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April 18, 2011

Drew Bohan, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: CSM 02-TC-10 County of Los Angeles
CSM 02-TC-51 Riverside Unified School District
California Public Records Act

Dear Mr. Bohan:

I have received the Commission's Draft Staff Analysis (DSA) for the above referenced consolidated test claim dated March 30, 2011, to which I respond on behalf of the test claimant for 02-TC-51, Riverside Unified School District.

PART 1. NEW PROGRAM STANDARD OF REVIEW

The DSA (15,16) states that to determine if a program is new or imposes a higher level of service, the statutes pled "must be compared with the legal requirements in effect immediately before the enactment." This is incorrect. The County of Los Angeles test claim was filed on October 15, 2002. The Riverside Unified School District test claim was filed on June 26, 2003. These filings are effective prior to the September 30, 2003, effective date of Statutes of 2002, Chapter 1124 (for mandates that became effective before January 1, 2002)¹, which first established at Government Code Section 17551,

¹ Statutes of 2002, Chapter 1124, is generally effective September 30, 2002. However, the amendment that added Government Code section 17551, subdivision (c), delayed the effective date of that subdivision for mandates effective before January 1, 2002, by one year to September 30, 2003:

(c) Local agency and school district test claims shall be filed not later than three years following the date the mandate became effective, *or in the case of*

subdivision (c), time limits for filing on statutes enacted after December 31, 1974. Based on the date these test claims were submitted, the standard of review is to compare the statutes pled on the effective date of the test claim filing (for these test claims, July 1, 2001) to the status of the law as of December 31, 1974, pursuant to Government Code Section 17514.

The Commission, however, decided to the contrary on this issue in the March 24, 2011, Statement of Decision for 02-TC-25,46,31, Discrimination Complaint Procedures, relying upon *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859. The legal issue here is identical to that in the Discrimination Complaint Procedures test claim. The test claimant raises it here for purposes of the record and does not waive the issue. The proposed statement of decision should be revised to compare the statutes and laws effective July 1, 2001 (the effective reimbursement date of these test claims), to the law as it existed on December 31, 1974.

PART 2. PROGRAM STATUTES ANALYSIS

Section 6253-Collection of the Fee

The DSA (17) asserts that the plain language of Section 6253, subdivision (b), does not require the agency to determine or collect a fee for the duplication of records. Chapter 620, Statutes of 1998, Section 4, renumbered former Government Code Section 6253 as Government Code Section 6253.4, and at Section 5, added a new Government Code Section 6253. Subdivision (b) states:

- (b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person, *upon payment of fees covering direct costs of duplication, or a statutory fee, if applicable*. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency. *(Emphasis added.)*

The unambiguous plain meaning of this Section is that collection of the fee is a condition precedent to providing the records, so it is a necessary activity to comply with the mandate to provide the records. Furthermore, to collect the fee, the amount must be determined.

mandates that became effective before January 1, 2002, the time limit shall be one year from the effective date of this subdivision. (Emphasis added)

Regarding the scope of this activity prior to 1975 (DSA 19), Section 6256, as amended by Chapter 575, Statutes 1970, Section 3, stated:

Any person may receive a copy of any identifiable public record or copy thereof. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency.

Section 6256 only required that the agency provide a copy, without any condition of collecting fees. This Section was amended in 1981 and then repealed by Chapter 620, Statutes of 1998, Section 7, in favor of new Section 6253,

Prior to 1975, Section 6257, as added by Chapter 1473, Statutes, 1968, Section 39, stated:

A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, or the prescribed statutory fee, where applicable.

Section 6257 only stated that the requesting party include the fee with the request. The 1968 language did not create a statutory condition precedent to releasing the records, that is, performing the mandate, nor did it require the agency to determine the amount of the fee and the collection of the fee prior to the release of the records. This Section was amended in 1975, 1976, repealed and replaced in 1981, and then repealed by Chapter 620, Statutes of 1998, Section 10, in favor of new Section 6253.

Section 6259 Court Costs and Attorney Fees

The DSA (26) concludes that Section 6253, subdivision (d), is not a new program or higher level of service, but rather it is a consequence of failing to perform the mandate to provide public records access.

Section 6259, as added by Chapter 1473, Statutes of 1968, Section 39, and as first amended by Chapter 1246, Statutes of 1975, Section 9, states:

Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and such oral argument and additional evidence as the court may allow.

If the court finds that the public official's decision to refuse disclosure is not justified under the provisions of Sections 6254 or 6255, he shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure. Any person who fails to obey the order of the court shall be cited to show cause why he is not in contempt of court. The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. Such costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

The DSA has already concluded that there is a limited mandate to provide public records access as determined by changes from legislation enacted after December 31, 1974, or as otherwise excepted. To perform that mandate of appropriate public access, the agency has the affirmative duty to the people of California and certain protected classes of persons, such as peace officers and public agency employees, not to disclose the information described in Section 6254 and to provide a written justification for that non-disclosure pursuant to Section 6255. The evaluation of the public records for non-disclosable information is necessary to implement the mandated activity to disclose the disclosable portion of the record.

Sections 6254 and 6255 are heavily litigated. The West's Annotated California Code has about 150 case notes for these two sections. The standard for judicial review merely requires alleging the *appearance* of agency error. Costs and fees are awarded to the plaintiff should the court agree with the plaintiff that the agency non-disclosure was not justified, that is, neither correct nor reasonable in its inception or implementation. To the contrary, any award of costs and fees to the agency requires a higher standard, that the plaintiff's case was *clearly frivolous*, that is, something a reasonable person would never take seriously. However, that determination is made only after the court performs the required evaluation, which is after the public agency has incurred costs to respond to the petition. The standards are not mirror opposites by any means.

The court's determination is not a finding of failure to implement the mandate to disclose or not disclose the records, but instead, it is a conclusion as to whether the justification for the action was reasonable. The litigation costs incurred by the public agency are a necessary and reasonable consequence of its statutory duty to comply with Sections 62253, 6254 and 6255. Therefore, to the extent that the subject matter of the litigation pertains to information not to be disclosed pursuant to legislation enacted after December 31, 1974, the costs and fees incurred by the public agency to respond to the writ and the court are reimbursable, as well as any award assessed against the

public agency.

Certification

By my signature below, I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this submission is true and complete to the best of my own knowledge or information or belief, and that any attached documents are true and correct copies of documents received from or sent by the state agency which originated the document.

Executed on April 18, 2011 at Sacramento, California, by



Keith B. Petersen

C: Commission electronic service list
Mail service to CLM Financial Consulting, Inc.

DECLARATION OF SERVICE

Re: Test Claim 02-TC-10 County of Los Angeles
Test Claim 02-TC-51 Riverside Unified School District
California Public Records Act

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above-named claimants. I am 18 years of age or older and not a party to the entitled matter. My business address is P.O. Box 340430, Sacramento, CA 95834-0430.

On the date indicated below, I served the attached letter dated April 18, 2011, to:

Cheryl Miller
CLM Financial Consultants, Inc.
1241 North Fairvale Avenue
Covina, CA 91722

U.S. MAIL: I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

OTHER SERVICE: I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

FACSIMILE TRANSMISSION: On the date below from facsimile machine number (916) 263-9701, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

PERSONAL SERVICE: By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

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 April 18, 2011, at Sacramento, California.


Barbara Rinkle