SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

178

FROM: Executive Office

SUBMITTAL DATE:
May 25, 2011

SUBJECT: Order Initiating Riverside County Ordinance No. 905

RECOMMENDED MOTION: That the Board of Supervisors:

1) Adopt an order initiating proceedings for Ordinance No. 905 which will authorize custodians of records to charge sums reasonably necessary to at least partially recover the cost of providing copies of public records beyond direct costs of duplication; and
2) Direct the Executive Office and County Counsel to prepare and process Ordinance No. 905.

BACKGROUND: The weighted hourly salary of a county custodian of records, or his or her designee, for actual time spent complying with a Public Records Act request is greater than the direct duplication costs that are recoverable under Government code section 54985. County custodians of records often spend inordinate time responding to records requests, which can create a substantial burden in tight budgetary times and takes employees away from their daily duties.

Raymond Smith, public information officer

FINANCIAL DATA	**Current F.Y. Total Cost:**	-0-	**In Current Year Budget:**	
	Current F.Y. Net County Cost:		**Budget Adjustment:**	
	Annual Net County Cost:		**For Fiscal Year:**	

SOURCE OF FUNDS:

Positions To Be Deleted Per A-30 ☐

Requires 4/5 Vote ☐

C.E.O. RECOMMENDATION:

County Executive Office Signature

APPROVE
BY: Bill Luna

MINUTES OF THE BOARD OF SUPERVISORS

On motion of Supervisor Stone, seconded by Supervisor Ashley and duly carried by unanimous vote, IT WAS ORDERED that the request to adopt an Order Initiating Riverside County Ordinance No. 905 is Denied, IT WAS FURTHER ORDERED that the committee staffed by Supervisor Stone and Supervisor Tavaglione review all requests for increases in fees for services or items provided to the taxpayers before agendized.

Ayes:	Buster, Tavaglione, Stone, Benoit and Ashley
Nays:	None
Absent:	None
Date:	June 28, 2011
xc:	EO, Auditor, Supvr. Tavaglione, Supvr. Stone

Kecia Harper-Ihem
Clerk of the Board
By: Deputy

Prev. Agn. Ref.: | **District:** | **Agenda Number:** 3.12

Departmental Concurrence

☐ Consent ☑ Policy

☐ Consent ☐ Policy

Dep't Recomm.:

Per Exec. Ofc.:

To fulfill some requests, county staff must retrieve boxes of records from storage for review before the records can be released. The task can require several hours a day, or more, over the course of many days. In recent years, some records requests have preceded the filing of civil lawsuits, providing a means to commence a de-facto discovery process before a case has even been filed in court.

Other complex requests have involved the review of thousands of documents by a custodian of records, followed by a County Counsel examination needed to identify records that should not be released because of personnel, legal or privacy exemptions included in state law.

Ordinance No. 905 would provide a mechanism for the County to recover costs above and beyond the direct expense of duplication. This cost recovery is allowed pursuant to the Office of the Attorney General, State of California, Opinion No. 01-605 dated November 1, 2002. However, because government must be responsive to residents and maintain transparency in its operations, the following provisions will be added:

1. The Ordinance will provide that any fee beyond the direct cost of duplication is capped at $50 per hour.
2. The Ordinance will exempt requests that require a nominal amount of processing time, which will be defined as less than one hour.
3. The Ordinance will provide that the Board may waive charges if individuals demonstrate the fee creates a hardship.

Barton, Karen

From: Peter Scheer <pscheer@earthlink.net>
Sent: Monday, June 27, 2011 4:24 PM
To: COB; District1; District2; District3; District4 Supervisor John J Benoit
Cc: Tom Newton; Jim Ewert; Terry Francke; Maria Henson; Alonzo Wickers IV; Judy Alexander; Roger R. Myers; Mel Opotowsky
Subject: Oppose Ordinance 905, Riverside County
Attachments: Riverside letter 062711.pdf; ATT00001.txt

Supervisors, Riverside County:

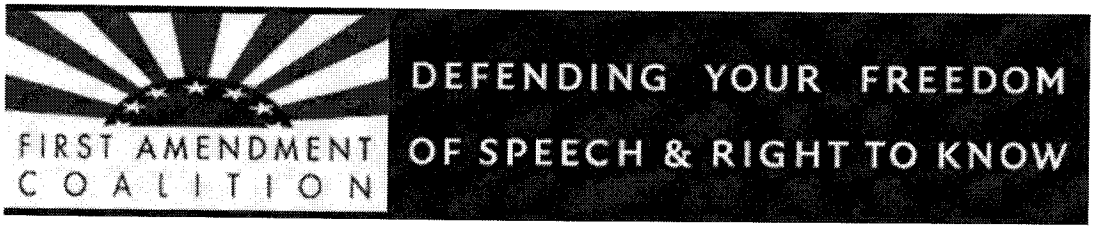
Attached please find the First Amendment Coalition's letter opposing proposed Ordinance 905 and other proposals to tax county citizens'
exercise of their rights under the Public Records Act.

If you have any questions, please don't hesitate to call.

Sincerely,

Peter Scheer, Executive Director
FIRST AMENDMENT COALITION
534 4th St., Suite B
San Rafael, CA 94901
415.460.5060 / 415.886.7081 (direct)
pscheer@firstamendmentcoalition.org
http://www.firstamendmentcoalition.org

Peter E. Scheer
Executive Director



June 27, 2011

Riverside County, Clerk of the Board of Supervisors
4080 Lemon Street, 1st Floor
Riverside, CA 92501
Fax: 951.955.1071
cob@rcbos.org

Supervisor Bob Buster, Chairman
4080 Lemon St., 5th Floor
Riverside, CA 92502
district1@rcbos.org

Supervisor John Tavaglione, Vice Chairman
4080 Lemon St., 5th Floor
Riverside, CA 92502
District2@rcbos.org

Supervisor Jeff Stone
4080 Lemon St., 5th Floor
Riverside, CA 92502
District3@rcbos.org

Supervisor John Benoit
73-710 Fred Waring Drive, Suite 222
Palm Desert, CA 92260
District4@rcbos.org

Supervisor Marion Ashley
4080 Lemon St., 5th Floor
Riverside, CA 92502
District4@rcbos.org

Re: Oppose Ordinance No. 905: A forbidden and misguided tax on democracy

Dear Supervisors,

I am writing to express the opposition of the First Amendment Coalition to legislative proposals before the Riverside County Board of Supervisors to increase charges to county residents for access to public records under the California Public Records Act (CPRA). In particular, we oppose a proposal of the County Executive for Ordinance No. 905, which would impose fees up to $50/hour for time (in excess of one hour) expended in searching for records responsive to CPRA requests.

