BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Evidence Code Sections 1043, 1044, 1045, and 1047; Penal Code Sections 832.5, 832.7 and 832.8; Statutes 1978, Chapter 630; Statutes 1982, Chapter 946; Statutes 1985, Chapter 539; Statutes 1989, Chapter 693; Statutes 1996, Chapter 1108; Statutes 1998, Chapter 25;

Filed on June 29, 2001,

by City of Hayward and County of San Mateo, Claimants, and

Evidence Code Section 1046; Statutes 1988, Chapter 685; Statutes 1989, Chapter 615; Statutes 1994, Chapter 741; Statutes 1996, Chapter 220; Statutes 2000, Chapter 971; Statutes 2002, Chapter 63;

Filed on September 13, 2002,

by Santa Monica Community College District, Claimant.

No. 00-TC-24, 00-TC-25,02-TC-07,02-TC-08

Peace Officer Personnel Records: Unfounded Complaints and Discovery

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

(Adopted on September 25, 2003)

STATEMENT OF DECISION

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

Paula Higashi

PAULA HIGASHI, Executive Director

October 3, 2003

Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Evidence Code Sections 1043, 1044, 1045, and 1047; Penal Code Sections 832.5, 832.7 and 832.8; Statutes 1978, Chapter 630; Statutes 1982, Chapter 946; Statutes 1985, Chapter 539; Statutes 1989, Chapter 693; Statutes 1996, Chapter 1108; Statutes 1998, Chapter 25; Filed on June 29, 2001, by City of Hayward and County of San Mateo, Claimants, and Evidence Code Section 1046; Statutes 1988, Chapter 685; Statutes 1989, Chapter 615; Statutes 1994, Chapter 741; Statutes 1996, Chapter 220; Statutes 2000, Chapter 971; Statutes 2002, Chapter 63; Filed on September 13, 2002, by Santa Monica Community College District, Claimant.	No. 00-TC-24, 00-TC-25, 02-TC-07, 02-TC-08 ***Peace Officer Personnel Records: Unfounded Complaints and Discovery*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on September 25, 2003)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during regularly scheduled hearings on July 31, 2003, and September 25, 2003. At the July 31, 2003 hearing, the Commission heard and decided the test claim allegations from the city and county claimants. Pamela Stone appeared as representative for claimants City of Hayward and County of San Mateo, along with witnesses Veronica Larsen, Revenue Manager for City of Hayward, and Gregory Eatmon, Sergeant with San Mateo County Sheriffs Office. Susan Geanacou appeared on behalf of the Department of Finance.

At the September 25, 2003 hearing, the Commission heard the test claim allegations from the school district claimant. Keith Petersen appeared as representative for Santa Monica Community College District. Susan Geanacou appeared on behalf of the Department of Finance.

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

The Commission adopted the staff analysis for the city and county test claim issues by a 5 to 1 vote on July 3 1, 2003. The Commission adopted the staff analysis at the September 25, 2003 hearing for the remaining school district test claim issues by a vote of 6 to 0, denying reimbursement for school district claimants.

BACKGROUND

Claimants allege a reimbursable state mandate for compliance with new procedures for discovery of peace officer personnel records and the filing and investigation of unfounded complaints against peace officers. On June 29, 200 1, claimant, City of Hayward ["City"], submitted a test claim alleging a reimbursable state mandate for employers of peace officers was imposed by amendments to Penal Code section 832.5. On the same date,' claimant, County of San Mateo ["County"], submitted a test claim alleging a reimbursable state mandate for employers of peace officers arising from additions and amendments to the Evidence and Penal Codes, including Penal Code section 832.5.

On September 13, 2002,[2] the Commission received two test claims from claimant, Santa Monica Community College District ["District"], alleging substantially similar (but not identical) test claim legislation and activities on behalf of school district employers of peace officers to the claims originally filed by the City and County. On May 1, 2003, the Commission's Executive Director consolidated all four claims, noting however that the 2002 test claims were not filed on behalf of the same claimants as the 2001 test claims, and therefore they are not "amendments" pursuant to Government Code section 17557, subdivision (c). This may impact potential reimbursement periods for some alleged activities.

Claimants' Positions

City's claim alleges a reimbursable state mandate for unfounded complaints against peace officers was imposed by amendments to Penal Code section 832.5. City asserts that prior law required departments to establish procedures to investigate citizen complaints and make those procedures available to the public. Following amendments in 1978, any complaints were required to be kept for five years. City further alleges that the 1996 statutory amendment required that complaints deemed to be "frivolous" be maintained in a separate personnel file subject to the Public Records Act, and that this, for the first time, required citizen complaints to be investigated.

County's test claim alleges new reimbursable activities are required for responding to requests for the discovery of peace officer personnel records. County's August 24,200 1 rebuttal to DOF's response states that the claimant does not contend that the costs incurred by the Public Defender's Office for preparation and presentation of the discovery.motions pursuant to Evidence Code sections 1043 et seq. are reimbursable, as these are prepared at the discretion of the attorney. In addition, "[c]laimant is not claiming any costs relating to court personnel. The claimant is, however, claiming the following costs:"

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[1] Potential reimbursement period for these claims begins no earlier than July 1, 1999. (Gov. Code, § 17557, subd. (c).)

[2] Potential reimbursement period for any newly-alleged test claim legislation in these claims begins no earlier than July 1, 2001. (Gov. Code, § 17557, subd. (c).)

