

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

ORIGINAL DATE 2/15/07

SPONSOR Jennings LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Expungement of Criminal Records SB 1081

ANALYST Wilson

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$0.1	\$0.1	\$0.1	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates SB 599, except for the short title

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Attorney General's Office (AGO)  
 Department of Public Safety (DPS)  
 Children, Youth & Families Department (CYFD)  
 Public Education Department (PED)  
 Public Defender Department (PDD)  
 State Records Center & Archives (SRCA)

### SUMMARY

#### Synopsis of Bill

Senate Bill 1081 requires agencies that maintain public criminal records to expunge such records within thirty days of receiving an order from a court of original jurisdiction if it finds that no other charge or proceeding is pending against the accused and if:

- A. the accused was a victim of identity theft;
- B. the accused, in a proceeding for a violation of a municipal ordinance, misdemeanor, or felony, was released without conviction, including:
  - (1) an acquittal or finding of not guilty;
  - (2) a nolle prosequi, a no bill or a dismissal;
  - (3) a referral to a pre-prosecution diversion program.
- C. the proceedings were otherwise discharged; or
- D. the accused was convicted of a misdemeanor or violation of municipal ordinance, but has had no other conviction after completion of the sentence for the original conviction:

- (1) for a period of two years, unless the conviction was an offense committed against minors or children, a sex offense, an offense involving domestic violence or abuse or an offense involving driving while under the influence of intoxicating substances or
- (2) for a period of four years after a misdemeanor aggravated battery conviction.

## **FISCAL IMPLICATIONS**

The AOC notes there will be significant fiscal impact on the judiciary to monitor external agencies' compliance with an expungement order. Also, the court's case management system will require much reprogramming to retain information required for such monitoring and record keeping; or, a new information system will have to be developed to track such monitoring. As a practical matter, only the DPS has any leverage with local law enforcement agencies since it provides law enforcement agencies with criminal history services including rap sheets, domestic violence order of protection information and missing person information. In contrast, the courts provide no services to law enforcement.

The other responding agencies did not provide any information relating to fiscal impacts

## **SIGNIFICANT ISSUES**

The AOC provided the following:

While it is the responsibility of a judge to order an expungement, the courts are not the official keeper of criminal history records in New Mexico or in any state, for that matter. The records kept by a court may include arrest and disposition information but the courts do not verify offender identification information or any of the other functions of law enforcement that are required to create and maintain a criminal history record repository. The official criminal history repository in New Mexico is maintained by DPS and only DPS can request expungement of records from federal criminal history repositories maintained by the Federal Bureau of Investigation (FBI) and the National Crime Identification Center (NCIC).

Since the act requires that the FBI remove a notation of an arrest placed on person's record and to destroy or otherwise remove all records of the proceeding, DPS should be made the responsible entity since only they can submit the proper forms and required documentation under current federal rules (please note that the FBI and the NCIC interprets expungement not to mean that information is physically destroyed but that the information is not available through routinely available access methods). In fact, federal justice entities will not accept communications requesting expungement of criminal records from any court and will only accept such communications from the agency in each state that maintains the official criminal history repository.

The act requires that courts monitor other agencies' compliance with the order to expunge with specific deadlines identified within which the other agencies must report compliance. Among the entities in New Mexico that maintain some piece of a person's criminal history are the following:

1. Local police agencies or other agencies with arrest powers.
2. Local sheriff departments and jails
3. The department of public safety

4. The administrative office of the district attorneys
5. The department of corrections
6. Tribal police and prosecutors

Courts have no capabilities to provide such a level of compliance monitoring; however, DPS has a statewide criminal history network that includes all law enforcement entities. DPS could make requests for local state agency record expungements and monitor expungement compliance through use of this network. This network meets stringent federal security standards and is regularly audited by the NCIC. According to federal regulations, the courts, as a non-law enforcement entity, cannot be a participant on this network.

The act appears to require the courts to conduct background checks to ensure that a person requesting expungement meets eligibility requirements of Act. As keeper of official criminal history records DPS should perform this background check. Moreover, the courts are not sufficiently staffed to conduct background investigations to prove such eligibility as required by the Act.

The final significant issue is that “identity theft” is not defined in the bill. Identity theft as a crime category is relatively new and the specific crimes in this category have yet to be universally agreed upon. A complicating factor is the recent tendency to classify an individual as a victim of identity theft if any data regarding that individual was misplaced, lost, stolen or even unintentionally discarded without first rendered unreadable. The class of “victim” belonging to this class of identity theft is very large and some estimates have most residents of the United States as belonging to the class. As such, a very restrictive definition of identity theft is required for this bill.

PED provided the following:

Because the bill refers to a “court of original jurisdiction,” district courts, magistrate courts and municipal courts will have authority to issue orders of expungement under the proposed Act.

There already is an expungement law at Section 30-31-2 of the Criminal Code that permits expungement upon the completion of conditions imposed by a court upon an order of conditional discharge for a first offense. The bill does not make a distinction for a first time offender.

There is another avenue of expungement permitted under the DNA Identification Act [Chapter 29, Article 16 NMSA 1978], which involves DNA samples given by persons arrested for covered offenses.

There is another opportunity for a person to petition the DPS for expungement of arrest information records found in Section 29-3-8.1. That section only permits expungement following final disposition if the arrest was for a misdemeanor or petty misdemeanor, but not for a crime of moral turpitude.

The bill permits expungement for an accused referred to a pre-prosecutions diversion program. Perhaps the expungement should be granted upon successful completion of such a program. That will serve as more of an incentive.

## ADMINISTRATIVE IMPLICATIONS

DPS has a concern about the immediate notification to the NCIC via the DPS Law Enforcement Records Bureau (LERB) which serves as the state Criminal History Repository for all fingerprint supported arrests. LERB also serves as the liaison with the FBI. There will also be a significant increase of incoming expungements for processing and verification by the LERB.

The agencies named in the bill which include DPS, PED, CYFD, Human Services Department and the courts will d be required to adopt procedures to respond to and comply with court orders of expungement.

## RELATIONSHIP

SB 1081 duplicates SB 599, except for the short title and relates to several existing expungement laws discussed in Significant Issues.

## TECHNICAL ISSUES

The AOC provided the following:

- Page 2, line 4 after “remove” add “from public access the court records that contain any reference to or record of the proceeding” and delete “all records of the proceeding.”
- Page 3, line 11 after “dismissal” add “, other that a dismissal pursuant to Section 31-20-9 NMSA 1978.”
- Page 3, line 17 after “sentence” add “, including paying all fines and fees owed to the state, “
- Page 4, line 4 delete the entire page and replace with the following: The administrative office of the courts and the department of public safety shall develop rules and procedures to implement the criminal expungement act including procedures for notifying the accused of his rights under the act.

The SRCA notes the definition of "public records" contained in the bill appears to be in conflict with the definitions set forth in the Public Records Act and the Inspection of Public Records Act. The definition in SB599 excludes certain confidential records. Confidential records are still public records; they are, however, exempt from public disclosure for the duration of their confidential status.

The SRCA suggests that the definition of public records be amended so that it better conforms with existing definitions and does not exclude the confidential material referenced in Paragraphs (1) and (2) of Subsection F of Section 2 but rather recognizes it as exempt from disclosure.

DW/nt