534 Fourth Street Suite B, San Rafael, CA 94901 www.firstamendmentcoalition.org
email psscheer@firstamendmentcoalition.org ph 415.460.5060 cell 415.886.7081

While we understand the financial and political pressure on all local governments to cut costs and raise revenue, Ordinance 905's assessment of CPRA search fees is beyond the power of the county. It is also a terrible idea.

First, the law. Under the CPRA, public agencies must provide copies of public records "upon payment of fees covering direct costs of duplication, or a statutory fee . . ." Govt. Code section 6253(b). Ordinance No. 905 is an attempt to create an alternative "statutory fee." However, although Govt. Code section 54985 may authorize counties to assess fees that purport to recover more than "direct costs of duplication," those fees may not include recovery of costs for searching for records.

This limitation is established in a 2002 Attorney General Opinion, 85 Ops. Cal. Atty. Gen 225, interpreting Govt. Code section 54985. While agreeing that section 54985 applies to public records and permits the charging of some costs not authorized by section 6253(b), the Attorney General adds this crucial caveat: "In any event, a 'reasonably necessary' fee for a copy of a public record would have no effect upon the public's right of access to and inspection of public records *free of charge."* 85 Ops. Cal. Atty. Gen, supra, at 229 (emphasis added).

In other words, section 54985 does not alter the right, conferred by the CPRA, to inspect records (without making copies of them) that have been assembled pursuant to a CPRA request. Since the right to inspect records for free precludes charging for the costs of searching for those same records, costs recoverable under Govt. Code section 54985 cannot include search costs. They might include other costs involved in duplicating records, but not search costs.

This conclusion is strengthened by Prop 59, the open-government constitutional amendment approved by 83 percent of voters in 2004. Prop 59, Article 1, Section 3(b)(2), commands that: "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. "

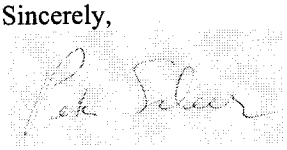
Govt. Code section 54985, as a limitation on public access, therefore must be narrowly construed to incorporate section 6253(b)'s bar on cost recovery for record searches.

Quite apart from Ordinance No. 905's vulnerability to legal challenge, the charging of new fees to access public records is a horrendous mistake from a public policy standpoint. Ordinance 905 is a tax on democracy. Ordinary citizens, having already paid, through their taxes, for the government's creation of public records, should not have to pay again to see them.

The First Amendment Coalition is a nonprofit organization committed to free speech and government transparency. FAC's activities include litigation to enforce open-government rights. Recent FAC cases against Santa Clara County, Sacramento County and CalPERS have resulted in payments, by those entities, exceeding $600,000 as attorney's fees to FAC's lawyers.

We hope the Board of Supervisors will vote NO to Ordinance No. 905 or other proposals to impose new fees on the people's exercise of open-government rights.

Sincerely,



Peter Scheer
Executive Director

cc:
Tom Newton
Jim Ewert
Terry Francke
Mari DeVarenne
Alonzo Wickers
Judy Alexander
Roger Myers
Mel Opotowsky

Barton, Karen

From: Solano, Carolina <carolinasolano@dwt.com>
Sent: Monday, June 27, 2011 4:52 PM
To: COB; District1; District2; District3; District4 Supervisor John J Benoit; District4 Supervisor John J Benoit
Cc: Wickers, Alonzo; Glasser, Jeffrey
Subject: Proposed Riverside County Ordinance No. 905
Attachments: img-627164916-0001.pdf

Letter attached Re: Proposed Riverside County Ordinance No. 905

Thank you,

Carolina Solano | Davis Wright Tremaine LLP
Assistant to Alonzo Wickers IV, Jeffrey Glasser
and Lisa Kohn
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Tel: (213) 633-6858 | Fax: (213) 633-6899
Email: carolinasolano@dwt.com | Website: www.dwt.com

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June 27, 2011

Via Email

Supervisors Bob Buster, Mr. John Tavaglione,
Jeff Stone, Mr. John Benoit, Marion Ashley
c/o Riverside County Clerk
of the Board of Supervisors
4080 Lemon Street
1st Floor
Riverside, CA 92501

Re: Proposed Riverside County Ordinance No. 905

Dear Supervisors Buster, Tavaglione, Stone, Benoit, Ashley:

On behalf of The Press-Enterprise, we write to oppose Proposed Riverside County Ordinance No. 905, under which Riverside County would charge a $50-per-hour fee on top of direct costs of duplication for responding to Public Records Act requests. The Proposed Ordinance directly violates controlling case law as well as the fundamental rights of public records requesters under Article 1, § 3(b) of the California Constitution.

More than 15 years ago, the Fourth Appellate District Court of Appeal made clear that Riverside County and other public agencies may only recover the "direct costs of duplication" when responding to public records requests, which the Court of Appeal held is limited to photocopying costs. *North County Parents Organization v. Dep't. of Education*, 23 Cal. App. 4th 144, 148 (1994); *see also* Gov't Code § 6253(b) (providing for recovering of "direct costs of duplication"). The Court of Appeal based this ruling on the statutory history of the Public Records Act, which provides that "'direct cost' does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted." *Id.*[1] This decision applies to Riverside County and should be followed.

