amendment to subdivision (a)(3) were proposed in A.B. 1023, A.B. 1023 was amended to include the proviso in subdivision (a)(1) at issue here. (Stats. 1953, ch. 730, § 1, p. 1994.) Thereafter, A.B. 1023-with the urgency clause and the noted changes to subdivisions (a)(1) and (a)(3)-was enacted into law. (Stats. 1953, ch. 730, § 1, pp. 1994-1996.)

In the urgency clause, the Legislature expressly stated its intent that a section 214 organization " could rightfully use the income from the property devoted to the exempt activity for the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies without losing the tax exempt status of its property," and that " [i]t has never been the intention of the Legislature that the property of nonprofit ... hospital ... organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies, ..." (Stats. 1953, ch. 730, § 4, pp. 1995-1996.)

Where the Legislature has expressly declared its intent, we must accept that declaration. (*Tyrone v. Kelley, supra,* 9 Cal.3d at p. 11; see *California Assn. of Psychology Providers v. Rank, supra,* 51 Cal.3d at p. 15.) Pursuant to the legislative expression here, there is no limitation on earned revenue that *automatically* disqualifies a nonprofit hospital from obtaining the welfare exemption; the concern is whether that revenue is devoted to furthering the ***224** exempt purpose by retiring debt, expanding facilities or saving for contingencies. [FN3]

> FN3 This is not to say that a nonprofit hospital can earn any amount above 10 percent and still qualify for the welfare exemption. The hospital must show that indeed it is not organized or operated for profit and that it meets all of the other conditions in section 214. One of these other conditions, section 214 (a)(3), now mandates in pertinent part that the " property [be] used for the actual operation of the exempt activity, *and ... not exceed an amount of property reasonably necessary to the accomplishment of the exempt purpose.*" (Italics added.)

It is true that the urgency clause containing the Legislature's expressed intent was made a part of A.B. 1023 before the proviso in section 214(a)(1) was added to that bill, and that the clause refers to section 214(a)(3). Regardless of timing, however, both the section 214(a)(1) proviso and the urgency clause were enacted into law as part of A.B. 1023. (Stats. 1953, ch. 730, §§ 1, 4, pp. 1995-1996.) More importantly, the urgency clause focuses on the issues of tax exemptions for *hospitals,* the urgent need for *hospital* construction and expansion, and the ways of financing that construction and expansion for nonprofit *hospitals.* It is in this context-a context fundamentally implicated by a hospital earning above the 10 percent figure in section 214(a)(1)-that the Legislature declares " [i]t has never been the intention of the Legislature that the property of nonprofit ... hospital ... organizations otherwise qualifying for the welfare exemption should be

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denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies, ..." (Stats. 1953, ch. 730, § 4, p. 1996.) In a related vein, the reference in the urgency clause to section 214(a)(3) concerns the issue of how the use of income from exempted property affects welfare exemption eligibility; this issue is also fundamentally implicated in the context of a nonprofit hospital earning a surplus revenue greater than 10 percent.

County contends the section 214 (a)(1) proviso is rendered meaningless if interpreted to allow a nonprofit hospital that earns more than 10 percent the welfare exemption; under such an interpretation, County maintains, it makes no difference whether a nonprofit hospital earns below or above the 10 percent figure-the exemption can be claimed in either instance.

We think the 10 percent figure in section 214(a)(1) is meaningful even if nonprofit hospitals that earn over that figure can still qualify for the welfare exemption. The 10 percent figure provides a clear guideline by which nonprofit hospitals can engage in sound financial practices to further the exempt activity without jeopardizing their tax exempt status, assuming they otherwise qualify for the welfare exemption. The proviso in section *225 214(a)(1) recognizes the complex financial and functional realities of the modern hospital operation, an operation that often requires deliberately designed surplus revenues to ensure adequate levels of service and resources. (See *Sutter Hospital v. City of Sacramento, supra,* 39 Cal.2d at pp. 36, 39-40; see also *St. Francis Hosp. v. City & County of S. F.* (1955) 137 Cal.App.2d 321, 323-326 [290 P.2d 275]; *Cedars of Lebanon Hosp. v. County of L. A.* (1950) 35 Cal.2d 729, 735- 736 [221 P.2d 31, 15 A.L.R.2d 1045].)

The modern hospital is an extremely complex entity-essentially, it is a minicity. (See *Cedars of Lebanon Hosp. v. County of L. A., supra,* 35 Cal.2d at pp. 735-745.) A modern hospital generates significant revenue but spends considerable amounts for labor, equipment, facilities and capital outlay; large and complex annual budgets are commonplace in this setting. (See *St. Francis Hosp. v. City & County of S. F., supra,* 137 Cal.App.2d at p. 325.) And in this setting, a surplus might be accidental rather than designed; or a particular surplus might be designed but the fate of fortuity intervenes and the budget forecasters have sleepless nights. (*Ibid.*)

Recall, section 214 was amended in light of the *Sutter Hospital* court's request for legislative intervention after the court acknowledged that its holding made it difficult for modern hospitals to operate in a financially sound manner to reduce indebtedness and expand their facilities. In that case, the nonprofit hospital purposely earned surplus revenue to retire its debt and expand its facilities. (39 Cal.2d at pp. 36, 40.) Accordingly, § 214(a)(1) provides a clear guideline by which nonprofit hospitals can deliberately design surplus revenues and not risk losing their tax exempt status (provided the other conditions of section 214 are satisfied and the revenues are used for proper purposes).

The very complexity just described and recognized in the cited cases runs counter to an interpretation that an earned surplus revenue above 10 percent *automatically* disqualifies a nonprofit hospital from the welfare exemption. To say, as County does with its interpretation of *automatic* ineligibility, that a nonprofit hospital which earned 10 percent is eligible for the exemption while the nonprofit hospital which earned 10.01 percent is *automatically* excluded from it, is to say that these complex realities are irrelevant.

Rather, the nonprofit hospital earning over 10 percent is outside the clear guideline offered by section 214(a)(1) and thereby subject to an increased scrutiny by tax authorities and an increased burden in showing it is not organized or operated for profit. Such a nonprofit hospital is no longer " deemed" to meet the condition of section 214(a)(1). In short, the proviso of *226 section 214(a)(1) provides no protection for the nonprofit hospital earning over 10 percent; that hospital must prove it is not organized or operated for profit under the general rule of section 214(a)(1). Contrary to County's argument, therefore, the section 214(a)(1) 10 percent proviso is meaningful even if not construed as a point of automatic disqualification.

County also relies on a 1954 opinion of the Attorney General and a 1967 opinion from the First District. The Attorney General's opinion considered whether the 1953 amendments to subdivisions (a)(1) and (a)(3) of section 214 were valid and effective in a general sense. (*Welfare Exemptions,* 23 Ops.Cal.Atty.Gen. 136 (1954).) In passing, the Attorney General noted that " [t]he Legislature might

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well determine that hospitals as distinguished from other organizations entitled to the welfare exemption usually operate on a schedule of rates more comparable to a schedule of rates by a commercial organization and therefore their net earnings should be restricted in order for them to have the benefit of the welfare exemption (see *Sutter Hospital* case pp. 39-40)." (*Id.* at p. 139.) The First District opinion-*San Francisco Boys' Club, Inc. v. County of Mendocino* (1967) 254 Cal.App.2d 548 [62 Cal.Rptr. 294]-involved profitmaking logging operations on land owned by and used for a nonprofit, charitable club for boys. Referring to the section 214(a)(1) proviso at issue here, the court noted that " the Legislature amended section 214 to permit nonprofit hospitals to have excess operating revenues in a sum equivalent to 10 percent of operating expenses." (254 Cal.App.2d at p. 557.)

Against the Attorney General's passing reference of 1954 and the First District's dicta of 1967 stands an Attorney General opinion from 1988 on the identical issue in this case. (*Welfare Exemption Qualification,* 71 Ops.Cal.Atty.Gen. 106 (1988).) In fact, it was County that requested this 1988 opinion. In that opinion, the Attorney General concluded that " [a] non-profit hospital which had earned surplus revenue in excess of ten percent during the preceding fiscal year might still qualify for the 'welfare exemption' from taxation under section 214 of the Revenue and Taxation Code." (*Id.* at p. 107.) Although it was not used as pivotal support, the 1954 Attorney General opinion was cited twice in the 1988 opinion. (*Id.* at p. 112.) [FN4]

> FN4 County also relies on cryptic passages in certain letters written in 1953 to then Governor Earl Warren. These letters were from the attorney for the California Hospital Association, which sponsored A.B. 1023, and from the Attorney General. In deciding whether to sign A.B. 1023 amending subdivisions (a)(1) and (a)(3), Governor Warren requested the views of these two entities. These unpublished and informal expressions to the Governor-especially the letter from the hospital association attorney-are not the type of extrinsic aids that courts can meaningfully use in discerning legislative intent. (See 58 Cal.Jur.3d, Statutes, §§ 160-172, pp. 558-582.)

