J:/mandates/99TC08/request for reconsideration
Hearing: June 19, 2003

ITEM 2

REQUEST FOR RECONSIDERATION
of the Commission's Statement of Decision adopted
May 29, 2003

Penal Code Section 13730,
As Added and Amended by Statutes 1984, Chapter 1609, and Statutes 1995, Chapter 965

Family Code Section 6228,
As Added by Statutes 1999, Chapter 1022

Crime Victims' Domestic Violence Incident Reports (99-TC-08)

Commission Chairperson, Requestor

Executive Summary

This is a request for reconsideration made by the Commission Chairperson to reconsider the Commission's decision adopted on May 29, 2003, on the *Crime Victims' Domestic Violence Incident Reports* test claim pursuant to Government Code section 17559 and section 1188.4 of the Commission's regulations.

Background

The *Crime Victims' Domestic Violence Incident Reports* legislation generally requires local agencies to provide a copy of the domestic violence incident report and face sheet to the victim of a domestic violence incident, free of charge, within specified time frames. The legislation further requires the local agency to maintain the incident reports and face sheets for five years.

On May 29, 2003, the Commission adopted a statement of decision partially approving this test claim for the activity of storing domestic violence incident reports and face sheets for five years pursuant to Family Code section 6228, subdivision (e). The Commission concluded the following:

> 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 five 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.

The Commission found that the activity of storing the reports for five years constituted a new program or higher level of service for the following reasons:

> 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 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 Commission agrees.
>
> Under prior law, local law enforcement agencies are required to provide daily reports of misdemeanor and felony offenses, and a monthly report on domestic violence calls, to the Attorney General and the Department of Justice.[1] *But, the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence. Record retention policies were left to the discretion of the local agency.*
>
> Accordingly, the Commission finds that storing the domestic violence incident report and face sheet for five years constitutes a new program or higher level of service. (Emphasis added.)

The statement of decision was mailed to the claimant, interested parties, and affected state agencies on June 3, 2003.

Request for Reconsideration

On June 5, 2003, the Chairperson of the Commission directed staff to prepare a request for reconsideration of the statement of decision in order to take into consideration prior law, codified in Government Code sections 26202 and 34090. Those sections require counties and cities to maintain records for two years. Thus, the requestor states that 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.

Staff Analysis

Government Code section 17559, subdivision (a), grants the Commission, within statutory timeframes, discretion to reconsider a prior final decision. By regulation, the Commission has provided that any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.

Before the Commission considers a request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for

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[1] Penal Code section 11107 (added by Stats. 1953, ch. 1385); Penal Code section 13730 (added by Stats. 1984, ch. 1609). As indicated above, Penal Code section 13730 has been suspended by the Legislature.

reconsideration should be granted. A supermajority of five affirmative votes is required to grant the request for reconsideration and schedule the matter for a hearing on the merits.

If the Commission grants the request for reconsideration, a subsequent hearing is conducted to determine if the prior final decision is contrary to law and to correct an error of law. A supermajority of five affirmative votes is required to change a prior final decision.

Thus, at this stage, the sole issue before the Commission is whether it should exercise its discretion to grant the request for reconsideration. In this regard, the Commission has the following options:

> Option 1: The Commission can approve the request, in all or in part, finding that reconsideration is appropriate to determine if any error of law is present.
>
> Option 2: The Commission can deny the request, finding that the requestor has not raised issues that merit reconsideration.
>
> Option 3: The Commission can take no action, which has the legal effect of denying the request.

Conclusion and Staff Recommendation

Staff recommends that the Commission approve this request, finding that reconsideration is appropriate to determine, at a subsequent hearing on the merits, if an error of law is present.

STAFF ANALYSIS

Chronology

5/29/03	Commission adopts statement of decision
6/03/03	Commission mails statement of decision to claimant, interested parties, and affected state agencies
6/05/03	Request for reconsideration is filed with the Commission

Background

Government Code section 17559, subdivision (a), grants the Commission, within statutory timeframes, discretion to reconsider a prior final decision. That section states the following:

> The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

By regulation, the Commission has provided that any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.[2]

Before the Commission considers a request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted.[3] A supermajority of five affirmative votes is required to grant the request for reconsideration and schedule the matter for a hearing on the merits.[4]

If the Commission grants the request for reconsideration, a subsequent hearing is conducted to determine if the prior final decision is contrary to law and to correct an error of law.[5] A supermajority of five affirmative votes is required to change a prior final decision.[6]

Thus, at this stage, the sole issue before the Commission is whether it should exercise its discretion to grant the request for reconsideration. In this regard, the Commission has the following options:

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[2] California Code of Regulations, title 2, section 1188.4, subdivision (b).

[3] California Code of Regulations, title 2, section 1188.4, subdivision (f).

[4] *Ibid.*

[5] California Code of Regulations, title 2, section 1188.4, subdivision (g).

[6] California Code of Regulations, title 2, section 1188.4, subdivision (g)(2).

Option 1: The Commission can approve the request, in all or in part, finding that reconsideration is appropriate to determine if any error of law is present.

Option 2: The Commission can deny the request, finding that the requestor has not raised issues that merit reconsideration.

Option 3: The Commission can take no action, which has the legal effect of denying the request.

The Commission's Decision

The Commission partially approved this test claim for the activity of storing domestic violence incident reports and face sheets for five years pursuant to Family Code section 6228, subdivision (e). The Commission concluded the following:

> 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 five 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.

The Commission found that the activity of storing the reports for five years constituted a new program or higher level of service for the following reasons:

> 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 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 Commission agrees.
>
> Under prior law, local law enforcement agencies are required to provide daily reports of misdemeanor and felony offenses, and a monthly report on domestic violence calls, to the Attorney General and the Department of Justice.[7] *But, the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence. Record retention policies were left to the discretion of the local agency.*

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[7] Penal Code section 11107 (added by Stats. 1953, ch. 1385); Penal Code section 13730 (added by Stats. 1984, ch. 1609). As indicated above, Penal Code section 13730 has been suspended by the Legislature.

Accordingly, the Commission finds that storing the domestic violence incident report and face sheet for five years constitutes a new program or higher level of service. (Emphasis added.)

Discussion

The request for reconsideration alleges the following error of law:

> 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.

Staff recommends that the Commission approve this request for reconsideration since the statement of decision does not address Government Code sections 26202 and 34090. Both statutes require counties and cities to retain records for at least two years. 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.)[8]

Government Code section 34090, which applies to cities, 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*:
>
> [¶] . . .[¶]

[8] Government Code section 26202 was last amended by Statutes 1963, chapter 1123.

(d) *Records less than two years old. . . .*(Emphasis added.)[9]

In 1980, the California Supreme Court decided a case, noting that under Government Code section 34090, the city council lacked the authority to approve destruction of records less than two years old.[10]

Staff finds that the finding in the statement of decision, that "the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence" and that "record retention policies were left to the discretion of the local agency," is not correct. Thus, the conclusion that storing domestic violence incident reports and face sheets for *five years* is a new program or higher level of service may constitute an error of law.

Conclusion and Staff Recommendation

Staff recommends that the Commission approve this request, finding that reconsideration is appropriate to determine, at a subsequent hearing on the merits, if an error of law is present.

[9] Government Code section 34090 was last amended by Statutes 1975, chapter 356.

[10] *People v. Zamora* (1980) 28 Cal.3d 88, 96, fn. 3.

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THE PEOPLE, Plaintiff and Respondent,
v.
JOSEPH ANTHONY ZAMORA, Defendant and Appellant

Crim. No. 21063.

Supreme Court of California

Aug 28, 1980.