[1] We have attached a copy of the Court of Appeal's ruling in *North County Parents Organization* as Exhibit A.

The Attorney General Opinion (85 Ops. Cal. Atty. Gen. 225 (2002)) cited by Riverside County does not change the law. While the Attorney General gave an opinion that the county board of supervisors has statutory authority to charge a fee that exceeds the amounts recoverable under the Public Records Act, the Attorney General stated that the amount charged could only be that "reasonably necessary to recover the costs of providing" the public records. *Id.* at 228-229. Requiring public records requesters in most instances to pay $50-per-hour fees (when $.25 cent per page fees were found to be untenable in *North County Parents Organization*) cannot be deemed "reasonably necessary" by any stretch of the imagination. Moreover, such an exorbitant $50-per-hour fee not only would be bad public policy, conditioning the public's right of access on ability to pay fees, but it would also impermissibly chill the public's "fundamental and necessary" right of access to public records, which is now codified in the California Constitution. *See* Gov't Code § 6250; Cal. Const. Art. 1, § 3(b).

For all these reasons, The Press-Enterprise respectfully requests that the Riverside County Board of Superivsors reject Proposed Ordinance 905 and reaffirm the public's fundamental right of access to public records, unencumbered by onerous fee requirements.

***North County Parents Organization* Requires Rejection Of The Proposed Ordinance.**

North County Parents Organization itself demonstrates the unreasonableness of the proposed $50-per-hour fee that Riverside County seeks to impose on fee requesters. In that case, the Department of Education was seeking to charge $0.25 per page instead of $0.10 per page. *Id.* at 147. As is the case here, the goal of the additional charge was to "reimburse[] Department for staff time involved in searching the records, reviewing records for information exempt from disclosure under law, and deleting such exempt information." 23 Cal. App. 4th at 146. The Court of Appeal said these additional costs were not recoverable under the Public Records Act, which clearly provided that the only recoverable costs were direct costs of duplication, which had the plain meaning of the costs incurred in photocopying the records. *Id.* at 146-147. The Court of Appeal explained:

> There is no disagreement with the proposition that the Department was put to a great amount of trouble responding to appellant's request, much of which had nothing to do with copying. Records were searched, documents were read for any material to be excised, such material was removed, files were refiled.
>
> We sometimes presume too much of the Legislature, but this is assuredly not the case when we presume that the statute writers, themselves bureaucrats of a sort, knew the ancillary costs of

> everything government does. They specified, however, that the sole charge should be that for 'direct cost' of duplication. Obviously to be excluded from this definition would be 'indirect' costs of duplication, which presumably would cover the types of costs the Department would like to fold into the charge.

Id. at 147 (emphasis added). The Court of Appeal also explained that the Legislature used the term "direct costs of duplication" "to limit, rather than broaden" the fee that could be collected so that the public agency could not collect fees for the "various tasks associated with locating and pulling the file, excising material, etc." *Id.* at 147-148.

Here as in *North County Parents Organization*, Riverside County may not adopt a policy allowing the County to impose $50-per-hour fees in exchange for access to public records. The Proposed Ordinance would greatly broaden the fees collected by Riverside County, which would contravene the Legislature's intent that public agencies may only recover direct costs of duplication, a provision of law designed to help ensure maximum public access to records.

The Attorney General Opinion Does Not Support The Proposed Ordinance.

Riverside County's reliance on the 2002 Attorney General Opinion is misplaced. Writing before the elevation of the public's right of access to constitutional status through Proposition 59 in 2004, the Attorney General interpreted the County's production of public records as being a "service or product"; the Attorney General stated that the Board of Supervisors could increase or decrease the fees for providing this access-to-public-records"service or product" as long as such fees were "reasonably necessary to recover the cost of providing the product or service...." 85 Ops. Cal. Atty. Gen. at 227-228 (citing Gov't Code § 54985). However, in passing Proposition 59, the public made clear that agencies such as the County were not merely providing a "service or product" like a business license when responding to public records requests, but were fulfilling the agency's responsibility to serve the public's fundamental right of access to public records. See Cal. Const. Art. 1, § 3(b). The Attorney General's opinion is of questionable value in light of this change in the California Constitution, especially considering that the opinion, if interpreted as the County urges,would lead to the illogical result that counties like Riverside could charge exorbitant $50-per-hour fees for access to their records, while all other public agencies in California would be limited to recover only the direct costs of duplication (costs of photocopying) for Public Records Act cases.

Moreover, the California Constitution now requires narrow construction of statutes that limit the public's right of access. See Cal. Const. Art. 1, § 3(b). A narrow construction of Section 54985 and a broad construction of Section 6253 would not allow a county to impose

$50-per-hour fees on most public records requesters except for those requests involving "nominal" time, which is defined as under an hour. Put another way, if the Department of Education could not charge $0.25 per copy when responding to a public records request, then it would make little sense for the County to authorize a $50-per-hour fee. Such a remarkably high charge cannot be said to be "reasonably necessary to recover the costs" of providing the public with access to public records.[2]

Conclusion

The Legislature was aware that it was prohibiting public agencies – including Riverside County – from recovering fees beyond the cost of copying for having to comply with their public responsibilities in ensuring the public's access to government information. Because nothing in the Public Records Act allows Riverside County to shift the overhead costs for responding to public records requests onto the request, The Press-Enterprise respectfully requests that the Board of Supervisors reject Propose Ordinance 905 and promote the continued vitality of public access to records in the County.

Please feel free to call me (213-633-6865) or my colleague, Jeff Glasser (213-633-6864), with any questions regarding this issue.