The First District's opinion in *San Francisco Boys' Club* concerned an issue relating to a charitable social organization rather than a hospital. For *227 that reason, the analysis there is not germane to the hospital-specific provision before us. (6, 1d) Although opinions of the Attorney General, while not binding, are entitled to great weight (*Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 251 [239 Cal.Rptr. 395]; *Henderson v. Board of Education* (1978) 78 Cal.App.3d 875, 883 [144 Cal.Rptr. 568]), it is unclear how to apply this principle to the two published Attorney General opinions noted above. This principle applies because the Legislature is presumed to know of the Attorney General's formal interpretation of the statute. (*Ibid.*) But the two Attorney General opinions seem to be at odds. And while the 1954 opinion is a contemporaneous construction of long duration, the 1988 opinion involves the identical issue in this case and the Legislature amended section 214(a)(1) nonsubstantively about one and one- half years after the 1988 opinion was published. (*Welfare Exemption Qualification, supra,* 71 Ops.Cal.Atty.Gen. 106; Stats. 1989, ch. 1292, § 1.) So we return, as we must, to the words used by the Legislature in the statute and in the urgency clause's declaration of intent.

That return also provides the answer to County's final argument. County argues that its interpretation of the 10 percent figure in section 214 as a point of automatic ineligibility is supported by the language in section 214(a)(1) that qualifies the terms " operating revenues" and " operating expenses." Under section 214(a)(1), gifts, endowments and grants-in-aid are excluded from " operating revenues" while depreciation based on cost of replacement and amortization of, and interest on, indebtedness are included in " operating expenses." Basically, County argues that the Legislature has provided certain financial advantages for facility improvement, debt retirement and nonoperating revenues in section 214(a)(1), thereby intending to place a cap on what nonprofit hospitals can earn for welfare exemption eligibility.

The problem with this argument is that it is difficult to define automatic ineligibility in a more roundabout way than that suggested by County's interpretation. If the section 214(a)(1) proviso accounts favorably to nonprofit hospitals for all of the uses of net earnings that do not defeat welfare exemption eligibility, why did the Legislature include that double negative? In

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such a situation, the proviso would be tailor-made for dispensing with the double negative because the statute has the sound financial management practices and the allowed uses for net earnings built into it. But the section 214(a)(1) proviso, by its terms, applies only to the nonprofit hospital whose operating revenues have *not* exceeded 10 percent of operating expenses; in that situation, the proviso *deems* the nonprofit hospital in compliance with section 214(a)(1). The proviso, by its terms, does not cover the nonprofit ***228** hospital which has earned over 10 percent; in that situation, the nonprofit hospital must *show* it is not organized or operated for profit. And the Legislature stated in the urgency clause that it has never been the Legislature's intent " that the property of nonprofit ... hospital ... organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property for the exempt activity be devoted to the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies ...."

Nor does our construction of section 214(a)(1) violate the rule of strict construction by extending the tax exemption allowed beyond the plain meaning of the language employed. (*Peninsula Covenant Church v. County of San Mateo, supra,* 94 Cal.App.3d at p. 392.) If we have attempted to do anything in this opinion, we have attempted to adhere to the plain meaning of the language employed in section 214(a)(1).

For all of these reasons, we conclude that a nonprofit hospital that earned surplus revenue in excess of 10 percent during the relevant fiscal year can still qualify for the " welfare exemption" from taxation under section 214. [FN5]

FN5 Our opinion and conclusion are limited to this single question of law. Accordingly, we express no views on whether Rideout actually was or was not organized or operated for profit or whether Rideout can obtain the welfare exemption for the specific years in question, aside from concluding that earnings in excess of 10 percent do not *automatically* disqualify Rideout from the exemption.

Disposition

The judgment is affirmed. Each party to bear its own costs on appeal.

Sparks, Acting P. J., and Nicholson, J., concurred.
A petition for a rehearing was denied August 17, 1992. ***229**

Cal.App.3.Dist.
Rideout Hospital Foundation, Inc. v. County of Yuba
8 Cal.App.4th 214, 10 Cal.Rptr.2d 141

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C
Vallejos v. California Highway Patrol
Cal.App.2.Dist.
FRANK VALLEJOS, Plaintiff and Appellant,
v.
CALIFORNIA HIGHWAY PATROL, Defendant and Respondent.
ROBERT E. FIELD, Plaintiff and Appellant,
v.
THE STATE OF CALIFORNIA, Defendant and Respondent.
JEFFREY ADRIAN VILLAGRAN, Plaintiff and Appellant,
v.
THE STATE OF CALIFORNIA, Defendant and Respondent.
Civ. No. 53205., Civ. No. 53243., Civ. No. 53265.

Court of Appeal, Second District, Division 3, California.
Feb. 26, 1979.

SUMMARY

In actions seeking reimbursement from the State of California and the California Highway Patrol for allegedly illegal charges made for copies of traffic accident reports and an injunction against such practice, the trial court sustained defendants' demurrers without leave to amend on the ground that the accident reports were not public records within the meaning of Gov. Code, § 6257, which limits the amount that may be charged for copies of such records. No request for leave to amend was made by any of the parties and the actions were forthwith ordered dismissed. (Superior Court of Los Angeles County, Nos. CA 000399, CA 000419, C 189860, George M. Dell, Judge.)

The Court of Appeal reversed the orders of dismissal and remanded the causes with instructions for the trial court to sustain the demurrers with leave to amend. The court held that the accident reports were public records, but it further held that the complaints failed to state causes of action in that plaintiffs had failed to allege their status, under Gov. Code, § 6254, subd. (f), and Veh. Code, § 20012, as persons entitled to copies of such otherwise confidential records. (Opinion by Allport, J., with Potter, Acting P J., and Cobey, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Records and Recording Laws § 12--Inspection of Public Records-- Confidential Records--Copies--Charges.
In actions seeking reimbursement from the State of California and the California Highway Patrol for allegedly illegal charges made for copies of traffic accident reports and an injunction against such practice, the trial court properly sustained defendants' demurrers, where, though the reports were public records within the meaning of Gov. Code, § 6252, subd. (d), and thus subject to the limitation of Gov. Code, § 6257, as to charges for copies, the complaints failed to allege that plaintiffs were persons entitled, under Gov. Code, § 6254, subd. (f), and Veh. Code, § 20012, to such otherwise confidential information. However, the court should have granted plaintiffs leave to amend to allege such entitlement if the facts permitted.
[See **Cal.Jur.3d**, Records and Recording Laws, § 8; **Am.Jur.2d**, Records and Recording Laws, § 12 et seq.]

COUNSEL
Laufer & Roberts, Kenneth P. Roberts, Merritt L. Weisinger and Weisinger & Frederick for Plaintiffs and Appellants.
Evelle J. Younger, Attorney General, L. Stephen Porter, Assistant Attorney General, and Henry G. Ullerich, Deputy Attorney General, for Defendants and Respondents.
ALLPORT, J.
Frank Vallejos, Jeffrey Adrian Villagran and Robert E. Field appeal from orders of dismissal of their actions for restitution, accounting and injunctive relief following sustaining of general demurrers. At the request of defendants the three matters were consolidated for briefing, oral argument and decision by this court. The gravamen of the actions is that, during the year 1976, defendants made illegal charges for copies of traffic accident reports in violation of Government Code section *783 6257, [FN1] for which reimbursement is sought and against which practice an injunction is requested. The

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Vallejos and Field actions are brought as class actions.

FN1 Prior to its amendment effective January 1, 1977, section 6257 provided: "A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, provided such fee shall not exceed ten cents ($0.10) per page or the prescribed statutory fee, where applicable."

The reporter's transcript discloses that the three demurrers were heard on November 9, 1977, and each was sustained without leave to amend on the ground that the accident reports were not public records within the meaning of section 6257. No request for leave to amend was made by any of the parties and the actions were forthwith ordered dismissed.

The Issue

(1)Bearing in mind that our function on appeal in these cases is to review the validity of the ruling and not necessarily the reason therefor *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 627 [137 Cal.Rptr. 681]; *Rupp v. Kahn* (1966) 246 Cal.App.2d 188, 192, fn. 1 [55 Cal.Rptr. 108]), we proceed to consideration of whether written traffic accident reports prepared and retained by the California Highway Patrol during the year 1976 were "identifiable public record[s]" for which reproduction costs were limited to 10 cents per page. [FN2] We deem this to be the threshold, if not the only, issue before us. It was so considered by the court below and it has been so treated by all parties in their presentations on appeal. For reasons to follow we conclude these reports were "identifiable public records" and will therefore reverse.

FN2 Section 6257 was amended effective January 1, 1977, to read as follows: "A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a fee or deposit to the state or local agency, provided such fee shall not exceed the actual cost of providing the copy, or the prescribed statutory fee, if any, whichever is less."

Discussion

In 1968 the California Public Records Act, Government Code section 6250 et seq., section 6252 subdivision (d) defined public records to include "any 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." In *Cook v. Craig* (1976) 55 Cal.App.3d 773 [127 Cal.Rptr. 712], citizens sought copies of the *784 rules and regulations of the department governing the investigation and disposition of complaints of police misconduct. In holding the material requested to be public records this court said, at pages 781-782:

"The California Public Records Act

"The PRA begins with a broad statement of intent: 'In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.' (§ 6250.)

"Like the federal Freedom of Information Act, section 552 et seq. of 5 United States Code, upon which it was modeled (see *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 652 [117 Cal.Rptr. 106]), the general policy of the PRA favors disclosure. Support for a refusal to disclose information 'must be found, if at all, among the specific exceptions to the general policy that are enumerated in the Act.' (*State of California* ex rel. *Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 783 [117 Cal.Rptr. 726].) To this end, subdivision (d) of section 6252 states that '" [p]ublic records" includes any 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.' The word 'writing' is itself defined comprehensively in subdivision (e) of section 6252: '(e) "Writing" means handwriting, 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.'