SUMMARY

Following a municipal court jury trial, defendant was convicted of battery on a police officer (Pen. Code, § § 242, 243), and resisting an officer in the discharge of his duties (Pen. Code, § 148). Prior to trial, defendant's counsel made an informal request to the city attorney's office, which was prosecuting the case, for discovery of records relating to the four police officers involved. The city attorney agreed to produce records of any citizen complaints charging racial prejudice or excessive use of force against the officers, including names, addresses and telephone numbers of the complainants. The city attorney subsequently supplied the promised information as to one of the officers and informed defendant that no complaints had been filed against another of the officers. With respect to the remaining two officers, defendant was given only the names of complainants, without addresses or telephone numbers, and was told that no further information was available. At a pretrial hearing on a motion for discovery of the complaint records, the prosecution revealed for the first time that all records of unsustained citizen complaints against police officers from 1949 through 1974 had been destroyed in May 1976, about two weeks prior to defendant's arrest. Such destruction was accomplished pursuant to a city council resolution approving requests for destruction of a variety of city records, including miscellaneous police records, through 1974. Concluding that the destruction had not been malicious or perpetrated in bad faith, the municipal court declined to impose sanctions on the prosecution. (Municipal Court for the Los Angeles Judicial District of Los Angeles County, No. 31546058, Michael T. Sauer and Mary E. Waters, Judges.)

The Supreme Court reversed. Rejecting contentions that the records had been lawfully destroyed pursuant to the city council resolution and *89 established administrative procedures, and not with the specific purpose of violating defendant's rights, the court held that such destruction had deprived defendant of the opportunity to locate witnesses who might testify that the officers involved had used excessive or unnecessary force on past occasions, and that the failure to impose sanctions upon the prosecution was prejudicial error. The court also held that the appropriate sanction was an instruction to the jury that the officers at issue had used excessive or unnecessary force on each past occasion when complaints had been filed against them, but that complaint records were later destroyed, along with an instruction that the jury could rely upon that information to infer that the officers were prone to use excessive or unnecessary force and that the officers' testimony regarding incidents of alleged police force might be biased. (Opinion by Tobriner, J., with Mosk and Newman, JJ., concurring. Separate concurring and dissenting opinion by Manuel, J., with Clark and Richardson, JJ., concurring. Separate concurring and dissenting opinion by Bird, C. J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Evidence § 9--Judicial Notice--Matters Subject to Notice--Court Records and Documents Admitted in Evidence in Other Cases.
On appeal from convictions for battery on a police officer (Pen. Code, § § 242, 243), and resisting an officer in the discharge of his duties (Pen. Code, § 148), in which the issue was what sanctions, if any, were appropriate for the city attorney's destruction of unsustained citizen complaints against police officers through 1974, the reviewing court declined to take judicial notice of specified case records and documents concerning destruction of the complaint files that had been discovered and admitted into evidence in other cases, since such documents and court files related to evidentiary matters which should have, but were not, presented to the trial court in the instant prosecution.

(2) Criminal Law § 45--Rights of Accused--Fair Trial--Distortion or Suppression of Evidence--Citizen Complaints Against Police Officers-- Destruction--Pursuant to Statutory Authority.
In a prosecution for battery on a police officer (Pen. Code, § § 242, 243), and *90 resisting an officer in the discharge of his duties (Pen. Code, § 148), in which it was disclosed that unsustained citizen

complaints against police officers through 1974 had been destroyed about two weeks prior to defendant's 1976 arrest, which destruction deprived defendant of the opportunity to locate witnesses who might testify that the officers involved had used excessive or unnecessary force on past occasions, the municipal court committed reversible error in failing to impose sanctions on the prosecution, notwithstanding the contention that a city council resolution adopted pursuant to Gov. Code, § 34090, authorized the destruction, where the police department had submitted a vague and misleading request for permission to destroy miscellaneous records without disclosing the significance of the records or the purpose for which destruction was sought, and where, contrary to Gov. Code, § 34090, the resolution authorized the destruction of records less than two years old.

[See **Cal.Jur.3d,** Criminal Law, § 110; **Am.Jur.2d,** Evidence, § 177.]

(3) Criminal Law § 45--Rights of Accused--Fair Trial--Distortion or Suppression of Evidence--Destruction--Pursuant to Established Administrative Procedures.

In a prosecution for battery on a police officer (Pen. Code, § § 242, 243), and resisting an officer in the discharge of his duties (Pen. Code, § 148), in which it was disclosed that unsustained citizen complaints against police officers through 1974 had been destroyed about two weeks prior to defendant's 1976 arrest, which destruction deprived defendant of the opportunity to locate witnesses who might testify that the officers involved had used excessive or unnecessary force on past occasions, the municipal court committed reversible error in failing to impose sanctions on the prosecution, notwithstanding the contention that the records were lawfully destroyed pursuant to established administrative procedures, where the record disclosed no rigorous and systematic procedures designed to preserve evidence, but rather the wholesale destruction of records previously preserved.

(4) Criminal Law § 45--Rights of Accused--Fair Trial--Distortion or Suppression of Evidence--Destruction--In Absence of Intent to Deprive Particular Defendant of Useful Evidence.

In a prosecution for battery on a police officer (Pen. Code, § § 242, 243), and resisting ***91** an officer in the discharge of his duties (Pen. Code, § 148), in which it was disclosed that unsustained citizen complaints against police officers through 1974 had been destroyed about two weeks prior to defendant's 1976 arrest, which destruction deprived defendant of the opportunity to locate witnesses who might testify that the officers involved had used excessive or unnecessary force on past occasions, the municipal court committed reversible error in failing to impose sanctions on the prosecution, even though the records had not been destroyed with the express purpose of depriving this particular defendant of useful evidence, since proof of a specific intent to deprive a particular defendant of evidence, as contrasted to an intent to deny evidence to a class of potential defendants, is not a prerequisite to the imposition of sanctions. The purpose of the requirement that records of citizen complaints be retained for a reasonable period of time is to protect the discovery rights of those persons who have already been involved in altercations with the police as well as those who might be so involved in the future.

(5) Criminal Law § 45--Rights of Accused--Fair Trial--Distortion or Suppression of Evidence--Destruction--Imposition of Sanctions.

In a prosecution for battery on a police officer (Pen. Code, § § 242, 243), and resisting an officer in the discharge of his duties (Pen. Code, § 148), in which it was disclosed that unsustained citizen complaints against police officers through 1974 had been destroyed about two weeks prior to defendant's 1976 arrest, which destruction deprived defendant of the opportunity to locate witnesses who might testify that the officers involved had used excessive or unnecessary force on past occasions, the appropriate sanction for such destruction was an instruction to the jury that the officers at issue had used excessive or unnecessary force on each prior occasion when complaints had been filed against them, but that complaint records were later destroyed, along with an instruction that the jury could rely upon that information to infer that the officers were prone to use excessive or unnecessary force and that the officers' testimony regarding incidents of alleged police force might be biased.

(6) Criminal Law § 45--Rights of Accused--Fair Trial--Distortion or Suppression of Evidence--Destruction--Failure to Impose Sanctions--Prejudicial Error.

In a prosecution for battery on a police ***92** officer (Pen. Code, § § 242, 243), and resisting an officer in the discharge of his duties (Pen. Code, § 148), in which it was disclosed that unsustained citizen complaints against police officers through 1974 had been destroyed about two weeks prior to defendant's 1976 arrest, which destruction deprived defendant of the opportunity to locate witnesses who might testify

that the officers involved had used excessive or unnecessary force on past occasions, the trial court's failure to impose the sanction of an adverse finding that the officers had used excessive or unnecessary force on each past occasion when complaints had been filed against them constituted prejudicial error, where the evidence presented at trial was closely balanced, and where it could be presumed that the jury had discounted the testimony of defendant's witnesses, all of whom were friends or relatives. Access to the destroyed complaint files might have enabled defendant to call favorable witnesses who did not have such an obvious interest in the outcome of the trial.

COUNSEL

Irwin Siegel for Defendant and Appellant.

Quin Denvir, State Public Defender, Charles M. Sevilla, Chief Assistant State Public Defender, Wilbur F. Littlefield, Public Defender (Los Angeles), Dennis A. Fischer and Robert Berke, Deputy Public Defenders, A. Wallace Tashima, Tracy S. Rich and Morrison & Foerster as Amici Curiae on behalf of Defendant and Appellant.

