

How Might the “Classification by Race, Ethnicity, Color, or National Origin” Initiative Impact Data Collection in California?

A Research Paper Prepared by the California Budget Project

Executive Summary

Proposition 54, the “Classification by Race, Ethnicity, Color or National Origin” (CRECNO) Initiative, will appear on the October 7, 2003 Statewide Special Election ballot called to consider the recall of Governor Gray Davis.¹ This measure would prohibit the state “from using race, ethnicity, color or national origin to classify current or prospective students, contractors, or employees in public education, contracting or employment operations [and]... also covers persons subject to other operations of government.” Proposition 54 is sponsored by Ward Connerly, who previously sponsored Proposition 209 limiting affirmative action.

Proposition 54 prohibits the state and local governments from classifying individuals by race, ethnicity, or national origin for any purpose other than those outlined in the initiative. Specifically, Proposition 54:

- Prohibits the state from classifying any individual by race, ethnicity, color or national origin in the operation of public education, public contracting, public employment;
- Prohibits the state from classifying any individual by race, ethnicity, color or national origin in the operation of any other state operations, however the Legislature could by a two-thirds vote and with the approval of the Governor authorize “classification”;
- Defines “classifying” by race, ethnicity, color or national origin as the act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms;
- Provides that the “state” shall include, but is not necessarily limited to, the state itself, any city, county, city and county, public university system, including the University of California (UC), California State University (CSU), community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state; and
- Takes effect on January 1, 2005.

Proposition 54 contains several exemptions from the prohibitions outlined above. Specific exemptions include:

- Activities of the Department of Fair Employment and Housing would be exempt for a period ending January 1, 2015;
- Otherwise lawful classification of medical research subjects and patients;

¹ This measure is also known as the Racial Privacy Initiative.

- Actions by law enforcement officers, while carrying out their law enforcement duties, would be allowed to describe particular persons in “otherwise lawful ways”;
- Actions taken due to requirements of federal law, or needed to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state; and
- Actions required by any valid consent decree or court order which is in force as of January 1, 2005.

The universe of data collected in California is so large that, despite these exemptions, the state’s ability to collect data by race or ethnicity in state programs could be substantially affected. Even more significant, the state’s ability to *use* racial and ethnic data, whatever the source, may be dramatically curtailed.

What will Proposition 54 Do?

This paper focuses on the possible direct effects of Proposition 54. Our research suggests that, if enacted, Proposition 54 could have broad impact on state data collection, use, and availability. However, the definitions and exemptions provided by Proposition 54 create much ambiguity about which activities would be prohibited and which would be allowed. Due to the controversy over the measure, resolution of these ambiguities will likely be left to the courts. Key issues include:

The breadth of the definition of “classification”: Proposition 54 defines “classification” as “the act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms.” Controversy over the scope of this exemption is likely, since prohibited activities are “not limited to” those specified in the text and Proposition 54 contains no additional guidance or definition of the types of activities that would be prohibited. In particular, the extent to which Proposition 54 would prohibit the use of data is uncertain. The types of questions that are likely to arise include:

- Could the state continue to use data sorted by race and ethnicity that is collected by the federal government, such as federal Census data? For example, could the State Department of Housing and Community Development use federal Census data or data collected by the federal Department of Housing and Urban Development to identify housing disparities and monitor local governments’ compliance with local housing element laws?
- Could the state use data collected under one of the measure’s exemptions for non-exempt purposes? For example, could the state use data required by the federal No Child Left Behind (NCLB) Act on student performance, race, and ethnicity to evaluate the effectiveness of alternative curricula at boosting the performance of students of different racial and ethnic groups?

- Would the use of data collected in response to federal requirements be limited to complying with federal law? Could, for example, the state continue to make student performance data available on the State Department of Education's web site?

The breadth of the definition of the “state,” Proposition 54 defines “the state” as including “but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the UC and CSU, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.” One of the most critical issues that arises from the measure’s definition of the “state” and “any other state operations” is the status of research conducted by the faculty and staff of the UC and CSU systems.

Proposition 54 clearly prohibits public institutions of higher education from collecting racial and ethnic admissions data. However, the extent to which the measure will limit faculty research is an important question. While Proposition 54 defines the university as part of the “state,” an entity prohibited from “classifying” racial and ethnic data, a memorandum from the Office of the General Counsel of the Regents of the University of California argues that while:

“Faculty members are expected to carry out research as part of their faculty duties and are considered to be acting in the course and scope of their employment when they do so... Faculty members make their own determinations about what research to pursue...about what use to make of their research, when and where, and even whether to publish.”

Furthermore, Counsel argues that since

“Faculty research is a highly focused and personal process, typically with no plan for any particular use by the University of the results ...all of these facts suggest that faculty members act independently, and not as ‘the University’ when performing their research...”

Counsel concludes that

“Given the arguments on both sides of this issue, it is difficult to predict whether a court would consider individual faculty researchers to be ‘the State’ for purposes of the Initiative.”²

Finally, Counsel notes that the initiative may be interpreted as inconsistent with academic freedom as protected by the First Amendment and may “raise a serious question as to the constitutionality of the Initiative...”³

² Office of the General Counsel, the Regents of the University of California, *Re: Classification by Race, Ethnicity, Color, or National Origin Initiative*, May 1, 2003, pp. 6-7.

³ Office of the General Counsel, the Regents of the University of California, *Re: Classification by Race, Ethnicity, Color, or National Origin Initiative*, May 1, 2003, pp. 9-10.

The proponents of Proposition 54 appear to concur with this interpretation. The proponents' web site includes an analysis that states as follows:

“Are faculty members ‘the University of California’ for purposes of the initiative when they conduct research?”

No. This measure is clearly addressed at government agencies at all levels of the state and local government system in California. Although members of the faculty are clearly employees of the University, and have access to University resources, they do not exercise any governmental power or authority. They cannot compel the collection of the data, nor can they use the data to grant or deny admission to the University, a contract with the University, or a job with the University.”⁴

While Proposition 54 may not affect faculty research, the measure may affect non-faculty researchers, support staff, such as computer specialists, and other ancillary personnel. It is also unclear how Proposition 54 might affect student researchers who receive university paychecks. As with other provisions, this question will likely be clarified through litigation if voters approve Proposition 54. Ambiguity over this issue may affect researchers' choice of projects, for example, faculty might choose to avoid particular topics due to the potential for litigation. Similarly, Proposition 54 could discourage some students from enrolling in, or faculty or staff from accepting employment with, the CSU or UC.

The considerations raised by both proponents and opponents would not, presumably, apply to state workers outside of the universities, such as scientists employed by environmental agencies or researchers employed by the Department of Health Services.

Finally, the measure does not define “other governmental instrumentalities,” which are treated as part of the state for purposes of the prohibition on “classification.” It is unclear, for example, of whether this term would affect activities of private organizations that receive state support.

The impact of the Legislature's override authority. The Legislature's authority to exempt certain activities applies to only a fraction of the activities affected by Proposition 54. The measure prohibits the collection of racial and ethnic data in public education, public contracting, public employment, and any other state operation. The measure allows the Legislature to authorize classification of individuals by race, ethnicity, color, or national origin by a two-thirds vote, with the concurrence of the governor. However, this exemption applies only to “any other state operation,” and not to public education, public contracting, or public employment. Thus, the Legislature could not, for example, vote to exempt continued data on the race and ethnicity of prospective students applying to the UC. That prohibition is absolute. While this

⁴ Racial Privacy Initiative, Proposition 54, *Legal Analysis* downloaded from <http://www.racialprivacy.org/legal.htm> on July 27, 2003.

provision provides relatively broad authority to the Legislature, the required two-thirds approval of the Legislature may be difficult to achieve in practice.

The impact of exemptions for specific data collection activities and agencies. A number of exemptions allow continued collection and use of data on race and ethnicity. Specifically:

- **Department of Fair Employment and Housing.** Proposition 54 exempts data collected by the Department of Fair Employment and Housing (DFEH) until January 1, 2015. After that date, the DFEH would be subject to the measure's general prohibitions. During the period of the exemption, the DFEH is prohibited from imputing race, color, ethnicity, or national origin to any individual. In other words, the DFEH would be prohibited from identifying a person's race or ethnicity based on surname, appearance, or other factor if that person does not voluntarily provide their race or ethnicity. The DFEH currently receives federal funds to investigate claims of housing discrimination. If this funding continues, the DFEH would be allowed to continue some data collection on an ongoing basis.
- **Medical and patient research.** The measure exempts "otherwise lawful classification of medical research subjects and patients..." However, Proposition 54 provides no definition of what constitutes medical research. Proponents of Proposition 54 state that, "Public health experiments that call for ***volunteer subjects*** of a certain racial background should not be prohibited from classifying those individuals for analysis" (emphasis added).⁵ Critics counter that the proponents have carefully restricted the exemption to research that involves volunteer subjects and that such a definition would exclude most environmental, epidemiological, and other population-based research, as well as research that links data from patient records to survey data (for example, studies that link reports of the prevalence of a disease or health condition to population data to analyze differential rates of health conditions by race and ethnicity). It is also unclear, for example, whether the exemption would apply to the state's collection of hospital discharge data, which includes the condition for which a patient was hospitalized; surveys of health behavior, such as smoking; or collection and analysis of data pertaining to individuals' access to health coverage, such as rates of insurance coverage or use of medical services.

