

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

FISCAL IMPACT REPORT

SPONSOR <u>Mathews/Nibert/Jaramillo/Dixon/ Szczepanski</u>	LAST UPDATED _____ ORIGINAL DATE <u>2/27/2023</u>
SHORT TITLE <u>CYFD Info Sharing</u>	BILL NUMBER <u>House Bill 10</u>
	ANALYST <u>Chenier</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		\$460.0-\$2,605.0	\$460.0-\$2,605.0	\$920.0-\$5,210.0	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Responses Received From
 Children, Youth and Families Department (CYFD)
 University of New Mexico (UNM)
 Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of House Bill 10

House Bill 10 would add a new section to the Children's Code and outlines how CYFD should handle department information. The bill defines “department information” as including all information gathered during an investigation from when a file is opened until it is closed, excluding information contained in child welfare agency licensing records. Department information is to be maintained as required by federal law and exceptions for its public release will be interpreted as openly as possible under federal and state law.

Department information may be disclosed to a wide range of individuals, including law enforcement, schools, medical examiners, and family members, among others. The section also allows for access to department information by individuals such as auditors, accreditation personnel, legislative committees, citizen review panels, and the governor. The Department may also provide information to individuals conducting research or to parents, guardians, or custodians if it is deemed necessary to promote the safety and well-being of a child. Individuals who have been denied department information may petition the first judicial district court of Santa Fe County for release of the information, and the court will review the records in camera and order disclosure consistent with the law.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

CYFD said that the bill limits CYFD's ability to release investigation records and information. Before releasing information or records, CYFD must find that (a) the release fulfills a requirement of this bill *and* (b) not jeopardize a reporter, a CYFD investigation, or a DA investigation. The work necessary to conduct these reviews will require a minimum of one FTE in most field offices, 3 FTE in Bernalillo and Dona Ana Counties, and 3 FTE in central records (33 FTE costing \$65 thousand annually), as all requests for information will need to be reviewed to determine whether the release is appropriate, plus five attorneys (costing \$92 thousand annually) to confirm that the release, or failure to release, will not expose CYFD employees to criminal charges as per paragraph T of the bill, and to respond to lawsuits brought by persons whose standing is newly established under paragraphs G, H, and J of this bill. CYFD cannot absorb this fiscal impact with existing resources.

CYFD did not provide data indicating how many of these information requests would be processed each year at each field office making it difficult to determine the number of staff that would be to process the release of department information. However, much of the records request could likely be handled by the five attorneys as discussed above and may not need to be handled separately by each field office.

AOC said Subsections G, H, and J of the bill will likely result in an increase in cases filed in the First Judicial District Court. The number of cases and time needed for each case is unknown and dependent on the number of lawsuits filed.

SIGNIFICANT ISSUES

CYFD provided the following:

With respect to Section 32A-4-33(B) NMSA 1978, this bill expands the entities entitled to records, but limits the records that existing entitled entities may receive, including limiting the courts to *only* information necessary for the child's safety and well-being, in some circumstances.

With respect to Section 32A-4-33(C) NMSA 1978, this bill restricts a parent, guardian, or legal custodian's current entitlement to records to *only* information necessary for the child's safety, permanency, or well-being, meaning that parents, guardians, and legal custodians no longer have an unrestricted right to the results of investigations, law enforcement reports, or third-party assessments or diagnostics. The bill also *expands* the entities which have standing to petition the court for access to records from parents, guardians, and legal custodians, to absolutely *everyone*.

With respect to Section 32A-4-4 NMSA 1978 (the confidentiality of reporters), CYFD already makes available to judges who so order it, for in camera review, information concerning the identity of reports. Paragraph J of this bill strips all New Mexico district courts of this ability, limiting it solely to the First Judicial District Court.

The requirement to provide information only after confirming the information will not jeopardize a CYFD or district attorney investigation will add at least two (2) weeks processing time to all requests for confidential investigation information.

While portions of this bill prohibit the re-release of information (paragraphs E.3, E.4, and R), paragraph Q requires CYFD, or anyone receiving CYFD information under this bill, to “provide department information to law enforcement and a court to protect the safety of any employee of the department or the office of the attorney general or to protect a family member of such an employee.” It is unclear how providing CYFD information to law enforcement and the court will “protect the safety of any employee of the department or the office of the attorney general or to protect a family member of such an employee.”

With respect to paragraph T, which declares that violation of a provision of this section is a criminal offense. It is not clear whether the violation consists of releasing information in violation of the bill, or withholding information in violation of the bill, which suggests that *any* action taken concerning the release of CYFD investigation information could be subject to criminal prosecution.