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"Defendants claim that nowhere in the PRA is the term 'public records' *defined*, and that subdivision (d) of section 6252 is merely a statement of certain inclusions within the term and not its definition. Accordingly defendants urge a narrow meaning to the term, based upon cases interpreting it as used in other statutes. (See *People v. Olson* (1965) 232 Cal.App.2d 480, 486 [42 Cal.Rptr. 760]; *Nichols v. United States* (D.Kan. 1971) 325 F.Supp. 130, affd. on other grounds (10th Cir.) 460 F.2d 671, cert. den. (1972) 409 U.S. 966 [34 L.Ed.2d 232, 93 S.Ct. 268].) Without quibbling over whether or not subdivision (d) of section 6252 is a 'definition' of the term 'public records,' the expression '*any writing *785 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' is sufficiently broad to include the material sought by the plaintiffs. The breadth of the term 'public records' is further shown by certain exceptions in section 6254, such as subdivisions (a) exempting '[p]reliminary drafts ... which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure; ...' (g) exempting test questions for examination, and (j) exempting '[l]ibrary and museum materials made or acquired and presented solely for reference or exhibition purposes.'

"We therefore conclude that the scope of the term 'public records' as used in subdivision (d) of section 6252 does not depend upon the scope of the term as used elsewhere; defendants cases interpreting it are thus inapplicable." (Fn. omitted.)

Relying upon the rationale of *Cook* we are persuaded to hold that the traffic accident reports sought in the instant case are likewise public records within the meaning of the act. The language of section 6252 subdivision (d) is "sufficiently broad" to include these reports within its definition as "containing information relating to the conduct of the public's business prepared ... by a state agency." "The *filing* of a document imports that it is thereby placed in the custody of a public official to be preserved by him for public use. Because for a season its value is best conserved by maintaining its confidential character by excluding public gaze, it becomes no less a public record. (*People v. Tomalty*, 14 Cal.App. 224, 232 [111 P. 513]; *Cox v. Tyrone Power Enterprises, Inc.*, 49 Cal.App.2d 383, 395 [121 P.2d 829].) (*People v. Pearson* (1952) 111 Cal.App.2d 9, 30 [244 P.2d 35].) The state does not seriously contend to the contrary, arguing strenuously however that the reports are exempt from disclosure under section 6254 subdivisions (f) and (k) as being investigatory records compiled by a state agency. In *Cook v. Craig*, *supra.*, 55 Cal.App.3d 773, at pages 782-783, this court suggested such approach, saying: "Defendants' justification for refusing to disclose that which was sought herein must be found, if at all, in the exemptions for particular records set out in section 6254, the 'islands of privacy upon the broad seas of enforced disclosure.' (*Black Panther Party v. Kehoe*, *supra.*, 42 Cal.App.3d [645] at p. 653 [117 Cal.Rptr. 106].) ***786**

"Section 6254 provides in part: 'Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are:

"'

. . . . . .

"'(f) Records of *complaints to or investigations conducted by*, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and *any state or local police agency*, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;

"'

. . . . . .

"'(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.' (Italics added.)" (Fn. omitted.) [FN3] While it is true these reports are deemed confidential by Vehicle Code section 20012 and perhaps privileged under Evidence Code section 1040, for reasons to follow they may not be exempt from disclosure in these cases. While the general public is denied access to this information such is not true with respect to parties involved in the incident or others who have a proper interest in the subject matter. For example, subdivision (f) of Government Code section 6254 provides in part that: "except that local police agencies shall disclose the names and

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addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the persons involved in an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, ..." ***787**

> FN3 Subsection (2) of subdivision (b) of section 1040 of the Evidence Code provides: "(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and: elip; [¶] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

Vehicle Code section 20012 renders the reports confidential, "except that the Department of the California Highway Patrol or the law enforcement agency to whom the accident was reported shall disclose the entire contents of the reports, including, but not limited to, the names and addresses of persons involved in, or witnesses to, an accident, the registration numbers and descriptions of vehicles involved, the date, time and location of an accident, all diagrams, statements of the drivers involved in the accident and the statements of all witnesses, to any person who may have a proper interest therein, including, but not limited to, the driver or drivers involved, or the legal guardian thereof, the parent of a minor driver, the authorized representative of a driver, or to any person injured therein, the owners of vehicles or property damaged thereby, persons who may incur civil liability, including liability based upon a breach of warranty arising out of the accident, and any attorney who declares under penalty of perjury that he represents any of the above persons." Thus there exists an obvious exception to the exemption granted by section 6254.

Furthermore, the burden of establishing an exemption is upon the public agency. (§ 6255.) If for some reason not apparent to us, the department did in fact consider the instant reports to be exempt under the act, or otherwise not to be made public, the burden was upon it to so demonstrate before preparing and delivering copies. If no claim of confidentiality or exemption from disclosure was then and there asserted it is deemed waived. (Cf. *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656 [117 Cal.Rptr. 106].)

The question remains-are the plaintiffs in the instant actions "interested or proper parties" within the statutory exceptions. Presumably so but the complaints fail to allege their status in these respects and for that reason do fail to state a cause of action. Under the circumstances it is appropriate to give plaintiffs an opportunity to amend their complaints in accordance with the views expressed herein in the event the facts so permit.

Assuming arguendo that the reports come within the purview of section 6257, the state would have us sustain the demurrers on a number of other grounds not considered below. It is argued that the demurrers were properly sustainable on theories of governmental immunity, lack of payment under protest, as being improper class actions, as lacking compliance with claim statutes and that no cause for refund of money has been stated. It is also argued that the Villagran complaint failed to state a ***788** cause of action under Civil Code section 3369. While it may be true that our function on appeal is to review the validity of the ruling below, not the reasons therefor, we do not perceive our function to include an *ab initio* consideration of all of the grounds of the demurrer not heretofore considered below. It does not go so far as to render this court a law and motion department of the superior court. In view of our determination to allow time to amend, the propriety of the remaining grounds of demurrer can be considered in due course.

The order of dismissal in each case is reversed and the causes remanded with instructions for the court below to sustain the demurrers with leave to amend.

Potter, Acting P. J., and Cobey, J., concurred.
Petitions for a rehearing were denied March 20, 1979, and respondents' petitions for a hearing by the Supreme Court were denied May 10, 1979. ***789**

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Cal.App.2.Dist.
Vallejos v. California Highway Patrol
89 Cal.App.3d 781, 152 Cal.Rptr. 846

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C
Fagan v. Superior Court
Cal.App. 1 Dist.,2003.

Court of Appeal, First District, Division 1, California.
Alex FAGAN, Jr., et al., Petitioners,
v.
The SUPERIOR COURT of San Francisco County, Respondent;
The People, Real Parties in Interest.
No. A102525.

Aug. 22, 2003.

Background: Police officers, who were indicted for felony assault and battery, filed motion for protective order, seeking to prevent district attorney from disclosing urinalysis test results obtained from confidential peace officer personnel files. The Superior Court, City and County of San Francisco, Nos. 2096549, 188728-01, 2096547, 188728-03, 2096548, 188728-02,Ksenia Tsenin, J., denied motion and dissolved interim protective order. Officers filed petition for writ of mandate.

Holdings: The Court of Appeal, Stein, J., held that:

(1) inherent discretion to resolve issue regarding confidentiality of test results would be exercised even though indictment was dismissed;

(2) state Public Records Act did not permit disclosure of test results;

(3) fact that officers' conduct giving rise to indictment occurred when officers were off duty did not preclude application of exception to confidentiality of peace officers personnel records when there are investigations or proceedings concerning conduct of police officers by grand jury or district attorney's office;

(4) district attorney has ability to review confidential peace officer personnel files without giving notice to involved officers when investigating police misconduct; and

(5) district attorney is statutorily required to maintain non-public nature of peace officer personnel files absent judicial review of relevance of information to criminal or civil action.

Peremptory writ of mandate issued.
West Headnotes
[1] Mandamus 250 ⚿16(1)

250 Mandamus
250I Nature and Grounds in General
250k16 Mandamus Ineffectual or Not Beneficial
250k16(1) k. In General. Most Cited Cases
In deciding whether to grant police officers' petition for writ of mandate requiring trial court to keep officers' urinalysis results sealed and confidential, Court of Appeal would exercise its inherent discretion to resolve issue of whether urinalysis results, which were obtained during internal affairs investigation and which were obtained from personnel files by district attorney regarding indictment of officers for felony assault and battery, would remain confidential, even though dismissal of indictment during pendency of officers' mandate proceedings normally would have rendered matter moot, since action involved matter of continuing public interest, and issue was likely to recur. West's Ann.Cal.Evid.Code § 1043; West's Ann.Cal.Penal Code § 832.7(a) (2002).

[2] Mandamus 250 ⚿172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of Inquiry and Powers of Court. Most Cited Cases
In deciding petition for writ of mandate that was brought by police officers who were indicted for felony assault and battery and that sought to keep confidential officers' urinalysis reports, which were obtained by district attorney from confidential peace officer personnel files, Court of Appeal would review de novo question of law concerning scope of district attorney's statutory authority to review and disclose information contained in such files. West's Ann.Cal.Penal Code § 832.7(a) (2002).

