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FISCAL IMPACT REPORT

SPONSOR Sedillo Lopez ORIGINAL DATE 02/24/21
LAST UPDATED _____ HB _____
SHORT TITLE Release of Certain Sensitive Info SB 327
ANALYST Courtney

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Fiscal Implications			Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB75, HB124

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC).

State Ethics Commission (SEC; Commission).

State Personnel Office (SPO).

Department of Health (DOH).

Office of the Attorney General (OAG).

Office of the Superintendent of Insurance (OSI).

No Response Received

Taxation and Revenue Department (TRD).

SUMMARY

Synopsis of Bill

Senate Bill 327 (SB327) amends the Governmental Conduct Act to provide protections for “sensitive personal information,” specifically “status as a recipient of public assistance or as a crime victim,” “sexual orientation, gender identity, physical or mental disability, medical condition, immigration status, national origin or religion,” and “social security number or individual tax identification number.”

SB327 would allow for the release of the information under seven exceptions including when disclosure is necessary to carry out a state agency function, as ordered by a court or subpoena, to

contractors when required to perform contract obligations, required or permitted by state or federal law, or made with written consent of the person whose information would be disclosed.

SB327 also amends the statute on motor vehicle-related records (NMSA 1978, Section 66-2-7.1) to modify the conditions required for sharing of personal identifying information. Statutory changes include providing more specificity regarding the intended audience and conditions under which personal information can be shared from the motor vehicle department's systems including addition of law enforcement agencies when needed to pursue a criminal investigation, governmental agencies when personal information is shown to be needed to carry out agency functions, a court in response to a subpoena, a motor vehicle manufacturer in connection with production changes or advisories, a college or university for research activities, towing companies for providing notice of towed or impounded vehicles to owners, a person eligible to receive an anatomical gift, and a person whose property is found in an abandoned vehicle.

Additional changes to statute on motor vehicle-related records include removal of some existing categories that are currently in law including an employer's agent or insurer for verifying information relating to an employee's commercial driver's license, removal of a category for providing organ donor information, for providing names and addresses of lienholders and owners of record of abandoned vehicles to storage facilities or wrecker yards.

SB327 also includes a new section to require disclosure of personal information in Section 66-2-7.1 NMSA 1978, to be accompanied by a written request to the secretary, director of the bureau, or division, or the secretary's or director's designee, to include the reasons the information is needed by the person making the request. The secretary or designee would have to provide a written determination prior to any personal information being disclosed.

SB327 defines "governmental agency" and "law enforcement agency."

SB327 would go into effect July 1, 2021.

FISCAL IMPLICATIONS

SB327 does not include an appropriation, however two state agencies indicate enactment of the legislation could increase state agency costs.

The Administrative Office of the Courts (AOC) indicates that the bill could have an undetermined fiscal impact on the judiciary should it require courts to issue additional subpoenas to obtain access to the protected personal information under 66-2-7.1, or if legislation leads to litigation regarding disclosure of protected information.

The State Ethics Commission indicates that the expansion of the Governmental Conduct Act to require additional duties of state employees would marginally increase the Commission's administrative caseload, and increase corresponding costs on the Commission.

SIGNIFICANT ISSUES

Data access and data sharing between agencies. The Administrative Office of the Courts (AOC) provided concerns regarding the impact of SB327 on accessing data or records through electronic court databases and potential impacts on existing agency data-sharing related to the New Mexico

dataXchange network. AOC indicates that their Court Operations Division, along with individual state courts, access personal information from the motor vehicle database (MVD) multiple times a day to verify identify, addresses, and other information of defendants in traffic and criminal cases. AOC further states that sensitive personal information is often shared with criminal justice partners such as law enforcement, prosecutors, public defenders and jails through the New Mexico dataXchange platform which was established in 2019 through HB267. AOC indicates SB327 would limit disclosure of personal information from its database to courts only “in response to subpoena.” AOC recommends a number of amendments to ensure that court operations would not be impacted by restrictions for data sharing among state agencies (see ALTERNATIVES below).

Along these lines, SB327 could introduce additional ambiguity to interpretation of existing law in relationship to data-sharing between government agencies. Previous LFC staff reports have cited difficulties in data-sharing among state and local agencies noting agencies are reluctant to share data citing concerns with sharing confidential information in state and federal law. Currently, data is sometimes shared among agencies through agreements (e.g. memoranda of understanding) setting out protections for confidential data. The State Ethics Commission points out that it is unclear whether SB327 could limit or significantly constrain the sharing of “sensitive personal information” where agencies have entered into data sharing agreements. Along these lines, several projects are underway with the goal of building integrated data systems using data sharing across multiple state agencies, including the HHS 2020 project based at HSD.

Overlap with existing law and rule. The State Personnel Office (SPO), Department of Health (DOH), and Office of Superintendent of Insurance (OSI) points out that there is some overlap of SB327 and existing laws and regulations aimed at protecting personal information. Along these lines, existing state law (NMSA 7-1-8; NMSA 10-16-3(A); NMSA 10-16-6; NMSA 14-3A; NMSA 43-1-19) and federal law (Health Insurance Portability and Accountability Act, the Americans with Disability Act, and the Family Educational Rights and Privacy Act) provide protections to certain categories of data deemed confidential by law including information regarding disabilities and social security numbers. For example, SPO points out that the Americans with Disabilities Act already requires employers and employees to keep confidential any information they learn about an applicant’s or employee’s disability. SPO also indicates that state employees can already be disciplined, up to and including termination, for inappropriate disclosure of information deemed confidential by agency through regulation or policy. Similarly, DOH states “Because the Governmental Conduct Act (GCA) already prohibits the disclosure of “information that by law or practice is not available to the public” for gain of a public employee or anyone else, it appears that SB327 would be somewhat redundant of existing law. However, SB327 would prohibit the disclosure irrespective of whether the disclosure is done for private gain.” OSI notes that much of what is protected in SB327 under sensitive personal information is already information that by law or practice is not available to the public.