1. Receipt, review and forwarding to appropriate departments of all motions for discovery of peace officer personnel files by the employing entity or other department;

2. Notification of officer whose personnel records are sought by the employing entity or counsel;

3. Review of the personnel file for matters in excess of five years;

4. Research and preparation of any responsive pleadings or documents relating to the motion;

5. Conferences between the representative of the employing agency and counsel;

6. Appearance at court and hearing on any motion for discovery of peace officer personnel files and attendance at any *in camera* review of the file;

7. Preparation and service of any court orders relating to the motion for discovery of peace officer personnel files. [Claimant's footnote: "Note that it is common in many courts for the party which is successful in a motion, whether bringing the motion or opposing it, to prepare the order reflecting the ruling on the motion for the court's signature and service."]

It is Claimant's position that due to the fact that it has no control over the filing of discovery motions for production of peace officer personnel files, yet the files themselves are confidential, that its response to these motions is not within its discretion but is a mandatory function. The test claim legislation is the only process or mechanism by which third parties can request information contained within the peace officer's personnel files.

District's test claim allegations on behalf of school district police departments are similar to the allegations made by City and County and will be analyzed below. In addition, the Commission received rebuttal comments on the draft staff analysis from County on June 26, 2003, and from District on June 30, 2003. The comments will be discussed below.

State Agency's Position

DOF responded to each of the four original test claim filings in separate correspondence. The pertinent portions of each of the responses are quoted or summarized below:

DOF's August 9, 2001 response states complete disagreement with the City's test claim allegations on unfounded complaints against peace officers:

> Although Section 832.5 of the Penal Code may result in additional costs to local entities, those costs are not reimbursable because they are not unique to local government. . . . Numerous State agencies have personnel classified as peace officers, including the California Highway Patrol, the University of California, the Department of Fish and Game, and the Department of Corrections. . . . Therefore based on Section 6, Article XIII B of the California State Constitution and the California Supreme Court ruling in County *of Los Angeles [supra,* 43 Cal.3d 46], we believe the test claim statutes do not result in reimbursable State-mandated costs.

DOF's August 10, 2001 response to County's test claim allegations on discovery of peace officer personnel records states "the following concerns with the activities asserted by the claimant":

- It is not clear, from the information provided in the test claim, what specific activities are being asserted as reimbursable state mandates.
- It appears that activities pursued by the Public Defender's Office, including filing motions with the court to obtain peace officer personnel files, would be at the discretion of that office, and would therefore not be subject to reimbursement.
- The review process has been established to protect the interests of peace officers, when necessary. The test [claim] legislation does not require the use of the review process. It only makes the process available, when necessary, to ensure that (1) relevant information is available during an investigation and (2) the interests and privacy of the peace officer in question are protected.
- It appears that the cost impact of this legislation would be more appropriately attributed to the activities performed by the courts, which are required to conduct the hearing and make a determination on the relevance of information within the personnel file. These activities would not be reimbursable.

On September 13, 2002, District filed two test claims alleging substantially similar test claim legislation and mandated activities as those claims filed previously by City and County. On October 15, 2002, DOF responded to both of the District's test claims with the following:

> As the result of our review, we have concluded that the statute may have resulted in a new higher level of service within an existing program upon community college and school districts that employ peace officer personnel. If the Commission reaches the same conclusion at its hearing on the matter, the nature and extent of the specific activities required can be addressed in the parameters and guidelines which will then have to be developed for the program.

As of July 10, 2003, the Commission did not receive any comments from. DOF on the draft staff analysis; however, at the July 2003 hearing, they expressed agreement with the staff analysis,

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.[3] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service. 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.[4] To determine if the program is new

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

[4] *County of Los Angeles v. State of California (1987) 43* Cal.3d *46, 56; Lucia Mar Unified School Dist.* v. *Honig* (198X) 44 Cal.3d 830, 835.

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

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

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[7] Although the court has held that only one of these findings is necessary,' both will be analyzed here in order to address one of the arguments presented by DOF.

DOF contends that the test claim legislation does not impose a reimbursable state-mandated program because it is not unique to local government. DOF contends that the test claim statute affects all peace officers in the state, including those in the California Highway Patrol, the University of California, the Department of Fish and Game, and the Department of Corrections. DOF states that the California Supreme Court decision in *County of Los Angeles* supports its position.'

The Commission finds that DOF misapprehends the decision in *County of Los Angeles* for support of its argument that the statutes relating to peace officer personnel-records are not unique to local government. *County of Los Angeles* involved state-mandated increases in workers' compensation benefits, which affected public and *private* employers alike. The California Supreme Court found that the term "program" as used in article XIII B, section 6, and the intent underlying section 6 "was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government,* not for expenses incurred as an incidental impact

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[5] Government Code section *175* 14; *County of Sonoma v. Commission on State Mandates (2000)* 84 Cal.App.4th 1265, 1284; *County of Fresno v. State of California* (1991) 53 Cal.3d 482,487.

[6] Article XIII B, section 6 of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975 ."

[7] *County of Los Angeles, supra,* 43 Cal.3d at page 56.

[8] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

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

of law that apply generally to all state residents and entities." [10] (Emphasis added.) Since the increase in workers' compensation benefits applied to all employees of private and public businesses, the court found that no reimbursement was required.

Here, the test claim statutes regarding peace officer personnel records are to be followed by all employers of peace officers, which by definition are public entities. [11] They do not apply "generally to all state residents and entities," such as private businesses. Thus, the test claim legislation meets this test for "program" in that it does not impose requirements that apply generally to all residents and entities of the state, but only upon those public entities who employ peace officers.

Next, the Commission finds that the test claim legislation satisfies the other test that triggers article XIII B, section 6, carrying out the governmental function of providing a service to the public, to the extent that the test claim legislation requires employers of peace officers to engage in maintenance and notification activities related to the personnel records of peace officers. As discussed by the court in *Carmel Valley,* police protection is one "of the most essential and basic functions of local government."[12] Therefore, governmental functions required of employers of peace officers, unique to those maintaining a police force, ultimately provide a service to the public. Accordingly, the Commission finds that file maintenance and notification activities related to the personnel records of peace officers constitute a "program" and, thus, are subject to article XIII B, section 6 of the California Constitution.