John K. Van de Kamp, District Attorney, Harry B. Sondheim, Donald J. Kaplan and Richard W. Gerry, Deputy District Attorneys, for Plaintiff and Respondent.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Norman H. Sokolow, Acting Assistant Attorney General, Howard J. Schwab and Carol Wendelin Pollack, Deputy Attorneys General, Burt Pines, City Attorney (Los Angeles), George C. Eskin, Chief Assistant City Attorney, Rand Schrader, Laurie Harris and S. Thomas Todd, Deputy City Attorneys, as Amici Curiae on behalf of Plaintiff and Respondent. ***93**

TOBRINER, J.

Defendant appeals from convictions for battery on a police officer (Pen. Code, § § 242, 243) and resisting an officer in the discharge of his duties (Pen. Code, § 148). About two weeks before defendant's arrest in May of 1976, the Los Angeles City Attorney's office directed the destruction of all past records through 1974 of citizen complaints against police officers, excepting only complaints found meritorious by police investigation. As we shall explain, we have determined that the destruction of unsustained citizen complaints was entirely improper, and that such destruction deprived defendant of the opportunity to locate witnesses who could testify that on past occasions the officers involved in his case had used excessive or unnecessary force. [FN1] We therefore conclude that the trial court erred in failing to impose sanctions upon the prosecution.

> FN1 Unsustained complaints are discoverable as well as sustained complaints. (*Saulter v. Municipal Court* (1977) 75 Cal.App.3d 231, 240 [142 Cal.Rptr. 266]; *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 829 [133 Cal.Rptr. 325].)

In deciding the appropriate sanction in the present case we examine and weigh three considerations. First, we note that although the record indicates that complaint records were destroyed improperly, and with the knowledge that such records were subject to defense discovery, such destruction does not suffice to prove that the police or city attorney acted in bad faith. Second, the destroyed records are not material evidence, but merely a possible source through which defendants might discover witnesses to impeach the testifying officers. Third, although a sanction should be severe enough to deter improper destruction of records, the sanction of dismissal urged by the defendant would result in the unfortunate consequence that an officer named in a destroyed complaint could be assaulted or resisted with impunity. These considerations lead us to conclude that a severe sanction should be imposed but that dismissal of the charges against defendant would be too drastic.

We therefore believe that the correct sanction in this case is that proposed by Presiding Justice Klein in her opinion for the Court of Appeal: the trial court should instruct the jury (a) that the officers in question used excessive or unnecessary force on each occasion when complaints were filed against them but that the complaint records later were destroyed, and (b) that the jury may rely upon that information to infer that the officers are prone to engage in excessive or unnecessary force (see Evid. Code, § 1103) and that the officers' testimony regarding incidents ***94** of alleged police force may be biased (see Evid. Code, § 1101, subd. (c)). The failure of the trial court to impose this or any sanction upon the prosecution in the present case constitutes reversible error.

1. *Summary of proceedings below.*

Defendant was charged with one count of battery against Los Angeles Police Officer Nelson and one count of resisting Officer Nelson in the discharge of his duties. The prosecution evidence at trial indicated that on May 22, 1976, several officers responded to a call that defendant and his father, Raymond, were involved in an argument. Officer Nelson entered the Zamora home first and, according to the police testimony, defendant immediately attacked him. A scuffle ensued between the officers and defendant, his father, and his brother Pedro. The officers subdued and arrested the three Zamoras. According to defendant, as well as friends and relatives of defendant who witnessed the incident, however, Officer Soelitz, not Nelson, first entered the premises. The defense evidence indicated that Soelitz attacked defendant without provocation.

Defendant, his father, and his brother were tried jointly. The jury convicted defendant as charged, acquitted defendant's father, and deadlocked as to Pedro Zamora. Defendant appealed to the appellate department of the superior court, which reversed the conviction. The Court of Appeal transferred the cause to that court pursuant to California Rules of Court, rule 62(a); we granted a hearing following the Court of Appeal decision.

The principal issue on appeal relates to the destruction of police records by direction of the city attorney's office. Prior to trial, defendant's counsel made an informal request of the city attorney's office for discovery of records relating to the police officers involved. The city attorney agreed to produce records of any citizen complaints charging racial prejudice or excessive use of force against Officers Nelson, Soelitz, Schroyer, and Skiles; he assured counsel that the records would include the names, addresses, and phone numbers of the complainants.

The city attorney subsequently supplied the promised information as to Officer Nelson, and informed defendant that no complaints had been filed against Officer Skiles. With respect to Soelitz and Schroyer, however, he gave defendant only the names of complainants - without ***95** addresses or phone numbers - and stated that no further information was available.

Defendant's father, Raymond Zamora, filed a formal motion for discovery of the complaint records; defendant joined in the motion. At a hearing on the motion before Judge Michael Sauer, the prosecution revealed for the first time that all records of unsustained complaints from 1949 to 1974 were destroyed on May 5 and 7 of 1976, about two weeks before the incident at the Zamora home. Sergeant Stark of the city police department acknowledged that the police knew that the records might have some relevancy in criminal proceedings, but insisted that an order of the city council sanctioned the destruction. Judge Sauer concluded that the records were "destroyed by the City Council on the advice of the attorneys, advice of the City Clerk, advice of the various agencies, that they be destroyed. There has been no showing that they were done deliberately to keep you [Zamoras' attorneys] from receiving such information."

Defendant renewed his discovery motion before Judge Mary Waters, who presided at the trial. Defendant attached to his motion a copy of the police request to the city council for "authority to destroy obsolete records," noting that the request referred only to "miscellaneous files and memos" and did not suggest that the police sought destruction of complaint records subject to defense discovery. He attached also the resolution of the city council in response to that request. [FN2] The resolution states that numerous city departments, including the police department, "desire to destroy certain records ... which have served their purpose and are no longer required." Reciting that "none of said records ... are less than five (5) years old," the resolution approves requests for destruction of a variety of city records including miscellaneous police records through 1974. [FN3] In a postconviction hearing Judge Waters reviewed these documents and the transcript of the hearing before Judge Sauer, and concluded that the destruction of records was "not deliberate, malicious, or wilful." ***96**

FN2 The declarations submitted by defendant to verify the police request and the council resolution did not reflect the place of execution of the declarations. (See Code Civ. Proc., § 2015.5.) The authenticity of the documents themselves, however, is not questioned.

FN3 We note that under Government Code section 34090 as it then read, the city council lacked authority to approve destruction of records less than two years old. The city council resolution adopted

May 3, 1976, appears to violate this statute by authorizing destruction of records through the end of 1974. It is not clear, however, whether any records less than two years old were actually destroyed.

(1) During the pendency of the present appeal, defense counsel in other cases developed additional facts and obtained further documents concerning the destruction of the complaint records. The Los Angeles County Public Defender, appearing here as amicus curiae, has asked us to take judicial notice of the records in three such cases and of a number of documents discovered and admitted into evidence in other cases. The People oppose our taking judicial notice on the ground that the requested documents and court files relate to evidentiary matters which should have been presented to the trial court. (See *People v. Preslie* (1977) 70 Cal.App.3d 486, 493 [138 Cal.Rptr. 828]; *People* v. *Superior Court* (*Mahle*) 3 Cal.App.3d 476, 482, fn. 3 [83 Cal.Rptr. 732].) Although we regret that we must thus decide the present appeal upon a record less complete than that developed in later cases, we find the People's position viable and decide that we should not take judicial notice of matters which should have been, but were not, presented to the trial court.