Sincerely,

Alonzo Wickers IV

Alonzo Wickers IV
Davis Wright Tremaine LLP

cc: Maria DeVarenne

[2] In fact, the Proposed Ordinance is so overbroad that it would sweep in requests for inspection of public records when it would take more than "nominal time" for Riverside County to review the records, even though the inspection right does not carry with it any specified fee recovery. See Gov't Code § 6253.

EXHIBIT A

Positive
As of: Jun 27, 2011

NORTH COUNTY PARENTS ORGANIZATION FOR CHILDREN WITH SPECIAL NEEDS, Plaintiff and Appellant, v. DEPARTMENT OF EDUCATION, Defendant and Respondent.

No. D016698.

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

23 Cal. App. 4th 144*; *28 Cal. Rptr. 2d 359*; *1994 Cal. App. LEXIS 212*; *94 Cal. Daily Op. Service 1811*; *94 Daily Journal DAR 3224

March 10, 1994, Decided

PRIOR HISTORY: [***1] Superior Court of San Diego County, No. 628246, J. Richard Haden, Judge.

DISPOSITION: We reverse the judgment of the trial court and remand the case for further proceedings in accord with this opinion.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant filed appeal from judgment of Superior Court of San Diego County (California), which held *Cal. Gov't Code § 6257* permitted respondent California Department of Education to charge appellant for cost of duplicating requested records and cost of staff time for records search and that no fee waiver was required.

OVERVIEW: Appellant requested from respondent California Department of Education copies of all decisions rendered in past two years in actions by parents of special needs children. Respondent charged appellant a fee, which covered the cost of duplicating such documents and the staff time involved in searching the records. Respondent refused to waive the charge. Appellant paid the charge and sued respondent seeking miscellaneous relief. The trial court ruled for respondent, finding *Cal. Gov't Code § 6257* permitted respondent to make this charge and that it did not err by refusing to consider a waiver. The court reversed. *Section 6257* provided that one who requested copies of public documents was required to pay the statutory fee and where there was no statutory fee, a fee covering direct costs of duplication. Here there was no statutory fee and the statute covered only a charge for duplication, not the indirect costs included in respondent's charge. The trial court also erred in finding that respondent had no obligation to waive the fee because respondent had contended it had no discretion to waive the fee. The case should be returned to respondent to consider the waiver request.

OUTCOME: Court reversed judgment for respondent because where, as here, there was no statutory fee for public document request, California Government Code covered only direct costs of duplication. Trial court erred in finding respondent had no obligation to waive fee because respondent had contended it had no discretion to waive fee.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an action by a nonprofit organization against the California Department of Education, the trial court en-

tered a judgment that the department properly charged the organization 25 cents per page for furnishing copies of requested documents, and that *Gov. Code, § 6257*, permitted the department to charge the full direct cost of duplication. (Superior Court of San Diego County, No. 628246, J. Richard Haden, Judge.)

The Court of Appeal reversed and remanded for further proceedings. Noting that the charge not only covered the cost of duplication of the documents, but also reimbursed the department for staff time involved in searching and reviewing records for exempt information and deleting it, the court held that under the plain language of the statute, which authorizes a fee "covering direct costs of duplication," the amount chargeable by the department for furnishing the copies was the cost of copying them, and such "indirect" costs charged by the department were excluded. The statutory history indicates that "direct cost" does not include the ancillary tasks necessarily associated with the retrieval, inspection, and handling of the file from which the copy is extracted. The court also held that the trial court properly determined that the department had the power to waive fees under *Gov. Code, § 6253.1*, which gives an agency power to "adopt requirements for itself that allow greater access to records than prescribed by the minimum standards set forth in this chapter." However, the court held that the trial court erred in finding no obligation on the part of the department to reduce the fee; the trial court's ruling ignored the fact that the department declined to exercise discretion, contending that it had none. Had the department been aware that it was vested with discretion to reduce the fee, it might have done so. (Opinion by Froehlich, J., with Work, Acting P. J., concurring. Separate concurring and dissenting opinion by Huffman, J.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Records and Recording Laws § 15.2--Inspection of Public Records--Procedure--Requests for Disclosure--What Constitutes Costs of Duplication. --In an action by a nonprofit organization against the California Department of Education, the trial court erred in ruling that the department properly charged the organization 25 cents per page for furnishing copies of requested documents, and that *Gov. Code, § 6257*, permitted the department to charge the full direct cost of duplication. The department's charge not only covered the cost of duplication of the documents, but also reimbursed the department for staff time involved in searching and reviewing records for exempt information and deleting it. Under the plain language of the statute, which authorizes a fee "covering direct costs of duplication," the amount chargeable by the department for furnishing the copies was the cost of copying them, and such "indirect" costs charged by the department were excluded. The statutory history indicates that "direct cost" does not include the ancillary tasks necessarily associated with the retrieval, inspection, and handling of the file from which the copy is extracted.

[See 2 **Witkin,** Cal. Evidence (3d ed. 1986) § 1252.]

(2) Records and Recording Laws § 15.2--Inspection of Public Records--Procedure--Requests for Disclosure--Costs of Duplication--Waiver by Public Agency. --In an action by a nonprofit organization against the California Department of Education, arising out of the department's charging the organization 25 cents per page for furnishing copies of requested documents, the trial court properly determined that the department had the power to waive fees under *Gov. Code, § 6253.1*, which gives an agency power to "adopt requirements for itself which allow greater access to records than prescribed by the minimum standards set forth in this chapter." However, the trial court erred in finding no obligation on the part of the department to reduce the fee, since the trial court's ruling ignored the fact that the department declined to exercise discretion, contending that it had none. Had the department been aware that it was vested with discretion to reduce the fee, it might have done so.

COUNSEL: Charles Wolfinger for Plaintiff and Appellant.

Joseph R. Symkowick, General Counsel, Roger D. Wolfertz, Assistant General Counsel, and Carolyn Pirillo, Deputy General Counsel, for Defendant and Respondent.