However, this finding is only for city and county-level law enforcement agencies. The Commission finds that local agencies (cities and counties), not school districts (within the meaning of Government Code section 175 19),[13] have the responsibility for carrying out the "essential and basic functions" of police protection. Pursuant to Education Code section 38000:[14]

> [t]he governing board of any school district may establish a security department .... or a police department . . . [and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district may

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[10] *Id.* at pages 56-57; *City of Sacramento, supra,* 50 Cal.3d at page 67.

[11] Penal Code section 830 et seq.

[12] *Cannel Valley, supra,* 190 Cal.App.3d at page 537.

[13] ""School district' means any school district, community college district, or county superintendent of schools."

[14] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 15831.

establish a community college police department . . . [and] may employ personnel as necessary to enforce the law on or near the campus. . . . This subdivision shall not be construed to require the employment by a community college district of any additional personnel."

In a 2003 California Supreme Court mandates decision, the Court found (affirming the holding in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777), "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate? Education Code sections 38000 and 72330 permit K through 12 and community college districts to establish police departments, but do not require it. Nor are there any other readily apparent statutes or case law *requiring* districts to establish or maintain police departments. Therefore, forrning a school district police department and employing peace officers is an entirely discretionary activity on the part of all school districts.

The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement."[16] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are established,"[17] nowhere in the Constitution is the suggestion that school districts are functioning within their essential educational function by operating police departments. In contrast, article XI, Local Government, provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff, and section 5, City charter provision, specifies that city charters are to provide for the "government of the city police force." Thus, at the Constitutional level, cities and counties are given local law enforcement responsibilities, while school districts are only statutorily permitted to form police departments.

District, in comments on the draft staff analysis received June 30, 2003, disagrees. District argues: (1) "*Carmel Valley* does not exclude school district eligibility;" and (2) "the fact that school district police departments are permissive has not been a dispositive issue in prior test claims." First, District argues:

> Just as *Carmel Valley* establishes "police protection" as an essential and basic public service, *Long Beach* (Long Beach Unified School District v. State of California, (1990) 275 Cal.Rptr. 449, 225 Cal.App.3d 155) concludes that public education is administered by local agencies to provide service to the public, citing *Carmel Valley:*
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> > "In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly government [sic] function. (Cf. Carrnel Vallev Fire Protection Dist. v. State of California (1987) 190 Cal.App.3d at p. 537) Further, public education is administered by local

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[15] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743 *(Department of Finance*).

[16] California Constitution, article IX, section 1.

[17] California Constitution, article IX, section 14.

> agencies to provide service to the public. Thus public education constitutes a 'program' within the meaning of Section 6."
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> Therefore, both local governments and school agencies perform a peculiarly essential governmental function to provide service to the public. There is no statutory or case law basis to distinguish the type of public services provided by local agencies and school districts in order to determine whether the agency provides a "program" within the meaning of Section 6. So there is no basis to exclude police protection as an appropriate service and function of school districts as compared to cities or counties.

Under District's argument, the definition of public education as an essential governmental function is too expansive. Operating police departments is not an essential governmental function of providing *public education.* Although maintaining safe IS through 12 schools is required under the state Constitution, this does not need to be accomplished through a school district police department independent of the public safety services provided by the cities and counties a school district serves. [18]

The California Supreme *Court* in *Department of Finance, supra*, 30 Cal.4th at page 73 1, stated:

> [*W]e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs,* and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

District argues that the decision "was decided on the particular facts of that case. Therefore, any comments of the court on the issue of compulsion are only dictum." The Commission disagrees and asserts that the Commission is not free to disregard clear statements of the California Supreme Court on the grounds that they are mere dicta. In *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1168-l 169, the court explains why even a footnote from a California Supreme Court decision cannot be dismissed as dicta:

> The prosecution brushes aside the above language as dicta and an incorrect statement of the law. ¶ . . . ¶ Mr. Witkin has summarized the distinction between the holding of a case and dictum as follows: "The *ratio decidendi* is the principle or rule which constitutes the ground of the decision, and it is this principle or rule which has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which

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[18] Article I, section 28, subdivision (c) of the California Constitution provides "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are **safe,** secure and peaceful." *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448: "[H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, 'it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."'

statements of law were necessary to the decision, and therefore binding precedent, and (b) which were arguments and general observations, unnecessary to the decision, i.e., dicta, with no force as precedents. (Citations.)" (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, pp. 753; see also *Trope v. Katz* (1995) 11 Cal.4th 274, 287, 45 Cal.Rptr.2d 241, 902 P.2d 259.)

Footnote 14 of *Izazaga* must be read in connection to the text to which it is appended. . . . Footnote 14 cannot reasonably be construed as being unnecessary to the *Izazaga* opinion.

Thus, the ruling of respondent court violates the well-known rule articulated in *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450,455, 20 Cal.Rptr. 321, 369 P.2d 937. The Court of Appeal, the appellate department of the superior court, and the trial courts are required to follow the "statements of law" of the California Supreme Court. These "statements of law" ". . . must be applied wherever the facts of a case are not fairly distinguishable from the facts of the case in which . . . [the California Supreme Court has] declared the applicable principle of law." *(People* v. *Triggs* (1973) 8 Cal.3d 884, 106 Cal.Rptr. 408, 506 P.2d 232, 891.)