The controversy over the breadth of this exemption would likely result in litigation if Proposition 54 is passed by the voters. The outcome of this litigation could have significant implications for a variety of state population-based health research efforts.

- **Law enforcement.** Proposition 54 exempts activities that law enforcement officers engage in "while carrying out their law enforcement duties..." However, it also prohibits the governor, legislature, and state agencies from requiring law enforcement agencies to track individuals by race and ethnicity. The measure does

⁵ Racial Privacy Initiative, Proposition 54, *FAQs* downloaded from <http://www.racialprivacy.org/faqs.htm#e> on August 4, 2003.

not define “law enforcement duties” and, as a result, the breadth and potential impact of this exemption is difficult to assess. The Legislative Analyst, for example, notes that it is unclear whether local law enforcement agencies would be allowed to analyze crime trends by race.⁶ Moreover, Proposition 54 prohibits the governor, legislature, and any state agency from requiring law enforcement officers to maintain records tracking individuals by race and ethnicity, and prohibits the state from withholding funding from law enforcement agencies for failing to maintain such records. Finally, Proposition 54 would exempt assignment of prisoners and undercover law enforcement officials based on race and ethnicity from the measure’s restrictions.

- **Federally required data:** Proposition 54 exempts data collected to “comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.” Federal law requires a substantial fraction of the state’s current data collection activities. For example, the federal NCLB Act requires states to collect and submit data on student performance by race and ethnicity. Federal law also requires states to submit data on the race and ethnicity of participants in a number of health and human service programs that receive federal funds, including Medi-Cal and Child Welfare Services.⁷

This exemption allows continued collection of data covered by a variety of federal statutes and data that is required as a condition of federal funding. However, it is unclear whether data required by federal law could be used for purposes other than fulfilling federal reporting requirements. In particular, it is unclear whether the state could make federally required data available to the public, such as the “user friendly” databases that currently provide public access to education and other datasets. The interpretation of this exemption will have a significant impact on data use across state government. Nonetheless, this exemption, while it has its own gray areas, is perhaps the most clear in terms of its range of application.

- **Consent decrees and court orders.** Proposition 54 would not apply to data collection required by consent decrees or court orders. This provision would, for example, allow police departments in Los Angeles, Oakland, and San Jose to continue to collect data on race and ethnicity of suspects while the orders remain in effect.

How and Where Does the State Currently Collect Data on Race and Ethnicity?

Data collection across state and local governments in California is enormously complex and varied. Most state agencies and departments maintain data systems, and data collection occurs at both the state and local levels. This study focuses on those areas where primary racial and ethnic data are collected and used. However, our research

⁶ Legislative Analyst’s Office, *Proposition 54: Classification by Race, Ethnicity, Color, or National Origin*, downloaded from http://www.lao.ca.gov/initiatives/2003/54_10_2003.htm on August 11, 2003.

⁷ Not all federal programs include such requirements. For example, states are not required to submit data on the race and ethnicity of individuals participating in programs supported by Temporary Assistance for Needy Families (TANF) dollars. Proposition 54 would presumably prohibit the state from including race and ethnicity in surveys of program participants.

was complicated by the complexity of the data collection system. In addition, there are few people who are familiar with all of the data collected by an individual agency or department and even fewer with knowledge that cross departmental boundaries.

A Note on Methodology

This paper does not attempt to comprehensively assess how Proposition 54 would affect the availability of data in California. Instead, we have confined ourselves to “sampling” Proposition 54’s likely impact. The methods used to gather the information for this paper were interviews, Internet research, and review of documents.

Data collection activities under Proposition 54 have been categorized as follows:

- *Presumed Exempt:* Data that can be collected under the federally required exemption.
- *Presumed Partially Exempt:* This category includes, for example, instances where multiple data sets are considered as sources of the same data, but where a portion of data would be covered by an allowed exemption.
- *Presumed Potentially Exempt:* Data that could potentially qualify for the exemption for medical and patient research or law enforcement exemption. These are ‘potentially’ exempt because neither of these exemptions are fully defined in the initiative.
- *No Exemption Currently Identified:* Data that does not fall under an identified exemption and which presumably would be prohibited if Proposition 54 is enacted.
- *No Data Currently Collected:* The state does not currently collect data addressing some of the policy questions analyzed.

Examining the Impact of Proposition 54 Through the Lens of Five Policy Areas

The findings of this research lead to a number of broad conclusions:

- *Data collection in California is complex, broad, and extremely fragmented.*
- *Nonetheless, there is a great deal of cross-departmental data utilization that could be substantially curtailed by passage of Proposition 54.*
- *In each of the policy areas examined, data collection efforts also would be negatively impacted by Proposition 54, some more seriously than others.*
- *Vague wording in Proposition 54 creates ambiguities that make accurate projections of its likely impact all but impossible.*

These broad conclusions were based on an examination of the likely impacts of Proposition 54 on five important areas of policy concern. This report describes key questions within each issue area and identifies data currently collected by the state that could respond to these questions. Data exemptions and prohibitions are discussed in detail in relation to each data set. Following is a broad summary for each issue area.

A. Education

Overall, much of the education data collected by the state would be presumed exempt from Proposition 54. As such, the key question is how Proposition 54 will affect the utilization and dissemination of that data. The universe of education related data is enormous and fragmented, and while many key data collection efforts would be unchanged as a result of Proposition 54, there are a number of other data collection efforts and studies that would be affected.

Federal law requires the state to collect and report race and ethnicity data for students and schools. Applicable federal laws include those governing Head Start, Department of Human Services, the NCLB Act, and Civil Rights Act. Nonetheless, under Proposition 54, activities such as tracking transfers by race and ethnicity, from California community colleges to four-year institutions could be prohibited. Similarly, it would not be possible to track financial aid data by race and ethnicity in the case of state funded student aid programs.

B. Child Welfare

Overall, key child welfare datasets are presumed exempt. Child welfare data are subject to multiple federal reporting requirements. The racial and ethnic data in this area come primarily from two large federally required data sets, the Child Welfare System Case Management System (CWSCMS), and the Adoption and Foster Care System (AFCARS).

Again, Proposition 54 may limit current uses of data and data that would be collected under system improvements that are currently in progress. The state provides significant funding to the Center for Social Service Research at the University of California at Berkeley to improve the quality of state data. This data collection/classification effort is presumed prohibited under Proposition 54, as would be the collection of data on race and ethnicity under approved plans for a new expanded system.

C. Housing, Employment, and Workforce Development

Key housing, employment, and workforce development data collection activities are presumed partially exempt, under the waiver for federally required data. Proposition 54 may limit data use.

Housing data are partially exempt since Proposition 54 exempts data collected and used by the Department and Commission of Fair Employment and Housing for a ten-year period, and the federal Department of Housing and Urban Development requires significant data as a condition of funding. However, data by race and ethnicity collected by state and county fair housing commissions would be presumed prohibited.

The labor market and training data are also partially exempt, with key data required by the Workforce Investment Act and other federal programs. Additional data collection would be prohibited and the use of data by the state for program evaluation or other purposes would potentially be prohibited as well.

D. Health

Much of the state's health data collection would be presumed partially exempt. However, significant questions remain with respect to the breadth of the exemption for medical and patient research, particularly with respect to the use of data for epidemiological and public health research. Proposition 54 does not define the term "medical and patient research." If the measure is enacted, the scope of this exemption will likely be subject to litigation. Other health data are presumed exempt due to federal reporting requirements.

In both instances, Proposition 54 is ambiguous as to the extent of the prohibition on the use of exempt data for purposes unrelated to the specific exemption. This ambiguity could prove particularly critical for research that depends on linking population data, such as Census data, with patient records to determine the prevalence of health conditions. Also, even if data collection is allowed to continue in some areas, it is unclear whether state employees could use the data for research and analysis.

E. Criminal Justice

Proposition 54 gives potentially broad latitude to law enforcement agencies to classify individuals by race or ethnicity for law enforcement purposes, saying that: *"Nothing in this section shall prevent law enforcement officers, while carrying out their law enforcement duties, from describing particular persons in otherwise lawful ways."* The measure also includes a specific limit on the state's ability to require collection of data an agency does not wish to collect, *"Neither the Governor, the Legislature nor any statewide agency shall require law enforcement officers to maintain records that track individuals on the basis of said classifications, nor shall the Governor, the Legislature or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records."*

In some instances, federal reporting requirements would require continued data collection and reporting. As in other areas, one of the major unresolved issues is the extent to which the state could continue to use exempt data for research and analysis unrelated to the purposes of the initial exemption.

Within the juvenile justice area, sources were unable to identify federal reporting requirements. Also, while collection of race and ethnicity data on youths that are incarcerated in the juvenile justice system would be potentially exempt, no grounds for exempting the collection and use of data for youth in prevention-oriented programs could be identified.

