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FISCAL IMPACT REPORT

LAST UPDATED _____

SPONSOR Gallegos/Lopez **ORIGINAL DATE** 3/02/2023

BILL

SHORT TITLE Dissemination of Public Official Info **NUMBER** Senate Bill 496

ANALYST Tolman

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*

(dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	\$0.0	At least \$26.6	At least \$37.6	At least \$64.2	Recurring	General Fund

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

Sources of Information

LFC Files

Responses Received From

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

No Response Received

Department of Finance and Administration (DFA)
 New Mexico Sentencing Commission (NMSC)
 Office of the Governor (GOV)
 Secretary of State (SOS)

SUMMARY

Synopsis of Senate Bill 496

Senate Bill 496 creates a fourth degree felony for making available the home address or telephone number of a public official or the official’s spouse or child with the intent to cause harassment or harm to life or property or with reckless disregard for any harassment or harm that may be caused.

A person, business, or association would be subject to a civil action for damages of no less than \$4,000, punitive damages and attorney fees and costs if the person, business, or association

solicits, sells, or trades on the internet the home address or telephone number of a public official, the official's spouse or child after the public official had made a written demand to not disclose the official's home address or telephone number.

No liability would be imposed on:

- An interactive computer service or access software provider as defined in 47 U.S.C. 230(f);
- An information service or a telecommunications provider for content provided by another person; or
- A person that reproduces, distributes, publishes, exhibits, or otherwise disseminates content in furtherance of a legitimate public purpose, including the compilation or dissemination of news by newspapers and license broadcasters.

The "public official" protected in this bill is defined in Subsection F and includes a person who is or was or is retired from:

- An elected or appointed office of the executive or legislative branch of the state;
- An elected or appointed federal office, local public body, or post-secondary educational institution;
- An appointment to an advisory board by a state agency, local public body or public post-secondary institution;
- A full-time salaried employee of a federal, state, or local law enforcement agency, or a certified part-time salaried police officer employed by a federal, state, or local law enforcement agency whose principal duties are to hold in custody persons accused of a criminal offense, maintain public order, make arrests, or investigate crimes;
- A public defender or attorney contracted by the public defender department; or
- A prosecutor.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have moderate fiscal impacts. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico's prisons and jails, consequently increasing long-term costs to state and county general funds. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY22 was \$54.9 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$26.6 thousand per year across all facilities. SB496 is anticipated to increase the number of incarcerated individuals and increase the time they spend incarcerated.

The proposed new crime of unauthorized dissemination of a public official's private information is a fourth-degree felony, which carries an 18-month prison sentence; the Sentencing Commission (NMSC) estimates the average length of time served by offenders released from prison in FY21 whose highest charge was for a fourth-degree felony was 516 days. Based on the marginal cost of each additional inmate in New Mexico's prison system, each offender sentenced to prison for this crime could result in estimated increased costs of \$37.6 thousand to NMCD.

It is difficult to estimate how many individuals will be charged, convicted, or get time in prison or jail based on the creation of a new crime. Without additional information, this analysis assumes at least one person will be admitted to prison each year for this crime, a cost of \$37.6 thousand. Because the estimated time served is greater than one year, the costs of one year (\$26.6 thousand) would be incurred in the first year of incarceration, while the cost of the remaining 151 days (\$11 thousand) would be incurred in the second year of incarceration. To account for time to adjudication, no costs are anticipated to be incurred until one year after the bill takes effect, in FY25. Because the estimated time served is greater than one year, costs are anticipated to increase in FY26, as an offender admitted in FY25 serves the remainder of their term and another offender is admitted but will level out that same year (as offenders begin to be released from prison) and remain level in future fiscal years.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under SB496, are not included in this analysis, but could be moderate.

The Administrative Office of the Courts (AOC), Law Offices of the Public Defender (PDD), and New Mexico Corrections Department (NMCD) note that it is difficult to estimate the potential fiscal impact, due to the uncertainty of how often the proposed offense currently occurs and how often it will be prosecuted, but anticipate that it could be minimal. New laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, requiring indigent defense funding to maintain compliance with constitutional mandates, thus requiring additional resources to handle the increase.

The PDD further suggests that because enactment of this law would declare to be criminal activities that have previously been legal since the founding days of New Mexico, any such enactment should be accompanied by advertising and public awareness campaigns to prevent innocents from inadvertently becoming criminals by simply continuing behavior they have previously legally done, or which remains legal in other jurisdictions, or both.

SIGNIFICANT ISSUES

The general rule under the U.S. Privacy Act of 1974 is that an agency cannot disclose a record contained in a system of records unless the individual to whom the record pertains gives prior written consent to the disclosure. Specifically, “No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains,” 5 U.S.C. § 552a(b). There are 12 exceptions to this general rule, including: Need to know within agency, required FOIA disclosure, routine uses, bureau of the census, statistical research, national archives, law enforcement request, health or safety of an individual, congress, government accountability office, court order, and debt collection.¹

AOC questioned whether SB496 would prohibit publication of the addresses of public officials and cited the example of the Voter Reference Foundation (VoteRef.com), which in March of

¹ Office of Privacy and Civil Liberties, U.S. Department of Justice (2020). Overview of the Privacy Act: 2020 Edition. Available: <https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition/disclosures-third-parties>.