"*Even if properly characterized as dictum, statements of the Supreme Court should be considered persuasive.* (Citation.)" *(United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 835,209 Cal.Rptr. 16.) Twenty years ago, Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate appellate court justices: *Generally speaking, follow dicta from the California Supreme Court. (People* v. *Trice* (1977) 75 Cal.App.3d 984, 987, 143 Cal.Rptr. 730.) That was good advice then and good advice now. Unfortunately, this advice was lost upon respondent court. [Emphasis added.]

When the Supreme Court has conducted a thorough analysis of the issues or reflects compelling logic, its dictum should be followed. *(United Steelworkers of America v. Board of Education, supra,* 162 Cal.App.3d at p. 835,209 Cal.Rptr. 16.) The language of footnote 14 in *Izazaga* was carefully drafted. It was not "... inadvertent, ill-considered or a matter lightly to be disregarded." (*Jaramillo v. State of California* (1978) 81 Cal.App.3d 968, 971, 146 Cal.Rptr. 823; see also *In re Brittany M.* (1993) 19 Cal.App.4th 1396, 1403, 24 Cal.Rptr.2d 57.)

In *Department of Finance,* the Court stated "Our *conclusion* is based on the following determinations: First, we reject claimants' assertion that they have been legally compelled to incur . . . costs, and hence are entitled to reimbursement from the state, . . . without regard to whether a claimant's participation in the underlying program is voluntary or compelled." Thus, the Court's statements regarding discretion and compulsion in finding a reimbursable state-mandated program cannot be mere dicta, because the conclusion is premised on those assessments. And, as established in *Hubbard,* even if language is properly characterized as dicta, statements of the California Supreme Court are persuasive and should be followed.

District continues, arguing that the Commission has never made the "compulsory employee distinction" before, citing a list of mandate claims in which the Commission has approved reimbursement for school peace officers: *Peace Officer Procedural Bill of Rights* (CSM-4499, decision adopted *Nov. 30,* 1999); *Threats Against Peace Officers* (CSM-96-365-02, Apr. 24,

1997); Health Benefits for Peace Officers ' Survivors (97-X-25, Oct. 26, 2000); *Law Enforcement Sexual Harassment Training* (97-TC-07, *Sept.* 28, 2000); *Photographic Record of Evidence (984X-07,* Oct. 26, 2000); *Law Enforcement College Jurisdiction Agreements (98-K-20,* Apr. 26, 2001); *and Sex Offenders: Disclosure by Law Enforcement Officers* (97-TC-15, Aug. 23, 2001.)

Prior Commission decisions are not controlling in this case. Since 1953, the California Supreme Court has held that the failure of a quasi-judicial agency to consider prior decisions is *not* a violation of due process and does not constitute an arbitrary action by the agency. *(Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772.) In *Weiss,* the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue them an off-sale beer and wine license at their premises. Plaintiffs contended that the action of the board was arbitrary and unreasonable because the board granted similar licenses to other businesses in the past. The California Supreme Court disagreed with the plaintiffs' contention and found that the board did *not* act arbitrarily. The Court stated, in pertinent part, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: Not only does due process permit omission of reasoned administrative opinions but it probably also perrnits substantial deviation from the principle of stare decisis. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (*Id.* at 776.)

In 1989, an Attorney General's opinion, citing the *Weiss* case, agreed that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra,* 40 Cal.2d at 777]." (72 Ops.Cal.Atty.Gen. 173, 178, fn. 2 (1989).)

Thus, prior Commission decisions are not controlling here. Rather, the merits of a test claim must be analyzed individually. Commission decisions under article XIII B, section 6 are not arbitrary or unreasonable as long as the decision strictly construes the Constitution and the statutory language of the test claim statute, and does not apply section 6 as an equitable remedy. *(City of San Jose v. State of California* (1996) 45 Cal.App.4th at *18* 16- *18* 17; *County of Sonoma , supra,* 84 Cal.App.4th at pages 1280-128 1.) The analysis in this test claim complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs that the Commission must now follow.

Pursuant to state law, school districts, the essential governmental function of which is to provide public education, remain free to discontinue providing their own police department, and statutory duties that follow from such discretionary activities do not impose a reimbursable state mandate. Therefore, school districts are not eligible claimants for the test claim statutes. With that deterrnination, the analysis that follows is limited to mandate findings on behalf of the City and County claimants. However, because the claims were consolidated, test claim statutes alleged by District will be analyzed for the imposition of a reimbursable state mandate upon city and county (local agency) peace officer employers.

Issue 2: Does the test claim legislation impose a new program or higher level of service within an existing program upon local agency employers of peace officers within the meaning of article XIII B, section 6 of the California Constitution?

Under prior law, as enacted by Statutes 1974, chapter 29, county sheriffs departments and city police departments were required to "establish a procedure to investigate citizens' complaints against the personnel of such departments," and "make a written description of the procedure available to the public."" In addition, the California Supreme Court decision, *Pitchess v. Superior Court* (1974) 11 Cal.3d 53 1, established discovery rights and procedures to obtain peace officer personnel records when necessary for a fair trial in a criminal case. The test claim legislation makes changes to some requirements as compared to prior law. The statutes are analyzed individually below for imposition of a new program or higher level of service on local agency peace officer employers within the meaning of article XIII B, section 6.

Unfounded Complaints

Penal Code Section 832.5.

Penal Code section 832.5 was added by Statutes 1974, chapter 29. It then read:

> Each sheriffs department and each city police department in this state shall establish a procedure to investigate citizens' complaints against the personnel of such departments, and shall make a written description of the procedure available to the public.