2. *The municipal court erred in failing to impose sanctions on the prosecution for the destruction of complaint records.*

"[T]he intentional suppression of material evidence favorable to a defendant who has requested it constitutes a violation of due process, irrespective of the good or bad faith of the prosecution." (*People* v. *Hitch* (1974) 12 Cal.3d 641, 645 [117 Cal.Rptr. 9, 527 P.2d 361]; *Dell M. v. Superior Court* (1977) 70 Cal.App.3d 782, 786 [144 Cal.Rptr. 418].) Although complaint records themselves may not be material evidence, the defendant is entitled to discovery of such records because they may lead to evidence admissible under Evidence Code section 1103. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537-538 [113 Cal.Rptr. 897, 522 P.2d 305].) Consequently, courts have not hesitated to conclude that the suppression or destruction of discoverable complaint records also constitutes a violation of due process. (See *Dell M. v. Superior Court, supra*, 70 Cal.App.3d 782, 786.) The court must impose appropriate sanctions in such a case in order to uphold defendant's right to a fair trial and to deter prosecution attempts to defy or circumvent judicial authority.

The prosecution does not dispute the fact that the city attorney's office destroyed complaint records, and that the destruction of the records deprived defendant of the opportunity to locate witnesses who might ***97** testify concerning the officers' past use of excessive or unnecessary force. Seeking to avoid the imposition of sanctions which would ordinarily follow from such undisputed facts, the prosecution argues that the records were lawfully destroyed pursuant to a resolution of the Los Angeles City Council and established administrative procedures, and not with the specific purpose of violating the rights of defendant Zamora. [FN4] As we shall explain, the prosecution's arguments cannot stand analysis.

FN4 The People contend that defendant's discovery request was overbroad and did not show sufficient cause for discovery; they further argue that production of the names of complainants sufficiently complied with the request and production of addresses would be useless. The Court of Appeal properly rejected all these contentions. Its opinion notes: "The People ... did not question the sufficiency of defendant's discovery request in the court below or demand that a formal motion be made, but instead expressly agreed to provide the names and addresses of the pertinent complainants. Since defendant was thus led to believe that his discovery request would be complied with without a further showing on his part, it would be manifestly unfair at this late stage to give consideration to the People's criticisms of that request. (Cf. *Kelvin L. v. Superior Court, supra*, 62 Cal.App.3d 823, 827 [133 Cal.Rptr. 325]; see *People* v. *McManis* (1972) 26 Cal.App.3d 608, 617-618 [102 Cal.Rptr. 889], regarding compliance with informal discovery requests.)

"Further, since the prosecution's agreement to comply with defendant's discovery request included an express promise to supply the addresses of the citizen complainants, the People will likewise not be heard to argue now that the production of some of the complainants' names alone was sufficient for compliance or that the missing addresses would, in all probability, have been useless to the defense because of their ages. We note only that even if a substantial

> number of the complainants were no longer living at the addresses stated in the destroyed files, the addresses, if available, could no doubt have provided leads to the complainants' current whereabouts."

(2) The prosecution urges as its first contention that the city council authorized the destruction by a resolution adopted pursuant to Government Code section 34090, which states that: "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 the destruction of: ... [¶] (d) Records less than two years old. ..." [FN5] ***98**

> FN5 At the time of the destruction of the complaint files in May 1976, Government Code section 34090 was the operative statute authorizing the destruction of the records. As of January 1, 1979, however, that section was superseded by the more specific provisions of Penal Code section 832.5, which requires retention of complaints for a period of at least five years. The 1978 Legislature also enacted Evidence Code section 1045, barring defense discovery of complaints concerning conduct occurring more than five years before the event which is the subject of the litigation.

Citing *City of Sacramento v. Municipal Court (Pope)* (1978) 83 Cal.App.3d 795 [148 Cal.Rptr. 114] (hereafter cited as *Pope*), the People maintain that no sanction should be imposed if records are destroyed pursuant to the quoted language of section 34090. The present case, however, does not exemplify the strict compliance with statutory requirements for the destruction of records that justified *Pope's* refusal to impose sanctions. In the present case the Los Angeles Police Department, acting apparently under advice of the city attorney's office, submitted a vague and misleading request for destruction of miscellaneous records without disclosing the significance of the records nor the purpose for which destruction was sought. The city council apparently approved the request under the mistaken impression that the records were more than five years old and no longer useful. We doubt that the Los Angeles City Council actually considered and intended to approve the destruction of any records discoverable by defendants and less than five years old.

Furthermore, as we noted earlier, the resolution of the council did not comply with section 34090 since it authorized destruction of records less than two years old. The Attorney General recently observed that "if destruction is desired [under Gov. Code, § 34090], it may only be done in the manner provided for by the statute. The mode prescribed is the measure of the power." (57 Ops.Cal.Atty.Gen. 307, 310 (1974).) We conclude that the People cannot justify the destruction of the records by reliance upon section 34090 and the city council resolution.

(3) Secondly, the People may not avoid sanctions by reliance upon our statement in *People* v. *Hitch, supra*, 12 Cal.3d 641, 652-653, to the effect that "intentional but nonmalicious destruction" of evidence did not warrant sanctions if "the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve" the evidence. The present record discloses no "rigorous and systematic procedures" designed to preserve evidence, but the wholesale destruction of records previously preserved. [FN6] ***99**

> FN6 We also distinguish the Court of Appeal decision in *Robinson v. Superior Court* (1978) 76 Cal.App.3d 968 [143 Cal.Rptr. 328]. The court there did not impose any sanctions because of the destruction of jailhouse visitor passes, since such passes were not intended as records and the police were not aware that their preservation might aid the defense. In the present case, the complaint files were records retained by the city for many years; the city attorney's office was aware that such records were discoverable under our decision in *Pitchess* v. *Superior Court, supra*, 11 Cal.3d 531, because of their potential usefulness to defendants.

(4) We reject also the last ground advanced by the prosecution: that the city did not destroy the records with the express purpose of depriving this particular defendant of useful evidence. Proof of a specific intent to deprive a particular defendant of evidence, as contrasted to an intent to deny evidence to a class of potential defendants, is not a prerequisite to

imposition of sanctions. Our decision in *Pitchess* establishing the right of defendants to discover citizen complaints necessarily implies a duty on the city's part to retain such records for a reasonable period of time. (See *Pope, supra,* at p. 799; cf. *People v. Nation* (1980) 26 Cal.3d 169, 175 [161 Cal.Rptr. 299, 604 P.2d 1051].) The purpose underlying that obligation is to protect the discovery rights of persons involved in altercations with the police. We drew no distinction in *Pitchess* between persons who had already been involved in such altercations and those who might be involved in the future; we make no such distinction here; the destruction of records involved in this case equally violates the discovery rights of both classes of defendants. Redress of that violation requires the imposition of appropriate sanctions by the trial court.

(5) 3. *An instruction to the jury relating the destruction of the complaint records to the officers' testimony is the appropriate sanction in the present case.*

Defendant argues that the only appropriate sanction in the present case is dismissal of all charges against him. The People, on the other hand, relying on the trial court's failure to find bad faith, urge that only minimal sanctions or none at all be imposed. As we explain, in our view, this case, falling between the two positions, calls for a severe sanction but one short of dismissal of the charges.

We first observe that the courts enjoy a large measure of discretion in determining the appropriate sanction that should be imposed because of the destruction of discoverable records and evidence. "[N]ot every suppression of evidence requires dismissal of charges. ... The remedies to be applied need be only those required to assure the defendant a fair trial." (*Brown v. Municipal Court* (1978) 86 Cal.App.3d 357, 363 [150 Cal.Rptr. 216]; see *Dell M. v. Superior Court, supra,* 70 Cal.App.3d 782, 788.) [FN7] ***100**

FN7 Courts and Legislatures have displayed considerable flexibility in devising remedies fashioned to the facts of each particular case. In *People v. Hitch, supra,* 12 Cal.3d 641, failure of the police to preserve a breath ampoule led not to dismissal of the charges, but rendered the breath alcohol test inadmissible. In *Brown v. Municipal Court, supra,* 86 Cal.App.3d 357, police refusal to allow a defendant to take a blood alcohol test rendered inadmissible a breath alcohol test favorable to the prosecution. In *Giglio v. United States* (1972) 405 U.S. 150 [31 L.Ed.2d 104, 92 S.Ct. 849], the prosecution concealed a promise of immunity to a witness; the court ordered a new trial in which the evidence was disclosed. Finally, under Evidence Code section 1042, prosecution assertion of a privilege of nondisclosure results in an adverse finding "upon any issue in the proceeding to which the privileged information is material."