Overall, the bill:

- Does not define confidential information but requires CYFD maintain the confidentiality of confidential information later in the text.
- May be in conflict with the pre-existing confidentiality statute concerning Protective Services records (Section 32A-4-33NMSA 1978) without repealing that statute.
- The language is inconsistent with most of the current Children’s Code confidentiality provisions, including Section 32A-2-32 (Juvenile Justice Services records), Section 32A-4-4 (individuals making reports to Protective Services), Section 32A-5-8 (adoptions), and Section 32A-6A-24 (mental health records). It is unclear whether all the confidentiality provisions of the Children’s Code are intended to be affected by this bill, as this bill is a new provision and not an amendment or replacement of a particular statute.
 - Section 32A-2-32 (A) NMSA 1978, “All records pertaining to the child...are confidential and shall not be disclosed directly or indirectly to the public.
 - Section 32A-4-4 (A) NMSA 1978, “The name and information regarding the person making the report shall not be disclosed absent the consent of the informant or a court order.”
 - NMSA 1978, §32A-4-33 (A), “All records or information concerning a party to a neglect or abuse proceeding...shall be confidential and closed to the public.”
 - NMSA 1978, §32A-5-8 (B), “All records...in connection with an adoption, are confidential and may be disclosed only pursuant to the provisions of the Adoption Act.”
 - NMSA 1978, §32A-6A-24 (A), “Except as otherwise provided in the Children’s Mental Health and Development Disabilities Act, a person shall not, without the authorization of the child, disclose or transmit any confidential information from which a person well-acquainted with the child might recognize the child as the described person or any code, number or other means that could be used to match the child with

confidential information regarding the child.”

- Allows disclosure of department information if “the information has been disclosed in a public...record...a public meeting. Or court proceeding.”
 - This exception to disclosure effectively allows an aggrieved party (a parent under investigation for example) to determine whether information will be considered confidential or not. While the party could be subject to being charged with a misdemeanor, said party would still be able to make extremely sensitive information no longer confidential by simply publicly disclosing it. This would be unfair and potentially damaging for CYFD, parties, and children.
- This exception to disclosure also fails to distinguish between a closed and open hearing. This, in effect, would make information that would otherwise be confidential open to public disclosure if it had been previously referenced in an abuse/neglect case before the Children’s Court, which hearings are typically closed.
- Fails to adequately define certain terms used in the determination of whether or not to release department information, such as “bona fide research”.
- Potentially opens the litigation floodgates in regard to parties seeking to obtain otherwise confidential information by expanding dramatically the population of individuals with standing to petition the court, in effect granting universal standing to sue CYFD for access to otherwise confidential information, while at the same time limiting that venue to the First Judicial District Court.
- Grants an extremely vague and open-ended exception for the release of otherwise confidential information to prospective adoptive parents, foster parents, or guardians.

AOC provided the following:

Subsection A: Defines “department information” which is used broadly throughout the bill. Neither the definition in HB10 nor use of the term within the bill distinguishes or clarifies different types of information. Notably, Section 8.8.2.15 NMAC entitled “Confidentiality” delineates the following: different privacy requirements for abuse and neglect records per Section 32A-4-33(A) NMSA 1978; foster care and adoption records per Sections 32A-3B-22, 32A-4-33, 40-7-4 (D), 32A-5-6 and 32A-5-8; adoption proceeding records per Section 32A-5-8; and social security records per 5 U.S.C. Section 552a. Furthermore, some records are covered by the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Family Educational Rights and Privacy Act (FERPA). These differing types of information have different existing statutory requirements that require different approaches.

Subsection C: Sections 32A-4-33 and 32A-3B-22 NMSA 1978 already allow CYFD to share information regarding abuse and neglect and family in need of court ordered services with the entities listed in the bill’s Subsection C. Notably, Subsection C does not include attorneys or guardians ad litem for children involved in a case that are not victims, tribal entities that are not law enforcement, or health care providers.

Subsection H: This subsection does not take into consideration that *not all* children who are involved with CYFD have an attorney or guardian ad litem, and this subsection

makes no provision for their appointment.

TECHNICAL ISSUES

CYFD said this bill does not make any changes to Section 32A-4-33(A) NMSA 1978, which is the existing statute concerning the confidentiality and release of child protective services records and information, including investigations, and in several instances directly contradicts the provisions of Section 32A-4-33(B) or (C) NMSA 1978 concerning the confidentiality and release of child protective services investigations records and information. The bill additionally contradicts Section 32A-4-33.1 NMSA 1978, which governs the confidentiality and release of records in the event of a child fatality.

AOC provided the following:

The following subsections of HB10 are duplicative of existing state law:

- **Subsection B:** Duplicative of existing state law such as the Inspection of Public Records Act (IPRA) which already requires records to be open unless addressed by an exception, although there are many exceptions for privacy in the Children’s Code.
- **Subsection G:** Duplicative of existing statutes allowing for the disclosure of information with a court order.
- **Subsection L:** This subsection requires CYFD to provide information to a prospective adoptive parent, foster parent, or guardian, yet Section 32A-4-33(B)(10) already allows disclosure to “...a foster parent, if the records are those of a child currently placed with that foster parent or of a child being considered for placement with that foster parent and the records concern the social, medical, psychological or educational needs of the child.” In the case of adoptions, Section 32A-5-12(E) provides for full disclosure of information.
- **Subsection M:** This is duplicative to the provisions in the Children’s Code, such as 32A-4-33 and 32A-3B-22 that provide misdemeanor penalties for the disclosure of private information.

To be consistent with Section 32A-4-33.1 NMSA 1978, this **Subsection K** should specify that the person who “conducts a forensic medical evaluation of a child where there is reasonable suspicion that the fatality was caused by abuse or neglect.” Disclosure of department information to the medical examiner is already allowed in most cases as a law enforcement officer or by order of the court.

Subsections G, H, and J of HB10 allow for suits to be filed in court, but *only* the First Judicial District Court. Limiting filings only to one district court could disproportionately impact people of color and people with limited means who may not be able to afford to miss work or pay travel costs to get to and from Santa Fe for court hearings.