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FISCAL IMPACT REPORT

SPONSOR Ivey-Soto/Chasey ORIGINAL DATE 2/07/2020
 LAST UPDATED 2/15/2020 HB _____

SHORT TITLE Electronic Communication Search & Seizure SB 270/aSPAC/ec

ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Fiscal Impact	See Fiscal Impact	See Fiscal Impact	See Fiscal Impact	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (NMAG)
 Administrative Office of the Courts (AOC)
 Department of Public Safety (DPS)
 Administrative Office of the District Attorneys (AODA)
 Law Offices of the Public Defender (LOPD)

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to SB 270 adds an emergency clause so that the legislation would become effective immediately once it is signed by the governor.

Synopsis of Original Bill

Senate Bill 270 makes several amendments to the Electronic Communications Privacy Act (“ECPA”), which was enacted in 2019. *See* Laws 2019, Chapter 39 (Senate Bill 199), codified at Sections 10-16F-1 to 10-16F-4 NMSA 1978. The bill:

- Requires that information obtained through execution of a search warrant that is unrelated to the objective of the warrant or is not exculpatory to the target be “sealed” rather than “destroyed,” and not subject to further use or disclosure except pursuant to a court order or to comply with discovery, and provides for the destruction of unrelated information as soon as

feasible after the current investigation and related investigations or proceedings are terminated.

- Requires a government entity that receives information voluntarily disclosed by a service provider to “seal,” rather than “destroy,” the information within 90 days, and provides that the information is not subject to further use or disclosure except pursuant to a court order.

- Requires the immediate “sealing” rather than “destruction” of information obtained by a government entity because of an emergency if a court finds an emergency did not exist. The sealed information is not subject to further use or disclosure except pursuant to a court order or to comply with discovery.

- Makes explicit that a government entity can require an employee to return an electronic device owned by the entity.

- Deletes the requirement that NMAG publish reports related to emergency requests and warrants within 90 days.

- Modifies the information required in annual reports submitted by government entities to NMAG, deletes the requirement that NMAG publish on its website individual reports received from each government entity, and changes the start date for annual reporting requirements and publication on NMAG’s website to 2021.

FISCAL IMPLICATIONS

AOC states there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced applications, motions and requests for court orders under ECPA. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

DPS explains that if it were responsible for complying with SB270’s requirement that certain information obtained with a warrant be sealed, DPS would likely handle that responsibility in one of two ways. First, DPS could enter into a contract with a third party to house the sealed data and release it back to DPS upon receipt of a court order. Second, DPS could purchase third party encryption data and contract with a third party to unencrypt the sealed data with a court order. DPS states that either of these options would impose additional costs on DPS.

SIGNIFICANT ISSUES

LOPD refers to the bill’s provisions for the destruction of information unrelated to the current warrant “as soon as feasible” after the termination of the current investigation and related proceedings. LOPD states that because the provisions do not set forth clear deadlines, there is the potential for the information to be retained indefinitely or for unduly long periods of time. Should a person’s information be retained and accessed years after the end of an investigation or proceeding, the person might challenge the retention. The lack of clarity in the bill gives rise to the possibility that courts would have to determine whether information was destroyed “as soon as practicable” following the cessation of investigations or proceedings against the person.

LOPD states that the bill's changes to the reporting requirements decrease transparency on matters important to ensuring that information is not being sought for an excessive number of individuals or for unduly long periods of time. If the purpose of ECPA is to help protect each individual's expectation of privacy in electronic information, it would be helpful to know the number of persons whose information was sought and the average period of time for which information was retained.

DPS states that it is supportive of the changes made in SB270. Removal of the requirement for destruction of unrelated information obtained with a warrant within thirty days is a huge improvement. DPS does not believe any criminal investigation is improved by imposing quick deadlines for an investigative agency to decide whether information seized supports the filing of criminal charges.

DPS also states that the modifications to the annual reporting requirements strike the right balance in ensuring agency compliance without imposing a tremendous administrative burden and create more space for DPS to make legitimate use of undercover operations.

PERFORMANCE IMPLICATIONS

According to AOC, this bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

OTHER SUBSTANTIVE ISSUES

DPS expresses a concern about the requirement to seal information in emergency situations that do not involve criminal activity, such as search and rescue ("SAR") missions handled by DPS' SAR unit under the New Mexico Search and Rescue Act. ECPA does not require a government entity to obtain a warrant to access information from a device in an emergency (Section 10-16F-3(C)(6)), but, even in an emergency, ECPA requires a warrant to compel production of or access to electronic communications information from a service provider or a person other than the owner of a device (Section 10-16F-3(B)). DPS suggests that in an emergency situation that does not involve criminal activity, such as a SAR mission, information a government entity must compel a service provider or third party to provide with a warrant be destroyed, rather than sealed, after the emergency situation ends.

BG/sb