[3] Criminal Law 110 ⚿1148

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110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1148 k. Preliminary Proceedings. Most Cited Cases
Trial court's decision concerning discoverability of material in police personnel files is ordinarily reviewable under abuse-of-discretion standard. West's Ann.Cal.Evid.Code § 1043; West's Ann.Cal.Penal Code § 832.7(a) (2002).

[4] Criminal Law 110 627.5(3)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.5(3) k. Prosecution's Right to Disclosure. Most Cited Cases

Criminal Law 110 627.6(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.6 Information or Things, Disclosure of
110k627.6(6) k. Records. Most Cited Cases
Prosecutor must comply with Evidence Code section governing discovery or disclosure of peace officer personnel records to obtain discovery of former police officer's personnel file when prosecuting that person for crime committed post-retirement. West's Ann.Cal.Evid.Code § 1043.

[5] Criminal Law 110 627.5(3)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.5(3) k. Prosecution's Right to Disclosure. Most Cited Cases

Criminal Law 110 627.8(3)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(3) k. Application, Motion or Request; Affidavits. Most Cited Cases

Criminal Law 110 627.8(5)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(5) k. Hearing; Excising Extraneous Matter; Review. Most Cited Cases
Discovery of information from confidential peace officer personnel files obtained by defendant in criminal action may not be provided to prosecutor absent separate motion and hearing; nor may it be used outside proceeding in which discovery was ordered. West's Ann.Cal.Evid.Code § 1043.

[6] Criminal Law 110 627.6(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.6 Information or Things, Disclosure of
110k627.6(6) k. Records. Most Cited Cases
Police officer's privilege concerning contents of personnel file is conditional or limited because officer cannot prevent disclosure of his or her personnel records or information contained in those records simply because he or she does not desire disclosure. West's Ann.Cal.Evid.Code § 1043; West's Ann.Cal.Penal Code § 832.7(a) (2002).

[7] Action 13 3

13 Action
131 Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
Violation of statute generally making peace officer's personnel records confidential does not give rise to

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private cause of action for damages. West's Ann.Cal.Penal Code § 832.7(a) (2002).

[8] Records 326 ⚿58

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k58 k. Personal Privacy Considerations in General; Personnel Matters. Most Cited Cases
State Public Records Act did not permit disclosure of police officers' urinalysis test results, which were obtained as part of administrative investigation and which were placed in officers' confidential peace officer personnel files, since results were contained in police investigative files and district attorney's files relating to indictment of officers for felony assault and battery. West's Ann.Cal.Gov.Code § § 3303, 6254(f); West's Ann.Cal.Penal Code § 832.8; § 832.7(a) (2002).
See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 51 et seq.; 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 774; 2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § § 292, 294.

[9] Records 326 ⚿58

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k58 k. Personal Privacy Considerations in General; Personnel Matters. Most Cited Cases

Records 326 ⚿60

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k60 k. Investigatory or Law Enforcement Records. Most Cited Cases
Fact that police officers' conduct giving rise to indictment for felony assault and battery occurred when officers were off duty did not preclude application of exception to confidentiality of peace officers personnel records when there are investigations or proceedings concerning conduct of police officers by grand jury, district attorney's office, or Attorney General's Office; officers were employed as police officers at time of incident, and, despite being off duty, officers were nonetheless police officers and under duty to protect the public. West's Ann.Cal.Penal Code § § 830.1, 830.2; § 832.7(a) (2002).

[10] District and Prosecuting Attorneys 131 ⚿8

131 District and Prosecuting Attorneys
131k8 k. Powers and Proceedings in General. Most Cited Cases
District attorney has ability to review confidential peace officer personnel files without giving notice to involved officers when investigating police misconduct. West's Ann.Cal.Penal Code § 832.7(a) (2002).

[11] Statutes 361 ⚿219(5)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(5) k. Particular Officers, Construction By. Most Cited Cases
Opinions of the Attorney General, while not binding, are entitled to great weight when interpreting statutes.

[12] Statutes 361 ⚿219(5)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(5) k. Particular Officers, Construction By. Most Cited Cases
In absence of controlling authority, opinions of Attorney General concerning interpretations of statute are persuasive since legislature is presumed to be cognizant of that construction of statute and, if it were a misstatement of legislative intent, some corrective measure would have been adopted.

[13] District and Prosecuting Attorneys 131 ⚿8

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131 District and Prosecuting Attorneys
131k8 k. Powers and Proceedings in General. Most Cited Cases
While district attorney may review peace officer personnel file without giving notice to involved officer when investigating police misconduct, district attorney is statutorily required to maintain non-public nature of files absent judicial review of relevance of information to criminal or civil action. West's Ann.Cal.Evid.Code § 1043; West's Ann.Cal.Penal Code § 832.7(a) (2002).

****241** ***609** James P. Collins, Glendale, for Petitioner Alex Fagan, Jr.
Freya A. Horne, San Francisco, for Petitioner Matthew Tonsing.
Mark Nicco, San Francisco, for Petitioner David Lee.
No appearance for Respondent.
Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Eric D. Share, Catherine A. McBrien, Deputy Attorneys General, for Real Party in Interest The People.
Terence Hallinan, San Francisco District Attorney, David Merin, Michon Martin and Laura Zunino, Assistant District Attorneys, for Real Party in Interest The People.
Steinhart & Falconer LLP, Roger R. Myers, Rachel E. Matteo-Boehm, San Francisco, for Real Party in Interest Media Intervenors.
***610** STEIN, J.
By petition for writ of mandate, Alex Fagan, Jr., Matthew Tonsing and David Lee challenge an order of the San Francisco Superior Court denying their motion to maintain under seal the results of urinalysis tests. The urinalysis results are contained in petitioners' confidential peace officer personnel files (Pen.Code, § 832.8),[FN1] but were obtained by the San Francisco District Attorney pursuant to section 832.7, subdivision (a). Petitioners contend that the district attorney was not authorized to obtain the results and, even if the district attorney was so authorized, the information obtained may not be used or disclosed in criminal proceedings, or otherwise publicly disseminated, absent further judicial review. The superior court, on petitioner's motion, issued an interim protective order precluding public dissemination of the urinalysis results. After the superior court denied petitioners' motion, it dissolved its interim protective order. This petition followed. We stayed the superior****242** court's order unsealing the urinalysis results, thereby reinstating that court's interim protective order.

FN1. Further statutory references not otherwise noted are to this Code.

We hold that although the district attorney properly obtained the results of petitioners' urinalysis tests under the provisions of section 832.7, subdivision (a), those results may not be publicly disclosed or disseminated absent compliance with Evidence Code section 1043, et seq., including a judicial determination of their admissibility (Evid.Code, § 350), relevancy (Evid.Code, § 1043, subd.(b)(3); *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 80, fn. 2, 260 Cal.Rptr. 520, 776 P.2d 222), and the need for a protective order (Evid.Code, § 1045, subd. (d)).

BACKGROUND

In the early morning hours of November 20, 2002, petitioners, off-duty San Francisco police officers, were detained following a street fight. They were ordered to provide urine samples to the San Francisco Police Department's Management Control Division pursuant to Police Department General Order 2.02.[FN2] The urinalysis tests were conducted for purposes of the police internal affairs investigation and not as part of a criminal investigation. The results of the urinalysis tests were placed in petitioners' personnel files. Petitioners allege that in violation of the provisions of the Public Safety Officers Procedural Bill of Rights Act (Gov.Code, § 3303 et seq.), they were not afforded an opportunity to object before this information was placed in their personnel files. (Gov.Code, § 3305 & 3306.) A grand jury subsequently returned indictments against petitioners charging them with felony assault and battery (§ 245, subd. (a)(1) and § 243, subd. (d)); however, the urinalysis results were not introduced into evidence in those proceedings.

FN2. San Francisco Police Department General Order 2.02 provides that "[a] member, while off-duty and carrying a weapon, shall not consume alcoholic beverages to the extent that he/she becomes intoxicated."

***611** Following disclosure that the district attorney had obtained the urinalysis results from petitioners'

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confidential peace officer personnel files, the superior court, on petitioners' motion, issued an interim protective order precluding public dissemination of those results. Thereafter, petitioners filed, under seal, their motion for a protective order, making the arguments raised here.[FN3] Petitioners also requested an order precluding the district attorney from releasing the urinalysis results on the grounds that those results were likely inadmissible and that release of them would prejudice their rights to a fair trial. The superior court rejected this argument on First Amendment grounds, and petitioners do not challenge that ruling here. The superior court granted motions to intervene by members of the media (hereafter media intervenors) [FN4] who opposed petitioners' motion. The superior court denied petitioners' motion, and dissolved its interim protective order.

FN3. When the motions were presented in this Court in support of the petition (Cal. Rules of Court, rule 56(d)), we gave notice to all parties of our intention to unseal them. (Cal. Rules of Court, rule 12.5(f)(2).) No opposition was filed, and we unsealed the motions. The urinalysis results themselves were not included in any filing in the superior court.

FN4. The media intervenors are Hearst Communications, Inc., dba San Francisco Chronicle; Oakland Tribune; CBS Broadcasting, Inc.; KGO Television, Inc.; and KNTV Television, Inc.