JUDGES: Opinion by Froehlich, J., with Work, Acting P. J., concurring. Separate concurring and dissenting opinion by Huffman, J.

OPINION BY: FROEHLICH, J.

OPINION

[*146] **[**360]** The issue in this case is whether the California Department of Education (Department) is entitled to charge its full cost of providing copies of public documents which are requested in accordance with the California Public Records Act. (*Gov. Code, [1] § 6250 et seq.*)

1 All statutory references are to the Government Code unless otherwise specified.

North County Parents [***2] Organization for Children With Special Needs (appellant) is a nonprofit tax-exempt corporation which provides advisory services to parents of children with disabilities. Appellant assists such parents in enforcing their rights to special educational services provided by state and federal laws. Parents seeking review of local school district action respecting such services may take advantage of an appellate hearing process. The decisions resulting from this process are public records maintained by the Department.

Appellant requested copies of all decisions rendered in the last two years. Department charged $.25 per page for furnishing the copies, rendering a total bill of $126.50. This charge not only covered the cost of duplication of the documents, but also reimbursed Department for staff time involved in searching the records, reviewing records for information exempt from disclosure under law, and deleting such exempt information. Department refused to reduce this charge, and also refused to waive the charge upon the ground that "there is no legal authority to waive such charges." Appellant paid the charge and then brought this action seeking miscellaneous relief.

The trial court [***3] ruled for the Department, finding that *section 6257* permits the Department to charge "the full direct costs of duplication," and that the Department's charge of $.25 per copy "was not in contravention of *section 6257*." The court made a second ruling pertaining to the potential of waiver of fees. It ruled that the Department had discretion to waive fees pursuant to *section 6253.1*, but that it was not required to waive fees and did not err in this case by refusing to consider waiver. Appellant contends both rulings are in error.

(1) We agree with appellant. *Section 6257* provides that one who requests copies of public documents must pay the statutory fee for same, if there is one. The parties agree there is none prescribed in this case. Lacking [*147] a statutory fee the cost chargeable is a "fee[] covering direct costs of duplication." There seems to be little dispute as to what "duplicate" means. It means just what we thought it did, before looking it up: to make a copy. (See Black's Law Dict. (4th ed. 1968) p. 593 ["to . . . reproduce exactly"]; Webster's Third New Internat. Dict. (1981) p. 702 ["to be or make a duplicate, copy or transcript . . ."].) Since words of a statute are [***4] to be interpreted "according to the usual, ordinary import of the language employed in framing them" (*In re Alpine (1928) 203 Cal. 731, 737 [265 P. 947, 58 A.L.R. 1500]*), we conclude that the cost chargeable by the Department for furnishing these copies is the cost of copying them.

There is no disagreement with the proposition that the Department was put to a great amount of trouble responding to appellant's request, much of which had nothing to do with copying. Records were searched, documents were read for any material to be excised, such material was removed, files were refiled, etc.

We sometimes presume too much of the Legislature, but this is assuredly not the case when we presume that the statute writers, themselves bureaucrats of a sort, knew the ancillary costs of everything government does. They specified, however, that the sole charge should be that for duplication. In order to clarify this limitation the Legislature added that the fee should be the "direct cost" of duplication. Obviously to be excluded from this definition would be "indirect" costs of duplication, which presumably would [**361] cover the types of costs [***5] the Department would like to fold into the charge.

The parties to this appeal argue earnestly about the policy considerations which should go into this momentous decision (whether to charge $.10 or $.25 per copy). We do not reach these arguments. Clearly the Legislature could have provided a different charge for copying. It simply did not, and the reason it did not is of no moment to the Court of Appeal, a body which simply interprets statutes and does not ordinarily seek their rationale.

However, if our quick conclusion needs any bolstering it is easy to find in the statutory history of this fee-setting provision. The original wording, adopted in 1968 (Stats. 1968, ch. 1473, § 39), was that "a reasonable fee" could be charged. In 1975 an amendment limited the "reasonable fee" to not more than $.10 per page. (Stats. 1975, ch. 1246, § 8.) An amendment in 1976 deleted "reasonable fee" and inserted instead "the actual cost of providing the copy." (Stats. 1976, ch. 822, § 1.) Finally, the present version of the statute was adopted in 1981 limiting the fee to the "direct costs of duplication." (*§ 6257.*) Thus it can be seen that the trend has been to limit, rather [*148] than to broaden, [***6] the base upon which the fee may be calculated. A "reasonable fee" or the "actual cost of providing the copy" could be interpreted to include the cost of all the various tasks associated with locating and pulling the file, excising material, etc. When these phrases are replaced by the more restrictive phrase "direct costs of duplication," only one conclusion seems possible. The direct cost of duplication is the cost of running the copy machine, and conceivably also the expense of the person operating it. "Direct cost" does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted.

(2) We apprehend that the court's second ruling was also in error. It may be thought that the error was either inadvertent or insignificant. However, being called upon herein to right wrongs which might seem inconsequential

to most, we complete our task by identifying this one. As stipulated by the parties, the Department refused to waive fees because it determined there was no legal authority to do so. The trial court, to the contrary, concluded that the Department *did* have the power to waive fees, citing *section 6253.1*. [***7] This section gives an agency power to "adopt requirements for itself which allow greater access to records than prescribed by the minimum standards set forth in this chapter." The trial court apparently concluded that this provision permits an agency to waive or reduce its fees. We agree. A reduction in copy fee permits "greater access" to records.

The trial court then, however, found no obligation to reduce the fee and hence no actionable wrong by the Department. Our difficulty with this ruling is that it ignores the fact that the Department declined to exercise discretion, contending it had none. Had the Department been aware that it was vested with discretion to reduce the fee, it might have done so. We believe, therefore, that the case should be returned to the Department with instructions to consider (but not necessarily to grant) the request for fee waiver.