Conclusion

This survey is by no means comprehensive. While every effort was made to identify federal reporting or funding requirements, many of the departmental personnel contacted were unable to identify specific requirements in federal law. More important, the lack of a detailed definition for the exemptions contained in Proposition 54 leave the

measure's true impact in doubt. If Proposition 54 is passed, these ambiguities will most likely be resolved through litigation and case law.

However, based on this research it appears that the potential impact of Proposition 54 varies across the issue areas surveyed. Federal law requires much of the state's current data collection, and Proposition 54 would potentially have a minimal impact on these data collection efforts. On the other hand, the state funds a broad range of data collection activities that could be prohibited.

Proposition 54's most significant impact is likely to be in the area of data *use*. Currently, the state publishes a variety of reports and makes a number of its core data sets available to the public and to other researchers. Data resources range from education test score data for school districts and school sites, which are available for independent analysis in a user-friendly inquiry system, to demographic data on the state's population made available through state web sites. While the state's public records laws would likely require release of data reported to the federal government, the state would not be obligated to and might, in fact, be prohibited from using the data to prepare reports or datasets that are accessible to the public or to researchers. Similarly, the state would likely be prohibited from using this information for program evaluation or other purposes that exceed minimal federal requirements.

Lorene Allio and Jean Ross prepared this report. The California Budget Project (CBP) was founded in 1994 to provide Californians with a source of timely, objective, and accessible expertise on state fiscal and economic policy issues. The CBP engages in independent fiscal and policy analysis and public education with the goal of improving public policies affecting the economic and social well-being of low- and middle-income Californians. Funds for this report came from the Evelyn and Walter Haas, Jr. Fund. Support for the CBP comes from foundation grants, publications and individual contributions. Please visit the CBP's web site at www.cbp.org.

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Introduction

Proposition 54, the “Classification by Race, Ethnicity, Color, or National Origin” (CRECNO) Initiative will appear on the October 7, 2003 Statewide Special Election ballot called to consider the recall of Governor Gray Davis.⁸ This measure would prohibit the state “from using race, ethnicity, color or national origin to classify current or prospective students, contractors, or employees in public education, contracting or employment operations [and]... also covers persons subject to other operations of government.” Proposition 54 is sponsored by Ward Connerly.

The following analysis examines the potential impact of Proposition 54 on state data collection and use. This analysis focuses on the types of data that would be potentially exempt from Proposition 54, as well as areas of ambiguity. The universe of data collected in California is so large that, despite these exemptions, the state’s ability to collect data by race or ethnicity in state programs will be significantly affected. In addition, given the language of the initiative, the state’s ability to utilize racial and ethnic data, whatever the source, may be dramatically curtailed.

What Does Proposition 54 Do?

Proposition 54 prohibits the state and local governments from classifying individuals by race, ethnicity, or national origin for any purpose other than those outlined in the initiative. Specifically, Proposition 54:

- Provides that the state shall not classify any individual by race, ethnicity, color, or national origin in the operation of public education, public contracting, or public employment;
- Provides that the state shall not classify any individual by race, ethnicity, color, or national origin in the operation of any other state operations, although the Legislature could by a two-thirds vote and with the approval of the Governor authorize “classification;”
- Defines “classifying” by race, ethnicity, color, or national origin as the act of separating, sorting, or organizing by race, ethnicity, color, or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms;
- Provides that the “state” shall include, but is not necessarily be limited to, the state itself, any city, county, city and county, public university system, (including the University of California, California State University, and California Community

⁸ This measure is also known as the Racial Privacy Initiative.

Colleges), school district, special district, or any other political subdivision or governmental instrumentality of or within the state;

- Prohibits the Governor, Legislature, or other state department from requiring law enforcement officers from tracking individuals based on race or ethnicity or withholding funding based on a failure to report such tracking; and
- Provides that the measure would take effect on January 1, 2005.

Proposition 54 contains several exemptions from the prohibitions outlined above. Specific exemptions include:

- Activities of the Department of Fair Employment and Housing until January 1, 2015;
- Otherwise lawful classification of medical research subjects and patients;
- Actions by law enforcement officers, while carrying out their law enforcement duties, (officers would be allowed to describe particular persons in “otherwise lawful ways”);
- “Otherwise lawful” assignment of prisoners and undercover law enforcement personnel;
- Actions taken due to requirements of federal law, or needed to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state; and
- Actions required by any valid consent decree or court order which is in force as of January 1, 2005.

The World of Data

While many people contribute to data collection, knowingly and unknowingly, very few understand what data are collected in any given issue area and far fewer are aware of how the racial, ethnic, and country of national origin data that are collected are used.⁹ Data collection and “meta-data,” that is *data about data*, are specialized fields, regardless of whether the data are collected by public or private entities. But it can be argued that the state’s data and data collection are distinguished from many other kinds of data and data collection by their social purpose.¹⁰ For example, state data may be collected to estimate eligibility for programs, understand how well programs are functioning, and inform those who design the programs about current and future needs.

This paper focuses on the possible direct effects of Proposition 54 on state data collection and use. Our research suggests that, if enacted, Proposition 54 could have broad impacts. Much of the data collected by the state are placed in the public domain where they are used by myriads of organizations, both public and private. Users of this data include state policymakers, departments, and agencies; local governments; researchers in public and private universities; and nonprofit organizations, private businesses, and individuals. While public data are generally aggregated to protect the confidentiality of

⁹ For most of this paper, the terminology “racial and ethnic” data will be utilized inclusively. In most cases, the data collected will not be broken down into racial, ethnic, and country of national origin data specifically.

¹⁰ This paper uses the term the “state” as defined in Proposition 54 to “include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, California State University, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.”

individuals, program evaluators and researchers can gain access to individual level data under strict use and confidentiality agreements.

Like many initiatives, the language of Proposition 54 is vague in some areas and it fails to define terms that may be critical to its implementation. As a result, it is impossible to delineate precisely which data and activities would be affected by the measure's prohibitions and exemptions and which would be exempted from them (Appendix A includes the text of Proposition 54). The impact of Proposition 54 will extend far beyond its direct effects on state and local governments' data collection and use.

Definitions, Exemptions, and Other Gray Areas

In many areas, the impact of Proposition 54 will depend on the interpretations of the definitions and exemptions contained in the measure. Because of the controversy surrounding the measure, the resolution of many of the ambiguities in the language of Proposition 54 probably will be left to the courts. Some of the more important 'gray areas' include:

- 1. The breadth of the definition of "classification":** Proposition 54 defines "classification" as "the act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms." Exactly what kinds of "classification" activities are prohibited is not entirely clear and, in particular, the extent to which Proposition 54 would prohibit the use of data is uncertain. A strict interpretation of the initiative could prohibit use of racial and ethnic data, even where it is collected in a manner that is authorized by the initiative (i.e., in response to a federal requirement or for medical research), for a purpose unrelated to the exempt activity. This interpretation would prohibit, for example, the state from using data collected under an exemption for any purposes other than the preparation of the specific reports required by the federal government. Furthermore, it would limit staff of government agencies from using federal or other data that is not covered by Proposition 54. The state could, for example, be prohibited from using federal Census data sorted by race and/or ethnicity for research or policy analysis. The prohibition on use may limit public access to otherwise exempt data. For example, Proposition 54 might prohibit the state from making federal data or data collected as a requirement of federal funding on available state web sites or in state publications.
- 2. The breadth of the definition of the "state":** Proposition 54 defines the state as including "but not necessarily ... limited to, the state itself, any city, county, city and county, public university system, including the University of California (UC), California State University (CSU), community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state." Could university researchers who receive a federal or private research grant use racially classified data or would they be prohibited from doing such work on university property or equipment?

Proposition 54 clearly prohibits public institutions of higher education from collecting racial and ethnic admissions data. However, the extent to which the measure will limit faculty research is an important question. While Proposition 54 defines the university as part of the “state,” and therefore an entity prohibited from “classifying” racial and ethnic data, a memorandum from the Office of the General Counsel of the Regents of the University of California argues that while:

“Faculty members are expected to carry out research as part of their faculty duties and are considered to be acting in the course and scope of their employment when they do so...faculty members make their own determinations about what research to pursue...about what use to make of their research, when and where, and even whether, to publish.”¹¹

Furthermore, Counsel argues that since

“Faculty research is a highly focused and personal process, typically with no plan for any particular use by the University of the results ...[this suggests] that faculty members act independently, and not as ‘the University’ when performing their research...”¹²

Counsel concludes that

“Given the arguments on both sides of this issue, it is difficult to predict whether a court would consider individual faculty researchers to be ‘the State’ for purposes of the Initiative.”¹³

Finally, Counsel notes that the initiative may be interpreted as inconsistent with academic freedom as protected by the First Amendment and may “raise a serious question as to the constitutionality of the Initiative...”¹⁴

The proponents of Proposition 54 appear to concur with this interpretation. The proponents’ website includes an analysis that states as follows:

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faculty are clearly employees of the University, and have access to University resources, they do not exercise any governmental power or authority. They cannot compel the collection of the data, nor can they use the data to grant or deny admission to the University, a contract with the University, or a job with the University.”¹⁵

While Proposition 54 may not affect faculty research, the measure may affect non-faculty researchers, support staff such as computer specialists, and other ancillary personnel. It is also unclear how Proposition 54 might affect student researchers who receive university paychecks.