MOOTNESS

[1] After we issued our order to show cause, the district attorney dismissed the **243 criminal indictments and filed new criminal complaints against petitioners. The urinalysis results remain under seal in accordance with the superior court's interim protective order and our stay order. If we discharged our order to show cause, dissolved our stay, and denied the petition as moot without determining its merits, the district attorney might publicly disseminate the information he obtained from petitioners' confidential peace officer personnel files. We anticipate that the petitioners would seek a new protective order from the superior court, which would then face the same questions of law presented by this petition. Since this is an action involving a matter of continuing public interest, and the issue is likely to recur, we will exercise our inherent discretion to resolve the issue now, even though dismissal of the indictment during the pendency of these proceedings would normally have rendered the matter moot. (See *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 829, fn. 4, 50 Cal.Rptr.2d 101, 911 P.2d 1.) [FN5]

FN5. Where, as here, a question of public access to information in a criminal proceeding is concerned, "resolution of the case at this juncture is appropriate." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190, fn. 6, 86 Cal.Rptr.2d 778, 980 P.2d 337.)

Having issued our order to show cause and having afforded the parties an opportunity for oral argument, we now decide the merits of the petition. (See *612 Cal. Const. art. VI, § 14; *Kowis v. Howard* (1992) 3 Cal.4th 888, 12 Cal.Rptr.2d 728, 838 P.2d 250.)

DISCUSSION

1. Standard of Review

[2][3] Ordinarily, " '[a] trial court's decision concerning the discoverability of material in police personnel files is reviewable under an abuse of discretion standard.' " (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228, 114 Cal.Rptr.2d 482, 36 P.3d 21.) Here, however, we are called upon to review the superior court's determination of a question of law: the scope of a district attorney's authority to review and disclose information contained in a confidential peace officer personnel file under section 832.7, subdivision (a). Our review of the construction and interpretation of the controlling statutes is de novo. (See *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588, 594, 22 Cal.Rptr.2d 409.)

2. The Parties' Contentions

The People contend that the district attorney properly obtained the urinalysis results from petitioners' confidential personnel files, and that those results are no longer confidential. They argue that the urinalysis results are evidence in the criminal case and subject to public disclosure as would blood

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alcohol evidence in any other criminal prosecution. Media intervenors agree, arguing that the protections afforded police officers concerning the confidentiality of their personnel files do not apply when those officers are defendants in a criminal case. In addition, media intervenors argue that the sealing of personnel information referenced in pleadings or court hearings is inconsistent with the First Amendment.

Petitioners contend that the district attorney wrongfully gained access to their confidential peace officer personnel files because the crimes with which they are charged occurred while they were off-duty. Alternatively, they contend that even if the district attorney properly accessed their files under section 832.7, the information obtained remains confidential unless and until there has been a judicial review of its ****244** relevancy and admissibility to the prosecution's case.

3. The Statutory Scheme

Before we address the precise issues presented here-(1) whether a district attorney may have access to information in confidential peace officer personnel files to investigate conduct of off-duty officers, and if so, (2) whether he ***613** nonetheless must comply with Evidence Code section 1043, et seq., or obtain other judicial review, prior to disclosing the information to the public or in a criminal action-we will review the statutes governing peace officer personnel files.

Section 832.7 generally makes "peace officer or custodial officer" personnel records confidential, allowing disclosure of them in criminal and civil proceedings only upon compliance with the provisions of Evidence Code section 1043 or 1046.[FN6] "Personnel records" are files maintained by the employing agency under the officer's name, and containing records relating to personal data, medical history, and employee benefit elections, "(d) [e]mployee advancement, appraisal, or discipline. [¶] (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties. [¶] (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy." (§ 832.8.)

FN6. Section 832.7, subdivision (a) provides that "[p]eace officer personnel records ... or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of police officers or a police agency conducted by a grand jury, a district attorney's office, or the Attorney General's office."

Sections 832.7 and 832.8, along with Evidence Code sections 1043 and 1045, were enacted in 1978 to codify procedures for the discovery of peace officer personnel files. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1037-1038, 130 Cal.Rptr.2d 672, 63 P.3d 228.) [FN7] "A party seeking disclosure must file a written motion.... The motion must describe the type of records or information sought and provide affidavits showing good cause for the disclosure, setting forth its materiality to the pending litigation and stating on reasonable belief that the identified agency possesses the records or information.... The trial court must then make an in camera examination of the information produced by the agency and exclude from disclosure certain categories of information...." (*City of San Jose v. Superior Court, supra,* 5 Cal.4th at p. 52, 19 Cal.Rptr.2d 73, 850 P.2d 621.) The party seeking disclosure must give notice of the motion to the custodian of the records, who in turn must immediately notify the officer whose records are sought. (Evid.Code, § 1043, subd. (a).) "The statutory scheme carefully balances two directly conflicting interests: the ***614** peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertaining to the defense." (*City of San Jose v. Superior Court, supra,* 5 Cal.4th at p. ****245** 53, 19 Cal.Rptr.2d 73, 850 P.2d 621.) The custodian of the file, or the officer whose records are at issue, may request a court order "to protect the officer or agency from unnecessary annoyance, embarrassment or oppression." (Evid.Code, § 1045, subd. (d).)

FN7. Previously, motions for such discovery were governed by the California Supreme Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 113 Cal.Rptr. 897, 522 P.2d 305, holding "that a criminal defendant's fundamental right to a fair trial

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> and an intelligent defense in light of all relevant and reasonably accessible information entitled a defendant, who was asserting self-defense to a charge of battery on a police officer, to discovery of police personnel records." (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 52, 19 Cal.Rptr.2d 73, 850 P.2d 621.)

[4][5] The protections afforded by the statutory scheme, however, are not limited to the circumstance of a criminal defendant seeking discovery of a police witness's file. For example, a prosecutor must comply with Evidence Code section 1043 to obtain discovery of a former police officer's personnel file when prosecuting that person for a crime committed postretirement. (*People v. Superior Court* (*Gremminger*) (1997) 58 Cal.App.4th 397, 67 Cal.Rptr.2d 910 (hereafter, *Gremminger*).) And discovery of information from confidential peace officer personnel files obtained by a defendant in a criminal action may not be provided to the prosecutor absent a separate motion and hearing, nor may it be used outside the proceeding in which discovery was ordered. (*Alford v. Superior Court, supra,* 29 Cal.4th at pp. 1045-1046, 130 Cal.Rptr.2d 672, 63 P.3d 228.)

[6][7] "The term 'confidential' in Penal Code section 832.7 has independent significance and 'imposes confidentiality upon peace officer personnel records and records of investigations of citizens' complaints, with strict procedures for appropriate disclosure in civil and criminal cases....' " (*Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 426, 98 Cal.Rptr.2d 144, quoting *City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1440, 38 Cal.Rptr.2d 632.) "Given the status of confidentiality conferred by the Legislature on police personnel records, the officer's right to be notified that his or her records are sought (Evid.Code, § 1043, subd. (a)), and his or her right to seek a protective order from 'unnecessary annoyance, embarrassment or oppression' (Evid.Code, § 1045, subd. (d)), courts have concluded that an officer has limited or conditional privilege in such records. [Citations.] The privilege is conditional or limited because an officer cannot prevent disclosure of his or her personnel records or information contained in those records simply because he or she does not desire disclosure." (*Rosales v. City of Los Angeles, supra,* 82 Cal.App.4th at pp. 426-427, 98 Cal.Rptr.2d 144.) These are the only protections available to these officers because a violation of section 832.7 does not give rise to a private cause of action for damages. (*Id.* at pp. 427-428, 98 Cal.Rptr.2d 144; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1430, 44 Cal.Rptr.2d 532; *Bradshaw v. City of Los Angeles* (1990) 221 Cal.App.3d 908, 918-919, 270 Cal.Rptr. 711.) Thus, an officer whose records are wrongfully disclosed may not state causes of action for invasion of privacy, negligence, negligence per se, violation of a federal right to privacy or infliction of emotional distress. (*Rosales v. City of Los Angeles, supra,* 82 Cal.App.4th at pp. 429-432, 98 Cal.Rptr.2d 144.)

615** ***4. Access to Petitioners' Personnel Files

[8] The urinalysis tests petitioners were subjected to were conducted as part of an administrative investigation (Gov.Code, § 3303), and the results of those tests were placed in their confidential peace officer personnel files. (§ 832.7, subd. (a); § 832.8.) Petitioners were not under arrest when the urinalysis tests were administered, and the tests were not administered pursuant to driving under the influence statutes or implied consent laws. (Veh.Code, § § 23136, 23152.) Nor are they evidence obtained by a search, with or without a warrant, as part of a **246 criminal investigation. (*Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908.) Because petitioners' urinalysis test results are contained in police investigative files, and the files of the district attorney, they are not subject to disclosure under the California Public Records Act. (Gov.Code, § 6254, subd. (f).) Since these test results have not been disclosed in any court filing, and were not presented as evidence to the grand jury, the arguments of the People and media intervenors concerning public disclosure of the blood alcohol results of members of the public arrested for driving under the influence are inapposite, and the arguments of media intervenors concerning public access to court hearings and court records are premature.