Review of prior cases suggests the factors that guide the exercise of that discretion. First, "the imposition and mode of sanctions depends upon the particular circumstances attending such loss or destruction." (*People v. Hitch, supra,* 12 Cal.3d 641, 650 [117 Cal.Rptr. 9, 527 P.2d 361].) Thus lawful and proper destruction requires no sanction (*Pope, supra,* 83 Cal.App.3d 795; *Robinson v. Superior Court, supra,* 76 Cal.App.3d 968); illegal and malicious suppression of evidence may result in dismissal (see *People v. Mejia* (1976) 57 Cal.App.3d 574 [129 Cal.Rptr. 192]; *Dell M. v. Superior Court, supra,* 70 Cal.App.3d 782).

Second, the sanction depends on the materiality of the evidence suppressed. In *Hitch,* for example, we noted that bad faith destruction of evidence which might conclusively demonstrate innocence could require dismissal. (12 Cal.3d 641, 653, fn. 7.) Suppression of evidence which might impeach a witness for bias, however, may result in a new trial instead of a dismissal (*Giglio v. United States, supra,* 405 U.S. 150); suppression of evidence immaterial to the charge invokes no sanction (see *Dell M. v. Superior Court, supra,* 70 Cal.App.3d 782, 788).

Finally, the courts must consider the impact of the sanction upon future cases and future police conduct. If a sanction is to deter suppression of records and evidence, it must contain a punitive element; it must outweigh the benefit that the prosecution gains from the suppression. At the same time the court must bear in mind the public interest in law enforcement, and the harm which may be inflicted by a sanction which prevents the trial and conviction of possibly guilty future defendants.

We examine the record in the present case in light of the foregoing considerations, looking first at the circumstances of the destruction of the records. Two

municipal court judges, after hearing and argument, found that the destruction here was not malicious or perpetrated in bad faith; on the limited record of this case we cannot overturn that finding. Nevertheless, the police department and the city attorney's office knew that the records were subject to defense discovery. They knew, too, that ***101** the process which led to the approval of the destruction of the records had not afforded the ground for a careful and informed decision of the city council. If defendant here has proven less than a malicious and bad faith suppression of evidence, he has still shown more than a proper and innocent act which might avoid sanction.

Militating against defendant's proposed sanction of dismissal, however, is the fact that the suppressed records do not contain material evidence. If the records had not been destroyed, defendant could have learned the addresses and phone numbers (several years old) of persons who made unsustained charges against two of the officers involved. Defendant could possibly have located some of those persons; they might possibly have been suitable witnesses; the jury might have believed them and inferred that the officers, having used improper force in the past, did so again when they entered the Zamora residence. But this chain of possibilities, leading at most to impeachment evidence, does not demonstrate the need for the severe sanction suggested for suppression of conclusive evidence (see *People v. Hitch, supra*, 12 Cal.3d 641, 653, fn. 7) or material witnesses (see *People v. Mejia, supra*, 57 Cal.App.3d 574).

Finally, we recognize the desirability of the imposition of some sanction to deter future destruction of records or evidence in similar circumstances. We therefore reject the suggestion that the jury should merely be told that records of unsustained complaints were destroyed; such a proposal imposes no penalty on the prosecution; the prosecution may well prefer such an instruction to the nuisance of having to produce records for discovery.

The threatening effect of the sanction upon future law enforcement, however, impels us to reject the claim that dismissal is the appropriate penalty. If we ordered dismissal of the charges against this defendant, then on any future occasion when a defendant is accused of assaulting or resisting Officer Soelitz or Officer Schroyer, such defendant could claim the officer's use of unnecessary or excessive force provoked the encounter, and demand discovery of the complaint records. Similarly, any time either officer was an essential witness to an assault of another person, the defendant could demand the records to investigate whether the officer was biased. Since the records have been destroyed and could not be produced, the defendant in such a future case being similarly situated ***102** as defendant Zamora in the present case, would be entitled to the same sanction. If that sanction is dismissal of the charges, then anyone who assaulted those officers or engaged in forceful resistance to arrest by them would be immune from prosecution. [FN8]

> FN8 The effect on the officers would resemble the ancient and obsolete punishment of outlawry, under which "one is deprived of the benefit of the law, and out of the King's protection." (3 Stroud's Judicial Dict. (4th ed. 1973) p. 1900.)

Thus the trial court could foresee as the consequence of a dismissal in the present case the creation of a cadre of police officers who could not be called upon to quell a disturbance or to make an arrest because those resisting their authority could not be prosecuted. Indeed, the officers' personal safety might be seriously endangered. A police officer performing his duties will necessarily arouse anger and incur enmity; public knowledge that an assailant cannot be convicted for an assault on the officer would pose an extreme hazard. [FN9]

> FN9 The same reasons which induce us to reject the sanction of dismissal lead us to reject the proposal that the officers named in the complaints should be barred from testifying. Such a sanction would mean that the named officers could be assaulted or resisted with impunity so long as they were alone, and that other persons could also be assaulted when the officer was a crucial witness to the assault.

The officers named in the complaints did not decide to destroy the records of the complaints; the Los Angeles City Attorney's office did so. If that destruction were unlawful, and executed with the intent to thwart defense discovery, sanctions ranging from internal disciplinary measures to criminal prosecution (see Gov. Code, § 6200 (wilful destruction of public records)) were available to punish the malefactors. Since many of those persons

are attorneys, a state bar inquiry would also be possible. Such penal and administrative sanctions would single out those actually responsible for the destruction of the records, without endangering the officers named in the complaints or impairing the public interest in the trial of persons accused of crime. The administrative sanctions might be more effective in deterring future conduct than would the dismissal of criminal charges.

For the foregoing reasons, we conclude that the appropriate sanction is that set out in the opinion of the Court of Appeal. According to that opinion, upon remand of this case, the court should instruct the jury that Officers Soelitz and Schroyer used excessive or unnecessary force on each occasion when complaints were filed against those officers, but ***103** that the complaint records later were destroyed. [FN10] The court should also instruct the jury that they may rely upon that information to infer that the officers were prone to use excessive or unnecessary force (see *Kelvin L. v. Superior Court, supra*, 62 Cal.App.3d 823, 831) and that the officers' testimony regarding incidents of alleged police force may be biased. (Cf. *Cadena v. Superior Court* (1978) 79 Cal.App.3d 212, 221-222 [146 Cal.Rptr. 390].)

> FN10 Because we do not believe the city council intentionally authorized the destruction of any complaint records, we draw no distinction between records which could have been lawfully destroyed pursuant to a resolution conforming to Government Code section 34090 and those which could not lawfully be destroyed.

In our opinion, the sanction of a jury instruction will adequately redress the actual harm done to defendant by the destruction of the complaints. It will not, of course, provide him with a live witness who can testify to past police misconduct. The instruction, however, substantially favors defendant in other respects. First, it assumes that the destroyed records would have led defendant to favorable evidence; in reality, defendant might not have been able even to locate the witnesses identified in the records or, if he had found them, the resulting testimony might have proven useless. Second, the instruction deprives the prosecution of the opportunity to rebut the evidence of past misconduct by the officers. Finally, it prohibits the jurors from rejecting such evidence, although in the absence of the instruction such rejection would have been their prerogative.

We would thus tailor the sanction to compensate for the exact wrong done; we would attempt to remedy the harm to the victims by giving them the approximate equivalent of the destroyed records of the complaints. We prefer this redress to the imposition on the officers of the drastic penalty of denial of current and future defenses.