Finally, the measure does not define “other governmental instrumentalities,” which are treated as part of the state for purposes of the prohibition on “classification.” It is unclear, for example, whether this term would affect activities of private organizations that receive state support.

3. **The practical impact of the Legislature’s power of exemption.** Proposition 54 prohibits the collection of racial and ethnic data in public education, public contracting, public employment, and any other state operation. The measure allows the Legislature to authorize classification of individuals by race, ethnicity, color, or national origin by a two-thirds vote, with the concurrence of the governor. However, this exemption applies only to “any other state operation,” and not to the prohibition on classification that applies to public education, public contracting, or public employment. That prohibition is absolute. While this provision provides relatively broad authority to the Legislature, the required two-thirds approval of the Legislature may be difficult to achieve in practice.
4. **The impact of exemptions for specific data collection activities and agencies.** A number of exemptions allow continued and limited agency collection of racial and ethnic data and/or the continued collection of data in activity areas. Specific exemptions include:
 - **Department of Fair Employment and Housing.** Proposition 54 exempts data collected by the Department of Fair Employment and Housing until January 1, 2015. After that date, the Department would be subject to the measure’s general prohibitions. During the period of the exemption, the Department shall not “impute” race, color, ethnicity, or national origin.
 - **Medical research subjects and patients.** The measure exempts “otherwise lawful classification of medical research subjects and patients.” However, Proposition 54 provides no definition of what constitutes medical research. As a result, it is unclear how this exemption might apply, in particular, to data used for environmental, epidemiological, and other population-based research or to research that links data from patient records to survey data (for example, studies that link reports of the

¹⁵ Racial Privacy Initiative, Proposition 54, *Legal Analysis* downloaded from <http://www.racialprivacy.org/legal.htm> on July 27, 2003.

prevalence of a disease or health condition to population data to analyze differential rates of health conditions by race and ethnicity). While the exemption appears to be aimed at traditional human subject research, it is unclear whether it would apply to the state's current collection of hospital discharge data; surveys of health behavior, such as smoking; or collection and analysis of data pertaining to individuals' access to health coverage, such as rates of insurance coverage or use of medical services.

- **Law enforcement.** Proposition 54 exempts activities that law enforcement officers engage in “while carrying out their law enforcement duties.” However, it also prohibits the governor, legislature, and state agencies from requiring law enforcement agencies to track individuals by race and ethnicity. The measure does not define “law enforcement duties” and, as a result, the breadth of exemption is difficult to assess. The Legislative Analyst, for example, notes that it is unclear whether local law enforcement agencies would be allowed to analyze crime trends by race.¹⁶ Moreover, Proposition 54 prohibits the governor, legislature, and any state agency from requiring law enforcement officers to maintain records tracking individuals by race and ethnicity and prohibits the state from withholding funding from law enforcement agencies for failing to maintain such records. Finally, Proposition 54 exempts assignment of prisoners and undercover law enforcement officials based on race and ethnicity from the measure's restrictions.
- **Federally required data:** Proposition 54 exempts data collected to “comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.” This exemption should permit the continued collection of data covered by a variety of federal statutes and data that is required as a condition of federal funding. However, it is unclear whether data required by federal law could be used for purposes other than fulfilling federal reporting requirements. In particular, it is unclear whether the state could make federally required data available to the public, such as the “user friendly” databases that currently provide public access to education and other datasets. The interpretation of this exemption will have a significant impact on data use in virtually all of the policy areas examined in this research. Nonetheless, this exemption, while it has its own gray areas, is perhaps the most clear in terms of its range of application.

How and Where Does the State Currently Collect Data on Race and Ethnicity?

Data collection across state and local governments in California is enormously complex and varied. Most state agencies and departments maintain data systems. Departments also rely on data collected by other entities within state government, as well as federal and private sources. Data collection is mandated and guided by a labyrinthine web of state legislation, regulation, and departmental procedures, as well as federal law, administrative, and funding requirements. Datasets including race and ethnicity are used for a variety of purposes, from population projections to analyzing state program outcomes. Data collection occurs through client intake forms and interviews, survey

¹⁶ Legislative Analyst's Office, *Proposition 54: Classification by Race, Ethnicity, Color, or National Origin*, downloaded from http://www.lao.ca.gov/initiatives/2003/54_10_2003.htm on August 11, 2003.

research, or secondary resources such as the Census. Oftentimes researchers combine data from a number of sources in the course of their analyses.

This study focuses on those areas where primary racial and ethnic data is collected and used. However, our research was complicated by the complexity of the data collection system. Data collection occurs at both the state and local levels; the coordination of locally collected data is notoriously weak; and California has been slow to implement data systems that communicate across jurisdictions. In addition, there are few persons who are familiar with all of the data collected by an individual agency or department and even fewer, if any, with knowledge that crosses departmental boundaries. For practical reasons, then, this paper will focus on the larger and more comprehensive state data collection efforts.

A Note on Methodology

This paper is based on interviews, Internet research, and review of documents. Whenever possible, the researcher contacted state agencies and departments to confirm which racial and ethnic variables were being collected in their data sets and whether that collection was required by the federal law. If interviewees did know the federal requirements, attempts were made to contact national experts and/or federal department officials. When accurate information could not be obtained, that has been noted.

This paper does not attempt to comprehensively assess how Proposition 54 would affect the availability of data in California or its impact on the many uses and users of these data. We have confined ourselves to “sampling” Proposition 54’s potential impact by examining five issue areas: education; child welfare; housing, employment, and workforce development; health; and criminal justice. For each area, the paper will 1) identify what data are currently available to answer several sample questions, and 2) identify the potential impact of Proposition 54, if passed. The analysis follows three steps:

- Does the state currently collect the ethnic, race, and/or national origin data needed to answer the question? If so:
- Is this data required by federal law or as a condition of federal funding? If so:
- Is this data likely to fall under the exemptions for medical research subjects and patients or law enforcement?

For this analysis, data collection activities under Proposition 54 have been categorized as: Presumed Exempt, Presumed Partially Exempt, Presumed Potentially Exempt, No Exemption Currently Identified, or No Data Currently Collected. The following are definitions of each:

- *Presumed Exempt*: Data that can be collected under the federally required exemption.
- *Presumed Partially Exempt*: This category includes, for example, instances where multiple data sets are considered as sources of the same data, but where a portion of data would be covered by an allowed exemption.

- *Presumed Potentially Exempt:* Data that could potentially qualify for the exemption for medical research subjects and patients or the law enforcement exemption. These are ‘potentially’ exempt because neither of these exemptions are fully defined in the initiative.
- *No Exemption Currently Identified:* Data that do not fall under an identified exemption and which presumably would be prohibited if Proposition 54 is enacted.
- *No Data Currently Collected:* The state does not currently collect data addressing some of the policy questions analyzed.

Examining the Impact of Proposition 54 Through the Lens of Five Policy Areas

The findings of this research led to a number of broad conclusions:

- *Data collection in California is complex, broad, and extremely fragmented.* Few coordinated data collection efforts link together multiple data sets to inform policy analysis, research, or reporting activities. Data warehousing, the creation of a resource of multiple databases that are linked together, is not widespread. While some data, for example criminal justice data, are “warehoused,” the practice is not prevalent in state government. Of the multiple datasets collecting racial and ethnic data, the impetus, and requirements for collecting that data vary dramatically. Therefore, there will also be significant variation in the degree to which data will be allowed to be collected under the provisions of Proposition 54.
- *Despite the complexity and fragmentation in data collection, there is a great deal of cross-departmental data utilization.* Data can have multiple uses within the state, both across departments and at different levels of government. As a result, the elimination of data in one area might have a ripple effect on other areas as well. For example, some data on health services are used to identify environmental hazards. This cross-purpose use is likely to be prohibited under Proposition 54, particularly where the data use differs fundamentally from the use exempted by a federal reporting requirement.
- *Each issue area investigated in this research would be affected by Proposition 54, some more seriously than others.* In some areas, the strongest data sets are federally required and are often funded, in part, by federal funds. This is particularly true in education, community development, and child welfare. Since Proposition 54 exemptions permit these data sources to continue to collect race and ethnic data, some substantial percentage of the statistical resources in these key issue areas probably would be maintained. However, it is unclear whether the state could continue to analyze that data and make it available to the public beyond the federal requirements, or whether data would merely be passed on to the federal government. Furthermore, in all the areas reviewed, it was clear that some data collection and analysis efforts would be eliminated. In total, the impact of PROPOSITION 54 would be to narrow the multiple forms in which racial and ethnic data are collected and used, rather than halt the collection of race and ethnicity data entirely.

