

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 02/02/11
 LAST UPDATED 03/08/11 **HB** _____

SPONSOR Wirth

SHORT TITLE True & Accurate Public Records **SB** 128/aSPAC

ANALYST Wilson/Hughes

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	FY12	FY13		
	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 52

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Administrative Office of the Courts (AOC)
- Aging and Long Term Services Department (ALTSD)
- Administrative Office of the District Attorneys (AODA)
- Children, Youth & Families Department (CYFD)
- Commission of Public Records (CPR)
- Corrections Department (CD)
- Department of Cultural Affairs (DCA)
- Department of Information Technology (DoIT)
- Economic Development Department (EDD)
- Educational Retirement Board (ERB)
- Energy, Minerals & Natural Resources (EMNRD)
- Environment Department (ED)
- ExpoNM
- Gaming Control Board (GCB)
- General Services Department (GSD)
- Health Policy Commission (HPC)

Senate Bill 128/aSPAC - Page 2

Human Services Department (HSD)
Municipal League (NMML)
Office of the State Engineer (OSE)
Public Defender Department (PDD)
Public Education Department (PED)
Public Employees Retirement Association (PERA)
Public Regulation Commission (PRC)
Regulation & Licensing Department (RLD)
Sentencing Commission (SC)
State Land Office (SLO)
State Personnel Office (SPO)
State Treasurer's Office (STO)
Tourism Department (TD)

Other Responses

Michael Schwarz, Attorney & Counselor at Law

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to Senate Bill 128 requires a custodian of public records to certify that the records produced are used, created, received or maintained in the regular course of the operations of the public body.

Synopsis of Original Bill

Senate Bill 128 amends Section 14-2-7 NMSA 1978 of the Inspection of Public Records Act (IPRA). The bill adds new subsections that relate specifically to certifying public records as true and correct copies and made in the regular course of the operations of the public body or that no such records exist; it also requires that custodians "set forth" the request and identify the responsive documents when responding.

The bill provides that custodians, in responding to a request to inspect public records, shall "set forth" the request and identify the documents responsive to the request. Upon request, custodians shall provide certified copies of public records. Custodian must certify that records are true and correct copies and made in the regular course of the operations of the public body.

In the event that no records are found, custodians shall certify that, after a due and diligent search no records, statements or data compilations responsive to the request were found.

FISCAL IMPLICATIONS

CPR already provides certified copies of public records in paper format held in its custody in the State Archives. This bill, however, will apply to all records in the custody of the agency, including those generated in the daily operations of the agency as well as rules held in the State Rules Collection and master microfilm from state agencies and local governments. Currently the agency's fee schedule is as follows:

- the cost of an 8 ½ by 11 page is \$0.25 for a copy and \$0.50 for the certification; and
- the cost for an 11 by 17 page is \$0.35 for a copy and \$0.50 for the certification.

Both are below the maximum \$1.00 allowed in Section 14-2-9 NMSA 1978.

CPR notes that many of the requests the agency responds to are not made pursuant to IPRA. However, if the number of IPRA requests for certified records rose significantly as a result of this bill, the agency could realize an increase in revenue. However, certification can be time-consuming and a marked increase in certification requests will impose a burden on an already depleted and overworked staff.

Even if CPR were to earn additional revenue, that revenue does not translate into the increase in staffing resources that could be needed. It should be noted that the agency has realized an increase in requests for certified copies over the past year or more because of requests from District Attorneys for certified copies of DUI and domestic violence case records held in the State Archives and the impact has been noticeable.

It is the provision of certified copies of electronic records that could prove costly in terms of staff resources. To certify an electronic record as “authentic” and “reliable” – the terms used in the industry – can be difficult and can require the participation of an information technology professional as well as a records manager. It also requires that an agency have a solid records management program that covers electronic records in place and that identifies what version of an electronic records is the official one since multiple versions of an electronic records may exist.

EMNRD provided the following:

The requirement that the public records custodian identify the documents responsive to the IPRA request will increase the workload of public records custodians and agency attorneys and require at least one full time position be devoted to responding to IPRA requests. Currently the EMNRD has several individuals that serve as public records custodians, but only a portion of their time is devoted to the duties of public records custodian. Currently, public records custodians are only required to list those documents that the agency is not providing pursuant to exceptions in IPRA not to provide a list of all documents that may be responsive to the request. Given the number of documents involved in many IPRA requests the requirement to provide a list of all potentially responsive documents will be time consuming and labor intensive.

The public records custodian is frequently not the individual who reviews and collects responsive public records because of the volume of records and the large numbers of employees in various locations who maintain files. Instead other employees in the agency who actually possess the records collect the records and provide them to the public records custodian, who then makes them available to the requester. Requiring the public records custodian to certify that the records are true and correct copies and that when there are no records, that a due and diligent search has been made, will require the public records custodian to ... mak[e a] certification based upon the actions and assurances of other employees.

While this might not be burdensome when there are only a handful of documents that are responsive to the request, this is not the case when the request involves numerous documents or multiple boxes of documents. Under the present IPRA statutes it is reasonable and appropriate for the agency to produce all the boxes of records and allow the requester to inspect and copy the responsive records. For IPRA requests involving

large numbers of documents, it will be extremely time consuming for the agency to “identify the documents responsive to the request” as this amendment will require. With the requirement to identify the documents that are responsive to request, it is unlikely the agency will be able to meet the 15 day time limit for providing the documents when the request involved large numbers of documents.

