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GEORGE DEUKMEJIAN  
Attorney General

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OPINION	:	No. 80-612
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of	:	<u>October 1, 1980</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Lawrence Keethe	:	
Deputy Attorney General	:	
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SUBJECT: OPERATION OF DRY CLEANING FACILITY—Folsom State Prison is exempt from the payment of fees levied for a permit issued by the Sacramento County Air Pollution Control District pursuant to Health and Safety Code section 42311, subdivision (a), for the operation of its dry cleaning facility.

The Honorable Ruth L. Rushen, Director, Department of Corrections, has requested an opinion on the following question:

Is Folsom State Prison exempt from the payment of fees levied for a permit issued by the Sacramento County Air Pollution Control District pursuant to Health and Safety Code section 42311, subdivision (a), for the operation of its dry cleaning facility?

CONCLUSION

Folsom State Prison is exempt from the payment of fees levied for a permit issued by the Sacramento County Air Pollution Control District pursuant to Health and Safety Code section 42311, subdivision (a), for the operation of its dry cleaning facility.

## ANALYSIS

The Legislature has given air pollution control districts the authority to adopt regulations establishing permit systems (Health & Saf. Code, §§ 39025, 42300<sup>1</sup>) and, similarly, to adopt a schedule of fees (§ 42311) for such permits an order to monitor nonvehicular machinery or equipment which may cause the issuance of air contaminants. (§ 42300) The Sacramento County Air Pollution Control District (“District”), pursuant to the above-referenced sections, has promulgated a regulation, rule 70, which provides that governmental entities are subject to the permit fees set forth therein. The District has informed officials in charge of Folsom State Prison it must pay the fee established by rule 70 for a permit to operate its dry cleaning facility.

The question presented for analysis is whether the District may impose upon Folsom State Prison a permit fee for the operation of its dry cleaning equipment located within the prison facility. We conclude that it may not.

Government Code section 6103 provides as follows:

*“Neither the state nor any county, city, district, or other political subdivision, nor any public officer or body, acting in his official capacity on behalf of the state, or any county, city, district or other political subdivision, shall pay or deposit any fee for the filing of any document or paper, for the performance of any official service, or for the filing of any stipulation or agreement which may constitute an appearance in any court by any other party to the stipulation or agreement. This section does not apply to the State Compensation Insurance Fund or where a public officer is acting with reference to private assets or obligations which have come under his jurisdiction by virtue of his office, or where it is specifically provided otherwise. No fee shall be charged for the filing of a confession of judgment in favor of any of the public agencies named in this section.*

*“No fee shall be charged any of the public agencies named in this section to defray the costs of reporting services by court reporters. Such fees shall be recoverable as costs as provided in Section 6103.5.” (Emphasis added.)*

This statute exempts the state from the payment of any fees for the performance of any official service unless this exemption is eliminated by some other state law. (*City of Pasadena v. Fox* (1936) 16 Cal. App. 2d 584, 586; *Regents of University of California v.*

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<sup>1</sup> All unidentified statutory references are to the Health and Safety Code.

*City of Santa Monica* (1978) 77 Cal. App. 3d 130, 136; 33 Ops. Cal. Atty. Gen. 149 (1959); 40 Ops. Cal. Atty. Gen. 15 (1962).)

When the state engages in sovereign activities such as the construction, maintenance or operation of its buildings for a governmental purpose such as education or a prison it is specifically exempt from the payment of local permit and inspection fees by Government Code section 6103 unless some state statute provides otherwise. (*Regents of University of California v. City of Santa Monica, supra*, 77 Cal. App. 3d at p. 136.)

The Legislature has enacted a number of exceptions to the exemption provisions of Government Code section 6103. An exception directly applicable to fees charged by air pollution control districts is contained in the last sentence of section 42311, subdivision (a), which reads as follows:

“(a) A district board may adopt by regulation, a schedule of fees for each fiscal year, commencing with the 1979–80 fiscal year, to be paid for the issuance and renewal of permits. Such schedule of fees shall not exceed the estimated cost for such fiscal year of (1) evaluation and issuance of permits, (2) inspection, including source testing and surveillance, of sources for which a permit or permits have been issued, to the extent such inspection is for the purpose of determining whether such sources are in compliance with all applicable permit conditions and all applicable orders, rules, or regulations of the state board or of a district, adopted pursuant to this part, and (3) implementation and enforcement of permit terms and conditions. In no event shall the estimated cost of the activities referred to in (1), (2), and (3) above exceed for any fiscal year the estimated cost of such activities to the district for the immediately preceding fiscal year, with an adjustment no greater than the change in the annual California Consumer Price Index, as determined pursuant to Section 2212 of the Revenue and Taxation Code, for the preceding year. Any revenues received by the district pursuant to such fees, which exceed the cost of the activities referred to in (1), (2), and (3) above, during any fiscal year shall be carried over for expenditure in the subsequent fiscal year, and such schedule of fees shall be changed to reflect such carryover. *Every person applying for a permit, including, notwithstanding the provisions of Section 6103 of the Government Code, a person that is a publicly owned public utility, shall pay the fee required by the schedule.*” (Emphasis added.)