(6) 4. *The trial court's failure to impose the sanction of an adverse finding constitutes prejudicial error.*

With respect to this point we adopt the opinion of the Court of Appeal. It explained that: "The evidence presented at trial was closely balanced, as is reflected in the fact that defendant's two codefendants both escaped conviction .... Indeed, the trial was essentially reduced to a credibility contest in which the testimony of the arresting officers was to be weighed against that of defendant and his witnesses. Since all of the witnesses who testified on defendant's behalf were either friends ***104** or relatives, it can be presumed that the jury discounted their testimony because of apparent bias. Access to the now destroyed complaint files may very well have enabled defendant to call favorable witnesses who did not have such an obvious interest in the outcome of the trial. That defendant was deprived of a fair trial by virtue of the absence of appropriate sanctions is accordingly manifest." [FN11]

> FN11 "The People assert that whatever error occurred below should be assessed against the 'miscarriage of justice' standard explicated in *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]. But since suppression of evidence constitutes a violation of a defendant's due process rights (*People v. Hitch, supra*, 12 Cal.3d 641, 645; *People v. Kiihoa* (1960) 53 Cal.2d 748, 752 [3 Cal.Rptr. 1, 349 P.2d 673]), it would appear that the proper test to be employed here is that enunciated in *Chapman* v. *California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710- 711, 87 S.Ct. 824, 24 A.L.R.3d 1065] for errors of a constitutional nature. (See *People* v. *Ruthford* (1975) 14 Cal.3d 399, 408 [121 Cal.Rptr. 261, 534 P.2d 1341].) Actually, with respect to the case at bench, the distinction between the two tests is of no significance since the error in question could not be considered harmless under either." (Fn. by the Court of Appeal.)

For the foregoing reasons the judgment is reversed.

Mosk, J., and Newman, J., concurred.

MANUEL, J.,

Concurring and Dissenting.

I concur in the judgment. While I am in accord with the views of the majority as to why the extreme sanction of dismissal should not be imposed, I am of the belief that under the circumstances disclosed by the record the severe penalty suggested by the Court of Appeal and adopted by the majority is unreasonable.

This is not a case where evidence existing contemporaneously with or subsequent to the event in question was destroyed. Rather, as the majority notes, the evidence was destroyed about two weeks before the incident at the Zamora home. Nor is this a case where evidence was destroyed in order to put this appellant at a disadvantage. (Maj. opn., *ante*, pp. 94-95.) Judge Sauer concluded that there was no showing that the destruction was done to keep defendant from receiving information contained in the destroyed documents. Judge Waters concluded that the records were not destroyed deliberately, maliciously or willfully.

Unlike *People v. Hitch* (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9, 527 P.2d 361], we are not here concerned with an item of evidence which is ***105** directly determinative on the issue of guilt or innocence. In *Hitch* the item sought was the breath sample from which evidence of the alcoholic content of the blood of the accused automobile driver could be ascertained. Evidence obtained in a pending case was there destroyed. Here the majority agrees that the records sought are not material evidence.

This is not a case where the missing records were known to contain meritorious complaints of police conduct. Rather the complaints involved here were unsustained.

The best that can be said for the defendant's position, in the record before us, is that the records were destroyed in apparent violation of Government Code section 34090. [FN1] In my view under the circumstances here presented, there is no such sinister conduct attending the destruction of the records as to warrant either dismissal of the suit or the giving of the instruction suggested by the majority. Our law furnishes ample guidelines for cases such as this - guidelines applicable to all parties, prosecutors and defendants alike. Evidence Code section 413 provides in part: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's ... willful suppression of evidence relating thereto ...." With respect to a defendant's conduct juries may be instructed "If you find that a defendant attempted to suppress evidence against himself in any manner, such as [by destroying evidence] such attempts may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your consideration." (CALJIC No. 2.06 (4th ed. 1979).)

> FN1 I assume, for it has not been otherwise argued, that the City of Los Angeles, a chartered city, is bound by that code section. (See Cal. Const., art. XI, § 5, subd. (a).)

Under the circumstances revealed by the record in this case, it would appear that the most that defendant could reasonably expect would be an instruction based on Evidence Code section 413 and perhaps patterned on CALJIC No. 2.06, informing the jury that a specific number of complaints had been lodged against the officer in the past, that these records had been destroyed and that the jury may bear this in mind in determining whether this officer had a propensity to use excessive or unnecessary force. No more is required on the facts of this case. Application of the law, not the devising of sanctions should be our rule. ***106**

Clark, J., and Richardson, J., concurred.

BIRD, C. J.,

Concurring and Dissenting.

I concur in the judgment and, for the sole purpose of achieving a single majority position to guide the trial court on remand, I join in the instructional directions to the trial court set forth in Justice Tobriner's

opinion. However, I respectfully disagree with the reasoning of the lead opinion since it would effectively foreclose dismissal as a sanction in any case which involved the wholesale destruction of discoverable evidence. As a result, the lesson the police will draw from this decision is that if they maliciously destroy all the records which contain discoverable materials at one time, they do not have to fear any sanctions or reprisals. However, if they refuse on a case by case basis to disclose discoverable records, they face the possibility of dismissal of their case and contempt of court. (See *Dell M. v. Superior Court* (1977) 70 Cal.App.3d 782 [144 Cal.Rptr. 418].) I cannot join in reasoning that sanctions such an illogical result.

Respondent's petition for a rehearing was denied October 16, 1980. Clark, J., Richardson, J., and Manuel, J., were of the opinion that the petition should be granted. ***107**

Cal.,1980.

People v. Zamora

END OF DOCUMENT

Hearing: June 20, 2003
File: mandates/99TC08/item2-face

ITEM 2

REQUEST FOR RECONSIDERATION BY COMMISSION MEMBER

Penal Code Section 13730,
As Added And Amended By Statutes 1984, Chapter 1609, And Statutes 1995, Chapter 965

Family Code Section 6228,
As Added By Statutes 1999, Chapter 1022

Crime Victims' Domestic Violence Incident Reports (99-TC-08)
Filed by County of Los Angeles, Claimant

Executive Summary

This is a request for reconsideration made by the Commission Chairperson to reconsider the Commission's decision adopted on May 29, 2003, on this claim pursuant to Government Code section 17559 and section 1188.4 of the Commission's regulations.

On May 29, 2003, the Commission adopted a statement of decision partially approving this test claim for the activity of storing domestic violence incident reports and face sheets for five years pursuant to Family Code section 6228, subdivision (e). This finding 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 reports 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.

RECOMMENDATION

Staff recommends that the Commission grant this request for reconsideration.

Note: If the Commission grants the request for reconsideration, a hearing shall be conducted to determine if the prior final decision is contrary to law and to correct an error of law, pursuant to section 1188.4, subdivision (g) of the Commission's regulations.

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

COMMISSION ON STATE MANDATES
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June 5, 2003

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

RE: Request for Reconsideration of Statement of Decision
Crime Victims' Domestic Violence Incident Reports, 99-TC-08

Dear Ms. Higashi:

I am requesting that the Commission reconsider the Statement of Decision adopted on May 29, 2003, on the *Crime Victims' Domestic Violence Incident Reports* test claim. The Commission determined that the activity of storing the incident reports and face sheets for five years was a reimbursable activity. The Statement of Decision, however, does not take into consideration prior law, codified in Government Code sections 26202 and 34090, which requires counties and cities to maintain records for two years.

I am directing staff to prepare the request for reconsideration pursuant to the Commission's regulations.

Sincerely,

Robert Miyashiro

STEVE PEACE
Chairperson
Commission on State Mandates

REQUEST FOR RECONSIDERATION BY COMMISSION MEMBER
(Gov. Code, § 17559; Cal. Code Regs., tit. 2, § 1188.4)

Penal Code Section 13730,
As Added and Amended by Statutes 1984, Chapter 1609, and Statutes 1995, Chapter 965

Family Code Section 6228,
As Added by Statutes 1999, Chapter 1022

***Crime Victims' Domestic Violence Incident Reports* (99-TC-08)**

Filed by County of Los Angeles, Claimant

This is a request for reconsideration made by the Commission Chairperson to reconsider the Commission's decision adopted on May 29, 2003, on this claim pursuant to Government Code section 17559 and section 1188.4 of the Commission's regulations.