- *The vague wording of Proposition 54 creates ambiguities that make accurate projections of its likely impact all but impossible.* These ambiguities go beyond the immediate issues of incomplete definitions and imprecise exemptions. For example, it is also unclear whether public employees would be prevented from freely using data that are lawfully collected under Proposition 54. If employees at the California Department of Finance were unable to utilize the Census and other federal sources of data on racial and ethnic demographics, they could not prepare reports upon which a number of other departments depend. Similarly, the impact of Proposition 54 on state funding of data collection and analysis is unclear.

These broad, overarching conclusions of our research were based on an examination of the likely impacts of Proposition 54 on five important areas of policy concern: education; child welfare; housing, employment, and workforce development; health; and criminal justice. That more detailed analysis is presented below.

A. Education

Much of the state's education data is collected in response to federal reporting requirements. As a result, the most significant impact of Proposition 54 would likely be in the areas of data use and dissemination. The universe of education related data is enormous and fragmented and there are multiple federal reporting requirements. While many key data collection efforts would be unaffected by Proposition 54, others would be affected. Posing the following set of research-related questions can identify some of these specific impacts:

1. ***What data would be available to assess the educational status of California's children and youth by race and ethnicity? Could the state determine the extent to which educational achievement is similar or different across ethnic groups in terms of test scores, grades, dropout rates, high school graduation/four year completion rates, and exit exam scores?***

Overall impact of Proposition 54 on data collection: *Presumed partially exempt*

Overall impact of Proposition 54 on data use: *Unknown*

Analysis: The federal requirement exemption would allow continued collection of data that would answer most of the questions identified above. The largest and most thorough data set collected is the Standardized Testing and Reporting Program (STAR) achievement data. Most of the data collected by the STAR system is required as a condition of funding under the federal No Child Left Behind (NCLB) Act.

The federal Office of Civil Rights conducts a survey that includes dropout rates and graduation rates. Since this is a federal survey, Proposition 54 would not affect it. However, Proposition 54 could prohibit the collection of high school exit exam data by race and ethnicity, which is not required by federal law. The impact on other achievement related data sets are considered below:

- *Test Scores: Presumed Exempt.* The Academic Performance and STAR data systems collect data on test scores by race and ethnicity. Academic Performance Index (API) reports provide a performance index for individual schools and individual districts, including test scores by race and ethnicity at the school site and district level. Federal requirements would exempt the collection of test score data by race and ethnicity. The NCLB ACT, which made dramatic changes to the Elementary and Secondary Education Act of 1965, requires states to provide an assessment of “adequate yearly progress” toward academic achievement across several dimensions including “students from major racial and ethnic groups.” To meet this requirement, states must administer tests from grades three to twelve. The NCLB ACT also requires sorting of test scores to assess the progress of economically disadvantaged students, students with disabilities, limited English proficiency students, and students from racial and ethnic minorities. The results of these tests must be publicly reported in state and district report cards. District report cards must include detailed information on the performance of various population groups. Title I of the NCLB ACT also provides for significant accountability for progress of particular marginalized populations in need of special services.
- *Grades: No Data Currently Collected.* No significant data collection by the state as to student grades or variation in grades by racial and ethnic group was identified.
- *Four-Year Completion, Graduation, and Dropout Rates: Presumed Exempt.* As of 2002, the state collected a four-year completion rate, based on an aggregation of high school completers and high school dropouts over a four-year period. In order to fulfill the requirements of the NCLB Act, California is shifting to a new data system to improve the quality of data collection by race and ethnicity. The state is slated to collect data by race and ethnicity in a way that should “allow longitudinal tracking of individual students from grade 9 or 10 through high school graduation.” Such a system, currently under development, “can and will be used to calculate a high school graduation rate.” One component of the NCLB Act is the High School Dropout Prevention Program, which distributes funds to states and local educational institutions on a competitive basis. Institutions receiving funds must collect and report high school dropout rates.¹⁷
- *Exit Exams: Presumed Partially Exempt.* Exit exam scores are collected under state law. Students take the California High School Exit Examination (CAHSEE), authorized by Education Code Section 60850 in 1999, in grade 10. Students must successfully complete all sections of the test by Grade 12 in order to graduate from high school. The class of 2004 is slated to be the first cohort subjected to this requirement.¹⁸ State law requires that “pupil performance will be broken down by grade level, gender, race, or ethnicity.”

However, exit examinations are not a federal requirement. The federal Office of Civil Rights’ Elementary and Secondary School Survey conducts a survey that

¹⁷ Title I, Part H of the No Child Left Behind Act of 2001 (PL 107-110).

¹⁸ AB 356 (Hancock) would postpone implementation of the exit exam requirement until the 2005-06 school year.

collects data by race and ethnicity on students who fail to be promoted because of a state or district administered test, including tests such as the high school exit examination. While these data are presumed exempt, not every school is surveyed every year, so comprehensive data would not be available.

2. *Would the state be able to assess school disciplinary procedures such as suspensions and expulsions by race and ethnicity?*

Overall impact of Proposition 54 on data collection: Presumed Exempt

Overall impact of Proposition 54 on data use: Unknown

Analysis: This study was unable to identify state or local racial and ethnic data on suspensions that is kept in a comprehensive or systematic way. However, the Office of Civil Rights of the US Department of Education collects this information through the Elementary and Secondary School Survey (E&S Survey), which gathers trend data regarding elementary and secondary schools.¹⁹ The survey is based on a sample that can vary from year to year and does not always include all California schools.²⁰

3. *Would it be possible to assess the demographics of California schools, for example, how student populations vary by race and ethnicity in urban versus suburban school environments, in failing versus succeeding school districts?*

Overall impact of Proposition 54 on data collection: Presumed Exempt

Overall impact of Proposition 54 on data use: Unknown

Analysis: Federal law requires schools to collect data on student and district demographics. At the federal level, data are collected annually through the Common Core of Data, the federal Department of Education’s annual statistical database that provides demographic information on all U.S. schools. The NCLB Act also requires reporting of achievement by racial and ethnic demographics in all schools. States are required to respond to annual surveys collecting demographic data.

The state Department of Education’s Educational Demographics office supports the California Basic Educational Data (CBEDS) system and the California School Information Services initiative. These systems provide “user friendly” public access to demographic data files through Data Quest and other tools. Depending upon the

¹⁹ The federal requirement for this information to be collected is 34 C.F.R. Section 100.6(b) of the Department of Education regulation implementing Title VI of the Civil Rights Act of 1964. Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [45 FR 30918, May 9, 1980, as amended at 53 FR 49143, Dec. 6, 1988]. These regulations prohibit discrimination on the basis of race, ethnicity, or national origin in public education where federal financial assistance is being utilized.

²⁰ For example, the 1998 survey included 5,581 public school districts and 55,769 schools in those districts. The 2000 survey was a comprehensive survey of all of the nation’s public school districts and public schools; a universe of 16,800 school districts and 91,500 public schools. This survey covers a range of disciplinary procedures including corporal punishment, suspension, expulsion with cessation of service, and zero tolerance expulsions.

interpretation of Proposition 54's limits on the use of exempt data, these systems could be prohibited from including data classified by race and ethnicity.

4. *Could the state determine the ethnic and racial background of the children, youth, and families receiving supportive services such as tutoring and after-school enrichment programs?*

Overall impact of Proposition 54 on data collection: *Presumed Partially Exempt*

Overall impact of Proposition 54 on data use: *Unknown*

Analysis: A broad universe of programs and services, with multiple sources of funding and reporting requirements, are included in this question. As a result, passage of Proposition 54 will have differential impacts on the programs related to education and schools. Programs covered by NCLB ACT, including Title I supportive funded programs, are presumed exempt.

Title I provides funding for programs serving "special needs" student populations (see above). Three clusters serve migrant farmworkers, youth involved in the juvenile justice system, and homeless youth. Federal funding requirements would exempt continued collection of racial and ethnic data for these programs. Included within Title I are the:

- *Migrant Education Program*, which provides bi-national education services along with a number of programs to support students who move due to their parents' seasonal employment.
- *Mini-Corps*, which provides academic and social support using college students from a migrant family background who are pursuing teaching credentials as tutors.
- *Portable Assisted Study Sequence (PASS)*, which assists migratory students in grades nine to twelve to receive credits toward graduation. The PASS program is designed to supplement the regular program of instruction and help migratory students stay in school.
- *Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At Risk*, which provides financial assistance to education programs for youth in state institutions or community day programs. This program also provides funds for school districts to work with locally operated correctional facilities.
- *Homeless Children and Youth*, under the federal Stewart B. McKinney Homeless Assistance Act of 1987, which attempts to ensure that homelessness does not impede educational opportunity for children and youth.

5. ***Could the state assess the use of postsecondary education, including community college and public and private universities, and how transfer from community colleges to four-year institutions varies by race and ethnicity? Could the state determine the demographics of who enrolls and graduates and who obtains state financial aid (e.g. Cal Grants) and other services?***

Overall impact of Proposition 54 on data collection: Presumed Partially Exempt

Overall impact of Proposition 54 on data use: Unknown

Analysis: Federal requirements apply to some data pertaining to transfers and enrollment, graduation, and financial aid. However, limits on the use of exempt data for unrelated purposes could result in significant impacts on admissions, outreach, and student aid allocation and counseling activities.