[9] The confidentiality provision of section 832.7, subdivision (a) contains a limited exception: "This section shall not apply to investigations or proceedings concerning the conduct of police officers or a police agency conducted by a grand jury, a district attorney's office, or the Attorney General's Office." Relying on *Gremminger, supra,* 58 Cal.App.4th 397, 67 Cal.Rptr.2d 910, petitioners initially contend that this exception is inapplicable to them because the conduct with which they are charged occurred while they were off-duty. In *Gremminger, supra,* the defendant was charged with

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a murder committed while he was employed in a non-peace-officer capacity. (*Id.* at p. 400, 67 Cal.Rptr.2d 910.) The court held that "[t]he exemption provided in section 832.7 applies to investigations of police officer conduct. The key is whether the police officer was employed as a police officer at the time of the conduct, which is being investigated. If so, then the exemption applies, whether or not the police officer is currently employed as a police officer at the time of the investigation...." (*Id.* at p. 406, 67 Cal.Rptr.2d 910.) It is undisputed that petitioners were employed as police officers at the time of the incident in question. Indeed, petitioners were required to undergo urinalysis testing precisely because they were so employed. Although they were off-duty, petitioners were nonetheless police officers and under a duty to protect the public. (§ § 830.1 & 830.2; *People v. Derby* (1960) 177 Cal.App.2d 626, 2 Cal.Rptr. 401.) [FN8]

FN8. We note, however, that our Supreme Court has held that for some purposes, off-duty officers have been determined not to be engaged in the performance of their duties. (*People v. Corey* (1978) 21 Cal.3d 738, 147 Cal.Rptr. 639, 581 P.2d 644; *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 156 Cal.Rptr. 198, 595 P.2d 975.)

***616** *Gremminger, supra,* does, however, resolve media intervenors' argument that the protections of section 832.7 are inapplicable to police officers charged as criminal defendants. Although Gremminger was a retired police officer, the court found that the protections afforded by section 832.7 are triggered by whether information is contained in a confidential peace officer personnel file, not by the witness or defendant status of the subject of the file. (§ 832.7, subds.(a) & (f); Evid.Code, § § 1043, subd. (a); 1045, subd. (d).) Thus, the prosecutor was precluded from access to Gremminger's peace officer personnel records, absent compliance with Evidence Code section 1043. (*Gremminger, supra,* 58 Cal.App.4th at p. 407, 67 Cal.Rptr.2d 910.)

People v. Gwillim (1990) 223 Cal.App.3d 1254, 274 Cal.Rptr. 415, relied upon by media intervenors, is not to the contrary. In *Gwillim* a police officer was charged with crimes committed against another officer while the two were on duty. (*Id.* at p. 1259, 274 Cal.Rptr. 415.) During a police department internal investigation of ****247** the incident, Gwillim gave an immunized statement. (See *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 221 Cal.Rptr. 529, 710 P.2d 329 (*Lybarger*).) [FN9] He was told that his statement would be "held confidential consistent with ... section 832.7." (*Gwillim, supra,* 223 Cal.App.3d at pp. 1269-1270, 274 Cal.Rptr. 415.) The district attorney received the statement under the authority of section 832.7, and revealed information about it to the victim. The appellate court affirmed the district attorney's right to receive the statement (*ibid.*), but held, consistent with *Lybarger,* that the prosecution must "develop, prepare, and present the criminal case without reference to defendant's immunized statement." (*Id.* at p. 1273, 221 Cal.Rptr. 529, 710 P.2d 329.) The precise issue we address today was not before the court.

FN9. In *Lybarger, supra,* the California Supreme Court harmonized certain provisions of the Public Safety Officers Procedural Bill of Rights Act, reconciling them by employing use and derivative use immunity. The high court held that an officer must be told "that although he had the right to remain silent and not incriminate himself, (1) his silence could be deemed insubordination, leading to administrative discipline, and (2) any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding." (40 Cal.3d at p. 829, 221 Cal.Rptr. 529, 710 P.2d 329.)

5. Disclosure of Information Obtained from Police Personnel Files

[10] Alternatively, petitioners argue that even if the district attorney had legitimate access to their confidential personnel files for purposes of conducting an investigation concerning their conduct or that of the police department, the material obtained from their files remains confidential, absent compliance with the provisions of Evidence Code sections 1043 and 1045, or other judicial review.

***617** "Our role in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citation.] Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning. [Citation.] We do not, however, consider the statutory language in isolation, but rather examine the

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entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts." (*Alford v. Superior Court, supra,* 29 Cal.4th at p. 1040, 130 Cal.Rptr.2d 672, 63 P.3d 228.) It is well settled that " ' "language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." ' " (*People v. Ledesma* (1997) 16 Cal.4th 90, 95, 65 Cal.Rptr.2d 610, 939 P.2d 1310.)

The People contend that the exception in section 832.7, subdivision (a) applies to both its confidentiality provision and its limitation on disclosure so that when the district attorney investigates or prosecutes police officer or police agency misconduct, he not only has unfettered access to confidential police personnel files, but there are no constraints on his use or disclosure of any information obtained from those files. The People's interpretation of section 832.7, subdivision (a) leads to the absurd consequence that the protections specified in that section are completely lost for all information in any peace officer's personnel file (§ 832.8) perused by the district attorney in the course of an investigation, regardless of whether that information is ultimately admissible or relevant to a subsequent criminal or civil action. Moreover, this loss of confidentiality would occur with no notice to the officers involved, and they ****248** would have no recourse. (*Rosales v. City of Los Angeles, supra,* 82 Cal.App.4th at pp. 429-432, 98 Cal.Rptr.2d 144.) The People's interpretation of the section would also conflict with the provisions of the Public Records Act concerning disclosure of investigative or personnel files. (Gov.Code, § 6254, subds. (c) & (f).)

In a well-reasoned opinion, the Attorney General was asked to consider "what restrictions are placed upon a district attorney in obtaining access to the personnel records of a police officer." (66 Ops.Cal.Atty.Gen. 128 (1983).) The Attorney General concluded that "as long as the district attorney is duly investigating 'the conduct of police officers or a police agency' as specified in section 832.7, he need not first obtain a court order for access to the records in question." (66 Ops.Cal.Atty.Gen., *supra,* 128.) The Attorney General noted that "the Legislature and the courts have generally allowed public access to government files relating to the conduct of official business but not to those files relating to the personal lives of individuals. [Citations.] The latter have been treated as 'confidential' so as to protect the right of privacy." (66 Ops.Cal.Atty. Gen., *supra,* 129.) "Confidential information," the Attorney General observed, is "not publicly disseminated." (66 Ops.Cal.Atty.Gen., *supra,* 129, fn. 3.) And, such exempt records do not ***618** lose their non-public status if they are disclosed to the district attorney. (Gov.Code, § 6265.) The Attorney concluded that "[a] district attorney, however, would not be authorized under section 832.7 to release the information to the public; the exception language in the statute is limited to the district attorney's office for the purposes stated." (66 Ops.Cal.Atty.Gen., *supra,* at p.130 (1983).)

[11][12] The Legislature amended section 832.7 in 1988 (Stats.1988, c. 685, § 2) to, among other things, exempt from the prohibition against disclosure investigations or proceedings conducted by the Attorney General's Office. (Legis. Counsel's Dig., Sen. Bill No. 685 (1987-1988 Reg. Sess.) Stats.1988, Summary Dig., p. 203.) We note that, notwithstanding the Attorney General's 1983 opinion, the Legislature made no change to the language of that section concerning confidentiality of these records.[FN10]

> FN10. "Opinions of the Attorney General, while not binding, are entitled to great weight. In the absence of controlling authority, these opinions are persuasive since the Legislature is presumed to be cognizant of that construction of the statute ... and that if it were a misstatement of the legislative intent, some corrective measure would have been adopted." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17, 270 Cal.Rptr. 796, 793 P.2d 2, internal quotations and citations omitted; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 103-104, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

[13] The exception contained in section 832.7 affords the district attorney the ability to review confidential peace officer personnel files when investigating police misconduct without notice to the individuals involved. At the same time, it requires the district attorney to maintain the non-public nature of the files absent judicial review of the relevance of the information to a criminal or civil action. Where the exception afforded the district attorney by section 832.7, subdivision (a) is inapplicable, he must proceed according to the provisions of Evidence Code section 1043. (*Gremminger, supra,* 58 Cal.App.4th 397, 67 Cal.Rptr.2d 910.)

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Our interpretation of this section is consistent with our Supreme Court's recent conclusion that access to confidential peace officer personnel files for one purpose by a party does not allow disclosure of the information****249** to other parties or in other proceedings. (*Alford v. Superior Court, supra,* 29 Cal.4th at pp. 1045-1046, 130 Cal.Rptr.2d 672, 63 P.3d 228.)

CONCLUSION

We therefore conclude that the district attorney properly gained access to petitioners' confidential peace officer personnel files under section 832.7, ***619** subdivision (a); however, the information obtained from those files remains confidential absent judicial review pursuant to Evidence Code section 1043, et seq.[FN11]

FN11. Nothing in our analysis prevents a prosecutor from presenting information obtained from confidential peace officer personnel files as evidence before a grand jury investigating police officer misconduct. The grand jury is itself afforded the limited exception to confidentiality provisions of section 832.7, subdivision (a). The grand jury proceedings are closed proceedings. (§ 914, et seq.; 79 Ops.Cal.Atty.Gen. 185 (1996).) Grand jury transcripts remain sealed in criminal cases until 10 days after the filing of an indictment, and are subject to further sealing by the superior court in whole or in part. (§ 938.1, subd. (b).)