Claimants allege Penal Code section 832.5, as amended by Statutes 1978, chapter 630, Statutes 1996, chapter 1108, Statutes 1998, chapter 25,[20] imposes a reimbursable state-mandated program:

> (a)(1) Each department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public.
>
> (2) Each department or agency that employs custodial officers, as defined in Section 83 1.5, may establish a procedure to investigate complaints by members of the public against those custodial officers employed by these departments or agencies, provided however, that any procedure so established shall comply with the provisions of this section and with the provisions of Section 832.7.
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> (b) Complaints and any reports or findings relating to these complaints shall be retained for a period of at least five years. All complaints retained pursuant to this subdivision may be maintained either in the peace or custodial officer's general

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[19] Penal Code section 832.5.

[20] Amendment by Statutes 2002, chapter 391 (A.B. 2040) was not alleged by claimants as imposing a reimbursable state mandate, but is included in the cited language of the statute. The amendment designated former subdivision (a) as subdivision (a)(l), added paragraph (a)(2), and substituted "peace or custodial officer" for "peace officer" or "officer" throughout.

personnel file or in a separate file designated by the department or agency as provided by department or agency policy, in accordance with all applicable requirements of law. However, prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing department or agency, the complaints described by subdivision (c) shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, in accordance with all applicable requirements of law.

(c) Complaints by members of the public that are determined by the peace or custodial officer's employing agency to be frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel file. However, these complaints shall be retained in other, separate files that shall be deemed personnel records for purposes of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and Section 1043 of the Evidence Code.

(1) Management of the peace or custodial officer's employing agency shall have access to the files described in this subdivision.

(2) Management of the peace or custodial officer's employing agency shall not use the complaints contained in these separate files for punitive or promotional purposes except as permitted by subdivision (f) of Section 3304 of the Government Code.

(3) Management of the peace or custodial officer's employing agency may identify any officer who is subject to the complaints maintained in these files which require counseling or additional training. However, if a complaint is removed from the officer's personnel file, any reference in the personnel file to the complaint or to a separate file shall be deleted.

(d) As used in this section, the following definitions apply:

(1) "General personnel file" means the file maintained by the agency containing the primary records specific to each peace or custodial officer's employment, including evaluations, assignments, status changes, and imposed discipline.

(2) "Unfounded" means that the investigation clearly established that the allegation is not true.

(3) "Exonerated" means that the investigation clearly established that the actions of the peace or custodial officer that formed the basis for the complaint are not violations of law or department policy.

Claimants allege that following amendments in 1978, any citizen complaints were required to be kept for five years. City further alleges that the 1996 statutory amendment required that complaints deemed to be "frivolous" be maintained in a separate personnel file subject to the Public Records Act, and that this, for the first time, required citizen complaints to be investigated.

The Commission utilizes the same rules of rules of statutory construction as the courts in identifying reimbursable state-mandated programs. A test claim statute or executive order imposes a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[21]

According to the California Supreme Court:

> 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. [22] (Citations omitted.)

Therefore, the Commission first looks to the plain meaning of the statutory language when identifying a reimbursable state-mandated program. Prior law required all sheriffs departments and city police departments to establish a procedure to investigate citizens' complaints and to make that procedure available to the public. Therefore the requirement of subdivision (a)(l) is not new to local agency peace officer employers and does not impose a new program or higher level of service.

Statutes 1978, chapter 630, by adding subdivision (b), imposed a record retention requirement for complaints against peace officers and related reports for five years. The statutes give the law enforcement agency the option of storing the complaints and reports in the officer's personnel file or in a separate file. However, cities and counties have pre-existing statutory record retention requirements: records are required to be maintained for at least two years before destruction is permitted pursuant to Government Code section 34090[23] for city records, and Government Code section 26202[24] for county records. Therefore the activity of storing the complaints and related reports constitutes a new program or higher level of service for storing the records for an additional three years.

Under subdivision (c), complaints determined to be "frivolous, unfounded, or exonerated" must be removed from the officer's general personnel file and maintained in a separate file, which retains the same confidentiality and discovery protections. County, in comments on the draft staff analysis received June 26, 2003, argues that, first, "the employing agency may [sic] establish a procedure to investigate custodial officers." Then,

> there must be a segregation between those complaints which are found to be frivolous, unfounded or exonerated from those which are not . . . Because of the

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[21] *Long Beach Unified School Dist., supra, 225* Cal.App.3d at 174.

[22] *Estate of Griswald* (200 1) 25 Cal.4th 904, 9 1 O-9 11.

[23] "[W]ith 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."*

[24] "The board may authorize the destruction or disposition of any record, paper, or document which is more than two years old . . ."

> categorization of the types of complaints there must now, *a fortiori*, be a determination as to what complaints are, in fact frivolous, unfounded or exonerated, from the universe of complaints. This requirement that there be a segregation of the types of complaints means that there has to be an investigation to determine what type of complaint has been made against a given officer.

The Commission does not need to reach the conclusion that the plain language of subdivision (a) *required* investigations to be performed under prior law in order to conclude that the plain language of the subdivision *(c) does not require* any special investigations to be performed. Subdivision (c) only requires that *if* a complaint is determined to be without merit or untrue, the documents shall be retained in separate files. There is no new requirement to perform investigations contained in subdivision (c) that does not require inference beyond plain meaning. Thus, the Commission finds that the claimed activity of investigating complaints under subdivision (c) is not a new program or higher level of service.

Thus, the Commission finds Penal Code section 832.5, subdivisions (b) and (c), imposes a new program or higher level of service on local agency employers of peace officers, for the following record retention activity:

- Retain complaints against peace officers by members of the public, and any reports or findings relating to these complaints, either in the officer's general personnel file or in a separate file, for an additional three years (a higher level of service above the two-year record retention requirement pursuant to Government Code sections 26202 and 34090.) Complaints found to be frivolous, unfounded, or exonerated shall not be maintained in that officer's general personnel file, but shall be retained in other, separate files.