- *Postsecondary Enrollment:* The California Postsecondary Education Commission (CPEC) collects data on post-secondary enrollment. The Commission is established by state statute and has the authority to collect data from a variety of institutions, including colleges and high schools. CPEC acts as a clearinghouse for this data that, in turn, is collected at the federal level by the National Center for Education Statistics in the Integrated Postsecondary Education Data System. As required by the Higher Education Act (HEA), this system collects data by race and ethnicity on enrollment, degrees granted, and graduation. Transfer data is not covered by the HEA.
- *Financial aid data:* Federal law requires the collection of data related to financial aid programs supported by federal funds. Proposition 54 would presumably prohibit collection of data for state funded programs, such as the Cal Grant program.

B. Child Welfare

Overall, key child welfare datasets are presumed exempt. Racial and ethnic data come primarily from two large federally required data sets, the Child Welfare System Case Management System (CWSCMS) and the Adoption and Foster Care System (AFCARS). Again, the main questions are how Proposition 54 will limit the utilization and dissemination of that data. Child welfare data is subject to multiple federal reporting requirements.

Proposition 54 may limit the use of current data and data that would be collected under system improvements currently in progress. The state provides significant funding to the Center for Social Service Research at the University of California at Berkeley to improve the quality of state data and this data collection/classification effort is presumed prohibited under Proposition 54. Proposition 54 is also presumed to prohibit the collection of data on race and ethnicity as part of the planned expansion and improvement of child welfare data. Again, we explore some of the possible specific impacts on this policy area by posing a set of research-related questions:

1. ***Could the state ascertain the composition of child welfare caseloads by race and ethnicity and the related numbers of children who receive child welfare visits, receive support, are transferred to foster care, are adopted, or are permanently removed from their homes, by race and ethnicity?***

Overall impact of Proposition 54 on data collection: Presumed Exempt

Overall impact of Proposition 54 on data use: Unknown

Analysis: Federal regulations require states to collect demographic data, including race and ethnicity, on children receiving services through the child welfare system, particularly children in foster care. The federal government funds the statewide CWSCMS system of data collection for this purpose.²¹

Two primary systems, the CWSCMS and AFCARS systems, collect data on child welfare services. Both systems operate under federal mandates. Both systems include race and ethnic descriptors. Data is gathered through questions asked when a child is initially referred to the child welfare system and again when a child receives more intensive services.

2. ***Could the state assess whether reports of abuse and neglect occur disproportionately among certain racial and ethnic groups or whether reports are more likely to be substantiated when they involve certain ethnic groups?***

Overall Impact of PROPOSITION 54 on data collection: Presumed Exempt

Overall impact of Proposition 54 on data use: Unknown

Analysis: Federally required data would disclose whether reports of abuse are occurring disproportionately among certain racial or ethnic groups. Currently, available data are somewhat limited, and reflects a single point in time. The state's Department of Social Services is supporting an effort by the Center for Social Services Research at the University of California at Berkeley to collect and reconfigure this data to permit longitudinal analysis and reporting of a broad range of measures at the state and local level, including analyses by race and ethnicity. However, this further classification of data may exceed minimum federal requirements and thus be prohibited. Federal requirements would allow continued collection of data currently collected by CWSCMS and AFCARS.

California plans to implement a new outcomes and accountability system in January of 2004. AB 636 of 2002 (Steinberg, Chapter 678) requires the new system, which is designed to improve the tracking of disparities in service provision. Proposition 54 will affect the use of the new system to the extent the data collected exceeds federal requirements and could limit the use of the data for purposes, including program evaluation and improvement, that exceed federal requirements.

²¹ See Federal Regulation 1355.40 in Federal Register 65, no. 16 (Tuesday, January 25, 2000).

3. Could the state assess who uses child abuse prevention services, such as family preservation?

Overall impact of Proposition 54 on data collection: *Presumed Partially Exempt*

Overall impact of Proposition 54 on data use: *Unknown*

Analysis: Federal requirements would allow some ongoing data collection for particular types of family preservation services. However, very little data are currently collected in a systematic manner and therefore the impact of Proposition 54 would be minimal. To the extent that counties are currently collecting data that are not reported to the state, these activities would be presumed prohibited under Proposition 54.

In terms of access to preventive services, federal reporting and funding requirements include collection of data with racial and ethnic identifiers for children who receive family maintenance services under Title IVB of the Social Security Act. However, other child abuse preventive services are not included in these requirements because there is no centralized data collection for family preservation services provided through counties and community-based nonprofits.

C. Housing, Employment, and Workforce Development

Key housing, employment, and workforce development data collection activities are presumed partially exempt. However, the extent to which Proposition 54 would limit their use is unclear.

Housing data would be partially exempt, since Proposition 54 exempts data collected and used by the Department and Commission of Fair Employment and Housing for a ten-year period and the federal Department of Housing and Urban Development (HUD) requires significant data reporting as a condition of funding. The labor market and training data would also be partially exempt, with key data required by the federal Workforce Investment Act (WIA) and other programs.²² However it likely that much of the use of this data, which often exceeds federal requirements, may be prohibited, as the following questions illustrate.

1. Could the state determine the race and ethnicity of subsidized housing residents and persons eligible for subsidized housing? Would the state have the ability to evaluate whether outreach efforts effectively reach specific racial and ethnic populations?

Overall impact of Proposition 54 on data collection: *Presumed Partially Exempt*

Overall impact of Proposition 54 on data use: *Unknown*

²² Solely state-funded programs, such as the Employment Training Panel, would not be exempt from Proposition 54.

Analysis: Much of the housing data currently available comes from federal surveys, including the Census Bureau and American Housing Survey. There is very little centralized collection of housing data at the state level. Our research was unable to identify any data resources that address outreach efforts. A significant fraction of the programs affected by Proposition 54 are administered at the local level by housing authorities and redevelopment agencies. Proposition 54 would prohibit the collection of data for programs and activities that are not covered by the exemption for federally required data collection. The state Department of Housing and Community Development (HCD) relies on forecasts prepared by the Department of Finance (DoF) to assess the need for housing and the extent to which the needs of various population groups are being met. Proposition 54 could prohibit the DoF from preparing these forecasts and the HCD from evaluating the housing status of racial and ethnic groups. Currently, HCD uses these analyses to guide policy discussions and determine whether local governments are complying with state housing planning laws.

- *Department of Housing and Urban Development data.* Federal requirements would exempt the collection of data for programs receiving funds from the federal Department of Housing and Urban Development (HUD). HUD makes this data available on the Internet in its report, *A Picture of Subsidized Households*. HUD also collects data for the Multifamily Tenant Characteristics System (MTCS) that tracks data about public housing residents and Section 8 Voucher Program participants. The state must submit data on the race and ethnicity of communities where funds will be spent when applying for federal dollars. Data needed for these reports would be presumed exempt under Proposition 54.
- *Department of Fair Employment and Housing.* Data collected by the Department and Commission of Fair Employment and Housing, including data on complaints received alleging discrimination in employment, public accommodations, housing, and bias-related hate violence and their resolution, would be exempt under a special, ten-year exemption included in Proposition 54. This exemption would sunset on January 1, 2015. Data collected by city and county fair housing commissions would not be covered by the exemption for the state department and thus would be presumed prohibited.

2. Could the state determine the racial and ethnic composition of local labor forces and labor market outcomes?

Overall impact of Proposition 54 on data collection: *Partially Exempt*

Overall impact of Proposition 54 on data use: *Unknown*

Analysis: Most of the state's basic labor force and labor market data derives from surveys conducted by the federal Census Bureau, such as the decennial Census and monthly and annual surveys. It is unclear whether the state would be prohibited from using these data from published reports documenting labor market outcomes by race and ethnicity, such as unemployment by race and ethnicity or from making this information on state web sites.

Applicants for Unemployment Insurance are asked to report their race and ethnicity when applying for benefits. These data are federally required and are reported to the US Department of Labor. In addition, the state submits demographic information on large employers with state contracts to the federal Equal Employment Opportunity Commission (EEOC). Federal reporting requirements would exempt this information from Proposition 54.

- 3. Could the state determine whether low-income adults of different racial and ethnic backgrounds are able to access and successfully complete government-funded employment and training programs? Could the state evaluate whether individual employment and training programs are successfully tailoring their efforts to reach under-represented racial and ethnic populations?**

Overall impact of Proposition 54 on data collection: *Presumed Partially Exempt*

Overall impact of Proposition 54 on data use: *Unknown*

Analysis: The Workforce Division of the Employment Development Department (EDD) collects data on the race and ethnicity of training participants as a requirement of the federal Workforce Investment Act (WIA). Under the policy guidance of the California Workforce Investment Board (CWIB), the EDD works in cooperation with local Workforce Investment Areas. The WIA requires collection of race and ethnicity as a condition of funding, thus continued collection is presumed exempt from Proposition 54. Additional data collection would be prohibited and the use of data by the state for program evaluation or similar purposes would potentially be prohibited, as well.