Section 6258 provides: "Any person may institute proceedings for injunctive or declarative relief or writ of mandate . . . to enforce his or her right to inspect or to receive a copy of any public record . . .." This lawsuit clearly comes within this provision, and hence appellant's requests for writs, orders and declarations [***8] are proper. We decline, however, to grant such specific relief. As indicated by the general counsel, the Department will surely follow the law once it is advised of it. Appellant is entitled to a declaration of its right to obtain copies at a cost of only the expense of copying, and it is also entitled to our advice that the Department could waive this fee if it chose to do so. By this opinion we have granted these declarations. Appellant is also entitled to a refund of some portion of the fee it has already paid, [*149] and also to costs both at trial and appellate level. The statute (§ 6259, subd. (d)) contains authority for an award of attorney fees to appellant. All these matters are best determined by the trial court assuming (which we would expect is a false assumption) [**362] that the parties cannot now resolve their dispute by stipulation.

DISPOSITION

We reverse the judgment of the trial court and remand the case for further proceedings in accord with this opinion.

Work, Acting P. J., concurred.

DISSENT BY: HUFFMAN, J.,

DISSENT

Concurring and Dissenting.--Although I agree with the majority that *Government Code section 6253.1* [1] provides a public agency with the discretion to make fee waivers [***9] in appropriate cases, I respectfully dissent from the conclusion of the majority regarding the scope of the statutory term "direct costs of duplication." (*§ 6257.*) Although the monetary amount involved in this appeal is small, the question presented as to allocation of the direct costs of duplication of public records between requestors of such records or the taxpayers is of material importance in this era of straitened public finances. Interpreting *section 6257* de novo within the context of the Public Records Act (*§ 6250 et seq.*) (the Act) and on the record presented, I would conclude that the statutory term "direct costs of duplication" was intended by the Legislature to include not only the actual per page copying cost, but also the costs directly resulting from the acts necessary to prepare the public record material to make it available to the requesting party in an appropriate form. Such preparation may, in my view, include the tasks directly related to duplication, such as searching for appropriate records, "sanitizing" or redacting the material to segregate out statutorily exempt information, and then providing the public records in a prepared form.

1 All statutory references are to the Government Code unless otherwise specified.

[***10] A few more facts than those set forth by the majority are helpful to an understanding of my position on this issue. Respondent California Department of Education (the Department) is the state agency responsible for ensuring that local school districts provide appropriate special education services. As part of its duties, the Department conducts administrative hearings on appeals by parents contesting local school district decisions about their children's rights to special education services. North County Parents Organization for Children with Special Needs (Appellant), a nonprofit corporation and association of parent volunteers, requested copies of [*150] all decisions issued in such administrative hearings during 1987 and 1988, a two-year period. [2]

2 Appellant had made a similar request for a one-and-one-half-year period earlier, and had been provided a copy of four decisions (twenty pages in total), for which the Department charged no fee. Appellant then requested copies of all hearing decisions from other nearby school districts for a three-year period, and was told a representative should come to Sacramento to inspect and select the decisions needed, copies of which would then be provided at the rate of ten cents a page. Appellant declined to take this route, based on the cost of travel and because the 10-cent-per-page charge was excessive in its view.

[***11] In response to Appellant's request, the Department assigned a staff analyst to reply to the request by searching individual case files for the hearing decisions, reviewing them for information exempt from disclosure under the Act (names of students and parents), deleting the names and copying decisions, and then refiling the original decisions. The Department then sent Appellant the requested copies of decisions with a bill for $126.50, based on the rate of 25 cents per page for 506 pages. Appellant paid the charge under protest, asking the Department either to reduce the charges to 10 cents per page or to waive them altogether because Appellant is a nonprofit group using the decisions to provide free advice to parents about their rights under applicable special education laws. The Department responded that the charges covered staff costs for locating the records (two hours), reviewing the records for exempt information and then deleting it (one and one-half hours), and then copying the five hundred six pages twice, once from the original and once with the whited-out or "sanitized" copy (three hours). Costs for operating the copy machines and for postage were also incurred.

[**363] *Section* [***12] *6257* provides as follows: "Except with respect to public records exempt by express provisions of law from disclosure, each state or local agency, upon any request for a copy of records, which reasonably describes an identifiable record, or information produced therefrom, shall make the records promptly available to any person, *upon payment of fees covering direct costs of duplication, or a statutory fee, if applicable.* Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law." (Italics added.) [3] The trial court gave broad scope to the fees provision of this section by ruling the Department was permitted to charge parties requesting records "the full direct costs of duplication." Review of this determination, according to rules of statutory interpretation, involves the resolution of a question of law de novo on appeal. (*Shippen v. Department of Motor Vehicles (DMV) (1984) 161 Cal.App.3d 1119, 1124 [208 Cal.Rptr. 13]*; *Los Angeles County Safety Police Assn. v. County of Los Angeles (1987) 192 Cal.App.3d 1378, 1384 [237 Cal.Rptr. 920].*) [***13] Although construction of statutory language is [*151] unnecessary where the language is clear and unambiguous, rules of statutory interpretation must be applied where there is ambiguity or conflict in the statutory language, or where a literal construction would lead to absurd results. (*Shippen v. DMV, supra, at p. 1124.*) The statutory term "direct costs of duplication" is subject to more than one interpretation and must be considered ambiguous.