Penalties for inadvertent disclosure. DOH and OSI noted concerns that the provisions of SB327 coupled with the enforcement provisions of the GCA would create the potential for significant penalties against state employees for both purposeful and inadvertent disclosures. This concern is notable for DOH as inadvertent disclosures can and do happen accidentally in response to Inspection for Public Records Act (IPRA) related requests. Along these lines, OSI notes that the GCA makes it a criminal offense to knowingly and willfully violate the act, but there is no requirement that a violation is knowing and willful for civil penalties or disciplinary action stating “Thus, an agency employee who mistakenly failed to redact an item of sensitive personal information when responding to an IPRA request could face dismissal and a civil monetary penalty

for a mere oversight.” Along these lines, office of the Attorney General (OAG) notes that “sensitive personal information” as defined in the bill would not be exempt from disclosure through the Inspection of Public Records Act (IPRA).

Potential positive impact on LGBTQ+ community. DOH notes that enactment of SB327 could potentially re-assure undocumented individuals and asylum-seekers that sensitive information will not be shared with other government entities which may minimize feelings of anxiety and promote health equity thereby increasing utilization of public health services.

PERFORMANCE IMPLICATIONS

The courts participate in performance-based budgeting as required by the state’s Accountability in Government Act. AOC states that it is unknown if enactment of SB327 would potentially impact reporting on existing performance measures.

ADMINISTRATIVE IMPLICATIONS

SPO indicates state agencies will need to train their employees on sensitive personal information and the increasingly serious repercussions for its disclosure that are represented in SB327. AOC also notes that there may be an administrative impact on the courts to train employees and that courts and the AOC may also need to obtain or amend user agreements (contracts and memoranda of understanding) to ensure compliance with restrictions on disclosure of information protected by SB327.

OSI indicates that changes to the Motor Vehicle Code could result in difficulty to find employees to act as IPRA custodians due to the potential penalty for inadvertent mistakes and notes that requests for public records and MVD records are likely to take more time.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

OSI notes a conflict with HB272 which requires the exchange of personally identifying information between state agencies. See also the section under significant issues titled “Data access and data sharing between agencies.”

HB124 and SB75 propose adding similar new restrictions to the Governmental Conduct Act, although these two bills do not propose changes to statute related to motor vehicle-related records, whereas SB327 does.

TECHNICAL ISSUES

Office of the Attorney General (OAG) notes that the bill is more restrictive for disclosure of personal information obtained by motor vehicle employees as disclosure can only be made to law enforcement agencies when needed to pursue a criminal investigation. Whereas disclosure could be made to other government agencies more broadly or when personal information is needed in carrying out its functions.

OAG notes that the provisions of Section 1 only apply to employees of state agencies but not local government agency employees.

According to SPO, the definition of “governmental agency” and “law enforcement agency” omit Native American agencies and law enforcement.

According to AOC, the SB327 defines government agency as “any agency of a city, county, state or territory of the United States or of the District of Columbia and any agency of the federal government.” However, AOC points out that the definition does not explicitly account for courts as an independent judicial branch of government.

OTHER SUBSTANTIVE ISSUES

The State Ethics Commission indicates that they have promulgated a non-disclosure provision in the commission’s model code of ethics for state agencies that is similar to SB327. Agencies are not required to adopt said provisions but could incorporate them into their own agency policies and subsequently enforce those policies through disciplinary action.

ALTERNATIVES

AOC proposes the following amendments:

- To ensure that disclosure of the personal information could continue to occur to the judicial branch of government for administrative purposes without a subpoena, exception (3) in the legislation could be amended to read: “a government agency, other than a law enforcement agency, and *a court or judicial entity of this state* when the personal information is shown to be needed by the agency, *court or judicial entity* in carrying out its functions.”
- For clarity and consistency with the legislation’s proposed disclosures allowed under the Governmental Conduct Act, a new exception to 66-2-7.1 could be added: “*comply with an order of a court of this state or of the United States.*”
- To ensure the proposed amendments to the Governmental Conduct Act do not impact access to data or records through electronic court databases and the newly established NM dataXchange network, the legislation’s exception (4) could be amended to read, “made to or by a court in the course of a judicial proceeding, or made in a court record *or electronic database of court record information.*”

DOH proposes the following amendment:

“Given the significant exposure that SB327 would create for state employees to be subjected to monetary penalties for inadvertent disclosures of sensitive personal information, the Department of Health would recommend that the bill be amended to address only intentional disclosures by state employees. To this end, the Department would recommend that Section 1(A) be amended to state, “...shall not intentionally disclose sensitive personal information”.”

OSI offers the following:

“An alternative could be to re-define “confidential information” in the GCA to include the definition of sensitive personal information in the bill and to change the penalty provision from “knowingly and willfully” for “private gain” to simply “intentionally.” That way, no proof of the undefined “private gain” is necessary, the standard of “intentionally” is probably less rigorous than “knowingly and willfully,” and thus inadvertent disclosure is not subject to punishment. Intentional disclosure would still be subject to punishment,

regardless of the reason for the disclosure.”

The State Ethics Commission notes that state agencies could adopt their model code of ethics which contains a non-disclosure provision similar to SB327, and state agencies could enforce those policies through disciplinary action.

JC/a/sb