Administrative guidelines from the US Department of Labor require the EDD to collect data on both race and ethnicity. Currently, the state collects data on individuals who receive intensive or training services through the local workforce investment boards (WIBs). Data are not gathered on individuals who only use job search services.

The state's Performance Based Accountability (PBA) system, mandated by state law, collects data on employment rates, earnings, and receipt of public benefits for participants in state workforce development programs. The PBA includes programs administered by the Employment Training Panel, Community Colleges, Department of Corrections, EDD, Department of Social Services, Department of Rehabilitation, and former Job Training Partnership Act. These data are reported by an extensive range of demographic factors, including race and ethnicity. This system is used to fulfill the performance reporting requirements of the WIA. To the extent that these data fulfill federal reporting requirements, it would be exempt from Proposition 54. However, state use of data that exceed the federal requirements may be prohibited.

D. Health

Much of the state's health data collection would be presumed partially exempt. However, a number of questions remain with respect to the breadth of the exemption for medical research subjects and patients, particularly with respect to the use of data for

epidemiological and public health research. Proposition 54 does not define the term “medical research subjects and patients.” If the measure is enacted, the scope of this exemption will likely be subject to litigation. Some data are presumed exempt due to federal reporting requirements. In both instances, questions remain with regard to the extent of the prohibition on the use of exempt data for purposes unrelated to the specific exemption. This could prove particularly critical for research that depends on linking population data, such as Census data, with patient records to determine the prevalence of health conditions. The ambiguities in Proposition 54 are illustrated by the following questions.

1. ***Would data be available to examine the prevalence of various diseases by race and ethnicity? Would the state know whether responses to treatment varied by race and ethnicity?***

Overall impact of Proposition 54 on data collection: *Presumed Partially Exempt*

Overall impact of Proposition 54 on data use: *Unknown*

Analysis: While reports of the number of occurrences of diseases or other health conditions are likely to qualify under the exemption for medical research, it is unclear whether Proposition 54 would allow researchers to link this data to population data to obtain prevalences. Moreover, the impact of the measure on various surveys conducted by the state, such as the new California Health Interview Survey (CHIS), which is funded from a combination of state and private sources, is unknown. Thus, even if data collection is allowed to continue, it is unclear whether state employees could use the data for research and analysis.

- *Office of Statewide Health Planning and Development (OSHPD): No Exemption Currently Identified.* The OSHPD collects data on disease and injury outcomes by race and ethnicity through the hospital discharge data system. The status of continued collection of data including racial or ethnic identifiers is uncertain due to Proposition 54’s lack of a definition for the term “medical research subjects and patients.”
- *AIDS Data: Presumed Exempt.* Federal law requires the collection of data on the incidence of AIDS as a condition of funding.
- *The California Health Interview Survey (CHIS): Possible Partial Exemption.* The CHIS is a new initiative aimed at obtaining data on a variety of health related issues, ranging from the prevalence of disease and behaviors to insurance status. The CHIS is funded from a combination of state and private sources. The CHIS surveys 55,000 individuals and over-samples ethnic minorities, particularly Asian and Pacific Islanders and Native Americans, in order to obtain statistically valid results. While continued collection of race and ethnic identifiers may be possible under the exemption for medical research, a strict interpretation of the exemption for medical research would prohibit this type of survey research. Thus, the lack of a clear

definition for this exemption leaves continued collection and analysis of data by race and ethnicity in question.

- *Program Level Studies: Presumed Partially Exempt.* The state periodically engages in specific, program-based research studies using state, federal, and/or private funds. The status of these studies may depend on specific research design and/or funding considerations.
- *Vital Records Data: Presumed Exempt.* The state collects and maintains vital records data based on birth and death certificates that include race and ethnic identifiers. Birth certificates include up to three races for a child's parents and death certificates collect up to three races for a decedent. The collection of this data is presumed exempt since the National Center for Health Statistics requires states to report birth and death date by race as a condition of funding.

2. *Would data be available to tell us the extent to which health care access varies by race and ethnicity, or how insurance rates vary by race and ethnicity? Among those insured, who has employer-funded insurance, public, or other coverage? How does utilization of Medi-Cal vary by race and ethnicity?*

Overall impact of Proposition 54 on data collection: *Presumed Partially Exempt*

Overall impact of Proposition 54 on data use: *Unknown*

Analysis: Most of the data that are currently collected on insurance status and sources will be exempted from Proposition 54 since it is federally required. The CHIS, described above, includes data on insurance status; the impact of Proposition 54 on CHIS is uncertain. The remaining data sources include private industry and federal Census data. These sources would continue to be available, however Proposition 54 could prohibit state employees from using this data for research and analysis. The University of California's Center for Health Policy Research publishes a number of reports on health status that include analyses by race and ethnicity. If University staff and faculty are prohibited from engaging this type of research, the Center could be prohibited from including data on health status by race and ethnicity in future reports.

- *Birth Certificate Insurance Data: Presumed Exempt.* Birth certificates include the source of payment for prenatal care and births; however, unlike the racial and ethnic data on birth certificates, these data are not a requirement of federal funding. Since federal law requires collection of the racial and ethnic data on birth certificates, and the collection of insurance data are not covered by Proposition 54, the collection of these data are presumed exempt. However, the use of birth certificate data for assessment of insurance rates may be a prohibited use.
- *Medi-Cal Coverage and Utilization: Presumed Exempt.* Federal law requires the collection of data on Medi-Cal enrollees, including their race and ethnicity. Counties collect this information at the time an application is filed and reported to the state. The federal Social Security Department reports data on Medi-Cal enrollees who received coverage based on their receipt of SSI/SSP to the state. These data can be

used to analyze utilization of services by race and ethnicity, however it is unclear whether Proposition 54 would permit continued use of the data.²³

- *Healthy Families Program, Access for Infants and Mothers Program, and the Major Risk Medical Insurance Program: No exemption Currently Identified.* The Healthy Families Program, Access for Infants and Mothers Program, and the Major Risk Medical Insurance Program are all funded entirely with state funds. All three of these state insurance programs collect racial and ethnic data from enrollees and make that data available to the public in a variety of media. No federal reporting requirements could be identified for this data.

3. What data would be available to assess the health impact of environmental toxins by race and ethnicity?

Overall impact of Proposition 54 on data collection: *Potentially exempt*

Overall impact of Proposition 54 on data use: *Unknown*

Analysis: Researchers use a number of health and demographic datasets to examine the prevalence of environmental health hazards. While many of the primary health datasets are presumed to be exempt, either due to federal requirements or medical research subjects and patients, it is unclear whether this kind of use of the data would be permitted under Proposition 54.²⁴ This would likely depend on the courts' interpretation of the scope of the medical research exemption and limits on the use of exempt data for purposes unrelated to the exemption.

It is also ambiguous whether data qualifying for the medical research exemption could be linked to population-based data, such as Census data, to determine rates and prevalence. For example, the California Cancer Registry (CCR) collects data on cancer diagnoses, which are used to examine patterns of cancer diagnoses by race, ethnicity, geography, gender, and other factors. The CCR is not subject to federal reporting requirements and it is unclear whether population-based research would qualify under the exemption for medical research.

E. Criminal Justice

Proposition 54 gives potentially broad latitude to law enforcement agencies to classify individuals by race or ethnicity for law enforcement purposes. At one point, for example, it declares: "*Nothing in this section shall prevent law enforcement officers, while carrying out their law enforcement duties, from describing particular persons in otherwise lawful ways.*" The measure also includes a specific limit on the state's ability to require collection of data an agency does not wish to collect: "*Neither the governor, the legislature nor any statewide agency shall require law*

²³ Contacts report a number of problems with this dataset, particularly as the share of enrollment in managed care plans, which do not report comprehensive utilization data, increases.

²⁴ Datasets used for environmental health research and analysis include the OSHPD hospital discharge data, the CHIS, Medi-Cal utilization data, the Healthy Kids survey, Birth Defects Monitoring Program, the California Cancer Registry, and Childhood Lead Poisoning Program records.

enforcement officers to maintain records that track individuals on the basis of said classifications, nor shall the governor, the legislature or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records.”

In some instances, federal reporting requirements would mandate continued data collection and reporting. As in other areas, if Proposition 54 passes, a major unresolved issue will be the extent to which the state could continue to use exempt data for research and analysis unrelated to the purposes of the initial exemption. Within the juvenile justice area, sources were unable to identify federal reporting requirements. While collection of race and ethnicity data on youths incarcerated in the juvenile justice system would be potentially exempt, no grounds for exempting the collection and use of data for youth in prevention-oriented programs could be identified.