Background

Government Code section 17559, subdivision (a), grants the Commission, within statutory timeframes, discretion to reconsider a prior final decision. That section states the following:

> The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

Section 1188.4 of the Commission's regulations authorizes any Commission member to request reconsideration to correct an error of law if the request is made no later than 30 days after the statement of decision is delivered or mailed to the claimant. (Cal. Code Regs., tit. 2, § 1188.4, subd. (b).) The regulations require that all requests for reconsideration be submitted in writing and shall contain the name and address of the requesting party; a copy of the Commission's prior final decision; a detailed statement of the reasons for the request; a description of the proposed change to be made in the prior final decision; and a statement that the request for reconsideration and all attachments have been sent to the claimant, interested parties, and affected state agencies. (Cal. Code Regs., tit. 2, § 1188.4, subd. (c).)

The Commission Chairperson is requesting reconsideration of this decision and has requested staff to prepare this request.

Statement of Decision

On May 29, 2003, the Commission adopted a statement of decision partially approving this test claim for the activity of storing domestic violence incident reports and face sheets for five years pursuant to Family Code section 6228, subdivision (e). The Commission concluded the following:

> 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 five 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.

The Commission found that the activity of storing the reports for five years constituted a new program or higher level of service for the following reasons:

> 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 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 Commission agrees.
>
> Under prior law, local law enforcement agencies are required to provide daily reports of misdemeanor and felony offenses, and a monthly report on domestic violence calls, to the Attorney General and the Department of Justice.[1] *But, the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence. Record retention policies were left to the discretion of the local agency.*
>
> Accordingly, the Commission finds that storing the domestic violence incident report and face sheet for five years constitutes a new program or higher level of service. (Emphasis added.)

The statement of decision was mailed to the claimant, interested parties, and affected state agencies on June 3, 2003. A copy of the statement of decision is attached to this request.

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[1] Penal Code section 11107 (added by Stats. 1953, ch. 1385); Penal Code section 13730 (added by Stats. 1984, ch. 1609). As indicated above, Penal Code section 13730 has been suspended by the Legislature.

Reason for the Request and Proposed Correction to Statement of 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.

Copies of Government Code sections 26202 and 34090 are attached to this request.

C

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 3. GOVERNMENT OF COUNTIES
DIVISION 2. OFFICERS
PART 2. BOARD OF SUPERVISORS
CHAPTER 13. MISCELLANEOUS POWERS

Current through Ch. 3 of 2003-04 Reg.Sess. urgency legislation,
Ch. 4 of 1st Ex.Sess. urgency legislation, & Ch. 1 of 2nd Ex.Sess.

§ 26202. Destruction of old records

The board may authorize the destruction or disposition of any record, paper, or document which is more than two years old and which was prepared or received in any manner other than pursuant to a state statute or county charter. The 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.

CREDIT(S)

1988 Main Volume

(Added by Stats.1947, c. 424, p. 1138, § 1. Amended by Stats.1957, c. 1180, p. 2472, § 1; Stats.1963, c. 1123, p. 2597, § 1.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

1988 Main Volume

Derivation: Pol.C. § 4041.39, added Stats.1939, c. 246, p. 1503, § 1.

LIBRARY REFERENCES

1988 Main Volume

Records 22.

C.J.S. Records § § 73, 75, 76.

NOTES OF DECISIONS

Boards of education 1
Bonds and coupons 2

1. Boards of education

The records of county boards of education dealing with school affairs are records of "state agencies" within meaning of § § 14755, 14756 governing the destruction of records of state agencies, and are not records of a department of the county within § § 26201 to 26205. 27 Ops.Atty.Gen. 161.

2. Bonds and coupons

Cancelled bonds and coupons of paid-up issues of county sanitary districts, road improvement districts, school districts, and various other county sub- divisions may be destroyed in accordance with procedures set forth in § § 26201, 26205 and this section. 18 Ops.Atty.Gen. 111.

West's Ann. Cal. Gov. Code § 26202

CA GOVT § 26202

END OF DOCUMENT

C

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 4. GOVERNMENT OF CITIES
DIVISION 1. CITIES GENERALLY
CHAPTER 1. GENERAL
ARTICLE 4. MISCELLANEOUS

Current through Ch. 3 of 2003-04 Reg.Sess. urgency legislation,
Ch. 4 of 1st Ex.Sess. urgency legislation, & Ch. 1 of 2nd Ex.Sess.

§ 34090. Destruction of city records; excepted records; construction

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 the destruction of:

(a) Records affecting the title to real property or liens thereon.

(b) Court records.

(c) Records required to be kept by statute.

(d) Records less than two years old.

(e) The minutes, ordinances, or resolutions of the legislative body or of a city board or commission.

This section shall not be construed as limiting or qualifying in any manner the authority provided in Section 34090.5 for the destruction of records, documents, instruments, books and papers in accordance with the procedure therein prescribed.

CREDIT(S)

1988 Main Volume

(Added by Stats.1949, c. 79, p. 101, § 1. Amended by Stats.1955, c. 1198, p. 2214, § 2; Stats.1975, c. 356, p. 801, § 1.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

1988 Main Volume

Derivation: Gov.C. § 1225, added Stats.1945, c. 803, p. 1497, § 1.

WEST'S CALIFORNIA CODE FORMS

1988 Main Volume

See West's Cal. Code Forms, Govt. § 34090--FORM 1.

CROSS REFERENCES

Legislative action by resolution, see Government Code § 50020.

Theft or destruction of public records and documents, see Government Code § 6200 et seq.

LIBRARY REFERENCES

2003 Electronic Update

California Jury Instructions--Criminal [CALJIC].

1988 Main Volume

Records 22.
C.J.S. Records § 73 et seq.

Legal Jurisprudences
Cal Jur 3d Recds § 11.
66 Am Jur 2d Records and Recording Laws § § 10 et seq.

Treatises and Practice Aids
Witkin, Evidence (3d ed) § 1652.

Additional References
McKinney's Cal Dig Records § 44.

NOTES OF DECISIONS

1. Complaints against police

State could not justify destruction of unsustained citizen complaints against police officers by reliance upon this section governing destruction of records and resolution by city council, which apparently approved vague and misleading request by city police department for destruction of miscellaneous records without disclosing significance of the records nor purpose for which destruction was sought, under the mistaken impression that the records were more than five years old and no longer useful, when in fact the resolution authorized destruction of records less than two years old in violation of this section. People v. Zamora (1980) 167 Cal.Rptr. 573, 28 Cal.3d 88, 615 P.2d 1361.

Where it was not contended that provision of this section or city council resolution, pursuant to which police internal affairs records more than two years old had been destroyed, was unconstitutional, and where the records had been destroyed before defendant did acts resulting in his being charged with wilfully resisting, delaying or obstructing officers in performance of their duties, issuance of prerogative writ to prohibit municipal court from enforcing its subpoena and subpoena duces tecum concerning police policy regarding disclosure or destruction of information about peace officers as contained in police files was affirmed. City of Sacramento v. Municipal Court in and for Sacramento County (App. 3 Dist. 1978) 148 Cal.Rptr. 114, 83 Cal.App.3d 795.

2. Exceptions

Videotapes made by security cameras on public buses and other transit vehicles are required to be retained for one year; the retention period may be reduced to ninety (90) days under specified circumstances. Op.Atty.Gen. No. 02-207 (December 20, 2002).

If any of the exceptions in this section exist the record may not be destroyed unless the provisions of § 34090.5 are complied with by the city officer having custody of the record. 57 Ops.Atty.Gen. 307, 6-20-74.

The legislature intended, by § 34090.5, that before any city record which is covered by the exceptions in this section is destroyed two microfilm or other type copies must be made and retained indefinitely. 57 Ops.Atty.Gen. 307, 6-20-74.

Provided that copies of original city documents are made and preserved pursuant to § 34090.5, there is no requirement as to how long original documents must be kept before they are microphotographed and destroyed. 57 Ops.Atty.Gen. 307, 6-20-74.