2022 published the voter records of New Mexicans. The Secretary of State made a criminal referral to the Attorney General’s Office for violating New Mexico statutes that govern how voter data can be used, arguing that Section 1-4-5.5(C) NMSA 1978 requires each requester of voter data to sign an affidavit that the voter data shall be used for governmental or election and election campaign purposes only and shall not be made available or used for unlawful purposes. However, U.S. District Court for the District of New Mexico, in *Voter Reference Found. v. Balderas*, CIV 22-0222 JB/KK (D.N.M. Jul. 22, 2022), <https://casetext.com/case/voter-reference-found-v-balderas>, ruled in favor of Voter Reference Foundation, ruling that New Mexico law does not prohibit any organization from posting voter data online.

The court noted that as long as Voter Reference was not publishing voters’ month and day of birth, or any portion of a voter’s social security number, they would not violate the Section 1-5-22(A) NMSA 1978 prohibition against the unlawful disposition of a voter file and incur a fourth degree felony penalty. New Mexico did not have and still does not have an “address confidentiality program” for public officials. New Mexico does, however, have a Confidential Substitute Address Act, Section 40-13B-1 NMSA 1978, providing a process by which a victim of domestic violence may protect the confidentiality of the victim’s residential and delivery addresses in public records.²

Several states, like New Mexico, limit the use of voter registration lists. New Mexico law does not prohibit commercial purposes but requires a written request, a signed affidavit it will only be used for "governmental or election and election campaign purposes" and a minimum \$15 fee. Colorado and Texas laws allow anyone to request a copy of the voter list. Arizona allows the public inspection at local election offices while political parties are provided lists. Utah limits the information to qualified persons or those who agree to confidentiality measures.³ Maine amended its election code so that its voter data cannot be posted online (Me. Rev. Stat. 21-A, Section 196-A(J)(2)).⁴

The PDD raises concern that there is some vagueness with the proposed mental state of “intent to cause harm or reckless disregard of harm.” It could encompass currently lawful conduct, such as protest, which civil rights law may be implicated if the proposed law punishes lawful protest at the residence of a state official. For example, in *Dean v. Byerly*, 354 F.3d 540, 551-552 (6th Cir. 2004) found that a defendant picketing on a sidewalk in front of plaintiff’s home was constitutionally protected conduct. The proposed legislation seems modeled on similar California law, but requires an “inten[t] to cause imminent great bodily harm that is likely to occur or threatening to cause imminent great bodily harm to that individual,” Cal. Govt. Code § 6254.21 (b).

The PDD also notes that SB496’s use of the term “make available” is vague and could be subject to uneven enforcement.

PDD and the Administrative Offices of the District Attorney (AODA) both note that SB496

² *Voter Reference Found. v. Balderas*, CIV 22-0222 JB/KK (D.N.M. Jul. 22, 2022). Available: <https://casetext.com/case/voter-reference-found-v-balderas>.

³ Editorial Board (August 3, 2022). Editorial: Online voter data – transparency vs. privacy concerns. *Albuquerque Journal*. Available: <https://www.abqjournal.com/2521440/webhedline-114.html>.

⁴ *Voter Reference Found. v. Balderas*, CIV 22-0222 JB/KK (D.N.M. Jul. 22, 2022). Available: <https://casetext.com/case/voter-reference-found-v-balderas>.

omits judges. Section 30-3-20 NMSA 1978 provides a misdemeanor offense for a person who shares the personal information of a judge or an immediate family member of the judge with the intent to cause harm, to place the judge or family member in fear of great bodily harm, or to prevent or interrupt the judge's performance of official duties.⁵

AODA also notes that SB496 is not clear whether all full-time employees of a law enforcement agency are public officials, or whether it is only full-time police officers.

PERFORMANCE IMPLICATIONS

AOC notes that the courts are participating in performance-based budgeting and that this bill may have an impact on the measures of the district courts in the areas of cases disposed of as a percent of cases filed and percent change in case filings by case type.

OTHER SUBSTANTIVE ISSUES

The Office of Attorney General (NMAG) notes that under the Inspection of Public Records Act, every person has the right to inspect public records except for certain listed exceptions, one of which is an exception for “as otherwise provided by law,” Section 14-2-1(H) NMSA 1978. Therefore, if this bill becomes law, NMAG notes as an example, a public agency could possibly withhold release of an official’s address or home telephone number if it could articulate that releasing such information would be in reckless disregard of the risk of harassment or harm to the person, or their property.

ALTERNATIVES

AOC recommends that a potential alternative is to amend the Election Code to prohibit voter information or any part of the voter information that identifies, or that could be used with other information to identify, a specific voter, including but not limited to a voter’s name, residence address, or street address, to be made accessible by the general public on the Internet or through other means (see Maine Revised Statute 21-A, Section 196-A(J)(2)⁶).

The PDD recommends that civil process, rather than criminal, appears to cover the harm anticipated by the legislation. New Mexico recognizes the tort of “invasion of right to privacy,” in cases of intrusion to a plaintiff’s seclusion, or publication of private information (see *McNutt v. New Mexico State Tribune Co.*, 1975-NMCA-085⁷).

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⁵ N.M. Stat. § 30-3-20. Available: <https://casetext.com/statute/new-mexico-statutes-1978/chapter-30-criminal-offenses/article-3-assault-and-battery/section-30-3-20-malicious-sharing-of-personal-information-of-a-judge-or-an-immediate-family-member-of-a-judge-penalty>.

⁶ Maine Legislature (retrieved March 2, 2023). Maine Revised Statutes. Title 21-A: Elections. Available: <https://legislature.maine.gov/statutes/21-A/title21-Ach0sec0.html>.

⁷ Justia US Law (retrieved March 2, 2023). *McNutt v. New Mexico State Tribune Company*. Available: <https://law.justia.com/cases/new-mexico/court-of-appeals/1975/1669-1.html>.