The following questions illustrate some of these ambiguities:

- 1. *Could the state assess variation in the rates at which drivers from various racial and ethnic populations are being stopped by the police for suspected crimes? What about the variation by race and ethnicity of those who are arrested and incarcerated?***

Overall impact of Proposition 54 on data collection: *Presumed Partially Exempt*

Overall impact of Proposition 54 on data use: *Unknown*

Analysis: State, not federal, law governs the collection of data on the race and ethnicity of drivers stopped for suspected crimes. Collection of these data would be prohibited under Proposition 54. However, three city police departments, Los Angeles, Oakland, and San Jose, are currently subject to court orders and/or consent decrees requiring collection of data on the race and ethnicity of suspects. These agencies would be presumed exempt during the period of the orders or decrees.

- *Arrest Data: Presumed Exempt.* The Department of Justice collects and reports arrest data by race and ethnicity to the federal government. Sources contacted for this report were unsure as to whether reporting was voluntary or a condition of federal funding.
 - *Incarceration data: Presumed Exempt.* The California Department of Corrections (CDC) collects data on the race and ethnicity of inmates. These data are used to inform decisions affecting inmate housing and security decisions. These data would be presumed exempt under the provision of Proposition 54 allowing the collection of data for law enforcement purposes.
- 2. *Could the state ascertain the racial and ethnic background of the young people involved in the juvenile justice system, and the youth involved in prevention activities? Could the state assess whether outreach strategies effectively reach the populations most in need of prevention services?***

Overall impact of Proposition 54: Presumed Potentially Exempt

Overall impact of Proposition 54 on data use: Unknown

Analysis: Approximately two to three percent of the state’s juvenile offenders are wards of the California Youth Authority (CYA); the remainder are incarcerated in county or contract facilities. While no federal reporting requirements were identified for wards of the CYA, data collection would be presumed exempt. No centralized source of data on juveniles in county facilities was identified. While the collection of data used to inform security decisions would presumably qualify under the exemption for law enforcement activities, it is less clear whether these data could be used for research and analysis unrelated to the purpose of the exemption.

California Youth Authority: Presumed Potentially Exempt. The CYA, similar to the CDC, collects data on the race and ethnicity of wards and uses these data to inform housing and security decisions. As such, the collection of these data would be presumed exempt. As noted above, it is unclear whether this information could be used for research and policy analysis unrelated to the purpose of the exemption.

Office of Juvenile Justice and Delinquency Prevention: Status Uncertain. The federal Office of Juvenile Justice and Delinquency Prevention collects data from juvenile courts across the country. Sources believe that state courts voluntarily report this information and it is unclear whether either the law enforcement or federal reporting requirement exemptions would permit continued collection and reporting of these data.

County Probation Data: Status Uncertain. Counties report a variety of data to the state Attorney General’s office. It is unclear whether federal law requires reporting and, therefore, whether these data would be exempt under the law enforcement provision of Proposition 54.

Conclusion

This survey is by no means comprehensive. While every effort was made to identify federal reporting or funding requirements, many of the departmental personnel contacted were unable to identify specific requirements in federal law. More importantly, the lack of a detailed definition for the exemptions contained in Proposition 54 will leave the measure’s true impact in doubt, pending the litigation that will no doubt occur if the measure is enacted.

However, this research suggests that the potential impact of Proposition 54 will vary significantly across policy areas. Federal law requires collection of much of the state’s current data collection, and Proposition 54 would potentially have a minimal impact on these data collection efforts. On the other hand, California funds a broad range of data collection activities that could be prohibited.

Proposition 54’s most significant impact would likely be in the area of data use. Currently, the state publishes a variety of reports and makes a number of its core data sets available to the public and other researchers. Data resources range from education

test score data for school districts and school sites, which are available for independent analysis in a user-friendly inquiry system, to demographic data on the state's population, made available through the internet. While the state's public record laws would likely require release of data reported to the federal government, the state would not be obligated to, and might be prohibited from using the data to prepare reports that are accessible to the public or researchers.

Lorene Allio and Jean Ross prepared this report. The California Budget Project (CBP) was founded in 1994 to provide Californians with a source of timely, objective, and accessible expertise on state fiscal and economic policy issues. The CBP engages in independent fiscal and policy analysis and public education with the goal of improving public policies affecting the economic and social well-being of low- and middle-income Californians. Funds for this report came from the Evelyn and Walter Haas, Jr. Fund. Support for the CBP comes from foundation grants, publications and individual contributions. Please visit the CBP's web site at www.cbp.org.

Appendix A Proposition 54

Prohibition Against Classifying by Race by State and Other Public Entities

Section 32 is added to Article I of the California Constitution as follows:

Sec. 32. (a) The state shall not classify any individual by race, ethnicity, color, or national origin in the operation of public education, public contracting, or public employment.

(b) The state shall not classify any individual by race, ethnicity, color or national origin in the operation of any other state operations, unless the legislature specifically determines that said classification serves a compelling state interest and approves said classification by a 2/3 majority in both houses of the legislature, and said classification is subsequently approved by the governor.

(c) For purposes of this section, "classifying" by race, ethnicity, color or national origin shall be defined as the act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms.

(d) For purposes of subsection (a), "individual" refers to current or prospective students, contractors, or employees. For purposes of subsection (b), "individual" refers to persons subject to the state operations referred to in subsection (b).

(e) The Department of Fair Employment and Housing (DFEH) shall be exempt from this section with respect to DFEH-conducted classifications in place as of March 5, 2002.

(1) Unless specifically extended by the legislature, this exemption shall expire ten years after the effective date of this measure.

(2) Notwithstanding DFEH's exemption from this section, DFEH shall not impute a race, color, ethnicity, or national origin to any individual.

(f) Otherwise lawful classification of medical research subjects and patients shall be exempt from this section.

(g) Nothing in this section shall prevent law enforcement officers, while carrying out their law enforcement duties, from describing particular persons in otherwise lawful ways. Neither the governor, the legislature nor any statewide agency shall require law enforcement officers to maintain records that track individuals on the basis of said classifications, nor shall the governor, the legislature or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records.

(h) Otherwise lawful assignment of prisoners and undercover law enforcement officers shall be exempt from this section.

(i) Nothing in this section shall be interpreted as prohibiting action which must be taken to comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(j) Nothing in this section shall be interpreted as invalidating any valid consent decree or court order which is in force as of the effective date of this section.

(k) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, California State University, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(l) This section shall become effective January 1, 2005.

(m) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Table 1: Summary of Key Data Sets Currently Responsive to Guiding Questions

| EDUCATION DATA SETS | Collects racial and ethnic descriptors? | Federally mandated or required for funding | Other potential exemptions |
|---------------------------------------------------------------------------------|------------------------------------------------|---------------------------------------------------|----------------------------------------|
| California Academic Performance Index (by school/group) | Yes | Yes | None |
| STAR (Standardized Testing and Reporting Program) | Yes | Yes | None |
| CBEDS Enrollment data collected annually via self reporting from all schools | Yes | Yes | None |
| CPEC - IPEDS | Yes | Partial | None |
| Student aid | Yes | Partial | None |
| CHILD WELFARE DATA SETS | Collects racial and ethnic descriptors? | Federally mandated or required for funding | Other potential exemptions |
| Federal level Adoption and Foster Care (AFCARS) | Yes | Yes. | |
| Child Welfare Services Case Management System (CWSCMS) | Yes | Yes | |
| Child Welfare Program level data | No Coordinated Collection | No | |
| COMMUNITY DEVELOPMENT DATA SETS | Collects racial and ethnic descriptors? | Federally mandated or required for funding | Other potential exemptions |
| Department of Housing and Urban Department block grant | Yes | Yes | |
| Employment Development Department - Unemployment Insurance | Yes | Yes | |
| Employment Development Department - Workforce Investment Act | Yes | Yes | |
| Department of Fair Employment and Housing | Yes | No | 10 year specific exemption |
| HEALTH DATA SETS | Collects racial and ethnic descriptors? | Federally mandated or required for funding | Other potential exemption |
| California Health Information Survey | Yes | No | Medical research subjects and patients |
| Office of Statewide Health Planning and Development hospital discharge data | Yes | No | Medical research subjects and patients |
| Program level studies | Yes | Partial | Medical research subjects and patients |
| Vital records Birth/death certificates | Yes | Yes | Medical research subjects and patients |
| Medi-Cal Data | Yes | Yes | Medical research subjects and patients |
| Cancer registry | Yes | N/A | Medical research subjects and patients |

| | | | |
|------------------------------------------------------------------------|------------------------------------------------|---------------------------------------------------|----------------------------------------|
| CA birth defects monitoring program | Yes | N/A | Medical research subjects and patients |
| Healthy Kids survey | Yes | N/A | Medical research subjects and patients |
| CRIMINAL JUSTICE DATA SETS | Collects racial and ethnic descriptors? | Federally mandated or required for funding | Other potential exemptions |
| California Youth Authority data | Yes | Partial | Law enforcement |
| Traffic stop data | Yes | No (only in departments under consent decrees) | Law enforcement |
| Local law enforcement agencies arrest data | Yes | Yes | Law enforcement |
| California Department of Corrections Offender Based Information System | Yes | No | Law enforcement |