The word “person as used in section 42311 is defined in section 39047 to include any state or local governmental agency which would include Folsom State Prison as a state agency. However, not all such “persons” normally exempt from paying fees by

Government Code section 6103, must pay the fee under the last sentence of section 42311, subdivision (a). By its express language the last sentence of said section requires only a public agency normally exempt from paying fees under Government Code section 6103 which is “a publicly owned public utility” to pay the permit fees established pursuant to the section.

The term “public utility” is not defined in the Health and Safety Code. It is defined in Public Utilities Code section 216, subdivision (a), as follows:

“(a) ‘Public utility’ includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof.”

In *Allen v. Railroad Com.* (1918) 179 Cal. 68, 88, the court stated:

“‘What is a public utility, over which the state may exercise its regulatory control without regard to the private interests which may be affected thereby? In its broadest sense everything upon which man bestows labor for purposes other than those for the benefit of his immediate family, is impressed with a public use. No occupation escapes it, no merchant can avoid it, no professional man can deny it. As an illustrative type one may say instance the butcher. He deals with the public, he invites and is urgent that the public should deal with him. The character of his business is such that under the police power of the state it may well be subject to regulation, and in many places and instances is so regulated. The preservation of cleanliness, the inspection of meats to see that they are wholesome, all such matters are within the due and reasonable regulatory powers of the state or nation. But these regulatory powers are not called into exercise because the butcher has devoted his property to public service so as to make it a public utility. He still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all such activities from a true public utility is this, and this only: That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and by every individual member of it, as a legal right. Such is not only the

accepted significance of the phrase by the great weight of authority as expounded by Mr. Lewis (Eminent Domain, sec. 164 *et seq.*), but is the definition repeatedly announced by this court . . . .”

In *Richfield Oil Corp. v. P.U.C.* (1960) 54 Cal. 2d 419, 429, the court stated:

“In 1917 in *Associated Pipe Line Co. v. Railroad Commission*, 176 Cal. 518 [169 P. 62, L.R.A. 1918C 849], the court held that the Legislature could not declare that pipeline corporations were public utilities unless they had dedicated their property to public use (see also *Producers Transp. Co. v. Railroad Com.*, 176 Cal. 499, 504 [169 P. 59]), and since that decision it has consistently interpreted the statutory definitions of public utilities as applying only to utilities that have dedicated their property to public use.” (Citing a number of cases starting with the *Allen* case, *supra.*)

While it is clear that Folsom State Prison is publicly owned it appears equally clear that a state prison is not a public utility as that term has been defined by the Legislature and our appellate courts. Thus, we conclude that the exception to the fee exemption contained in the last sentence of section 42311, subdivision (a), does not apply to Folsom State Prison.

The only other statute we have found which might affect the state’s fee exemption is Government Code section 6103.7, which provides as follows:

“Section 6103 does not apply to any fee or charge for official services established by a city, county, city and county, or district as a reasonable and nondiscriminatory inspection fee to defray the costs of the inspection by such city, county, city and county, or district of building construction work performed within the boundaries of such city, county, city and county, or district, whether such work is done pursuant to franchise, statutory authority, or otherwise. Section 6103 does not apply to a reasonable and nondiscriminatory fee or charge established by a city, county, city and county, or district ordinance to defray the costs of providing plan-checking services to any applicant, whether such plan-checking services are performed by the city, county, city and county, or district having jurisdiction over the construction or are contracted by such city, county, city and county, or district to an independent plan-checking firm. This section does not authorize a fee or charge for the mere issuance of a permit to do such work, nor does this section authorize the assessment against, or collecting of any fee or charge from the state or its agencies when, and to the extent that, such inspection or services are otherwise required by law, to be, and are in fact,

performed by another governmental agency.”

The first sentence of Government Code section 6103.7 excepts district fees imposed to defray reasonable costs of inspections for “building construction work” from section 6103 fee exemptions. Similarly the second sentence excepts district fees imposed to defray the costs of providing “plan-checking services.” Section 42300 authorizes air pollution districts to establish a permit system that requires that before any person “builds, erects, alters, replaces, operates, or uses any article, machine, equipment, or other contrivance which may cause the issuance of air contaminants,” a permit must be obtained from the district. The exception to the fee exemption for “building construction work” and “plan checking” would apply to the building, erection, alteration and replacement of devices which may cause air contamination, but would not apply to the operation or use of existing equipment.

Since we have found no applicable exception in the statutes, we conclude that Folsom State Prison is exempt from the payment of fees levied for a permit issued by the Sacramento County Air Pollution Control District pursuant to Health and Safety Code section 42311, subdivision (a), for the operation of its dry cleaning facility.

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