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FISCAL IMPACT REPORT

ORIGINAL DATE 01/25/13

SPONSOR Smith/Ivey-Soto LAST UPDATED 02/11/13 HB 21/aHJC

SHORT TITLE Public Meetings Agendas 72 Hours in Advance SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Minimal*	Minimal*	Minimal*	Minimal*	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Department of Cultural Affairs (DCA)
 Department of Finance & Administration (DFA)
 Secretary of State (SOS)
 Department of Health (DOH)
 Educational Retirement Board (ERB)
 Energy, Minerals & Natural Resources Department (EMNRD)
 Human Services Department (HSD)
 Medical Board (MB)
 State Personnel Office (SPO)
 New Mexico Environment Department (NMED)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment: 1) expands from five days to ten days the time in which a public body taking action on an emergency matter must report to the AGO the action taken and the circumstances creating the emergency; and 2) provides an exception from that reporting requirement in the event a state or national emergency has been declared.

Synopsis of Original Bill

House Bill 21 (HB 21) amends the Open Meetings Act (OMA) to increase the time that public bodies must make the final agenda available from at least 24 hours prior to a meeting to at least

72 hours, except in the case of an emergency (as defined in the existing Act as matters arising from unforeseen circumstances that if not addressed immediately will likely result in injury, damage to persons or property, or substantial financial loss to the public body) or for public bodies that ordinarily meet more frequently than once a week. For those public bodies, a draft agenda must be posted at least 72 hours prior to the meeting and a final agenda be posted 36 hours prior to the meeting. This bill also requires that agendas be posted on the public body's website within the specified time periods if a website is maintained.

HB 21 adds a new requirement that any public body taking action on an emergency matter to report the action and the nature of the emergency to the Attorney General's Office within five days of that action.

FISCAL IMPLICATIONS

A small but indeterminate fiscal impact to state agencies (and political subdivisions of the state) may be anticipated due to the greater period of time in which an agenda must be final, since additional items may arise after the 72-hour deadline has passed that cannot be added to the final agenda, resulting in additional special meetings and the concomitant additional expenses including legal notices, supplies, minute-taking and mileage and per diem costs. The MB reports that just the mileage and per diem costs of an additional meeting average \$1,000. Additionally, agency staff workloads would increase if additional meetings are required.

SIGNIFICANT ISSUES

The DFA (Board of Finance), HSD and EMNRD suggest that extending the time by which an agenda must be published from 24 to 72 hours may increase transparency and public participation, since members of the public would have more time to make arrangements to attend a meeting at which an item of interest to them is to be discussed and acted on.

On the other hand, DFA (Board of Finance) and DOH point out that the earlier posting of agendas could reduce an agency's ability to resolve issues and questions concerning an agenda item prior to its presentation to the public body, which may result in some items not being handled in a timely fashion because they must be delayed until a later meeting. The DCA calls attention to the need for Cultural Properties Review Committee review of tax credits for building rehabilitations and archaeological permit applications which could end up being delayed for up to two months, given the Committee's bi-monthly meeting schedule. The MB expresses concern about the difficulty in establishing a date and time when a quorum of actively practicing professional members of the board will be available, and the increased effectiveness and efficiency that is gained by being able to add licensing and disciplinary matters to an agenda up to 24 hours before a meeting that has already been scheduled.

The MB cautions that, in order to accommodate as many items as possible at a meeting, matters may be listed on the 72-hour agenda that may be pulled at the last minute because they are not ready, which could result in members of the public showing up for a meeting only to see the item they are interested in be removed.

The ERB suggests an alternative:

While increasing the notice time to 72 hours is not objectionable to the ERB, for some agencies like the ERB that have a board of trustees that reside in locations throughout the state and who

are sometimes difficult to bring together, a notice requirement of 48 hours might prove to be more useful. Doubling the current requirement to 48 seems to strike a good balance between the public need for notice with the logistical concerns of agencies similar to the ERB that have board meetings only every other month. A 48 hour requirement would decrease the probability that the agency would either have to call special board meetings or allow certain issues, which do not meet the definition of emergencies, but are none the less important, go unaddressed for another 60 days.

The AGO notes that currently, the OMA does not specify the amount of advance notice a public body must provide for its meetings, but simply requires “reasonable” advance notice, leaving it to each public body to determine how much advance notice is appropriate given all the circumstances, including the type of meeting, the type of public body, the size of its constituency, and the nature of the business that comes before it. By requiring meeting agendas be made available at least 72 hours before a meeting, HB 21 effectively requires public bodies to provide at least 72 hours advance public notice for their meetings.

Additionally, as to the new requirement to report emergency actions contained in HB 21, the AGO states:

Requiring every state and local public body to report to the Attorney General’s Office within 5 days of taking action on an emergency matter may be viewed as unnecessarily intrusive into the business of public bodies, particularly local government bodies. Unless there is evidence that public bodies routinely take action on “emergency” matters that do not appear on the agenda or it is otherwise clear that this requirement warrants closer scrutiny than the other requirements of the Act, the utility of the reporting requirement in this context is not apparent.

The NMED also raises a concern as to the emergency action reporting requirement:

NMED is periodically involved in emergency actions relating to safe drinking water which may require actions by public bodies subject to the OMA. Just this last summer, the Village of Ruidoso faced emergencies related to the Little Bear Fire that extended for weeks and which threatened the safety of its drinking water supply. More generally, NMED periodically issues “Boil Water Orders” requiring Associations to take actions to protect public health due to contamination of drinking water. Boil Water Orders may require Associations to hold emergency meetings or take other actions to restore the safety of drinking water supplies. Particularly for small Associations dealing with emergencies without staff, it is unduly burdensome to impose reporting about emergency actions to the Attorney General within five days. At that point, an emergency like a serious fire may not even be over; flooding emergencies during the summer monsoon season may repeat day after day. Associations should not be required to report to the Attorney General while they are dealing with ongoing impacts of emergencies. NMED suggests an amendment to resolve this issue below.

ADMINISTRATIVE IMPLICATIONS

Many public bodies may need to amend their open meetings policies if this bill becomes law. Further, the reduction in flexibility to add items to agendas by two days may result in additional meetings and the corresponding additional workload to agency staff.

TECHNICAL ISSUES

Section 1, p.4, lines 9-14: The AGO suggests that this sentence is awkward and hard to follow, and proposes this language as a possible alternative: “This agenda shall be available to the public and posted on the public body’s website, if one is maintained, at least seventy-two hours prior to the meeting, except in the case of an emergency or if a public body ordinarily meets more than once per week.”

OTHER SUBSTANTIVE ISSUES

The NMED warns that requiring reporting to the Attorney General within five days of taking emergency action could have unintended consequences because failure to comply with the OMA is subject to criminal penalties (a misdemeanor resulting in a \$500 penalty): first, HB 21 could potentially discourage associations from taking prompt actions to protect their communities’ public health. Second, it is already difficult for many small communities to find volunteer board members to serve on these public bodies; exposing them to more risk of criminal prosecution for actions taken in the face of emergencies will only make this more difficult.

AMENDMENTS

The ERB recommends amending the prior notice requirement to 48 hours (rather than 72 hours).

The NMED suggests the reporting period for emergency actions be modified to set a five day limit if practical, but no later than 90 after the action is taken, since an emergency would likely be over and ordinary operations resumed.

MD/svb:blm