DISPOSITION

Let a peremptory writ of mandate issue, commanding respondent, County of San Francisco Superior Court in *People v. Alex Fagan, Jr., et al.,* (Nos.2096549, 188728-01, 2096547, 188728-03, 2096548, 188728-02) to maintain its interim protective order in effect. The results of petitioners' urinalysis tests, contained in their confidential peace officer personnel files, shall remain sealed absent further proceedings consistent with this decision.

We concur: MARCHIANO, P.J., and MARGULIES, J.
Cal.App. 1 Dist.,2003.
Fagan v. Superior Court

111 Cal.App.4th 607, 4 Cal.Rptr.3d 239, 20 IER Cases 614, 03 Cal. Daily Op. Serv. 7645, 2003 Daily Journal D.A.R. 9517

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BILL ANALYSIS

SENATE COMMITTEE ON Public Safety
Senator Bruce McPherson, Chair
2001-2002 Regular Session

SB 1807

SB 1807 (Chesbro)
As Introduced February 22, 2002
Hearing date: April 16, 2002
Penal Code
SH:br

FIREARMS AND DEADLY WEAPONS SEIZED BY LAW ENFORCEMENT FROM SCENE OF DOMESTIC VIOLENCE INCIDENTS

(1) LAWFUL SEARCHES

(2) BURDEN OF PROOF TO PREVENT RETURN TO OWNER

HISTORY

Source: City of Santa Rosa

Prior Legislation: SB 2052 (Schiff) - Chapter 254, Statutes of 2000
SB 218 (Alpert) - Chapter 662, Statutes of 1999
AB 363 (Nolan) - Chapter 866, Statutes of 1991
AB 798 (Zeltner) - Chapter 131, Statutes of 1987
AB 416 (Mojonnier) - Chapter 1362, Statutes of 1987
AB 3436 (Wright) - Chapter 901, Statutes of 1984

Support: Americans for Gun Safety; California State Sheriffs' Association; NOW; City Attorney of San Diego; League of California Cities; California Coalition for Youth; San Diego Police Department; Mayor, City of Concord; Women's Justice Center; YWCA Sonoma County; Sonoma

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County DA; Mayor, City of Santa Rosa; Santa Rose Police Department; California Peace Officers' Association; California Police Chiefs Association; WEAVE

Opposition:None known

KEY ISSUES

EXISTING LAW PROVIDES THAT SPECIFIED PEACE OFFICERS WHO ARE AT THE SCENE OF A DOMESTIC VIOLENCE INCIDENT INVOLVING A THREAT TO HUMAN LIFE OR PHYSICAL ASSAULT SHALL TAKE TEMPORARY CUSTODY OF ANY FIREARM OR OTHER DEADLY WEAPON IN PLAIN SIGHT OR DISCOVERED PURSUANT TO A CONSENSUAL SEARCH, AS NECESSARY FOR THE PROTECTION OF THE PEACE OFFICER OR OTHER PERSONS PRESENT. EXISTING LAW INCLUDES SPECIFIC PROCEDURES FOR THE RETURN OR THE RETENTION OF THE FIREARM OR WEAPON INCLUDING (1) RETENTION BY THE SEIZING AUTHORITY IF THERE IS "REASONABLE CAUSE" TO BELIEVE THAT RETURNING THE FIREARM OR WEAPON POSES SPECIFIED DANGERS, AND, (2) A REQUIREMENT IN COURT ACTIONS TO RETAIN THE FIREARM OR WEAPON THAT THE STATE MUST PROVE "BY CLEAR AND CONVINCING EVIDENCE" THAT THE RETURN WOULD PRESENT SPECIFIED DANGERS.

SHOULD "OTHER LAWFUL SEARCH" BE ADDED TO THE EXISTING "CONSENSUAL SEARCH" REQUIREMENT?

SHOULD THE STANDARD OF PROOF REQUIRED FOR THE STATE TO RETAIN THE FIREARM OR WEAPON IN COURT ACTIONS BE CHANGED TO "PREPONDERANCE" OF THE EVIDENCE?

PURPOSE

The purpose of this bill is (1) to add any "lawful" search to the existing "consensual" search required in domestic violence circumstances for the mandated seizure of firearms and weapons, and, (2) to reduce the standard of proof required for the state to retain those items in court actions brought by owners for the return of those items to "preponderance" of the evidence.

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Existing law (all Penal Code 12028.5) does the following:

Mandates that specified peace officers at the scene of a domestic violence incident involving a threat to human life or a physical assault, shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual search as necessary for the protection of the peace officer or other persons present. Upon taking custody of a firearm or other deadly weapon, the officer shall give the owner or person who possessed the firearm a receipt.

Requires that no firearm or other deadly weapon shall be held less than 48 hours and that except as otherwise provided and if a firearm or other deadly weapon is not retained for use as evidence related to criminal charges brought as a result of the domestic violence incident or is not retained because it was illegally possessed - the firearm or other deadly weapon shall be made available to the owner or person who was in lawful possession 48 hours after the seizure or as soon thereafter as possible, but no later than 72 hours after the seizure.

Provides that in those cases where a law enforcement agency has reasonable cause to believe that the return of a firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat, the agency shall advise the owner of the firearm or other deadly weapon, and within 30 days of the seizure, initiate a petition in superior court to determine if the firearm or other deadly weapon should be returned. The law enforcement agency may make an ex parte application stating good cause for an order extending the time to file a petition. Including any extension of time granted in response to an ex parte request, a petition must be filed within 60 days of the date of seizure of the firearm.

Requires that, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting

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the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

Requires that if, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If the owner or person who had lawful possession does not petition the court within this 12-month period for a second hearing or is unsuccessful at the second hearing in gaining return of the firearm or other deadly weapon, the firearm or other deadly weapon may be disposed of as otherwise provided in law.

This bill does the following:

Adds any "lawful" search to the existing "consensual" search required in domestic violence circumstances for the mandated seizure of firearms and weapons.

Reduces the standard of proof required for the state to retain those items in court actions brought by owners for the return of those items from "clear and convincing" to "preponderance" of the evidence.

COMMENTS

1. Need for This Bill

The author indicates that:

> SB 1807 aims to reduce domestic violence by providing the courts and law enforcement with another tool to deal with violent cases. This bill would lower the standard of evidence for confiscation of weapons in civil proceedings. SB 1807 would change the standard of evidence from "by clear and convincing evidence," to "preponderance of the evidence" that the return of the weapon would result in endangering the victim or person

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who reported the crime.

2. Brief History of "Seizure of Weapons" in Section 12028.5

Penal Code section, as added to the law in 1984 by AB 3436, allowed the specified peace officers to take possession of handguns at the domestic violence scenes and required that those handguns be returned - no sooner than 48 hours and no later than 72 hours - to the owner unless held for evidence or illegally possessed. Prior to enactment, AB 3436 did allow for a hearing at the request of the owner of the handgun if it was not returned as required but the hearing was deleted in the April 25, 1984 amendments.

In 1987, AB 798 removed the limitation on only handguns that could be seized, thus allowing seizure of rifles, shot guns, and handguns and AB 416 allowed attorney's fees for successful actions to get firearms returned.

In 1991, AB 363 added "other deadly weapon" and allowed agencies to retain weapons and required the agency to petition the superior court to retain the firearm, including the addition of the "clear and convincing evidence" standard.

In 1999, SB 355 changed the "may" take temporary custody to "shall" take temporary custody thus mandating the peace officers take custody in all cases.

3. Lawful Searches

This bill adds to the existing authority in section 12028.5 to search for firearms or weapons, now limited to a "consensual" search, "other lawful" search.

Peace officers are allowed to make searches without a warrant when those searches are incident to the arrest. For example, 4 Witkin Cal. Crim. Law section 1937 states that:

> A search of the person arrested, his home, place of business, papers or effects may be permissible as an

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> incident to a lawful arrest. The principal purpose of the search is to discover evidence of criminal conduct, and the right to search depends on the validity of the arrest . . .
>
> Another important purpose is the discovery of weapons, and P.C. 833, enacted in 1957, extends the right of search to make it independent of an arrest: (1) "A peace officer may search for dangerous weapons any person whom he has legal cause to arrest, whenever he has reasonable cause to believe that the person possesses a dangerous weapon." (2) "If the officer finds a dangerous weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person." (3) "The arrest may be for the illegal possession of the weapon." (See People v. Strelich (1961) 189 C.A.2d 632, 635, 11 C.R. 807; on validity of search for weapons, see infra, 2375.)

In addition, peace officers may make a search based on consent. In the case of a scene of domestic violence, it may be that several persons would be able to consent to a search. At a house where both the "victim" and the "perpetrator" reside, it would be possible for either to consent. If the house is occupied by the parents of one of those parties, those parents may be able to consent to the search (all predicated on not only residing but having access to all or portions of the house). There may be a question of whether the consent is truly consensual or a submission to the "authority" of a peace officer, but consensual searches and "plain sight" seizures are allowed under the existing statute.