3 It is agreed that no statutory fee applies to this case.

"Accordingly, we are compelled to engage in statutory construction, giving words their usual, ordinary, and common sense meaning based on the language the Legislature used and the apparent purpose for which the statute was enacted. [Citation.] We '. . . ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.]" (*Shippen v. DMV, supra, 161 Cal.App.3d at p. 1124.*)

Stated differently, [***14] statutory language must be construed in context, keeping in mind the statutory purpose, and statutory enactments relating to the same subject must be harmonized to the extent possible. (*Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323].*) "Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.]" (*Ibid.*) Further, " ' ". . . the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used." ' [Citations.]" (*Id. at p. 1391, fn. 14.*)

The majority reads *section 6257* according to the "usual, ordinary import" of its language (*In re Alpine (1928) 203 Cal. 731, 737 [265 P. 947, 58 A.L.R. 1500]*), without benefit of citation of authority or much in the way of explanation. I believe some background of interpretation [***15] of the Act is of assistance in this statutory interpretation question. Appellant relies on *American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal.3d 440, 451-453 [186 Cal.Rptr. 235, 651 P.2d 822]* (ACLU), in which the Supreme Court recognized that under section 6255 of the Act, an agency's costs for reviewing and deleting exempt information from records are a burden which may be taken into account in requiring disclosure of records. Section 6255 creates a balancing test by which an agency can justify nondisclosure of requested records by showing "that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

Although neither party in the case before us has presented the issue as requiring a section 6255 balancing test, the general principles of *ACLU,* [*152] *supra,* 32 Cal.3d 440 may be applied here; we are required to read related statutory enactments as a whole. (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra, 43 Cal.3d at p. 1387.*) [***16] Section 6255 "imposes on [**364] the California courts a duty . . . to weigh the benefits and costs of disclosure in each particular case." (*ACLU, supra,* at p. 452.) A court performing this balancing test is authorized to take into account any expense and inconvenience involved in segregating non-exempt

from exempt information, because the statutory term "public interest" "encompasses public concern with the cost and efficiency of government." (*Id. at p. 453*, also see fn. 13, p. 453.) We may thus take it as established that the Act includes a policy favoring the efficiency of government and limitation of its costs.

Moreover, although the evident purpose of the Act is to increase freedom of information by giving the public maximum access to information in the possession of public agencies (*CBS, Inc. v. Block (1986) 42 Cal.3d 646, 651-652 [230 Cal.Rptr. 362, 725 P.2d 470]*), such access to information is not unlimited under the Act. For example, section 6254 et seq. defines a number of categories of information that are exempt from disclosure; requests for records are subject to those constraints. The Act thus places both substantive [***17] and some financial constraints upon disclosure of public records. (See *ACLU, supra*, 43 Cal.3d at p. 451; *State Bd. of Equalization v. Superior Court (1992) 10 Cal.App.4th 1177, 1191 [13 Cal.Rptr.2d 342]*.)

I would read the language of *section 6257* referring to the "direct costs of duplication" with this background in mind. To effectuate the purpose of the statute, according to the intent of the Legislature, a court is required to look first "to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided." (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra, 43 Cal.3d at pp. 1386-1387.*) The fee provisions of *section 6257* are activated by "any request for a copy of records, which reasonably describes an identifiable record, or information produced therefrom, . . ." (*§ 6257.*) Upon such a request, the agency must make the records promptly [***18] available to any person, with the proviso that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law." Thus, there are two clauses in this statute suggesting that public records must in some cases be edited or otherwise prepared before being made available to the requestor: (1) The records may consist of information produced from an identifiable record, and (2) nonexempt information may be provided in the form of any reasonably segregable portion of [*153] the records. The Legislature thus showed it was aware that there might be a need for preparation of records (search, review, and deletion) before they could be made appropriately available to the requestor, and that accompanying costs would be incurred. Such costs might be considerable, for example, if the requested material contained privileged personnel matters or litigation-related documents. (See § 6254, subds. (b), (c), (k).) I see no reason to assume that the Legislature intended that in all nonwaiver (*§ 6253.1*) cases, taxpayers, rather than requesting parties, should bear the full direct costs of duplicating copies [***19] of public records under the Act.

Where statutory language is uncertain or ambiguous, "consideration should be given to the consequences that will flow from a particular interpretation. [Citation.]" (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra, 43 Cal.3d at p. 1387.*) The financial consequences of Appellant's position are potentially considerable in this era of public agency budget deficits. I believe that the Legislature's references to the "information produced" from a record and the "reasonably segregable portion" of records which may be produced show that in this context, the Legislature intended that the meaning of the word "duplication" should be enlarged by reference to the object of the whole clause in which it is used. (*Id. at p. 1391, fn. 14.*) It thus should include the tasks directly related to duplicating the material as prepared for release, in [**365] accordance with the limitations imposed by the Act.

Dicta in a recent opinion by the Second District, Division Three, in *County of Los Angeles v. Superior Court (1993) 18 Cal.App.4th 588, 600-601 [22 Cal.Rptr.2d 409]*, [***20] suggest that in *section 6257*, the Legislature "has provided only for recovery of *duplication costs* by the . . . agency involved. This is a restriction which is both reasonable and appropriate where the mandatory disclosure is limited to current records of contemporaneous activity, but totally unreasonable and inappropriate where both generation and compilation of information from historical archives is required." (*18 Cal.App.4th at p. 601.*) I find support for my position on *section 6257* in this quoted language, since selecting and preparing the records requested by Appellant for disclosure required someone to compile those records and then edit them for disclosure. Such preparation was directly related to duplicating and making the copies available and was not free of agency expense.

Moreover, for purposes of interpreting the fee provision in *section 6257*, it is not proper to place too much weight upon the identity of the requestor of the documents. The Act does not differentiate among those who seek access to public information (e.g., a requestor who is a commercial entity, intending to use the material obtained for commercial purposes, [***21] and a private party [*154] who seeks public information). (*State Bd. of Equalization v. Superior Court, supra, 10 Cal.App.4th at p. 1190.*) In *State Bd. of Equalization*, the court refuted any interpretation of the Act which would give less deference to commercial users, as opposed to private parties, and adhered to its previous statement in *Shippen v. DMV, supra, 161 Cal.App.3d at pages 1126-1127* that access to bulk records by commercial users may be cir-

cumscribed by reasonable conditions regarding format and price. (*State Bd. of Equalization, supra, 10 Cal.App.4th at p. 1191.*) I believe that an interpretation of "direct costs of duplication" as including directly related search, compilation, review, and deletion expenses is consistent with the principles of *State Bd. of Equalization*, as allowing access to public records to be circumscribed in appropriate instances by reasonable conditions regarding format and price. I therefore dissent from the majority opinion on this point.