3. Tape recordings of council meetings

Where the city clerk makes an authorized tape recording of a city council meeting to facilitate the preparation of the minutes: (a) any person has a right to inspect the tape which includes the right to listen to the tape on equipment provided by the city, (b) any person has a right to receive a copy of the tape which includes the right to buy a duplicate copy from the city or to make a duplicate copy on his own equipment but does not include the right to have a written transcript made, and (c) the tape recording may be destroyed at any time if the purpose for which it was made and retained was solely to facilitate the preparation of the minutes of the meeting but if the tape was made or retained to also preserve its informational content for public reference it may only be destroyed as expressly authorized by state law. 64 Ops.Atty.Gen. 317, 4-17-81.

4. Police personnel records

Defendant failed to show bad faith in police department's failure to preserve evidence consisting of personnel records of interrogators who allegedly coerced confession, and, thus, destruction of them did not violate due process; although records were destroyed two months after oral argument in appeal concerning motion for discovery, they were kept three years beyond two-year statutory period for preservation. People v. Memro (1995) 47 Cal.Rptr.2d 219, 11 Cal.4th 786, 12 Cal.4th 783D, 905 P.2d 1305, modified on denial of rehearing, certiorari denied 117 S.Ct. 106, 519 U.S. 834, 136 L.Ed.2d 60.

Trial court's refusal to impose sanction for police department's failure to preserve evidence consisting of personnel records of interrogators who allegedly coerced confession was not abuse of discretion or violation of due process; although records were destroyed two months after oral argument in appeal concerning motion for discovery, they were kept three years beyond two- year statutory period for preservation, and court could conclude that department did not realize possibility of need for records after court in prior trial denied discovery motion. People v. Memro (1995) 47 Cal.Rptr.2d 219, 11 Cal.4th 786, 12 Cal.4th 783D, 905 P.2d 1305, modified on denial of rehearing, certiorari denied 117 S.Ct. 106, 519 U.S. 834, 136 L.Ed.2d 60.

5. Review

Deferential standard applied to review of trial court's decision to consider secondary evidence of records sought by defendant, but destroyed by police department. People v. Memro (1995) 47 Cal.Rptr.2d 219, 11 Cal.4th 786, 12 Cal.4th 783D, 905 P.2d 1305, modified on denial of rehearing, certiorari denied 117 S.Ct. 106, 519 U.S. 834, 136 L.Ed.2d 60.

Trial court's inquiry whether evidence was destroyed in good faith or bad faith is essentially factual; therefore, proper standard of review is substantial evidence. People v. Memro (1995) 47 Cal.Rptr.2d 219, 11 Cal.4th 786, 12 Cal.4th 783D, 905 P.2d 1305, modified on denial of rehearing, certiorari denied 117 S.Ct. 106, 519 U.S. 834, 136 L.Ed.2d 60.

6. Burden of proof

Defendant had burden to show bad faith in police department's failure to preserve evidence consisting of personnel records of interrogators who allegedly coerced confession. People v. Memro (1995) 47 Cal.Rptr.2d 219, 11 Cal.4th 786, 12 Cal.4th 783D, 905 P.2d 1305, modified on denial of rehearing, certiorari denied 117 S.Ct. 106, 519 U.S. 834, 136 L.Ed.2d 60.

West's Ann. Cal. Gov. Code § 34090

CA GOVT § 34090

END OF DOCUMENT

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

COMMISSION ON STATE MANDATES
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June 3, 2003

Mr. Leonard Kaye
SB 90 Coordinator
County of Los Angeles
500 West Temple Street, Room 603
Los Angeles, CA 90012

And Affected State Agencies and Interested Parties (see attached mailing list)

RE: **Adopted Statement of Decision**
Crime Victim's Domestic Violence Incident Reports, CSM 99-TC-08
Los Angeles County, Claimant
Penal Code Section 13730 and Family Code Section 6228
Statutes of 1984, Chapter 1609
Statutes of 1995, Chapter 965
Statutes of 1999, Chapter 1022

Dear Mr. Kaye:

The Commission on State Mandates adopted the attached Statement of Decision on May 29, 2003. This decision is effective on June 3, 2003. State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program; approval of a statewide cost estimate; a specific legislative appropriation for such purpose; a timely-filed claim for reimbursement; and subsequent review of the claim by the State Controller's Office. Following is a description of the responsibilities of all parties and the Commission during the parameters and guidelines phase.

- **Claimant's Submission of Proposed Parameters and Guidelines**. Pursuant to Government Code section 17557 and California Code of Regulations, title 2, sections 1183.1 et seq., the claimant is responsible for submitting proposed parameters and guidelines by **July 3, 2003**. See Government Code section 17557 and California Code of Regulations, title 2, sections 1183.1 et seq. for guidance in preparing and filing a timely submission.
- **Review of Proposed Parameters and Guidelines**. Within ten days of receipt of completed proposed parameters and guidelines, the Commission will send copies to the Department of Finance, Office of the State Controller, affected state agencies, and interested parties who are on the enclosed mailing list. All recipients will be given an opportunity to provide written comments or recommendations to the Commission within

15 days of service. The claimant and other interested parties may submit written rebuttals. (See Cal. Code Regs., tit. 2, § 1183.11.)

- **Adoption of Parameters and Guidelines.** After review of the proposed parameters and guidelines and all comments, Commission staff will recommend the adoption of the claimant's proposed parameters and guidelines or adoption of an amended, modified, or supplemented version of the claimant's original submission. (See Cal. Code Regs., tit. 2, § 1183.12.)

Please contact Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosure: Adopted Statement of Decision

MAILED: ✓
DATE: 6/9/03
CHRON:
FILE: ✓
WORKING BINDER:
FAXED:
INITIAL: VS
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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*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on May 29, 2003)*

STATEMENT OF DECISION

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

This Decision shall become effective on June 3, 2003.

Paula Higashi

PAULA HIGASHI, Executive Director

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*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on May 29, 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.

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 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]

---

[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.

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.
>
> (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?

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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.

These issues are addressed below.

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 apply generally to all residents and entities in the

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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.

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 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:

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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).

[18] Claimant's test claim filing, page 10; Claimant's comments on draft staff analysis, pages 1, 7-10.

> 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 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

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[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.

[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.

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.
- 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

[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."

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]

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

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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).

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

[28] *Baugh v. CBS, Inc.* (1993) 828 F.Supp. 745, 755.

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. 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]

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[29] Government Code section 6253, subdivision (b).

[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.

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]

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

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[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.

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 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 Commission agrees.

Under prior law, local law enforcement agencies are required to provide daily reports of misdemeanor and felony offenses, and a monthly report on domestic violence calls, to the Attorney General and the Department of Justice.[35] But, the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence. Record retention policies were left to the discretion of the local agency.

Accordingly, the Commission finds that storing the domestic violence incident report and face sheet for five 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[36] 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.

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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.

[35] Penal Code section 11107 (added by Stats. 1953, ch. 1385); Penal Code section 13730 (added by Stats. 1984, ch. 1609). As indicated above, Penal Code section 13730 has been suspended by the Legislature.

[36] Schedule 1 attached to Test Claim Filing.

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 five 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.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

June 3, 2003, I served the:

Adopted Statement of Decision
Crime Victim's Domestic Violence Incident Reports, CSM 99-TC-08
Los Angeles County, Claimant
Penal Code Section 13730 and Family Code Section 6228
Statutes of 1984, Chapter 1609
Statutes of 1995, Chapter 965
Statutes of 1999, Chapter 1022

by placing a true copy thereof in an envelope addressed to:

Mr. Leonard Kaye
SB 90 Coordinator
County of Los Angeles
500 West Temple Street, Room 603
Los Angeles, CA 90012

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

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 June 3, 2003, at Sacramento, California.

Victoria Soriano

VICTORIA SORIANO

Commission on State Mandates

Original List Date: 5/18/2000
Last Updated: 4/17/2003
List Print Date: 06/03/2003
Claim Number: 99-TC-08
Issue: Crime Victims' Domestic Violence Incident Reports

Mailing Information: Notice of adopted SOD

Mailing List

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Commission on State Mandates

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