Discovery

Evidence Code Section 1043.

Claimants allege Evidence Code section 1043, as added by Statutes 1978, chapter 630 and amended by Statutes 1989, chapter 693,[25] imposes a reimbursable state-mandated program:

> (a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

[25] Amendment by Statutes 2002, chapter 39 1, which substituted "peace or custodial officer" for "peace officer" throughout, was not alleged by claimants as imposing a reimbursable state mandate, but is included in the cited language of the statute.

(b) The motion shall include all of the following:

(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

(2) A description of the type of records or inforrnation sought.

(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.

Claimants assert that Evidence Code section 1043, and related Evidence and Penal Code sections discussed below, impose a reimbursable state-mandated program on local agency employers of peace officers for responding to and defending against motions for discovery of peace officer personnel records. Specifically, claimants make claims for the following costs:

- Receipt, review and forwarding to appropriate departments of all motions for discovery of peace officer personnel files by the employing entity or other department;
- Research and preparation of any responsive pleadings or documents relating to the motion;
- Conferences between the representative of the employing agency and counsel;
- Appearance, with legal counsel, at court and hearing on any motion for discovery of peace officer personnel files, and attendance at any in camera review of the file;
- Preparation and service of any court orders relating to the motion for discovery of peace officer personnel files, including filing a motion in the court for a protective order protecting the peace officer or the district from unnecessary annoyance, embarrassment or oppression;
- To train district personnel in the policies and procedures to be followed upon receipt of a motion seeking discovery of the personnel records or records of citizens' complaints of a peace officer.

These claims must fail on multiple grounds. First, responding to a motion for discovery of peace officer personnel records is not a new program or higher level of service because the law permitting discovery of peace officer personnel records was previously developed by the California courts.

The defendant in *Pitchess* v. *Superior Court, supra*, 11 Cal.3d 53 1, was accused of battery against four deputy sheriffs. The defendant in turn sought discovery of internal investigations of alleged previous misconduct by the officers: documents that would tend to show the defendant acted in self-defense when faced with the use of excessive force. The court found that although civil discovery statutes, Code of Civil Procedure sections 1985 and 2036, do not apply in a criminal proceeding, "an accused in a criminal prosecution may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial." *(Id.* at p. 536.)

As described in *San Diego Police Officers' Assn. v. City of San Diego Civil Service Corn.,* the test claim legislation, in part, codified the *Pitchess* decision:

> These Evidence Code sections [1043 and 1046] codify the *Pitchess* motion procedure requiring a good cause finding and an in camera examination before peace officer personnel information may be disclosed in discovery to civil or criminal litigants. *(City of Los Angeles v. Superior Court (2002) 29* Cal.4th 1, 9 [124 Cal.Rptr.2d 202, 52 P.3d 129]; *see Pitchess v. Superior Court* (1974) 11 Cal.3d 53 1 [113 Cal.Rptr. 897, 522 P.2d 305] *(Pitchess).)* By enacting these code sections, the Legislature "balanced [a litigant's] need for disclosure of relevant information with the law enforcement officer's legitimate expectation of privacy in his or her personnel records." *(People* v. *Mooc* (2001) 26 Cal.4th 12 16, 1220 [114 Cal.Rptr.2d 482, 36 P.3d 21].)[26]

The Legislature, by codifying pre-existing California case law, did not mandate a new program or higher level of service than what was the current state of the law in California, thus the claims for costs related to receiving and responding to motions for discovery of peace officer personnel records are not subject to subvention pursuant to article XIII B, section 6.[27]

In comments received June 26, 2003, County disagrees with the assertion that the Legislature codified *Pitchess* as part of the enactment of Statutes 1978, chapter 630. County asserts, citing at length the discussion in *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, "the test claim legislation did not codify *Pitchess,* but rather was a reaction to the severe problem the decision posed to law enforcement," to either disclose personnel information about an officer, or dismiss charges against a defendant.

As stated in *San Diego Police Officers' Assn.,* the Legislature codified the Court-sanctioned discovery procedures. Next, as separate grounds for denying certain test claim allegations, the Commission finds that activities of receiving, responding to, or defending against litigation are not a new program or higher level of service mandated by the state. A test claim statute or executive order only imposes a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task. The Commission finds that the plain meaning of the statute creates a requirement for parties seeking disclosure of peace officer

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[26] *San Diego Police Officers' Assn. v. City of San Diego Civil Service Corn. (2002) 104* Cal.App.4th 275, 282, mod. 104 Cal.App.4th 1274B.

[27] This concept is also stated in Government Code section 17556, subdivision (b), which forbids a finding of costs mandated by the state if "the statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts."

personnel records to make a written discovery motion containing specified information, and to give written notice to the governmental agency that has custody and control of the records. Those are requirements only for the party seeking disclosure of the personnel records and do not, by the plain meaning of the statutory language, mandate any action or duty on the part of the peace officer or employer. Thus, Evidence Code section 1043 does not establish a new duty to defend a peace officer employee.

However, subdivision (a) does require that "[u]pon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought," This is the only new program or higher level of service imposed by this statute. Thus, the Commission finds Evidence Code section 1043, subdivision (a), imposes a new program or higher level of service on local agency employers of peace officers, for the following activity:

- Upon receipt of the notice that discovery or disclosure is sought of peace officer personnel records, the local agency served shall immediately notify the individual whose records are sought.

The Commission finds that none of the additional activities or costs claimed for receiving, responding to, or defending against a discovery motion impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Evidence Code Section 1044.