Furthermore, producing records for the requester’s inspection, without listing each document that may potentially be responsive, allows the requester to decide what records are desired when there are numerous files or boxes of documents. Where a request is broad or vague, an agency could spend hours or days compiling a list of potentially responsive documents, when agencies receive vague requests they often advise the requester about the type of documents available and ask the requester if those documents will satisfy their request. The individual or entity does not usually submit a revised request to reflect this agreement. Therefore, the agency will still have to list all documents that might satisfy a very broad or vague request.

A proponent of Senate Bill 128 stated that it was not the intent of SB 128 that each document for every Inspection of Public Records request must be identified. An amendment to address this issue is provided below.

The enactment of SB128 could affect the fiscal and performance implications for all agencies. The actual costs will depend on the number of new requests. The bill will have little or no impact on the smaller agencies, but the larger agencies and those agencies that deal with controversial matters will require additional resources and staff.

SIGNIFICANT ISSUES

OCA states the addition of this language to the IPRA will work to more clearly define the role of the public records custodian and how the records custodian communicates with someone who requests to inspect or copy public records. This increased clarity in the IPR request process will seem to further foster the transparency that is fundamental to the Inspection of Public Records Act.

The certification of a copy of an electronic record as “true and correct” requires an understanding of electronic records – their properties, metadata, etc. Further, an agency must have the ability to identify the “official” version from the multiple other versions that may exist in various locations and to maintain the integrity of that version.

If the intent of the bill is to cover only paper records, then that needs to be clarified. However, it should be noted that SB52 also amends the IPRA mandating that a records custodian provide a copy of a public record in electronic format if the records is available in electronic format and an electronic copy is requested.

The process of certifying an electronic record is more involved. It may require the participation of an information technology specialist, and it certainly dictates that an agency – any agency responding to a request for a certified copy of an electronic records– have a solid records management program that includes a strong electronic records management component.

For an electronic record to be official, the agency must first authenticate it by:

- (1) certifying that the electronic record is a true and correct copy of the original record;
- and

(2) provide sufficient information to determine that the certification is valid.

Even if the electronic record is printed to paper, the issues with authentication and reliability of the underlying electronic remain.

True and correct electronic documents are those in which content has been verified by a government entity to be complete and unaltered when compared to the electronic version deemed to be official record. Typically, an electronic document deemed as true and correct should bear a certificate or water mark that authenticates the text is complete and unaltered ensuring that the record is what it claims to be.

Some agencies will not certify documents under the Rules of Evidence, 11-902, Self-authentication. Rule 11-902 provides the level of authenticity for admissibility of a document in a court proceeding without requiring the custodian of records to testify. Rule 11-902.D requires official records and reports be “certified as correct by the custodian or other person authorized to make the certification.” Certified records of a “regularly conducted activity” is an exception to the hearsay rule in admitting evidence in a court proceeding.

ADMINISTRATIVE IMPLICATIONS

Many of the agencies affected by this bill have vacant positions and will find added mandates difficult to handle.

There is an added cost in staffing resources and time to certify records and, if the record is electronic, that cost may be significant. Even the certification of paper records can have an adverse impact on already limited staff resources, but the process required of electronic records is more complicated.

RELATIONSHIP

Senate Bill 52 also amends the Inspection of Public Records Act, specifically Section 14-2-9 NMSA 1978 mandating that a records custodian provide a copy of a public record in electronic format if the record is available in electronic format and an electronic copy is requested. Senate Bill 52 also addresses the costs of providing records in electronic format – but, SB52 does not cover certification or the extra costs of certifying. If both bills were to pass, then certification of electronic records provide in electronic format will clearly be an issue.

TECHNICAL ISSUES

CPR further notes if the intent is to only cover paper records, then that needs to be clarified. If the intent is to certify records regardless of format if requested, the language in Sections 14-2-7 and 14-2-9 NMSA 1978 regarding reasonable fees may be sufficient; however, more explicit language addressing the costs associated with certification of electronic records might be considered. Also, language that defines what constitutes certification of an electronic record will be helpful. Otherwise, agencies, based on their knowledge of electronic records management lack, may end up certifying copies as “true and correct” that are not.

HSD states Page 2, lines 18-20 is not clear whether the custodian is required to list the identity of the documents produced or whether the records can just be produced. If they must actually compile a list, this will take a huge amount of staff resources. EMNRD claims it is unclear

Senate Bill 128/aSPAC - Page 6

whether the term “certify” as used on page 2, line 20 and page 3, line 2 of SB 128 means that the public records custodian is stating that based upon their own personal knowledge the records are true and correct copies and are made in the regular course of the agency’s operations or that there are no responsive records or if the public records custodian is making a general certification based on information provided by others in the agency.

AMENDMENT

Page 2, Line 19, after the word “and” strike “identify” and insert “produce”

Page 2, Line 20, after the word “request,” insert “segregate the documents responsive to each request and”

TH:DW/svb:bym