This bill adds "other lawful" search to section 12028.5. That could be intended to add searches pursuant to a warrant since section 12028.5 currently is limited to "consensual" searches for purposes of the rest of the provisions of that statute. It may be intended to allow searches based on statements by another party who themselves do not have authority to consent but have indicated to law enforcement that a firearm or weapon is present

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at the scene of a domestic violence incidence involving a threat to human life or a physical assault.

Another circumstance that may or may not be affected by the change proposed by this bill includes the issue of a minor's consent. As noted in 4 Witkin Cal. Crim. Law section 2305:

> People v. Jacobs (1987) 43 C.3d 472, 233 C.R. 323, 729 P.2d 757, defendant's 11-year-old stepdaughter consented to the entry into the home by police officers seeking to arrest defendant pursuant to warrant. Held, her consent was ineffective.
>
> (a) The stepdaughter's consent was not valid "unless she had the authority to permit the entry or the police reasonably and in good faith believed she had such authority." (43 C.3d 481.)
>
> (b) That her parents had entrusted her with the care of children two and five years of age cannot alone support a finding that she had actual authority to permit adult strangers to enter and search the home. "Minor children do not have coequal dominion over the family home. . . . Although parents may choose to grant their minor children joint access and mutual use of the home, parents normally retain control of the home as well as the power to rescind the authority they have given." (43 C.3d 482.) As other courts have soundly reasoned, a child cannot waive the privacy rights of his parents. (43 C.3d 482.)
>
> (c) "We do not suggest that consent by a minor will be ineffective in all cases in which no adult occupants are present. As a child advances in age she acquires greater discretion to admit visitors on her own authority. In some circumstances, a teenager may possess sufficient authority to allow the police to enter and look about common areas. . . . Exceptional circumstances also may justify a search that otherwise would be illegal. For example, some courts have

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upheld searches made at the request of a child or when a child is the victim of or a witness to a crime." (43 C.3d 483.) (See also LaFave 8.4(c); 99 A.L.R.3d 598.)

4. Other Issues Raised by This Bill

The existing requirement in law for specified peace officers to take temporary custody of firearms and weapons present at a domestic violence scene applies in all circumstances, regardless of whether an arrest is made or not and regardless of whether or not a restraining or protective order is applicable. All firearms are to be taken into temporary custody, whether owned by a person alleged to have perpetrated domestic violence, the person subject to the domestic violence, or another person in the household who may lawfully possess firearms.

Existing law prohibits a number of persons from possessing a firearm. For example, there is a lifetime ban on possessing a firearm for persons convicted of any felony or specified crimes whether the conviction is for a felony or a misdemeanor (Penal Code 12021, 12001.6, and 12021.1). Persons convicted of specified misdemeanors, including both assault and battery, are prohibited from possessing a firearm for ten years. Persons on probation may not be allowed to possess a firearm (Penal Code 12021(d)). Persons subject to a protective order may not possess a firearm for the duration of that order and persons subject to a temporary restraining order may not possess a firearm (both Penal Code 12021(g)). Persons who are a danger to themselves or others may not possess a firearm (Welfare and Institutions Code 8100).

Existing law provides that no person who has been taken into custody or admitted to a designated facility because that person is a danger to himself, herself, or others shall own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase any firearm for a period of 5 years after the person is released from the facility unless, upon petition to the superior court, the person is found by a preponderance of the evidence likely to use firearms in a safe

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and lawful manner (Welfare and Institutions Code 8103; see also 8102).

In addition, persons who have been arrested may not purchase a firearm pending resolution of that arrest and other state and federal laws may impose additional restrictions on purchasing or possessing firearms.

If firearms are taken into temporary custody pursuant to section 12028.5, there is a likelihood that in some number of cases an arrest and conviction will result that would prohibit persons from ever recovering those firearms.

However, in some cases, no arrest may be made or charges may be dropped and those persons would not generally be prohibited from purchasing or possessing firearms (unless other prohibitions applied such as for restraining or protective orders).

In those cases where a person is not otherwise prohibited from possessing - or lawfully buying - a firearm, this bill would lower the burden of proof on the state to allow the state to keep firearms taken into temporary custody even though a person who cannot obtain the return of firearms is not otherwise prohibited from purchasing and possessing firearms.

In addition, firearms not returned pursuant to section 12028.5 are to be disposed of pursuant to existing Penal Code section 12028 that allows for retention, destruction, or sale of the firearm by the law enforcement agency. There is not provision in either section 12028 or 1208.5 for a sale of firearms with the proceeds going to the lawful owner - who can otherwise go purchase and possess a firearm (albeit as of January 1, 2002, all firearms purchased would be accompanied by a firearms safety device and after January 1, 2003, a handgun purchaser must possess a handgun safety certificate).

There is some anecdotal evidence to suggest that with the current clear and convincing burden of proof on the state, some persons have been allowed to arrange a sale of seized firearms in lieu of the state seeking to prohibit their return. It may

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be assumed that by lowering the proof required in section 12028.5 to "preponderance" more firearms will be retained by law enforcement agencies and fewer offers to allow an arranged sale may be made. Firearms seized may be of little value or may be of both sentimental - bequeathed by parent - or monetary value such as hunting rifles or shotguns. There are at least some elements of section 12028.5 that arguably involve a kind of "asset forfeiture" without conviction although a court process is in place in the statute.

It also may be that since there are two hearings possible for the return of firearms, it would be appropriate to lower the standard for the state to preponderance for the first hearing and to retain clear and convincing for the second. Or that the statute could be amended to provide a presumption that the lawful owner should be allowed to try to arrange a sale of the firearm(s) with some costs paid to the state agency and the remainder, if any, returned to the owner. As noted above, a firearm at a domestic violence scene may be owned by the victim or a person other than the alleged perpetrator of the domestic violence.

SHOULD THE BURDEN OF PROOF ON THE STATE FOR RETAINING FIREARMS OWNED BY A PERSON WHO OTHERWISE MAY POSSESS FIREARMS - INCLUDING VICTIMS OF DOMESTIC VIOLENCE - BE REDUCED TO A "PREPONDERANCE" OF THE EVIDENCE AS PROPOSED BY THIS BILL?

Given that there is a second hearing option for persons who are unable to obtain the release of their weapons at the first hearing, given the cost of going through a court petition, and given that a positive indicator of a person's improved circumstance may be demonstrated by positive behavior over time, another approach that might be cost-effective would be for the initial 30-day - extendable to 60 days - period for the return of firearms by the agency before a petition must be submitted to the court could be extended for another four months with the 12-month maximum time for seeking recovery extended by the same amount of time.

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5. Clear and Convincing Evidence

This bill deletes " clear and convincing " and inserts "preponderance" of the evidence required for an agency to prevent the return of a firearm or weapon in section 12028.5. This change would reduce the standard of proof the state must show to prevent relinquishment of a firearm or weapon back to a lawful owner.

Under existing law, the burden of proof generally means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact, or establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof is by a preponderance of the evidence. (Evidence Code 115.)

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The Court of Appeal in In Re Marriage of Peters (1997) 52 Cal.App.4th 1487, 1490, discussed the issue of the degree of the burden of proof to be applied in a particular situation:

> The . . . burden of proof . . . is an expression of the degree of confidence society wishes to require of the resolution of a question of fact. The burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. Preponderance of the evidence results in the roughly equal sharing of the risk of error. To impose any higher burden of proof demonstrates a preference for one side's interests. Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake. To determine whether a higher standard of proof is warranted, we must first identify the interests at stake. (citations omitted)

The different standards of proof relevant to criminal cases may be summarized as follows:

Beyond a Reasonable Doubt : The United States Constitution guarantees that a defendant in a criminal case is entitled to a jury trial and that the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. (Sullivan v. Louisiana (1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 2081].) This basic principle of law is codified in Penal Code 1096:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt.

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> Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

Clear And Convincing : Clear and convincing evidence denotes proof that is clear, explicit, and unequivocal and leaves no substantial doubt (People v. Yovanov (1999) 69 Cal.App.4th 392, 402.) The standard of clear and convincing evidence is used in a number of different contexts - establishing the grounds for withdrawing a guilty plea (People v. Cruz (1974) 12 Cal.3d 562, 566; People v. Castaneda (1995) 37 Cal.App.4th 1612, 1617.)

Preponderance : The phrase "preponderance of evidence" is usually defined in terms of probability of truth, e.g., "such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. [citations.]" (1 Witkin, Cal. Evidence (3d ed. 1986) Burden of Proof and Presumptions, Subsection 157, p. 135.) The standard jury instruction defines preponderance of the evidence as "evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence of either side of an issue preponderates, your findings on that issue must be against the party who had the burden of proving it." (CALJIC 2.50.2.)

6. Support for This Bill

The Americans for Gun Safety letter in support includes:

> According to the US Department of Justice, Office of Justice Programs over 40% of the women killed with firearms are murdered by an intimate partner. Given

the low rate of prosecution for domestic violence and the high rate of murder in these cases, SB 1807 seeks to lower the standard of evidence necessary for law enforcement to take into custody and destroy weapons in civil proceedings. SB 1807 proposes to change the standard of evidence from "by clear and convincing evidence," to "by a preponderance of the evidence" that the return of the weapon would result in endangering the victim or person who reported the assault. This bill would allow law enforcement officers to take into custody any weapons discovered in any lawful search, and subject those weapons to the procedures used for consensual searches.

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