County pleads that Evidence Code section 1044, as added by Statutes 1978, chapter 630 imposes a reimbursable state-mandated program:

> Nothing in this article shall be construed to affect the right of access to records of medical or psychological history where such access would otherwise be available under Section 996 or 10 16.

The Commission finds that the plain meaning of the statute does not mandate any action or duty on the part of a peace officer or employer. Thus, the Commission finds Evidence Code section 1044 does not impose a new program or higher level of service on local agency employers of peace officers.

Evidence Code Section 1045.

Claimants allege Evidence Code section 1045, as added by Statutes 1978, chapter 630, and amended by Statutes 1982, chapter 946, [28] imposes a reimbursable state-mandated program.

> (a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of

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[28] Amendment by Statutes 2002, chapter 391 was not alleged by claimants as imposing a reimbursable state mandate, but is included in the cited language of the statute. The amendment made non-substantive changes and rewrote subdivision (a). Prior to amendment, subdivision (a) read: "(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of such investigations, concerning an event or transaction in which the peace officer participated, or which he perceived, and pertaining to the manner in which he performed his duties, provided that such information is relevant to the subject matter involved in the pending litigation."

those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in Section 83 1.5 of the Penal Code, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.

(b) In determining relevance, the court shall examine the information in chambers in conformity with Section 9 15, and shall exclude from disclosure:

(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

(c) In deterrnining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.

To restate the analysis regarding Evidence Code section 1043, discovery of peace officer personnel records was established by case law and is therefore not a new program or higher level of service; in addition, defending against or undertaking litigation, including complying with any orders of the court, is not a new program or higher level of service *mandated by the state*. The Commission finds that the plain meaning of the statute gives direction to the courts regarding relevance when evaluating motions for the disclosure or discovery of peace officer records, but does not order or command any activity on the part of the peace officer or employer. Thus, the Commission finds Evidence Code section 1045 does not impose a new program or higher level of service on local agency employers of peace officers.

Evidence Code Section 1046.

District alleges Evidence Code section 1046, as added by Statutes 1985, chapter 539,[29] is an additional basis for disclosure of peace officer personnel records.

> In any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer or custodial officer, as defined in Section 83 1.5 of the Penal Code, in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility.

A test claim statute or executive order only imposes a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task. The Commission finds that the plain meaning of the statute creates a requirement for parties seeking disclosure of peace officer personnel records to include certain documents with their discovery motion, but does not mandate any action or duty on the part of the peace officer or employer. Thus, the Commission finds Evidence Code section 1046 does not impose a new program or higher level of service on local agency employers of peace officers.

Evidence Code Section 1047.

County alleges a reimbursable state mandate was imposed by Evidence Code section 1047, as added by Statutes 1985, chapter 539.[30]

> Records of peace officers or custodial officers, as defined in Section 83 1.5 of the Penal Code, including supervisorial officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct is alleged to have occurred within a jail facility, shall not be subject to disclosure.

The Commission finds that the plain meaning of the statute defines for the courts a circumstance in which peace officer records would not be subject to disclosure, but does not order or command any activity on the part of the peace officer or employer. Thus, the Commission finds Evidence Code section 1047 does not impose a new program or higher level of service on local agency employers of peace officers.

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[29] Amendment by Statutes 2002, chapter 391 was not alleged by claimants as imposing a reimbursable state mandate, but is included in the cited language of the statute. It added language regarding "conduct alleged to have occurred within a jail facility."

[30] Amendment by Statutes 2002, chapter 391 was not alleged by claimants as imposing a reimbursable state mandate, but is included in the cited language of the statute. It added the language "or who were not present at the time the conduct is alleged to have occurred within a jail facility."

Penal Code Section 832.7.

Claimants allege a reimbursable state mandate was imposed by the addition of section 832.7 to the Penal Code by Statutes 1978, chapter 630; and as amended by Statutes of 1985, chapter 539, Statutes 1988, chapter 685, Statutes 1989, chapter 615, Statutes 1994, chapter 741, Statutes 1996, chapter 220, Statutes 2000, chapter 971, and Statutes 2002, chapter 63.[31]

> (a) Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of police officers or a police agency conducted by a grand jury, a district attorney's office, or the Attorney General's office.
>
> (b) Notwithstanding subdivision (a), a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed.
>
> (c) Notwithstanding subdivision (a), a department or agency which employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.
>
> (d) Notwithstanding subdivision (a), a department or agency which employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative.
>
> (e) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition.
>
> The notification described in this subdivision shall not be conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before an arbitrator, court, or judge of this state or the United States.

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[31] Amendment by Statutes 2002, chapter 391, which substituted "peace or custodial officer" for "peace officer" throughout, was not alleged by claimants as imposing a reimbursable state mandate, but is included in the cited language of the statute.

(f) Nothing in this section shall affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code.

Penal Code section 832.7 prescribes the confidentiality of peace officer personnel records and provides minor exceptions to the private nature of the records for using the records for compiling statistics without identifying the individual officer; to refute false statements made by the peace officer concerning disciplinary investigations or actions; and for the discoverability of information in the files pursuant to a *Pitchess* motion for discovery. None of these statutory concepts order or command any new activities of the peace officer employer. However, statutory amendment by Statutes 1994, chapter 74 1 added two new requirements regarding complaints filed by the public, expressed in subdivisions (b) and (e).