Barton, Karen

From: Chris Caro <Chris@cnpa.com>
Sent: Monday, June 27, 2011 5:25 PM
To: COB
Cc: District1; District2; District3; District4 Supervisor John J Benoit; District5; Jim Ewert; Karlene Goller; Ralph Alldredge; Tom Newton
Subject: Proposed Riverside County Ordinance
Attachments: Riverside proposed ordinance #905.pdf

Dear Ms. Harper-Ihem,

Please see the attached CNPA letter opposing the proposed Riverside County Ordinance No. 905.
A hard copy of this letter will follow via U.S. Postal Service.

Thank you,
Christine Caro
CNPA Legislative Assistant
916/288-6014

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June 26, 2011

Ms. Kecia Harper-Ihem
Clerk of the Riverside County Board of Supervisors
4080 Lemon Street,
1st Floor
Riverside, CA 92501

RE: Oppose Proposed Riverside County Ordinance No. 905

Dear Ms. Harper-Ihem:

The California Newspaper Publishers Association (CNPA) recently learned that the Riverside County Board of Supervisors is considering the adoption of Proposed Ordinance No. 905 which would authorize the county to charge an amount in excess of the direct cost of duplication to provide a copy of a public record to a member of the public. The proposal would cap the amount the county could charge a member of the public at $50 per hour.

The county believes it has the authorization to charge the additional amount based on a California Attorney General Opinion interpreting California Government Code Section 54985.

While we are mindful of the budgetary shortfall that Riverside County faces, the public policy advanced by Proposed Ordinance No. 905 is unconscionable and would make it difficult, if not impossible, for the average resident of Riverside County to meaningfully participate in his or her government.

Public access to copies of public records is a right, not a product or service for which a fee may be set by local decree. The public's Constitutional right of access to records and meetings was embedded in Article I, Section 3 of the State Constitution by overwhelming approval of Proposition 59 by 83% of the state's voters in 2004.

In addition, rules of statutory construction demonstrate that Section 54985 cannot be harmonized with provisions of the California Public Records Act (CPRA) that control the permissible fees that may be charged for providing a copy of a public record. Further, the Legislature's intent in enacting 54985 is not served by allowing counties to set fees for copies of public records.

Article I, Section 3(b)(1) of the California Constitution establishes, "***The people have the right of access to information concerning the conduct of the people's business,*** and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Emphasis added)

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

The Board's reliance on Attorney General Opinion No. 01-605 and Section 54985 is misplaced. When it was published, Opinion No. 01-605 interpreted Section 54985 broadly to allow counties to recover costs over and above the direct costs of duplication in providing records to a requester.

The Opinion does not authorize the county to charge any amount for the gathering and preparation of records. Section 54985 only provides the county with authority to increase or decrease the fee or charge, "that is otherwise authorized to be levied by another provision of law in the amount necessary to recover the cost of providing the product or service . . ."

The CPRA contains no provision that authorizes a public agency to recover any costs to search for and prepare records for inspection or copying purposes nor can authority for this purpose be found in any other code section. The California Attorney General's California Public Records Act Manual, on page 4, acknowledges this stating, "The CPRA contains no provision for a charge to be imposed in connection with the mere inspection of records."

Moreover, the Attorney General's Opinion itself bars the county's interpretation: "In any event, a 'reasonably necessary' fee for a copy of a public record would have no effect upon the public's right of access to and inspection of public records free of charge." 85 Ops. Cal. Atty. Gen, at 229. Accordingly, by its own terms Section 54985, cannot be used as authority for enabling the county to charge any amount for the gathering and preparation of public records as proposed here.

Opinion No. 01-605 was published in November, 2002 – two years prior to the passage of Proposition 59. Proposition 59 added Article I, Section 3(b)(2) to the state constitution which states, "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and ***narrowly construed if it limits the right of access***." (Emphasis added) Article I, Sec. 3 provides a superior bar to the county's interpretation of Attorney General Opinion No. 01-605 and Section 54985.

On behalf of the members of the CNPA, we respectfully urge the Board of Supervisors to reject Proposed Ordinance No. 905 and continue to recognize the historical and fundamental precept in the CPRA that appropriately limits the collection of fees for copies of public records.

Sincerely,

James W. Ewert
CNPA General Counsel

cc: Ralph Alldredge, CNPA President, Publisher, *Calaveras Enterprise*
Karlene Goller, CNPA Governmental Affairs Committee Chairwoman, Vice President and Deputy General Counsel, *Los Angeles Times*
Thomas W. Newton, CNPA Executive Director
Honorable Bob Buster, Chairman, Riverside County Board of Supervisors
Honorable John Tavaglione, Vice Chairman, Riverside County Board of Supervisors
Honorable Jeff Stone, Supervisor, Riverside County
Honorable John Benoit, Supervisor, Riverside County
Honorable Marion Ashley, Supervisor, Riverside County
Ron Redfern, Publisher, The Press-Enterprise

Riverside County Board of Supervisors
Request to Speak

Submit request to Clerk of Board (right of podium), Speakers are entitled to three (3) minutes, subject Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: Mel Opotowsky

Address: 5813 Old Zuck Rd. Riverside CA 92504
(only if follow-up mail response requested)

City: Riverside **Zip:** 92504

Phone #: 951 787 0403

Date: 6/28/11 **Agenda #** 3.12

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Position on "Regular" (non-appealed) Agenda Item:

_____**Support** _____**Oppose** _____**Neutral**

Note: If you are here for an agenda item that is filed for "Appeal", please state separately your position on the appeal below:

_____**Support** _____**Oppose** _____**Neutral**

I give my 3 minutes to: _____