Penal Code section 832.7, subdivision (b) provides that a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed. The 1968 California Public Records Act (CPRA, Gov. Code, § 6250 et seq.) generally requires open access to public records and duplication upon fee payment. Most law enforcement complaints, investigations or intelligence information are explicitly excluded from CPRA disclosure.[32] Subdivision (b) could be interpreted as an exception to this exclusion, and thus, would be subject to the CPRA fee authority and would not impose costs mandated by the state.[33] However, the language of subdivision (b) is broader than that of the CPRA. Specifying that "a department or agency *shall* release to the complaining party a copy of his or her own statements *at the time the complaint is filed,*" requires more than providing access and/or a copy of records upon request. Rather, the statute commands law enforcement to provide a copy of the complaint upon receipt of the complaint, whether the filer requests it or not. Therefore, the Commission finds that Penal Code section 832.7, subdivision (b) imposes a new program or higher level of service on local agency employers of peace officers, for the following activity:

- Release to the complaining party a copy of his or her own statements at the time the complaint against the peace officer is filed.

In addition, Statutes 1994, chapter 741 added a mandatory notice requirement following the disposition of the complaint. Thus, the Commission finds Penal Code section 832.7, subdivision (e) imposes a new program or higher level of service on local agency employers of peace officers, for the following activity:

- Provide written notification to the complaining party of the disposition of the complaint against the peace officer within 30 days of the disposition.

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[32] Government Code section 6254, subdivision (f).

[33] Government Code section 17556: "The commission shall not find costs mandated by the state, as defined in Section 175 14, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: . . . (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

Penal Code Section 832.8.

County alleges a reimbursable state mandate was imposed by the addition of section 832.8 to the Penal Code by Statutes 1978, chapter 630; and as amended by Statutes 1990, chapter 264:

> As used in Section 832.7, "personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:
>
> (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar inforrnation.
>
> (b) Medical history.
>
> (c) Election of employee benefits.
>
> (d) Employee advancement, appraisal, or discipline.
>
> (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.
>
> (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

The Commission finds that the plain meaning of the statute defines what information and documents constitute peace officer personnel records, but does not order or command any activity on the part of the peace officer or employer. Thus, the Commission finds Penal Code section 832.8 does not impose a new program or higher level of service on local agency employers of peace officers.

Issue 3: Does the test claim legislation found to require a new program or higher level of service also impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose "costs mandated by the state." Governrnent Code section 175 14 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. Claimants estimated costs of $200 or more for the test claim allegations.[34] Claimants also state that none of the Government Code section 17556 exceptions apply. For the activities listed in the conclusion below, the Commission agrees and finds accordingly that they impose costs mandated by the state upon local agency employers of peace officers within the meaning of Government Code section 175 14.

[34] As required by Government Code section 17564 at the time the claim was filed. Current statute and regulations require filed claims to exceed $1000.

CONCLUSION

The Commission concludes that Evidence Code section 1043, subdivision (a), Penal Code sections 832.5, subdivisions (b) and (c), and 832.7, subdivisions (b) and (e), impose new programs or higher levels of service for local agency employers of peace officers within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 175 14, for the following specific new activities:

- Upon receipt of the notice that discovery or disclosure is sought of peace officer personnel records, the local agency served shall immediately notify the individual whose records are sought. (Evid. Code, § 1043, subd. (a).)[35]
- Retain complaints against peace officers by members of the public, and any reports or findings relating to these complaints, either in the officer's general personnel file or in a separate file, for an additional three years (a higher level of service above the two-year record retention requirement pursuant to Government Code sections 26202 and 34090.) Complaints found to be frivolous, unfounded, or exonerated shall not be maintained in that officer's general personnel file, but shall be retained in other, separate files. (Pen. Code, § 832.5, subds. (b) and (c).)[36]
- Release to the complaining party a copy of his or her own statements at the time the complaint against the peace officer is filed. (Pen. Code, § 832.7, subd. (b).)[37]
- Provide written notification to the complaining party of the disposition of the complaint against the peace officer within 30 days of the disposition. (Pen. Code, § 832.7, subd. (e).)[38]

The Commission concludes that Evidence Code sections 1044, 1045, 1046 and 1047, Penal Code section 832.8, and none of the additional activities or costs claimed for receiving, responding to, or defending against a discovery motion, or investigating complaints against peace officers, constitute a new program or higher level of service within the meaning of the California Constitution, article XIII B, section 6.

The Commission finds that forming a school district police department and employing peace officers is a discretionary activity on the part of all school districts. Pursuant to Education Code sections 38000 and 72330, school districts remain free to discontinue providing their own police department, and statutory duties that follow from discretionary activities do not impose a

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[35] As amended by Statutes 1978, chapter 630; test claim allegation filed June 29, 2001, reimbursement period begins no earlier than July 1, 1999. (Gov. Code, § 17557, subd. (c).).

[36] As added by Statutes 1978, chapter 630; test claim allegation filed June 29, 2001, reimbursement period begins no earlier than July 1, 1999. (Gov. Code, § 17557, subd. (c).).

[37] As amended by Statutes 1994, chapter 741; test claim allegation filed September 13, 2002, reimbursement period begins no earlier than July 1, 2001. (Gov. Code, § 17557, subd. (c).).

[38] *Ibid.*

reimbursable state mandate. Thus, the Commission concludes that school districts are not eligible claimants for the test claim statutes.

The Commission denies any remaining alleged costs or activities because they do not impose a new program or higher level of service, and do not impose costs mandated by the state.

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 958 14.

October 3, 2003, I served the:

Adopted Statement of Decision
Peace Officer Personnel Records: Unfounded Complaints and Discovery, OO-TC-24
Statutes 1978, Chapter 630, et al.
City of Hayward, County of San Mateo, and
Santa Monica Community College District, Claimants

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

Ms. Pamela A. Stone
DMG-Maximus
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Mr. Keith B. Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

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 October 3, 2003, at Sacramento, California.

Victoria Soriano
VICTORIA SORIANO